Doctrine of Repugnancy – RERA vs. West Bengal Housing Industry Regulation Act

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Background

The Parliament enacted the Real Estate (Regulation and Development) Act, 2016 and the law was implemented from 1.05.2017. States notified RERA Rules in connection with the procedural aspects of RERA. The entire gamut of real estate projects are regulated under RERA. The State of West Bengal did not frame the requisite rules and instead enacted the West Bengal Housing Industry Regulation Act, 2017.

The Hon'ble Supreme Court of India in the case of***Forum for People's Collective Efforts (FPCE) & Anr Vs. State of West Bengal and Anr*** **[LSI-268-SC-2021(NDEL)]** recently looked into the constitutional validity of the West Bengal Housing Industry Regulation Act, 2017 and struck down the Act holding it to be 'repugnant to the RERA', a Central Act.

Contentions

The petitioner contended that –

(i) The state law is mostly a 'copy and paste' replica of the Central legislation and covers the field which is occupied by the Central enactment.

(ii) The West Bengal Regulation is repugna to the Central Act and that the State Law does not fall under 'land' (Entry 18, List II) or 'industry' (Entry 24, List II).

(iii) The meaning of the term 'industry' was analysed by relying on various landmark decisions including***ITC Ltd Vs. Agricultural Produce Market Committee & Ors, (2002) 9 SCC 232; Tika Ram Ji Vs. State of UP (1956) SCR 393*** and ***Calcutta Gas Co Ltd. Vs. State of West Bengal (1962) Supp. 3 SCR 1*** among others.

(iv) The act was intended to govern the field of housing industry under Entry 24, List II but is actually falling under Entries 6 and 7 of List III.

(v) That the validity of new laws would have to be tested with reference only to Article 254 and 256 of the Constitution.

The Union of India contended that-

(i) The State Act was in direct conflict with the Central Act

(ii) The State Act is legislated on an occupied field

(ii) The creation of a parallel regime in the real estate sector by the State Government, cannot co-exist with the provisions of RERA

(iv) The State Act is completely repugnant.

The State of West Bengal Contended that-

(i) RERA is non-exhaustive in nature while referring to Sections 88 and 89 of RERA

(ii) The West Bengal Act is not repugnant to RERA

(iii) Identity of subject-matter does not constitute inconsistency or repugnancy especially considering the non-exhaustive nature of RERA and that it is complementary to the Central Law.

(iv) There are only few inconsistencies that exist between both the legislations and these are minor in nature and there is no real conflict with the provisions of RERA.

Supreme Court Judgement

The Supreme Court has rendered a landmark decision while striking down the West Bengal legislation and the discussions on various Articles of the Constitution are a treatise by itself.

Meaning of 'industry'

The Hon'ble Supreme Court first highlighted that the WB-HIRA was intended to cover the field of 'housing industry' under Entry 24 of List II. Referring to the absence of this argument in the oral submissions before the Supreme Court, the Court looked into the meaning and ambit of the expression 'industry' in the three lists. In the case of ***Tika Ramji***, it was argued that the expression 'industries' should be construed as not only including the process of manufacture of production but also activities antecedent. In this case, a challenge was made to the validity of the UP Sugarcane (Regulation of Supply and Purchase) Act, 1953. The Court had rejected the contention that the meaning of the term 'industry' was wide enough to encompass the power to legislate in respect of raw material said to be an integral part of the industrial process or the distribution of the products of the industry. This view was reiterated in ***Calcutta Gas Co. (Proprietary) Vs. State of West Bengal*** and in ***ITC Ltd. Vs. Agricultural Produce Market Committee***. It was observed that the as both RERA and WB-HIRA fall within the ambit of

Entries 6 and 7 of Schedule III, "in a matter involving the Constitutional validity of the Act, the State of West Bengal has not been precluded by this Court from urging the full line of its defense."

