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NOT IN GOD'S NAME- NO PROPRIETARY RIGHTS

India and its many Gods

India is a country of a million Gods. Owing to our faith and religious beliefs, we tend to take God's name in all our endeavors, especially as the trade name of our businesses. For instance there are about 500 companies which contains the name 'Krishna' in its company name. In trademarks, there are much more 'Ram(s)', 'Jesus(s)', 'Mohammed' and a million other god names as brands under which traders sell their goods and services.

Gods are not exclusive

However, not all such brand names can be protected under the Trade Marks Act, 1999. In 2015, the Supreme Court in the case Lal Babu Priyadarshi vs Amritpal Singh (Civil Appeal No. 2138 of 2006) considered whether the mark 'Ramayan' could be granted exclusivity which would thereby enable the registered owner to enforce the said mark, restricting others from using the mark 'Ramayan'. The apex court of the land expressed that no one could claim trademark over Gods/ Goddesses/Deities or religious books like the Holy Quran, Holy Bible, Guru Granth Sahib, Ramayana, etc. over goods or services. The Hon'ble Court further explicitly mentioned that names of religious books could not come under the purview of the subject matter of monopoly for any individual. The apex court in its verdict announced that "the word 'Ramayan' represents the title of a book written by Maharishi Valmiki and is considered to be a religious book of the Hindus in our country. Thus, using exclusive name of the book 'Ramayan' for getting it registered as a trademark for any commodity could not be permissible".

Monopolizing the Gods

The next logical question would be, if anyone can apply for a trademark which contains the name of a God/ Goddess?

The answer is yes, provided the mark satisfies any of the following:

1. It has acquired the status of well-known trademark for instance 'Natraj' pencils or 'Hari Darshan' incense sticks which has decades of market presence making these marks distinctive.
2. In case the mark to be registered has not yet attained the status of a well-known mark:
    a. it should contain a word(s) to suffix or prefix the name of the god/goddess, for instance the mark "Hotel Saravana Bhavan" was registered even though it contained the name of the God Saravana; and
    b. should be distinctive, fanciful and unique
3. It should not hurt the religious sentiment of any segment of the society as prohibited under Section 9 of Trade Marks Act, 1999. In addition to the forgoing points it is advisable to have a device or a logo mark rather than a wordmark.

Conclusion

Enforcement of marks which contain the names of Gods/Goddesses whether registered or un- registered faces practical difficulties as these marks do not enjoy exclusivity/monopoly. Therefore it is advisable to refrain from using/adopting brands/trade names which contain Gods/Goddesses/Deities or religious books for the simple reason that the goodwill accumulated by the use of such marks cannot be effectively protected.

HOMEBUYERS V. SECURED CREDITORS- RIGHTS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The Insolvency and Bankruptcy Code, 2016 ("Code"), the Government's first attempt at bringing a single legislation for consolidating the insolvency processes of individuals, entities and other forms of organisations, was brought into effect from December 2016.

Little did the nation know the implications of enacting a legislation providing an upper hand to the creditors, as the apex Court has gone back and forth in deciding about the validation of insolvency proceedings initiated under the Code within 9 months of its coming into effect.

The apex Court, on September 4, 2017, had stayed the insolvency proceeding initiated by IDBI against Jaypee Infratech Limited ("Jaypee" or "Company"), a real estate company, following agitation and a public interest litigation ("Case") filed by homebuyers. The issue had aggravated especially because the cases subsisting in consumer forums against Jaypee were rendered infructuous by virtue of Section 62 of the Code.

Homebuyers requested the apex Court to consider them as Secured Creditors under the Code as the amount due to them was around 15,000 crore rupees which was more than the amount owed by Jaypee to the IDBI.

It was alleged by the homebuyers that the insolvency proceeding were made to maim the homebuyers' claims as they would liquidate the Company's assets leaving the homebuyers, who were classified as unsecured creditors, little to nothing of the amounts due to them.

The Case was heard again on September 11, 2017, wherein the Supreme Court lifted the stay on insolvency proceedings on Jaypee by imposing conditions to protect the interests of homebuyers. In an attempt to secure the financial woes of the homebuyers the Court ordered asking the parent Company of Jaypee, Jaiprakash Associates to deposit 2000 crore rupees on or before October 27, 2017. Further, the Supreme Court also ordered that Mr.Shekhar Naphade, senior counsel and Ms.Shubangi Tuli, an advocate on record, to participate in the meetings of committee of creditors to represent and support the cause of homebuyers. The interim insolvency resolution professional appointed was required to submit a resolution plan within 45 days which shall include the interest of low and middle income homebuyers. However, the Supreme Court did not allow the continuation of the proceedings pending before the consumer courts and thereby this attempt at striking a middle ground was not well received by homebuyers.

