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**“Dharma is to protect the Needy”**

**RESEARCH ARTICLE ON**

**ADR MECHANISM AS AN EFFECTIVE FRAMEWORK UNDER  
THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT**

**2016**

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## **ABSTRACT**

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 seeks to give an end to baffled and helpless buyers who have so far been helpless before the corrupt builders and years of litigation. To combat such disputes, it is the need of extreme significance for legal fraternity to embark upon the certain Alternate Dispute Redressal Mechanism which is the appropriate form of forum as compared to classical form i.e., litigation.

After observing the unscrupulous extortion of buyers, the Government of India passed the RERA. The act was passed with the following primary objectives: *first*, promotion and proper regulation of the real estate sector; *second*, to secure home-buyers interest in the real estate sector; and *third*, to set up a dispute resolution mechanism for speedy disposal. Furthermore, through this paper the Author seeks to analyse the nature of real estate disputes; different laws in the picturesque of their intermingling with the Arbitration and conciliation. The paper would also analyse certain judgments judged upon and their ramification in the coming age.

Lastly through this piece of research work I would further like to add certain quintessential aspects of nuanced jurisprudence in the realm of ever-growing demand for Dispute Resolution as a beacon of new hope in the current legal pandemonium.

## INTRODUCTION

The issue began when the aggrieved buyers, whose money and savings have been stranded in the real estate projects for years, have appreciated the enactment of Real Estate (Regulation and Development) Act, 2016 ('**RERA**')<sup>1</sup>. The buyer's money has been stuck for a long duration without any information regarding the date of completion of the project or the date of handing over possession. The real estate sector in India was largely unregulated,<sup>2</sup> unlike other countries,<sup>3</sup> which led builders to take an unfair advantage of the property holders or allottees.

After observing the unscrupulous extortion of buyers, the Government of India passed the RERA. The act was passed with the following primary objectives: first, promotion and proper regulation of the real estate sector; second, to secure home-buyers interest in the real estate sector; and third, to set up a dispute resolution mechanism for speedy disposal.<sup>4</sup> In addition to the regulation, the most important objective is to protect the rights of the buyers and to assist them with a speedy dispute redressal system. To implement the said objective, the RERA has set up two forums, i.e., the Real Estate Regulation Authority<sup>5</sup> ('**RERA**') and the Adjudicating Officer<sup>6</sup>.

In the current contemporary time of hyper boom in the Real Estate area, it is mandatory to enrol those questions will undoubtedly upset and upgrade the said industry in different aspects of the fundamental institutionalization of the Real Estate industry as a whole. To fight such questions which range from being piddling to being that of significantly more accidental

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<sup>1</sup> The Real Estate Act, 2016 No. 16 Act of Parliament, 2016.

<sup>2</sup> C.f. The Maharashtra Housing (Regulation and Development) Act, 2012 (Maharashtra is an exception to this).

<sup>3</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>4</sup> The Real Estate Act, 2016.

<sup>5</sup> *Id.*, Section 20.

<sup>6</sup> *Id.*, Section 2(a).

methodology, it is the devoir of most extreme significance for legal fraternity to embark upon the specific system to battle such Disputes.

A dispute can be understood as difference of opinion over the existence of a legal right, or over the extent and kind of compensation that may be claimed by the injured party for a violation of such right. One of the essential objectives of law is to provide social justice and equity amongst the society to maintain peace and security, it is supremely important for all the 3 pillars of Justice i.e., legislature, executive and judiciary and to ensure an effective mechanism to overcome the disputes which can be resolved by the alternate dispute resolution mechanism rather than the ancient method of litigation.

Furthermore, through this paper the Author seeks to analyse the nature or real estate disputes; different laws in the picturesque of their intermingling with the Arbitration and conciliation. The paper would also analyse certain judgments judged upon and their ramification in the coming age.

The initial part will be dealing with the basic understanding and objective of RERA and the importance of ADR Mechanism, followed by the critical analysis of arbitrability of real estate disputes and the scope of conciliation under the same. The latter part will be covering the suggestive reforms to enhance the administration of RERA followed by the conclusion as per the author.

