

Impact Of The Real Estate (Regulation And Development) Act, 2016, On The Home-Buyers: Addressing The Unconscionability?

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INTRODUCTION

The Real Estate (Regulation and Development) Act, 2016 (hereinafter 'RERA'), was enacted to safeguard the innocent purchasers against the exploitative developers. The importance of such a regulation was realized after countless number of applications were made before the Competition Commission of India (hereinafter 'CCI') regarding the abusive behaviour of the developers. One-sided agreements, non-consensual amendments in projects, recurring delays in transfer of possession were, inter alia, some common unethical practices followed in the real estate sector by the developers. There was little that the CCI or the National Consumer Disputes Redressal Commission ('NCDRC') could do to avert the unscrupulous developers from craftily drafting the one-sided agreements. To address this defiant behaviour of the developers, the law makers enforced RERA as an attempt of respite to the consumers by regulating the real estate sector. The Act was enacted with three primary objectives, first, manage and promote the real estate sector; second, protect consumer interests; and third, provide a speedy mechanism for dispute redressal to the consumers. In this regard, the States were required to adopt and ratify the statute after making any suitable changes as per the State's policy. Despite this, many states are yet to adopt or fully implement the Act.

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In this article, we assess the enforceability of the Act to examine its benefits for the home-buyers. Many states are yet to fully enforce the Act. Further, there has been a lackadaisical response from the brokers and developers who see it as a hindrance to their means of making perfidious profits. Part II of this article throws light on the purpose and motivation behind legislating the Act in light of certain cases showing consumer exploitation by developers, and analyses the recent judgement of the Bombay High Court in upholding the constitutionality of the Act. In Part III of this article, we substantially analyse the impact of the statute on the real estate market, whether it is exhaustive enough to protect the interests of the consumers, whether it has met with the expectations of the home-buyers till now, and consequently suggest a germane future course of action. In doing this, we use statistical data and analyse the attitude of the developers and the brokers in light of this.

UNDERSTANDING THE LEGAL FRAMEWORK OF THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

The RERA was legislated to regulate the otherwise disorganized real estate sector in the country. The main objectives of the law makers were to bring in transparency, accountability and consistency in the real estate practices. While the supplementary aims were to also attract investments in this sector, the concerns of the buyers have been the main highlight ever since its enforcement. In the subsequent sub-parts of this article, we shall first emphasize and illustrate the oppression faced by several buyers in the real estate sector by certain dominant players in the market. While this had led to the legislation of RERA several developers and brokers had challenged multiple provisions of the Act, terming them unconscionable.

The Competition Commission of India has repeatedly noted in its Annual Reports that the real estate sector topped the list amongst all the sectors, in the number of cases that have been filed by the consumers.³ The builders and developers had not been unsuccessful in finding ways to circumvent the land and real estate regulations so as to dupe the consumers of their rightful money or possession. For instance in the case

³ See Annual Reports (2014-15), (2015-16) & (2016-17) et. al., Competition Commission of India, available at <http://www.cci.gov.in/annual-reports> (Last visited on March 20, 2018).

of Raghubir Mertia v. Aura Real Estate Pvt Ltd,⁴ the developer continuously delayed giving possession to the consumers and not only fixed the payment schedule by exercising its discretion arbitrarily but also required the consumers to follow the floor plan prescribed by it.⁵ The CCI termed this conduct by the developer as abuse of their position at the costs of the consumers.⁶ In another case, Vineet Arya v. Prestige Estate,⁷ the developer clandestinely reduced the area of land on which the property was constructed (from 105 acres to 56 acres),⁸ or in the case of LaxmikantDhyani v. Omaxe Ltd,⁹ the lifts were attached without safety checks and statutory permissions, bad quality of construction materials, non-availability of important services as decided in agreement, inappropriate delivery of maintenance services inter alia.

