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UPDATES ON ALLIED LAWS VIZ. GST, STAMP DUTY, RERA, PMLA, IBC AND BANKING LAWS IMPACTING THE REAL ESTATE SECTOR

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I N D E X

UPDATES ON GST, STAMP DUTY, RERA, PMLA, IBC AND BANKING LAWS IMPACTING THE REAL ESTATE SECTOR

1. GOODS AND SERVICE TAX

1.1 GST on Constructed Apartments

(A) Recently the Gujarat High Court in the case of ***Munjaal Manishbhai Bhatt vs UOI 2022-TIOL-663-HC-AHM-GST*** has held that the buyer is required to pay GST only on the construction cost and not on the actual value of the land / undivided share involved in the sale of a flat, villa or commercial place. The Gujarat High Court held that when the actual value of land is ascertainable from the agreement of sale / Sub-Registrar records, GST can be imposed / collected on the construction cost and not on the total price of the flat minus 1/3rd deduction towards the land.

(B) The transaction of sale of flats/ villas includes 2 components i.e. land & construction cost. Since GST is applicable only on construction cost, the Government vide Notification No. 11/2017-Central Tax (Rate) dated 28th June 2017 has deemed 1/3rd of the total price of flat considered as land value irrespective of actual land value available or identifiable. It is known fact that the land value may not be same across the country, therefore, GST is indirectly being imposed on the portion of the land value also. This has led to huge GST cost to the buyers.

In this context Hon'ble High Court held as follows :

"*Notification No. 11/2017-Central Tax (Rate) dated 28.6.2017, which provide for a mandatory fixed rate of deduction of 1/3rd of total consideration towards the value of land is ultra-vires the provisions as well as the scheme of the GST Acts. Application of such mandatory uniform rate of deduction is discriminatory, arbitrary and violative of Article 14 of the Constitution of India.*

In our considered view, while maintaining the mandatory deduction of 1/3rd for value of land is not sustainable in cases where the value of land is clearly ascertainable or where the value of construction service can be derived with the aid of valuation rules, such deduction can be permitted at the option of a taxable person particularly in cases where the value of land or undivided share of land is not ascertainable."

Our comments

(a) The transaction of sale of flats / villa / commercial spaces comprises of two components viz. land cost / land value and construction cost. Presently, the buyer pay GST on the total value or the transaction value of the purchase of the flat or commercial space which includes the land cost / land value subject to 1/3rd deduction for the land.

With Gujarat High Court judgment, the buyer can now pay GST only on the cost of construction of the flat and not on the land value / land cost thus saving substantial amount of GST.

(b) To take the advantage of Gujarat High Court judgment, the developers and the buyers will have to show the break-up of the total consideration in the Agreement for Sale towards consideration for land, consideration towards construction cost and consideration towards other charges, deposits, etc. But if two agreements are executed, one for sale of undivided interest in the land and another for providing construction services, the Gujarat High Court Judgement would apply beyond doubt and GST would be leviable only on the construction services provided by the Developer (with benefit of ITC) and not on the land.

(c) GST on construction cost is 18% whereas GST on sale of a residential unit is 5%. The preposition laid down by the Gujarat High Court would be beneficial where the land cost / land value as a percentage of the total consideration or the transaction value in case of a residential unit is 73% or more (Assuming No ITC is available).

(d) The Gujarat High Court judgment is applicable retrospectively from the day GST was introduced i.e. from 1st July, 2017.

(e) The developers or buyers can also file refund application with the GST authorities for refund of excess GST if any paid in the past on this account.

1.2 GST of Plotted Development

(A) There was a controversy in case of plotted development where the developer develops plots in a layout, provides basic amenities/ infrastructure such as levelling of road, laying down of drainage and sewerage lines, water lines, electricity lines, pipe line facilities for drinking water, street lights, telephone line, etc. and then sells the individual plots to different buyers (without construction of any structure thereon), whether the transaction would be exempt from GST levy on the ground that it is a pure sale of land or that GST would be payable on the ground that there is a sale of land coupled with infrastructure facilities and therefore not a pure sale of land?

(B) In this respect, the Gujarat AAR in the case of ***Shree Dipesh Anilkumar Naik (Gujarat AAR)*** has held that it is a case of plotted development where large land is sub-divided into smaller plots after obtaining necessary plan approval from the development Authority and primary amenities such as and sewerage, drainage line, water line, electricity line, land levelling for road, pipe line facilities for drinking water, street lights, telephone line, etc. is provided. Sale of such sites is done to end customers who may construct houses/ villas on the plots. The sellers charge the rate on

super built-up basis and not on actual measure of the plot. The super built-up area includes area used for common amenities, road, water tank and other infrastructure on proportionate basis. Thus the charges collected by the seller are partly towards the land and partly towards the amenities. The appellant's sale price includes cost of land as well as cost of provision of common amenities. Sale of developed plot is not equivalent to sale of land but is a different transaction. Sale of such plotted development tantamount to supply/ rendering of service. Thus, the sale of plotted development is exigible to GST as per clause 5(b) of Schedule II of the CGST Act as "construction of civil structure or a part thereof intended for sale to a buyer" @ 18%.

