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**Land System
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APARTMENT OWNERSHIP ACT, 1972

Q. Define 'Apartment'. "An apartment to be transferable and heritable property" – Discuss.

A. Clause (a) of section 3 of the West Bengal Apartment Ownership Act, 1972 gives its definition .

"apartment" means part of a property having a direct exit to a road, street or highway or to a common area leading to such road, street or highway which together with its undivided interest in the common areas and Facilities forms an independent residential unit and includes a flat.

Section 4 of the West Bengal Apartment Ownership Act, 1972 speaks that an apartment to be transferable and heritable property.

(1) Each apartment owner shall be entitled to the exclusive ownership and possession of his apartment. (2) An apartment, together with its undivided interest in the common areas and facilities, shall constitute heritable and transferable immovable property within the meaning of any law for the time being in force: Provided that no apartment and the percentage of undivided interest in the common areas and facilities appurtenant to such apartment shall be partitioned or subdivided for any purpose whatsoever. (3) Notwithstanding anything contained in the Transfer of Property Act, 1882, or in any other law for the time being in force, but subject to the provisions of section 11 of this Act, any person,— (a) acquiring by purchase or by inheritance , or (b) taking lease of, for a period of thirty years or more, an apartment comprised in a property submitted to the provisions of this Act, shall,— (i) in respect of the said apartment, be subject to the provisions of this Act, and (ii) execute and register an instrument in such form, accompanied by such fee, and in such manner and within such period as may be prescribed, undertaking to comply strictly with the bye-laws and with the covenants, conditions and restrictions set forth in the Declaration referred to in section -2 .

Q. What are the common areas and facilities as stated under West Apartment Ownership Act, 1972 ?

A. Clause (d) of section-3 of the West Bengal Apartment Ownership Act,1972 defines 'common areas and facilities'.

"common areas and facilities" includes—

- (1) the land on which the building is located and all easements, rights and appurtenances belonging to the land and the building,
- (2) the foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire-escapes and entrances and exits of the building,
- (3) the basements, cellars, yards, gardens, parking areas, shopping centres, schools, garages, building or apartment vacant or occupied by a tenant or any other person not being an owner, and transferred or proposed to be transferred to the Association of Apartment Owners and storage spaces,
- (4) the premises for the lodging of janitors or persons employed for the management of the property,
- (5) installations of common services, such as, power, light, gas, hot and cold water, heating, refrigeration, air conditioning, sewerage, etc.,
- (6) the elevators, tanks, pumps, motors, compressors, pipes and ducts and in general all apparatus and installations existing for common use,
- (7) such other common facilities as may be specially provided for in the Declaration,
- (8) all other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use;

Q. What is meant by limited common areas and facilities ?

A. clause (i) of section-3 defines limited common areas and facilities. “ **limited common areas and facilities**” means those common areas and facilities which may be designated in the Declaration as reserved for use of certain apartment or apartments to the exclusion of the other apartments.

Q . State the provision for framing bye laws under West Bengal Apartment Ownership Act, 1972.

A. Section -6 of the West Bengal Apartment Ownership Act, 1972 provides for the compliance with bye-laws, covenants, conditions and restrictions set forth in the declaration. So, each apartment owner shall comply strictly with the bye-laws and if fails to comply with any of the bye-laws it shall be a ground for an action to recover damages or other relief from that apartment owner.

Section-13 of the West Bengal Apartment Ownership Act, 1972 provides for the bye-laws .

Every property which comes under this enactment shall be administered in accordance with such bye-laws as may be framed by the Competent Authority.

The bye-laws shall be framed with the prior approval of the State Government.

The bye-laws shall provide for the following amongst other matters, namely-

- a. the manner in which the Association of Apartment Owners is to be formed,
 - i. the election of a Board of Manager from among the apartment owners;
 - ii. the number of persons constituting the Board;
 - iii . the number of members of such Board to retire annually;
 - iv . the powers and duties of the Board;
 - v . the honorarium, if any, of the members of the Board;
 - vi . the method of removal from office of members of the board;
 - vii . the powers of the Board to engage the services of a Secretary or Manager;
- b) method of calling meetings of the apartment owners and the number to constitute a quorum;
- c) election of a President who shall preside over the meetings of the Board and of the Association of Apartment Owners;
- d) maintenance, repair and replacement of the common areas and facilities and payments therefor,

- e) manner of collecting share of the common expenses from the apartment owners;
- f) any other matter considered to be necessary for the administration of the property.

There is West Bengal Apartment Ownership Bye-laws, 1974. In the exercise of the power conferred by sub-section (1) of section- 13 of the West Bengal Apartment Ownership act,1972 , the competent authority hereby makes with the prior approval of the State Government, the following bye-laws, namely-

1. bye-laws for the formation of the Association,
2. constitution of a Board and its functions,
3. Accounts and Audit'
4. Assessment of common expenses by Association and realization thereof'
5. Duties and Obligations of the Apartment Owners etc.

