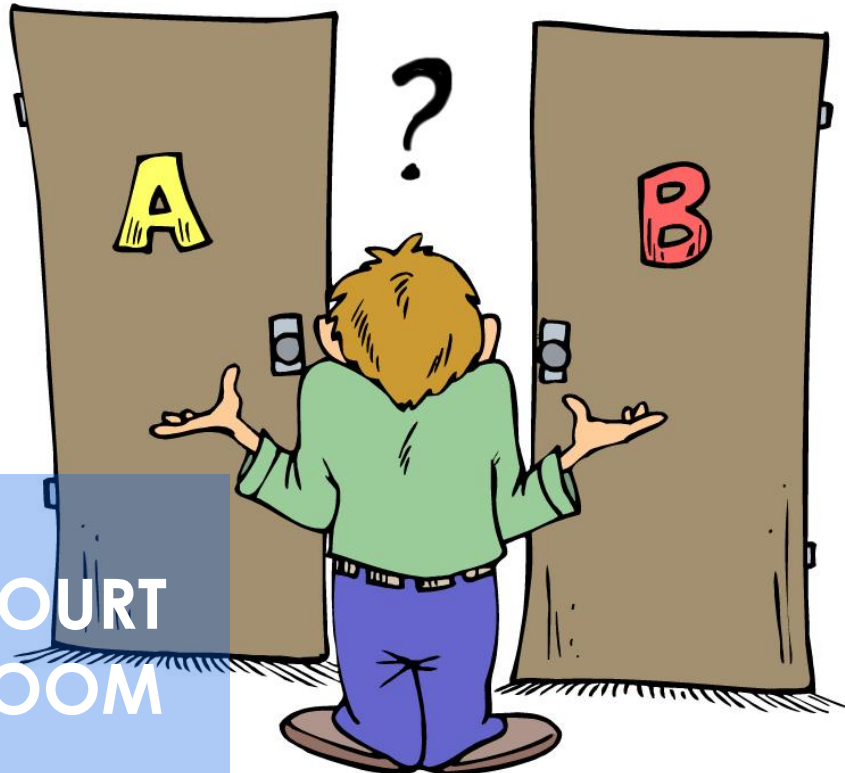


INDIA LEGAL UPDATE is a journal of Singhania & Partners which offers a legal perspective on the new business climate and opportunities in India in keeping with the existing laws, current happenings and events in Corporate India.



COURT
ROOM

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Vodafone scheme of arrangements crashes – courts adopt contradictory approaches.

By Sunil Kumar & Hitesh Kumar

Introduction

Recently, a scheme of arrangement filed under section 391-392 of the Companies Act, 1956 (the Act) has received opposite treatment from two different High Courts. In the first case Gujarat High Court (Gujarat HC) rejected the scheme in its order dt. 09.12.2010. On the same facts, Delhi High Court (Delhi HC) approved the scheme in its order dt. 29.03.2011. It is interesting to note that on the same grounds Delhi HC has sanctioned the scheme whereas on the same grounds Gujarat HC has rejected the scheme. This article is, therefore, an attempt to analyze and compare the reasons adopted by the two courts in adopting a polarity of views on identical issues.

It is interesting to note that on the same grounds Delhi HC has sanctioned the Vodafone scheme whereas on the same grounds Gujarat HC has rejected the Vodafone scheme.

Facts of the Scheme

The cases involved approval of a scheme of arrangement (Scheme) u/s 391-394 of the Act to transfer or demerge passive infrastructure assets (PIAs) of eight transferor companies to the transferee company. The transferee company and all transferor companies were part of Vodafone Essar Limited (VEL) Group but were located in different States. The petitioner companies claimed that the Scheme was intended to restructure, within the VEL Group, the holding of PIAs in a more efficient manner to serve business needs and did not involve any movement of assets or liabilities to any company outside the VEL group. An important fact was that the Scheme did not provide for any consideration to be paid by the transferee company either to the transferor companies or to their shareholders. Moreover, the Scheme specifically provided that the liabilities pertaining to PIAs would remain with the transferor companies.

Issues and ratio

In both cases, the Regional Director and Income Tax department (IT Department) raised objections, with the IT Department raising substantial objections from a tax perspective. We now analyze the major issues raised before both the courts and the reasoning by which the courts reached their respective decisions:

Transaction of 'Giff' is an arrangement under S. 391 of the Act:

This was one of the fundamental objections raised by the IT Department that since the Scheme provides for transfer of PIAs without any consideration, it took the colour of a gift, and a gift was not covered within the term 'arrangement' under S. 391 of the Act. It was contended that the expression "arrangement" u/s 391 contemplates an arrangement in the nature of a contract which necessarily involves consideration. In other words, there must be 'give and take' from both sides to be treated as an 'arrangement' as mentioned in S. 391.