(C) The Goa AAR in the case of ***Shantilal Real Estate Services (Goa AAR)*** was concerned with two projects

Project 1 : Waddo by Shantilal

Under this project the land parcels were to be sub-divided into plots as per sub-division plan approved by Mormugoa Planning and Development Authority. There was an existing road and as such no road development was to be undertaken. Further, drainage and electricity lines were already pre-existing which were to be marginally improved. There was also no development of amenities or open road. No construction of building or structures was to be done.

Project 2: Valley and Hills by Shantilal

This project comprised of the land to be sub-divided into plots and new roads and drains to be constructed in line with the subdivision plan approved by Mormugoa Planning and Development Authority. Further, electricity poles were to be realigned and added as necessity. No construction of building or structures was be done.

In respect of both the projects in line with the development permission granted by the Authorities the roads, open spaces etc. are to be transferred to the Authority being in the nature of public utility.

Further in both the projects the sale was only of the plots of land the applicant being the owner. The price charged was based on the actual area of the plot and there was no built-up area, super built-up area or constructed structure which was being sold.

This statutory permission requires *inter alia* the construction of roads and drainages and the demarcation of plots with permanent boundary stones. Further, all roads developed were to be gifted to the Authority and were as such public utility.

The GOA AAR held that the sale being merely of a plot of land, sold based on its actual measurement and not on the basis of any built-

up area/super built-up area or carpet area and without any construction of any buildings or structure would fall within the purview of land as per para 5 of the Schedule III of the CGST Act. Furthermore, the roads, poles or drainages constructed by the seller of land are at no time transferred to the purchaser of sub-divided developed plot. These amenities will be available for use to every plot holder without any title to it. These amenities will be handed over/ gifted to the local authority and thereafter the local authority will be the owner of such road, electricity poles. No plot owner or collectively all plot owners will be in a position to sell these poles or road or drainages nor will they be in a position to sell only plots with these poles or road on it. Plot owner cannot opt to buy only plot without these amenities. No structure is being erected or construction of facilities such as gyms, clubhouses, etc.in the nature of complex, building, civil structure or part thereof are being undertaken. So it can be concluded that the object for sale is land. Hence clause 5(b) of Schedule II of CGST Act is not applicable.

(D) In this respect CBIC vide its Circular No. 177/09/2022 dated 3rd August, 2022 has clarified as under :

"*Land may be sold either as it is or after some development such as levelling, laying down of drainage lines, water lines, electricity lines, etc. It is clarified that sale of such developed land is also sale of land and is covered by Sr. No. 5 of Schedule III of the Central Goods and Services Tax Act, 2017 and accordingly does not attract GST*."

(E) In view of the aforesaid discussion, there will be no GST levy on plotted developments, where after plotting, the plots are sold along with basic infrastructure / amenities but without having any construction thereon.

1.3 GST on Liquidated damages, compensation, penalty arising out of breach of contract or other provision of law

(A) Para 5(e) of Schedule II of CGST Act deems "*Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act*" as a supply of service under Section 7 of the CGST Act and accordingly exigible to GST. This entry has opened up a pandora box by the GST authorities purporting to levy GST on all the transaction whether any service is given or not. Controversies have arisen with respect to the levy of GST on the following items on the grounds of the same being "supply" vis-à-vis "*agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act*".

(B) The said expression has following three limbs viz. (i) agreeing to the obligation to refrain from an act; (ii) agreeing to the obligation to tolerate an act or a situation; and (iii) agreeing to the obligation to do an act.

Agreeing to the obligation to refrain from an act

Example of activities that would be covered by this part of the expression would include non-compete agreements, a builder refraining from constructing more than a certain number of floors, even though permitted to do so by the municipal authorities, against a compensation paid by the neighbouring housing project, which wants to protect its sunlight, or an industrial unit refraining from manufacturing activity during certain hours against an agreed compensation paid by a neighbouring school, which wants to avoid noise during those hours.

Agreeing to the obligation to tolerate an act or a situation

This would include activities such a shopkeeper allowing a hawker to operate from the common pavement in front of his shop against a monthly payment by the hawker, or an RWA tolerating the use of loud speakers for early morning prayers by a school located in the colony subject to the school paying an agreed sum to the RWA as compensation.

Agreeing to the obligation to do an act

This would include the case where an industrial unit agrees to install equipment for zero emission/discharge at the behest of the RWA of a neighbouring residential complex against a consideration paid by such RWA, even though the emission/discharge from the industrial unit was within permissible limits and there was no legal obligation upon the individual unit to do so.

(C) The Government of India, Ministry of Finance, Department of Revenue (Tax Research Unit) has issued a Circular bearing No. 178/10/2022-GST (F. No. 190354/176/2022-TRU) dated 3rd August, 2022 explaining in detail the principles to be applied to determine whether or not any transaction relates to supply of service falling under Para 5(e) of Schedule II of CGST Act thereby exigible to GST. The said Circular further enumerates examples of services falling under Para 5(e) of Schedule II of CGST Act thereby supply of such services being exigible to GST and examples of services not falling under Para 5(e) of Schedule II of CGST Act thereby not liable to GST.

