



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

D.B. Civil Writ Petition No. 18078/2018

Sanjay Ghiya

----Petitioner

Versus

1. Union Of India, Through The Secretary, Ministry Of Law And Justice, 4Th Floor, A-Wing, Rajendra Prasad Road, Shastri Bhavan, New Delhi-110001
2. State Of Rajasthan, Through The Secretary, Urban Development And Housing Department, Food Building, Secretariat, Jaipur In The State Of Rajasthan.
3. Real Estate Regulatory Authority Of Rajasthan, Nagar Niyojan Bhawan, Near Jaipur Development Authority, Jawahar Lal Nehru Marg, Jaipur-302015 In The State Of Rajasthan.
4. The Institute Of Chartered Accountants Of India, ICAI Bhawan, Indraprastha Marg, Post Box No. 7100, New Delhi-110002

----Respondents

For Petitioner(s) : Mr. Siddharth Ranka, Adv.
For Respondent(s) : Mr. Anand Sharma, Adv.
Mr. Prakul Khurana Adv., through VC
for Mr. Sanjay Jhanwar, Sr. Adv.
Ms. Pallavi Mehta, Adv., through VC

**HON'BLE MR. JUSTICE MANINDRA MOHAN SHRIVASTAVA
HON'BLE MR. JUSTICE ANOOP KUMAR DHAND**

Judgment

04/03/2022

Reportable:

(PER ANOOP KUMAR DHAND, J)

By way of filing this writ petition, a challenge has been given to Section 56 of the Rajasthan Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'RERA Act or Act of 2016') which reads as under:-

"56. Right to legal representation- The applicant or appellatant may either appear in person or authorise one or



more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may be.

Explanation—For the purposes of this section,-

(a) "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (38 of 1949) or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(b) "company secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 (56 of 1980) or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(c) "cost accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 (23 of 1959) or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(d) "legal practitioner" means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice."

Brief facts of the case are that one Suresh Chand Jain submitted an appeal before the Real Estate Regulatory Authority Tribunal (hereinafter referred to as 'the Tribunal') on 26.06.2018 against the Jaipur Development Authority (hereinafter referred to as 'JDA') for redressal of his grievance. The Tribunal issued notices to JDA for its appearance before it on 17.07.2018. JDA appointed the petitioner as its counsel to appear before the Tribunal to defend the case on behalf of the JDA. The petitioner is a Chartered Accountant (C.A).

Acting under the instructions of JDA, he prepared a written submission and appeared before the Tribunal on 01.08.2018 but the same was not taken on record by saying that Chartered Accountant is barred from appearing before the Tribunal. Thereafter, the JDA in order to safeguard its interest communicated one Tejram Meena, Advocate to represent its case



before the Tribunal but vide order dated 02.08.2018, the Tribunal passed the following orders which is as under:-

"Another authorisation letter on behalf of OSD, Jaipur Development Authority, Jaipur, authorizing Mr. Sanjay Ghiya and Mr. Ashish Ghiya Chartered Accountant(s) under Section 56 of the Real Estate (Regulation and Development) Act, 2016 filed by Mr. Sanjay Ghiya (C.A).

In view of the order dated 01.08.2018 of this Tribunal authorisation of Mr. Sanjay Ghiya and Mr. Ashish Ghiya (C.A) is not maintainable before the Tribunal.

JDA as respondent should have avoided it.

Another set of written submissions on behalf of the JDA submitted today by Mr. Sanjay Ghiya (C.A). Written submissions having been signed and verified by the authority of JDA. Therefore, they cannot be taken on record. It is just and proper to mention here that, in view of specific order dated 01.08.2018 of this Tribunal, Mr. Sanjay Ghiya should not have dare to submit this. Conduct of JDA authorities in this regard cannot be appreciated.

However, Mr. Tej Ram Meena, Advocate has filed power on behalf of the JDA. If, JDA as respondent wants to file any reply or objection to the averments made in the appeal, they may do so as per the rules with proper verification by appropriate authority. This Tribunal is constrained to observe that hitherto been no serious effort has been made by JDA to contest this appeal. Be it so, it is upon the wisdom & discretion of JDA to contest it properly or not. In the interest of justice one more opportunity is given to JDA for proper representation as per rules."

