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RERA

A uniform regime





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Introduction

For decades, the real estate sector in India has remained unregulated despite its exponential growth. At the transactional or operational level, this sector has been plagued with diverse legal regimes across states and opaque enforcement strategies by various State Governments. Although a significant contributor of gross domestic product, the real estate still suffers as the irregularities endemic in the real estate industry have resulted in deficit of trust amongst buyers as well as investors. As India moves ahead in its growth trajectory and becomes increasingly urbanised, the need to regulate and instil transparency in the real estate sector is more important than ever.

Prior to the advent of the Real Estate (Regulation and Development) Act, 2016 (“**RERA**”), real estate projects in India were regulated and sanctioned by various departments in the State Governments, as “land, rights in or over land, land improvements and colonization” are included in the State List of the Seventh Schedule of the Constitution of India. With the advent of RERA under discussion, the Ministry of Housing and Urban Poverty Alleviation, Government of India (“**MHUPA**”) in its press release dated June 5, 2013 clarified that RERA has been prepared in pursuance of the powers of Central Government under entries 6, 7 and 46 of the Concurrent List of Seventh Schedule in the Constitution of India, as RERA governs the contractual understanding between developers and buyers of units.

RERA was an initiative of the MHUPA to boost domestic and foreign investment in the real estate sector and provide ‘housing for all by the year 2022’. In the face of the operation of the promoters of real estate projects, becoming subject to a greater level of monitoring and regulation as per the provisions of the RERA, the proposed legislation met opposition at various stages. RERA received the assent of the President of India on March 25, 2016, was published in the Gazette for public information on March 26, 2016 to govern residential and commercial real estate projects. Certain parts of the Act came into force on May 1, 2016 and the remaining parts came into force on May 1, 2017, respectively.

Pursuant to RERA, it is hoped the likely integration of the regulation and investment in the real estate industry will provide

an impetus towards development of real estate projects in India. At a consumer level, once the framework under RERA is in place in all states and becomes functional, the creditworthiness of this sector may see a positive shift in the long term.

A Uniform and Structured Legal Regime:

RERA has been framed as a beneficial legislation with the objective of safeguarding the interest of buyers in real estate projects at every step of purchasing an apartment or unit in a real estate project. Some of the key safeguards are as under:

- Certain key terms such as apartment, promoter, buyer, carpet area and common areas with reference to development of real estate projects, have been defined, resulting in clarity in interpretation and enforcement of the provisions of RERA;
- One or more Real Estate Regulatory Authorities (“**Regulators**”) are required to be instituted in each State and all real estate projects will be registered with Regulators in whose jurisdiction the project is being developed. Further, where a project is to be developed in phases, each phase shall be considered as a stand-alone real estate project.
- The process of registration is exhaustive, wherein numerous details/information in relation to the real estate project are required to be certified by an architect or a chartered accountant enclosed with the application. Ongoing projects as on May 1, 2017, are required to be registered by July 31, 2017.
- Upon registration of the real estate project and receipt of the login ID and password from the Regulator, the promoter of a real estate project is required to create a page in relation to the proposed real estate project on the website of the Regulator and enter all details of the same including details of registration with the Regulator, quarterly updated list of units sold, quarterly updated status of the real estate project and any other information prescribed by the Regulator;
- Registration of real estate agent in addition to the registration of the real estate project.

Promoter obligations under RERA:

The most prominent aspect of RERA is that a number of obligations have been imposed on a ‘promoter’ of a real project. A ‘promoter’ under RERA includes the following:



- person who constructs a real estate project or converts an existing project, for the purpose of sale;
- person who develops a real estate project, whether or not such person constructs structures on plots, for the purpose of sale;
- development authorities or public bodies which construct buildings or apartments or delivers plots, on land owned by them or the government, for the purpose of sale;
- apex state level co-operative housing finance society and primary co-operative housing societies which undertake construction of projects for their members or other buyers;
- person who acts as a builder, coloniser, contractor, promoter, or acts as a holder of power of attorney from the land owner on who's the project is being constructed for sale.

