

REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016: CEMENTING THE GAPS OF AN UNSTABLE FOUNDATION

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INTRODUCTION

Real estate is considered as the most important sector in Indian economy after agriculture. The sector amounts to 5-6% of the GDP of the country and it is expected to reach 13% by 2028.¹ There are approximately 3,489 projects worth Rs. 14.5 lakh crore in real estate sector currently existing in the country.² The fact that real estate acts as a facilitator in satisfying the requirement of home and infrastructure makes it one of the most essential sectors of the economy. The growth of the real estate sector in India can be attributed to the substantial investment which it has drawn due to quick urbanization, rising income levels, and foreign investments.

Investment in the sector reached its peak in 2010 with the rate being 13.5% but ever since then, a sharp decline in investment has been recorded.³ Further, there is an acute housing shortage of at least 24.7 million units for 67.4 million families.⁴ Currently, 70% of the Indian population lives in rural areas, however, with advent of Foreign Direct Investment (FDI) and rapid urbanization, it is being estimated that 40% of the population will be residing in urban areas by 2030.⁵ With development of urban areas, there is dire need for better regulation and governance of the real estate sector. Moreover, with only 5 years left for maturity of 'Housing

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¹ India Brand and Equity Foundation, *Real Estate*, (July 23, 2017), www.ibef.org/download/Real-Estate-March-2017.pdf.

² The Associated Chambers of Commerce of India, *3 States Together Account for Half of Total Investments Attracted by Real Estate & Construction Sector: Study*, (July 22, 2017), <https:// ASSOCHAM.ORG/newsdetail.php?id=6278>.

³ *Id.*

⁴ Government of India, Ministry of Urban Development, *Streamlining Procedures for Clearance of Building Projects Town and Country Planning Commission*, (July, 25, 2017), http://tcpomud.gov.in/Divisions/MUTP/Streamlining_Procedure.pdf.

⁵ Department of Economics and Social Affairs, United Nations, *World Urbanization Prospects – The 2014 Revision*, (24th July, 2017), <https://esa.un.org/unpd/wup/publications/files/wup2014-highlights.Pdf>.

for All by 2022' scheme, it is imperative that the real estate sector boosts up.⁶

In order to put a check on all the issues plaguing real estate sector, government has brought an act called The Real Estate (Regulation and Development) Act, 2016 (hereinafter RERA or The act). However, the act isn't free from loopholes and these loopholes could act as obstacles in attaining the main objective. This paper seeks to address the positive features and the lacunae present in the act. The paper, then provides plausible solutions for the problems prevailing within and around the act.

POSITIVE IMPACTS OF THE ACT

ON BUYERS

1. Registration of builders is mandated by this act. No promoter can sell, buy, advertise, or invite customers to buy projects without registering the project with Real Estate Regulatory Authority.⁷ Hence, all the activities of builders will be checked by the authority created by this act.

⁶ National Mission for Urban Housing, "Housing for All by 2022" Mission, (July 22, 2017), www.pmindia.gov.in/en/news_updates/housing-for-all-by-2022-mission-national-mission-for-urban-housing/.

⁷ Real Estate (Regulation and Development) Act, 2016 § 3.

2. RERA guarantees buyers right to get details of the project which includes cost of land and construction, project completion time, phase-wise plans of development, any minor alteration in the project and so on.⁸ Over 13,000 projects have been registered with Maharashtra RERA.⁹ Developers have to update project progress in every 90 days.
3. The act mandates formation of a Residents' Welfare Association (RWA). Out of 5576 registered societies in Delhi,¹⁰ only about 1200 societies have a registered Residents' Welfare Association.¹¹ Given that, the act mandates formation of such society, buyers will have a platform to direct their grievances to the promoters and post-allotment maintenance of the projects.

⁸ Real Estate (Regulation and Development) Act, 2016 § 19.

⁹ APNA RERA, *More than 13k Ongoing Projects Registered with MAHA RERA*, (July 23, 2017), <http://apnarera.com/more-than-13k-ongoing-projects-registered-with-maha-rera>.

¹⁰ Office of the Registrar Cooperative Societies, *Summary of Current Registered Societies*, (July 21, 2017), http://delhi.gov.in/wps/wcm/connect/doit_rcs/RCS/Home/General+Information/List+of+Registered+Societies.

¹¹ Office of the Registrar Cooperative Societies, *List of Societies Registered W.E.F. 09.06.2010 TO 31.03.2014*, (23rd July, 2017), <http://delhi.gov.in/wps/wcm/connect/81325f00463cfec9bafbfec2f3146d7f/LIST+OF+SOCIETY+LATEST.pdf?MOD=AJPERES&lmod=-993297804>.

