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Real Estate Regulatory Authorities

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All India Forum Of Real Estate Regulatory Authorities

Distinguished members of AIFORERA,

I with immense pleasure would like to introduce this first edition of e-journal brought out by the AIFORERA's Secretariat on the basis of a decision taken during Governing Council meeting.

Over the years, our organization has evolved into a purposeful platform which not only discusses the matters of mutual importance but also challenges presented by ever-changing real estate market in the country. Through our collective efforts, we have gained valuable insights and adopted innovative approaches for meeting such challenges.

I am sure, the e-journal would be able to highlight the important decisions taken by various Real Estate Regulatory Authorities in the country for the benefit of various stakeholders in the real estate sector.

I would request every Member, Real Estate Regulatory Authority to contribute by sharing e-journals of their important decisions taken or judgments passed by them.

I would like express my heartfelt gratitude to each and every one for their invaluable contribution and making this e-journal a success.

Thank you.

**(Anand/Kumar)
Chairman, AIFORERA**

LEGAL SECTION

I

Citation: New Tech Promoters and Developers Pvt Ltd VS State of UP and Others

Matter under Consideration: Validity of Real Estate (Regulation and Development) Act, 2016.

A three-judge bench of the Hon'ble Supreme Court of India (the "Court") recently passed a judgment dated 11th November 2021 (the "said Judgement") dealing with various afflicting practices of the promoters and builders, and further clarified the existing inconsistencies within various provisions of the Real Estate (Regulation and Development) Act, 2016 ("the Act").

2. BACKGROUND

A complaint was instituted by the homebuyers and allottees before the Uttar Pradesh Real Estate Regulatory Authority (the "Authority") for refund of their investment amount along with interest under Section 31 of the Act as the promoters had failed to hand over the possession of the units to the allottees in

accordance with the home buyers' agreements.

Accordingly, an order was passed to refund the principal amount along with interest (MCLR + 1%) as prescribed under the Act. However, aggrieved by the aforesaid order, the promoters took an unconventional step and filed an appeal before the High Court of Allahabad under Articles 226 and 227 of the Constitution of India instead of filing an appeal under Section 45(5) of the Act and contended that the order of refund was passed by the single member of the Authority without jurisdiction. The promoters also questioned the pre-requisite of deposit of the amount as necessitated under Section 43(5) of the Act. However, the writ petition was dismissed by the High Court of Allahabad and therefore, the present appeal was filed by the promoters before the Court.

3. ISSUES

The Court in the said Judgment reaffirmed and clarified the ambit, applicability and various provisions of the Act. The Court not only identified the

inconsistencies in the Act but also pointed out the nature and extent of the Act within the said Judgment. The following issues were dealt with in detail by the Court:

- a. Whether the Act has a retroactive application? ("Issue 1");*
- b. Whether the Authority has power to pass an order directing the builders to refund the amount to the allottees under Sections 12, 14, 18 and 19 of the Act? ("Issue 2");*
- c. Whether the Authority has the power under Section 81 to delegate its function of hearing of complaints? ("Issue 3");*
- d. Whether the pre-condition of pre-deposit mentioned under Section 43(5) of the Act in relation to right of appeal is valid? ("Issue 4");*
- e. Whether the Authority has been vested with the power to issue recovery certificate for retrieval of the principal amount? ("Issue 5").*

ISSUE 1: RETROACTIVE APPLICATION OF THE ACT

It was observed by the Court that the Act is not retrospective in

nature because it affects the existing rights of the persons mentioned in the Act like promoters, allottees etc. The intent of the legislature was to bring all "ongoing projects" which commenced prior to the Act and for which the completion certificate had not been issued, under the ambit of the Act.

