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Corporate Brief

- *MCA extends the time for holding Annual General Meeting by companies whose financial year ended on December 31, 2019;*
- *The Ministry of Commerce and Industry reviews the FDI policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the Covid-19 pandemic;*
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Corporate Brief

➲ MCA extends the time for holding Annual General Meeting by companies whose financial year ended on December 31, 2019:

The Ministry of Corporate Affairs (MCA) vide its Circular No. 18/2020 dated April 21, 2020, has extended the statutory time period for holding an annual general meeting (AGM). As per the Companies Act, 2013, companies have to hold an AGM within 6 months from the closure of the financial year and not later than 15 months from the date of the last AGM. MCA clarified that companies, whose financial year ended on December 31, 2019, will now be permitted to hold their AGM anytime within a period of 9 nine months from the closure of financial year, that is, by September 30, 2020.

➲ The Ministry of Commerce and Industry reviews the FDI Policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the COVID-19 pandemic:

The Department for Promotion of Industry and Internal Trade under the Ministry of Commerce and Industry, Government of India issued a Press Note No. 3 of 2020 series on April 17, 2020, amending para 3.1.1 of the extant foreign direct investment (FDI) policy. Earlier, any non-resident entity, other than an entity belonging to Pakistan or Bangladesh, could invest in any sector in India other than in prohibited sectors, India, subject to the FDI policy. However, after the revision, an entity of a country which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, will require prior government approval to invest in India i.e. such entity can only invest under the government route. Para 3.1.1(b) clarifies that in the event of the transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, which results in the beneficial ownership falling within the restriction, then such subsequent change in beneficial ownership will also require the approval of the government of India. This has been done with a view to curb opportunistic takeovers/acquisitions of Indian companies due to the Covid-19 pandemic. However, these restrictions will come into effect from the date of FEMA notification.

➲ MCA provides clarification on passing of ordinary and special resolutions by companies under the Companies Act, 2013 on account of threat posed by Covid-19:

The Ministry of Corporate Affairs (MCA) issued a General Circular No. 14/2020 dated April 8, 2020 followed by another General Circular No. 17/2020 dated April 13, 2020, providing a clarification on passing of ordinary and special resolutions by the companies under the Companies Act, 2013 ("Act") on account of the threats posed by Covid-19 ("Circulars").

This comes at a time when the normal functioning of companies poses a threat to the stakeholders caused due to the unprecedented pandemic Covid-19 requiring social distancing. In view of the above, companies have been requested to take all decisions of urgent nature requiring the approval of members, other than items of ordinary business or business where any person has a right to be heard, through the mechanism of postal ballot/e-voting in accordance with the provisions of the Companies Act, 2013 without holding a general meeting, as it requires physical presence of members at a common venue. The Act does not contain any particular provisions for conducting of general meetings through video conferencing (VC) or other audio visual means (OAVM). However, Section 108 of the Act allows e-voting in general meetings and Section 110 of the Act allows companies to pass resolutions through postal ballot (including electronic ballot), under certain circumstances.

The following procedure has been prescribed for holding of unavoidable EGMs on or before June 30, 2020:

I. For companies which (a) are required to provide the facility of e-voting under the Act i.e. a listed company or a company having not less than one thousand shareholders or (b) have opted for the facility-

  i. EGMs may be held through VC or OAVM and the recorded transcript of the same shall be maintained in safe custody by the companies and in case of public companies should be made available on the website of the company.

ii. Convenience of different persons in different time zones must be considered and it should be ensured that such meetings allow a two way teleconferencing for ease of participation.

iii. Who can attend: Such facility must have a capacity to allow at least 1000 members to participate on a first-come-first-served basis. The shareholders holding more than 2% shareholding, promoters, institutional investors, directors, key managerial personnel, the chairpersons of various committees, auditors, etc. may be allowed to attend the meeting without restriction on account of first-come-first-served principle. The facility for joining the meeting should be kept open at least 15 minutes before the time scheduled to start the meeting and shall not be closed till the expiry of 15 minutes after such scheduled time. At least one independent director and the auditor are required and member institutional investors may be encouraged to attend such meetings. Attendance of members will be counted for reckoning the quorum of the meeting.

