

# REDRESSAL MECHANISM UNDER THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT 2016: OUSTER OF THE ARBITRATION TRIBUNAL?

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*The Parliament enacted the Real Estate (Regulation and Development) Act, 2016 to regulate the real estate sector, protect innocent buyers and provide speedy redressal mechanism. This Act fills a large lacuna as real estate was hitherto unregulated. This Act seeks to provide respite to frustrated and helpless buyers who have so far been at the mercy of unscrupulous builders and years of litigation. Apart from protecting the buyers, this Act establishes a specialised body for its enforcement and also creates a dedicated forum for seeking compensation, which was earlier being awarded by consumer forums. Looking closely at the provisions of this Act and the procedure for filing of complaints, the creation of two separate forums for enforcement and compensation establishes an absurd position of law leading to multiplicity of complaints for the same cause of action, an unnecessary determination of jurisdiction and the possibility of conflicting views. Further, in the presence of specialised statutory forums for adjudication of disputes, the question of validity of arbitration clauses in real estate agreements and the arbitrability of disputes under this Act becomes a moot point. Given the lack of clarity over the arbitrability of such disputes, and in furtherance of the objectives of this Act, this paper argues in favour of ouster of the jurisdiction of arbitration tribunals for an effective enforcement and speedy redressal of disputes in the real estate sector.*

## I. INTRODUCTION

The recently passed Real Estate (Regulation and Development) Act, 2016 ('REA')<sup>1</sup> has been welcomed by frustrated consumers, whose money has been stuck in real estate projects for years without any clear indication of the date of completion or handing over of possession. Unlike other countries,<sup>2</sup> the real estate sector in India was largely unregulated,<sup>3</sup> which led builders,

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<sup>1</sup> The Real Estate (Regulation and Development) Act, 2016.

<sup>2</sup> Axel Boersch-Supan, *Housing Market Regulations and Housing Market Performance in the United States, Germany and Japan* in SOCIAL PROTECTION VERSUS ECONOMIC FLEXIBILITY: IS THERE A TRADE-OFF? 119, 119-156 (2008).

<sup>3</sup> C.f. The Maharashtra Housing (Regulation and Development) Act, 2012 (Maharashtra is an exception to this).

construction contractors, real estate project developers ('builders')<sup>4</sup> to take unfair advantage of consumers. There were several incidents of fraud – land not being owned by builders, misrepresentation with respect to licenses and approvals from authorities, etc.<sup>5</sup> On account of this, several home-buyers in India faced immense frustration, arguments with builders, massive delay in delivery of possession and years of litigation at some stage while purchasing property.<sup>6</sup>

Before the enactment of the REA, many buyers received some respite from consumer forums under the Consumer Protection Act, 1986 ('COPRA'). Despite this, builders delayed the litigation for years.<sup>7</sup> In other cases, builders had included arbitration clauses in their standard form agreements, effectively leaving the buyers remediless, either due to the costs of arbitration, or due to a complete lack of understanding of arbitration.<sup>8</sup>

The Government of India, observing the unscrupulous extortion of buyers, passed the REA with three primary objectives: *first*, regulation and promotion of the real estate sector; *second*, protection of consumer interest in the real estate sector; and *third*, establishment of an adjudicating mechanism for speedy dispute redressal.<sup>9</sup> Thus, apart from regulation, the primary objective of the REA is to secure the rights of buyers and to provide them with a speedy dispute redressal. In furtherance of this objective, the REA has established two forums, i.e., the Real Estate Regulation Authority<sup>10</sup> ('RERA') and the Adjudicating Officer<sup>11</sup> ('AO').

Real estate agreements, more often than not, also contain arbitration clauses providing for all disputes to be referred to arbitration.<sup>12</sup> Given the presence of these clauses in most agreements, a conflict arises with respect

<sup>4</sup> The Real Estate (Regulation and Development) Act, 2016, §2(zk) (this provision defines a "promoter").

<sup>5</sup> The Economic Times, *Top 6 Real Estate Scams and How Home Buyers Can Avoid Them*, April 5, 2010, available at <http://economictimes.indiatimes.com/wealth/personal-finance-news/top-6-real-estate-scams-and-how-home-buyers-can-avoid-them/articleshow/46930255.cms> (Last visited on January 13, 2017).

<sup>6</sup> *Id.*

<sup>7</sup> E.T. Realty, *Homebuyers Can Now Move NCDRC Directly Against a Builder*, October 13, 2016, available at <http://realty.economictimes.indiatimes.com/news/regulatory/homebuyers-can-now-move-ncdrc-directly-against-a-builder/54823235> (Last visited on January 13, 2017).

<sup>8</sup> Ben Giaretta, *Changing the Arbitration Law in India*, September 1, 2015, available at <https://www.ashurst.com/en/news-and-insights/legal-updates/changing-the-arbitration-law-in-india/> (Last visited on February 14, 2017).

<sup>9</sup> The Real Estate (Regulation and Development) Act, 2016 (as contained in the preamble).

<sup>10</sup> *Id.*, §20.

<sup>11</sup> *Id.*, §§2(a), 71.