Moreover, in the catena of cases against DLF, in Ess Cee Securitiies Pvt Ltd v. DLF Universal Ltd,¹⁰ DLF threatened the consumers with forfeiture of money and annulment of the contract of sale if the consumer failed to follow their directions. Further, it also misrepresented the consumers with fraudulent payment schedules, requisite approvals/ sanctions, selling of parking spaces, inter alia.¹¹ Besides, in the landmark case of Belaire Owner's Association v. DLF Limited,¹² there was not only abnormal delay in the project but instead of nineteen floors as proposed in the plan, the authorities unilaterally decided to construct twenty nine floors, the floor plan was changed after entering into contracts of sale, etc.¹³ In this case, a

⁴ RaghubirMertia v. Aura Real Estate Pvt Ltd, (CCI) Case No. 14 of 2016.

⁵ *Ibid*

⁶ *Ibid*

⁷ Vineet Arya v. Prestige Estate, (CCI) Case No. 100 of 2015.

⁸ *Ibid*

⁹ LaxmikantDhyani v. Omaxe Ltd, (CCI) Case No. 89 of 2015.

¹⁰ Ess Cee Securitiies Pvt Ltd v. DLF Universal Ltd, (CCI) Case No. 45 of 2015.

¹¹ *Ibid*

¹² Belaire Owner's Association v. DLF Limited, (CCI) Case No. 19 of 2010.

¹³ *Ibid*

hefty penalty of Rupees 630 crores was imposed on the developer for its exploitative behaviour.¹⁴

The aforementioned cases are just a few illustrations of the multifarious ways in which buyers have been previously exploited by the developers. The buyers are generally left with no feasible option but to meet with the demands of the developers since they have already deposited a huge sum of money with the developers and are bound by the contractual obligations. This has been clearly evinced in the above set of cases. Hence, the need for regulations as the RERA was felt so as to avert any further oppression against the buyers.

CONSTITUTIONAL VALIDITY OF THE ACT

Several developers and brokers had also been arguing that the provisions in the Real Estate Act were unconstitutional alleging them to be arbitrary. However, the Bombay High Court in its recent judgement in the case of Neelkamal Realtors Suburban v. Union of India upheld the validity of certain provisions of RERA that were challenged by several builders and developers.¹⁵ The petitioners argued against the retrospective application of the Act that required the builders to register for the projects for which an occupational certificate had not been obtained.¹⁶ They contested that this was against the original covenant between the parties that was entered into before the execution of the Act.¹⁷ However, the Court aptly put down this argument. It reasoned that the Act merely required the developers to register and they were eligible to suggest new time duration for completion of the project so as to not arbitrarily impose any penal ramifications on them.¹⁸ Further, the Court rightfully held that RERA could use its discretion in certain scenarios and the provisions would not be necessarily used against the developers as under the alleged provisions of the Act.¹⁹ With respect to the provision that required the promoters to pay interest for

¹⁴ *Ibid*

¹⁵ Neelkamal Realtors Suburban v. Union of India, W.P. No. 2711 OF 2017 (December 6, 2017).

¹⁶ *Ibid*

¹⁷ *Ibid*

¹⁸ *Ibid*

¹⁹ *Ibid*

delayed possession,²⁰ the Court justified that if the developers were allowed a leeway here, it would amount to unjust enrichment, and considering that the same was also requisite under the Maharashtra Ownership of Flats Act, 1963, it cannot be declared invalid.²¹ Evidently, the Court promoted the interests of the consumers over that of the promoters, keeping in mind the unconscionable control that the developers had over consumer interests. The Court's obiter evinces a clear reflection of the objective of the act i.e. to develop the real estate sector, especially the unfinished projects. In light of this landmark judgement, it has become expressly clear that the developers have no option but to follow the RERA in its entirety. This has not only been mandated statutorily but has also been reaffirmed by the judiciary.

