



EFFICACY OF THE NEW REAL ESTATE LAW AND ITS CONSTITUTIONAL ASPECTS

Jahangir Badar

LL.B (Hons.), LL.M, Ph.D (Pursuing)

Abstract-- The legislature in our democracy can broadly enact two types of laws viz. general laws which are standard for and Special Laws, which cater to specific area for which these are enacted. The story of protection of interests of consumers after independence started with the enactment of MRTP Act, 1969 which was a result of reports and recommendations of several commissions. The roots of this legislation lies in the Directive Principles of State Policy. Finally, in the year 1986, the Consumer protection Act, 1986 was introduced signifying the change in governments policy to give more value to consumer rights. The tribunal system has been a long standing feature of the Indian judicial system. The special expertise needed to effectively adjudicate upon a matter and the technical know how is at the core of this idea of Tribunalisation of justice. In continuation of the tribunal culture, the recently introduced Real Estate (Regulation and Development) Act, 2016 provides for the establishment of Real Estate Regulatory Authority. The objective of the Act is to protect the homebuyers and promote real estate sector. To achieve these goals, it provides for the establishment of a Regulatory authority and adjudicatory body with appellate authority. The Real Estate Regulatory Authority is established by the Act which plays the role of a regulator as well as adjudicator. The real estate sector has various stakeholders, however, the Real Estate (Regulation and Development) Act, 2016 mainly caters the interest of buyers and sellers/builders/promoters and is said to be based on the principle of “caveat venditor”. The implementation of RERA has been uneven at the state level. Most of the states have tweaked the essential provisions which adversely impacts the effectiveness of the Act.

1. INTRODUCTION

The legislature in our democracy can broadly enact two types of laws viz. general laws which are standard for and Special Laws, which cater to specific area for which these are enacted. The story of protection of interests of consumers after independence started with the enactment of MRTP Act, 1969 which was a result of reports and recommendations of several commissions.¹ The roots of this legislation lies in the Directive Principles of State Policy². It addressed the problem of monopolistic and restrictive trade practices which were rampant at that time and were detrimental, in particular, to the market competition and, in general, to the growth of economy. The objective behind enactment of this Act was, inter alia, to prevent the concentration of economic power in the hands of few commercial houses. However, it also promoted consumer interest because healthy competition ensured competitive prices and quality products to the end user. The Act also established the MRTP commission for adjudicating cases violating its provisions. An amendment was made to this Act in 1984 when Unfair trade practices were also included. Now, the act directly provided for securing the interest of the consumers by addressing the problems like misleading and false advertisement, etc.

Finally, in the year 1986, the Consumer protection Act, 1986 was introduced signifying the change in governments policy to give more value to consumer rights. The act established two institutions, namely, Consumer protection Councils which were advisory bodies and Consumer Redressal Commission which were adjudicatory in nature. This was a huge leap forward in the direction of addressing consumer problems. The statute provided for speedy and effective remedy thereby reducing the risk attached to buying a product or service from the market and in turn, leaving a much contended and satisfied

¹ R.K Hazari, “Report on Industrial Planning and Licensing policy” (July, 1966); P. C. Mahalanobis “Report of the Committee on Distribution of income and Levels of Living” (July, 1969); K. C. Das Gupta, “Report of the Monopolies Inquiry Commission” (1965)

² Constitution of India, arts. 39(b), 39(c).



consumer at the end of the day. The consumer forums were available at three levels i.e. District, State and National, and jurisdiction was decided by the pecuniary limits.

Another objective of introducing a special legislation to address consumer related problems was to reduce the burden on civil court which, as we all know, are buried under a plethora of cases.

