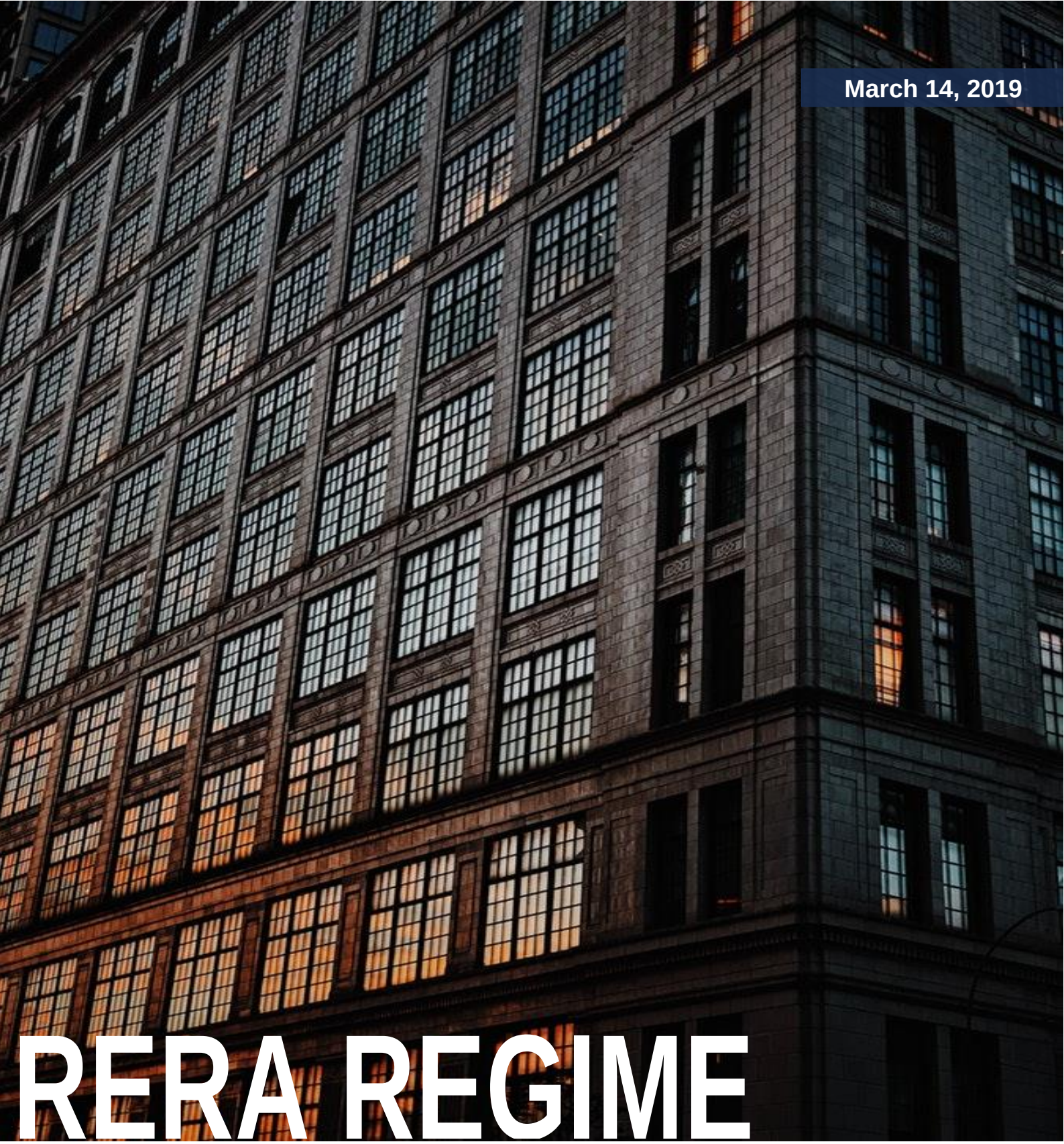

March 14, 2019

RERA REGIME

- TEETHING TROUBLES

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Introduction

On the value of owning a property, Franklin D. Roosevelt once said that "*Real Estate cannot be lost or stolen, nor can it be carried away. Purchased with common sense, paid in full, and managed with reasonable care, it is about the safest investment in the world.*" The truth of this statement is unavoidable even today, as the scurry to own a home is at an all time high. In this respect, with the advent of the Real Estate (Regulation and Development) Act, 2016 ("**RERA**"), we now have a central piece of legislation governing the *inter se* rights and obligations of all key players in the real estate industry, which was heretofore largely regulated by the local laws of each State.

Under the RERA regime, each State Government is required to establish a regulatory authority and promulgate its own set of rules and regulations within the confines of the provisions of the statute.[1] Accordingly, rules and regulations have been made, and real estate regulatory authorities (each an "**Authority**" and collectively the "**Authorities**") have been established by the Governments of different States in compliance with the mandate of RERA.[2]

In the short passage of time since these Authorities have been set up, RERA has already come to the forefront as a popular choice of forum for adjudication of disputes, with thousands of complaints being made before the Authorities in different States all over India. As is true for all laws in their nascent phases, the Authorities have encountered an overwhelming majority of complaints regarding real estate projects which were already in existence when RERA was brought to life. Such pre-existing projects brought with them the legacy of rights and liabilities created under contract, as well as the local laws. In this transitionary phase, it becomes imperative to understand the inter play of rights and obligations set forth under RERA with respect to projects and complaints which pre-date the statute.

Objective of the paper

In light of the above, the aim of this paper is to understand two (2) of the several significant issues that have arisen, as far as real estate projects preceding RERA are concerned, by critically analyzing the views taken by the courts and the Authorities with respect to the same, and to evaluate the impact that such developing jurisprudence may have on allottees and promoters falling within the ambit of RERA.