Examples of services falling under Para 5(e) of Schedule II of CGST Act thereby its supply being liable to GST :

(i) Late payment surcharge or fee is a payment for a service of tolerating the act of late payment, it is an ancillary supply naturally bundled and supplied in conjunction with the principal supply, and therefore assessable as the principal supply. E.g. late payment or fees for electricity, water, telecommunication, cooking gas, insurance etc.

(ii) Cancellation charges are assessable at the same rate as applicable to the service contract.

Examples of services not falling under Para 5(e) of Schedule II of CGST Act thereby its supply not liable to GST :

(i) Liquidated damages paid for breach of contract is a compensation specified in a written contract for breach of non-performance of the contract. Liquidated damages cannot be said to be a consideration received for tolerating the breach or non-performance of contract. They are rather payments for not tolerating the breach of contract. Such payments do not constitute consideration for a supply and are not taxable. E.g. penalty stipulated in a contract for delayed construction of houses, forfeiture of earnest money by a seller in case of breach of 'an agreement to sell' an immovable property by the buyer.

(ii) Compensation for cancellation of coal blocks pursuant to Supreme Court order.

(iii) Fine / penalty recovered for dishonour of cheque is not a consideration for any service.

(iv) Penalty / fine imposed for violation of any law is not for tolerating violation but for not tolerating, penalizing and deterring such violations. Accordingly, penalty / fine paid for violation of any law is not consideration as no service is received in lieu of payment of such fines and penalties.

(v) Forfeiture of salary or payment of bond amount in the event of the employee leaving the employment before the minimum agreed period is not in the nature of consideration for tolerating the act of such premature quitting of employment but as penalty for dissuading the non-serious employees from taking up employment and to discourage and deter such a situation. Further, the employee does not get anything in return from the employer against payment of such amounts. Therefore, such amounts recovered by the employer are not taxable as consideration for the service of agreeing to tolerate an act or a situation.

(D) In determining whether or not a particular transaction would fall under Para 5(e) of Schedule II of the CGST Act, the said Circular has laid down certain principles, a gist whereof is given as under :

(i) Service of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is nothing but a contractual agreement. There must be two parties. There must be a necessary and sufficient nexus between the supply (i.e. agreement to do or to abstain from doing something) and the consideration.

(ii) There has to be a contractual obligation to either (a) refrain from an act, or (b) to tolerate an act or a situation or (c) to do an act. Further some "consideration" must flow in return for such act.

(iii) Agreement to do or abstain/refrain from an act should not be presumed to exist. There has to be an express or implied agreement; oral or written.

(iv) If a payment constitutes a consideration for a supply, then it is taxable irrespective of by what name it is called; it must be remembered that a "consideration" cannot be considered *de hors* an agreement/contract between two persons wherein one person does something for another and that other pays the first in return. If the payment is merely an event in the course of the performance of the agreement and it does not represent the 'object', as such, of the contract then it cannot be considered 'consideration'. For example, a contract may provide that payment by the recipient of goods or services shall be made before a certain date and failure to make payment by the due date shall attract late fee or penalty. A contract for transport of passengers may stipulate that the ticket amount shall be partly or wholly forfeited if the passenger does not show up. A contract for package tour may stipulate forfeiture of security deposit in the event of cancellation of tour by the customer. Similarly, a contract for lease of movable or immovable property may stipulate that the lessee shall not terminate the lease before a certain period and if he does so he will have to pay certain amount as early termination fee or penalty. Some banks similarly charge pre- payment penalty if the borrower wishes to repay the loan before the maturity of the loan period. Such amounts paid for acceptance of late payment, early termination of lease or for pre-payment of loan or the amounts forfeited on cancellation of service by the customer as contemplated by the contract as part of commercial terms agreed to by the parties, constitute consideration for the supply of a facility, namely, of acceptance of late payment, early termination of a lease agreement, of pre-payment of loan and of making arrangements for the intended supply by the tour operator respectively. Therefore, such payments, even though they may be referred to as fine or penalty, are actually payments that amount to consideration for supply, and are subject to GST, in cases where such supply is taxable. Since these supplies are ancillary to the principal supply for which the contract is signed, they shall be eligible to be assessed as the principal supply. Such payments will not be taxable if the principal supply is exempt.

2. AMENDMENTS IN STAMP DUTY RATES

2.1. RECENT UPDATES IN MAHARASHTRA STAMP ACT

(Sukoon Construction Pvt Ltd. Vs. The collector of stamps)
Bombay High Court held that once Collector levies the stamp duty and endorses a certificate u/s 31 of Stamp Act at the time of adjudication to that effect on the Deed. Based on which the stamp duty was also paid by the petitioner, thereafter Collector could not have revised the stamp duty upon the Deed, when he has already once adjudicated it. It further observed that the Collector has clearly acted beyond his powers in revising the stamp duty on the ground that it was not properly levied and since he had become *functus officio*, he could not have exercised the power of revising the duty, which is, at the most, available with the Chief Controlling Revenue Authority under Section 53-A of the Stamp Act.

