

Ref. No. MCHI/PRES/20-21/049

November 12, 2020

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Bandish Ajmera

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PRESIDENT, NAVI MUMBAI
Vijay Lakhani

To,
Shri S V R Srinivas (I.A.S.)
Principal Secretary
Housing Department
Government of Maharashtra
Mantralaya, Mumbai - 400 032

Sub: Request to Repeal MOFA ACT

Respected Sir,

With the advent of RERA, one of the expectations of the real estate industry was that of a unified legal regime. However, in Maharashtra, with MOFA being still active, this legal duality has only made life difficult for the real estate developers. Neither the Government nor the Judiciary was prompt in issuing a clarification on the status of MOFA.

At the outset, it is submitted that on 24.02.2014 the State Government enacted an Act viz. Maharashtra Housing (Regulation & Development) Act, 2012, in order to make a comprehensive law to regulate and provide for promotion of the construction, sale, management and transfer of flats on ownership basis etc.,. By virtue of Section 56 of the said Act, MOFA stood repealed.

As such by virtue of the enactment of Maharashtra Housing (Regulation & Development) Act, 2012, which came into effect, the provisions of MOFA stood repealed, save and except, those that were saved by the virtue of the proviso contained in Section 56(1).

Thereafter, on 26.03.2016, the Central Government enacted the Real Estate (Regulation & Development) Act, 2016 (hereinafter referred to as 'RERA'). Section 92 of RERA has repealed Maharashtra Housing (Regulation & Development) Act, 2012. Section 92 reads as follows:

92. The Maharashtra Housing (Regulation and Development) Act, 2012 is hereby repealed.

The provisions of RERA and specially Section 92 have come into effect from 01.05.2016. In other words, the Maharashtra Housing (Regulation & Development) Act, 2012 stands repealed and the only Act that now regulates in place and stead of MOFA and Maharashtra Housing (Regulation & Development) Act, 2012 is RERA.

Chapter VIII of RERA provides for offences, penalties and adjudication. A mere perusal of the provisions under Chapter VIII would clearly reveal that the commission of offences is contemplated for the violation of the provisions of RERA and the non-compliance of the orders, decisions and directions of the Authority (as contemplated by 1(i) and established under Chapter V of RERA), as well as, the directions of the Tribunal (under Chapter VII) of RERA.

The maximum punishment of imprisonment contemplated under the Act is under Section 59 which is an imprisonment for a term which may extend upto 3 years.

As per Part II of Schedule I of the Code of Criminal Procedure, 1973, if the punishment is for a period of less than 3 years, then the offence is of a non-cognizable nature. As such the violations of the provisions of RERA are not cognizable offences. Therefore, it is submitted that the Police are not empowered to register a First Information Report for the violation of RERA.

Your attention is also drawn to Section 80 of RERA which incorporates an embargo on the Courts from taking cognizance of any offence punishable under RERA, save and except, on a complaint in writing made by the Authority under RERA. Thus, only the Authority under RERA or any officer duly authorised by the Authority can file a 'Complaint' before the Court of the Magistrate of competent jurisdiction. In the circumstances aforesaid, the subject captioned Circular deserves to be recalled.

That the repeal of MOFA is complete and final is discernible from the following provisions of law;

Section 6 of the General Clauses Act, 1897 reads as follows :

6. Effect of repeal

Where this Act, or any 13[Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or*
- (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or*
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or*
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or*
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;*
and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

It would be pertinent to note that Section 6 of the General Clauses Act, 1897 provides that once an Act is repealed it cannot come back into force unless a separate Act is enacted to revive it. In other words MOFA stands repealed by Maharashtra Housing (Regulation & Development) Act, 2012 and further the Maharashtra Housing (Regulation & Development) Act, 2012 stands repealed by RERA. Thus, merely because RERA has repealed the Maharashtra Housing (Regulation & Development) Act, 2012; MOFA will not stand revived.

Further, Article 254 of the Constitution of India reads as follows:

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.-

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

Thus, Article 254 of the Constitution of India clearly mandates that in case of a conflict of acts between the State and the Centre on a subject; the Central Act shall prevail over the State Act. Therefore, assuming without admitting, MOFA is in operation, by virtue of Article 254, RERA shall prevail over MOFA.

Your attention is also drawn to Section 89 of RERA. Section 89 of RERA reads as follows:

89. The Provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Thus, by virtue of Section 89 the provisions of RERA shall even otherwise have an overriding effect.

Therefore, in order to bring some relief and clarity on the legal status of the two statutes, CREDAI-MCHI, request to the repeal MOFA ACT.

Thanking you,

Yours Faithfully,
For CREDAI-MCHI



Deepak Goradia
President



Pritam Chivukula
Hon. Secretary