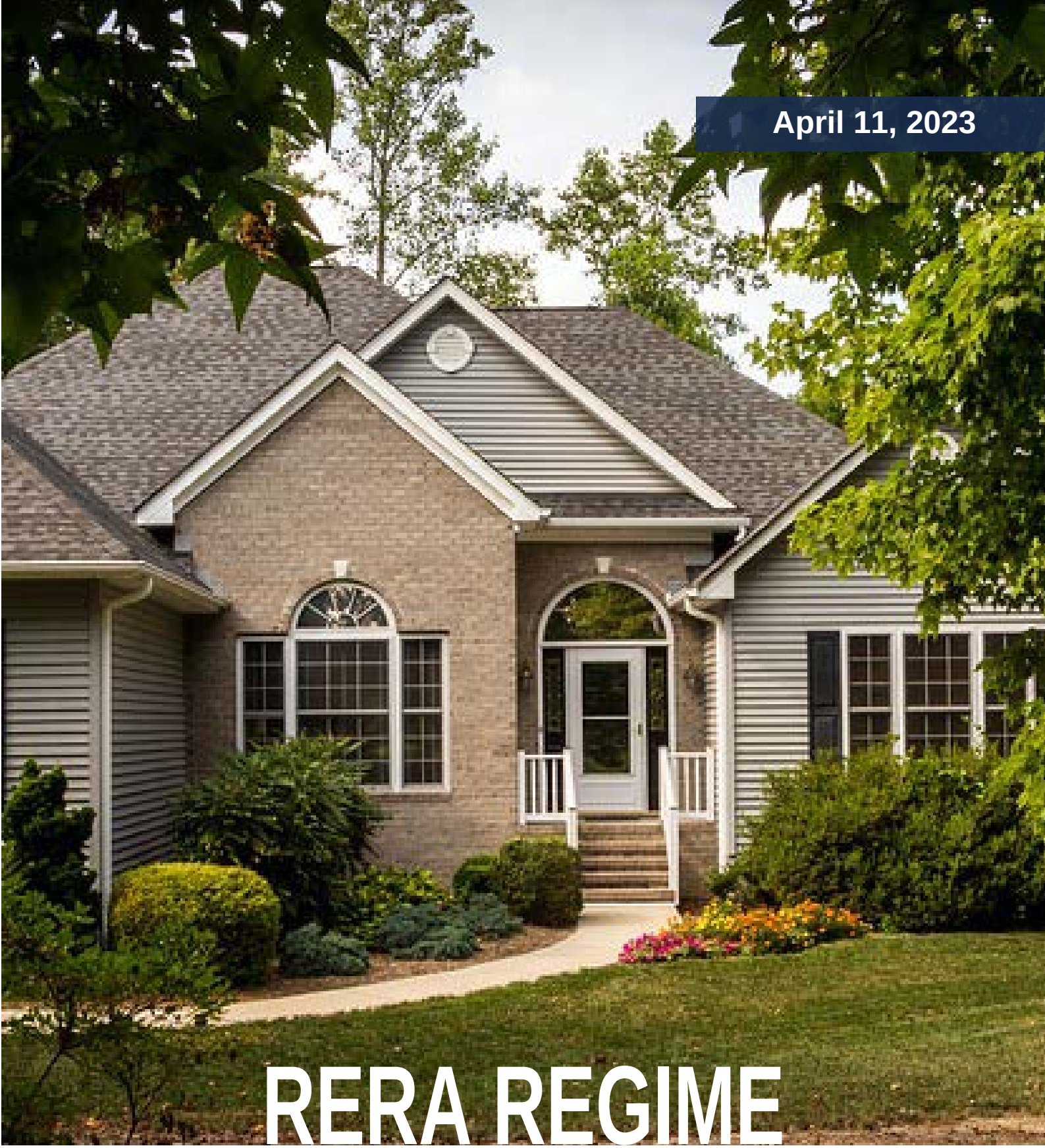

April 11, 2023

RERA REGIME

- THE EXEMPTION CONUNDRUM

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Introduction

Over the years, since the enactment of the Real Estate (Regulation and Development) Act, 2016 ("**RERA**"), the authorities constituted under RERA ("**Authority(ies)**") have adjudicated on various complex issues stemming therefrom. One such issue revolves around the exemptions available to certain real estate projects[1] from being registered under RERA[2].