2.2 STAMP DUTY ON MORTGAGE DOCUMENTS

The Government of Maharashtra vide Ordinance dated 9th February, 2021 and called as the Maharashtra Stamp (Amendment and Validation) Ordinance, 2021 has amended the stamp duty applicable on instrument of Deposit of Title Deed, Housing Loan, Pawn, Pldge or Hypothecation - Deed, Agreement or Letter chargeable under Article 6 of Schedule I of the Maharashtra Stamp Act, 1958 and English Mortgage under Article 40(b) of Schedule I of the Maharashtra Stamp Act, 1958.

REVISED STAMP DUTY RATES FOR ARTICLE 6 and 40 OF SCHEDULE –I OF MAHARASHTRA STAMP ACT:

Article	Document Type	Old Stamp Duty Rate	Stamp Duty Rate w.e.f. 9th February, 2021
6(1)(b)	The pawn, pledge or hypothecation of movable property for securing the repayment of money advanced or to be advanced by way of loan or an existing or furture debt and such amount exceeds Rs. 5 lakhs	**0.2%** of the amount being secured, subject to maximum of Rs.10 lakhs	**0.3%** of the amount being secured, subject to maximum of Rs.10 lakhs
6(2)(b)	The pawn, pledge or hypothecation of movable property for securing the repayment of money advanced or to be advanced by way of loan or an existing or furture debt and such amount exceeds Rs. 5 lakhs	**0.2%** of the amount being secured, subject to maximum of Rs.10 lakhs	**0.3%** of the amount being secured, subject to maximum of Rs.10 lakhs
40(b)	Mortgage Deed (not covered under Article 6) and when possession of the property is not given.	**0.5%** of the amount being secured, subject to maximum of Rs.10 lakhs	**0.3%** of the amount being secured, subject to maximum of Rs.10 lakhs

This amendment has resulted into uniform rate of stamp duty applicable on any type of mortgage instrument viz. pledge, deposit of title deed, hypothecation, English mortgage.

2.3 IMPORTANT CHANGES IN GOVERNMENT GUIDELINES FOR STAMP DUTY VALUATION

The Department of Registration and Stamps have amended certain valuation guidelines for the year 2022-203 for the valuation of properties falling under Mumbai Municipal Corporation consisting of Mumbai City and Mumbai Suburban Districts.

a. DEPRECIATION

While valuing old building, depreciation as per the age of the building shall be now done as follows:

Completed Age of building in Years from the date of Occupation Certificate or Completion Certificate	Depreciation applicable for R.C.C. Structure / other pukka structure
0 to 2 years	Nil
2 to 5 years	5%
Above 5 years	After initial 5 years for every year 1% depreciation is to be considered. However, maximum deduction available shall be 70% of the market rate.

b. VALUATION OF DEVELOPMENT AGREEMENT WHERE BUILT-UP AREA / REVENUE IS TO BE SHARED.

The Department of registration and Stamps has brought the valuation guidelines for area sharing development agreement and revenue sharing development agreement almost at par. Earlier, the valuation were different under each case.

Guideline No. 23 of the General Guidelines for Valuation provides for valuation of development agreement where built up area is to be shared or revenue is to be shared and is stated as follows:

A. **Value of consideration to be received by the land owner**

i) Construction cost of landowners area **+**

ii) Cash Consideration , Interest on deposit, development fee, premium and other things recorded in the agreement to be considered. If rate of interest on deposit is mentioned then such rate or else 6% p.a. simple interest shall be adopted for period upto completion of the project

B. **Value of consideration to be received by the Developer**

Developer area X Land Rate Less TDR value and premium value borne by the developer and such other things mentioned in the agreement.

Value of A or B, which is higher is to be considered as the market value.

This has brought interest payable to Developers by the Landowners on Refundable Deposits as part of consideration which effectively increases the stamp duty rate from 0.3% to 5%. In our view, interest @ 6% p.a. on interest free deposit should only be covered under this Guideline No. 23.

3. Recent updates in RERA

3.1 Transfer of rights in a project implies transfer of all accompanying liabilities towards allottees - MAHARERA

(*MAHARERA Complaint No.CC005000000011883, Nikhil Mane Vs. Vinodkumar Muktinath Sharma*)

Facts:

The Complainant sought refund along with interest and compensation under section 18 of the Real Estate (Regulation and Development) Act 2016 ("**RERA**") on account of the delay in handing over the possession of flat as promised in the agreement for sale executed between the Complainant and V.M. Sharma (Respondent no. 1) being erstwhile Promoters of RERA registered project named "Willows Twin Tower" in Pune.

Pending the hearing of Complaint the erstwhile Promoter transferred the Project R.J. Construction (Respondent No.2) after complying the procedure required under Section 15 of RERA. The Complainant filed amendment application to bring Respondent No.2 on record of Complaint.

Respondent no. 2 had in his written arguments claimed several grounds for force majeure including Covid -19 and further contended that they were not in default and they has not signed the registered agreement for sale with the Complainant and the liability to refund the amount to the complainant falls upon the Respondent no. 1 and not upon it.