<sup>12</sup> Hindustan Times, *Compensation Clause in Builder-Buyer Agreement is Unfair, One-Sided*, July 18, 2015, available at <http://zeus.firm.in/wp-content/uploads/Compensation-clause-in-builder-buyer-agreement-is-unfair-one-sided.pdf> (Last visited on February 14, 2017); The Chambers of Law, *Do Not Fall Prey to One-Sided Builder Agreements*, May 13, 2013, available at <http://www.tcl-india.net/node/19> (Last visited on February 14, 2017); Hindustan Times, *Legal Remedies*, September 10, 2016, available at <http://www.pressreader.com/india/>

to the method of dispute resolution which should be followed. The choice is between the mechanism under the REA and that laid down in the Arbitration and Conciliation Act, 1996 ('Arbitration Act'). This is because §71 of the REA clearly provides for compensation payable to the buyer, which is to be determined by an AO. In the presence of specific provisions providing for a statutory remedy, what will happen if there is an arbitration clause in the agreement? Since the REA also applies to projects still under construction, it becomes particularly relevant to examine the validity of arbitration clauses in builder-buyer agreements.<sup>13</sup>

In this backdrop, Part II of this paper highlights the key provisions and the rights guaranteed to buyers under the REA. Part III critically examines the redressal mechanism under the REA and whether it furthers the objective of speedy dispute redressal. Part IV takes a look at the existing jurisprudence of arbitrability of disputes when a statutory remedy has been specifically provided, and whether the tests to determine arbitrability can be applied to disputes under the REA. Part V analyses the effect of the Arbitration and Conciliation (Amendment) Act, 2015 on disputes in the real estate sector. Part VI argues for ouster of the jurisdiction of arbitral tribunals ('Tribunal'), if the objectives of the REA are to be successfully achieved.<sup>14</sup> Part VII concludes the paper emphasising the manner in which the REA has improved the position of consumers in India.

## II. PROTECTING THE BUYERS

The REA comes as a saviour for innocent buyers, who more often than not, invest their life savings into real estate.<sup>15</sup> Before the enactment of the Act, the relationship between buyers and their builders was governed only by agreements signed between them<sup>16</sup> and therefore, all kinds of people entered the real estate sector without any prior experience or proof of financial capability to execute the projects.<sup>17</sup> Further, there were no guidelines or qualification

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hindustan-times-chandigarh-estates/20160910/281565175213414 (Last visited on February 14, 2017).

The Real Estate (Regulation and Development) Act, 2016 (as contained in the preamble).

<sup>13</sup> *Id.*, Proviso to §3(1).

<sup>14</sup> *Id.*, §2(x) (this provision states that "family" includes husband, wife, minor son and unmarried daughter wholly dependent on a person).

<sup>15</sup> The Economic Times, *Consumer Activism: Buoyed by Social Media and Pro-Consumer Courts, Homebuyers Take on Errant Builders*, October 22, 2014, available at <http://economictimes.indiatimes.com/wealth/personal-finance-news/consumer-activism-buoyed-by-social-media-and-pro-consumer-courts-homebuyers-take-on-errant-builders/articleshow/44903267.cms> (Last visited on February 14, 2017).

<sup>16</sup> Malathi Iyengar, *Real Estate (Regulation and Development) Bill – What's in it for Home Buyers?*, April 20, 2015, available at <http://emicalculator.net/real-estate-regulation-and-development-bill-whats-in-it-for-home-buyers/> (Last visited on February 14, 2017).

<sup>17</sup> Lalit Wadhvani, *Passage of Real Estate Bill: Blessing for Both, Home Buyers & Developers*, March 29, 2016, available at <http://www.freepressjournal.in/mumbai/>

requirements of any kind for an individual to become a builder. This lack of monitoring was thoroughly exploited by builders. Builders devised various schemes to take the hard-earned money of consumers without complying with the agreed terms. They did not complete the projects in time, or used the money for other existing projects.

In order to fill this regulatory lacuna, the REA contains several provisions, some of which are extremely stringent, and completely reverse the unequal bargaining power in favour of the buyer. Each real estate project<sup>18</sup> now needs to be registered with the RERA right from the stage of marketing,<sup>19</sup> except projects where the area of land to be developed does not exceed 500 sq. meters or eight apartments.<sup>20</sup> It is pertinent to note that the projects that have already started but not yet received an occupancy certificate are also required to be registered under the Act.<sup>21</sup>

At the time of registration, the REA, in addition to requiring provision of proformas of the agreements, also requires the builder to file an affidavit clearly mentioning the time period within which the builder undertakes to complete the project.<sup>22</sup> The affidavit also needs to contain an undertaking that seventy percent of the amount realised for the real estate project from the buyers, from time to time, would be deposited in a separate bank account. This is to cover the cost of acquiring the land and construction, and can thus only be used for these purposes.<sup>23</sup>

Additionally, for the first time, the REA gives statutory recognition to the concept of class action suits by recognising the *locus standi* of an association of buyers or any voluntary consumer association registered under any law.<sup>24</sup> Until recently, this was recognised only by the National Consumer Redressal Commission for consumer disputes under the COPRA.<sup>25</sup> Prior to

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passage-of-real-estate-bill-blessing-for-both-home-buyers-developers/813487 (Last visited on January 13, 2017).

<sup>18</sup> The Real Estate (Regulation and Development) Act, 2016, §2(zn) (this provision defines a “real estate project” as:

“ “real estate project” means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto.”).

<sup>19</sup> *Id.*, §3(1).

<sup>20</sup> *Id.*, §3(2).

<sup>21</sup> *Id.*, §3(1).

<sup>22</sup> *Id.*, §4(2)(1)(C).

<sup>23</sup> *Id.*, §4(2)(1)(D).

<sup>24</sup> *Id.*, Explanation to §31(1).

