

CONSTITUTIONAL VALIDITY AND ADJUDICATORY MEASURES OF THE REAL ESTATE REGULATION AND DEVELOPMENT ACT 2016

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ABSTRACT

The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. But this sector has been unregulated for a long time. In 2013, the union government proposed a bill with regards to the real estate. The bill was then assigned to a standing committee to look for its effectiveness and to find loopholes and propose proper amendments that need to be made keeping in mind the situation of the country. The standing committee took in account the opinions of Ministry of Housing and Urban Poverty Alleviation and the NGOs working in this sector. After hearing them out, the standing committee proposed its report and suggested some amendments. The Rajya Sabha gave its assent on the bill along with some 20 amendments. The bill was then sent to Lok Sabha and after receiving imprimatur from the Lower house, the bill was sanctioned by the President and was introduced as the Real Estate (Regulation and Development) Act, 2016.

The Constitution of India in its Seventh Schedule contains the State List which permits only the State to legislate on matters within it. If the Centre wishes to legislate on the same they are required to propose an amendment to the State List and thus pass an amendment for removal of that matter from the State List.

This paper aims to evaluate the Act passed by the Central Government Regulating Real Estate and to verify if the stated bill has had any such amendments by the Central Government in The State List. Further it also seeks to verify that in the absence of the same was The Central Government further holding the Right in the matter by any judgment of the Supreme Court to legislate on the same. There are many disputable entries in the State List that can be pointed out as not being a part of the Central list and these include entries in the form of Item no 18, 45, 49 and many such items.

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The main idea behind the act is to regulate the Real Estate Sector thus another issue that also needs to be addressed as a part of the same is to verify if the State Appellate Tribunal is enough for the effective functioning of the system of Real Estate or is there a need for the establishment of a body higher than the same in to regulate the sector in case of further dispute.

Thus, finally these two main issues have been dealt and further suggestions are also made as to whether the act is to be taken to verify if the ruling will be a prospective or a retrospective legislation and if it is a retrospective legislation then the role of the Real Estate Tribunals are also considered as a part of the same.

1. INTRODUCTION

The concept of Real Estate has evolved mutli-fold for times to come. The entire scope of Real Estate with the act has grown transparent. While the RERA does not provide a sense of substantial growth yet it is one of the greatest modifications in the procedural area of Real Estate.

2. RESEARCH QUESTION AND METHODOLOGY

The main idea behind this entire paper has been to obtain a perspective on the constitutional validity of the RERA as a provision, the main research questions are as follows:

1. Whether the Union had power to legislate on all the matters that it legislated on in the RERA?
2. Whether there was a need to make a centralized bill in spite of the available provision separately in each state?

The main research methodology that has been adopted is directed at the shaping of the understanding of the idea of the forthcoming of the RERA which involves the analysis of cases that indicated the issues in the bare acts of the states that ideally had the idea of RERA. Further after analyzing the issues in the various cases and determining the success of the idea in the Bare Acts that were prevalent for the states separately. Following this is the identification of the need for RERA as a concept by the Union. Thus tracing the basic need behind the idea RERA followed by the procedural and substantial ideas proposed in the form of rights and obligations. Following this is the identification of the powers of the State and the Union and the jurisdiction of Union in the ruling of matters that were actually a part of the State List after identifying the matters that are a part of the

State. Finally the focus of this paper will be completed by the identification of the need created by the Stat

4. OBSERVATIONS

4.1 PRE RERA PERIOD

The Pre- RERA period was one that did not have any central real estate authorities governing the system of real estate. Rather prior to this the idea of the RERA each state had a separate stance on the presence of a real estate authority. Mainly this was in Maharashtra where the Maharashtra Apartments Act was applicable. This was furthermore indicated by the idea that the Consumer Protection Act, 1986 was available as a remedy to the real estate market but not in cases that involved a curative matter. The Pre RERA period was one which did not provide transparency although it did provide a remedy to the various consumers it was not effectively one that was completely efficient. Further before the RERA certain states had the idea of proposing the concept of RERA basis their own acts.