Ruling:

Hon'ble MahaRERA Authority held that transfer of rights in a project implies transfer of rights alongwith all accompanying liabilities towards allottees. Section 15 explicitly mentions that the incoming promoter shall independently comply with all pending obligations of the erstwhile promoter and further that transfer or assignment permitted under section 15 shall not result in extension of time to the incoming promoter to comply with the pending obligations of the erstwhile promoter.

Hence, the complaint was allowed. Respondent no. 2 was directed to refund the entire amount paid by the complainant along with interest at SBI's MCLR + 2% from date of default till actual realisation of the aforesaid amount.

3.2 Once the OC for Real Estate Project is received from the relevant Planning Authority, the project is assumed to be complete in all aspects as per the sanctioned plan – MAHARERA

(*MahaRERA Complaint No.CC006000000089986, Kirankumar Pralhad Ingle Vs. Runwal Constructions*)

Facts:

The Complainant filed complaint for (1) Claiming interest on account of delay in possession of flat and (2) Claiming covered parking and other reliefs as stated thereunder.

An agreement for sale (AFS) dated 2nd May 2019 was entered into between the Complainant (Allottee) and the Respondent (Promoter) wherein the date of possession for the subject flat was stipulated as 31st May 2019.

The Respondent submitted that the occupation certificate (OC) for the project was received on 9th April 2019 i.e before Agreement was registered and possession was offered on 17th May 2019. The Complaint was filed on 6th July 2019 for claiming interest for delayed possession. However, the Complainant sought preferential covered car parking and did not take possession until 19th July 2019.

Ruling:

The Hon'ble Member noted that the OC was received even before the AFS was registered and that once the OC for any real estate project is received from the relevant Planning Authority; the project is assumed to be complete in all aspects as per the sanctioned plan approved by the aforesaid Authority. Hence, no cause of action remains in terms of section 18 of the Real Estate (Regulation and Development) Act, 2016 and the Complaint was dismissed as being not maintainable..

3.3 Allottees cannot claim flat/ relief from New Developer appointed by Society after termination of Development Agreement with Erstwhile Developer.

(Samudra Darshan Co-operative Housing Society Vs. Peter Almeida and other)

Facts:

Complainant booked flat in Society Redevelopment being done by Shubh Enterprise ("**Erstwhile Developer**"). Due to non performance of erstwhile Developer the Society terminated Development Agreement and appointed New Developer. Complainants filed Complaint against the new Promoter of Project appointed by Society seeking reliefs for allotment of

Flat and interest on delay which was allowed by the Hon'ble MahaRERA Authority

Hon'ble Appellate Tribunal overturned the decision of MahaRERA Authority and has re-confirmed that law laid by Supreme Court in **Vaidehi Akash** with regards privity of contract holds field even under RERA. Furthermore in the present facts since the transfer of project had happened before RERA coming into force, provisions of Section 15 shall not be applicable, hence dismissed the claim of the Complainants against the New Developer

3.4 Financial Investor of Project controlling the Project shall deemed to be a Promoter under RERA

(*Rare Township Pvt Ltd vs. IIRF India Realty VIII Ltd)*

Facts:

The Complainant being a Promoter of several Projects filed Complaint against the Respondent (being Financial Investor) before the Hon'ble MahaRERA Authority seeking declaration that Investor is a Promoter of the Project and consequential reliefs on it being declared as a Promoter.

Ruling:

A Division bench of MahaRERA comprising of the Chairperson and Member observed that the "Veto Matters" under Shareholders Agreement and its addendum provided for taking consent of Respondent relating to all major decisions relating to the Project it further concluded reading the provisions of above agreements along with definition of Promoter under RERA, stating a Promoter is not only a person who "constructs" ,but also a person who "causes to construct", thus the legislature has provided a wider meaning to the term 'Promoter' by adding the term "causes to construct" to protect the interests of homebuyers. Even though the Investor was not a person constructing the project but through diverse legal writings is vested with unbridged authority in all matters pertaining to the project (including authority to stop construction) and as such Investor was deemed to be a Promoter.

3.5 Centre proposes to submit model Builder-Buyer Agreement with mandatory RERA clauses before the Supreme Court

(*SC Writ Petition(s) (Civil) No(s).1216/2020, Ashwini Kumar Upadhyay Vs. Union of India and Ors.*)

In a PIL filed seeking a model Builder-Buyer Agreement, the Supreme Court opined that to protect the interests of the homebuyers a model agreement is a necessity. The model agreement would be divided into 2 parts, one part will be in consonance with the mandatory provisions of RERA and the second part will be additional clauses based on the individual needs and exigencies of each State/ Union Territories.

4. COLLECTOR NOC NOT REQUIRED FOR TRANSFER OF FLATS IN CO-OPERATIVE HOUSING SOCIETIES

Background

By and under an Order dated 30th September 2022 ("**said Order**") passed by the Hon'ble Supreme Court of India in Civil Appeal No. 5809 of 2011 in State of Maharashtra and Ors. (referred to as the "Appellants") and Mr. Aspi Chinoy ("Respondent No. 1") and Anr. (collectively referred to as the "Respondents"), it is held that where land which is not allotted to a society but to a builder on leasehold basis and where the builder has constructed flats for private individuals who have subsequently formed a co-operative society, the government resolutions dated 12th May 1983 ("**1983 Resolution**") and 9th July 1999 ("**1999 Resolution**") would not be applicable.

