

human beings they have to be taught at school level to bring back this country on correct track of progress. So long as corporate mafia is dictating terms to many politicians the values of democracy will be gone on winds. Time to think youth should come forward in politics also.

The National Judicial Appointments Commission Act is aimed at clip the wings

of Judiciary. It is being struck down by the apex Court with 4-1 majority. So many issues are pending to resolve to lawmakers and it is better to think about good governance instead of intruding on the powers of Judiciary. It is true that many lower Court Judges are not appointed by High Courts, the reason is work pressure due to long pending vacancies in these constitutional Courts.

REAL ESTATE (REGULATION & DEVELOPMENT) ACT, 2016 — AN OVERVIEW

By

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The Real Estate (Regulation and Development) Act, 2016¹ (Hereinafter referred to as the 'Act' for the sake of brevity) came into force on 1st May, 2016 with 69 out of the total 90 sections notified by the Ministry of Housing and Urban Poverty Alleviation, Government of India.

The Act is perceived as a significant step towards ensuring better protection of home consumers by clearly delineating the standards of realtor services and business practices in the realtor sector. The Act aims to reform and regulate the Real Estate Sector by clearly defining the rights and obligations of the realtors as well as home consumers for facilitating the healthy growth and development of the Real Estate Sector. Further, the Act seeks to foster and promote transparency, accountability and level playing field in the Real Estate Sector by putting in place a workable and effective regulatory mechanism to address several ills and deficiencies afflicting the sector. The Act seeks

to enable and empower home consumers to get their grievances redressed in an inexpensive, expeditious and time bound manner against the realtors. The Act puts in place a pragmatic legal framework for facilitating informed purchasing choices of home consumers and therefore, it is undoubtedly a game changer in the Real Estate Sector. Hence, the Act is expected to boost the confidence of consumers and further encourage honest realtors by striking a perfect balance in between the rights of the home consumers and the realtors. Though this Act can't be described as the panacea for all the ills afflicting the Real Estate Sector yet it can reasonably be considered as a catalyst in promoting the healthy growth and development of the Real Estate Sector by striking a perfect balance in between the rights of realtors and home consumers. The Act doesn't supplant the remedies available to home consumers under the Consumer Protection Act, 1986 as it apparently provides additional remedies to home consumers.

1. Act No.16 of 2016, published in the Gazette of India on 26.3.2016. Land, rights over land and improvements fall under Entry 18 of The State List of the Schedule VII of the Constitution of India. However, Parliament has legislative competency to enact the present legislation under Entry 7 of the Concurrent List of the Schedule VII, dealing with regulating contracts and transfer of properties.

1. *Aims and Objectives of the Act*

The long title of the Act clearly envisages that the aims and objectives behind this enactment are:

To establish the real estate regulatory authority for regulation and promotion of the Real Estate Sector,

To ensure sale of plot, apartment or building or sale of real estate project in an efficient and transparent manner,

To protect the interests of consumers in the Real Estate Sector and

To establish adjudicating mechanism for ensuring expeditious disputes redressal mechanism and further to establish the appellate Tribunal to hear appeals from the decisions of the regulatory agency and adjudicating officer.

2. *Highlights of the Act*

The Act contains several innovative features by making a radical from the existing enactments on the subject and therefore, it can definitely be acclaimed and applauded as a trend setting piece of legislation, aimed at promoting and sustaining healthy, efficient, vibrant and competitive functioning of Real Estate Sector to fulfil the needs of all the stakeholders. Some of the novel features of the Act are:

I. Establishment of Sectoral Regulators

The Act mandates the establishment of Real Estate Regulatory Authority in each State and Union Territory by the Appropriate Government and Real Estate Appellate Tribunals in all States and Union Territories.² The regulators are expected to ensure transparency and accountability in the sector and further to promote informed choice of home consumers through the process of mandatory registration and maintenance of

data base of real estate projects and making easy accessibility of the full and comprehensive information of every registered real estate project on their websites for Public viewing. The Act makes it mandatory for registration of every real estate project with the Real Estate Regulatory Authority, when the total area of land proposed to be developed exceeds 500 square meters or where more than eight flats are proposed to be developed.³ Further, the Act requires every phase of a project to be registered separately as a stand a long project. Even the existing projects which have not received Completion Certificate as on the date of commencement of the Act are required to procure registration with the Regulatory Agency within 3 months of commencement of the Act.⁴

II. Compulsory Registration of Agents:

The Act mandates compulsory registration of realtor agents with the Regulatory Agency prior to commencement of sale or purchase of a plot or apartment or building. Further the Real Estate Agents are prohibited from facilitating any sale or purchase of a plot/apartment/building in a real estate project without securing their registration with the Regulatory Agency.⁵ The agents are duty bound to facilitate easy access of project information to consumers at the time of booking of a flat or plot and further refrain from making false, misleading and unfair representations through any means. A registered Real Estate Agent is prohibited from engaging in the sale or purchase of a plot/apartment or building in an unregistered real estate project. Realtor agents are made explicitly liable for any deficiency in their services and also for making false and misleading statements for manipulating the informed choices of home consumers.⁶ Thus

3. See Section 3 of the Act

4. Ibid

5. See Section 9 of the Act

6. See Section 62 of the Act

2. See Sections 20 and 43 of the Act

for the first time the realtor brokers have been explicitly brought under the regulatory scanner in order to make them accountable for their deficient acts and omissions.

