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Regulatory Dynamics in Real Estate: Exploring the Intersection of RERA and the Arbitration Act

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The Real Estate (Regulation and Development) Act 2016¹ (RERA Act) has shifted the regulation mechanism in the Real Estate Sector. This act tries to protect the interests of the home buyers, tenants or even investors from dishonest builders. There have been a lot of disputes in the real estate sector, especially between the builders and the home buyers. The builder, in most cases, fails to cater to the needs of the buyer. This includes false promises such as delay in possession of the property, poor quality of material used, payment schedules etc. All these issues resulted in a protracted year of litigation. As a result, the Real Estate Regulating Authority, established under the RERA Act, serves as a special tribunal to resolve individual real estate disputes. However, there have been many doubts raised about whether there are any other options for resolving RERA Act conflicts. Here comes the Arbitration and Conciliation Act of 1996 (A&C)², whose primary goal is to resolve disputes outside of the jurisdiction of the courts. The question today is which approach is best for resolving disputes in the real estate sector. This depends on the parties involved and the sort of agreement reached between the buyer and the builder. According to Section 8 of the A&C³, a party can refer a dispute to arbitration if there is an arbitration agreement present in the contract. However, the National Consumer Dispute Redressal Commission has ruled that a builder cannot compel buyers to resolve their issues through arbitration, even if the clause is included in the agreement. This paper seeks to advocate for real estate consumers and to determine the optimum way of dispute resolution, whether through the Real Estate Regulating Authority or Arbitration. This paper then attempts to

¹ The Real Estate (Regulation and Development) Act 2016

² Arbitration and Conciliation Act 1996

³ Arbitration and Conciliation Act 1996, s 8(1)

determine the appropriate form of a mechanism using various case laws established throughout the years and finally, it examines the RERA ACT and the A&C, as well as their procedures and rules, to discover the optimum redressal method for consumers.

Keywords: *buyers, dispute resolution, arbitration.*

INTRODUCTION

The word 'Real' in the RERA Act does not stand for something that exists, but it comes from the Latin word 'root *res* or *thing*' or '*rex* or *king*'. Here, the *rex* specifies that kings owned their land in ancient times. The act, enacted on 1st May, regulated the field and protected the consumer's rights by addressing malpractices⁴. Before the RERA Act, the⁵Town and country planning laws governed the enterprises, and the consumer laws considered the complaints. In contrast to consumer forums such as the National Consumer Disputes Redressal Commission ('NCDRC'), which take a reactive approach.

The word 'Arbitration' is also derived from the Latin word '*arbitrari* or *judge*,' meaning when two or more parties are in a civil or commercial dispute, arbitration as a dispute mechanism helps the parties reach a decision ('arbitration award'). This is an alternative to traditional litigation as it lessens the burden and is found to be efficient and flexible.

The Act requires the builders to register their projects, disclose essential information to homebuyers, handle funds transparently, and adhere to the project timelines. Currently, stakeholders are increasing awareness and making efforts to mandatorily comply with the essentials to avoid legal liabilities and penalties. The Real Estate Regulatory Authority (RERA) provides the service of a specialized redressal body for matters and disputes in the sector to streamline the resolution process and structured operation of problems, whether it be maintenance, possession, or development, and relief of the burden of the civil court. The formation of a Reserve Account to address the funds allotted and everyday functioning in real estate projects indicates the approach to accountability and transparency in project management, as residents are given more control over the activities. The case of *Brig. (Retd.)*

⁴ Real Estate (Regulation and Development) Act 2016

⁵ Town and Country Planning Act 1960 and the Apartment Ownership Act 1989

*Kamal Sood v M/S DLF Universal Ltd*⁶, the question was whether the builder could guarantee customers that their apartments would be delivered on schedule, even if the builder later claimed the delay was due to a lack of government approvals.

After RERA, notable improvements in the real estate sector were seen by increasing transparency, ensuring projects are completed on schedule, and holding developers responsible for construction standards. These reforms have elevated buyers' confidence and promoted a more professional and ethical industry. However, the challenges that are yet to be addressed include third-party inspections, how to approach specific cases to compensation, and modification under the Act to promote project completion on time.

Arbitration plays a relevant role in RERA Act disputes as it is an alternative resolution option to resolve the disagreement between the parties (i.e., the builders and developers). Arbitration ensures their contractual commitments are fulfilled while fostering speed and efficiency. In *Hindustan Petroleum Corporation Ltd. v Pink City Midway Petroleum*⁷, the provision of the Arbitration and Conciliation Act⁸ is applied, which requires that issues covered by an arbitration agreement be submitted to arbitration. The case highlights the part where civil Courts can only decide upon the arbitration jurisdiction with a valid arbitration agreement. Thus, arbitration makes specialized adjudication of RERA Act-related matters possible, which helps safeguard the stakeholders' interests.

