$~6

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 19th April, 2022

\+ ARB. P. 868/2021

PRIYANKA TAKSH SOOD & ORS. ..... Petitioners

Through: Ms. Mrinalini Sen and Mr. Tanmay Yadav, Advocates.

versus

SUNWORLD RESIDENCY PVT. LTD. & ANR. ..... Respondents

Through: Mr. Amol Sinha, Mr. Anshum Jain, Mr. Kshitiz Garg and Mr. Ashvini Kumar, Advocates for R-1.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 [*hereinafter, "**A&C Act**"*] seeking appointment of a Sole Arbitrator for reference of disputes arising between the parties.

THE PARTIES

2. Respondent No. 1 – Sunworld Residency Pvt. Ltd. [*hereinafter, "**Sunworld**"*] is a Real Estate Developer, which had undertaken construction

of the Group Housing Society - 'Sunworld Arista' in Sector 168, Noida, U.P. Petitioner No. 1 – Priyanka Taksh Sood and her late husband Shri Taksh Krishna Dass [*hereinafter collectively referred to as* the "***Allottees***"] were joint allottees of Flat No. T-1/1701, 174th Floor, Tower-1, (super built-up area admeasuring approximately 2100 square ft.), Sunworld Arista, Sector 168, Noida, U.P. [*hereinafter*, "***subject flat***"]. Shri Taksh Krishna Dass passed away on 20th April, 2021 and is being represented by his legal heirs *viz.* Petitioner No. 2 (his mother), 3 and 4 (his minor son and daughter respectively). Respondent No. 2 is ICICI Bank Limited which has granted loan to the Allotees under the agreement, referred to hereinafter.

3. The parties entered into the following agreements, all dated 27th July 2015:

(i) 'Flat Buyer Agreement' executed between the Allottees and Sunworld;

(ii) 'Supplementary Agreement' executed between the Allottees and Sunworld;

(iii) 'Tripartite Housing Loan Agreement' between the Allottees, Sunworld and Respondent No. 2.

4. The Petitioners state that all the afore-noted agreements are interlinked, and, when read together, reflect the complete understanding between the parties. It is further stated that in terms of the Tripartite Housing Loan Agreement, ICICI Bank sanctioned a loan of Rs. 1,02,72,000/- on 28th August, 2015, payable over 240 months, subject to terms and conditions of the other agreements [*hereinafter*, "***bank loan***"].

5. Further, the first recital to the Supplementary Agreement notes that the same is in continuation of the Flat Buyer Agreement and reads as follows:

> *"This Supplementary Agreement is made and executed at Noida on this Day of 27th day of July 2015, in continuation of Builder Buyer Agreement dated Day of 27th July, 2015."*

THE DISPUTE

6. As per Clause 7 of the Supplementary Agreement, the Allottees and Sunworld agreed to a lock-in period of 24 months which prohibited Petitioners from withdrawing/ surrendering/ terminating/ cancelling the Flat Buyer Agreement from the date of disbursement of the bank loan. On 27th April, 2017, the Allottees opted to cancel the allotment by sending an intimation as contemplated under Clause 10 of the Supplementary Agreement and surrendered the subject flat, requesting Sunworld to refund an amount of Rs. 22,84,812/-. Petitioners rely upon Clause 8 of the Supplementary Agreement and contend that in terms thereof, since the Allottees exercised their option to cancel the allotment, the surviving obligations under the Supplementary Agreement fall upon Sunworld. They contend that Sunworld has failed to refund the amounts which are due to the Petitioners under the abovesaid contracts, and has also failed to settle the loan account with ICICI Bank.

7. Since disputes have arisen, Allottees seek recourse to the alternate dispute resolution mechanism envisaged under Clause 72 of the Flat Buyer

Agreement, which provides as under:

> *"All or any disputes arising out of or touching upon or in relation to the terms or this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion and mediation before CREDAI failing which the same shall be adjudicated upon and settled through Arbitration by the sole Arbitrator. The arbitration shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments/ modifications thereto for the time being in force. The Arbitration proceedings shall be held at an appropriate location in New Delhi or at Noida by the Sole Arbitrator who shall be appointed by the Director of the developer and whose decision shall be final and binding upon the Parties. The Allottee shall not raise any objection on the appointment of sole Arbitrator by the Developer. The Allottee hereby confirms and agrees that he/she shall have no objection to this appointment even if the person so appointed as the sole Arbitrator, is an employee or advocate of the Developer or is otherwise connected to the Developer and the Allottee confirms that notwithstanding Such relationship/connection, the Allottee shall have no doubts or objections to the independence or impartiality of the said sole Arbitrator merely on aforesaid grounds. The fee shall be shared equally between the parties. The arbitrator so appointed shall decide the issue between the parties as per the terms of the present agreement."*

8. Mr. Amol Sinha, counsel for Sunworld, does not dispute the existence of the afore-noted Agreements or the existence of the arbitration clause contained therein, but disputes the maintainability of the present petition on the following grounds:

8.1. There is no dispute between the parties, as the subject flat is ready for delivery and Sunworld has already offered possession thereof to the Petitioners on 13th January 2021, and subsequently sent a reminder on 19th May 2021. However, no response has been received from the Petitioners.

8.2. The Flat Buyer Agreement, containing the arbitration clause is not duly stamped as per Section 33 and 35 of the Stamp Act, 1899, and thus it is not enforceable till such time requisite stamp duty is paid.

