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RERA REGIME

LANDOWNERS AND PROMOTERS

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Introduction

Since the advent of the Real Estate (Regulation and Development) Act, 2016 (“RERA”), the authorities constituted thereunder (“**Authority(ies)**”) have shown great resilience and adaptability in their approach in dealing with complex issues arising in matters of real estate, wherein multiple parties and stakeholders are involved. More often than not, joint development agreements between landowners and promoters contemplate complex area sharing arrangements, revenue sharing arrangements, or hybrids thereof, together with a division of rights and obligations pertaining to development of the project. It is in this context that various Authorities have examined whether an owner of the land on which a real estate project is proposed to be developed, can in certain circumstances, be classified as a ‘promoter’¹ under RERA.

In light of the above, this paper aims to understand the definition of a ‘promoter’ as provided in RERA, analyze the views taken by the Authorities in its various orders and circulars, and evaluate the impact of the same on the underlying contracts between the landowners and developers.²

Brief Overview

Under RERA, it is the promoter of the real estate project that has the responsibility of registering the project with the Authority³ and complying with all the provisions specified thereunder, including completing the project and handing over units to the allottees.⁴ It is solely the promoter of the registered real estate project who is liable to refund the money or pay interest to the allottees upon failure to deliver apartments within the time committed therefor⁵; and/or be subject to penalties for contravention of the statute.⁶ It then becomes essential to understand who will be considered a ‘promoter’ of a real estate project under RERA.

A ‘promoter’ has been defined in Section 2(zk) of RERA as follows:

“‘promoter’ means:

- (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments.....for the purpose of selling...; or
- (ii) a person who develops land into a project.... for the purpose of selling...; or
- (iii) any development authority...; or
- (iv) an apex State level co-operative housing finance society...; or
- (v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or
- (vi) such other person who constructs any building or apartment for sale to the general public. Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder.”⁷

(emphasis supplied)

¹ Section 2(zk) of RERA.

² Certain Authorities have been passing orders and judgements in vernacular languages. For the purpose of this paper, only orders and judgements which were available in the English language have been considered.

³ Section 4 of RERA.

⁴ Section 11 of RERA.

⁵ Section 18 of RERA.

⁶ Section 59, 60, 61 of RERA.

⁷ Section 2(zk) of RERA.

RERA Authorities

The Authorities in the States of Maharashtra, Goa, Karnataka, Rajasthan and Gujarat have issued circulars and orders for laying down the circumstances in which a landowner may be classified as a promoter:

Maharashtra, Goa & Karnataka

The MahaRERA⁸ issued a circular on December 4, 2017, declaring that where the developer has agreed to share revenue generated from the real estate project with the landowner, the latter will also be considered as a promoter under RERA.⁹ The circular further states that, while the liabilities of a developer and owner towards each other will be governed as per their mutual agreement or arrangement, with respect to withdrawal of money from the project bank account, the developer promoter and the 'landowner promoter' shall be at par with each other. For this purpose, the landowner promoter who is entitled to a share of the total area being developed, is required to open a separate bank account for deposit of 70% of the sale proceeds realized from the allottees of its share, in compliance with the provisions of RERA.¹⁰

Similarly in February 2018, GoaRERA¹¹ issued a circular stating that landowners or investors who, by virtue of an arrangement with the developer, are entitled to a share of revenue generated from sale of apartments or a share of the total area developed for sale which are marketed and sold by them, would be covered within the scope of 'promoters' under RERA. The Authority has further clarified that such landowners would be "*jointly liable for the functions and responsibilities specified under the Act in the same manner as the promoter who actually obtains building permissions and carries out construction*", however, their liabilities would be co-terminus with the development agreement.¹² The circular also imposes an obligation of opening a separate bank account by the landowner promoters in a manner similar to that prescribed by MahaRERA.

Subsequently, KarRERA¹³ has followed suit and issued a circular¹⁴ which is akin to the circular issued by MahaRERA and GoaRERA. The circular issued by KarRERA imposes additional obligations on the promoters, including submission of a joint affidavit in the format prescribed by the Authority¹⁵ and ensuring that the development agreement expressly includes compliance with the terms of the KarRERA circular.

Rajasthan

A more cautious approach has been taken by RajRERA¹⁶ vide its circular dated June 30, 2020.¹⁷ The Authority has clarified that the mere fact that the landowner is entitled to receive a certain part

⁸ Maharashtra Real Estate Regulatory Authority, Mumbai.

⁹ MahaRERA circular no: 12/2017 bearing no. MahaRERA/Secy./FileNo.27/538/2017 dated December 4, 2019 effective from May 11, 2017. This circular has been issued by MahaRERA in supersession of its earlier order bearing no. Maha-Rera/LA/32/2017 dated May 11, 2017, in pursuance of its affidavit in reply in *Ismail Ibrahim Patel v. State of Maharashtra*, W.P. 2023 of 2017, (November 14, 2017).

¹⁰ For jurisprudence pertaining to this matter in Maharashtra see *Anjali Suresh Juvale v. M/s Rupji Constructions*, No. AT00600000000190 (August 30, 2018), *Mohan Hanumant Mate v. Ashok Pawar Group*, Complaint no. CC005000000022720 (September 25, 2019), *Pawar Builders and Developers v. Pallavi Suresh Hedavkar*, Complaint No. CC006000000079442 (October 3, 2019), *Udayachal Goregaon CHS Limited v. M/s Jaycee Homes Private Limited*, Appeal no. AT006000000010569 (January 30, 2019), *Goregaon Pearl CHSL v. Dr. Seema Mahadev Paryekar*, Appeal from Order (Stamp) No. 22143 of 2019 (October 14, 2019).

