# THE INTERPLAY BETWEEN RERA AND SARFAESI: HOMEBUYER PROTECTION VS. SECURITY INTEREST ENFORCEMENT IN REAL ESTATE

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**ABSTRACT**

This paper entitled "THE INTERPLAY BETWEEN RERA AND SARFAESI: HOMEBUYER PROTECTION VS. BANK ENFORCEMENT IN REAL ESTATE" deals with an analysis of the inherent conflicts that are present in the intersecting field of real estate oriented for consumers and security interest enforcement. The paper goes further to analyse the overlap in effect between these pieces of legislation, jurisdiction of the tribunals that have been set up under these statutes, and several other issues arising out of such an intersection of the two statutes. Concepts like in what circumstances one statute would be considered more important than the other, basis for such application, whether RERA has any retrospective application and what gives rise to such an effect among others are all covered. Forum shopping due to this intersecting conflict has been analysed with judicial precedents. The article's main goal is to identify the point at which these two pieces of law are balanced.

## 1. INTRODUCTION:

The 'SARFAESI Act'[1] was passed in the year 2002. Some of the essential features of this Act include governing securitization and reconstruction of financial assets, and regulation of the enforcement of the security interest. In this Act, the term 'securitization' implies acquisition of financial assets by Asset Reconstruction Companies from the banks or financial institutions, or even from some other ARC which has the ownership over such financial assets. Apart from this, the Act is also meant to create a database for the security interest created over the property rights, and any other matters concerning this matter. The objective of the Act includes helping out the banks and financial institutions in getting back the loan which is classified as NPA (non-performing assets) without going through the court process, and settlement of dues of secured creditors prior to other debts, taxes, and cesses etc[2]. Debt Recovery Tribunal and Debt Recovery Appellate Tribunal are the adjudicating bodies under this Act.

On the other hand, the Real Estate (Regulation and Development) Act, abbreviated as RE(R&D) Act, 2016 was passed in order to facilitate and regulate the real estate industry. The distinguishing characteristic of this law is that in addition to being able to regulate the real estate industry, it is also concerned with protecting the interests of consumers of this industry, i.e. home buyers. The Act further states the operations, rights, and obligations of both the 'promoter' and the 'allottees'. Two judicial authorities have been set up according to this Act, and these are Real Estate Regulatory Authority (RERA), and Real Estate Appellate Tribunal (REAT).[3]

SARFAESI Act,2002 is a creditor-oriented legislation, while the RE(R&D) Act,2016 is a buyer's protective real estate law. These two pieces of legislations seem totally unconnected from each other at first glance, however, the point of friction comes in when a land is mortgaged by the promoter of a real estate project, selling off its property units to buyers and the secured creditor's right to assert their security interest under the 'SARFAESI Act' would affect the rights of the buyers under the 'RE(R&D) Act' in the event that the borrower defaults. This would create a point of intersection for these two legislations. The instant work would critically examine the interplay of these two legislations through their respective provisions and

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[1] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, No.54 of 2002, India code (2002).
[2] Id.
[3] The Real Estate (Regulation and Development) Act, No.16 of 2016, India Code (2016).

precedents created in the context.

## 2. CAN RERA ASSERT JURISDICTION OVER PROCEEDINGS INITIATED BY BANKS?

At the outset, the answer is 'Yes'. The apex court had discussed this issue in the landmark case of '***Union Bank of India v. Rajasthan RERA & Ors***'[4], where the highest court in India upheld that when recourse is taken by the secured creditor under S. 13(4) of the SARFAESI Act, 2002, there occurs statutory assignment of the rights of borrower to the secured creditor. This is so because as soon as S. 13(4) is invoked, the secured creditor puts himself in the shoes of the borrower and his rights in regard to transfer of the asset vests on him. At this point the secured creditor is brought under the ambit of 'promoter' as defined under 'S.2(zk)(i) of the RE(R&D) Act, 2016'. The definition of the term 'promoter' is provided as follow:

"a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees.[5]"

Here the phrase 'other persons and includes his assignees' is used very purposefully so as to cover a wide range for the term 'promoter'. This way, if a secured creditor avails any of the steps available under S.13(4) of the SARFAESI Act, then the said person becomes a 'promoter' as per the above definition. Through this approach, the apex court has decided that RERA will be able to exercise its jurisdiction over any complaints by aggrieved parties about transactions between the borrower and secured creditor.