III. Service Deliverables:

The Act not only delineates the components and standards of realtor service deliverables to be made by the promoters for the benefit of the home/plot consumers and association of allottees but also prescribes definite time frames for the delivery of the same. Thus the Act makes an earnest attempt towards promotion of standardization of realtor services and thereby lessening the scope for unnecessary disputes in between the realtors and home consumers.⁷

IV. Warranties:

The Promoter is mandated to declare his legal title to the project land or authenticate validity of title, if such land is owned by another person. The promoter is also required to obtain insurance of title and building alongwith construction insurance.⁸ Consequently, home consumers have been relieved from the burden of holding painstaking inquiries to ascertain the nature of title of realtors over the project land as this burden has been fixed on the latter.

V. Promotes informed choice of Consumers:

The right of a consumer to exercise his/her informed choice for purchase of a flat or plot would invariably hinge upon the disclosure of full and complete information by a realtor. In fact, the disclosure of such information is the very edifice of the right of a consumer to exercise his or her informed choice. However, in the past the right of home and plot consumers to take informed decisions has been stifled in most of the cases due to want of proper

regulatory mechanism and lack of access to vital information. In contrast to this, the Act facilitates and ensures the exercise of informed choice by a home consumer by ensuring easy access to all the vital information. The Act mandates every promoter of a realtor project falling within its purview to disclose the full and complete details of the project alongwith time frame for its completion, quarterly related disclosures as to number of bookings, advance amount received *etc.*⁹ All such information must be freely accessible to the consumers on the website of the regulatory agency concerned in order to facilitate the informed choice of consumers. It is very interesting to notice that no promoter shall advertise, book, sell, market or invite either by himself or through any one for inviting persons to offer for purchase of flats or sale of apartment, plot or building without firstly registering his or her real estate project with the regulator concerned by disclosing all the pertinent information.¹⁰ Thus this Act contains inbuilt provisions for facilitating the informed choices and decisions of home and plot consumers.

VI. Cap on Receipt of advance amount and withdrawal of receivables.

The Act mandates that a promoter cannot accept more than 10 per cent of the cost of the plot, apartment or building as an advance payment by way of application fees from a home or plot buyer without first entering into a written agreement of sale with such person and further only after registering the said agreement of sale with the authority concerned as per laws in vogue.¹¹ What is more interesting and gratifying to notice is that even skeleton formats of allotment letter, agreement of sale and deed of conveyance must be displayed on the website of the regulator at the time of the

7. See Sections 13 to 18 of the Act

8. See Section 16 of the Act

9. See Section 4(2) of the Act

10. Supra note 3

11. See Section 13 of the Act

registration of realtor project by the promoter. Hence, it will definitely enable consumers to exercise their informed choices apart from promoting standardization of documentation leading to mitigation of frivolous and vexatious litigation in between consumers and realtors. Thus, one could safely assume that the Act is definitely a game changer in the Real Estate Sector and further narrows down the scope for arising of disputes and differences in between the consumers and the realtors.

VII. Time Bound Resolution of Disputes

The Act provides for the time bound resolution of complaints and disputes arising in between the consumers and promoters of realtor projects by the regulatory agencies and the Real Estate Appellate Tribunals.¹² It further provides for refund of amounts paid by consumers alongwith interest and compensation upon the failure and default of the promoter to give possession of the apartment in accordance with the benchmarks and time frame set out in the agreement of sale.

VIII. Wide Ambit and Amplitude of the Act:

The Act extends its benevolent provisions not only to the original buyers of apartments, plots or buildings but also to any person, who purchases apartment, plot or building from such original allottees.¹³ Thus this Act has obviously done away with the anachronistic principle of “privity of contract” by empowering even a second and subsequent purchaser of a flat or plot or building to initiate action against the erring realtor. The promoter is further mandated to deposit 70% of the amount realized from the allottees in an escrow account, maintained in a scheduled Bank to cover the cost of construction and the land cost and the

amount must be used for that purpose only.¹⁴ The amount to be withdrawn periodically should be in proportion to the percentage of completed project and that too after necessary certification to the same effect by an Architect, Chartered Accountant and Engineer. This will definitely be helpful in preventing delay in completion of project and further ensure that funds meant for one project are not diverted by the promoters for other activities and purposes. However, this may push the promoters to borrow funds from the external agencies at a higher interest resulting in the escalation of cost of capital for home projects and which in its turn will invariably be passed on to the home consumers.