ISSUE 2: POWERS VESTED WITH THE AUTHORITY

In view of the legislative intent of the Act, the Court held that the power is vested with the Authority to deal with issues relating to refund of the investment amount or interest on such refund. However, if any complaint pertains to compensation and interest thereon, the adjudicating officer under the Act will have the power to deal with such cases. If adjudication other than compensation as envisaged under Sections 12, 14, 18 and 19 of the Act is extended to the adjudicating officer, it may expand the ambit and scope of powers and functions of the adjudicating officer under Section 71 of the Act, and that would be in contravention of the Act.

ISSUE 3: POWER OF AUTHORITY UNDER SECTION 81 OF THE ACT

If the power under Section 81 of the Act has been delegated by the Authority, then such action, if being exercised by a single member cannot be said to be outside the provisions of the Act. However, the same power to delegate under Section 81 shall exclude making regulations under Section 85 of the Act.

ISSUE 4: VALIDITY OF PRE-DEPOSIT UNDER SECTION 43(5)

The Court held that the question of discrimination between allottees and promoters does not arise as they fall under distinct and different categories or classes. The deposit of amount equivalent to 30 percent of penalty by the promoter while preferring an appeal shall avoid uncalled litigation at the appellate stage and shall further safeguard the amount to be recovered for the allottee in case the appeal fails at a later stage. The intention of the legislation is that the promoters ought to show their bona fide intentions by depositing the amount so contemplated and avoid frivolous appeals.

ISSUE 5: POWER OF AUTHORITY TO ISSUE RECOVERY CERTIFICATE

The Court observed that there exist visible inconsistencies in the powers of the Authority regarding refund of the principal amount under Section 18 of the Act and the text of the provision by which such refund can be referred under Section 40(1) of the Act. If Section 40(1) is strictly construed, it would defeat the purpose of the Act. The Court held that there exists ambiguity in Section 40(1) of the Act and the same must be harmonized with the purpose of the Act. It was further clarified that the amount which has been determined and refundable to the allottees is recoverable within the ambit of Section 40(1) of the Act.

II

Citation: Pioneer Urban Land and Infrastructure Limited & Anr vs Union of India & Ors

Matter under Consideration: A large number of writ petitions were filed in this Court challenging the constitutional validity of amendments made to the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code"), pursuant to a

report prepared by the Insolvency Law Committee dated 26th March, 2018 (hereinafter referred to as the “Insolvency Committee Report”). The amendments so made deem allottees of real estate projects to be “financial creditors” so that they may trigger the Code, under Section 7 thereof, against the real estate developer. In addition, being financial creditors, they are entitled to be represented in the Committee of Creditors by authorized representatives.

Hon'ble Supreme Court Held According to the Supreme Court, neither Articles 14, 19(1)(g) in combination with Article 19(6) nor Article 300-A of the Indian Constitution are violated by the Amendment Act to the I&B Code. The I&B Code supersedes RERA in the event of a disagreement, as the two codes are intended to coexist. The Consumer Protection Act, RERA, and the I&B Code are among the concurrent remedies that apartment or flat allottees may pursue. Rather than bringing about a major change, the explanation included in Section 5(8)(f) sought to clarify the current legal situation.

III

Citation: M/S Imperial Structures Ltd V/S Anil Patni and others

The facts of the case can be briefly outlined as the appellant launched a project named 'The ESFERA' in Gurgaon, Haryana in 2011 and all the complainants booked their apartments and paid the booking amount and later Builder Buyer Agreement was entered by all the complainants and the appellant.

One of the complainants filed appeal with Consumer Disputes Redressal Commission, New Delhi (Civil Appeal Diary No. 9796 of 2019 CIVIL APPEAL NO. 3581-3590 OF 2020 @ CIVIL APPEAL DIARY NO.9796/2019 M/s Imperia Structures Ltd. vs. Anil Patni)

Issue:

“Despite enactment of a special act RERA can home buyers still approach the consumer forum to seek remedies including refund and compensation from the developer for delayed possession of the property.”

