

CHANGING DIMENSIONS OF THE REAL ESTATE SECTOR: CENTRAL GOVERNMENT'S ATTEMPT TO BRING TRANSPARENCY INTO THE SYSTEM VIS-À-VIS INTRODUCTION OF REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

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Ever since the liberalization of the Indian economy in the 1990s', the Real Estate sector saw a large amount of investment in the domestic sector, coupled with an increase in the investment in the form of FDI when the Indian government in 2005 invited foreign investors in the sector. While the sector underwent a huge change, the system still remained opaque because of a lack of accountability in the sector due to it being vastly unregulated. Large inflows of money into the sector in addition to No centrally governed law, led to increased malpractices on the side of various Stakeholders, particularly the Promoters and the Agents. Uncertainty loomed large over the sector until 2016 when finally the Real Estate (regulation and development) Act, 2016 was passed by the Central Government.

*The research paper in toto aims to evaluate the impact, both legal as well as sociological, that the newly enacted statute has created in just a year of its inception. In order to reach a conclusion, the study has been divided into five parts. In the first part, the author will trace the history and need for the regulation of the sector by the way of an enactment along with the impact on various Stakeholders, particularly the Promoters, who have been the most affected party. The research will be focused on determining how the check on activities of the Promoter will instill a sense of optimism in the Buyer/Allottee. After that, the author will make the reader understand how this consumer-centric regulation will benefit from the optimism so gained in the form of increased Foreign Direct Investment. Also, a link would be established between the increased FDI and the successful implementation of the **Pradhan Mantri Awas Yojana (PMAY)** along with Urban*

*Development. In the third stage, the study will be confined to elaborating how Affordable Housing and Homebuyer's Protection are interlinked. Following which, the author argues that though the primary focus of implementation of RERA is to bring transparency but, it is directly or indirectly helping the government achieve its other agendas as well, the biggest beneficiary being the **Housing for All by 2022 Plan**. Therefore, it would be tried to establish how RERA is the means to an end; the end being much more than just bringing transparency into the real estate sector. In drawing things to a close, the author will give suggestions on what can be the possible shortcomings of RERA as a night watchman in the light of State Governments agitation to abide with the centre and how RERA has fared in what is its infancy.*

INTRODUCTION

'Real Estate Act coming into force after a nine year wait marks the beginning of a new era making buyer the King while developers benefit from the confidence of the King in the regulated environment...This important legislation gained momentum under this Government and could see the light finally'- ¹A tweet by Minister of Housing & Urban Poverty Alleviation Shri M.Venkaiah Naidu on account of the Real Estate (Regulation and Development) Act, 2016 finally coming into force on may 1, 2017.

Real Estate as a sector has received a significant amount of attention in the recent years because of its proliferation. A sector so vast was running vastly unregulated until the central government finally decided to come up with a solution in the form of Real Estate (Regulation and Development) act, 2016(RERA)².

ROAD TO THE ACT: The road began in 2009 when the National Conference of Ministers of Housing, Urban Development and Municipal Affairs of States and UTs made a proposition of making a law on Real Estate sector. This was followed by a suggestion made in 2011 by the

¹ Real Estate act into force from tomorrow; A new Era begins, says the government(Press information bureau, 30 April 2017) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=161408> accessed 29 July 2017.

² Herein after referred to as 'the Act'.

ministry of law and justice on the need to have a central legislation in the Real Estate sector. (Made on account of powers given to it in the concurrent list; entry 6, entry 7). The bill, on getting the approval of the union cabinet, was presented to the Rajya Sabha in August, 2013. Finally, the bill was brought to life in 2016, when both the Rajya Sabha and the Lok Sabha passed it on 10th march and 15th march respectively. On March 25th 2016, the president gave his nod to the bill thereby making it an enforceable law. The act which contains a total of 92 sections came into force from 1st May 2016, but only 69 sections were notified by the ministry of housing and urban poverty alleviation with the entire act finally coming into force from 1st may, 2017.³

NEED FOR THE ACT: In its draft report on the Real Estate Regulation bill, 2013, the Select committee mentioned that the demand for housing has increased manifold and that despite government's various schemes, it has not been able to keep pace with the exponential increase in demand of housing and infrastructure. Because of this, a number of reasons were raised like; *firstly*, the promoters took undue advantage of the situation and used it to exploit the customers, thereby, directly or indirectly, becoming the focal point of this sector. *Secondly*, though it became easier to avail loans from both public as well as private banks, yet the high rates of interest and high EMI's added to the burden of the stakeholders in this sector. *Lastly*, since there was no specific regulatory body for this sector, there was no way for the buyers to enforce accountability against the promoters or procure complete information from them. Though Consumers Protection Act, 1986 was available as a remedy to the allottees in the sector, yet the resource was only remedial in its nature and moreover the consumer courts were unable to dispense speedy justice because of the excessive amount of consumer disputes that were there.⁴

OBJECTIVES OF THE ACT:

³ Hussain Ali, 'REAL ESTATE REGULATION AND DEVELOPMENT ACT, 2016: A CRITICAL ANALYSIS' (2016) 2(3) World journal on juristic polity <http://jurip.org/real-estate-regulation-development-act-2016-critical-analysis/> accessed 1 August 2017.

