West Bengal Housing Industry Regulation Act, 2017- Comparison with RERA and Questioning its Vires

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1. INTRODUCTION

1.1. The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While the sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardisation and lack of adequate consumer protection. Further, whilst there are a number of legislations, *inter alia* including Consumer Protection Act, 1986 and Competition Act, 2002, to address the concerns of the end consumer/ allottee, the legislations have been largely curative, and does not address the huge information asymmetry that exists between a promoter/developer of a real estate project and an intending buyer. To ensure greater accountability towards consumers and significantly reduce frauds, arrest delays and transaction costs, need for a new law was felt, to balance the interest of the consumers and promoters by imposing certain responsibility on both. Thus, the Real Estate (Regulation and Development) Act, 2016 ("**RERA**") was conceived for, *inter alia*, regulation and promotion of the real estate sector in India. RERA, provisions of which were first published in the official gazette on May 26, 2016 and were made effective with effect from May 1, 2017, aims to establish symmetry of information between a promoter and an allottee, ensure transparency of contractual conditions, set minimum standards of accountability and set up a fast track dispute resolution mechanism.

1.2. Whilst RERA laid down the substantive measures required to govern the relationship between a promoter and an allottee, the appropriate Governments were entrusted with framing and formulating the rules and procedures for implementation of the mandate of the legislation. Following the enactment of RERA, whilst various states have promulgated rules under RERA for the effective implementation of the legislation, a different course was charted by the State of West Bengal. Whilst, draft of the rules to be promulgated under RERA was published by the Housing Department, Government of West Bengal, instead of notifying the said draft rules, the State Government decides to enact a legislation of its own. And thus, born the West Bengal Housing Industry Regulation Act, 2017 ("**HIRA**") for, *inter alia*, regulation and promotion of the housing sector. The rationale for the enactment of HIRA was explained in the statement of objects and reason appended to the bill for enactment of HIRA[1], which read as follows:

> *"Considering the growing need for quality as affordable Housing in the State's housing and real estate sector and to provide a transparent and stable policy and institutional framework for protecting the interest of the buyers as well as creating an atmosphere to encourage private investment in the State's housing and real estate sector, with an emphasis on the guiding principles of "housing for all", it is envisaged to enact a State Law in the field of Housing Industry in place of West Bengal Building (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993.*
>
> *2. Since the 'housing' comes under the periphery of 'industry', it is contemplated that the State Government should go for its own State Legislation considering the necessity and local requirements*

[1] Bill No. 30 of 2017, Notification no. 858-L, dated July 31, 2017, the Law Department, Government of West Bengal

that would be befitting to the people of the State and the State Law can also be amended by the State itself without approaching the Central Government as and when the occasion arises to meet the necessity of the people of the State. Moreover, the State Legislature is competent to enact law on such subject matter under the constitutional domain.

3. This is an Act to establish the Housing Industry Regulatory Authority for regulation and promotion of the housing sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish a mechanism for speedy dispute redressal and for matters connected therewith or incidental thereto.

4. The Bill has been framed with the above objects and views." (Emphasis supplied)

1.3. The said bill received the assent of the Governor of the State of West Bengal on October 17, 2017. As of November 27, 2017, however, only section 1 (*Short title, extent and commencement*) of HIRA has been brought to force, with the remaining provisions yet to be notified in the Official Gazette.

2. AIM OF THE PAPER

2.1. With the enactment of HIRA, we are witnessing a rare phenomenon post the enactment of the Constitution of India ("**Constitution**"), where both State and Central Government have enacted two different legislations encompassing the same subject and with the same objective[2]. In this paper, by comparing the provisions of both RERA and HIRA, we intend to understand to what extent HIRA is different from RERA, and how would both the legislations impact the real estate sector in the State of West Bengal, should the provisions of one enactment being repugnant to the other.

3. COMPARATIVE ANALYSIS OF RERA AND HIRA

3.1. If one analyses and compares both RERA and HIRA, it becomes clear that both the legislations intend to establish an authority for regulation and promotion of the real estate/housing sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish a mechanism for speedy dispute redressal and for matters connected therewith or incidental thereto.

[2] A similar instance can be found in the context of pre-constitutional legislation, like Industrial Disputes Act, 1947, which was enacted by the Central Government on March 11, 1947, and Uttar Pradesh Industrial Disputes Act, 1947, which received the assent of the Governor-General on December 21, 1947.