Gujarat HC

Relying upon a ruling in *Re: N.F.U. Development Trust Ltd.*, (1972) 1 WRL 1548 (Chancery Division) the court held that- "the expression 'arrangement' contemplates give and take between the parties as against something in nature of gift which has to be without consideration. In the present case, there being admittedly no consideration and, therefore, no give and take between the parties, the same is not an arrangement under Section 391".

Delhi HC

Delhi HC on the other hand held that even a transaction in the nature of 'gift' is covered within the term 'arrangement'. Interestingly, even before Delhi HC the ruling in *N.F.U. Development Trust* was pressed by IT Department, but the court distinguished the said ruling from the facts of the present case and held that the scheme in that case was a scheme of confiscation which intended to confiscate the rights of the objecting minority shareholders. In that case, the view taken was that confiscation of the rights of an objecting minority member by virtue of a majority-approved scheme, cannot amount to either a "compromise" or an "arrangement" by that company with its members and therefore any sanction granted to such a scheme would amount to sanctioning a scheme of confiscation.

Delhi HC however ruled that in the case before it, considering the nature of shareholding between transferor companies and the transferee company, there was clearly no question of any confiscation of the rights of any party to the Scheme. Furthermore, all concerned shareholders had given their consent and there was no objecting shareholder.

On 'give and take' being an indispensable component of any "arrangement", Delhi HC held that –

"Although *NFU Development Trust Ltd.*'s case (*supra*) interpreted the expression "arrangement" to mean an implied give and take, the Court did not specify that "give and take" was to mean reciprocal promises by way of consideration. To my mind, the expression "give and take" used in that judgment implies a degree of voluntariness in the transactions contemplated by the Scheme between all parties thereto, and no more. Even the offer of a gift by the donee and its required acceptance by the doner, are sufficient to satisfy this test".

Thus, Delhi HC in fact interpreted "give and take" not in the strict sense of 'consideration' which is an essence of every legal contract. Rather, it construed the scope of 'give and take' to include an arrangement which is based on the voluntary acceptance of the parties.



Analysis

The Delhi HC viewed "give and take" as encompassing even an arrangement without involving consideration so long as the parties had voluntarily entered into the arrangement and did not view the absence of consideration as material whereas the Gujarat HC found consideration to be an indispensable ingredient of any arrangement before it could be sanctioned. This approach of Delhi HC is in stark contrast with the approach of Gujarat HC and will certainly require a decision by the Apex Court.

The Scheme is a device to evade tax and is against the public interest:

It was contended by IT Department that whole purpose of the Scheme was to evade taxes because, among other things, the Scheme had been framed as a gift transaction to avoid capital gain tax; petitioner companies would be able to claim double depreciation and to reduce their profitability and consequently tax liabilities; and the transferee company would be able to claim certain deduction benefits under Income Tax Act. It was also contended that the Scheme was contrary to law as being something which was not contemplated by the policy of Department of Telecommunications (DOT) on 'infrastructure sharing' and it was, in fact, a conduit for tax evasion and also not in the public interest.

Gujarat HC

Gujarat HC accepted the contentions of the IT Department and was not convinced with the contentions of the petitioner companies. It held the Scheme as being a device with the sole purpose of evading tax. The following reasoning is noteworthy in Gujarat HC judgment on this point:

- (i) As no liabilities were to be taken over nor any shares were supposed to be issued, the Scheme could not satisfy the condition of demerger. Hence, the only option was to transfer PIAs as a gift as a tax planning device. By doing so, it constituted a conduit to avoid capital gain tax.
- (ii) As no liabilities were to be transferred including employees of transferor companies, expenses in that respect would continue to be borne by the transferor companies which would artificially deplete their taxable profit and thus would adversely affect their taxability.
- (iii) The transferee company would claim deduction benefit on PIAs on which such deduction had already been claimed by transferor companies.
- (iv) The court was not satisfied with the accounting (depreciation) treatment of PIAs as mentioned in the Scheme as this would lead to double depreciation in the hands of petitioner companies.

Delhi HC

Delhi HC on the other hand rejected the contentions of the IT Department and held that -

“Simply because the tax payable under the business structure adopted by the Assessee, which he is otherwise entitled to adopt in law, is reduced, does not, in my view, ipso facto, make such adoption illegal or impermissible on the ground that it is opposed to the public interest. I fail to see how then a scheme which is aimed at achieving the objectives of the policy of government to promote sharing of infrastructure must be held to be opposed to the public interest merely because, by its adoption, revenue payable by the transferor company might decrease with no corresponding increase in the revenue payable by the transferee company since the latter would be entitled to exemption under an incentive scheme of the government.”