Bare perusal of Section 56 clearly indicates that Right of legal representation has been given only to the applicant/appellant to appear in person or the applicant/appellant can authorise one or more Chartered Accountants or Company Secretaries or Cost Accountants or Legal Practitioners or any of the officer to present before the Appellate Tribunal or the Regulatory Authority or the Adjudicating Officer as the case may be. But no such right of representation has been given to the respondent against whom the proceedings have been initiated before the Appellate Tribunal or before the Regulatory Authority or the Adjudicating Officer.

It is noteworthy to mention here that though Section 56 does not permit the legal practitioner to appear on behalf of the respondent but still the Tribunal allowed the JDA to appear



through Advocate and denied the Chartered Accountant like the petitioner to appear on behalf of the respondent.

Being aggrieved by the impugned orders dated 01.08.2018, 02.08.2018 passed by the Tribunal and also being aggrieved by the impugned exclusion of the word "Respondent" to Section 56 of the RERA Act, the petitioner has challenged the legality and validity of Section 56 of the Act of 2016 by filing this writ petition with the following prayers:-

That the petitioner prays that this Hon'ble Court may be pleased to:-

- (a) Your Lordships may be pleased to issue any writ, order or direction to declare that Section 56 of the Real Estate (Regulation and Development) Act, 2016 as unconstitutional as it denies the Chartered Accountant the right to represent the respondent(s) before the authorities;
- (b) Your Lordships may be pleased to issue any writ, order or direction to read down Section 56 of the Real Estate (Regulation and Development) Act, 2016 wherein the words 'applicant or appellant' are to be read as 'applicant or appellant or respondent';
- (c) Pending admission, hearing and till final disposal of this petition, your Lordships may be pleased to pass an order of stay of the operation of the impugned order dated 01.08.2018 and 02.08.2018 passed by the RERA Tribunal to the extent it restricts the Chartered Accountant to appear on behalf of the respondent;
- (d) Your Lordships may be pleased to award the cost of the present petition from the respondents;
- (e) Your Lordships may be pleased to grant any other relief or reliefs and pass such further order or other orders in the facts and circumstances of the present case as may be deemed fit by this Hon'ble Court."

The validity of Section 56 of the Act of 2016 has been challenged mainly on the ground that it is hit by Articles 14, 19(1) (g) and 21 of the Constitution of India.

Learned counsel for the petitioner submitted that Section 56 of the Act suffers from constitutional infirmity because it gives the right of legal representation only to the applicant or appellant. This right of representation before the authority has not been given to the respondent and the same is in violation of Articles 14



and 19 of the Constitution of India. Counsel submitted that non-inclusion of the word 'the respondent' under Section 56 of the Act is bad and discriminatory. The classification made among the applicant/appellant and respondent is not rational. As such the classification made is in contravention of Articles 14 and 19 of the Constitution of India.

On the other hand, learned counsel for the respondent No.1 supported the provisions contained in Section 56 of the Act and submitted that no constitutional provision has been violated. The stand taken by the Union of India in its reply is as under:-

“(v) The grievance of the petitioner is that he is Chartered Accountant by profession and in an appeal filed by one Shri Suresh Chand Jain before the RERA Appellate Tribunal in which the petitioner put in appearance in the capacity of Chartered Accountant on behalf of respondent-JDA. The petitioner has come out with a case that his authorization to appear on behalf of JDA (respondent in the case) before the Appellate Tribunal has not been acknowledged and rather rejected by the Appellate Tribunal on the ground that as per Section 56, only the appellant/applicant can be allowed to be represented by Chartered Accountants/Company Secretaries and such similar profession has not been made for the respondent in the case. Hence, as the petitioner was seeking permission to represent respondent in the above case, therefore, vide order dated 01.08.2018 RERA Appellate Authority has not permitted the petitioner to appear on behalf of the respondent.

(VI) That it is respectfully submitted that provision of Section 56 are absolutely clear and having no ambiguity whatsoever. Only on the basis of question of wrong interpretation by any authority or for the reason that the provision is likely to be construed differently, the petitioner cannot assail the validity of the provision itself. At the cost of repetition, it is respectfully submitted that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. Petitioner in the instant case has utterly failed to discharge his burden, hence, writ petition filed by him is liable to be rejected.