4. If any structural defect occurs in the unit within five years from the date of handing over the project to the allottee, developer is liable to fix such defect without charging the allottee. If developer fails to fix such structural defect within thirty days, RERA gives buyers right to file a complaint before RERA authority.¹²
5. The act prohibits builders to make any alteration in the project without obtaining consent of at least 2/3rd of allottees.¹³ In this way, the buyers are safeguarded against arbitrary action of the dishonest promoters over the project.
6. The act prescribes penalty on the developers if they fail to deliver the project on time. A developer will have to pay monthly interest on bank loan taken for under-construction project if delay occurs.¹⁴

¹² Real Estate (Regulation and Development) Act, 2016 § 14(3).

¹³ Real Estate (Regulation and Development) Act, 2016 § 14(2)(ii).

¹⁴ Real Estate (Regulation and Development) Act, 2016 § 18(2)(b).

In case, a promoter fails to comply by the aforementioned provision, the act prescribes for heavy penalties.¹⁵

If someone fails to comply with these rules, he will have to face proceeding in the Real Estate Regulatory Authority. One such case was initiated by Maharashtra RERA where a RERA registered promoter had put advertisement of an unregistered project. In this case, it was established that the act of the promoter had violated the § 10(a) of the 2016 Act and § 9(5) of the 2017 Act. Consequently, an order was passed by the authority which included a penalty of Rs. 1,20,000 to be paid in instalments of Rs. 10,000 for 12 days.¹⁶

FOR BUILDERS

1. With this act, the process of depositing payment will be smoothened. The act prescribes that buyers have to make payments on time. Secondary payments like registration charge, municipal taxes,

¹⁵ Real Estate (Regulation and Development) Act, 2016 § 59.

¹⁶ Maharashtra Real Estate Regulation Authority v. Sai Estate Consultant Chembur Pvt. Ltd. Suo-moto Case No. 1 of 2017, (27th July, 2017) [https://maha.mahaonline.gov.in/Upload/PDF/Legal-Advisor-Mahareal Estate \(Regulation And Development\) Act, 2016-Vs-Sai-Estate-Consultant-Chembur-Pvt-Ltd-Suo-Motu-Case-No-1-of-2017-dated-5-06-2017.pdf](https://maha.mahaonline.gov.in/Upload/PDF/Legal-Advisor-Mahareal Estate (Regulation And Development) Act, 2016-Vs-Sai-Estate-Consultant-Chembur-Pvt-Ltd-Suo-Motu-Case-No-1-of-2017-dated-5-06-2017.pdf).

and water and electricity charges are also included in this.¹⁷

2. The act will also ensure that customers take possession of the respective units within two months of circulation of occupancy certificate.¹⁸

POSITIVE IMPACTS OF THE ACT ON THE ECONOMY

The necessity of keeping 70% of the total amount in a reserve account aims to solve the issue of delay. Earlier, builders used to divert funds stipulated for one project to a different project. Now, earnings of such an account can only be towards outflow of land and construction. Moreover, it'll be verified by an expert.¹⁹ However, this provision needs to be implemented strictly else there could a misuse as discussed later in this paper.

The documents of projects will not be verified by RERA directly. There is provision for verification by an authorized architect after appropriate statement to the buyer.²⁰ Hence, if

any wrongdoing occurs, the promoter along with the architect will be liable.

Since, the act prescribes huge penalties in case of non-conformity of the rules²¹, builders who aren't customer-centric will be eliminated. Thus, there will be reduction in the total cost of ownership for consumer in the long run.²²

Further, cash transactions will likely become extinct and consecutive trail of transactions will be possible. This will check fraud and a good deal of anomalies will be solved.

According to § 16 of the act, it is mandatory for the promoters to obtain insurances for title and land of the project and construction of the project. The act also makes promoters liable to pay premium in relation to the insurance. Further, promoters are expected to transfer documents and insurance to the buyers at the time of sale.²³

The act will also solve the problem of Floor Space Index (FSI) by bringing in the concept of

¹⁷ Real Estate (Regulation and Development) Act, 2016 § 19(6)

¹⁸ Real Estate (Regulation and Development) Act, 2016 § 19(10).

¹⁹ Real Estate (Regulation and Development) Act, 2016 § 4(2)(1)(D).

²⁰ Real Estate (Regulation and Development) Act, 2016 § 14(2)(i).

²¹ Real Estate (Regulation and Development) Act, 2016 § 59, 60.

²² The Times of India, *Real estate grappling with triple whammy*, July 13, 2017, (24th July, 2017), <http://timesofindia.indiatimes.com/city/goa/real-estate-grappling-with-triple-whammy/articleshow/59568179.cms>.