Such establishment of tribunals have been a long standing feature of the Indian judicial system. The special expertise needed to effectively adjudicate upon a matter and the technical know how is at the core of this idea of Tribunalisation of justice. Judicial backlog and delay has also been a key reason behind the introduction of tribunals in India.³ The Constitution of India contains Article 323-A and 323-B which empowers the Parliament as well as the State legislature to establish tribunals. In order for these tribunals to act as special courts for certain class of cases, it is imperative that they are presided over by such qualified persons having special and technical knowledge in that domain. Which begs the question, do we have such candidates available to serve this requirement both in numbers and knowledge/experience? With the judiciary already suffering from the problem of lack of personnel, it would be *prima facie* fair to conclude that tribunals are facing the same crisis. The numbers given by 74th Parliamentary Standing Committee Report⁴ backs this theory. The very object for constituting tribunals is to supplement the functions of the High Courts and the other courts and to ensure that consumer of justice gets speedy redressal to his grievances. The lack of personnel plaguing these tribunals is rendering them dysfunctional. Very recently, a PIL was filed in the Supreme Court raising concern on the vacancies in Appellate Tribunal(PMLA)⁵ which deals with sensitive and crucial matters pertaining to PMLA, SAFEMA, NDPS, FEMA and PBPT.

2. REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

In continuation of the tribunal culture, the recently introduced Real Estate (Regulation and Development) Act, 2016 provides for the establishment of Real Estate Regulatory Authority. The objective of the Act is to protect the homebuyers and promote real estate sector. To achieve these goals, it provides for the establishment of a Regulatory authority and adjudicatory body with appellate authority. It primarily focusses on the under-construction phase of the project during which the swindling activities are more common.

Prior to the introduction of the Act, the real estate sector was largely unregulated. Delays on part of the builder/promoter, either in completion of project or handing over the possession, is the most common problem in the construction industry within the housing projects. A person aggrieved by such delays could only approach the civil courts or consumer courts before the establishment of Real Estate Regulatory Authority. The above mentioned courts have a lengthy and cumbersome process which renders them ineffective in delivery justice as per the principle '*justice delayed is justice denied*'.

The Act makes it mandatory to register every Real Estate project wherein the area under development is more than 500 sq. meters or the number of apartments proposed to be developed are more than 8 in

³ Arun K. Thiruvengadam, "Tribunals", *The Oxford Handbook of the Indian Constitution*, February 2017, available at <<https://doi.org/10.1093/law/9780198704898.001.0001>> (last visited on 9th July, 2021).

⁴ Kunwar Surya Pratap, "'Access to Justice': The Unattended Facet of Fundamental Right in Consumer Forums", *Manupatra*, 28 May 2020, available at <<https://www.manupatrafast.com/articles/articleSearch.aspx#>> (last visited on 09 July, 2022)

⁵ Prevention of Money-Laundering Act, 2002 (Act 15 of 2003).



all phases of development.⁶ However, no such registration is required for renovations and reparations and in cases, where the project has received completion certificate before the commencement of this Act. The major focus of RERA was to promote the approach of “Caveat Venditor⁷” that literally means Cautious Seller. This will hold the builder accountable for any problem that buyer faces with respect to the goods or services.

The Real Estate (Regulation and Development) Act, 2016 also provides for registration of real estate agents which includes property dealers, brokers, middlemen, etc. Inclusion of such provisions reveals the efforts of the legislature to leave no gaps in the law through which homebuyers can be defrauded without consequences. The Act comprehensively provides for functions and duties of the promoter and lays down penalties on failure to deliver on those directions. In the same manner, it also enlists the rights and duties of the allottees and penal provisions which can be invoked if they fail to oblige their duties. However, it is important to note that the Courts through various judgements have established that the penalty clause in the ‘Agreement for sale’ must be equitable and the traditional practice of drafting one-sided agreements which favoured the builders/promoters in all aspects would be rendered ‘Unfair Contracts’ as per the new Consumer Protection Act, 2019 and as ‘unfair trade practice’ according to the repealed Act of 1986. The Act also provides for promotion of advocacy, creating awareness and imparting training about laws relating to real estate sector and policies.⁸

