

GAHC010133652023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Arb.P./21/2023

PALLAB GHOSH
S/O- MR. SUBIR KUMAR GHOSH, R/O- QUARTER NO. F-77, IIT CAMPUS,
P.O. IIT GUWAHATI, P.S.- AMINGAON, DISTRICT KAMRUP, GUWAHATI, PIN-
781039, ASSAM

2: SMTI. KAKALI ROY
D/O- MR. TARAPADA ROY
R/O- QUARTER NO. F-77
IIT CAMPUS
P.O. IIT GUWAHATI
P.S. AMINGAON
DIST. KAMRUP
GUWAHATI
PIN- 781309
ASSA

VERSUS

SIMPLEX INFRASTRUCTURES LIMITED AND ANR
REPRESENTED BY SRI SUDIP DASH, S/O- SRI TARAPADA DASH, SIMPLEX
HOUSE, 27 SHAKESPEARE SARANI, KOLKATA-700017.

2:GUWAHATI METROPOLITAN DEVELOPMENT AUTHORITY
BHANGAGARH
GUWAHATI
PIN 781005
ASSA

BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

Advocate for the petitioners : Mr. S. Mitra, Advocate

For the respondents : Mr. R.J. Das, Advocate

Dates of hearing : 09.05.2024, 28.05.2024

Date of Judgment : 13.06.2024

JUDGMENT AND ORDER (CAV)

- 1.** Heard Mr. S. Mitra, learned counsel for the petitioners and Mr. R.J. Das, learned counsel for the respondent No.1.
- 2.** This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act') for appointment of an Arbitrator, inasmuch as, in terms of the Arbitration Clause executed between the parties, an Arbitral Tribunal made up of 3 Arbitrators were to be constituted.
- 3.** The petitioners case is that the petitioners have appointed an Arbitrator. However, despite receipt of the Arbitration Notice from the petitioners by the respondents, the respondents have till date not appointed their Arbitrator. The claim of the petitioners in this case is only with respect to the interest on the amount that has been paid by them for their apartment, from 21.12.2020 till handing over possession of the apartment.

4. The facts of the case is that the petitioners and the respondents executed an agreement for sale of an apartment on 24.01.2017 and as per the terms and conditions of the said agreement, the respondent No.1 was to deliver possession of the apartment on 20.12.2020. The petitioners had accordingly paid 95% of the total consideration amount of the apartment and the remaining 5% was to be paid at the time of handing over possession of the said apartment. However, as the apartment was not been handed over to the petitioners, the petitioners are claiming interest as per the provisions of Section 18 of the Real Estate (Regulation and Development) Act, hereinafter to as the RERA Act and Clause 11.3 of the Agreement.

5. The petitioners' counsel submits that in terms of the judgment of the Delhi High Court in the case of ***Priyanka Taksh Sood & Ors. Vs. Sunworld Residency Pvt. Ltd.***, reported in ***2022 SCC OnLine Del. 4717***, the Delhi High Court has held that adjudication of a dispute in terms of the Arbitral Clause between the parties was not barred by the existence of a concurrent remedy under the RERA Act. The petitioners have also relied upon the judgment of the Hon'ble Supreme Court in the case of ***Smt. M. Hemalatha Devi & Ors. Vs. B. Udayasri***, reported in ***2023 SCC OnLine SC 1686***, where the Supreme Court has referred to another of it's judgments, i.e., ***M/S Emaar MGF Land Limited Vs. Aftab Singh***, reported in ***(2019) 12 SCC 751*** and held that an option is left to the party, to choose between a public or private forum and the party may choose to go for a private forum. Para 63 of the judgment, states as follows-

“63. We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statues 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."