<sup>25</sup> *Ambrish Kumar Shukla v. Ferrous Infrastructure (P) Ltd.*, 2016 SCC OnLine NCDRC 1117.

this, consumers had to file separate complaints for a common grievance against the same builder, such as poor quality of construction or delay in possession.<sup>26</sup>

The REA also sets up various compliance and reporting requirements. *Inter alia*, the REA requires updates at frequent intervals and requires such updates to be published on the website of the RERA.<sup>27</sup> One of the most important highlights of the REA is that it brings within its ambit real estate agents,<sup>28</sup> which were hitherto completely unregulated and exempt from any form of legal liability. Real estate agents or ‘brokers’ now have to register with the RERA before they can facilitate the sale or purchase of any property,<sup>29</sup> and they also have to quote their registration number every time they facilitate a transaction.<sup>30</sup> The REA mandates the brokers to maintain and preserve books of accounts, records and documents,<sup>31</sup> besides listing activities which amount to unfair trade practices.<sup>32</sup>

Apart from the above, in order to protect buyers and reverse the unequal bargaining power, the REA provides that buyers have the right to seek compensation and withdraw their entire investment along with interest, in case the builder is guilty of committing misrepresentation in advertisements or the prospectus.<sup>33</sup> To address the problem of diversion of funds to other projects, a builder cannot receive more than ten percent of the cost of the apartment, plot or building, without first entering into a registered agreement for sale.<sup>34</sup>

Under the REA, the builder is now under a strict legal obligation to develop the real estate project in accordance with the sanctioned layout plans and specifications as approved by the competent authorities.<sup>35</sup> The builder is also obliged to execute the sale deed in favour of the buyer within three months

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<sup>26</sup> Raheja Vedanta, *Invite All Flat Buyers to Join the Case Through Public Notices – Consumer Forum*, October 1, 2015, available at <http://www.thelogicalbuyer.com/blog/invite-all-flat-buyers-to-join-the-case-through-public-notice-consumer-forum/> (Last visited on February 14, 2017).

<sup>27</sup> The Real Estate (Regulation and Development) Act, 2016, §11(1).

<sup>28</sup> *Id.*, §2(zm) (this provision defines a “real estate agent” as:

““real estate agent” means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as commission or otherwise and includes a person who introduces, through any medium, prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called.”).

<sup>29</sup> *Id.*, §9(1).

<sup>30</sup> *Id.*, §9(5).

<sup>31</sup> *Id.*, §10(b).

<sup>32</sup> *Id.*, §10(c).

<sup>33</sup> *Id.*, §12(1).

<sup>34</sup> *Id.*, §13(1).

<sup>35</sup> *Id.*, §14(1).

from the date of obtaining the occupancy certificate.<sup>36</sup> The REA also provides for return of investment within a defined period.<sup>37</sup> The buyer can request for the return of the entire investment along with interest, in the event the buyer wants to withdraw from the project for any reason.<sup>38</sup> In case the buyer does not wish to withdraw from the project, he can claim interest for every month of delay till handing over of possession,<sup>39</sup> within forty-five days from the date such refund or interest becomes due.<sup>40</sup>

Thus, the REA casts several legal obligations on the builder and secures the rights of the buyers, which were hitherto not given statutory recognition and hence exploited by the builders.

### III. REDRESSAL

One of the key objectives of enacting the REA was to create a specialised body to provide for speedy dispute redressal.<sup>41</sup> This is because consumer forums, though sensitive to the rights of the consumers, still suffered from the delays of litigation in India.<sup>42</sup> The builders exploited this to their advantage and adopted a policy of tiring out the consumer in the hope of paying a meagre settlement, or frustrating the consumer to a point where the consumer withdraws the legal claim.<sup>43</sup> The buyers would have to initially approach the district forum, then the state forum, and finally the national forum, which not only caused delay, but also made the process lengthy, cumbersome and economically burdensome for the buyers.<sup>44</sup> To aggravate the malady, most builders, especially those considered to be big conglomerates, hired specialised legal counsels to draft lop-sided contracts and as a matter of practice, included arbitration clauses to deter buyers from litigation.<sup>45</sup>

<sup>36</sup> *Id.*, §17 (§2(zf) defines an “occupancy certificate” as:

““occupancy certificate” means the occupancy certificate, or such other certificate by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has the provision for civic infrastructure such as water, sanitation and electricity.”)

<sup>37</sup> Chandigarh Real Estate (Regulation and Development) (General) Rules, 2016, Rule 16.

<sup>38</sup> The Real Estate (Regulation and Development) Act, 2016, §§12, 18(1).

<sup>39</sup> *Id.*, §18(1); Chandigarh Real Estate (Regulation and Development) (General) Rules, 2016, Rule 15 (they provide that interest payable by the builder shall be the State Bank of India highest Marginal Cost of Lending Rate plus two percent).

<sup>40</sup> Chandigarh Real Estate (Regulation and Development) (General) Rules, 2016, Rule 16.

<sup>41</sup> The Real Estate (Regulation and Development) Act, 2016 (as contained in the preamble).

<sup>42</sup> *Supra* note 5.

<sup>43</sup> India Today, *The Long, Expensive Road to Justice*, April 27, 2016, available at <http://india-today.intoday.in/story/judicial-system-judiciary-cji-law-cases-the-long-expensive-road-to-justice/1/652784.html> (Last visited on February 14, 2017).

<sup>44</sup> Consumer Protection Act, 1986, §§11, 15, 17, 19, 21, 23.

<sup>45</sup> The Chambers of Law, *Do Not Fall Prey to One-Sided Builder Agreements*, May 13, 2013, available at <http://www.tcl-india.net/node/19> (Last visited on January 13, 2017).

