

The Real Estate (Regulation and Development) Act, 2016: Taming the Untamed??

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Abstract—*Delayed projects and deliveries, rampant corruption lack of transparency and accountability, mistrust between builders and buyers and much more was or rather is the scene of the real estate sector across the country today. Beyond all doubts the real estate sector up till now was a unruly horse galloping in all directions. However the dust finally seems to have settled now with the much awaited legislation RERA coming into full force and effect from first of May 2017.*

The ambitious legislation sets in the much needed legal and institutional machinery and framework for the real estate sector and performs the critical task of identifying and allocating risks associated with construction and development projects. Many experts do believe that the act has rightly hit the bull's eye and will perform the task of reining the sharks through its incisive and consumer centric provisions like Registration, 70 % of dedicated fund allocation, effective dispute resolution mechanism and increased defect liability period. However on the flip side the legislation is not free from ambiguities and loopholes as well. On the top of it, it is now coming into light that many state governments have "diluted and derailed" the provisions of their own rules to provide errant builders lobby with a ready escape route. In view of above background, the author basically seeks to analyse the bare provisions of the Act, the institutional framework created under it, the penalty, rights and duties of various stakeholders etc., how state governments have diluted the rules and most significantly how far the act has been successful in addressing and protecting the interests of the consumers with special reference to the major loopholes in the act.

1. TRACING REAL ESTATE ECOSYSTEM AND RATIONALE OF THE ACT

The Real Estate sector has always been a mammoth and is the second largest employer after the agriculture sector in India. It contributes a whopping 9 % to the country's Gross Domestic Product and is expected to touch US \$180 billion by 2020. According to Press Release published by Ministry of Housing and Urban Poverty alleviation in India total of 76,044 companies are involved in real estate sector including 17,431 in Delhi, 17,010 in West Bengal, 11,160 in Maharashtra, 7,136 in Uttar Pradesh, 3,054 in Rajasthan, 3,004 in Tamil Nadu, 2,261 in Karnataka, 2,211 in Telangana, 2,121 in Haryana, 1,956 in Madhya Pradesh, 1,270 in Kerala, 1,202 in Punjab and 1,006 in Odisha. Furthermore new projects in the range of 2,349 to 4,488 were launched every year between 2011 -2015

amounting to a total of 17,526 projects with investment value of Rs.13.70 lakh cr. in 27 cities including 15 state capitals. According to industry information, about 10 lakh buyers invest every year to own a house of their own. The data aforesaid thus itself speaks volumes about the stellar role played by the sector in the economy of the country. However off recently the sector has been grappling with numerous challenges from many direct and indirect factors. The sector until recently was obscure with regards to price, construction delay, construction quality, ownership (title) and litigations. Of these, the biggest issue has been delay in delivery of property to buyers. During the last two decades the number of under construction properties rose to an all-time high. Particularly in major cities many builders have flouted norms by failing to keep up with project deadlines. However no specific law was existing to tackle the errant builders in the effective manner. Finally the wait seems to be over with much awaited RERA coming into force after a wait of long 9 years. According to many experts RERA is one of the key reforms which will be game changers for India's real estate sector. Unveiling the Act Housing and Urban Poverty Alleviation Minister M Venkaiah Naidu said " the law will make "buyer the king", while developers will also benefit from the increased buyers' confidence in the regulated environment."

2. CONSTITUTIONAL VALIDITY OF THE ACT UPHELD:BEGINNING OF THE NEW INNINGS

The RERA since the beginning has always been hot couch potato. Some experts believe that the Act is a legislative overreach by the Centre in the states' domain. While addressing this issue, it is important to note, that, Entry 18 of List II of the Seventh Schedule of the Constitution of India gives the states the right to legislate over inter alia, land, rights in or over land and colonization. The RERA however, has been enacted by the Centre by the power vested in it by virtue of Entries 6 and 7 in List III (Concurrent List) of the Seventh Schedule of the Constitution dealing with contracts and the transfer of property. Both Central government and state governments can legislate on matters under the concurrent list, and Article 254 of the Constitution specifically provides that central laws will prevail over state laws on matter in the