The 1983 Resolution provided for the grant of land to co-operative housing societies of different categories at concessional rates throughout the State of Maharashtra. Pursuant thereto, the government came up with a modified resolution being the 1999 Resolution made applicable to co-operative housing societies to whom the government lands are sanctioned at concessional rates. Under the terms and conditions of grant of government lands to co-operative housing societies as per Annexure 'B' Paragraph (ix) of the 1983 Resolution, a society shall not enrol any new member or substitute any member without the prior written permission of the Collector/ Commissioner/Government ("**said Authority**") and the said Authority shall have a right to approve or disapprove any such request or to grant permission on such terms and condition as the said Authority considers fit. Further, as per the terms and conditions for allotting government lands to co-operative housing societies, as per Attachment 'B' Paragraph 7 of the 1999 Resolution, a society without the prior written permission of the said Authority, will not record the name of any new member or will not take any other member in place of the member approved by the said Authority and the said Authority will have the right to grant the permission based on appropriate terms and conditions.

In view of the Supreme Court's Order (supra), it is inferred that in respect of transfer of flats by any member to any new purchaser in co-operative housing societies constructed on lands which are not leased by the State Government to such co-operative housing societies ***(i)*** the permission of the said Authority/State Government is not necessary; and ***(ii)*** the State Government has no power to demand any premium for transfer of flats in co-operative housing societies.

The said Order does not specifically address issues regarding whether any levies/ charges for utilization of TDR are applicable and/ or payable to the State Government/ the said Authority in respect to co-operative housing societies built on lands which are leased by the State Government/said Authority to co-operative housing societies.

Further, it may also be noted that the said Order, the 1983 Resolution and the 1999 Resolution will not be applicable in those cases where ***(i)*** lands

are leased out by MMRDA, as such lands are governed under the provisions of the Mumbai Metropolitan Development Act, 1974 and for transfer of such lands, the prior permission/NOC of the MMRDA is required; and ***(ii)*** lands are leased out directly by the Collector, Mumbai to co-operative housing societies at concessional rates, as transfer of such lands are governed by the 1983 Resolution and the 1999 Resolution and the permission/ NOC of the Collector is required.

5. RECENT UPDATES IN PREVENTION OF MONEY LAUNDERING ACT, 2002 ("PMLA")

5.1 Prosecution under PMLA not possible once accused is acquitted of the Scheduled Offence – Delhi High Court

(*Delhi HC WP(CRL) No.408/2022, Harish Fabiani & Ors. Vs. Enforcement Directorate & Ors.*)

The Delhi High Court observed that the authorities under the PMLA cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed.

Further, the scheduled offence must be registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum and, in the event there is already a registered scheduled offence but the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or quashing of the criminal case of the scheduled offence, there can be no action for money laundering against not only such a person but also any person claiming through him in relation to the property linked to the stated scheduled offence.

5.2 A mere exculpatory statement to the ED not a reasonable ground to be guilty of an offence under PMLA – Delhi High Court

(*Delhi HC Bail Appln. No.2438/2022, Bimal Kumar Jain Vs. Directorate of Enforcement*)

The Delhi High Court ordered that an exculpatory statement to the Enforcement Directorate can never suffice to form a ground, leave alone a reasonable ground to believe that the applicant is not guilty of the offence.

High Court Bench further observed that law by virtue of Explanation (ii) to Section 44(d) of the PMLA empowers the Directorate of Enforcement to investigate and file a charge-sheet and continue investigations, including against the named accused.

Rejecting the bail application, the Delhi HC noted that allegations on the accused involved laundering of amount of ninety-six thousand crores and hence, it was a serious allegation. The Court observed that in such cases a mere exculpatory statement to the ED can never be a ground let alone a reasonable ground to believe that the accused is not guilty of the offence.

5.3 In the absence of scheduled offence, case under PMLA not maintainable.

(Babulal M. Varma and Kamalkishor Gupta Vs Directorate of Enforcement, Mumbai (2022))

Facts:

Babulal M. Varma and Kamalkishor Gupta being accused under provisions of PMLA filed two applications for quashing of their cases and immediate release, on ground that in view of 'C' Summary discharge by trial court absolving them from the Scheduled Offence and no appeal preferred against the same by ED, present case cannot be tried against them on the basis of full bench judgment passed by Hon'ble Supreme Court in the matter of *Vijay Madanlal Choudhary and Ors Vs. Union of India*.

Ruling:

Court after relying the aforesaid judgement held that an order of 'C' Summary Report in the background of Sec. 320(8) Cr.P.C. amounts to an acquittal. Hence there can be no action for money laundering against both accused in relation to the property linked to the Scheduled Offence. It further observed that no contemporaneous FIR is filed by E.O.W., under Sec. 66(C) PML Act. Accordingly when there is no Scheduled Offence at all in existence, continuation of the PMLA case will be nothing but a futile work. Such futile work at the cost of detention of accused behind bars, is absolutely without any legal basis or justification. Furthermore in the absence of Scheduled Offence there cannot be any proceeds of crime, when there is no proceeds of crime, there cannot be money laundering and when there is no money laundering, prosecution for the same under the PML Act is not maintainable. Accordingly, the application was allowed and both of accused have been discharged as prayed for.

