

## RERA to Rejuvenate Indian Real Estate Sector



*Despite huge housing need vis-a-vis inherent limitation of supply of land coupled with lack of infrastructure limiting vertical expansions, the overall Indian real estate market has been down since almost more than 5 years. The consumer confidence in buying under construction units is at its lowest due to large scale defaults by builders, both big and small and the unsold inventory has been steadily piling up. In some cases, investors are continuing due to parking of unaccounted money. Affordable housing is doing comparatively better. Earlier, the real estate prices had reached to unrealistic high levels and as a result the costs of all inputs including land, development rights, contractors, professionals, interest, corruption had also significantly risen. Now post demonetisation and with onset of RERA law, due to poor market conditions, these costs have started coming down in India. Now the market is expected to grow steadily but firmly due to inculcation of discipline and enforcement of new law over a period of time coupled with lesser unaccounted economy. In any article with space constraints, it is not possible to write views in complete details on interpretation of each section. As such, the author has made a humble effort to write about gist of some of the key provisions and their impacts.*



**CA. Tarun Ghia**

(The author is a member of the Institute. He can be reached at [tarunghiaca@yahoo.co.in](mailto:tarunghiaca@yahoo.co.in).)

The market which hitherto accommodated lot of unaccounted funds appears to have come out of the shock of demonetisation and is in the process of absorbing GST effects.

In such background, the Real Estate (Regulation and Development) Act, 2016 ("RERA") has started

# Corporate & Allied Laws

rejuvenating the market by introducing much required discipline which is likely to instil confidence in the buyers and investors in the medium and long term. With few mistakes on drafting of the law, vagueness etc., the law has certainly captured the major wrongs that were crippling the industry and its goodwill. After the RERA law has become effective from 1<sup>st</sup> May, 2017, infusion of big funds in terms of FDI and private equity is steadily on rise. Affordable housing has become more attractive due to government incentives. The new constructions are adding to existing supply of unsold inventory. Even though in the new projects, assurances are RERA backed, the consumers have not yet come out of deep rooted fears and therefore are not so much ready to book under construction units. They rather prefer to pay higher and buy constructed units. The fears of end users not to blindly rely upon the RERA backed promises is to an extent well placed considering the law and implementation problems in the country and particularly by the State Government administration. For such and other economic reasons, the real estate prices are most likely to remain in correction stage.

The much awaited RERA law has become operative in major parts of the country and in rest of the country with few exceptions, it is in offing. The new law has started making all round waves in the industry and in market conditions. While on the one hand the promoters including builders and developers have been gearing up to embrace with the stringent requirements of the new law, on the other hand consumers and other stake holders are quite thrilled to be empowered in the industry hitherto dictated by the builders. At the same time, changes are not so simple because the most complex factor is whereas the enactment is Central, the rules and the implementation of the law have been entrusted to concerned States and Union Territories and the new law will operate simultaneously with the existing various State laws. While on the one hand law is very powerful having captured all the vital wrongs plugging the growth of the industry so far, it will take a long time to settle the interpretational and implementational problems. While on the one hand the industry is grappling with increased inventory in hand, on the other hand, the RERA lends credibility to the assurances by the promoters. Therefore, ultimately the market will become vibrant due to huge gap between the high demand and comparatively short supply. At the same time, the disciplined market may not see the kind of the



appreciations and the kind of the jumps which it had witnessed in the hitherto loosely regulated one sided market practices.

RERA law is expected to bring revolutionary changes in the manner real estate sector is functioning. Hitherto, quite myriad and unscrupulous practices were dominating the real estate sector which has brought the customer confidence to the lowest as reflecting in constantly reducing and hitherto very little demand in under construction projects. The manner in which gullible buyers are lured and taken for rides, the manner in which manipulative and concealing documents are drafted, the manner in which plans and designs are changed without even information to the allottees, the manner in which title certificates are drafted and misrepresented, the manner in which funds of the buyers and investors are diverted, may be things of the past as the RERA law has the capacity to overnight bring a full stop to these unhealthy and malafide practices which have not only been harming the customers but also the credibility of the entire developing and plotting industry. However, all this is subject to the real implementation of the law at the ground level. Our country has some of the finest laws but when it comes to implementation, much is found wanting.