It may be pertinent to note that certain Authorities have been passing orders and judgements in vernacular languages, however, for the purpose of this paper, only orders and judgements which were available in the English language have been considered.

Brief overview

RERA was propounded with threefold objectives: firstly, establishment of the Authorities for regulation and promotion of the real estate sector and for ensuring protection of consumers; secondly, establishment of an adjudicating mechanism for speedy dispute redressal; and thirdly, establishment of Appellate Tribunals to hear appeals.[3]

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[1] Please see Sections 20, 84 and 85 of RERA.

[2] It may be pertinent to note that instead of making rules and regulations under RERA, the Government of the State of West Bengal enacted the West Bengal Housing Industry Regulation Act, 2017 (HIRA). Please see the thought paper titled '*West Bengal Housing Industry Regulation Act, 2017 – Comparison with RERA and Questioning its Vires*' dated November 30, 2017, which analyses the constitutional validity of HIRA. Please also note that, as per the information available on the date of this paper, not all States have notified rules or established authorities under RERA, examples – Mizoram, Meghalaya and Sikkim.

[3] Please see the Preamble of RERA.

In line with the aforementioned objectives, the provisions of RERA have been divided into ten chapters, which broadly cover registration of promoters and real estate agents[4], rights, functions and duties of promoters and allottees[5] and establishment of Authorities[6], Appellate Tribunals[7] and the Central Advisory Council[8], and offences and penalties[9] for non-compliances under RERA.[10]

A 'real estate project' has been defined in Section 2(zn) of RERA as "the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;".

Analysis

Jurisdiction of Authorities & Applicability of RERA to Unregistered Projects

Section 3(1) of RERA restricts a promoter from *inter alia* advertising, selling or offering to sell any plot, apartment or building in a real estate project, without registering such real estate project with the Authority. Section 3(2) of RERA provides exemptions from registration under RERA to certain real estate projects.[11]

From a review of the orders and judgements passed by the Authorities in the States of Maharashtra, Haryana and Punjab, it would appear that a recurring question which these Authorities have dealt with from time to time, has been with respect to the jurisdiction of the Authorities to entertain complaints pertaining to unregistered projects.

In order to have a holistic view of the matter, it becomes imperative to understand the different kinds of projects which would remain 'unregistered' under RERA. One such set of projects would of course be those that have been specifically exempted under Section 3(2), *viz*. small projects, projects which have received completion certificates and renovation projects. However, it may be pertinent to note that 'unregistered' projects would also comprise of real estate projects which were required to be registered under Section 3, but which have in fact not been registered in violation of the provisions of RERA. The jurisprudence in this regard has developed in the following manner –

[4] Please see Chapter II, Section 3 to Section 10 of RERA.
[5] Please see Chapters III & IV, Section 11 to Section 19 of RERA.
[6] Please see Chapter V, Section 20 to Section 40 of RERA.
[7] Please see Chapter VII, Section 43 to Section 58 of RERA.
[8] Please see Chapter VI, Section 41 to Section 42 of RERA.
[9] Please see Chapter VIII, Section 59 to Section 72 of RERA.
[10] Sections 2, 20 to 39, 41 to 58, 71 to 78 and 81 to 92 of RERA came into force with effect from May 1, 2016, whereas the remaining provisions of RERA came into force on May 1, 2017.
[11] Section 3(2) of RERA – "*..(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required –*
(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases: Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;
(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;
(c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project."

Maharashtra

In one of its earlier decisions[12], the full bench of the Maharashtra Real Estate Regulatory Authority, Mumbai ("MahaRERA") had categorically stated that:

"*MahaRera gets jurisdiction to entertain only those complaints which relate to a registered project*" (emphasis supplied).

Subsequently however, the Authority altered its view and took a step to update its software to entertain complaints pertaining to projects which were not registered with it. This development has been recorded by the Division Bench of the Bombay High Court in the case of *Mohammed Zain Khan v. Maharashtra Real Estate Regulatory Authority & Ors.*,[13] as follows:

"*The counsel appearing for the Respondent No.1 on instructions states that at present the on-line software system is not equipped to entertain the complaints in respect of the projects which are not registered under the RERA Act. It is further stated that necessary modifications / up-gradation of the software will be made within period of 15 days from today. On completion of the process of up-gradation of the software equipped of receiving online complaints, in respect of unregistered projects by the MahaRERA within the time stipulated as above, it would be open for the Petitioner to register the complaint in observance of the procedure prescribed in that behalf. The complaint tendered online by the Petitioner and other similarly situated complainants, in respect of unregistered projects would be entertained and the same would be dealt with in accordance with the procedure that is being adopted by MahaRERA in respect of disposal of complaints in relation to registered projects.*" (emphasis supplied)

The aforementioned stand taken by MahaRERA, has also been reiterated in its subsequent decisions, wherein its jurisdiction to entertain complaints with respect to unregistered projects has been upheld.[14] While the foregoing decisions referred to the Authority's jurisdiction over unregistered projects in general, it may be noted that, with respect to a project which was exempted under Section 3(2) of RERA as it had already received its completion certificate prior to commencement of RERA, a Single Member of MahaRERA, while disposing of a series of 25 (twenty five) complaints by a single order in the case of *Sagar Fulzade v. M/s. Vedant Buildcon & Ors.*, has observed that[15] –

"*With regard to the preliminary objections raised by the respondent, with regard to the maintainability of the complaints which are not part of this registered project, the MahaRERA feels that the respondent has undertaken the project having total 5 numbers of buildings, out of which he has completed 2 buildings i.e. A & B and obtained occupancy certificate for the said buildings in part and few buildings are yet to be completed. As per the provisions of section 19(3) of the RERA Act, on receipt of completion certificate, the promoter is liable to handover possession of the flat to the allottee. In the present case though the respondent has obtained occupancy certificate for a few buildings, wherein the flats of the complainants are situated, the possession of the same has not been given. It shows that although the said project of the respondent had competed, the obligation of the respondent to hand over possession of the flat was not fulfilled in terms of Section 4 of MOFA 1963 and Section 18 & 19 (3) of RERA Act, 2016. The respondent in the present case cannot deny the entitlement of the homebuyers. The MahaRERA therefore feels that this Authority has jurisdiction to try and entertain these complaints.*" (emphasis supplied)

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[12] *Prasad Patkar v. Runwal Projects Pvt. Ltd. & Ors.*, [Complaint No. CC006000000000182]; *Prasad Patkar v. Runwal Projects Pvt. Ltd.*, [Complaint No. CC006000000000481]; & *Avinash Rai v. Runwal Projects Pvt. Ltd. & Ors.*, [Complaint No. CC006000000000131][All disposed off by a final common order dated November 17, 2017].