8.3. Further, without prejudice, he contends that since Sunworld is registered with the Real Estate Regulatory Authority, District Gautam Buddha Nagar, Uttar Pradesh, in terms of Sections 88 and 89 of Real

Estate (Regulation and Development) Act, 2016 [*hereinafter*, "***RERA Act***"], jurisdiction for the disputes urged would lie with the UP RERA. He emphasises that RERA Act is a special legislation, enacted specifically for social welfare with a public policy objective, wherein homebuyers were given specific remedy. Thus, RERA's jurisdiction cannot be excluded and the dispute urged by the Petitioners cannot be referred to arbitration. Reliance in this regard is placed upon Section 79 of the RERA Act, to contend that the civil court's jurisdiction to entertain a suit or proceeding would be barred in respect of any matter which the Authority (in this case, the UP RERA) is empowered to determine under the said Act.

9. The existence of the agreements not being in dispute, together with the fact that disputes have arisen – requires this Court to refer the parties to arbitration. However, since an objection regarding maintainability has been raised, a *prima facie* view needs to be expressed thereon.

10. On a query of the Court as to whether the Authority under RERA would be empowered to adjudicate the claim for recovery of the amount as claimed by Petitioners, Mr. Sinha replies in the affirmative and relies upon Section 34(f)[1] along with Sections 88 and 89 of the RERA Act. In support of his submission, reliance is placed on ***Gujarat Urja Vikas Nigam Limited v.***

[1] Section 34 : Functions of Authority. —
The functions of the Authority shall include —
(a) to (e) [xx … xx … xx]
(f) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder;

Essar Power Limited.[2]

11. In rejoinder, the objection of bar under RERA Act is countered by the counsel for the Petitioner by relying upon the decision of the High Court of Patna in ***Bihar Home Developers and Builders v. Narendra Prasad Gupta***,[3] wherein the court had rejected a similar plea.

ANALYSIS

12. Although this judgment was dictated to completion in open court on the date of hearing itself, subsequent research has shown a deeper colour to the legal debate arising herefrom, which, the undersigned deems appropriate to include herein for the sake of taking a complete conspectus of the issue. Accordingly, the analysis has been refined in-chamber.

13. The Court has considered the arguments advanced by the parties. There are three overarching objections raised by the Respondent, *viz.* – (a) non-existence of disputes, (b) deficiency of stamp duty, and (c) non-maintainability of petition due to alternate remedy under the RERA Act. These objections are dealt hereinafter in seriatim.

(a) Non-existence of disputes

14. The existence of disputes is purely a question of fact, which this court

[2] (2008) 4 SCC 755.
[3] 2021 SCC OnLine Pat. 1355.

cannot adjudicate under Section 11 of the A&C Act. In view of the legislative mandate contained in Section 11(6A) of the A&C Act, the scope of enquiry at this stage is limited and the court is only required to examine the existence of the arbitration agreement. Whether the Allottees are entitled to refund or not is a question that has to be adjudicated in arbitration. There is thus no merit in this ground.

(b) Deficiency of Stamp Duty

15. As regards the objection *qua* deficiency of stamp duty, it must be noted that, first and foremost, the pleadings on this issue are vague and unspecific. Sunworld has failed to make a case as to how the Agreement is not properly stamped. No clause has been shown to allege that payment of stamp duty was the obligation of the allottee. Pertinently, the Flat Buyer Agreement and the Supplementary Agreements were prepared and drafted by Sunworld itself. No document has been produced to show that Sunworld ever called upon the Allottees to pay any stamp duty, and now for the first time it is alleged that the document is deficient in stamp duty. That said, this objection cannot be a ground to reject the petition. In a recent decision of the Supreme Court in ***InterContinental Hotels Group (India) Pvt. Ltd. v. Waterline Hotels Pvt. Ltd.***,[4] the Court, conscious that the question of stamp duty is pending adjudication before a larger bench, has observed as under:

> *"22. Although we agree that there is a need to constitute a larger Bench to settle the jurisprudence, we are also cognizant of time-sensitivity when dealing with arbitration issues. All these matters are still at a pre-appointment stage, and we cannot leave them hanging until the larger Bench settles the issue. In view of the same, this Court – until the larger Bench decides on the interplay between Sections 11(6) and 16 – should ensure that*

[4] 2022 SCC OnLine SC 83.

arbitrations are carried on, unless the issue before the Court patently indicates existence of deadwood."

16. A similar view has also been adopted by the Bombay High Court in 2021,[5] and again in 2022.[6] Further, a coordinate bench of this court, this year, too, in similar circumstances wherein such a plea was advanced, has rejected the plea and referred the parties to arbitration.[7]

17. In such circumstances, the objection of deficiency of stamp duty, too, is not sufficient to dissuade this court from appointing an arbitrator.

(C) ADJUDICATION OF DISPUTES UNDER RERA ACT

18. Next, in order to determine the maintainability of the present petition, we will have to examine the interplay between the RERA Act and the A&C Act.

(i) Whether the matter concerns rights in rem and is thus non-arbitrable?

