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AT INDIA

A PUBLICATION OF ASHU THAKUR & ASSOCIATES



Volume I - 2016 Series

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Dear Reader,

It gives me immense pleasure to bring to you Volume I - 2016 Series of our in house newsletter "**AT INDIA**". We have in this May 2016 edition of "**AT INDIA**" thrown light on the much awaited and widely acclaimed Real Estate (Regulation and Development) Act, 2016 and put together the legal snippets to give you a bird's eye view of the recent legal developments.

We trust you will find "**AT INDIA**" useful and informative. Please feel free to revert back to us with any queries or feedback to enable us to serve you better.

We look forward to hear from you.

Best regards,

Ashu Thakur
Editor in chief

THE INDIAN REAL ESTATE SECTOR ON THE BRINK OF A COMPLETE TRANSITION

The Indian Real Estate sector has over decades been subjected to the monarchy and dictatorial policies of the builders to the utter dismay of buyers looking to acquire their dream commercial & residential abodes. In this background, the Real Estate (Regulation & Development) Bill, 2015 ("**Bill**") which addresses the long-standing demand to put in place a real estate regulator brings some respite. After several rounds of discussions & deliberations between politicians, builders & state bodies coupled with the aggressive lobbying of the builders, the Bill was finally pruned and passed by both the houses and notified as the Real Estate (Regulation & Development) Act, 2016 ("**Act**") on 26th March 2016.

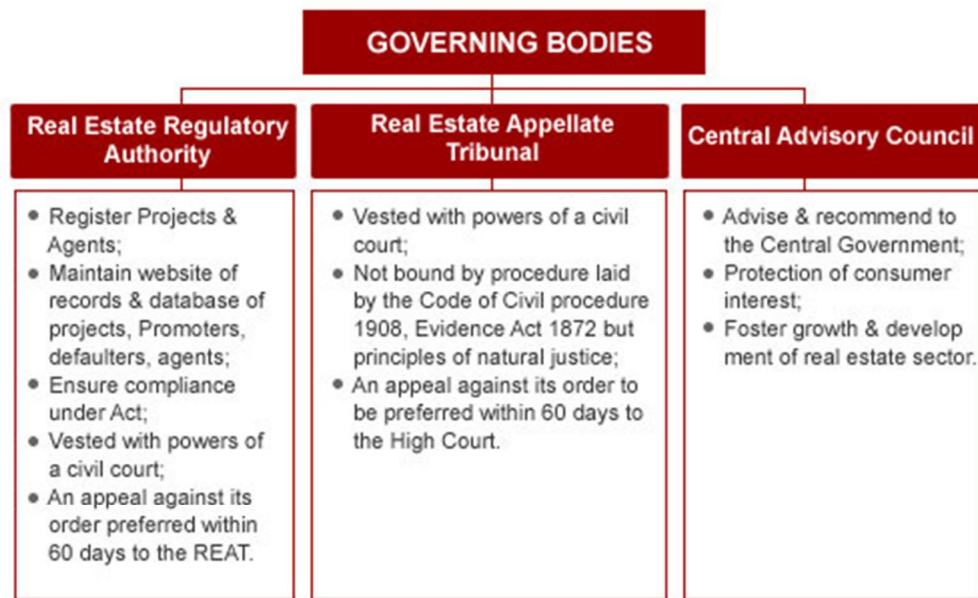
The Act stipulates setting up a Real Estate Regulatory Authority within 1 years of coming into force and lists out various obligations for Promoters/builders/developers and real estate agents thereby ensuring greater accountability and transparency towards consumers, seeks to arrest delays & high transaction costs whilst providing an adjudication machinery for speedy dispute redressal and insurance to protect buyers from frauds by the builder. The Act brings clarity and defines various terms i.e. "Carpet Area", "promoter", "real estate agent", "real estate project" etc which were widely misinterpreted and misused by the builders. In this article we are attempting to share with you certain significant aspects of the Act:

A. **Registration of Real Estate Projects and Real Estate Agents:**

With the onset of the new law, all new projects for sale in any manner of any plot, apartment or building in any real estate project will now need to be compulsorily registered with the Real Estate Regulatory Authority ("**RERA**") disclosing project information such as schedule of implementation, layout plans, status of approvals, details of consultants etc. Promoters are prohibited from advertising, marketing, booking, selling or offering for sale or inviting persons to purchase without registering with the RERA but registration of real estate projects where the area of land proposed to be developed is less than 500 square meters or the number of apartments proposed to be developed is less than 8 units are excluded from the purview of the Act. The registration shall be deemed to be granted after a lapse of 30 days if the RERA does reject the same. Additionally the registration of Real Estate Agents has been made mandatory and strict penalties for non registration have also been provided in the Act.