6. The petitioners' counsel submits that in the case of ***Imperia Structures Ltd. Vs. Anil Patni & Anr.***, reported in ***(2020) 10 SCC 783***, the Supreme Court held that merely because the registration of the Project under the RERA Act was valid till a certain date, did not mean that the entitlement of the allottees concerned, to maintain an action stands differed in terms of the extension given to the validity of the registration of the builder under the RERA Act, 2016. He submits that in terms of the said judgment, the period, for the purpose of Section 18 of the RERA Act, has to be reckoned in terms of the agreement and not the registration under the RERA Act. He submits that in spite of Section 71 of the RERA Act, other Foras can be invoked for resolving the dispute between the parties, such as under the Arbitration Act, in view of absence of a bar under Section 79 of the RERA Act.

7. The petitioners' counsel also submits that in terms of the judgment of the Patna High Court, in the case of ***Bihar Home Developers and Builders, through its authorised and registered partner Sh. Rajiv Ranjan Kumar vs. Narendra Prasad Gupta***, reported in ***2021 SCC OnLine Pat 1355***, the arbitration clause can be invoked in a case of this nature, as the Patna High Court has found that the Arbitration Act is not inconsistent with the provisions of the RERA Act.

8. He also submits that in the case of ***Vidya Drolia & Ors. Vs. Durga Trading Corporation***, reported in ***(2021) 2 SCC 1***, the Supreme Court has held that disputes which are to be adjudicated by the DRT, under the DRT Act

are not arbitral, as the DRT Act is a complete Code in itself, insofar as recovery of debt is concerned. He submits that the decision in the ***Vidya Drolia (supra)*** was only in relation to Chapter-V of the DRT Act, especially relating to Section 25 & 29 of the DRT Act. On the other hand, the proviso to Section 18(1)(b) of the RERA Act shows that the payment of interest by a promoter, due to delay in handing over possession of an apartment, can also be decided by way of an arbitration. Section 88 states that the provisions of the RERA Act shall be in addition to, and not derogation of, the provisions of any other law for the time being in force. He submits that the power to adjudicate the dispute between the parties under Section 71 of the RERA Act is akin to section 19(22) of the DRT Act. However, a reading of Section 18 & 88 of the RERA Act shows that the jurisdiction of the Arbitration Act, for resolving the dispute regarding payment of interest, for the delay in handing over the apartment is not ousted. As there is an arbitration clause between the parties and as the dispute is arbitrable, the petition should be allowed.

9. On the other hand, the learned counsel for the respondents submits that in terms of the judgment of the Hon'ble Supreme Court in ***Vidya Drolia (supra)*** at Para 55 to 58 and 78 and 79, the doctrine of election to select arbitration as a dispute resolution mechanism by mutual agreement is available, only if the law accepts existence of arbitration as an alternative remedy and freedom to choose is available. Further, the Supreme Court in *Vidya Drolia (supra)* had held that disputes which are to be adjudicated by the DRT under the DRT Act are not arbitral, as the DRT Act was a complete code by itself, so far as recovery of debt was concerned. He thus submits that the same analogy will be applicable in respect of the RERA Act.

10. The learned counsel for the respondents has also relied upon the judgment of the Supreme Court in the case of ***NTPC Ltd. Vs. SPML Infra Ltd.***, reported in **(2023) 9 SCC 385**, at Para 25 to 28, wherein the Hon'ble Supreme Court has held that the first enquiry to be made in respect of 11(6A) of the 1996 Act would be with regard to the existence and validity of an arbitration agreement and secondly, as to whether the dispute was arbitrable.

11. The learned counsel for the respondents submits that under Section 35 of the RERA Act, the authority who can decide the dispute raised by the petitioner, can call for information and conduct investigation which would not be possible in an arbitral proceeding. Further, under Chapter-VIII of the RERA Act, if any promoter does not comply with the orders, decisions or directions issued by an authority, the authority can impose penalties which would not be possible in the case of an arbitral proceeding. As the orders passed under the RERA Act can be enforced under the RERA Act, the petitioner should avail the remedy provided under the RERA Act.