iv. Who can vote: As per the Circulars, only those members, who are present in the meeting through VC or OAVM facility and have not cast their vote on resolutions through remote e-voting (to be provided to the members before the actual date meeting) and are otherwise not barred from doing so, will be allowed to vote.

v. Appointment of Chairman: Unless provided otherwise in the articles of the company, the Chairman for the meeting will be appointed either (a) in accordance with section 104 of the Act (i.e. by show of hands or by poll, as decided) where there are less than 50 members present at the meeting or (b) by a poll through the e-voting system where there are 50 members or more.

vi. Voting: (a) In case of less than 50 members - the voting may be conducted either through the e-voting system or by a show of hands, unless a demand for poll is made in accordance with section 109 of the Act, in which case, the voting shall be conducted through the e-voting system; (b) in all other cases, the voting will be conducted through e-voting system. For this purpose, the Chairman must ensure that the facility of e-voting system is available during the meeting held through VC or OAVM.

vii. No proxies by members: Since the physical attendance of the members, has anyway been dispensed with, the facility of appointment of proxies by members will not be available for the meetings held through VC or OAVM. However, in pursuance of Section 112 and Section 113 of the Act, representatives of the members may be appointed for the purpose of voting and participation in such meetings.

viii. Mode and manner of issue of notices: The notice to members for convening general meetings through VC or OAVM should make disclosures and provide instructions with regard to the manner in which framework provided in these Circulars shall be available for use by the members. Companies should also provide a helpline number through the registrar & transfer agent, technology provider, or otherwise, for those shareholders who need assistance with using the technology before or during the meeting. Also a copy of the notice should be displayed on the company website.

ix. Further, the notice may be given only through e-mails registered with the company or with the depository in accordance with Rule 18 of the Companies (Management and Administration) Rules, 2014 ("Rules"). The following, other than any other necessary detail, should be stated in the public notice:

- a statement that the EGM is being convened through VC or OAVM in compliance with applicable provisions of the Act read with the Circulars;
- date and time of the EGM;
- that the notice of the meeting is available on the website of the company and the stock exchange;
- the manner in which the members who are holding shares in physical form or who have not registered their email addresses with the company can cast their vote through remote e-voting or through the e-voting system during the meeting;
- the manner in which the members who have not registered their email addresses with the company can get the same registered with the company.

x. Filing of Resolutions: All resolutions passed in accordance with this mechanism shall be filed with the Registrar of Companies (RoC) within 60 days of the meeting indicating compliance of the mechanism and the provisions of the Act and rules made thereunder.

II. For companies which are not required to provide the facility of e-voting under the Act-

i. The procedure provided above in paragraphs (i), (ii), (vii), (viii) and (x) of Part I are applicable.

ii. Who can attend: Such facility must have a capacity to allow at least 500 members or members equal to the total number of members of the company (whichever is lower) to participate on a first-come-first-served basis. The shareholders holding more than 2% shareholding, promoters, institutional investors, directors, key managerial personnel, the chairpersons of various

committees, auditors, etc. may be allowed to attend the meeting without restriction on account of first-come-first-served principle. The facility for joining the meeting should be kept open at least 15 minutes before the time scheduled to start the meeting and shall not be closed till the expiry of 15 minutes after such scheduled time. At least one independent director and the auditor are required and member institutional investors may be encouraged to attend such meetings. Attendance of members will be counted for reckoning the quorum of the meeting.

iii. Appointment of Chairman: Unless provided otherwise in the articles of the company, the Chairman for the meeting will be appointed (a) in accordance with section 104 of the Act (i.e. by show of hands or by poll, as decided) where there are less than 50 members present at the meeting or (b) by a poll conducted in the following manner, in all other cases.

iv. Voting: In case there are less than 50 members present in a meeting, the voting may be conducted either by a show of hands or through poll if a demand for poll is made by any member in accordance with Section 109 of the Act. In case of voting by poll, the following procedure should be followed.