This verdict eventually expanded the jurisdiction of RERA over matters relating to recourse measures taken by secured creditor, but it comes with a restriction that RERA can assume jurisdiction over complaints filed by home buyers only when such complaints are made for the object of safeguarding their rights as enshrined under S.11 & 19[6] of the RE(R&D) Act, 2016.

[4] Union Bank of India v. Rajasthan RERA & Ors, D.B. Civil Writ Petition No. 13688/2021.
[5] The Real Estate (Regulation and Development) Act, No.16 of 2016, India Code (2016), §.2(zk)(i).
[6] The Real Estate (Regulation and Development) Act, No.16 of 2016, India Code (2016), §.11 & §.19.

## 3. OVERRIDING EFFECT:

Both the enactments that are being discussed for the sake of this article are Special legislations, where an overriding clause has been inserted in both the legislations. For instance, 'Section 35 of the SARFAESI Act,2000'[7] prescribes that, the Act's clauses will take precedence over other current legislation., and 'Section 37'[8] of the same provides that the Act will not bar the application of any other laws, rather it applies along with other enactments as an additional layer. Meanwhile, 'Section 89 of RE(R&D) Act'[9] confers the same overriding effect on the Act, and Section 88 provides that the Act shall coexist with other enactments, and shall not be derogative with others. At this point, a conflict arises as to which Act shall override the provisions of another Act. The issue complicates as both the legislations are being special enactments in nature. This issue was addressed by the apex court in a landmark case titled '*Bikram Chatterjee Vs UOI*' [10], wherein it was settled that when there is conflict between two special legislations with respect to overriding effect, the legislation which was enacted subsequently will prevail over the legislation enacted earlier.

### 3.1 SITUATIONS WHERE RERA OVERRIDES SARFAESI:

- Matters relating to Consumer Protection: RERA prevails over SARFAESI where the interests of homebuyers are concerned.
- Rights of Secured Creditors: SARFAESI gives banks the right to enforce their claims, but with regard to the consumer-friendly approach of RERA.
- Harmonious Interpretation of the Statutes: Both acts are interpreted by courts in harmony, yet with more inclination towards RERA for meeting legislative intent.

The priority of consumer protection was established clearly by the Supreme Court in the case '*Bikram Chatterjee Vs UOI*'[11]. In the case under discussion, the problem lied in the fact that Amrapali Group, which is a major real estate developer in this context, collected huge sums

[7] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, No.54 of 2002, India code (2002), §.35.
[8] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, No.54 of 2002, India code (2002), §.37.
[9] The Real Estate (Regulation and Development) Act, No.16 of 2016, India Code (2016), §.89.
[10] Bikram Chatterji Vs UOI, (2019) 19 SCC 161.
[11] Id.

from a number of people but failed to deliver on its promise. It had committed itself to many schemes that were meant to secure the interests of the bank; therefore, a clash occurred between the interest of the secured creditors who come under SARFAESI and the interests of the homebuyers who came under RERA.

The issue arose because the same property was covered by both SARFAESI's creditor's recovery plan and RERA's consumer protection system.

The homebuyers were stakeholders who had invested their entire life's wages, the Court observed. The builders were able to embezzle money and mortgage projects that had already been sold to purchasers since the banks had neglected their due diligence. Since the goal of RERA's legislation was to safeguard consumers, RERA will always take precedent over SARFAESI when it comes to the interests of consumers. The Court came determined that apartments that had already been assigned to purchasers could not be put up for auction, even if they were mortgaged.