However with time these bills ceased to exist as the RERA came into being. If one takes a second to pause on this particular point and think it raises a very fundamental question as to the extent to which the bill of the State could be overruled just like that. While it is acceptable that the standardization on a national level is quite helpful it raises a question in respect to the success of the legislation and with respect to whether in the respective states the legislation was able to make the impact that was desired. Further if not then was it fair to apply this idea to such states as well just because it was a centralized bill.

To answer this question it is necessary to understand the perspective as to the real proposer of the bill and following this the agreements and disagreements that arose from the States that already had an act governing the sector of real estate. Further it was necessary to bring to light the concept of the evaluation of to what degree is the principle of federalism available if the States are not able to implement what is a part of their own list.

In this particular bill the major states that already had laws with reference to the same are the States of Maharashtra, Gujarat

4.2 THE NEED FOR REAL ESTATE REGULATION AND DEVELOPMENT ACT 2016

The real objective of RERA was the identification of the possibility of transparency within the Indian market of real estate. It was to ensure that the sector did not have any more instances where the buyer is not clear on availing remedy or is not aware with reference to the steps that a person needs to take in order to avail the following remedies. Thus working upon that the idea of the same the procedural idea has been proposed to standardize all transactions that involve the sector of real estate.

Further² it also goes on to indicate the buyer and promoter shall receive equal protection under the act, which is considerably the idea of bringing the buyer and seller on a transparent platform. Furthermore the indication by the various courts have been to highlight that this particular bill is of such a nature that it tends to imply a sense of creating orderly and healthy growth of the industry.

Moving on to the identification of the crux of the idea of RERA it can also be attributed to an extent to the need of the common person and the small developers. As has been interpreted by the Supreme Court³ the need to protect a sense of development within a country is a system where the development is not hindered in lieu of the concentration of rights in one particular entity and there is uniform distribution of respective resources within all. This particular interpretation in terms of RERA can in furtherance point to the fact that through RERA there is a need to ensure that every particular part of the strata receives the benefit of equality and every particular sector receives the benefit of being able to develop. This it makes sure by establishing the act and it tries to bring to light a sense of equality.

This should ideally be the interpretation of the RERA in today's context although to what extent can one identify the success in the interpretation is yet to be observed.

²The Select Committee on the Real Estate (Regulation and Development) Act, 2013 - (Parliament of India- Rajya Sabha) [30th July 2015] Pg 4 para 1

³Joshi, P. Lexis Nexis '*Law Relating to Infrastructural Projects*' "General overview of Legal Aspects"(2003)."

However in furtherance of the same the basic need behind RERA is given above and ideally the problems that RERA proposes are given above. It is thus the basic need that RERA is here to serve.

4.3 JURISDICTION OF THE UNION IN THE TOPICS COVERED UNDER THE STATE LIST

The matters identified as a part of the State List and the Union is given within the 7th Schedule List I and II of the Constitution of India. Now in this particular instance the matters that can be disputed are given as below under the various articles that have been cited:

As a matter of principle the first matter that falls within the jurisdiction of the State but the ruling has been by the Union it is one that involves ground rent, as a concept the idea of rent is to be regulated by the State List⁴ Item no 18 but here the item is being regulated by the Union and this raises the question with reference to the extent of the exercise of the jurisdiction of the Union over the matters in the State. It created a fundamental question in respect to the extent of the applicability of the power of the Union. To sum it up it is also of great significance to state

As has been defined ground rent is one that requires the necessity

Rent⁵ under common law: A certain profit issuing yearly out of lands and tenements corporeal; a species of incorporeal hereditament. A compensation or return yielded periodically, to a certain amount, out of the profits of some corporeal hereditaments, by the tenant thereof. Ground rent is defined as Leased land payment to the owner. Allows the lessor to improve the land. However, the property returns to the owner as is at the end of the lease.

