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# TRI-REMEDIATION OPTION AVAILABLE TO HOME BUYERS

**AN OVERVIEW**

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## Introduction

### Real Estate (Regulation and Development) Act, 2016

The real estate sector, a key contributor to India’s economic growth strategy, was plagued by multiple lacunae, mainly due to the absence of a regulator. The Real Estate (Regulation and Development) Act, 2016 (“**RERA**”) envisages that real estate regulatory authorities are required to be created in each State for regulation of the real estate sector and to act as an adjudicating body for speedy resolution of disputes. Increased transparency, compensation for delays/ deficiencies, cancellation and refund are some of the key reliefs provided to homebuyers under RERA.

### Consumer Protection Act, 2019

The Consumer Protection Act, 2019 (“**CPA 2019**”) was notified by the Central Government on July 23, 2020 replacing the three-decade old Consumer Protection Act, 1986 (“**CPA 1986**”). The CPA 2019 classifies “housing construction” as one of the services and accordingly the home buyers have also been included under the purview of CPA 2019<sup>1</sup>. Hence, a complaint may be filed by the homebuyer for various grievances including any delay in giving possession of flat/unit by the builder and/or any deficiency in services rendered to the homebuyer.

### Insolvency and Bankruptcy Code, 2016

Guided by the directions of the Supreme Court in the case of Jaypee Infratech (“**JIL**”)<sup>2</sup>, the homebuyers were designated as financial creditors under the Insolvency and Bankruptcy Code, 2016 (“**the Code**”),<sup>3</sup> and were empowered to file an application before the National Company Law Tribunal (“**NCLT**”) for initiating corporate insolvency resolution process (“**CIRP**”) against a defaulting company (developer). Prior to that, a homebuyer’s inclusion was subject to judicial interpretation. However, in 2020, Section 7 of the Code was further amended to incorporate a pre-condition of at least 100 or 10% of the total number of allottees, whichever is less, in the “same real estate project” to apply for the initiation of CIRP<sup>4</sup>.

## A Comparative Snapshot

### A. Table

Particulars	RERA	CPA 2019	IBC
<b>Pecuniary Limit</b>	There is no pecuniary limit for filing a complaint under RERA.	Complaints shall lie before: <b>District Commission-</b> for paid value up to Rs 1 crore <sup>5</sup> ;	Where the minimum amount of the default by the corporate debtor (builder) is one crore rupees <sup>8</sup> :

<sup>1</sup> As per Section 2(42) of CPA 2019, "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service

<sup>2</sup> *Chitra Sharma v. Union of India*, [Writ Petition (Civil) No. 744 Of 2017, decided on August 9, 2018].

<sup>3</sup> Inserted as an explanation to Section 5(8)(f) of the Code by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 with effect from June 6, 2018.

<sup>4</sup> Inserted as a *proviso* to Section 7(1) of the Code by the Insolvency and Bankruptcy Code (Amendment) Act, 2020 with effect from December 28, 2019.

<sup>5</sup> Section 34(1) of CPA 2019.

<sup>8</sup> Section 4 of IBC Code was modified vide Notification No. S. O. 1205(E) dated March 24, 2020 by the Ministry of Corporate Affairs enhancing the minimum amount of default as Rs.1 crore with effect from March 24, 2020.

