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**Promoter under RERA
Act 2016 – Widened Scope
(Part - V of RERA Series)**

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PROMOTER UNDER RERA ACT 2016 – WIDENED SCOPE

(PART - V OF RERA SERIES)

The real estate sector plays an important role in fulfilling the need and demand for housing and infrastructure in the country. Real estate Industry contributes the 2nd highest GDP to the country next to agriculture. It employs a large number of skilled, unskilled resources. While this sector has grown significantly in recent decades, it has been largely unregulated, with absence of professionalism, accountability, standardisation and lack of adequate, speedy consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardisation has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasised in various forums.

In common parlance the person carry on the business of real estate be called as builder, developer etc. In this article, we would like to discuss and deliberate how RERA Act has brought in / defined/ included the various stakeholders as promoters and their responsibility under RERA Act 2016.

Definition under RERA – Section 2(zk) "promoter" means,

- (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or
- (ii) a person who develops land into a project, whether or not the person also constructs

structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

- (iii) any development authority or any other public body in respect of allottees of—
 - (a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or
 - (b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or
- (iv) an Apex State Level Co-operative Housing Finance Society and a Primary Co-operative Housing Society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; 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 there under;

Definition of promoter is wide and covers all types of Promoters viz., developer, builders, GPA Holder, coloniser, contractor, Land owner in the Real Estate Project. Hence, any person who develops and sells is included within the definition of a Promoter.

Objective of the Act is to include any such person who has right or gets right in the real estate project to enter into a contract of sale with allottees and collect money thereon is responsible for delivery and meet the obligations.

The common question encountered are :

1. Is Landowner a promoter ?

Ans - Yes, the words “causes to be constructed” in the definition of a Promoter brings the Landowner within the ambit of definition of a Promoter. Landowner is the person causing construction of the project, who may give the rights to a developer by way of granting development rights, GPA etc.,

All such persons are jointly responsible to the Allottees in the project.

2. Is Housing Society a Promoter ?

Yes and No - One should understand the role of Housing Society to answer this question. If the Housing society collects money from its members towards a plot or apartment, then the Housing Society is a Promoter and all obligations under the Act should be complied with by such a Housing Society.

If the Housing society facilitates the transaction through a builder or contractor by identifying, negotiating etc., on behalf of its members (without collection of money from its members towards such a plot or apartment) then, the Housing society would be acting as an Agent.

Hence, one should understand the role of Housing Society by its functions, responsibility to its members etc., to conclude whether it is acting as a Promoter or a Agent.

Government bodies like Development Authorities, Housing Boards etc, whoever promote the real estate projects are also included in the definition of Promoter.

In the Application for Grant of Registration, applicant should provide details of all promoters in the real estate project and their respective shares in the project.

Maharashtra, Karnataka, Goa have clarified by way of circulars and notifications to confirm and include the landowner as part of the application for grant of registration.

Karnataka RERA – Circular No /K RERA / 3/2019 dated 31.10.2019

Goa - No 11/35/2017-DMA/3390(A) dated 13th Feb 2018

MahaRERA - Secy/File No 27/538/2017 dated 4th Dec 2017 - Circular No 12/2017

MahaRERA - Circular No 13/2017 dated 4th Dec 2017

Practical Cases and judicial pronouncements –

Important aspects under RERA between the landowner and developer under joint development agreement -

- a) The RERA Act does not differentiate the landowner or developer. Both are having same responsibility and obligations towards the allottees in the project.
- b) The agreement between landowner or developer (JDA) defines their roles and responsibility. Hence all possible clauses shall be incorporated while drafting JDA, to name few -
 - 1) Who is responsible for RERA Registration, Quarterly updates, Annual Audit Compliances, Advertisement Compliances.
 - 2) How to open the RERA Designated project Bank Account – who are the signatory to the Bank Account / operation.
 - 3) How to collect money from allottees, mandatory depositing of 70 % into RERA designated bank account including sale proceeds of Landowner units in the project.
 - 4) How to operate the RERA designated bank account to protect the interest of both (landowner and developer)

- 5) Withdrawal of money from the RERA designated bank account, distribution of money so withdrawn between landowner and developer based on the proportion completion of the project.
 - 6) Utilisation of money withdrawn for the Project purpose only.
 - 7) Delay in delivery of the possession of the units to the allottees.
 - 8) In case of noncompliance, if penalty levied, who will responsible and comply with it.
 - 9) All other compliances under RERA -
- c) Caselaw on landowner is a developer - **Tupe Developers & Ors. v. Bhansali Infotech LLP & Ors.**

Housing Society and the Developer –

It is common practice that the Housing Society's are registered in order to facilitate purchase of the plots/houses to their members.