Observations and Decision:

The court observed and held as follows:

- *The remedies under Consumer Protection Act are additional and are over and above other remedies available under any other Acts. The availability of any other alternate remedy under any special statute is no bar for claiming benefits under Consumer Protection Act.*
 - *A person if satisfies to be a 'consumer' under Consumer Protection Act shall be entitled have remedies and initiate proceedings under the Consumer Protection Act apart from the normal civil remedies available. If he does not satisfy to be 'consumer' then he is entitled to claim only normal civil remedies.*
 - *RERA ACT provides for the remedy to an allottee who on failure of the developer to deliver possession within the agreed period under Section 18 of the RERA ACT,2016. The section provides that on failure of the developer to deliver possession by the date specified in the agreement, the developer, if the allottee wishes to withdraw from the project, shall be liable to return the amount received by him with respect to the property and*
- with such rate of interest as prescribed. And if allottee does not wish to withdraw from the project then the developer shall be liable to pay interest for every month of delay till the handing over of the possession. It is totally up to the discretion of the allottee to choose any option.*
- *The right of allottee under Section 18 of the RERA ACT is an unqualified right and is made without "any prejudice to any other remedy available". The intent of the lawmakers is clear in Section 18 that it is the discretion of allottee to choose to continue or exist. Thus, any clause inferring the discretion to the developer like in present case shall have no relevance and shall stand null and void.*
 - *The court held that even though special authorities to regulate and promote real estate sector are created under RERA ACT but by the virtue of Section 18 that gives right "without prejudice to any other remedy available", any person cannot be barred from claiming other remedies available under any other laws.*

- Section 79 of the RERA ACT bars jurisdiction of Civil Court to entertain any suit or proceeding of a matter the authority under RERA ACT is empowered to deal. Thus, an allottee would stand barred from invoking jurisdiction of a Civil Court. The court observed by quoting the landmark decision of *Malay Kumar Ganguli vs. Dr. Sukumar Mukherjee* that although proceedings before NCDRC are of judicial nature but are not in nature of civil court proceedings within the meaning of Civil Procedure Code and thus, cannot be called a Civil Court. So, a person who can be called a 'consumer' under Consumer Protection Act cannot be barred by virtue of section 79 of RERA ACT.

It was held that merely on the ground of expiry of the registration of the project under RERA ACT, the allottee cannot be barred to maintain an action against the developer.

- The court observed that the developer is a service provider and shall be treated same as any other service provider

within the scope of Consumer Protection Act and therefore, the buyer or allottee shall be treated as a consumer of the services of the developer. And thus it was held that,

- "Section 79 of the RERA ACT does not in any way bar the Commission or Forum under the provisions of the CP Act to entertain any complain."

- Section 88 of RERA ACT specifies that provisions of RERA ACT would be in addition and not in derogation of the provisions of any other law.

- The decision of *Pioneer Urban Land And ... vs Union Of India* on 9 August was referred by the court wherein it was held that RERA ACT should be read harmoniously read with the other code and laws for the time being in force. In event of conflict only the code shall prevail over RERA ACT.

IV

Citation: Neelkamal Realtors Suburban Pvt. Ltd. and another v. Union of India and others (Writ Petition No.- 2737 of 2017 Order dated- 06.12.2017)

Issue Under Consideration:

1. *The constitutionality of the Real Estate Regulation Act was challenged in multiple petitions in the High Courts.*
2. *Seeing this, the Supreme Court ('SC') filed a Transfer Petition (where the SC has the power to transfer any appeals or proceedings from one court to another) and clubbed all the petitions challenging the same provisions.*
3. *It ordered the Bombay High Court to take up the petitions.*
4. *The Petitioners challenged following:*

(a) The proviso states that the projects which are pending as of the commencement of this section and have not yet received the completion certificate from the local authorities need to be registered under RERA.

(b) If the project is divided into phases, then each such phase shall be registered as a project.

(c) The promoter while applying for registration shall also state the period within which the project would be completed; and deposit in a scheduled bank 70% of the money received from the allottees.