IMPLEMENTATION AND ENFORCEMENT OF THE ACT

One of the common problems faced in India is with respect to the execution of these beneficial legislations. While the Centre has enforced this Act, it is now upon how the States execute it, land being a state subject.²² While there are many states, like Maharashtra and Karnataka, that have actively started acting on the implementation of the Act –with works including setting up the Real Estate Regulatory Authority, establishing the online portal to register and file complaints, inter alia, it is yet to be seen how the States amend this Act according to the conditions in those particular states, and if it will be to the advantage or to the disadvantage of the home-buyers. For example, while the Central Act merely exempts the application of the Act for the projects that have already received a completion certificate, the Acts enacted by Gujarat and Uttar Pradesh have given further exemptions for projects whose services have been handed over to the local authorities for maintenance, or where development work has been completed and sale/lease deeds of sixty percent of the apartments have been executed, where development work has been finished and application has been filed for a completion certificate. This indefinitely opens doors of anomalies considering that on the commencement of the Act, the developers can start seeking for

²⁰ The Real Estate (Regulation and Development) Act, 2016, §18(1)(b).

²¹ Neelkamal Realtors Suburban v. Union of India, Writ Petition No. 2711 OF 2017 (December 6, 2017),262.

²² See List II Entry 18.

completion certificates even if their projects are not entirely complete or may complete the projects in a hurried manner to avoid the procedural hassle under the Act. In this regard, there have also been many ongoing debates whether the Act will be applicable to projects that have received the completion certificate but the flats have yet not been allotted. This is because, while many developers have already received the completion certificate, they may not have allotted many flats. This leaves it open to them to further modify the project if required without registering their project, in light of the blanket exemption provided for projects having received completion certificates.

Moving on to the salient features of the Act, the properties, as per the Act, are non-marketable without registration (otherwise attracting a penalty of ten percent of the cost),²³ consumers can expect to find details of even the smallest developers online on the website.²⁴ Moreover, the authorities have taken a clear stance as to averting developers from collecting money before they have all the requisite permissions to commence with the project.²⁵ If they do, it can be presumed that they are consciously undertaking the risk and will be liable on failure of finishing the project by the deadline.²⁶ Another salient feature of the Act is Sec 15 that proscribes the promoter to transfer any of rights and liabilities attached to the property if the promoter has failed to acquire an express consent from 2/3rd of the allottees. To ensure that the developer does not fabricate excuses at a later stage, the rules also require a legal title report from the hands of a practicing lawyer.²⁷ This also prevents any situation where a case may already be pending in the court with respect to the land on which the project is being constructed.

Further, the authorities have also made it a statutory compulsion requiring the developers to send certificates with respect to the construction work finished in accordance with the latest plan approved by the authority, the

²³ The Real Estate (Regulation and Development) Act, 2016, §3(1).

²⁴ *Supra* note 24.

²⁵ The Real Estate (Regulation and Development) Act, 2016, §4(1)(C).

²⁶ Kailash Babar, *Maharashtra sets up tribunal to hear appeal against Maha RERA rulings*, Economic Times, January 2, 2018, available at <https://economictimes.indiatimes.com/wealth/personal-finance-news/maharashtra-sets-up-tribunal-to-hear-appeal-against-maharera-rulings/articleshow/62334236.cms> (Last visited on March 18, 2018).

²⁷ *Ibid*

expected time taken to construct the promised amenities, a certificate from the engineer wherein he determines the balance cost and if at all, any extra area, inter alia.²⁸ Lastly, to avoid any kind of circumvention, to make any modifications to the plan, the promoter is required to procure the consent of the allottees.²⁹ However, in the event that the developer is unable to finish the project in the agreed time period, the registration automatically stands revoked, unless the developer can show any exceptional reason.

All these measures in their totality attempt to ensure that the commitments made by the developers are realistic. Moreover the requisite procedure ensures that the developers do not misrepresent the consumers about the project details, relieving the consumers from carrying out any intrusive investigation themselves. It can also be safely predicted that the regularization brought in by the Act, the transparency, elimination of scams, etc., may definitely bring in more credibility increasing the flow of funds from foreign institutional investors. This may further help in stabilising the prices in the real estate markets.