The counsel for the respondents further submits that the award made by an Arbitral Tribunal cannot be implemented or enforced as is possible to be done in terms of the RERA Act. He submits that Chapter-VIII of the RERA Act comprising of Sections 59 to 72 provides for the authority to prescribe punishment and penalties for failure to comply with the orders of the authority. He submits that in terms of the judgment of the Supreme Court in ***Vidya Drolia (supra)***, where the remedies beyond the ordinary domain of the fora is prescribed, disputes become non arbitral and as such, the right fora to decide the present dispute would be the RERA Act. He further submits that as a remedy is made available under the RERA Act, which is not available under the

Arbitration and Conciliation Act, the petitioners' attempt to bracket the RERA Act and the Arbitration and Conciliation Act in the same boat does not hold any water. He further submits that since the registration of the respondent no.1 was extended by the RERA Authorities, the dispute raised by the petitioner is non-arbitrable.

12. I have heard the learned counsels for the parties.

13. The question to be decided is whether there is any bar to invoke the arbitration clause in the contract agreement, for claiming payment of interest, for not handing over possession of the apartment on time, in terms of the 3rd Schedule Part-III of the Agreement dated 24.01.2017, when a statutory remedy is available under the RERA Act.

14. In the case of ***Priyanka Taksh Sood (supra)*** the Delhi High Court has held that adjudication of a dispute in terms of an Arbitral Clause between the parties was not barred, because of the existence of a concurrent remedy under the RERA Act. Similar is the decision of the Patna High Court.

15. In the case of ***Imperia Structures Ltd. (supra)***, the Supreme Court has held that in terms of Section 18 of the RERA Act, if a promoter fails to give possession of an apartment by the dates 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 to him. The proviso to Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the project. In that case he

is entitled to and must be paid interest for every month of delay, till the handing over possession of the apartment/house etc. It is upto the allottee to proceed either under Section 18(1) or under proviso to Section 18(1) of the RERA Act. The Supreme Court was thus to decide whether the remedy provided under Section 18 of the RERA Act to an allottee was only an exclusive modality to raise grievance and whether the provisions of the RERA Act barred consideration of the grievance of an allottee by other Fora, i.e under the Consumer Protection Act. The Supreme Court held that under Section 79 of the RERA Act, which bars the jurisdiction of a Civil Court to entertain any suit or proceeding in respect of any matter which the Authority under the RERA Act can determine, does not bar the Consumer Forum to entertain any complaint with regard to the issue raised under Section 18 of the RERA Act. The absence of a bar under Section 79 of the RERA Act, to the initiation of proceedings before a fora which cannot be called a civil court and the express savings clause under Section 88 of the RERA Act, makes the position quite clear. Further, Section 18 itself specifies that the remedy under the said section is "without prejudice to any other remedy available". The Supreme Court thus held that the preliminary intent was clear, that a choice or discretion was given to the allottee, whether he wishes to initiate appropriate proceedings under the CP Act or to file an application under the RERA Act.

16. In the case of ***Pioneer Urban Land & Infrastructure Ltd. vs. Union of India*** reported in ***(2019) 8 SCC 416***, the Supreme Court was to consider the provisions of the Insolvency and Bankruptcy Code, 2016 (the Code in short) and the RERA Act and other legislations, including the provisions of the Consumer Protection Act. One of the conclusions arrived at by the Supreme Court was that the RERA Act was to be read harmoniously with the Insolvency

and Bankruptcy Code, 2016. It is only in the event of conflict that the Code will prevail over RERA Act. It further held that 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, RERA Act as well as the triggering of the Code.

17. The Supreme Court in ***Imperia Structures Ltd. (supra)*** held that the allottees under the RERA Act, who are called consumers within the meaning of CP Act, could initiate proceedings under either of the two Act.

18. In the case of ***Management Committee of Montfort Senior Secondary School vs. Shri Vijay Kumar & Ors.***, reported in ***(2005) 7 SCC 472***, the Supreme Court was dealing with the ambit and scope of the Delhi School Education Act, 1973 vis-a-vis the provisions of the Arbitration and Conciliation Act, 1996. The Supreme Court held that in case of conflict of jurisdiction, the choice ought to lie with the plaintiff to choose the forum best suited to him, unless there was a rule excluding access to a forum of his choice.