2.1 Institutions Under RERA

The Real Estate Regulatory Authority is established by the Act which plays the role of a regulator as well as adjudicator. The Authority shall comprise of one chairperson and at least two whole time members. The members and the presiding officer are non-judicial persons having certain length of experience and technical knowledge. It has very wide powers ranging from power to conduct investigation to power to issue interim order/directions and impose penalty in case of contravention of provisions of this Act. Although there is a separate advisory body called CAC⁹ set up under the Act but the real estate regulatory authority may also render advice to appropriate government for development of real estate sector.¹⁰ The appropriate government may ask the authority for its opinion while framing new policies and introducing reforms in real estate sector. A very interesting feature of the Act is that it casts a duty upon the Authority to take appropriate steps for the promotion of advocacy, spreading awareness and imparting training with respect to laws and policies pertaining to real estate sector.¹¹ Any person aggrieved by the decisions, orders or directions issued by the Authority may approach the Appellate Tribunal within a period of 60 days having jurisdiction over the matter. It would comprise of one Chairperson and at least two whole time members. The Chairperson and one member in the appellate authority must have a judicial background whereas the other member may have administrative or technical expertise. These qualifications, in my opinion, make the appellate authority more competent and reliable for addressing questions or interpreting provisions which require application of judicial

⁶ Real Estate(Regulation and Development) Act, 2016, s. 3.

⁷ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050.

⁸ Real Estate(Regulation and Development) Act, 2016 (Act 16 of 2016), s. 33(3).

⁹ *Id.*, s. 41.

¹⁰ *Id.*, s. 32.

¹¹ *Id.*, s. 33.



mind. Interestingly, the Act allows for the appointment of an Adjudicating officer for adjudging quantum of compensation for contravention of various provisions of the Act.¹²

2.2 Administration of Justice

The real estate sector has various stakeholders, however, the Real Estate (Regulation and Development) Act, 2016 mainly caters the interest of buyers and sellers/builders/promoters. Although the first part of this paper make a reference to the maxim “caveat venditor” as the principle on which the Act is enacted, but it is pertinent to note here that it also protects the interest of the promoter/builder of the real estate project. There are several provisions which hold the allottee/buyer accountable if he fails to fulfil his obligations and penalty may also be imposed for contravening the provisions of the Act.

Before the introduction of this Act, an aggrieved consumer could approach the civil courts which needless to say were heavily overburdened, or the consumer forums. The Consumer law defines a Consumer as—“means any person who buys goods or avails any type of services for which consideration has been paid or promised, or under any system of deferred payment and includes any user or such goods aside from the one that buys such goods for consideration, paid or promised or partly paid or partly promised, or under any system of credit, when such use is formed with the approval of such person, but doesn’t include an individual, who obtains such goods for resale or for any commercial purpose.”¹³ By the virtue of this definition, homebuyers/flatbuyers also come under its ambit. “Fostering the development of effective, low cost ways for consumers to resolve their disputes and obtain monetary compensation for losses sustained is a key consumer policy objective. The particular features of consumer disputes require tailored mechanisms that can provide consumers with access to remedies that do not impose a cost, delay and burden disproportionate to the economic value at stake.”¹⁴ In order to facilitate the achievement of this goal, the Consumer Protection Act, 2019 establishes consumer courts for grievance redressal of consumers. These Courts have a three-tier system with NCDRC at National Level, SCDRC at State level and District Forum at District level. The earlier reports¹⁵ reveal that only about half of the cases were disposed off in many states like Haryana, Assam, Arunachal Pradesh, Jharkhand, Maharashtra, Manipur and Orissa. The state of Uttar Pradesh had an even worse performance with disposal rate of merely 30%. During the same time, the performance of consume forums at National and District level was acceptable except for the Districts of Jharkhand where only 39% cases were disposed in that year. Whenever there are inordinate delays in administration of justice, especially by a body specifically established for that sector, the institution loses its value and affects the motivation of the public to approach it in future. “Non-functional for many months due to lack of quorum, the consumer forums, conceived in 1986 as a solace for the common man, has become a paper tiger in many districts. According to the official database, not even a single case has been considered in Thrissur, Ernakulam, Malappuram, and Wayanad districts in 2019.”¹⁶

¹² *Id.*, s. 71.