⁴ Select committee of Rajya Sabha, *The report of the select committee on real estate(regulation and development) bill,2013(monsoon session, 2015-16)* http://mhupa.gov.in/writereaddata/Select_Committee_Report.pdf accessed 27 July 2017

'An Act to establish the Real Estate Regulatory Authority for Regulation and promotion of the Real Estate sector and to ensure sale of plot, apartment or building, as the case may be... and the adjudicating officer and for matters connected therewith or incidental thereto'

On a clear reading of the above quoted long title of the Act along with the need of the act, the following objectives could be ascertained:

- To ensure that there is a defined process and efficient handling of disputes.
- To establish a regulatory mechanism which would oversee every activity and enforce a contract that needs to be enforced.
- To promote good governance in the sector which would in turn gather investor confidence⁵

LAWS THAT GOVERNED THE REAL ESTATE SECTOR BEFORE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016.

Before knowing the laws that governed the sector, it is inevitable to understand what Real means and includes in its ambit. Black's law Dictionary(2nd. ED.) defines Real Estate as- "*Real Estate includes the land and anything fixed, immovable, or permanently attached to it such as buildings, walls, fixtures, improvements, roads, trees, shrubs, fences, roads, sewers, structures, and utility systems.*". It is, therefore, inadvertently clear from the above given definition that the scope of Real Estate is vast and therefore governed by multiple statutes.

Some of the provisions of the statutes dealing with Real Estate are as follows:

THE SPECIFIC RELIEF ACT, 1963- By the way of this act, any person who is under law entitled to obtain title to a specific immovable property by due course of law, can file a suit claiming the same. In every such suit brought under section 5 of the specific relief act, order XXI, Rules 35 and

⁵ Real Estate (Regulation and Development) Act, 2016 – Frequently Asked Questions (FAQ)' (ministry of housing and urban poverty alleviation) <http://mhupa.gov.in/writereaddata/1564.pdf> accessed 1 August 2017.

36 would apply⁶. The person who intends to recover the immovable property has to file a suit within 6 months from the date of dispossession of the property.⁷ In a suit for specific performance of a contract, unless the contrary is proved, the Court shall presume that a contract to transfer immovable property is one in which monetary compensation for its nonperformance would not afford adequate relief.⁸

THE INDIAN CONTRACT ACT, 1872: This legislation helps in determining who are the parties that can enter into a Realty contract. The contract act, in the case of Real Estate, helps in determining whether the parties are eligible to enter into a contract as well as clearing out the doubts regarding the existence of a contract, if at all there arises any doubt. It lays down certain stipulations which help a person decide if he/she is competent to form a contract. The conditions are: 1) the person should be a major. 2) Should be of sound mind and 3) is not prohibited under the laws of the country to enter into a contract.⁹ For egg., Residents in India and citizens of India are allowed to buy/sell immovable properties, but a non resident is prohibited to buy any immovable property. However, a non resident is allowed to enter into a valid lease agreement not lasting for more than 5 years. Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau or Hong Kong, irrespective of their residential status, cannot, without prior permission of the Reserve Bank, acquire or transfer immovable property in India, other than on lease, not exceeding five years¹⁰. These rules emanate from foreign exchange management act, 1999 along with the subsequent notifications issued by the Reserve bank of India in the year 2000.¹¹

THE CONSUMER PROTECTION ACT, 1986: via an amendment made to the consumer protection act in 1993, the word 'housing construction' was added to the ambit of service as defined under section 2 of the same act.¹² Any aggrieved consumer can approach the forum under this act and ask for relief. Though the relief under consumer protection act was available but it failed because of

⁶ Code of Civil Procedure 1908.

⁷ Specific relief Act, s 6

⁸ Specific Relief Act, s 10.

⁹ The Indian Contract Act 1872, s 11.

¹⁰ The Foreign Exchange Management Act 1999, s 6.

¹¹ Foreign exchange management act notifications (reserve bank of India, 3 may 2000) <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/13270.pdf> accessed 3 august 2017.