19. In the case of ***M. D. Frozen Foods Exports Pvt. Ltd vs. Hero Fincorp Ltd.***, reported in ***(2017) 16 SCC 741***, the Supreme Court held that the proceedings both under the Arbitration Act and the SERFAESI Act could continue simultaneously.

20. Sections 18, 71 and 88 of the RERA Act are re-produced hereinbelow 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.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

71. Power to adjudicate.- *(1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of*

being heard:

Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986[68 of 1986], on or before the commencement of this Act, 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 this Act.

(2) The application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application:

Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections.

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."*

21. In the case of ***Imperia Structures Ltd. (supra)***, the Supreme Court has held that Section 88 of the RERA Act 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. The Supreme Court further held that under Section 79 of the RERA Act, consumers would stand barred from invoking the jurisdiction of a civil court. However, with regard to consumers within the meaning of the Consumer Protection Act, Section 79 did not bar the Consumer Protection Forum to entertain any complaint. It further held that the proviso to Section 71(1) of the RERA Act gives a right or option to a complainant to withdraw a proceedings under the Consumer Protection Act with the permission of the Forum or Commission and file an appropriate application before the adjudicating officer under the RERA Act. The proviso to Section 71(1) of the RERA Act does not statutorily force a complainant to withdraw a complaint or transfer the said pending proceeding from the Forum or Commission to an authority under the RERA Act.

22. The Supreme Court in ***Imperia Structures Ltd. (supra)*** at para 26 and 32 held as follows-

“26. 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.

32. 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 the said section

is "without prejudice to any other remedy available". Thus, the parliamentary intent is clear that a choice or discretion is given to the allottee whether he wishes to initiate appropriate proceedings under the CP Act or file an application under the RERA Act."

23. In the case of ***Bihar Home Developers and Builders (supra)*** upon analysis of Sections 88 and 89 of the RERA Act has held that the RERA Act is not inconsistent with the provisions of the Arbitration Act. It has held at paragraph-22, 23 & 26 as follows :

"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 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.

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."*

24. In the case of ***National Seeds Corporation Limited vs. M. Madhusudhan Reddy***, reported in ***(2012) 2 SCC 506***, the Supreme Court has held that the remedy 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. It further held that the language of Section 3 of the Consumer Protection Act made it clear that the remedy available in that Act is an addition to and not in derogation of the provisions of any other law for the time being in force.

25. In the case of ***Emaar MGF Land Ltd. vs. Aftab Singh***, reported in ***(2019) 12 SCC 751***, the Supreme Court was seized of an issue where an application under Section 8 of the Arbitration Act have been rejected by the Court as the litigant had already chosen the forum under the RERA Act. In this contents, the Supreme Court had in paragraph-55 as follows :

"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."

26. In the case of ***A.P. State Financial Corporation vs. GAR Re-rolling Corporation***, reported in ***(1994) 2 SCC 647***, the Supreme Court has held that 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.”

27. As can be seen from the above, Section 79 of the RERA Act bars the invocation of the jurisdiction of a civil court. However, an Arbitral Tribunal is not a civil court, though it is a judicial authority.

28. In the case of ***Malay Kumar Ganguly Vs. Sukumar Mukherjee***, reported in ***(2009) 9 SCC 221***, the Supreme Court has held that the proceedings before the National Commission are although judicial proceedings, but at the same time it is not a civil court within the meaning of the provisions of the Code of Civil Procedure. It may have all the trappings of the Civil Court, but yet it cannot be called a civil court.

29. In the case of ***Ashok Palav Coop. Housing Society Ltd. Vs. Pankaj Bhagubhai Desain and Anr***, reported in ***2022 SCC OnLine Bom 10229***, the Bombay High Court, by considering the decision of the Supreme Court in ***Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation***, reported in ***(2009) 8 SCC 646***, has held that although an Arbitral Tribunal has some trappings of the Court, the Arbitral Tribunal is not a civil court within the meaning and purview of the Code of Civil Procedure, so that the bar to arbitral proceedings can be read under Section 79

of the RERA Act.

