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# CONUNDRUM OF CONCURRENT REMEDIES FOR HOMEBUYERS UNDER RERA, 2016 AGAINST IBC, CONSUMER PROTECTION ACT AND ARBITRATION ACT

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## ABSTRACT

The Real Estate (Regulation and Development) Act, 2016 (hereinafter RERA) is the central legislation regulating the real estate market of India. The purpose of this umbrella legislation is to bring harmony into the homebuying ecosystem. The Act has been largely successful, but like every law, it has its own shortcomings. The paper will focus on certain contradictions and ambiguities that the Act holds. Section 79, 88 and 89 of RERA are dealt with specifically to address such inconsistencies.

The first section of the paper deals with the various redressal mechanisms, other than RERA, available for homebuyers under different laws such as the Insolvency and Bankruptcy Code, 2016 (hereinafter IBC) and Consumer Protection Act, 2019 (hereinafter CPA). The relevance of these acts with respect to real estate matters and significant provisions has been discussed.

The second section moves on to establish the discrepancies between S.88 and S.89 of RERA. The Consumer Protection Act and the Insolvency and Bankruptcy Code have been used to analyse the paradox of such concurrent remedies. In the final section, the conflict of RERA and the Arbitration and Conciliation Act, 1996 has been examined. The contradiction between S.79 of RERA and S.8(1) of the Arbitration Act forms the principal cause of contention.

**Keywords:** Real Estate, Conflicting Remedies, Arbitration, Financial Creditors, Consumer Protection

**Introduction:**

The Indian Real Estate Industry is one of the fastest growing sectors of the country and contributes significantly to the GDP of the country. It is expected to reach a market size of US \$1 trillion by 2030 which would amount to 18-20% of India's GDP. The Indian real estate market is divided into four main segments: residential, commercial, retail, and hospitality. The residential segment is the largest segment, accounting for over 70% of the market. India is a developing country with a large and rapidly growing middle-class population and this fuels the demand for both affordable and luxury housing.

The sector was previously not subject to many regulations, and the Government of India only regulated a few aspects of it. This led to rampant malpractices and irregularities and the developers were raking in huge profits at the cost of the homebuyers' interests. Therefore, the Real Estate (Regulation and Development) Act, 2016 was enacted by the Parliament to protect the interest of consumers. Its objective is to regulate and promote the real estate market of India while ensuring that the sector and the regulatory authorities are efficient and transparent. The Real Estate Regulatory Authority and the Appellate Tribunals act as an adjudicating mechanism for speedy redressal of disputes that come under the Act. The analysis of the conflict of provisions of RERA with other laws and the Act itself forms the focal point of this paper.

S.88 of the Real Estate (Regulation and Development) Act, 2016 in essence establishes how the Act will be in addition to and not in derogation of provisions of any other law for the time being in force. S.89 on the other hand talks about how the provisions of this Act shall have effect, regardless of whether its provisions are inconsistent with any other law for the time being in force.

S.79 of the Act imposes a bar on any other civil court to deal with matters that RERA and the related authorities under the Act have been empowered to decide on. However, S.8 of the Arbitration and Conciliation Act, 1996 mandates the judicial authority to refer the parties to arbitration in the presence of an arbitration agreement.

Therefore, the central areas of contentions become:

- i. How does the interpretation of S.88 and S.89 affect the homebuyers' remedies through

other legislations like the IBC, 2016 and Consumer Protection Act, 2019?

- ii. What is the effect of the bar on jurisdiction imposed by S.79 on disputes bound by RERA on S.8 of the Arbitration and Conciliation Act, 1996, with respect to the arbitration clauses present in contracts?

The paper compares few existing Indian legislations that provide a redressal mechanism to homebuyers through qualitative doctrinal research. The provisions of IBC, 2016, CPA, 2019 and the Arbitration Act, 1996 are analysed in detail while trying to clarify the ambiguity in the provisions of RERA, 2016 with respect to the other mentioned laws. The author has relied on secondary sources of data and chosen an analytical approach to show the cause and effect of the ambiguity in law on the homebuyers' remedies. The textual analysis of the letter of the law and the precedents which show the contradictions are the primary source of data relied upon. Furthermore, articles by authoritative sources have been referred to strengthen the claim.

Thus, the author contends that there exists a contradiction between S.88 and S.89 of RERA, 2016 in respect of whether the Act is in addition to other laws or will prevail over other laws time being in force and a conflict between S.79 of the Act with the arbitration clauses in contracts is found as the former imposes a bar on jurisdiction on all other civil courts in matters relating to real estate.

