

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 561 OF 2020

1. SHAILESH GUPTA

S/O MR. PREM CHAND GUPTA R/O FLAT NO. 18, HEWO
APARTMENT SECTOR 16, FARIDABAD, HARYANA

2. SHWETA GUPTA

W/O MR. SHAILESH GUPTA THROUGH HER AUTHORIZED
REPRESENTATIVE R/O FLAT NO. 18, HEWO APARTMENT,
SECTOR-16, FARIDABAD, HARYANA

.....Complainant(s)

Versus

1. PURI CONSTRUCTION PRIVATE LIMITED

HAVING ITS REGD OFFICE AT 4-7B, GROUND FLOOR,
TOLSTOY HOUSE 15 & 17, TOLSTOY MARG, CENTRAL
DELHI, NEW DELHI-110001

.....Opp.Party(s)

BEFORE:

**HON'BLE DR. S.M. KANTIKAR, PRESIDING MEMBER
HON'BLE MR. BINOY KUMAR, MEMBER**

For the Complainant : Mr. Gaurav Gupta, Advocate and
Mr. Samyak Gangwal, Advocate

For the Opp.Party : Mr. Pravin Bahadur, Ms. Kanika Gomber,
Mr. Amit Agarwal, Mr. Saurabh Kumar, Advs.

Dated : 23 May 2022

ORDER

Binoy Kumar, Member

Learned counsel for the Complainant Mr. Gaurav Gupta, and for the Opposite Party, Mr. Pravin Bahadur argued at length on the maintainability of this case in this Commission. Learned counsel for Opposite Party raised the issue of maintainability of this Complaint on the ground of Doctrine of Election among other reasons. He submitted that the Complainant was lead Complainant in a case in this Commission in CC No. 335 of 2017. While the matter is pending, the Complainant withdrew on 12.11.2018 to file Complaint in Haryana Real Estate Authority Panchkula, Haryana (for short HRERA). He filed two cases. The first was under Section 7 of Real Estate (Regulation and Development) Act, 2016 (for short RERA) and the second was under Section 18 of the RERA. The Authority rejected both his complaints including one for refund on 8.1.2019 and 2.12.2019 whereupon the Complainant filed an Appeal before Haryana Real Estate Appellate Tribunal, Chandigarh (for short Appellate Tribunal). Subsequently, the Complainant withdrew from the Appeal which was dismissed as withdrawn "without any prejudice to the right of the appellants in the Appeals filed by them for providing remedy under Section 18 of RERA Act, 2016. Thereafter, in July, 2020, the Complainant has filed the present Complaint" in this Commission.

2. Learned counsel for the Opposite Party also mentioned about the principle of Res Judicata to be applied in this case as HRERA has already passed Orders which can only be challenged as per the provisions contained in the statute of RERA Act, 2016.

3. He also submitted that the Haryana Real Estate Appellate Tribunal, in its Order dated 29.1.2021 did not set aside the Order of the Authority. It only gave liberty to avail appropriate legal remedy before appropriate forum. So, the Order of HRERA Authority holds and therefore, seeking relief in this Commission is hit by Doctrine of Res Judicata.

4. Learned counsel for the Complainant argued that the Order of Haryana Real Estate Appellate Tribunal gave him liberty to avail legal remedy before the appropriate forum. He further argued that the Order of RERA Haryana

is not consonance with the power vested with it at that particular time and, therefore, should be considered as a nullity. He drew distinction between the powers of the Regulatory Authority and the Adjudicating Officer under RERA 2016. He argued that the RERA Authority while rejecting refund was not competent to issue such Order in view of the Order of Haryana Real Estate Appellant Tribunal's Order in **Sameer Mahawar Vs. M.G. Housing Pvt.Ltd.** (Appeal No.6/2018) decided on 2.5.2019 which held that HRERA Authority has no jurisdiction to entertain any of the issues with respect to refund claim. Rather, it is the adjudicating officer who has jurisdiction to adjudicate the issues of the refund. So, the impugned Orders passed earlier by the Haryana RERA Authority, declining refund is without jurisdiction and cannot be sustained in the eyes of law.

5. He further submitted that on 12.9.2019, Haryana Government amended Rules 28 and 29 of HRERA Rules conferring jurisdiction upon HRERA Authority to entertain the complaints for any violation of the provisions of RERA as well as application for inquiry to adjudge the quantum of compensation by adjudicating officer. This amendment was challenged in Punjab and Haryana High Court in **Wg. Cdr.Sukhbir Kumar Minhas Vs. State of Haryana** which stayed the Notification of 25.11.2019. However, later on 16.10.2020, Punjab and Haryana High Court upheld the validity of Haryana Government Notification dated 12.9.2019. He summed up by stating that in view of the Appellate Authority's Order in Sameer Mahawar case (supra), the Order of the RERA Authority is not valid. It is another matter that the matter which was subsequently clarified by Government of Haryana, High Court of Punjab & Haryana and the Hon'ble Supreme Court that the Authority had necessary powers in respect of all the Complaints seeking refund. He clarified that these Orders do not have retrospective effect. This was objected to by the learned counsel for the Opposite Party who averred that HRERA Authority possessed requisite powers to adjudicate.