As has been pointed out the definition of rent contains the scope and ground rent, in furtherance of the concept it clearly falls within the scope of rent and thus should be considered a form of rent as well in this particular instance.

Further the contention can also be raised in reference to the taxes that have been levied by the government and the matters that have been discussed as a part of the act clearly specify that the taxes connected to matters of real estate are a matter of State List as has been given below:

⁴The Constitution of India 1950 ; 7th Schedule List II

⁵Black's Law Dictionary(2nd Edition, 1910), Rent

“Section 1⁶(v) "estimated cost of real estate project" means the total cost involved in developing the real estate project and includes the land cost, taxes, cess, development and other charges.

11(g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project)

19(6) Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any. “

The idea of encroachment of the Union on the powers of the State leads to a situation of the provision being held ultra vires on the grounds that the particular provision did not have State Jurisdiction.

Further this has been illustrated through a number of judgments as given below:

The majority judgment of the Supreme Court in *Union of India v. H.S. Dhillon*⁷ is of major importance for Indian federalism as it determinesthe controversy about the legislative relationship between the union and the states in the all-important area of taxation of capital value of agricultural assets.

This particular instance it is of great significance to highlight that in this particular case there was a question with respect to the levying of taxes by the Union over which the fundamental power was of that of the State. It was also expressly specified in this particular instance that the legislation can be struck down as being ultra vires.

⁶The Real Estate Regulation and Development Act , Section 1(v),11(g),19(6)

⁷Shodhganga :Residuary Power And Wealth Tax On Agricultural Property—A Note On Union Of India V. H.S. Dhillon (OUP 1972) Para 1

Further the real concept of federalism in order to achieve the protection of the constitution mandates that every provision to be of such a nature that it protects one entity from achieving the ultimate sovereign authority. The point of distribution of power of the States based on the principle of development is that there is a need to ensure that there is no need to concentrate all the power of monarchical body as has been given by the Supreme Court.

It is also a need to point out that this bill though providing a very effective transparency it had a regulatory body to be appointed by the State. While at the same time it proposes to indicate that the State as a free entity there are multiple States that already have laws in reference to the same issue and have run comfortably in the past however this legislation takes away some of these powers and modifies these legislation. The Union has deemed to make this law after a major procedural limitation and a substantial limitation however this limitation is to an extent also to apply to the Centre encroaching on the States authority. It is to be one of the major limitations on the authority of the union

4.4 RETROSPECTIVITY IN THE LEGISLATION

Furthermore at this instant it is also relevant to point out that lack of provision is a very risky situation in the context of the act. If the act was to be made applicable to only projects made after the passing of the act this would create a fundamental question with regards to the extent of applicability of the particular provision in the context of the act. As any time there is a situation where the act is bound to harm the interest of the investor there is a considerable amount of reason to believe that the person may claim non applicability of the act. Further with the separate legislation of the State repealed there will be no provision that will be binding the person with the laws in relevance to the same. Even if for the sake of argument it is assumed there will be a binding effect of such a legislation what needs to be considered is that if the State legislation has a flaw or a loophole and if the central act was meant to fill this loophole then ultimately in flow the entire situation will lead to chaos.

Further the above contention brings to the light the real idea behind the provision of real estate. It brings to light the retrospective nature that the legislation has followed. It creates a situation there is a major dilemma that comes to light with reference to how to deal with the dilemma that results in

consequence of the act that establishes no separation of powers. The nature of retrospective legislation is not something that should be encouraged. RERA is one that creates nothing prospective in its substantial content rather it is of such nature that it focuses more on the content of retrospection. Furthermore the idea and the concept of retrospection should have had a judicial interpretation but in fact in the various judgments that have been propounded it has nowhere been stated that the bill is needed in presence of the act in the respective states.

In this particular instance to the legislation was passed midst the creation of new projects and this created a very large retrospective effect. Extreme refusal to this idea has been highlighted by the Supreme Court in various judgments. Further it also points out the fact that this legislation could create confusion and this is one of the reasons why the various States have refused to point out that they would like to notify and consent to the respective bill.

