

The Real Estate (Regulation & Development) Bill

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INTRODUCTION

The Union Ministry of Housing and Urban Poverty Alleviation has published the draft Model Real Estate (Regulation and Development) Bill (“Model Act”). The proposed Act, as the name suggests, proposes to lay down what is expected to be a regulation for adoption by all states within India. The proposed Act proposes to establish a regulatory authority to control and promote construction, sale, transfer and management of colonies, residential buildings, apartments and other similar properties

The Real Estate (Regulation and Development) Bill is an attempt to regulate real estate transactions in India. The Real Estate Bill deals with mandatory registration for construction and development of property, duties and liabilities of a promoter, establishment, powers and functions of regulatory authorities, penalties and offences and miscellaneous provisions.

The Real Estate Bill seeks to establish an authority to regulate, control and promote development, sale, transfer and management of properties, bring transparency to safeguard public interest and to facilitate speeding up the construction and maintenance of properties.

Being wide-ranging and composite, the Real Estate Bill is viewed differently by different stakeholders. Private builders are not comfortable with some of the bill's provisions and voiced their objections. Builders are of view that there is no need for a regulator as they are already subjected to clearances from multiple agencies.

The Positive Aspects of the Bill

1. Restoration of Confidence of Investor/End user in Real Estate

The current scenario of the Indian real estate sector is unorganised with absence of sound business principles. Due to unprofessional and unorganised nature of the sector, the situation has gotten worse in last few years with so many inefficient practices (call it malpractice) being done by different identities. With the introduction of so many inefficient practices, the confidence of consumers has gone down. So many consumers being cheated by the fly by night developers, their confidence level has substantially reduced distorting the sector. Some of malpractices are given below:

- Insufficient clearances/permits
- Delay/halt in construction due to lack of funds or cross use of funds for buying land chunks
- Unilateral cancellation of booking, selling the booked property to someone else for profit making, not giving back/ giving back the deposits to the first person without interest
- Not supplying the assured specification
- Not supplying essential services like water/sanitation/electricity
- Booking the same property for two or more deposits
- Charging additional money for completion of project
- Construction of low quality project for profit making

Thus there is highly a need to bring in some transparency into the sector as well as sound business principle and professionalism. The proposed act is an effort by the government to bring the same to the industry.

The Indian real estate sector possesses a huge potential towards profit and revenue generation, and the same is very evident from the funds inflow that has taken place towards the sector in the recent years. With such a huge need for cash inflows and with government's target of making the GDP contribution of 9%, the need of sound business principle as well as

transparency has been felt. The proposed act would increase the confidence of both the foreign as well as the domestic investors.

2. Creation of Information Hub

The regulatory authority would host and maintain a website as a database containing all the records of records of the past and current projects with details provided in the registration process. With a huge database containing details of all the projects, it could be utilised for much different process not just at the state level, but also even at the national and global level. Such a hub would be useful for the promoters, the investors, the end users, the government and other stakeholders.

Benefits for investor: The website would provide the potential investor with valuable information of projects and past track record of the developer.

Useful for policy making: The data can also be utilised for taking macroeconomic decision by the government and other planning authorities.

Marketing/Advertisement for developer: The investors/end user will search from the Authorities website. This will indirectly help in marketing/advertisement of developer's project.

3. Only Serious Developers will remain in Market

Developer with sound financial background will be able fulfil all requirements of regulatory authority. Non-serious and developer without sufficient funds will be eliminated from market.

4. Ensured Quality Construction

Different clauses of the act make sure that the quality of construction is up to the mark. The regulatory makes it mandatory for the promoter to supply the essential services and utilities as mentioned in the sale agreement.

5. Banks & Financial Institutions will come up for Project Finance

Banks in India unlike other developed countries still maintain a very small share of their lending towards the real estate sector (merely a 4%), this conservative policy on one hand did come out as a positive factor saving the economy from the catastrophe of the macro level (like the recent global recession, the cause of which was ascertained as the high value of debt towards the real estate sector in form of mortgages in US), but on the other hand has been a major problem for the promoters (unavailability of construction funding).

The situation has gotten worse with so many inefficient practices in place, which has oriented consumer's preference towards the completed or almost completed project. Though there have emerged a number of new channels for financing these projects (like the Private equity, ECBs, QIPs, FDI etc.). This has not been able to solve the problem for small-scale promoters as well as for the ones who are new in business, as access to most of these funds indirectly requires financial credibility as well as past track record.

As the regulator one placed would make sure only the viable projects get the nod would increase the consumer's confidence towards the promoter and the project. This would in turn encourage them to get involved in the projects at a very early stage. The outcome would be a sector less dependent on external lending as the funds could be generated from the consumers themselves.

6. Registration of Agents

Real estate agents will also be asked to register with the regulator. The agents, an important link between the promoter and buyer, have been unregulated. Once they are registered, it will help in curbing money laundering. In recent past the real estate agents cheated many investors. Registration of agents will improve market practices.