Therefore, before discussing the scope of ADR in real estate disputes, let us have a greater understanding about the Real Estates Act, 2016 and the objectives for its enactment.

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## **INTRODUCTION AND KEY OBJECTIVES OF RERA**

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The key focus of RERA has been upon the upliftment and administration of real estate industry, ensuring transparency in the real estate project transactions in an efficient manner, protecting the rights and interest of consumers or buyers and creating a customer-friendly environment along with a promising creation of a system, ensuring a time bond resolution of by distinguishing those brought within the authority of the Appellate Tribunal. Some of the key objectives of RERA are as follows

1. The state has been directed under RERA to issue guidelines and principles for a proper administration of the dispute and industry in accordance with the act. Furthermore, a

centralized Real Estate regulatory authority, a specific adjudicatory authority, and a Central Advisory Council has also been established by RERA to implement the said objective.

2. A greater liability has been casted upon the builders and real estate agents. The emergence of RERA has witnessed a significant shift of risk-bearing from buyers to builders.
3. With regard to creating a compulsory separate bank for the real estate transaction, proper guidelines have been issued, out of which 70% can only be utilised for the project and remaining 30% may be appropriated.
4. The said act has made it mandatory to make a Prior registration with the concerned authority with regard to any sale or advertisement of any real estate project, the same is permitted without Provision of mandatory disclosure of all project details.
5. The act has enlisted with a detailed provision pertaining to the rights, responsibilities and functions of all parties to the construction project.
6. To ensure a proper functioning of the real estate industry with a considerable decrease of malpractices, penalty provisions and penalties for offenses committed by promoters, real estate agents allotted persons and companies.
7. The Act has an overriding effect on all other legislations which are not in consonance with the Central Act. It also delegates the power to the Member States to draw up their own legislation on real estate in accordance with the Central Act.
8. As stated earlier, one of the key features of RERA is the time bound dispute redressal mechanism, the adjudicating officer has been entrusted with the power to investigate the parties or *suo moto* concerns regarding infringement of the Act. Furthermore, an appellate, Real Estate Appellate Tribunal (**REAT**) has also been constituted to adjudicate upon the matters appealed. A sixty days' time window has been made separately for dispute redressal. RERA can be considered as a concentrated platform to resolve disputes, whereas in case of primitive consumer forums/courts, the dispute would have clubbed with several other consumer disputes, causing delay in justice.

Now, as we have gained the basic understanding and objectives of the Real Estate Act, 2016, we shall move forward to understand the importance of alternate dispute resolution mechanism which has been proven as the most effective alternative to the judicial system.

## **IMPORTANCE OF ALTERNATIVE DISPUTE RESOLUTION AS AN ALTERNATIVE TO LEGAL INDICTMENTS**

There has been constant support from the members of the legal field to promote ADR as an alternate forum which is much more superior and practical as compared to the ancient concept of litigation for dispute redressal. In view of the law professionals, mediation and arbitration is considered to be a pragmatic approach rather than litigation. This is due to their flexible procedure and also provides to the parties with an amicable solution which can be beneficial, in addition to having a less hostile method of resolving their differences.<sup>7</sup>

In disputes of commercial nature, where the parties have equal bargaining power, the methods like mediation or arbitration have been proven to be the most effective and rational methods for dispute redressal. The Arbitration and Conciliation act was inculcated in India seeing to the overall potential and outreach of ADR mechanism in solving the disputes. After its implementation numerous laws have been developed in the legal regime. In this day and age, what meets the eye is the fact that the Arbitration clauses have made a way into the consumer contracts also, i.e., the contracts which are between a consumer and a business entity for the sale or lease of goods and services or other relevant things.<sup>8</sup>

However, despite all other factors pertaining to ease of establishing Arbitration clauses in consumer contracts, it is undeniable that the consumers while entering into a contract with a business entity are often ignorant that their contracts contain an arbitration clause or agreement.<sup>9</sup>

Due to the lack of legal awareness and less promoted ADR Mechanism, a consumer of ordinary prudence may even have problems in understanding the language and meaning of the arbitration clause, let alone understand what it means and the implication it carries in clear and unambiguous terms.<sup>10</sup>

<sup>7</sup> Gilmer vs. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991).