[13] [W.P. (Lodging) No. 908 of 2018, Order dated July 31, 2018].

[14] *Kirit Gandhi v. M/s. Sunstone Developers JV & Ors.* [No. AT006000000000267, Order dated August 30, 2018]; *Lodha Bellissimo Crown Buildmart Pvt. Ltd. v. Haresh Jethmal Asher* [No. AT006000000010684, Order dated October 25, 2018].

[15] [Complaint No. CC005000000011536 & Ors., Order dated October 15, 2018].

It may be noteworthy to mention here, that as the per the aforementioned view, it appears that not only does MahaRERA have jurisdiction to adjudicate disputes relating to unregistered projects, but also the power to hold promoters of unregistered projects liable for non-compliance with the obligations of promoters under RERA.

Haryana

The question as to whether the Authority had jurisdiction over unregistered projects was answered in the affirmative by the Haryana Real Estate Regulatory Authority, Panchkula ("**HARERA Panchkula**"), in its landmark decision in *Sanju Jain v. TDI Infrastructure Ltd.*[16]. Further with respect to the applicability of the provisions of RERA to promoters of unregistered projects, the Authority held that –

"*Section 11 of the Act defined and elaborates the functions and duties of a promoter. Nowhere in this section is used the expression 'Promoter of a registered project' and since the expression used everywhere in the Section is 'Promoter', it cannot be legitimately argued that the duties cast upon the promoter will be applicable only to promoter of a registered project and not to the promoter of an unregistered project.*
…Section 34(f) of the Act enjoins a duty upon the Authority to ensure compliance of all the obligations by the stake-holders in the real estate project as envisaged under the Act, Rules and Regulations made thereunder. There is no provision in the Act which expressly or impliedly provides that duties, responsibilities and obligations of a promoter towards his allottees will cease to exist upon grant of completion or occupation certificate. So, no promoter can be allowed to argue that he stands absolved of discharging his statutory obligations after receipt of completion certificate or that the Authority after grant of completion certificate will have no jurisdiction to adjudicate the complaints of the allottees.
….That apart, the issuance of a part or full completion certificate will not be a conclusive proof of the fact that the project has been developed as envisaged under the agreement of sale executed between the promoter and the allottee. Unless the development of the project is carried out in the manner as promised to the allottee under the agreement of sale, the allottee may have some genuine grievance against the promoter and will have the right to invoke the jurisdiction of this Authority for redressal of his grievance, irrespective of the fact that the promoter had obtained a completion/part completion or a occupation certificate for his project. The actual status of the project in such eventuality shall always remain a subject for verification by the Authority in order to determine whether or not the promoter has discharged his obligations in respect of development works. Thus viewed, no promoter can save himself from discharging his obligations on the ground that he has obtained a completion/occupancy certificate in respect of his project and this Authority has jurisdiction to adjudicate upon the complaint filed against a promoter regarding non-performance of his obligations." (emphasis supplied)

The other significant decision in this regard was passed by the Haryana Real Estate Regulatory Authority, Gurugram ("**HARERA Gurugram**") in the case of *Simmi Sikka v. Emaar MGF Land Limited*[17], where the HARERA Gurugram summed up its views regarding the applicability of RERA and jurisdiction of the Authorities as follows –

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[16] [Complaint No. 144 of 2018, Order dated June 12, 2018]. Followed in *Ritu Aggarwal v. TDI Infrastructure Pvt. Ltd.* [Comp No. RERA-PKL 730/2018, Order dated January 15, 2019]; *Madhu Sareen v. BPTP Ltd.* [RERA-PKL-Comp.113/2018 & Ors.; Order dated August 31, 2018]; *Devinder Singh v. BPTP Ltd.* [RERA-PKL 103/2018, Order dated January 15, 2019]; *Manoj Suneja v. TDI Infrastructure Pvt. Ltd.* [RERA-PKL 451/2018, Order dated December 20, 2018]; *Shamsher Singh v. Suncity Projects Pvt. Ltd.* [Comp No. 504/2018, Order dated December 18, 2018]; *Baldev Singh v. Ultratech Township Developers Pvt. Ltd.* [RERA-PKL 335/2018, Order dated November 27, 2018]; *Aditya Shrivastava v. BPTP Ltd.* [RERA-PKL 437/2018, Order dated November 20, 2018]; and others.

