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Interplay Between Alternative Dispute Resolution & The Real Estate Industry¹

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Introduction

Section 89 of the Code of Civil Procedure provides for the duties of the civil courts to refer the parties when they things fit that there exists an element of settlement that can be achieved by and between the parties only without going into the lengthy procedure of litigation the court is duty bound to send such parties to either of the four listed Alternative Dispute

Resolution methods:

- Arbitration
- Mediation
- Conciliation
- Lok Adalats

There are different rules and laws governing these provisions and according to the said requirements the court shall refer the parties to these ADR methods. In a similar way the RERA Act, 2016 should also be provided for such a mechanism. Under the said act there are two adjudicating bodies i.e. the Real Estate Regulatory Authority and for some specific kinds of matters there is the provision of Adjudicating Officer. However, the said law has not provided for any kind of mechanism dealing with how the disputes can be resolved amicably by referring the parties to the above stated ADR methods.

The way in which an authority resolves a dispute can sometimes be a tedious process and in that case it becomes difficult for the parties to move on with their lives. To ease the dispute resolution procedure between the parties the Maharashtra Government has suggested to bring in newer mechanism such as appointment of Conciliators for resolution of the disputes between the parties.

¹ Yash Dadriwal

A panel of the conciliators shall be appointed herein which shall help in mediating the disputes between the parties and this shall be done even before the said dispute is referred to the RERA Authority or the Adjudicating officer, however the same has not be complied with yet and is still in the process of getting approvals².

The research paper focuses on the similar aspects of Real Estate Dispute Resolution that can be settled through various Alternative Dispute Resolution Methods and will also recommend possible ways of implementation of all such appropriate methods in the current legal scenario.

Current Dispute Resolution Mechanisms In Real Estate

Industry

After the RERA Act, 2016 was enacted by the Indian Parliament, there were not many recourses available to the participants in the real estate industry. Still, there were some remedies that can be relied upon by those participants. The effectiveness of the same can still be in question as there might be some difficulties that led to the enactment of a new law for getting the interests of the real estate allottees enforced³. Some of the remedies that were indeed available before 2016 can be listed in the following manner:

Consumer Protection Act, 1986

The Consumer Protection Act is one such remedy is available to Home Buyers, there are the District Forum and the State and National Commissions that help in redressal of disputes that might arise in the real estate project. Since the Real Estate Allottees are also the Consumers in the said project a right can be accrued that will entitle them to approach the Consumer Forums.

A homebuyer in the instant case can file a complaint in cases where there are any deficiencies in services that are provided to them or if there is any delay on the part of the developers/promoters of the said real estate projects.

² Karker, Snehal, and Sana Khan. "Conciliating Disputes under the Real Estate (Regulation & Development) Act, 2016 - Real Estate - India." Conciliating Disputes under the Real Estate (Regulation & Development) Act, 2016 - Real Estate - India, October 16, 2017. <https://www.mondaq.com/india/real-estate/637606/conciliating-disputes-under-the-real-estate-regulation-development-act-2016>.

³ Khajanchi, Unnati. "How Are Disputes in Real Estate Industry Resolved - iPleaders." iPleaders, July 17, 2020. <https://blog.ipleaders.in/how-disputes-real-estate-industry-resolved/>.

The homebuyer, without any help from an advocate or legal consultant, can approach the consumer forum and file such a complaint along with the documents supporting the claims of the allottee, and the said complaint shall be resolved by the forum within the stipulated period. A single homebuyer or a group of homebuyers can approach the forum as and when a breach occurs.

Flat Ownership Acts Of Different States

Every state has enacted laws with regard to the ownership of flats, and the rights and duties of the flat owners have been listed by this act. Some of such acts are the Maharashtra Flat Ownership Act, 1963; the J & K Apartment Ownership Act, 1989; the Rajasthan Apartment Ownership Act, 2015; etc. All these legislations were actively governing the promotion, construction, management and transfer of flats in the respective states.

The acts also provided for some of the other mechanisms through which the flat owners could get their rights enforced. However, with new problems, the need was felt to enact better redressal mechanisms and hence some of these laws were repealed.

CREDAI – Code Of Conduct, 2011

The Confederation of Real Estate Developers' Associations of India (CREDAI) is a body that was established by and between various developers and promoters of the real estate industry and all most all of the current promoters/developers follow the code of conduct as given by the CREDAI. It aims to promote ethical practices in the industry and to maintain honor and dignity for its members.

However, the code of conduct is not a binding document that can get the rights of the promoters and homebuyers enforced, and the other available remedies are also not very efficient in dealing with the issues that arise in the industry. Hence, the need to develop an entirely new law that can effectively and efficiently deal with such issues was felt. The Real Estate (Regulation and Development) Act, 2016 was enacted to fulfil these purposes⁴.