In this third edition of our RERA Regime series[3], we aim to understand the parameters of a very specific exclusion provided under Section 3(2)(a) of RERA which was originally devised to provide relief to small real estate projects from the rigours of registration under RERA.[4]

Regulatory Overview

Under RERA, registration of a real estate project is mandatory if a promoter[5] intends to "*advertise, market, book, sell, or offer for sale, or invite persons to purchase*" any plot, apartment or building in such real estate project[6]. There are, however, certain exceptions to this rule provided under Section 3(2) of RERA, and if a real estate project falls within the ambit of any such exception, then such real estate project need not be registered.

Section 3(2) of RERA reads as follows:

> "***Section 3 – Prior registration of real estate project with Real Estate Regulatory Authority -***
>
> *(1) …..*
>
> *(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:*

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[1] As per Section 2(zn) of RERA, "*real estate project*" means "*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 apartments, 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*".

[2] Section 3(2) of RERA.

[3] Can be accessed at https://www.argus-p.com/papers-publications/thought-paper/rera-regime-teething-troubles/ & https://www.argus-p.com/papers-publications/thought-paper/rera-regime-landowners-and-promoters/

[4] Certain Authorities have been passing orders and judgments in vernacular languages. For the purpose of this paper, only orders, circulars and judgments which were available in the English language have been considered.

[5] As per Section 2(zk) of RERA, "*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) ….; or
(iv) ….; or
(v) ….; or
(vi) such other person who constructs any building or apartment for sale to the general public.
…."

[6] Section 3(1) of RERA.

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.

Explanation - For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately." (emphasis supplied)

Section 3(2)(a) of RERA states that registration of a real estate project is not required, if: (i) the area of land on which the project is to be developed does not exceed 500 (five hundred) square meters, or (ii) not more than 8 (eight) apartments[7] are to be developed in such project, including all the phases of such project. From a review of, the various judgements, orders and rulings passed and circulars issued, by the Authorities (which have been discussed below), it appears that there are 2 (two) conflicting views taken by the Authorities with respect to the meaning and intent of the exemption provided in Section 3(2)(a) of RERA:

View 1 – a real estate project is required to be registered under the provisions of RERA, if it does not meet the criteria provided in either (i) or (ii) of the preceding paragraph.[8] (emphasis supplied)

View 2 – a real estate project is required to be registered under the provisions of RERA, if it does not meet the criteria provided in both (i) and (ii) of the preceding paragraph.[9] (emphasis supplied)

For illustrations of View 1 and View 2, we may rely on the following frequently asked questions ("**FAQ(s)**") framed by the different Authorities and available on their respective websites:

View 1

Telangana State Real Estate Regulatory Authority:

"*FAQ No. 4:* *Q. If a real estate project has land area more than 500 Sq. mts but containing less than 8 apartments. Does it still need to be registered?*

Ans. Yes. Every real estate project which has land area more than 500 Sq. mts or has more than 8 apartments needs to be registered."[10]

"*FAQ No. 5:* *Q. If a real estate project has land area less than 500 Sq. mts but contains more than 8 apartments. Does it still need to be registered?*

[7] As per Section 2(e) of RERA, "*apartment*" whether called "*block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit or by any other name*", means "*a separate and self-contained part of any immovable property, including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, office, shop, showroom or godown or for carrying on any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified*"

[8] The Authorities in the States of Telangana, Bihar, Delhi, Rajasthan and Tamil Nadu, subscribe to View 1.

[9] The Authorities in the States of Goa, Maharashtra and Odisha, subscribe to View 2.