B. **Governing Bodies:**

The Act stipulates set up of 3 regulatory bodies i.e. the Real Estate Regulatory Authority, the Real Estate Appellate Tribunal ("**REAT**") and the Central Advisory Council. An overview of the Authorities is detailed below:



The Civil Courts are barred from entertaining any suit or proceedings or granting any injunctive reliefs in respect of matters which the RERA & REAT are empowered to determine. Further no Court inferior to that of a Metropolitan Magistrates or a Judicial Magistrate of the first class can try any offence punishable under this Act save on a complaint in writing of made by the RERA.

C. Obligations on Promoters:

Amongst the various obligations cast on a promoter the Act prohibits a promoter from accepting more than 10% of the cost of the apartment, plot or building as advance without executing an agreement for sale and necessitates the Promoter to deposit 70% of collections received from allottees in a separate bank account maintained by the Promoter to cover cost of construction and land cost. The Act further prohibits the Promoter from changing the plan and design in a project unless 2/3rd of the allottees have agreed for such a change. Promoters are obligated to provide a declaration on its legal title to the Land and disclosure of encumbrances if any along with disclosure of the time period within which the real estate project would be completed. Additionally, the Promoter is obliged to obtain insurance including title insurance of the land and building which would shall stand transferred to the benefit of the Allottees eventually.

D. Protection to Allottees/Purchaser/Consumer:

The Allottees/Purchaser/Consumer are provided several rights which enable them to procure information relating to site and layout plans along with the specifications as per the terms of the agreement signed with the promoter, know stage-wise time schedule of completion of the project, including the provisions for water, sanitation and electricity; the disclosure of which was earlier the sole prerogative of the Builder. The Allottee can now not only claim the possession of apartment, plot or building, as per the declaration given by the promoter but also claim the refund of amount paid, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, in accordance with the terms of agreement or in the event of discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of Act.

E. Penal provisions:

The penalty & imprisonment provisions of the Act as detailed below are realistic and would act as a deterrent for the Promoters, Allottees and Real estate Agents & in turn ensure strict

compliance of the obligations cast under the Act:

	Offence	Penalty
A. Promoter	<ul style="list-style-type: none"> ○ Non-registration of projects ○ Non-compliance with RERA order ○ Incorrect & incomplete disclosure to RERA ○ Willfully fail to comply or contravene orders or directions of RERA ○ Willfully fail to comply or contravene orders or directions of REAT 	<ul style="list-style-type: none"> ○ Max 10% of estimated cost of plot, apartment or building cost of the Real Estate Project (“cost of REP”). ○ Max Imprisonment 3 years & max penalty is 10% of estimated cost of REP or both. ○ Penalty of 5% of the cost of REP. ○ Penalty for every day of default is max 5%, of the estimated cost of REP. ○ Imprisonment of up to 3 years & penalty for every day of default is max 10%, of the estimated cost of REP.
B. Real Estate Agent & Allottees	<ul style="list-style-type: none"> ○ Non registration of projects ○ Non-compliance or contravention of orders or directions of RERA ○ Willfully fail to comply or contravene orders or directions of REAT 	<ul style="list-style-type: none"> ○ Real Estate Agent to pay penalty of INR 10,000 for every day the default continues, up to 5% of estimated cost of REP ○ Penalty for every day default continues may extend up to 5%, of estimated cost of REP ○ Max Imprisonment for 1 year or penalty for every day of default up to max 10%, of estimated cost of REP.