5.4 Prevention of Money Laundering Act can have No Retrospective Or Retroactive Operation

(Ajay Kumar Gupta Vs. PMLA)

Section 13 of Prevention of Corruption Act was included in the list of Scheduled Offences under Prevention of Money Laundering Act is only on 1.6.2009 cannot have retrospective effect.

It is well settled that Article 20(1) of the Constitution of India expressly forbids that no person can be convicted of any offence except for the violation of a law in force at the time of the commission of the act charged as an offence. Further, no person can be inflicted a penalty greater than what could have been inflicted under the law at the time when the offence was committed. Clearly, no proceedings under the Act can be initiated or sustained in respect of an offence, which has been committed prior to the Act coming into force viz. the act is a penal statute and, therefore, can have no retrospective or retroactive operation. However, the subject matter of the Act is not a scheduled offence but the offence of money-laundering. Strictly speaking, it cannot be contended that the Act has a

retrospective operation because it now enacts that laundering of proceeds of crime committed earlier as an offence.

6. RECENT UPDATES OF INSOLVENCY AND BANKING CODE (IBC)

Whether the Subscription Agreement and the DTD can be relied as valid legal documents, since they are insufficiently stamped as required under the Maharashtra Stamp Act, 1958 ("**Stamp Act**"), while considering the Section 7 application under IBC

(Mr. Praful Nanji Satra, the promoter of Satra Properties (India) Limited ("**Appellant**") Vs. Vistra ITCL (India) Limited)

NCLAT, Delhi while dismissing the application filed by the appellant held that insufficiently Stamped documents can be relied while considering the claims under Section 7 application under IBC. It further observed that the issue of debt being due and payable has not been prohibited by any law in the present case, rather the insufficiency of stamping of the documents is only a technical deficiency, which can be cured. The bonafides of debt as due and payable is not doubted under any law due to insufficient stamping of instruments and which being purely technical deficiency can be cured at later stage.

6.1 No bar to withdrawal of an admitted CIRP application before constitution of Committee of Creditors – Supreme Court

(*SC Civil Appeal No.4911 of 2021, Ashok G. Rajani Vs. Beacon Trusteeship Ltd. & Ors.*)

The Supreme Court ("Court") observed that there is no bar to withdrawal of an admitted CIRP application before constitution of Committee of Creditors.

The Court further noted that Rule 11 of the NCLT Rules enable NCLT to pass orders for the ends of justice including orders permitting an applicant for CIRP to withdraw its application and to enable a corporate body to carry on business with ease, free of any impediment. Further, the withdrawal of an application for CIRP by the applicant would not prevent any other financial creditor from taking recourse to a proceeding under IBC. The urgency to abide by the timelines for completion of the resolution process is not a reason to stifle the settlement.

6.2 Distinction in moratorium under Sections 14 and 33 (5), IBC – Clarifies Delhi High Court

(*Delhi HC CS(Comm) 151/2017 & I.A.2496/2017, Elecon Engineer Company Limited Vs. Energo Engineer Company Limited Vs. Energo Engineer Project Limited & Ors*)

The High Court of Delhi has held that under Section 33(5) there is no bar on a suit or proceedings being continued along with the liquidation proceedings as the word "pending" is not used anywhere in the Section, unlike Section 14 of IBC

(above judgment are too technical and not relevant to real estate)

6.3 Financial Debt under Section 5(8) of IBC does not cover indemnity clause – Supreme Court

(*NCLT IA No.717/MB/C-I/2022 in CP (IB) No.1231/MB/C-1/2021, Axis Bank Limited Vs. Mr. Nageswara Rao*)

The Supreme Court has clarified that disbursement is a sine qua non for a debt to be considered as financial debt and secondly, that a simple indemnity clause of the obligations under an agreement does not come under the ambit of the financial debt.

It was observed that there was no evidence to prove that the money was disbursed to the Corporate Debtor and therefore, the question of default does not arise. Moreover, there was no proof of any borrowings by the Corporate Debtor and there was no commercial interest of the Corporate Debtor in the commercial papers. In such cases, the Court clarified that for the debt to be considered as a financial debt, it is important to prove disbursement, and if the same cannot be proved, the debt will not qualify as a financial debt.

6.4 Margin money can in no manner be said to be a 'Security Interest' as defined under Section 3(31) of the IBC - NCLAT

(*Company Appeal (AT) (Insolvency) No.657 of 2020, Punjab National Bank Vs. Supriyo Kumar Chaudhuri*)

It was held that margin money can in no manner be said to be a 'Security Interest' as defined under Section 3(31) of the IBC. Section 14(1)(c) prohibits any action to foreclose, recover or ensure any 'Security Interest' created by the Corporate Debtor in respect of its property. As held that no 'Security Interest' was created by the Corporate Debtor with respect to the margin money that was deposited by the Corporate Debtor Company towards the opening of the Letter of Credit in the Appellant Bank, NCLAT is of the view that the Banks having appropriated this money during the period of Moratorium is justified, the amount is not an asset of the Corporate Debtor. Therefore, a conjoint reading of Section 3(31) and Section 14 of the Code makes it abundantly clear that margin money is not included as a 'Security' and is not an asset of the Corporate Debtor.