- The members are required to convey their vote through designated email addresses provided by the company whenever a poll is conducted during the meeting.
- The company must ensure authenticity of the designated email addresses and strictly maintain the confidentiality of the password and other privacy issues associated with the designated email addresses.
- Voting by member on the resolutions must be done only by sending emails through their email addresses which are registered with the company and sent only to the designated email address circulated by the company.
- The meeting may be adjourned and called later to declare the result if counting of votes requires time.

v. Mode and manner of issue of notice: The notice may be given only through e-mails registered with the company or with the depository in accordance with Rule 18 of the Rules. The company, in order to ensure that all members are aware that a general meeting is proposed to be conducted in compliance with applicable provisions of the Act read with the Circulars, should:

- contact all those members whose e-mail addresses are not registered with the company before sending the notice for meeting to all its members; or
- where the contact details of any of members could not be obtained, the company should publish a public notice by way of advertisement specifying that the company intends to convene a general meeting in compliance with applicable provisions of the Act read with the Circulars and for the said purpose it proposes to send notices to all its members by e-mail; and provide a contact number for members to register their e-mail addresses for the same.

The Chairman of the meeting shall satisfy himself and cause to record the same before considering the business in the meeting.

➲ RBI issues Guidelines on Regulation of Payment Aggregators and Payment Gateways:

The Reserve Bank of India (RBI) issued the Guidelines on Regulation of Payment Aggregators and Payment Gateways under Section 18 read with Section 10(2) of the Payment and Settlement Systems Act, 2007 vide Circular No. DPSS.CO.PD.No.1810/02.14.008/2019-20 dated March 17, 2020 ("Guidelines"), which came into effect from April 1, 2020. The main purpose of the guidelines was to regulate the activities of payment aggregators and payment gateways in India. Before the issuance of the Guidelines, payment aggregators were required to adhere to the directions for opening and operation of accounts and settlement of payments for electronic payment transactions involving intermediaries issued by the RBI in 2009.

The 2009 Directions stated that the settlement of amounts with the merchant was to take place only upon completion of the transaction with the customer. When a particular transaction would be complete was left open-ended and to the discretion of the merchants and customers. This ambiguity has been remedied by the new Guidelines which have imposed an obligation on payment aggregators to settle amounts not upon completion of the transaction but dependent upon factors like - the date of intimation by the merchant of delivery of goods to the customer, intimation of shipment of goods to the aggregator and expiry of refund period.

In the processing of an online transaction, the following timelines are involved:

i. 'Tp'- date of charge / debit to the customer's account against the purchase of goods or services.

ii. 'Ts'- date of intimation by the merchant to the intermediary about shipment of goods.

iii. 'Td'- date of confirmation by the merchant to the intermediary about delivery of goods to the customer.

iv. 'Tr'- date of expiry of refund period as fixed by the merchant.

Applicability

- As per the Guidelines, Payment Aggregators ("PA") are entities that facilitate e-commerce sites and merchants to accept various payment instruments from the customers for completion of their payment obligations without the need for merchants to create a separate payment integration system of their own. Payment Gateways ("PG") are entities that provide technology infrastructure to route and facilitate processing of an online payment transaction without any involvement in handling of funds. While the Guidelines are made mandatory for the PAs, the PGs may only adhere to the baseline technology related recommendations.

