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Corporate Brief

Amendments in the Foreign Direct Investment Policy

The Government of India vide Press Note No. 4 (2019 Series) reviewed and amended the existing Consolidated Foreign Direct Investment Policy Circular dated 28 August, 2017. The chief aim of these amendments was to expand the scope of various commercial sectors to make India more attractive as a lucrative investment destination. The key changes introduced are:

- SINGLE BRAND RETAIL TRADING: The stipulations regarding the Single Brand Retail Trading shall be made less stringent to promote flexibility and ease of business operation. For example, all procurements made by the Single Brand Retail Trading entity for that particular brand, from India, shall be included as local sourcing, regardless of whether such goods are to be sold in India itself or exported further.
- Any goods which are procured/sourced by a Single Brand Retail Trading entity from India for the purpose of global operations, shall be done either directly by the entity itself, its associate/group companies or by a third party.
- The amendment in the Foreign Direct Investment allows Single Brand Retail Trading entities to conduct their business activities on an online platform, till the opening of their brick and mortar stores. This is a welcome change from the pervious compulsory condition of having a brick and mortar office for commencing business.
- DIGITAL NEWS: Up to 26 per-cent of Foreign Direct Investment shall also be allowed in the arena of digital news and current affairs media on a prior approval basis with the competent authority.
- CONTRACT MANUFACTURING: In the sector of Contract Manufacturing, the amendment in the policy allows the foreign investment to now be under an automatic route. Under the amendment, manufacturing activities may be either self-manufacturing by the investee entity or contract manufacturing in India through a legally tenable contract, whether on Principal to Principal or Principal to Agent basis. A manufacturer is also permitted to sell its products manufactured in India through wholesale and/ or retail, including through e-commerce, without Government approval.
- COAL AND LIGNITE: The entry route for Coal and Lignite sector has now been made automatic and the equity/Foreign Direct Investment cap is now hundred percent. This includes captive consumption by power projects, iron & steel and cement units and other eligible activities permitted under and subject to the provisions of Coal Mines (Special Provisions) Act, 2015 and the Mines and Minerals (Development and Regulation) Act, 1957, setting up coal processing plants like washeries subject to the condition that the company shall not do coal mining and shall not sell washed coal or sized coal from its coal processing plants in the open market and shall supply the washed or sized coal to those parties who are supplying raw coal to coal processing plants for washing or sizing etc.

Amendments in the Companies (Share Capital and Debentures) Amendment Rules, 2019

The Ministry of Corporate Affairs notified the amendments to the Companies (Share Capital and Debentures) Amendment Rules 2019 on 16 August 2019. These amendments aim to change and rectify the Companies (Share Capital and Debentures) Rules, 2014, the primary one being with respect to the relaxations brought in respect to issue of equity shares with differential rights.

Under the original framework, a company could issue equity shares with differential rights, provided that the shares with differential rights did not exceed 26 per-cent of the total post issue paid up share capital and the issuer company had a consistent track record of distributable profit for the last three financial years. However, under the new amendment, the existsing cap of 26 per-cent has been expanded up to 74 per-cent and the pre-requisite of

a three year financial period has been done away with in its entirety.

This amendment has been percieved as a welcome change especially by the promoters of Indian companies who wish to retain control of their companies in pursuit for growth, even as they raise equity capital from global investors.

- *Amendment to the Companies Act, 2013*

The Ministry of Corporate Affairs recently notified the new Companies Amendment Act 2019 which was introduced to further strengthen the provisions of the Companies Act, 2013 and specifiy norms regarding management of compliances, recategorization of offences to reduce workload of National Company Law Tribunal etc. Some of the recent provisions were enforced on 15 August, 2019 which deal with,

- National Financial Reporting Authority: The provisions regarding the Authority were enforced, including its functions, constitution of each division as well as the executive body.
- Investigation by Serious Fraud Investigation Office: Key amendments have been made to provisions regarding arrest of persons being investigated by Serious Fraud Investigation Office, and key managerial personnel of companies found to have been guilty of fraud by Serious Fraud Investigation Office may be held personally liable by the National Company Law Tribunal without any limitation of liability.
- Significant Beneficial Ownership: Key provisions have been introduced to impose obligations on companies to identify Significant Beneficial Ownership and failure to do so would attract penalties under the Act.