²³ Real Estate (Regulation and Development) Act, 2016 § 16.

‘net carpet area’.²⁴ It can be seen as a major step in eliminating corruption that used to occur due to haphazard implementation of FSI policies. Now, it’ll be determined by ‘net carpet area’. The habit of putting porch, balcony and roof within the ambit of ‘carpet area’ will come to an end. While this would lead to an increment in property rates, the buyers will be completely aware of the useable portion of the land.²⁵ This would also cause the builder to provide a better design and productivity.

While many are seeing the act as a hassle for developers, it will be beneficial for them in the long run as it aims at bringing discipline, hence, the act custodian for the beginners. The act aims at eliminating ambiguity. Thus, it would inspire ambitious builders to build their credibility in the market without encountering any legal obstacles.

Consequently, RERA will have two-fold positive impact. At micro-level, this act will bring relief to homebuyers by facilitating quick delivery of homes. At marco-level, this act will

heal the entire real estate sector by bridging the trust deficit between buyers and developers.

HOW RERA AIMS TO SHAPE PRIVATE EQUITY INVESTMENT

Private equity is the investment which isn’t noted on a public exchange. When an investor directly invests in a private company, it results in delisting of private equity and thus, such an investment is known as private equity investment.²⁶ It has been calculated that private equity investment has fallen from \$3.6 billion in 2015 to \$3.1 billion in 2016.²⁷ RERA also affects private equity investors in a way. Investment documents usually endow rights to private equity investors to undertake projects and guarantee completion if builder defaults. Now, since the act mandates requirement of consent of 2/3rd of the allottees in the project, private equity investors will have to work on the side of the allottees.²⁸

In a recent case, the Apex Court stated, “While application of law and interpreting a particular

²⁴ Real Estate (Regulation and Development) Act, 2016 § 2(k)

²⁵ Vibha Singh, *How Carpet Area Definition Changes in Real Estate (Regulation And Development) Act, 2016* (June 13, 2017), [https://housing.com/news/carpet-area-definition-changes-Real Estate \(Regulation And Development\) Act, 2016/](https://housing.com/news/carpet-area-definition-changes-Real-Estate-(Regulation-And-Development)Act,2016/).

²⁶ M.K PITHISARIA & MUKESH PITHISARIA, *TAX LAW DICTIONARY* 579 (LexisNexis 2013).

²⁷ Abhineet Kumar, *PE investors cautious on real estate Real Estate (Regulation And Development) Act, 2016* (May 11, 2017), www.business-standard.com/article/economy-policy/pe-investors-cautious-on-real-estate-with-new-law-117051000966_1.html.

²⁸ *Id.*

provision, economic effects of a decision has to be kept in mind. Courts needs to avoid that particular outcome which has a potential to create an adverse effect on employment, growth of infrastructure or economy or the revenue of the State. It is in this context that economic analysis of the impact of the decision becomes imperative”.²⁹

While Private Equity fund would come under the ambit of ‘Promoter’, thus, incurring all the liabilities and obligations under RERA, the returns which would come as a result of the investment would also boost. This could be attributed to mandatory lock-in of funds till the time of project completion. This would benefit PE investors in a two-fold manner. Firstly, monetizing on the stake of PE fund before completion would become challenging. Secondly, PE funds could seek higher returns for the time-risk undertaken by it.³⁰

Now, since the act is already leaning on the side of the customers, RERA authorities should take cues from the aforementioned decision to

²⁹ Shivashakti Sugars Limited v. Shree Renuka Sugar Limited, 2017 SCCOnline SC 602.

³⁰ Ketan Dalal, RERA – *It Takes Two to Tango!* Taxsutra (June 14, 2017), <http://www.taxsutra.com/blog/2/7/RERA%20%E2%80%93%20It%20takes%20Two%20to%20Tango!>.

encourage perpetual investments in the sector.³¹ If RERA achieves its objectives and black money goes down to minimal level, then, investors would need just sources of capital and that would boost private equity investment in the sector.³²

After analysing the act, we can conclude that RERA does carry a promise to bring transparency and rationalization which would certainly promote a constructive environment for private equity investment in the sector. Although, a lot will be determined on the way it is implemented across the country.

ISSUE OF DELAY IN GETTING PERMITS

It is quite unfortunate that RERA Act fails to solve the issue of delay caused in obtaining clearances. Delay in obtaining permits is one of the major reasons behind lagging of projects and unreasonable rise in the prices.

While India has brought measures to lessen the time involved in getting a building permit,³³ the time consumed in granting permits is still high as compared to world’s average. Countless

³¹ Sambhav Ranka & Nitesh Tiwari, *Real Estate (Regulation and Development) Act, 2016: A Private Equity Perspective*, PRESS READER, (June 27, 2017), www.pressreader.com/india/mint-st/20170627/281621010346269.