IX. Lucid definition of litigation generating words:

An objective analysis of most of the disputes arising in between realtors and consumers would invariably pinpoint that the preponderant of litigation was centred on the determination of the true meaning and contours of certain key words and phrases that include *inter alia*: Advertisement,¹⁵ carpet area,¹⁶ common areas,¹⁷ rights and obligations of promoters and consumers. The Act lucidly delineates and explains all these words and expressions in an unambiguous and lucid manner so as to minimize the scope for arising of disputes or differences in between consumers and realtors. Hence, it is reasonably expected that the implementation of the Act will definitely mitigate frivolous litigation to a greater extent.

X. Deterrant against errant promoters:

The Act prohibits promoters of realtor projects from creating any charge or encumbrance on any apartment after executing an agreement for the same in favour of an allottee.

12. See the definition of ‘Allottee’ in Section 2(d) of the Act

13. See Section 4(2)(1)(D) of the Act

14. See Section 2(b) of the Act

15. See Section 2(k) of the Act

16. See Sections 31 and 43 of the Act

17. See Section 2(n) of the Act

It further makes it crystal clear that in the event of creation of any charge or encumbrance on any apartment by the promoter subsequent to the execution of any agreement of sale on such apartment, then it will not affect the rights or interests of the allottee concerned in any manner.¹⁸ Further, promoters are prohibited from altering plans, structural designs and specifications of the land, apartment or building except with the prior consent of 2/3rd of the allottees.¹⁹ Thus the Act upholds the sanctity of approved and circulated plans, structural designs and specifications of land except in the rare cases and that too with the approval of the 2/3rd of the allottees. Similarly, the promoters are not permitted to transfer or assign majority of rights and liabilities in a project without the consent of 2/3rd of the allottees and with the prior written approval of the Real Estate Regulatory Authority concerned.²⁰ The promoter's liability for defects and deficiencies in title over the land forming a part and parcel of the realtor Project is explicitly made perpetual.²¹ The promoter shall also be made liable for 5 years from the date of handing over of the possession of flat or building for any structural defects and other deficiencies in the workmanship or quality or provision of any service.²² Thus this Act undoubtedly gives better protection to consumers by making a serious departure from the existing enactments dealing with the obligations and liabilities of promoters of realtor projects.

XI. Stringent penalties:

The Act makes the cost of non-

compliance with the regulatory mechanism very costly and deterrent in order to ensure better and effective compliance. Sale of plot/apartment or building in a realtor project without registration with the regulatory agency shall entail a penalty of the ten percent of the total cost of the real estate project and if such contravention is of continuous nature then it may even entail punishment of three years.²³

XII. Even handed approach:

The Act strikes a perfect balance in between the rights of the promoters and the allottees by treating them on equal footing without any discrimination whatsoever. The allottees are duty bound to make their contributions and perform their commitments as per the time frames mutually agreed. A statutory duty has been cast on the allottees to pay interest in the event of any delay in the payment of their contributions and charges for provision of services and for breach of terms and conditions of the sale agreement.²⁴ Penalties can also be slapped on the allottees in the event of non-compliance with the orders of the regulatory agency or the appellate Tribunal.²⁵ Thus it is crystal clear that an aggrieved realtor promoter shall have a right of action against an erring allottee for recovery of outstanding dues and interest for the delayed payments.

Lowlights of the Act:

(a) *Single Window clearance:* The Act has not done away with the existing dilatory and cumbersome system of mandating a promoter of a realtor project to get approvals and sanctions from multiple agencies resulting in unconscionable delays in the execution of projects and cost escalation. Mandating a promoter of realtor project to seek approvals from multiple agencies for

18. See Section 11(4)(h) of the Act

19. See Section 14(2) of the Act

20. See Section 15 of the Act

21. See Section 18(2) of the Act. Thus it is very clear that the Act negates limitation period prescribed under the Limitation Act, 1963 by making the promoter liable permanently for tile defects in the land.