(VII) That the aforesaid Real Estate (Regulation and Development) Act, 2016 has been enacted by the Parliament in exercise of its legislative powers flowing from the provisions of Constitution of India. Such provisions are causing no discrimination amongst any class of persons; nor can such provisions be termed as patently arbitrary,



therefore, petitioner has got no right to challenge the validity of aforesaid provisions.

(VIII) That it appears from bare perusal of the contents of the writ petition that the petitioner is more aggrieved by a particular order passed by RERA Appellate Tribunal restraining him to appear on behalf of the respondents. Such order of RERA Appellate Authority can be assailed by the petitioner independently without questioning the validity of the provisions of Section 56 of the Act of 2016. It is settled proposition of law that in case action of any Authority is claimed to be not in consonance with the provisions of the Act, in such cases it is not necessary to examine the validity of the provisions. Under these circumstances, the writ petition filed by the petitioner is totally misdirected and is liable to be rejected."

The State-respondent No.2 has not submitted any reply to the writ petition. The Real Estate Regulatory Authority (i.e. respondent No.3) submitted its reply and took objection that no notice for demand of justice was served before filing this writ petition and except denial, no other argument has been raised.

The Institution of Chartered Accountant of India (i.e. respondent No.4) submitted its reply and supported the stand of the petitioner by saying that Section 56 of the RERA Act is per-se violation of the basic structure of the Constitution as it prohibits and takes away the right of the representation of the respondents before the forums established under the Act of 2016. The respondent No.4 submitted that the provision of Section 56 of the Act of 2016 be suitably read down as "the applicant or appellant or respondent may either appear in person or authorised one or more Chartered Accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may be" and accordingly declare that Chartered Accountants are eligible to appear and represent appellants, applicants as well as



respondents before the Appellate Tribunal or Regulatory Authority or the adjudicating officer, as the case may be.

Heard learned counsel for the parties.

The RERA Act was enacted by the legislature with an object to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be or sale of real estate projects, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.

Chapter 'V' of the Act deals with establishment and composition of the Real Estate Regulatory Authority and its powers and functions. Similarly, Chapter 'VII' of the Act deals with establishment, composition, powers and functions of the Real Estate Appellate Tribunal. The complete procedure has been prescribed under Sections 43 to 58 of the Act. Section 43 deals with establishment of Real Estate Appellate Tribunal. Section 44 deals with the provision of filing an application for settlement of disputes and appeals to Appellate Tribunal. Section 45 deals with provision of composition of Appellate Tribunal. Section 46 deals with powers of the Tribunal likewise Section 47 deals with administrative powers of the Chairpersons of Appellate Tribunal and Section 48 deals with right to legal representation. Section 49 deals with powers of the Appellate Tribunal to be executable as a



decree and Section 50 deals with provision of filing appeal to the High Court.

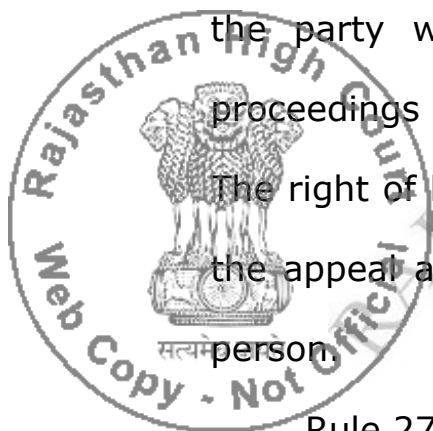
Section 84 of the Act empowers the State Government to make rules to carry out the objects and purposes of the Act. Exercising this power, the State of Rajasthan framed the Rajasthan Real Estate (Regulation and Development) Rules of 2017 (hereinafter referred to as 'the Rules of 2017'). Chapter 'VI' of the Rules of 2017 deals with the entire procedure of establishment of the Real Estate Regulatory Authority and Chapter 'VII' deals with the procedure of establishment of Real Estate Appellate Tribunal. In pursuance of Chapter 'VII' of the Rules of 2017, Real Estate Regulatory Authority of Rajasthan was constituted to discharge functions assigned under the Act and Rules.