Debarring of erring Auditors: Provisions prescribing that persons found guilty of misconduct would be debarred from being appointed as an auditor or internal auditor of a company or body corporate or to perform a company's valuation for a minimum period of 6 months, which may extend to 10 years.

- *Competition Commission of India introduces the Green Channel Route*

The Competition Commission of India notified the *Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019*, on 13th August, 2019, which has brought a massive change in the merger regime by introducing the Green Channel Route that will aid the Competition Commission of India to use its resources efficiently and effectively.

Regarded as one of the significant amendments of merger control regime in India, this amendment now allows the parties to mergers/combinations to get on the spot approval without waiting for a period of 30 working days. This amendment has also simplified the process of filing the merger notification and has also eliminated the duplication of the efforts for the same. Needless to say, the process of doing business in this field has been vastly simplified.

Also, Form 1 has been also revised and simplified for the filings. This Form deals with all the basic and essential information that parties to a merger/combination have to furnish by means of filling it. It now requires details such as market-facing data, details of the proceedings before Competition Commission of India or any other authority under it to which the parties have been part of in the last five years, all plausible alternative relevant markets etc. On the flip side, the penalties for furnishing wrong and/or incorrect information have also been made more stringent.

Further, a transaction shall be deemed to be approved only after an acknowledgment of a notification filed under the Green Channel has been received by the respective authority.

Real Estate Brief

- UP RERA will handover flats to buyers if authorities delay in granting completion certificate or the occupancy certificate:

As under Section 11(4) (b) of the RERA, the promoter is responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees. Further, under Section 15-A of the RERA, every person or body having been granted permission under Section 15(3) of the RERA, the promoter shall complete the development according to the approved plan and send a notice in writing of such completion to the Authority, and obtain a completion certificate from the Authority. On reciept of application for completion certificate, the authority has to take a decision within seven days and intimate the deficiencies and either disapprove or approve the application. The Uttar Pradesh Real Estate (UP-RERA) has issued an order that if occupancy certificates (OCs) are pending with the authority concerned beyond the stipulated period, UP-RERA will treat is as deemed approval and direct the builder to give possession to allottees. Under Uttar Pradesh Urban Planning & Development Act, a developer will complete the development according to the approved plan and send a notice of completion to the authority concerned and obtain a completion certificate from it. If the the promoter

has developed proper infrastructure for electricity, water, sewerage, and other internal infrastructure, including roads, and has procured the electrical safety certificate, the fire safety certificate, structural engineer's certificate and lifts installation and safety certificate, and submitted all these certificates with the completion certificate application and if in the next seven days, the application is not rejected, then after this period, UP-RERA has not replied to this application, then the Promoter will treat it as deemed approval. . To safeguard the interest of buyers, the decision was taken to give possession of apartments once deemed approval period is over and then UP RERA will direct the Promoter to execute sale deed or sub-lease deed and give possession to the allottees.

KARNATAKA RERA:

- Vide circular dated 27.08.2019 Karnataka RERA assigned a procedure for transferring or assigning promoters rights and liabilities to a third party:

Karnataka RERA prescribed a procedure for the purpose of transfer of promoter's rights and liabilities to third party in accordance with the provisions of section 15(k) of Real Estate (Regulation and Development) Act ("Act"), 2016.

Under Section 15 of the RERA Act approval is not required:

(i) For the purposes of this section, changes in (internal) shareholding or constituents of a promoters organization, that doesn't effect the obligations and liabilities with respect to the Allottees shall not require approvals.