30. In *Nahar Industrial Enterprises Ltd. (supra)*, the Supreme Court has held that all "Courts" are "Tribunals", but all "Tribunals" are not Courts. Similarly, all "Civil Courts" are "Courts" but all "Courts" are not "Civil Courts." It further held that the Tribunal, which is authorized to take evidence of witnesses would ordinarily be held to be a "Court" within the meaning of Section 3 of the Evidence Act. It includes not only Judges and Magistrates but also persons, who except Arbitrators, legally authorized to take evidence.

31. In view of the findings of the Supreme Court and the Bombay High Court, this Court is also of the view that the Arbitral Tribunal cannot be said to be a civil Court under the Code of Civil Procedure.

32. As held by the Supreme Court in the case of *Vidya Drolia (supra)*, the DRT Act is a complete Code in itself and recovery of money is provided under Chapter-V of the DRT Act, after the procedure under Chapter-IV of the DRT Act has concluded. The recovery of money is automatic as soon as the order of the Tribunal or the Appellate Tribunal is made under the DRT Act. However, the same is not the case with respect the RERA Act. The recovery of money under the RERA Act has to be made under Section 40 as an arrear of land revenue and Section 40 does not come into play automatically, until and unless the appropriate procedure is adopted, based upon the order of the adjudicating officer or the authority concerned.

33. In view of the above, there is a difference in the mode of recovery of money envisaged under the DRT Act and the RERA Act. In so far as recovery of

money is to be done under the Arbitration and Conciliation Act, an execution case would have to be filed in terms of the provisions of the Arbitration and Conciliation Act before the District Judge, which is somewhat akin to following the appropriate procedure prescribed under the RERA Act for recovery of money.

34. The Supreme Court in Paragraph 55 of *Vidya Drolia (supra)* had held that the doctrine of election to select arbitration as a dispute resolution mechanism by mutual agreement is available, only if the law accepts existence of arbitration as an alternative remedy and freedom to choose is available. It further held that there should not be any inconsistency or repugnancy between the provisions of the mandatory law and arbitration as an alternative. Conversely, when there is repugnancy and inconsistency, the right of choice and election to arbitrate is denied. It further held that when arbitration cannot enforce and apply such rights or the award cannot be implemented and enforced in the manner as provided and mandated by law, the right of election to choose arbitration in preference to the courts or other public forum is either completely denied or could be curtailed.

35. A bare perusal of paragraph 55 of the above judgment appears to indicate that if additional specific/special remedies are available, the right of election to choose arbitration in preference to the public forum should be denied or curtailed. However, in the present case, there is nothing to show that there is any inconsistency or repugnancy between the provisions of the RERA Act and arbitration as an alternative. Even otherwise, the parties have both agreed to the arbitration clause being provided in the contract agreement for settlement of

their disputes including the issue raised by the petitioners herein. Though it appears that the present dispute should not be referred to arbitration in view of paragraph 55 of the judgment of ***Vidya Drolia (supra)***, the fact that an Award passed under the Arbitration and Conciliation Act can be enforced cannot be denied.

The enforcement of an order under the DRT Act is automatic, which is not the case in respect of the RERA Act, as it requires the appropriate procedure to be followed for enforcement of an award/order under Section 40 of the RERA Act. There is a difference between the manner in which an enforcement of an award/order is to be made under the Arbitration Act and the RERA Act on one side, though the provisions are not pari-materia and the Consumer Protection Act on the other side.

36. While the Supreme Court in Paragraph 55 of ***Vidya Drolia (supra)*** has made an observation that the doctrine of election to select arbitration as an alternative dispute mechanism is subject to certain conditions, the Supreme Court has summarized the whole issue and propounded a fourfold test for determining whether the subject-matter of a dispute in an arbitration agreement is arbitrable or not. The said fourfold test propounded by the Supreme Court is reflected in Paragraph 76 of the said judgment, which is as follows-

“76. In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:

76.1. (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.