## **1. Redressal Mechanisms Available to Homebuyers other than RERA:**

RERA is not the only legislation under which homebuyers can claim remedies for their disputes. Other legislations such as the IBC, 2016 and Consumer Protection Act, 2019 can also be applied if the homebuyer wishes to proceed through that forum. Often the parties also wish to proceed through alternative dispute mechanisms such as arbitration as they have included an arbitration clause in their contract.

### **1.1. Consumer Protection Act, 2019**

The Consumer Protection Act (CPA) of 2019 is a significant socioeconomic legislation that safeguards the interests of consumers across a broad range of goods and services. Section 2(42) of the CPA defines "service" in a comprehensive manner, including housing construction.<sup>1</sup> This

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<sup>1</sup> The Consumer Protection Act, 2019, §2(42).

consumer-centric law provides various remedies for consumers who have been wronged, such as compensation, replacement, repair, or rescission of the contract. Interestingly, Section 100 of CPA, 2019 also states that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.<sup>2</sup>

## 1.2. Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code, 2016 defines certain debts as "financial debts" in Section 5(8). According to Section 5(8), a "financial debt" is a debt that is "disbursed against the consideration for the time value of money."<sup>3</sup> This means that the lender is provided with a consideration for the length of time that he has waited and the debt is incurred by the borrower. The borrower is expected to pay back more money than they initially had borrowed due to the time value of money, that is, the price associated with the waiting period.

Any person to whom a financial debt is owed is considered a "financial creditor" under Section 5(7) of the IBC.<sup>4</sup> One of the safeguards given to financial creditors under the Code is the right to initiate insolvency proceedings against a corporate debtor.

An ordinance was promulgated in the year 2018 to amend the provisions of the IBC, 2016. The need for an amendment was felt by the legislators due to the plight of the homebuyers in our country. This is evident from the Preamble of the Ordinance, where the motivation behind including home buyers is elucidated. It states that "there is a need to strike a balance between the interests of various stakeholders, particularly homebuyers."<sup>5</sup>

By virtue of this Ordinance, the definition of 'Financial Debt' in terms of Sec. 5(8) was modified. In the definition of Financial Debt, clause (f) which pertains to any amount raised under a transaction having the commercial effect of a borrowing, an Explanation was inserted after clause (f). This Explanation added that: The amount raised from an allottee under a real estate project shall be deemed to satisfy the criteria of clause (f). Now this amount raised has the commercial effect of borrowing. The other provision added in the explanation established

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<sup>2</sup> *Id.*, §100.

<sup>3</sup> The Insolvency and Bankruptcy Code, 2016, §5(8).

<sup>4</sup> *Id.*, §5(7).

<sup>5</sup> The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, Preamble.

that the terms "allottee" and "real estate project" shall have the same meaning as ascribed to them under RERA, 2016.

To facilitate the inclusion of homebuyers within the category of financial creditors, the Ordinance introduced several modifications. These include permitting their participation through a 'representative capacity' by an insolvency professional which was later known as the 'authorised representative', altering Sections 21 and 24, inserting a new Section 25A into the IBC Code, 2016, and implementing other consequential changes. Pursuant to the Ordinance, the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2018 was passed.<sup>6</sup>

In August, 2018, a culmination of both the Ordinance and the Bill led to the passing of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. This Amendment Act had a retrospective application so as to offer maximum protection.

## **2. RERA vis a vis IBC, 2016 and CPA, 2019:**

### **2.1 S.88 and S.89 of RERA**

S.88 of the Real Estate (Regulation and Development) Act, 2016 establishes how the Act will be in addition to and not in derogation of provisions of any other law for the time being in force.<sup>7</sup> This thus clarifies that the provisions of RERA are supplementary to other laws already in place and does not replace them. Instead, it offers homebuyers an additional platform to seek relief. It ensures that homebuyers have access to a comprehensive and specialized mechanism to address their grievances related to real estate projects.

S.89 on the other hand talks about how the provisions of this Act shall have effect, regardless of whether its provisions are inconsistent with any other law for the time being in force.<sup>8</sup> This implies that the RERA's provisions supersede any conflicting provisions in any other existing law. This overriding effect ensures that the RERA's provisions are implemented uniformly and effectively, regardless of any inconsistencies with other laws. It empowers the RERA to take precedence in regulating the real estate sector and protecting homebuyers' interests.

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<sup>6</sup> Vaneeta Patnaik & Ramya Chandrashekhar, *Unequals or Equals: Analysis of the Status of 'Homebuyers' as Financial Creditors under the IBC Code, 2016 in Light of the Pioneer Case*, 3 INDIAN J.L. & LEGAL Rsch. 1 (2021).