Despite the limitation of administration in the State hands, the law has such stringent provisions, quite harsh consequences that it will not be possible for the wrong doers to bypass the law as in the past. At the same time despite the bright provisions, many of the provisions are not iron clad and leave many gaps with the result that it will take a lot of time for the law to settle. Only time will tell, how much financial and administration support the new law will get from the State Governments, which kinds of people are appointed at the helm of administration and adjudication, only time will tell and would differ

# Corporate & Allied Laws

from State to State and hopefully in competition between the States, the results will improve over a period of time. Law and implementation will take a long time to settle.

RERA is not the first law of its kind to inculcate discipline in the construction industry. There have been Central laws like Consumers' Protection Act, 1986 and plethora of State laws like MOFA. There have been regular court decisions protecting the rights of the consumers and declaring the obligations of the promoters. But because of the slow moving costly judicial system, the sufferings are manifold and, therefore, the impact of the judgements remains minimal. The main factor that enables continuation of the dictates of the builders is very large gap existing between the housing shortage vis-a-vis the inherent nature of limited supply of immovable properties. Probably due to these reasons that before believing RERA backed assurances, the consumers will take their own time to be confident of the efficacy of the new law at the grass roots. It is because of the deep rooted fears that inspite of so many attractive new construction projects entering the market, that the ultimate consumers' buying is confined mainly to constructed units except in affordable housing enjoying government incentive schemes.

Some of the key changes likely to flow from implementation of RERA law are briefed in the ensuing paras.

On perusal of the law, an informed reader realises that an honest attempt has been made to address the burning issues concerning the consumers by introducing stringent provisions for timely possessions, transparent title papers along with title clearance certificates and consequences for defective titles, changes in plans only with prior approvals by flat buyers, disciplining fund utilisation only

**On perusal of the law, an informed reader realises that an honest attempt has been made to address the burning issues concerning the consumers by introducing stringent provisions for timely possessions, transparent title papers along with title clearance certificates and consequences for defective titles, changes in plans only with prior approvals by flat buyers, disciplining fund utilisation only after incurrence of cost and only for the purposes of the project, time bound disposal of complaints etc.**

after incurrence of cost and only for the purposes of the project, time bound disposal of complaints, etc. However, drafting and coverage are not upto the mark. In the drafting of the law, glaring legal and language fallacies are there apart from lacking coordination between some of the provisions. Further, before enacting the law to address a complex field like real estates transactions, so many case studies were required but have not been done with the result that the law has not been able to take cognizance of many a realistic situations and many contexts. It is never too late; the Government can invite the holistic case studies now also and exercise the power to remove difficulties. While rule making also, the State Government should invite appropriate and informed representations because surely the Government cannot afford to further kill the real estate industry on which the primary needs of the citizens, the employment generation and substantial economy are based.

The project on land above 500 square metres and consisting above 8 apartments are only covered but the appropriate government can reduce the parameters. The projects in planning areas are only covered but RERA can include projects beyond planning area in specific cases.

The real estate projects including ongoing projects in respect whereof completion certificate is not received on the date on which registration provisions become effective will have to be registered. Therefore, there is the need for planning in respect of on-going projects also.

Subject to specified exceptions, RERA will cover development and redevelopment projects, plotted developments, residential, commercial or for any use will be covered. RERA law will also regulate the activities of real estate agents operating in primary market.

Under the onerous new law, the developer is responsible to the purchaser of the apartment in the real estate project whether sold on freehold basis or leasehold basis. He continues to be responsible to the subsequent purchaser of the apartment who acquires such apartment in resale. Similar will be the situation in cases of sales by the developer of any plot under plotted development, sale of building or part of building. The term "apartment" has been assigned quite wide meaning to include sales of all kinds of premises used for whatever purposes including residential, commercial etc. within the defined parameters of a real estate project.

