

SAMVĀD: PARTNERS

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THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

This is an update on the Real Estate (Regulation and Development) Act, 2016 (the “**Act**”), which was notified in the Official Gazette on 26.03.2016.

The purpose of the Act is to regulate and promote the real estate sector by ensuring efficiency and transparency in sale of real estate projects (“**Project**”), and to protect the interests of consumers in the real estate sector. In this behalf the Act proposes to establish the Real Estate Regulatory Authority (the “**RERA**”) and a speedy dispute redressal mechanism through the RERA and the Appellate Tribunal established thereto.

The Act regulates Projects undertaken for both commercial and residential purposes, and imposes a plethora of stringent obligations on the promoter/builder (the “**Promoter**”). Real estate agents and the buyers/customers (the “**Allottee**”) are also regulated.

Obligations of the Promoter

The Promoter is defined as a person who constructs any Project, and includes any person who acts as a builder, colonizer, contractor, developer, estate developer, or constructs any building or apartment, for sale to the general public. For the purposes of the Act, a Project would include any independent building or a building consisting of apartments, or land developed into a Project for the purpose of selling to other persons.

Section 3 of the Act states that it is mandatory for the Promoter to register the Project with the RERA before advertising, marketing, booking, selling or offering for sale, or inviting persons to purchase the apartment or building in any manner. The obligation to register extends to ongoing Projects, and must be satisfied within 3 (three) months from the date of commencement of the Act. Further, if the Project is to be developed in phases, each such phase is considered as a separate Project and hence, the Promoter has to separately register each such phase under the Act. However, there are exemptions from registration for (i) small Projects (up to 500 sq. m. or 8 apartments), (ii) Projects for which completion certificates have been received before commencement of the Act and (iii) renovations or repair which does not involve marketing or sale.

Registration requires information disclosures from the Promoter, including, amongst others, the carpet area of apartments for sale and areas of exclusive balconies, verandahs or open terraces – if any. Also required is a declaration, supported by affidavit, stating, amongst others, the time period within which the Promoter undertakes to complete the Project. The Project registration is valid only for such tenure. The registration may be renewed for a further period not exceeding 1 (one) year under reasonable circumstances and in a *force majeure* scenario, provided that there is no default on the part of the Promoter. It is pertinent to note that *force majeure* is restricted to war, flood, drought, and such other natural calamities and excludes any form of ‘controlled situations’ that may affect construction.

A range of financial controls have been imposed on the Promoter (noteworthy provisions are summarized herein). The Promoter must maintain a separate account (“**Project Account**”) in a scheduled bank in which 70% (seventy percent) of the amounts obtained from the Allottees, from time to time, must be deposited. The amount deposited in the Project Account is to cover the cost of construction and the land cost and is to be used only for such purpose. The amount to be withdrawn from the Project Account is to be in proportion to the percentage of completion of the Project, upon prior certification by an engineer, an architect, and a chartered accountant that the withdrawal is in proportion to the percentage of completion of the Project. The Promoter is obliged to get his accounts audited within 6 (six) months after the end of every financial year by a practicing chartered accountant and must produce a statement of accounts duly certified and signed by such accountant. The audit must verify that the amounts collected for a particular Project have been utilized for such Project and the withdrawal has been in proportion to the completion of the Project.

A Promoter cannot accept an amount more than 10% (ten percent) of the cost of the apartment or building as an advance payment from an Allottee, without entering into a written agreement for sale with such Allottee registered in accordance with applicable laws.

Once the agreement for sale is executed, the Promoter is prohibited from mortgaging or creating a charge on the apartment, plot or building; and if any such mortgage or charge is created, it shall not affect the right and interest of the concerned Allottee.

The range of financial controls imposed on Promoters in the Act should have a vicarious effect on lenders to Promoters and act as hedges to financing risks. Reduced risks increase the pool of financiers willing to lend to Promoters, while simultaneously reducing financing costs, all of which ultimately benefits Allottees.

Where an Allottee pays an advance or deposit to the Promoter on the basis of information contained in an advertisement or prospectus or on the basis of a model apartment, and such Allottee suffers losses by reason of incorrect/false statements, it is incumbent on the Promoter to compensate such Allottee. If the injured Allottee

intends to withdraw from the Project, the Promoter is bound to return his entire investment together with interest and to compensate such Allottee in accordance with the Act. Therefore, the Act endeavors to punish Promoter's misrepresentations and to remedy the Allottee's loss of expectation.

The Act obliges the Promoter to complete the Project in accordance with sanctioned plans, layout plans, and specifications approved by competent authorities. After such plans are disclosed to the Allottee, any alterations to such plans can be made only on obtaining the prior consent of the Allottee. The Promoter is duty bound to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the competent local authority and to make it available to the Allottee. It may be understood that the Promoter cannot transfer physical possession of the Project without obtaining the completion certificate and occupancy certificate – an important change and contrary to prevailing practices.

Where the Promoter fails to complete the Project or is unable to transfer possession of the apartment or building in accordance with the terms of the agreement for sale, or has discontinued its business due to suspension or revocation of the Project registration under the Act, such Promoter is bound to return the amount paid by the Allottee, on demand of the same, with interest and compensation as prescribed under the Act, to such Allottee. In case the Allottee does not demand the amount, the Promoter is to pay interest for every month of delay till the apartment or building is handed over to the Allottee. The Promoter is to also compensate the Allottee if any loss is incurred by the Allottee due to defective title of the land and the right to claim such compensation is not time barred. It is imperative to note that compensation for defective title is distinct from the obligation to refund money for non-completion.