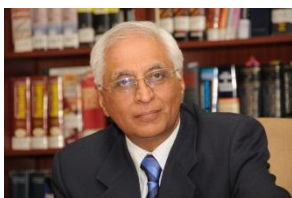
Clearly, Delhi HC not only recognized that Scheme was intended to achieve the objectives of DOT policy, which recommends sharing of infrastructure, but also treated this as a basis to hold that the Scheme was not a device to evade taxes. The court even went on to hold that as far as the objection relating to accounting and tax treatment of the Scheme was concerned, it could not come in the way of sanctioning the Scheme. It was held that it would be open to IT department to inquire into the correctness or otherwise of the accounting/tax treatment of the Scheme independently of the sanction of the Scheme. It appears Delhi HC was influenced by the senior counsel for petitioner companies' upfront submission that his client would be bound by the applicable provisions of the Income Tax Act and that the sanctioning of scheme would not grant any immunity to the petitioner companies qua any liability that may be imposed on them under the Income Tax Act.

Analysis

It may be noted that considerations of tax evasion weighed heavily with Gujarat HC and influenced the court to reject the Scheme. On the other hand, Delhi HC did not consider tax issues as material considerations to deny approval to the Scheme u/s 391-394. The argument did not find favour with Gujarat HC that the Scheme would serve the purposes of DOT policy whereas Delhi HC found that the Scheme was perfectly within the given framework of DOT policy and was designed to achieve the stated objectives of the DOT policy. Delhi HC also observed that arrangements similar to the Scheme were not only followed by petitioners' competitors in India, but the Scheme conformed to global standards as well. On the contrary, Gujarat HC appeared to have accepted the contention that the Scheme was not identical with what the competitors of petitioner companies had proposed in the past.

Conclusion

It is nothing new that on identical facts two courts have reached diametrically opposite decisions. No doubt the High Courts are sovereign and free to decide a case in the light of their own understanding of the law, and are not obliged to consider co-ordinate High Court's view. Be that as it may, tax issues cannot become the decisive factor in deciding cases under section 391-394 of the Act which are decided by courts having regard to the interest of the shareholders, creditors and of the public. The tax authorities are free to initiate independent proceedings under the Income Tax Act and challenge the arrangement as a colourable device for evading taxes by issue of notices. If tax becomes a standard ground for knocking down schemes for asset sale and acquisition, then more such schemes will founder on the rocks of alleged tax evasion and tax authorities may subvert the objects which are germane to the sanction of schemes of arrangement under the Act. This does not bode well for corporate restructuring and may thwart larger business interests.



Sunil Kumar
Senior Partner
skumar@singhanian.in



Hitesh Kumar
Sr. Associate

LEGAL SUITE

Can judgments from foreign courts be enforced in India?

By Ritu Chhabra & Pooja Sharma

Globalization of economy has brought about a steep rise in the number of international, commercial transactions. Consequently claims and counter claims are integral part of international commercial disputes. As India is now poised as a major global player in the world economy, therefore the law relating to enforcement of foreign judgments in India would be of great interest to all the major players entering the commercial transactions with Indian entities.

Multilateral conventions on the recognition and enforcement of foreign judgments have not been ratified in India, thus the foreign judgments are enforced solely according to the provisions of the Code of Civil Procedure, 1908 (CPC). A "Foreign Judgment is defined under Section 2 (6) of Code of Civil Procedure which means the judgment of a foreign court as defined in Section 2(5)". The foreign judgments are to be executed keeping in view the conditions as enumerated in Section 13, Section 38, Section 39, Section 40, Section 44-A and Section 45 of the CPC. The Supreme Court of India in the matter of Moloji Rao vs Shanker Saran, held that the rules laid down in these sections are rules of substantive law and not of mere procedure.

Enforcement of foreign judgments of reciprocating territories:

Under Section 44A of the CPC, a decree as defined in Section 2(2) of CPC of the superior courts of reciprocating territories as notified by the Central Government in the official gazette is executable as a decree passed by the domestic court. The said section provides that where a certified copy of a decree of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court. The Phrase "District Court" has not been defined in CPC. The word "district" has, however, been defined in Section 2(4) of the CPC, which means the local limits of the jurisdiction of principal Civil Court of original jurisdiction (in the provision of the CPC called a "District Court"), and it includes the local limits of ordinary original civil jurisdiction of a High Court.

Countries that have been declared and notified by India as reciprocating territories for the purpose of Section 44A of the CPC includes the United Kingdom, Aden, Fiji, Republic of Singapore, Federation of Malaya, Trinidad and Tobago, New Zealand, the Cook Island and the Trust Territories of Western Samoa, Hong Kong, Papua New Guinea, Bangladesh, and the United Arab Emirates.

Enforcement of foreign judgments of non-reciprocating territories:

In cases where the judgment has been passed by the country which is not a reciprocating territory to India, a party seeking enforcement must institute a fresh suit in India on the basis of such a decree or judgment which may be construed as a cause of action for the said suit and establish that the judgment is conclusive under the terms of Section 13 of CPC.

Exceptions of Section 13 of Civil Procedure Code:

A Judgment will be enforceable in Indian Court provided it is final judgment between the same parties and it does not fall within the six categories of non-conclusive judgment as specified in Section 13 of CPC.