3.2. Further, upon a comparative analysis of the provisions of RERA and HIRA, we note the following differences between the two:

Sr. No.	Topic	RERA	HIRA
1.	Definition of 'car parking area'	'Car parking area' has not been defined.	'Car parking area' has been defined to mean '*such area as may be prescribed*'.
2.	Definition of 'garage'	'Garage' has been defined to mean '*a place within a project having a roof and walls on three sides for parking any vehicle, but does not include an unenclosed or uncovered parking space such as open parking areas*'.	'Garage' has been defined to mean '*garage and parking space as sanctioned by the Competent Authority*'. Meaning thereby, any type of parking space sanctioned by the competent authority may be included in the meaning of 'garage', including an open parking area.
3.	Planning area	RERA applies to only those real estate projects which are located within the planning area notified by the appropriate government or a competent authority to be a planning area.	There exists no separate concept of a planning area. HIRA applies to all projects in the state of West Bengal.
4.	Force Majeure events	Limited to a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.	Force Majeure events mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project or any other circumstances as may be prescribed.
5.	Power of the regulatory authority	The authority has power to make *suo moto* reference to the Competition Commission of India, in certain cases.	No such power to make *suo moto* reference to the Competition Commission of India.

Sr. No.	Topic	RERA	HIRA
6.	Factors for adjudging quantum of compensation or interest	Factors stated in RERA for adjudging the quantum of compensation or interest, payable by a promoter, allottee or real estate agent, as the case may be, are required to be considered by the adjudicating officer appointed by the regulatory authority.	Factors stated in HIRA for adjudging the quantum of compensation or interest, payable by a promoter, allottee or real estate agent, as the case may be, are required to be considered by the regulatory authority.
7.	Compounding of offences	Notwithstanding anything contained in the Code of Criminal Procedure, 1973, if any person is punished with imprisonment, the punishment may be compounded on such terms and conditions and on payment of such sums, as may be prescribed, but not exceeding the maximum amount of the fine which may be imposed for the offence so compounded.	No such provision for compounding of offences.
8.	Courts which may try offences	Courts inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class are not permitted to try any offence punishable under RERA.	No such provision.
9.	Construction materials to be used	Authority may make recommendations to appropriate government for use of appropriate construction materials.	Authority may make recommendations to the state government for use of state construction materials.
10.	Power of government to supersede authority	Appropriate government may supersede the regulatory authority for reasons stated in RERA and appoint person(s) as the President or Governor, as the case may be, may direct to exercise powers and discharge functions under RERA.	State government may supersede the regulatory authority for reasons stated in HIRA.

4. ANALYSING CONSTITUTIONAL VIRES OF HIRA

4.1. Power to make laws under the Constitution

4.1.1. As per Article 246 of the Constitution, the power to enact laws of the Parliament and state legislatures has *been* divided in three (3) lists comprised in the Seventh Schedule of the Constitution in the following manner:

4.1.2. In *relation* to the matters enumerated in List I (Union List), the Parliament has the exclusive power to make laws.

4.1.3. In relation to the matters enumerated in List II (State List), the state legislature has the *exclusive* power to make laws for such state or any part thereof.[3]

4.1.4. In relation to the matters enumerated in List III (*Concurrent* List), both the Parliament and state legislatures have the exclusive power to make laws. [4]

4.2. Repugnancy between Central and State legislations

4.2.1. As both Union and State legislatures have been conferred with the power to legislate on certain items in the Concurrent List, the possibility of overlap between the two competent legislatures cannot be ruled out. To address such a situation, Article 254[5] expressly *recognises* the possibility of repugnancy arising between laws made by the Centre and State legislatures on a subject that has been enlisted in the Concurrent List. In terms of Article 254, when there is repugnancy between such laws, the law enacted by the Centre would prevail. The only exception to this rule is where

[3] As per Article 246(4), '*Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List*'.

[4] It has been held by the Supreme Court in various cases that the entries in the legislative lists of the Seventh Schedule are not the source of powers for the legislative constituents, but they merely demarcate the fields of legislation. The power to enact laws emanates from Article 246 of the Constitution. Such entries are to be construed liberally and widely so as to attain the purpose for which they have been enacted. Narrow interpretation of the entries is likely to defeat their object as it is not always possible to write these entries with such precision that they cover all possible topics and without any overlapping. (See *Ujagar Prints* v. *Union of India*, (1989) 3 SCC 488, *Jijubhai Nanabhai Kachar* v. *State of Gujarat*, (1995) Supp. 1 SCC 596, *Hoechst Pharmaceuticals* v. *State of Bihar*, 1983 (4) SCC 45, *Offshore Holdings Private Limited* v. *Bangalore Development Authority*, C.A. No. 711 of 2011, decided on January 18, 2011 (Supreme Court).)