¹³ The Consumer Protection Act, 2019 (Act 35 of 2019), s.2(7).

¹⁴ Dr. Shammi Minhas, “Consumer Disputes and Consumer Redressal Forums in India” 8 *International Journal of Engineering Science Invention* 01 (2019).

¹⁵ Government of India, “Annual Report of Department of Consumer Affairs” (MINISTRY OF CONSUMER AFFAIRS, FOOD & PUBLIC DISTRIBUTION, Department of Consumer Affairs, 2006).

¹⁶ *Supra* note 4.



The statistics for all the three forums improved in the later years and the disposal rate reached at a good 90% in the 2016-17.¹⁷ A study conducted in the year 2017 reveals that 13.74% cases are pending at the National Commission, 14.32% cases at the State commissions and 7.56% cases at District Consumer Forums.¹⁸ It can be concluded that the District Forums are performing better when compared to the National Commission and the State Commissions and the National Commission is performing better than the State Commissions.

Now, with the establishment of Real Estate Regulatory Authority, it is imperative that a consumer of real estate sector would approach it over other tribunals because one of the objectives of this legislation was to provide speedy and effective justice, at least theoretically. It can also be presumed that the tribunals, as they're entertaining complaints related to one sector only, wouldn't be overburdened at any point of time thereby preventing delays in justice.

To our surprise, the reality is far from our presumption and the figures tell a totally different story. The Annual Reports of HRERA Panchakula shows that only about 50% cases are disposed of by the authority and the adjudicating officer upto March 2019.¹⁹ Uttar Pradesh has performed relatively better but nowhere even close to the expectation with the disposal rate of 67% as on 4th September, 2019.²⁰ Maha-RERA, which is apparently the most active authority across the country, has disposed of about 62% complaints till 2019. Whereas, its adjudicating body could only dispense with about 46% cases and the appellate authority was able to settle only 35% of the appeals.²¹ "The inability to bring erring realtors to book is an oft-repeated complaint against the authority by buyers. Presenting statistics on the backlog up to November 6, Forum for People's Collective Efforts General Secretary M S Shankar said, "Out of the 4,450 complains that have been filed with the authority, 2,310 have been heard and judgment delivered".²² These statistics reveal the poor state of Institutions established under the real estate law and their failure to deliver simple, inexpensive and speedy adjudication of consumer complaints. Such delays in delivery of justice may put off homebuyers who are desperate after investing huge amounts of money into properties.

2.3 Right To Speedy Justice (Emanating From Article 21)

As matter concerns fundamental rights, Court cannot refuse to look into problem even if issues are primarily policy matters. Access to speedy justice is a part of fundamental rights under Articles 14 and 21 of the Constitution, *Krishnakant Tamrakar v. State of M.P.*²³. In light of this observation made by the Apex court of the country, it would not be wrong to say that the real estate law is failing its stakeholders in obliging their fundamental rights. Scope of Liberty guaranteed by Pt. III of the Constitution covers within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. When a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge accused

¹⁷ Government of India, "Annual Report of Department of Consumer Affairs" (MINISTRY OF CONSUMER AFFAIRS, FOOD & PUBLIC DISTRIBUTION, Department of Consumer Affairs, 2017).

¹⁸ Dr. G. Rambabu, "Performance Evaluation of Consumer Disputes Redressal Agencies in India", 19 *IOSR Journal of Business and Management* 40 (2017).

¹⁹ HRERA Panchkula, "Annual Report" (2017-18, 2018-19).

²⁰ UPRERA, "Annual Report" (2019).

²¹ MahaRERA, "Annual Report" (2019).

²² S. Lalitha, "Under flak, RERA-K hopes to deliver speedy justice", *The New Indian Express*, Nov. 18, 2020.