¹² *Lucknow development authority v M.K. Gupta* AIR 1994 SC 787.

various reasons. Some of the important reasons being :- 1) The recourse available under consumer protection act is only remedial in nature 2) The consumer courts in our country are jam-packed with a plethora of cases 3) Lack of any standard mechanism has added to the problems. By the virtue of the act, the aggrieved consumer has the discretion to withdraw his/her complaint from the consumer courts and place it before the authority as established under the act. Complaints filed pertaining to section 12, 14, 18 and section 20 of the act can be withdrawn from the consumer forum and brought into the consideration of the authority.¹³

LAND ACQUISITION ACT, 1984: Through this act, the appropriate government or societies registered under the societies registration act, 1860, can take control of any immovable property for the purpose of public welfare. This can be done by issuing a notification in the official gazette¹⁴. With time, the land acquisition act was found to be inadequate because it was believed by a large number of people to be grossly unfair, following which the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR Act, 2013) was passed. It focuses on increasing transparency and involves prior consultation with local landowners and the Local Panchayati Raj institutions.

Apart from all of these statutes, every state in India regulates the Real Estate sector in its particular territory by the means of their own laws, but the provisions of RERA will have an overriding effect in the case of a clash with the provisions of any other law for the time being in force.¹⁵

¹³ s 71 of The Act.

¹⁴ Land Acquisition Act 1894, part VII s 38A-44B.

¹⁵ s 89 of The Act.

IMPACT ON THE VARIOUS STAKEHOLDERS

CHECK ON THE PROMOTERS

As mentioned in the draft report of the Real Estate bill, 2013 by the select committee, one of the most important reasons behind the birth of RERA was the unregulated abuse of power by the promoter/builders¹⁶. With the introduction of large amount of foreign direct investment, the sector underwent a significant change, but with an opaque structure. The structure of the entire sector remained covered with a plethora of issues mainly because the developers started accepting amounts from the prospective buyers but due to one or the other reasons failed to deliver the property within the stipulated time. Slowly but surely, the promoters developed their monopoly in a sector which should have been more consumer-centric.¹⁷ The act, therefore, tries to impose various checks on the activities of the promoters by the way of various provisions. Some of the important provisions making the promoters more accountable are:

Compulsory registration by the Promoter- Under the new regime, it has been made compulsory for the promoter to register with the Real Estate regulatory authority established under this act.¹⁸ The mandate to register applies on the following kinds of properties: 1) where the total area of the land that is to be developed exceeds five hundred square meters or 2) where the total number of apartments exceeds eight.¹⁹ Section 2(e) and 2(j) of The Act make it amply clear that the Real Estate projects being mentioned in this act could be both:- residential as well as commercial.

¹⁶ Select committee report (n 4).

¹⁷ Ibid.

¹⁸ s 3 of The Act.

¹⁹ Ibid.

Application for registration- In order to get registered, ever promoter has to submit an application to the authority in the manner as prescribed by the authority in the Regulations²⁰. This section is very important from the point of view of maintaining transparency because the promoters in order to get the registration are supposed to enclose certain documents with the authority. Some of them are: A brief detail encompassing the name(s) of the promoter, registered address and type of enterprise²¹, A brief detail about the projects launched by him in the past five years²², The names and address of the Real Estate agents, if any(s) etc.²³

Introduction of a Separate Account- Before The Act came into effect, one of the major issues being faced by the Real Estate sector was that the promoters used to take the entire amount of money from the buyer of a certain project and invest it in a different project thereby often leading to shortage of funds for timely completion of the project. As a response to this issue the ‘Separate account’²⁴ was introduced. This separate account is to be maintained by the bank itself and not by any trustee, which would have been the case had the account been an ‘Escrow account’.²⁵ The promoters are required to withdraw funds from this account only in such proportion as is required to complete the project. More so, the funds from this account can only be withdrawn after it has been given a green light by an engineer, an architect, and a chartered accountant in practice.

Mandate to mention the carpet area- a large chunk of cases that which involved a dispute between two parties in Real Estate dealings were mainly confined to the customer being duped by the promoter in regards to the actual area of the apartment. The promoters used to include the area occupied to disclose the total area of the flat after including the area of external walls, service

²⁰ s 4(1) of The Act.

²¹ s 4(2)(a) of The Act.

²² s 4(2)(b) of The Act.

²³ s 4(2)(j) of The Act.

²⁴ s 4(2)(l) of The Act.

²⁵ Sunil Dhawan, ‘Builders can keep funds in separate account instead of escrow account: Will RERA prevent misuse?’ *The Economic Times* <http://economictimes.indiatimes.com/wealth/real-estate/builders-can-keep-funds-in-separate-account-instead-of-escrow-account-will-rera-prevent-misuse/articleshow/58242934.cms> (April 19 2017) accessed 3 August 2017.

shafts and the common usable area of all the residents of that particular apartment. The act now clearly mandates the promoter to disclose the total size of the property per the carpet area.²⁶ In order to avoid any ambiguity, the legislature has clearly mentioned the ambit of the carpet area which is the net usable area in an apartment.