The various judgments that comment on the concept of retrospectively are as given below:

"Since the Governor exercises the legislative power under the proviso to Art. 309⁸ of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate, must be shown to bear either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case"⁹

Today's equals cannot be made unequal by saying that they were unequal twenty years ago and we will restore that position by making a law today and making it retrospective. This is an example of an unreasonable restriction.

"It needs to be realized that giving retrospective effect to the rules creates frustration and discontentment since the just expectations of the officers are falsified. Settled seniority is thereby unsettled, giving rise to long drawn-out litigation between the promoters and direct appointees. That breeds indiscipline and draws the High Court into the arena, which is to be deprecated."¹⁰

⁸The Constitution of India; Article 309

⁹State Of Gujarat & Another vs. Raman LalKeshavLalSoni& Others [1983] 1984 AIR 161, 1983 SCR (2) 287

¹⁰B. S. Yadav And Others Etcvs State Of Haryana And Others Etc [1980]1981 AIR 561, 1981 SCR (1)1024

The following ideas are just pointing to certain claims given by the courts indicative of legislations not being of a retrospective nature. While some courts do seem to agree that there is permission under Article 309 to pass retrospective legislation it does not however allow the implementation of this to contain loopholes in terms of the implementation. In fact the courts entirely negate the point of implied terms in any legislation that involves retrospective terms is to clarify that every time a legislation is made in retrospective terms or creates the effect of the same it does not lead to a dilemma with reference to its successful implementation.

4.5 POWER OF THE LEGISLATURE TO MAKE RETROSPECTIVE LAW

The legislature has forever been a body that has aimed at the separation of powers being the law making body it is one of the most important bodies of our country. One of the main issues that results and which has been debated in the scale of the country has been the extent of the exercise of the power of the legislature, judiciary and the executive. The concept of retrospection is highly debatable and thus is of such a nature that tends to result in the way of separation. From a long time the job of retrospection has been the job of the judiciary. While the legislature can legislate on who can retrospect and what are the rules of retrospection. It cannot pass a legislation that is on the face of it appearing retrospective. Furthermore it is the job of the judiciary to adjudicate on every matter and carry out the process of retrospection; if legislature started doing the same it would be heavily detrimental to the interests of the concept itself. It would render the concept useless and detrimental to the interests of justice.

Further in this particular instance though the court has considered this legislation to be of legal standing yet there is a fundamental query that has been left unanswered by the concept of the legislation. Furthermore it legislation has also failed in respect of legislating with an idea of substantial limitation that is fundamental to the functioning of the system. Not being able to provide a substantial clause is not going to solve the biggest problem associated with real estate. The major standpoint of the legal judgment:

4.6 SUGGESTIONS

The concept of RERA has grown to a very large extent throughout this decade. It is of great significance. Within the scope of economics the RERA is going to be one of the most successful ideas if implemented successfully. Effects such as multiplier effect and the policies that involve fiscal and monetary policy are going to be kept up as most of the money will be assuredly kept in the hands of the consumers and the idea of constitutionality of the provision. It is very much thus in upholding the principles of equality.

However when the Right to Equality was interpreted in the case of Shankari Prasad¹¹ too the idea of landform was of fair nature and the policy was considered to be really fair, however the real question that came up and even did not allow such a provision to be outright implemented is the idea of the constitution barring the implementation of such a provision. There is furthermore a need to point out that in this particular instance the Right to Equality will not be able to achieve its utmost of objective if the necessary method was not one that received the principle of equality under the same.

Further another suggestion is with reference to upholding the binding nature of one's power. When all the States that had their separate legislations were able to function effectively in their respective areas there was no need to intervene with their functioning and that too this topic is of such a nature that if any law was passed it would create a situation of chaos in determining the nature of the power that should be exercised and from when the rights and obligation under RERA shall be applicable.

