EMAAR MGF LAND LTD. v. *AFTAB SINGH*: THE END OF THE LINE FOR CONSUMER ARBITRATION IN INDIA

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Abstract *The recent decision of the Supreme Court upholding the judgment of the National Consumer Disputes Redressal Commission in Aftab Singh* v. *Emaar Mgf Land Ltd. finally clears the confusion over arbitration of consumer disputes. While jurisprudence prior to the NCDRC's decision left the choice to the consumer to seek redressal before the forums established under the Consumer Protection Act, 1986, or to seek redressal through arbitration, it was for the first time that a judicial body had entered the murky waters of whether consumer disputes are arbitrable or not. NCDRC's decision marked a watershed in jurisprudence on consumer arbitration in India and ultimately held consumer disputes unarbitrable under Section 2(3) of the Arbitration & Conciliation Act, 1996. This paper takes a critical look at the decisions on consumer arbitration prior to the decision of the NCDRC, the decision in Emaar, and whether consumer disputes should be arbitrable. It argues that while the NCDRC arrived at the right conclusion, the analysis should not have been restricted to the Consumer Protection Act being a special legislation and consumer disputes being unarbitrable on grounds of public policy. Thus, the paper argues that the Supreme Court too, in following suit, missed a golden opportunity to not only examine the issue of arbitrability but also to consider the inherent nature of consumer disputes, thereby resulting in the right position of law, but on half-baked legal reasoning.*

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I. INTRODUCTION

The reference of consumer disputes to arbitration or consumer arbitration as it is sometimes called, has for long been an unpleasant road in Indian law.[1] Judicial precedent has forced consumers to row in two boats, i.e., it has maintained jurisdiction of both the consumer fora and the arbitral tribunal in the presence of arbitration clauses and has never completely ousted the jurisdiction of the arbitral tribunal.[2]

However, the recent decision of the Supreme Court of India ("**SC**")[3] upholding the judgment of the National Consumer Disputes Redressal Commission ("**NCDRC**") in *Aftab Singh* v. *Emaar Mgf Land Ltd.*[4] ("***Emaar***") has finally sunk the boat of arbitration by holding that consumer disputes are unarbitrable under Section 2(3) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") and hence, consumer forums are not bound to refer consumer disputes to arbitration under Section 8(1) Arbitration Act.

Admittedly, the decision of the NCDRC and now the SC, marks a watershed in the development of jurisprudence on the issue of arbitrability of consumer disputes and the jurisdiction of the fora created under the Consumer Protection Act, 1986 ("**CoPRA**"). Section 3 of CoPRA *prima facie* states that the remedies under the CoPRA shall be in addition to, and not in derogation of, the provisions of any other law. Thus, the CoPRA only provides for additional remedies, and does not oust the possibility of arbitration of consumer disputes. On the other hand, the addition of the words "*notwithstanding any judgment, decree or order of the Supreme Court or any Court*"[5] to Section 8(1) of the Arbitration Act in 2015[6] arguably manifests the intention of the legislature to disregard any previous judgments,[7]

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1 Alan S. Kaplinsky and Mark J. Levin, 'Consumer Arbitration: If the FAA "Ain't Broke", Don't Fix It', *The Business Lawyer,* vol. 63, no. 3, May 2008, pp. 907-919.

2 Skypack Couriers Ltd. v. Tata Chemicals Ltd. [2000] 5 SCC 294; National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy [2012] 2 SCC 506; and Rosedale Developers (P) Ltd. v. Aghore Bhattacharya [2018] 11 SCC 337 : [2015] 1 WBLR 385.

3 Emaar Mgf Land Ltd. v. Aftab Singh, Civil Appeal Nos. 23512-23513 of 2017, decided on 13-2-2018 (SC).

4 Aftab Singh v. Emaar Mgf Land Ltd., 2017 SCC OnLine NCDRC 1614.

5 Arbitration Act, s8(1) (this provision states as:
"*A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.*.")

6 As amended by the Arbitration and Conciliation (Amendment) Act, 2015.

7 Such as that passed in National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy [2012] 2 SCC 506, Skypack Couriers Ltd. v. Tata Chemicals Ltd. [2000] 5 SCC 294 and Rosedale

which held that the remedy of arbitration is not the only remedy available to the consumer, but is an optional remedy. Therefore, the consumer is free to choose whether the consumer wishes to opt for the remedy under the CoPRA or seeks to resolve his/her dispute through the remedy of arbitration.

