THE REAL ESTATE REGULATORY BILL, 2013

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*[**Abstract**: Government perceive that the Real Estate (Regulatory and Development) Bill, 2013 as introduced in Rajya Sabha in August 2013 is towards protecting the interest of consumers and promoting fair play in Real Estate transactions. It is being expected that the legislation would ensure greater accountability towards consumers, and to significantly reduce frauds by instituting transparency and accountability in the transactions. This paper notes that the Commercial and Farm Housing segments of the sector, where malpractices are rampat, have not been included in the scope of the Bill. Expectation that consumers would get a fair deal are belied when it does not address the issue of transaction costs involved in obtaining pre commencement approvals from local bodies. This paper examines various clauses of the Bill and suggests rewording/rewriting/ adding new clauses to enable the Bill to subserve its objective effectively in its limited scope in the residential segment of the sector. Need for enhancing the status of the Real Estate Regulatory Authority and Appellate Tribunal to be at par with other Regulatory Bodies has been highlighted with stress for providing necessary and effective safeguards for protecting their autonomy.]*

While addressing the media on 5th June 2013 following approval of The Real Estate Regulatory Bill 2013 by the Union Cabinet, Union Minister of Housing described the Bill in the following terms:-

a) A pioneering initiative to protect the interests of consumers;
b) Promoting fair play in real estate transactions; and
c) Ensuring timely execution of the projects

The Minister assured that the Bill provides for a uniform regulatory environment with a view to:-

a) Protecting consumer interests;
b) Helping speedy adjudicating of disputes;
c) Ensuring orderly growth of real estate sector;
d) Making real estate development transparent and consumer friendly by ensuring greater accountability of promoters towards consumers thereby reducing frauds and delays; and,

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e) Promoting orderly growth through efficiency, professionalism and standardization.

When transparency and accountability is institutionalized with the implementation of the Bill, the real estate sector would be enabled to access capital and financial sector to ensure its long term growth[1].

Real estate sector refers to three segments, namely, Commercial, Residential and Farm Housing which attract investment for capital appreciation, rental income, and enhanced income from agricultural pursuits, lease and commercial use. The Bill addresses the concerns in the residential segment of the sector only. Malpractices in commercial segment are equally pronounced and many a times the developers set up integrated projects including residential and commercial segments.

Exclusion of commercial segment from provisions of the Bill defies logic. There are also instances of developers developing farm houses and lure investments on such projects which are not unoften on reserve forest lands, government lands, and common interest lands and even on encroached private lands. Such situations are created in the absence of proper disclosers. It would stand to reason that such segments of agriculture and non-agriculture land which are traded as farm house etc. should also come under the purview of the Bill.

The Press Note mentions about the fact real estate and housing construction had been largely the concern of state institutions till the 1980's with very few private promoters and a nascent industry. With the liberalization of the economy conscious encouragement was given by the government to the growth of private sector in construction, with a great deal of success, and the sector today is estimated to contribute substantially to the country's GDP. The Note goes on to acknowledge that sector has become opaque, with consumers often unable to procure complete information, or enforce accountability against builders and developers in the absence of effective regulation. Consequently such a sector has come to be known

[1] "Real Estate Bill to protect the interest of the consumers and promote fair play in Real Estate transactions" by, Press Information Bureau, June 5, 2013, Ministry of Housing and Urban Poverty Alleviation, Government of India.

as the fountain head of corruption in the country and nurtures a strong nexus between the powers that be and the developers[2].

Confederation of Real Estate Developers Association of India (CREDAI) in April 2011, called for a time bound action from government to tackle the menace of corruption in the Real Estate Sector. In their representation, CREDAI stated that the developer community was being branded as corrupt and it offered to discuss the entire matter with government.

CREDAI was candid enough to lay the blame on government agencies charged with granting plethora of approvals which are granted only on furnishing speed money. CREDAI referred to a study pointing out such approvals costing as high as 40 per cent of the total costs[3]. The malaise is further compounded by the fact in the investigations carried out by CBI in G-2 scam, companies in real estate sector provided parking facilities for funds in the transactions involved in the scam. Such a revelation gives credence to the belief that the real estate sector has become the biggest generator and absorbent of black money.