²³ AIR 2018 SC 3635.



on bail regardless of statutory restrictions imposed on right to bail by provisions like Section 43-D(5) of the UAPA, *Union of India v. K.A. Najeeb*²⁴.

3. LEGISLATIVE RELATIONS BETWEEN CENTRE AND STATE

Part XI of the Constitution provides for relations between Union and the States and chapter one focuses on Legislative relations. Article 245 defines the jurisdiction of the Parliament and the legislative assemblies for enacting and implementing laws. By virtue of the expression “Subject to provisions of this Constitution” in Article 245(1), two principal limitations exist to the legislative powers of the Parliament (i) legislative competence of the Parliament as prescribed by Article 246; and (ii) law must be subject to provisions of the Constitution and not abridge the rights conferred by Part III. “The limitations are justiciable in courts.”²⁵

3.1 Constitutionality of WB-HIRA

A petition was filed under Article 32 challenging the constitutionality of the West Bengal Housing Industry Regulation Act, 2017.²⁶ The contention was that the WB-HIRA, which is a State law and Real Estate (Regulation and Development) Act, 2016, which is a Parliamentary law are relatable to the legislative subjects contained in Entries 6 & 7 of the Concurrent List(List III) of the VIIth Schedule to the Constitution. The State law either contained provisions which were practically the replica of the Parliamentary law, or other provisions which were inconsistent with the corresponding provisions of the Central Act. The rule says if the Parliament has legislated on a subject contained in the IIIrd List, it is inappropriate for the state Legislative assembly to enact a law in the same field as a parallel legislation. Article 254 addresses the situation where there is inconsistency between laws made by parliament and laws made by Legislatures of States and clause(1) clearly says that the Parliamentary enactments will have supremacy over the State enactments in such case. However, according to Clause(2), if such a State enactment is reserved for the consent of the President and consequently, receives it, then such State law would prevail within the territory of that State. In accordance with the proviso to Article 254(2), Parliament can repeal a state law, when it relates to a matter mentioned in the Concurrent List. But, in the instant case, it was neither reserved for President’s Assent nor has it received it. The State Law shall still be void under that provision if it conflicts with a later ‘law with respect to the same subject matter’ that may be enacted by the Parliament.²⁷ Repugnancy between two statutes may be ascertained on the basis of following principles: (a) whether there is direct conflict between two provisions; (b) whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; (c) whether the law made by Parliament and the law made by the State Legislature occupy the same field.²⁸ Therefore, it is constitutionally impermissible for Legislature of a State to enact a law on the same subject matter in the same field thereby creating a parallel legislation because it certainly undermines the authority of the Parliament.

Prior to the enactment of RERA in 2016, the many state legislatures had enacted laws for regulating the dynamics between buyer and the seller in the real estate sector. Three such prominent laws were passed

²⁴ AIR 2021 SC 712.

²⁵ *A.K.Gopalan v. State of Madras*, AIR 1950 SC 27.

²⁶ *Forum for People's Collective Efforts and Ors. vs. The State of West Bengal*, (04.05.2021 - SC) : MANU/SC/0339/2021

²⁷ *Zaverbhai Amaidas v. State of Bombay*, AIR 1954 SC 752.

²⁸ *Rajiv Sarin v. State of Uttarakhand*, AIR 2011 SC 3081.



by the state of West Bengal, Maharashtra and Kerala. While the Legislative assembly of Kerala repealed its earlier Act by Kerala Real Estate (Regulation and Development) Repeal Act, 2017, the older Act in the State of Maharashtra was repealed by S. 92 of Real Estate(Regulation and Development) Act, 2016. On the other hand, West Bengal enacted a new state legislation called WB-HIRA instead of repealing its earlier 1993 enactment. It would not be improper to say that WB-HIRA is a 'copy- and paste' replica of the Central law. The state law wouldn't be saved by virtue of Article 255 as well as it is applicable to a situation where a 'previous sanction' or 'recommendation' is required to be given by the Governor or the President.

