

Registration Intricacies under RERA

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Abstract

The precedents of RERA regime depicted that there was no real estate regulator to bind the builders/developers, thus making them negligent towards their responsibilities for buyers. Quality was compromised, funds were diverted, and delays were uncontrollable and above all the buyers did not have a specific landing resort where they could go to get their grievances addressed. The real estate segment has been a rebellious sector lacking control. The consumer complaints had shelter under Consumer Protection Act; however there was no specific legislation for early redressal of complaints in the real estate sector. Real estate is a mammoth industry, where affluent players have a high leverage over the buyers. The need to directly control and organize the project life cycle gave birth to RERA in India.

Keywords: RERA, RERA registration, Phase under RERA, Advertisement under RERA, Consumer protection under RERA.

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INTRODUCTION

The project life cycle constitutes various stages. It begins with approvals for commencement of the project and its registration with the regulating authority. Therefore, this becomes quintessential to understand and resolve the conflicts and controversies that might arise in the inception stage.

Section 3 of the Act dictates the requirement of registration under RERA [1]. Let us have look at the section which reads as:

“No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act.

“Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act.”

METHODS, DISCUSSION AND RESULTS

Prima facie reading of the section suggests that every ongoing project in the planning area is required to be registered within 3 months of commencement of this Act. But this must be organized in harmony with the section which says that only those ongoing projects require registration, which have started advertisement/marketing/booking by any means prior to introduction of RERA. Therefore, while interpreting any section along with its proviso, it should be kept in mind that the function of a proviso is to limit the main part of the section and carve out something which but for the proviso would have been within the operative part. Thus, it can be construed that the requirement of registration of the project in planning area will be triggered only when the entity wants to advertise/market/book/sell/offer for sell/receive advance money/invite customer by any means. So, the section covers entire gamut of activities. However, it may be important to note some key actions like financing either in the form of bank loan or other means and taking approvals required for commencement of the project from competent authorities, which may be taken prior to registration. Another important term referred to in the

aforesaid section is “planning area”. The Act requires registration of the projects within the planning areas as declared by the competent authorities. However, the Act also has the power to draft the provision that the authority may direct registration of projects outside the planning areas, if the Authority thinks it necessary.

Thus, the promoter can prolong the registration until initiation of the marketing activities. Further, if no marketing/booking is done till commencement of the Act, i.e., 01st May, 2016, for any under-construction project, one can categorize the project as a new project. The promoter will have to prove the grounds for registering as a new project by giving some proof like date of commencement certificate of the project. Also, there might be a possibility that the project was under construction pre RERA but intention to sell arose post RERA. In such a case, one has to ensure that no marketing is done, or the project has not been launched or no deposits/advances have been accepted from the customers. The receipts should not be camouflaged in the form of unsecured loans.

The aforesaid scenario arises where any project is developed for the purpose of self-utilization (hotel or multiplex) and not for the purpose of sale and later on after receipt of completion certificate the promoter decides to sell the same, whether the promoter would require taking registration under RERA for the purpose of sale? The provisions of the Act clearly state that any commercial or residential project intended to be sold by the promoter requires registration under RERA. Therefore, whenever the promoter intends to sell the project, he shall require registration under RERA, and he may register it as a new project subject to approval from the authority.

The project whose construction has begun prior to introduction of RERA and where the marketing/booking activities have also been initiated, there is needed to mandatorily register it as an ongoing project.

The promoter needs to first obtain registration before initiating any sort of marketing and until registration number is obtained, any

advertisement by any means should be kept on hold, say following ongoing marketing campaigns:

- SMS—Should be stopped
- Website—Should be blocked
- Hoardings—Should be covered or removed. One may even choose to have a below disclaimer on website:

The decision about registering a project in multiple phases or is a critical matter. Some of the essential factors to be kept in mind while evaluating the optimum option are listed below:

- ✓ **Amount of Penalty:** Generally, penalty gets levied on the estimated cost of the project. In case of phase-wise registration, the estimated cost will get limited to the area registered as a project (i.e. phase) under RERA. In case of default in obligations of any one phase, the entire project will not bear the cost.
- ✓ **Additions/Alterations in Plan:** The Act requires previous written consent of at least two-thirds of the allottees in case of any alterations or additions (other than minor additions or alterations as defined under Act) in the project plans and building specifications. In case of phase wise registration, the said requirement can be complied with more rapidly as the requirement of two-thirds of allottees will be limited to the phase rather than the project.
- ✓ **Timeline to Complete the Project:** The project completion needs to be provided at the time of registration of the project. In case of a single registration of entire project, any internal delay in the completion of different blocks/towers can be adjusted within the timeline of project completion, which is usually decided keeping certain contingencies in mind. In case of phase wise registration, the promoter is exposed to delays on multiple phases.
- ✓ **Project Accounting:** In case where the company maintains a single set of books of accounts of the entire project, the direct costs and the common expenses needs to be bifurcated amongst all the phases by taking proper basis in case if different registrations are taken for each phase.

- ✓ **Marketability of the Phases vis-a-vis Entire Project:** Marketing strategies would require restructuring in case of phase wise registration. Promoter needs to display separate RERA number for each phase on banners and hoardings, the document and plans for advertisement, social media marketing, etc.
- ✓ **Formation of Association of Allottees Phase-Wise:** The Act requires formation of an association of allottees and transfer of common areas within three months of issue of occupancy certificate. The requirement to create an association of allottees would be triggered on completion of each phase separately, thereby increasing the compliance burden and giving up the control over the part phase of the project at an early stage.
- ✓ **Cost factor, Cash Flow and Project Finance Requirement:** In case of phase-wise registration, a separate bank account needs to be maintained for each project (i.e. phase), as per the provisions. Once the project gets completed, the promoter can take control of the separate bank account and withdraw the balance amount from the same, once the phase is complete. However, in case a single registration for the entire project, there is a possibility that the funds may get blocked pending project completion, especially in scenarios where the project margin is more than 30%.
- ✓ **Implication under Income Tax, GST, etc.:** The concept of registering project in phases is only limited to RERA. For all other statutes, the entire project is offered for taxation and eligibility of benefits may have to be calculated considering entire project and not phase wise. However, now that RERA is considering each phase as a separate real estate project, one may think of taking the same stand in other statutes, if found beneficial.

The projects which are not required to be registered under RERA have been specified under Section 3 as below:

- ✓ Where the area of land proposed to be developed does not exceed 500 square meters or the number of apartments proposed to be developed does not exceed

eight inclusive of all phases. Both the conditions would have to be satisfied if one decides not to register the project

- ✓ Where the promoter has received completion certificate for a real estate project prior to commencement of this Act (01st May 2016)
- ✓ Renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building under the real estate project

However, some of the states have taken a view that even unregistered projects will be subjected to penal actions under RERA, if found requisite for consumer protection, which is the core objective behind the implementation of RERA [2,3].

Typical Structures in Real Estate Projects and Issues Affecting Them

In the model of joint development agreements (JDA) the land owner/(s) contributes his land, for a pre-determined share of area to be developed or share of revenue and provides development rights to the developer/(s), who with his resources, efforts and skills develops the project. Joint development arrangements are found to carry some complexities as RERA does not explicitly throw light on the same. The moot question is whether all parties in a JDA are required to register themselves as promoter/co-promoters. Typically, it is the developer who drives the project and the land owner is only playing a passive role by allowing developer to enter his land. Does this mere permission would make him fall in the trap of words “Causes to Construct” as referred to under section 2(zk) as?

“promoter” means

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees.

Different states have opined below:

State	Legal Reference	Clarification
Gujarat	Circular 2/2017 dated 29 th July, 2017	Area Sharing Model/Revenue Sharing Model: ✓ The agreement between the promoter and each of the co-promoters shall clearly lay down the entity which is principally or primarily responsible for completion of the real estate project. ✓ The copy of such agreement or arrangement is required to be uploaded at the time of registration of the Real Estate Project [4]
Maharashtra	Circular 12/2017 dated 04 th December, 2017	Area Sharing Model/Revenue Sharing Model : ✓ Landowners or investors shall be specified as such at the time of online registration of the project. ✓ For the purpose of withdrawal from the designated bank account of a real estate project, the obligations and liabilities of all such promoters shall be at par with each other. ✓ A copy of the written agreement or arrangement between promoters (whether landowner or investor) which clearly specifies and details the rights and shares of each promoter, should be uploaded on the website ✓ Such landowner promoter and investor promoter should also submit declaration in Form B (Declaration, supported by an affidavit) ✓ Each such landowner promoter or investor promoter, who is entitled to a share of the total area developed, should also open a separate bank account for deposit of 70% of the sale proceeds realized from the allottees of their share (<i>This point is specifically for Area Sharing Model</i>) [5]
Maharashtra	Final order dated 26 th March, 2018 – <i>Shakuntala Omprakash Zanvar Versus Vishwajeet Jhavar, Nitin D. Nyati</i> by Maharashtra Real Estate Regulatory Authority, Pune.	✓ Both the promoters and land owners shall be deemed to be the promoters and shall be jointly liable as such for the functions and de-functions specified. The land owner cannot escape the liability pointing out the breach of agreement alleged to have been made by the developer while developing his land [6].
Goa	Circular 11/35/2017-DMA/3390(A) dated 13 th August 2017	Area Sharing Model/Revenue Sharing Model: ✓ Landowners or investors shall be specified as such at the time of online registration of the project. ✓ For the purpose of withdrawal from the designated bank account of a real estate project, the obligations and liabilities of all such promoters shall be at par with each other. ✓ A copy of the written agreement or arrangement between promoters (whether landowner or investor) which clearly specifies and details the rights and shares of each promoter, should be uploaded on the website ✓ Each such landowner promoter or investor promoter, who is entitled to a share of the total area developed, should also open separate bank account for deposit of 70 percent of the sale proceeds realized from the allottees of their share (<i>This point is specifically for Area Sharing Model</i>) [7].

Another complex structure in real estate industry is that of lease. The disputable matter is whether in this structure, the lessor can be held as a promoter and whether the lessee enjoys equal rights as that of an allottee? Whether the projects which are being developed for the purpose of leasing and not selling, are covered under RERA? Are both long-term and short-term leases covered under RERA?

If lease is kept outside the purview of RERA, it might become a tool for shirking from the responsibilities. The duties of promoter as defined under Section 11 clearly lay down that the projects which are being developed on a

leasehold land will also be covered within RERA. Further, for the projects which are not sold and given on lease, Bombay High Court in the case of *Lavasa Corporation Limited vs. RERA Authority* has clarified that the long-term lease (in the given judgement lease period was of 999 years) will be covered under the purview of RERA. Once any project gets registered under RERA, the lessee enjoys equal rights as that of an allottee. Although the question as to which type of leases can be considered as Long Term has been a debatable matter [8].

Under the Income Tax Act [9], a lessee is treated as a deemed owner of the house if the

lease is for 12 years or more (whether originally fixed or provision for extension exists); lessee is deemed to be the owner of the property. Therefore, the lease equal to or above twelve years may be construed as a long-term lease. The matter of short-term lease to be covered under RERA or not is still a grey area. Thus, the state authorities need to give more clarity on this model.

CONCLUSIONS

There are many more aspects of this legislation which shall receive clarity with time in the form of circulars, notifications and judgements. The ambiguities can be addressed by keeping in mind, the ultimate essence of bringing the legislation into force, i.e. enhancement of transparency and accountability in this unregulated sector.

DISCLAIMER

Thank you for visiting our website. We are currently in the process of revising our website in accordance with the RERA and the Rules made under.

Until our website is duly revised and updated, none of the images, material, stock photography, projections, details, descriptions and other information that are currently available and/or displayed on the website, should be deemed to be or constitute advertisements, solicitations, marketing, offer for sale, invitation to offer, invitation to acquire, including within the purview of the RERA.

You are therefore requested to directly verify all details and aspects of any proposed booking/acquisition of units/premises, directly with our authorized representatives. The user must verify all the details and specifications, including but not limited to the location, sizes, amenities, specifications, services, terms of sales, payments, delivery dates, and all other

relevant terms independently with our sales team prior to concluding any decision for buying any unit in any of our projects/developments.

Please note that we will not be accepting any bookings or allotments based on the images, material, stock photography, projections, details, descriptions that are currently available and/or displayed on the website. We thank you for your patience and understanding.

REFERENCES

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2. Website of various real estate groups.
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4. Circular 2/2017 dated 29th July, 2017 of Gujarat RERA.
5. Circular 12/2017 dated 04th December, 2017 of Maharashtra RERA.
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