Article 254 and Repugnancy

The Constitution of India through Article 246 clearly demarcates the law-making capacity of both the Parliament and the State to extend to the whole of India or its part and to the whole or any part of a State respectively. With reference to the ambit of Article 246, the Hon'ble Court noted that –

(i) Parliament has the exclusive power to legislate on matters provided in List I and this is reaffirmed by the non-obstante clause provided in the relevant provision;

(ii) With reference to matters detailed in List III, both the Parliament and the State have the power to legislate;

(iii) State Legislature has the exclusive power to make laws on subjects enumerated in List II, subject to the working of clause (1) and (2) of the Article.

Article 248 bestows upon the Parliament the power to make laws with respect to any matter not enumerated in the Concurrent and State List. The Doctrine of Repugnancy is incorporated into the Indian Constitution by the insertion of Article 254 which provides for inconsistencies between laws made by the Parliament and State Legislature. Breaking down Article 254, the salient features of the Article were examined as follows: -

"(i) Firstly, Article 254(1) embodies the concept of repugnancy on subjects within the Concurrent List on which both the State Legislatures and Parliament are entrusted with the power to enact laws;

(ii) Secondly, a law made by the legislature of a State which is repugnant to Parliamentary Legislation on a matter enumerated in the Concurrent List has to yield to a Parliamentary law whether enacted before or after the law made by the State Legislature;

(iii) Thirdly, in the event of a repugnancy, the Parliamentary legislation shall prevail and the State law shall "to the extent of the repugnancy" be void;

(iv) Fourthly, the consequence of a repugnancy between the State legislation with a law enacted by Parliament within the ambit of List III can be cured if the State legislation receives the assent of the President; and

(v) Fifthly, the grant of Presidential assent under clause (2) of Article 254 will not preclude Parliament from enacting a law on the subject matter, as stipulated in the proviso to clause (2)."

The Supreme Court also referred to its decision in ***Zaverbhal Amaldas Vs. State of Bombay, (1955) 1 SCR 799*** , wherein it was held that:

"If the later legislation deals not with the matters which formed the subject of the earlier legislation but with other and distinct matters though of a cognate and allied character, then Article 254(2) will have no application. The principle embodied in Section 107(2) and Article 254(2) is that when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State" and that

".... The principle on which the rule of implied repeal rests, namely, that if the subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, will be equally applicable to a question under Article 254(2) whether the further legislation by Parliament is in respect of the same matter as that of the State law."

The Supreme Court also observed that the Australian Constitution is similar to the Indian Constitution with regard to the principles of Fedaralism and Repugnance. The Hon'ble Court analysed and deliberated the international jurisprudence evolved regarding the operation of the concept of repugnancy by looking at the three tests of repugnancy on inconsistency spelt out by Nicholas' text on the Australian Constitution which states as under-

*(1) There may be inconsistency in the actual terms of the competing statutes (**R Vs. Brisbane Licensing Court, (1920) 28 CLR 23**)*

*(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 (**Clyde Engineering Co. Ltd. Vs. Cowburn (1926) 37 CLR 466**).*

*(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 (**Victoria Vs. Commonwealth, (1937) 58 CLR 618; Wenn Vs. Attorney-General (Vict.), (1948) 77 CLR 84**).*

The Supreme Court in ***Deep Chand Vs State of UP (1959) Supp (2) SCR 8*** , reformulated the principles held in ***Tika Ramji*** and ***Zaverbhai*** and observed as under –

" ..Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:

(1) Whether there is direct conflict between the two provisions

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State legislature and

(3) Whether the law made by Parliament and the law made by the state legislature occupy the same field…."

The Hon'ble Court referred to a multitude of decisions including ***State of Orissa Vs. M/s M A Tulloch (1964) 4 SCR 461*** ; ***M. Karunanidhi Vs. Union of India (1979) 3 SCC 431***; ***Hoechst Pharmaceuticals Ltd. Vs. State of Bihar (1983) 4 SCC 4 5***and ***State of Kerala Vs. Mar Appraem Kuri Company Ltd. (2012) 7 SCC 106.***

The Court also drew reference to a recent decision of the Supreme Court in ***Innoventive Industries Ltd. Vs. ICICI Bank (2018) 1 SCC 407*** which formulated three tests of repugnancy in the following terms-

"51.6. 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.