With the adoption of broad and liberal approach to construction of the entries of the three lists, a presumption of constitutionality should always exist in the favor of statute and every legally permissible effort should be made to keep the statute within the competence of the State Legislature.²⁹ However, the alterations made by the legislature tilt the law in favour of the promoter – builder which reveals the underlying intention of the State and certainly it is against the interest of the consumer. Some of the changes were³⁰:

1. Under RERA, the adjudication of the quantum of compensation is entrusted to an adjudicatory officer who is a judicial officer, this provision doesn't exist in the state enactment.
2. Certain alterations were made in the definition of the expression's 'garage' and 'force majeure'.
3. Removal of the concept of planning area in the state legislation.
4. Change in the jurisdictional court which takes cognizance of offences

A copy of the Central real estate law would cause chaos in the sector and therefore, the problem was already addressed by way of Section 89 of RERA through which such inconsistent laws are automatically rendered repealed.

The expression "for the time being in force" may, according to context and intent refer to either

1. a specific period of time, or
2. to all periods of time.

Since RERA is remedial and regulatory, it is to operate together with existing laws including the Consumer Protection Act for the purpose of providing wholesome statutory protections- both to promoters and consumers. Section 89 gives overriding effect to RERA over inconsistent existing laws, but, at the same time, Section 88 clarifies that the remedies available under different consumer laws like the Consumer Protection Act, 2019, Insolvency and Bankruptcy Code, 2016 and Competition Act, 2002 are concurrent.

The State of West Bengal in their response to the petition seeks to justify their action by referring to under Entry 24(State list) of VIIth Schedule. However, the argument couldn't sustain as the scope of Entry 24(List II) has been explained in the decisions of the Constitution Bench in *Tika Ramji vs State of UP*³¹ and *ITC Ltd vs Agricultural Produce Market Committee*³² to exclude those subjects which are specifically included in the other entries of List III in the Seventh Schedule.

3.2 Dilution of law by states

The implementation of RERA has been uneven at the state level. Most of the states have tweaked the essential provisions which adversely impacts the effectiveness of the Act. As per the RERA, an ongoing

²⁹ *Id.*

³⁰ *Supra* note 25.

³¹ AIR 1956 SC 676.

³² AIR 2002 SC 852.



project is basically a project “for which the completion certificate has not been issued” on the date of commencement of the Act. This basically makes sure that any home project of which work-in-progress can be covered under the Act.

However, several states have diluted this definition. Crisil Research points out: “Andhra Pradesh, Kerala and Uttar Pradesh have altered this definition in their notified rules.”³³ In case of Gujarat, the operational rules do not mention any definition of an ongoing project.

“The operational rules specified by the Haryana government also dilute the definition by declaring that projects which have applied for a part completion certificate or an occupancy certificate will not come under the RERA, if the certificate is granted. This has led to many builders rushing to acquire an occupancy certificate to ensure that their project does not come under the Act.”³⁴

In another such instance, the legality of Regulations 7 and 8 of Punjab Real Estate Regulatory Authority Regulations, 2017 (Punjab RERA Regulation) was challenged.³⁵ It was held that Single Member of Authority cannot validly pass orders on complaint under RERA. Thus, Regulations 7 and 8 of Punjab RERA Regulations struck down as being ultra vires and any order passed by Single Member of Appellate Tribunal which form subject matter of RERA appeal are set aside.

“The extension for completion of the project as per the local laws of the States dilutes the RERA provision restricting it to one year. The projects which are not completed on May 2, 2017 will be bound by RERA irrespective of the delay made by the States to notify the Rules. The consumers, interest is diluted mostly in Kerala as the RERA is even not applicable to the projects exceeding 500 square meters up to 1,000 square meters and also to the projects having carpet area of 3,000 square meters on a plot of less than 1,000 square meters. This will affect the allottees in highly urban areas. The structural defect liability of the builders is only for two years in Kerala.”³⁶

All these instances reveal the need for understanding the nuances of Centre’s Real Estate law in light of the intention of the legislature behind drafting those provisions and the objective they sought to achieve. The States should also behave sincerely while framing their state specific rules under the central law and must try to adopt the spirit with which such enactments are made. Only a harmonious relationship between the centre and the state can enable to nation and its citizens to reap the fruits of such welfare oriented legislations.