The major trends in Indian jurisprudence with respect to these six elements are analysed below:

Foreign Judgment not by a Competent Court

It is a fundamental principle of law that the judgment or order passed by the court, which has no jurisdiction, is null and void. Thus, a judgment of a foreign court to be conclusive between the parties must be a judgment pronounced by a court of competent jurisdiction. Such judgment must be by a court competent both by the law of state, which has constituted it and in an international sense.

Foreign Judgment not on merits

The Foreign Judgment shall not be executed by the courts of India, if the same is not passed on the merits of the case. The Supreme Court of India in *International Woolen Mills v. Standard Wool (U.K.) Limited* has laid that a decision on the merits involves the application of the mind of the Court to the truth or falsity of the case and therefore though a judgment passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even though passed ex parte, a decision passed without evidence of any kind but passed only on the pleadings cannot be held to be a decision on the merits..

Foreign Judgment against the law of India, or of International Law

A judgment based upon an incorrect view of international law or a refusal to recognize the law of India where such law is applicable is not conclusive. The precedents have shown that the said clause comes in operation mainly in matrimonial disputes.

The Supreme Court of India in *Y. Narasimha Rao vs Y. Venkata Lakshmi* held that when a foreign judgment is founded on a jurisdiction or on the ground not recognized by law, then it is a judgment which is in defiance of the Law. Hence, it is not conclusive of the matters adjudicated therein and therefore, unenforceable in this country.

Foreign Judgment in violation of natural justice

It is the essence of a judgment of a court that it must be obtained after due observance on the judicial process, i.e. the court rendering the judgment must observe the minimum requirements of natural justice. A judgment, which is the result of bias or want of impartiality on the part of a judge, will be regarded as a nullity and the trial "corum non jndice".

Foreign Judgment obtained by fraud

No judgment of a court may be allowed to stand, if it has been obtained by fraud. A judgment obtained by fraud is "non-est" in the eyes of law and is thus a nullity. It therefore can be challenged in any court in appeal, in revision or even in collateral proceedings. A fraud may be by the party obtaining a judgment in his favour or upon the court pronouncing the judgment.

Foreign Judgment contrary to Indian legislation

Where a foreign judgment is founded on a breach of any law in force in India, it would not be enforced in India. The rules of Private International Law cannot be adopted mechanically and blindly. Every case, which comes before an Indian Court, must be decided in accordance with Indian law. It is implicit that the foreign law must not offend our public policy.

Conclusion:

The Indian courts have developed a reasoned, cautious and a sophisticated approach concerning the enforcement of foreign judgments. This augurs well for the growth and development of legal jurisprudence in India in the field of "conflict of laws".



Ritu Chhabra
Associate Partner
rc@singhania.in



Pooja Sharma
Associate

NEWSQUEST

By Sunayna Jaimini

India not to dilute stand on intellectual property rights

India has decided not to dilute its stand or take a position on intellectual property rights, especially on pharmaceuticals, beyond its domestic law and the current international commitments. Prime Minister of India Manmohan Singh has said this should be India's position as he chaired the meeting of the Trade and Economic Relations Committee. The committee includes Finance Minister Pranab Mukherjee, Commerce and Industry Minister Anand Sharma, External Affairs Minister S.M. Krishna, Planning Commission Deputy Chairman Montek Singh Ahluwalia and Economic Advisory Council Chairman C. Rangarajan. Among other matters, the meeting reviewed the status of the India-EU Bilateral Trade and Investment Agreement and the various issues involved in the talks, apart from the proposed trade pact with Australia and countries in southern Africa.

Govt clears FDI proposals worth ₹1,027 cr

The Government of India has cleared 21 foreign direct investment (FDI) proposals amounting to ₹. 1,027 crore, including those of ACB India and Oriental Tollways. A total of 47 FDI proposals were taken up by the Foreign Investment Promotion Board (FIPB), but the board deferred decisions on 17 applications and rejected nine, the finance ministry said in a statement. FIPB gave its approval to Oriental Tollways Pvt Ltd (Delhi and Haryana) for induction of foreign equity in an investing company. The proposal is likely to bring in FDI worth ₹. 475 crore. Meanwhile, the finance ministry said the next meeting of the FIPB chaired by secretary of economic affairs R Gopalan will be held on 20 May.

Orissa govt approves project with investment of ₹ 1.36 Trillion

The Orissa government approved nine new projects, including coal-to-liquid (CTL), steel and aluminium units, involving a total investment of ₹. 1.36 trillion. Apart from two CTL, two steel and one aluminium units, the approved projects included a power plant, one textile unit, a paper plant and an aluminium park. Among the major proposals was the ₹. 42,000 crore CTL project of Jindal Symflex Ltd to be set up at Durgapur in Angul district using German Lurgi technology, adding its capacity would be 80,000 barrels per day. Requiring 4,000 acre of land, the project would have an 1100 MW captive power plant. Set to provide 6,500 direct employments, it would use 90 cusec water from river Mahanadi.