<sup>8</sup> Frederick L. Miller, “*Arbitration Clauses in Consumer Contracts; Building Barriers to Consumer Protection*”, 78 Mich. B. J. 302, 302 (1999)

<sup>9</sup> Mary Flood, “*Arbitration Not Always Fair, Cheap for Parties in Dispute*,” Hous. Chron., Apr. 11, 2001, at 21.

<sup>10</sup> Joseph T. McLaughlin, “*Arbitrability: Current Trends in the United States*”, 59 Alb. L. Rev. 905, 922 (1996).

Therefore, now that we have gained the knowledge with respect to the basic objectives of the Real Estate Act and the importance of ADR as an alternative to the judicial system, we can finally discuss the scope of ADR in real estate disputes in the coming chapter.

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## **COETANEous ASPECTS OF ADR AS AN ALTERNATIVE TO LITIGATION IN CASE OF REAL ESTATE DISPUTES**

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The Real Estate sector is a booming sector and plays an integral role in fulfilling the need and demand for housing and infrastructure and other residential requirements especially pertaining to the urban areas of the nation. The sector has a vast outreach and is possessed with a beaming potential to overhaul the current statistics and burgeon into an even more enormous version of itself in the years to come.

Real estate is indeed an integral and significant sector and is closely linked to the economy of India, it provides for employment and contributes significantly in the realm of GDP, and has a prodigious potential to grow with reports supplementing that it may amount to \$853 billion by 2028.<sup>11</sup>

Brimming some light on all these essential facts and intricacies of this industry, the Real Estate (Regulation and Development) Act, 2016 ("RERA") was passed.

Under a common category of all forms of consumer contracts, the arbitration clauses had also made their way in the Buyer Contracts for the transactions pertaining to the real estate. The basic conundrum in this scenario arises from the fact that most of the contracts which are entered into are standardized form of contracts which provides for almost little or no power to the other party to argue on the terms and conditions of the said contract and it is on basis of choice that whether they want to enter into contract with those clauses or leave the contract itself, such contracts are also referred to as 'Take it or leave it contracts'.

Recently the N.C.D.R.C.<sup>12</sup> in an order<sup>13</sup> held that the consumer disputes, even if with a valid Arbitration Agreement cannot be forced to have arbitration, the appeal against which was dismissed by the Supreme Court.<sup>14</sup>

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<sup>11</sup> Mohammad Khalid Parvez, Real Estate Act 2016, Vol. 8 Issue 12 Lex Witness 8, 9 (2017).

<sup>12</sup> The National Consumer Disputes Redressal Commission (NCDRC), 1988

<sup>13</sup> Aftab Singh v. Emaar M.G.F. Land Ltd. Consumer Case 715 of 2015.

<sup>14</sup> Emmar M.G.F. Land Limited v. Aftab Singh, Civil Appeal No. 23512-23513 of 2017.

Discussing about the scope of ADR has a whole has made us understand that it can be proved as an effective forum to resolve real estate disputes. Therefore, in the next chapter we will be discussing in detail about the scope of arbitration in real estate disputes or arbitrability of such disputes.

## **ARBITRABILITY OF DISPUTES UNDER TO REAL ESTATE SECTOR**

There has been no clarity in the area of disputes which can be resolved under arbitration, which is one of the major setbacks of the Arbitration and Conciliation Act. The bar to arbitrability of a suit is contained in *Section 34(2) (b) and Section 48(2)* of the Arbitration Act<sup>15</sup> which provide, *inter alia*, that an award can surely be challenged if the subject matter of the dispute is not deemed fit to be arbitrable.<sup>16</sup>

Predominantly the arbitrability of a certain dispute is subject to a valid arbitration agreement, which provides that the jurisdiction of arbitration tribunals cannot be excluded.<sup>17</sup> In cases where the dispute is civil or criminal in nature, it can be deemed to be arbitrable in nature, provided it is based upon a contract or otherwise.