(ii) Any conversion of the promoter entity under any statute, of :

(a) Partnership Firm into LLP/ Private Limited Company or

(b) Conversion of Private Limited Company or unlisted company to a LLP or otherwise

(c) Proprietorship change by succession to legal heirs shall not require the approvals.

However, approval is required under the following circumstances:

Case I- Cases where the transfer is initiated by the Promoter:

- The Promoter shall have to apply to the Karnataka Real Estate Regulatory Authority with the consent of 2/3rd Allotees. as on the date of application in the project. The promoter is to apply to the secretary, Karnataka Real Estate Regulatory Authority in the prescribed format as attached to the circular as Annexure A.
- After receipt of approval, the new promoter shall then apply for necessary corrections in the existing registration details. The new promoter is also to upload a registered agreement stating that they shall comply with all the obligations under agreement of sale executed by the erstwhile promoter with respect to the Allottees of the project and has assumed all the obligations of the erstwhile promoter under this Act.
- Amalgamation or merger of the companies, in which the amalgamating company has one or more of the project registered under RERA, and which is voluntarily initiated by the promoter, after 11th July 2017, shall be regarded as transfer initiated by the promoter and will therefore have to follow the procedure prescribed above.
- However, if the amalgamation or merger or demerger of the companies which is not regarded as transfer under section 47 of the Income Tax Act 1961 or where 75% of the shareholders remains the same in the resultant company, the same shall not require the aforesaid approvals.

Case II -Where the transfer is initiated by a third party like financial institutions/ creditors etc. by operation of law or by way of enforcing of the security.

- Where secured loan on and/or the charge on the project is disclosed in the registration details of the project on the website of the Karnataka Real Estate Regulatory Authority then in such cases the promoter shall write to the secretary, K-RERA in the prescribed format (Annexure A). The promoter shall also inform each and every Allottee of the project of the proposed transfer.
- The Financial Institution of creditors or the new promoter (as appointed by the financial institution) shall then apply for necessary corrections in the existing registration details and upload an undertaking agreement stating that they shall comply with all the obligations under agreement of sale executed by the erstwhile promoter with respect to the Allottees of the project and has assumed all the obligations of the erstwhile promoter under this Act.

HIGH COURT OF DELHI JUDGMENT:

- In the matter of M3M India Pvt. Ltd. & anr ("**Petitioners**") Vs. Dr. Dinesh Sharma & anr ("**Respondents"):**

Facts:

1. The petition was filed in the Hon'ble High Court, against the order of the National Consumer Disputes Redressal Comminison against the Petitioner which held that the remidies provided under Consumer Protection Act, 1986 ("**CPA** or "**Consumer Protection Act, 1986")** and RERA are concurrent, and the jurisdiction of the forums/

comissions constituted under CPA is not outsted by RERA, particularly Section 79 thereof.

Issue:

Whether proceedings under Consumer Protection Act, 1968 commenced can be commenced by the home buyers (or allottees of properties in proposed real estate developments projects) against developers, after commencement of Real Estate (Development and Regulation) Act, 2016.

Contentions of the Respondents:

- The Respondents (home buyers) urged that the issue raised in these petitions had already been decided against the Petitioners by the Supreme Court in Pinoneer Urban Land and Infrastruct Pioneer Urban Land and Infrastructure Ltd. & Anr. Vs. Union of India (Pioneer case). The court had held therein that "remedies given to allottees of flat/apartments are concurrent, and such allottees are in a position to avail of remedies under CPA, RERA, as well as trigger the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC)".

Contentions of the Petitioners:

- The Petitioners, and other real estate developers, on the other hand argued that the issue involved in Pioneer case was of the relationship between the remedies provided under IBC and RERA and that the question of inter-relationship between RERA and CPA was neither raised nor argued before the Supreme Court. Moreover, if at all the judgment was to be regarded as having held that CPA and RERA provide concurrent remedies, the finding to that effect was only made with regard to Section 71 of RERA and not Section 79 of RERA, thus the judgment to this extent was per incuriam.
- In the alternative it was submitted that the conclusion recorded in Pioneer case regarding the concurrent nature of remedies under CPA and RERA, neither formed ratio decided nor obiter dicta and thus, was not binding.