<sup>7</sup> Real Estate (Regulation and Development) Act, 2016, §88.

<sup>8</sup> *Id.*, §89.

The contention put forth is that there exists a contradiction between S.88 and S.89 that leads to a confusion as to whether RERA, 2016 would prevail over other laws when in conflict or would give way to the other law. The presence of multiple legal avenues for addressing real estate disputes, such as RERA, consumer courts, and IBC proceedings, can create confusion among homebuyers regarding the appropriate course of action and the applicable law. This confusion stems from the overlapping jurisdictions, varying procedures of these different mechanisms and the ambiguity with respect to the provisions itself.

## 2.2. Insolvency and Bankruptcy Code, 2016

*Pioneer Urban Land Infrastructure Ltd., and Anr. v. Union of India and Ors.*<sup>9</sup> is a landmark judgement by the Supreme Court of India which decided on the position of homebuyers as financial creditors under the Insolvency and Bankruptcy Code, 2016. The court was also to clarify on whether the provisions of the IBC, 2016 shall override RERA.

The Court in the case held that the homebuyers can indeed be given the status of financial creditors. This meant that homebuyers would have the same rights and protections as other financial creditors in insolvency proceedings against defaulting developers. They will also be able to seek higher compensation from builders in resolution plans.

On the question as to whether the provisions of the IBC override the RERA, the apex court established that the IBC and RERA should be read harmoniously. Nevertheless, in cases where there is a conflict between the two laws, the Code shall prevail. This judgement shows that despite the existence of S.89, the Code will prevail over the provisions of RERA.

## 2.3. Consumer Protection Act, 2019

In the recent case of *Ireo Grace Realtech Pvt Ltd v. Abhishek Khanna*<sup>10</sup>, the Supreme Court of India examined the scope of the Consumer Protection Act, 2019 in relation to issues covered by the RERA, 2016. The court reviewed various provisions of the RERA, including sections 18, 71, 79, and 88, to determine whether the CPA applies to matters addressed by the RERA Act.

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<sup>9</sup> Pioneer Urban Land Infrastructure Limited and Another v. Union of India and Others, [2019 SCC OnLine SC 1005].

<sup>10</sup> Ireo Grace Realtech Pvt Ltd v/s Abhishek Khanna & Ors, AIR 2021 SC 437.

The court also examined Section 79 of the RERA, which prohibits civil courts from hearing cases related to real estate matters, and Section 88, which permits the application of other laws without affecting the provisions of RERA. Moreover, the court drew parallels between section 88 of the RERA and Section 100 in the Consumer Protection Act, 2019 to address the question of concurrent jurisdiction. The court applied the 'Doctrine of Election' and came to a conclusion that the buyer has two alternate remedies, and they can choose to elect either of those two available.

It relied upon another judgment by the apex court, *M/s Imperia Structures Ltd. v. Anil Patni and Anr.*<sup>11</sup> in which it was reasoned that the parliament intended to give the allottee the option of either pursuing legal action under the Consumer Protection Act or filing an application under the Real Estate (Regulation and Development) Act.<sup>12</sup>

### **3. RERA vis a vis the Arbitration and Conciliation Act, 1996**

Developers prefer arbitration over traditional litigation for several reasons. First, arbitration limits consumers' ability to join together in class-action lawsuits against developers. This is because arbitration agreements often contain clauses that prevent individuals from consolidating their claims into a single lawsuit. As a result, developers face a lower risk of costly class-action lawsuits when they use arbitration agreements. The second reason lies in the fact that arbitration often makes it difficult and expensive for consumers to pursue claims against developers. These proceedings are often held in locations that are inconvenient for consumers, such as the developer's headquarters. Additionally, the financial capacity of the consumers should be kept in mind. The costs of arbitration can be high, which ultimately deters the consumers from pursuing claims, especially when the value of their claims is relatively small.<sup>13</sup>

An area of concern is that S.79 restricts any other civil court to deal with matters that RERA or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine.<sup>14</sup> Section 79 and 89 of RERA, through a literal interpretation would imply that the provisions of RERA would prevail over the Arbitration Act. If one were to interpret this

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<sup>11</sup> *M/s Imperia Structures Ltd. v. Anil Patni and Anr* (2020) 10 SCC 783.

<sup>12</sup> *Id.*,

<sup>13</sup> Girish Deepak & Almas Shaikh, *To Arbitrate or Not to Arbitrate Mandatory Consumer Arbitration by Unilateral Contracts*, 5 GNLU L. REV. 186 (2018).