The Negative Aspects of the Bill

1. All Stakeholders are not targeted

One of the most noticed drawbacks of the Act is the fact that it doesn't target all the stakeholders involved in the development practice and as of now is just targeted at the promoters. Real estate development is a complex process involving various stakeholders of different financial strata, starting from a wage earning construction worker to mass scale institutional investors. Each one of these plays their respective role in the whole development process and is liable for their respective share of work. Any inefficient practice is not so evidently been done by the developers in all the cases. The contractors, brokers, agents all of them should be taken into account if there is such a need to justice to be done. The regulatory that would just cover the developer's activity is not sufficient to regulate the whole sector.

2. Government Authorities not accounted

One of the prime concerns of all the promoter opposing the present form of the Act is that it does not provide any relief for the promoters against the time consuming bureaucratic process of getting various sanctions/approvals for a project (as of now there are more than 50 approvals that is needed for a project to get nod). The ministry's motive that the bill would bring in transparency and health to the sector is not justified. In its present form it is nothing but a consumer protectionist act and deals with no problem of what a promoter faces. As the approvals are all subject level things including different government authorities and personnel, it involves layers of paper work and a substantial amount of money spending. As of now promoters have claimed that one of the reasons of property prices being high is because of the fact that 20-25% of it actually goes into the various sanctions and approvals.

The bill does bring in transparency but only on the one face of the coin, the other one being remain untouched. The part that government authorities at the state level play in development process should not be overlooked. Doing a microscopic study reveals that the share of processes in which these authorities are involved are considerable. There is truly a need of substantial modification to include this important factor before such an Act could be placed on the sector.

3. No Provision for Single Window

The bill does not have any provision for single window clearance of the project. The government has no plans to start a single window system for issue of sanctions/approvals for projects; it does intend to simplify the procedure for obtaining construction licenses. A single-point, time-bound clearance system is required for transparent and hassle-free operation of real estate projects.

The bill received much criticism from developers for not providing relief for them in getting permissions and approvals expeditiously. The developers in India have long complained about the delay and difficulty in obtaining approvals for construction from various government agencies and the need for single window approvals. This issue has not been addressed in the bill.

4. Project Cost will increase

The other demerit of the bill in its present form is it would somehow be responsible for the rise in project cost. Once the Act gets implemented it would further increase the cost of projects the probable reasons are:

Guarantee amount: The 5% guarantee amount that has to be furnished to the competent authority would ultimately be borne by the consumers themselves as no promoter would put his own money. This would again raise the project cost.

Registration/Renewal fee: The clause makes it mandatory for the promoter to furnish the fee for registration and even for renewal, this fee however the exact amount of which is not mentioned would again be borne by the consumers raising their project cost.

The registered sale agreement: As per the act the sale agreement that has to be made for sale of an advance collection has to be registered to make it valid. This would make the buyer pay additional cost as the registration fee, which earlier was used to be paid at the time of conveyance deed. This would again raise the project price.

5. Delayed Realisation of Funds Invested by Developer

One of the negative aspects of the bill is that the realisation of funds invested by the developer will be delayed. The developer is not allowed to collect the advances of booking before the registration of project to the Regulatory Authority.

Approval and sanction from the competent authority: The developer will first clear his project from competent authority. Getting all approvals and sanctions is cumbersome and time consuming process

Registration from the Real Estate Regulatory Authority: After getting all approvals and sanctions from competent authority the developer will apply for registration from the Real Estate Regulatory Authority.

Advertisement & bookings: After getting registered from the Real Estate Regulatory Authority the developer can advertise his project and accept the booking payments

6. Projects will be delayed

Requirement of registration and certification, the project will be delayed. As per the Act the promoter has to take permission from the regulatory authority for every small alteration in the specification, even when he has the consent of the buyers, engineer and the architect, and even for certain other things there is a permission needed from the Regulatory Authority. The Act does mention the maximum time the Regulatory Authority will take for processing the registration application and the appeals against the promoter but it doesn't mention the time frame for these extra permissions. This would delay the progress of the project and would in turn delay the project, which is contradictory to the basic move of the Regulator.

7. May Increase Corruption/Red-tapism

Giving such supreme powers to the Regulatory Authority and the Appellate tribunal as well as the whole thing being in the hands of government might lead to more corruption in the sector. Though the clauses in the act seems to be fair, but there still a chance that the Act would bring in news windows for red-tapism like all the other government run things.

8. Penalties too Hostile

In order to give teeth to the provisions of the proposed Act, penalties have been prescribed for violations of the provisions of the Act. The penalties range from up to three years imprisonment for not registering a project or for not complying with the orders of the Appellate Tribunal to monetary penalties, which may be ascertained on a daily basis for non-compliance or as a percentage of the development costs or sale price.

