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THE RERA RETREAT: PROTECTING CONSUMER INTERESTS

This issue of Knowledge Bank is in continuation of the Legal Validity of the Real Estate (Regulation and Development Act, 2016 (PART-1)). The Part-II consists of the observations & analysis of the comprehensive judgement dated 06.12.2017 in the matter of Neelkamal Case, pronounced by the Justices Naresh Patil and R.G. Ketkar of the Hon'ble Bombay High Court.

GLOSSARY

S.NO.	ABBREVIATION	FULL TITLE
1	Neelkamal Case	Neelkamal Realtors Suburban Private Ltd. & Anr. vs. Union of India & Ors ^[1] .
2	Petitioner	Neelkamal Realtors Suburban Pvt. Ltd and Anr.
3	Respondent	Union of India & Ors.
4	RERA	The Real Estate (Regulation and Development) Act, 2016
5	Authority	The Real Estate Regulatory Authority
6	REAL	The Real Estate Appellate Tribunal

BACKGROUND OF THE CASE (as covered in Part I)

(1) The Writ Petitions under consideration were filed before the Hon'ble Bombay High Court, wherein the Petitioners challenged the legality and constitutional validity of 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.

(2) Three main grounds on which the Petitioners have challenged the various provisions of RERA were:

- Retrospective/ retroactive application of certain provisions
- Unreasonable restrictions placed by certain provisions contrary to Article 19(1)(g) and violative of Article 14, 20 & 300A of the Constitution of India.
- Absence of judicial member under Section 46 of RERA.

[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

(3) The object, purpose and provisions of RERA which were challenged in Neelkamal Case were elaborated in PART-I of the Knowledge Bank.

(4) Hereafter, we shall cover how the provisions under challenged have been interpreted by the Hon'ble Bombay High Court and the specific observations thereto.

OBSERVATIONS AND DECISION

(1) Interpretation of Statute:

The Hon'ble Bombay High Court interpreted the provisions of RERA as whole with regard to the general scope, scheme, purpose and the objects of RERA. The Hon'ble Bombay High Court applied the Heydon Rule for the true interpretation of RERA. Under the Heydon Rule for the interpretation of a statute in general four things are to be discerned and considered:

(a) What was the common law before the making/passing of RERA?

Before RERA came into force, the regulation of the sale and construction of apartments in Maharashtra was governed by the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short "MOFA").

(b) What was the mischief and defect for which the MOFA did not provide?

The biggest fallout affecting the real estate sector was as follows:

- The delay in real estate project completion.
- Diversion of funds by developers collected from buyers.
- One-sided contracts due to power asymmetry.
- Reneging on contractual commitments by both the developers and buyers.
- Constraint in financing and investment options available to the real estate sector, thereby affecting its long-term growth.

(c) What remedy the Parliament has resolved to strengthen the real estate sector?

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 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.

(d) True reason/effect of RERA?

RERA ensured greater accountability towards consumers and significantly reduced frauds and delays. RERA balanced the interests of consumers and promoters by imposing certain responsibilities on both. RERA ensures sale of plot, apartment or building in an efficient and transparent manner. It establishes symmetry of information between the promoter and purchaser and establishes a fast-track dispute resolution mechanism and standardisation of the real estate sector.

Analysis of challenge to validity of certain provisions

Under RERA, real estate projects can be divided into two parts, firstly, the real estate project that are launched after coming into force of RERA, Secondly, the real estate projects that are launched before RERA and for which completion certificate is not issued i.e. Ongoing Projects.

(a) Sections 3, 4(2)(1)(C) & (D) and 5(3) of RERA

- The Hon'ble Bombay High Court considered the scheme, object and purpose of RERA and held that RERA was enacted in the larger public interest. It was observed by Hon'ble Bombay

High Court that in past few decades the demand for housing has increased manifolds and many private players have taken over the real estate sector with no concern for the customers. RERA was enacted to induce professionalism in the real estate sector. The Hon'ble Bombay High Court harmoniously interpreted the provisions of RERA to advance the object and purpose of RERA.

- The Hon'ble Bombay High Court held that proviso to Section 3(1) which provides for registration of the ongoing real estate projects on the date of commencement of RERA and for which the completion certificate has not been issued, is not contrary to Article 14 and 19(1)(g), and stated that the Parliament felt the need to register the ongoing projects under RERA, because it was noticed that all over the country in large number of projects the allottees did not receive possession of plots, buildings or apartments for years altogether.

- The Hon'ble Bombay High Court held that RERA was enacted in the larger public interest and merely because sale and purchase agreement was entered into by the promoter prior to coming into force of RERA does not make the application of RERA retrospective in nature, as RERA would apply after the projects are registered. The contention of the Petitioners that Parliament lacks power to make retrospective law was denied by the Hon'ble Bombay High Court, and it was held that the Parliament has not only power to legislate retrospectively but can also modify pre-existing contract between the private parties in the larger public interest.

- The Hon'ble Bombay High Court held that the Section 4(2)(1)(C) which provides for a declaration by the promoter in respect of the time limit during which the promoter would complete the development work of the real estate project, and Section 5(3) of the RERA are not arbitrary. It was observed that the object of these clauses was to make the promoter disclose a time-line at the time of getting registration of the ongoing projects to bind him to complete the remaining work of the project which may be pending for years, without default of allottees.

