

## ANALYSIS OF ALLOTTEE'S STATUS IN REAL ESTATE SECTOR

A. Swathi<sup>1</sup>**ABSTRACT**

This paper is aimed at examining the present status of allottees in the real estate sector in India and the remedies available to them under various laws. This paper mainly deals with the status of the allottees in the RERA Act. Under this Act, Allottees means a person to whom the apartment, building or plot is being sold or allotted by the promoter for consideration. It has been enacted with the primary purpose of protecting the homebuyers from the defaults committed by the developers in the real estate sector. Furthermore, this paper analyses the remedies available to the allottees under other laws like, the consumer protection Act, under this the homebuyers can avail the remedies as a consumer and also in IBC, and the homebuyers have the liberty to initiate insolvency proceedings as a financial creditor. Though different types of remedies are available under the above-mentioned laws, homebuyers are still facing problems relating to the speedy disposal of cases. And also, the homebuyers are always confused about which the appropriate forum is and which provides better and speedy remedies to them. The scope of study is limited to the role of allottees in the RERA Act and the impact of various laws on allottees in the real estate sector in India.

**KEYWORDS:** Allottees, consumers, financial creditors, developers and real estate sector.

**I. INTRODUCTION:**

The real estate sector is one of the recognised sectors in our country. After agriculture, it is the second-highest employment generator in India and it has contributed to the national income at a substantial level. For the last few decades, investment in the real estate business has tremendously increased with the increasing demand in purchasing the flats either for office or for residential purposes. Accordingly, to protect the homebuyers who put their hard-earned money into the real estate projects and to regulate the real estate sector, the Indian Government

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<sup>1</sup> A. Swathi, student pursuing 5 Year B.A.LL.B in Government Law College, Trichy, Tamil Nadu. E-Mail: swathilaw2000@gmail.com. Phone Number : +91 76393 37370

has enacted the Real Estate (Regulation & Development) Act, 2016 and set up an adjudicating authority named as Real Estate Regulatory Authority to hear the complaints and resolve it in a time-bound manner. And in this paper, we are going to analyse and discuss the following sections.

## II. OBJECTIVE OF STUDY:

The study of this paper aims at the following objects:

- To study the status of allottees in the real estate sector.
- To examine the role of allottees in the consumer protection Act.
- To probe the insertion of allottees as financial creditors under the IBC.

## III. METHODOLOGY:

The methodology of this research paper is based on non-doctrinal research. This paper broadly used an exploratory research technique based on past pieces of literature from respective journals, reports from government authorities and extensive academic literature on the real estate sector. For the research, secondary data are relied upon. The research design of this paper is descriptive, describing the effect of various Laws on allottees in the real estate sector.

## IV. LITERATE REVIEW:

1. Deep Patel, Sameer Gujar and Vivek Patel in their research paper explained the need for RERA to revive the confidence in the real estate sector. This Act provides the Allottee With a right to know every detail about the real estate project and. It will ensure timely delivery of the project which is a big sigh of relief to home buyers. [1]

2. Aditya V Kadam, Rushikesh R Sagvekar, Prof G.D. Parulekar and Prof S.S.Patil in their studies titled,' Real Estate sector is one of the topmost contributors of the country's GDP and employment criterion. Despite this, it had remained largely unregulated. The developers were taking advantage of the situation to deceive the buyers. Therefore, to protect the interest of the consumers, the RERA has been enacted. [2]

3. Somdutta P Patil and Ashish P Waghmare in their paper considered that the RERA has been enacted to increase the transparency regarding project completion and ensure timely delivery of the flats. Thereby it acts as a trust bridge between property buyers and developers. [3]

4. Dr.Reena Vasistha, Additional Secretary of the Government of India in her studies stated this Act was implemented to prevent fraudulent activities happening in the Indian Real Estate sector. So, this was indeed to make a call in favour of customers, buyers, promoters and agents. (Indian Express Dec 26<sup>th</sup> 2012)[4]

5. Dr A.Joshi and Nisha Singh in their studies emphasized that the RERA was enacted to effectuate the right to life under Art 21 which includes the right to housing as a basic fundamental right. It imposes penalties on errant builders and follows the regulatory mechanism in the field. [5]