76.2. (2) *When cause of action and subject-matter of the dispute affects third-party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.*

76.3. (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.*

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

76.5. *These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when the answer is affirmative that the subject-matter of the dispute would be non-arbitrable.*

76.6. *However, the aforesaid principles have to be applied with care and caution as observed in Olympus Superstructures (P) Ltd.7: (SCC p. 669, para 35)*

"35. Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leemans). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst⁵¹, Wilson v. Wilson⁵² and Cahill v. Cahill⁵³)."

37. On applying the fourfold test laid down by the Supreme Court in **Vidya Drolia (supra)** for deciding as to whether the subject-matter of this writ

petition is arbitrable or not, this Court finds that the four test is to the facts of this case and as such does not bar the subject-matter in dispute in this case from being arbitrable.

38. As can be seen from the various judgements of the Supreme Court, arbitration is not the only remedy available to a consumer and that they can either seek reference to arbitration or file complaint under the Consumer Protection Act. The judgments of the Delhi High Court and Patna High Court are more specific to the issue to be decided in the present case, i.e., the Arbitration Act is not inconsistent or in derogation of the RERA Act. Thus, arbitration can be invoked by a party, in spite of the availability of the alternative remedy provided under the provisions of the RERA Act. The decisions of the Supreme Court in ***National Seeds Corporation Limited (supra)*** and ***Emaar MGF Land Ltd. (supra)*** has allowed the party to chose between the public or private fora. In the case of ***Emaar MGF Land Ltd. (supra)***, the Supreme Court has held at paragraph-63 as follows :

“63. We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statues 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.”

39. In the present case, the petitioners have opted for arbitration, as per the arbitration clause, for settling the dispute between them. In view of the above reasons, this Court is of the view that the arbitration clause which had been agreed to by the parties for resolution of their disputes can be chosen by the

petitioners for deciding the present dispute, instead of taking recourse to the RERA Act.

40. Though the petitioners have appointed an Arbitrator, the question arises as to whether this Court should appoint the second Arbitrator for the respondents, on account of the respondents not having appointed an Arbitrator in terms of the arbitration clause made in the contract agreement. At this juncture, the learned counsel for the petitioners submits that due to the cost factor payable as Arbitrators fees, which may become burdensome if three Arbitrators are to be given payments, only one Arbitrator may be appointed by this Court, to decide the dispute between the parties. The same is however objected by the counsel for the respondents, who submits that an Arbitral Tribunal consisting of three Arbitrators would have to decide the dispute, in terms of the arbitration clause.

41. The arbitration clause provided in the contract agreement states as follows-

“16. ARBITRATION:

*a) **Disputes to be settled by Arbitration:** Any dispute, controversy or claim between the Developer and the Purchaser arising out of or relating to this Agreement or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996.*

*(b) **Arbitral Tribunal:** The arbitral tribunal shall be composed of three arbitrators, one to be appointed by the Developer, one to be appointed by the Purchaser and a third arbitrator to be appointed by the abovenamed 2 (two) arbitrators.*

*(c) **Place of Arbitration:** The place of arbitration shall be Guwahati and any award made, whether interim or final, shall be deemed for all purposes between the Parties to be made in Guwahati.*

*(d) **Language and Applicable Law:** The arbitral proceeding shall be conducted in the English language and any award or awards shall be rendered in English. The procedural law of the arbitration shall be Indian law.*

*(e) **Award Final and Binding:** The award of the arbitral tribunal shall be final and conclusive and binding upon the Parties and the Parties shall be entitled (but not obliged) to enforce the award. The Parties further agree (to the maximum extent possible and allowed to them) that such enforcement shall be subject to the provisions of the Arbitration and Conciliation Act, 1996.*

*(f) **Summary Proceedings and Interim Awards:** The Arbitrators shall have the right to proceed summarily and to make interim awards."*

Clause 16(b) of the contract agreement provides that the Arbitral Tribunal shall be composed of three Arbitrators, one to be appointed by the Developer, one to be appointed by the Purchaser and a third Arbitrator to be appointed by the abovenamed two Arbitrators.