19. The dispute herein does not fall into the category of cases which have been recognized as non-arbitrable in ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Ors***.[8] The four-fold test of non-arbitrability laid down in ***Vidya Drolia and Others v. Durga Trading Corporation,***[9] remains unfulfilled in the facts of the instant case.[10] The claims for refund of monies,

[5] *Vivek Mehta & Anr. KaRRs Designs & Developments & Ors.*, 2019 SCC OnLine Bom 10634.
[6] *Pigments & Allieds Vs. Carboline (India) Pvt. Ltd. and Anr.*, MANU/ MH/ 0775/ 2022
[7] *Parsvnath Developers Ltd. v. Future Retail Ltd.*, 2022 SCC OnLine Del 1017.
[8] (2011) 5 SCC 532.
[9] (2021) 2 SCC 1.
[10] Four-fold test of arbitrability propounded in para 45 of ***Vidya Drolia and Others v. Durga Trading Corporation***, (2021) 2 SCC 1, is as follows:-

arise from cancellation of allotment under the Flat Buyer Agreement and thus relate to rights *in personam*, which are amenable to arbitration. No issue of *in rem* has been put forth by either side. Moreover, in ***Vidya Drolia*** (*supra*), the Supreme Court has clarified that even - "*Disputes relating to subordinate rights in personam arising from rights in rem are considered to be arbitrable*." Besides, no function of the Authority under Section 34 of the RERA Act is impinged as well if such claims are referred to arbitration.

(ii) <u>*Kompetenz Kompetenz*</u>

20. Under the scheme of A&C Act, an arbitrator is empowered to determine its jurisdiction under Section 16, which enshrines the *kompetenz kompetenz* principle. At this pre-referral stage, the Court is to apply *prima facie* standards to refuse a referral under Section 11 altogether. This is also envisaged under the dicta of the Supreme Court in ***Vidya Drolia*** *(supra).* Thus, the remedy of approaching the Tribunal to rule on its jurisdiction is always available to the Respondent.

(iii) <u>*Generalia specialibus non derogant*</u>

That said, since the Respondent has raised a jurisdictional objection, it becomes imperative to examine the relevant provisions of the RERA Act.

---

(1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

(2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;

(3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and

(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s)."

The RERA Act is a special law enacted to aid homeowners and regulate the ailments plaguing the real estate sector. The sections invoked by the Respondent to oust the jurisdiction of this court under Section 11 of the A&C Act, are as under:

> "***Section 79 - Bar of Jurisdiction:***
>
> *No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.*
>
> ***Section 88 - Application of other laws not barred:***
>
> *The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.*
>
> ***Section 89 - Act to have overriding effect:***
>
> *The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force."*

21. The afore-said provisions are not unique to RERA Act and similar provisions are found in many other special laws. A quick search instantaneously reveals that Section 79 is *pari materia* to - Section 41 of the Prevention of Money Laundering Act, 2002; Section 61 of the Information Technology Act, 2000; Section 61 of the Competition Act, 2002; and Section 15Y of the Securities and Exchange Board of India Act, 1992. Section 88 of RERA is *pari materia* to - Section 3 of the Consumer Protection Act, 1986; Section 100 of the Consumer Protection Act, 2019; and Section 62 of the Competition Act, 2002. Likewise, Section 89 is *pari materia* to - Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993; Section 60 of the Competition Act, 2002; and Section 81 of the Information Technology Act, 2000, amongst others.

22. For this reason, this court deemed it fit to delve into certain decisions where a similar question as to maintainability of a petition, in light of a special legislation in place, was raised where such *pari materia* provisions were interpreted.

23. The latin maxim '*generalia specialibus non derogant*' governs the issue. For statutory construction, it means that "*for the purposes of interpretation of two statutes in apparent conflict, the provisions of a general statute must yield to those of a special one*."[11] This was explained by the Supreme Court in ***Gobind Sugar Mills Ltd. v. State of Bihar***,[12] as follows:

> *"… while determining the question whether a statute is a general or a special one, focus must be on the principal subject-matter coupled with a particular perspective with reference to the intendment of the Act. With this basic principle in mind, the provisions must be examined to find out whether it is possible to construe harmoniously the two provisions. If it is not possible then an effort will have to be made to ascertain whether the legislature had intended to accord a special treatment vis-à-vis the general entries and a further endeavour will have to be made to find out whether the specific provision excludes the applicability of the general ones. Once we come to the conclusion that intention of the legislation is to exclude the general provision then the rule "general provision should yield to special provision" is squarely attracted."*

24. Keeping the aforenoted rule of construction in mind, the question to be answered is whether, relying upon provisions of RERA Act, the jurisdiction of the civil court or arbitral tribunal stands ousted. It cannot be disputed that in respect of a Section 11 appointment, the A&C Act is a general law and not a special law. Section 2(3) of the A&C Act expresses that Part I of this Act, "*shall not affect any other law for the time being in*

[11] ***R. v. Greenwood***, [1992] 7 O.R. (3d) 1.
[12] (1999) 7 SCC 76.

force by virtue of which certain disputes may not be referred to arbitration". Thus, if any law provides, either expressly or by necessary implication, that disputes specified therein cannot be submitted to arbitration, then, despite the *non obstante* provision of Section 5 of the A&C Act, Section 2(3) shall apply, and restrict the overriding effect of the A&C Act. In this regard, it has also been noted by the Supreme Court in ***Gujarat Urja*** (*supra*), as follows:

> *"28. Section 86(1)(f)* [of the Gujarat Electricity Industry (Reorganisation and Regulation) Act, 2003] *is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86(1)(f) shall apply in such a situation."*

25. This has also been approved by the subsequent three-Judge bench decisions of the Supreme Court in ***Hindustan Zinc Ltd. v. Ajmer Vidyut Vitran Nigam Ltd***,[13] ***NHAI v. Sayedabad Tea Company Ltd***.[14], and recently in 2021 in ***Chief General Manager (IPC) MP Power Trading Company Limited v. Narmada Equipment Pvt. Ltd.*** [15]

26. This Court has also examined how the courts have interpreted Section 3 of the Consumer Protection Act 1986. It is noted that in ***Secretary, Thirumurugan Cooperative Agricultural Credit Society v. M. Lalitha (dead) through L.Rs. and Ors.***,[16] the Supreme Court observed:

> *"12. As per Section 3 of the* [Consumer Protection] *Act* [1986], *as already stated above, the provisions of the Act shall be in addition to and not in derogation of any other provisions of any other law for the time being in force. Having due regard to the scheme of the Act and purpose sought to be achieved to protect the interest of the consumers*

[13] (2019) 17 SCC 825.
[14] (2020) 15 SCC 161.
[15] (2021) SCC Online SC 225.
[16] (2004) 1 SCC 305.

better, the provisions are to be interpreted broadly, positively and purposefully in the context of the present case to give meaning to additional/extended jurisdiction, particularly when Section 3 seeks to provide remedy under the Act in addition to other remedies provided under other Acts unless there is a clear bar."

27. Similarly, in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy and Anr.***,[17] in the context of the Seeds Act, 1966, the SC held as under:

"57. (…) There is no provision in that Act and the Rules framed thereunder for compensating the farmers, etc. who may suffer adversely due to loss of crop or deficient yield on account of defective seeds supplied by a person authorised to sell the seeds. That apart, there is nothing in the Seeds Act and the Rules which may give an indication that the provisions of the Consumer Protection Act are not available to the farmers who are otherwise covered by the wide definition of "consumer" under Section 2(1)(d) of the Consumer Protection Act. As a matter of fact, any attempt to exclude the farmers from the ambit of the Consumer Protection Act by implication will make that Act vulnerable to an attack of unconstitutionality on the ground of discrimination and there is no reason why the provisions of the Consumer Protection Act should be so interpreted."

28. In fact, it was noted in ***Fair Air Engineers v. NK Modi***,[18] that the Parliament was well-aware of the Arbitration Act, 1940 when the Consumer Protection Act, 1986 was enacted providing for additional remedy. It was noted as follows:

"15. Accordingly, it must be held that the provisions of the [Consumer Protection] *Act,* [1986] *are to be construed widely to give effect to the object and purpose of the Act. It is seen that Section 3 envisages that the provisions of the Act are in addition to and are not in derogation of any other law in force. It is true, as rightly contended by Shri Suri, that the words "in derogation of the provisions of any other law for the time being in force" would be given proper meaning and effect and if the complaint is not stayed and the parties are not relegated to the arbitration, the Act purports to operate in derogation of the provisions of the Arbitration Act. Prima facie, the contention appears to be plausible but on construction and conspectus of the provisions of the Act we think that the contention is not well founded. Parliament is aware of the provisions of the Arbitration Act and the Contract Act, 1872 and the consequential remedy available Under Section 9 of the Code of Civil Procedure, i.e., to avail of right of civil action in a competent court of civil jurisdiction. Nonetheless, the Act provides the additional remedy.*

16. It would, therefore, be clear that the legislature intended to provide a remedy in addition to the consentient arbitration which could be enforced under the Arbitration Act

[17] (2012) 2 SCC 506.
[18] (1996) 6 SCC 385.

or the civil action in a suit under the provisions of the Code of Civil Procedure. Thereby, as seen, Section 34 of the Act does not confer an automatic right nor create an automatic embargo on the exercise of the power by the judicial authority under the Act. It is a matter of discretion. Considered from this perspective, we hold that though the District Forum, State Commission and National Commission are judicial authorities, for the purpose of Section 34 of the Arbitration Act, in view of the object of the Act and by operation of Section 3 thereof, we are of the considered view that it would be appropriate that these forums created under the Act are at liberty to proceed with the matters in accordance with the provisions of the Act rather than relegating the parties to an arbitration proceedings pursuant to a contract entered into between the parties. The reason is that the Act intends to relieve the consumers of the cumbersome arbitration proceedings or civil action unless the forums on their own and on the peculiar facts and circumstances of a particular case, come to the conclusion that the appropriate forum for adjudication of the disputes would be otherwise those given in the Act."

29. Lastly, the Supreme Court, in ***Imperia Structures v. Anil Patni***,[19] juxtaposed the provisions of the Consumer Protection Act 1986 and the RERA Act. After holding that concurrent remedies are available under the 1986 Act, it then proceeded to examine what remedies are available to a flat allottee, in the following paras:

"22. Before we consider whether the provisions of the RERA Act have made any change in the legal position stated in the preceding paragraph, we may note that an allottee placed in circumstances similar to that of the Complainants, could have initiated following proceedings before the RERA Act came into force.

A) If he satisfied the requirements of being a "consumer" under the CP Act, he could have initiated proceedings under the CP Act in addition to normal civil remedies.