Prior to RERA Act 2016, housing societies use to collect the money from their members even before identification of land, builder etc. The money so collected would be advanced for the purpose of procurement of land or payment of advances to the builders. Can this holds good post RERA regime -

The definition of Promoter includes - an Apex State Level Co-operative Housing Finance Society and a Primary Co-operative Housing Society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings;

Post RERA Practice shall be –

- a) Housing Society's shall collect money in accordance with Section 3 of the RERA Act 2016. i.e., only after Registration of Real Estate Project with the RERA Authorities.
- b) Means, the Housing society shall invest their own money in identifying the land, obtaining necessary approvals or plans till obtaining RERA Registration, post that, permitted to collect advance from their members.
- c) Money so collected shall be used for the specific project.

- d) If society doesn't have sufficient money, then they may enter into agreement with the builder and facilitate the transaction to their members. In that situation, Housing Society shall register themselves as Real Estate Agent under RERA in accordance with Section 9 and Section 10 of the RERA Act.
- e) The provisions of RERA shall be applicable to all housing co-operative society's collected money from their members.

The person provides the property on Lease is also a promoter

- a) The RERA Act 2016 shall be applicable to the Property developed on the Lease Land. It is common practice in few states that the builder obtain land from the government on long lease basis. In turn development of the land into building/apartment etc. Ultimately, these buildings be allotted to the customers on a long lease basis (viz., 30 years / 60 years etc).
- b) The intention of the legislature while enacting the provisions of the RERA Act is to protect those persons who have invested substantial amounts in the real estate Hence, they are required to be called as 'consumers' or 'Allottees' and if they are excluded The definition of 'Allottee' and thereby from the protection given under the Act, by giving restrictive meaning to the term 'Allottee', it would be a case of unjust enrichment on part of the appellant and the very object of the Act would stand frustrated. The remedy provided to the 'Allottees' under Section 18 of the Act can be available against the 'Lessor' because the definition of 'Promoter' under Section 2(zk) of the Act will also include the 'Lessor'.
- c) Well known case Law pertaining to Lease Land and RERA- **Lavasa Corporation Unlimited.**
- d) Further Section 11(4)(C) of the Act includes the promoter shall be responsible to obtain the lease certificate, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees;

- e) With these conversation, one can reasonably conclude that the Lease property's where in substantial cost of land and building is collected would cover under the provisions of the RERA Act 2016.

Is the assignee in a real estate project is a promoter?

Let us understand the statement with an Example –

- M/s. Crazy Developers Private Limited obtained apartment project sanctioned plan from planning authority. To meet the development cost for the real estate project M/s. Crazy Developers has assigned 50 apartments (being 40% of units in the project) to Mr. Zenith for a consideration, collected full consideration and executed the Assignment agreement.
- Mr. Zenith, being the assignee of the 50 apartments in the project started marketing and promised amenities and facilities to the customers as promised by M/s. Crazy Developers Private Limited. However, M/s. Crazy Developers Private Limited could not provided the promised amenities and facilities in the project.
- The buyers / allottees whoever purchased from Mr. Zenith seeking compensation for non-delivery of amenities and facilities in the project by the builder.
- Legal Provisions under RERA Act 2016 –
- Section 2(zk) "promoter" means,— a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees;
- Case Law pertaining to assignee is a promoter - **Samruddhi Developers v. Kiran Vasanf Verekar & Ors.**
- It was inter alia held by the Bombay High Court that Section 15(2) of the Act read with definition of "promoter" under Section 2(zk) of the Act clearly mentions that promoter includes his assignees and is required to independently comply with all the pending obligations of the original promoter under the provisions of the

Act and the rules and regulations made there under as well as comply with the pending obligations under the agreement for sale entered into between the respondent developer with the allottees on transfer or assignment of a project.