4. ANTI-BUILDER ENACTMENT

One law cannot serve the interest of all of its stakeholders and if a right is conferred by law on one party then certainly a corresponding duty/liability would be imposed on the adverse party. Something similar happened with the Real Estate Act, 2016 when it pissed off the promoter/builder lobby so much so that they decided to knock the doors of the Court. A petition was filed in the High Court of Bombay challenging the constitutional validity of a number provisions in the Act.³⁷

³³ CRISIL, “Research report on Most states miss RERA deadline : CRISIL Impact Note” (May 2, 2017), available at <<https://www.crisil.com/content/dam/crisil/our-analysis/views-and-commentaries/impact-note/CRISIL-Research-Impact-Note-Most-states-miss-RERA-deadline-May02-2017.pdf>> (last visited on July 20, 2019).

³⁴ Jahangir Badar, “Real Estate Regulation Act: A critical evaluation”, in Kanu Priya, Komal, *Contours of Real Estate Laws* (Thomson Reuters, 1st Ed. 2020).

³⁵ *Janta Land Promoters Private Limited and Ors. vs. Union of India*, 2020 (4) RCR (Civil) 845.

³⁶ Shripad S. Merchant, *et.al.*, “Analysis of Dilutions of the Real Estate (Regulations and Development) Act 2016 by State Governments: A Case study”, 6 *International Journal of Creative Research Thoughts* 742 (2018).

³⁷ *Neelkamal Realtors Suburban Pvt. Ltd. and Ors. vs. Union of India*, 2018(1)ABR558.



It was contended on behalf of the petitioners that Sections 3, 4, 5, 6, 7, 8, 18, 38, 59, 60, 61, 63 and 64 of Real Estate (Regulation and Development) Act, 2016 (RERA) are ultra vires. Although, in the instant case, the Court held that the impugned provisions are not in violation of Constitution of India, the penalties imposed under Sections 18, 38, 59, 60, 61, 63 and 64 of RERA are to be levied on account of contravention of provisions of RERA and that, it shall be imposed prospectively and not retrospectively. Apart from it, the Court clarified that there is no total prohibition on promoters on carrying on their business and their fundamental right under Article 19(1)(g) is not infringed in any sense.

The proviso to Section 43(5) stipulates that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at least thirty percent of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard. The contention of the proviso was questioned by Avarsekar Realty Pvt Ltd against a MahaRERA order directing the company to refund L&T Financial Consultants Ltd an amount of Rs 5.28 crore each for four flats.³⁸ The former sought an exemption from Section 43 (5) proviso of RERA contending that the said proviso is not “mandatory” in nature and cited two Supreme Court orders of 1998 and 2006 and one Delhi High Court order of 2009 to substantiate his submission.

In response to this, the tribunal stated, “It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered. The Hon’ble Supreme Court has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature, and not upon the language in which the intent is clothed”. With this, the tribunal held the proviso as mandatory and obligatory in nature and dismissed the appeal stating that the developer failed to perform the obligation under Section 43 (5) proviso of RERA.

5. ECONOMIC JUSTICE AND MITIGATING INCOME INEQUALITIES

Law helps people to assert their rights and consumer centric legislations definitely boosts the confidence of the buyers. A grievance redressal machinery gives assurance to a buyer foreseeing risk in the transaction she is about to enter that her interest would not be superseded by the adverse party or any other entity. “Consumers are strongly agreeing with the clauses mentioned in the act and those clauses are generating positive factor in consumers mind to invest in real estate property.”³⁹ So, with the advent of RERA, the consumers are became more concerned with the fact whether the project is registered under RERA or not.