FUNCTIONS AND DUTIES OF THE PROMOTER: To protect the allotted, it is now the duty of the promoter to make sure that the advertisement or prospectus used by him shall contain the details of the website along with the specific registration number of the promoter. Also, the promoter shall and not 'may' inform the buyer about the sanctioned plans, the layout plans as authorized by the authority.²⁷

Bar on alterations

In an attempt to eliminate every possible bit of unfair practice by the promoter, the act has even created a bar on promoter from making any alteration to the Real Estate plan. However, under certain circumstances, the promoter can make alterations to the sanctioned plans. They are: when the changes are made to be made in one specific part of the sanctioned plans, layout plans or in other words when an alteration is to be made to a particular segment of the house, then the consent of that particular allottee is required. Also, when the alterations are to be made to the common areas in the project, then the consent of at least two third allottees is required.²⁸

Also, Under this act, in case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter has been duly brought to the notice of the promoter by the consumer within five years, then it becomes the promoter's duty to fix the default within 30 days²⁹.

²⁶ s 4(2)(h) of The Act

²⁷ s 11(3)(a) of The Act.

²⁸ s 14 of The Act.

²⁹ Ibid.

Transfer of rights and liabilities by the promoter

Now, the promoter has to obtain a prior written consent from two-thirds of the allottees as well as the authority, before he can effectuate a transfer of his rights and liabilities to a third party. This condition is followed by a stipulation that a transfer of rights and liabilities to a third party will not affect the transfer made by the previous promoter. In addition to that, the new promoter shall not be given any extra time to completely dispense his liabilities.³⁰

Promoters duty to compensate or refund

There are provisions mandating the promoter to compensate and return the amount of capital invested by the buyer along with the rate of interest as prescribed. The buyer can claim on account on account of the following situations: 1) when the promoter fails to deliver the possession of the project within the stipulated time due to discontinuation of his business or revocation of his registration. 2) The aggrieved customer has to be compensated by the promoter on account of any loss caused to him due to the defective title of the land. Compensation claimed under this section is not barred by limitation as provided by any other prevalent law in existence.³¹ 3) Generally, buyers purchase a property on account of a prospectus issued by the promoter which contains a detailed outlay of the entire plan it is on this basis of this information that the buyer shifts his inclination towards the plan. Therefore, if a customer suffers makes an advance to the promoter on the basis of information which eventually turns out to be false, then the promoter has to compensate the aggrieved customer for the loss so caused.³²

PENALTY FOR NON-COMPLIANCE BY THE PROMOTER

³⁰ s 15 of The Act.

³¹ s 18 of The Act.

³² s 12 of The Act.

The loopholes in other legislations were identified and tried to be curbed by the legislature through the means of this act. The punishments mentioned under chapter VIII contains certain penal provisions, too, making the statute both remedial as well as penal. Penalties for promoters include:

Penalty for providing incorrect information or in other words contravening the provisions of section 4 of the act³³.

Promoters liability for not following the directions of the authority.³⁴

Promoters liability for not complying with the appellate tribunal.³⁵

It is noteworthy to mention here that the punishments under chapter VIII of the Act are compoundable in nature.³⁶

Impact on Real Estate Agents

Duties and penalties for non compliance

It often used to be the case that in absence of any central authority, agents worked at their whims and fancies. In order to convince prospective buyers into buying a property, agents used to tamper with the information about the property thereby misleading them. The Real Estate agents are now under an obligation to get themselves Registered³⁷ and get a registration number after which they could go about facilitating the sale of a Real Estate project already registered under this act by the promoter. In addition to getting registered, the Real Estate agents are mandated to maintain and preserve books of accounts, records and documents.³⁸

³³ s 60 of The Act

³⁴ s 63 of The Act.

³⁵ s 64 of The Act.

³⁶ s 70 of The Act.

³⁷ s 9 of The Act.

³⁸ s 10(b) of The Act.

Under the act, there have been provisions mentioning the penalty to be faced the agent on compliance with the norms so laid down. Now, the agent will face strict actions on non compliance with the orders of the specific state authority as well as the appellate tribunal.

IMPACT ON ALLOTTEES

Most of the provisions of the act collaborate towards making the Real Estate sector more transparent for the allottees, therefore rather than mentioning the duties of the allottee, more emphasis has been laid on specifying their rights in case of any unfair practice by the promoter or the agent. Some of the Rights of the allottees are:³⁹

- The allottees have been entitled to know the complete up-to date stage wise progress of the project. The promoters are under a duty to make the allottee aware of the updates on the project in terms of time left for completion of the project.
- If the promoter fails to comply or is unable to give possession of the apartment, plot or building than the allottee shall be entitled to claim the refund of amount paid along with interest.
- The allottees are now entitled to get hold of all important documents relating to the project after being handed over the physical possession of the same. All of this has to be done by the promoter.

RERA BOOSTING UP FDI:

In order to make investments attractive in the Indian construction and development sector, the government has introduced and liberalized rules for building townships, built-up infrastructure, construction development projects and housing. These sectors provide employment opportunities in addition to contributing to the demand for other manufacturing industries like steel, cement, etc. The incentives introduced for the same are as follows:

³⁹ s 19 of The Act.