[5] Article 254 - Inconsistency between laws made by Parliament and laws made by the Legislatures of States

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

the law enacted by the State legislature has received the assent of the President, and in that case, the law enacted by the State legislature would prevail, until and unless Parliament subsequently enacts any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the legislature of the State.

4.2.2. The tests for determination of whether two legislations are repugnant to each other has evolved through a catena of judicial precedents. A helpful summary of such tests can be found in the recent judgment of the Supreme Court in *M/s Innoventive Industries Limited v. ICICI Bank*[6] as follows:

(i) "Repugnancy under Article 254 arises only if both the Parliamentary (or existing law) and the State law are referable to List III in the 7th Schedule to the Constitution of India.

(ii) In order to determine whether the Parliamentary (or existing law) is referable to the Concurrent List and whether the State law is also referable to the Concurrent List, the doctrine of pith and substance must be applied in order to find out as to where in pith and substance the competing statutes as a whole fall. It is only if both fall, as a whole, within the Concurrent List, that repugnancy can be applied to determine as to whether one particular statute or part thereof has to give way to the other.

(iii) The question is what is the subject matter of the statutes in question and not as to which entry in List III the competing statutes are traceable, as the entries in List III are only fields of legislation; also, the language of Article 254 speaks of repugnancy not merely of a statute as a whole but also "any provision" thereof.

(iv) Since there is a presumption in favour of the validity of statutes generally, the onus of showing that a statute is repugnant to another has to be on the party attacking its validity. It must not be forgotten that that every effort should be made to reconcile the competing statutes and construe them both so as to avoid repugnancy – care should be taken to see whether the two do not really operate in different fields qua different subject matters.

(v) Repugnancy must exist in fact and not depend upon a mere possibility.

(vi) Repugnancy may be direct in the sense that there is inconsistency in the actual terms of the competing statutes and there is, therefore, a direct conflict between two or more provisions of the competing statutes. In this sense, the inconsistency must be clear and direct and be of such a nature as to bring the two Acts or parts thereof into direct collision with each other, reaching a situation where it is impossible to obey the one without disobeying the other. This happens when two enactments produce different legal results when applied to the same facts.

(vii) Though there may be no direct conflict, a State law may be inoperative because the Parliamentary law is intended to be a complete, exhaustive or exclusive code. In such a case, the State law is inconsistent and repugnant, even though obedience to both laws is possible, because so long as the State law is referable to the same subject matter as the Parliamentary law to any extent, it must give way. One test of seeing whether the subject matter of the

[6] *M/s Innoventive Industries Limited* v. *ICICI Bank,* (C.A. No. 8337 of 2009, decided on August 31, 2017) (Supreme Court).

Parliamentary law is encroached upon is to find out whether the Parliamentary statute has adopted a plan or scheme which will be hindered and/or obstructed by giving effect to the State law. It can then be said that the State law trenches upon the Parliamentary statute. Negatively put, where Parliamentary legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provisions made in it, there can be said to be no repugnancy.

(viii) A conflict may arise when Parliamentary law and State law seek to exercise their powers over the same subject matter. This need not be in the form of a direct conflict, where one says "do" and the other says "don't". Laws under this head are repugnant even if the rule of conduct prescribed by both laws is identical. The test that has been applied in such cases is based on the principle on which the rule of implied repeal rests, namely, that if the subject matter of the State legislation or part thereof is identical with that of the Parliamentary legislation, so that they cannot both stand together, then the State legislation will be said to be repugnant to the Parliamentary legislation. However, if the State legislation or part thereof deals not with the matters which formed the subject matter of Parliamentary legislation but with other and distinct matters though of a cognate and allied nature, there is no repugnancy.

(ix) Repugnant legislation by the State is void only to the extent of the repugnancy. In other words, only that portion of the State's statute which is found to be repugnant is to be declared void.