JURISDICTION OF THE ACTS

The statute formed RERA to handle real estate problems. RERA is administered with quasi-judicial power to settle disputes arising between homebuyers, developers, or other stakeholders in this sector. The RERA is established in every State or Union Territory of India and has the jurisdiction to seek fair and impartial help. The decision of the authority is legally binding, if the parties are not satisfied with the decision, they can approach the higher judicial body like the

⁶ *Kamal Sood v M/S DLF Universal Ltd* First App Nos 557/2003 & 683/2003

⁷ *Hindustan Petroleum Corporation Ltd. v Pink City Midways Petroleum* (2003) 6 SCC 503

⁸ Arbitration and Conciliation Act 1996, s 8

Real Estate Appellate Tribunal (REAT) or the Civil Court under the jurisdiction, keeping in mind the provisions of RERA ACT and rules established by the State or Union Territory.

Whereas for Arbitration⁹, various Courts interpreted the jurisdiction depending on factors including arbitration clauses in ¹⁰Pre-RERA Agreements, if the agreement mentions the arbitration clause, that will prevail only in agreements before the RERA ACT was established. The doctrine of election allows arbitration to parties opting for special remedies under the RERA ACT. The Courts cautiously adopt the interpretation while guaranteeing remedies in addition to remedies under the A&C. Thus, the Arbitration Tribunal does not fall under the category of 'Court or Other Authority' under the provision¹¹ of the RERA ACT, allowing interim relief under the A&C¹².

As a result, the two statutes have conflicting jurisdictions, where the state level and the RERA handle disputes and adhere to compliance. While Arbitration is an alternative dispute mechanism to settle disputes between the parties. In 2017, the matter related to that argued for the sale agreement was to be arbitrated and thus, MahaRERA had no jurisdiction. But MahaRERA stated that a separate application for arbitration attached to the original agreement did not satisfy section 8 of the A&C¹³ inter alia. Similarly, in MP¹⁴, Madhya Pradesh Real Estate Regulatory Authority (MP RERA), held not to remove the jurisdiction by the presence of an arbitration clause in the agreement. The MP RERA argued RERA ACT is a special act that will prevail over the general law (i.e., the A&C).

TEST OF ARBITRABILITY

Arbitrability and the validity of an arbitration agreement go hand in hand. However, it is important to understand that an arbitration agreement is not just about agreeing to arbitrate – it also involves jurisdictional and contractual provisions. Even if a Tribunal says the arbitration

⁹ Jyoti Sinha and Ishrita Bagchi, 'Interplay of the RER Act and the Arbitration Act' (*Lexology*, 23 January 2023) <<https://www.lexology.com/library/detail.aspx?g=0cbd72db-265a-4174-b1ba-c098918a044d>> accessed 09 June 2024

¹⁰ *Ibid*

¹¹ Real Estate Regulation Act 2016, s 79

¹² Arbitration and Conciliation Act 1996, s 17

¹³ Arbitration and Conciliation Act 1996, s 8

¹⁴ *Anil Kumar Arya v SVS Buildcon Private Limited* MANU/RR/0005/2017

agreement is valid, it does not mean everything can be solved through arbitration automatically. The A&C includes provisions that offer the parties more authority over their disputes. The number one rule for determining whether an issue can be resolved through arbitration is whether the agreement between the homebuyer and the seller contains a legal arbitration clause. A&C states that¹⁵ states that judicial authorities have the power to refer a party to arbitration if there is an arbitration clause present. However, not all RERA disputes can be resolved through arbitration. It is well understood that disputes related to rights and liabilities arising out of criminal offences, matrimonial disputes, eviction, tenancy matters etc. are disputes that are not non-arbitrable¹⁶. The underlying concept of arbitration is that any civil or commercial dispute, whether contractual or non-contractual, can be settled by arbitration until and unless the jurisdiction of the arbitral tribunals is explicitly excluded or by necessary inference. *Booz Allen & Hamilton Inc. v SBI Home Finance Ltd.*¹⁷ clarified that while ‘*Rights in Personam*’ refer to your rights or interests that can be used only against specific people, ‘*Rights in Rem*’ are the rights that can be used against the entire world. It was decided that while rights in rem are not arbitrable under the law, *rights in personam* are. It is despite a somewhat lenient rule. The rights breached in the RERA can be defined as the *right in personam* since the consumer's interests and personal rights are being violated against an individual, specifically the builder. Furthermore, Sections 12¹⁸, 14¹⁹, 18²⁰, and 19²¹, when read in conjunction with Section 71²², which discusses the ‘power to adjudicate,’ fall under the category of ‘*Rights in Personam*’ because all these sections state the promoter's duties regarding real estate projects, and any violation of any of them would directly violate the rights of the allottees. As a result, it is possible to establish that allottees’ rights breached in RERA Act disputes are personal rights, and hence arbitrable. Again, this is not a set rule; it varies from case to case. The Supreme Court in the case of *Vidya Drolia v Durga Trading Corporation*²³, has set out certain guiding principles to decide the meaning of non-