To remedy this practice, the REA establishes a dedicated body for real estate disputes, i.e., the RERA.<sup>46</sup> The REA also provides for strict time-lines, such as sixty days for the disposal of appeals by the Appellate Tribunal,<sup>47</sup> which ensures speedy redressal and reduces the delay faced before the consumer forums. The functions of the RERA are not restricted to adjudication; they also include regulation, monitoring and promotion of the real estate sector.<sup>48</sup> Curiously, the REA also provides for an AO for the purpose of adjudging the compensation under §§12, 14, 18 and 19.<sup>49</sup> Thus, the REA, in effect, creates two separate forums for the redressal and enforcement of buyers' rights, i.e., the RERA and the AO, wherein the RERA can be approached for filing a complaint with respect to the violations of the REA, and the AO can be approached for compensation.<sup>50</sup>

The independence and separation of the proceedings before the two forums is evident from a plain reading of §31(1) of the REA<sup>51</sup> and the Chandigarh Real Estate (Regulation and Development) (General) Rules, 2016 ('Rules'). Rule 34 of the Rules provides for the procedure to file a complaint before the RERA in Form 'M', while Rule 35 of the Rules provides for the procedure to file a complaint before the AO in Form 'N'. It is unclear why the legislature would create two separate forums for redressal, especially when §72 of the REA explicitly lists out the factors to be taken into account while adjudging compensation.<sup>52</sup> When the primary objective of the legislation is to ensure speedy justice, creating multiple forums for the enforcement of rights would unnecessarily involve determining questions of jurisdiction and can defeat the very objective of the law.

For instance, the builder has to provide an undertaking at the time of registration with respect to the date of handing over of possession.<sup>53</sup> In the event the builder fails to hand over possession on the date promised, the buyer

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<sup>46</sup> The Real Estate (Regulation and Development) Act, 2016.

<sup>47</sup> *Id.*, §44(5).

<sup>48</sup> *Id.*, §11.

<sup>49</sup> *Id.*, §71(1).

<sup>50</sup> *Id.*, §31(1) (provides that:

<sup>51</sup> "Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.").

<sup>52</sup> *Id.*, §72 (provides that:

"While adjudging the quantum of compensation or interest, as the case may be, under section 71, the adjudicating officer shall have due regard to the following factors, namely:— (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; (b) the amount of loss caused as a result of the default; (c) the repetitive nature of the default; (d) such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.").

<sup>53</sup> *Id.*, §4(2)(1)(C).

can claim the possession of the apartment<sup>54</sup> and compensation for delay.<sup>55</sup> Apart from these remedies in the nature of restitution, the builder is also liable to be penalised under §61 of the REA<sup>56</sup> for contravention of the provisions of §4. Therefore, the cause of action on which the buyer will seek redressal would be a single cause of action, i.e., the delay in handing over of possession. However, the complaint can be filed before the RERA for violation of the undertaking given under §4, as well as before the AO under §71 for violation of §§18 and 19. It makes little sense to file two complaints for the same cause of action, that too before two separate forums. From the perspective of the buyer, it would be more beneficial to file the complaint before the AO and seek compensation, than to file a complaint before the RERA and only seek the imposition of a penalty on the builder. This creates an absurd position of law as there is no provision providing for transfer of complaints or joint-hearings before the RERA and the AO.

If the buyer does not file a complaint before the RERA, the builder will escape liability for contravention of the REA under §61, which will also nullify the objectives of regulation and monitoring. On the other hand, if the buyer does not file a complaint before the AO, the buyer will be left without any efficacious remedy. To file two complaints for the same cause of action would be an absurd situation leading to multiplicity of claims and higher legal costs for the aggrieved buyer, besides giving rise to the possibility of contradictory judgments by the two authorities.

Another key aspect of the redressal mechanism under the REA is that it does not oust the jurisdiction of consumer forums. The proviso to §71 states that the buyer may withdraw a litigation pending before a consumer forum and file a complaint before the AO for compensation.<sup>57</sup> In order to ensure speedy redressal, there should have been a provision for transfer of existing

<sup>54</sup> *Id.*, §19(3) (provides that:

“The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (I) of sub-section (2) of section 4.”)

<sup>55</sup> *Id.*, §71.

<sup>56</sup> *Id.*, §61 (provides that:

“If any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to five per cent of the estimated cost of the real estate project as determined by the Authority.”)

<sup>57</sup> *Id.*, Proviso to §71(1) (provides that:

“Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.”)



complaints to the AO, instead of making buyers withdraw the existing proceedings and file fresh claims before the AO.

The creation of multiple forums for the adjudication of the same claim does not further the intention of speedy redressal. The legislature could have ousted the jurisdiction of all other courts, including consumer forums, and established a single forum i.e., the RERA with a judicial officer as a member to determine compensation in accordance with §72 of the REA. This would have fostered the disposal of complaints more efficiently and in a time-bound manner without any delay on account of determination of jurisdiction or multiplicity of claims. In addition to the aforesaid remedies, there is arbitration as well. After the enactment of the REA, it is a moot point whether the parties can still resolve disputes through arbitration and whether the Tribunal will continue to have jurisdiction despite the provision of a specific statutory remedy.

#### IV. ARBITRABILITY OF DISPUTES

The Arbitration Act does not define, clarify or state in specific terms the kind of disputes that are amenable to arbitration. The bar to arbitrability is contained in §34(2)(b) and §48(2) of the Arbitration Act which provide, *inter alia*, that an award can be challenged if the subject matter of the dispute is not arbitrable. Generally, every dispute, which is civil and commercial in nature, whether arising out of a contract or otherwise, is in principle arbitrable.<sup>58</sup> This is subject to the valid existence of a valid arbitration agreement, provided the jurisdiction of the Tribunal is not excluded.<sup>59</sup>

In *Booz Allen & Hamilton, Inc. v. SBI Home Finance Ltd.*,<sup>60</sup> ('Booz Allen') the Supreme Court of India ('SC') outlined the following test for the 'arbitrability' of a dispute:

- (a) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts)?
- (b) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the 'excepted matters' excluded from the purview of the arbitration agreement.