New body for nuclear oversight

Signalling its resolve to go ahead with a proposed \$10 billion (₹.44,600 crore) nuclear plant, the United Progressive Alliance (UPA) government announced it would set up an independent, statutory nuclear regulatory body. The move, which comes at a time when the government is contemplating a greater role for the private sector as it pushes for higher reliance on nuclear power, would make the regulatory process transparent and the body accountable to Parliament. Fears of a disaster after the nuclear accident in Fukushima in Japan had intensified protests against the proposed 9,900 megawatts nuclear plant in Jaitapur, Maharashtra, by farmers and fishermen in the villages near the proposed site, who were already against land acquisition for the project.

Govt aiming for broadband in 5 lakh villages

The telecom ministry is likely to provide rural wireless broadband connections to over 5 lakh villages in one-and-a-half years and will provide a subsidy to both state-owned and private service providers operators from the Universal Service Obligation Fund for this purpose. The tender for the same was supposed to come in March. The resources for implementation of USO are raised through a Universal Service Levy (USL), which at present has been fixed at 5% of the Adjusted Gross Revenue (AGR) of all telecom service providers, excluding pure value-added services like Internet, voice mail, e-mail, etc. Under the 'Rural Wireline Broadband' scheme of USOF, a total of 2,61,413 broadband connections and 2,506 kiosks have been provided till 31 January, 2011, in rural and remote areas of the country, against a target of 8,88,832 connections and 28,762 kiosks by 2014.

ADB extends \$250 mn loan for Bangalore metro rail project

Multilateral lending agency Asian Development Bank (ADB) has approved a \$250 million loan to part-finance the Bangalore Metro Rail Transit System Project (BMRTPS). The bank's board of directors has approved the loan, which will partly fund a total of 42.3 kilometres of track, rolling stock, stations and equipment for two key routes in the tech hub. The Bangalore Metro Rail Corporation, a special purpose vehicle, jointly owned by the government of India and the Karnataka government, is carrying out the project. Besides the ADB loan, the Bangalore metro project is also being funded by the Japan International Cooperation Agency.

India, Russia decide to remove bottlenecks

Russia and India have agreed to remove bottlenecks in their cooperation in the field of pharmaceuticals, including clinical trials of new drugs. The officials from the two countries could agree on mutual recognition of clinical trials, although it was a very technical, scientific issue.

Infra funds make a beeline for India

India-specific infrastructure funds from abroad and in the country are queuing up to invest large sums. There are 13 India-specific infrastructure funds targeting an investment of nearly \$7.3 billion in projects. Nine funds are set to be launched in 2011, according to a report. India requires nearly \$1 trillion worth of infrastructure development in the next five years if it is to meet the demands of a growing population and an emerging industrial economy. The government does not have the means or capability to finance this requirement. A significant proportion of the capital will come from the private sector. Institutional investors and unlisted infrastructure funds will play a key role in Indian infrastructure development, said Prajin, an independent research firm focusing on alternative assets. Given the long payback period and the nature of infrastructure industry, foreign investors would prefer to invest in countries that can provide a legal and regulatory framework that is transparent, investor friendly and predictable. Indian courts and the legal fraternity would also need significant capacity building as several public policy issues and investor concerns have to be balanced equitably with limited precedents for guidance in the private-public-partnership space, he said.

India, Australia to start negotiations on free trade

India and Australia are all set to open negotiations on free trade following a feasibility study that showed each sides would gain AUD 30 billion over 20 years from lowering barriers. According to Australian Trade Minister Craig Emerson, preliminary talks on a deal with India would kick off next week in Canberra with his visiting Indian counterpart Anand Sharma. The minister praised India government's formal agreement to begin negotiations on a free-trade agreement as a milestone in diplomatic relations. "India is an enormous, rapidly expanding market for Australian businesses," he said. "Such a deal would broaden the base of merchandise trade, remove barriers to services trade, facilitate and encourage investment and address behind-the-border obstacles to trade." While a free-trade agreement to achieve zero tariffs would be bilateral, Emerson stressed the importance of achieving trade liberalisation with India through multilateral forums.

External commercial borrowings rise to the most in more than two years

Indian companies raised \$5.63 billion (₹. 25,000 crore) overseas in March, the highest amount in more than two years, to take advantage of low interest rates abroad. Companies such as Reliance Communications Ltd and Aircel Ltd had raised money overseas in the month to refinance rupee loans availed for bidding for third-generation (3G) telecom spectrum. Others such as Infrastructure Development Finance Co., Indian Railway Finance Corp. Ltd and Rural Electrification Corp. Ltd had raised money to fund projects. Interest rates at home have been climbing with India's central bank raising its key policy rate eight times in a year to 6.75% to tame inflation.

Government seeks World Bank assistance for 37,000 km roads

The Government of India has sought assistance from the World Bank for construction and upgradation of 37,000 km of roads as national highways. While approval has been given by the Cabinet to convert 10,000 km of state highways into national highways, the ministry is in the process of seeking nod for another 10,000 km. India has an extensive road network of 3.3 million km, the second largest in the world, and national highways constitute 70,548 km. The Government of India has announced constructing 35,000 km of highways by 2014 for which it has estimated an investment of over ₹. 3 lakh crore. A major chunk of this is expected from the private sector.