[17] [Complaint No. 7 of 2018, Order dated August 21, 2018] Followed in *Sandeep Singhal v. Umang Realtech Pvt. Ltd.* [Complaint No. 711/2018, Order dated January 15, 2019]; *Mandeep Singh Brar v. Landmark Apartment Pvt. Ltd.* [Complaint No. 84/2018, Order dated November 20, 2018]; *Monika Jain & Ors. v. Parsvnath Developers Ltd.* [Complaint No. 697/2018, Order dated November 20, 2018]; *Bhim Sain Jhorar v. Ramprastha Promoters and Developers Pvt. Ltd.* [Complaint No. 217/2018, Order dated November 20, 2018]; *Raman Kumar v. Landmark Apartments Pvt.*

"***99. Applicability of the Act***
(a) The Real Estate (Regulation and Development) Act, 2016 mentions nowhere that it is applicable only for registered projects.
(b) The Real Estate (Regulation and Development) Act, 2016 provides certain categories of projects are not required to be registered but these are within the ambit of the Act. These projects mentioned in section 3(2) have been taken out of registration requirement but not out of purview of other provisions of the Act.
(c) The provisions regarding registration and obligation during registration are applicable only for the registered projects……
(g) A complaint pertaining to violation of provisions of the Real Estate (Regulation and Development) Act, 2016, the Haryana Real Estate (Regulation and Development) Rules, 2017 and regulation thereunder may be filed by any aggrieved person in respect of real estate belonging to any real estate project which qualifies to be real estate project as per the definition given in section 2(z)(n) of the Real Estate (Regulation and Development) Act, 2016." (emphasis supplied)

From a perusal of the decisions cited in the foregoing paragraphs, it is quite evident that the views taken by both HARERA Panchkula and HARERA Gurugram are in tandem, to the extent that these Authorities have upheld their jurisdiction to entertain complaints with respect to unregistered projects. They have also observed that even though certain projects have been granted exemptions from being registered under RERA, such unregistered projects would come within the purview of RERA and consequently the promoters of these unregistered projects would have to comply with the obligations of promoters specified therein.

Punjab

A diametrically different approach has been taken by the Real Estate Regulatory Authority, Punjab ("**Punjab Authority**") with regard to maintainability of complaints in relation to projects which are not registered under RERA. In the case of *Bikramjit Singh & Ors. v. State of Punjab & Ors.*[18], the majority view of the full bench of the Punjab Authority was that, complaints with respect to unregistered projects would not be maintainable before the Punjab Authority, as the Authority does not have the jurisdiction to adjudicate upon such complaints –

"*In my opinion, even though it is not specifically laid down in the Act that complaints cannot be filed against promoters in relation to projects that are not registered, the scheme and sequencing noted above does lead to this conclusion. To hold otherwise would imply that promoters who do not register their projects can be put into double jeopardy, as it were by both penalizing them and also making them amenable to the directions issued by the Authority. Thus I have no hesitation in holding that under the RERA Act complaints can be instituted against promoters only in relation to projects which have been registered with this Authority – complaints against other promoters/projects can be filed in other forums/courts available under law.*" (emphasis supplied)

Ltd. [Complaint No. 438/2018, Order dated November 22, 2018]; *Pramod Kumar Agarwal v. SS Group Pvt. Ltd.* [Complaint No. 63/2018, Order dated November 22, 2018]; *Puneet Dhar v. Supertech* [Complaint No. 743/2018, Order dated December 18, 2018]; *Roop Chand Chopra & Ors. v. VSR Infratech Pvt. Ltd.* [Complaint No. 231/2018, Order dated November 22, 2018]; *Bihari Lal Bakshi v. VSR Infratech Pvt. Ltd. & Ors.* [Complaint No. 232/2018, Order dated November 22, 2018]; *Pushpa Gupta v. VSR Infratech Pvt. Ltd.* [Complaint No. 145/2018, Order dated November 22, 2018]; and many others.

[18] [Complaint No. 3 of 2017, Order dated December 13, 2017].

Tamil Nadu

The Tamil Nadu Real Estate Regulatory Authority ("TNRERA"), has consistently held in a string of orders that projects for which completion certificates have been received, fall "*outside the purview of TNRERA*", without elaborating on the reasons for such view.[19]

From the judgements referred to in the preceding paragraphs, it becomes clear that the Authorities have dealt with two (2) critical questions concerning projects which are not registered under RERA:

***Firstly*, whether the Authorities have the jurisdiction to hear cases pertaining to unregistered projects; and**

***Secondly*, whether projects which have been exempted from registration requirements under Section 3(2) of RERA, have only been exempted from such registration requirements, and consequently fall within the realm of RERA.**

From a perusal of the provisions of RERA, it is apparent that the Authorities would have jurisdiction to hear complaints for any "*violation or contravention of the provisions of this Act or the rules and regulations made thereunder*"[20], thereby including within its ambit projects which are 'unregistered' in violation of the legislation. With respect to projects which have been specifically exempted under Section 3(2), it may be noted that Sub-Section (2) of Section 3 of RERA is a non obstante provision, beginning with the words "*Notwithstanding anything contained in sub-section (1)…..*"[21]. The non obstante clause only refers to the enacting provision Sub-section (1) of Section 3, which covers the obligation of a promoter to register his real estate project. On interpretation of non obstante clauses, the Supreme Court in the case of *Central Bank of India v. State of Kerala & Ors.*[22] held that –

"*A non obstante clause is generally incorporated in a statute to give overriding effect to a particular section or the statute as a whole. While interpreting non obstante clause, the Court is required to find out the extent to which the legislature intended to do so and the context in which the non obstante clause is used.*" (emphasis supplied)

The Courts have also cautioned that the words used in a non obstante clause should be construed strictly[23] and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution.[24]

Relying on these settled principles of interpretation, the language of the non obstante clause in Section 3(2) would suggest that it was inserted with the intention to only prevail over the provisions of Section 3(1) and not the whole enactment. The corollary of such an interpretation would be that, projects which have been exempted under Section 3(2), have only been exempted with respect to the obligation of registration under RERA and therefore the remaining provisions of RERA would continue to be applicable to these projects, and consequently the Authorities would have jurisdiction to entertain complaints against such violations[25].

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[19] Please see *Seetharaman Ramachandran & Anr. v. Ozone Projects Private Limited* [Complaint No. 51/2018; Order dated July 31, 2018]; *Nishant H. Doshi v. Ozone Projects Private Limited* [Complaint No. 149/2017; Order dated July 31, 2018]; and *P. Ravichandran v. Manikandan Ravi* [Order dated March 13, 2018].

