

Certain Issues in Real Estate (Regulation & Development) Act

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Since the Real Estate (Regulation & Development) Act, 2016 (colloquially referred as 'RERA law') picking its heat in the state of Telangana, we thought of writing an article on certain issues which were examined by our office in last few months pertaining to the applicability of RERA provisions and found to be interesting.

Before dwelling into such issues, it is to be noted that projects which have obtained approval post 01.01.2017 are treated as 'on-going projects' as defined vide Rule 2(j) of Telangana State Real Estate (Regulation and Development) Rules, 17. Vide Order No 04 dated 28th December 2018, TS RERA has communicated that there will be a penalty amounting to Rs 2 lakhs if the project has received approval between 01.01.2017 to 31.08.2018 and registers prior to 15.01.2019. Hence, it is urged that all projects which have received approval between 01.01.2017 to 31.08.2018 should be register prior to 15.01.2019.

Issue # 1:

ABC Private Limited (ABC) is a company engaged in construction and development of residential complexes. ABC has laid foundation for a new project and is contemplating not to advertise, market, offer for sale, or invite persons to purchase or sell until the entire project is completed and completion certificate has been obtained from the appropriate authority. In other words, ABC intends to use their own funds for the entire project and sell them to the customers as immovable properties after obtaining completion certificate. In such a scenario, whether ABC is required to obtain registration under RERA Laws?

Viewpoint:

- a. Section 3(1) of RE (R&D) Act states that *'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 Real Estate Regulatory Authority established under this Act'*.
- b. Section 3(2) of RE (R&D) Act states that, notwithstanding to anything contained in Section 3(1), no registration of real estate project shall be required in the following cases:
 - i. where area of land proposed to develop does not exceed 500 square meters or the number of apartments proposed to be developed does not exceed eight
 - ii. where promoter has received completion certificate for a real estate project prior to commencement of this Act
 - iii. for the purpose of renovation or repair or re-development which does not involve marketing, advertising, selling or new allotment of any apartment, plot, or building as the case may be, under the real estate project.
- c. Clearly from the provisions of Section 3(2), the project contemplated by ABC does not fit and accordingly the exemption from registration mentioned therein shall not be applicable to ABC. Now, the question is whether in the given facts, since ABC is contemplating not to advertise, market, book, sell or offer for sale or invite any person to purchase in any manner, should it be getting registered under the subject Act.

- d. In other words, ABC is of the opinion that the phrase 'sell', appearing in Section 3(1) has to be read as, sale before completion of project (by taking advance from customers) and not a sale of apartment after obtaining completion certificate (where sale is akin to sale of immovable property). They have reached such conclusion for the reason that majority of the provisions of the Act deal with compliances during the execution of project and since no advance is received from the customers, the registration is not required under the Act.
- e. It is tempting to adopt the rationale of ABC because it sounds logical. However, Section 3(1) read with other provisions does not support such a view. Section 14(3) of the Act provides that *'in case of any structural defect or any other defect workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act'*
- f. From the above, it is clear that RE (R&D) is not only a law which protects the customer during the execution of the project but also intends to protect post-delivery of the apartment in case of any structural defects. In such case, if a project is not registered by the promoter because of the reason that such promoter is not engaged in advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner, the Real Estate Regulatory Authority (RERA) or Adjudicating authority, as the case may be, would not have any say if a compliant is received from any customer in light of Section 14(3), since the project has not been registered.
- g. Recently the Honourable Division Bench of Bombay High Court in a writ petition filed by Mohammed Zain Khan against Maharashtra Real Estate Regulatory Authority has directed the Authority to accept complaints on unregistered projects and accordingly the Authority has stated it is in the process of updating the software to accept complaints in respect of unregistered projects. Hence, it cannot be said that the RERA does not have jurisdiction in case of unregistered projects, however the issue is not free from litigation.
- h. Hence, ABC cannot avoid the obligation of registration of project despite of the fact that such project is sold after obtaining completion certificate without resorting to any advertising or likes mentioned in Section 3.

Issue # 2:

XYZ is a partnership firm. XYZ regularly purchases land, applies for conversion from agricultural to commercial or residential and then sells entire land to DEF Private Limited. XYZ enters an agreement with DEF to sell the entire converted land to DEF as and when DEF identifies a customer or bunch of customers. DEF develops such converted land into plots and promises certain amenities to the customers. There is no joint development agreement between XYZ and DEF. In such a scenario, who has to register with RERA, XYZ or DEF?

Viewpoint:

- a. In the facts above, it is evident that XYZ is just purchasing land and getting it converted by making an appropriate application with concerned authority. In any case, XYZ does not develop

the converted lands into plots or into structures. By virtue of an agreement with DEF it sells land on piece meal basis when DEF identifies customs or bunch of customers.

- b. However, DEF promises the customer that the such land will be converted into plots and certain amenities would be created in such plots and receives money from customers (allottees). In other words, DEF is developer and XYZ is a land owner but there does not exist any development agreement except an agreement where XYZ states entire land would be sold in piece meal to DEF and consideration for XYZ is qua land and not any share of revenue or built-up area in the completed project.
- c. Strictly speaking, it can be inferred from the above facts that XYZ is simply transferring the land and is not engaged in development of any project and hence not required to register with RERA, since XYZ is engaged in sale of land and no development.
- d. However, on perusal of the phrase 'promoter' as defined in Section 2(zk), specifically vide sub-clause (ii), it means 'a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purposes of selling to other persons all or some of the plots in the said project, whether with or without structure thereon'. On a plain reading of the above, a person who develops land into a project whether he constructs any structures on any of plots for the purposes of selling to other persons all such plots is covered under the definition of 'promoter'.
- e. The only question that has to be answered is whether conversion of land without the activity of plotting would be covered under the 'development of land into project' as laid down in the definition of 'promoter' above. For this, we have to refer to the definition of 'project', which is used in definition of 'promoter'. The phrase 'project' has been defined vide Section 2(zj) to mean a real estate project as defined in Section 2(zn).
- f. 'real estate project' means *the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or **the development of land into plots or apartment**, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto*
- g. Since the real estate project only includes development of land into plots and does not cover mere conversion of land from agricultural to residential or commercial, the activity of XYZ does not fall under the phrase 'development of land into project' and thereby does not fall into the definition of 'promoter'. Once XYZ is not a promoter, he is not required to be registered under RERA.
- h. Since DEF is engaged into conversion of such land into plots and consequently offer for sale to allottees, DEF is required to be registered under RERA. However, since the entire land does not belong to DEF which is used for plotting, it is advisable to show XYZ as land owner while registering the project with RERA.