A. UNDERSTANDING FROM THE DEVELOPERS' PERSPECTIVE

For the developers, the Act seems like some extra procedural burden to all of them because of malpractices undertaken by a few of them. Further, providing with a formal deadline to the authorities may also be inconvenient to them. In light of concerns of supply of raw materials, getting all the paper work done in time, receiving the money on time, the engineers, architects and other contractors abiding by the deadline, and many other contingencies, it becomes difficult to suggest the nearest date within which they may expect to finish the project. Lots of calculations, permutations go in, and further things need to fall in at the right place at the right time. While they may not know the approach of the authority in letting go the mistakes that may cause delay, they can only hope that these uncertainties will be considered by the authority.

²⁸ See, *for e.g.*, The Real Estate (Regulation and Development) Act, 2016, §3, §4(2)(c).

²⁹ The Real Estate (Regulation and Development) Act, 2016, §14(2)(i).

Further, the Act requires the developers to procure the consent of two third of the buyers before making any alterations to the plans.³⁰ However, it is unclear as to if they are required to obtain the consent for every minor change. They need to make certain changes in urgency and cannot wait for an approval in each and every step. It would impede the expediency if they are unable to obtain the consent for minor things. Further, in light of the object of the Act, and the general inclination towards the interests of the buyers, there seems to be a general apprehension amongst the developers, which nevertheless is beneficial for the real estate sector. Moreover, while the Act requires the developer to keep at least 70% of money in a separate account,³¹ to be only used for the purpose of the project, one can only wait to see how are the developers going to follow this. This is because till now, many developers used to unnecessarily delay the projects to gain interests out of these money; however, now, they have no option but to use this money immediately for the purposes of the project. It seems that if this provision in itself is monitored successfully, there might be a drastic change in the regularization of the real estate sector.

B. UNDERSTANDING FROM THE AGENTS' PERSPECTIVE

The new Act has made it mandatory even for the real estate agents to register.³² While it indefinitely eliminates the sham agents, the Act merely requires the agents to register so as to provide the purchasers with better and more options. Otherwise, the duties of the agents more or less remain similar. Further, the website also intends to keep a record of all misrepresentations by the agents/cases against the agents so that the consumers can assess his worth from the record of work. The requirement of registration for the agents is only beneficial to all. It will avert the potential purchasers from being defrauded by fraudulent agents. Further, it will undoubtedly help the buyers in recognising the agents that can truly be of help to them. There have been many instances when purchasers have been duped of lakhs of rupees by certain agents. The tabulations available

³⁰ The Real Estate (Regulation and Development) Act, 2016, §14(2)(ii).

³¹ The Real Estate (Regulation and Development) Act, 2016, §14(2)(D).

³²The Real Estate (Regulation and Development) Act, 2016, §11.

online will also help the purchasers to compare the work of different agents in that particular area.

Nonetheless, the introduction of such a comprehensive website providing nearly all the possibly details, on-going projects, etc. does threaten the jobs of the real-estate agents. However, on the other hand, it also allows the consumers to rely on them since they can see if the agents are duly registered or not, along with their prior registration on the online portal.

C. UNDERSTANDING FROM THE REAL ESTATE AUTHORITY'S PERSPECTIVE

The authorities in different states have noted that the progress was slow initially but later, they started imposing penalties for starting the work without registering, after which the developers took it seriously. They can also consider plans of increasing the penalty if required or categorising it differently for builders with different magnitude of projects. The assistance of goons available to the developers is a well-known fact. Often, these developers threaten the buyers to withdraw their complaints. Hence, the authorities need to enact provisions which require the requisite authority to scrutinize the matter even if a buyer withdraws a complaint, so as to ensure that the withdrawal was not as a result of coercion.³³ Further, it is important to note that in states like Maharashtra, the fee for complaints is also five thousand rupees. This is relatively higher than other states, and considering that the authority is now also taking the slum developments within its purview, it should consider reducing the fee. However, to ensure the successful implementation of all these functions, the authorities also need to have a dedicated workforce with sufficient number of workmen. For instance, the authorities in Maharashtra have clearly taken a strict stance by charging fines as high as 1.2 Lakh Rupees for displaying a false advertisement.³⁴ This clearly shows the straightforward approach of the authority to clear any malpractices prevailing in the real estate sector. More

³³ Maharashtra initially received only 108 complaints within the first six months of its functioning.

