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Litigation

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Investment Funds (AIFs), Real Estate Investment Trust (REITs), Infrastructure Trusts (InvITs) regulated under SEBI Act. [See MCA notification F.NO 1/1/2018 CL-V dated 13th June 2018].

➔ *RBI eases norms for Foreign Portfolio Investment to invest in debt, particularly large businesses*

RBI has reviewed the investment by Foreign Portfolio Investors (“**FPI**”) in debt and based on feedback received from custodians, FPIs and other stakeholders, it has been decided to provide some operational flexibility as well as transition path for FPIs and custodians to adapt these regulations. The changes, inter-alia, include: (i) FPIs are permitted to invest in Central Government Securities (G-secs) without any minimum residual maturity requirement, subject to the condition that short-term investments by FPI shall not exceed 20% of the total investment; (ii) the cap on aggregate FPI investment in government securities to 30% of the outstanding stock of that security, from the 20% earlier; and (iii) no FPI will invest in partly paid debt instruments [See RBI Notification No. RBI/2017-18/199 dated 15th June 2018].

➔ *President approves the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018*

The President gave his assent to the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (“**the Ordinance**”). The major amendments, inter-alia, include: (i) significant relief for home buyers by recognizing their status as financial creditors; (ii) enable home buyers to invoke section 7 of The Insolvency and Bankruptcy Code (IBC), 2016 (“**IBC 2016**”) against errant developers; (iii) the major beneficiary of the Ordinance would be Micro, Small and Medium Sector Enterprises (“**MSME**”), recognizing MSME in terms of employment generation and economic growth, the Ordinance empowers government to provide them with a special dispensation under the Code; (iv) it also provides immediate benefits by not disqualifying the promoter to bid for his enterprise undergoing Corporate Insolvency Resolution Process (“**CIRP**”); (v) the Ordinance allows participation of security holders, deposit holders and all other classes of financial creditors that exceed a certain number, in meetings of the Committee of Creditors, through the authorized representation; and (vi) the Ordinance provides for a minimum one year grace period for the successful resolution applicant to fulfill various statutory obligations required under different laws. [See Press Information Bureau release dated 6th June 2018].

Corporate Brief

➔ *MCA notifies the Companies (Significant Beneficial Owners) Rules, 2018*

MCA in context of section 90 of the Companies Act, 2013 (“**the Act**”) notified the Companies (Significant Beneficial Owners) Rules, 2018 (“**the Rules**”). The Rules came into effect from 13th June 2018. The rules, inter-alia, define: (i) “registered owner”, which means a person whose name is entered in the register of members of a company as the holder of shares in that company, but who does not hold beneficial interest in such shares; and (ii) “significant beneficial owner”, which means an individual referred to in sub-section (1) of section 90 of the Act read with sub-section(10) of section 89 of the Act, but whose name is not entered in the register of members of a company as the holder of such shares and the term ‘significant beneficial ownership’ shall be construed accordingly. Every significant beneficial owner shall file a declaration to the company in which he holds the beneficial ownership on the date of commencement of these Rules within ninety days from such commencement and within thirty days in case of any change in his significant beneficial ownership. The Rules shall not be applicable to the holding of shares of companies/body corporates, in case of pooled investment vehicles/investment funds such as Mutual Funds, Alternative

➤ *RBI introduces Single Master Form for all types of Reporting with respect to Foreign Investment in India*

RBI with the objective of integrating the reporting structures of various types of foreign investment in India, has introduced Single Master Form ("**SMF**"), which shall be filed online. The facilities provided by SMF, inter-alia, include: (i) facility for reporting total foreign investment in an Indian entity, as also investment by persons resident outside India in an Investment Vehicle; (ii) an interface is provided to the Indian entities, to input the data on total foreign investment in a specified format; and (iii) Indian entities not complying with the pre-requisites will not be able to receive foreign investment (including indirect foreign investment) and will be non-compliant with Foreign Exchange Management Act, 1999. [See RBI Circular No. RBI/2017-18/194 A.P. (DIR Series) Circular No. 30 dated 7th June 2018].