¹¹ Goa Real Estate Regulatory Authority.

¹² GoaRERA, circular no: 11/35/2017-DMA/3390(A) dated February 13, 2018.

¹³ Karnataka Real Estate Regulatory Authority.

¹⁴ KarRERA circular no: KREERA/circular/03/2019 dated November 6, 2019.

¹⁵ The prescribed affidavit format is available at: <https://rera.karnataka.gov.in/downloadPage>.

¹⁶ Rajasthan Real Estate Regulatory Authority.

¹⁷ RajRERA, circular no: F.1(152)RJ/RERA/LAND/2020/1202 dated June 30, 2020.

of sale proceeds (gross revenues) of the project does not make him a promoter¹⁸ and the Authority has laid down the following criterion with respect to landowner promoters:

“6. Whether a landowner will be named and treated as a promoter will depend on the terms of the development agreement....when the development, by its intent or expression, disclose any of the following conditions:-

(a) The landowner himself has some role as a builder, coloniser, contractor, developer or estate developer in construction or development...; or

(b) The landowner has a share in the area developed for sale in the project, with the intent of marketing or selling it or any part of it before completion of the project; or

(c) The landowner, through the development agreement and/or a power of attorney (irrevocable for the term of the development agreement), does not give to the developer-promoter all powers of sale and conveyance of all the units to be sold, along with proportionate undivided interest in the land in the name and on behalf of the landowner, such that the landowner is required to sign all agreements for sale or sale deeds, etc....; or

(d) The landowner proposes to share profit or loss of the project; or

(e) It is specifically agreed in the development agreement that the landowner shall be named or treated as a promoter under the Act.”

(emphasis supplied)

Gujarat

The GujRERA¹⁹ by its order dated May 23, 2019²⁰, mandated that a joint affidavit be given by the promoter and landowner for ensuring fulfilment of their respective commitments under the development agreement, including participation by the landowner in execution of deeds of conveyance and title transfer to the allottees. Provided that, the landowner's responsibility in such case would be limited to the extent of such title transfer. The Authority further held that where the landowner takes share of the completed unit/ flat for the purposes of sale, the landowner and developer will both be promoters under RERA.²¹

Analysis

From a perusal of the foregoing circulars, it is evident that all the aforementioned Authorities have in some instance or another, classified a landowner as a 'promoter' under RERA. While their views as to the circumstances may differ, it is clear that landowners are being held accountable as promoters under RERA, even though the definition of 'promoter' in sub-paragraph (v) thereof²², clearly brings out the distinction between the owner of the land and its developer and despite the definition being an exhaustive one.²³ The common thread in all these circulars seems to be that

¹⁸ Also see *Raghunath Prasad Jain v. Arihant Dream Infra Projects Limited*, Complaint No. RAJ-RERA-C-2017-2105 (June 12, 2019) and *Shakuntala Narendrasingh Chauhan v. Modest Infra Limited*, Complaint No. RAJ-RERA-C-2018-2403 (October 17, 2019).

¹⁹ Gujarat Real Estate Regulatory Authority.

²⁰ GujRERA order no: 23 dated May 23, 2019.

²¹ It may be interesting to note that while no circulars have been issued by the Authorities in Haryana, the Authorities have in certain cases held that where a landowner undertakes selling of units or any other activity which falls within the definition of 'promoter' under RERA, such landowner would also be a promoter of the real estate project and be liable to the allottees. See: *The Olive Spire v. Pal Infrastructure and Developers Private Limited*, Complaint No. 136 of 2018 (December 4, 2018); *Orris Infrastructure Private Limited v. Greenopolis Welfare Association*, Appeal No.158 of 2019 (December 23, 2019). Also, see *Ankur Dhanuka v. Godrej Projects Development Limited*, Complaint No. 1757 of 2018 (April 10, 2019), wherein it was held that landowners therein did not have any obligations towards the complainants.

²² Section 2(zk) of RERA.

²³ The definition of 'promoter' under RERA begins only with the word "means". It is settled law that the usage of the word 'means' in the beginning of a definition indicates that the list provided therein is an exhaustive one, and such definition cannot be further widened. See: *Gough v. Gough (1891)2Q.B.665*; *P. Kasilingam v. P.S.G. College of*

the treatment of landowners as promoters would be almost entirely dependent on the commercial understanding between the owner and developer captured in the underlying contract.

Traditionally, landowners would receive monetary compensation for devolution of development rights in favour of developers. However, this practice is now almost extinct considering the size and scale of real estate projects, and instead landowners today generally receive a share in revenue from the project or a share in built-up area which can then be sold by the landowner directly or through the developer for a marketing fee. Most of the Authorities quoted above, have taken a view that these landowners who have a stake in the real estate project would be 'promoters' for the purposes of RERA. Such a view has far reaching ramifications for landowners, as it would expose them to onerous obligations and harsh penalties under RERA.

It therefore becomes crucial for a landowner to negotiate development agreements in such a manner that his liability and obligation thereunder is limited and he is not treated as a 'promoter' under RERA, in consonance with the view taken by the Authority of that State.

This paper has been written by Nidhi Arya (Partner) and Ayushi Jain (Associate).

Technology, AIR 1995 SC 1395 (order dated March 24, 1995); *D.A.V. College Trust and Management Society v. Director of Public Instructions*, AIR 2019 SC 4411 (order dated September 17, 2019).

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