42. In the case of ***M/s B.N. Sharma vs. The Chief Engineer, Public Works Department & Others*** (Arb.P. 16/2017) which was disposed of on 05.10.2018, a Coordinate Bench of this Court had appointed a single Arbitrator to decide the disputes between the parties, though the Arbitration Clause required the appointment of a Three Member Arbitral Tribunal. The said order dated 05.10.2018 had been made by referring to a decision of the Supreme Court in the case of ***City Bank vs. TLC Marketing***, reported in **(2008) 1**

SCC 481. The order dated 05.10.2018 passed in Arb.P. 16/2017 does not indicate whether there was any objection on the part of the parties for appointment of one Arbitrator under Section 11(6) of the Arbitration Act, instead of constituting a Three Member Arbitral Tribunal. Thus it is not clear as to whether the above order dated 05.10.2018 can be used as a precedence in this case, inasmuch as, the respondents are not agreeable to have only one Arbitrator instead of a Three Member Arbitral Tribunal. Though the Coordinate Bench of this Court had passed the order dated 05.10.2018 in Arb.P. 16/2017 on the basis of the Supreme Court judgment in **City Bank (Supra)**, there is nothing to show that the Arbitration Clause in **City Bank (Supra)** required a Three Member Arbitral Tribunal to decide the disputes. However, the fact of the matter is that this Court has appointed one Arbitrator, even though the Arbitration clause provides for 3 Arbitrators.

43. In the case of **M/s Dipayan Paul & Chanchal Paul JV vs. The State of Assam & 2 Others** (Arb.P. 17/2019), the Coordinate Bench of this Court had appointed one Arbitrator to decide the disputes between the parties, even though the Arbitration Clause required the appointment of a Three Member Arbitral Tribunal. The petitioner in Arb.P. 17/2019 had appointed an Arbitrator from his side. However, as the respondent authorities did not appoint an Arbitrator from their side, the petition under Section 11(6) of the Arbitration Act had been filed by the petitioner therein. As stated earlier, only one Arbitrator has been appointed by the Coordinate Bench to decide the disputes between the parties. In the present case, the respondents have objected to the appointment of a single Arbitrator to decide the dispute in this case.

44. Under the old Arbitration Act, 1940, the Supreme Court in ***Union of India vs. M.P. Gupta***, reported in **(2004) 10 SCC 504**, held that appointment of a retired Judge as sole Arbitrator contrary to Clause 64 (which requiring serving gazette railway officers to be appointed as Arbitrators) was held to be impermissible. However, the position is different after coming into force of the new Act, i.e., the present Arbitration Act, as held in ***Northern Railway Admn., Ministry of Railway vs. Patel Engg. Co. Ltd.***, reported in **(2008) 10 SCC 240**. The Supreme Court in ***Northern Railway Admn., Ministry of Railway (supra)*** held that appointment of an Arbitrator(s) named in the arbitration agreement is not mandatory or a must, but the emphasis should be on the terms of the arbitration agreement being adhered to and/or given effect, as closely as possible. In ***Northern Railway Admn., Ministry of Railway (supra)*** it was further held that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of Section 11A of the Arbitration Act are kept in view. This would mean that the Court should first appoint the Arbitrators in the manner provided for in the arbitration agreement. But where the independence and impartiality of the Arbitrator(s) appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not become functional and it becomes necessary to make fresh appointment, the Chief Justice or his designate is not powerless to make alternative arrangement to give effect to the provision for arbitration. In the present case, while the petitioner has appointed an Arbitrator, the respondent has not appointed any Arbitrator.