The Supreme Court of India provides for an outline of the following “**Test for the Arbitrability**” of a dispute in the judgement of *Booz Allen & Hamilton, Inc. v. SBI Home Finance Ltd.*<sup>18</sup>, the aforementioned guidelines were as follows

- “*Whether the disputes are capable of adjudication and settlement by arbitration?*” Which means that whether such disputes could be addressed by the forum chosen by the parties which is confidential in nature or they will fall within the jurisdiction of the judicial forum i.e., courts.
- “*Whether the disputes are covered by the arbitration agreement?*” Which means that whether the dispute fall under the ambit of the arbitration clause of agreement or it falls under the “excepted matters” excluded from the purview of the arbitration agreement.

<sup>15</sup> Arbitration and Conciliation Act, 1996, Number 26 Act of Parliament, 1996.

<sup>16</sup> Ajar Rab, Redressal Mechanism under the Real Estate Act, 2016: Ouster of the Arbitration Tribunal, 10 N.U.J.S. L. Rev. 1, 9 (2017)

<sup>17</sup> Booz Allen & Hamilton, Inc. vs. S.B.I. Home Finance Limited., (2011) 5 S.C.C. 532, 29.

<sup>18</sup> *Id.*

· “*Whether the parties have referred the disputes to arbitration?*” Which talks about the nature of the disputes falling under the scope of arbitral tribunal, or whether they do not arise out of the scope of the arbitration clause or agreement pertaining to the dispute.

However, it is quite evident that the Supreme Court, earlier in a gamut of cases has been of the opinion that the jurisdiction of the ordinary civil court is excluded by conferring exclusive jurisdiction on a special court or tribunal as a matter involving public policy, then the dispute would not to be held arbitrable.<sup>19</sup> This was quite similar to the technicalities involving the Consumer Act.

## **1. THE TEST OF NATURE OF RIGHTS**

This is one of the primary tests to examine the arbitrability of a dispute which testifies whether the dispute can be categorised as the one which can be adjudged by the tribunal. In *Booz Allen*,<sup>20</sup> the SC gave a clear distinction between rights in rem and rights in personam, and held that rights in personam are considered to be as arbitrable and rights in rem are not. The differentiation between such rights is that a right in rem is available to the public at large and a right in personam is available only to a particular person.<sup>21</sup> The reasoning for it is the basic feature of arbitration being confidentiality. It was also held by the apex authorities that the said distinction was peremptory in nature, and should be taken in rigid sense. The court also held that the rights in personam arising from rights in rem are considered to be arbitrable.<sup>22</sup>

## **2. THE RELIEF SOUGHT TEST**

An alternative approach was taken by the Bombay High Court in *Rakesh Malhotra v. Rajinder Kumar Malhotra*<sup>23</sup>, where the court stated that since the arbitrator due to his lack of technical expertise was not able to grant the relief to administer the functions of the company, the same would not be held as arbitrable in nature. But on the contrary, the Bombay High Court in *Eros Int. Media Ltd. vs. Telemax Links India (P) Ltd.*,<sup>24</sup> was of the opinion that the case relating to copyright will come under the scope of arbitration in cases of rights pertaining to

<sup>19</sup> *Natraj Studios Ltd. v. Navrang Studios*, (1981) 1 SCC 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.

<sup>20</sup> *Booz Allen and Hamilton, Incorporation v. SBI Home Finance Limited*, (2011) 5 SCC 532.

<sup>21</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>22</sup> *Booz Allen and Hamilton, Incorporation vs. SBI Home Finance Limited*, (2011) 5 SCC 532.

<sup>23</sup> *Rakesh Malhotra vs. Rajinder Kumar Malhotra*, 2014 SCC Online Bom 1146.

<sup>24</sup> *Eros Int. Media Ltd. vs. Telemax Links India Pvt. Ltd.*, 2016 SCC Online Bom 2179.

contracts. Therefore, the Bombay HC, gave its opinion and relied the test of arbitrability on the nature of the relief which is prayed by the parties rather than the differentiation of their right in particular.<sup>25</sup>

However, on the application of the *Booz-Allen* test to the arbitrability in disputes pertaining to the company's affair, it can be noted that in cases of operation and mismanagement, the rights of the shareholders can be construed under the right to personam and therefore can be considered as arbitrable in nature. However, on the application of the relief sought test, the said dispute would be considered as non arbitrable.<sup>26</sup> Hence, neither of the tests have been proven to be effective in all cases of arbitrability.