➤ *SEBI issues circular regarding enforcement of SEBI Orders regarding appointment of Directors by the listed companies*

SEBI issued instructions to the Exchanges vide its Letter dated June 14, 2018, wherein SEBI referred to enforcement of its Orders debarring entities/individuals from accessing the capital markets and/or restraining from holding position of directors in any listed Company. SEBI has issued certain orders regarding enforcement and monitoring of the appointment of restrained persons mentioned in the SEBI orders. Accordingly, the companies are required to comply with the following, which inter-alia, include: (i) listed Company and its nomination committee, while considering a person for appointment as director, shall check the details of the person appointed and verify that the said person is not debarred from holding the office by virtue of any SEBI order; and (ii) in case the existing director is restrained from acting as director by virtue of any SEBI Order or any other such authority, the director shall voluntarily resign with immediate effect, failing which the listed entity shall initiate the process of removal of such director in terms of relevant sections of the Companies Act, 2013, and inform the Exchange about the same. [See NSE circular no. NSE/CML/2018/02 dated 20th June 2018].

➤ *SEBI constitutes Group to review Institutional Trading Platform framework to facilitate the listing of start ups*

SEBI has constituted a group to look into the existing Institutional Trading Platform ("**ITP**") and to suggest measures to facilitate listing of startups. SEBI in 2015 with a view to facilitate listing of new age companies in sectors like

e-commerce, data analytics, bio-technology and other startups. The objectives, include the following: (i) review the need for present ITP framework; (ii) revisit the current ITP framework and identify the areas, if any, which require further changes; and (iii) any other issues relevant to ITP which the group may like to access. [See SEBI PR No.: 17/2018 dated 12th June 2018].

➤ *Cabinet approves proposal for enactment of Dam Safety Bill, 2018*

Union Cabinet has approved the proposal for enactment of Dam Safety Bill, 2018 ("**the Bill**"). The Bill will help all the States and Union Territories of India to adopt safety procedure, which shall ensure safety of dams and safeguard benefits from such dams. The major points of the Bill are : (i) the Bill provides for proper surveillance, inspection, operation and maintenance of all specified dams in the country to ensure their safe functioning; (ii) it provides for constitution of a National Committee on Dam Safety which shall evolve dam safety policies and recommend necessary regulations; (iii) it provides for establishment of National Dam Safety Authority as a regulatory body, which shall discharge functions to implement the policy, guidelines and standards for dam safety in the country; and (iv) it provides for constitution of a State Committee on Dam Safety by State government. [See Press Information Bureau release dated 13th June 2018].

➤ *WCD proposes amendments to widen the scope of Indecent Representation of Women (Prohibition) Act, 1986*

Ministry of Women and Child Development proposes amendments to the Indecent Representation of Women (Prohibition) Act, 1986 ("**IRWA**"). The proposed amendments in IRWA, inter-alia, include: (i) amend the definition of term advertisement to include digital form or electronic form or hoardings, or through SMS, MMS etc.; (ii) amendment in definition of distribution to include publication, license or uploading using computer resource, or communication device or in; (iii) insertion of a new definition to define the term publish; (iv) amendment in section 4 to include that no person shall publish or distribute or cause to be published or cause to be distributed by any means any material, which contains indecent representation of women in any form; and (v) creation of a Centralized Authority under the aegis of National Commission of Women. This authority will be authorized to receive complaints or grievances regarding any program or advertisement broadcasted or publication and investigate/examine all matters related to the indecent representation

of women. [See Press Information Bureau release dated 4th June 2018].

➤ *SEBI issues a circular on Go Green Initiative in Mutual Funds*

SEBI issued a circular on Go Green Initiative in Mutual Funds. SEBI in order to bring cost effectiveness in disclosing and providing information to unitholders and as a green initiative measure, the following steps need to be adhered, which inter-alia, include: (i) Mutual Funds/ Asset Management Companies (“AMCs”) shall prominently disclose the Net Asset Value of all schemes under a separate head on their respective website and on the website of Association of Mutual Funds in India (“AMFI”). Further, Mutual Funds/ AMCs shall extend facility of sending latest available NAVs to unit holders through SMS, upon receiving a specific request in this regard; (ii) the scheme wise annual report shall be hosted on the website of the Mutual Funds/ AMCs and on the website of AMFI. The Mutual Funds/ AMCs shall display the link prominently on their websites and make the physical copies available to the unit holders, at their registered offices at all times; (iii) Mutual Funds/ AMCs shall e-mail the scheme annual reports or abridged summary thereof to those unit holders, whose email addresses are registered with the Mutual Fund; and (iv) Mutual Funds/ AMCs shall publish an advertisement every year disclosing the hosting of the scheme wise annual report on their respective website and on the website of AMFI and the modes such as SMS, telephone, email or written request (letter), etc. through which unit holders can submit a request for a physical or electronic copy of the scheme wise annual report or abridged summary thereof. Such advertisement shall be published in the all India edition of at least two daily newspapers, one each in English and Hindi. [See SEBI Circular No. SEBI/HO/IMD/DF2/CIR/P/2018/92 dated 5th June 2018].

