

UPDATE

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Realty Law Rejig for Bengal

Highlight

The Hon'ble Supreme Court of India ("SC") on 4 May, 2021, struck down the West Bengal Housing Industry Regulation Act, 2017 ('WBHIRA'), holding it to be unconstitutional in view of the existence of Real Estate (Regulation and Development) Act, 2016 ('RERA'), which is the Central legislation on the identical subject-matter. The SC held that WBHIRA was 'unconstitutional' as it created a parallel regime and was in direct conflict with RERA.

Facts:

1. The RERA was in existence since 2016. WBHIRA received the assent of the Governor of West Bengal on 17 October, 2017.
2. The Constitutional validity of the WBHIRA was challenged in a petition filed under Article 32 of the Constitution of India ("Constitution") by Forum for People's Collective Efforts (FPCE), primarily on the following grounds:
 - (i) Both WBHIRA and RERA are relatable to the legislative subjects contained in Entries 6 and 7 of the Concurrent List of the Seventh Schedule to the Constitution;
 - (ii) WBHIRA has neither been reserved for nor has it received Presidential assent under Article 254 (2) of the Constitution.
 - (iii) WBHIRA contains certain provisions which are either:
 - (a) Directly inconsistent with the corresponding provisions of RERA; or
 - (b) A virtual replica of RERA.
 - (iv) Parliament having legislated on a field covered by the Concurrent List, it is constitutionally impermissible for the State Legislation to enact a law over the same subject matter by setting up a parallel legislation.

Abridged Analysis:

1. **West Bengal's 'housing industry' defense under Entry 24, List II of the Constitution**

It was contended that when WBHIRA was enacted, it was intended to cover the field of 'housing industry' under Entry 24 of List II of the Constitution. The SC held otherwise and said that the ambit of Entry 24 of List II to the Seventh Schedule is of settled exposition, and there can be no doubt that the subject matter of WBHIRA is not 'industries' within the meaning of Entry 24. The State legislation in pith and substance, falls within the ambit of Entries 6 and 7 of List III with substantial overlap as well as inconsistencies with RERA.

2. ***The Constitution Scheme of Article 254 and Repugnancy***

- (i) Article 254 (1) of the Constitution states that in case a law enacted by a state legislature is 'repugnant' to a law enacted by Parliament or to an existing law, the State law would be 'void to the extent of the repugnancy' and the Parliamentary enactment shall prevail.
- (ii) Article 254 (2) of the Constitution provides that a law enacted by a State legislature which is repugnant to a law enacted by Parliament or an existing law on a matter within the Concurrent List, shall, if it has received the assent of the President, prevail in the State.
- (iii) The SC observed that decisions of courts essentially contemplate *three* types of repugnancy:

First envisages a situation of an absolute or irreconcilable inconsistency between provisions contained in a State legislative enactment with a Parliamentary law with reference to a matter in the Concurrent List. The conflict between the two statutes gives rise to repugnancy, the consequence of which is that the State legislation will be void to the extent of the repugnancy.

Second envisages a situation of conflict between State and Central legislations which may arise in a circumstance where Parliament has evinced an intent to occupy the whole field. Such an intent emerges when a Parliamentary legislation is complete and exhaustive as a Code so as to preclude the existence of any other State legislation.

Third test is where repugnancy arises because the subject which is sought to be covered by the State legislation is identical to and overlaps with the Central legislation on the subject.

In assessing whether the overlap between the provisions of WBHIRA and RERA makes the former repugnant to the latter under Article 254 (1) of the Constitution, the SC applied the above three tests of repugnancy and, *inter alia*, concluded:

- (i) there is identity of subject matter between the two legislations, the WBHIRA and RERA;
- (ii) WBHIRA purports to occupy the same subject as the RERA;
- (iii) State of West Bengal has not enacted a cognate or allied legislation but one which, in so far as statutory overlaps in concerned is identical to and bodily lifted from the RERA.
- (iv) It is an attempt to set up a parallel legislation involving a parallel regime.

3. ***Lack of Presidential Assent for WBHIRA***

The SC clarified, rejecting the argument of the State of the West Bengal that WBHIRA does not require Presidential assent since it has been enacted under the State List, as it was admitted that it comes under the Concurrent List. The SC also clarified, rejecting the argument of the State of West Bengal that Sections 88 and 89 of RERA did not implicitly permit the States to create their own legislation creating a parallel regime alongside the RERA which would not have required Presidential assent. It also stated that it is abundantly clear that the State of West Bengal would have had to seek the assent of the President before enacting WBHIRA, where its specific repugnancy with respect to RERA and its reasons for enactment would have had to be specified.

Final Findings:

In view of the above, the SC *inter alia* held as under:

1. WBHIRA is repugnant to RERA and is hence unconstitutional.
2. 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.

3. In order to avoid uncertainty and disruption in respect of actions taken in the past, striking down of WBHIRA will not affect the **registrations, sanctions and permissions** previously granted under the legislation prior to the date of this judgment.

Practical Concerns:

1. The judgment will have prospective application.
2. The State of West Bengal shall now have to frame a set of Rules under RERA and either create or modify the existing operational infrastructure for alignment with RERA.
3. It is to be considered if during the interim period when in the absence of notification appointing a Regulatory Authority where the promoter does not have the possibility of registering a real estate project, in any planning area, prior to advertising, marketing, booking, selling or offering for sale or inviting persons to purchase in any manner wrt such real estate project :
 - (i) whether the promoter can undertake such abovementioned activities even prior to registration of the project under RERA, however ensuring that the real estate projects comply with RERA provisions and for which such promoter will not be held liable for violation of Section 3 of RERA; OR
 - (ii) will the promoters shall have to wait till the Rules are framed; AND
 - (iii) follow up on notifications/ order of the State Government to determine whether the Housing Secretary or any other authority is being designated as the Regulatory Authority or not until the establishment of a Regulatory Authority.
4. The fate of the pending applications for registration of projects will have to be considered as to whether they will have to wait till the Authority is set up by the State Government in alignment with RERA, thereby causing a delay.
5. The definitions of “car parking”, “garage” etc., are different in RERA from what it had been provided under WBHIRA, therefore, there is a possibility that the developers will need to revise their plans for the project, in respect of pending applications.
6. Similarly, it may adversely affect a promoter who needs to make a modification or rectification in respect to the plan or permission so submitted and sanctioned by WBHIRA, in the interim. Thereby, again causing a considerable delay while the application is pending.
7. Further, in respect of modification or rectification of plan or permission, where in the WBHIRA and RERA laws have fundamental differences, such modifications or permissions needs to see the test of time.
8. It is also to be pondered as to which forum consumers should approach for projects which had received sanction under WBHIRA, in case of complaints and grievances, meanwhile as the Authority under RERA is being set up by the State Government. The probable options open to the customers would be to approach the consumer forums, or wait till the Authority is set up in alignment with RERA.
9. Moreover, it is also to be considered as to what shall be the treatment/action taken in respect to the various cases pending trial/hearing before WBHIRA.
10. It also needs to be seen as to whether appeals from the orders passed by WBHIRA will be entertained by the Real Estate Appellate Tribunal (Appellate Tribunal under RERA), as the West Bengal Housing Industrial Appellate Tribunal (Appellate Tribunal under WBHIRA) now stands redundant.

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