The RERA Act and the Rules made thereunder play a significant role to protect the interest of the consumers in the real estate sector and it provides a mechanism for speedy dispute redressal. The Appellate Tribunal has been established to hear the appeals from the decisions, directions and orders of the Regulatory Authority and the adjudicating officer. For proper assistance, right of representation has been given under Section 56 of the Act to the applicant or the appellant to appear in person or authorise one or more Chartered Accountants of company secretaries or Cost Accountants or legal practitioner of any of its officer to present its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer but the framers of the Act forgot to provide this Right of legal representation to the respondent to authorise any of the above persons to present their



case before the Appellate Tribunal or the Regulatory Authority or the Adjudicating Officer.

The State of Rajasthan in its wisdom framed the Rules of 2017 in exercise of its powers under Section 84 of the Act and framed rules for carrying out the provisions of Act. Even the State never intended to frame the rules against the interest of any of the party who is being represented as a respondent to the proceedings before the Appellate Tribunal or Regulatory Authority. The right of legal representation has been given to both parties to the appeal and opposite to appear in person or by an authorised person.



Rule 27 (5) & (6) of Rules of 2017 are reproduced as under:-

"27 Form for filing appeal and the fees payable:-

(5) Whether a party to the appeal is represented by an authorised person, as provided under Section 56, a copy of the authorisation to the act as such and the written consent thereto by such authorised person, both the original, shall be appended to the appeal or the reply to the notice of the appeal, as the case may be.

(6) On the date of hearing or any other date to which hearing could be adjourned, it shall be obligatory on the parties or their agents, as the case may be, to appear before the Appellate Tribunal:

Provided that where the appellant or his authorised person, as the case may be, fails to appear before the Appellate Tribunal on such date, Appellate Tribunal may in its discretion either dismiss the appeal for default or decide it on the merits and where the opposite party or his authorised person fails to appear on the next date of hearing, the Appellate Tribunal may decide the appeal ex-parte."

Even the procedural rule contained under sub-Rule (5) and (6) of Rule 27 of the Rule of 2017 does not discriminate between the applicant/appellant and the respondents. It gives equal right of legal representation to the party to the appeal and the opposite party to appear in person or through authorised person. The right to representation has been accorded to both parties to the proceedings. The party to the proceedings include the appellant,



applicant and the respondent as well. The party to the proceedings can either appear in person or through their authorities. Similar provisions have been incorporated in the regulations framed by other States in view of the power granted to them under Section 84 of the RERA Act like:-

(a) Rule 24(5) & (6) of National Capital Territory of Delhi Real Estate (Regulation and Development) (General) Rules, 2016;

(b) Rule 25 (5) & (6) of Dadra and Nagar Haveli Real Estate (Regulation and Development) (General) Rules, 2016;

(c) Rule 25(5) & (6) of Daman and Diu Real Estate (Regulation and development) (General) Rules, 2016;

(d) Rule 25 (5) & (6) of Andaman and Nicobar Islands Real Estate (Regulation and Development) (General) Rules, 2016;

(e) Rule 25 (5) & (6) of Chandigarh Real Estate (Regulation and Development) (General) Rules, 2016;

(f) Rule 25 (5) & (6) of Lakshadweep Real Estate (Regulation and Development) (General) Rules, 2016.

There are various statutes which permit Chartered Accountants/Company Secretary/Cost Accountant/Lawyer to appear before the quasi-judicial and judicial authorities/Tribunals constituted under these statutes.

Section 432 of Companies Act also allows Chartered Accountants/ Company Secretaries/ Cost Accountants/Legal Representation/ any other person to appear on behalf of the parties before the Tribunal or the Appellate Tribunal. For ready reference, Section 432 of the Companies Act, 2013 is reproduced as under:-

“432. Right to legal representation



A party to any proceeding or appeal before the Tribunal or the Appellate Tribunal, as the case may be, may either appear in person or authorise one or more Chartered Accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Tribunal or the Appellate Tribunal, as the case may be."