³² *Id.*

³³ *Supra* note 31.

reports published by World Bank have said that India has one of the bulkiest and prolonged process for construction permits. There are 34 processes and it normally takes 196 days to get construction permits.³⁴ The situation on ground is worse. It has been found that it takes up to 6 months to a year to get these approvals. Further, if the clearances are related to land, the time stretches up to two years.³⁵

The situation is further deteriorated by massive costs of construction permits. In a report published by World Bank, it was said, “The cost of construction permit in Greater Mumbai is 46.05 per cent of the cost of construction”.³⁶ The statistics of other cities aren’t different either.³⁷

High costs of construction permits coupled with the delay offer negative impacts on the economy. An economy plagued with high costs and delay in construction permits, is less likely to be stimulated by interest rates change.

³⁴ *Supra* note 32.

³⁵ SAPREP Committee, *Volume I Report of The Committee Of Streamlining Approval Procedures For Real Estate Projects In India Key Recommendations*, (23rd July, 2017), www.naredco.in/notification/pdfs/SAPREP%20Committee_draft%20report_Volume%20I.pdf.

³⁶ The World Bank, *Dealing with Construction Permits in Mumbai – India*, Doingbusiness.org, (23rd July, 2017), www.doingbusiness.org/data/exploreeconomies/india/sub/mumbai/topic/dealing-with-construction-permits.

³⁷ *Id.*

Consequently, the monetary policy of the economy becomes less functional. This leads to scarcer rate of consumption and also lessens the employment in the real estate sector.³⁸

The bulky process of obtaining construction permits also paves way for corruption and bribery. Politicians and bureaucrats take wrongful advantage of these loopholes and demand bribes for construction clearances by using their power to delay.³⁹

Although, the act does contain a provision relating to creation of a single window system to check delays in permit,⁴⁰ however, scope of this provision may lead to infringement of the state list. The binding nature this provision remains under question. It is safe to say that the aforementioned provision is not definite and it is left up to states to enforce the provision in the way they choose to do. Hence, it could be a long time before the consumers see digitisation of land records or creation of a single window

³⁸ Pedro Gete, *Dealing with Construction Permits, Interest Rate Shocks and Macroeconomic Dynamics*, (24th July, 2017), http://faculty.georgetown.edu/pg252/GETE_permits.pdf.

³⁹ R Jagannathan, *Surgical Strikes on Black Money in Real Estate and Gold will Not be Possible*, HINDUSTAN TIMES, Nov 21, 2016, (23rd July, 2017), www.hindustantimes.com/analysis/surgical-strikes-on-black-money-in-real-estate-and-gold-will-not-be-possible/story-mBQm7OzV3BaHDVcRKLzqYN.html.

⁴⁰ Real Estate (Regulation and Development) Act, 2016 § 32(b).

system, provisions indispensable for the development of a modern, transparent and efficient real estate sector. The Centre needs to understand that the financial institution will not be willing to finance such projects if their interests are not taken care of and therefore it needs to make provision regarding the same. For the growth of a transparent and efficient real estate sector it is imperative that enabling provisions under § 32 should be implemented in a time bound manner. The Centre, through a notification, should specify a time period within which the states must come up with rules and regulations implementing the same.

It should be understood that the permits should not exist for the sake of it but rather for a prompter and smoother functioning of the sector. It is quite essential to calculate which permits are indispensable and which ones require simplification. A balance between cost of such regulations and their benefits should be maintained. Therefore, it is must for the central and state governments to bring a single-window authorization system at the earliest to avoid delay and unreasonable hike in prices of projects. A single-window clearance system will certainly be a stepping stone in advancement of real sector. It can be implemented through online windows.

ISSUE OF JUDICIAL MECHANISM PROVIDED IN THE ACT

One of the major objectives is to establish an adjudicating mechanism for speedy dispute redressal. The Act provides for the same and imposes a period of 60 days on the Authority,⁴¹ the Adjudicating officer⁴² as well as the Tribunal⁴³ to dispose of the matter before it. If any of the authorities are unable to dispose of the matter in the said time period, they have to record their reasons in writing for the same.

Inclusion of limitation on time periods for the adjudication of issue is a major relief to the consumers and shall instil confidence in the consumers and act as a deterrent for the promoters who use the, lengthy and unavoidable proceedings in the courts and forums to their advantages. Although, provisions like appointment of an adjudicating officer instead of filing an application to the Authority for adjudging compensation, time barred appeal to the High Court, power to pass interim orders both by Authority and the tribunal have made speedy dispensation of justice accessible to the

⁴¹ Real Estate (Regulation and Development) Act, 2016 § 29(4).