Government changes norms to protect directors

Independent directors will not be hauled up for the acts undertaken by companies without their consent or knowledge, as per the new norms announced by the Government of India. Under the new norms, no action can be taken against independent directors and nominee directors for acts of companies undertaken without their "consent or connivance or where he has acted diligently in the Board process." Under the existing provision, penal actions for defaults committed under the Companies Act, 1956, are taken against an "officer in default" or "directors" or "persons" as specified in the Act. The role and responsibility of independent directors have been a topic of constant public debate, especially after the move of Satyam Computer Services to buy out Maytas Infra and Maytas Properties, promoted by kin of the founder B Ramalinga Raju, was rejected by the shareholders.

Mining FDI to be put on FIPB route

After telecom, ports and refineries, foreign direct investment (FDI) in more sectors could now be put under security scrutiny. The Government of India is planning to slap new entry route restrictions on FDI in the mining and realty sectors from a security standpoint. So all FDI proposals in mining would now have to be vetted by the Foreign Investment Promotion Board (FIPB). Similarly, restrictions will also be put for foreign investments in the realty sector as the government is worried about circuitous flow of unaccounted funds into the sector through the FDI route. There are reports that FDI norms related to minimum capitalization and minimum area are being violated by players in the construction industry. At present, up to 100% FDI is allowed in realty projects through the automatic route with certain conditions like a three-year lock-in on investments and minimum capitalization of \$5 million. In mining, the government allows 100% FDI through the automatic route. Under the automation route, companies are allowed to bring in FDI into the country just by informing the Reserve Bank of India. The National Security Council secretariat has already issued a note highlighting the need for security scrutiny of these sensitive sectors to all the stakeholders in the government, said a government official privy to the development. In mining, the concern is that control of national resources should not go into the hands of overseas entities without proper scrutiny as it could be exploited against national interests. The thinking goes against the provisions in the new mining Bill, which has suggested a host of measures to give a boost to FDI inflows into the sector. The Bill is currently being examined by a group of ministers, after which it is intended to be put up for Parliamentary approval. Till date, the mining and realty sector have got ₹.3,400 crore and ₹.42,000 crore of FDI, respectively. The RBI wants real estate removed from the list of sectors where FDI can come in through the automatic route. Since real estate companies are not allowed to raise external debt, there are reports of them using instruments like compulsory convertible debentures and offshore special purpose vehicles for borrowing abroad and then funneling the funds to the parent in India as FDI.

Ultra mega projects needed to raise capacity to 145MT: Steel ministry

To raise India's capacity to 145 MT by 2015-16 to meet growing alloy demand and curb imports, a Steel Ministry panel has proposed "Ultra Mega projects" citing delays in multi-billion dollar ventures of Arcelor Mittal and POSCO due to regulatory and land acquisition hurdles. Each Ultra Mega Steel Project (UMSP) to be built on fast track basis using super critical technology on the pattern of Ultra Mega Power Projects (UMPPs), may cost ₹ 50,000 crore.

Union cabinet clears creation of National clean energy fund

The Union cabinet has cleared the creation of a national clean energy fund that will finance green energy projects and research ventures aimed at reducing India's carbon footprint. The 2010-11 budget had made provision for such a fund created through a clean energy cess of ₹ 50 per tonne of coal, lignite and peat since last year. The cabinet committee of economic affairs also approved the setting up of an inter-ministerial group to pick up projects and schemes eligible for financing from the fund. While the Government of India collected around ₹. 3,124 crore from the coal cess in 2010-11, it is yet to draw a firm roadmap for investing the money. The corpus under the fund is expected to swell to over ₹.6,500 crore in 2011-12. A two-tier setup has been proposed, one at the Centre and the other at the state level for framing the policies and guidelines for implementing the mission. The cabinet committee on infrastructure approved two infrastructure projects costing ₹ 2,537.76 crore and ₹ 580.79 crore, respectively for six-laning a highway in Gujarat and four-laning of a highway in Rajasthan.

HCL to develop system for CCI M&A cases

The Competition Commission of India (CCI) has selected HCL Technologies to develop an electronic system ensuring confidentiality of sensitive documents given by companies for merger and acquisition (M&A) scrutiny. Confidentiality of data has been a major concern of the industry after the Government of India notified provisions under the Competition Act, 2002, for CCI to handle M&A scrutiny from June 1. Anticipating the operationalization of M&A rules from June, CCI is busy equipping its staff through training programmes conducted by experts from agencies such as the US Federal Trade Commission. It has also established a floor in its offices to only house the M&A section, with strict entry restrictions. Meanwhile, CCI and its administrative ministry, corporate affairs, are in the process of finalising the M&A rules which will provide the operational directions to CCI.