22. See Section 14(3) of the Act

23. See Section 59 of the Act

24. See Section 19(7) of the Act

25. See Sections 67 and 68 of the Act

launching his or her project has always been found to be a big stumbling block to the healthy growth and development of the Real Estate Sector, apart from resulting in dilatory delays and cost escalation. This problem can be addressed effectively by introducing a Single Window clearance for formal commissioning of realtor projects as it will be immensely useful for the healthy growth and effective functioning of the Real Estate Sector, apart from scaling down of unnecessary costs. However, the Act simply envisages that the regulatory body may suggest and recommend to the Appropriate Government for introduction of such Single Window clearance as and when it deems fit and proper.²⁶ Even if such recommendation is made yet it is not binding on the Government. Hence, it is suggested that instead of making an ineffective vague provision like the present one on the Single Window clearance, the Act ought to have made a definite provision for the introduction of Single Window clearance at the earliest by dispensing with the present system of obtaining clearance from multiple agencies resulting in the cost escalation of realtor projects apart from unconscionable delays in the execution of projects.

(b) *Promotion of level playing field in between big players and SMEs.* Small and medium enterprises and individuals operating in the realtor sector can't be expected to compete with big players operating in the realtor sector as the latter are invariably endowed with better financial resources, operational systems and talented human resources. If the cost of complying with the regulatory mechanism is made uniform in regard to the big and small players then it will invariably lead to the elimination of small players and abuse of dominance by the dominant entities in the sector. Therefore, it is imperative that the cost of regulatory compliance by the SMEs and individual players operating with

small and medium resources should be made inexpensive and relatively relaxed in order to enable them to compete with the dominant players to engender a level playing field and competitive environment in the sector. The creation of such safety nets for encouraging small and medium players is desirable to foster healthy competition in the sector.

Conclusion:

The Act is undoubtedly a progressive piece of legislation as it contains several novel and innovative provisions for striking a perfect balance in between the interests of promoters of realtor projects and home consumers. The effective and efficacious implementation of the Act will invariably lead to increasing levels of transparency, accountability and level playing field in the Real Estate Sector. It also puts in place effective and efficacious forums for redressal of grievances of aggrieved persons and therefore, the implementation of the Act will lead to lowering of disputes in between the promoters and home consumers. Time bound approvals for registration coupled with deemed approval clauses and transparency and accountability in the functioning of regulatory agencies established at the State level will definitely attract more investment both domestic and foreign into the sector.

However, it is still depressing to notice that the Act has not done away with the existing system of getting approvals from multiple agencies for the formal launch of realtor projects, which inevitably leads to cost escalation, Project delays and rampant corruption. Hence, the need of the hour is to introduce Single Window clearance for realtor projects by doing away with the existing system of seeking sanctions from multiple agencies for facilitating scaling down of costs and speedy execution of projects. The successful implementation of the Act demands synergic approach and action in

26. See Section 32(b) of the Act

between the Central Government and State Governments as the power to regulate the Real Estate Sector falls within the domain and jurisdiction of both Governments. This Act is definitely a harbinger of positive changes in a sector of key importance to the Indian economy hitherto marked by

rampant venality, rapacious consumer exploitation and lack of even semblance of regulation. Hence, it is expected that the effective implementation of the Act will inevitably bring about expected beneficial outcomes in the sector adding to the further strengthening of the Indian economy.

A CRITICAL STUDY – IMPLEADMENT OF LEGAL REPRESENTATIVES -

Whether Civil Procedure Code including Order 22(4) and 22(9) CPC applies to the procedure covered by the Recovery of Debts Due to Banks and Financial Institution Act 1993

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It appears, there has been a considerable controversy as to whether entire Civil Procedure Code applies to the proceedings covered by the Recovery of Debts Due to Banks and Financial Institution Act, 1993. There are two schools of thought one some of the provisions like Order 22 applies and another school of thought in contra distinction entire CPC applies. An exhaustive study of the matter in this direction appears to be desideratum in view of its applicability in the day-to-day proceeding before the Tribunal. In order to have an impact over this critical issue, the relevant sections of the Act are extracted. Section 22 of the Act postulates Tribunal and the appellate Tribunal shall not be bound by the procedure laid down by CPC but should be guided by the principles of natural justice subject to the other provisions of the Act and rules. The Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the place at which they shall have their sittings. In sub-section (2) of Section 22. The Debts Recovery Tribunal has been given the same powers as are vested in civil Court under Civil Procedure Code 1908, while trying a suit in respect on the following matters, namely :

- (a) Summoning and enforcing the attendance of any person and examining him on oath.
- (b) Requiring the discovery and production of documents.
- (c) Receiving evidence on affidavits.
- (d) Issuing commissions for the examination of witnesses.
- (e) Reviewing its decisions.
- (f) Dismissing an application for default or deciding it *ex parte*.
- (g) Setting aside any order of dismissal of any application for default or any Order passed by it *ex parte*.
- (h) Any other matter which may be prescribed.

Even a cursory look of the above section and the rules framed under the Act, it is found there appears to be an inhibition for the applicability of the CPC and the provision of Order XXII of CPC relating to the impleadment of legal representatives and the concomitant abatement *etc.* However, it mentions the Tribunal should be guided by the