6. The RERA Act has been enacted with a view to ensure efficiency in the real estate sector in regards to sale of plots, apartments, buildings or real estate projects. Prior to this Act, there was no clarity on carpet area and there was sort of monopoly of builders regarding loading, rates, modes of payment. (Kalpesh Amrut Sispdiya and others)[6]

7. The objective of the real estate sector reform was to bring fair and equitable transactions between buyers and sellers and make transactions accountable and transparent. (Mahesh sarva and others)[7]

## **V. ISSUES REGARDING ALLOTTEES IN REAL ESTATE SECTOR:**

### *Allottees in RERA:*

- The real estate sector is a major contributor to economic growth in our country. So, a special law dealing only with this sector is needed to make it more consumer-friendly thereby inducing investments from the people. That is why the RERA Act has been enacted in the year of 2016.

### *Allottee as a consumer:*

- The term consumer covers the allottees who avail service of the promoters for consideration. But it only provides remedies to those who buy apartments or buildings

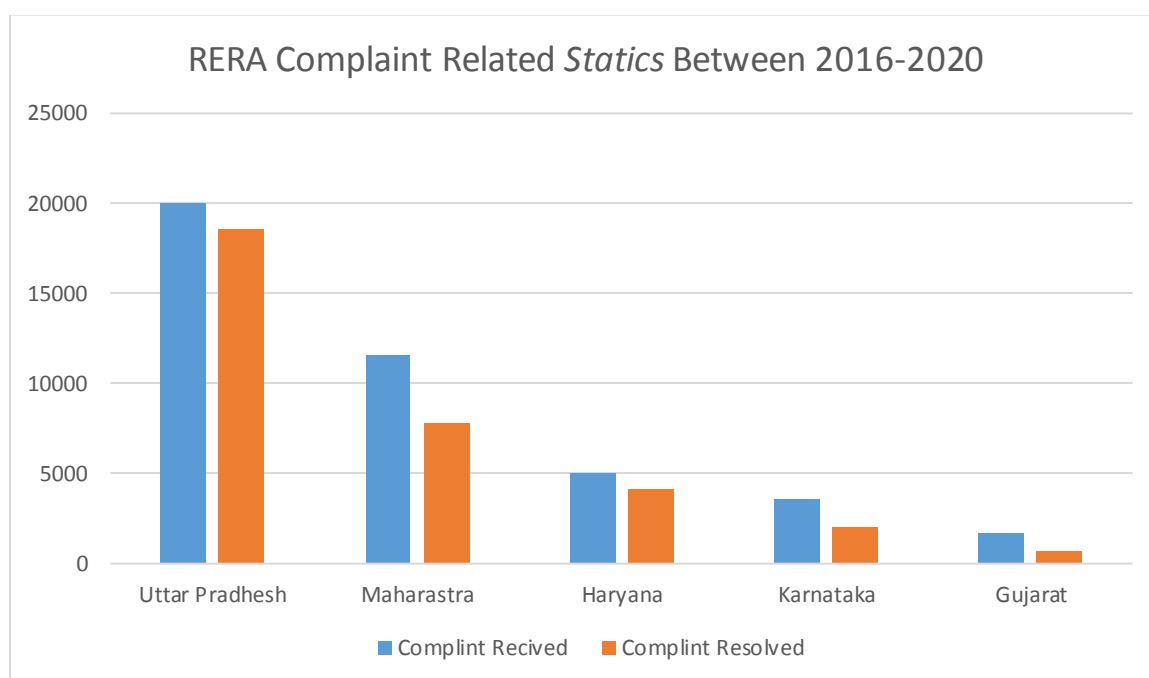
for residential purposes. Because in its definition itself it excludes the persons availing services for commercial purposes.

*Allottee as financial creditor:*

- Insolvency and Bankruptcy Code mainly deals with the insolvent companies which are unable to pay their debts and enable the financial creditors to initiate CIRP. With the insertion of allottees as a financial creditor and deeming the advance money paid by the allottees as financial debt, they can approach NCLT constituted under IBC.