However, the moot question is: What should prevail? Should consumer forums disregard the consent of the parties and force parties to seek redressal from consumer forums when they have specifically opted for resolution of their dispute through arbitration, or should they hold the consent of the parties supreme, and refer consumers to arbitrate disputes under Section 8(1) of the Arbitration Act?

Part I of this paper surveys the important judicial precedents on whether the presence of an arbitration clause effectively ousted the jurisdiction of the consumer fora prior to the judgment in *Emaar*. Part II takes a look at the arbitrability of consumer disputes. Part III analyses the judgment in *Emaar* and how the reasoning of the NCDRC diverges from the existing jurisprudence to completely oust the possibility of consumer arbitration in India. Part IV takes a critical look at the inherent nature of consumer disputes irrespective of the test of arbitrability. It supports the decision of the SC and NCDRC in *Emaar* on various grounds other than those considered by the NCDRC.

II. TO ARBITRATE OR NOT TO ARBITRATE? – SAILING IN TWO BOATS BEFORE EMAAR

The Indian courts have for long hesitated to make up their mind about consumer arbitration. Caught between being pro-arbitration, and fulfilling the social welfare objective of the CoPRA, judicial precedents have been shy to hold that consumer disputes are unarbitrable. Instead, they have conveniently left it to the choice of the consumer, who by the very dint of being a 'consumer' has no idea about litigation options.

In this context, it is to be noted that the preamble to the CoPRA states that the CoPRA was enacted to provide for better protection of the interests of the consumers and for that purpose establishes authorities for the settlement of consumer disputes.[8] Thus, the CoPRA was enacted as a special social legislation to address the unequal bargaining power of consumers and to provide swift and efficacious remedy. However, the CoPRA lacked a

Developers (P) Ltd. v. Aghore Bhattacharya [2018] 11 SCC 337 : [2015] 1 WBLR 385.

[8] Preamble of the CoPRA.

non-obstante clause giving it overriding application in supersession to other laws, unlike the recently enacted Real Estate (Regulation and Development) Act, 2016 ("**REA**").[9] Instead, Section 3 of the CoPRA made the remedies under the CoPRA in addition to other existing remedies. Thus, the courts decided not to choose one way or another as to which remedy would prevail, i.e., arbitration or the remedy under the CoPRA.

In their hesitation to decide in favour, or against arbitration of consumer disputes, the courts until *Emaar* never examined the question of arbitrability of consumer disputes under Section 2(3) of the Arbitration Act which clearly provides that not all matters are capable of being referred to arbitration.[10] Instead, they chose to focus their attention on whether the remedy under the CoPRA is exclusive, or in addition to other remedies.

In order to fully appreciate the ramifications of the present problem, it is pertinent to examine the jurisprudence with respect to Section 8(1) of the Arbitration Act prior to its amendment in 2015 vis-à-vis consumer disputes. In *Skypack Couriers Ltd.* v. *Tata Chemicals Ltd.*,[11] the Supreme Court held that the remedy under the CoPRA is in addition to provisions of any other law and therefore, the existence of the arbitration clause cannot oust the jurisdiction under the CoPRA. In another case, the Supreme Court considered the preamble of the CoPRA and the statements of objects and reasons and held that "*it is apparent that the main objective of the Act is to provide for better protection of the interest of the consumer and for that purpose to provide for better redressal mechanism through which cheaper, easier, expeditious and effective redressal is made available to consumers*".[12] Therefore, the remedies under the CoPRA cannot be curtailed in favour of arbitration.