Q. Discuss the grounds on which the bye laws may be treated as ultra vires.

A. A trend very much in vogue to day in all democratic countries is that a good deal of legislation takes place in government departments outside the Houses of Legislature. This type of activity is known as 'Delegated Legislation'. Delegated legislation means the law made by the executive under the powers delegated to it by the legislature. Delegated legislation refers to all law making which is generally expressed as rules, regulations, bye-laws, orders, schemes, directions, circulars or notifications etc. In delegation of legislative powers to the executive , there is inherent danger of abuse of the legislative power by the executive authorities. Therefore, there is need of controlling delegated legislation. For this purpose different types of control are there to check or to keep the delegated legislation within its permissible limits , such as, judicial control, legislative control, procedural control etc.

In the control mechanism , judicial control has emerged as the most outstanding controlling measure. Judicial control over delegated legislation is exercised by applying the test of ultra vires. Ultra vires means beyond powers. When a delegated legislation becomes ultra vires , it is declared as void. Judicial control over delegated legislation is exercised by applying the doctrine of ultra vires in a number of circumstances, namely-

1. where Parent Act is ultra vires the constitution. If the parent Act or enabling Act is ultra vires the Constitution the rules and regulations made thereunder would also be null and void.
2. sometimes parent Act may not be ultra vires the Constitution, yet the delegated legislation may be held invalid on the ground that it is ultra vires the Constitution, that is it violates the provisions of Constitution.
3. delegated legislation can be challenged on the ground that it is ultra vires the parent Act.

4. a delegated legislation may be ultra vires on the ground of unreasonableness. In India the doctrine of unreasonableness of delegated legislation has been based on a firm ground, that is, article-14 of the Constitution. Article 14 which guarantees equality before law can now be used to invalidate any law and action which is arbitrary or unreasonable.

The bye-laws under the West Bengal Apartment Ownership Act, 1972 is also made by the Competent Authority under section-13, in the nature of delegated legislation. So, the grounds on which delegated legislation is treated as ultra vires, bye-laws made under this enactment will be treated as ultra vires on the same grounds.

Q. A Benamdar of an apartment to be deemed to be the real owner thereof – Discuss .

A . section -4A of the West Bengal Apartment Ownership Act, 1972 speaks of the provision as to benamdar of an apartment to be deemed to be the real owner.

Where an apartment is transferred to one person for a consideration paid or provided by another person for his own benefit, the transferee shall, notwithstanding anything in the Transfer of Property Act, 1882 or in the Indian Trust Act, 1882, or in any other law for the time being in force, be deemed to be the real owner of such apartment, and no court shall entertain any claim of the person, paying or providing the consideration for title in such apartment on the ground that he did not intend to pay or provide such consideration for the benefit of the transferee and that the transferee is his benamdar, or on any other ground.

Under section-4A it is provided that where an apartment is transferred to one person for a consideration paid or provided by another person for his own benefit, the transferee shall be deemed to be the real owner of such apartment, because the Benami Transactions (Prohibition) Act, 1988 makes a benami transaction illegal. As per the Benami Transaction (Prohibition) Act, 1988, in case of benami transfer, the person in whose favour and name property is held, will become a real owner.

Therefore, section 4A of the West Bengal Apartment Ownership Act, 1972 is a corollary to the provisions laid down in the Benami Transactions (provision) Act, 1988.

A Benami Transaction means, a transaction or an arrangement where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person and the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration.

Benami Transactions (Prohibition) Act, 1988 is an Act of the Parliament of India that prohibits certain types of financial transactions. The act defines a 'benami' transaction as any transaction in which property is transferred to one person for consideration paid by another person for his own benefit. Such transactions were a feature of the Indian economy, usually relating to the purchase of property (real estate), and were thought to contribute to the Indian black money problem. The act bans all benami transactions and gives the government the right to recover property held benami without paying any compensation.

Section-5 of the Benami Transaction (Prohibition) Act, 1988 provides that ,any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government .

Q. What are the contents of declaration ?

A. Section 2 of the West Bengal Apartment Ownership Act,1972 provides that, this Act shall apply to every building which is used or is proposed to be used, mainly for residential purpose, and the sole owner or all the owners of every such building shall submit the same to the provisions of this Act by duly executing and registering a declaration setting the particulars referred to in section 10.

Section 10 of the West Bengal Apartment Ownership Act, 1972 deals with the contents of declaration.

The Declaration referred to in section 2 shall be submitted in such form, accompanied by such fee and in such manner as may be prescribe, and shall contain the following particulars, namely :-

(a) description of the property;

(b)nature of interest of the owner or owners in the property;

(c)existing encumbrance, if any, affecting the property;

(d)description of each apartment containing its location, actual built up area, number of rooms, immediate common area to which it has access, and any other data necessary for its proper identification;

(e)description of the common areas and facilities;

(f)description of the common areas and facilities, if any, stating to which apartments their use is reserved;

(g)value of the property and each apartment, and the percentage of undivided interest in the common areas and facilities appertaining to each apartment and its owner

(h)such other particulars as may be prescribed.

The declaration may be amended under such circumstances and in such manner as may be prescribed.