- **Minimum ‘carpet-area’** – With the coming of RERA, the size of all the residential units will be measured taking into account the carpet-area and not the built-up area, like earlier. The size of the residential area has been reduced from 50,000 square meter to 20,000 square meter. This move would facilitate FDI in smaller projects specially in the cities with dense development and population like Mumbai, Delhi, etc.
- **Minimum capitalization required** – As minimum capitalization has been reduced from USD10 million to USD5 million which will encourage pockets not as big as USD10 to come forward and invest. Lesser capital requirement for investment will open avenues to other investors other than the rich ones. Thereby attracting FDI from smaller pockets, too.
- **Discontinuation of lock-in period** – The three-year post-completion lock-in period which was applicable to all the foreign investors has now been discontinued under normal circumstances. Leverages have been served to the investors who can exit on completion of project or even after the development of just the trunk infrastructure like construction of roads, water supply, drainage. As there are not going to be any stringent rules, and the investors will not necessarily have to be involved in the development of the project they have financed, more investors would look forward to invest without being constrained to be a part of the project.⁴⁰

The Pradhan Mantri Awas Yojna also entails for 100 percent tax exemptions for private players who are going to construct affordable housing of 30 square meter in the four metros and 60 square meter in other cities, within three years of construction approval. In this way, foreign investors will be driven towards participating in the construction of projects for affordable housing, which will give a boost to Housing for All. Apart from the 100 percent investment linked-tax deductions for private development firms launching projects for affordable housing, 100 percent excise duty exemption for ready mix concrete was also introduced, which will bring down the construction

⁴⁰ ‘Challenging the tides : Indian real estate’ (*KMPG in India*, 2015)
<https://assets.kpmg.com/content/dam/kpmg/pdf/2015/10/Challenging-the-tides-RE.pdf> accessed 27 July 2017.

cost to some at least.⁴¹ In the end, Urban Development would be uplifted. Owing to The Benami Transactions (Prohibition) Amendment Act, 2016 and demonetization the Indian real estate sector will stand out to be more transparent, credible and attractive to all types of serious investors, especially the institutional investors. Institutional investors mainly include banks, insurance companies, hedge funds, REITS, investment advisors, etc. Future growth in the residential property sector is definitely going to be steady and rational. As a result, FDIs will increase as investors will have the confidence to invest in projects.

HOMEBUYERS' PROTECTION:

RERA is said to be a Consumer-Centric Act which will start an era wherein the consumer will actually become the king, who will be served through different provisions stipulated in this Act. Before RERA coming into force, homebuyers' interests were mostly compromised. Property builders advertised and sold properties based on ambiguous super built-up area. A lot of homebuyers ended up spending more but actually derived lesser benefits and less of useful space. Homebuyers had to pay a booking charge to block their investment in an apartment and later pay the total purchase consideration in one go or in installments without even knowing that how and where their funds were being utilized. Apart from that, there was no redressal mechanism for either delay in obtaining occupancy certificates/ possession or for the realization of sub-standard development in the future.

With the advent of RERA, the ultimate beneficiaries would be the homebuyers, who would benefit in several ways.

Pay for what you buy – As per RERA, a property has to be sold based only on carpet area. Earlier, property was sold based on super built-up area, which is now prohibited. For further clarity, “carpet area” means the net usable floor area of an apartment, excluding the area covered by the external

⁴¹ Anshuman Magazine, ‘Real Estate: Incentives and exemptions to provide housing sector a much-needed shot in the arm’ *The Indian Express* (19 March 2017) <http://indianexpress.com/article/business/business-others/real-estate-incentives-and-exemptions-to-provide-housing-sector-a-much-needed-shot-in-the-arm/> accessed 1 August 2017.

walls, areas under service shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment. The expression “exclusive open terrace area” means the area of the open terrace which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the buyer⁴². In other words, the carpet area is the area which is enclosed within the walls, i.e. the actual area that is available to lay the carpet. Further, the super built-up area is the built-up area plus the proportionate area of common areas like the lobby, lifts shaft, stairs, etc. Before this Act, the property was sold as per super built-up area which in turn raised the costs to be paid by the customers. With the customers only having to pay as per carpet area, the costs incurred by the consumers while buying an apartment will also go down resultantly.