Authorization

- The non-bank PAs shall require authorization from RBI under the Payment and Settlement Systems Act, 2007.
- These PAs should be a company incorporated in India under the Companies Act. Existing non-bank entities offering payment aggregator services are required to apply for authorization before June 30, 2021. They shall be allowed to continue their operations till they receive communication from RBI regarding the fate of their application.
- Commercial marketplaces providing payment aggregator services shall not continue this activity beyond the deadline prescribed above.
- Payment gateways will be considered as 'technology providers' or 'outsourcing partners' of banks or non-banks, as the case may be.

Capital requirements

- Existing PAs have to achieve a net worth of ₹15 crore by March 31, 2021 and a net worth of ₹25 crore on or before March 31, 2023. The net worth of ₹25 crore has to be maintained at all times thereafter.
- New PAs should have a minimum net worth of ₹15 crore at the time of application for authorization and have to attain a net worth of ₹25 crore by the end of the third financial year of the grant of authorization. The net worth of ₹25 crore has to be maintained at all times thereafter.

Governance

- The PAs are required to be professionally managed and promoters of the PAs are required to satisfy the 'fit and proper' criteria prescribed by RBI.
- PAs are required to have a Board approved policy for disposal of complaints, dispute resolution mechanism, time-lines for processing refunds, etc., as prescribed by the RBI from time to time.
- PAs should also appoint a Nodal Officer responsible for regulatory and customer grievance handling functions whose details should be displayed on the website.

Compliance

- The Know Your Customer (KYC) Directions and the provisions of Prevention of Money Laundering Act, 2002, updated from time to time, will be applicable mutatis mutandis to all PAs.

Merchant on-boarding

- As per the Guidelines, PAs are also required to have a Board approved policy for merchant on-boarding. They need to undertake background and antecedent checks of the merchants to ensure that such merchants do ot have any malafide intention of duping customers, and do not sell fake, counterfeit or prohibited products.
- Merchant sites cannot save customer card and such related data. A security audit of the merchant may be carried out to check compliance, as and when required. Agreement with the merchant should have provision for security / privacy of customer data.
- PAs should submit the list of merchants acquired by them to the bank where they are maintaining the escrow account and update the same from time to time. The bank needs to ensure that payments are made only to eligible merchants / purposes.
- PAs should ensure that the extant instructions with regard to Merchant Discount Rate (MDR) are followed. Information on other charges such as convenience fee, handling fee, etc., if any, being levied should also be displayed upfront by the PAs.

Security

- The RBI said PAs have to put in place adequate information and data security infrastructure and systems for prevention and detection of frauds. They should establish a mechanism for monitoring, handling and follow-up of cyber security incidents and breaches.
- PAs cannot place limits on the transaction amount for a particular payment mode. They should not give an option for ATM PIN as a factor of authentication for card-not-present transactions.

Seeing the surge in online payments the RBI has recently been more focused on regulating the payments sector in India, especially where intermediaries are involved. These additional obligations and compliances on payment aggregators such as maintenance of net worth requirements imposed by the

Guidelines may ensure more transparency and accountability in the payment structure in India.

Real Estate Brief

➲ **Reliefs contemplated by ministry of housing & urban affairs, government of India, to tackle disruption caused by covid-19 in real estate sector:**

- The Central Ministry of Housing and Urban Affairs has mentioned that the impact of lockdown will be treated as a force majeure event under the Real Estate (Regulation and Development) Act, 2016 and further reliefs in respect of the same are expected to follow, in order to protect the interests of both the promoters and the home buyers.
- Based on the meetings held by the Chairpersons of RERA and the Minister of state for Housing and Urban Affairs, Mr. Hardeep Singh Puri, on 29.04.2020, the latter mentioned that the competent authorities may soon announce measures in order to combat the adverse impact of COVID – 19, The measures that are being contemplated are briefly mentioned as under:

≡ Homebuyers are expected to get relief as they won't have to pay any penalty for delayed payments to builders, which was due during the impacted period;

≡ The entire lockdown period may be treated as "zero period";

≡ Regulators may not impose any penalty for not meeting the timelines.