		<b>State Commission-</b> For paid value above Rs 1 crore up to Rs.10 crore <sup>6</sup> ; and <b>National Commission-</b> for paid value exceeding Rs.10 crore <sup>7</sup> .	
<b>Who can file Complaint/Application</b>	Any aggrieved person may file a complaint with the adjudicating authority for any violation or contravention of the provisions of RERA or the rules and regulations made thereunder against any promoter. <sup>9</sup>	The complaint can be filed only by the consumer and a buyer is considered to be a consumer only when he buys the house for his end-use and not for the commercial purposes.	Minimum 100 or not less than 10 per cent of total homebuyers in the same project can jointly initiate insolvency resolution process against the developer.
<b>Limitation Period for filing Application/Complaint</b>	There is no specific time frame provided in RERA for filing a complaint.	Within 2 (two) years from the date on which the cause of action has arisen <sup>10</sup> .	Within 3 (three) years pursuant to Article 137 of the Limitation Act, 1963 <sup>11</sup> .
<b>Resolution Time</b>	While a period of 60 (sixty) days from the date of receipt of the application is prescribed <sup>12</sup> , in practice, on an average, much longer time is taken for resolution of disputes.	While period of 3 (three) months, from the date of receipt of notice by opposite party, where the complaint does not require analysis or testing of commodities, and five months if it requires analysis or testing <sup>13</sup> , is prescribed, in practice much longer time is taken to dispose of the complaints.	Time period prescribed for (i) admission or rejection of Application is 14 days <sup>14</sup> (ii) for completion of CIRP is 330 days maximum <sup>15</sup> and (iii) for completion of liquidation process is one year <sup>16</sup> . However, on an average, time taken for disposal of Applications is much longer and as of March 2020, the time for completion CIRP is around 375 days for resolved cases and 309 days for liquidation cases <sup>17</sup> .
<b>Adjudicating Authority</b>	Real Estate Regulatory Authority or the adjudicating officer of the respective State in which the project is situated.	District, State and National Commission depending on the pecuniary limits mentioned above.	National Company Law Tribunal having jurisdiction over the state where the registered office of corporate debtor/builder is situated.
<b>Option for Out of Court Settlement</b>	Conciliation forum has been set up by various states, in accordance with the provisions of Section 32(g) of RERA.	Sections 74-81 and Chapter V of CPA 2019 deal with mediation, wherein the parties meet with a mutually selected impartial and neutral person who assists them in negotiation and settlement of their differences.	An application for initiating pre-packaged insolvency resolution process can be made in respect of a corporate debtor classified as a micro, small or medium enterprise (MSME) <sup>18</sup> subject to conditions specified in Section 54A(2) of the

<sup>6</sup> Section 47(1)(a)(i) of CPA 2019.

<sup>7</sup> Section 58(1)(a)(i) of CPA 2019.

<sup>9</sup> Section 31 (1) of RERA.

<sup>10</sup> Section 69 (1) of CPA 2019.

<sup>11</sup> As held by the Hon'ble Supreme Court in *Gaurav Hargovindbhai Dave v. Asset Reconstruction Company India Limited*, Civil Appeal No. 4952 of 2019, Order dated September 18, 2019 and *Sagar Sharma & Anr v. Phoenix Arc Private Limited & Anr.*, Civil Appeal No. 7673 of 2019, Order dated September 30, 2019.

<sup>12</sup> Section 29 (4) of RERA.

<sup>13</sup> Section 38 (7) of CPA 2019.

<sup>14</sup> Section 10 (4) of Code.

<sup>15</sup> Proviso in Section 12 (3) of Code.

<sup>16</sup> Regulation 44 (1) of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

<sup>17</sup> As per Mediation in Insolvency Matters Writeup by Dr. Rajiv Mani working in the Department of Legal Affairs, Ministry of Law and Justice, Government of India.

<sup>18</sup> Section 54A(1) of The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021.

			Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021.
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## B. Remedies for Home Buyer(s)/Allottee(s)/ Complainant(s)

### 1. Compensation

**Under RERA, the homebuyer can seek compensation for:**

- i. Loss or damage sustained by homebuyer due to false/ incorrect statement/ information included in an advertisement or project prospectus by the Promoter<sup>19</sup>.
- ii. In the event of Promoter's failure to rectify structural and other defect incurred in five years from the date of giving the possession within thirty days of being brought into the notice of the Promoter.<sup>20</sup>
- iii. In case the allottee wishes to withdraw from the project due to the failure of the Promoter to complete or give possession in accordance with the terms of the agreement for sale or due to discontinuance of his business<sup>21</sup>.
- iv. Loss caused to allottee due to defective title of land on which project is developed or has been developed<sup>22</sup>.
- v. If the Promoter fails to discharge any other obligations imposed on it under RERA/terms and conditions of Agreement for sale<sup>23</sup>.