<sup>14</sup> Real Estate (Regulation and Development) Act, 2016, §79.

literally, then the provision would be a direct contravention of Section 8(1) of the Arbitration Act, which mandates that in every dispute where there is an arbitration clause present in the agreement between the parties, the same should be referred to the Tribunal.<sup>15</sup>

One side argues that the bar on civil courts extends to arbitration tribunals as well. They base their contentions on the broad but clear language adopted by the provision, which states that "no court or other authority" shall have jurisdiction over matters within RERA's purview. If the courts were to include arbitration tribunals by interpreting the provision any differently, it would lead to a judicial overreach and go against the intent of the legislators. The argument put forth by the other side is that the provision does not explicitly mention arbitration tribunals and thus should not be interpreted to include them. They also place importance on the will of the parties to undertake arbitration proceedings which is evident from the clauses present in the agreement.

To determine if a dispute can be settled through arbitration, it must first be established whether a tribunal has the authority to adjudicate and settle the matter. The Supreme Court in its ruling in the case of *Booz Allen and Hamilton, Inc. v. SBI Home Finance Ltd.*,<sup>16</sup> made a distinction between rights in rem and rights in personam. The bench held that only disputes involving rights in personam can be arbitrated. The reasoning lies in the inherent meaning of such rights. A right in rem refers to a right that is enforceable against the world at large. Such rights may be called 'negative rights' as they provide a guarantee against the negative actions of others. On the other hand, a right in personam is a right which can only be enforced against specific individuals. These rights arise from the agreement or contract between two parties. However, the Court also acknowledged that this distinction is not absolute, and held that certain subordinate rights in personam arising from rights in rem may still be arbitrable.<sup>17</sup>

As per the Supreme Court's ruling in the Booz Allen case, disputes arising from violations of RERA are considered rights in rem because they affect all buyers and not just an individual. Since these violations impact the public at large, they cannot be settled through arbitration. They fall under the regulatory scope of the real estate sector and thus can be adjudicated only through RERA. However, compensation claims based on Sections 12, 14, 18, and 19 read with

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<sup>15</sup> Arbitration and Conciliation Act, 1996, §8(1).

<sup>16</sup> *Booz Allen and Hamilton v/s SBI Home Finance Ltd*, (2011) 5 SCC 532.

<sup>17</sup> Ajar Rab, *Redressal Mechanism under the Real Estate (Regulation and Development) Act, 2016: Ouster of the Arbitration Tribunal*, 10 N.U.J.S. L. Rev. 1, 9 (2017)



Section 71 of the RERA are considered rights in personam, meaning, they involve claims against specific individuals. Therefore, compensation claims can be resolved through arbitration.

In the case of *Aftab Singh v. Emaar M.G.F. Land Ltd.*,<sup>18</sup> it was held by the NCDRC that even if there is a valid arbitration agreement, the parties cannot be forced to have arbitration. The Supreme Court has consistently held in a series of cases that if a dispute involves public policy and a special court or tribunal has been granted exclusive jurisdiction, then the ordinary civil court's jurisdiction is excluded, and the dispute is not arbitrable.<sup>19</sup> It is always the special legislation which prevails over the general law.

### **Conclusion:**

The Real Estate (Regulation and Development) Act, 2016 was enacted to protect the homebuyers from the unscrupulous developers who were taking advantage of the largely unregulated real estate sector. The provisions of RERA are designed to complement and reinforce the existing laws, rather than undermining or negating any other laws currently in effect. In essence, this paper highlights the coexistence of the RERA with the broader legal landscape while pointing out the inconsistencies in the existing legal framework.

S.88 and S.89 of RERA contradicts one another which was examined with the help of the provisions of IBC, 2016 and CPA, 2019. Furthermore, S.79 of the Act conflicts with S.8(1) of the Arbitration Act. The Supreme Court is burdened with clearing the ambiguity of the provisions of RERA against every legislation so that the homebuyers are well-informed about the position of law. The letter of the law claims that the legislations are supposed to be read harmoniously and that concurrent remedies can be availed. Yet, there are judgements as highlighted in the paper which show that RERA prevails over a set of laws while also giving way to a few others. Even though the apex court has clarified the standing of RERA against a few other laws, the ambiguity in the letter of the law with respect to S.79, 88 and 89 still persists.

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<sup>18</sup> *Aftab Singh v. Emaar M.G.F. Land Ltd.* Consumer Case 715 of 2015.

<sup>19</sup> *Natraj Studios (P.) Ltd. v. Navrang Studios*, (1981) 1 S.C.C. 523; *A. Ayyasamy v. A. Paramasivam*, (2016) 10 S.C.C. 386; *Vimal Kishore Shah v. Jayesh Dinesh Shah*, (2016) 8 S.C.C. 788.