- Mr. Durga Shanker Mishra, secretary for housing and urban affairs, further stated that one of the unanimous demands raised in the aforementioned meeting was regarding invocation of the force majeure clause to give suo-moto relief to registered projects due to be completed on or after 25.03.2020 to ensure that projects can be completed and homes get delivered.

Relief granted by State RERA Bodies In Lieu Of Covid-19 Pandemic

Uttar Pradesh:

- Vide press release dated 14.04.2020, Uttar Pradesh Real Estate Regulatory Authority ("Authority") granted an extension of 3 (three) months to the date of completion of such registered projects having their date of completion between 15.04.2020 and 31.12.2020.
- The Authority decided to allow the Promoters to update the QPR of the first quarter of the year 2020 till 31.05.2020. The date of any other statutory compliances pending at the level of promoter have also been extended till 31.05.2020.
- Later, the Authority has via public notice dated 30.04.2020 decided to postpone the hearing of the complaints listed before it till 08.05.2020.

Gujarat:

- Vide Order No. 33 dated 13.04.2020, Gujarat Real Estate Regulatory Authority decided to extend the completion date for all for registered projects which was between 01.04.2020 and 31.03.2021. Promoters have been allowed to make one-time application seeking extension of registration, without payment of any fees.

Tamil Nadu:

- Vide its Circular dated 06.04.2020, Tamil Nadu Real Estate Regulatory Authority ("the Authority") has automatically extended all registrations that are valid as on 01.02.2020 and the completion period of all registered projects have been extended by a period of 5 (five) months. Further, the Authority has also provided for various reliefs pertaining to statutory compliances which were due in March and June 2020, but have now been primarily extended till September 2020.

Delhi:

- As a suitable pre-caution towards the containment of pandemic COVID-19 and to ensure that the parties are not required to appear personally unless such appearance becomes indispensable, the cases listed before the Real Estate Regulatory Authority For NCT of Delhi ("the Authority") from 21.04.2020 and 06.05.2020 have been adjourned to subsequent dates by the Authority via issue of notice to this effect.

Haryana:

- A decision was taken by Haryana Real Estate Regulatory Authority, Gurugram on 14.04.2020 vide order no. 9/1-2020 HARERA/GGM (Admm.) wherein the cases listed before itself and the Adjudicating Authority between 15.04.2020 and 03.05.2020 have been adjourned to subsequent dates.

Maharashtra:

- The relief granted by Maharashtra Real Estate Regulatory Authority for extension of project completion date etc. in lieu of Covid-19 pandemic has been covered by our RERA Newsletter for March, 2020.

Karnataka:

- The relief granted by Karnataka Real Estate Regulatory Authority for extension of project completion date etc. in lieu of Covid-19 pandemic has been covered by our RERA Newsletter for March, 2020.

➲ **Vide Public Notice Dated 22.04.2020, Issued By Uttar Pradesh Real Estate Regulatory Authority ("Authority"):**

- **A consultant was appointed for putting in place a framework for evaluation of developers and projects via quantifiable parameters:** The Authority has come up with this grading system after working very closely with its consultant i.e. CRISIL Limited (CRISIL) which has designed this framework relying upon the suggestions and inputs received from Development Authorities, Industrial Development Authorities, Homebuyers Associations, Promoters Associations and other stakeholders.

- **Grading of all registered promoters and projects to be done annually on a scale of I to V:** The grading would be undertaken on a scale of I to V, whereby I will be the lowest and V will be the highest. The primary motive behind bringing about this grading is to evaluate the promoters and projects registered with the Authority and grade them in a way that homebuyers will have the opportunity to make an informed decision/

- **Projects and the promoters to be graded to assist a prospective homebuyer while investing in a project:** The principal considerations that are evaluated for promoter grading are economic quality, organizational structure & certifications, track record, compliance adherence and customer feedback. The promoter's competence is then compared and contrasted against the considerations as set forth by the grading system relying upon other graded projects in the state.