RERA clarifies that the entity carrying out construction and the entity selling the units are separate entities, both are deemed to be promoters under RERA and shall be jointly liable.

The key obligations of promoters under RERA include:

- obtaining a completion certificate from the relevant competent authority and to make it available to the buyers individually or to the association of buyers;
- providing and maintaining the essential services on reasonable charges, till the taking over of the maintenance of the project by the association of the buyers;
- execute and register an agreement to sell before accepting more than ten per cent. (10%) of the cost of the unit in a real estate project from a buyer;
- complete the real estate project in accordance with the plans, designs and specifications approved by the concerned authorities;
- rectify any structural defect in the development of the real estate project brought to the notice of the promoter within a period of five (5) years from the date of handing over the possession of the unit, free of charge within a reasonable period of time;
- take all steps necessary for the execution of a registered conveyance deed in favour of the buyer along with undivided proportionate title in the common areas and handing over of the possession of the units;
- deposit seventy per cent. (70%) of the sale proceeds from a real estate project, including land cost, in a separate account and such proceeds use the same towards the development of such real estate project only.

The real estate sector, so far, has functioned on the basis of the faith that a buyer was forced to place on the *bona fide* intention of the promoter as the disclosures mandated by law were minimal. With RERA and its framework in place, the obligations of the promoter of a real estate project shall be manifold and the consequence of any failure shall be governed by the offences and penalties prescribed under the RERA.

Legislative, Operational and Enforcement Lacunae:

In the current scenario, implementation and enforcement of the RERA regime suffers from multiple lacunae in terms of interpretation of the legislation, setting up the framework under RERA in all States and enforcement of the provisions of RERA. Below are certain key lacunae that plague the current RERA regime:

Delay in setting up of the Regulators in States

The Regulators under RERA were to be set up by April 30, 2017, however, till date there are 8 (eight) states where the Regulator is yet to be set up and the established Regulators are in the process of setting up its operations.

A noteworthy exception to this is the Regulator set up in the state of Maharashtra ("**MahaRERA**"). The MahaRERA has issued circulars clarifying various aspects under the RERA, for example, the MahaRERA has set out a conciliation mechanism by way of Alternative Dispute Resolution, the procedure for correction of information provided at the time of registration of projects and given clarifications in relation to the assignment or transfer of projects by promoters to third parties.

However, in states like Haryana, the Regulator was an interim authority until as late as January, 2018. The state government has now appointed members and chairperson and set up two (2) benches of the Regulator in Gurugram and Panchkula. Therefore, although the Regulator in Haryana had been issuing notices to promoters and undertaking registration of projects, the required framework under RERA has been put in place only recently. Therefore, the effects of the operation of the entire RERA framework is yet to be seen in the state of Haryana.

As a result of this delay, there has been a lack of clarity with regard to RERA related compliance amongst promoters and buyers alike. Amongst the buyers there is a lack of confidence in the efficiency



of the Regulators and timely redressal of their grievances, whereas the promoters, on the other hand, are in dark in relation to the process to be undertaken for responding to the notices of default issued by the Regulators.

Delay and disparity in Rules under RERA

Under RERA, each state is required to notify the rules under RERA (“Rules”) for carrying out provisions of the legislation, within six (6) months of RERA coming into force, that is, on or before October 31, 2016. However, only a handful of states were able to meet this deadline. Since the Rules were to stipulate on aspects such as forms and fees for registration, rates of interest payable to buyers and other such key aspects under RERA, the delay in notification of the Rules by certain states has resulted in restraining the smooth operation of this legislation.

As on date, although most States have notified the Rules, on a closer look it is clear that certain key aspects have been dealt with differently in each State. A prime example of this is the inclusions under “cost of construction” and “land cost”, which has been dealt with in detail at paragraph 4.10 below.

Liquidity challenges for promoters due to restrictions on seventy per cent. (70%) project account

Promoters are required to deposit seventy per cent. (70%) of the amounts realised from the buyers in a designated bank account (“Project Account”). The monies in the Project Account can only be used towards land cost and cost of construction of the real estate project. Also, the monies in this account can be withdrawn by the promoter only in proportion to the percentage of completion of the real estate project.