[10] Can be accessed at http://rera.telangana.gov.in/Site/64/FAQ.

Ans. Yes. Every real estate project which has land area more than 500 sqmts or has more than 8 apartments needs to be registered."[11]

View 2

Maharashtra Real Estate Regulatory Authority ("**MahaRERA**"):

"*FAQ No. 4: Q. If a real estate project has land area less than 500 sq.mts but contains more than 8 apartments. Does it still need to be registered?*

Ans. No. Every real estate project which has land area more than 500 sq.mts and has more than 8 apartments needs to be registered."[12]

"FAQ No. 38: Q. Our society land is less than 500 sq.m. but there are 16 apartments in the redevelopment project. Does MahaRERA apply?

Ans. No, As land is less than 500 sq.m."[13]

Interpretation of the Authorities

Maharashtra

Ascribing to View 2, the majority of members of the MahaREAT[14] in the case of *Messrs Geetanjali Aman Constructions* v. *Hrishikesh Ramesh Paranjpe*[15] by their order dated July 10, 2019, emphasised on the word "*or*" between the 2 (two) conditions provided in Section 3(2)(a) of RERA, and clarified that in the event any one of the conditions is satisfied then the real estate project is not required to be registered under RERA. MahaREAT, *inter-alia*, held that:

> "*From the above proceedings, it is clearly discernible that by retaining the word 'or' in the relevant clause, the legislature always intended to provide two contingencies where if either of the two is satisfied, the project is to be held eligible for exemption from registration. Had the legislature intended to apply both the conditions collectively or conjunctively, the simple use of the word(s) 'and' or 'and/or' would have achieved the objective.*" (emphasis supplied)

Interestingly, 1 (one) of the members of the Bench in the same matter[16] took a dissenting view and held that to be eligible for an exemption under Section 3(2)(a) of RERA, the real estate project has to satisfy both the conditions provided therein, i.e. View 1. The dissenting member held that:

> "*…. project must satisfy both conditions i.e. area of plot not exceeding 500 sq. meters and number of flats not exceeding 8 for getting exemption from registration as per section 3(2)(a) of RER Act. Satisfaction of one condition is not sufficient to exempt the project from registration.*" (emphasis supplied)

Following the majority decision of the MahaREAT in *M/s. Geetanjali Aman Constructions* v. *Hrishikesh Ramesh Paranjpe*[17], the MahaRERA issued a circular on October 11, 2019[18], under which it clarified as follows:

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[11] *Ibid.*
[12] Can be accessed at https://maharera.mahaonline.gov.in/Upload/pdf/FAQs-23072019.pdf.
[13] Can be accessed at https://maharera.mahaonline.gov.in/Site/Upload/pdf/Additional-FAQ-2-English.pdf.
[14] Maharashtra Real Estate Appellate Tribunal, Mumbai.
[15] M*/s. Geetanjali Aman Constructions* v. *Hrishikesh Ramesh Paranjpe,* Appeal in Complaint No. SC10000672 in Complaint No. SC10000691 dated July 10, 2019, before the Maharashtra Real Estate Appellate Tribunal, Mumbai.
[16] *Ibid.*
[17] *Supra* note 15.
[18] Circular no. 25/2019 dated October 11, 2019 issued by MahaRERA.

"*It is therefore necessary to clarify that the following transactions / projects do not require MahaRERA Project Registration for Agreement for Sale / Sale Deed Registration:*

I. ***Real Estate Projects that are excluded from MahaRERA Registration***
1. Real Estate Projects where the area of land proposed to be developed is less than or equal to five hundred square meters.
2. Real Estate Projects where number of apartments proposed to be developed is less than or equal to eight apartments.
…."

Subsequently, in the case of *Sanjay Jawaharlal Surana* v. *Kaushalya Developers*[19] the 2 (two) member bench of MahaREAT, by its order dated July 29, 2020, gave a split decision, whereby 1 (one) of the members subscribed to View 1, whereas the other member subscribed to View 2.