Discrepancies

- The Supreme Court, while trying to achieve the middle ground, had stated that the resolution plan shall include the interest of 'low and middle income homebuyers'. However, the term 'low and middle income homebuyers' is vague and could result in ambiguity in categorizing the said group of people.
- While the homebuyers can assume only the position of unsecured creditors under the Code and the cases pending in any Court is rendered infructuous, their claims are enervated if the Company is rendered insolvent.
- While the Supreme Court in the said case has ordered for a proportion of amount to be deposited upfront to protect the interest of the homebuyers, the same fact could also affect the solvency status of the Company as the time allowed for the deposit is too short.
- The Government introduced a separate legislation, namely, Real Estate (Regulation and Development) Act, 2016 to govern the process of real estate development and the inter-se rights and duties of the homebuyers and the real estate developers. However, due to the delay in implementation of the said

legislation, aggrieved homebuyers are worst affected when insolvency proceedings are initiated.

Conclusion

The case discussed herein above has resulted in multiple complexities in enforcing the Code against real estate companies or any industry in which general public is directly interested. The Government has made parallel efforts in bringing legislations to protect various stakeholders to avoid this anomaly. But the regulatory bottlenecks in implementing the legislations have resulted in additional burden to the already overburdened Judiciary.

THE CONSOLIDATED FDI POLICY 2017

The Consolidated FDI Policy for 2017 was released on 28th August, 2017. Though it does not bring substantial changes like the 2016 FDI policy, the 2017 policy provides clarity on several aspects.

One of the foremost changes that has been made is in pursuance of the abolition of FIPB, the listing of other offices (predominantly ministries) which would now be responsible for granting approvals and carrying out other erstwhile duties of FIPB. A significant change in this regard has been replacement of SIA and FIPB with RBI and FIFP as the authority which grants approvals for downstream investments by Indian entities and LLPs. (3.8.4.2)This would mean greater scrutiny for the Indian entities wanting to engage in downstream investment, given that they have to intimate the RBI.

Conversion of LLPs: LLPs with FDI are now allowed to convert to a Company and similarly, Companies with FDI are allowed to convert to an LLP. Though the same was not explicitly prohibited in the earlier FDI Policy, this establishes clarity on the matter. However, such conversion shall be permitted, only if (i) the LLP/ Company is operating in a sector where 100% FDI by automatic route is allowed (ii) there are no FDI-linked performance conditions. (3.2.4)

FDI-linked performance conditions was another sore spot in the last FDI Policy with no explanation given on what the term would mean. However, the 2017 policy provides a definition to the term though with not much clarity as "sector specific conditions for companies receiving foreign investment".

Single Brand Product Retail Trading:

Earlier in the year, RBI had relaxed the local sourcing requirements under the 2016 FDI Policy for a period of 3 (three) years for entities that are involved in products that are "state of the art" and "cutting edge" and local sourcing is not possible.

Vide the new FDI Policy, a committee (with representatives from NITI Aayog) has been established to examine whether a particular product or technology qualifies as "state of the art" or "cutting- edge" to be eligible for the exemption.

Cash and Carry wholesale trading:

Cash and carry wholesale trading in single brand retail has been allowed since 2015. However the current FDI Policy now has struck down the restriction of cash and carry wholesale trading to only single brand retailing.

Additional investment to require fresh approval

Earlier, additional investment into same entity did not require a fresh approval as long as it is within the approved foreign equity percentage. Further investment into the same entity beyond Rs. 5000 crore will now require fresh approval from the Government, even if it is within the mandated percentage.

Investment in Securities Market to be subject to more conditions

FDI in Infrastructure Company in the Securities Market is now to be also subject to Securities Contracts (Regulations) (Stock Exchanges and Clearing Corporations) Regulations 2012, and Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 and other regulations of the Central government, SEBI and RBI. Further investment in financial sector has been liberalised from the earlier restriction of 18 sectors to allow 100% FDI under automatic sector as long as they are regulated by relevant financial authorities.

Details of sectors where FDI policy has been liberalised.