GST Brief

- **Central Board of Indirect Taxes (“C.B.I & C”)** had issued a circular to clarify the procedure for interception of conveyance for inspection of goods in movement, and detention, release and confiscation of such goods and conveyances. Further, the C.B.I & C issued modification to the said circular to clarify certain issues regarding the specified procedure and in order to ensure uniform implementation of the provisions of the Central Goods and Service Act. [See C.B.I & C. Circular No. 49/23/2018-GST, dated 21st June 2018].
- **C.B.I & C** has been extended the second refund deadline from 31-5-2018 to 16-6-2018, and advised the exporters to ensure

that the correct procedure of filing returns, giving accurate information in Shipping bill and submitting the application forms to the jurisdictional formations are followed quick disbursement of their refund claims. [See C.B.I & C. Press Release No. 167/2018, dated 20th June 2018]

RERA Brief

➤ *RERA Regulations notified by Tamil Nadu*

The regulations by Tamil Nadu Real Estate Authority have been notified after a year of its coming into place. These RERA Regulations also cover the Andaman & Nicobar Islands. These Regulations outline the procedures that are to be followed regarding registration of housing projects, grievances by the home buyers and examination of cases. As per the regulations, complainants can inspect the records of the ongoing or concluded cases with the real estate authority. Strangely according to the notified regulations, those inspecting the records, should not record or take notes of the documents. Regulations states that no electronic gadgets are allowed inside the record room. In the court hall or in any hearing before the authority or the adjudicating officer, no cell phone or any other electronic gadget can be used or operated.

➤ *Builders to be blacklisted in case of non-registration: Bihar RERA Chairman*

As per the notice given by RERA Bihar from 1st June 2018 the charges for late registration by the developers would be with a late fee of Rs 3 Lakh or 300% of the registration amount, whichever is higher. This late fee charges will be in effect till 30th June. According to reports, Chairman of Bihar RERA, at a press conference recently stated that the building projects not registered under Real Estate (Regulation and Development) Act, 2016 till June 30 deadline will be blacklisted.

RERA member Rajiva Bhushan Sinha said the list of blacklisted firm would be circulated to all RERAs in India so that they would not be able to form a company in any part of the country.

➤ *West Bengal notifies its own real estate law – West Bengal Housing Industry Regulation Act*

The state of West Bengal has notified its own law relating to the Real Estate Regulations Act, West Bengal Housing Industry Regulation Act. This act is set to cover the Real Estate and housing sector. The state had drafted the RERA Rules last

year on the lines of the central RERA Act but notified its own Housing Act now in June 2018.

As per news reports the West Bengal act has still not got the presidential assent that is essential; for its enactment. Section 254 of the Constitution specifies that if any provision of a law made by state legislature is repugnant to any provision of a law made by Parliament then the law made by Parliament shall prevail.

There are two major dilutions of RERA in the new law notified by the West Bengal Banerjee government. The first is on unforeseen circumstances that prevent a builder from fulfilling his contract. RERA says the circumstances could be war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature where HIRA makes an addition to the clause "...or any other circumstances as may be prescribed."

The second deviation is on garages. While RERA requires a roof and walls on three sides, HIRA has removed the clause altogether and defined garage as any parking space sanctioned by the government authority.

RERA Case

➤ *Maha RERA to have jurisdiction even where Agreement for Sale is cancelled prior to Real Estate (Regulation and Development) Act, 2016*

An order was passed by the Real Estate Regularity Authority on 4th June stating that even though the Agreements for Sale was cancelled by the Respondent before the Real Estate (Regulation and Development) Act, 2016 came into force, the Authority would have jurisdiction to hear and adjudicate such complaints as the consideration paid by the Complainants was still in possession of the Respondent.

It was held that though the Agreements for Sale was cancelled by the Respondent before the RERA came into force in May 2016, the consideration paid by the Complainants was still with the Respondent, the Authority has complete jurisdiction to hear and adjudicate the complaint.

The Complaint was disposed of by the MahaRERA stating that the MahaRERA had jurisdiction over the present dispute as the project is registered with MAHA RERA and if the Complainants chose to continue, both parties should execute the Agreements for Sale in accordance with Section 13 of the RERA and in addition, do so within 45 (forty-five) days from the date of the Order.