³⁴ <http://www.financialexpress.com/india-news/in-a-first-under-rera-catch-maharashtra-real-estate-company-slapped-with-rs-1-2-lakh-penalty/703991/>

so, it has proscribed developers from advertising their projects unless they have it registered.³⁵

Despite all this, there are several states like West Bengal, Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim and Tripura where the RERA rules have still not been notified.³⁶ Even Kerala is yet to finalize the rules and constitute an authority to this extent.³⁷ Surprisingly, West Bengal has enforced the West Bengal Housing Industry Regulation Act, 2017. RERA has been sidestepped by the State and WBHIRA is not being executed, with even the Rules not being notified to date. It is awful that despite the COSL Report and the Bombay High Court judgement, States have been unyielding in not modifying their Rules. There seems to be an absence of commitment among the State Governments and the Central government, saving exceptions like the states of Maharashtra, Punjab and Karnataka, etc., to fully execute the Acts. Further, awareness also needs to be created among the people, considering that the poll conducted by MagicBricks suggests that nearly seventy four percent of respondents were unaware of the rule by RERA requiring them to check the registration of the projects online.³⁸

CONCLUDING REMARKS

The above analysis manifests that RERA, with its ups and downs, has undoubtedly benefitted the buyers massively. By making the real estate sector more organized and regulated, not only disciplining the work of the promoters but also avoiding encounters with sham agents, it has helped the buyers to properly assess and compare different projects, different agents, sitting at home and decide. With the real estate sector growing and developing exponentially like never before, changing the architecture

³⁵ The Real Estate (Regulation and Development) Act, 2016, §3(1).

³⁶ *Quell all efforts at sabotaging implementation of RERA: Hardeep Singh Puri*, MoneyControl, May 28, 2018, available at <https://www.moneycontrol.com/news/business/real-estate/quell-all-efforts-at-sabotaging-implementation-of-rera-hardeep-singh-puri-2560633.html>

³⁷ *Kerala: No RERA, rules after one year*, Deccan Chronicle, May 21, 2018, available at <https://www.deccanchronicle.com/nation/in-other-news/210518/kerala-no-rera-rules-after-one-year.html>

³⁸ *Express News Service, A year after RERA Act introduction, changes in realty sector negligible*, Indian Express, May 1, 2018, available at <http://www.newindianexpress.com/business/2018/may/01/a-year-after-rera-act-introduction-changes-in-realty-sector-negligible-1808532.html>.

of the state, such a regulation was a necessity. It has now also widened its ambit to include projects of the slum development area, and plans to ensure its development systematically. With the introduction of RERA, the malpractices of the promoters including arbitrarily modifying the plans, increasing the floors, reducing the allotted area, delaying the projects, asking for an increased price are difficult to carry out. This is because the registration before the RERA requires the promoters to lay out all their plans and any modifications further can take place only with the consent of the buyers. Further, while equal representation is given to the stakeholders in the Board of Conciliation, having two members in the Board creates great uncertainty in light of the possibility of a divided opinion. In any case, the clear approach of the legislature and the judiciary is to proscribe the exploitative practices of the developers and the results are clearly visible with the authorities taking each and every possible step.

However, at the same time, the Act needs to be complemented with Regulations that give a clear cut approach to the authorities to enforce the provisions. Otherwise, the Act may be another legislation that vests rights without any effective remedies. Further, the RERA Authority should work with other departments, as the framework of the real estate sector cannot be viewed in isolation. For instance, there should be coordination of RERA with local authorities, the pollution control board, the municipality, the land development authority, and proper regulations need to be enacted in this regard, otherwise the loopholes can be cited at the disadvantage of the consumers. Concurrently, while certain shortcomings are inevitable with the wide ambit of provisions and to also balance the interests of all the stakeholders, the model of RERA adopted by Maharashtra can definitely be followed by all states