(x) The only exception to the above is when it is found that a State legislation is repugnant to Parliamentary legislation or an existing law if the case falls within Article 254(2), and Presidential assent is received for State legislation, in which case State legislation prevails over Parliamentary legislation or an existing law within that State. Here again, the State law must give way to any subsequent Parliamentary law which adds to, amends, varies or repeals the law made by the legislature of the State, by virtue of the operation of Article 254(2) proviso."
(Emphasis supplied)

4.3. Repugnancy between HIRA and RERA

4.3.1. If one analyses the provisions of HIRA on the basis of the tests laid down in various judgments and summarized in the case of *M/s Innoventive Industries Limited v. ICICI Bank*, it appears that HIRA would fail to satisfy the test of repugnancy on the following considerations:

4.3.1.1. If one analyses as to whether the provisions of both HIRA and RERA can be simultaneously obeyed, as the following table would illustrate, the same is not possible in all situations:

Issue	Position under RERA	Position under HIRA
Whether sale of open parking spaces is allowed or not?	Not allowed.	Allowed.
Whether the government can restrict applicability of the law to certain backward areas, etc.	Such exclusion can be made, since RERA applies to only those real estate projects which are located within the planning area notified as such by the appropriate government.	No such exclusion can be made, since HIRA applies to all projects in the state of West Bengal.
Whether offences can be compounded or not?	Yes.	No provision for compounding of offences.
Whether a court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class be designated to try any offences or not?	No. Courts inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class are not permitted to try any offence punishable under RERA.	No such bar exists under HIRA.

From the above analysis, since the results obtained by applying a situation on both RERA and HIRA are different, it can be concluded that obedience of one of them would mean disobedience of the other. Here, repugnancy exists in fact and is not a mere possibility.

4.3.1.2. If for the sake of argument, it is argued that, the differences highlighted are minor and do not make the compliance with the provisions of both the legislations impossible, let us analyse, whether HIRA can still be considered as repugnant to RERA, considering both the legislations deal with identical subject matter. In this regard, the following observation noted in the *Innoventive* judgment becomes pertinent and provides the answer to the issue:

> "*A conflict may arise when Parliamentary law and State law seek to exercise their powers over the same subject matter. This need not be in the form of a direct conflict, where one says "do" and the other says "don't". Laws under this head are repugnant even if the rule of conduct prescribed by both laws is identical. The test that has been applied in such cases is based on the principle on which the rule of implied repeal rests, namely, that if the subject matter of the State legislation or part thereof is identical with that of the Parliamentary legislation, so that they cannot both stand together, then the State legislation will be said to be repugnant to the Parliamentary legislation. However, if the State legislation or part thereof deals not with the matters which formed the subject matter of Parliamentary legislation but with other and distinct matters though of a cognate and allied nature, there is no repugnancy*" (Emphasis supplied)

4.3.1.3. Even otherwise also, and assuming there is no conflict between RERA and HIRA, HIRA might still not stand the test of constitutionality as it appears that RERA was intended by the legislature to be a *complete, exhaustive or exclusive code*. In this regard, whilst we are aware that Section 88 of RERA does not bar application of other legislations and expressly provides that the provisions of RERA are in addition to and not in derogation of the provisions of any other law for the time being in force, such provision cannot be considerer to deny RERA the status of being a complete code[7]. It has been held by the Supreme Court in various decisions that when a competent legislature with a superior efficacy, expressly or impliedly, evinces by its legislation an intention to cover the whole field, the enactments of the other legislature whether passed before or after would be overborne on the ground of repugnance.[8] Such repugnancy would arise even where obedience of both enactments is possible without disobeying the other.[9] Where such is the position, the inconsistency is demonstrated not by a detailed comparison of provisions of the two statutes but by the mere existence of the two pieces of legislations.[10] It may be argued that if RERA is considered to be a complete code with respect to regulation and development of real estate in India, HIRA would be repugnant due to mere existence of RERA. Such repugnancy would exist even if the provisions of HIRA that are different from RERA were severed.

4.3.2. Issue of Repugnancy when competing legislations are not enacted under the Concurrent List

4.3.2.1. Whilst, undeniably HIRA fails in the test of repugnancy, one should not be oblivious to the fact that the test for repugnancy is applicable only where both the competing legislations have been enacted under the Concurrent List. In this context, we understand from the statement of objects and reasons of HIRA, discussed in paragraph 1.2 herein above, that the power to enact HIRA has been sought to be derived by the West Bengal government from Entry 24 of the State List, which deals with industries, as the same has been enacted in the field of 'housing industry', as opposed to Entry 6 (*Transfer of property other than agricultural land; registration of deeds and documents*) and Entry 7 (*Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land*) of the Concurrent List[11].