concurrent list. **Accordingly, RERA has an over-riding effect on conflicting state laws. Interestingly, the RERA also repeals the Maharashtra Housing (Regulation and Development) Act (MHRDA), despite the MHRDA having received Presidential assent instead of the assent of the Governor.** Article 254 (2) of the Constitution mentions that state laws under the concurrent list which have received Presidential assent shall prevail in the state; however, the proviso to this Article gives plenary powers to the Centre to amend, vary or repeal the particular state law. Very interestingly on 6th of December 2017 the Hon'ble Bombay High Court has upheld the validity of the RERA through its historic verdict. A bench of Justices Naresh Patil and Rajesh Ketkar pronounced judgement on a bunch of petitions filed by real estate developers and individual plot owners, all challenging the constitutional validity of the Act. Most of the developers had challenged a provision of '**force majeure or a natural disaster**', where any extension beyond a year for completion of project would have led to penalties. Further the petitions claimed that the Act, and the constitution of a state-level authority for its implementation, were arbitrary, and therefore unconstitutional. However the bench though upheld the constitutional validity of the act however allowed a significant leeway for developers in judgment by permitting the state-level RERA authority and the **Appellate Tribunal to consider delays on case-to-case basis, and not to cancel projects or developers' registration in cases where the delay was caused due to "exceptional and compelling circumstances."** Moreover the High Court upheld that the two-member bench of a majority of the Real Estate Appellate Tribunal must comprise one judicial member and majority of the bench must comprise judicial officers where it has more than two members. It struck down part of section 46(1)(b) which required the judicial members of the Appellate Tribunal to have served as additional secretary to the government in addition to having been a judicial officer.

3. DECODING RERA : ANALYSIS OF THE MAJOR LEGAL PROVISIONS OF THE ACT

The bill was passed by the Rajya Sabha on 10 March 2016 and by the Lok Sabha on 15 March 2016. The Act came into force on 1 May 2016 with 59 of 92 sections notified. Remaining provisions came into force on 1 May 2017.

- **Salient Features of the Act**

The salient features of the Act are the following:

1. Real Estate Regulatory Authority

Under the Act, instead of a regular forum of consumers, the purchasers of real estate units from a developer would have a specialised forum called the "Real Estate Regulatory Authority" which has to be set up within one year from the

date of coming into force of the Act. In the interim, the appropriate Government (i.e., the Central or State Government) shall designate any other regulatory authority or any officer preferably the Secretary of the department dealing with Housing, as the Regulatory Authority. Many state governments have designated principal

2. Registration with the Regulatory Authority

The promoter has to register their project (residential as well as commercial) with the Regulatory Authority before booking, selling or offering apartments for sale in such projects. In case a project is to be promoted in phases, then each phase shall be considered as a standalone project, and the promoter shall obtain registration for each phase. Further, in case of ongoing projects on the date of commencement of the Act which have not received a completion certificate, the promoter of such project shall make an application to the Regulatory Authority for registration of their project within a period of three months of the commencement of the Act. However the following types of projects shall not be required to be registered before the Regulatory Authority:

- Where the area of land proposed to be promoted does not exceed 500 square meters or the number of apartments to be constructed in the project does not exceed eight apartments. However, the appropriate Government (Central and State Government) may, if it considers appropriate, reduce the threshold limit below 500 square meters or eight apartments;
- Projects where the completion certificate has been received prior to the commencement of the Act;
- Projects for the purpose of renovation or repair or re-development which does not involve marketing, advertising, selling and new allotment of any apartment plot or building.

3. Carpet Area

Under the Act, developers can sell units only on carpet area, which means the net usable floor area of an apartment. This excludes the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.

4. 70% of realisation from allottees in a separate bank account

The Act mandates that a promoter shall deposit 70% of the amount realised from the allottees, from time to time, in a separate account to be maintained in a scheduled bank. This is intended to cover the cost of construction and the land cost and the amount deposited shall be used only for the concerned

project. The promoter shall be entitled to withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project. However, such withdrawal can only be made after it is certified by an engineer, an architect and chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project. The promoter is also required to get his accounts audited within six months after the end of every financial year by a practicing chartered accountant. Further, he is required to produce a statement of accounts duly certified and signed by such chartered accountant, and it shall be verified during the audit that (i) the amounts collected for a particular project have been utilised for the project; and (ii) the withdrawal has been in compliance with the proportion to the percentage of completion of the project.

5. Limit on receipt of advance payment

A promoter shall not accept a sum more than 10% percent of the cost of the apartment, plot, or building, as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement of sale with such person and register the said agreement of sale, under any law for the time being in force.