Clothing of the Real Estate Sector in the image of corporate business has not resulted in any significant development in transparency measures and assuring fair dealings to the consumers. Rather the corporate structure has been used to facilitate the process of parking and generating black money. Such a mode of working would necessarily be towards creating distance and opacity between developers and users by creating a layer of brokers and would increase the transaction costs for the end user. There would be another set of intermediaries between the developers and government agencies who would be facilitating the approvals albeit on consideration[4].

The Real Estate Regulation Bill, 2013 does not contain any provision in its body to address the concern of CREDAI about the substantial hidden costs incurred by the

[2] "What goes on in Real Estate Business?" By M.M.K Sardana, ISID Discussion Note: DN2011/10

[3] Nawaz (2011), "'CREDA' calls for time-bound action to fight corruption, accommodation", Times, April 30, 2011.

[4] *Op. cit.* 2

developers in obtaining various approvals from government and local bodies before they can obtain a commencement certificate. Therefore, a measure like the Bill under review professing to achieve cost efficiencies and transparency is at best a half hearted measure and compromising on stated objectives. Bill should have contained provisions empowering The Real Estate Regulatory Authority (RERA) -- to be watchdog for the process of approvals expeditiously by the agencies of the government and local bodies in a time bound manner on pain of penalties on such authorities and also on developers if they themselves cause delays by furnishing inadequate information. Effective implementation of such provisions, if provided, would not only cut down hidden costs but would also speed up the availability of commencement certificates and thus the desired efficiencies would become a reality. Legislators, before whom the Bill has already come up, would have the opportunity of ensuring the incorporation of appropriate provisions for empowering the RERA as above. It may not be out of place to point out that the Bill has enjoined upon RERA to accord registration of the projects within a period of fifteen days (Clause 5). On the same lines, RERA needs to be empowered to bring fair work culture among the local bodies and agencies.

Clause 3(b) of the Bill seeks to exempt promoters from their projects being registered with RERA if they have all requisite approvals and commencement certificates for the development of the real estate projects prior to the commencement of this Act. It means that all such promoters whose projects are under implementation would not be required to file before RERA various documents and affidavits of disclosure and there would no occasion for the authority to exact adherences from the promoters as enunciated under clause 7 of the Bill and thus these promoters would not be required to put a webpage on the website of the authority and enter details of their projects. Such promoters would also thus not be required to adhere to provisions of clause 11 and thus they need not disclose about the progress of allotment and also of the progress of their project. On a wider interpretation of the proviso clause of clause 61, it may be inferred that provisions of clauses 12, 14 and 16 would be applicable to them on institution of a complaint for a payment of compensation in case they fail to fulfill their obligations. Exempting such

category of promoters from the rigors of the Bill defies logic. Logic of creating the proposed legislation is rooted in the unfair and restricted trade practices indulged into by such promoters and their agents. In the absence of proper disclosures, the allottees and investors in such projects seeking to exact the benefits of clauses 12, 14 and 16 by taking recourse to the provision of clause 61 would be required to perform a great amount of diligence for establishing their complaints before the adjudicators. It would be fair and appropriate to build clauses in the Bill to make the Bill applicable to ongoing projects including those projects where commencement certificates are available before coming into force of the Act and work on them is yet to commence. The proposed provisions would be having built in flexibility to facilitate the registration of ongoing projects from the stage where these projects stand so that the rigors of the provisions of the Bill start applying to them immediately from the stage at which these projects stand. With the availability of the exemption clause, the perpetrators of opacity and unfair trade practices are being allowed to proceed unhindered by the rigorous provisions of the Bill.