¹⁵ Arbitration and Conciliation Act 1996, s 8(1)

¹⁶ *Booz Allen & Hamilton Inc. v SBI Home Finance Ltd* (2011) SCC Online SC 636

¹⁷ *Ibid*

¹⁸ Real Estate Regulation Act 2016, s 12

¹⁹ Real Estate Regulation Act 2016, s 14

²⁰ Real Estate Regulation Act 2016, s 18

²¹ Real Estate Regulation Act 2016, s 19

²² Real Estate Regulation Act 2016, s 71

²³ *Vidya Drolia v Durga Trading Corpn* (2020) SCC Online SC 1018

arbitrability of a dispute. Herein the validity of the arbitration agreement under Section 8²⁴ and Section 11²⁵ of the A&C Act has been discussed. It states again that a dispute can be brought to arbitration under Section 8²⁶ unless and until the opposing party establishes on the face of it that there is no valid arbitration agreement between the parties. Hence, if there is a dispute under the RERA Act, and if the opposing party establishes on prima facie that there is no valid arbitration agreement between the parties, then the dispute would not be arbitrable.

Hence taking reference from the above case laws it can be drawn out that the test of arbitrability depends on certain factors:

Nature of Rights: As discussed above, the case of Vidya Drolia v Durga Trading Corporation took reference from the Booze Allen Case wherein disputes involve the right in realm and rights in personam. Herein, the rights in personam are arbitrable. If the dispute concerns rights in rem, it may be regarded as non-arbitrable under RERA because these rights are frequently considered of public importance and subject to specific statutory mechanisms for resolution.

Relief Sought: What relief the party seeks is also another factor for determining the arbitrability of the dispute. If the desired relief involved financial compensation or contractual disagreements (Section 12 of RERA²⁷), it could be eligible for arbitration under RERA. However, if the desired resolution pertains to statutory entitlements outlined in RERA, such as reimbursement of funds, interest, or other safeguards specified within the legislation (Section 18 of RERA²⁸), it may not be suitable for arbitration. Instead, it may be necessary to resolve the issue via the specified statutory procedures outlined by RERA. This distinction emphasizes the need to align the manner of conflict resolution with the nature of the parties' rights and remedies, as well as maintaining adherence to RERA's regulatory framework.

Social Objectives and Public Policy: The main aim of RERA is to build transparency and accountability between the buyer and the home builder. As a result, issues involving public

²⁴ Arbitration and Conciliation Act 1996, s 8

²⁵ Arbitration and Conciliation Act 1996, s11

²⁶ Arbitration and Conciliation Act 1996, s 8

²⁷ Real Estate Regulation Act 2016, s 12

²⁸ Real Estate Regulation Act 2016, s 18

interest, consumer rights, or statutory infractions may be designated non-arbitrable to ensure they are resolved through RERA's established mechanisms, such as regulatory bodies or appellate tribunals.

Francis Russell in his book *Russell on Arbitration* stated that, '*Not all matters are capable of being referred to arbitration. As a matter of English Law certain matters are reserved for the court alone and if a tribunal purports to deal with them the resulting award will be unenforceable. These include matters where the type of remedy required is not one that an Arbitral Tribunal is empowered to give*²⁹.

REDRESSAL

There are three stages of the Redressal Mechanism in RERA ACT established in states and union territories of India, the Real Estate Authority³⁰ (Real Estate of Regulatory Authority), Appellate Tribunal³¹ and High Court³². Illustration of types of disputes arising between the builder ('Promoter') and the consumer/homebuyer ('Allottee') could be: When a promoter delays handing over the possession of a plot, apartment, or building to the allottee, it causes inconvenience and potential financial stain for the buyer. Such delays³³ often necessitate the promoter paying interest for the period beyond the agreed possession date, compensating the allottee for the inconvenience and financial burden caused. In situations where the delay prompts the allottee to withdraw from the project, the promoter is typically obligated to refund the money paid, recognizing the breach of contract.