(d) The promoter while applying for registration shall also state the period within which the project would be completed; and deposit in a scheduled bank 70% of the money received from the allottees.

(e) Only in cases of 'Force Majeure' (i.e. war, flood, earthquake, cyclone, etc.) the authority can extend the registration for a maximum period of 1 year.

(f) The authority may revoke the registration of a project if the promoter defaults in his duty, violates the act or rules/regulations made thereunder, or indulges in unfair/fraudulent trade practices. The authority is bound to give the opportunity of being heard to the promoter. The authority may direct to freeze the bank account

and may give such directions as it may deem fit. I may also direct how the remaining construction work may be completed.

(g) Refund: It states that if the promoter fails to comply with the act or the authority or if the promoter's business is closed down, then on demand he is liable to pay back to the allottees the consideration with interest from the date of receipt.

(h) Penalty: for non-registration under section 3, the penalty for contravention of section 4, the penalty for contravention of other provisions, the penalty for failure to comply with the orders of the authority; respectively.

Violation of following Articles of Indian Constitution:

(i) Right to Equality —

'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

(j) 'Protection of certain rights regarding freedom of speech, etc.—

(1) All citizens shall have the right —

(g) to practise any profession, or to carry on any occupation, trade or business.'

(k) 'Protection in respect of conviction for offences.— (1) No person shall be convicted of any offence, except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.'

(l) 'No person shall be deprived of his property save by authority of law'

Ruling

1. Citing the case of State of Bombay v. Vishnu Ramchandra Hon'ble SUPREME COURT observed that only because the law operates on past requisites, it doesn't mean it is retrospective or retroactive unless the action under the law was not introduced before its commencement. In RERA's case, the requisites on which the RERA operates are the status of the project being ongoing and not having received the completion certificate.

2. **Section 4 (2)(1)(C)** where the promoter is required along with the application for registration to state the time required for completion of the project. This provision was challenged to be violative of Arts. 14, 19(1)(g) and 300A. Although it was adjudged to be constitutional. Reasoning: This provision is not mandatory, but a voluntary act. Any unreasonable period mentioned would result in the rejection of an application.

3. **Section 4 (2)(1)(D)** where it was mandated to deposit 70% of the consideration received into a scheduled bank account. A point, argued, was how the promoters of ongoing projects would deposit the amount if it was already spent or invested or if it was not received from allottees. Here the court adjudged that the amount already spent or invested need not be deposited, only the certification of such expense shall be filed with the authority.

4. **First Proviso to section 6:** The court upheld that as stated by

the Union of India that if the court would declare such proviso to be directory and not mandatory, it would result in floods of litigations for stay/injunction and would delay the projects. If this happens, the entire purpose of the act would be frustrated. S. 7 & 8 provided the procedure for action on contravention of the act, where the authority has considerable power to direct the promoter and to give an opportunity of being heard. Hence, the court stated that there was a balance between restriction in section 6 and opportunities under sections 7 and 8. Therefore, the said proviso was not violative of Arts. 14, 19(1)(g) and 300A.

5. **Sections 7 & 8** where authority could exercise power against the contraventions by the promoter, and also could direct how the remaining construction work be completed. It was argued by the petitioners that it resulted in the vesting of rights or takeover by the authority. The court upheld that the provisions were for the larger

public interest, and the property could neither be confiscated nor acquired and thus were not contrary to the Arts. 14, 19(1)(g) and 300A.

6. In the case of section 18, the court upheld its constitutionality as parliament can enact laws retrospectively, assuming RERA to be one, hence the provision is constitutional unless it becomes too harsh.

7. In sections 59, 60, 61 & 63: The petitioners submitted that mentioned provisions were violative of Arts. 14 & 20 being operated retrospectively. The court held that the Chapter of penalties not only contained penalties by the promoters, but also others. RERA seeks to strike a balance between the rights and obligations of the promoters and allottees. Hence, the challenge was not sustainable.