- 100% FDI is allowed through approval route for Retail trading in respect of products manufactured and produced in India.
- 100% FDI is allowed, with investments beyond 49% requiring approval of the government in the Defence Industry.
- 100% FDI is allowed for Broadcasting Carriage Services. However, foreign investment beyond 49% resulting in change in ownership pattern or transfer to stake from existing investor to new for investor would in companies not seeking permission of the respective ministry, will require government approval.
- 100% FDI is allowed for Airports in case of existing projects.
- 100% FDI is allowed, with investments beyond 49% requiring approval of the government in the Scheduled Air Transport Service/ Domestic Scheduled Passenger Airline and Regional Air Transport Service. However investments by NRI are allowed up to 100% under the automatic route.
- 74% FDI is allowed, with investments beyond 49% requiring approval of the government for investments in Private Security Agencies
- 100% FDI is allowed, with investments beyond 74% requiring approval of the government in the Pharmaceutical (Brownfield) sector.

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DIRECTORS' DISQUALIFICATION: THE SUDDEN CLEAN UP

The recent notice issued by the Ministry of Corporate Affairs ("**MCA**") has disqualified 2,00,000 and more directors for holding their posts in defaulting companies. The list of disqualified directors has been made available on the MCA website based on the location of the Registrar of Companies ("**RoC**"). It has been notified by the MCA website that any person disqualified under Section 164(2) of the Companies Act, 2013 ("**Act**) to not act as director during the period of the disqualification and not to file any document or application with MCA as the same shall be summarily rejected.

In light of the said notice, captured below is position of law with respect to the disqualification for appointment/ re-appointment of directors.

General disqualifications under the Companies Act, 2013

Section 164 of the Act deals with disqualification of directors and is read with Section 167 of the Act that deals with vacation of the office of a director. The general grounds for disqualification of a person for being appointed as a director are, if such person:

- has been found to be of unsound mind by a court of competent jurisdiction;
- is an un-discharged insolvent or has applied to be adjudicated as an insolvent and his application is pending;
- has been convicted by a court for any offence involving moral turpitude and has been sentenced to imprisonment for not less than 6 months, and a period of 5 years has not elapsed from the date of expiry of the sentence;
- has not paid any call in respect of shares of the company held by him, whether alone or jointly with others, and 6months have elapsed from the last day fixed for the payment of the call; or
- has an order disqualifying him for appointment as director that been passed by a court in pursuance of Section 203(appointment of key managerial person) and is in force, unless the leave of the court has been obtained for his appointment in pursuance of that section.

Non filing of financial statements and non-repayment of deposits:

Section 164 (2) of the Act further states that no person/ director shall be eligible to be re- appointed as a director of that company or appointed in any other company for 5 years from that date on which that company:

- has not filed financial statements or annual returns for any continuous period of 3financial years; or
- has failed to repay the deposits accepted by it or pay interest therein or redeem any debentures on due date or pay interest due or pay any dividend declared and such failure to pay or redeem continues for 1 year or more.

If any of the above two situations arise, all the directors of such company shall be deemed to be disqualified. It is pertinent to note that the above disqualification applies to all companies as against the corresponding Section 283 of the Companies Act, 1956 that extended this disqualification only to public companies.

Additional disqualifications for Private Companies: In addition to the above general disqualifications, Section 167(4) of the Act, also allows the articles of association of a private company to provide for any additional disqualifications.

Consequences for disqualification of director:

- In the event that the director is disqualified pursuant to Section 164 of the Act, the director shall vacate his office as per the provisions of Section 167 of the Act.
- Disqualification of a director does not change the status of the director as a shareholder.
- Additionally, a statutory auditor is also mandated under Section 143 (3) (g) of the Act to report whether any director is disqualified from being appointed as a director under Section 164 (2) in the Auditor's report. Similarly, a secretarial auditor in their report as per Section 204 is required to comment on the composition of the Board in form MR-3.

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- Per Rule 14 of the (Appointment and Qualification of Directors) Rules, 2014 ("**Rules**"), every director is required to inform to the concerned company about his disqualification under Section 164 of the Act in form DIR-8 before his appointment/re-appointment.
- In the event that a company fails to file its annual filings or fails to repay any deposit, interest, dividend etc per Section 164(2) of the Act, the company is required to immediately file Form DIR-9 with the RoC furnishing the names and addresses of all directors of the Company during the relevant financial years. Failure to file the said form with the RoC within 30 days of the failure would attract a penalty between Rs.50, 000 to Rs.5,00,000 on the Company and every officer who is in default.
- An application in Form DIR 10 may be filed with the RoC for the removal of disqualification under the Rules.