### **3. THE TEST OF SOCIAL OBJECTIVE AND PUBLIC POLICY**

One of the most landmark judgement on arbitrability of disputes was *Natraj Studios (P) Ltd. v. Navrang Studios*,<sup>27</sup> wherein the court stated that, the presence of a statutory remedy and a creation of a specialised body having been established by law, the disputing parties should not be allowed to contract out of the statute.

However, in *HDFC Bank Ltd. v. Satpal Singh Bakshi*,<sup>28</sup> A full bench of the Delhi HC was of a different opinion on contrary that parties to a dispute have the autonomy to opt for any form of dispute resolution despite the creation of specific tribunals. It was further stated that the reasoning for coming to this decision was to promote the alternate forums for dispute redressal and not to favour arbitration in particular. The Court held that the parties have the autonomy to choose the dispute resolution forum in spite of the creation of the specific tribunals and the matters pending before the Civil Court can also be referred to lok adalats, mediation, conciliation, etc.<sup>29</sup>

### **APPLICATION OF THE TESTS TO DISPUTES UNDER THE RERA**

On the basis of the dictum of the SC in “*Booz Allen*”, the rights of the buyers with reference to the breach of the RERA would come under the scope of *rights in rem* as the infringement by the promoters would adversely affect the homebuyers at large. Moreover, any

<sup>25</sup> Arthat Kurlekar, *A False Start – Uncertainty in the Determination of Arbitrability in India*, June 16, 2016.

<sup>26</sup> *Id.*

<sup>27</sup> *Natraj Studios Ltd. vs. Navrang Studios*, (1981) 1 SCC 523: (1981) 2 SCR 466.

<sup>28</sup> *HDFC Bank Ltd. vs. Satpal Singh Bakshi*, 2012 SCC Online Del 4815.

<sup>29</sup> *Id.*

violation with respect to RERA would fall under the ambit of regulation of real estate industry and hence will affect the public at large, thus being a *right in rem*. Thus, the disputes pertaining to compensation claims can be arbitrable in nature.

If we go by the elucidation of the Bombay High Court in *Rakesh*<sup>30</sup> is analysed, then the end result would be similar as the claim sought for breach of RERA would be compensation, hence not arbitrable.<sup>31</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, the major drawback with the *Booz-Allen* test is that the arbitrability of dispute is dependent on the mere distinction of a right is in rem or in personam, like in the case of delay of possession, violating *Section 61*, and *Section 18 and 19 of the RERA*. Similarly, the problem with the claim sought is that parties may deliberately seek reliefs which are beyond the scope of arbitration.<sup>32</sup>

Thus, it can be understood from the above observation that neither of the tests have been successful enough to resolve the issue pertaining to arbitrability of dispute under RER and their reference to ADR. Now the only reliable test aids the intention of RERA is the “*Test of Social Objective and Public Policy*” as outlined in *Natraj Studios*.<sup>33</sup> Since the enactment of RERA specifically address the delay in judicial proceedings and to provide for a time bound redressal, then the overriding effect of the jurisdiction of the RERA in favour of the Tribunal would not in effect in nullity to purpose of the RERA as the alternate dispute forum has a similar purpose and would in fact will add support to the specialised bodies.

The reason for this is that arbitration would not only be flexible and less complex for the consumers, but would also create a protection to the parties with respect to their reputation as the said forum is private in nature. Further, the objective of regulation and administration of the real estate sector will get enhanced if complaints and grievances of buyers do reach to either of the forums, as it would lead of less pendency of cases on courts as well as will lead to speedier recovery which will benefit the buyers.

<sup>30</sup> *Rakesh Malhotra vs. Rajinder Kumar Malhotra*, 2014 SCC Online Bom 1146.

<sup>31</sup> Arthat Kurlekar, *A False Start – Uncertainty in the Determination of Arbitrability in India*, June 16, 2016.