This clause poses a two pronged problem insofar as interpretation is concerned. The first being, the interpretation of the terms “land cost” and “cost of construction” and second being, the manner of calculation of percentage of completion of the real estate project.

Many of the States have, in their Rules, clarified the meaning of the terms “land cost” and “cost of construction” whereas some of them are silent on this aspect. A snapshot of the view taken by some of the States is set out below:

State	Land Cost	Cost of construction
Andhra Pradesh	Cost incurred by the promoter, whether as an outright purchase, lease charges etc.	Cost incurred by the promoter, towards the on-site expenditure for the physical development of the Project
Haryana	Cost incurred by the promoter, whether as an outright purchase, lease, registration charges, stamp duty and brokerage cost etc.	Cost incurred by the promoter, towards the on-site expenditure for the physical development of the project inclusive of all statutory charges as well as external development charges
Jharkhand	Cost incurred by the promoter, whether as an outright purchase, lease charges incurred to obtain the approval of the competent authority	Cost incurred by the promoter, towards the on-site expenditure for the physical development of the project
Karnataka	(i) costs incurred by the promoter for acquisition of ownership and title of the land parcels for the real estate project as an outright purchase lease etc., or the Guidance Value in accordance with section 45-B of the Karnataka Stamp Act, 1957 relevant on the date of registration of the real estate project whichever is higher; (ii) amount paid for acquisition/ purchase of TDR etc.; (iii) amount paid to the competent Authority for project approval, No objection certificates, stamps duty, transfer charges, registration charges, conversion charges, change, taxes, statutory payments to state and central Government.	All such costs, incurred by the promoter towards on-site and off-site expenditure for the development of the real estate project including payment of taxes, fees, charges, premiums, interests etc., to any competent Authority, or statutory Authority of the Central or State Government, including interest, paid or payable to any financial institutions including scheduled banks or non – banking financial companies etc.



As is clear from the above, states like Maharashtra and Karnataka have given more clarity with regard to identification of costs as land or construction cost, whereas others leave some room for difference in interpretation.

The intention of this clause for depositing seventy per cent. (70%) amount is to ensure that the promoter does not siphon funds and utilise the amounts collected for one project in another project. However, the restrictions on withdrawal of funds from the Project Account results in reduced liquidity with the promoter. At an operational level, a substantial part of the expense of a real estate project is incurred by the promoter at the time of commencement of the project, however, the percentage of onsite completion of the project may not be commensurate at this point in time. This will lead to a liquidity crunch amongst promoters as the funds from the Project Account can only be withdrawn in proportion to on-site completion of the project.

In this regard, States such as Maharashtra and Gujarat have taken a practical approach to resolve this predicament by allowing withdrawal of funds in proportion to the estimated cost of the project instead of the completion of the project. However this is a clear dilution of the provisions of RERA.

In our view, this issue shall pain the smaller promoters considerably more than the more established promoters with better cash reserves.

Transfer or Assignment of Real Estate Projects

RERA restricts transfer or assignment of majority rights and liabilities of the promoter of a real estate project to a third party and stipulates a requirement of written consent from two thirds of the buyers (except the promoter) and approval of the Regulator.

As a matter of practice, promoter entities may change internal shareholding and convert the nature of the entity, for example, from a partnership firm to a company. The language used RERA does not provide for a carve out to eliminate such change in internal shareholding or conversion of entities from the ambit of this restriction transfer or assignment of majority rights in a project. In this regard it should also be borne in mind that obtaining consent from buyers and Regulators for such internal processes such as change in shareholding or conversion of the

promoter entities is not practical at an operational level.

MahaRERA has *vide* its circular dated November 8, 2017 provided the much awaited clarity on this aspect and excluded cases of internal shareholding or conversion of the promoter entity, from the requirement of consent of buyers and Regulators. However, other Regulators are yet to provide any such clarifications.