Real Estate (Regulation And Development) Act, 2016

The Act has been brought into force to safeguard the interests of promoters as well as the real estate allottees. Under the Act, there are provisions enumerating the rights and duties of the Promoters as well as the rights and duties of the Allottees. However, unlike any other law, the

⁴ Divekar, Samruddhi. "A Review on Dispute Resolution under the Real Estate (Regulation and Development) Act, 2016" International Research Journal of Engineering and Technology (IRJET), August 8, 2021. <https://www.irjet.net/archives/V8/i8/IRJET-V8I8320.pdf>

rights and duties that have been mentioned are enforceable using the mechanisms as provided by the Act.

Under the Act, there is one regulatory authority that has been set up that governs each and every real estate project that will be taken up by any promoter throughout the country. The name of the said authority is the Real Estate Regulatory Authority, or the RERA. This authority does not only have a regulatory role but also plays a quasi-judicial role in RERA, adjudicating the disputes between the promoters and the allottees. The Act has also set up an appellate authority in case the parties are not satisfied by the decision of the RERA, namely the Real Estate Appellate Authority (REAT).

Apart from the above authorities, the act has also provided for the formation of adjudicating officers who will have powers only in relation to certain sections of the act. All the above stated mechanisms are however adjudicating measures and party autonomy is not followed herein and for this reason a need for effective Alternative Dispute Resolution Method was felt which will be further discussed in the study⁵.

Alternative Dispute Resolution And Real Estate Industry

The abovementioned means of dispute resolution in the real estate industry have not been very effective for the buyers and the promoters. The cost involved in such projects is huge, and the need for faster dispute resolution is felt by the stakeholders when they are in a dispute. The burden of solving the disputes is not only on the Real Estate Regulatory Authority but also on civil courts and consumer forums that are already overburdened with other matters. Here the Alternative Dispute Resolution methods like Arbitration, Conciliation, Mediation and Lok Adalats can play a crucial role⁶.

The ADR method generally tries to enforce various contracts that are entered into between the parties and such a contract generally has a dispute resolution clause in the form of either an Arbitration clause or a dispute resolution clause itself lists various ADR methods that can help in the resolution of the said disputes between the parties. Dispute resolution is a sign that

⁵ Rab, Ajar. "Redressal Mechanism under the Real Estate (Regulation and Development) Act 2016: Ouster of the Arbitration Tribunal?" Manupatra <http://docs.manupatra.in/newsline/articles/Upload/833D918D-8BE9-4AB7-9F70-3A603AEE2BD6.pdf>

⁶ Gupta, Nimish. "Alternative Dispute Resolution: How It Can Help Developers and Buyers, Alike | Housing News." Housing News, December 9, 2019. <https://housing.com/news/alternative-dispute-resolution-how-it-can-help-developers-and-buyers-alike/>.

there is a chance of a dispute between the parties and hence such a clause is present. In such a case, it will always be better to knock on the doors of an Alternative Dispute Resolution forum instead of the RERA or a court.

Furthermore, it is also to be noted that the types of disputes we are talking about in the instant case are on the basis of a construction contract and have a lot of technicalities that need to be resolved. When a dispute arises in this there is always a chance that parties would want an expert to hear these disputes and give a solution as soon as possible. However, when we talk about the RERA, there is always a chance that the person who is going to adjudicate might be a retired justice or someone with no real expertise in the field. For these reasons, it is always better to approach an arbitration tribunal or appoint an expert mediator. These people can be expert lawyers or judges who deal in the matters of construction have good knowledge of the market and can even be civil engineers as per the discretion of the party and the need of the dispute⁷.

Along with the abovementioned aspects, it is also to be kept in mind that while in dispute, if the said dispute is not resolved quickly, the project will be at a standstill and that will keep increasing various kinds of costs that the promoter might be paying, like the cost of storage of material available at the site, the cost of the watchman, interest on the payments as made by the allottees to the promoter for the project, and many other costs as well. If an ADR method is applied in the instant case then these disputes will be acted comparatively faster than adjudication by the Real Estate Regulatory Authority or the adjudicating officer under the act⁸.

Under the Real Estate (Regulation & Development) Act, 2016, along with the dispute resolution by the authorities and the adjudicating officers, there are also provisions for a conciliation forum. This can be said to be the first step in resolving the dispute in the form of an out-of-court settlement. The RERA has to adjudicate disputes within 60 days of the filing of the complaint. However, this takes more time due to the overload of cases in the court. However, the conciliation authority will solve the aforementioned disputes faster.

Conciliation is a method in which the conciliator plays the role of a mediator between the parties.

⁷ Dhavan, Astha. "How Can ADR Be Beneficial for the Real-Estate Sector? | VIA Mediation Centre." How can ADR be beneficial for the Real-Estate Sector? | VIA Mediation Centre. Accessed September 9, 2022. <https://viamediationcentre.org/readnews/MzIx/How-can-ADR-be-beneficial-for-the-Real-Estate-Sector#:~:text=ADR%20can%20help%20both%20the,the%20closest%20alternative%20to%20litigation.>

⁸ Supre Note 3

However, the said role is more interventionist as he plays a comparatively vital role in settling the dispute in comparison to the mediator. Once a settlement is arrived at between the parties the project can continue without the interference of the court and shall move on swiftly⁹.