Goa

Relying on the order of the MahaREAT in *M/s. Geetanjali Aman Constructions* v. *Hrishikesh Ramesh Paranjpe*[20], the GoaRERA[21] *vide* a notification[22] dated January 27, 2023 titled '*Standard Operating Procedure for Registration of real estate projects under Section 3 of the Real Estate (Regulation and Development) Act, 2016*' ascribed to View 2, by noting that:

"*…. the project is registrable if it is constructed in an area of more than five hundred square meters comprising more than eight units inclusive of all phases.*"

Odisha

The ORERA[23] *vide* its order bearing reference no. MISC(Regd)-25/21/ORERA No – 2009 dated July 15, 2021, subscribed to View 2, by holding that:

"*Both the clauses are to be read disjunctively and not conjointly.*

If the land area does not exceed five hundred Square meters, but the apartment proposed to be developed exceeds eight inclusive of all phases, there is no requirement of registration.

Similarly, if land area is more than five hundred Square Meters, but the apartment proposed to be developed does not exceed eight inclusive of all phases, no registration is required to be taken from this Authority….." (emphasis supplied)

Tamil Nadu

Taking a diametrically opposite view from the Authorities in the States of Maharashtra, Goa and Odisha, the TNREAT[24] in the matter of *M/s. Devinarayan Housing Board and Property Developments Private Limited* v. *Mr. Manu Karan*[25], by its order dated May 22, 2020 subscribed to View 1, and held that:

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[19] *Sanjay Jawaharlal Surana* v. *Kaushalya Developers,* Appeal No. U-11 in Complaint No. SC10000491 dated July 29, 2020, before the Maharashtra Real Estate Appellate Tribunal, Mumbai.
[20] *Supra* note 15.
[21] Goa Real Estate Regulatory Authority.
[22] F. No: 1/RERA/SOP/2019/73 dated January 27, 2023 issued by GoaRERA.
[23] Odisha Real Estate Regulatory Authority.
[24] Tamil Nadu Real Estate Appellate Tribunal.
[25] *M/s. Devinarayan Housing Board and Property Developments Private Limited* v. *Mr. Manu Karan,* Appeal No. 70 of 2019 dated May 22, 2020, before the Tamil Nadu Real Estate Appellate Tribunal.

"*… being a beneficial legislation, we have to take into consideration a wider and inclusive interpretation so as to bring everything within the fold of the Act. So when one of the criterion, namely the total area exceeds 500 sq. mts, automatically, they will come under the purview of the Act….*" (emphasis supplied)

Bihar

Following in the footsteps of TNREAT, the BiharRERA[26] in the matter of *Birendra Kumar Singh* v. *M/s. Arya Building Construction Private Limited*[27], by its interim order dated September 7, 2021, held that if either of the two conditions under Section 3(2)(a) of RERA is not fulfilled, then the concerned real estate project needs to be registered under RERA, i.e., View 1.

Delhi

The DelhiRERA[28] *vide* a public notice dated April 28, 2022, by subscribing to View 1, clarified that:

"*…. all Real Estate Projects are required to be registered under the Act with RERA, NCT of Delhi if;*
i. the area of land proposed to be developed either for building flats, floors, shops, commercial space or for plotting exceeds 500 square meters, in all phases…..
OR
ii. the number of apartments whether called block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit or by any other name; proposed to be developed exceeds eight, in all phases, on any size of the plot…..
OR
iii. If plotting is done as a Real Estate Project on the land area of more than 500 sq. meters in all phases."

Rajasthan

The RajRERA[29] *vide* its order[30] dated March 8, 2022 ("**RajRERA Order**"), subscribed to View 1, and held that:

"*All such real estate projects are required to be registered under the Act where the area of land proposed to be developed exceeds five hundred square meters or the number of apartments proposed to be developed exceeds eight (inclusive of all phases). That is to say that a real estate project is required to be registered under the Act, if it satisfies either of the two following conditions:*

(i) The area of land proposed to be developed exceeds five hundred square meters; or
(ii) The number of apartments proposed to be developed exceeds eight.