Held: Considering the scheme of the RERA and the provisions of Section 18(1)(b), we are of the view that the same are not contrary to Articles 14 and 19(1)(g) of the Constitution.

The provisions cannot be struck down on the ground of challenge that its operation is retroactive in

nature. Neither the provisions of Section 18(1)(a) and (b) violate Article 20 os-wp-2737-17 & ors-RERA-JT.doc of the Constitution.

V

Citation: National Company Law Appellate Tribunal: (NCLAT) Case Title: Flat Buyers Association, Winter Hills-77, Gurgaon Vs Umang Realtech Pvt. Ltd. (CP(AT)(Insolvency)No.- 926 of 2019)

Issue Under Consideration:

The Issues involved:

- (a) Whether the 'allottees'(Homebuyers) come within the meaning of 'Financial Creditors';
- (b) Whether the assets of one real estate project can be clubbed with another project of the same real estate company;
- (c) Whether moratorium prevail on all projects located in different State/ Union territory of the same real estate company against whom the insolvency proceedings have been initiated with regard to project situated in different State/Union Territory?

Ruling

1. The peculiar issue that arises in the real estate sector is that when the real estate developer defaults on

repaying his debt to the financial institutions, then such institutions, being the lenders, would undoubtedly want to take over the possession of the unfinished projects and auction them to recover the loan amount.

2. Homebuyers would only suffer as a result of such action because the possession of the flat(s) would be further delayed due to litigation over the amount and property.
3. Therefore, home buyers suffer due to the tussle between the builders and the financial creditors.
4. Many times, the builders declare themselves bankrupt, which only hampers the investment of the home buyers, whose ultimate goal is to purchase one apartment.
5. Therefore, necessary to understand the new phenomenon of 'Reverse CIRP,' which the NCLAT has come up with to aid the real estate sector and boost economic growth by allowing the particular project to

function irrespective of its default.

HELD:

1. The RE (RD) Act, 2016 is "Project Centric" and assets of one real estate project cannot be clubbed to complete the other project of the same real estate company against which the insolvency proceedings have been initiated irrespective of the location of the project.
2. Moratorium u/s 7 of the IB Code cannot prevail with respect to other projects of the same real estate company

VI

Citation: *Pathapati Subba Reddy (Died) By L.Rs. and Ors. Vs. The Special Deputy Collector (LA) - Supreme Court April 12, 2024*

Issue: *interpretation of the provisions of the Limitation Act*

Hon'ble Supreme Court held that: in brief the SC held that: The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be construed in a strict sense whereas Section 5 has to be construed liberally.

Details

(i) Law of limitation is based upon public policy that there should be an end to litigation by forfeiting the right to remedy rather than the right itself; (ii) A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time; (iii) The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be construed in a strict sense whereas Section 5 has to be construed liberally; (iv) In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act; (v) Courts are empowered to exercise discretion to condone the delay if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence; (vi) Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the

court is not satisfied with the cause shown for the delay in filing the appeal; (vii) Merits of the case are not required to be considered in condoning the delay; and (viii) Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamount to disregarding the statutory provision.

VII

Citation: Vishal Chelani & Ors. Vs. Debashis Nanda - Supreme Court October 19, 2023

No distinction can be made between Home Buyers who had approached RERA and obtained decree for refund and Other Homebuyers, both are remained the same as Homebuyers within a class -

