

The Maharashtra Housing (Regulation and Development) Act, 2012 *vis-à-vis* The Real Estate (Regulation & Development) Bill, 2013: A Critical Appraisal

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Introduction

The Real Estate prices in Maharashtra are among the highest in world. The success of the sector is dependent on the transparent and accountable laws for buyers while as single window clearance to the project for promoters which were lacking. Therefore, a need of regulatory body to mitigate risks and increase trust in such transactions through a transparent legal framework was from decades but it could be satisfied only on 25th February, 2014 when the Maharashtra Housing (Regulation and Development) Act, 2012² came into force, making Maharashtra as the first State in country to have a 'Real Estate Regulator' repealing the Maharashtra Ownership of Flats (Regulation of the promotion of Construction, Sale, Management and Transfer) Act, 1963³. The proposed Act seeks to regulate and promote the construction, sale, management and transfer of flats on ownership basis and to establish the Housing Regulatory Authority and Housing Appellate Tribunal for providing redressal on matters connected.⁴The Act empowers to make regulation for the proper implementation of the provisions of the Act which are still in draft stage (herein referred as Draft regulations).⁵But the Act came in force when a Real Estate Bill is pending covering the same circumference but with different intensity as regards to penal provisions. Furthermore, the state Act is a later law but doesn't follow most of the buyer friendly provisions. It gave rise to debates, questioning the atoms of the MHRDA, 2012.

In this article, an attempt has been made to deal with the main provisions of the MHRD Act and compare it with the Real Estate Bill that is still pending. Furthermore, the article tries to grey some serious flaws in the MHRD Act, 2012 which makes the Act more or less redundant.

History of Real Estate Laws

The Tenth Five Year Plan Report brought out the realities of the Real Estate sector in context with its historical evolution.⁶In India, there are about a hundred legislative mandates regulating the real estate sector but these are outdated and need to be reformed.⁷Initially, the Real Estate regime in the nation was regulated by laws like the Indian Contract Act, 1872, the Transfer of Property Act, 1882, Registration Act 1908, the Specific Relief Act, Urban Land (Ceiling and Regulation) Act (ULCRA), 1976, The Rent Control Act and the various State laws which regulated the developmental projects and formation of society.⁸There are other sets of municipal laws working in this arena which date back to half a decade or more. The Commission was of the opinion that a model law should be drafted where the government acts as a facilitator and not as a controller. The Report also highlighted the red tapism subsisting in getting planning approvals. Real Estate was also brought under the ambit of the Consumer Protection Act⁹ by bringing "housing construction" under the ambit of "service". However, by bringing it under the ambit of

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² Wherein referred as MHRDA or the State Act.

³Wherein referred as MOFA, 2012.

⁴Preamble, MOFA, 2012.

⁵Section 51, MHRDA, 2012.

⁶ Planning Commission, Tenth Five Year Plan 2002-2007, Chapter 7.6, Real Estate available at http://planningcommission.nic.in/plans/planrel/fiveyr/10th/volume2/v2_ch7_6.pdf

⁷ *Ibid.*

⁸ *Ibid.*

⁹Section 2 (1) (o) of the Consumer Protection Act, 1986.

“service” and not goods, the illegal trade practices as to pricing are not covered and the relief of liquidated damages cannot be claimed by the purchaser. In the wake of the rampant urbanization, the Competition Commission of India held that India needs a single market regulator in order to facilitate the real estate regime in the nation.¹⁰ The FICCI report also acknowledges the key challenges faced by this sector, both purchasers and the developers.¹¹ The Real Estate Bill is an attempt to regulate and promote the real estate regime in a comprehensive manner and the same is being followed by the MHRDA, 2012.