⁴² Real Estate (Regulation and Development) Act, 2016 § 71(2).

⁴³ Real Estate (Regulation and Development) Act, 2016 § 44(5).

aggrieved, the Act suffers from two major lacunae which are inter-related.

The first is in the form of § 3 which limits the jurisdiction of the Act to apartments where the area of land exceeds five hundred square metres and number of apartments to be developed is more than 8 inclusive of all phases.⁴⁴ This would result in exclusion of the bulk of urban middle and lower class home buyers from the protection of the act as the plot sizes across urban areas are usually below five hundred square meters, especially in dense neighbourhoods inhabited by this section of the society. It was suggested at various stages of formation of the Act to lower the exclusionary provision to 100 square meters of land area and the number of apartments to three⁴⁵ or even abolish the limitation set by § 3⁴⁶ so as to bring all the homebuyers under the purview of the act.

The problem is further aggravated by the language of the act which on various occasions uses the phrase ‘under this Act’ which limits the jurisdiction of the act strictly to the provisions contained in the act and effectively excludes a

large number of consumers from redressing their concerns under the act directly. This is related to the second problem that is of forum shopping and conflicting jurisdiction. § 79 bars the jurisdiction of the civil courts to try disputes covered under the act. However, it does not bar the jurisdiction of consumer forums set up under the Consumer Protection Act, 1986⁴⁷ and other tribunals like the Competition Commission of India. Any decision that affects the competition in the relevant market will come under the jurisdiction of CCI. The tussle between TRAI and CCI, CREC and CCI and RBI and CCI, in which the government had to intervene, is a relevant precedent in this regard.⁴⁸ Hence, these forums will exercise simultaneous jurisdiction facilitating forum shopping and conflicting jurisdiction which will eventually harm the interested parties.⁴⁹

This problem will be further aggravated by consumers not covered under RERA as instead of appealing to the Regulatory Authority, they might go to the Consumer Court for dispute redressal as it provides the best three tier

⁴⁴ Real Estate (Regulation and Development) Act, 2016 § 3.

⁴⁵ 15th Lok Sabha Ministry of Housing and Urban Poverty Alleviation, *The Real Estate (Regulation and Development) Bill, 2013*, page 25.

⁴⁶ Rajya Sabha Secretariat, *Report of the Select Committee on Real Estate (Regulation and Development) Bill, 2013 Presented to the Rajya Sabha on 30th July, 2015*.

⁴⁷ Real Estate (Regulation and Development) Act, 2016 § 71.

⁴⁸ The Indian Express, *So Many Regulators*, THE INDIAN EXPRESS, July 30, 2014, (24th July, 2017), <http://indianexpress.com/article/opinion/columns/so-many-regulators/>.

⁴⁹ *Id.*

mechanism for such complaints. The act does not bar the jurisdiction of the Consumer Forum while answering the queries of the Standing Committee on § 61 of the RERA Bill (§ 71 of the Act).⁵⁰ Hence, forum hopping and delayed justice can very well be the scenario when the act is finally implemented.

REAL ESTATE AGENTS AND SECONDARY MARKETS

The act is conspicuous by the absence of regulation for controlling the secondary market operations of the Real Estate Agents as a major portion of the transaction in the Real Estate sector takes place in the secondary market in which the agents and brokers play a pivotal role accounting for approximately 65% transaction in the secondary and resale market and 20% - 30% in the primary market.⁵¹ Further, the Indian realty broking market is estimated at ₹15,000-20,000 crore and approximately five lakh agents operate out of top 15 cities.⁵² Thus, one could

easily calculate the extent of the secondary market and the role played by the agents in it.

§ 9 of the act provides for registration of the Real Estate Agents for the sale of apartments. However, the regulation is prospective in nature and only covers those projects that are registered under the act. The phrase ‘real estate project’ isn’t included in the definition of ‘real estate agent’. By doing so, secondary market operations of the agents could be brought under the ambit of the act.⁵³ It would be a major step in ushering in transparency in the sector and would further augment the authorities during compensating the aggrieved consumers and penalising the agents for default.⁵⁴ A one-time registration, a model code of conduct and strict eligibility criteria through a notification by the Centre for Real Estate Agent would go a long way in achieving the objective of transparency and efficiency in the market, one of the primary aims of the Act.⁵⁵

⁵⁰ 15th Lok Sabha Ministry of Housing and Urban Poverty Alleviation, *The Real Estate (Regulation and Development) Bill, 2013, Standing Committee*, page 85.