# Corporate & Allied Laws

**The utilisation of the funds by builders would be regulated through a process of prior certifications by three professionals namely the architects, the engineers and the chartered accountants about stage of completion of the project. In addition, the project will be subject to special audit to get certified utilisation of funds in accordance with the provisions of the Act.**



Before registration of the real estate project, sale is not to be permitted and for registration, a commencement certificate is a pre condition. One cannot advertise or market or invite for sale of the property in the project without registration. Pertinent to mention here that the condition of commencement certificate as a pre requisite, is already being diluted by some States to enable the developers early registration and early marketing and sales.

Registration would require firm commitments and disclosures including w.r.t. legal title to the land whether owned or developed encumbrances, completion time, plans and specifications, etc.

The provisions regarding completing the project in declared time are very stringent, subject to force majeure which has been provided a very narrow connotation which is unrealistic and in some cases will not be workable as the same is confined to only natural calamities. RERA would have the powers to grant extension for maximum one year in aggregate for reasons to be recorded in writing.

The provisions to complete the project in declared time will require the promoters a lot of planning including financial planning and accepting the challenges as in the initial stages sales proceeds

may be slow. The stringent provisions to ensure completion of the project in time would prevail upon a promoter to do the planning work of the project more meticulously and may lead to promoter engaging experts with responsibility clauses and commensurate incentives to the executives or working partners for timely completion.

For failure of timely possession and for misinformation, a member is entitled to withdraw from the project and get full amount paid by him together with interest. This issue will create unimagined problems for the project and although prices of real estates generally don't go down, if that happens, withdrawals can trigger avoidable failure of the project. Further, the entitlement to withdraw from the project and demanding funds paid with interest is without prejudice to any other remedy available to the allottee. If the allottee does not withdraw from project, then interest at the prescribed rate will have to be paid for the period of delay. In case of defect in title, the promoter would be liable to compensatory and penal liabilities.

The registration granted under the law may be revoked by the Authority on a complaint or suo motu on the recommendation of the competent authority, if the Authority is satisfied that the promoter has committed any of the specified defaults which have been assigned wide connotations after allowing opportunity of being heard.

Lapse or revocation of registration would invite very harsh consequences taking away the project from the hands of the promoter. In some cases such steps may not ensure best interests of the allottees and the quality of the project itself. As for misinformation and unfair trade practices, the registration can be withdrawn, this provision, if implemented in spirit, will enhance the goodwill of the industry and the real estate agents in primary market will also come under much required monitoring.

Upon registration, sales realisations to the extent of 70% would have to be parked in a designated bank account with scheduled bank to be used to meet cost of construction and the land cost in the real estate project. The utilisation of the funds would be regulated through a process of prior certifications by three professionals namely the architects, the engineers and the chartered accountants about stage of completion of the project. In addition, the project will be subject to special audit to get certified utilisation of funds in accordance with the provisions of the Act.

# Corporate & Allied Laws

Hitherto, the practice in the industry was to do virtually entire business by the funds of the needy flat purchasers and at their cost and consequences. The burden of all problems, the consequences of all happenings and contingencies were practically passed on the consumers. Now the crux of fund mechanism in RERA provides that sell only after the project is approved by local authorities, collect sales proceeds from the flat purchasers but the withdrawal from the designated account will be restricted to the funds spent by the promoter for the project implying that let the promoter first spend from his own resources and then to the extent of such spending he would be allowed to withdraw. Further, obviously withdrawal from sales is possible only if sales are happening. But due to compelling provisions to complete projects in declared time lines, even in the face of slow sales, it should not be possible to delay or slow down construction as used to happen hitherto. The framework of the law clearly indicates that if the project goes in red, the promoter will suffer a lot. The changes in the Insolvency and Bankruptcy Code, 2016 read with provisions of the RERA would mean that the funds collected from the buyers will have to be spent for the project only. This is now resulting into exit of those promoters who wanted to do business without owning entailing risks and who wanted to pass on the consequences of all risks upon the needy buyers and still earn huge dividends. The overnight introduced discipline is now resulting into exit of those promoters who want to do business in the capital intensive industry with meagre capital. Sudden exits will further spell bad times for the industry.



Introduction of much required financial and product delivery discipline upon the real estate development projects should lend required confidence and attract fund providers including private equity and FDI and may attract more investors including small investors. Real Estate Investment Trusts will add to such investments. The industry has started consolidating. Such changes will ultimately enhance the demand and increase the construction activity.