Present position:

The Ministry of Housing & Urban Poverty Alleviation notified 69 of the 92 sections of the Act on 27th April 2016 bringing the Act into force from 1st May 2016. Rules for implementing the provisions of the Act need to be formulated by the Central and State governments within 6 months i.e. by October 2016 the maximum period as stipulated in Section 84 of the Act. On ratification of the Act in the State of Maharashtra, the Maharashtra Housing (Regulation & Development) Act 2012, the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management & Transfer) Act

1963 will stand repealed.

Our views:

The Act is an excellent attempt to regulate the Real estate sector whilst ending the "Gonda Raj" of the Builders and bringing in the much needed respite to various Allottees who were compelled to sign lopsided contracts totally in favour of the Builders. The enforceability of contracts and stringent penalty & imprisonment provisions will reduce the frauds and promote accountability of the parties towards each other leading to efficient project execution, professionalism and standardization. Moreover the uniform regulatory environment to ensure speedy adjudication of disputes will provide an orderly growth of the real estate sector. Additionally, the Act will to an extent curb the prevalent practice of diversion of funds and black money in real estate sector however real estate agents who facilitate the sale or purchase of any existing plots, apartments or buildings are presently still outside the purview of the Act. The successful implementation of the Act which paves way for the transition of the Indian real estate sector whilst stimulating recognition of title insurance in India is directly related to the efficiency with which the Union and State Governments ensure smooth and effective implementation of the Act at the grass-root level.

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AT INDIA - LEGAL SNAPSHOTS

Revised norms on Foreign Direct Investment in Asset Reconstruction Companies :

The Department of Industrial Policy & Promotion has vide a Press Note dated 6th May 2016 allowed 100% foreign direct investment under the automatic route in Asset Reconstruction Companies ("ARC"). All investments including investment limit of a sponsor in the shareholding of an ARC will be governed by the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 as amended from time to time. Additionally, Foreign Institutional Investors & Foreign Portfolio Investors ("FIIs/FPIs") can invest up to 100% of each tranche in the Security Receipts issued by ARCs registered with the Reserve Bank of India ("RBI") subject to directions/ guidelines of RBI & the total shareholding of an individual FII/FPI shall be below 10% of the total paid up capital.

Cabinet approves National Intellectual Property Rights Policy:

The Department of Industrial Policy & Promotion which shall be the nodal point to coordinate, guide &

oversee implementation & future development of Intellectual Property Rights (“IPR”) in India has w.e.f 12th May, 2016 announced the National Intellectual Property Rights Policy 2016. The objective of the policy is to ensure strong effective IPR laws, create awareness about the economic, social & cultural benefits of IPRs, stimulate generation of IPRs, strengthen the enforcement mechanisms for combating IPR infringements, create capacities for teaching, training, research & skill building in IPRs & introduces support systems for MSMEs, start-ups and grass root innovators to reduce transaction costs linked to IP creation. The policy stipulates creation of a public platform to function as a common database of IPRs which can help creators & innovators connect to potential users, buyers, funding institutions, promote expeditious digitization of the design office & copyright records & introduce on-line search facility.

Government allows 49% Foreign Direct Investment in Insurance under automatic route:

The Department of Industrial Policy & Promotion (“DIPP”) has vide a Press Note dated 23rd March, 2016 permitted Foreign Direct Investment (“FDI”) up to 49% through the automatic approval route in the insurance sector subject to verification by the Insurance Regulatory and Development Authority of India. Earlier, only up to 26% FDI was permitted through the automatic approval route. Further, no Indian Insurance company shall permit the aggregate holdings by way of total foreign investment in its equity shares by foreign investors, including portfolio investors, to exceed 49% of its paid up equity capital of such Indian insurance company.

Government liberalizes Foreign Direct Investment Policy on Pension Sector:

The Department of Industrial Policy & Promotion (“DIPP”) has vide a Press Note dated 23rd March, 2016 permitted Foreign Direct Investment (“FDI”) up to 49% through the automatic approval route in the pension sector subject to the condition that entities bring in foreign equity as per the Pension Fund Regulatory and Development Authority (PFRDA) Act, 2013 and must obtain the necessary registration under the PFRDA Act and the Rules and regulations framed under it for participating in the Pension Management activities in India. In the event such foreign equity investment involves control or ownership by the foreign investor or transfer of control or ownership of an existing pension fund from resident Indian citizen and or Indian companies owned and controlled by resident Indian citizens to such foreign investing entities as a consequence of the investment, it would require Government approval in consultation with the department of Financial services, PFRDA and other entities concerned and the onus of these conditions will be on investee Indian pension fund company.