4.3.2.2. Whilst it is doubtful as to whether the rationale behind enactment of HIRA is immune from challenges, as well as, whether the decision to consider HIRA to be a legislation

[7] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was held to be a complete code in the case of *Pegasus Assets Reconstruction Private Limited* v. *Haryana Concast Limited,* C.A. No. 3646 of 2011, decided on December 29, 2015 (Supreme Court); The Banking Regulation Act, 1949 was held to be a complete code in the case of *ICICI Bank Limited* v. *Official Liquidator of APS Star Industries,* AIR 2011 SC 1521; The Foreigners Act, 1946 was held to be exhaustive in *Martinez Montsant Joan* v. *Union of India,* 2009 (5) ALT 120.

[8] *M/s Innoventive Industries Limited* v. *ICICI Bank,* (C.A. No. 8337 of 2009, decided on August 31, 2017) (Supreme Court); *Deep Chand* v. *State of U.P.,* AIR 1959 SC 648; *Ch. Tika Ramji* v. *The State of Uttar Pradesh,* (1956) SCR 393.

[9] *Animal Welfare Board of India* v. *A. Nagaraja*, C.A. No. 5387 of 2014, decided on May 7, 2014 (Supreme Court).

[10] *State of Orissa* v. *M. A. Tulloch & Co.*, (1964) 4 SCR 461.

[11] See, paragraph 3.21 of *Thirtieth Report on Real Estate (Regulation and Development) Bill, 2013 by Standing Committee on Urban Development (2013-2014)*, available at www.prsindia.org/uploads/media/Real%20Estate/SCR-Real%20Estate%20Bill.pdf (last accessed on November 27, 2017).

intended to cover an '*industry*'[12] was merely a strategy to wriggle out of the issue of repugnancy[13], the issue would be, whether a legislation enacted under the State List (such as HIRA) directly and substantially relates to a matter enumerated in the Concurrent List and is repugnant to the provisions of any existing law with respect to that matter in the Concurrent List (such as RERA), could survive the test of repugnancy.

4.3.2.3. Answer to the aforesaid query may be found in the following observation of the Supreme Court in the case of *Bondu Ramaswamy* v. *Bangalore Development Authority*[14], where the following was observed:

"*49…The question of repugnancy can arise only where the State law and the existing Central law are with reference to any one of the matters enumerated in the Concurrent List. The question of repugnancy arises only when both the legislatures are competent to legislate in the same field, that is, when both the Union and State laws relate to a subject in List III. Article 254 has no application except where the two laws relate to subjects in List III [See: Hoechst Pharmaceuticals v. State of Bihar 1983 (4) SCC 45]. But if the law made by the State Legislature, covered by an Entry in the State List, incidentally touches upon any of the matters in the Concurrent List, it is well-settled that it will not be considered to be repugnant to an existing Central law with respect to such a matter enumerated in the Concurrent List. In such cases of overlapping between mutually exclusive lists, the doctrine of pith and substance would apply. Article 254(1) will have no application if the State law in pith and substance relates to a matter in List II, even if it may incidentally trench upon some item in List III. (See Hoechst (supra), Megh Raj v. Allah Rakhia AIR 1947 PC 72, Lakhi Narayan v. Province of Bihar AIR 1950 FC 59). Where the law covered by an Entry in the State List made by the State Legislature contains a provision which directly and substantially relates to a matter enumerated in the Concurrent List and is repugnant to the provisions of any existing law with respect to that matter in the Concurrent List, then the repugnant provision in the State List may be void unless it can co-exist and operate without repugnancy to the provisions of the existing law.*" (Emphasis supplied)

[12] In *Ch. Tika Ramji v. State of UP* [AIR 1956 SC 676], Supreme Court was of the view that industry in the wide sense of the term would be capable of comprising three different aspects – (i) raw materials which are an integral part of the industrial process, (ii) process of manufacture of production, and (iii) distribution of the products of the industry. Raw materials would be the goods which would be comprised in Entry 27 of List-II. Process or manufacture of production would be comprised in Entry 24 of List-II except where industry is a controlled industry when it would fall within Entry 52 of List-I and products of the industry would also be comprised in Entry 27 of List-II except where they are the products of a controlled industry when they would fall within Entry 33 of List-III. Notably, HIRA deals with none of the aforesaid aspects and it is doubtful whether at all, the real estate sector proposed to be regulated, would qualify as an *industry*.