The project would have to be developed and completed in accordance with the approved plans, layout plans and specifications and changes therein would be subject to the prior approval of stakeholders. RERA requires that the project shall be developed and completed by the promoter in accordance with the approved sanctioned plans, layout plans and specifications. So far as changes in respect of plans and specifications concerning an allotted apartment are concerned, the same would require prior consent of the apartment purchaser except minor changes at the instance of the allottee or due to architectural and structural reasons subject to conditions. When it comes to changes in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project, with the prior consent of at least two-thirds of the allottees in which promoter will be excluded and allottees belonging to the same family shall be counted as one allottee only.

Assurances will now become most conservative as against very casual and unviable ones. Large township planning will require good understanding of law and at the same time law cannot harm such projects

RERA law bars cases to be tried at civil court in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under the RERA. In such matters, the civil court cannot issue any injunction also. It is submitted that such cases cannot be tried at consumers court also. So far as possible consequences of such bar is concerned, it will depend upon the rule of law followed by the RERA in each State. Where rule of law will be followed, then the bar to civil court will augur better for the affected persons. Where rule of law will not be followed, it will be a big loss to the already slow moving justice system.

Although defaults and wrongs were quite common and all pervasive, as in the real estate market big or brand did not necessarily meant good,

# Corporate & Allied Laws

it was experienced that the consumers used to prefer buying at a premium from the big builders and those enjoying brands. There is likely to be substantial difference in this context in as much as now in the RERA discipline consumers may find the assurances by SME builders also equally reliable and, therefore, the price difference between branded and non branded may moderate.

Credibility of RERA law substantially hinges upon the types of the decisions that would be delivered by the State RERA authorities. So far, it is observed that while the MahaRERA is most active and quite progressive but at the same time MahaRERA decisions have not been strictly in accordance with letter and spirit of law and there is lack of uniformity in the decisions. This may create scope for discretions, discriminations over a period of time. RERA authorities are regulators. However, it is a moot point whether the regulators are functioning as regulators or take convenient stands. The problem gets confounded when we observe that the courts and governments are not eager to investigate into the propriety of the decisions of the regulators. So the question arises: who regulates the regulators? For a common man it may be easy to challenge a discretionary decision of a government department than a regulator because of the aura prevailing around the image of the regulator. To add to this, the functioning of various RERA authorities being State appointed ones, may differ sharply and decisions by one authority do not become precedents for the others and at the most may have only persuasive value.

As far as corruption is concerned, it is always a debatable issue as to who is more interested in corruption. Even if some State Governments Act tough and introduce stringent deadlines for granting approvals, there is no assurance that there will not be corruption for allowing and/or ignoring wrongs. Therefore, need of the RERA was overdue but at the same time timely steps need to be taken to streamline the departments concerned. At the same time more computerisation and more digitisation should reduce scope for corruption.

The realty sector is slowly coming out of the long suffered stagnancy. The stock of unsold units is reducing. With moderation in cost factors of land and development rights, number of launchings has started increasing. Due to credibility increasing on account of RERA and due to transactions complying with GST, it appears that the industry is not only

**RERA has the potential to make the market disciplined and vibrant but to what extent and how much fast changes happen is a matter of concern because coordinated approach is not so evident from various ministries and various government authorities as also between the Central Government, the State Government and the local authorities.**



stabilising and reviving but also gaining long term good health. However, at the same time affordability factor will prevail to see that more activities will be witnessed in the affordable housing segment. Luxury will take a long time to revive and in the meantime the prices in the luxury segment may go on moderating. It is observed that both in affordable as well as in luxury segments, more organised players are entering to provide required fillip to the market.

RERA has the potential to make the market disciplined and vibrant but to what extent and how much fast changes happen is a matter of concern because coordinated approach is not so evident from various ministries and various government authorities as also between the Central Government, the State Government and the local authorities. The State Governments should take immediate steps to discipline and monitor the administration in the municipal and other local authorities concerned with granting construction approvals as lot of red-tapism and rampant corruption are only opens secrets. ■