

The Constitutional Validity Of WB-HIRA

written by Kunjal Patil | June 5, 2021



In 2017, the State of West Bengal introduced the West Bengal Housing Industry Regulation Act, 2017 ("WB-HIRA"). The main objective of the Act was to regularise and promote the housing sector and to ensure the sale of plots, apartment buildings, or sale of real estate in an effective and translucent manner to protect the interest of consumers in real estate projects.

After it came into existence, questions were raised concerning the validity and constitutionality of the Act as some of the provisions of WB-HIRA Act are in conflict with the RERA Act, 2016 which led to filing a petition before the Supreme Court to decide the constitutional validity of the WB-HIRA.

The Forum for People's Collective Efforts (FPCE) filed Writ Petition (C) No. 116 of 2019 against the State of West Bengal & Anr., challenging the validity and constitutionality of the WB-HIRA. The Division Bench of the Hon'ble Supreme Court of India, comprising Justice Chandrachud and Justice M. R. Shah in the said judgment, discussed and declared the constitutional validity of the West Bengal Housing Industry Regulation Act, 2017.

Introduction:

The Petition filed under Article 32 of the Constitution of India mainly on the grounds that both the West Bengal Housing Industry Regulation Act, 2017 (WB-HIRA) and Real Estate (Regulation and Development) Act, 2016 (RERA) are relatable to the legislative subjects contained in the entry 6 & 7 of Concurrent List of seventh schedule the Constitution of India. WB-HIRA has neither been reserved for nor had it received presidential assent under Article 254 (2). Further, certain provisions of WB-HIRA are inconsistent with RERA or virtual replica of RERA, it is constitutionally not permissible for State legislature to enact a law over the same subject matter by setting up a parallel legislation.

History of RERA & WB HIRA:

The RERA Act was enacted by the parliament in 2016. Before the enactment of RERA, states like West Bengal (1993), Maharashtra (2012) and Kerala (2015) enacted laws to regulate the relationship between promoters and purchasers of real estate.

The RERA was partially enforced on 1st May 2016 & its other provisions were enforced on 19th April 2017. Accordingly, the Maharashtra Act was repealed by RERA and the Kerala Act was repealed by the State Legislative Assembly.

In the State of West Bengal, draft rules under the RERA were framed on 18th August 2016 but no further progress was made in that respect. On 16th August 2017, the motion for passing the WB-HIRA Bill was adopted in the State Legislative Assembly. The State enactment received the assent of the Governor of West Bengal on 17th October 2017.

The WB-HIRA repealed the WB 1993 Act. The remaining provisions of WB-HIRA were enforced by a notification dated 29th March 2018, issued by the Governor of the State of West Bengal in exercise of the power conferred by sub-section (3) of Section 1 of WB-HIRA. Thereafter on 8th June 2018, the State of West Bengal framed rules under WB-HIRA.

Comparison of RERA and WB-HIRA:

The Hon'ble Apex Court thoroughly compared and each and every provision of RERA and WB-HIRA Act and observed that the provisions of WB-HIRA Act are verbatim reproductions of RERA in most instances, with minor differences.

Submissions of Parties:

Petitioner-

As per the Petitioner, *"RERA, is a special statute governing the real estate sector encompassing rights and obligations found in different central enactments. WB-HIRA covers the identical field of regulating the contractual behaviour of promoters and buyers in real estate projects. The state law is a 'copy and paste' replica of the central legislation (except for certain provisions which are inconsistent with RERA) and covers the field which is occupied by the central enactment.*

WB-HIRA does not fall under Entry 24, List II. RERA being a comprehensive code regulating the contractual relationships between promoters and buyers in the real-estate sector, WB-HIRA establishes on an occupied field and is hence repugnant and void under Article 254(2) of the Constitution.

The State was under a constitutional mandate to act under Article 256 rather than enacting its own law without Presidential assent under Article 254(2). WB-HIRA was not reserved for the assent of the President and is hence not protected by Article 254(2). The state legislature has made several changes that tilt the law in favour of the promoter-builder. At the time when WB-HIRA was enacted by the state legislature, it was intended to govern the field of housing industry under Entry 24 of List II in the State of West Bengal and not the field of 'contracts' and 'transfer of property' under Entries 6 and 7 of List III.