B) However, if he did not fulfil the requirements of being a "consumer", he could initiate and avail only normal civil remedies.

C) If the agreement with the developer or the builder provided for arbitration:

i) in cases covered under Clause 'B' hereinabove, he could initiate or could be called upon to invoke the remedies in arbitration.

ii) in cases covered under Clause 'A' hereinabove, in accordance with law laid down in Emaar MGF Ltd. and Anr. v. Aftab Singh, (2019) 12 SCC 751, he could still choose to proceed under the CP Act.

23. In terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the Promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the Project. Such right of an allottee is specifically made "without prejudice to any other remedy available

[19] (2020) 10 SCC 783.

to him". The right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed. (…)

24. It is, therefore, required to be considered whether the remedy so provided under the RERA Act to an allottee is the only and exclusive modality to raise a grievance and whether the provisions of the RERA Act bar consideration of the grievance of an allottee by other fora.

25. Section 79 of the RERA Act bars jurisdiction of a Civil Court to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered under the RERA Act to determine. Section 88 specifies that the provisions of the RERA Act would be in addition to and not in derogation of the provisions of any other law, while in terms of Section 89, the provisions of the RERA Act shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force.

26. On plain reading of Section 79 of the RERA Act, an allottee described in category (B) stated in paragraph 22 hereinabove, would stand barred from invoking the jurisdiction of a Civil Court. However, as regards the allottees who can be called "consumers" within the meaning of the CP Act, two questions would arise; a) whether the bar specified Under Section 79 of the RERA Act would apply to proceedings initiated under the provisions of the CP Act; and b) whether there is anything inconsistent in the provisions of the CP Act with that of the RERA Act.

xx … xx … xx

28. (…) Again, insofar as cases where such proceedings under the CP Act are initiated after the provisions of the RERA Act came into force, there is nothing in the RERA Act which bars such initiation. The absence of bar Under Section 79 to the initiation of proceedings before a fora which cannot be called a Civil Court and express saving Under Section 88 of the RERA Act, make the position quite clear. Further, Section 18 itself specifies that the remedy under said Section is "without prejudice to any other remedy available.

xx … xx … xx

30. (…) we must go by the purport of Section 18 of the RERA Act. Since it gives a right "without prejudice to any other remedy available", in effect, such other remedy is acknowledged and saved subject always to the applicability of Section 79.

31. At this stage, we may profitably refer to the decision in Pioneer Urban Land and Infrastructure Limited and Anr. v. Union of India and Anr. (2019) 8 SCC 416, where a bench of three Judges of this Court was called upon to consider the provisions of Insolvency and Bankruptcy Code, 2016, RERA Act and other legislations including the provisions of the CP Act. One of the conclusions arrived at by this Court was:

> *"100. 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 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."*

32. We, therefore, reject the submissions advanced by the Appellant and answer the questions raised in paragraph 26 hereinabove against the Appellant."

30. From the foregoing, there is no doubt in the mind of this Court that, giving a purposive interpretation to Sections 79, 88 and 89 of the RERA Act, there is no bar under the RERA Act from application of concurrent remedy under the A&C Act, and thus, there is no clash between the provisions of the RERA Act and the A&C Act, as the remedies available under the former are in addition to, and not in supersession of, the remedies available under the A&C Act.

(iv) *Doctrine of election of remedies.*

31. In the question of whether RERA ousts the jurisdiction of the civil court or of a private fora voluntarily chosen by the parties to adjudicate their disputes, courts are governed by the 'Doctrine of Election'. According to ***Snell's Principles of Equity*** (31st Ed., p. 119), the Doctrine of Election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election. The doctrine of election was discussed in ***A.P. State Financial Corporation v. M/s. GAR Re-rolling Corporation***,[20] as follows:

"15. The Doctrine of Election clearly suggests that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different. To hold otherwise may lead to injustice and inconsistent results…"

32. Even in ***IREO Grace Realtech Pvt. Ltd. v. Abhishek Khanna***,[21] the Supreme Court took a similar view:

[20] (1994) 2 SCC 647.
[21] (2021) 12 SCC 751.

> *"37.5. An allottee may elect or opt for one out 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.*
>
> *xx … xx … xx*
>
> *41. In Transcore v. Union of India, 2008 1 SCC 125, this Court considered the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) and the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDB Act), wherein it was held that there are three elements of election viz. existence of two or more remedies, inconsistencies between such remedies, and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply."*

33. The legislature intended to provide a remedy in addition to consentient arbitration which could be enforced under the A&C Act or the civil action in a suit under the provisions of the Code of Civil Procedure, 1908. The remedy available under the A&C Act is in addition to the remedies available under other statutes, and the availability of alternative remedies is not a bar to the entertaining of a petition filed under the A&C Act. [See: ***Imperia Structures*** *(supra)*, ***National Seeds*** *(supra)*, ***Fair Air*** *(supra)*, ***Skypak Couriers Ltd. v. Tata Chemicals***,[22] and ***Trans Mediterranean Airways v. Universal Exports***.[23]]

34. In ***Skypak Couriers***,[24] the court laid down as follows:

> *"Even if there exists an arbitration Clause in an agreement and a complaint is made by the consumer, in relation to a certain deficiency of service, then the existence of an arbitration Clause will not be a bar to the entertainment of the complaint by the Redressal Agency, constituted under the Consumer Protection Act, since the remedy provided under the Act is in addition to the provisions of any other law for the time being in force."*

[22] (2000) 5 SCC 294.
[23] (2011) 10 SC 316.
[24] (2000) 5 SCC 294.