Nature of the offence:

- As Section 164 of the Act, does not contain any specific punishment, the punishment under Section 172 of the Act shall be applicable wherein the company and every officer in default shall be
- punishable with a penalty between Rs.50, 000 to Rs. 5,00,000.
- Since this offence is punishable only with a fine per Section 441(1) of the Act, the said default may be made compoundable.
- The power of compounding an offence lies with the NCLT/ Regional Director/ or any such person authorised by the Central Government depending on the amount of penalty.

Conclusion

This step to disqualify over 2,00,000 directors has come after the Central Government struck off the names of 2,00,000 firms from the RoC for not being in compliance with the regulatory requirements under applicable law and had initiated action to restrict their bank accounts. While this whole exercise of the Government has been branded as part of the fight against black money and to check any siphoning of funds by/into shell companies it remains to be seen as to whether the government will prioritise cases that involve large movement of cash and aim to increase the investors' confidence rather than interfering in the corporate structure.

SNIPPETS OF OTHER KEY LEGAL UPDATES

- Restriction on layers of Subsidiaries: The Ministry of Corporate Affairs ("MCA") has notified the proviso to Section 87(ii) of the Companies Act, 2013 which imposes restriction on certain classes of companies from having more than two layers of subsidiaries. While computing the layers, the wholly owned subsidiaries shall not be taken into account. The rules also state that the said proviso is not applicable to a banking company, an NBFC, an insurance company or a government company. It also lays down reporting requirements of the companies which currently have more than the allowed number of layers of subsidiaries. – [Source: http://www.mca.gov.in/Ministry/pdf/CompaniesRestrictionOnNumberofLayersRule_22092017.pdf]
- Suspension of internet, legitimised now: The Ministry of Communications has notified the "Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017" naming competent authorities who will now be the only authorities who can issue directions to suspend telecom services. The directions will further be subject to the review by a Committee appointed/ constituted by the Central or State Government. However, the directions do not specify the powers of the review committee if it is found that the directions made under the rules are not compliant with the Telegraph Act, 1885. [Source: http://www.dot.gov.in/sites/default/files/Suspension%20Rules.pdf]
- Dematerialisation to reach public unlisted companies: Dematerialisation has been one of the major revolutions brought in the capital markets by SEBI since its incorporation. However the same was restricted to listed companies (since only they come under the purview of SEBI) Section 29 of the Companies Act, 2013 already mandates that all public offer of securities shall be only in a dematerialised form. MCA is looking to strictly enforce the provision by requiring unlisted public companies also to convert their physical shares to a dematerialised form. [Source: http://economictimes.indiatimes.com/markets/stocks/news/government-plans-to-dematerialise-shares-of-unlisted-companies-to-crack-down-on-black-money/articleshow/60415992.cms]
- Ambit of the Payment of Wages Act, 1936 increased: The Act has been amended to apply to employees who earn not more than Rs. 24,000/- (Rupees Twenty Four Thousand only). This would mean increase in the obligations of the employer as more employees will now be protected under the Act, which provides for regulations on wage periods, deductions to be made from wages among other conditions relating to payment of wages. [Source:http://labour.gov.in/sites/default/files/Payment%20of%20Wages%2024000.pdf]
- Restriction on number of subsidiary companies held by listed companies: The Corporate Governance Committee of SEBI which is scheduled to submit a report on October 3 rd , is looking to accord more responsibility on the holding company and its auditors in general and with respect to the operations of a subsidiary company. It might also suggest limiting the number of subsidiary companies that may be held by a public listed companies. Other expected suggestions include, attendance rules for independent directors and increased participation by investors in AGMs, apart from royalty payments requiring approval of minority shareholders. [Source:http://www.moneycontrol.com/news/business/markets-business/sebi-appointed-committee-may-put-a-cap-on-number-of-subsidiaries-of-listed-companies-2386047.html]
- Other Creditors to now be able to institute proceedings under the Insolvency and Bankruptcy Code: Section 9A has now been incorporated into the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 to enable creditors other than Financial Creditors and Operational Creditors to file claims against a Corporate Debtor. This will be particularly instrumental for claimants such as real estate buyers who are owed money by the real estate companies (Corporate Debtors) to reclaim their investment. [Source: http://ibbi.gov.in/AMEND_Fast_track.pdf and http://ibbi.gov.in/AMEND_CIRP.pdf]

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