The Maharashtra Housing (Regulation & Development) Act, 2012

The Maharashtra Housing (Regulation & Development) Act, 2012 passed in order to create a level of transparency that would secure the buyers, the ‘Aam Aadmi’ from the malpractices and to provide speedy adjudication on matters connected therein. The Act necessitates the registration of the project by the promoter that will be displayed on the website of the regulator. It enumerates a minimum disclosure to be made by the promoter about the project which would serve as a basis for registration and will be displayed on the website which would help the buyer in order to know the status of the project. It establishes a regulatory body that will deal with the matters connected therein. The Act enumerated various responsibilities that need to be complied with by the promoter and penal provisions in case of any default. The whole MHRDA therefore, can be kept into eight heads, i.e., registration of project, responsibilities and restrictions on promoter, revocation of registration, establishment of regulatory body, appointments under HRA & HAT, procedure of Adjudication, penal provisions and the limitations of the state Act which will be dealt extensively in the next part of the article.

Registration of Project

MHRDA mandates registration of the project by a promoter prior to any transaction including marketing.¹² All the projects except those where the proposed land does not exceed two hundred fifty square meters or total number of flats is less than five or the promoter has an occupation certificate prior to the commencement of this Act or project is of redevelopment or reconstruction, need to be registered under this Act and will be displayed on the website of the housing authority.¹³ It is the sole duty of the promoter to enter the record or details of the project on the website of the regulatory body.¹⁴ The relevant provision of the draft regulation gives a detailed procedure to be followed while registering the project.¹⁵ Form V needs to be submitted which contains the details of the promoter and his project.¹⁶ Form v consists of a column which needs the details of the bank which has financed the project; however it has no column for financial institutions other than the banks.

The Real Estate Bill of on the other hand is quite liberal due regard to the exceptions of registration. It lays that where the area of land to be developed doesn't exceed thousand square meters or where the number of apartments proposed to be developed doesn't exceed twelve inclusive of all phase need not to be registered.¹⁷

Revocation of Registration

The State Act provides for a single ground of cancellation of the registration of the project. A project can be only cancelled if it is declared by the court of law that the contract, agreement, or power of attorney or instrument or writing from which the promoter derives the right to the land or development of the land, is

¹⁰ *Belaire Owners Association v. DLF Limited, HUDA & Ors* (CCI) Case No.19/2010

¹¹ FICCI , Report on Real Estate available at http://www.ficci.com/sector/59/Project_docs/real-eastate-profile.pdf

¹² Section 5, MHRDA, 2012

¹³ Section 4, MHRDA, 2012

¹⁴ Section 6, MHRDA, 2012

¹⁵ Rule 5, Maharashtra Housing (Regulation and Development) (General) Rules, 2014

¹⁶ Rule 5, Maharashtra Housing (Regulation and Development) (General) Rules, 2014

¹⁷ Clause 3 of the Real Estate Bill, 2013

invalid.¹⁸ However, the Real Estate Bill lays down comprehensive grounds for revocation of the registration. Clause 7 of the said bill states that the Authority may, on receipt of a complaint in this behalf or on the recommendation of the competent authority, revoke the registration granted under Clause 5, after being satisfied that either the promoter makes willful default in doing anything required of by him or under the Act or the rules or the regulations made there under or the promoter violates any of the terms or conditions of the approval given by the competent authority or he is involved in any kind of unfair practice or irregularities. Further, the scope of “unfair practices” has been elaborately defined in the Real Estate Bill.”

Responsibilities & Restrictions of promoter

The Maharashtra Housing Regulatory and Development Authority exhaustively lay down the responsibilities of a Promoter of a housing project. The responsibility of a promoter begins with the promoter being required to enter the details of the housing project on the website of Housing Regulatory Authority.¹⁹ This act of making the project details available on the website helps to keep such information on record for the benefit of public at large. The promoter is also obliged under the law to compensate any person who has relied upon any willful untrue statement provided by him under any advertisement.²⁰

It is the duty of the promoter to provide proper safeguards. The promoter has to obtain the occupation certificate or building completion certificate in respect of the building from the concerned local authority as per the building regulations in force and make a copy thereof available to the flat purchasers or unit holders individually or to an organization which is the authorized collective body of flat purchasers or unit holders, as the case may be.²¹ The liability of the promoter does not extend to the additions and alterations are done in the flat, or building by the flat purchasers or unit holders or occupier, in violation of the building regulations.²² The Act envisages the promoter to be liable for not providing the basic services like water, electricity and sanitary services according to the agreement entered by the promoter and the purchasers.²³ But the Act also takes into consideration the preexisting liabilities of the service provider and exempts the promoter in presence of the service provider’s liability.²⁴ The Act limits the liability of the promoter undertaking a re development project for sale in the open market only and does not extend to the promoter undertaking such projects for alternate accommodation.²⁵ The promoter shall also be liable to pay all outgoing charges if he is in possession or has collected such outgoings from the persons who have taken or are to take flats in case he has not paid such charges before the transfer of property.²⁶ The Act extends such liability even after the transfer of property and subjects the promoter open to legal action by the Authority or the aggrieved persons.²⁷