[20] Please see Section 31(1) of RERA which states that "*Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.*" (emphasis supplied)

[21] Please see Section 3(2) Supra.

[22] [2010153CompCas497(SC)].

[23] *Madhav Rao Jivaji Rao Scindia Bahadur and Ors. v. Union of India & Ors.* [AIR 1971 SC 530].

[24] *R.S. Raghunath v. State of Karnataka and Ors.* [AIR 1992 SC 81]; *Dominion of India v. Shrinbai A. Irani* [AIR 1954 SC 596].

[25] Please see Section 31(1) supra.

It may be noteworthy to also make a reference to Section 71(1) of RERA which provides for the appointment of adjudicating officers for determination of compensation under certain provisions of RERA.[26] It may be noted that there is a proviso to Section 71(1), which provides for transfer of proceedings pending before the consumer redressal forums as follows –

"*Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.*"

Whilst this provision allows for transfer of pending proceedings from the consumer redressal forums to the adjudicating officer under the Act, it is interesting to note that nowhere in this provision has the legislature specified that such a right would only be available to promoters or allottees of projects which shall be registered under RERA, thereby lending support to the view that the Authorities and the adjudicating officers would have jurisdiction over all real estate projects, irrespective of their registration under the Act.

It may also be relevant to refer to the decision of the Bombay High Court in *Neelkamal Realtors Suburban Private Limited & Ors. v. Union of India & Ors.*[27], where while determining the constitutional validity of some of the provisions of RERA, the Court has ruled that –

"*A promoter would remain always a promoter under RERA. What is registered under Section 3 of RERA is a project and not a promoter. This is a crucial distinction which needs to be understood while analyzing the scheme of RERA…… We cannot encompass all the situations for all the times to come at this stage. It is left to the wisdom of the authority concerned, which is expected to deal with the facts of each case while discharging its obligation in implementing the provisions of RERA in letter and spirit.*" (emphasis supplied)

Following the aforementioned ruling, it may be contended that, since there are no registration requirements for promoters, all persons who fall within the definition of a 'promoter'[28] under RERA,

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

[27] 2018(1)ABR558.

[28] Section 2(zk) – "*"promoter" means, –*
(i) 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; or
(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or
(iii) any development authority or any other public body in respect of allottees of –
(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or
(b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or
(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or
(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or
(vi) such other person who constructs any building or apartment for sale to the general public.
Explanation. – For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;"

are required to comply with the provisions thereof, irrespective of whether their projects have been registered or not.

An argument may be made that under Section 34(a) of RERA, one of the functions of the Authority is "*to register and regulate real estate projects and real estate agents registered under this Act*" and hence the provisions of the enactment would only apply to registered projects. However, such an argument may not sustain, since the list of functions of the Authorities under Section 34 is an inclusive list and pursuant to sub-section (f) of the same provision, the Authorities are required to ensure compliance of the obligations under RERA, which as per the interpretation provided above, would include obligations of promoters and allottees of unregistered projects as well.

In light of the aforementioned analysis, the following observations emerge with respect to the decisions of the Authorities discussed hereinabove –

Neither while agreeing to accept complaints with respect to unregistered projects in *Mohammed Zain Khan v. Maharashtra Real Estate Regulatory Authority & Ors.* (supra), nor in the case of *Sagar Fulzade v. M/s. Vedant Buildcon & Ors.* (supra), has the MahaRERA provided any reasoning as to how it arrived at such conclusions. In fact, in the latter case, the Authority only mentions that it 'feels' that it has jurisdiction. Similarly, with regard to applicability of RERA, both the Authorities in Haryana in *Sanju Jain v. TDI Infrastructure Ltd.* (supra) and *Simmi Sikka v. Emaar MGF Land Limited* (supra) respectively, placed more emphasis on the absence of certain expressions and provisions, rather than discussing the express provisions of RERA as they stand today. Even though, the HARERA Gurugram has held that the projects exempted under Section 3(2) have not been exempted from the provisions of RERA, the Authority has not provided any basis for such view. It is respectfully submitted that lack of a clear interpretation of the provisions of RERA would only lead to more confusion as to the applicability of this statute.

As for the judgement of the Punjab Authority in *Bikramjit Singh & Ors. v. State of Punjab & Ors.* (supra), it is apparent from the analysis provided above that such view of the Authority is grossly erroneous. The fallout from this decision of the Punjab Authority has been that a blanket ban has been placed with respect to complaints concerning unregistered projects (without going into merits), including even those projects which fall within the ambit of registration under Section 3.[29] Such mindless dismissal of complaints was foreseen by the Learned Member Mr. Sanjiv Gupta, who in his dissenting note in *Bikramjit Singh & Ors. v. State of Punjab & Ors.* (supra) had cautioned as follows –

"*38…. If, the Authority decides to reject the complaints on the grounds of maintainability in case of Projects not registered, a grave miscarriage of Justice shall take place if such defaulting promoters decide to register on their own volition or are forced to register their projects by the Authority, subsequent to the complaint being rejected, without going into its merits.*
39. Hence, in my view, all complaints against ongoing Projects, with or without Registration with the Authority are maintainable unless the promoter, during the proceedings is able to prove that his project is not liable to be registered as per provisions of Section 3(2) of the Act." (emphasis supplied)

[29] *Yellowstone Industrial Plot Allottees Welfare Association v. Sukham Infrastructure Pvt. Ltd.* [Complaint No. 22 of 2017, Order dated January 15, 2018]; *Jagtar Singh v. Harjeet Singh & Ors.* [Complaint No. 9, Order dated January 11, 2018]; *Nikhil Juneja v. PUDA* [Complaint No. 70, Order dated January 16, 2018]; *Rahul Bansal & Ors. v. M/s GBM Projects* [Complaint No. RERA/C-23/751-752, Order dated October 16, 2017]; *Ekta Vihar Welfare Society, Dhuri Sangrur v. Ekta Vihar Colonizers, Dhuri Sangrur* [Complaint No. RERA/C-35/745-746, Order dated October 16, 2017]; *Vrindavan Gardens Residents Welfare Society v. Mukesh Goyal Colonizers & Builders (P) Ltd.* [Complaint No. RERA - 15/2017, Order dated December 22, 2017]; *Skylark Residents Welfare Society v. Builder of Skylark Enclave* [Complaint No. 52, Order dated January 12, 2018]; *Dev Raj Sharma & Ors. v. M/s. Sukham Infrastructure Pvt. Ltd.* [Complaint No. 38, Order dated January 15, 2018]; *Mittal Paradise Apartments Residents Welfare Association v. Mittal Township* [Complaint No. 55, Order dated January 16, 2018].