“Research shows that consumers are interested to invest in small builder’s projects if they are registered under RERA.”⁴⁰ Thus, it can be said that it promoted the small scale builders and improved the competitor in the market. Inevitably, the consequence was that there was availability of more competitive products in the market. Hence, it can be fairly concluded that it serves the principle laid down under Article 39(c) of the Constitution to the extent that it reduces the concentration of wealth in the hands of big businessmen and Article 38(2) by reducing income inequalities.

³⁸ *Avarsekar Realty Pvt. Ltd. vs. L and T Financial Consultants Ltd.*, (02.09.2020 - REAT Maharashtra) : MANU/RT/0061/2020.

³⁹ S.K.S. Yadav, “Impact of Government Policies on Real Estate Consumer Buying Behaviour: (With special reference to RERA & Affordable Housing)”, 8 *International Journal of Trade & Commerce-IIARTC* 176 (2019).

⁴⁰ *Id.*



The real estate law can also be said to be in line with Article 38(1) of the Constitution as the effort by the State in ensuring economic justice. This can be explained by an illustration:

A middle class person books a home for her family in a decent looking society as per the advertisement. The said apartment is allotted to her but the builder fails to abide by the timeline for delivery of possession and execution of conveyance deed. Assuming, the allotted has paid 50% of the total amount by taking a loan for 40% @ 9% per annum, she would have to pay the EMI's of the loan as well as the rent for her temporary accommodation. Over and above that, there will be a constant stress which would affect the quality of life and perhaps the life span as well. The Act enable the Authority to impose penalty on the builder/promoter to pay interest on the paid up amount which would help the aggrieved consumer to pay the EMI's and the adjudicating officer can award compensation for the mental agony and other difficulties faced by such allottee. In this sense, the object of economic justice is achieved to some extent.

6. CONCLUSION

The tribunal culture is in trend in the present era, however, it wouldn't be wrong to say that the objectives for which such administrative or other tribunals are established is not achieved in its truest sense. As it was observed in the first part of the paper that there are inordinate delays in administering justice by the tribunals, the reason for which may range from vacancies, or lack of personnel, to competency of presiding officer and members and lack of initiative on their part. The primary objective of any tribunal is to provide expeditious disposal of complaints/cases so that the complainant doesn't suffer due to a lethargic setup of grievance reversal. The second issue identified is specifically with respect to modal law nature of the Act. Whenever states are given discretion to implement the central model law in their territories, there is a high probability that the state rules/regulations may deviate from the lines on which the modal law was enacted. The problem with such deviation is that it fails to achieve the required result as intended by the Parliament. In other words, it doesn't deliver upto the expectations of the legislature. Although the duty to enact a law rests with the legislature, however, the responsibility of proper interpretation of the provisions in line with the intention of the legislature lies with the judiciary. So, I would say, judiciary has a very important role to play here whenever a new law is enacted especially in a field which requires some special or technical knowledge. It was seen that there were doubts around certain provisions of the Act and some of which were also challenged before the Court as being ultra vires. Notably, in the recent Bombay High Court judgment, Neelkamal Realtors Suburban Pvt. Ltd. and Ors. vs. Union of India and Ors., while the judges have made a conscious effort to bring clarity on various aspects of the Act including its retrospective vis-à-vis retroactive application and the payment of compensation by the dates mentioned in the agreements, what can be noted here is that it has refrained from arriving at conclusions. The judiciary while doing so has not deemed it appropriate to hypothetically consider situations and decide upon the constitutional validity of statutory provisions. Since the implementation of the key schemes under the Act by the Authority and its interpretation by the judiciary is yet to be seen, there is not enough clarity with the Developer on whether efforts and interests will be best protected or not. With the foreign players eyeing the change and effects of the real estate regulatory regime, India is at the cornerstone of witnessing major investments, if things go in order.