35. Further clarity on this aspect was brought in by ***National Seeds (supra)*** in the following paragraph:

> *"66. The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Protection Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Protection Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the Arbitration and Conciliation Act, 1996. Moreover, the plain language of Section 3 of the Consumer Protection Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force."*

36. Recently, this position was clarified by the Supreme Court in ***Emaar MGF Ltd. and Anr. v. Aftab Singh***,[25] where a Section 8 application under the A&C Act was rejected by the court on account of the litigant having already chosen the forum of RERA. In this context, the Supreme Court made the following concluding remarks:

> *"55. We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration."*
>
> [Emphasis supplied]

37. In a similar vein, the Madras High Court too in November, 2021, in the case of ***Army Welfare Housing Corporation* v. *Col. R. Ganesan***,[26] took the same stance while rejecting an appeal arising from the dismissal of a Section 8 application by the Tamil Nadu RERA. Other factor which weighted with the court therein was the one-sidedness of arbitration rules, which is not applicable in the facts of the instant case as well.

---

[25] (2019) 12 SCC 751.
[26] MANU/TN/8243/2021.

38. From the foregoing, it is thus clear that the remedy available under the A&C Act is in addition to the remedies available under other special statutes and the availability of alternative remedies is not a bar to the entertaining of a petition filed under the A&C Act. But once elected, then the other remedy will not lie in respect of the same dispute. Hence, once a RERA proceeding is initiated, an application under Section 8 of the Act would not lie. However, in the instant case, Respondent has not initiated any proceeding under RERA, hence election of remedy of arbitration is not barred.

39. The counsel for Sunworld has relied upon the judgment of the Supreme Court in ***Gujarat Urja*** (*supra*) to oust the applicability of the A&C Act.[27] The decision has thus been examined closely by this Court. Therein, the question before the Supreme Court was whether the appointment of an arbitral tribunal by a High Court, under Section 11(5)&(6) of the A&C Act, ought to be struck down, considering the provisions of the Gujarat Electricity Industry (Reorganization and Regulation) Act, 2003 [*hereinafter*, '***GEI(RR) Act***']. The court relied on two relevant provisions of this Act - Section 158 (Arbitration), and Section 86 (Functions of State Commission), the latter of which, at sub-Section (1)(f), specifically provided that the State Commission shall adjudicate upon disputes which arise between licensing and generating companies, or refer the same to arbitration. Relying upon these provisions, Gujarat Urja contended that the exercise of power under Section 11(5)&(6) of the A&C Act by the High Court should be struck down as impermissible, on account of Section 86(1)(f) of the GEI(RR) Act being a special provision prevailing over a general one. The court therein agreed

[27] (2008) 4 SCC 755. [*See* paragraphs no. 32 to 37 and 51].

with this contention and struck down the same. Unlike the instant case, the special law in consideration therein contained specific provisions for appointment and conducting of arbitral proceedings, which weighted with the court. It was noted that, as a special law existed for appointing an arbitral tribunal to adjudicate the disputes between the parties, the general law of Section 11 of the A&C Act, which required the approaching of a high court, would not apply to such disputes. Hence, by implication, all other ways of appointment of an arbitrator are barred and only Section 86(1)(f) of the GEI(RR) Act prevailed. It was also argued by the Respondents therein that, upon a conjoined reading of Section 175 of the GEI(RR) Act, (which states that the provisions of the statute are in addition to and not in derogation of any other law), with Section 174 (which provides that the GEI(RR) Act will prevail over any other law), that the A&C Act would continue to apply regardless. The court decided that the two sections have to be read together to mean that inconsistency, if any, could be express as well as implied; and in the face of an arbitral appointment under Section 11(5) of the A&C Act, such inconsistency was implied on account of existence of Section 86 of the GEI(RR) Act.

40. This court is unconvinced as to the applicability of the aforementioned decision, because, in the instant case, the statute in question – i.e. RERA Act, does not contain a *pari materia* provision. Upon a comparison of the functions of both the authorities under the two acts, which involves a perusal of the functions of the RERA Authority as envisaged under Section 34 of the RERA Act, there is a conspicuous absence of a provision akin to Section Section 86(1)(f) of the GEI(RR) Act. There is no

provision in RERA for the authority to refer a matter to arbitration. Moreover, there is no provision for arbitration as was provided under Section 158 of the GEI(RR) Act. Thus, the circumstances in ***Gujarat Urja*** *(supra)*, in light of provisions which specifically called for arbitration mechanism, are conspicuously absent in the instant case. Even though both are special legislations, there is no commonality between the GEI(RR) Act and the RERA Act in this aspect. Hence, this court has no hesitation in taking the view that decision in ***Gujarat Urja*** *(supra)* is not applicable to the instant case.