- The Hon'ble Bombay High Court held that the provisions of Section 4(2)(1)(D), which mandates the promoter to deposit 70% of the amount realised for the real estate project from the allottees from time to time in a separate account in a scheduled bank and to be used for real estate project, was not arbitrary as the provision was enacted in the larger public interest of the consumer and allottees. The purpose behind the above section was to curb the practice where huge real estate projects were left incomplete by the builders without giving timely possession to the allottees and to ensure that the amount collected from the allottees by the promoter is invested for the project only. It was observed that section 4(2)(1)(D) balances the rights of promoters and allottees as 30% of the amount realised shall remain with promoters/ developers for the benefit of promoters and 70% of the amount invested in the project, to check the diverting of funds by the promoters for their own advantage.

(b) Sections 6, 7, 8, 37 of RERA

- After the careful scrutiny of the relevant provisions of RERA, the Hon'ble Bombay High Court harmoniously construed the provisions of Sections 6, 7, 8 & 37 of RERA, and held that Authority if satisfied that the promoter due to exceptional and compelling circumstances could not complete the project in spite of extension of one year granted by the Authority under section 6 of RERA, then the Authority would be entitled to continue the registration of the project by exercising power under Sections 7(3), 8 or 37 of RERA. It was further held that section 6 strikes a balance, so that the interest of genuine/non-defaulting promoters

is protected and, also the interests of allottees are protected. Hence, the proviso to Section 6 is not violative of Articles 14, 19(1)(g) and 300A of the Constitution.

(c) Section 18 of RERA

- The Hon'ble Bombay High Court held that section 18(1)(a) which provides for refund of amount and compensation to allottees in case the promoter failed to complete or unable to deliver possession of an apartment, plot or building either in accordance with the terms of the agreement for sale, is not arbitrary and harsh as the purpose of Section 18(1)(a) is to ameliorate the buyers in real estate sector and balance the rights of the stake holders. That Section 18(1)(a) is to protect the allottees and simplify the wrong committed by the promoter. It was further held that the requirement to pay interest under section 18 is not penal but compensatory in nature in the light of the delay being suffered by the flat purchaser, who had paid for his flat but did not get the possession. Further, RERA was enacted to protect the interests of the consumers in the real estate sector.

(d) Section 46(b) of RERA

- Section 46(b) defines a judicial member, which includes a member of Indian Legal Service who has held the post of Additional Secretary of that service or any equivalent post. The Hon'ble Bombay High Court held that under the scheme of RERA, the REAL constituted under Section 43 would be discharging judicial/quasi judicial functions and a member of Indian Legal Service is neither a retired judge nor qualified to be appointed as a judge and hence, can never fall within the definition of a Judicial Member. Section 46(1)(b) being contrary to express mandate of Section 45 which provides that the REAL should consist of a Judicial Member, was declared to be unconstitutional and was struck down by the Hon'ble Bombay High Court.

(e) Sections 59, 60, 61, 63 & 64 of RERA

- The Hon'ble Bombay High Court observed that RERA has aimed to balance the rights/ obligations of promoter and allottees while drafting the penal provisions. Therefore, Sections 59, 60, 61, 63 & 64 which provides for punishment and penalties for contravention of the provisions of RERA and for non-compliance of orders of the Authority or REAL, cannot be said to be operating retrospectively merely because it relates to ongoing projects registered with the Authority.

(f) The Hon'ble Bombay High Court rejected the submission made by the Petitioners that the Authority and the REAL under the RERA has unlimited power and held that the Authority does not have unlimited power, as the orders passed by the Authority are amenable to jurisdiction of the REAL. The orders passed by the REAL are further amenable to judicial review before the Hon'ble High Courts under Section 58 of RERA.

(g) Decision of the Hon'ble Bombay High Court

- Constitutional validity of first proviso to Section 3(1), Section 4(2)(1)(C) and (D), Section 5(3), first proviso to section 6 and Sections 7,8,18, 22, 38,40,59,60,61,63,64 of RERA were held to be constitutional, valid and legal.

- Section 46(1)(b) as "or has been a member of the Indian Legal Service and has held the post of Additional Secretary of that service or any equivalent post" was severed and struck down. It was held that in the constitution of REAL, majority of the members shall always be judicial members.

IMPORTANT TAKEAWAY FROM THE JUDGMENT

- The Parliament has not only power to legislate retrospectively but even modify pre-existing contract between private parties in the larger public interest.
- The legislature has power to make laws with retrospective effect and such retrospective operation would not render the law unconstitutional unless the retrospectivity is shown to be excessive or harsh which injuriously affects a substantive or vested right.
- RERA was enacted to protect the interest of consumer in the real estate sector. It was enacted in the public interest.
- The Hon'ble Bombay High Court gave effect to the scheme, object and intention of RERA, while interpreting the provisions of RERA. The Hon'ble Bombay High Court read RERA as whole and harmoniously construed the provisions with the other clauses of RERA to uphold the constitutional validity.