Similarly, in *Fair Air Engineers (P) Ltd.* v. *N.K. Modi*,[13] the Supreme Court took the view that the Parliament was well aware of the Contract Act, 1872 and therefore, while passing the CoPRA wanted the remedy under the Arbitration Act to be in addition to the remedy under the CoPRA and not to

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9 REA, s89 (this provision states as:
"*The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.*")

10 Arbitration Act, s2(3) (this provision states as:
"*This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.*")

11 Skypack Couriers Ltd. v. Tata Chemicals Ltd. [2000] 5 SCC 294.

12 Thirumurugan Coop. Agricultural Credit Society v. M. Lalitha [2004] 1 SCC 305.

13 Fair Air Engineers (P) Ltd. v. N.K. Modi [1996] 6 SCC 385.

serve as an ouster of the jurisdiction of consumer fora. The court explained its view as "*The reason is that the Act intends to relieve the consumers of the cumbersome arbitration proceedings or civil action unless the forums on their own [...] come to the conclusion that the appropriate forum for adjudication of the disputes would be otherwise those given in the Act*".

Thereafter, in *National Seeds Corpn. Ltd.* v. *M. Madhusudhan Reddy* ("***National Seeds***"),[14] the court emphasized on the remedies under the CoPRA being in addition to the other remedies provided under the law and held that the consumer may choose either to go to arbitration or consumer fora.

Thus, prior to *Emaar* the courts were primarily concerned with the remedies available and not whether consumer disputes themselves were arbitrable under Section 2(3) of the Arbitration Act or not.

III. ARE CONSUMER DISPUTES ARBITRABLE?

Before the decision in *Emaar,* courts have applied the jurisprudence on arbitrability of disputes only on the sidelines. However, in order to evaluate the rationale of the NCDRC in *Emaar,* it becomes imperative to examine the existing tests of arbitrability. One such test is the type of remedy sought and whether such remedy is one which the arbitral tribunal is empowered to grant,[15] especially in the presence of special legislation or public policy considerations. In this context, the most important question is whether an arbitration clause can undermine statutory protections granted under the CoPRA for consumer disputes[16] and whether consumer disputes ought to be referred to arbitration. In order to answer the above, it is necessary to look at the position of law with respect to arbitrability of disputes.[17]

The landmark judgment on the question of arbitrability is the case of *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Ltd.*,[18] ("**Booz Allen**") which categorically held:

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[14] National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy [2012] 2 SCC 506.

[15] Russell on *Arbitration* 28, 2007 (22nd edn., 2002).

[16] Aftab Singh v. Emaar Mgf Land Ltd. [2017] SCC OnLine NCDRC 1614.

[17] For arbitrability of disputes, see generally Ajar Rab, 'Redressal Mechanism under the Real Estate (Regulation and Development) Act 2016: Ouster of the Arbitration Tribunal?', NUJS *Law Review,* vol. 10, no. 1, 2017. Available from http://nujslawreview.org/2017/03/26/redressal-mechanism-under-the-real-estate-regulation-and-development-act-2016-ouster-of-the-arbitration-tribunal/, (accessed 6 February 2018).

[18] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. [2011] 5 SCC 532.

> "*Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora.*"

Thus, the court specifically held that public policy considerations or matters exclusively reserved by the legislature for public forums shall be outside the purview of the arbitration. One such public policy consideration relevant to the present analysis is whether parties can contract out of the special legislation in favour of dispute resolution by arbitration and oust the jurisdiction of public courts, tribunals or forums.

Addressing such a concern, in *Vimal Kishor Shah* v. *Jayesh Dinesh Shah*,[19] the court held that the claims under the Trusts Act, 1882 are not arbitrable since the Act exhaustively provides for remedies before the Principal Civil Court. Interestingly, the court relied on the interpretation in *Premier Automobiles Ltd.* v. *Kamlekar Shantaram Wadke*,[20] wherein the issue before the court was whether a civil suit can be barred in the context of remedies provided under the Industrial Disputes Act. Further, in *Natraj Studios (P) Ltd.* v. *Navrang Studios,*[21] while discussing the inter-play of the Arbitration Act versus the remedies provided under the Bombay Rents Act, the Supreme Court held:

> "*17. ...Therefore, public policy requires that parties cannot also be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by Special Courts constituted by the Act. It follows that arbitration agreements between parties whose rights are regulated by the Bombay Rents Act cannot be recognized by a court of law.*"

The Supreme Court clearly emphasized that if special courts have been constituted under a legislation, especially when such legislation is used to address a social objective, parties cannot be permitted to contract out of the legislative mandate which requires that disputes under such legislations be resolved through redressal mechanisms created under such a legislation.