In *Parkash Chand Arohi v. Pivotal Infrastructure Private Limited*<sup>24</sup>, the Haryana Real Estate Regulatory Authority (Haryana RERA) held that:

*“Compensation to the aggrieved party can be awarded by way of compensatory interest i.e., interest beyond the rate of interest declared reasonable by the higher court or by way of awarding lump-sum compensatory amount. For awarding compensation that is not quantifiable from the record and it requires evaluation of evidence furnished by both the parties, the appropriate forum shall be the Adjudicating Officer. However, if it can be easily calculated from the record, the Authority may itself award it as its own level after passing speaking orders.”*

**Under CPA 2019, the homebuyer can seek compensation:**

- i. For any loss or injury suffered by them due to the negligence of the opposite party.  
Provided that the District/ State/ National Commission shall have the power to grant punitive damages in such circumstances as it deems fit;<sup>25</sup>.
- ii. In a product liability action under Chapter VI<sup>26</sup>.

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<sup>19</sup> Section 12 of RERA.

<sup>20</sup> Section 14 (3) of RERA.

<sup>21</sup> Section 18 (1) of RERA.

<sup>22</sup> Section 18 (2) of RERA.

<sup>23</sup> Section 18 (3) of RERA.

<sup>24</sup> RERA-PKL-COMP. 49/2018, Haryana RERA, date of hearing September 04, 2018.

<sup>25</sup> Section 39 (1)(d), Section 49 (1) and Section 59 (1) of CPA 2019.

<sup>26</sup> Section 39 (1)(e), Section 49 (1) and Section 59 (1) of CPA 2019.

In *Shri Yogesh Sharma v. M/s Unitech Limited*<sup>27</sup>, the National Consumer Disputes Redressal Commission (NCDRC) citing other case laws observed that:

*“the interest claimed by the flat buyers in such a case does not represent only the interest on the capital borrowed or contributed by them but also includes compensation on account of appreciation in the land value and increase in the cost of construction in the meanwhile. The Forum or the Commission must determine that there has been deficiency in service and/or misfeasance in public office which has resulted in loss or injury. That compensation cannot be uniform and can best be illustrated by considering cases where possession is being directed to be delivered and cases where only monies are directed to be returned”.*

## 2. Refund with/without Interest

**Under RERA, the homebuyer can get refund for:**

- i. Loss or damage sustained by homebuyer due to false/incorrect statement/information included in an advertisement or project prospectus by the Promoter. The homebuyer shall be returned his entire investment along with interest at such rate as may be prescribed.
- ii. In case the allottee does not wish to withdraw from the project due to the failure of the Promoter to complete or give possession in accordance with the terms of the agreement for sale or due to discontinuance of his business, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

In *Sanvo Resorts Private Limited v. Mr. Ranveer Sharma and Mrs. Neha Dixit*<sup>28</sup>, the Maharashtra Real Estate Appellate Tribunal held:

*“Where the refund of the paid amount is sought along with interest simpliciter and not by way of compensation per se, the Authority has necessary jurisdiction to deal with such claims U/Sec. 18 of the Act. Therefore, such claim for interest is not in the nature of compensation and adjudication thereof is not precluded from the jurisdiction of the Authority. We do not see any prohibition to the Authority in the Act to entertain such claims as involved under this appeal and to award the relief of refund and interest”.*

**Under CPA 2019, the homebuyer can get refund for:**

If District/State/National Forum is satisfied that the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to:

Refund of price/charges paid by the complainant along with interest<sup>29</sup>.

In *Country Colonizers Private Limited v. Karnail Singh Mudahar*<sup>30</sup>, the NCDRC directed a builder to refund money to home buyers for delayed projects with interest rates similar to the rate for a house building loan in a corresponding period given by scheduled nationalized bank.

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<sup>27</sup> Consumer Case No. 267 of 2014, NCDRC, order dated November 26, 2015.

<sup>28</sup> Appeal No.AT00600000010751 of 2018 in Complaint No.CC006000000055001 of 2018, Maharashtra Real Estate Appellate Tribunal, order dated July 19, 2019.

<sup>29</sup> Section 39 (1)(c), Section 49(1) and Section 59(1) of CPA 2019.