<sup>32</sup> *Id.*

<sup>33</sup> *Natraj Studios Private Ltd. v. Navrang Studios*, (1981) 1 SCC 523: (1981) 2 SCR 466.

**LEGISLATIVE SCOPE OF ARBITRATION IN REAL ESTATE DISPUTES**

The primary reason for the origin of RERA was to make sure that the disputes of the homebuyers are resolved in a time bound manner. The RERA was formulated to regulate the gargantuan unregulated sector, i.e., the real estate industry. It provided for certain provisions to safeguard the interest of the consumers. The said legislation has laid down clear provisions with regard to the constitution of the adjudication authority in the form of Real Estate Authority and an Appellate Tribunal for each state.

One of the ardent aspects of RERA which is of significant relevance is to note that *section 88 of the RERA* affirms that, the RERA shall be an addition and not in contravention of, any other legislation. Primarily mere reading of the provision provides for favouring the riddance of Arbitration, or Arbitration being a mere alternative remedy which is to be held optional to the estranged parties involved in the suit.

From the literal interpretation of *Section 88 OF RERA*, it can be construed that the specialised legislation shall be an addition to the administration system in the real estate sector. It can also be interpreted from the plain reading that the said provision has an overriding effect over the Arbitration Act as an alternate dispute redressal forum.<sup>34</sup> On the other hand section 89 of the RERA also reinstates that: “The provision of this Act shall have effect, notwithstanding anything inconsistent contained in any other law for the time being in force.” Therefore, it can be clearly understood that section 89 of the RERA provides for an overruling effect. Thus, both the sections, on a mere unadorned reading, suggest that the implications of the RERA would prevail over the Arbitration Act.

However, from the interpretation of the contradicting provision *section 8(1) of the Arbitration Act*, which makes it mandatory for the tribunals to refer the disputes to arbitration in cases where there is existence of an arbitration agreement or clause. Therefore, it is certainly evident that a direct dispute between two statutes, i.e., the RERA and the Arbitration Act exists, as to which legislation will have an overriding effect over the other in real estate matters.

Furthermore, if the judgment given by the NCDRC clubbed with the judgments of the Supreme Court in *Nataraj Studios* is to be taken into consideration then it is a confirmed principle in law that if there is a special legislation in place, then in those cases the jurisdiction of the specialised forums cannot be excluded rather it is the tribunal which is to be excluded

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<sup>34</sup> Hindustan Lever Ltd. vs. Ashok Vishnu Kate, (1995) 6 SCC 326.

as it concerns the matter of public policy.<sup>35</sup> Also it is always the general law which has to make the way for the existence of the special legislation.

Therefore, it can be clearly understood that real estate disputes can be resolved through the forum of arbitration and has been proven as an effect mechanism for dispute redressal. Now moving forward, we would be discussing in the next chapter about the scope of conciliation in Real Estate Act, 2016 and the various measures taken by the government to promote conciliation as an alternate to Real Estate tribunals.

## **CONCILIATING DISPUTES UNDER THE REAL ESTATE ACT, 2016**

Time bound dispute redressal being one of the major objectives of the Real Estate Act, 2016 in addition to those numerous efforts have been put in by the legislative authorities for the proper implementation of the provision along with the protection of rights of the homebuyers to resolve the distress of the homebuyers. Recently the Maharashtra and Uttar Pradesh government has established a Conciliation Committee under the Act to administer the real estate disputes under the Act. This means that the parties will be able to approach the State Real Estate Regulatory Authority ("SRERA") only after the appointed panel of conciliators fail in finding a solution to the dispute. The guidelines laid down provide that the panel of conciliators shall be appointed to mediate the dispute between home buyers and builders and help them come to an amicable solution. This advanced step is taken to resolve the dispute of the parties even before the said dispute is taken to the Adjudicating Authority.

*Section 32(g)(2)* of the Act, provides that the Authority is entitled "to make recommendations to the Government on different ways to provide a smooth function to the conciliation of disputes" between the builders and homebuyers through the dispute redressal mechanism established by the associations. To implement such recommendations, the government has been successful enough to establish a Conciliation Committee so that conciliatory proceedings can take place between builders and home buyers.