The Bill does not provide for an investigation Agency for RERA who would assist it in discharge of its functions as enumerated in the Bill effectively. For example, clause of 7 of the Bill empowers the authority to cancel the registration of a promoter of a project on various grounds stated in the clause. In the absence of an independent agency of its own, RERA would be handicapped in verifying the claims and counterclaims of the complainants and defendants before it. In the absence of an independent investigating agency of its own, RERA would experience difficulties in monitoring on its own the projects if circumstances require it to do so. Investigation Agency of RERA would be statutorily equipped to enter the offices/project sites of the promoters, Real Estate Agents and other professionals involved in the project with the prior approval of RERA and would be empowered to go through their records and collect samples of materials being used and seek direction of RERA with a view to ensuring the efficient execution of the projects with proper adherence to quality and specifications as per the disclosures of the promoters.

It is welcome that the Bill seeks to provide for the registration of Real Estate Agents and specifies their role explicitly. The Bill also contains penal provisions against them for their defaults. However, the Bill does not define about the qualifications that would be required before being Real Estate Agents. Therefore anyone with local influence and muscle power can seek to be registered as Real Estate Agent. Agents are the cutting edge in the Real Estate Sector. When the developers perceive themselves to adhere to corporate image, it is imperative that the professional ancillary services are professionalized to inspire confidence among the users and other stake holders. In recognition of the fact that there is no professional body available in the country certifying a person qualified to be Real Estate Agent and in order to maintain continuity, the Bill should have provisions for provisional registration initially as one time measure valid for a period of three years extendable to five years where upon such provisionally registered agents would be eligible for 'Registration' on their being certified by a professional body specifically promoted by RERA and appropriate government obligating it to prescribe minimum qualifications and standards before certifying a person eligible for being a Real Estate Agent. Once the certifying bodies are in place and have become functional, provisionally registered agents should be allowed to fade away unless they get certified. No provisional registration should be made six month after the coming into force of the Act. As the provision of clause 10 of the Bill mandating duties and responsibilities of the agents would come into force immediately after the coming into force of the Act, it may be necessary to mandate on RERA to organise reorientation programmes for the provisionally registered agents so that they are enabled to discharge their functions as expected of them under the provisions of the Bill. Requirement of certification before one can aspire to become a Real Estate Agent is very much in position in all developed countries. For example, Ontario Real Estate Association in Ontario State of Canada has a regular course calendar on display for sales person Registration Education Programme covering all facets of the Real Estate business including on real property laws, mortgage financing, principles of property appraisal etc. For becoming a Real Estate Agent an aspirant has to gain proficiency in related laws and procedures surrounding the responsibility of a Real Estate Agent and pas mandatory examinations before he can be certified to be qualified for seeking

registration under the law. In fact, there is need to ensure that all those professionals who advise the real estate investors towards investing in real Estate need to be qualified and certified to perform their job of tendering such an advice. A qualified Real Estate Appraiser would be able to advise an investor about the true and projected value of the property in which an investor is proposing to invest and thus insulate the investor from the noise effects of the sales pitch of the promoters and the real estate agents.

Nobel Prize in economics for the year 2013 has been awarded to a trio of economists who have developed an index for real estate investments to enable the investors to make a scientific choice on the options available to them on different kinds of assets. The certifying institutes as proposed above can enhance their scope of certifying the ancillary service providers in the sector to inspire confidence among the investors and curb the speculative pitches. On the advice of such professional institutes, registration of such service providers can also be regulated by providing enabling provisions at this stage itself.

Clause 29 of the Bill lays down functions of the authority for promotion of real estate sector. The first and foremost function outlined in the clause is towards protection of interest of allottees and promoters. In this connection, the legislature may consider that at this juncture, it is being expected of the RERA to bring out a balance between a set of strong promoters *vis-a-vis* a set of allottees who are at the receiving end of the market asymmetries in a market where demand far outstrips the supply and where investment opportunity to most allottees is available once in their lifetime. Therefore, legislatures may consider providing a more proactive role to RERA In maintaining a positive discrimination in favour of the allottees. RERA needs to be mandated specifically to draw up model buyer seller agreements etc. for various segments of the sector so that terms of these agreements are evenly poised and are not loaded against the allottees as has been the industry practice so far. Therefore, RERA has to take upon itself the responsibility of scrutinizing such documents at pre registration stage itself before granting the registration.