6. Restriction on addition and alteration in the plans

The promoter cannot make any addition or alteration in the approved and sanctioned plans, structural designs, specifications and amenities of the apartment, plot or building without the previous consent of the allottee. The promoter also cannot make any other addition or alteration in the approved and sanctioned plans, structural designs and specifications of the building and common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such a building.

7. Structural defect

In case any structural defect or any other defect in the workmanship, quality or provision of services or any other obligations of the promoters is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, the promoter shall rectify such defect without any further charge, within thirty days. If the promoter fails to rectify such defect within such time, the aggrieved allottee shall be entitled to receive appropriate compensation in the manner as provided in the Act.

8. Restriction on transfer and assignment

The promoter shall not transfer or assign his majority rights and liabilities in respect of a project to a third party without obtaining prior written consent from two-thirds of the allottees, except the promoter, and without the prior written approval of the Regulatory Authority.

9. Refund of amount in case of delay in handing over possession

In case the promoter is unable to hand over possession of the apartment, plot or building to the allottee (i) in accordance with the terms of the agreement of sale; or (ii) due to discontinuance of his business as a promoter on account of suspension; or (iii) revocation of his registration or for any other reason, then the promoter shall be liable, on demand being made by the allottee, to return the amount received by him from the allottee with interest and compensation at the rate and manner as provided under the Act. This relief will be available without prejudice to any other remedy available to the allottee. However, where an allottee does not intend to withdraw from the project, he shall be paid interest by the promoter for every month of delay, till the handing over of the possession, at a prescribed rate.

10. Real Estate Appellate Tribunal

In addition to the establishment of the Regulatory Authority, the Act also proposes to establish a Real Estate Appellate Tribunal (Appellate Tribunal) within one year from the date of commencement of the Act. Any person aggrieved by any direction or decision made by the Regulatory Authority or by an adjudicating officer, may make an appeal before the Appellate Tribunal within a period of 60 days from the date of receipt of a copy of the order or direction. The Appellate Tribunal shall deal with the appeal as expeditiously as possible and endeavour shall be made to dispose of the appeal within a period of sixty days from the date of receipt of appeal. The Appellate Tribunal shall have same powers as a civil court and shall be deemed to be a civil court. An appeal against the order of the Appellate Tribunal may be filed before the jurisdictional High Court within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal.

11. Adjudicating Officer

For adjudging the compensation to be paid by the promoter in accordance with the provisions of the Act, the Regulatory Authority shall appoint (in consultation with the appropriate Government) one or more judicial officers as deemed necessary, who is or has been a District Judge, to be an adjudicating officer for holding an inquiry in this regard.

However, such an appointment will be made after giving any person concerned a reasonable opportunity of being heard.

12. Offences and Penalty

Stringent penal provisions have been prescribed under the Act against the promoter in case of any contravention or non-compliance of the provisions of the Act or the orders, decisions or directions of the Regulatory Authority or the Appellate Tribunal which are the following:

- i. If promoter does not register its project with the Regulatory Authority – the penalty may be up to 10% of the estimated cost of the project as determined by the Regulatory Authority;
- ii. If promoter does not comply with the aforesaid order of the Regulatory Authority - imprisonment of up to three years and a further penalty of up to 10% of the estimated cost, or both; and
- iii. In case the promoter provides any false information while making an application to the Regulatory Authority or contravenes any other provision of the Act – the penalty may be up to 5% of the estimated cost of the project or construction.

13. Overriding effect

The provisions of this Act shall have an overriding effect in case there is any inconsistency between the provisions contained in this Act and in any other law (including a state law) for the time being in force.

4. THE STATE AFFAIR: WANTON TWEAKING OF PROVISIONS OF THE CENTRAL ACT

One of the most potent challenge which has come into light as regards implementation of RERA is concerned is that many state governments have significantly diluted/tweaked the RERA provisions to favour builders lobby. Further another perturbing aspect is that implementation of the act by the states has been wholly half-heartedly. Getting on to the ground zero report, by August 2017 only 23 states and union territories (all) had notified their rules and had set up interim or permanent authorities. Analysing the provisions of the various rules notified by various states we find that definition of the 'ongoing projects', has been substantially changed by many state governments. For instance the Haryana government's RERA rules have let a majority of the ongoing projects off the hook by allowing the projects even with part completion certificate and occupation certificate out of the ambit of the new law. Thus in a major escape route for the developers, the Haryana government has kept even those projects out of the purview of RERA where merely applications have been moved seeking part-CC/CC and OC. Consequentially it is not surprising that to take advantage of