45. The Delhi High Court in the case of ***M/s Twenty-Four Secure Services Pvt. Ltd. Vs. M/s Competent Automobiles Company Ltd. (Arb. P. 24/2024)***, appointed one Arbitrator though the arbitration clause provided for an Arbitral Tribunal consisting of three Arbitrators. The Delhi High Court by following the judgment of the Supreme Court in the case of ***Union of India vs. Singh Builders Syndicate***, reported in ***(2009) 4 SCC 523***, appointed only one Arbitrator to settle the dispute between the parties despite the arbitration clause providing for an Arbitral Tribunal consisting of three Arbitrators.

46. In the case of ***Singh Builders Syndicate (supra)*** the Supreme Court was to decide a question as to whether the appointment of a retired Judge of the High Court as sole Arbitrator should be set aside and an Arbitral Tribunal consisting of three Arbitrators should be constituted in the manner provided in the Arbitration Clause under Clause 64 of the general terms and conditions of the contract.

In the case of ***Singh Builders Syndicate (supra)*** the Arbitral Tribunal was to consist of three Arbitrators, two of whom were to supposed to be from a panel made available by the General Manager of the Northern Railways. Due to the frequent transfers of the Railway officers, there could not be an expeditious and effective disposal of disputes. The Apex Court thus held that constituting Arbitral Tribunal with serving officers from different faraway places should be avoided and there should be a conscious effort to ensure that the Arbitral Tribunal is constituted promptly and arbitration does not drag on for years and decades. The dispute between the parties in the above case had been pending for nearly 10 years and having regard to the passage of time the Supreme Court

was of the view that the delays and frequent changes in the Arbitral Tribunal made a mockery of the process of arbitration. Besides the above, the Supreme Court was of the view that the cost of arbitration merited serious consideration. Also, the emphasis on independence and impartiality required a rethink on phasing out arbitration clauses, providing for serving officers to act as Arbitrators and to encourage professionalism in arbitration. It was in that context that the Supreme Court had appointed one Arbitrator, even though the Arbitral Tribunal was to consist of three Arbitrators. The Supreme Court in the case of ***Singh Builders Syndicate (supra)*** had thus appointed one Arbitrator even though the Arbitral Tribunal was to consist of three Arbitrators. The Delhi High Court in ***M/s Twenty-Four Secure Services Pvt. Ltd. (supra)*** has also followed suit. As stated in the foregoing paragraphs, this Court in the case of ***M/s B.N. Sharma (supra)*** and ***M/s Dipayan Paul & Chanchal Paul JV (supra)*** has also appointed one Arbitrator, despite the arbitration clause providing for three Arbitrators.

47. One other aspect that is weighing heavily with this Court is the stand taken by the petitioners that if three Arbitrators are to decide the dispute between the parties, the same would involve a lot of expenditure. The payment of fees to three Arbitrators may be very difficult for the petitioners. On considering the judgment of the Supreme Court in ***Singh Builders Syndicate (supra)*** and the fact that co-ordinate Benches of this Court have appointed single Arbitrator, even though the arbitration clause provided for 3 Arbitrators, this Court is of the view that a single Arbitrator can be appointed.

48. The arbitration clause provides for appointment of a Three Member

Arbitral Tribunal. Section 11(6) application has been made to give effect to the Arbitration Clause executed by the parties. The facts of the case show that there is a dispute between the parties which is arbitrable. Though the petitioner has appointed an Arbitrator from his side, this Court is of the view that a single Arbitrator can be appointed by this Court, for settlement of the dispute between the parties, as the respondents have waived their right to appoint an Arbitrator.

49. In view of the reasons stated above, the Hon'ble Mr. Justice (Retired) H.N. Sarma is appointed as an Arbitrator. Any disclosures to be made by the Hon'ble Mr. Justice (Retired) H.N. Sarma, in terms of Section 12(5) of the Arbitration Act and 7th Schedule of the Arbitration Act should be made known to the parties.

50. This Section 11(6) petition under the Arbitration Act is accordingly disposed of.

JUDGE

Comparing Assistant