6. The key issue before us is whether the Doctrine of Election will apply in this case. We are at this stage not going into the merits of the Order of HRERA for which there is statutory provision for appeal and which was availed by the Complainant. The confusion created by the Appellate Tribunal in **Sameer Mahawar case (supra)** has been appropriately dealt with both by the Punjab & Haryana High Court and Hon'ble Supreme Court in **Newtech Promoters & Developers Pvt.Ltd. Vs. State of UP & Ors.** decided on 11.11.2021.

7. From the perusal of facts of the case and as summarized by the learned counsel for the Opposite Party in his oral submission, it is very clear that this case is covered under Doctrine of Election. In this regard, we would like to refer to the Order of the Hon'ble Supreme Court in **Ireo Grace Realtech Pvt.Ltd. Vs. Abhishek Khanna & Ors.** (2021) 3 SCC 241, decided on 11.1.2021, wherein the issue of doctrine of election has been dealt of length with as under :-

“39. The doctrine of election is based on the rule of estoppel. [In P.R. Deshpande v. Maruti Balaram Haibatti](#),¹¹ it was held that :

8. The doctrine of election is based on the rule of estoppel – the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. (vide Black's Law Dictionary, 5th Edn.)

40. [In National Insurance Co. Ltd. v. Mastan & Ors.](#),¹² claims for compensation were filed both under the Workmen's Compensation Act, 1923 and the Motor Vehicles Act, 1988. This Court held that the doctrine of election was incorporated in Section 167 of the Motor Vehicles Act. The relevant extract from the judgment reads as follows (SCC pp.648-51, paras 23,27 & 33).

23. The — “doctrine of election” is a branch of “rule of estoppel”, in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Although, there are certain exceptions to the same rule but the same has no application in the instant case.

27. The first respondent having chosen the forum under the 1923 Act for the purpose of obtaining compensation against his employer cannot now fall back upon the provisions of the 1988 Act therefor, inasmuch as the procedure laid down under both the Acts are different save and except those which are covered by [Section 143](#) thereof.

33. On the establishment of a Claims Tribunal in terms of [Section 165](#) of the Motor Vehicles Act, 1988, the victim of a motor accident has a right to apply for compensation in terms of [Section 166](#) of that Act before that Tribunal. On the establishment of the Claims Tribunal, the jurisdiction of the civil court to entertain a

claim for compensation arising out of a motor accident, stands ousted by Section 175 of that Act. Until the establishment of the Tribunal, the claim had to be enforced through the civil court as a claim in tort. The exclusiveness of the jurisdiction of the Motor Accidents Claims Tribunal is taken away by Section 167 of the Motor Vehicles Act in one instance, when the claim could also fall under the Workmen's Compensation Act, 1923. That section provides that death or bodily injury arising out of a motor accident which may also give rise to a claim for compensation under the Workmen's Compensation Act, can be enforced through the authorities under that Act, the option in that behalf being with the victim or his representative. But Section 167 makes it clear that a claim could not be maintained under both the Acts. In other words, a claimant who becomes entitled to claim compensation under both the Motor Vehicles Act, 1988 and the Workmen's Compensation Act, because of a motor vehicle accident has the choice of proceeding under either of the Acts before the forum concerned. By confining the claim to the authority or the Tribunal under either of the Acts, the legislature has incorporated the concept of election of remedies, insofar as the claimant is concerned. In other words, he has to elect whether to make his claim under the Motor Vehicles Act, 1988 or under the Workmen's Compensation Act, 1923. The emphasis in the section that a claim cannot be made under both the enactments, is a further reiteration of the doctrine of election incorporated in the scheme for claiming compensation. The principle 'where, either of the two alternative Tribunals are open to a litigant, each having jurisdiction over the matters in dispute, and he resorts for his remedy to one of such Tribunals in preference to the other, he is precluded, as against his opponent, from any subsequent recourse to the latter' (see *R. v. Evans* [(1854) 3 E & B 363 : 118 ER 1178]) is fully incorporated in the scheme of Section 167 of the Motor Vehicles Act, precluding the claimant who has invoked the Workmen's Compensation Act from having resort to the provisions of the Motor Vehicles Act, except to the limited extent permitted therein. The claimant having resorted to the Workmen's Compensation Act, is controlled by the provisions of that Act subject only to the exception recognised in Section 167 of the Motor Vehicles Act." (emphasis supplied)

41. In Transcore v. Union of India,¹³ this Court considered the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("SARFAESI Act") and the Recovery of Debts due to Banks and Financial Institutions Act, 1993 ("RDDB Act"), wherein it was held that there are three elements of election viz. existence of two or more remedies, inconsistencies between such remedies, and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. The judgment in Transcore was subsequently followed in Mathew Varghese v. M. Amritha Kumar,¹⁴ where it was held that (SCC p. 641, para 46)

"46. A reading of Section 37 discloses that the application of the SARFAESI Act will be in addition to and not in derogation of the provisions of the RDDB Act. In other words, it will not in any way nullify or annul or impair the effect of the provisions of the RDDB Act. We are also fortified by our above statement of law as the heading of the said section also makes the position clear that application of other laws are not barred. The effect of Section 37 would, therefore, be that in addition to the provisions contained under the Sarfaesi Act, in respect of proceedings initiated under the said Act, it will be in order for a party to fall back upon the provisions of the other Acts mentioned in Section 37, namely, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, or any other law for the time being in force."