Observations:

The High Court thus held that judgment in Pioneer was binding on the High Court with regard to the issue in question in as much as:

- It was pointed out by the Respondents that the litigation before the Supreme Court principally raised the question of remedies under IBC and RERA, the issues arising out of CPA proceedings were also brought to the attention of the Court. In fact, it had recorded that "Remedies that are given to allottees of flats/apartments are therefore concurrent remedies and connected matters such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code." Thus the High Court held that, it could not be said that any of those conclusions are obiter dicta or made as passing observations, and not intended to be followed.
- While examining the operation of remedies under RERA and IBC, the Supreme Court had drawn on Section 71(1) as another illustration that the remedies under RERA were not intended to be exclusive, but to run parallel with other remedies.
- The High Court could not disregard the judgment of the Supreme Court as being per incuriam based on its perception regarding the arguments considered therein. Reliance was placed ion Sundeep Kumar Bafna V. State of Maharashtra and Anr. (2014) 16 SCC 623, wherein the Supreme Court gave a " salutary clarion caution to all courts, including High Courts, to be extremely careful and circumspect in concluding a judgment of the Supreme Court to be per incuriam".

Held:

- Thereby the High Court concluded that "remedies available to the Respondents herein under the CPA and RERA are concurrent, and there is no ground for interference with the view taken by the National Commission in these matters.

MAHARASHTRA RERA APPELLATE TRIBUNAL ORDER:

➲ In the matter of Oberoi Construction Limited ("**Promoter/ Appellant**") and Asset Auto (I) Private Limited ("**Allotte/ Respondent**"):

Facts:

- The Allottee booked 2 flats in the project of the Promoter. The Promoter issued two allotment letters. The Promoter repeatedly made demands for amount of stamp duty and registration of Agreement of Sale (hereinafter referred "Agreement of Sale"). The Allotee committed breach by defaulting payment of price as per agreed schedule of payment. The Promoter repeatedly demanded for payment of amount of stamp duty and registration for execution of Agreement for Sale. However, the Allottee apprehended that possession of flats may not be received as per agreed timelines. Both Parties failed to execute Agreement for Sale as both were blaming each other for failing to perform their respective responsibilities to execute the Agreement for Sale.
- The first complaint before MahaRERA was filed by the Promoter for relief of execution and registration of Agreement for Sale. The second compliant was filed by Allottee for deletion or amendment in some clauses of

draft Agreement for Sale. The Promoter filed the third complaint, for the relief sought was imposing penalty on Allottee as the Allottee committed breach of order of MahaRERA to execute the Agreement for Sale. The Allottee raised new demand for parking spaces as per choice and refused to accept the parking as per allotment by Promoter. The Allotee then filed a last complaint and sought relief of refund of entire amount without any deduction by Promoter on account of termination of allotment. The Learned chairperson passed the impugned order and directed he Promoter to refund the entire amount to Allottee.

- That Learned Chairperson of MahaRERA passed an order and directed the Promoter to refund the entire amount to Allottee, was based only on clause-18 of model form of agreement which is provided under RERA, 2016 and rules and regulations made thereunder. However, the Allotee in one of its complaint had sought the deletion or amendment of some clauses of earnest money and right to forfeit the earnest money and right to forfeit the earnest money upon termination of the Agreement for Sale.

Issue:

- Whether compliant is tenable under clause 18 of model form of agreement under RERA Rules, 2017 or Section 18 of RERA, 2016?
- Whether the draft Agreement for Sale without signatures of the parties and registration is legally enforceable and binding on the Promoter and Allottee?
- Whether the transaction between Promoter and Allottee constitutes a concluded and valid contract?
- Whether the Promoter is entitled to forfeit the earnest money on termination of transaction with Allottee?