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<sup>58</sup> *Booz Allen and Hamilton, Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532, ¶35.

<sup>59</sup> *Id.*, ¶29.

<sup>60</sup> *Id.*

- (c) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal.”<sup>61</sup>

### A. THE TEST OF NATURE OF RIGHTS

The first and foremost test to determine arbitrability of a dispute is whether the dispute is capable of being adjudicated and settled by a Tribunal. In *Booz Allen*,<sup>62</sup> the SC distinguished between rights *in rem* and rights *in personam*, and held that rights *in personam* are arbitrable and rights *in rem* are not. The distinction between a right *in rem* and a right *in personam* is that a right *in rem* is available against the world at large and a right *in personam* is available only against particular persons.<sup>63</sup> It should be noted that the Court also held that this distinction is not rigid or inflexible, and subordinate rights *in personam* arising from rights *in rem* are considered to be arbitrable.<sup>64</sup>

The Court took the view that certain categories of proceedings are reserved by the legislature exclusively for public forums as a matter of a public policy and some categories, which are not exclusively reserved, may, by necessary implication, be excluded from the purview of private forums.<sup>65</sup> For example, a mortgage suit is to be decided by a Court, as the provision of the Transfer of Property Act, 1882 and Order 34 of the Code of Civil Procedure, 1908, impliedly bar adjudication by a Tribunal.<sup>66</sup> The Court thus outlined six categories of disputes which are not arbitrable:

“first, disputes relating to rights and liabilities which give rise to or arise out of criminal offences, second, matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody, third, guardianship matters, fourth, insolvency and winding up matters, fifth, testamentary matters (grant of probate, letters of administration and succession certificate) and sixth eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts

<sup>61</sup> *Id.*, ¶21.

<sup>62</sup> *Id.*

<sup>63</sup> P.J. FITZGERALD, SALMOND ON JURISPRUDENCE 235 (12th ed., 2009) (states:

“My right to the peaceable occupation of my farm is in rem, for all the world is a under a duty towards me not to interfere with it. But if I grant a lease of the farm to a tenant, my right to receive the rent from him is in personam.”)

<sup>64</sup> *Booz Allen and Hamilton, Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532, ¶41.

<sup>65</sup> *Id.*, ¶35.

<sup>66</sup> *Id.*, ¶48.

are conferred jurisdiction to grant eviction or decide the disputes.”<sup>67</sup>

The seventh category of disputes related to trusts was added in *Vimal Kishor Shah v. Jayesh Dinesh Shah*.<sup>68</sup>

In *Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd.*,<sup>69</sup> the SC further held that a winding up petition is not for money and the power to order winding up of a company, which is specifically conferred on the Court, emanates from the Companies Act. Hence, the winding up of a company cannot be subject to arbitration.<sup>70</sup> Similarly, the grant of probate is a judgment *in rem* and beyond the jurisdiction of the Tribunal.<sup>71</sup> In *N. Radhakrishnan v. Maestro Engineers*,<sup>72</sup> the Court held that issues related to misappropriation of funds and malpractices arising out of a partnership dispute should not be referred to arbitration and should be tried in a court of law.

Conversely, the SC has held that matters related to specific performance of a sale falls within contractual rights and in order to curtail litigation in regular courts, the performance of contracts concerning immovable property is not hit by the test of arbitrability under the Arbitration Act.<sup>73</sup>

## B. THE TEST OF RELIEF SOUGHT

Taking an alternative approach, the Bombay High Court in *Rakesh Malhotra v. Rajinder Kumar Malhotra* (‘Rakesh’)<sup>74</sup> held that since the arbitrator could not grant the relief of regulating the affairs of the company, the same could not be the subject matter of arbitration. Similarly, in *Eros International Media Ltd. v. Telemex Links India (P) Ltd.*,<sup>75</sup> the Bombay High Court took the view that the contractual rights relating to copyright fall within the scope of arbitration. Thus, the Bombay High Court, in essence, developed the test of arbitrability on the basis of the relief sought by the parties and not the distinction in the nature of their legal rights.<sup>76</sup>

<sup>67</sup> *Id.*

<sup>68</sup> *Vimal Kishor Shah v. Jayesh Dinesh Shah*, (2016) 8 SCC 788 : 2016 SCC Online SC 825.

<sup>69</sup> *Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd.*, (1999) 5 SCC 688.

<sup>70</sup> *Id.*

<sup>71</sup> *Chiranjilal Shrilal Goenka v. Jasjit Singh*, (1993) 2 SCC 507.

<sup>72</sup> *N. Radhakrishnan v. Maestro Engineers*, (2010) 1 SCC 72.

<sup>73</sup> *Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan*, (1999) 5 SCC 651; *Keventer Agro Ltd. v. Seegram Co. Ltd.*, APO No. 499 of 1997 and CS No. 592 of 1997, decided on 27-1-1998 (Cal) (Unreported).

<sup>74</sup> *Rakesh Malhotra v. Rajinder Kumar Malhotra*, 2014 SCC OnLine Bom 1146.

<sup>75</sup> *Eros International Media Ltd. v. Telemex Links India (P) Ltd.*, 2016 SCC OnLine Bom 2179.