42. In a recent judgment delivered by this Court in M/s Imperia Structures Ltd. v. Anil Patni and Anr., it was held that remedies under the Consumer Protection Act were in addition to the remedies available under special statutes. The absence of a bar under Section 79 of the RERA Act to the initiation of proceedings before a fora which is not a civil court, read with Section 88 of the RERA Act makes the position clear. Section 18 of the RERA Act specifies that the remedies are "without prejudice to any other remedy available". We place reliance on this judgment, wherein it has been held that : (SCC P.811, para 31-32).

"31. Proviso to Section 71(1) of the RERA Act entitles a complainant who had initiated proceedings under the CP Act before the RERA Act came into force, to withdraw the proceedings under the CP Act with the permission of the Forum or Commission and file an appropriate application before the adjudicating officer under the RERA Act. The proviso thus gives a right or an option to the complainant concerned but does not statutorily force him to withdraw such complaint nor do the provisions of the RERA Act create any mechanism for transfer of such pending proceedings to authorities under the RERA Act. As against that the mandate in Section 12(4) of the CP Act to the contrary is quite significant.

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.”

8. Further, the Hon’ble Supreme Court in its Order in Vodafone Idea Cellular Ltd. Vs. Ajay Kumar Agarwal decided on 16.2.2022 has reiterated the above position as under :-

“The above position was reiterated in IREO Grace Realtech Pvt.Ltd. Vs. Abhishek Khanna by a three-judge Bench of this Court, of which one of us (Justice Dy. Chandrachud) was a part. Justice Indu Malhotra, speaking for the Bench invoked the doctrine of election, which provides that when two remedies are available for the same relief, the party at whose disposal such remedies are available, can make the choice to elect either of the remedies as long as the ambit and scope of the two remedies is not essentially different. These observations were made in the context of an allottee of an apartment having the choice of initiating proceedings under the Act of 1986 or the RERA. In the present case, the existence of an arbitral remedy will not, therefore, oust the jurisdiction of the consumer forum. It would be open to a consumer to opt for the remedy of arbitration, but there is no compulsion in law to do so and it would be open to a consumer to seek recourse to the remedies which are provided under the Act of 1986, now replaced by the Act of 2019. The insertion of the expression ‘telecom services’ in the definition which is contained in Section 2 (42) of the Act of 2019 cannot for the reasons which we have indicated be construed to mean that telecom services were excluded from the jurisdiction of the consumer forum under the Act of 1986 was wide enough to comprehend services of every description including telecom services.”

9. Also, in this Commission’s Order, in ***Nidhi Sachan Vs. Ireo Grace Realtech Pvt. Ltd.*** decided 5.4.2022, it has been held as under :-

“Recently, the Hon’ble Supreme Court in the case of M/s Imperia Infrastructure Ltd. Vs. Anil Patni & Anr. reported in 2020 10 SCC 783, has held that a person has a remedy to approach either of the three Authorities, namely, consumer for a under the Consumer Protection Act, 1986, now replaced by Consumer Protection Act, 2019, Real Estate Regulatory Authorities under the Real Estate (Regulation and Development) Act, 2016 and the National Company Law Tribunal under the provisions of Insolvency & Bankruptcy Code, 2016 for redressal of the grievances, but having approached any one of the Authorities, the doctrine of election applies and that person is estopped from approaching the other two Authorities/Forums/Tribunals, as the case may be.”

10. In view of the principle enunciated by the Hon’ble Supreme Court, once the Complainant has exercised his option withdrawing his complaint from this Commission and filing Complaint before RERA Authority, the Complainant has already exercised his option under Doctrine of Election. Having exercised the option once, he cannot again come back to this Commission seeking redressal of his grievance. In this case, it is noticed, he has been going to various Tribunals and Courts and the allegation of forum shopping is not incorrect.

11. Having regard to the exhaustive arguments of counsel for both Parties, we are of the considered opinion that there are remedies available against the Order of the RERA Authority as per RERA statute and the Complainant should have pursued those remedies. Having opted for redressal of his grievance under Doctrine of Election by withdrawing his complaint from this Commission, the Complainant has no legal right to get back to this Commission after having already gotten Orders from RERA Authority. As rightly ordered by Haryana Appellate Tribunal, the Complainant should have proceeded to file his complaint in the appropriate Court of law. This Commission is not the appropriate forum.

12. In view of the aforesaid discussion, we dismiss this Consumer Complaint with liberty to the Complainant to approach the appropriate Court of law for redressal of his grievance.

13. The pending application, stands disposed of.

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(DR. S.M. KANTIKAR)

PRESIDING MEMBER

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(BINOY KUMAR)

MEMBER

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DR. S.M. KANTIKAR
PRESIDING MEMBER

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BINOY KUMAR
MEMBER