Separate Bank Account – Section 4(2)(1)(D) provides that the promoter has to maintain a separate account for every project which is undertaken by him wherein 70% of the money received from the allottees has to be deposited for the purposes of construction and land cost.⁴³ for the withdrawal can be made only after requisite certificates have been obtained from an architect, an engineer or a chartered accountant in practice. In this way, the homebuyers will be assured that their money is being invested in the right hands and will be used specifically in the project itself and not for any other purpose, thereby, guaranteeing the quality of development. The ‘separate account’ has to be self-maintained and is not an escrow account.⁴⁴ In an escrow account, the bank and the builder who holds an account in the same bank enter into an agreement and appoint a trustee for the account whose role is to release the funds as per the terms and conditions of the agreement.⁴⁵ Herein mostly the bank itself were the trustees. While a separate account is a current account opened in the name of the promoter with a scheduled bank.

Project registration – Developers cannot invite, advertise, sell, offer, market or book any plot, apartment, house, building, investment in projects without first registering themselves with the

⁴² s 2(k) of The Act.

⁴³ Ministry of Housing & Urban Poverty Alleviation (FAQs) p 7 (n 5).

⁴⁴ ‘Lok Sabha clears Real Estate Bill as passed by Rajya Sabha’ (Press Information Bureau; Government of India, 15 March 2016) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=138014> accessed on 25 July 2017.

⁴⁵ Sunil Dhawan, ‘will rera prevent misuse?’ (n 25).

regulatory authority. Only after registration, a unique RERA registration number will be allotted. This registration number will be provided project-wise. Once the project has been registered, the developers will be bound to furnish the details of their financial statement, legal title deed and supporting documents.⁴⁶ After following these steps, the developer can invite applications for allotment.

Provision and disclosure of Information – Under the Act, it has been made mandatory for the property developers to open a portal and maintain that website. Through the means of an online portal, the developers have to provide the details of registration granted by RERA, quarterly updates on the number and types of apartments or plots booked, the approvals so granted, the status of the project, etc.

Pre-determined Interest Rate – Interest payable by the property developer and the allottee in case of any default has to be specifically mentioned in the agreement for sale, which means it must be decided right at the time of agreement keeping in mind the rates benchmarked on the basis of the SBI prime lending rate.

Clauses of penalty – For incomplete or incorrect disclosure of information by the developer or builder, the penalty to be charged in that case is 5% of the total project cost. In case a developer leaves a project without completing it fully, for any reason, then allottees have the right to demand their money back along with the interest payable at the pre-determined interest.⁴⁷ Along with this, for non-compliance of provisions of RERA shall attract a penalty or/and imprisonment which may extend up to three years. All these provisions specifying the penalties also will guarantee timely completion of projects.

Compulsion of a written sale agreement – The property developer is only allowed to take 10% of the total amount as advance from the allottees if a written agreement for sale has not been entered into.⁴⁸ Thereby obligating the developer to enter into a written agreement with the buyers

⁴⁶ Express Web Desk, 'What is the Real Estate Regulation Act (RERA)? Here is how it will help buyers' *The Indian Express* (New Delhi, 1 May 2017) <http://indianexpress.com/article/what-is/what-is-rera-and-how-will-it-help-homebuyers-4635705/> accessed 4 August 2017.

⁴⁷ s 60 of The Act.

⁴⁸ s 13(1) of The Act.

completing all the formalities, which will instill the feeling of security amongst the homebuyers for a written agreement will be proof of their having entered into an agreement.

AFFORDABLE HOUSING VIS-À-VIS HOMEBUYER'S PROTECTION

The urban population is expected to rise in the coming years due to large scale urbanization. To combat the problem of this expected rise in population because of the shortage of urban housing for the Lower Income Groups (LIG) and the Economically Weaker Sections (EWS), the government had proposed an initiative in June, 2015 named 'Housing for all by 2022' under Pradhan Mantri Awas Yojna (PMAY), which encompasses a development of 11 crore housing units.

The affordable housing segment presents a prospective opportunity to promote housing for the lower income groups, dreaming of owning a house, but it still includes some of the challenges –⁴⁹

- *Development norms* – Stringent and inflexible development norms have led to little or zero optimal utilization of land thereby contributing to the raise in the per unit value.
- *Scarcity of land* – Affordable housing projects have become non-viable due to the non-availability of land within the city in addition to the rising land and construction costs.
- *Problems with the approval processes* – The approval process is lengthy and really complex which results into a higher gestation period which eventually amounts to the escalation of the project's cost by 20-30 percent.⁵⁰
- *Lack of adequate policy framework* – Owing to the lack of an effective policy framework, the developer fraternity has had low focus on housing for the EWS and LIG segment.
- *Cost overrun* – The overall project economics that is pre-planned and laid down is usually not achieved due to the lack of advanced technology and skilled manpower. Even in the

⁴⁹ 'Decoding housing for all by 2022 report; India's commitment to inclusive, sustainable and affordable development' (KPMG in India, 2014) <https://assets.kpmg.com/content/dam/kpmg/pdf/2014/09/Decoding-Housing-for-all-2022.pdf> accessed 25 July 2017.