Conversely, a real estate project is not required to be registered under the Act, if it satisfies both the following conditions:

(i) The area of land proposed to be developed is less than or equal to five hundred square meters; and

[26] Real Estate Regulatory Authority, Bihar.
[27] *Birendra Kumar Singh* v. *M/s. Arya Building Construction Private Limited,* Case No. CC/1834/2020 dated September 7, 2021, before the Real Estate Regulatory Authority, Bihar.
[28] Real Estate Regulatory Authority, National Capital Territory of Delhi.
[29] Rajasthan Real Estate Regulatory Authority.
[30] F.1(31)RJ/RERA/2019/550 dated March 8, 2022 issued by RajRERA.

(ii) The number of apartments proposed to be developed is only eight or less than eight.

Thus, if either of these two conditions is not met, the real estate project is not exempt from registration under clause (a) of sub-section (2) of section 3 of the Act….." (emphasis supplied)

The RajRERA Order was also relied on by the RajRERA in the matter of *Harish Jasuja* v. *Rajendra Wadhwa*[31], in its order dated May 9, 2022.

Analysis

It may be noted that Section 3(2) of RERA starts with a negative imperative, i.e., "*….no registration of the real estate project shall be required—…*". Consequently, the applicability of sub-section (a) thereof, is hinged on the interpretation of the word 'or' which separates both the conditions specified in Section 3(2)(a) of RERA.

The Supreme Court in the case of *Cable Corporation of India Limited* v. *Additional Commissioner of Labour*[32] has reiterated the established rule of interpretation that, "*the word "or" is normally disjunctive and the word "and" is normally conjunctive*", however, there may be circumstances in which the words "or" and "and" are read as *vice-versa*, if the context may so require, in order to give effect to the intention of the legislation.

The jurisprudence with regard to the rule of interpretation of the word "or" was also discussed by the Supreme Court in *Competition Commission of India* v. *Steel Authority of India Limited*[33] while considering the provisions of Section 53-A(1)(a) of the Competition Act, 2002. In that case, the literal interpretation of the word 'or' was upheld as follows:

"*It is a settled principle of law that the words 'or' and 'and' may be read as vice versa but not normally. "You do sometimes read 'or' as 'and' in a statute. But you do not do it unless you are obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'...." [Green v. Premier Glynrhonwy Slate Co. (1928) 1 KB 561]. As pointed out by Lord Halsbury, the reading of 'or' as 'and' is not to be resorted to, "unless some other part of the same statute or the clear intention of it requires that to be done." [Mersey Docks and Harbour Board v. Henderson Bros. (1888) 13 AC 603]. The Court adopted with approval Lord Halsbury's principle and in fact went further by cautioning against substitution of conjunctions in the case of Municipal Corporation of Delhi v. Tek Chand Bhatia (1980) 1 SCC 158, where the Court held as under:-*

11. ...As Lord Halsbury L.C. observed in Mersey Docks & Harbour Board v. Henderson LR (1888) 13 AC 603, the reading of "or" as "and" is not to be resorted to "unless some other part of the same statute or the clear intention of it requires that to be done". The substitution of conjunctions, however, has been sometimes made without sufficient reasons, and it has been doubted whether some of the cases of turning "or" into "and" and vice versa have not gone to the extreme limit of interpretation.

To us, the language of the Section is clear and the statute does not demand that we should substitute 'or' or read this word interchangeably for achieving the object of the Act." (emphasis supplied)

[31] *Harish Jasuja* v. *Rajendra Wadhwa,* File No. F.16(22)RJ/RERA/C/2020 dated May 9, 2022, before the Rajasthan Real Estate Regulatory Authority.
[32] *Cable Corporation of India Limited* v. *Additional Commissioner of Labour,* (2008) 7 Supreme Court Cases 680. Please also see *Raghunath International Limited* v. *Union of India*, 2012 SCC OnLine All 4229.
[33] *Competition Commission of India* v. *Steel Authority of India Limited,* (2010) 10 SCC 744.