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[19] Vimal Kishor Shah v. Jayesh Dinesh Shah [2016] 8 SCC 788.
[20] Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke [1976] 1 SCC 496.
[21] Natraj Studios (P) Ltd. v. Navrang Studios [1981] 1 SCC 523.

Recently, in *Ayyasamy*,[22] which is post the amendment to the Arbitration Act, Dr. D.Y. Chandrachud J. referred to the decisions of the Hon'ble Supreme Court[23] and held that the existence of an arbitration clause will not be a bar to the consumer forum(s) entertaining a complaint under the CoPRA. In this case, the court took the test mentioned in *Booz Allen* a step further and created a distinction between a public fora and special fora. The rationale of the court was that the general principle is that a dispute which is capable of adjudication by an ordinary civil court will also be capable of being resolved by an arbitration. Therefore, the test of public fora may not be adequate to oust the jurisdiction under the Arbitration Act. The court explained that there are classes of dispute which falls within the exclusive domain of special fora under legislation and where such legislation confers exclusive jurisdiction to the exclusion of the ordinary civil court, then as a matter of public policy such dispute would not be capable of resolution by arbitration. Surprisingly and erroneously, the Supreme Court recently upheld this reasoning in *Himangni Enterprises* v. *Kamaljeet Singh Ahluwalia*[24], even when the dispute between the landlord and tenant was not governed by a special rent legislation.

IV. *EMAAR* – BRINGING CONSUMER ARBITRATION TO AN END

Relying on the aforesaid judgments, the NCDRC took the view that the amendment to the Arbitration Act could not be interpreted in a manner by which the Parliament intended to undo the jurisprudence under the CoPRA and reduce it to "useless lumber" or "dead letter".[25] The NCDRC stated that the purpose of the Law Commission's report with respect to the amendment to the Arbitration Act was self-evident, being related to the scope and nature of permissible pre-arbitral judicial intervention, especially in the context of the Section 11 of the Arbitration Act.[26] The NCDRC held that the Law Commission while using the phrase "*notwithstanding any judgment, order or decree*" did not have the issue of non-arbitrability of consumer disputes

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22 A. Ayyasamy v. A. Paramasivam [2016] 10 SCC 386.

23 Skypack Couriers Ltd. v. Tata Chemicals Ltd. [2000] 5 SCC 294; National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy [2012] 2 SCC 506; and Rosedale Developers (P) Ltd. v. Aghore Bhattacharya [2018] 11 SCC 337 : [2015] 1 WBLR 385.

24 Himangni Enterprises v. Kamaljeet Singh Ahluwalia [2017] 10 SCC 706.

25 Aftab Singh v. Emaar Mgf Land Ltd. [2017] SCC OnLine NCDRC 1614, para 31.

26 Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Com No 246, August 2014).

or any other dispute in mind. It was limited to changing the position of law after the judgment in *SBP & Co.* v. *Patel Engg. Ltd.*[27]

The NCRDC also made reference to Section 2(3) of the Arbitration Act and held that the mandate of the provision was that the statutory regime concerning the arbitration will not be applicable where public law regime operates, and unlike many general savings clauses, Section 2(3) of the Arbitration Act categorically prevents the application of the Arbitration Act to disputes which are unarbitrable. Therefore, even the Arbitration Act recognizes that there are certain disputes which cannot be referred to arbitration and are to be adjudicated and governed by statutory enactments which have been specifically passed for a particular public purpose and to attain the public policy objective. If a tribunal attempts to deal with such matters, the award so passed would be unenforceable.[28]

It is extremely important to note that the NCDRC's reasoning is different from the existing jurisprudence. In *National Seeds*,[29] the court held that consumers can choose whether to go for arbitration or to seek remedy under the CoPRA. The NCDRC, in *Emaar,* expressly held that consumer disputes are not arbitrable and effectively ousted the jurisdiction of the arbitral tribunal by placing reliance on Section 2(3) of the Arbitration Act.

