



Anju Bansal

LLB
University of Mumbai

Expertise:

Documentation
Corporate
Real Estate

✉ Anju.b@mcolegals.in



Ayushi Gupta

LLB (Hons.)
Campus Law Centre
Faculty of Law
University of Delhi

Expertise:

Corporate Due Diligence
Transaction Documentations
Third Party Diligence
Compliances and
Commercial Arbitrations.

✉ ayushi.g@mcolegals.in



Pratibha

B.A.LL.B from
Campus Law Centre
University of Delhi

Expertise:

Corporate, Compliances
and Litigation

✉ pratibha.p@mcolegals.in

28th December, 2017

BIG WIN FOR HOME BUYERS: NEELKAMAL CASE

This issue of Knowledge Bank divides the comprehensive judgment delivered by the Hon'ble Bombay High Court in the matter of "**Neelkamal Realtors Suburban Private Ltd. & Anr. vs. Union of India & Ors.**" (For short "Neelkamal Case") into two parts.

The first part contains the introduction of the Neelkamal Case, facts, issue, object/scope of the Real Estate (Regulation and Development) Act, 2016 (for short "**RERA**"), the provisions of RERA whose constitutional validity were challenged and contentions of the parties. The second part will deal with the observation, decision of the Hon'ble Bombay High Court and relevance/importance of the Neelkamal Case.

INTRODUCTION

In a victory for home buyers, the Hon'ble Bombay High Court vide its judgment dated 06.12.2017^[1] upheld the validity of the various provisions of the RERA in the matter of Neelkamal Case. The judgment dated 06.12.2017 was pronounced on a bunch of Petitions filed by real estate developers and individual plot owners, all challenging the constitutional validity of RERA. The Hon'ble Bombay High Court upheld RERA and its applicability to ongoing projects across states.

FACTS/ISSUE

A number of writ Petitions were filed by the builders i.e. Neelkamal Realtor Suburban Private Limited & Another (for short "**the Petitioners**") of real estate project against the Union of India & Others (for short "**the Respondent**") before the Hon'ble Bombay High Court challenging the constitutional validity of various provisions i.e. first proviso to Section 3(1), Section 3(2)(a), Explanation to Section 3, Section 4(2)(1)(C) & (D), Section 5(3) and the first proviso of Section 6, Sections 7, 8, 18, 22, 38, 40, 46, 59, 60, 61, 63, 64 of RERA as being violative of the Articles 14, 19(1)(g), 20 and 300A of the Constitution of India (for short "**Constitution**").

The main issue before the Hon'ble Bombay High Court was to decide whether the provisions of RERA as stated above are violative of Article 14, 19(1)(g), 20 and 300A of the Constitution or not? Whether the provisions of RERA have retrospective/ retroactive application?

Before delving into the analysis of the comprehensive judgement dated 06.12.2017 pronounced by the Justices Naresh Patil and R.G. Ketkar of the Hon'ble Bombay High Court, it is important to understand RERA, the provisions whose constitutional validity were challenged by the Petitioners and the contentions of the Parties.

CONTENTIONS OF THE PETITIONERS

In the present case the Petitioners advanced main submissions regarding ongoing real estate projects. The Petitioners challenged the validity of above provisions of RERA on the following grounds:

- Retrospective/ retroactive application of certain provisions
- Unreasonable restrictions placed by certain provisions of RERA, contrary to Article 19(1)(g) and violative of Article 14 of the Constitution.
- Absence of judicial member in the REAL constituted under Section 46 (b) of RERA.

The main submissions were:

- The Petitioners attacked the proviso of Section 3(1) by submitting that registration of ongoing projects under RERA would be contrary to the contractual rights established between the promoters and allottees under the agreement for sale executed prior to registration under RERA, further the proviso had retrospective application.

[1] W.P. 2327 of 2017, W.P. 2711/2017, W.P. 2255/2017, W.P. 2708/2017, W.P. 2727/2017, W.P. 2256/2017, W.P. 2730/2017

(b) Section 4(2)(1)(C) was challenged by the Petitioners on the ground of arbitrariness and section 4(2)(1)(D) of RERA was challenged by the Petitioners on the ground that no guidance in respect of 70% of the amount realized from the allottees is provided under Section 4(2)(1)(D), and the Petitioners referred to situations where the promoters may not receive 70% of the amount from the allottees etc.