More recently, the Supreme Court, in *Spentex Industries Limited* v. *Commissioner of Central Excise*[34], while discussing Rule 18 of the Central Excise Rules, 2002, read the word 'or' therein as 'and', and held that:

> "***Interpretation of word 'OR' occurring in Rule 18****: The aforesaid discussion leads us to the only inevitable consequence which is this : the word 'OR' occurring in Rule 18 cannot be given literal interpretation as that leads to various disastrous results pointed out in the preceding discussion and, therefore, this word has to be read as 'and' as that is what was intended by the rule maker in the scheme of things and to carry out the objectives of the Rule 18 and also to bring it at par with Rule 19…*
>
> *Of course, these two words normally 'or' and 'and' are to be given their literal meaning in unless some other part of same Statute or the clear intention of it requires that to be done. However, wherever use of such a word, viz., 'and'/'or' produces unintelligible or absurd results, the Court has power to read the word 'or' as 'and' and vice-versa to give effect to the intention of the Legislature which is otherwise quite clear. This was so done in the case of State of Bombay v. R.M.D. Chamarbaugwala (1957) 1 SCR 874….*
>
> *In J. Jayalalitha v. Union of India (1999) 5 SCC 138, provisions of Section 3 of the Prevention of Corruption Act, 1988 empowers the Government to appoint as many special judges as may be necessary for such area or areas or for such case or group of case, as may be specified in the notification. Construing the italicised 'or' it was held that it would mean that the Government has the power to do either or both the things, i.e., the Government may, even for an area for which a special judge has been appointed, appoint a special judge for a case or group of cases…*
>
> *Likewise, in Mazagaon Dock Ltd. v. The Commissioner of Income Tax and Excess Profits Tax (1959) 1 SCR 848, word 'or' occurring under Section 42(2) of the Income Tax Act, 1922 was construed as 'and' when the Court found that the Legislature 'could not have intended' use of the expression 'or' in that Section…*" (emphasis supplied)

In view of the above, while interpreting a rule of law, whether the word 'or' appearing therein shall be construed as an 'and', would largely depend on the intent of the legislation. It may be noted that in the context of Rule 3(2)(a) of RERA, the Authorities which have subscribed to View 2 have applied the literal meaning of the word 'or', whereas the Authorities that have taken View 1 have interpreted the word 'or' in Rule 3(2)(a) of RERA, as an 'and'.

Parting Thoughts

The purpose for which RERA was enacted was *inter alia* "*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..*". To this intent, View 1 offers better protection to allottees by restricting the ambit of the exemption to truly small real estate projects. However, it is imperative that RERA be amended to finally put an end to this debate and provide clarity to promoters and allottees alike.

[34] *Spentex Industries Limited* v. *Commissioner of Central Excise and Ors.,* (2016) 1 SCC 780.

Contributed by:

Nidhi Arya, Partner

Avin Sarkar, Senior Associate

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You can send us your comments at:
knowledgecentre@argus-p.com

Mumbai I Delhi I Bengaluru I Kolkata
www.argus-p.com

MUMBAI
11, Free Press House
215, Nariman Point
Mumbai 400021
T: +91 22 6736 2222

DELHI
Express Building
9-10, Bahadurshah Zafar Marg
New Delhi 110002
T: +91 11 2370 1284/5/7

DELHI
155, ESC House, 2nd floor,
Okhla Industrial Estate, Phase 3,
New Delhi – 110020
T: +91 11 45062522

KOLKATA
Binoy Bhavan
3rd Floor, 27B Camac Street
Kolkata 700016
T: +91 33 40650155/56

BENGALURU
68 Nandidurga Road
Jayamahal Extension
Bengaluru 560046
T: +91 80 46462300

www.argus-p.com I communications@argus-p.com