⁵⁰ 'Study on project schedule and cost overruns; Expedite infrastructure projects' (PMI –KMPG, 2013) http://www.pmi.org.in/downloads/PMI_KPMG_2013.pdf accessed 25 July 2017.

age of modern techniques, many of the on-going affordable housing projects are still adopting the conventional construction techniques.

- *Dearth of Funding* – There has been an increase in the housing cost as a consequence of the lack of funding sources at lower coupon rates for developers. As lower coupon rates are not made available, the developers are reluctant to invest. In addition to this, the access to credit by the EWS and LIG segment is very limited which has also led to the reduction in housing affordability.
- *Continuation of Archaic Laws* – Various archaic laws like the Rent Control Act have proven to be pernicious to the urban fabric which has resulted in the decay of housing stock. Not only do such laws hamper the redevelopment of areas with old properties but also leads to a further hike in shortage of housing stock owing to the obsolescence and congestion.⁵¹

Keeping in view the positive changes that have been brought about to benefit the homebuyers, there is scope that through RERA, the demand for affordable housing will be uplifted. RERA seeks to ensure that the developers of the affordable housing project do not delay their projects or just divert their funds. Along with this, there will be elimination of the fly-by-night operators, who run away with the homebuyer's invested money. These operators specialize in small scale projects which from the time of initiation did not have all statutory clearances and used sub-standard construction materials compromising the quality of the houses being built. The developers of the projects registered under RERA have to comply with the rules laid down for timely completion of the project. The affordable housing segment has faced a number of issues and challenges as mentioned above, the biggest issue being the small time builders who used to cheat on customers. RERA will help in overcoming these challenges and try scraping out the issues. By the virtue of the same, only reputed and reliable brands would qualify and proceed to deliver homes. RERA guarantees the assurance of delivery and quality to all the customers. In addition to the safeguarding measures coming into play with RERA, the consumers are expected to enjoy the

⁵¹ 'Affordable Housing in India : Key Initiatives for Inclusive Housing for All' (*Jonelang lasalle*, February 2016) <http://www.asiapacific.joneslanglasalle.com/india/Affordable-Housing-ICC.pdf> accessed 24 July 2017.

price benefit as now only the carpet area would be taken into account while measuring the size of the residential unit, unlike before. In this way, housing will become affordable for the homebuyers owing to the expected price drop. Furthermore, the developers under RERA are bound to provide the homebuyers with all the information on the amenities and facilities that would be available by the end as promised while the house is in the initial stages of construction. Thus, re-assuring the customers in the end that they will get what they had been promised right in the beginning and nothing will be compromised. All of this will help in incentivizing and re-building of the positive sentiments of the consumers who will be driven and motivated to invest in affordable housing.

SHORTCOMINGS OF THE ACT

RERA, in Toto, has been a revelation of sorts. A major chunk of problems have been tried to resolve by the central government, but no enactment comes without its loopholes. Therefore, the act, like any other act, has been targeted to achieve great heights, but it still falls short on certain aspects. Some of the most important loopholes that have been determined to date are:

No clarity about the approvals

The act specifically deals with the purchase and sale of Real Estate, but fails to address the approval/clearance issues which the promoters face. According to the findings of a world bank report titled 'doing business 2013'⁵², India ranked 182 out of a total 185 countries on which the study was conducted. The report dealt with analyzing the ease of acquiring construction permits in different countries. This was enough evidence for a need to have an elaborate and efficient mechanism for clearing up the construction projects, but nowhere in the act has there been a mention of formulating a mechanism for speedy clearance of all projects. The promoters have to acquire clearances from departments like public welfare department, municipal corporations, national highway authority of India and various others before construction work can actually start.

⁵² International finance corporation, *Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises* (10th edn, the world bank 2013).

This, along with the pressure of saving the investment cost, will burden the promoter more and more.⁵³

States agitation to abide with the centre

The Real Estate Regulation act, 2016 has been brought to life by the central government but according to the concurrent list, land is a state subject. This is the major point of conflict because of the simple reason that projects in order to be completed require land which is a state subject, therefore, every state has been ordered to notify rules per their discretion but within the boundaries of the central legislation. These rules had to be compulsorily notified by the state governments within three months from the date of coming into force of this act.⁵⁴ Per the strict mandates of the act, every state or union territory had to establish a Real Estate regulatory authority in their particular territory within one year from the date of establishment of the act. Along with that, all promoters had to necessarily register all of their ongoing projects with the authority within three months of coming into force of this act i.e., 31st July, 2017.

As on 31st July, 2017 which was the deadline day for the compulsory registration by the promoters of new as well ongoing Real Estate projects, it was a setback for the Real Estate promoters in certain states wherein the rules were still not notified. Though all the seven union territories had notified their rules, but Out of the 29 states, only 15 had notified their RERA rules⁵⁵. For an enactment that primarily deals with making the system transparent, this was a major drawback.