51.7. 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 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.

51.8. 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 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."

The Supreme Court has held that the law contemplates three types of repugnancy:-

(i) Where there exists an absolute or irreconcilable conflict or inconsistency between a provision contained in a State Law with a Parliamentary Law with reference to a matter contained in the Concurrent List.

(ii) Where Parliament has evidenced intent to occupy the whole field and there exists a conflict between State and Central legislation.

(iii) Where the law enacted by the Parliament and by the State Legislature regulate the same subject.

The Court brought out the difference between the first and second and third test by stating that the first test is grounded in an irreconcilable conflict between the provisions of the two statutes; but the second and third tests are borne out of a comparative evaluation of the text of the two provisions. Stating that "in deciding whether a case of repugnancy arises on the application of the second and third test, both the text and the context of the Parliamentary legislation have to be borne in mind. The nature of the subject matter which is legislated upon, the purpose of the legislation, the rights which are sought to be protected, the legislative history and the nature and ambit of the statutory provisions are among the factors that provide guidance in the exercise of judicial review."

Concluding that the primary effort in the exercise of judicial review must be to harmonise the conflicting provisions, it was held that "Repugnancy in other words, is not an option of first choice but something which can be drawn where a clear case based on the application of one of the three tests arises for determination".

Scope of 'In addition to and not in derogation of'

Examining the application of RERA, the Hon'ble Court noted that the RERA had not attempted to supplant State Enactments and had followed the distribution of legislative powers. Section 88 of the Act provides that application of other laws is not barred and that the provisions of these laws "shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force". Simultaneously, Section 89 provides that RERA "shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force".

In the case of ***M D Frozen Food Exports Private Ltd. Vs. Hero Fincorp Ltd. (2017) 16 SCC 741*** , the question before the Hon'ble Supreme Court was whether arbitration proceedings initiated by the respondent can be carried on along with SARFAESI proceedings simultaneously. It was held that the provisions of the SARFAESI provided a remedy in addition to the provisions of the Arbitration Act.

In ***KSL and Industries Ltd. Vs. Arihant Threads ltd. (2015) 1 SCC 166*** , the Supreme Court observed that:

" …There is no doubt that when an Act provides, as here, that its provisions shall be in addition to and not in derogation of another law or laws, it means that the legislature intends that such an enactment shall coexist along with other Acts. It is

clearly not the intention of legislature, in such a case, to annul or detract from the provisions of other laws". The Court further observed that *"The term "not in derogation" clearly expresses the intention of Parliament not to detract from or abrogate the provisions of SICA in any way. This, in effect must mean that Parliament intended the proceedings under SICA for reconstruction of a sick company to go on and for that purpose further intended that all the other proceedings against the Company and its properties should be stayed pending the process of reconstruction.."*

More recently, in ***Pioneer Urband Land and Infrastructure Limited Vs. UOI (2019(8 SCC 416,*** where under the amended provisions of IBC, allottees of real estate projects were deemed to be financial creditors, thereby causing the application of IBC to real estate developers, the Court rejected the submission that RERA was a special enactment having precedence over the IBC which is a general enactment dealing with insolvency. Holding that the RERA and IBC must be held to co-exist, and that in the event of a clash, RERA must give way to the IBC, the Court observed:

"….. The fact that RERA is in addition to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies."

Scope of 'Law for the time being in force'

In so far as the meaning of the expression 'law for the time being in force' is concerned, the Court in the case of ***Thyssen Stahlunion GMBH Vs. SAIL (1999) 9 SCC 334***, considered this expression in the context of an arbitration agreement and held that the expression not only refers to the law in force at the time when the arbitration was entered into but also to any law that may be in force in the conduct of the arbitration proceeding. It was held that -

"…Arbitration clause in the contract in the case of Rani Constructions (Civil Appeal No. 61 of 1999) uses the expression "for the time being in force" meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held. We have been referred to two decisions — one of the Bombay High Court and the other of the Madhya Pradesh High Court on the interpretation of the expression "for the time being in force" and we agree with them that the expression aforementioned not only refers to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well."