PPP policy gaps to be filled in core push

The government is framing a national policy for public-private partnership (PPP) in infrastructure projects to eliminate the inconsistencies in current rules and make infrastructure more attractive to foreign investment. The policy will clearly spell out the rights of a private sector investor in a PPP infrastructure project. The Planning Commission has set an ambitious investment target of \$1 trillion in infrastructure over the 12th Five Year Plan. Most of this investment is expected to come from the private sector. The Government of India has already taken several initiatives to create an enabling framework for PPP's at the centre including establishment of a fast-track system for clearance of these projects.

Infra to exclude telephony, power

Finance ministry of Union of India draws up list, to put it up to panel of secretaries for discussion after seeking Cabinet approval. Telephony and power generation will no more be counted as infrastructure with the Union government set to notify 25 sectors as infrastructure, setting right a policy anomaly that gave incentives to the core sector but never defined it. These sectors will be eligible for tax incentives, viability gap funding and will be covered by regulatory framework for the infrastructure sector, including levy of user charges. Real estate, one of the most sensitive sectors when comes to lending, has been kept out of the definition along with cement. Among sectors that expected to benefit are roads, telecommunication towers, education, hospital, power transmission lines, petroleum and natural gas pipelines, cold storage and modern post-harvest storage facility. The sectors have been selected on the basis of six well-defined criteria, including levy of user charges for being eligible for incentives meant for infrastructure sector. With user charges being one of the conditions, the government has tried to make a distinction between public service and infrastructure. Another important requirement that went into the selection of sectors was the non-tradability of a good or service. Among other conditions is existence of natural monopoly where one company is capable of meeting the demand for a good or service at a price lower than others. Infrastructure sectors have also been chosen on the grounds of high sunk costs that make investment irreversible. The identified infrastructure sectors also create value around them. For instance, coming up of a road could enhance the value of real estate in that area or creation of storage facility can improve provision of food through less wastage.

Government seeks World Bank assistance for 37,000 km roads

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Projects below 200 MW not to get coal supply from Government

Projects below 200 MW coming on stream after March next year will not get coal supplies as the Government of India looks to promote higher-capacity power plants that consume less fuel. Power plants based on supercritical technology require less coal for generating same amount of heat and less polluting. The move also assumes significance in the backdrop of huge coal shortage faced by the country as available coal linkages are barely sufficient for sustaining 3,000 MW of additional power supply. The policy would still give priority to energy-efficient power plants being set up by central and state public sector undertakings and projects to be bid out on tariff-based competitive bidding. Balance coal would be distributed among private and captive projects.

Gail backs PNGRB proposal on pipeline tariffs

India's biggest gas transportation firm Gail India has endorsed petroleum sector regulator's proposal allowing pipeline companies to charge tariffs lower than approved rates but the move has been opposed by Reliance Gas Transportation Ltd. The regulator's move aims to promote competition in gas transportation sector which is expected to grow fast after Reliance Industries recently tied-up with global energy major BP to source and market natural gas in India. In a letter to the board, Gujarat State Petronet Ltd (GSPL) said that the move could "lead to predatory pricing by transporters and would act as a disincentive to the prospective investments in the sector in absence of assurance of adequate returns." GSPL, a subsidiary of Gujarat State Petroleum Corporation (GSPC), is another major energy transporter with 1,573 km of pipeline network that supplies 35 million standard cubic meter per day of gas. Major consumers of natural gas, power and fertilizer firms say that the regulator's proposal would help them in reducing cost.

India aims to add 17,000 MW renewable power by 2017

India aims to add 17,000 megawatts of renewable energy over five years starting 2012, stepping up the country's focus to develop clean energy sources. India will need an investment of Rs. 1.5 trillion (\$33.6 billion) to add the extra capacity in the 12th Five-Year Plan. The country has currently 20 gigawatt of renewable power generation capacity, constituting 11% of installed capacity. India offers cheap loans to companies building alternative energy power plants and provides tax breaks and tariff subsidies to encourage development of the renewables industry.

UMPPS may get to divert surplus coal

The Government of India is planning to allow developers of ultra-mega power projects to use surplus coal from allocated blocks for other projects in which they hold majority stake. The coal ministry, which is in the process of drafting a policy on use of surplus coal, will soon seek the law ministry's views on the proposal, a government official said. Power project developers NTPC and Jindal Power say the move will lead to reduction in electricity tariffs. There are 12 more ultra-mega power projects in the pipeline. At present, coal ministry guidelines require companies to sell surplus coal from captive blocks to the nearest subsidiary of Coal India at the cost at which it has been mined. Blocks of several companies that did not comply with the norm have been de-allocated in the past.