this provision a vast majority of builders in the State had applied for the OC for their existing projects to keep themselves out of the ambit of the new law. Besides, the Haryana RERA rules do not specify that the cost of flat will be as per the carpet area and that the builder cannot charge parking cost for the common area, leaving more loopholes for the developers. **On the whole summing up on this issue, Surabhi Arora, senior associate director – research, Colliers International India, states that “Several clauses have been diluted or omitted in the different versions of state regulations, such as inclusion of ongoing projects, promoters’ liability on structural defaults, liability of clear titles, imprisonment clauses for various offences, the definition of saleable area, project development in case of lapse/cancellation of registration, etc.”** Thus this wanton filthy legal tricks have seriously raised doubts over the real intention of the state governments as to protection of the consumers interests.

Further on analysis of the Maharashtra RERA rules it emerges out that the central act requires that all the information about the project and the promoter, collected by the regulatory authority, be made public. However, this has been omitted in the Maharashtra rules. Secondly, as per central act, the conveyance of land in layouts must be done only in the name of the federation, as undivided proportionate land to the association of allottees together or to the allottee. The Maharashtra rule, however, says that the promoter shall convey the structure to individual societies and the conveyance of the land shall be done in favour of the federation, after the receipt of the occupancy certificate (OC) of all buildings. So, if the last building remains incomplete, the conveyance will also be prolonged. The Maharashtra rule also says that the formation of the society shall be done after 60 per cent of the members take possession, whereas, the central rules state that the society has to be formed once 51 per cent of the building is sold.

5. ANALYSIS OF THE MAJOR LOOPHOLES IN THE ACT: FLY IN THE OINTMENT OR DEVIL IN DETAILS?

No doubt RERA is a game-changing legislation and it really seeks to revolutionize the sector and consumer's interests in many ways however many experts do believe that there are still many creases to be ironed out in the act so that it really proves to be effective. Thus though the passage of the Act is truly a significant move, it can be safely said that the act does falls short of holistically regulating the real estate sector and addressing some of the major and cogent fundamental issues associated with it. The major loopholes in the act are as under :

1. ONGOING PROJECTS KEPT OUT OF AMBIT

One of the most controversial aspects of the Act is that many ongoing projects have been kept out of ambit by many state

governments in the RERA rules which have been framed. All the projects which have not received their completion certificate have come under the ambit of RERA. However on analysis of the many state rules as we have seen aforesaid it is clearly evident that many State regulators have excluded registration of under-construction projects such as in the case of Uttar Pradesh, Rajasthan and even Maharashtra where completion certificate and occupation certificate has been used interchangeably. In such a case one always ponders over will the consumers of ongoing projects be able to reap dividends from such a transformative act ?

2. ABSENCE OF SINGLE WINDOW CLEARANCE SYSTEM

Another major drawback is that though the Act provides for formation of a regulatory body, it does not give clarity on establishing a single window clearance mechanism, something that the real estate industry needs since a long period of time.

3. ABSENCE OF ESCROW ACCOUNT: MAKING THE REGIME A TOOTHLESS TIGER AND ISSUES AS TO CAPITAL EFFICIENCY

The act though very ambitiously provides for mandate that 70% of the amount realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account and will be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose only **however it needs to be noted that the act does not provide for setting up of the escrow account rather the act only provides for depositing the fund in a separate bank account.** The separate account is just like any normal current account and thus one needs to deliberate that in absence of the escrow account how the oversight can be maintained over the withdrawal of the funds since withdrawals won't require approval from the regulator. Further withdrawals can only be known once some consumers bring the fact into the knowledge . Further as we know to ensure that funds withdrawn from escrow accounts have been utilized for the required purpose, developers have to obtain certificates from engineers, architects and chartered accountants, to certify that the withdrawal are in proportion to the percentage of completion of the project and also the Act requires developers to get the escrow account audited, within 6 months after the end of every financial year, by a chartered accountant, and they have to produce the statement of accounts duly certified and signed by such chartered accountants . **Thus one again ponders over that is it not difficult in India to obtain these certificates?** Another drawback pointed by experts is that this mandate will impact the utilisation of project receivables and increase promoter reliance on institutional capital such as private equity or bank finance (which can be expensive). Thus this could eventually lead to an escalation in project costs, which may then be passed on to the consumers.