The Supreme Court revoked Amrapali's registration under the RERA Act. In order to safeguard purchasers' interests, the Supreme Court ordered National Buildings Construction Corporation (NBCC) to finish the incomplete projects. Regarding the apartments that the purchasers had acquired, the banks were unable to pursue their rights under the SARFAESI Act. The Supreme Court made it quite evident that under RERA, purchasers have more rights than banks under SARFAESI.

In the case of ***'Pioneer Urban Land & Infrastructure Ltd. v. Union of India'***[12], the key issue was whether there would be exclusivity of remedies under RERA or whether the home buyers could resort to IBC and in turn the recovery laws such as SARFAESI. While the developers contended that having more than one remedy will affect the real estate sector, the buyers contended that multiple remedies were critical for protecting their interests.

RERA, on the other hand, was a consumer-focused legislation enacted for protecting the interest of homebuyers from any form of exploitation. In the process, the court held that RERA did not curb other laws like IBC or SARFAESI law. Here, the court adopted the approach of harmonious construction where the court held that all three laws viz. RERA, IBC and SARFAESI could coexist provided in case of any conflict, the special and subsequent law

[12] Pioneer Urban Land & Infrastructure Ltd Vs UOI, (2019) 8 SCC 416

would prevail. Importantly, it needs to be noted that the court understood the necessity of protection of interest of homebuyers and hence RERA could not be overruled by any creditor law. Constitutional validity of IBC provisions in declaring homebuyers as financial creditors had been validated by the Supreme Court. Remedies under RERA and IBC are independent of each other and buyers have option of choosing between these two methods. When banks/financial institutions exercise their rights under SARFAESI/IBC, they shall be treated as "promoters" under RERA.

### 3.2. WHEN SARFAESI GAINS EDGE OVER RE(R&D)?

It is well settled at this point that, whenever there is a conflict between the provisions of RERA and 'SARFAESI Act', the provisions of RERA will prevail, reference can be made *to Union Bank of India case and Bikram Chatterji case*, (Supra). However, there is an exception that gives edge to 'SARFAESI Act' which was laid down by the apex court in the same '***Union Bank of Inda V. Rajasthan RERA & Ors.***'[13] case vide paragraph 36(iv), wherein it has been held that provisions of RERA will not apply to transactions between borrower and financial institutions where the mortgages for creating the secured interest are made prior to enactment of the RE(R&D) Act i.e. 2016. This is because RERA Act does not apply retrospectively, unless it is explicitly provided. In essence provisions of RERA will not to matters where the security interest was created before 2016.

Tamil Nadu Real Estate Appellate Tribunal (TNREAT) in '***M/S. Indian Overseas Bank v. Banumathi & Ors.***'[14], held that there is no jurisdiction for TNRERA to determine issues on matter filed under 'S.17 of SARFAESI Act'. It was also stated that anybody aggrieved by the proceedings of 'SARFAESI Act' can file case before Debt Recovery Tribunal. It was further stated that in a situation where the order of Debt Recovery Tribunal for auction of the property of the promoter has been passed, TNRERA shall have no jurisdiction to direct diversion of the proceeds from the sale in favour of the allottees. TNREAT further stated that in case where there is any dispute pending before the Debt Recovery Tribunal, then RERA will not have jurisdiction to give any direction to the secured creditor. Further, it was held that in case the allottees want to challenge the auction proceeding of SARFAESI, they can file a case before Debt Recovery Tribunal under 'S.17 of SARFAESI Act'.

[13] Union Bank of India v. Rajasthan RERA & Ors, 2022 SCC Online SC 1885
[14] M/S. Indian Overseas Bank v. Banumathi & Ors, TNREAT Appeal Nos.159 to 162 of 2025.

### 3.3 BAR ON RETROSPECTIVE APPLICATION NOT ABSOLUTE:

The principle of bar on retrospective application is not absolute and has certain exceptions, which if met can enable RERA to apply retrospectively. As laid down in the landmark case of Union Bank of India case (supra) where it was held that RERA shall have application if the formation of such an arrangement or mortgage is found to be collusive or fraudulent in nature.