41. On the other hand, this Court finds resonance in the view taken by the Patna High Court in ***Bihar Home Developers and Builders v. Narendra Prasad Gupta***.[28] Therein, upon an analysis of Sections 88 and 89 of the RERA Act, it has taken the view that the RERA Act is not inconsistent with the provisions of the A&C Act, under circumstances quite similar to the instant case. The Patna High Court held as follows:

> *"21. What further requires consideration is the factum of petitioner applying the authority constituted under the Real Estate (Regulation and Development) Act, 2016. Is it a valid ground or reasons sufficient enough to reject the instant application?*
>
> *22. The object and purpose of both the statutes are distinct and different, and there is nothing inconsistent or derogation therein. The Arbitration Act was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. Whereas the RERA Act was enacted to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to*

[28] 2021 SCC OnLine Pat 1355.

protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.

23. Section 88 thereof provides the provisions of this Act explicitly to be in addition to and not in derogation of the provisions of any other law, with the only limitation contained in Section 89 making it prevail over in any other consistent law. Reading of both the statutes do not make the Arbitration Act to be inconsistent with the provisions of the RERA Act, more so when Respondent no. 1 himself disputes its applicability for want of the jurisdictional issue.

24. In Management Committee of Montfort Senior Secondary School Vs. Vijay Kumar and Others, (2005) 7 SCC 472, the Hon'ble Apex Court dealt with the ambit and scope of the Delhi School Education Act, 1973 vis-à-vis the provisions of the Arbitration and Conciliation Act, 1996. The issue arose as to whether the Tribunal for the Arbitration Act can be said to be a judicial authority or not. Clarifying it not to be, the Court reiterated that the plaintiff is dominus litis having dominion over his Case. He is the person who has carriage and control of the action. In Case of conflict of jurisdiction, the choice ought to lie with him to choose the forum best suited unless there be the rule of law excluding access to a forum of his choice; permitting recourse to a forum is opposed to public policy; or would be an abuse of process of law. The Court reiterated its earlier principle laid down in Bank of India Vr. Lekhi Moni Das & Ors. (2000) 3 SCC 640 that as a general principle where two remedies are available under law, one of them not to be taken as operating in derogation of the other.

25. In M.D. Frozen Foods Exports Private Limited and Others Vrs. Hero Fincorp Limited (2017) 16 SCC 741 the Hon'ble Apex Court held that proceedings both under the Arbitration Act and the SARFAESI Act could continue simultaneously.

26. For the aforesaid reason, it cannot be said that petitioners' right is foreclosed in light of RERA Act; they had an equally, alternative and efficacious remedy of adjudication under the said Act; They waived of their right to invoke clause 17 for resolution of disputes through Arbitration; or that they elected not to enforce their statutory rights under the Arbitration Act.

42. In the facts of the instant case, the dispute is for refund of payment under the Flat Buyer Agreement. Upon a conjoined reading of Sections 88 and 89 of RERA Act, it clearly emerges that provisions of RERA Act would be in addition to, and not in derogation of, any other law, and that the

provisions of RERA Act would have effect notwithstanding anything inconsistent with any other law in force. This, *prima facie*, would not prejudice the Petitioner's remedy as available under the RERA Act. Section 18 of the RERA Act – titled '*Return of amount and compensation*' – itself specifies that remedy thereunder is without prejudice to "*any other*" remedy available.[29]

In the instant facts, this Court finds the view taken by the Patna High Court to be a correct analysis of the provisions of the RERA Act with respect to the A&C Act. The object and purpose of both the statutes is distinct, and the Court is unable to find anything inconsistent or in derogation therewith. Petitioner's claims are for recovery of the amount and they are exercising their remedy in terms of Clauses 7, 8 and 10 of the Supplementary Agreement. These questions, therefore, would be required to be adjudicated in terms of the Agreements between the parties.

(v) *Doctrine of clean hands*

[29] Section 18 reads as follows:
18. Return of amount and compensation.—(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—
(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,
he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:
Provided that where an allottee does not intend to withdraw from the project, 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.

43. Given that the Respondent itself made the Agreement, and does not deny the existence of an arbitration agreement governing disputes, no cogent reason for denial of reference is made out. The Respondent cannot be allowed to backtrack out of its own agreement. In fact, considering that the Petitioner is the aggrieved party, such interpretation has to be given which is not against such party. It is, and in fact, a delaying tactic on part of the Respondent, and also amounts to forum shopping.

44. In light of the foregoing discussion, the only conclusion possible is that the adjudication of this dispute is clearly arbitrable, and not barred by the existence of a concurrent remedy under the RERA Act.

WHETHER ICICI BANK CAN BE REFERRED TO ARBITRATION?

45. Next, we have to consider whether ICICI Bank can be referred to arbitration. The Allottees, at the time of booking a flat with Sunworld, took out a loan from ICICI, wherein along with the Flat Buyer Agreement, the Allottees also entered into the Tripartite Agreement on 27th July, 2015 with Sunworld and ICICI. Petitioners also have disputes with ICICI Bank arising from the said Tripartite Housing Loan Agreement – which, however, does not contain an arbitration agreement. The obligations under the said agreement are independent and have to be adjudicated in accordance with the terms and conditions contained therein. Thus, disputes arising from the Tripartite Agreement cannot be referred to arbitration.

46. At this juncture it must be recorded that ICICI Bank is impleaded as

Respondent No. 2, and has, despite service, not presented itself to explain its stand. It is only in rare circumstances where the Courts have referred non-signatories to arbitration. [See: ***Cheran Properties Limited v. Kasturi and Sons Limited***,[30] ***Chloro Controls India Private Limited v. Severn Trent Water Purification Inc.***,[31] ***Ameet Lalchand Shah & Ors. v. Rishabh Enterprises & Anr.***,[32] and ***Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan Power Ltd. and Anr***.[33]] It can be done, without their prior consent, in exceptional cases, where commonality of subject-matter and the circumstances of the dispute indicate that adjudication of such a dispute would not be possible without the presence of such non-signatory, but the court always has to be cautious in exercising the same.