When the authority is being mandated to take measure to encourage construction of environmentally sustainable and affordable housing and promoting standardization in the use of construction materials, construction techniques etc., it is all the more important that it should be equipped with an independent investigation agency as argued in the preceding paragraphs to give it considered feedback for the authority to prescribe norms for achieving the objective of standardization.

It is obvious that development of professionalized ancillary services would take considerable time to develop and would be dependent on the coming of age of the professional certifying bodies, RERA needs to perform an 'advocacy role' to create appropriate level of awareness among the allottees as well as promoters so that the larger objective of transparency are arrived at with the capacity of appreciating each other's concern and market asymmetries are brought down. Advocacy responsibilities would also empower the allottees in being aware of their rights and obligations under the statute and similarly promoters would be brought closer to the local authorities for developing an environment and competence for speedy clearances.

Clause 8 of the Bill deals with the consequences of cancellation of the registration of the promoter or promoter ceasing to be in business. It enjoins upon RERA to work out modalities in consultation with government for carrying out of the remaining development works. It appears that the clause of the Bill is not comprehensive in laying down the provisions for dealing with the subsisting rights and liabilities created in the project at the time of the promoter ceasing his association with the project. This particular aspect needs to be closely examined legally before the legislatures approve this particular clause of the Bill.

The mandate of consulting the government would be towards delaying on a matter which in the interest of investors and allottees needs to be resolved expeditiously. Mandatory consultation with the government may be perceived to be an infringement of the autonomous functioning of the RERA. RERA would be required to develop its own competence and expertise in devising transparent procedures for inducting an alternate promoter. It would be facilitated in this task if it is equipped

with a competent investigation agency making a set of its recommendation after going into legal, financial and technical aspects where upon RERA takes final call towards passing on the project to the new entrant who would carry the subsisting rights and liabilities also.

Clause 11(1)(b) mandates the promoters to publish quarterly up to date list of number and types of apartments or plots booked. Quarterly reporting of booking etc. leaves scope of alliance between promoters and real estate agents to mislead the intending allottees. Agents and promoters have an interest in inflating the bookings artificially to create an impression of high demand as illustrated in an ISID discussion note[5]. Allottees are lured to do bookings under the pressure of the noise sales and that too even for non-preferential locales. An impression is created that all the preferential locations have already been looked. If an intending allottee pleads for a specific location and for floor; they are offered on 're-sale' basis and of course on premium.

In order to loosen such a nexus between promoters and the real estate agents, the promoters should be updating such an information on real time basis displaying full particulars of the allottees and thus eliminating noise from the sales pitch. Such a display would also be of interest to Revenue Authorities and thus would dampen the role of black money. Accordingly, this sub clause needs to be suitably reworded requiring the promoters to publish the details of booking along with the particulars of allottees on real time basis.

An intending allottee or an allottee would have queries regarding the status of the project over and above what is displayed by the promoter as required under clause (11)(1). Promoters lack aptitude to answer such queries. In an endeavour to make them responsive, another sub clause may be in order under clause (11)(1) making it mandatory on the promoters to mention telephone numbers and e-mail Ids of promoters and their senior functionaries and also of those involved in the project.

[5] *Op. cit.* 2

Clause 20 describes the qualifications of Chairperson and Members of RERA. According to this clause a person who has held the post of an Additional Secretary in the central government or its equivalent in the central/state government is eligible to become the Chairperson of RERA. For being a Member, a person should have held the post of a Secretary to the state government or any equivalent post in the central/state governments.

These qualifications for the Chairman as well as Member are lower than the qualifications prescribed for other regulatory bodies. Chairman of RERA would be lower in status to Secretaries to the central government and Chief Secretary and Financial Commissioners in the state. In the hierarchy of Regulators, RERA would be at the lowest rung and its Chairman/Members would not have handled policy issues at the apex levels in government. RERA is being conceived for regulating a sector which has come to be called as the fountainhead of corruption and is in the vice grip of the nexus of bureaucrats, politicians and developers where investor, for shelter or for their vocation, make investment of their life savings. In all fairness, the status of the Chairmen and Members needs to be brought at par with the status of other regulatory bodies. Accordingly, Chairman and Member should be such persons who have held posts of Secretaries to government of India or equivalent.