Similar provisions are there under Section 116 of the Central Goods and Services Tax Act which also gives the right to representation to both parties to appear before the authority in connection with any proceedings either in person or through his relative advocate, Chartered Accountants, Company Secretary or Cost Accountant. For ready reference, Section 116 of the Act of 2017 is reproduced as under:-

"Section 116- Appearance by Authorised representative-

(1) Any person who is entitled or required to appear before an officer appointed under this Act, or the Appellate Authority or the Appellate Tribunal in connection with any proceedings under this Act, may, otherwise than when required under this Act to appear personally for examination on oath or affirmation, subject to the other provisions of this section, appear by an authorised representative.

(2) For the purposes of this Act, the expression "authorised representative" shall mean a person authorised by the person referred to in sub-section (1) to appear on his behalf, being--

- (a) his relative or regular employee; or
- (b) an advocate who is entitled to practice in any court in India, and who has not been debarred from practicing before any court in India; or
- (c) any chartered accountant, a cost accountant or a company secretary, who holds a certificate of practice and who has not been debarred from practice; or
- (d) a retired officer of the Commercial Tax Department of any State Government or Union territory or of the Board who, during his service under the Government, had worked in a post not below the rank than that of a Group -B Gazetted officer for a period of not less than two years:"

Bare perusal of the aforesaid provisions of various Acts makes it absolutely clear that chartered accountants/company secretaries/cost accountants/lawyers are allowed to appear before



the Tribunals and authorities constituted and function under these enactments.

The right of legal representation through chartered accountants/company secretaries/cost accountants/lawyers is a part of principles of natural justice in any proceedings before the Tribunal or the regulatory authority.

The concept of natural justice though not provided in Indian Constitution but it is considered as necessary element for the administration of justice. Natural justice is a concept of common law which has its origin in on '*jua natural*' which means a law of nature. Natural justice has a very wide application in administrative discretion. It aims to prevent arbitrariness and injustice towards citizen with an act of administrative authorities.

Initially, the concept of natural justice was confined to judicial proceedings only but with passage of time, this concept is applicable even in quasi-judicial proceedings.

According to traditional law, natural justice is classified into two principles i.e. (1) '*nemo judex in causa sua*' which means (rule against bias). (2) '*Audi alteram partem*'- (rule of fair hearing).

'*Audi Alteram Partem*' means "hear the opposite side" or "let the other side heard as well."

This is the significant rule of natural justice which says that that no one should be condemned unheard. When a person against whom any action is sought to be taken and his right or interest is being affected, he shall be given an equal opportunity of being heard and defend himself. It gives right to the party to respond to the evidence against him and to choose legal



representative of his own choice. Any adjudicating authority while deciding a dispute between the parties has to take into consideration the principles of natural justice as they form a part of the fundamental fair procedure amongst the parties. It is the duty of every person or body exercising judicial or quasi-judicial function to act in good faith and to listen fairly to both the sides before passing any order. No party should be made to suffer in person without giving any fair opportunity of being heard; in case, if any authority proceeds without giving a fair opportunity of hearing to the other party, then such action would be violative of principles of natural justice of fair hearing as well as violative of Articles 14 and 21 of the Constitution of India. The sole purpose of rule of fair hearing is to avoid failure of justice. Thus, the essence of this principle is right of fair hearing or the right to be heard. The main motive of the principles of natural justice is to prevent the miscarriage of justice.

The Supreme Court has held in **A.K. Roy v. U.O.I, reported in AIR 1982, SC 710** a case under the NSA, that no party, neither the government nor the detaining authority, nor the detenu, would be entitled to have legal representation before the advisory board. But if the government has it, then the detenu also must have it. The Constitution does not contemplate that while the government has the facility of legal representation before the board, the same is to be denied to the detenu. If the government or the detaining authority is represented through a legal practitioner or legal adviser before the advisory board, the detenu must also have a similar right because of Arts. 14, 21 and 39A.



The Court emphasized: "Every person whose interest is adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend." The advisory board must grant such a facility whenever demanded.

Article 14 guarantees equality before law. Denial of hearing to an affected person may amount to denial of equality before law which may amount to an infringement of Art. 14.