## VI. STATISTICAL ANALYSIS OF COMPLAINTS UNDER RERA:

The following table helps us in better understanding the high number of complaints received and resolved by the RERA in seven states in India. Based on the report of [www.99acres.com](http://www.99acres.com), the cases under seven respective states RERA from the inception of the RERA Act.



*Table 1 – Top 5 RERA Complaint Received and Resolved Related Statics between 2016 to 2020*

Table- Complaints under RERA in seven states in the last four years.

The state of Maharashtra has been the most active in the country towards dealing with RERA complaints. Secondly, Uttar Pradesh has received the maximum number of complaints all over India. In this table, there is a large difference between cases received and resolved under RERA. It shows the lack of effectiveness of the RERA Act in these states. So, the respective

governments take prompt and stringent measures to implement this Act effectively. The remaining states are concerned, the RERA has received only meagre number of cases which stand below 1000 and some states are not yet implementing the RERA rules.

## VII. DISCUSSION:

### ROLE OF ALLOTTEES IN THE REAL ESTATE SECTOR

The real estate sector is one of the flourishing sectors in our country. With the increasing demand for housing, the advancement of the sector is always going upwards. So it is very important to regulate this sector to retain its fame at the world level. That is why the RERA Act has come into force. This Act revolves around mainly two characters, they are allottees and promoters. Allottee means a person who buys an apartment, plot or building or subsequently acquires the possession from the promoter. But it does not include a person who acquires the possession on rent. On the other hand, promoter means a person constructing a building or converting the existing building into an apartment or developing land into a project to sell to other persons. The main element for making a particular real estate project within the ambit of this Act is prior registration of real estate projects with the Real Estate Regulatory Authority. It is necessary only when the project exceeds the threshold of five hundred square meters or eight apartments. Before this Act, the developers sold the apartment, building or plot based on a super built-up area. This area is to cover the cost of construction of all common areas such as common passages, staircases and lift lobbies etc...But this Act allows the developers to sell the project only based on carpet area which means net usable floor area of an apartment including internal partition walls and it excludes external walls, verandas and balconies etc... This move is to ensure fairness and to prevent the unfair profit gained by the promoter and this Act makes the builder liable for any structural flaws within five years of hand overing the possession of buildings to the allottees and it is duty of the builder to rectify it within thirty days otherwise the allottees can claim compensation for such defaults. Further, the substantial evidence to prove the existence of a relationship between allottee and developer is Agreement for sale. It contains clauses relating to the cost of the project, payment mode whether to pay full amount at one hand or instalment, interest in case of delay in delivering the project by promoter or delay in making payment beyond specified time by allottees, compensation in case of default on either side and force majeure clause etc... This Act reduces the burden of homebuyers by limiting the amount of deposit as ten per cent of the value of the

project, which is also paid only after executing the agreement for sale and also it makes the developers transfer seventy percent of deposit money received from homebuyers into an escrow account and the fund can be withdrawn only after certification by an engineer, a chartered accountant and an architect. It provides security against fraud and scams happening especially in the real estate sector and reduce the risk of insolvency of the builder. Moreover, this Act entitles an allottee to know every detail about the project and it enables them to form an association, society or cooperative society etc... Also, it provides the option to the homebuyers to claim the refund of the amount along with interest at such rate when the promoter fails to comply with the provisions of the agreement or unable to give possession of the apartment, plot or building at a stipulated time. At the same time, it imposes liability on the allottees to make payment at a proper time and to make compensation to the promoter if he wishes to withdraw from the project. The RERA Act has established a Real Estate Regulatory Authority to resolve the disputes between the allottees and promoters in the real estate sector and it set up a Real Estate Appellate Tribunal to hear the appeals from the decisions, directions or orders of RERA. Finally, the appeal from the appellate tribunal goes to the Supreme Court of India. Thereby, this Act ensures fair and timely disposal of the cases relating to the real estate sector. It is to be noted that the Act gives power to the appropriate state governments to make rules under this Act. From the above discussion, it is evident that the RERA Act has been enacted with a motive of ensuring transparency and providing security to the people involved in the real estate sector, thereby increasing the investment in the real estate sector.