With respect to the decisions of the TNRERA, it is submitted that the same have not been substantiated with any justifications, however, considering the aforementioned interpretation, such view of TNRERA would not be tenable.

To conclude, it is humbly submitted that in line with the analysis provided above, it appears that the Authorities do have the jurisdiction to hear cases pertaining to unregistered projects. Further, it seems that projects which have been exempted from registration requirements under Section 3(2) of RERA, have only been exempted from such registration requirements, and not the remaining provisions of the enactment. In this respect, we concur with the views of the Authorities in Maharashtra and Haryana, however, we are not in complete agreement with the deductions made by these Authorities in arriving at such conclusions.

It may be pertinent to note that, arriving at such a conclusion has far reaching implications as the promoters and the allottees of all real estate projects, irrespective of whether the same have been completed, or are unregistered or exempted in any other manner, would need to comply with all the provisions of RERA, except Chapter II. For promoters such obligations include those pertaining to execution of agreements for sale[30], restrictions on transfer[31], defect liability[32], restrictions on alteration of projects[33], and handover of common areas[34]. In terms of long term non-transitory repercussions, it appears that promoters who engage in primarily small or redevelopment projects, would have to comply with the provisions of RERA and the obligations of promoters enshrined thereunder. This may also present a challenge for promoters of completed projects as far as their unsold units are concerned, as a situation may arise wherein units in the same project are being sold on different terms and conditions in pursuance of compliance under RERA. Another outcome may be the significant rise in litigations under Section 18 of RERA, with respect to withdrawal from projects and/or rates of compensation payable to allottees in the pre and post era of the legislation.

Section 18 – Right to Refund

The rights of allottees in the event that a promoter defaults in his obligation to complete the project or handover possession of a unit, have been enshrined in Section 18(1) of RERA, which reads as follows –

> "*(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—*
> *(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
> *(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act: Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.*" (emphasis supplied)

The aforementioned provision has perhaps been most litigated upon ever since this legislation has come into force. One of the primary reasons why more and more allottees are filing complaints under this provision is to avail of the choice offered to the allottees under sub-section (1) to either withdraw from or remain in, the project. Another compelling reason, can be found in the explanation

[30] Please see Section 13 of RERA.
[31] Please see Section 15 of RERA.
[32] Please see Section 14 of RERA.
[33] Please see Section 14 of RERA.
[34] Please see Section 17 of RERA.

to the definition of 'interest' provided in Section 2(za) of the statute[35], which has been enacted with the following objectives – *firstly*, it ensures that there is no disparity in the rates of interest payable by the promoters and the allottees, which was the norm in the pre RERA time; and *secondly*, it provides for clarity with regard to the respective time periods for which such interest would be payable, by both the promoters and the allottees.

However, it may be interesting to note that, while Section 18 of RERA, categorically provides allottees with the option to withdraw from a project and receive refund from promoters, in a catena of judgements passed by the Authorities, such right to claim refund has not been upheld in certain circumstances. The jurisprudence in this regard has developed as follows –

Haryana

On the issue of whether an allottee can claim refund when withdrawing from a project which was near completion, the HARERA Panchkula's view can be effectively summed up by its decision in the case of *Baldev Singh v. Ultratech Township Developers Private Limited*[36]. The Authority in such case has held that –

"*….in case the relief of refund is granted to the complainant, interests of the rest of the non-complainant allottees could also get seriously jeopardized. Moreover, the respondent has stated in his reply that the flat of the respondent is complete and ready for possession and the complainant can take the possession of the flat after clearing his pending dues. Thus in the opinion of this Authority, it not only is entrusted with the responsibility to protect the interest of the home-buyers including the complainant but also has to promote orderly growth of real estate industry through efficient project execution in the larger public interest.*" (emphasis supplied)

A similar view has been held by HARERA Gurugram in a string of decisions[37], wherein the Authority has observed that –

"*…the authority is of the view that in case refund is allowed in the instant complaint, it shall adversely affect the right of allottees who wish to continue with the project. Further, it will also hamper the completion of the project. Therefore, in the interest of justice, the relief sought by the complainant regarding refund of the deposited amount cannot be allowed.*" (emphasis supplied)

As is apparent from the decisions discussed in the preceding paragraphs, both the Authorities have consistently held that in cases where the real estate projects have been near completion or completed, an allottee's claim for refund shall not be allowed. However, it may be noteworthy to mention that, in cases where the development of a project was either negligible or dismal,

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[35] Section 2(za) of RERA reads as follows – "*"interest" means the rates of interest payable by the promoter or the allottee, as the case may be. Explanation. – For the purpose of this clause –*
(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;
(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;".

[36] [Complaint No. RERA-PKL 335/2018, Order dated November 27, 2018]. Please also see *Roshni & Anr. v. Jindal Realty Pvt. Ltd.* [Complaint No. 84/2018, Order dated August 28, 2018]; *Shamsher Singh v. Suncity Projects Pvt. Ltd.* [Comp No. 504/2018, Order dated December 18, 2018]; and *Manoj Suneja v. TDI Infrastructure Pvt. Ltd.* [RERA-PKL 451/2018, Order dated December 20, 2018].