Section 89 of the RERA impliedly repeals all earlier state acts with Presidential assent under the proviso to Article 254(2); and in the alternative, Section 86 of WB-HIRA which repeals WB 1993 Act may be severed by applying the doctrine of severability."

Union-

"The key purpose of RERA is to ensure uniformity, transparency, efficiency and effective dispute resolution. While enacting the RERA, Parliament entrusted wide powers to the State governments including the power to frame rules and regulations. The objects of WB HIRA are similar with RERA and WB HIRA deals with the same subject matter in an identical manner. The State of West Bengal has set up a parallel mechanism and similar regime which is similar to the RERA on a majority of counts."

State of West Bengal-

"The main object of WB HIRA is to protect consumer interest and establish an adjudicating mechanism for the speedy resolution of disputes, including

appeals. The provisions of Sections 88 and 89 of RERA indicate that the central legislation is not a complete or exhaustive code on the subject matter legislated upon by Parliament. Since the enactment in the State of West Bengal follows the provisions of RERA "broadly and substantially", the state enactment would also be covered by Entries 6 and 7 of List III of the Seventh Schedule. There is no repugnancy or inconsistency between WB HIRA and RERA. Irrespective of Sections 88 and 89 of RERA, Article 254 is not attracted.

As per the state, the identity of subject matter does not constitute inconsistency or repugnancy, particularly when the central enactment is not a complete and exhaustive code. One of the reasons for enacting WB-HIRA was to enable the State to have its own State Advisory Council for advising and recommending to the State government on the implementation of the law on major questions of policy, protection of consumer interest and development of the real estate sector.

The State further emphasises that Federalism is a basic feature of the Constitution. WB-HIRA follows the principle of cooperative federalism; hence the Union government has no authority to direct the State legislature to repeal its law."

Observations of the Court:

After discussing various judgments of the Constitutional Bench and various High Courts *inter alia* on the point of constitutional validity of a statute, the Apex Court observed that,

1. "The provisions under sections 3 to 17 of WB HIRA are repugnant to the corresponding provisions of RERA. In accordance with Sections 88 and 89 read with Article 254(1) of the Constitution, the said provisions of the WB 1993 Act impliedly stand repealed upon the enactment of the RERA in 2016.
2. Striking down of the provisions of WB-HIRA will not, in any manner, revive the WB 1993 Act, which was repealed upon the enactment of WB-HIRA since the WB 1993 Act is itself repugnant to the RERA, and would stand impliedly repealed.
3. As a consequence of the declaration of the invalidity of the provisions of WB-HIRA, there shall be no revival of the provisions of the WB 1993 Act since it would stand impliedly repealed upon the enactment of the RERA."

Specific Direction:

After considering the points argued by the parties, the Apex Court delivered the specific direction stating "since the enforcement of WB-HIRA in the state of West Bengal, the Act has been implemented by the authorities constituted under the law in the state, to avoid uncertainty and disruption in respect of actions taken in the past, 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 judgment."

Final Order:

The Division Bench of the Hon'ble Supreme Court of India, in the matter of Forum for People's Collective Efforts (FPCE) & Anr. Vs. The State of West Bengal & Anr. (Writ Petition (C) No. 116 of 2019) declared that the West Bengal Housing Industry Regulation Act, 2017 is repugnant to the RERA and that the same is unconstitutional.

Conclusion:

The Constitution of India provides for a federal system. The Union and the State Government derive their authority from the Constitution of India. The

relations between the Centre and State have been mentioned in Part XI and XIII of the Constitution of India under the headings legislative, administrative, and financial relations. A state can have legislation, but state cannot oust the Centre's law or enact any law which is similar or in direct conflict with it or having overriding effects on it. In such scenario's, such a law enacted by State is invalid and unconstitutional.

- [1] *Judgement and order dated 4th May 2021 passed in the matter of Forum for People's Collective Efforts (FPCE) & Anr. Vs. The State of West Bengal & Anr. {Writ Petition (C) No. 116 of 2019}*

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