Subsequently, while hearing the appeal against the judgment in *Emaar,* the SC in one line held that it does not find any ground for interference with the order of the NCDRC. The effect of this is that consumers no longer have a picking-option with respect to the choice of forum for adjudication of their disputes. By interpreting Section 2(3) of the Arbitration Act and holding that consumer disputes are no longer arbitrable, irrespective of the choice of the client, the courts have now closed the future of consumer arbitration in India. Sadly though, the position of law has emerged on half-baked legal reasoning and not on the strength of a comprehensive analysis of consumer arbitration.

V. CONSUMERS SHOULD NOT BE COMPELLED TO ARBITRATE DISPUTES

While the SC and the NCDRC have ensured that the consumers are no longer forced to arbitrate their disputes, both courts have missed a golden

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[27] SBP & Co. v. Patel Engg. Ltd. [2005] 8 SCC 618 : [2005] 3 Arb LR 285.
[28] Aftab Singh v. Emaar Mgf Land Ltd. [2017] SCC OnLine NCDRC 1614.
[29] National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy [2012] 2 SCC 506.

opportunity to discuss and examine the nature of consumer disputes and consider whether the traditional rules of the philosophy of arbitration apply to consumer disputes.

Freedom of Contract - One of the key features and premise of arbitration is that arbitration is a creature of consent, i.e., the starting point is the contract to arbitrate.[30] Parties willingly consent to refer their dispute to a forum apart from the court. They are usually informed and the decision to arbitrate is voluntary, i.e., they have the opportunity to determine what disputes are to be subjected to arbitration, they have the freedom to choose the arbitrator, the seat of arbitration, the procedure to be followed by the arbitral tribunal and the applicable law.[31] Thus, the entire premise of arbitration rests in the freedom of contract. However, it is this very freedom of contract that is missing in the agreements and contractual relationship between businesses and consumers.[32]

No Explicit Bargain - In consumer disputes, the decision to arbitrate is almost never the subject of an explicit bargain.[33] The parties, especially the consumers, never get to choose or even negotiate on whether they are agreeable to settle their disputes through arbitration. The choice to arbitrate is usually made unilaterally by the drafter of the standard form, who most likely selected arbitration not for its fairness but for its advantage.[34] Thus, arbitration clauses in consumer contracts do not involve arm's length negotiation but instead comprise terms which are given to the consumer on a take-it-or-leave-it basis, the classic case of adhesion in contracts.[35]

Result Shopping – Businesses, thus, impose arbitration to effectively keep the national courts or the judicial system out of the business of the consumer protection and replace it with a system of private justice, i.e., an effective result shopping and not just forum shopping alone.[36] Another

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30 Richard E. Speidel, 'Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?', (1998) 40 Arizona Law Review 1069.

31 *Ibid*.

32 *Ibid*.

33 Edward A. Dauer, 'Judicial Policing of Consumer Arbitration', (2000) 1 Pepp. Disp. Res. L.J. 91.

34 *Ibid*.

35 Thomas J. Stipanowich & J. Clark Kelso, 'Protecting Consumers in Arbitration: Consumer Due Process Protocol Sets Forth 15 Principles for Assuring Consumers a Fundamentally Fair Dispute Resolution Process', (1998) 5 Dispute Resolution Magazine 11.

36 Cherisse Mastry, 'Arbitration of Consumer Disputes: The AAA's Consumer Due Process Protocol', (2001) 5 Journal of Texas Consumer Law 43.

reason for businesses to use arbitration clauses as part of their boilerplate contract is to enact major changes in the substance and application of law.[37]

Bar to Class Actions - It is abundantly clear that only businesses get to decide whether their dispute shall be governed by arbitration or not. It is in the interest of businesses to use arbitration as it excludes class action suits.