The Section 50 of the bill says, “If any promoter willfully fails to comply with or contravenes the provisions of section 3, he shall be punishable with imprisonment for a term which may extend to three years, or a penalty which may extend to ten per cent of the estimated cost of the real estate project, or with both”.

Provisions of the Section 3 of the bill are related to prior registration of project with Real Estate Regulatory Authority, these provisions are of civil nature and punishment up three years of imprisonment for non-compliance is totally wrong. A civil offence should not be treated as a criminal one and hence should not be penalized with imprisonment.

Punishment in bill compared with other criminal offences

The punishment in the bill for non-compliance is much more than the punishment for theft, extortion, dishonest misappropriation of property, criminal breach of trust, cheating, mischief, criminal trespass and forgery in the Indian Penal Code 1860. Relevant sections of Indian Penal Code 1860 are given below:

Section 379. Punishment for theft: Whoever commits theft shall be punished with imprisonment of either description for a term, which may extend to three years, or with fine, or with both.

Section 384. Punishment for extortion: Whoever commits extortion shall be punished with imprisonment of either description for a term, which may extend to three years, or with fine or with both.

Section 403. Dishonest misappropriation of property: Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of

either description for a term, which may extend to two years, or with fine, or with both.

Section 406. Punishment for criminal breach of trust: Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term, which may extend to three years, or with fine, or with both.

Section 417. Punishment for cheating: Whoever cheats shall be punished with imprisonment of either description for a term, which may extend to one year, or with fine, or with both.

Section 426. Punished for mischief: Whoever commits mischief shall be punished with imprisonment of either description for a term, which may extend to three months, or with fine, or with both.

Section 447. Punishment for criminal trespass: Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, with fine or which may extend to five hundred rupees, or with both.

Section 465. Punishment for forgery: Whoever commits forgery shall be punished with imprisonment of either description for a term, which may extend to two years, or with fine, or with both.

9. Difficult to Implement Certain Provisions

The current scenario of the Indian real estate sector is unorganised with absence of sound business principles. It will be very difficult to implement the certain provisions of proposed act in true spirit.

- Section 6 of the bill says, “Upon lapse of the registration or on cancellation of the registration under this Act, the Authority, may consult the Appropriate Government to take such action as it may deem fit including the carrying out of the remaining development works by competent authority or by the association of allottees or in any other manner, as the case maybe.” The defaulter developer's project will be transferred to the competent authority to clean up the mess done by the developer. If the so-called competent authority takes over a hundred of so project in a single city, it is practically impossible to complete such projects.
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- Section 11. (1) of the bill says, “Notwithstanding anything contained in any other law for the time being in force, a promoter shall not accept any sum of money as an advance payment or deposit, from a person without first entering into a written agreement for sale with such person” The bill does not allow to accept advance payment, but companies act allows to accept debt. The developer will accept the advance payment in form of debt in books.
- Section 4(3) (b)(v) Seventy percent of the amounts realized for the real estate project from the allottees, from time to time, would be deposited in a separate account to be maintained in a scheduled bank, within fifteen days of its realization for meeting the costs of the real estate project and would be used only for that purpose
- Section 9. (1) No promoter shall issue or publish an advertisement or prospectus, or invite any member of the public to buy or book in such projects to be developed or take advances or deposits without obtaining a copy of certificate of registration with the Authority.

10. Overlapping of existing Laws

Various provisions of the bill over lap the existing laws.

- **The Indian Registration Act, 1908:** The bill makes an Agreement for Sale compulsorily registration. The Indian Registration Act, 1908 does not provide for compulsory registration of an Agreement for Sale since such an agreement by itself does not create any interest in immoveable property but merely gives the right to obtain another document, which when executed would create right, title and interest in immoveable property.
- **The Consumer Protection Act, 1986:** Real Estate, namely 'housing construction' has been inserted in 1993 in the definition of service in section 2 (o) of the Consumer Protection Act, 1986. At present position of law all housing construction projects comes under the consumer protection act. The Consumer Protection Act, 1986 is mend for inexpensive, speedy and summary redressal of consumer disputes. Quasi-judicial bodies have been set up in each District and State and at the National level, called the

District Forums, the State Consumer Disputes Redressal Commissions and the National Consumer Disputes Redressal Commission respectively. At present, there are 629 District Forums and 35 State Commissions with the National Consumer Disputes Redressal Commission (NCDRC) at the apex. Consumer courts have been flooded with complaints from consumers of real estate projects.

- In addition **Indian Penal Code, 1860; Indian Contract Act, 1872; Competition Act, 2002, Specific Relief Act, 1963** and a multitude of other laws are available to the aggrieved consumers, apart from those required to be complied with for project approval and development at the State level.

CONCLUSION

Real Estate is an over-regulated sector in India, with multiple laws which hold back the growth of the sector, and the Real Estate Bill proposed by the Central Government to regulate business practices of real estate developers is just an added layer of time consuming compliance. The Bill will add to the regulatory cost and compliance delay, due to the requirement of registration & certification from the Authority.