Analysis of Dilutions of the Real Estate (Regulations and Development) Act 2016 by State Governments: A Case study

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Abstract:

This paper aims at analysing the Rules passed by the States in India for implementing The Real Estate (Regulation and Development) Act (RERA), 2016 passed by the Parliament. The law is passed to protect the interest of the consumers. However, many States have diluted the provisions of the law and notified the Rules. The provisions regarding the definition of on-going projects, payment schedule, liability for non-compliance, norms for escrow withdrawal have been diluted jeopardising the consumer's interest. In certain cases, the Rules lack clarity on these aspects. Whether the dilutions made by the States is within their power or not have been examined. The research paper analyses the shortcomings of the diluted Rules in favour of the developers and the steps to be taken by the central government to enforce the law in its true spirit.

Keywords:

The Real Estate (Regulation and Development) Act (RERA), non-compliance, escrow withdrawal

Background:

Real Estate sector in India is one of the fastest growing sectors contributing 10-11 % to the National GDP. It involves residential housing, retail, hospitality and commercial sectors.Residential housing projects contribute around 85 % of the Real estate market[1]. Sector is growing at the rate of 20 % which is projected to increase to 30 % by 2030. According to the report of the technical group of housing, India has a shortage of 18.78 million urban houses,thereby creating huge gap in demand –supply market. It is the second largest employment generating sector after Agriculture. Unprecedented growth in the real estate sector is mainly driven by strong growth in retail and service sector in the last decade. Continuous increase in population, rapid urbanization, growing income levels and increase in number of middle class nuclear families have fuelled the growth of real estate sector in India. Increasing the per capita income and strong policy support

[1]Rebooting Indian Real Estate sector , A twelve months Realty report card of the NDA Government , June 2015

from government is expected to push the real estate market from 126 billion USD in 2015 to 180 billion USD in 2020[2]

Government policies incentivizing both demand and supply side of the realty sector has also contributed positively to the sector. Schemes like Housing for all by 2022 and subsequent regulatory provisions in financial sector have given a big boost to the demand side. Refinancing of Housing loans by National Housing Banks and Credit Linked Subsidy Scheme (CLSS) with a budgetary provision of Rs. 1000 Crore in Union budget of 2017-18 may catalyze the growth in this sector. Also, extending the tenure of the loans under Pradhan Mantri Awas Yojana from 15 years to 20 years have made the housing affordable to a large number of higher middle class families. Under this flagship initiatives, government is committed to build 20 million houses in urban India by 2020. Increased tenure helped large number of middle class families to reduce the EMIS on housing loans, making homes affordable. Providing infrastructure status to the affordable housing in the union budget for the financial year 2014-15 provided a big boost to the supply side. Government also increased the financial limit of loan from Rs. 25,00,000 to Rs. 65,00,000 in metro cities and Rs. 50,00,000 in other cities providing necessary push to the demand side. However the growth in the Real Estate Sector is against the backdrop of several irregularities, which threatens to derail the growth story of the sector.

Lack of transparency and proper regulatory framework has resulted in number of malpractices and increasing litigations in this sector. As per the Consumer Complaints Report[3] there are large number of complaints of cheating, project delays, and delay in handing of the possession, false assurances about amenities and facilities, sale of disputed properties without clear tittles, biased agreements, overcharging and use of substandard materials for construction. Due to the absence of a robust regulatory framework leading to large number of violations, Indian Real Estate Sector is not considered major real estate market globally. Government of India is taking positive initiatives to bring in transparency in this sector by minimizing the menace of black money and serious irregularities in the real estate sector. To promote transparency and protect the consumer interests, The Real Estate (Regulatory and Development) Act, RERA was passed in May 2016[4]. However, several states had initially blocked or diluted this landmark law in favor of developer lobby and many states are delaying the notification to avoid the inclusion of ongoing projects under RERA.

[2]Building the Economy Block by Block , Real Estate and Infrastructure , National Real Estate Development Council (NAREDCO) – APREA – PWc , White paper , 13th October 2016

[3]National Consumer Helpline , Annual Report 2014-15 , Ministry of Consumer Affairs , Food and Public distribution

[4]RERA implementation , Special report , Business India , June 18 , 2017

In the present paper the various dilutions of the Law by State Governments and its implications to the various stakeholders including consumers are researched and highlighted.

Objectives:

The main objectives of the research work are :

- To study the state wise dilutions and violations of the various provisions of The Real Estate (Regulation and Development) Act (RERA) ,2016 passed by the Parliament.
- To study whether the RERA dilutes the legislative power of the State under the federalism.
- The implications of the dilutions or violations of RERA on consumers.

Methodology:

The research is based on the secondary data such as Gazettes of RERA passed by the Parliament and various State Governments, Consumer Complaints Reports and Loksabha Subordinate Legislation Committee Report.