Establishment of Regulatory Authority

The State Act as well as the Real Estate Bill provides the much needed framework for fast adjudication of the matters connected thereto. It lays down provisions for the establishment of the first instance adjudicating authority as Housing Regulatory Authority²⁸ while as the Housing Appellate Tribunal²⁹ for

¹⁸Section 7 of MHRDA, 2012

¹⁹Section 6 of MHRDA, 2012

²⁰Section 11 (1) of the MHRDA, 2012

²¹Section 11(3) of the MHRDA, 2012

²²Section 11 (4) of the MHRDA, 2012

²³Section 11(5) of the MHRDA, 2012

²⁴*Ibid.*

²⁵Section 11(6) of the MHRDA, 2012

²⁶Section 13 of the MHRDA, 2012

²⁷*Ibid.*

²⁸Section 22 of MHRDA, 2012

²⁹Section 36 of MHRDA, 2012

appeal arising out of the first. Any appeal from the housing appellate tribunal will directly lie before the High Court.³⁰ This act unlike the Companies Act 2013 doesn't override the power of High court. The MHRD Act as well as the Real Estate bill lays down provisions for the formation of a regulatory body. The state act directs the state government to establish a 'Housing Regulatory Authority' which will be a body corporate having a common seal with perpetual succession which can sue and be sued.³¹

Appointments under Regulatory Authority

The State Act envisages that the members of the Housing Regulatory Authority and the Housing Appellate Tribunal are to be appointed by the State government.³² Further, the Section lays down the six areas from which the members should have previously been engaged in with "no year prescription" in the said fields.³³ In contrast to the State Act, the Real Estate Bill ascribes 20 years of prior experience for the Chairman and 15 years of experience for the members in 15 elaborate arenas. The significance of these differences in two fold; firstly, presence of an independent selection committee will nullify impact of any political favor in the appointment of the members and secondly, the elaborate arenas under the Real Estate Bill will ensure vibrancy in the Authority.

Adjudication Procedure

Although, both the Authorities established under the MHRDA and the Real Estate Bill are bound by Natural Justice, the Real Estate Bill tries to lay down a summary procedure for the functioning of the Authority. Like, for instance, the Real Estate Bill expressly excludes the ambit of the technical aspects of the Indian Evidence Act³⁴ in contrast with the State Act which is bound by the provisions of Civil Procedure Code and the Evidence Act.

The real estate sector in the nation, like all the sectors has been affected by the anti-competitive agents. In the light of this anti-competitive behavior, it becomes very essential to bring the anti-competitive element under the ambit of the Regulatory Authority. The Real Estate Bill ensures the exclusion of any anti-competition element by giving the power to the Authority to make any suo motto reference to the Competition Commission of India.³⁵ This will not only prevent cartelization or the like behaviors but will also ensure that the independence of Authority remains intact and unaffected from the Competition Commission of India. This provision is commendable in light of the redundant provision of the Maharashtra Act which not only expressly excludes the jurisdiction of the Competition Commission of India but also lays down no provision as to the management of the anti-competitive aspects arising in this sector.³⁶

Penalties

The Maharashtra Act and the Central Real Estate Bill are not only operating at different levels with differences in its functioning but differences in their punishments also. The first difference arises in the non-registration of the project itself. If a project under the Real Estate Bill is not registered with the Authority, shall be liable to a penalty which may extend up to ten percent of the estimated cost of the real estate project as determined by the Authority.³⁷ In case of continuous violation of the "registration clause" and non-adherence of the directions of the Authorities in regard with the same, shall be punishable with imprisonment for a term which may extend up to three years or with fine which may extend to a further ten

³⁰Section 42 of the MHRDA, 2012.