As was suggested above there is a need to identify that the legislation does not be of such a nature that it cannot be interpreted effectively. It further also points out that all legislations should be of implementable nature. A flaw in the implementation of legislation can be one of the fundamental drawbacks as can be the failure to interpret and implement the provisions within a reasonable lapse of time.

This particular provision needs to be divided on a state to state basis mainly because if this provision is allowed to function in the manner provided by the Central Government a lot of functioning defects that would result in the ultimate detriment of the idea of the legislation. Further in this particular instance the State has already received warnings for passing regulations against the State¹².

¹¹Shankari Prasad Singh Deo v. Union of India (1951) (AIR. 1951 SC 458)

¹²Dipak K Dashi, Centre warns States Against Diluting RERA <<http://timesofindia.indiatimes.com/india/centre-warns-states-against-diluting-rera/articleshow/5>> accessed 27th June 2009

What needs to be brought to light and furthermore understood is that no provision is going to be successful unless and until there is enough to prove that the idea is fair to a majority and procedurally fair.

In this particular case it has been pointed out as a part of the legislation that the equality of both the promoter and buyer shall be protected however this seems to be missing as the main interests gaining priority are the buyers. Further¹³ it is also proposed as a part of this bill that the limits on the State will be applicable to the extent of 10% profit of the transaction as payment in lieu of the failure to turning in the project. Now this is not fair to a developer who barely earns out of a project, the mannerism of ensuring fairness will not be upheld for the case of the developer who will lose 10% and also may uphold the possibility of criminal liability this needs to be brought to light and needs to be dealt with in order to protect the interest of equality.

If the Supreme Court in its interpretation of development wishes to uphold the idea of development there must most definitely be a mechanism that ensures that the idea of equal distribution of resources and power be maintained. The concept of the same will need to be understood forthwith this particular idea. The power thus needs to be conferred to a certain extent to the state in the Bill.

In fact in many provision the principle of discretion concept is exercised beyond the required scope. This creates a doubt in the mind of the people what needs to be considered as a part of the fair rule. In fact this too needs to be considered by the act as too much power being conferred on the regulatory body to decide its discretion on such matters may create very large errors with reference to the interest of the justice that developers require. In the era where a large number of conventional developers are rich and generally the new developers are fair the idea of creating a bias towards a particular set of buyers cannot be considered as a fair hypothesis.

Although the Court are not to err but this regulatory body has complete jurisdiction over a variety of matters and the civil courts are barred from obtaining any decree with reference to matters that involve the sector of real estate. Further while one could agree that such a notion seems logically consistent it creates a doubt as to whether such a body that has all jurisdictions over the laws that protect the developer can be rational in its judgment to take care of the developer.

¹³Real Estate Regulation and Development Act 2016; Section 58 (1),59

It should be in the best interest of the constitution that the legislation not creates a penal liability. Mainly because while the penal legislation may be a force on the side of the buyer but it is to the detriment of the small seller who is generally the person who will tend to not be able to repay the amount that will be required as a repayment.

5. CONCLUSION

To sum up all the points and to answer the questions that have been posed as a part of this particular article it is mainly the idea of RERA to cleanse and standardize the market of Real Estate Market but this cannot be achieved to its perfection without the considerable thought and further respect to the procedure and keeping in the principles of implementations. Further the RERA as an act has beautiful objectives for the consumer but in terms of the promoter it remains a moot question that is yet to receive any intimate answers. Further it is of great relevance to point out that these answers need to be obtained as fast as possible. In lieu of this concept and due to the requirement of the State being protected in a federal country it is important to point out that many parts of the provisions are matters over which the Union are not holding exclusive jurisdiction they need to be brought to light and an effective solution needs to be implemented, if the provision is ultra vires then it needs to be struck down else it needs to be upheld. Finally it is all the more important that the legislation not run the course of retrospection and respects the concept that has been proposed as a part of separation of powers. If the nation needs to progress it needs to ensure that it does not violate the basic principles upon which it propounded its constitution.

6. REFERENCES

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