<sup>30</sup> First Appeal No. 542 of 2017, NCDRC, Order dated July 01, 2019.

### Under IBC

In case of default committed by developer (corporate debtor), application can be filed by homebuyers (100 or 10% of total number of allottees in same project). On admission of such application, CIRP commences.

If the Committee of Creditors (“CoC”) of such corporate debtor does not approve any resolution plan or recommends liquidation of the corporate debtor, or no resolution plan is received or Adjudicating Authority rejects the plan, order for liquidation proceedings follows. In the wake of liquidation order being passed, the homebuyers can recover their dues only to the extent of liquidation value of the corporate debtor’s assets as reduced by its liabilities and costs of liquidation.

In *Mr. Arun Kumar Sinha v. Three C Homes Private Limited*<sup>31</sup>, NCLT, New Delhi rejected a proposed resolution offer, which was less than 20% of the liquidation value of Three C Homes Private Limited and ordered its liquidation.

## 3. Specific Relief or Relief of Possession of Flat/Unit

### Under RERA

The real estate regulatory authority may hand over the project completion task to competent authority or buyers' association or in any other manner upon lapse of the registration or on revocation of the registration under RERA.

In 2020-21, Uttar Pradesh Real Estate Regulatory Authority (“UPRERA”) allowed stalled projects comprising of four towers of Jaypee Kalypso Court (Phase-II)<sup>32</sup> and few other projects to be completed by the respective developers along with the association of allottees.

### Under IBC

If a resolution plan is accepted/approved by COC/ Adjudication Authority, the homebuyers may get their homes subject to the terms and conditions of the resolution plan, which is binding on all homebuyers.

In the CIRP of *M/s Ariisto Developers Private Limited*<sup>33</sup>, the resolution plan of Prestige Estates Projects Limited was approved by NCLT wherein, the homebuyers were allotted constructed houses subject to payment of balance receivables. Further, in the CIRP of the corporate debtor viz, *Celestial Estate Private Limited*<sup>34</sup>, the approved resolution plan provided for delivery of the units to the respective buyers in the manner and on the terms and conditions stipulated, by managing the project through a team of committed and dedicated management in much professional manner and to deploy the money received from the buyers in terms of the plan in accordance with RERA in a time bound manner.

## 4. Other Remedies

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<sup>31</sup> CA No. 3840/2020 in IB-432/ND/2019, NCLT, New Delhi, Order dated February 08, 2021.

<sup>32</sup> Order with Reference No. 450/U.P.RERA/Project/Rehabilitation/NCR/2020-21 dated July 29, 2020 by UPRERA.

<sup>33</sup> *Ashok Commercial Enterprises v. Ariisto Developers Pvt. Ltd*, in the matter of *Dipco Private Limited v. Ariisto Developers Private Limited.*, C.P. (IB) No. 2714 of 2018, NCLT, Mumbai Bench, order pronounced on March 23, 2021.

<sup>34</sup> *Sanjay Malik v. Celestial Estate Private Limited*, CA-1237/2019, CA-920/2019 & CA-654/2020 in CP No. (IB)1768(ND)/2018, NCLT New Delhi Bench III, order pronounced on March 15, 2021.

## Under RERA

Homebuyers can approach the regulatory authority under RERA in wake of:

- a. Cancellation of allotment of flat/unit unilaterally and without sufficient cause by the Promoter<sup>35</sup>.
- b. Acceptance of money in excess of 10% of cost of apartment, plot or building without execution and registration of written agreement by the Promoter<sup>36</sup>.
- c. Any alteration or addition in the sanction plan/ layout plan/specification by the Promoter without prior approval of 2/3<sup>rd</sup> allottees<sup>37</sup>.
- d. Transfer of Rights and liability in project by the Promoter without consent of 2/3<sup>rd</sup> allottee<sup>38</sup>.
- e. Failure to execute conveyance deed within specified period<sup>39</sup>.