This form of alternate approach is more flexible in nature and RERA is trying to promote such a forum to bring the disputing parties to negotiate their dispute in private instead of initiating formal court proceedings. The type of complaints that can be addressed by conciliation forums are—related to a refund, compensation or possession. Conciliation forums

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<sup>35</sup> *Id.*

also have an advantage over the judicial system with regard to the time bound dispute redressal mechanism it provides.

With the said motive the two bodies i.e., MahaRERA and UPRERA Conciliation and Dispute Redressal Bodies were established which aims to facilitate the process of dispute resolution amicably, thereby being cost efficient to parties and State, promoting greater public satisfaction with legal system and dispute resolution.

The homebuyers in case of a failure to reach to a solution under the mechanism of the Forum, will have the recourse to lodge a formal complaint against the builder via the Complaints Portal.

The following are the motives of the Uttar Pradesh and Maharashtra RERA Conciliation and Dispute Resolution Forum:

1. To Constitute a panel of eminent Conciliators representing different stakeholder groups and having the expertise to help the parties settle their disputes.
2. To follow Conciliation rules emanating from best features of common and civil law systems after extensive consultation with practitioners.
3. To provide an effective and efficient solution for the disputes arising out of real estate matters under the ADR mechanism.
4. To promote conciliation as one of the most efficient forums of dispute redressal with cost and time efficient as its major features.
5. At last, ensuring that the real estate disputes get an alternate forum which is more flexible and less time consuming to resolve their disputes.

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### **CERTAIN VOID OF RERA**

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Perfection is a utopia indeed! With this being laid out, it becomes an undeniable statement that every legislation has its own dual nature, in the sense that on one side it may contain new ideas, reforms with the evolution of the society but on the other side it may have numerous loopholes or voids. Similarly, RERA is not immune from such voids and following are some of the basic voids which are associated with RERA.

1. Due to the insufficiency with respect to recovery powers associated with RERA, which creates a void in the administration system which often led to the non-compliance of the orders issued by RER in favour of the homebuyers.

2. One of the major hurdles which hinders the progress of any real estate project is the multiple approvals needed by the authorities at each stage of the construction, as a result of which the project gets delayed. The only solution to this hurdle is the necessity for a single window clearance, so that all the necessary approvals can be granted in one go. Also, *Section 32 of the Act* states that it is the duty of the RERA to make a recommendation for the creation of a single window administration system in order to ensure the timely completion of the project without any hurdle of facing multiple approvals.
3. The conflicting reading of certain sections creates a void with respect to the RERA act. *Section 89 of the RERA* clearly provides for an overriding effect over all other legislation. Thus, on a mere unadorned reading, suggests that the implications of the RERA would prevail over the Arbitration and Conciliation Act.

However, this literal interpretation incidentally conflicts with *section 8(1) of the Arbitration Act*, which provides for a mandatory duty of the tribunals to refer every dispute containing an arbitration clause for arbitration proceedings. Therefore, it is certainly evident that a direct conflict between two statutes, i.e., the RERA and the Arbitration Act exists, as to which will prevail in case of real estate disputes. Such undefined and conflicting provisions cause grounds for confusion and mismanagement in the Real Estate Sector.

In the next chapter we will be discussing the reforms which can be implemented so as to improve the administration of RERA and fill the void areas in the act.

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## **SUGGESTIVE MEASURES TO STRENGTHEN THE DISPUTE REDRESSAL FORUM**

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The current scenario of Alternative Dispute Resolution as a wholesome alternative to the traditional discourse of legal proceedings is somewhat competent in its current state, yet the same is not immune from inefficiencies, lacunas and many more hurdles which must be overcome with. Following are certain key suggestions with reference to Alternative Dispute Resolution mechanism in Real estate industry along with the provisions of RERA act;

1. The conflicting approach of certain sections in the RERA act must be clarified such as *section 89 and section 8 of the Arbitration Act*. As discussed above the former provision of the RERA clearly provides for an overriding effect over all other legislations and parallelly *section 8(1) of the Arbitration Act*, provides for a mandatory duty of the tribunals to refer every dispute containing an arbitration clause for arbitration proceedings, thus creating a

direct conflict between the two statutes. This should be resolved as the same leads to unnecessary confusion and over complications to an otherwise simple mechanism of Dispute Resolution.