Litigation Brief

➤ *Is Registration A Prerequisite To Be Identified As A "Supplier" Under Micro, Small And Medium Enterprises Development Act, 2006?*

Case: *M/S Ramky Infrastructure Private Limited Vs Micro and Small Industries Facilitation Council & Anr (Before High Court of Delhi)*

Issue: Whether the Micro and Small Enterprises Facilitation Council ("the Council") had the jurisdiction to entertain the reference under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 ("the Act") as the dispute was regarding the execution of the contract in 2010 during which the supplier (Respondent No. 2) was not registered under Section 8 of the Act?

Facts:

- ≡ The Petitioner in the present case had filed a petition before the Hon'ble Delhi High Court questioning the direction given by the Council whereby the disputes between the Petitioner and Respondent No. 2 were referred to arbitration under Section 18 of the Act.
- ≡ The Petitioner, a company specialising in infrastructure development, had entered into a contract with Respondent No. 2 regarding certain civil work at Petitioner's project at the Delhi International Airport. The Respondent No. 2 claimed that despite several reminders, the Petitioner did not compensate them for the work conducted as per the contract.
- ≡ In 2015, Respondent No. 2 registered itself as a 'Service Enterprise' for Civil Construction under the Act. And soon after made a reference to the Council under Section 18 of the Act making a claim for the pending dues owed to them by the Petitioner. The Petitioner failed to appear and represent itself before the Council despite being served multiple notices.
- ≡ It was only in 2016 that the Petitioner decided to be a part of the conciliatory meetings conducted by the Council. Soon after the Council ascertained that it would not be able to adjudicate over the matter and referred it to Delhi International Arbitration Centre ("**DIAC**"). On receiving a notice from DIAC, the Petitioner filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 questioning the arbitral tribunal's jurisdiction over the matter.

Observations:**The Hon'ble Court went through all the relevant sections of the Act:**

- ≡ Section 16 mandates that the buyer would be liable to pay compound interest with monthly rests to the supplier on the amount from the appointed date or the date immediately following the date agreed upon at three times of the bank rate notified by the Reserve Bank.
 - ≡ Section 17 provides for the recovery of the amount due for any goods supplied or services rendered by the supplier to the buyer.
 - ≡ Section 18(1) enables the parties to refer the disputes under Section 17 to the Council. The obligation contemplated under Section 17 of the Act relates to the liability of a buyer and is only with respect of goods supplied or services rendered by a 'supplier'.
- It was observed that the definition of the term 'supplier' under Section 2(n) of the Act is an exhaustive one. If an enterprise is classified as a micro or a small enterprise within the scope of Section 7(1)(a)(i) and (ii) & Section 7(1)(b)(i) and (ii) of the Act and has filed the Memorandum under Section 8(1) of the Act, it would fall within the definition of a supplier. It was held that Respondent No. 2 falls within the definition of the micro/small /medium enterprise under the said provisions of the Act.
- The final issue was whether it was mandatory for a micro/small/medium enterprise to file the Memorandum under Section 8(1) of the Act in order to fall within the definition of a supplier under Section 2(n) of the Act.
- The Hon'ble Court observed that Section 2(n) of the Act indicates that it is in two parts. The first limb defines a supplier to mean a micro or small enterprise which has filed a memorandum with the authority referred to in Section 8 (1) of the Act and the second limb refers to (i) National Small Industries Corporation; (ii) the Small Industries Development Corporation of a State or a Union territory; and (iii) a company, co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises. The two limbs are required to be read together to exhaust all categories.

- The second limb which specifies three categories to fall within the definition of the term supplier is in addition to the category of small and medium enterprises that have filed the Memorandum under Section 8(1) of the Act. And, thus, the Respondent No.2 fell within the definition of micro/small/medium enterprises even during the material time (2010) when the contract was entered between the Petitioner and Respondent No. 2.
- The Court, therefore, held that Respondent No. 2 being engaged in supply of services rendered by a micro/small enterprise would fall within the fourth category of entities under the definition of supplier in Section 2 (n) that includes a company, co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises or rendering services provided by such enterprises. It is not necessary for such entities to have filed the Memorandum under Section 8(1) of the Act.

Held: It was held that an entity which falls within the definition of the micro/small/medium enterprise will be treated as a 'supplier' under Section 2(n) of the Act even if it has not filed a Memorandum for Registration as required under Section 8(1) of the Act.

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