<sup>76</sup> *Arthad Kurlekar, A False Start – Uncertainty in the Determination of Arbitrability in India*, June 16, 2016, available at [http://kluwerarbitrationblog.com/2016/06/16/a-false-start-uncertainty-in-the-determination-of-arbitrability-in-india/?\\_ga=1.183326437.2138946090.1480056927](http://kluwerarbitrationblog.com/2016/06/16/a-false-start-uncertainty-in-the-determination-of-arbitrability-in-india/?_ga=1.183326437.2138946090.1480056927) (Last visited on January 13, 2017).

However, applying the Booz-Allen test to the arbitrability of disputes with respect to the affairs of a company, since the dispute related to the shareholder claims against the company for operation and mismanagement, the same would fall under the category of rights *in personam* and hence would be arbitrable. However, applying the test of relief sought, the dispute would be unarbitrable.<sup>77</sup> Hence, neither of the tests is conclusive by itself in determining the arbitrability of a dispute.

### C. THE TEST OF SOCIAL OBJECTIVE AND PUBLIC POLICY

The most important decision on arbitrability of disputes is *Natraj Studios (P) Ltd. v. Navrang Studios* ('Natraj Studios'),<sup>78</sup> wherein the presence of a statutory remedy and a specific body having been established by law, parties should not be allowed to contract out of the statute. A three-judge bench of the SC held that a dispute between a landlord and a tenant regulated by the Bombay Rent Act was not arbitrable and would fall within the exclusive domain of the Small Causes Court at Mumbai. The rationale for this view was that the legislature had conferred exclusive jurisdiction on certain courts in pursuance of social objectives.<sup>79</sup> Furthermore, the Court held that public policy requires that parties be disallowed to contract out of a statute or a specific legislative mandate.<sup>80</sup> Therefore, if the jurisdiction of the Civil Courts is excluded and exclusive jurisdiction is granted to a specific court or tribunal as a matter of public policy, then such a dispute would not be capable of resolution by arbitration.<sup>81</sup>

Towing a similar line, the SC has, time and again, taken the view that the existence of an arbitration clause would not bar the jurisdiction of a forum under the COPRA.<sup>82</sup> This is because the remedy is in addition to any other law,<sup>83</sup> and is merely optional and in addition to, and not in derogation of, any other law for the time being in force.<sup>84</sup>

However, in *HDFC Bank Ltd. v. Satpal Singh Bakshi* ('HDFC Bank'),<sup>85</sup> a full bench of the Delhi High Court came to the conclusion that parties are free to choose their own forum for dispute resolution despite the creation of specialised tribunals. It should be noted that the reasons for coming to

<sup>77</sup> *Id.*

<sup>78</sup> *Natraj Studios (P) Ltd. v. Navrang Studios*, (1981) 1 SCC 523 : (1981) 2 SCR 466.

<sup>79</sup> *Id.*, ¶21.

<sup>80</sup> *Id.*

<sup>81</sup> *A. Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386 : (2016) 5 Arb LR 326 (SC), ¶32.

<sup>82</sup> Consumer Protection Act, 1986, §3 (provides that "The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.").

<sup>83</sup> *Skypak Couriers Ltd. v. Tata Chemicals Ltd.*, (2000) 5 SCC 294; *National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy*, (2012) 2 SCC 506.

<sup>84</sup> *Rosedale Developers (P) Ltd. v. Aghore Bhattacharya*, (2015) 1 WBLR 385 (SC).

<sup>85</sup> *HDFC Bank Ltd. v. Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815.

this conclusion were not to favour arbitration, but to uphold an alternate form of dispute resolution. The Court held that matters pending before the Civil Court can even be referred to *lok adalats*, mediation, conciliation, etc., and hence, despite the creation of a specialised tribunal, the parties were free to submit their disputes to arbitration.<sup>86</sup>

#### D. APPLYING THE TESTS TO DISPUTES UNDER THE REA

Following the dictum of the SC in *Booz Allen*, the rights with respect to the violation of the provisions of the REA would be considered as rights *in rem* as the violation by the builder would affect all buyers and not just an individual. Moreover, the violation would fall within the realm of regulation and monitoring of the real estate sector and hence will affect the public at large. On the other hand, the claim for compensation under §§12, 14, 18 and 19 read with §71 of the REA would fall within the realm of rights *in personam*. Thus, for violations of the REA, there can be no arbitration, but for compensation claims, there can be arbitration.

If the interpretation of the Bombay High Court in *Rakesh* is considered, then again, the result would effectively be the same as the relief claimed for violations of the REA would be a penalty and hence not arbitrable.<sup>87</sup> On the other hand, the claim for compensation being one for money would be arbitrable as it is a private dispute between the builder and the buyer.

However, there are inherent dangers in both views, the problem with the *Booz-Allen* test on the basis of the nature of rights is that it will always involve determining whether a right is *in rem* or *in personam*, like in the case of delay of possession, violating §61, and §§18 and 19 of the REA. Similarly, the problem with relief sought is that parties may deliberately seek reliefs which are beyond the scope of arbitration.<sup>88</sup>

Thus, the test of the nature of rights and that of the relief sought are inconclusive to determine whether disputes under the REA can be referred to arbitration. The only test which aids and furthers the intention of the REA is the test of social objective and public policy as outlined in *Natraj Studios*.<sup>89</sup> Since the REA has been specifically enacted to address the delay in litigation and to provide for speedy redressal, ousting the jurisdiction of the RERA and AO in favour of the Tribunal would in effect nullify the purpose of the REA.