Odisha Real Estate Appellate Tribunal (OREAT) dealt with one such case recently titled ***'Punjab National Bank V. Asish Kumar Pradhan and Anr.'***[15]. In this particular scenario, the security interest is constituted in accordance with equitable mortgage after the agreement for sale executed by the promoter and the purchasers of the houses. Secured lender, despite the fact that the agreement to sell had not been registered, gave the loan to the borrower and before the OREAT, argued that the loan taken by the bank should be considered as the first charge even though this charge was created after the agreement to sell because the agreement to sell had not been registered and cannot be produced as evidence before the court. Secured lender also stated that the mortgage was made prior to the implementation of the 'RE(R&D) Act', hence RERA will not be applicable as per the decision of the Supreme court. The judgement rendered by OREAT was remarkable as per which the fact that the secured creditor gave the loan while knowing the existence of the agreement to sell between the promoter and the house purchasers constitutes collusion with the latter and hence, RERA provisions will be applicable even to such transactions made before the enactment of the RERA. Thus, it can be inferred from this section that when a transaction between secured creditor and promoter is fraudulent or collusive in nature, RERA can ascertain jurisdiction even when the charge was created before formation of the said enactment.

## 4. DOES THE CONFLICT BETWEEN RERA AND SARFAESI PAVE WAY FOR FORUM SHOPPING?

Forum shopping is the practice of deliberately filing a lawsuit in a specific court or jurisdiction where the substantive or procedural laws are most favourable to one's case. Courts have clearly envisaged the existence of this doctrine in a lot of cases. In the case of '***United Bank of India v. Satyawati Tondon***'[16], instead of following the prescribed course in law through Section 17 of SARFAESI (whereby she could file an appeal before DRT), 'Satyawati Tondon' approached

[15] Punjab National Bank V. Asish Kumar Pradhan and Anr., OREAT Appeal No.26/2024.
[16] United Bank of India v. Satyawati Tondon, (2010) 3 SCC (Civ) 260.

the HC under 'Article 226'[17]. The Court severely criticized this route taken, stating that it is improper for the litigants to engage in forum shopping and approach the writ jurisdiction when there is a special statutory forum provided. The consumers may have other options besides RERA, such as the Consumer Protection Act, IBC, or the writ jurisdiction. It is well-established in law that the party to litigation must exercise forum shopping; otherwise, it will lead to injustice. When there is conflict between RERA and SARFAESI, the courts reconcile both legislations, but they do not encourage parties to go beyond one forum to another forum.

***The Phoenix ARC case***[18] whereby bank loans that were made accessible for obtaining loans for real estate projects were taken over by Phoenix ARC. Following the default, Phoenix ARC submitted an application to reclaim the property and put it up for auction under SARFAESI. However, purchasers had reserved the project's apartments and contacted the RERA administration to protect their rights.

Although courts recognized that this appeared to be forum shopping, it was not abusive forum shopping in accordance with custom.

This view was justified by the fact that while both RERA and SARFAESI offered concurrent remedies, their goals were different: RERA protected homeowners, while SARFAESI protected secured creditors. As a result, RERA prevailed over the creditors seeking SARFAESI remedies.
According to the Apex Court's ruling, individuals who feel wronged by private ARCs using the SARFAESI Act to execute their securities are not permitted to use writ petitions to get around the procedure (Article 226 of the Constitution). Only the appeals process made accessible by the DRT or the SARFAESI Act should be used by those who feel wronged.

In '***Keshavlal Khemchand & Sons Pvt. Ltd. v. Union of India***'[19]**,** while upholding the validity of the SARFAESI proceedings, it was also stated that the provisions under RERA protecting the consumers' interests should not be superseded where it relates directly to the buyers' rights. It also dissuaded forum shopping of borrowers or developers who tried to prolong the process by filing writ petitions or approaching other forums. The Court reconciled both the acts by stating that where the dispute is between buyer and the developer, RERA will prevail, whereas

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[17] India Const.art.226.
[18] *Phoenix ARC Private Limited v. Vishwa Bharati Vidya Mandir & Ors,* (2022) 5 SCC 345
[19] *Keshavlal Khemchand & Sons Pvt. Ltd. v. Union of India,* (2015) 4 SCC 770

in case of banks and borrowers, it is SARFAESI.