(c) Section 6 was challenged on the ground that the provision does not take into consideration practical difficulties (i.e. non-availability of labour and raw material, stoppage of work due to strike etc.) of the promoter to complete the project within the time line prescribed by the promoter under Section 4(2)(1)(C). That as per the proviso to Section 6, the Authority has not been given power under RERA to grant further extension of registration of project beyond the period of one year.

(d) The Petitioners challenged the validity of Section 18 on the ground, that the Section 18(1)(a) is harsh, arbitrary, penal, drastic and against the business of the promoter.

(e) The Petitioners submitted that provisions of penalties (Sections 59, 60, 61, 63, 64) operate retrospectively and therefore, violative of Articles 14 & 20 of the Constitution.

CONTENTIONS OF THE RESPONDENTS

(a) That RERA has been enacted to bring transparency in the real estate sector and to protect the life saving of consumers/buyers. RERA is aimed at improving the eco-system to ensure consumer protection, transparency, fair and ethical business practices in matters of sale and purchase of properties in the real estate sector. Thus the provisions which are challenged by the Petitioners are reasonable and constitutionally valid, as the same have been made in the larger public interest.

(b) On the issue of retrospective effect of the provisions of RERA, it was submitted that the public interest is relevant consideration in determining the constitutional validity of retrospective legislation.

RERA

The real estate sector is the second largest employer in India accounting for 9% of the Gross Domestic Product (GDP). The real estate sector supports 250 ancillary industries and 10 Lakh people buy houses every year. Therefore, the real estate sector needs to be regulated to ensure professionalism and standardisation. The Parliament to ensure interests of effective consumer protection, uniformity and standardization of business practices in the real estate sector passed RERA which received the assent of the President on 25.03.2016. Few provisions of the RERA i.e. Sections 3 to 19, Section 40, Sections 59 to 70 and Sections 79 to 80 came into force on 01.05.2017. RERA is an umbrella regulatory mechanism for disciplined growth of the real estate sector in India.

i. Object/Purpose of RERA

RERA provides for the establishment of the Real Estate Regulatory Authority (for short "the Authority") for regulation and promotion of the real estate sector and to ensure sale of plot, apartment, or sale of a real estate project, in an efficient and transparent manner. RERA seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism to induct professionalism and standardisation in the real estate sector, thus paving way for accelerated growth and investment in the real estate sector.

RERA provides for the following namely:

(a) To establish the Authority to exercise power and perform functions as assigned under RERA.

(b) To impose an obligation upon the promoter/real estate agent not to book, sell or offer for sale, or invite persons to purchase any plot or building in any real estate project without registering the real estate project with the Authority.

(c) To make registration of real estate project compulsory in case where area of land proposed to be developed exceed one thousand square meters or no. of apartments proposed to be developed exceed 12.

(d) To impose liability upon the promoter to pay such compensation to the allottee as provided under RERA, in case promoter fails to discharge any obligations imposed on him under RERA.

(e) To establish the Real Estate Appellate Tribunal (for short "REAL") to hear appeal from the directions, decision or order of the Authority.

(f) To make provision for punishment and penalties for contravention of the provisions of RERA and for non-compliance of orders of the Authority and REAL.

(g) To empower the appropriate Government to supersede the Authority on certain circumstances specified in the RERA.

ii. Important Definitions

(a) Project means the real estate project like development of a building or building consisting or apartment, or development of land into plots or apartments and includes development works, improvement and structures etc. for selling all or some of the said apartments, plots or buildings.

(b) Promoter means a person who constructs or causes to be constructed an independent building or a building consisting of apartments, a person who develops land into the project, any development authority, an apex state level co-operative housing society, a primary co-operative housing society, builder, coloniser, contractor, developer, estate developer and any other person who constructs any building or apartment for purpose of selling it to the public.

iii. Provisions of RERA

(a) Section 3. Prior registration of real estate project with the Authority-

- Section 3(1) of RERA imposes an obligation upon the promoter not to advertise, market, book, sell or offer for sale, or invite persons to purchase any plot, apartment or building in any real estate project without registering the real estate project with the Authority.