## Under CPA 2019

If District/State/National Forum is satisfied that the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following, namely:

- a. To remove deficiencies in the services<sup>40</sup> and to discontinue the unfair/restrictive trade practice<sup>41</sup>.
- b. To desist from offering services which are hazardous in nature<sup>42</sup>.
- c. To issue corrective advertisement to neutralise the effect of misleading advertisement<sup>43</sup> and to cease and desist from issuing any misleading advertisement<sup>44</sup>.
- d. Complaints against unfair contracts to be adjudicated by State and National Commission only<sup>45</sup>.

RERA is a special law as opposed to CPA 2019 which is a general law. Hence, specific remedies for the homebuyers are available under RERA. With regards to commonality in terms of remedies, some comparison can be done between RERA and CPA 2019, but IBC belongs to a completely different genre. Under RERA and CPA 2019, the general provisions under CPA 2019 (wherein the District/ State/ National Commission have the power to grant punitive damages and refund in such circumstances as it deems fit) give enough leeway to homebuyers to seek specific remedies that are available under RERA through CPA 2019, namely compensation on account of failure of the Promoter to complete or give possession in accordance with the terms of the agreement for sale, refund in cases where the allottee does not wish to withdraw from the project etc.

## Are the Remedies Concurrent or Mutually Exclusive?

The Supreme Court in the case of *Upendra Choudhury v. Bulandshahar Development Authority*<sup>46</sup>, refused to entertain a writ petition by the homebuyers against developers in the wake of alternate remedies available to them by observing that:

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<sup>35</sup> Section 11(5) of RERA.

<sup>36</sup> Section 13 of RERA.

<sup>37</sup> Section 14 (2)(i) and 14(2)(ii) of RERA.

<sup>38</sup> Section 15 of RERA.

<sup>39</sup> Section 17 (1) of RERA.

<sup>40</sup> Section 39 (1)(f), Section 49 (1) and Section 59 (1) of CPA 2019.

<sup>41</sup> Section 39 (1)(g), Section 49 (1) and Section 59 (1) of CPA 2019.

<sup>42</sup> Section 39 (1)(j), Section 49 (1) and Section 59 (1) of CPA 2019.

<sup>43</sup> Section 39 (1)(l), Section 49 (1) and Section 59 (1) of CPA 2019.

<sup>44</sup> Section 39 (1)(n), Section 49 (1) and Section 59 (1) of CPA 2019.

<sup>45</sup> Section 47 (1)(a)(ii) and 58 (1)(a)(ii) of CPA 2019.

<sup>46</sup> Writ Petition (Civil) No 150 of 2021, Supreme Court, decided on February 11, 2021.

*“Each of these statutory enactments has been made by Parliament with a specific purpose in view. The 1986 Act as well as the subsequent legislation contain provisions for representative consumer complaints. One or more home buyers can consequently seek relief to represent a common grievance for a whole class of purchasers of real estate. The RERA similarly contains specific provisions and remedies for dealing with the grievance of purchasers of real estate. The provisions of the IBC have specifically taken note of the difficulties which are faced by home buyers by providing for remedies within the fold of the statute”.*

Hence, it is pertinent to analyse the relevant provisions under the RERA, CPA 2019 and the Code, to determine whether the remedies available are mutually exclusive or concurrent in nature.

**i. Under RERA:**

Section 18 of RERA which deals with return of amount and compensation to the homebuyers, clearly specifies that the remedy under the said section is *‘without prejudice to any other remedy available’*. Further, Section 88 of RERA states that the provisions of RERA shall be in addition to and not in derogation of, the provisions of any other law for the time being in force and only jurisdiction of civil courts is barred by RERA by virtue of Section 79 of RERA.

Additionally, there is a *proviso* appended to Section 71(1) of RERA under which if the complaint of the homebuyers/consumers, in respect of matters covered under Sections 12, 14, 18 and Section 19 of RERA, is pending before any Consumer Forum/Commission, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under RERA.

**ii. Under CPA 2019:**

Section 100 of the CPA 2019 states that, the provisions of CPA 2019 shall be in addition to and not in derogation to the provisions of any other law for the time being in force.