2. The practicality of RERA must be focused upon too and the same should have a practical and a more universal implementation. The interface of the said act should be more friendly than its current form.
3. There should be more weightage provided to the dispute resolution under the RERA act. Though the same controls grievances pertaining to Real Estate Industry on a centralized level, yet its supremacy is still undermined as the parties are not bound to follow Alternative Dispute Resolution mechanism as a means to redressal of their grievances. When disputes arise, ADR can kick-in and address issues in a quick and timely manner. In most cases, it broadens the options available for resolving conflicts and minimises costly litigations. Although disputes cannot be completely settled, the trend is definitely in favour of upholding and enforcing agreements to arbitrate, which is the best-known and most formalised alternative to litigation.
4. Parallel ADR forums must be established in all parts of the country and specifically to remote areas so as to maximise the reach of justice in every area. The cost efficiency of ADR would also be beneficial for the people who are not financially sound. To cater such needs, each court must constitute an arbitration or mediation centre which would ensure that disputes capable of being solved through any of the ADR methods be first taken over by the ADR forum.
5. The legal recognition and establishment of ADR mechanisms in real estate disputes would be of no use if the general public is not aware about the other forms of dispute resolution mechanisms that exist which can be more efficient for them. But at the same time, awareness will not be enough, what is more important is the trust in such alternate forums which the parties must have in order to opt for the ADR mechanism.
6. It is important to understand that the disputes pertaining to real estate are technical in nature and are required to be addressed by the professionals having the said knowledge and experience, therefore it is very important for ADR professionals to gain the technical knowledge in order to resolve such disputes. They not only need to understand the complexities and commercial aspects of issues but also possess an in-depth knowledge of the lease of the land, thereby, enabling them to provide tailored solutions for disputes.

## CONCLUSION

The lack of the important due process rights which are afforded by the justice system is one of the most common concerns about customer dispute arbitration. The Arbitration and Conciliation Act of 1996 does not allow for arbitrable matters; rather, it specifies the circumstances under which an arrangement will be reached, which is the well-known and universally accepted fact.

The consumers of the real estate industry are the ones who suffer the most due to the arbitrary and vicious builders, who further use the Arbitration Clause to harass and take advantage of the homebuyers.

It is a well settled principle in the legal fraternity that in case of an existence of a specific legislation over a general one, then it becomes mandatory for adjudicate the said dispute under that specific jurisdiction. But the conflict arose due to the amendment of 2015, which made it compulsory to refer parties to arbitration in case of an existence of an arbitration clause or agreement under *Section 8 of the Act*. The apex court in *Aftab Singh*<sup>36</sup> made certain bold, crisp and appreciable steps in protecting the rights of consumers against the unscrupulous builders and their one-sided contracts. There has been provision with regard to dispute redressal under the RERA along with the time bound completion of disputes.

By the literal interpretation of the above mentioned landmark judgement, it can be construed that the jurisdiction of Arbitration Act cannot supersede the Consumer Protection Act as being a social legislation, and therefore it does not become mandatory for the parties to enter into the arbitration proceedings for dispute redressal.

It is up to the parties to choose the forum for remedy, which they wish to seek. At the same time if a consumer does not want to further a consumer complaint, then he/she shall be free to opt for arbitration, which however is an astronomical scenario considering the time and money related to it.

On the authority of the Supreme Court and the Bombay High Court, it may be argued that disputes falling within the exclusive jurisdiction of RERA should not be referred to

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<sup>36</sup> *Aftab Singh v. Emaar M.G.F. Land Limited*. Consumer Case 715 of 2015.

arbitration because it is a beneficial law passed in the wider public interest and because the authority is a special body granted broad powers, including those to implement its directions.

However, it would be important to see how the courts determine whether such disputes should be submitted to arbitration and whether and how arbitral awards can be implemented in situations where all parties have agreed to choose arbitration as their dispute redressal forum or where the nature of the dispute does not fall within the scope of RERA entirely.