Literature Review

The Real Estate (Regulation and Development Act, 2016) is a landmark law by the Government of India to bring transparency and good governance in the real estate sector, one of the promising sectors of the Indian economy. The main features of the RERA are that, all the projects above a certain size (Land area of 500 m2 or eight apartments) will have to be registered with the Real Estate Regulatory Authority. Builders need to share all the project approvals, project plan and layout, property tittles and timeline of the project completion with the consumers. Seventy percent of the amount received from the consumers is to be deposited in a separate account (escrow a/c) dedicated for the project and need to withdraw as per the expenditure incurred for the project. The last is a very important provision as the diversion of the funds was the important factor in delaying the project. Developer is liable for payment of penalty for delay in possession and jail term for violations under RERA.

Though, the framework of the RERA tightens the noose around the promoters fleecing the consumers, the Rules notified by the several governments have given a leeway to the builders. Considering that the State Government's Rules are diluting the RERA provision, a Parliamentary Committee has castigated three states for not including ongoing real estate projects under RERA. These States include Haryana, Uttar Pradesh and Gujarat. The states have been asked to comply with RERA by the Parliamentary Committee.[5]The Draft Rules of Haryana do not make it binding on the builder to make disclosure regarding

[5]http://www.thehindubusinessline.com/news/real-estate/house-panel-raps-states-for-diluting-rera/article9811454.ecelast accessed on September, 4, 2017

the specifications, approved plan and layout when the booking is done.[6] The Maharashtra Rules do not make it mandatory to make public the information received regarding the project and the promoter. A provision in the Maharashtra Rule is contrary to RERA that allows the formation of society of allottees once 51 percent of the flats are sold. The Maharashtra rules bind the builder to form the society when sixty percent of the members take possession.[7]

International Real Estate Laws

Few of the countries in the world have very transparent and robust regulatory framework. Dubai is the most favorite world real estate investment destination where most of the Real Estate Laws are managed by Dubai Land Department. Some of the global best practices in the real estate sector are followed in Dubai which makes it investor friendly market. Department has a Real Estate Regulatory Authority (RERA), Real Estate Investment Management and Promotion Center and Dubai Rental Dispute Center which bring about transparency and highest level of regulation managing consumer complaints. In United States, Department of Housing and Urban Development issues guidelines under Real Estate Settlement Procedure Act protecting the interest of the consumers and monitoring any violations by developers. However there is no federal regulatory authority but various states are empowered with Local State Real Estate Licensing Laws. In United Kingdom, the Financial Services Authority regulates the investment in the Real Estate Market. The Property Misdescriptions Act of 1991, protects the legal rights of the consumers. In China, which is world's fastest growing economy, The Real Estate Regulation Act of 2010 helps in regulating the Real Estate Market. The State Department of the Real Estate "New State 10" helps in regulating the pricing in the Real Estate Market. Any violations in the Real Estate sector are mostly settled through local laws.

Powers of State Government

The RERA passed by the Parliament grants powers to the State Governments to make rules for carrying out the provisions of the Act. The State Government can make the rules under section 84 of the RERA regarding the information and the documents required from the promoters and fees to be paid for the registration and real estate agents. However, the main features pertain to the power of making the rules regarding the rate of interest payable to the allotee when he intends to withdraw from the project or in case of false advertisement by the builder or failure of the promoter to give the possession of an apartment, plot or a building. The State Governments are empowered to make the model agreement which are to be compulsorily incorporated in the agreement.[8].

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[6] http://timesofindia.indiatimes.com/india/states-union-terrotories-dilute-rera-to-favour-realtors/articleshow/58451580.cms last accessed on September, 4, 2017

[7] https://housing.com/news/dilutions-threaten-reras-effectiveness/last accessed on September, 4, 2017

[8] Section 84 , The Real Estate (Regulation and Development) Act, 2016 , Gazette of India, Published on March 26, 2017

Punishment under RERA

RERA 2016 provides that a builder may face penalty up to 10% of the estimated cost of the project if his project is not registered[9]. If any promoter advertises and sells the units without registration,he may face imprisonment up to three years or fine up to ten percent of the cost of the project.[10] Providing false information or violating the provisions of the Act makes a builder liable to pay penalty up to 5 percent of the total cost of the project.[11]. A promoter is liable to face imprisonment up to three years or fine up to 10 percent of the cost of the project if he fails to comply with the order of the Appellate Tribunal.[12]A real estate agent may face jail term of one year or fine up to ten percent of the cost of the plot or the land if he violates the order of the Appellate Tribunal[13]

Federalism and RERA

After the passing of RERA, the issue of encroachment by Parliament on powers vested in the State to make the laws regarding real estate projects has come to fore. The earlier regulations regarding real estate projects were framed all over India by the States. The regulations were made under the powers vested under Entry 18 of the State List which provides for making of Laws relating to land, its improvement and colonization of the land. A Parliamentary Committee on Subordinate Legislation states that RERA has an overriding effect in case of conflict with the Rules made by State Governments. The Central Government has authority to repeal any State Law under Article 254(2) of the Constitution of India.[14]. According to the Central Government, The RERA is passed under Entries 6,7 and 46 of the Concurrent List . These entries provide for contract, registration of deeds and transfer of property. Hence, the validity of RERA passed by the Parliament may be challenged before the courts.[15].