³¹Section 22, MHRDA, 2012.

³²Section 23, MHRDA, 2012

³³ *Ibid.*

³⁴Clause 46 of the Real Estate Bill, 2013

³⁵Clause 3 of the Real Estate Bill, 2013

³⁶ Section 29, MHRDA, 2012

³⁷ Clause 51 (1) of the Real Estate Bill,2013

percent of the estimated cost of the real estate project, or with both.³⁸ In contrast with such stringent provisions of the Real Estate Bill, the Maharashtra Act prescribes for a meager penalty of a thousand rupees per day.³⁹ This fallout in the State Act is prima facie against the spirit of the Act which seeks to regulate the Real estate in the State. Maharashtra is a capital rich state with a lot of real estate capabilities and imposing a meager sum in case of non-registration renders the entire purpose of the Act futile. Further, the Real Estate Bill prescribes a penalty of five percent of the estimated cost of the project in case the promoter fails to apply to the requisite authority or provides false information to the Authorities.⁴⁰

The role of real estate agents in case of the various real estate projects are of importance at the time of fixing liability in case of any misappropriations. The Real Estate Bill makes it mandatory for the registration of such real estate agents and in case of default of the registration process, it imposes a penalty of ten thousand rupees per day during which such default continues, which may cumulatively extend up to five per cent of the cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated as determined by the Authority.⁴¹ It is an appalling disbelief that the State Act does not envisage such a provision in spite of the ever increasing no. of scams occurring in the Maharashtra real estate regime where the real estate agents are closely connected with the misappropriations.

In case, a promoter, willfully fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to five per cent, of the estimated cost of the real estate project as determined by the Authority.⁴² As opposed to this bill, the State law lays down that in case of contravention of Section 9, 12, 14, 18 and section 19; a maximum penalty of rupees one crore has been prescribed⁴³; and in case other violations of the Act by the promoter where no penalty has been prescribed, the maximum penalty of ten lakh rupees can be imposed. This difference in the extent and the means of penalty is of significant importance. In Maharashtra, where real estate projects of worth thousands of crores of rupees are undertaken, imposing a fixed penalty serves no deterrence to the promoters. Also, such a clause is inequitable in context with the promoters with small investment pool. Therefore, the novel and scientific approach of the Real Estate Bill is appreciable in this regard. Further, the liability of promoter in case of non-adherence of the Appellate Tribunal has been separately provided by the Bill. A maximum penalty of ten percent of the estimated cost of the real estate project can be imposed in such a case⁴⁴ where as the Maharashtra Act prescribes the same penalty irrespective of the fact that the ruling authority is the board or the Appellate Tribunal.

The mode of fixing liability and imposing penalty is highly unguided in case of the Maharashtra Act. Under the State Act, any allottee in case of failure of complying with, or contravening the “provisions of the agreement for sale” executed by him with the promoter for purchase of flat, including nonpayment of any amounts or charges in respect thereof, shall be liable to pay the penalty which may extend to rupees ten thousand or one percent of the sale price of the property specified in such agreement, whichever is higher.⁴⁵ This provision is in the fatal grounds because of the reason that it qualitatively ignores the value of the construction project and ignores the differences between the violation made against the Board or the Appellate Tribunal. The Real Estate Bill in this regard bases the penalty as two distinctive

³⁸ Clause 51 (2) of the Real Estate Bill, 2013

³⁹ Section 44 of the MHRDA, 2012

⁴⁰ Clause 52 of the Real Estate Bill, 2013

⁴¹ Clause 54 of the Real Estate Bill, 2013

⁴² Clause 55 of the Real Estate Bill, 2013

⁴³ Section 49(1) of the MHRDA, 2012

⁴⁴ Clause 56 of the Real Estate Bill, 2013

⁴⁵ Section 46 of the MHRDA, 2012

contraventions of the Housing Board⁴⁶ and the Housing Appellate Authority⁴⁷ and imposes penalty on the basis of the cost of the apartment, building or the plot.