Lop-sided - Additionally, a system of private justice such as arbitration will always favour those who control axes, procedures, and the money.[38] Thus, businesses analyze and determine the attributes of arbitration which will operate solely in their favour, e.g., a private venue chosen by an economically stronger party will effectively serve as a deterrent to the consumer from pursuing his/her claim at a far off venue.[39] Thus, though on the face of it, the arbitration mechanism seems to be fair but it can be systematically lopsided[40] in terms of the cost of arbitration, selection of venue, choice of arbitrators, etc., and therefore, unfair to the consumers.[41]

Cost of Arbitration - The cost of arbitration is usually high, and in some cases prohibitively high, either because the consumer may not be in a position to afford the fees of lawyers and the arbitrator's fees, or because the cost of bringing a claim would outweigh the benefit of the remedy.[42] Since consumer disputes arise most frequently with respect to small grievances such as home repairs, sale of cars, purchase of appliances or home furnishings, etc., the goods sold and services rendered are often necessities and not luxuries.[43] Therefore, to include arbitration for such small claims makes little sense, especially in light of the fact that businesses can tailor arbitration clauses to favour them.

Invalid Waiver - It is settled law that the principle of *quilibet potest renunciare juri pro se introducto*, i.e., anyone may renounce a law introduced for his own benefit, is applicable only when the statute makes the provision for individual benefit and the prohibition is not a matter of public

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37 *Ibid*.
38 *Ibid*.
39 Dauer (n 33).
40 Dauer (n 33).
41 Sugandha Kamal, 'Mandatory Consumer Arbitration', 3 May 2012. Available from SSRN: http://ssrn.com/abstract=2050418, (accessed 6 February 2018).
42 Mark E. Budnitz, 'The High Cost of Mandatory Consumer Arbitration', *Law and Contemporary Problems*, vol. 67, no. 1/2, Mandatory Arbitration, Winter-Spring 2004, p. 133-166.
43 Aryeh Friedman, 'The Effectiveness of Arbitration for the Resolution of Consumer Disputes', (1977) 6 N.Y.U. Review of Law & Social Change 175.

policy. However, in cases where the statute has been enacted in the interests of public policy and for the benefit of the public, such a right cannot be waived under any circumstance.[44] Therefore, if it is to be argued that parties validly gave up the remedy under the CoPRA in favour of arbitration, such a waiver would be invalid in light of the CoPRA being a statute enacted in the interest of public policy and hence, its application incapable of being contracted out of.

Uninformed Consumers – Most often than not, consumers are not aware of the process of arbitration, the consent to an arbitration clause and its effect of waiver of the right to go to trial or consumer forum. Furthermore, consumers have no access to information about arbitration procedure and their complexity. They often do not understand who should be appointed as arbitrator and what role that person is supposed to play. Therefore, the consumers' understanding the questions of independence and impartiality of the arbitrators does not even arise. Inevitably, parties have to engage lawyers to help them navigate the unchartered territory of arbitration. Therefore, the intent of allowing consumers to represent their own cases under the CoPRA would be rendered futile.[45]

Non-publication of awards – Since arbitration awards are not available in public domain, it forces consumers to compulsorily arbitrate disputes raising public policy concerns. The public is not only interested in resolving independent disputes but is also entrusted with ensuring that publicly promulgated laws are enforced and publicized.[46] Also, it is in the interest of the State to regulate consumer affairs in order to protect consumers. Otherwise, the objective of better protection of consumers mentioned in the preamble of the CoPRA would be negated as the State will not have any information on the violations of the CoPRA and hence, will not be able to regulate consumer affairs or enact or amend existing legislation in light of new consumer concerns.

Lack of Binding Precedent – Another problem that comes with forcing consumers to arbitrate their disputes is that the arbitrators cannot create or

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[44] Murlidhar Aggarwal v. State of U.P. [1974] 2 SCC 472 : [1975] 1 SCR 575 – the tenant waived his right to approach the civil court under the U.P. (Temporary) Control of Rents and Eviction Act. The lease deed was declared illegal as the provision was for the benefit of the public and could not be waived; Indira Bai v. Nand Kishore [1990] 4 SCC 668.

[45] Consumer Protection Regulations, 2005, s26 (3) and s 26(4).

[46] Kamal (n 41).

modify existing law.[47] Thus, arbitrators would not be able to further develop jurisprudence on consumer rights and concepts such as deficiency of service, strict product liability, definition of consumer, etc., would become stagnant and arbitrators will simply continue to apply existing principles of law even though nature of dispute may demand new tests, approaches and jurisprudence.