Clause 22(2)(a) enables the Chairperson or a Member to relinquish his office by giving notice of not less than three months. There are exigencies when it may not be possible or desirable to insist for a notice of not less than three months enabling the Chairperson and Members to relinquish his office. Such administrative exigencies can be taken care of by rewording the clause, say, in line with section 11(1) of the Competition Commissions Act, 2002. Same logic would apply towards rewording the clause 42(2) of the Bill which provides for relinquishment of office by Chairperson/Member of the Appellate Tribunal.

Clause 24 of the Bill lays down circumstances and procedure for removing the Chairperson or other Members of RERA and does not include safeguards for them against their being removed arbitrarily. Absence of such safeguards gives an impression that RERA is a subordinate office of the government and not an

autonomous institution. This clause needs to be reworded to provide for the safeguards as have been provide to say, Chairperson and Members of the Competition Commission, who are removable after an enquiry by the High Court under the procedure prescribed in this regard by the High Court and that Court giving their finding that Chairperson/Member is removable.

As per clause 39, there shall be an Appellate Tribunal consisting of a Chairperson and two other Members of which one would be a Judicial Member and other shall be a Technical or Administrative Member. Clause 40 goes on to prescribe the qualifications for the Chairperson as a serving or a Retired Judge of the High Court. Judicial Member should be one who has held a judicial office for at least seven years or has been member of the Indian Legal Service and has held the post in Grade 1 of that service or any equivalent post for at least three years etc. a Technical or Administrative Member should have held a post equivalent to a Joint Secretary to government of India at the centre or in the state.

The status of the Appellate Tribunal as provided in the Bill is not at par with similar regulatory bodies particularly in regard to the qualifications of Judicial Member and Technical or Administrative Member who would be from the lowest rung of the senior management in government.

In all fairness, Judicial Member and also Technical and Administrative Member should be those who have been Secretaries equivalent to government of India at the centre or in the state in their respective fields. To inspire confidence in the Appellate Tribunal, the selection to hold the position in the Tribunal should be on the recommendations of a Committee constituted by the High Court who would include a nominee of the appropriate government. Thus the entire of clause 40 needs to be reworded.

Under clause 43, procedures for removal of Chairperson, Member (Judicial) and Member (Technical or Administration) have not been kept uniform. The proceedings before the Appellate Tribunal are judicial in nature. Therefore, all the members perform judicial functions together as appellate authority. Clause 43 empowers the

government to suspend the Chairperson as well as Judicial Member on their making references to the High Court for conducting an enquiry against them. Technical Member can be removed from his office after an enquiry by the government. Such a Member would not get the benefit of an independent enquiry by the High Court at par with the Judicial Member.

The arrangement as provided in clause 43 not only transgresses the autonomy of the Appellate Tribunal but also would impact harmony of relationship within the Tribunal. It would be appropriate that the entire of clause 43 is be reworded to include that no Chairperson or a Member of the Appellate Tribunal shall be removed from his office except by an order made by an appropriate government after an enquiry made in this behalf by High Court in which such person or member had been informed of the charge against him and given a reasonable opportunity of being heard in respect of those charges. The Chairperson or a Member can be placed under suspension before or during enquiry if recommended by High Court.

Clause 61(1) provides for adjudicating on compensation under clauses 12, 14 and 16 of the Bill. As per this clause, RERA can appoint officers not below the rank of a Joint Secretary to the state government to be adjudicating officers. These officers would be required to dispose of the matters before them within 90 days as required in sub clause (2) of this clause. It is unlikely that serving officers of the government would be available to perform such a role as the government of a state would not find it feasible sparing officers for this purpose. Level of adjudicating officers as proposed in the Bill is not senior enough to inspire confidence among the parties. This clause needs to provide for adjudicating officers who have held a post with central/state government equivalent to a Joint Secretary to government of India and are below the age of 67. This would provide a scope to RERA to locate sufficient number of officers to assist them in this task. The clause thus needs to be modified accordingly.