Further relying on the Judgements of the Apex Court in***Municipal Corporation of Delhi Vs Prem Chand Gupta (2000) 10 SCC 115; Yakub Abdul Razak Memon Vs State of Maharashtra (2013) 13 SCC 1; Union Territory of Chandigarh Vs Rajesh Kumar Basandhi (2003) 11 SCC 549*** among others, the Court came to the conclusion that there are 2 fundamental features from a comparison of the two impugned statutes-

(1) That a significant and large portion of WB HIRA overlaps with the provisions of RERA

(2) That WB HIRA does not complement the RERA as there are no provisions that create additional rights, or fortify existing rights, obligations and remedies created by the Central Act.

The Court observed that "Repugnancy in the constitutional sense is implicated not because there is a conflict between the provisions enacted by the State legislature with those of the law enacted by Parliament but because once Parliament has enacted a law, it is not open to the State legislature to legislate on the same subject matter and, as in this case, by enacting provisions which are bodily lifted from and verbatim the same as the statutory provisions enacted by Parliament. The overlap between the provisions of WB-HIRA and the RERA is so significant as to leave no manner of doubt that the test of repugnancy based on an identity of subject matter is clearly established."

On the submissions of the State of West Bengal with reference to Sections 88 and 89 of RERA, the Court concurred that the Parliament has not intended to occupy the whole field so as to prevent any exercise of law making under any Central or State enactments. However, on application of the principles of repugnancy, the Hon'ble Court held that the State by setting up a parallel regime under the State law, has encroached upon the legislative authority of the Parliament and in doing so the act of the state legislature is unconstitutional. The Hon'ble Court further held that-

"*The statutory overlaps between WB-HIRA and the RERA cannot be overlooked, as noted above. But quite apart from that, there is an additional reason why the test of repugnancy engrafted in clause (1) of Article 254 is attracted. This is because several provisions of the WB-HIRA are directly in conflict and dissonance with the RERA. Where a State enactment in the Concurrent List has enacted or made a statutory provision which is in conflict with those which have been enacted by Parliament, it may in a given case be possible to exercise the provision of the State statute so as to bring it into conformity with the Parliamentary enactment. But the present case, as we shall demonstrate, involves a situation where valuable safeguards which are introduced by Parliament in the public interest and certain remedies which have been created by Parliament are found to be absent in WB- HIRA".*

In so far as the contentions raised against the State of West Bengal for failing to obtain Presidential Assent under Article 254(2) which was mandated as it was to occupy the same field as RERA, the Court extracted the relevant paragraphs in the judgement of the Supreme Court in ***Rajiv Sarin Vs State of Uttarakhand (2011) 8 SCC 708*** and held that although it is clear the Presidential Assent must have been obtained, this point of contention is rendered moot as it is already now held that WB HIRA is repugnant to RERA.

The Hon'ble Supreme Court concluded that

(i) The provisions in the WB 1993, Act, which was enacted before the WB HIRA are repugnant to the corresponding provisions contained in RERA;

(ii) That WB-HIRA is repugnant to RERA and is therefore, unconstitutional and as a consequence of the same, the provisions of

WB 1993 would be impliedly repealed upon the enactment of RERA;

(iii) That in exercise of jurisdiction under Article 142, the striking down of WB-HIRA will not affect the registrations, sanctions and permissions previously granted under the legislation, prior to the date of this judgement.

Conclusion

The march of RERA has been significant with States enacting rules; constituting of Real Estate Regulatory Authority. The level of transparency brought about through RERA has completely changed the way of functioning of the real estate industry. Relief under RERA has already been obtained by a number of parties. Given the precarious State-Centre relationships in the background of the journalistic din of Parliamentary dominance, this decision has clearly explained and analysed the issues at stake; the scope and ambit of Article 254; the concept of Occupied field. Striking down the West Bengal Act based on the Doctrine of Repugnancy, has settled the principles of law on the subject.