100% Foreign Direct Investment in e-commerce marketplace permitted:

The Department of Industrial Policy & Promotion (“DIPP”) has vide a Press Note dated 29th March, 2016 laid down Guidelines for Foreign Direct Investment (“FDI”) in e-commerce. As per the Press Note 100% FDI in e-commerce market place model has been allowed under automatic route; however FDI under automatic route is permitted only in “marketplace mode” of e-commerce & is not permitted in “inventory based” model of e-commerce. To bring clarity, the DIPP has defined “ecommerce”, “inventory-based model” and “marketplace model”. A marketplace model of e-commerce means one which provides an IT platform by an e-commerce entity on a digital and electronic network to act as a facilitator between buyer and seller, whereas, the inventory-based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to consumers directly. A marketplace entity will be permitted to enter into transactions with sellers

registered on its platform on business-to-business basis. An e-commerce firm, however, will not be permitted to sell more than 25% of the sales affected through its marketplace from one vendor or their group companies.

Competition Law Update:

The Ministry of Corporate Affairs (“MCA”) has vide a Gazette notification dated 4th March, 2016 made amends to the Competition Act, 2002 i.e. hereby -

- i. ‘Enterprises’ having assets value up to INR 50crores are exempted from the ambit of provisions of “combinations” under the Act whose control, shares, voting rights or assets are being acquired and either has assets of the value of not more than INR 350 crores in India or turnover of not more than INR 1000 crores in India from the ambit of ‘combination’ under the Competition Act, 2002 for a period of 5 years from the date of publication of the notification in the official gazette.
- ii. ‘Groups’ exercising less than 50% voting rights in other enterprise are exempt for 5 years for the purpose of determining combinations;
- iii. The limit of ‘value of assets’ and ‘value of turnover’ for determining ‘combination’ of entities has been doubled.

Definition of the term “Startup” notified by the Government:

The Department of Industrial Policy & Promotion (“DIPP”) has vide a notification dated 17th February, 2016 defined the term ‘startup’ and prescribed the procedure for its recognition and obtaining tax benefits. An entity shall be considered as a ‘startup’ –

- i. Up to five years from the date of its incorporation/registration;
- ii. If its turnover for any of the financial years has not exceeded INR 250 million, and
- iii. It is working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property.

Separately, any entity formed by splitting up or reconstruction of a business already in existence shall not be considered as a ‘startup’. In order to avail tax benefits a startup shall require a certificate of an eligible business from the Inter-Ministerial Board of Certification as specified under the notification.

Payment of Bonus (Amendment) Act, 2015 Notified:

The Payment of Bonus Act, 1965 which provides for the annual payment of bonus to employees of certain establishments including factories and establishments employing 20 or more persons was amended w.e.f 1st January 2016 vide The Payment of Bonus (Amendment) Act, 2015. As per the amendments the eligibility threshold for an employee payment of statutory bonus has been increased to INR 21,000 (Rupees Twenty One Thousand Only) per month from the current limit of INR 10,000 (Rupees Ten Thousand Only) per month & the wage ceiling for computing bonus has been increased from INR 3,500 (Rupees Three Thousand Five Hundred Only) per month to INR 7,000 (Rupees Seven Thousand Only) per month.

Patents Office rolls back guidelines allowing patenting for software:

The Patents office of India has vide an office order dated 19th February, 2016 rolled back its decision to

allow software patenting for computer-related inventions but has excluded the following computer-related inventions from patenting:

- i. A mathematical or business method or a computer program per se or algorithms;
- ii. A literary, dramatic, musical or artistic work or any other aesthetic creation whatsoever including cinematographic works and television production;
- iii. A mere scheme or rule or method of performing mental act or method of playing game" and
- iv. A presentation of information.

Person of Indian Origin ("PIO") cards are no more valid for travel to India:

The Government of India has vide notification dated 9th January 2015 withdrawn the PIO card scheme and as such PIO Card holders are required to apply for fresh Overseas Citizen of India ("OCI") card, as PIO card scheme will no longer be in existence with effect from 30th June 2016.

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