By September 2017, only 17 states had notified the rules under RERA. These states include Andhra Pradesh, Bihar, Chhattisgarh, Gujarat, Haryana, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Odisha, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh, Uttarakhand, Himachal Pradesh and Telangana. Out of 29 states, only 17 states have notified the rules[16].Arunachal Pradesh,Nagaland,Sikkim and Meghalaya, where land is not privately owned, have so far refrained from notifying the Rules.

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[9] Section 59(1) ,The Real Estate (Regulation and Development) Act, 2016 , Gazette of India, Published on March 26, 2017

[10] Section 59(2) ,The Real Estate (Regulation and Development) Act, 2016 , Gazette of India, Published on March 26, 2017

[11]Section 60 , 61 The Real Estate (Regulation and Development) Act, 2016 , Gazette of India, Published on March 26, 2017

[12]Section 64 , The Real Estate (Regulation and Development) Act, 2016 , Gazette of India, Published on March 26, 2017

[13]Section 66 , The Real Estate (Regulation and Development) Act, 2016 , Gazette of India, Published on March 26, 2017

[14]Twenty - first report, Committee on Subordinate Legislation, Lok Sabha Secretariat , August 2017,Pg.26

[15]http://www.cuts-international.org/CART/pdf/Regulation_and_Development_Bill_2013.pdf last accessed on September 4, 2017

[16]http://apnarera.com/rera-states last accessed on Septermber 4, 2017

Discussion and Analysis on dilution of RERA

The RERA Rules notified by 17 states have examined and analyzed to find out whether any dilutions were made to favor the promoters of the projects. RERA provides a complete scheme to regulate the real estate projects with limited powers to the State Government to register and prescribe the fees including the drafting of model agreement to be followed by the parties. The aim is to find out the dilutions that have been made by the State Governments and the conflict arising between the parent Act and the delegated legislation that will lead to litigations. It is observed that the States have diluted RERA on the provisions stated below in Table. 1.

Sr. No.	State	Notification of RERA	Extensions for Project as per RERA	Ongoingproject	Time of Refund	Compounding of offence
1.	Kerala	2/05/2017	Extension depends on consent ofmajority of allottees	Notrequired to be registered	As per terms	Not exceeding maximum penalty
2.	Punjab	28/07/2017	Extension as per RERA	Diluted	90 Days	Up to 10 %
3.	Bihar	2/05/2017	As per the Local laws	Not Diluted	60 Days	10 %
4.	Karnataka	10/07/2017	As per the Local laws	Diluted	60 days	Up to 10 %
5.	Madhya Pradesh	22/10/2016	As per the local Laws	Not diluted	45 Days	10 %
6.	Rajasthan	02/05/2017	As per the local Laws	Not Diluted	45 Days	5 %
7.	Odisha	25/02/2017	As per the local Laws	Not diluted	45 Days	10 %
8.	Maharashtra	20/04/2017	Extension as per RERA	Not Diluted	30 Days	Not Mentioned
9.	Andhra Pradesh	27/03/2017	As per the local laws	Not Diluted	45 Days	10 %
10.	Uttarakhand	01/05/2017	As per the local laws	Not Diluted	45 Days	10 %
11.	Uttar Pradesh	27/10/2016	As per the local laws	Not Diluted	45 Days	10 %
12.	Himachal Pradesh	01/07/2017	No extension beyond 1 Year	Diluted	60 days	10 %
13.	Gujarat	29/10/2016	No extension beyond 1 Year	Not Diluted	45 Days	5 % subject to maximum 10 %
14.	Chhattisgarh	26/04/2017	As per the local laws	Not Diluted	45 Days	10 %
15.	Haryana	28/04/2017	No extension beyond 1 Year	Not Diluted	90 Days	5-10 %
16.	Tamilnadu	22/06/2017	As Per the local Laws	Diluted	90 Days	Up to 10 %
17.	Telangana	04/08/2017	As per the local laws	Diluted	90 Days	10 %

Table 1.: Dilutions of the provisions of the RERA by various State Governments

Source: Gazette Notifications of RERA by several State Governments

Extension for the completion of the projects: The RERA provides that no extension can be given to the project beyond one year. In the states of Bihar, Karnataka, Madhya Pradesh, Rajasthan, Odisha, Andhra Pradesh, Uttarakhand, Uttar Pradesh,Tamil Nadu, Chhattisgarh, and Telangana, the extension depends on time allowed for completion under its local laws, which defeats the spirit of RERA. In Kerala, extension for the project depends on the consent of the majority of the allottees. Even as the Central piece of legislation prevails, the States have meddled in the matter against consumer interest.