- First proviso to Section 3(1) mandates promoters to make an application to the Authority for registration of the ongoing real estate project on the date of commencement of RERA, within a period of three months from the date of commencement of RERA.

(b) Section 4. Application for registration of real estate project-

- Section 4(1) of RERA states that the promoter shall make an application for the registration of the real estate project to the Authority as envisaged under Section 3 in prescribed form, manner, within stipulated time and fees. Section 4(2) prescribes requirement of necessary documents and information with the application of registration.

- Section 4(2)(1)(C) provides for declaration of time limit by promoter within which the real estate project would be completed by the promoter. Section 5(3) of RERA states that grant of registration of the real estate project would be valid for the period declared by the promoter under Section 4(2)(1)(C).

- Section 4(2)(1)(D) mandates the promoter to deposit 70% of the amounts realised for the real estate project from the allottees from time to time in a separate account to be maintained in a scheduled bank to be used only for the purpose to cover the construction cost and the land cost.

(c) Section 5. Grant of Registration

(d) Section 6. Extension of Registration

- Section 6 of RERA seeks to extend the period of registration by the Authority granted under Section 5 to the promoter, except in case of force majeure (i.e. war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project).

- The first proviso to section 6 of RERA empowers the Authority in reasonable circumstances, without default on part of the promoter, based on the facts of each case, and reasons to be recorded in writing, can extend the registration granted to a project, but not exceeding one year.

(e) Section 7. Revocation of Registration-

- Section 7(1) deals with revocation of registration and provides that the Authority in the large public interest to regulate the real estate sector may revoke the registration, if the promoter violated the provisions of RERA, rules or regulations made under RERA; if promoter violated the terms and conditions on which the registration was granted/approved by the Authority or promoter was involved in unfair trade practices.

- Section 7(3) of RERA entitles the Authority not to revoke the registration of the promoter under section 7(1), and to continue the registration of the project on such terms and condition as the Authority thinks fit in the interest of allottees.

(f) Section 8. Obligation of Authority consequent upon lapse of or revocation of registration-

- Section 8 confers wide powers on the Authority upon lapse of or on revocation of the registration of the project. Under section 8 the Authority could mould its directions in such a way to progress the object and purpose of RERA i.e. to complete the developmental work within the stipulated time frame.

(g) Section 18. Return of amount and compensation

- Section 18(1)(a) provides for refund of amount and compensation if the promoter fails to complete the project or is unable to give possession of an apartment, plot or building in accordance with the terms and agreement of sale. Under the above provision the promoter is liable to return the amount received by the allottee in respect of the apartment, plot or building together with interest including compensation, in case the allottee wishes to withdraw from the real estate project. In case the allottee does not intend to withdraw from the project, the promoter is liable to pay interest for every month's delay till handing over the possession.

(h) Section 37. Power of Authority to issue directions-

- Section 37 of the RERA confers power upon the Authority to issue directions from time to time to promoters, real estate agent or allottees to advance the purpose and intention of the RERA.

(i) REAL-

- Section 43 of RERA provides for establishment of REAL to hear appeal from the directions, decision or order of the

Authority. Section 45 provides for composition of REAL and provides that REAL shall consist of a chairperson and not less than two whole time members of which one shall be a Judicial member and other shall be a technical or Administrative Member. Section 46 (b) defines a Judicial member, which includes a member of Indian Legal Service who has held the post of additional on that service or any equivalent post.

(j) Penalties

- Section 59 deals with punishment to promoter for non-registration of the project under Section 3.

- Section 60 deals with penalty to promoter for contravention of Section 4 of RERA.

- Section 61 provides for penalty to promoter who contravenes other provisions of RERA other than Sections 3 & 4.

- Section 63 provides for penalty to promoter who contravenes/fails to comply with orders, directions of the Authority.

- Section 64 provides for penalty to promoter for failure to comply with orders, directions or decisions of the REAL.

Kindly note that in the second part of our Knowledge Bank, we shall be dealing with specific observation provision wise.