Contention of Allottee:

- The Allottee contended that he booked two flats in the project and paid the amount of earnest money to the Promoter. Thereafter, the Agreement of Sale is neither signed nor executed by the Parties and it was not executed and registered. The Allottee, further contended that such draft Agreement for Sale without execution by the Parties is not legally enforceable and valid and there was no concluded contract between the Promoter and the Allottee.

Contention of Promoter:

- Where as, the Promoter contended that the clauses of draft Agreement of Sale were amended or deleted as per consent of both the Parties and those consent terms were authorized by MahaRERA amounts to decree and it becomes a contract between the parties.

Observations:

- As per the Agreement for Sale, the Promoter was entitled to make adjustment and recover any agreed liquidated damages while refunding the amount to the Allottee. Also, the Agreement for sale contained a clause of having binding effect. After hearing both the Parties, MahaRERA disposed the complaint and directed Parties to register the Agreement for Sale, the Promoter was permitted to demand due balance price without interest on delayed period of payment of such price and the Alottee was directed to pay such price. This order was not challenged and became final and binding on the Parties.
- Subsequently another complaint was filed by the Allottee, wherein it sought the relief in respect of deletion and amendment or changes in clauses of draft Agreement or Sale as per consent terms. However, In the order to complaint of MahaRERA, the advocate of Allottee had submitted that the dispute stood resolved in terms of the consent terms and further the Promoter was directed to upload the amended draft agreement on website of MahaRERA, which is in conformity with RERA, 2016, rules and regulations. The Appellate Tribunal held, that it appeared that the Alottee had gone through the clauses of the draft Agreement for Sale and challenged some selected clauses by seeking deletion or amendment of said clauses in the draft of Agreement for Sale by filing the complaint. Both Parties filed the consent terms seeking the deletion or amendment of those clauses. Thus, both the Parties before MahaRERA finally agreed the draft Agreement for Sale.
- The Appellate Tribunal further held that since, the consent terms filed by the Promoter and Alottee for amending or deleting some clauses of the draft Agreement for Sale, became a consent decree which is passed by both command and contract and it is a contract with approval or imprimatur of the court and is as much as decree passed in adjudication. Imprimatur means approved or authorized. Thus the Allottee cannot challenge the amended draft agreement.
- However, the Promoter filed another complaint, as Allottee was not complying the orders of execution and registration of Agreement of Sale, passed by MahaRERA. The Appellate Tribunal held that even though formal contract is not signed and executed by both the Parties, there is concluded contract between the Promoter and the Allotee as they filed the consent terms regarding deletion or amendment of some clauses of draft Agreement for Sale and those consent terms were authorized and approved by the court and become the decree which is binding on the Promoter and the Allottee.

- The court held that various correspondence between the Promoter and the Allottee and various orders passed by MahaRERA in different matters between the Parties, it is sufficient to show there was binding contract between the parties. Consent terms of draft agreement signed and filed by both the Parties with imprimatur of court is consent decree, which is binding on both the parties. Thus the court held that draft Agreement for Sale without signatures of the parties and without registration is legally enforceable and binding on the Promoter and the Allottee and moreover the transaction between the Promoter and the Allottee constitutes the concluded and valid contract and the Promoter is entitled to forfeit the earnest money of 20% of sale price on termination of allotment by the Allottee.

Held:

- Promoter is entitled to forfeit earnest money to the extent of 20% of total price of each flat and shall refund the remaining amount to Allottee within 2 months. If Promoter fails to pay the amount as directed, Allottee shall be entitled t recover interest.

Litigation Brief

SUPREME COURT: Unregistered Agreement of Sale can be used as an evidence for Collateral purpose

Prakash Sahu **Vs.** Saulal & Ors. (CA No. 6772 of 2019)

Brief Facts:

The Plaintiff filed a suit for recovery of his earnest money paid to the defendant at the time of execution of the Agreement to Sell. However, the said Agreement of Sale was never stamped and/or insufficiently stamped. The Trial Court relied on the judgment of the Hon'ble Supreme Court in S. Kaladevi vs. V.R. Somasundaram (Civil Appeal No. 3192 of 2010) and decreed the suit of plaintiff by stating that plaintiff is allowed to lead evidence on an insufficiently stamped document. The order passed by Trial Court was set aside by the Hon'ble High Court wherein it was held that unregistered document could not be taken into consideration for collateral purposes.