- Hence, assignee in the project shall be aware of the provisions of RERA Act 2016 and his obligations towards the allottees in the project.

LENDERS (Bankers or Financial Institutions) AS PROMOTERS UNDER RERA –

- The Haryana Real Estate Regulation Authority ("HRERA") in the matter of **Deepak Chowdhary Vs PNB Housing Finance Ltd. & Ors. ("Supertech Hues case/ Order")** (Order dated 11.9.2020 in Complaint case no. 2145 (earlier 2031) of 2020.
- This Order will have implications on banks and other financial institutions, which provide loan or credit facilities to real estate projects, the conflict between the rights of such banks and financial institutions vis-à-vis the rights of allottees of such projects.
- Though the HRERA has mentioned in the Order that "it is not against the right of the lender to auction / sell the Project", it has concurrently attempted to balance between the lenders' right to pursue actions under the SARFAESI and the interests of allottees, and has stated the fact that the interests of allottees cannot be subservient to the interests of the lenders. While proceeding to treat the lenders as promoters under RERA (even though for a limited purpose), the HRERA has also affixed the liability on the lenders to ensure proper utilization of the loan funds.
- Also relied on the Hon'ble Supreme Court's judgment in the matter of **Bikram Chatterjee v. Union of India ("Amrapali")**[3], to hold that "in the event of diversion of funds, banks cannot be allowed to sell the flats/apartment and deprive the allottees, and that the rights of the allottees are not subservient to the rights of the banks, and therefore, in case of failure of the banks to ensure that the funds were applied for the purpose they were granted, banks cannot be allowed to supersede the rights of the allottees".

- e) In summary – the lender or financial institutions become the promoter in case of take over the real estate project on default of non-payment of borrowings of the builder/promoter and would be obligated to secure the interests of home buyers/ allottees.
- f) In the event a developer defaulted in repayment loans to a banker / financial institution and if the institution propose to auction the mortgaged real estate project / property, then the banks / institution shall seek prior written approval from RERA Authorities to protect the interest of the allottees.

Development Manager of the Real Estate Project is a promoter –

- a) Under the Development management model, large realty firms step in as development managers for smaller developers and landowners, in return for a share of the revenue, share of profit or a management fee.
- b) Maharashtra regulatory authority has specifically asked all partners involved in a project to be called co-promoters if revenues are shared between them. This move is likely to force developers to relook at the model because of the added regulatory risks, according to builders and consultants.
- c) The recent judgment of the Maharashtra Real Estate Regulatory Authority, (“MahaRERA”) on March 5, 2021 in **Gauri Thatte & ors. vs. Nirmal Developers & ors. (“Order”)**. By interpreting the definition of ‘promoter’ under Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016 (“RERA”), MahaRERA included a development manager appointed under a DMA within the definition of ‘promoter’ for the purpose of refund of principal amounts along with interest to the allottees (“**Complainants**”) for the delay in construction and possession of their flats. MahaRERA also directed the development manager to be added as a ‘promoter’ on the webpage of the project.
- d) The Complainants had booked apartments in ‘Mumbai Dreams — Olympia C & D’ (“Project”) in Mulund West, Mumbai, being developed by Nirmal Developers. The developer had appointed Lucrative Properties Private Limited (“Development Manager”),

a subsidiary company of Shapoorji Pallonji Private Limited (“**SPPL**”), as the development manager for the Project. There was delay in giving possession of the flats and completion of the Project. Accordingly, the Complainants moved MahaRERA claiming refund of their amounts along with interest under RERA stating date of possession of the Project were false. The Complainants prayed that Nirmal Developers and Dharmesh Jain (“**Promoters**”) and SPPL be held liable for refund of the amounts, on the ground that SPPL was a promoter as per Section 2(zk) of the RERA.

- e) Inclusion of Development manager as a promoter may cause builders to re - examine their scope as a development management agreement and include the necessary applicable clauses in the agreement between the promoter and development manager.

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