In this case, some home buyers sought decree from UPRERA. In the Resolution Plan, a distinction was made between home buyers, who had opted or elected for other remedies such as i.e. applying before the RERA and having secured orders in their favor, and those who did not do so. Hon'ble Supreme Court held that: (i) On a plain reading of Section 5(8)(f) no

distinction is per se made out between different classes of financial creditors for the purposes of drawing a resolution plan. (ii) The reasoning of the Mumbai Bench of NCLT “Mr. Natwar Agrawal (HUF) Vs. Ms. Sakash Developers & Builders Pvt. Ltd (2023) ibclaw.in 425 NCLT” is correct in the opinion of this Court. (iii) It is only home buyers that can approach and seek remedies under RERA - no others. In such circumstances, to treat a particular segment of that class differently for the purposes of another enactment, on the ground that one or some of them had elected to take back the deposits together with such interest as ordered by the competent authority, would be highly inequitable. (iv) Section 238 of the IBC contains a non obstante clause which gives overriding effect to its provisions. Consequently, its provisions acquire primacy, and cannot be read as subordinate to the RERA Act. (v) Set aside the NCLAT’s Ord

VII

Citation: Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority & Ors. etc., Petition for Special Leave

to Appeal (C) Nos.1861-1871/2022, The Supreme Court of India

Facts:

In this case, the Rajasthan High Court judgment which held that the Real Estate Regulatory Authority can entertain complaints by home buyers against the bank which took possession of a real estate project as a secured creditor was challenged.

Held:

The Supreme Court observed that it is in complete agreement with the view taken by the High Court by which the High Court has ultimately concluded in para 36, as under –“36. Our conclusions can thus be summarized as under:-

(i) Regulation 9 of the Regulations of 2017 is not ultra

vires the Act or is otherwise not invalid.

(ii) The delegation of powers in the single member of RERA to decide complaints filed under the Act even otherwise flows from Section 81 of the Act and such delegation can be made in absence of Regulation 9 also.

(iii) As held by the Supreme Court in the case of Bikram Chatterji (supra) in the event of conflict between RERA and SARFAESI Act the provisions contained in RERA would prevail.

(iv) RERA would not apply in relation to the transaction between the borrower and the banks and financial institutions in cases where security interest has been created by mortgaging the property prior to the

introduction of the Act unless and until it is found that the creation of such mortgage or such transaction is fraudulent or collusive.

(v) RERA authority has the jurisdiction to entertain a complaint by an aggrieved person against the bank as a secured creditor if the bank takes recourse to any of the provisions contained in Section 13(4) of the SARFAESI Act.”

IMPORTANT NEWS

Real Estate | Insolvency and Bankruptcy | RERA | IBC | Real estate project | Competent Authority | Resolution professional | Handing over possession of flat, apartment or building | Appointment of facilitators | Competent Authorities under RERA to attend COC meetings and give inputs | IRP to give detailed report on the development rights.

The IBBI issued a Notification dated 3 February 2025 notifying the IBBI (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2025. It amends the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. It shall come into force on the date of their publication in the Official Gazette. It seeks to further streamline the corporate insolvency resolution process with a special focus on real estate projects.

The key highlights of the amendment are provided in the Press Release dated 4 February 2025 and which inter alia include:

- The resolution professional can now hand over possession of the plot, apartment, or building, after obtaining the*

approval of the committee with a minimum of sixty-six percent of total votes. This transfer shall be at allottee's request for registration and their fulfilment of obligations as outlined in the agreement.

- Facilitators can now be appointed for sub-classes within large creditor classes such as homebuyers to ensure their effective participation in the insolvency resolution process. The roles and responsibilities of the facilitators are provided in the amendment.*
- The Committee of Creditors (CoC) can now invite relevant land authorities under the RERA to their meetings for inputs and perspectives on regulatory and land development related matters.*
- Resolution Professionals must now prepare a detailed report on the status of development rights, approvals, and permissions for real estate projects within 60 days of insolvency commencement.*

- *CoCs have now been empowered to relax certain conditions for associations or groups of homebuyers to participate as resolution applicants in the insolvency resolution process.*
- *CoCs must now consider forming a monitoring committee to monitor and supervise the implementation of resolution plan*
- *The Resolution Professional is now required to disclose the*
- *corporate debtor's registration status as a micro, small, or medium enterprise.*

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