[37] *Pramod Kumar Agarwal v. SS Group Pvt. Ltd.* [Complaint No. 63/2018, Order dated November 22, 2018]; *Puneet Dhar v. Supertech* [Complaint No. 743/2018, Order dated December 18, 2018]; *Roop Chand Chopra & Ors. v. VSR Infratech Pvt. Ltd.* [Complaint No. 231/2018, Order dated November 22, 2018]; *Bihari Lal Bakshi v. VSR Infratech Pvt. Ltd. & Ors.* [Complaint No. 232/2018, Order dated November 22, 2018]; *Pushpa Gupta v. VSR Infratech Pvt. Ltd.* [Complaint No. 145/2018, Order dated November 22, 2018]; and *Ashok Jaipuria v. Ireo Pvt. Ltd.* [Complaint No. 326/2018, Order dated November 27, 2018]

HARERA Gurugram has, in fact, upheld the right of allottees to receive refunds of their investments from the promoters of such projects.[38]

Maharashtra

In one of its earlier decisions, the MahaRERA has upheld the right of an allottee to recover its investment in pursuance of Section 18 of RERA.[39] In that case, not only was the promoter directed to refund the entire consideration for the unit, but also the amounts paid towards stamp duty and registration fees, observing that "*Cancellation of the agreement is inevitable because of its default and therefore, the allottee cannot be held liable to bear any burden when the transaction is frustrated*".

However, recently while disposing off three (3) complaints against the Bombay Dyeing and Manufacturing Company Limited[40], the Chairperson MahaRERA observed that –

"*Keeping in mind the larger interest of approximately 520 allottees of the said project allowing bulk withdrawal from the MahaRERA registered project to so many complainants at this stage would mean jeopardizing the project completion. Money for the refund will have to be taken out from the separate account, which is meant specifically for the completion of the project and would eventually slow down the progress of the project work especially at a stage where the project is nearing completion with more than 80% of the super structure work completed.*"[41]

It was further held that in the event that the Allottees wished to withdraw from the project, such withdrawal should be governed by the terms and conditions of the existing allotment letter.

Karnataka

With respect to the question of allowing refunds, the Adjudicating Officer, RERA, Karnataka ("**Karnataka Adjudicating Officer**") has upheld the literal interpretation of sub-section (1) of Section 18 of RERA in various cases[42] by observing that –

"*As per Section 18 of the RERA Act, it is the wish of the consumer to be with the project or to go out of the project……it is clear that the Act does not make any specific ground to go out of the project…*".(emphasis supplied)

Punjab

As for withdrawal from projects in Punjab, the Chairperson of Punjab Authority in the case of *Col. Jagjit Singh Randhawa & Anr. v. Parkwood Developers Private Limited*[43], has held that –

"*The main question to be answered is whether the complainants can withdraw from the agreement because of this unreasonable delay?...Time is of the essence in such contracts, and timely delivery*

[38] Please see *Sandeep Singhal v. Umang Realtech Pvt. Ltd.* [Complaint No. 711/2018, Order dated January 15, 2019]; and *Monika Jain & Ors. v. Parsvnath Developers Ltd.* [Complaint No. 697/2018, Order dated November 20, 2018].
[39] *Avinash Saraf & Anr. v. Runwal Homes Pvt. Ltd.* [Complaint No. CC006000000000032, Order dated October 13, 2017],
[40] *Narayan Venkitraman & Ors. v. The Bombay Dyeing and Manufacturing Company Limited* [Complaint Nos. CC006000000044441; CC006000000055616 & CC006000000055814; Order dated January 25, 2019].
[41] Please also see *Rutuja Thatte v. Forefront Private Limited* [Complaint No. CC006000000023293, Order dated October 16, 2018].
[42] Please see *Naveen Kumar S v. Sitansu Sekhar Behura* [Complaint No. CMP/180904/0001222, Order dated January 2, 2019]; *Ravi Kumar Madhappan v. Anand Marthand Purohit* [Complaint No. CMP/181003/0001353, Order dated January 2, 2019]; *Ramesh K. v. Prestige Royal Gardens* [Complaint No. CMP/181010/0001441, Order dated January 7, 2019]; and *Rakesh Gopal K. v. M. Ramu* [Complaint No. CMP/181125/0001667, Order dated January 9, 2019].
[43] [Complaint No. 80/2018, Order dated October 16, 2018]. Please also see *Naminder Singh v. Parkwood Developers Private Limited* [Complaint No. GC-110 of 2018, Order dated November 27, 2018].

of possession is critical for every person who invests in a real estate project… It would be a mockery of the law to hold that the complainants cannot withdraw from the transaction but are only entitled to get some compensation from the promoter… The complainants' demand for withdrawal from the project is therefore completely logical and understandable."

From a perusal of the foregoing decisions of the various Authorities, it is evident that the Authorities have been divided in their views concerning the implementation of the allottee's right to receive refund under Section 18 of RERA. While the Authorities in Haryana and Maharashtra have exercised extreme caution in this regard, especially with respect to projects which are in advanced stages of completion, Authorities in Karnataka and Punjab have chosen to strictly enforce this right as and when chosen to be so exercised by allottees.

Under the RERA regime, two (2) scenarios have been provided wherein an allottee would have the right to claim refund and compensation: the first has been provided under Section 18, as discussed above; and the second has been provided under Section 12[44], where if an allottee suffers a loss as a result of any false advertisement, he would be entitled to refund and compensation. The aforesaid right of allottees under Section 18, has also been reiterated under Section 19(4) of RERA[45].