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<sup>86</sup> *Id.* (the Court held, “While courts are State machinery discharging sovereign function of judicial decision making, various alternate methods for resolving the disputes have also been evolved over a period of time. One of the oldest among these is the arbitration.”).

<sup>87</sup> Kurlekar, *supra* note 76.

<sup>88</sup> *Id.*

<sup>89</sup> *Natraj Studios (P) Ltd. v. Navrang Studios*, (1981) 1 SCC 523 : (1981) 2 SCR 466.

The reason for this is that arbitration would not only be expensive for the consumers, but would also deprive the consumers of the protection granted by the REA with respect to the refund of money, interest and other such protections. Further, the objective of regulation and monitoring of the real estate sector will get diluted if complaints and grievances of buyers do not reach, and are not dealt with, by the RERA but are instead forwarded to the Tribunal.

## V. THE EFFECT OF THE ARBITRATION & CONCILIATION (AMENDMENT) ACT, 2015

In order to determine the validity of arbitration clauses *vis-à-vis* the REA, one of the key considerations has to be the consent of the parties to submit their dispute to the Tribunal, since arbitration is a creature of consent.<sup>90</sup> More often than not, builder-buyer agreements are not negotiated contracts and contain unreasonable standard terms, heavily favouring the builder.<sup>91</sup> Most of such agreements are standard form agreements, pre-drafted, where the buyers just sign the agreement, without having much of a chance to read the agreement or seek legal advice.<sup>92</sup> In this scenario, can it be considered that the parties actually intended to and agreed that their disputes are to be resolved by arbitration?

It is pertinent to note that the aforesaid decisions on arbitrability were passed before the amendment to the Arbitration Act,<sup>93</sup> and post the amendment, the language of §8(1) states that “notwithstanding any judgment, decree or order of the Supreme Court or any Court”, a judicial authority is bound to refer the parties to arbitration unless the authority finds that *prima facie* no valid arbitration agreement exists.<sup>94</sup> It is also important to note that the language of §8 of the Arbitration Act is peremptory in nature and it is obligatory for the court to refer the parties to arbitration.<sup>95</sup> Thus, the position of law, post the amendment, is that all matters, if arbitrable, have to be referred to arbitration.<sup>96</sup> In October, 2016, the SC in *A. Ayyasamy v. A. Paramasivam*,<sup>97</sup>

<sup>90</sup> ALAN REDFERN & MARTIN J. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* (4th ed., 2004).

<sup>91</sup> *LIC v. Consumer Education and Research Centre*, (1995) 5 SCC 482.

<sup>92</sup> *Superintendence Co. of India (P) Ltd. v. Krishan Murgai*, (1981) 2 SCC 246 : (1980) 3 SCR 1278.

<sup>93</sup> *The Arbitration and Conciliation Act, 1996.*

<sup>94</sup> *Id.*, §8(1) (provides that:

“A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exist.”).

<sup>95</sup> *P. Anand Gajapathi Raju v. P.V.G. Raju*, (2000) 4 SCC 539.

<sup>96</sup> *Sundaram Finance Ltd. v. T. Thankam*, (2015) 14 SCC 444 : AIR 2015 SC 1303; *Magma Leasing & Finance Ltd. v. Potluri Madhavilata*, (2009) 10 SCC 103.

<sup>97</sup> *A. Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386 : (2016) 5 Arb LR 326 (SC).

took the view that Article 8 of the UNCITRAL Model Law ('Model Law') only enables the "Court" to decline the reference to arbitration, whereas §8 of the Arbitration Act made a departure from the Model Law and used a very expensive expression of "judicial authorities" instead of the word "Court".<sup>98</sup> Hence, the presence of an arbitration clause in the agreement would necessarily trigger the mandate of §8 of the Arbitration Act and the parties would have to approach the Tribunal. However, there is no clarity on what is arbitrable and the Court accepts that it is necessary to have laws that state what matters are non-arbitrable, as the Civil Court has powers to set aside an award on the ground that the subject matter of the dispute could not have been settled by arbitration.<sup>99</sup>

Hence, one has to resort to the rules of statutory interpretation in order to determine the arbitrability of disputes under the REA.

## VI. OUSTER OF THE ARBITRATION TRIBUNAL

It is most relevant to note that §88 of the REA states that the REA shall be in addition to, and not in derogation of, any other law. A plain reading of the provision leans in the favour of ouster of arbitration, or arbitration being an alternative remedy optional to the parties.<sup>100</sup> On the other hand, §89 of the REA states: "The provision of this Act shall have effect, notwithstanding anything inconsistent contained in any other law for the time being in force." Therefore, §89 of the REA clearly has an overriding effect. Thus, both the sections, on a plain reading, suggest that the provisions of the REA would prevail over the Arbitration Act. However, this literal interpretation directly conflicts with §8(1) of the Arbitration Act which mandates the reference of every dispute to the Tribunal, when there is an arbitration clause. Thus, there appears to be a direct conflict between two statutes, i.e., the REA and the Arbitration Act, as to which will prevail in case of real estate disputes. Whenever there is a conflict of such nature, the only way to resolve it is to resort to the principles of statutory interpretation.

*First*, the REA is a social welfare legislation as it seeks to protect the consumers at large. Hence, following the view of the SC in Natraj Studios, when exclusive jurisdiction has been conferred on the RERA and AO, the jurisdiction of the Tribunal should be excluded as a matter of public policy.<sup>101</sup> Even if a literal interpretation is applied, §89 of the REA clearly provides that the REA

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Skypak Couriers Ltd. v. Tata Chemicals Ltd., (2000) 5 SCC 294; National Seeds Corp'n. Ltd. v. M. Madhusudhan Reddy, (2012) 2 SCC 506.