Issue:

Whether an unregistered Agreement of Sale can be seen for collateral purposes or not under the proviso to Section 49 of the Registration Act, 1908?

Hon'ble Supreme Court observed and held as follows:

- Section 17 of the Registration Act provides such documents of which registration is compulsory to become admissible as evidence under law. If any document which is listed under Section 17 is not registered, then the same is hit by the provisions of Section 49 of the Registration Act and hence, becomes inadmissible as evidence.
- However, such unregistered document can be used as an evidence for any collateral transaction as provided in the proviso to Section 49 of the Registration Act.
- An Unregistered Agreement to Sell and/or an Unregistered Sale deed could be received in evidence to prove the agreement between the parties though it may not itself constitute a contract to transfer the property.
- A document required to be registered, if unregistered, can be admitted in evidence as an evidence of a contract in a suit for specific performance.
- A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.
- A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.
- Such an unregistered Sale Deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as an evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act.

While setting the aside the order of High Court, the Hon'ble Supreme Court held that unregistered Agreement of Sale can be used as an evidence for collateral purpose.

Maharashtra Chess Association Vs. Union of India & Others

Facts:

The second Respondent – i.e., the All India Chess Federation challenged the jurisdiction of the Writ Petition filed by the Appellant before the Hon'ble Bombay High Court on the ground that Clause 21 of the Constitution and Bye Laws of the second Respondent oust jurisdiction of all courts except courts at Chennai. Clause 21 of the Constitution and Bye Laws of the second Respondent is reproduced hereinbelow –

"21. Legal Course

I. *The Federation shall sue and or be sued only in the name of the Hon. Secretary of the Federation.*

II. *Any Suits/Legal actions against the Federation shall be instituted only in the Courts at Chennai, where the Registered Office of All India Chess Federation is situated or at the place where the Secretariat of the All India Chess Federation is functioning"*

Issue(s) to be decided:

Whether a Private Agreement entered into between the Appellant and the second Respondent in the form of the Constitution and Bye Laws of the latter can, by conferring exclusive jurisdiction on the courts at Chennai, oust the writ jurisdiction of the Bombay High Court under Article 226 of the Constitution of India.

Observation(s):

- It is a well settled principle of contract law that parties cannot by contract exclude the jurisdiction of all courts. Such a contract would constitute an agreement in restraint of legal proceedings and contravene Section 28 of the Indian Contract Act, 1872.

- While the powers the High Court may exercise under its writ jurisdiction are not subject to strict legal principles, two (2) clear principles emerge with respect to when a High Court's writ jurisdiction may be engaged. First, the decision of the High Court to entertain or not entertain a particular action under its writ jurisdiction is fundamentally discretionary. Secondly, limitations placed on the court's decision to exercise or refuse to exercise its writ jurisdiction are self-imposed. It is a well settled principle that the writ jurisdiction of a High Court cannot be completely excluded by statute. If a High Court is tasked with being the final recourse to upholding the rule of law within its territorial jurisdiction, it must necessarily have the power to examine any case before it and make a determination of whether or not its writ jurisdiction is engaged. Judicial review under Article 226 is an intrinsic feature of the basic structure of the Constitution.

Finding(s):

- The existence of an alternate remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court's writ jurisdiction and therefore, does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court.
- The intention behind this self-imposed rule is clear. If High Courts were to exercise their writ jurisdiction so widely as to regularly override statutory appellate procedures, they would themselves become inundated with a vast number of cases to the detriment of the litigants in those cases.
- The mere existence of alternate forums where the aggrieved party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. It is a factor to be taken into consideration by the High Court amongst several factors.

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