Section 71(1) of RERA provides for the appointment of adjudicating officers for determination of compensation under certain provisions of RERA, including Sections 12 and 18. Under Section 72, for determination of the amount of compensation or interest, the adjudicating officer is required to take into consideration certain parameters, including factors 'necessary to the case in furtherance of justice'. Similarly, Section 38 states that the Authorities have the power to impose penalty or interest, however, the actions of the Authorities should be guided by the principles of natural justice. Therefore, it would follow that the Authorities and the adjudicating officers may exercise discretion in ascertaining the quantum of compensation or interest payable by the promoter, on a case to case basis, considering the extenuating circumstances.

It is understandable that for projects which are in advanced stages of development, the impact of granting refunds and compensation to a number of allottees, would have severe adverse consequences on the promoter's funds, which could have otherwise been utilized to complete the project. It is also necessary at this juncture to refer to the requirement of a promoter of a registered project under RERA, to maintain a separate account, wherein 70% (seventy percent) of project receivables are required to be deposited in line with the requirements of RERA and rules made by each State[46]. In such cases each claim of refund and/or compensation would be paid by a promoter from such separate account, which was otherwise statutorily reserved for completion of the project. However, it is humbly submitted that, such consequence would have been foreseen by the legislature while granting the allottees the choice to withdraw, especially in light of projects which were on going when the provisions of RERA came into effect.

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[44] Section 12 of RERA – "*Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act:*
Provided that if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under this Act." (emphasis supplied)

[45] Section 19(4) of RERA – "*The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.*"

[46] Please see Section 4(2)(l)(D) of RERA.

It may be noteworthy to mention that, the Bombay High Court in *Neelkamal Realtors Suburban Private Limited & Ors. v. Union of India & Ors.* (supra), has while upholding the constitutional validity of Section 18, observed that –

"*The plain language of Section 18(1)(a) shows that if the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein, he would be liable to return the amount received by him together with interest including compensation. In case the allottee does not intend to withdraw from the project, the promoter is liable to pay interest for every month's delay till handing over of possession. The purpose of Section 18(1)(a) is to ameliorate the buyers in real estate sector and balance the rights of all the stake holders. The provisions of RERA seek to protect the allottees and simplify the remedying of wrongs committed by a promoter.*" (emphasis supplied)

It was further held that –

"*We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports.*" (emphasis supplied)

It may also be noted that the right of withdrawal, which is akin to the right of cancellation or termination, has always been available to allottees under contract, even prior to the advent of RERA, wherein allottees could withdraw from, cancel or terminate their allotment in accordance with the terms of their contracts with promoters. Typically, promoters would forfeit certain amounts upon such withdrawal and refund the balance to the allottees, which was the mischief that was sought to be addressed through Section 18 of RERA. The change that has been brought about by Section 18 is that allottees are now entitled to compensation and/or interest as may be adjudged by the adjudicating officers, which is aimed at protecting allottees from unjustified forfeitures by promoters.

As has been noted earlier, the Authorities and adjudicating officers may exercise discretion while determining the quantum of compensation and/or interest that may be payable by a promoter, and may make such adjudication based on the larger social interest of the remaining allottees. However, refusal of a claim for refund may not be tenable, as the same would force an allottee to remain in the project, even though he wishes otherwise.

Armed with the aforementioned understanding, if we now turn to the various stands taken by the Authorities and adjudicating officers in the decisions discussed hereinabove, the views adopted by the Karnataka Adjudicating Officer and the Punjab Authority seem to be more acceptable as compared to those taken by the Authorities in Haryana and Maharashtra.

With respect to the views taken by the Authorities in Haryana and Maharashtra, it is submitted that, while it is a judicially accepted norm that private interest has to give way to public interest[47], the application of this principle in the present set of circumstances, as has been implied by these Authorities, is tenuous. Such deduction has been made considering that the interest of allottees in a project would ordinarily constitute a 'larger private interest' as compared to the private interest of an individual allottee (i.e. the complainant).

On a separate note, it may be mentioned that while MahaRERA in its decision in *Narayan Venkitraman & Ors. v. The Bombay Dyeing and Manufacturing Company Limited* (supra) observed that bulk withdrawal of allottees from a project may hamper the project, it did however, allow allottees to withdraw from the project in accordance with the terms of their respective allotment letters, thereby upholding the contractual rights of the allottees.

[47] Please see *Federal Bank Ltd. v. Sagar Thomas & Ors.* [(2003) 10 SCC 733].

To conclude, Authorities may need to exercise caution with respect to the leeway that can be offered to ongoing projects which pre-date RERA. For instance, even projects which have been newly registered under RERA will at some point of time arrive at a stage of near completion, and if the view of the Haryana Authorities is followed then even in such cases allottees may be restricted from claiming refunds. The corollary of this interpretation would be that, despite delays by the promoter, which is the *sine qua non* for making a claim under Section 18, no allottee shall be entitled to withdraw from a project, if such project is in an advanced stage of development, which is contrary to the provisions of RERA, as well as the contractual rights of allottees.

Conclusion

Considering that land is a finite resource pitted against the infinite demand of real estate, RERA and the Authorities constituted thereunder, will play a crucial role in the future. Presently the evolution of jurisprudence under RERA is proceeding at different paces in different States. From the decisions discussed above, it is clear that each of the Authorities have varying views on the same subject matter, which has resulted in an inconsistency in the protection of interests of allottees in different States. Hence, while an allottee in the State of Maharashtra can file a complaint with the Authority with respect to an unregistered project, an allottee in the State of Punjab cannot do so. Similarly, while an allottee in the State of Karnataka would receive a refund if he so chooses, an allottee in the State of Haryana might not. Such dichotomy of opinions with regard to the same provision, may defeat the purpose for which the RERA was enacted, i.e., a central legislation in the interests of effective consumer protection, uniformity and standardization of business practices and transactions in the real estate sector.[48]

This paper has been written by Nidhi Arya (Managing Associate).

[48] Please see the Statement of Objects and Reasons of RERA.

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