Litigation Brief

➲ **Indian *Evidence Act: Whether secondary evidence can be permitted to be produced if the existence of Will is not proved?***

In the matter of: Jagmail Singh & Another. **Vs.** Karamjit Singh & Others (Decided by Hon'ble Supreme Court of India).

Issue: Whether the Will can be permitted to be approved by allowing the secondary evidence when the prerequisite condition of existence of Will is not proved?

Facts:

- The Appellants filed a suit for declaration to the effect that they are owners to the extent of half share each of the land owned by one Babu Singh, situated in village Kokri Kalan, Tehsil/District Moga. Further, two Mutations sanctioned by the Assistant Collector Second Grade, Moga in favour of Baldev Singh (predecessors-in-interest of Respondent Nos.1 and 2) and Shamsher Singh (Respondent No.3) are illegal, null and void, as these two mutations have been sanctioned on the basis of a forged Will. A further prayer for consequential relief of permanent injunction to restrain the Respondents from alienating, transferring or mortgaging the suit property was also sought for. During pendency of the Suit, an Application under Section 65 and Section 66 of the Indian Evidence Act, 1892 (**Act**) was moved by the Appellants seeking permission to prove copy of Will by way of secondary evidence. Subsequently, the Application was allowed by the Trial Court.

- Aggrieved by the order of the Trial Court, the Respondents filed Revision Petition before the High Court of Punjab and Haryana at Chandigarh (**High Court**). The Revision was allowed on the ground that

once the Appellants have alleged that the original Will is in possession of the revenue official, they should have served a notice upon him under Section 66 of the Act for its production and in case, it is alleged that the said Will has been lost, then the application could have been filed for leading secondary evidence but in the absence of the compliance of the aforesaid procedure, the application per se filed under Section 65 of the Act is not maintainable.

- Thereafter, the Appellants preferred another application under Section 65 and Section 66 of the Act, before the Trial Court for issuance of notice under Section 66 of the Act to the revenue officials for production of original Will. The application was made on the ground that the original Will was handed over by the Appellants to revenue officials for sanctioning the mutation in their favor, however, the revenue officials failed to produce the will. Thus, the application was dismissed.
- Aggrieved by the aforesaid order, the Appellants filed a revision petition before the High Court. The High Court dismissed the same while upholding that the pre-requisite condition for admission of secondary evidence - i.e., existence of Will remained unestablished.
- The Civil Appeal was filed before Supreme Court challenging the judgement passed by the High Court.

Arguments and Court's Observations:

- The Appellants put forth that the order of the High Court suffers from patent errors of law and is against the letter & spirit of Sections 65 & 66 of the Act. It was pointed out that Section 65(a) of the Act allows the production of secondary evidence when the original is shown and appears to be in possession or power of one against whom the document is sought to be proved, or any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it. In such contingency, party concerned is entitled to prove the same by way of secondary evidence. It was further submitted that the Appellants had already served notice under Section 66 of the Evidence Act to the revenue officials through the Court but the Will, which was sought to be produced by way of secondary evidence, was not produced by either of the revenue officials. In addition to that, existence of the original Will can only be proved during the course of arguments and it is not the requirement of law that it should be proved at the first instance and only thereafter, secondary evidence can be allowed.
- The Hon'ble Supreme Court observed it is a settled position of law that for secondary evidence to be admitted, foundational evidence has to be given being the reasons as to why the original Evidence has not been furnished. Referring to certain precedents, the Hon'ble Apex Court also observed that it is trite that under the Act, facts have to be established by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence.
- The Hon'ble Supreme Court concluded that the factual foundation to establish the right to give secondary evidence was laid down by the Applicants. It was held that the Appellants would be entitled to lead secondary evidence in respect of the Will in question, but such admission of secondary evidence automatically does not attest to its authenticity, truthfulness or genuineness which will have to be established during the course of trial in accordance with law.

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