The State Act envisages a very liberal form of liability of the developers undertaking real estate projects as against its central counterpart. Under Section 44 of the State Act, a nominal amount of rupees one thousand has been imposed on the developers for non-registration with the registration authority. Further, under the State Act the developers have been given the power to collect 20% of the unit cost from the prospective buyers in absence of a written agreement. Adding to the plight of the buyers, they have no guarantee that the above amount will be refunded. In contrast with the State Act, the Real Estate Bill adopts a strict policy in order to protect the prospective buyers. Under Clause 13 of the Real Estate Bill, the developers can only extract a ten percent of the unit cost from the buyers in absence of a written agreement.

Limitations of MHRDA

1. Single window clearance: The State Act doesn't enshrine the much needed demand for single window clearance for speedy approvals which is an essence of such type of Act.
2. A majority of the Real estate developers tend to work in the form of a company. However, the State Act fails to recognize the presence of such companies unlike its Central counterpart. The Real Estate Bill enshrines and gives power to the concerned authority to proceed against the Companies engaged in real estate projects. It lays down that such companies to be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.⁴⁸
3. It is to note that the State Act is not just pro-developer but anti-purchaser. This is reflected in Section 19 of the State Act. Under this Section, the developers do not require any prior permission of the potential purchasers if the Floor Space Index of the plot in a layout is increased due to change in the law or the policies of the Government or local authorities to utilize the balance Floor Space Index or the Transfer of Development Right, Floor Space Index or additional Floor Space Index. It is contended the presence of such a clause is against the ruling of the Competition Commission of India which requires that prior approval of the home buyers or the allottees is required before making the changes.⁴⁹
4. The State Act expressly lays down the provision as to the Housing Regulation Authority calling for information and conducting investigation.⁵⁰ According to the Act, the Authority may call upon any "promoter" (only) in context with the obligations arising out of the "ownership agreement" only. The Authority may call for the "books of accounts or other related document related to the project or flat" under complaint "in custody having a bearing on the subject matter of such complaint." It is to note that such limited grounds of investigation under the State Act thwarts the entire purpose of the Act.
5. Another aspect of the Maharashtra Housing Regulation Act which is in unpopular conflict with the Central Real Estate Bill and a Supreme Court pronouncement is in regard with the exclusion of "parking space" in the ambit of "apartment". The Real Estate Bill includes "parking space" in the definition of apartment.⁵¹ The legal implication of this inclusion is that the developer has no right to sell the parking space to various parties. In *Nahalchand Laloochand Pvt Ltd v. Panchali Co-operative Housing Society Ltd.*⁵², the Hon'ble Supreme Court has held that "Apartment" is inclusive of the "parking space" and cannot be sold separately. However, it is to note that the definition of "Apartment" in the Maharashtra Housing Regulatory Act is based on the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act (MOFA), 1963 which excludes

⁴⁶ Clause 57 of the Real Estate Bill, 2013

⁴⁷ Clause 58 of the Real Estate Bill, 2013

⁴⁸ Clause 59 of the Real Estate Bill, 2013

⁴⁹ *Belaire Owner's Association v. DLF Limited Haryana Urban Development Authority Department of Town and Country Planning, State of Haryana* 2011 CompLR 239 (CCI)

⁵⁰ Section 30 of the MHRDA, 2012

⁵¹ Clause 2(d) of the Real Estate Bill, 2013

⁵² (2010) 9 SCC 536.

the ambit of both open and closed parking from the ambit of “apartment” and thus can be sold separately. This clearly is in conflict with the law of the land and in the interest of the home buyers.

Conclusion

The State Act, although a right step to deal with the real estate sector but is in the wrong way with such liberal provisions. The penal provisions of a regulatory Act are the essence of its implementation; however, the State Act has petty penal provisions which would endorse the promoters to do wrong. It falls short of its own model Act, i.e., the Real Estate (Regulation & Development) Bill, 2013 which is still pending. Although, the central government is quite ambitious to pass the Central bill which will override the State Act but the questions still persists, as to what will happen to pending matters connected to the MHRDA before the State Regulatory Authority. Therefore, clear provisions need to be laid down to deal with the confusion pertaining to such matters.