4. RIDDLED WITH AMBIGUITIES, MANY TERMS NOT DEFINED

Another drawback is that many important terms have not been defined in the act which were directly important like definition of land cost, construction cost and whether garage space can be sold to an allottee or not have not been significantly dealt with . Further most importantly net useable floor area and open parking space has also not been defined.

5. APPROVALS PROCESS

Another major drawback is that under the Act, all necessary approvals are required to be obtained prior to project launch, instead of certain specific approvals as previously required. This may delay project initiation and restrict supply of new properties. The another aspect of the problem is that, should a case arise, wherein the approval to the developer is withdrawn for some unforeseen reason then in such a case who shall bear the brunt? In the absence of the approval, the developer will be unable to construct or sell, directly impacting the consumer. What is the fate of the consumers who have made partial payments for the property? Has any step been outlined to make sure the consumer escapes this predicament unscathed?

6. NO RULES FOR DELAYED PROJECT APPROVALS

RERA lays emphasis on penalising developers for untimely project deliveries. However, a majority of the delay in execution of projects happens during the process of acquiring approvals and clearances from various authorities. Currently, there are close to 50 odd approvals that developers need to obtain before launching a project. The average time for acquiring all the approvals can range from 1-2 years. The Act does not make the government agencies accountable for the delay and places complete responsibility on developers. It lacks a stringent policy to force authorities to meet timelines or fasten the process of granting approvals. Thus force majeure clause has not been taken into account.

7. HOW FAR DISPUTE RESOLUTION MECHANISM WOULD BE SUCCESSFUL?

Another major loophole pointed is that RERA fixes a time period of six months for dispute resolution by the authority. Keeping in view the complexity of the disputes involved many experts have raised questions that the time line is too unrealistic and would further dampen the faith of the stakeholders in the system when deadlines would not be met.

8. LOCAL AUTHORITIES KEPT OUT OF AMBIT

Also many experts have pointed out that local authorities and statutory bodies, such as the state level municipal corporations engaged in the business of development have been kept out of the authority's ambit. It was always desirable that such stakeholders, who play a key role, should have been included

in the act's ambit to ensure accountability and efficient execution of projects.

9. SYSTEMIC ISSUES

The Act neither establishes a conclusive title system for land, nor addresses the issue of availability of housing stock across all income categories or the practice of using black money in real estate transactions. Thus in absence of these uncertainty still looms large over the real efficiency of the act.

10. UNCERTAINTY AS TO SUO MOTO ENQUIRY UNDER TAKEN BY THE RERA

Many experts have pointed out that there exists uncertainty as to the suo moto enquiry which would be done by the RERA. The act fails to establish the link between the provisions between taking up investigation suo moto, recording adverse finding therein and imposing penalty thereto, thereby creating uncertainty as to what would happen when case is taken up suo moto under the section 35 of the act.

6. CONCLUSION

Thus taking the 360 degrees view of the progressive and novel legislation, one substantially comes down to the conclusion that the story of RERA implementation is a case of conflicting interests. RERA beyond doubts is disrupter and is a well intentioned legislation in many ways. However the key to the act lies in its effective implementation in letter and spirit since in a polity of federalism, state governments have the key role to play in the implementation of RERA. One also reaches to conclusion that over time, RERA will weed out speculators in the Indian property market and push it towards maturity. When the announcement came initially, there was much joy in the minds of the consumers as they thought that the government has finally heard their voices. However, with the delay and dilution, the consumer feels cheated. Unfortunately, the lobby of the consumer has been a weak link in the whole chain of events in RERA. Hopefully, more agitations from the consumers will pressurise the state governments to hasten the implementation and ensure speedy delivery. Finally it can be safely said that much as this legislation attempts to make the housing sector more buyer-friendly, RERA still only manages

to address the symptoms but not the disease. It needs to be accompanied by more fundamental reforms such as improving land records and titling, reducing relatively unnecessary but costly approvals, reforming rules related to formal financing for housing projects and dismantling regressive land-use constraints and building regulations in cities. Merely mandating developers, for instance, to take on the liability of title representation would only transfer the existing risk of losing land title into higher housing prices for buyers. Although RERA is well-intentioned, the authorities in the respective states need to frame regulations which while encouraging greater transparency and accountability for home-buyers, also push through structural reforms to prevent a further reduction in the supply of affordable housing.

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