***M/s. Aashray Premises Pvt. Ltd. v. State of Maharashtra*[20], **The Bombay High Court specifically emphasized that whereas SARFAESI functions in favour of creditors, RERA is an example of special law that comes later and serves for the advantage of homeowners. It was emphasized that while RERA provides a different remedy for buyers to defend their rights, requesting relief from it cannot be seen as forum-shopping. The court noted that when banks take over a project under SARFAESI, they really become promoters under RERA.

***In Puneet Gupta v. International Infratech Pvt. Ltd*[21], **The RERA bench emphasized that while SARFAESI serves creditors, RERA is a specific statute that was created subsequently and is meant to protect purchasers. It also clarified that customers who choose RERA are not engaging in forum shopping because the legislation offers a particular remedy for the protection of buyers. Banks take on the role of promoters under RERA once they get ownership of the property through SARFAESI.

***In ICICI Bank Ltd. v. Umakant Sharma*[22], **The Delhi High Court upheld the principle established in Satyawati Tondon (2010), which maintained that SARFAESI is a comprehensive regulation with an internal appeals process. When legislative remedies are available, writ petitions should not be considered. Using the SARFAESI process, the Court denounced the borrower's propensity for forum shopping. The High Court made it plain that, absent extraordinary circumstances, it must proceed cautiously and refrain from interfering with matters concerning SARFAESI. Although RERA was not involved in this case, it had an impact on subsequent RERA proceedings where the Court harmonized the two rules to prevent forum shopping while permitting concurrent remedies for homebuyers.

## 5. CONCLUSION:

There is an inherent tension between the 'SARFAESI Act'[23] and the 'RE(R&D) Act'[24] since they serve two distinct legislative purposes: the protection of consumers and the right of creditors to collect their loans. While the latter was created to govern the real estate sector and

[20] *M/s. Aashray Premises Pvt. Ltd. v. State of Maharashtra,* Writ Petition (St.) No. 30411 of 2019
[21] *Puneet Gupta v. International Infratech Pvt. Ltd*, RERA-GRG-255-2023
[22] *ICICI Bank Ltd. v. Umakant Sharma*, 2018 SCC OnLine SC 2233
[23] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, No.54 of 2002, India code (2002)
[24] The Real Estate (Regulation and Development) Act, No.16 of 2016, India Code (2016).

shield the rights of its buyers, the former was developed to assist banks and financial institutions in quickly recovering their NPA's without going through the legal system. The issue arises because, in certain situations, the developer must simultaneously settle disagreements pertaining to a project's mortgage for both the bank and purchasers.

Court rulings have always supported consumer protection. *Union Bank of India v. Rajasthan RERA*, *Bikram Chatterji v. Union of India (Amrapali case)*, and *Pioneer Urban v. Union of India* are a few of the important decisions on the subject. It is evident from all of these rulings that the bank or asset reconstruction firm becomes the promoter's successor and is thus liable to RERA's regulations once they take control of the secured asset as per the 'SARFAESI Act'. It should be kept in mind that the consumer-friendly RERA supersedes the creditor-friendly SARFAESI and that apartments assigned to customers can never be put up for auction.

Forum shopping is another factor, in which litigants try to use the many forums to their advantage. Although courts recognize that purchasers who use RERA are exercising their statutory entitlement, they have prevented borrowers and developers from abusing the SARFAESI procedure by filing a writ petition. Therefore, the courts' interpretation maintains the coherence of the concurrent remedies available under RERA, SARFAESI, IBC, and consumer forums.

In conclusion, it may be said that by prioritizing RERA for homeowner protection, keeping SARFAESI for creditors' advantage, and prohibiting forum shopping, courts have successfully struck the right balance.