The issue of unapproved quality is another concern, when the construction quality does not meet the stipulated standards or the agreement's specification, the allottee has the right to seek redress, which can range from demanding rectifications to seeking compensation. Similarly, a non-registered society of allottees can cause administration and legal complications, as such registration is crucial for the society to function legally and protect the interests of its members. Inadequate fixtures and deviations from the agreed specifications are common issues that

²⁹ David St John Sutton et al., *Russell on Arbitration* (22nd edn, Sweet & Maxwell) pg 26

³⁰ Real Estate Regulation Act 2016, s 31

³¹ Real Estate Regulation Act 2016, s 44

³² Real Estate Regulation Act 2016 s 58

³³ Real Estate Regulation Act 2016, s 18

promoters must address. If the fixtures provided are substandard or not as per the agreement, the allottee could demand replacements or compensation. Additionally, the failure to convey the property to the allottee and the society as per the legal requirements is a significant breach of contract, leading to potential legal actions and financial claims.

Promises of amenities by the promoter that remain unfulfilled constitute a breach of trust and contract, necessitating redress. Such amenities often influence the decision of the buyers. On the flip side, promoters often claim interest when the allottees delay payment. This is outlined in the agreement and serves as a deterrent against late payments, ensuring financial discipline. The termination of the agreement by either the promoter or the allottee, followed by the refund of the amount paid, is a critical aspect of real estate transactions. This clause ensures that both parties have an exit route in case of breaches or changes in circumstances, safeguarding their financial interests.

Payment of brokerage amounts to real estate agents is another important point. Agents facilitate transactions and their brokerage fees are a legitimate expense, usually borne by the allottee's consent, and are a serious violation. Such changes can alter the value and utility of the property, and the allottee must be consulted and agree to any significant alterations to protect their investment and interest. An aggrieved person could be a real estate agent or a purchaser who can file a complaint before the authority or adjudicating officer for violation of rules under the RERA ACT, including the breach of the agreement for the grievance.³⁴ Under the MahaRERA Act³⁵, the complaint can be filed online; after receiving the complaint, the authority will decide the dispute between the parties. If any party is unsatisfied with the result, they can prefer an appeal to the Appellate Tribunal under the RERA ACT³⁶.

The real estate adjudicating authority or officer can prefer an appeal on any order, decision, or direction ('order'). It shall be selected within 60 days of receiving a copy of the order.³⁷ The appeal filed by the promoter will not be entertained until 30% of the penalty or the higher

³⁴ Real Estate Regulation Act 2016, s 31(1)

³⁵ Maharashtra Real Estate Regulatory Authority 2017

³⁶ Real Estate Regulation Act 2016, s 44

³⁷ Real Estate Regulation Act 2016 s 43(5)

percentage or the total amount is not deposited as directed by the Appellate Tribunal; however, the same is not the case with the customer. In case of a delay, a valid reason is to be provided for the satisfaction of the Tribunal. The appeal is heard based on facts and law; if the decision of the appeal still does not satisfy the party, a second appeal is filed in the High Court with similar provisions for time and delay followed during the filing of the appeal. A second appeal is decided only on the question of law and is the final process completing the three stages of the redressal mechanism; in case the party is still unsatisfied, the party can file a special leave petition in the Supreme Court.

Arbitration in real estate matters is considered a streamlined process and aims to resolve disputes within the time allotted. Arbitration is more flexible, efficient, and non-public. RERA ACT focuses strongly on safeguarding the rights of the consumer, guaranteeing timely project completions, and arbitration verdicts are enforceable and legally binding. Furthermore, it may work with RERA parallelly by offering a transparent and stakeholder-protective dispute resolution procedure that prioritises quick decisions, transparency, and safeguarding the interest of the stakeholders in real estate. In addition, arbitration is the first type of dispute resolution process allowing two parties to work with an arbiter (third party), providing a more organized means of settling real estate disputes. However, arbitration also protects the interest of the stakeholders by providing effective resolution, privacy, and enforcement of legally binding rulings in the real estate market.

Thus, parties shall abide by the judgements made by the RERA or Appellate Tribunal, which enforces RERA orders, if not obeyed, there can be compensation or other consequences involved. While, the Courts have the authority to enforce arbitration judgements, giving them the same legal standing as Court rulings. Enforcement actions ordered by the Court might result from noncompliance.