Hence, non-providing the opportunity of right of legal representation to the respondent through Chartered Accountant/Company Secretary/Cost Accountant/Lawyer amounts to denial of fair opportunity to participate in the proceedings and the same amounts to violation of natural justice.

Section 56 of the RERA Act confers a right upon the applicant/appellant to appoint CA/CS/Cost Accountant/Lawyer whereas it curtails the right of the respondent. Both parties before the Tribunal/Authority have equal rights and no differential treatment can be given to one set of person over the another set of persons. No reason or rationale has been provided under the RERA Act to give such differential treatment.

In order to pass the test of permissible classification, two conditions must be fulfilled, viz., (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group; and (ii) that differentia must have a rational relation to the objects sought to be achieved by the statute in question.

Non-inclusion of the word "Respondent" under Section 56 of the RERA Act sound harsh, unreasonable and contrary to



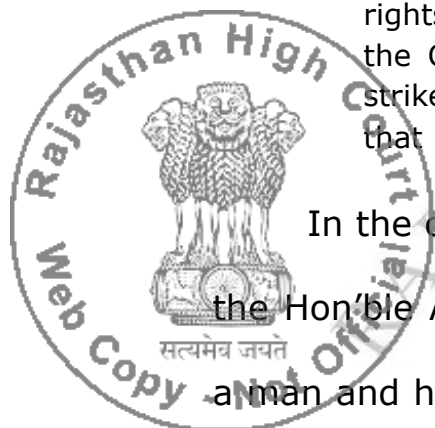
constitutional spirit. Taking into consideration the object, purpose and scheme of RERA, which was enacted in the larger public interest, we have placed our interpretational aspects of Section 56 with a balance approach so as to advance the object and purpose of RERA.

It is the settled principle of law that two equals should be treated as equal. Both appellant/applicant and the respondents are equal for the authorities hearing the matter. When once right or legal representation through CA/CS/Cost Accountant and lawyer has been given to the applicant then deprivation of his right to the respondent amounts to violation of right of equality of the respondent contained under Article 14 of the Constitution of India.

Thus, the clarification made by the legislature in not providing the right and legal representation to the respondent is not in conformity with the provisions of the Constitution. The provision under challenge violates the fundamental rights of the respondent citizens. Thus, this provision is arbitrary and discriminatory. Hence, in view of the settled position of law, as held by the Hon'ble Supreme Court in the case of the **Independent Thought Vs. Union of India & Anr. reported in 2017 (10) SCC 800**, Court can either hold the law to be totally unconstitutional and strike down the law or the Court may read down the law in such a manner that the law read down does not violate the Constitution. For ready reference, para 168 of the Judgment of Hon'ble Supreme Court in case of Independent Thought (supra) is reproduced as under:-



"168. Therefore, the principle is that normally the Courts should raise a presumption in favour of the impugned law; however, if the law under challenge violates the fundamental rights of the citizens, the law is arbitrary, or is discriminatory, the Courts can either hold the law to be totally unconstitutional and strike down the law or the Court may read down the law in such a manner that the law when read down does not violate the Constitution. While the Courts must show restraint while dealing with such issues, the Court cannot shut its eyes to the violations of the fundamental rights of the citizens. Therefore, if the legislature enacts a law which is violative of the fundamental rights of the citizens, is arbitrary and discriminatory, then the Court would be failing in its duty if it does not either strike down the law or read down the law in such a manner that it falls within the four corners of the Constitution."



In the case of Independent Thought (supra), the issue before the Hon'ble Apex Court was "whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape?"

In the above case, the legality and constitutional validity of following exception S.375 of the Indian Penal Code was under challenge:-

S.375 Rape- A man is said to commit rape who, except in the case hereinafter excepted has sexual intercourse with a woman under the circumstances falling under any of the six descriptions:-

"Firstly:- Against her will.

Secondly:- Without her consent.

Thirdly:- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly:- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly:- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly:- With or without her consent, when she is under sixteen years of age.



Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception:- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

The Hon'ble Apex Court in the case of Independent Thought (supra) struck down the age of 15 years and read it down to 18 years in Para Nos. 196 and 197 by observing thus:-

"196. Since this Court has not dealt with the wider issue of "marital rape", Exception 2 to [Section 375](#) IPC should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.

197. In view of the above discussion, I am clearly of the opinion that Exception 2 to [Section 375](#) IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:-

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of [Article 14](#), [15](#) and [21](#) of the Constitution of India;

(ii) it is discriminatory and violative of [Article 14](#) of the Constitution of India and;

(iii) it is inconsistent with the provisions of POCSO, which must prevail.

Therefore, Exception 2 to [Section 375](#) IPC is read down as follows:

"Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape".

It is, however, made clear that this judgment will have prospective effect."

Hence, exercising the power of judicial review the Hon'ble Apex Court read down age of 15 years to 18 years in exception to of Section 375 IPC.

In the case of **Pinki Devi Vs. State of Uttarakhand reported in 2019 SCC Online Utt. 937** the constitutional validity of Section 8(1)(r), Section 8(8) (1) (d) and Section 10-C of the Uttarakhand Panchayati Raj (Amendment) Act were under challenge and the Division Bench dealt with the scope of procedure of reading down any law and finally read down of above provision by giving following reasonings in Para Nos. 2, 88, 89, 90, 91, 92, 93 and 94 by observing thus:-



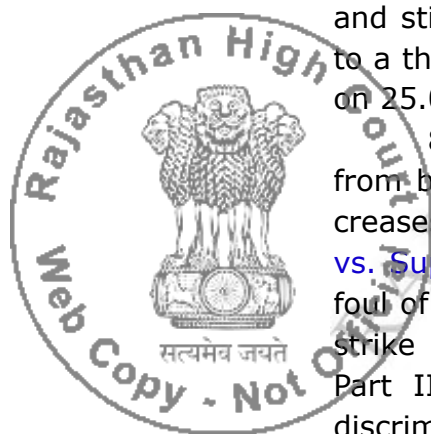
“2. Section 8(1)(r), as inserted by the 2019 Act, stipulated that a person shall be disqualified for being appointed, and for being a Pradhan, Up-Pradhan and a member of the Gram Panchayat, if he has more than two living children. The newly inserted Sub-Section (8) prescribes a further bar on holding two posts simultaneously and, under Sub-Section (1)(d) of Section 8(8) of the 2019 Act, a person shall be disqualified for holding the office of a Pradhan, Up-Pradhan or a Member of the Gram Panchayat if he is the Chairman, Vice-Chairman or a Member of any Cooperative Society.

88. It is submitted, on behalf of the petitioners, that applying the said provision, i.e. [Section 8\(1\)\(r\)](#), prospectively, and stipulating that it shall apply only to persons who give birth to a third child or more after the 2019 Act was brought into force on 25.07.2019, would save the provision from unconstitutionality.

89. It is well settled that, with a view to save a provision from being declared unconstitutional, it may be read down. The creases may be ironed out ([Entertainment Network \(India\) Ltd. vs. Super Cassette Industries Ltd.](#) to ensure that it does not fall foul of Part III of the Constitution, and, only if it cannot, to then strike down legislation (plenary or subordinate) as ultra-vires Part III of the Constitution of India. If the law is arbitrary, discriminatory and violates the fundamental rights guaranteed to the citizens of the country, then the law can either be struck down or can be read down to bring it in consonance with the Constitution of India. (Independent Thought).

90. As the Court must start with the presumption that the impugned provision is intra vires, the said provision should be read down only to save it from being declared ultra vires, if the Court finds, in a given case, that the presumption stands rebutted. ([J.K. Industries Limited & another v. Union of India & others](#); [Hindustan Zinc Limited v. Rajasthan Electricity Regulatory Commission](#)). A provision of an Act is read down to sustain its constitutionality ([Pannalal Bansilal Patil and others v. State of U.P. & others](#); [Delhi Transport Corporation v. D.T.C. Mazdoor Congress](#)), and by separating and excluding that part of the provision which is invalid, or by interpreting the word in such a fashion as to make it constitutionally valid. ([B.R. Enterprises v. State of U.P. & others](#)). The question of reading down a provision arises if it is found that the provision is ultra vires as they stand. ([Electronics Corporation of India Ltd v. Secretary, Revenue Department, Govt. of Andhra Pradesh and Ors.](#)). In order to save a statute or a part thereof, from being struck down, it can be suitably read down. But such reading down is not permissible where it is negated by the express language of the statute. ([C.B. Gautam v. Union of India & others](#)).