⁵¹ Bindu D Menon, *Small Brokers Worried Over Impact of New Realty Law*, THE HINDU BUSINESS LINE, April 30, 2017, (25th July, 2017), www.thehindubusinessline.com/news/real-estate/small-brokers-worried-over-impact-of-new-realty-law/article9674777.ece.

⁵² *Id.*

⁵³ 15th Lok Sabha Ministry of Housing and Urban Poverty Alleviation, *The Real Estate (Regulation and Development) Bill, 2013, Standing Committee*, page 20.

⁵⁴ Real Estate (Regulation and Development) Act, 2016 § 71, 72.

⁵⁵ *Id.* 11 at 50.

**ADVERSE IMPACT OF ACT ON SMALL
REALTORS AND CURBING COMPETITION
(HARSH PENAL PROVISION OF THE
STATE)**

The Act has imposed strict regulations for promoters and agents to be a legitimate player in the sector and has imposed even harsher penalties on the promoters, real estate agents as well as buyers in case of contravention on any of the provisions of the act or the rules made there under. It is expected that harsh penalties shall act as a deterrent and remove non-serious players from the market.⁵⁶ One cannot but agree that in a sector where currently developers and promoters are charging 12% to 18% – sometimes even 36% – interest from buyers for any delay in payment, while they themselves usually pay in the range of Rs. 5 to Rs. 10 per sq ft, it is the way to go.⁵⁷

The act, however, will have a negative impact on the local and regional developers. Already a number of small developers have either left the market or entered into agreements with the large

⁵⁶ Real Estate (Regulation and Development) Act, 2016 Chapter VIII.

⁵⁷ *Homebuyers to get Penalty for Delay in Projects but is That Enough?*, [http://www.financialexpress.com/money/Real Estate \(Regulation and Development\) Act, 2016-homebuyers-to-get-10-penalty-for-delay-in-projects-but-is-that-enough/659011/](http://www.financialexpress.com/money/Real-Estate-(Regulation-and-Development)-Act,-2016-homebuyers-to-get-10-penalty-for-delay-in-projects-but-is-that-enough/659011/).

firms for the development of the projects undertaken by them.⁵⁸ The major difficulties these developers face relates to maintenance of 70% of the amount accrued from the buyers in a separate account, harsh penalties for even minor defaults, lack of capital and the comprehension and compliance of the new standards imposed by the Act. Further, § 14(3) imposes duty on the promoter to take care of any structural defects arising within the period of five years free of charge and within 30 days of it being brought to their notice. The small developers may find it difficult to associate with the project for such a long period as they do not have the required capital.⁵⁹

The cost associated with longer association of the developer in the project would ultimately be borne by the consumer, especially in case of small developers. This would effectively work as an ‘exit barrier’ and the small developers might not be willing to take the market risks. Another issue that small developers may face relates to the provision 4(2)(1)(D). It provides that seventy per cent of the money from the buyer has to be kept in a separate account to be used for construction purposes and the withdrawal of money from this account shall be

⁵⁸ *Supra* note 52.

⁵⁹ *Supra* note 55.

in proportion to the development of the project subject to verification by various professionals. A situation may arise where at a later stage of development of the project the developer is found contravening the provision of the act and hence is penalised under Chapter VIII.⁶⁰ As the builder has already used most of the capital for the development of the project, he might not be in a position to pay the fines and refund the money of the consumers as has happened in a number of cases.⁶¹ The situation will be severely acute in case of small developers who barely have capital to complete the ongoing projects.

The Hon'ble Apex Court rightly held that the hard earned money of the consumer has to be returned, however this is just to refer how the section might work as a deterrent for the small developers to take up new projects on their own.⁶²

This will result in reduction of competition over time as these developers will either merge or enter into partnership with large Real Estate Firms or leave the market altogether. It is being contended that as the small firms shall have the

backing of large firms the projects shall be completed and delivered on time as the large firms make use of their vast capital resources to execute the development task while the small firms maintain the land and local asset for the big companies.⁶³

On the other hand, less competition entails the necessary consequences of reduction in R&D and a trend towards oligopolistic orientation of the market among other things. Whether the consumer shall benefit from the emergence of serious market players or the act effectively reigns in the large developers that are sure to dominate the market in the time to come, the fact that emerges is that the small developers have already lost under the new act. Whether this will benefit the consumers in the long run or harms them remains to be seen.

ISSUE OF EXCESSIVE STATE INTERFERENCE AND DELEGATION OF POWER

The Act provides for excessive powers to the state in matters relating to the Real Estate

⁶⁰ *Supra* note 57.

⁶¹ Sakshi Post, *Supreme Court Directs Builders to Refund Customers at Any Cost*, (September 7, 2016), <http://english.sakshi.com/business/2016/09/07/supreme-court-directs-builders-to-refund-customers-at-any-cost>.