COMPARATIVE ANALYSIS

When comparing the two statutes, it is important to highlight that the Real Estate Regulating Authority seeks to create a transparent atmosphere between the promoter and allottees to defend their best interests. In contrast, the arbitration provides the parties with more influence

over their cases. The issue here is whether the conflicts can be handled by arbitration, if there is a valid arbitration agreement between the parties, and whether there is jurisdiction to act for the resolution of the problems. Similarly, some provisions are conflicting, which may produce a sense of issues. The RERA ACT addresses the overriding provisions³⁸ as well. It stipulates that the provisions of the RERA ACT will take precedence over other regulations governing the real estate sector. This contradictory section would influence the process for settling disputes because it conflicts with Section 8³⁹. If this section is construed following the 'Literal Rule of Construction,' Section 89 will have precedence over all other sections of law. In the case of *C. Ronald v U.T Andaman & Nicobar Islands*⁴⁰, it was decided that where the terms of a statute are plain, there is no room for the courts to innovate or take on the work of changing statutory provisions. The literal rule of construction requires strict conformity to the usual and natural meanings of the terms used in the language. This rule prevents courts from adopting any alternative hypothetical construction⁴¹. But a different view has been in the case of *Priyanka Taksh Sood and Others v Sunworld Residency Private Limited and Anr*⁴². The court concluded that where a dispute is arbitrable, the existence of a parallel remedy under the RERA ACT does not preclude reference to arbitration. The court cited *Emaar MGF Ltd. v Aftab Singh*⁴³ as a precedent and determined that the doctrine of election would apply in this instance. When a party gets more than one alternative to get their disputes resolved, it is up to the petitioner or claimant to decide whether the remedy is under the Arbitration Act, the Consumer Protection Act⁴⁴, or the RERA ACT. When a party chooses one remedy, he is prohibited from beginning proceedings under the other. Hence, here as per the Doctrine of Election, it is at the discretion of the consumer/allottee to choose its mode of remedy if given more than one alternative. Furthermore, the Doctrine of Harmonious Construction states when there is a conflict between different statutes, the courts attempt to interpret them all together in a way that benefits the parties. JUSTICE SHAH in the case of *New India Sugar Mills Ltd. v Commissioner of Sales Tax*,

³⁸ Real Estate Regulating Authority, s 89

³⁹ Arbitration and Conciliation Act 1996, s 8

⁴⁰ *C. Ronald v U.T Andaman & Nicobar Islands* (2011) 12 SCC 428

⁴¹ D.N Mathur, *Interpretation of Statutes* (6th edn, Central Law Publications) pg 190

⁴² *Priyanka Taksh v Sunword Residency Private Limited* Arb P 868/2021

⁴³ *Emaar MGF Ltd. v Aftab Singh* 2019 (12) SCC 751

⁴⁴ The Consumer Protection Act 1986

Bihar⁴⁵ observed that the interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonize with the object of the statute, and which effectuate the object of the legislature. Hence, taking reference from the above, the conflict between Section 8 of the A&C, 1996⁴⁶ and Section 89⁴⁷ of RERA ACT, applying the doctrine of Harmonious Construction, the courts would try to interpret them both in a way wherein, it harmonizes with the aims and objectives of the statutes.

CONCLUSION

By implementing openness, RERA ACT hopes to eliminate incidences of fraud in the real estate market. Furthermore, it legally recognizes buyers' rights, allowing them to bargain more freely with builders when entering into agreements. This paper tries to advocate for the rights of the consumers. Hence, legal awareness among the public is one of the least focused but most crucial aspects of preserving a just and equitable society. Most people are unaware of their basic legal rights or the contracts into which they are engaged.

A common error made by the public is failing to read the contract provisions before getting into it. An unfair advantage can be gained in this situation. Specific to real estate matters, a builder-buyer contract may contain provisions that benefit the builder. These contracts are designed in such a way that just the buyer is required to sign them, denying them the option to properly analyze them or have them reviewed by lawyers. As a result, advocating for consumer rights in real estate, it is recommended that, while these contracts should be reviewed by lawyers, the public be informed of the contract's clauses and how the dispute resolution process works.

Meanwhile, the A&C focuses on creating a mechanism for resolving private disputes. RERA ACT is intended to regulate and encourage transparency in real estate, thereby protecting consumers' interests. But in the end where the consumers would want to go for relief, either in Arbitration or Real Estate Regulating Authority, NCDRC (National Consumer Disputes Redressal Commission), or even traditional litigation, it is at the discretion of the parties.

⁴⁵ *New India Sugar Mills Ltd. v Commissioner of Sales Tax, Bihar* AIR 1963 SC 1207

⁴⁶ Arbitration and Conciliation Act 1996, s 8

⁴⁷ Real Estate Regulating Authority, s 89