Delay in registration of on-going projects

Promoters of all on-going projects, that is, projects that had not received completion certificates as on May 1, 2017 were required make applications for registration of such projects with the concerned Regulator by July 31, 2017. Although Regulators in various states including Haryana, Punjab, Tamil Nadu and Karnataka have been issuing notice to defaulting promoters, there are a number of on-going projects that are yet to be registered.

Therefore, it is now clear that projects that had not received completion certificate as on May 1, 2017 are required to be registered under RERA.

View taken by Courts:

As it happens with any new law, RERA was also challenged on the grounds of certain provisions being ultra vires the Constitution of India. A batch of petitions filed by stakeholders were heard and decided by the Bombay High Court as per Supreme Court's directions.¹ Certain challenges and corresponding decision of the court are dealt with herein below:

- Petitioners claimed that RERA in as much as it mandated registration of ongoing project on the date of commencement of RERA, of which completion certificate had not been issued; and thus bringing the project under RERA's ambit was against the contractual rights established between the promoters and the allottees. According to the Petitioners, this being a retrospective/retroactive application, fell foul of Article 20.² The Petitioners also challenged penalty provisions of RERA³ being violative of Articles 14, 19(1) (g) and 20(1) of the Constitution in as much as they amounted to unreasonable restrictions.
- Challenge was also made to the validity of Section 4(2)(I)(D) mandating deposit of 70% of the amount realized from the allottees from time to time shall be deposited in a separate bank account.
- All the aforesaid challenges were dismissed by the Bombay High Court.



- Regarding the retrospective application of RERA, the court held that RERA had only prospective application and reasoned that even on-going projects which had not yet received a completion certificate would require a registration under Section 3 of RERA. It was clarified that at the time of such registration, promoters will have the benefit of submitting a fresh timeline. Penalties under the RERA will apply however in case of violation of such fresh timeline.
- Regarding deposit of 70% of the amount, the court held that the amount utilized by the Promoter for the project need not be deposited again, and it would suffice if necessary certificates are submitted at the time of application for registration to the satisfaction of the RERA Authority. The court further held that the amount so deposited is not expropriated by the Authority, and the Promoter is free to withdraw the same for the Project upon certification and instruction of the Authority. The balance 30% would be free for Promoter's utilization for their benefit.
- Another challenge was made to explanation to Section 6 of RERA which limited instances of "force majeure" to any calamity caused by nature for grant of an extension. This restrictive definition, it was submitted, ignored other possible *bonafide* instances such as litigation by third party against the promoter's project, non-supply of raw material, due to unavailability of labour etc. This challenge was also rejected by the Court on the ground that the provisions of RERA are to be construed harmoniously to strike a balance so that interest of genuine/non-defaulting Promoters is protected.

Upholding the validity of RERA, while the Bombay High Court seems to have affirmed MHUPA's stand towards a development oriented regime governing real estate sector in India; certain issues remain unresolved.

For instance, industry experts may agree that there may be numerous reasons for delay in a Project. Restricting the benefit of seeking extension beyond one year only on the ground of natural calamities may cause undue hardship for a developer. It would have been more logical if the Authority was conferred more discretion to grant extensions on the basis of facts of a particular case. Similarly, while provision for deposit of 70% amount undoubtedly is beneficial in so far as the interests of customers are concerned; with lesser cash liquidity in hand, the developers may find it difficult to smoothly carry on with the Project.

It is well understood that the introduction of RERA was intended to safeguard innocent customers against the abuses in the hands of developers in numerous ways. One of such provisions is Section 18 of RERA which confers a right to the customers to opt-out of a project on account of delay in delivery of possession of the apartment. The RERA Authority/Appellate Authority have been pro-actively doing justice to this provision. Desire of a customer to exit has been held to be of paramount importance.⁴

The RERA Authorities/Appellate Tribunal are also coming down heavily on the developers for any delay in performing their obligations. Excuses of developers are not being entertained accordingly. For instance, delay in obtaining occupation certificate on account of objections of municipal corporation,⁵ or attempt to shift burden on municipal corporation for building of access road⁶ have been rejected categorically.