47. That said, the court has also considered if ICICI Bank is a necessary party for adjudication of disputes under the Flat Buyer and Supplementary Agreements. The Tripartite Housing Loan Agreement, which has been placed on record by Petitioners, has been executed by both Sunworld and ICICI Bank. The Tripartite Housing Loan Agreement was also executed on the same date as the Flat Buyer Agreement and the Supplementary Agreement *i.e.,* 27th July, 2015. In terms of Clauses 7, 8 and 10 of the Supplementary Agreement, Sunworld had undertaken certain obligations towards ICICI Bank, which read as under:

> *"7. It is hereby agreed by the Allottee that subsequent to the execution of the present agreement, the Allottee cannot create any third party interest or transfer or withdraw or terminate the Builder Buyer Agreement dated 27th July, 2015 and the present supplementary agreement for 24 months from the date of first disbursement of "Bank*

[30] (2018) 16 SCC 413.
[31] (2013) 1 SCC 641.
[32] (2018) 15 SCC 678.
[33] 281 (2021) DLT 246.

Loan Amount" and the said period shall be termed as a "Lock-in period". It is however, agreed between both the parties that the Allottee has an option to cancel its booking after completion of said lock-in period i.e. on the completion of 24 months from the date of bank loan disbursement. In case the Allotee opts to cancel his/her apartment on the completion of 24 months by sending intimation as per Clause 9 of the present agreement, the Developer shall refund the entire booking amount of Rs. 1367637.00 (i.e. 10% of the Total Consideration of the Apartment including service tax paid by the Allotee) with an additional amount of Rs. 917175.00 totaling to Rs. 2284812.00 within a period of 30 days after completion of 24 months. In case there is a delay of above mentioned payment to Allottee beyond 30 days, the Developer shall be liable to pay interest at the rate of 18% per annum on the abovementioned amount for the delay period till the date of payment.

8. It is agreed between the parties that if the Developer fails to settle the Bank Loan Amount with the Bank within a period of 60 days from the date of intimation of cancellation by Allottee as per Clause 10 of the Agreement, the Developer undertakes to pay subsequent EMI's to the Bank after expiry of 24 months on behalf of the Allotee till the Developer settles the Loan Account with the Bank. It is however, agreed by the Allotee that the Developer shall pay subsequent EMI only, if the Allottee informs the Developer 60 days prior to the completion of 24 months and there is no default on part of Allotee of any terms and conditions as stipulated herein and the Allotee provides all relevant documents within time as desired by Bank or Developer during the process of cancellation of said Apartment.

10. It is agreed by the Allotee that in order to exercise its option of cancellation of the Apartment on completion of 24 months, the Allotee shall give a written intimation to the Developer 60 days prior to the completion of 24 months. However, in case the Allottee fails to give written intimation to the Developer 60 days prior to the expiry of 24 months, the Allotee shall be deemed to retain the Apartment. In case the Allottee opts for the option for cancellation, the Developer shall settle the loan Account of concerned Bank including service tax for the said Apartment by making the payment of Bank Loan Amount due on the date."

48. Further, the finance facility extended by ICICI Bank was being repaid by Petitioners as per the understanding between parties *qua* the loan amount disbursed by ICICI Bank, after the amount was disbursed after deducting pre-EMIs for two years. Thus, it appears that this is a composite transaction which would require the presence of ICICI Bank. Accordingly, considering the composite nature of the transaction and the fact that the subject matter of the present dispute *viz.* the flat in question, is common *qua* the three agreements, ICICI Bank is considered to be a necessary party and is also

referred to arbitration, failing which it may result in adjudication that would prejudice them. It is however, clarified that disputes pertaining to the Tripartite Housing Loan Agreement, for which an independent action is stated to have been taken by ICICI Bank under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, have not been referred to arbitration and would not be impacted by way of the instant order. The said remedies by ICICI Bank would continue irrespective of the arbitration proceedings.

49. In view of the above, the present petition is allowed, and accordingly, Mr. Ashwini Mata, Senior Advocate [Contact No.: +91 9810074466] is appointed as the Sole Arbitrator to adjudicate the disputes that are stated to have arisen between the parties out of the Flat Buyer Agreement and the Supplementary Agreement, both dated 27th July, 2015.

50. The parties are directed to appear before the Sole Arbitrator as and when notified. This is subject to the Arbitrator making necessary disclosure(s) under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

51. The Arbitrator appointed by the Court shall fix their fee in consultation with counsel for the parties.

52. It is clarified that the Court has not examined any of the claims in dispute, and all rights and contentions of the parties, on merits, are left open. The parties shall be free to raise their claims/ counter-claims before the

Arbitrator in accordance with law.

53. With the consent of the parties, the Arbitrator shall conduct the arbitration proceedings under the aegis of Delhi International Arbitration Centre, and in accordance with its Rules.

54. The petition is disposed of in the above terms.

SANJEEV NARULA, J

APRIL 19, 2022
nd
[corrected and released on 9th May, 2022]