⁶² *Anupam Charakborty v. Supertech Limited*, (2015) 16 SCC 290.

⁶³ Bidya Sapman, *RERA impact: Small Developers Look to Partner Larger Firms to Revive Stalled Projects*, LIVE MINT (June 21, 2017) [http://www.livemint.com/Politics/2izLBw3qr7BSZzujQA9YaP/Real Estate \(Regulation And Development\) Act, 2016-impact-Small-developers-look-to-partner-with-larger-fi.html](http://www.livemint.com/Politics/2izLBw3qr7BSZzujQA9YaP/Real-Estate-(Regulation-And-Development)-Act,-2016-impact-Small-developers-look-to-partner-with-larger-fi.html).

Regulatory Authority. Excessive delegation has been done under § 73 of the bill (§ 84 of the respective Act) in the name of flexibility which defeats the very purpose of the central law and recommended inclusion of specific provision in the act to safeguard the interest of the stakeholders as the states may or may not take into consideration their interests while framing rules and regulations under the said provision. The parliament's power to scrutinize these rules is also ousted due to delegation. Hence, only minimum provisions should be left for delegation and the matters of substantial nature should be clearly spelt out in the Act itself.

Other instances of excessive powers being granted to the state government may be seen in Sections 8, 82 and 83 of the respective Act. § 8 provides, "the Regulatory Authority has to consult the State government for action that is to be taken on lapse of registration or its revocation by the authority". Although, the first right of refusal is granted to the association of allottees the development work will be carried out by the government upon refusal as the Authority is not competent to take up project execution work.⁶⁴ The grant of power to the state government to carry out work as a

⁶⁴ 15th Lok Sabha Ministry of Housing and Urban Poverty Alleviation, *The Real Estate (Regulation and Development) Bill, 2013, Standing Committee*, page 44.

developer raises a conflict of interest as to its function as a facilitator and the other as a developer. Further, more often than not, the actions of the government are underlined by political interests. Hence, it is not in the best interests of the consumers to leave the development of the project in the hands of the State or Union Territories.

As the issue directly affects the consumers, rules should be issued by the Centre framing the procedure to be followed in case of revocation of registration which might include procedure for an auction to be conducted by the Regulatory Authority or the respective government to allot the rights of development to an interested party.

Similarly, § 82 and 83 provide over-arching powers to the respective governments in terms of control, functioning and dissolution of the Regulatory Authority. Under § 82, the government on the grounds provided may dissolve the Regulatory Authority. It is contended that dissolution of a regulatory authority should not be on the whims and fancy of the respective government that may become the case when political interests of the ruling party is involved. Instead, an element of judicial scrutiny should be introduced for the dissolution of the Authority. This would safeguard the state

level Authority from the prevailing politics to some extent.

ISSUE OF AMBIGUOUS TERMS AND SCOPE OF THE ACT

Ambiguity prevails throughout the various provisions of the Act. The term 'Construction Execution Certificate' hasn't been defined in the act. The inclusion of the term 'Construction Execution Certificate' would have made the provision exhaustive, justifiable and would further ensure better development of the project and fix responsibility of the promoters/builders in clear terms. As it stands, the fate of § 14(1) is left to the judiciary if such an issue does arise.

Similarly, § 76(2) provides that the state may keep the money realised through way of penalties in a separate account on the discretion of the state. The Act does not specify what has to be done with the same. The amount could be appropriated for the compensating the allottees from out of the fine money and to pay the financing bank whose interests have been prejudiced due to the default of the promoter. It is hereby recommended that a provision regarding the same should be inserted in the act.

The ambiguity prevailing under § 14(1) to demarcate the scope of the act and the excessive

powers granted to the state under sections 8, 82, 83 and 84 should be immediately taken care of in the manner prescribed above or through any mechanism that the centre deems fit as any state regulatory body needs to be autonomous to perform to the best of its ability.

In view of the fact that several units have already been purchased under super built up area, it is recommended that an exemption Section should be added to § 4(h) of RERA

DILUTIONS IN THE ACT BY STATES

It has been seen that states have diluted and omitted various provision of the centre's act. This includes promoters' liabilities on structural defects, bringing ongoing project in the ambit of RERA, saleable area and so on. While, it can't be said that in every case, such dilutions would have negative impact on the real estate sector but such dilutions would certainly bring ambiguity which isn't healthy for the sector. For instance, Karnataka's Real Estate (Regulation & Development) Act provides that all on-going projects which are 60% complete or 60% of the sale deed is completed would not come under the scope of RERA.⁶⁵ Moreover, the act doesn't provide for an authority to get into if 60% of the

⁶⁵ Karnataka Real Estate (Regulation and Development) Rules, 2017 § 4(iii).

task is completed. This also raises a question over builder's right to receive 80% to 100% payments without providing. This is not in terms with the rules provided by the centre under RERA. Loopholes like this could nullify the objective of this act.