Q. How can you distinguish ‘Apartment’ from a ‘Flat’ ?

A. many of us use the words flat and apartment interchangeably in India. However, a flat and apartment are not quite the same when you speak about them outside of India. Flat is a word that is used mostly in the United Kingdom. It emerged during the industrial revolution immigrants from rural to urban areas began moving to cities and the need for buildings with affordable rental units became popular. In America, people say ‘apartment’ when referring to the same housing units.

The West Bengal Apartment Ownership Act, 1972 defines ‘apartment’ in clause(a) of section-3 and ‘flat’ is also explained under explanation of the same clause.

“apartment” means part of a property having a direct exit to a road, street or highway or to a common area leading to such road, street or highway which together with its undivided interest in the common areas and facilities forms an independent residential unit; and includes flat.

Explanation – “Flat” shall mean a separate residential unit, whether self-contained or not, used or intended to be used for any of the purposes referred to in sub-clauses (a) to (i) of clause (2) of section 390 of the Calcutta Municipal Corporation Act, 1980.

Q. Discuss the rights of apartment owner to common areas and facilities.

A. section 5 of the West Bengal Apartment Ownership Act, 1972 speaks about the rights of apartment owner to common areas and facilities.

Each apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the Declaration.

The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the Declaration shall not be altered without the written consent of all the apartment owners, additions or alterations, if any, is to be expressed subsequently in an amended Declaration duly executed and registered as provided in this Act. The percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains, and shall be deemed to be conveyed or encumbered with the apartment even though such interest is not expressly mentioned in the conveyance or other instrument.

The common areas and facilities shall remain undivided, and no apartment owner or other person shall bring any action for partition or division of any part thereof, unless the property has been withdrawn from the provisions of this Act.

Each apartment owner may use the common areas and facilities for the purpose for which they are intended without hindering or encroaching upon the lawful rights of the other apartment owners.

The work relating to the maintenance, repair and replacement of the common areas and facilities and the making of any additions or improvement thereto shall be carried out in accordance with the provisions of this Act and the bye-laws made thereunder.

The Association of Apartment Owners shall have right, to be exercised by the Manager or the Board of Managers on behalf of the Association, with such assistance as the Manager or the Board of Managers, as the case may be, considers necessary, to have access to each apartment from time to time during reasonable hours, for the maintenance, repair and replacement of any of the common areas and facilities therein or accessible therefrom, or for making emergency repairs therein to prevent any damage to the common areas and facilities or to other apartments.

➤ **DEFINITIONS:-**

"apartment" means part of a property having a direct exit to a road, street or highway or to a common area leading to such road, street or highway which together with its undivided interest in the common areas and facilities forms an independent residential unit and includes a flat;

Explanation.—"Flat" shall mean a separate set of premises, whether self-contained or not, used or intended to be used for residence or office or showroom or shop or godown or garage or any other commercial purposes forming part of a building or for any of the purposes referred to in sub-clauses (a) to (i) of clause (2) of section 390 of the Kolkata Municipal Corporation Act, 1980 (West Bengal Act LIX of 1980).] [section 3(a)]

"Association of Apartment Owners" means the association competent to contract in its own name and formed in accordance with the provisions made in the bye-law; [section 3(b)]

"building" means a building containing two or more apartments or more than one building, each being a complete unit or each containing two or more apartments comprised in the same property; [section 3(c)]

"common expenses" means expenses of administration, maintenance, repair or replacement of the common areas and facilities and all other sums assessed against the apartment owners by the Association of Apartment Owners; [section 3(e)]

"common profit" means the balance of all income, rents, profits and revenues from the common areas and facilities remaining after the deduction of the common expenses; [section 3(f)]

"Competent Authority" means any person, or any officer not below the rank of a Deputy Magistrate, authorised by the State Government by notification in the Official Gazette to

perform functions of the Competent Authority under this Act, for such area as may be specified in the notification, and different persons or officers may be authorised for different functions or for different areas; [section 3(g)]

"Declaration" means the instrument by which the property is submitted to the provisions of this Act, as hereinafter provided; [section 3(h)]

"owner", in relation to any property or part thereof or apartment, includes

- (i) any person owning such property or part thereof or apartment, or
- (ii) any person deemed to be owning such property or part thereof or apartment, or
- (iii) any promoter, or
- (iv) a lessee of such property or part thereof or apartment, where the lease is for a period of thirty years or more:

Provided that any person who has executed an agreement for purchase or for taking lease for a period of thirty years or more, of any property or part thereof or apartment or has paid the consideration or part thereof, shall be deemed to be owning such property or part thereof or apartment even though the document for purchase or lease of such property or part thereof or apartment has not been registered; [section 3(ia)]

"property" comprises the land, the building and the common areas and facilities;

[section 3(k)]

"promoter" means a person who constructs, or causes to be constructed, a building on a plot of land for the purpose of transfer of such building by sale, gift or otherwise to any other person or to a company, cooperative society or association of persons, and includes—

- (i) his assign, if any,
- (ii) the person who constructs, and the person who transfers by sale, gift or otherwise, the building, if the two are different persons, or
- (iii) any board, company, corporation, firm or other association of persons, established by or under any law for the time being in force. [section 3(l)]