The Way Forward:

The intent of RERA is to provide and ensure the highest level of regulation in the real estate market in order to minimize, if not eradicate, the lack of regulation and transparency in the real estate sector. This change is a slow process and a number of steps can be taken for the RERA framework to be consolidated in our country.

Uniformity of Rules and provisions of RERA: Although the States were empowered to draft the Rules, there should not be any leeway given to the States for dilution of the provisions of the Act. In a way similar to the order of the Bombay High Court which termed the definition of 'co-promoter' notified by the MahaRERA as *ultra vires*, the judiciary and executive should conjointly ensure that the Rules do not conflict with the basic intent and object of RERA.⁷

Functional and operational Regulators: As is the case with most nascent legislation, certain aspects of RERA are yet to be clarified and with passage of time the Regulators should aim towards providing greater clarity on the nuances of RERA such as withdrawal of monies from the account designated for the project. Once the members and chairpersons of the Regulators have been appointed by respective States, we can expect this clarity.

Appointment of experts as Regulators: The State Governments should ensure that industry experts having experience with regard



to real estate matters are appointed as members of the Regulators so as to enable the Regulators to adjudicate disputes and redress complaints equitably and issue appropriate orders.

Framing of regulations by the Regulators: As per RERA, regulations to provide for the procedures and functions of the Regulator are required to be notified by the Regulators. A majority of Regulators are yet to frame these.

Compliance by promoters: RERA imposes a plethora of obligations on the promoter which will in the short term shall increase compliances by the promoter. However, in the long run we are hoping that in the coming years, with sufficient impetus in the form of Government policies, RERA will lead to renewed confidence in the domestic as well as foreign investors and usher in an era of high growth in the real estate sector.

Funding of projects: With the advent of RERA, the requirement of funds has increased. A carve out under RERA is required to provide flexibility with regard to repayment of monies to funds and financial investors so that funds and financial institutions can exit real estate projects.

Conclusion:

RERA is one of many initiatives of the current governmental regime to propel the real estate sector towards a long term growth path. In addition to RERA, initiatives such as Pradhan Mantri Awaas Yojna, Housing for All by 2022 and introduction of Real Estate Investment Trusts, the current government has made it clear that it recognises the fundamental role of the real estate sector in the Indian economy and that the growth of this sector is one of its top priorities.

On completion of almost two (2) years from its notification, RERA has so far not met expectations of benefitting the buyers, as a result of its piecemeal implementation. There is a need to operationalise the RERA framework to achieve its full potential. In the current scenario, where the Indian Judiciary is imposing strict liabilities on developers, it is important for each stakeholder to understand its rights and obligations under RERA. If all stakeholders perform and fulfil their respective obligations pursuant to RERA, it will ultimately result in the seamless development of real estate sector.

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- 1 Neelkamal Realtors Suburban Pvt. Ltd. and Ors.Vs. Union of India and Ors, WRIT PETITION NO. 2737 OF 2017 (WRIT PETITION LODGING NO. 2010 OF 2017)
 - 2 Proviso to Section 3 (1)
 - 3 Sections 18, 38, 59, 60, 61, 63 and 64 etc.
 - 4 M/s Gagan Horizon Venture vs. Sunil Nathuram Uttekar, Appeal No. AT006000000000153 decided by Maharashtra Real Estate Appellate Tribunal on 17 April 2018; Shakun Realty Pvt. Ltd. vs Pradeep Bedre, Appeal No. AT006000000000170 decided by Maharashtra Real Estate Appellate Tribunal on 25 April 2018
 - 5 Shakun Realty Pvt. Ltd. vs Pradeep Bedre, Appeal No. AT006000000000170 decided by Maharashtra Real Estate Appellate Tribunal on 25 April 2018
 - 6 Chandra Shekhar Singh vs M/s Kul Developers, Appeal No. AT005000000000004 decided by Maharashtra Real Estate Appellate Tribunal on 20 March 2018
 - 7 The circular passed by MahaRera was withdrawn as recorded in the order dated 14 November 2017 passed by Bombay High Court in Ismail Ibrahim Patel and others vs State of Maharashtra and others, WP (L) No. 2023 of 2017.

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