Maharashtra has departed from the essence of centre's act and has made an act which is slightly inclined in favor of the developers than the customers. This attitude can be attributed to the investment Maharashtra enjoys in this sector. Maharashtra alone accounts for 25% of the total investment in the real estate sector in the country.⁶⁶ Thus, it seems as the state government doesn't want to jeopardize the investment that it is receiving. While, this view can't be condemned outright, steps like these certainly add up to the ambiguity which isn't beneficial. For the act to achieve its aim, centre and states need to be on the same page.

CHALLENGES TO IMPLEMENTATION

The biggest challenge to this act is efficient implementation. In order to achieve the aims of

⁶⁶ The Associated Chambers of Commerce of India, *Construction and real estate investment: State-level analysis*, (26th July, 2017), <https:// ASSOCHAM.ORG/newsdetail.php?id=6278>.

RERA, the act should be implemented in true spirit or it would turn into another centre of corruption and delays.

It was found in a study that out of 2,300 construction projects which are under-implementation, 886 are encountering a delay of about 39 months. Most of these projects belong or housing and commercial sector. It should also be noted that 95 percent of such projects belong to private sector tenure.⁶⁷

Additionally, postponements and disagreement in withdrawal of sums may prompt cases endangering the tasks. Moreover, since, real estate sectors experiences rising prices very frequently, the tax rate applicable is in form of stamp duty. Now, this tax rate coupled with capital gains tax paves a way for tax evasion by the means of under-reporting of transaction price. This may lead to both creation and investment of black money.⁶⁸ The Act neglects to address the issue of investment through black money.

⁶⁷ *Ibid.*

⁶⁸ Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, New Delhi, *Black Money, White Paper*, (21st July, 2017), http://finmin.nic.in/sites/default/files/WhitePaper_BackMoney2012.pdf.

The act prescribes time limit for the adjudication process.⁶⁹ However, it should be noted that on similar lines, a time limit of 90 days was given in consumer courts dealing with real estate case but majority of the cases weren't disposed in the prescribed time. Hence, it is highly unlikely that time limits prescribed in RERA would work. The situation is made evident in case of Uttar Pradesh where around 15,000 complaints were lodged on the first day itself.⁷⁰

RERA provides for process to appoint real estate regulators but the onus is on the states to appoint an able official for the post. In order to fulfil the issue of objectivity and transparency, a person who isn't close to any promoter should be appointed for the post. The fact that the authority is more of an executive body than a judicial one, a well-designed set of norms should be laid out.

In order to implement this act proactively, all the prevailing local building control departments should record a list of ongoing

projects for onward communication to the Real Estate Regulating Authorities in their respective jurisdiction. By doing so, they would make the work of the RERA's quite easier.

Buyers, builders and legal advisors need to be well versed with the provisions of the act to make implementation of the act efficient. It can be achieved by providing training session and campaigns for both the customers and the developers.

CONCLUSION

It is undeniable that real estate is one of the most crucial sectors in Indian Economy. However, in recent years, the sector has been tainted due to various reasons. Real Estate Regulation Act, 2016 seeks to restore the charm of the sector. After analysing the act both on paper and ground level, we came to the conclusion that the act is certainly very promising. Nevertheless, a lot will depend on its implementation. One might argue that the act is excessively consumer-centric however, in current scenario where the balance is excessively tilted towards the realtors it is the need of the hour. The speedy redressal mechanism available in the act will restore the faith of the consumers and aggrieved in the sector and the harsh penalty provided in the act

⁶⁹ Real Estate (Regulation and Development) Act, 2016 § 29(4).

⁷⁰ The Times of India, *15,000 complaints flood UP Real Estate (Regulation And Development) Act, 2016 Site on Day 1, Pay Rs 1000 Fee Next Time*, (29th July, 2017), [http://timesofindia.indiatimes.com/city/noida/15000-complaints-flood-up-Real Estate \(Regulation and Development\) Act, 2016-site-on-day-1-pay-rs-1000-fee-next-time/articleshow/59781535.cms](http://timesofindia.indiatimes.com/city/noida/15000-complaints-flood-up-Real-Estate-(Regulation-and-Development)-Act,-2016-site-on-day-1-pay-rs-1000-fee-next-time/articleshow/59781535.cms).

shall deter all the interested parties from contravening the provisions of the act. One cannot claim that the act does not suffer from any legal lacunae, yet as the act is a first in its kind, it is certainly going to bring revolution in the sector if implemented in the truest sense.