91. An attempt should be made to make the provision of the Act workable and, if it is possible, to read down the provision. ([Balram Kumar Wat v. Union of India & others](#); [ANZ Grindlays Bank Ltd and Ors. v. Directorate of Enforcement and Ors.](#)). If a provision can be saved by reading it down, it should be done, unless the plain words are so clear as to be in defiance of the Constitution. This interpretation springs out of the concern of Courts to salvage a legislation. Yet, in spite of this, if the impugned legislation cannot be saved the Courts shall not hesitate to strike it down. ([B.R. Enterprises](#)).





92. In order to sustain [Section 8\(1\)\(r\)](#), an appropriate reading down of the said provision to save it from the vice of unreasonableness and arbitrariness should be resorted to. If it is not so read down, then [Section 8\(1\)\(r\)](#) would obviously fail on the touchstone of reasonableness, and would become void and inoperative. ([Hyderabad Karnataka Education Society v. Registrar of Societies and Others](#)). [Section 8\(1\)\(r\)](#) can be read down by giving it prospective application, meaning thereby that the disqualification under the said provision can be held to apply only to those who give birth to a third child or more after 25.07.2019 when [Section 8\(1\)\(r\)](#), inserted by the 2019 Amendment to the 2016 Act, came into force. The said provision can, thereby, be saved from being declared unconstitutional. It is only by so reading down [Section 8\(1\)\(r\)](#), and applying it prospectively from the date the 2019 amendment Act came into force on 25.07.2019, can the said provision be saved from unconstitutionality.

93. We, therefore, read down [Section 8\(1\)\(r\)](#) and declare that the disqualification from contesting elections to Panchayati Raj Institution, in terms of the said provision, would apply only to cases where persons, having two children or more, have a third child or more after 25.07.2019. The said provision shall not be understood as disqualifying those who already have three or more children before 25.07.2019

94. The challenge, to the constitutional validity of the newly inserted [Section 10-C](#) of the 2019 Amendment to the 2016 Act, must fail. [Section 8\(1\)\(r\)](#) shall be read down as a disqualification, from contesting elections to Panchayati Raj Institutions, only to those who give birth to a third child or more after the 2019 Amendment to the 2016 Act came into force on 25.07.2019."

The writ petition, in view of the discussion made, deserves acceptance, thus the same is allowed. The distinction made for non-inclusion of the word "Respondent" under Section 56 of the RERA Act is declared illegal.

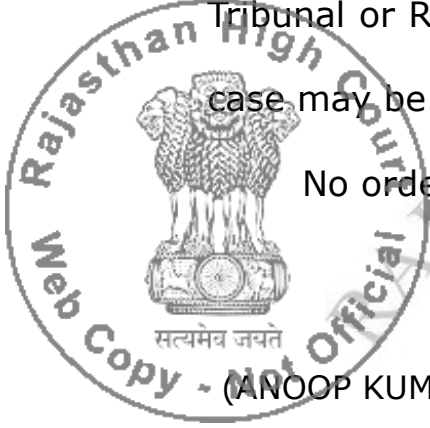
As a consequence of the declaration above, the Section 56 of the Act of 2016 stands read-down as under:-

"56. Right to legal representation- The applicant or appellant or respondent may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may be."



In the light of inclusion of the word "Respondent" under Section 56 of the Act of 2016, the respondent would also have the right of representation (like the applicant or appellant) to either appear in person or authorize one or more Chartered Accountants or Company Secretaries or Cost Accountants or Legal Practitioner or of its officer to present his or its case before the Appellate Tribunal or Regulatory Authority or the Adjudicating Officer, as the case may be.

No order as to cost.



(ANOOB KUMAR DHAND),J

(MANINDRA MOHAN SHRIVASTAVA),J

PRAVESH/42



सत्यमेव जयते