Consumers Cannot Choose the Right Arbitrators – Consumers might choose people who they know. Such people may not necessarily be lawyers or judges. Thus, there is ample scope for the possibility that there might be procedural unfairness or divergence from rules of evidence, etc., which may not be sufficient for a successful challenge of the award under Section 34 of the Arbitration Act since the grounds for challenge are limited.[48]

CoPRA Will Become Futile – If parties are forced to arbitrate their consumer disputes, the entire purpose of the CoPRA would be frustrated. The Supreme Court in *National Insurance Co. Ltd.* v. *Hindustan Safety Glass Works Ltd.*,[49] categorically highlighted that the CoPRA was enacted by the Parliament as the beneficial legislation to overcome the disadvantage a consumer has vis-à-vis the supplier of goods and services. In several cases,[50] the court has held that the provisions of the CoPRA have to be interpreted in favour of the consumer in order to equalize the bargaining power of consumers. Furthermore, on several occasions, the court has held that the CoPRA should be interpreted in a liberal manner and such interpretation should be preferred which fulfills the purpose of the Act. Thus, forcing consumers to arbitrate would effectively undo the CoPRA and the existing jurisprudence.

VI. CONCLUSION

It is clear from the foregoing that *Emaar* marks the first judicial precedent which engages in the real examination of the question of arbitrability of consumer disputes. However, the NCDRC came to the right conclusion only on the basis that consumers cannot be forced to arbitrate in light of CoPRA being a special legislation and on grounds of public policy. The Supreme

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47 Richard M. Alderman, 'What's Really Wrong with Forced Consumer Arbitration?', Business Law Today, November 2010, paras 1-2.

48 Justice R.S. Bachawat's *Law of Arbitration & Conciliation*, vol. 1, 6th edn., 2018, p. 1795.

49 National Insurance Co. Ltd v. Hindustan Safety Glass Works Ltd. [2017] 5 SCC 776.

50 LDA v. M.K. Gupta [1994] 1 SCC 243 : AIR [1994] SC 787, relying on ESI Corpn. v. High Land Coffee Works [1991] 3 SCC 617; CIT v. Taj Mahal Hotel [1971] 3 SCC 550 and State of Bombay v. Hospital Mazdoor Sabha AIR [1960] SC 610.

Court has now followed suit. While hearing the appeal, it should have at least examined the long-standing confusion over consumer arbitration after analyzing the entire philosophy of consumer disputes. Instead, the judges chose to shy away from that onerous, yet necessary task, by simply opting to not interfere with the NCDRC's judgment in *Emaar,* without any reasons.

Despite the broad and encompassing language of Section 3 of the CoPRA, the Supreme Court should have ventured into the inherent problems with consumer arbitration and not just rely on the existing jurisprudence on arbitrability which was examined by the NCDRC. In this context, the court would have found ample support from various jurisdictions across the globe which have specifically amended or enacted law(s) explicitly excluding consumer disputes from arbitration.[51]

Thus, while the road for consumer arbitration in India now remains forever closed, it is sadly not the result of a deliberate and conscious step towards protecting consumer rights but as a result of a landslide of the jurisprudence of arbitrability of disputes barricading consumer arbitration.

[51] New Civil and Commercial Code of Argentina, s1651; Marval O'Farrell & Mairal, 'Ruling on arbitrability of consumer disputes under new Civil and Commercial Code', *Lexology,* 19 April 2016. Available from https://www.lexology.com/library/detail.aspx?g=fd646ec7-657e-48b9-9a54-7868a7333752, (accessed 6 February 2018); For the amendments to the International Commercial Arbitration Act and to the Consumer Protection Act of Bulgaria, see, Velislava Hristova, 'Changes in the Arbitration Law: Greater Certainty for Consumers Comes with Greater Control over Arbitration in Bulgaria', *Kluwer Arbitration Blog,* 26 June 2017. Available from http://arbitrationblog.kluwerarbitration.com/2017/06/26/arbitral-women/, (accessed 6 February 2018).