### **ALLOTTEES AS A CONSUMER IN CP ACT**

From time immemorial, the house is observed as a valuable asset for every person. In our society, most of the people consider the home as their pride and they believe this will enhance their status in the society. So everyone wants to invest their hard earned money into the real estate project to buy their own home. But before the enactment of the RERA Act, the real estate sector had been found to be largely unorganised. By using this many developers used to swindle the money invested by the homebuyers or cheat them by making delays in hand overing the possession of the apartment or building. So, the homebuyers to protect themselves approached the consumer forum constituted under the Consumer Protection Act for seeking redressal against defaulting developers in the Real Estate Sector. Even after the RERA came into force, the allottees still have the liberty to approach the consumer forum. In the landmark case of pioneer urban land and Infrastructure Ltd & Anr v. Union of India [8], the Supreme Court

remarked that the allottees in the real estate sector have the right to approach RERA, consumer forum or NCLT under the IBC for taking recourse. The term "Allottee" in the RERA Act means a person who avails the services of the developer for constructing his building, plot or apartment for consideration either paying full amount at one time or choosing the instalment plan. Under the CP Act the term consumer means a person who avails the services for consideration either paid or promised. Both the term allottee and consumer are in consonance with each other in terms of availing of service provided by service providers. So, the homebuyers under RERA Act come within the purview of consumers under CP Act. In the case of M3M India pvt ltd v. Dinesh Sharma [9], the Delhi High court held that whenever the developer delays or denies to deliver the possession of the apartment even after the payment has been made, allottees can avail the jurisdiction of consumer forum or RERA for compensation. Despite that the RERA has been enacted only with a view to regulate the real estate sector and impose the liability upon the developers for delays thereby protecting the homebuyers, it does not compel the homebuyers to withdraw the complaints from the consumer forum. The option is given under sec 71(1) of RERA to homebuyers to withdraw the application with the consent of the consumer forum and initiate it under RERA. Furthermore, sec 18 states that the rights given under RERA shall not prejudice any other remedy available under other laws. So, the allottees are free to exercise their remedies given under the Consumer Protection Act. Generally, the presumption is that the special Act shall prevail over the general Act. However in the RERA Act, no provision prohibits the application of other laws and provisions under RERA are in addition to and not in derogation of any other laws in India. So, the application of provisions of the CP Act is not prohibited in the RERA Act. Moreover, sec 79 only restricts the jurisdiction of civil courts and the consumer forums are not civil courts as per the Code of Civil Procedure. At the same time, the homebuyers are facing a problem relating to pecuniary jurisdiction of the National Consumer Dispute Redressal Forum (NCDRC) which is the apex forum in CP Act. Because the NCDRC can only entertain a complaint valued more than Rs 10 crores. This was also remedied by the Supreme Court in the case of M/s Imperia Structures ltd v. Anil Patni &Anr [10], the court said that the buyers can get together and form groups to directly approach the apex consumer panel against the erring builders for unfair trade practices and deficiency in service owing to delay in hand overing the possession. The only criteria that the buyers must fulfil is that they come within the ambit of the consumer. I.e. they should buy an apartment or building only for residential purposes and not for commercial purposes. Even if the project is registered under RERA, this should not prevent the homebuyers from approaching the consumer forum. From the above discussion, it

has been made clear that the remedies given under RERA and Consumer Protection Act are concurrent.