<sup>101</sup> Hindustan Lever Ltd. v. Ashok Vishnu Kate, (1995) 6 SCC 326.

overrides other legislations and hence the Arbitration Act can only be applied as long as it is not inconsistent with the REA.<sup>102</sup>

*Second*, it has been held time and again that in case of a conflict between two statutes, a specific legislation should override a general legislation. This is based on the Latin maxim *generalia specialibus non derogant*, i.e., general law yields to special law, should they operate in the same field on the same subject.<sup>103</sup> In this case, the REA has been enacted specifically to regulate the real estate sector and provides for speedy dispute redressal and hence, arbitration clauses should be held invalid and the mandate of §8(1) of the Arbitration Act should consequently be subject to the provisions of the REA.

*Third*, taking a purposive interpretation, the costs associated with arbitration are relatively high and the process of arbitration is not understood by most buyers.<sup>104</sup> Since speedy redressal of disputes is one of the key objectives behind enacting the REA, the freedom to opt for an alternative redressal mechanism, as held in *HDFC Bank*,<sup>105</sup> would nullify the effect of the REA and bring buyers back at the mercy of the builder. Further, the costs to be paid by a buyer for redressal under the REA are low,<sup>106</sup> and the buyer is at liberty to appear before the authorities.<sup>107</sup> If the parties are referred to arbitration, the costs for the buyers would rise substantially, and it would only serve as a deterrent for buyers to pursue litigate against builders, which was the situation prevailing before the enactment of the REA. Since an interpretation nullifying the effect of any legislation should always be avoided,<sup>108</sup> therefore, the RERA or AO should not stay the proceedings in favour of arbitration, as the REA provides for a cheap and speedy redressal mechanism.<sup>109</sup>

*Fourth*, the REA provides for strict timelines, such as the refund of money within forty-five days,<sup>110</sup> and interest above the bank rate,<sup>111</sup> which will help buyers immensely. Such relief cannot be granted by the Tribunal as a standard applicable across all consumers as it will always be subject to the facts of each case and the discretion of the Tribunal, whereas such reliefs have been given statutory recognition, applicable to all cases, irrespective of the subjective facts of the case.

<sup>102</sup> *Govt. of A.P. v. Road Rollers Owners Welfare Assn.*, (2004) 6 SCC 210.

<sup>103</sup> *CTO v. Binani Cement Ltd.*, (2014) 8 SCC 319 : (2014) 3 SCR 1.

<sup>104</sup> *Giaretta*, *supra* note 8.

<sup>105</sup> *HDFC Bank Ltd. v. Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815.

<sup>106</sup> *Chandigarh Real Estate (Regulation and Development) (General) Rules*, 2016, Rules 34, 35 (provide that INR 1,000/- is required for complaints to be filed).

<sup>107</sup> *The Real Estate (Regulation and Development) Act*, 2016, §56.

<sup>108</sup> *Workmen v. Indian Standards Institution*, (1975) 2 SCC 847 : (1976) 1 LLJ 33 (SC), at 39.

<sup>109</sup> *Fair Air Engineers (P) Ltd. v. N.K. Modi*, (1996) 6 SCC 385 : AIR 1997 SC 533.

<sup>110</sup> *Chandigarh Real Estate (Regulation and Development) (General) Rules*, 2016, Rule 16.

<sup>111</sup> *Id.*, Rule 15.



## VII. CONCLUSION

The REA is much needed, and is a welcome step towards the protection of the buyers, who were hitherto at the mercy of lop-sided agreements, and lengthy and cumbersome litigation for enforcement of their rights. Providing for regulation, promotion and monitoring, the REA brings transparency which will lead to a reduction in real estate frauds, and offers statutory recognition to the rights of buyers which were earlier not included in builder-buyer agreements as buyers were not in a position to freely negotiate such agreements.

The requirement of registration of builders, and especially of real estate agents, would add credibility to builders and increase the confidence of buyers in the real estate sector. Furthermore, the establishment of the RERA and the AO would provide a huge relief to innocent buyers who would earlier invest their life-savings into real estate projects and then run from pillar to post for getting possession or refund of their money. Several statutory thresholds with respect to the amount of money that can be received, verification of title and blocking of seventy-five percent of capital would further the completion of projects in time and prevent siphoning off of consumer money. This would also deter builders from starting projects without the necessary capital and capability to execute them.

However, since the REA also applies to projects which are yet to receive an occupancy certificate, and following the practice in the real estate sector, the existence of arbitration clauses in builder-buyer agreements creates an apparent conflict between the redressal mechanism provided under the REA and the Arbitration Act. It is not clear as to which recourse would prevail in case of a dispute between the builder and the buyer. Also, given the lack of clarity with respect to arbitrability of disputes, and for the reasons outlined above, the jurisdiction of the Tribunal should be ousted and the buyers should be permitted to approach the RERA for the enforcement of their rights under the REA.

Further, if the REA is to achieve its objective of adequately protecting the interest of buyers and ensuring speedy redressal of disputes, then the unnecessary multiplicity of two forums, i.e., the RERA and AO should be avoided and the AO should be made a member of the RERA, with all complaints being filed before the RERA only. The REA should also be amended to oust the jurisdiction of all other forums, and not leave it to the option of the parties. This will not only help in achieving the objective of speedy dispute resolution but also further the objective of regulation, monitoring and promotion of the real estate sector, as the enforcement and redressal will be addressed by a single body, i.e., the RERA.