Similarly, parties can also approach the consumer forum with their complaints in certain cases. Generally, these complaints are adjudicated by the officer of the forum/commission. However, with the enactment of the new Consumer Protection Act, 2019, it has been mandated that in all disputes, the parties are first required to be sent to mediation and only in the event that the dispute is not resolved in the said mediation shall the forum/commission adjudicate on the disputes that have arisen between the real estate allottees and the promoters.

Arbitrability Of Real Estate Disputes

Construction arbitration is gaining importance with each passing day and has been growing at a substantial rate. There are dedicated lawyers or legal practitioners working in the field of construction arbitration both at the national and international levels. However, the question that is pertinent to answer here is whether each and every construction dispute or real estate dispute is arbitrable before the Arbitral tribunal or it is just those disputes in which the parties had expressly in the contract mentioned in the dispute resolution clause that the disputes if any shall be referred to Arbitration.

Generally speaking, the best way for the party to refer itself to arbitration in case of any dispute is to either mention the same in the contract or if both the parties deem it fit they can enter into a separate arbitration agreement referring to the dispute that has already arisen to the Arbitration. However, can the parties by themselves in all real estate disputes refer the matter to arbitration or does the authority/court have the power to refer the case to arbitration if the need so arises due to the complex nature of the case?

For answering the abovementioned questions, it is pertinent to refer to the test of arbitrability as stipulated by the Supreme Court in the case of *Booz Allen & Hamilton, Inc. v. S.B.I.*

⁹ K S, BAVADHARINI. "All You Need to Know about Conciliation Forum - The Hindu BusinessLine." All you need to know about conciliation forum - The Hindu BusinessLine, August 6, 2019. <https://www.thehindubusinessline.com/opinion/columns/slate/all-you-need-to-know-about-conciliation-forum/article28830555.ece>.

Home Finance Ltd¹⁰. The Supreme Court has given three questions that need to be answered before a matter can be referred to arbitration. The following are the said questions:

- Whether the dispute is an action in rem or action in personam? This means that the said matter should be between two or more parties that not affecting the people at large and the remedies that are prayed for against private persons and not act against the rem.
- Whether there is an arbitration agreement for the resolution of disputes? The disputes in hand should be covered by the arbitration agreement between the parties and the said disputes should not be expressly excluded from the purview of arbitration.
- Whether the parties indeed have approached the dispute to arbitration? Meaning thereby that the disputes that are in question indeed fall under the purview of the Statement of claim or counterclaim filed by the parties and if not that dispute shall not be arbitrated¹¹.

The courts, however, in a variety of case laws, such as Natraj Studios (P.) Ltd. v. Navrang Studios¹²; A. Ayyasamy v. A. Paramasivam¹³; Vimal Kishore Shah v. Jayesh Dinesh Shah¹⁴; have held that if an act provides for a special forum for the resolution of a dispute, then the said dispute shall not be arbitrable.

From all the above-mentioned points, it can be said that those disputes that satisfy the test as laid down above shall be arbitrable until and unless the authority has specific powers to resolve the said disputes or the parties are not in favor of referring the said dispute to arbitration.

¹⁰ (2011) 5 S.C.C. 532

¹¹ Vyas, Som Dutt. "Dispute Resolution and Spirit of RERA vis-à-vis Real Estate Industry" - International Journal of Legal Science And Innovation, September 10, 2022 <https://www.ijlsi.com/wp-content/uploads/Dispute-Resolution-and-Spirit-of-RERA-vis-a-vis-Real-Estate-Industry.pdf>

¹² (1981) 1 S.C.C. 523

¹³ (2016) 10 S.C.C. 386

¹⁴ (2016) 8 S.C.C. 788

Conclusion

The goal of this study was to disseminate the role that is played by the Alternative Dispute Resolution methods or will be played by them in the real estate industry. The study has dealt with various aspects of the real industry, including the current dispute resolution methods such as the consumer forums/commissions, the Real Estate Regulatory Authority, adjudicating officers under RERA and other methods that are not as such adjudicating but advisory. The methods mentioned herein above can be time-consuming and might not be completely efficient in the resolution of disputes.

Since the current methods of dispute resolution can be termed as a bit non-effective, that is why ADR methods are to be relied upon so that the disputes are resolved in a manner that is not detrimental to the interests of the parties. Along with that, since an expert in the said field will be resolving the dispute, the parties get a sense of security about their interests. The methods are faster as well as cheaper. The role of conciliation forums was also discussed in the said part of the study.

The final part dealt with the arbitrability of real estate, stating the test of arbitrability as propounded by the case of Booz Allen. Furthermore as stated that the role of party autonomy is supreme and disputes can be referred to arbitration in case there is some or arbitration agreement between the parties and the said dispute is a dispute in personam.

From all the above-mentioned points, it can be safely concluded that the study was successful in understanding the role played by various ADR methods when it comes to the real estate industry. It is however suggested that the government should take prompt steps to implement all the ways of resolution of the dispute as mentioned in the study without which the sufferings of the parties shall continue.