### **ALLOTTEES AS FINANCIAL CREDITOR IN IBC**

The Allottees in the real estate sector already have remedies against defaulting developers under the RERA Act and CP Act. Then the question arises as to whether another remedy under IBC is needed. The answer is that remedies under above mentioned two Acts can only be availed by the allottees until and unless the real estate companies are able to finish the project or in a good condition to repay the money and provide compensation in case of default. But when the company is unable to repay the advance money that has been invested by the allottees, then the allottees have the right to approach the National Company Law Tribunal under the IBC. For that IBC amended to include allottees into the category of financial creditors. The financial creditor is one who has given priority while distributing the assets of the insolvent company and the committee of creditors which is the chief decision making body shall comprise only of financial creditors in order to initiate the corporate insolvency resolution proceeding (CIRP) under IBC. Generally the banks and financial institutions are given the privilege of being financial creditors in the insolvency proceedings under IBC. The IBC Amendment Act encompasses allottees as a financial creditor under sec 7 and insert the entry (f) of sec 5(8) which states all forward sale and purchase agreements are considered as financial debt. Generally, financial debt means a debt along with interest. If a debt becomes a financial debt, it is disbursed against the consideration for the time value of money and it must have the effect of the commercial aspect of borrowing. On one hand, In the case of *Nikhil Mehta & Sons v. AMR Infrastructure Limited* [11], the NCLAT accepted committed returns as consideration for time value of money and in the real estate sector the allottees made advance payments in order to receive benefits under the committed return scheme. Further, the payment of 'interest' on the amount paid by the purchaser is nothing but recognition of 'time value of money' and it justified advance payment of homebuyers under committed return scheme could fall under the meaning of financial debt. On the other hand, in the real estate sector, the allottees after executing the agreement have made a certain sum of money as an advance which is used by the developer as a finance for the construction of the project. So, the advance amount made by the homebuyers has a commercial effect of borrowing. In the case of *Pioneer urban land and Infrastructure ltd v. Union of India*, the Supreme Court upheld the constitutional validity of inclusion of allottees as a financial creditor under IBC and validated the fixation of minimum



threshold of 10 percent or 100 allottees whichever is less for initiating the CIRP against the corporate debtors. It is pertinent to note that the allottees must be from the same project and if they are drawn from a different project cannot form an association to initiate insolvency proceedings. For that the 30 days deadline has been given to existing applicants to find a requisite number of allies to meet the minimum limit. The reason for this requirement is that permitting a single allottee to initiate insolvency proceedings will completely replace the developer company management and it would derail the plans of other allottees. Because the allottees in the real estate project are a heterogeneous group. So, some of them may want to give more time to the developers to complete the project while some of them may approach the authority under RERA Act, instead others may resort to the consumer protection Act. The court, after seeing the justification behind the requirement of 100 allottees, barred the application filed by the allottees without fulfilling the minimum threshold under IBC. It opined that this step will protect the real estate companies from frivolous petitions and safeguard the builders whose defaults were involuntary or because of external uncontrollable. Moreover under sec 88, the remedies under RERA are intended to be additional and not mutually exclusive. So, it does not act in derogation of provisions of IBC. Accordingly, in respect of allottees, the remedies under both RERA and IBC are concurrent and it is only in the event of conflict between those, the code shall prevail over the RERA. Therefore this amendment Act is not violative of Article 14, 19(1) (g) read with Article 19(6) or 300-A of the constitution of India. Ultimately, Inclusion of allottees into the category of financial creditors acts as a deterrent for the erring developers and this provides big relief to the disgruntled homebuyers in the real estate sector.

### **VIII. SUGGESTIONS AND CONCLUSION:**

The Real estate sector has become a trustworthy sector in our country particularly after the enactment of the RERA Act. The number of investments has been gradually increased after the enactment of this Act. Many states like Maharashtra have effectively implemented the RERA rules and attract the investors towards the real estate sector. But few states have not yet implemented the rules so far and are lagging behind in gaining trust among the people in the real estate sector. With the proper implementation of rules and appointment of regulatory authority, states can ensure the magnificent growth in the real estate sector and safeguard the interest of people investing in it. And finally from the above discussion and literature review here I give some suggestions:

- To urge the state Governments to implement the RERA rules immediately and effectively.
- To give priority to the RERA Act in respect of remedies, because it is a special legislation that has been enacted only for the regulation of the real estate sector in India.
- To insert a time period in the RERA Act, within which the disputes should be resolved by the RERA. Accordingly, undue delays will be eliminated.
- To enhance the punishments provided in the RERA Act. Thereby make this Act more deterrent for those who intend to commit defaults in the real estate sector.

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