[13] If we look at the first paragraph of the said statement of objects and reasons and section 86 of HIRA, it states unequivocally that it seeks to repeal the West Bengal Building (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993 ("**WB Promoters Act**"). It is interesting to note that the said WB Promoters Act, which dealt with the same subject matter, was enacted pursuant to the entries specified in the concurrent list and no attempt was sought to identify the source of power to be Entry 24 of List II.

[14] *Bondu Ramaswamy* v. *Bangalore Development Authority*, C.A. No. 4097 of 2010, decided on May 5, 2010 (Supreme Court).

4.3.2.4. The aforesaid decision has also been later affirmed by a constitutional bench of the Supreme Court in the case of *Offshore Holdings Private Limited* v. *Bangalore Development Authority*[15], which further stated as follows:

> *""60. We are dealing with a federal Constitution and its essence is the distribution of legislative powers between the Centre and the State. The Lists enumerate, elaborately, the topics on which either of the legislative constituents can enact. Despite that, some overlapping of the field of legislation may be inevitable. Article 246 lays down the principle of federal supremacy that in case of inevitable and irreconcilable conflict between the Union and the State powers, the Union power, as enumerated in List I, shall prevail over the State and the State power, as enumerated in List II, in case of overlapping between List III and II, the former shall prevail. This principle of federal supremacy laid down in Article 246(1) of the Constitution should normally be resorted to only when the conflict is so patent and irreconcilable that coexistence of the two laws is not feasible. Such conflict must be an actual one and not a mere seeming conflict between the Entries in the two Lists. While Entries have to be construed liberally, their irreconcilability and impossibility of co-existence should be patent. One, who questions the constitutional validity of a law as being ultra vires, takes the onus of proving the same before the Court. Doctrines of pith and substance, overlapping and incidental encroachment are, in fact, species of the same law. It is quite possible to apply these doctrines together to examine the repugnancy or otherwise of an encroachment. In a case of overlapping, the Courts have taken the view that it is advisable to ignore an encroachment which is merely incidental in order to reconcile the provisions and harmoniously implement them. If, ultimately, the provisions of both the Acts can co-exist without conflict, then it is not expected of the Courts to invalidate the law in question. While examining the repugnancy between the two statutes, the following principles were enunciated in the case of Deep Chand v. State of U.P. (AIR 1959 SC 648):*
> *(1) There may be inconsistency in the actual terms of the competing statutes;*
> *(2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code; and*
> *(3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject matter."*
> (Emphasis supplied)

4.3.2.5. Upon application of such tests, it appears that even though HIRA has been enacted under the garb of being under the State List, whilst RERA has been enacted under the Concurrent List, HIRA may still not stand the test of constitutionality laid down by the Supreme Court in such cases[16].

[15] *Offshore Holdings Private Limited* v. *Bangalore Development Authority*, C.A. No. 711 of 2011, decided on January 18, 2011 (Supreme Court).

[16] A recent instance, where the Court had struck down a legislation enacted by the State Government under the purported exercise of Entry 24 of List II of the

5. FINAL THOUGHTS

5.1. Both RERA and HIRA aim to achieve a salutary object, of protecting the interest of the consumers. However, the decision by the State legislature to enact a new (but almost identical) legislation covering the same field of operation, as opposed to making the relevant rules to make RERA implementable in the State, not only has delayed the implementation of a legislation regulating the real estate sector, but also has the potential of unsettling the regulatory landscape, should anyone decide to challenge the vires of HIRA. One would be prompted to think that, a better course of options would have been

5.1.1. Address the localised needs of the state, by promulgating rules under RERA, which would be in compliance with RERA; or

5.1.2. If the state legislature insisted on having its own legislation, it could have constitutionally enacted the same under the Concurrent List itself, on the same Entry as RERA, by obtaining the assent of the President under Article 254(2) of the Constitution; or

5.1.3. The state legislature could have also enacted its localized state amendments to suit its needs, as has been done in the context of other Central legislations such as, Industrial Disputes Act, 1947 of Indian Stamp Act, 1899, where the principal enactment has been modified by State amendments.

In the midst of all these, we can only hope that, the principal objective behind the enactment of legislations like RERA or HIRA is not defeated on account of uncertainty over legislative competence.

