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S. Shahzad Hussain

I.A.S. (Retd.)

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Rasesh Kanakia

Parag Munot

HON. JOINT SECRETARIES

Sandeep Raniwal

Lakshman Bhagiani

JOINT TREASURER

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Sanjay Chhabria

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Deepak Gundecha

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Sandeep Raheja

Munish Doshi

Navin Makhija

Rushank Shah

Pratik Patel

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Dhaval Ajmera

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Nikunj Sanghavi

Digant Parekh

Shailesh Puranik

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Pravin Doshi

Mohan Deshmukh

Mofatraj Munot

Rajini S. Ajmera

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Late Lalit Gandhi

Late Babubhai Majethia

MCHI-CREDAI UNITS

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Ajay Ashar

PRESIDENT, KALYAN-DOMBIVLI

Pratul Shah

PRESIDENT, MIRA VIRAR CITY

Ashit Shah

PRESIDENT, RAIGAD

Vilas Kothari

PRESIDENT, NAVI MUMBAI

Prakash Baviskar

Ref. No. MCHI/PRES/16-17/007

July 08, 2016

To,
Shri K. P. Bakshi (I.A.S.)
Additional Chief Secretary
Home Department,
Government of Maharashtra
Mantralaya, Mumbai

अपर मुख्य सचिव (गृह) यांचे कार्यालय
गृह विभाग, महाराष्ट्र शासन, मुंबई

Sub : Police Circular dated 01.07.2016 issued by the Special Inspector General of Police (Law & Order).

Respected Sir,

The Maharashtra Chambers of Housing Industry (MCHI-CREDAI) is the only recognized body of Real Estate Developers in Mumbai and MMR. MCHI-CREDAI is a member of Confederation of Real Estate Developers Association of India (CREDAI), the apex body for private Real Estate Developers in India and is also affiliated with leading associations like CII, FICCI, IMC and others.

We are deeply concerned with the subject captioned circular dated 01.07.2016 issued by the Special Inspector General of Police (Law & Order). The said circular, inter-alia, directs the initiation of action on the receipt of any complaint for an alleged violation of Maharashtra Ownership Flat Act, 1963 (hereinafter referred to as 'MOFA') as well as Maharashtra Regional and Town Planning Act, 1966. The circular inter-alia has enumerated provisions of MOFA and has concluded that the said violations constitute cognizable offences and as such if any complaints are received, necessary action ought to be taken.

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. Section 56 reads as follows :

56. (1) On and from the appointed day, the Maharashtra Ownership Flats (Regulation and Promotion of Construction, Sale, Management and Transfer) Act, 1963, shall stand repealed :

Provided that the repeal shall not affect, -

- the previous operation of the law so repealed or anything duly done or suffered thereunder, or
- any right, privilege, obligation or liability acquired, accrued or incurred under the law so repealed, or
- any penalty, forfeiture or punishment incurred in respect of any offence committed against the law so repealed, or

- (d) *any investigation, proceedings, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment may be imposed as if this Act has not been passed :*

Provided further that, subject to the preceding proviso and any saving provisions made elsewhere in this Act, anything done or any action taken under the provisions of the law so repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act; and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under this Act.

(2) Any reference in any law or in any instrument or other document to the provisions of law so repealed shall, unless a different intention appears, be construed as a reference to the corresponding provisions of this Act.

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.

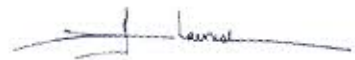
Thus by virtue of Section 89 the provisions of RERA shall even otherwise have an overriding effect.

In the circumstances aforesaid, the subject captioned Circular is bad in law, *de-hors* RERA and is violative of the Constitutional mandate.

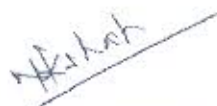
In any event MCHI has its own Consumer Grievance Cell. Further, RERA has provided for a mechanism for the redressal of grievances and hence any action by the Police would be oppressive and prejudicial.

You are therefore requested to direct the Special Inspector General of Police (Law & Order) to withdraw the subject captioned Circular dated 01.07.2016.

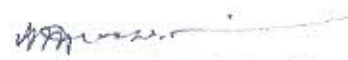
Yours Sincerely,
For MCHI-CREDAI



Dharmesh Jain
President



Nainesh Shah
Hon. Secretary



S. S. Hussain (I.A.S. Retd.)
Chief Executive Officer

CC to :

(1) Hon'ble Shri Devendra Fadnavis,
Chief Minister,
Govt. of Maharashtra,
Mantralaya,
Mumbai

मुख्यमंत्री
महाराष्ट्र शासन
मंत्रालय, मुंबई ४०० ०३२
दिनांक ०८/०७/१६

(2) Dr. Nitin Kareer (I.A.S.)
Principal Secretary - I,
Urban Development Department,
Government of Maharashtra,
Mantralaya, Mumbai - 400 032

8/7/16
Urban Development Deptt.
Mantralaya, Mumbai - 32