Ongoing Projects: A few states including Karnataka, Himachal Pradesh, Telangana, and Tamil Nadu have delayed notification of RERA Rules to keep on-going projects out of the ambit of RERA. However, a Lok Sabha Committee on Subordinate Legislation has noted that all the ongoing projects will be within the ambit of RERA when its relevant provisions came into force as the law made by the Parliament will prevail even though the States did not notify the Rules.[17]In Kerala ongoing projects are not required to be registered.

Projects covered: RERA, excludes projectnot exceeding 500 square meters of land and not having more than 8 units. However, Kerala is the only statethat has excluded the projects not exceeding 1,000 square meters of land and 12 units from the purview of registration under RERA. The projects whose carpet area is less than 3,000 square meters are exempted from the notified State Law. This provision punctures the claims of large number of consumers, whose buildings are constructed on size of plots less than 1,000 square meters of land. Kerala has clearly overstepped its brief even when the Central Law prevails.

Time of Refund: There is no uniformity in time of refund of the money or compensation to be payable in the Rules notified by the States. It varies from 45 days to 90 days.

Compounding of Offence: RERA empowers the States to compound the offences by fixing penalties to be paid by the promoters. Four States have fixed the penalty up to 10 percent of the cost of the project. Bihar, Madhya Pradesh, Odisha,Andhra Pradesh, Uttarakhand, Uttar Pradesh, Himachal Pradesh, Chhattisgarh and Telangana have fixed ten percent of fine in lieu of imprisonment. Rajasthan has fixed it at 5 percent .Gujarat and Haryana has fixed it between 5 percent to maximum ten percent. In Gujarat, the Rules empower the State Government to amend the quantum of penalty to be paid for compounding the offence. The different rates of penalty may not serve as a deterrent for violating developers across country.

Structure defect liability: All the States, except Kerala, have maintained that the promoter has to compensate the allottee if there is any structural defect in the project within 5 years from the completion of the project. In Kerala, the structural defect liability of the promoter is only for 2 years.

[17]Twenty - first report, Committee on Subordinate Legislation, Lok Sabha Secretariat , August 2017,Pg.26

Escrow Account The RERA stipulates that the 70 percent of the amount deposited in escrow account for construction of project can be withdrawn after it is certified by engineer, architect and chartered accountant. This withdrawal should be in proportion to the completion of the project. But, there is no provision in the RERA Rules issued by the State Governments to punish the professionals if they fraudulently certify that the work has been completed. There is no clarity on quantum of proportionate completion of the project. This can be manipulated by the promoters. The RERA authorities should have been empowered to decide before the start of the project, the manner in which money will be withdrawn after a particular phase of completion of the project that is to be certified by the professionals.

Considering all the RERA notifications issued by the 17 states, it is apparent that the compounding of the offence with up to ten percent of the cost of the project has made the RERA toothless in many States. This ten percent of the cost of the project may be a meager penalty when the cases drag on for number of years in the court while the real estate prices escalate.

The extension for completion of the project as per the local laws of the States dilutes the RERA provision restricting it to one year. The projects which are not completed on May 2, 2017 will be bound by RERA irrespective of the delay made by the States to notify the Rules. The consumers' interest is diluted mostly in Kerala as the RERA is even not applicable to the projects exceeding 500 square meters up to 1,000 square meters and also to the projects having carpet area of 3,000 square meters on a plot of less than 1,000 square meters. This will affect the allotees in highly urban areas. The structural defect liability of the builders is only for two years in Kerala.

Conclusions and Recommendations

Though powers of the States under RERA are limited, yet the States diluted the provisions while notifying the Rules that will defeat the purpose of law. In these circumstances, the Central Government has to come out with clear directives to achieve the objective behind the law. Merely giving warning that Central funds for housing projects in the States will be withheld will not serve the purpose. The promoters have already approached the courts challenging the powers of the Parliament to pass law on a subject which is in the State list. The court decision will have a bearing on allottee's rights. The Parliament should vest the powers in the Central Government to fix the penalty in case of compounding of offence .The real estate environment in the country can be made conducive for robust growth with adoption of laws that uphold the interest of the consumers instead of leaving them at the mercy of the builders. With strict regulations made by the State and Central Governments the real estate business has flourished in the developed countries. But in India, the Parliament's initiative to regulate this business has hit a roadblock due to the reluctance of the State Governments to follow the foot-steps of the Centre.