Undue burden because of the separate account

With the introduction of the separate account clause, the Real Estate builders will now have to separate seventy percent of the advance payments received from the buyers and keep them in a separate account so that they are not able to divert the funds for any other projects. Mounting

⁵³ L. balaji, 'transparency in realty: a reality' (live law, 23 July 2017) <http://www.livelaw.in/understanding-financial-penal-liability-rera/> accessed 5 August 2017.

⁵⁴ s 85 of The Act.

⁵⁵ Sunil Dhawan, 'RERA deadline ends. Only 15 states have notified rules, 6 states are online' *The Economic Times* (August 1, 2017) <http://economictimes.indiatimes.com/wealth/real-estate/rera-and-you/rera-deadline-ends-15-states-notifies-rules-only-7-states-are-online/articleshow/59860050.cms> accessed 6 August 2017.

challenges in terms of reduced debt flow will in turn increase the debt burden on the developers. According to the provisions mentioned, this amount that is to be maintained separately with a bank can be used by the promoters for only two purposes: covering the construction cost and cost incurred in acquiring the piece of land on which the project is to be made. Though on the face of it this clause seems to be more in the domain of successfully securing customer confidence but a part of it works in detriment of promoters, too. The debt burden on the promoter will rise substantially because he would have to avail finance from a bank or some other financial institutions in order to provide for the other expenses or other projects in case the total cost involved in that particular project falls short of seventy percent and the funds remain idle. The promoters would definitely feel a liquidity crunch because even if the funds are lying idle in the separate account, they still cannot use those idle funds for a purpose other than what has been specified. In order to cover up for the cost of financing, the promoters would in turn increase the cost of their future projects which would add on to the already long list of burdens for the buyers.⁵⁶

SUGGESTIONS ON IMPROVING THE ACT

Though the legislature has tried to cover most of the areas in order to avoid any ambiguity, yet the act falls short on certain aspects. Some of the suggested improvements are:

PARKING AREA:

In any project falling under the ambit of residential area, the society members are always confused about the parking area. No one remains sure about the parking area that might fall under their lot which often happens to be a cause of dispute among them. The act makes no mention of the parking area which will eventually be one of the many causes of disputes.

ANTI-DISCRIMINATION CLAUSE:

⁵⁶Legislative brief: the real estate (regulation and development) bill, 2013' (*PRS legislative research*, June 10 2014) <http://www.prsindia.org/administrator/uploads/media/Real%20Estate/Real%20Estate%20-%20Legislative%20Brief.pdf> accessed 8 August 2017.

A lot of time it happens that the promoters are found discriminating amongst buyers on the basis of background or status. The allottees complain that many promoters discriminate while selling flats. Nowhere in the act has there been a mention of any clause which stops the promoters from discriminating when it comes to selling their residential areas. Discrimination on the basis of sex, caste, colour, creed, sexual preferences has to be avoided when dealing with buyers.

REGISTRATION OF A REAL ESTATE PROJECT:

The act stipulates that no registration is required for real estate projects where total land area proposed is less than five hundred square meters or the numbers of apartments proposed are less than eight. Since most of the apartments in urban areas are less than five hundred square meters, therefore the act renders no protection to the middle-class section. Registration should be made compulsory for all project types.

SAFETY CLAUSE:

The promoters have been mandated to furnish all the necessary documents including the layout plans, sanctioned plans, time schedule of the completion of the various stages of the project along with various other documents as mentioned in section 11(3) of the act, but there has been no mention of providing for documents related to the various safety approvals required in a construction project. The most common being a fire safety certificate.⁵⁷

ISSUE OF MAINTENANCE CHARGE:

The act does not mention anywhere about the maintenance charges that are to be paid in lieu of the real estate project and who is obligated to pay them. Therefore, there needs to be a proper mandate stating that the maintenance charges are to be paid by the association of homebuyers right from the date of handing over of the project.

⁵⁷ Select committee report (n 4).

CONCLUSION

The enactment of the act is a giant leap towards accomplishing the government's object of introducing transparency into the real estate sector. Though the statute has certain loopholes, but that is the case with almost all of the statutes. There will always be certain arbitrary provisions in a legislation which is why the amendments take place. So, with the introduction of RERA, there will be a substantial increase in the competition in the real estate sector, because only the promoters who adhere to the rights and duties as prescribed in the act will be able to survive in the market. The act will bring about much optimism within the homebuyers who were basically left at the mercy of the builders before the enactment. The enactment as a whole seems to be consumer centric which serves the much needed purpose of homebuyers' protection and in a way draws a pathway towards affordable housing as well. However, all of these efforts would be successful only if the government makes sure that all the rules and regulations are properly adhered to. Therefore, the biggest obstacle in front of the government is now to make sure that no stone is left unturned in order to properly apply the provisions of the Act. If everything goes accordingly, the act will help the government in achieving a multitude of objectives with the most significant being the housing for all mission.