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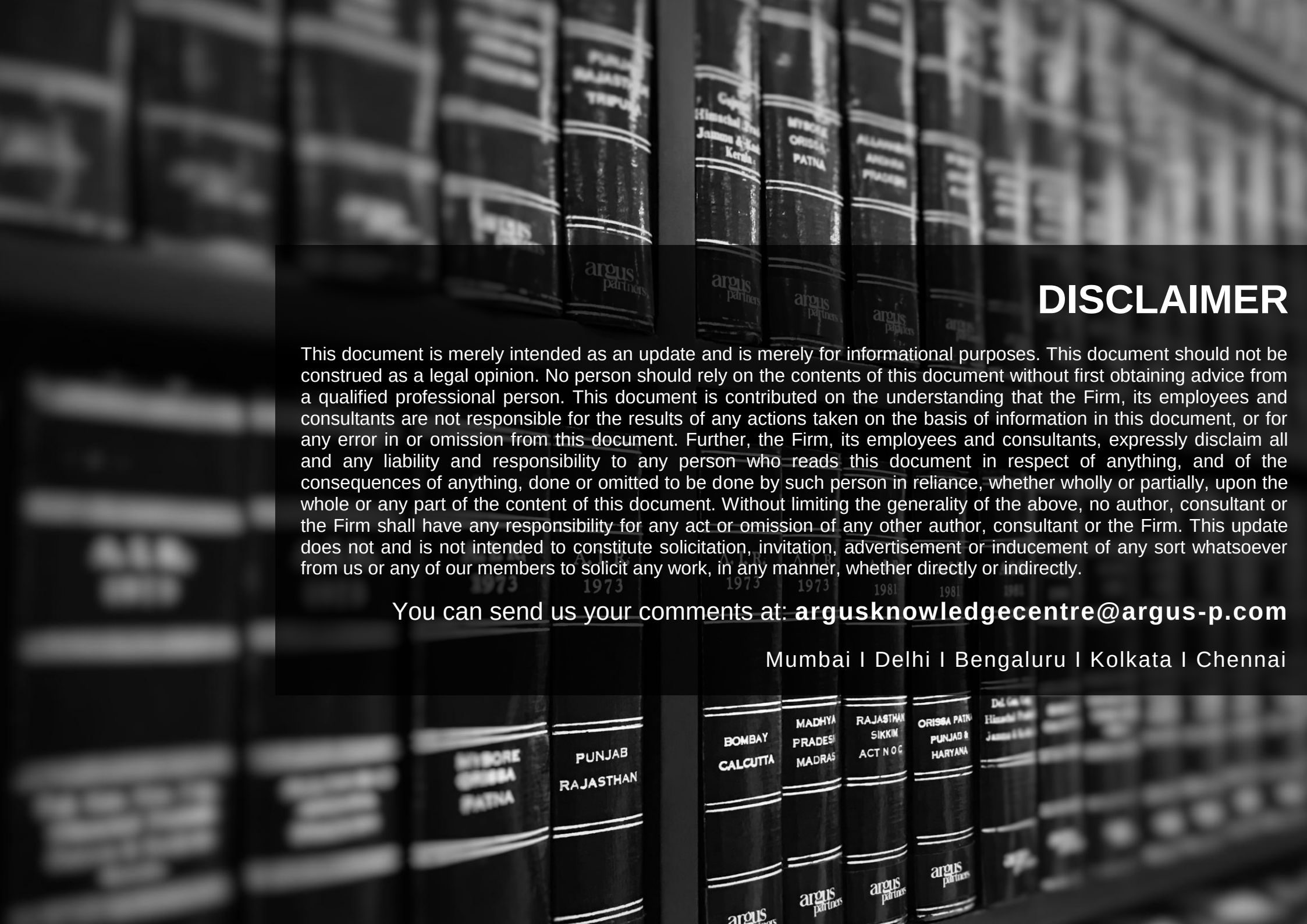
Constitution, due to presence of a Central legislation covering the same subject, albeit, enacted under Entry 52 of List I, can be found in the decision of Gauhati High Court rendered in the case of *Dharampal Satyapal Ltd. v. State of Assam* [W.P.(C) No. 1583/2014, decided on October 27, 2017], where *Assam Health (Prohibition of Manufacturing, Advertisement, Trade, Storage, Distribution, Sale and Consumption of Zarda, Gutka, Pan Masala , etc containing Tobacco and/or Nicotine) Act, 2013* was struck down due to presence of *Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003* enacted by the Parliament.



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