6.5 Remanding a resolution plan back to Committee of Creditors ("CoC") on the grounds of the procedural deviations would render the Corporate Insolvency Resolution Process (CIRP) a never-ending process.- NCLAT

(*NCLAT Company Appeal (AT) (Insolvency) No.906 of 2022, Piya Puri & Ors Vs. Mr. Debhashish Nanda & Ors.*)

The NCLAT held that remanding a resolution plan back to Committee of Creditors ("CoC") on the grounds of the procedural deviations rose by a dissenting minority in class of creditors, would render the Corporate Insolvency Resolution Process (CIRP) a never-ending process and is against the time bound objective of the Insolvency and Bankruptcy Code.

The NCLAT declined to remand back the revise Resolution Plan to CoC over hyper-technical grounds raised by minority dissenting creditors.

6.6 Liability of a Guarantor is co-extensive with the Borrower – Supreme Court

(*SC Civil Appeal No.9286 of 2019, K. Paramsivam Vs. The Karur Vysya Bank Ltd. & Anr.*)

The Supreme Court ("SC") held that Corporate Insolvency Resolution Process ("CIRP") under applicable provisions of Insolvency and Bankruptcy Code, 2016 ("IBC") can be initiated against the corporate guarantor without proceeding against the borrower of the defaulted loan ("Principal Borrower").

The liability of the corporate guarantor is co-extensive with that of the Principal Borrower.

The SC noted that, under Section 7 of IBC, CIRP can be initiated against a corporate entity who has given a corporate guarantee to secure the dues of a non-corporate entity as a financial debt accrues to the Principal Borrower, being entity, in respect of the guarantee given by such corporate guarantor, once the Principal Borrower commits default.

7. UPDATES IN BANKING & FINANCE

7.1 Only Fraud and Irretrievable Injury are grounds for interfering with the Bank Guarantee - Madras High Court

(*Madras HC CMA1384 of 2022, CEO, Cantonment Board (Ministry of Defence) Vs. M/s. Gharpure Engineering Construction Pvt. Ldt. Ors.*)

A two-judge bench of the Madras High Court comprising of Justice M. Duraiswamy and Justice Sunder Mohan reiterated that the invocation of bank guarantee cannot be ordinarily interfered with unless the two grounds namely (i) fraud and, (ii) irretrievable injury are shown, which is independent of the breach or otherwise of the primary contract. Further, in order to establish irretrievable injury, on account of invocation of bank guarantee, the irretrievable injury must be such that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

7.2 Original Title Documents of Property of Customer lost by Bank: NCDRC directs bank to compensate

(*First Appeal No.377 of 2019, Kamlesh Meena Vs. HSBC Bank*)

The NCDRC has set aside State Commission's order denying compensation to the customer whose bank lost the original title documents of his property.

It allowed the appeal under Section 19 of the Consumer Protection Act, 1986 while opining that there are makings of post-haste adjudication and pre-judging of the case on the part of the State Commission which

critique the amount of Rs. 95 lakh that has been claimed and has termed it to be 'very high'.

Commission stated that, "Non-availability of its original title documents unarguably puts a property under suspicion in the eyes of the general public or prospective buyers and decisively impacts its value detrimentally. The consequences continue in perpetuity, they continue even after the property has devolved to the heirs i.e. the value-extenuating consequences sustain indefinitely. The adverse consequences of non-availability of the original title documents do not appear to have been realistically appreciated in the right pragmatic perspective by the State Commission."

7.3 Notification by the Ministry of Electronics and Information Technology amends the IT Act,2000 schedule to include Demand Promissory Note and Power of Attorney in favor of entities regulated by the RBI, SEBI, NHB, IRDA and PFRDA

"With regard to the Notification by the Ministry of Electronics and Information Technology dated 26th September, 2022, in exercise of the powers conferred by the proviso to sub-section (4) of Section 1 of the Information Technology Act, 2000, the Central Government has made Amendments to the First Schedule of the Act.

The Act's Schedule amended would include Demand Promissory Note and Power of Attorney in favor of entities regulated by the Reserve Bank of India, Securities and Exchange Board of India, National Housing Bank, Insurance Regulatory and Development Authority, and Pension Fund Regulatory and Development Authority.

Any contract for the sale or conveyance of immovable property or any interest in such property has been omitted. **Hence, a contract of sale, conveyance, and mortgage can now be done electronically in terms of the Amendment but these required registration physically."** This can be implemented only after necessary changes in Registration Act and upgradation of infrastructure for Registration.

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PRIVATE CIRCULAR

UPDATES ON ALLIED LAWS VIZ. GST, STAMP DUTY, RERA, PMLA, IBC AND BANKING LAWS IMPACTING THE REAL ESTATE SECTOR

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09th day of December, 2022