CCI notifies M&A rules

The Competition Commission of India (CCI) notified regulations requiring corporates to seek its approval before going in for high value mergers and acquisitions. As per the notification, the CCI will take a view on the proposed merger deals within 180 days of the filing of notice by the companies. The regulation Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 shall come into force from 1 June 2011. The parties would have to submit a fee of up to Rs1 lakh for getting the CCI approval. According to the provisions in the Act, companies with a turnover of over Rs1,500 crore will have to approach the CCI for approval before merging with another firm. Only those proposals would need the CCI's nod where the companies have combined assets of Rs1,000 crore or more, or a combined turnover of Rs3,000 crore or more, as per the Act. Also, the target company's net assets have to be a minimum of Rs200 crore or it should have a turnover of Rs600 crore for CCI intervention.

LLP firms allowed to receive FDI

To boost Foreign Investments in India, CCEA has given its approval for FDI in Limited Liability Partnership (LLP), albeit with certain conditions. At present FDI would be allowed only in sector like mining, power and airports. LLPs with FDI, however, will not be allowed to operate in agricultural and plantation activity, print media or real estate business. The Cabinet Committee on Economic Affairs, which cleared the proposal, however, said a prior approval of the government (Foreign Investment Promotion Board) will be required for bringing in FDI in LLPs. The FDI in LLPs will be implemented in a calibrated manner, beginning with the 'open' sectors where monitoring is not required, subject to the following conditions: (a) LLPs with FDI will be allowed, through the Government approval route, in those sectors/activities where 100% FDI is allowed, through the automatic route and there are no FDI-linked performance related conditions. (b) LLPs with FDI will not be allowed to operate in agricultural/plantation activity, print media or real estate business. (c) LLPs with FDI will not be eligible to make any downstream investments. There are also additional conditions relating to funding, ownership and management of LLPs.



SYNAPSE

S&P appointed Legal Advisor to MoRD in consortium with IDFC for a \$ 400 million project

Advising Ministry of Rural Development (MoRD) in consortium with Infrastructure Development Finance Corporation (IDFC) for selection of service provider for Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) related works. The primary objective of implementing the Project on a national level is to ensure common standardized processes across the nation, in six hundred thousand villages through use of biometric and GPS enabled ICT devices at work sites. The introduction of biometric attendance systems are expected to eliminate ghost workers. Our mandate includes conceptualization, bid documentation and selection of service provider.



S&P, empanelled with two large State Infrastructure Development Boards

S&P has been empanelled for providing Legal Advisory Services to Gujarat Infrastructure Development Board (GIDB) which is a statutory organization created under GID ACT 1999 and it has the unique and challenging responsibility to attract investment and create world – class infrastructure by providing investor friendly policy framework that emphasizes development through equal emphasis on inter related sectors of the economy. S&P has also been empaneled with Department of Urban Development, Housing & Local Self Government, Government of Rajasthan for providing legal services for preparation of contractual documents etc. in PPP projects.



S&P defends NHA in an Arbitration matter with a claim of ₹ 200 million

S&P is defending National Highway Authority of India (NHA), in arbitration matter where the claimant, M/s Afcons Infrastructure Ltd. has filed claim of ₹ 200 million under a contract of ₹ 147 million related to road projects in the state of Karnataka. The claims pertain to issues related to extended stay cost, reimbursement of entry tax paid by the contractor, certification and payment of additional works, valuation of varied works, measurement and payment of portion of embankment construction executed between the original ground level after clearing and grubbing, measurement and payment for the portion of profile correction course executed by using DBM under BOQ items.



S&P appointed as Legal Advisor to wind up a premier Shipping Company

Scindia Shipping Navigation Company Ltd was one of the premier companies engaged in the business of shipping. Established in 1919, this was the first large scale Indian owned shipping company and played a significant role in India's Independence Struggle. However due to international recession in the 1980's, the Company suffered huge losses, pursuant to which the Government of India liquidated its assets for recovery of the amounts due to the Government of India. Under the directions of the Government, the Company has requested for voluntary winding up itself. S&P has filed Winding Up Petitions for the Company and its subsidiaries under Sections 433(a),(e) and (f) read with Section 439 of the Companies Act, 1956. before the Mumbai High Court.



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Editor Ravi Singhanian Research Aakanksha Agarwal Design Shilpa Laharwal
Delhi Dilip K Jhangiani Mumbai Bidan Chandran Bangalore Shilpa Shah Hyderabad Tara Sarma

S&P House, H186, Sector 63, Noida NCR Delhi 201301 (t) +91.120.4631000 (f) +91.120.4631001 (e) info@singhanian.in
B92, 9th Floor, Himalaya House 23, K.G.Marg, New Delhi 110001 (t) +91.11.41531000 (f) +91.11.41531001 (e) info@singhanian.in
123A, 12th Floor, Mittal Court, Nariman Point, Mumbai 400021 (t) +91.22.22885550 (f) +91.22.22885560 (e) mum@singhanian.in
401, Prestige Meridian II, M.G.Road, Bangalore 560052 (t) +91.80.41131900 (f) +91.80.41131901 (e)blr@singhanian.in
#614, Babukhan Estate, Basheer Bagh, Hyderabad 500001 (t) +91.40.65810662 (f) +91.40.23226219 (e) hyd@singhanian.in