The Act provides for a defect liability period. If a structural defect or any other defect (in workmanship, quality or provision of services) or any other obligation of the Promoter as per the agreement for sale is brought to the notice of the Promoter within a period of 5 (five) years from the date of handing over possession of the apartment or building, the Promoter is duty bound to rectify such defect without any charge within a period of 30 (thirty) days. Failure to rectify the defect entitles the aggrieved Allottees to compensation under the Act. This will bring about a level playing field and reduce the Promoter's bargaining power at the time of execution of the contract.

We understand that a single window clearance system for time bound Project approvals and clearances is being proposed under the Act. Also, a proposal for digitization of land records is under consideration. This will boost efficiency and assist Promoters in meeting timelines specified under the Act.

The RERA is empowered to revoke registrations under the Act *suo motu*, on receipt of a complaint, or on the recommendation of the competent authority. Registration may be revoked if the Promoter (i) defaults in doing anything required under the Act,

(ii) violates any of the terms or conditions of approval given by the competent authority, or (iii) is involved in any kind of unfair practice or irregularities. 'Unfair practices' include, for example, the Promoter making false representations to customers for the purpose of promoting the sale of a Project. On revocation of registration of a Project, the RERA may direct the scheduled bank, where the Project Account is maintained, to freeze the Project Account and to take further actions toward facilitating remaining development on the Project in accordance with the Act.

Where registration is revoked or lapsed, the RERA must facilitate the remaining development works to be carried out in accordance with the Act. The RERA may consult the government to take such action as it may deem fit, including carrying out the remaining development works by a competent authority or by the association of Allottees (who enjoy a first right of refusal for carrying out remaining development works).

Obligations of the real estate agent

It is mandatory for a real estate agent to register with the RERA before facilitating any sale or purchase of any apartment or building registered under the Act. Every registration is valid for a prescribed period and is renewable.

Section 10 of the Act imposes a set of duties on registered real estate agents, including: (i) not facilitating the sale or purchase of any apartment or building in a Project if such Project is not registered with the RERA, (ii) not being involved in any unfair trade practices and (iii) facilitating receipt of all information and documents as the Allottee is entitled to at the time of booking a plot, apartment or building.

Obligations and entitlements of the Allottee

The Act empowers the Allottee with a wealth of information on Projects. The Promoter is obliged (under Section 11 of the Act) to create a web page on the website of the RERA and to enter all details of the proposed Project for public viewing. This includes (but is not limited to) quarterly up-to-date information on a range of deliverables such as number and type of apartments booked, list of approvals taken and pending, and status of the Project. An Allottee is further entitled to obtain all information with respect to the Project including the sanctioned plans, layout plans, specifications, and the stage-wise schedule of completion of the Project including provision of water, sanitation, electricity, and amenities, as agreed in the agreement for sale with the Promoter.

The Allottee has certain obligations under the Act and is responsible to make all the payments as per the agreement for sale and must share the cost of registration, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any, with the Promoter. If there is any delay in making such payments, the Allottee is liable to pay interest on the amount due. The Act provides

flexibility to the Promoter and Allottee to reduce the rate of interest due on the delayed payments.

An Allottee is required to take physical possession of the apartment or building within 2 (two) months of the occupancy certificate being issued.

Penalties

The Promoter is liable to pay a sum that may extend to 10% (ten percent) of the estimated cost of the Project for failing to register the Project as per Section 3 of the Act. In case the Promoter provides false information, he is liable to a penalty which may extend to 5% (five percent) of the estimated cost of the Project. For the contravention of any other provision of the Act, apart from registration and all the undertakings in the application for registration, the Promoter is liable to a penalty which may extend to 5% (five percent) of the estimated cost of the Project.

If a real estate agent fails to register or contravenes any of his duties as per the Act, he shall be liable to a penalty of Rs. 10,000/- (Rupees ten thousand only) for every day of default which may cumulatively extend to 5% (five percent) of the cost of the apartment or building of the Project for which the sale has been facilitated.

An Allottee who fails to comply with any orders of the RERA, shall be liable to a penalty which may cumulatively extend to 5% (five percent) of the cost of the apartment or building bought by such Allottee.

Appeals

The Act stipulates that questions that come before the RERA must be dealt with “as expeditiously as possible” and must be disposed within 60 (sixty) days from the date of receipt of the concerned application (with reasons to be recorded in writing if disposal does not occur within the said period). Appeals from the directions of the RERA lie to the Appellate Tribunal and such appeals must also be dealt with expeditiously, though it is sufficient if the Tribunal “endeavors” to dispose of the appeal within 60 (sixty) days of the date of receipt of the appeal.

Conclusion

In conclusion, the Act is an attempt by the legislature to re-set the balance of power between the Promoter and the Allottee by imposing various obligations and controls on the Promoter. The Act also endeavors to bring about much needed transparency and accountability in the execution of Projects, which should induce greater investment into the real estate sector, particularly foreign investments.

****This is an update for general information purposes only and does not constitute legal advice. Should you have any queries please write to us at infosamvad@samvadpartners.com.***

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