**iii. Under IBC:**

Section 238 of the Code provides that the provisions of the Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

Thus, interpretation of the above provisions, unambiguously points towards concurrent nature of the remedies provided under all the three statutes. Although, the *proviso* to Section 71(1) to RERA does create an ambiguity with many builders trying to use it as a shield for protecting themselves from multiple litigations of homebuyers. However, it is imperative to note that, the word “may” used in the said *proviso* gives the homebuyer a discretionary power to withdraw his complaint from the consumer forum/commission and file an application under RERA. Thus, the legislative intent of giving the homebuyers an option to explore alternate remedies is apparent. The same can also be garnered from the decision of the Supreme Court in the case of *Pioneer Urban Land and Infrastructure Limited and another v. Union of India and another*<sup>47</sup>, wherein the Court held that:

*“RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of*

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<sup>47</sup> Writ Petition (Civil) No. 43 of 2019, decided on August 9, 2019.



flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code”.

(emphasis supplied)

In *Experion Developers v. State of Haryana*<sup>48</sup>, the Punjab-Haryana High Court held that,

*...proviso to Section 71 (1) of the Act (RERA) has to be read along with Section 88 of the Act (RERA). It is, therefore, not mandatory for a person, who has a complaint before the consumer fora to have his complaint transferred to the AO (Adjudicating Officer). He can pursue both the remedies simultaneously on the strength of Section 88 of the Act (RERA).*

(emphasis supplied)

Although Section 79 of RERA bars jurisdiction of civil courts, it does not in any way bar the consumer Commissions/Forums under CPA 2019 to entertain any complaint. The contentious issue of whether Consumer Commissions/ Forum is a civil court was dealt with by the Supreme Court in *Malay Kumar Ganguli v. Dr. Sukumar Mukherjee*<sup>49</sup> wherein it was held that:

“... it (Consumer Commissions/Forum) may have all the trappings of the civil court but yet it cannot be called a civil court.”

(emphasis supplied)

Further, in the case of *M/s. Imperia Structures Ltd. v. Anil Patn*<sup>50</sup>, the Supreme Court held that:

- a. *Proviso* to Section 71(1) of the RERA entitles a complainant who had initiated proceedings under the CPA 1986 before the RERA came into force, to withdraw the proceedings under the CPA 1986 with the permission of the Forum or Commission and file an appropriate application before the adjudicating officer under the RERA. The *proviso* thus gives a right or an option to the concerned complainant but does not statutorily force him to withdraw such complaint nor do the provisions of the RERA Act create any mechanism for transfer of such pending proceedings to authorities under the RERA Act.
- b. The absence of bar under Section 79 of RERA to the initiation of proceedings before a forum which cannot be called a civil court and express saving under Section 88 of RERA, make the position quite clear. Further, Section 18 of RERA itself specifies that the remedy under said Section is “without prejudice to any other remedy available”. Thus, the legislative intent is clear that a choice or discretion is given to the allottee whether he wishes to initiate appropriate proceedings under the CPA 2019 or file an application under the RERA.

## Doctrine of Election

In *Ireo Grace Realtech Pvt. Ltd. v. Abhishek Khanna*<sup>51</sup> matter, the facts of the matter being dealt with included a consumer complaint being Consumer Case No.3823 of 2017 before the National Commission was filed by the homebuyer, wherein it was inter alia prayed that the developer be directed to refund the amount of Rs.1,44,72,364/- deposited by the buyer in the project —The Corridors developed in Sector 67-A, Gurgaon, Haryana, along-with interest @ 20% per annum compounded quarterly till realization, and compensation towards damages on account of harassment, mental agony and litigation charges. With respect to the same project, an Apartment Buyer filed a complaint under Section 31 of the Real Estate (Regulation & Development) Act, 2016

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<sup>48</sup> CWP No. 38144 of 2018, decided on October 16, 2020.

<sup>49</sup> Criminal Appeal Nos. 1191-1194 of 2005, decided on August 07, 2009.

<sup>50</sup> Civil Appeal No. 3581-3590 of 2020 (@ Civil Appeal Diary No.9796/2019), decided on November 02, 2020.

<sup>51</sup> Civil Appeal No. 5785 of 2019, Supreme Court, decided on January 11, 2021.

read with Rule 28 of the Haryana Real Estate (Regulation & Development) Rules, 2017 before the Haryana Real Estate Regulatory Authority, Gurugram.

The Supreme Court elaborating on whether primacy to be given to RERA over CPA 2019 expounded the “*Doctrine of Election*” concept and further stated, that an allottee may elect or opt for one of the remedies provided by law for redressal of its injury or grievance. An election of remedies arises when two concurrent remedies are available, and the aggrieved party chooses to exercise one, in which event he loses the right to simultaneously exercise the other for the same cause of action.

In *Ireo Grace Realtech Pvt. Ltd.* matter, the facts that were dealt with included simultaneous complaints being filed with regards to the same project in RERA and Consumer Forum, albeit by different homebuyers. The impugned judgment passed by the National Commission was in direct conflict with the judgment passed by the RERA. The Commission held that since the Developer had failed to deliver possession of the allotted flats to the Apartment Buyers, it amounted to deficiency in service, and the complainants were entitled to refund of the amount along-with appropriate compensation. The Haryana Real Estate Regulatory Authority held that the Developer had failed to fulfil the obligation under Section 11(4)(a) of this Act, the Developer was liable under the proviso to Section 18 to pay interest at the prescribed rate of 10.75% p.a. on the amount deposited by the complainant, up to the date when the possession was offered. However, keeping in view the status of the project, and the interest of other allottees, the Authority was of the view that refund cannot be allowed at this stage. The Developer was directed to handover possession of the apartment by 30.06.2020, as per the Registration Certificate for the project. The hon’ble Supreme Court dealt with this anomaly by stressing on the Doctrine of Election concept.

Thus, in a scenario wherein the homebuyer seeks refund of his money and file a complaint in RERA, by the Doctrine of Election concept he loses the right to simultaneously exercise this remedy (refund) under CPA 2019. **The stance of judiciary is clear in terms of simultaneous exercise of same remedies under different forums, however a major hiccup in practical application of the same is that overlapping is bound to happen if the homebuyers opt to pursue same remedies under different forums simultaneously. The law on this subject is evolving constantly and we believe in times to come there will be much more clarity in terms of resolution of conflict that might arise from the concurrent pursual of same remedies under different forums.**

## Concluding Remarks

The option to choose the forum for complaint initiation/resolution lies with the homebuyer who has the liberty to select either or all the forums and the same has been legally validated through the relevant statutory provisions and judicial precedents. The first step for the homebuyers is to do a detailed study of the remedies available under all the three statutes and the following factors should be taken into consideration by them to make an informed decision:

- i. The recourse available to an aggrieved consumer under CPA 2019 is only curative and not preventive. This is mainly because CPA 2019 only provides for pecuniary damages and compensation and does not provide for specific performance. There are certain non-compensatory remedies which are solely provided by RERA, such as Section 8 that empowers the authorities to hand over the project completion task to competent authority or buyers' association or in any other manner. Additionally, even under the Code, the approved resolution plan should generally comprise of handing over of possession of constructed houses to homebuyers, subject to payment of balance sale price.
- ii. However, the Code should be the last legal option that can be resorted to by the homebuyers. This is because firstly, gathering 100 buyers or 10% of buyers in the same project to move together is generally difficult and secondly, once the insolvency application against the builder/corporate debtor is admitted, the moratorium is initiated which bars the

institution of suits/complaints or continuation of pending suits or proceedings against the corporate debtor till the completion of CIRP as per Section 14 of the Code. Therefore, once the application of the homebuyers is admitted, any complaints under RERA or CPA 2019 cannot be initiated or if already initiated will be stalled.

- iii. As per RERA, the appropriate Government shall by notification, make rules for carrying out the provisions of RERA. While there is no clarify if any States/ Union territories can dilute the Central law, many states have diluted RERA rules and hence homebuyers need to be fully aware of the rules prevailing in the state where their project is situated.
- iv. Further, although the homebuyers can avail remedies under the CPA 2019, RERA and IBC concurrently, in the wake of any inconsistency between IBC and the other two statutes, the provisions of IBC will prevail.

***This paper has been written by Prakash Panjabi (Senior Partner) and Harshita Jagwani (Senior Associate, Designate).***

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