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An e-newsletter from Lakshmikumaran & Sridharan, New Delhi, India

July, 2013 / Issue–24

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July
2013

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Land Acquisition Bill, 2011 – A comparative analysis with the Act

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The Land Acquisition Bill 2011 proposes a change in the definition of "public purpose", which is a fundamental concept in land acquisition. Presently the definition of public purpose under the Land Acquisition Act, 1894 includes provision of village sites or the extension, planned development or improvement of existing village sites; provision of land for town or rural planning; and provision of land for planned development of land from public funds in pursuance of any scheme or policy of government; land for corporation owned and controlled by the state; provision for land for residential purpose to the poor or for carrying out educational, housing, health or slum clearance scheme sponsored by the Government and also premises for locating public offices but not for companies.

The scope of the definition of public purpose has been widened in the Bill so as to include (a) provision of land for strategic purposes relating to naval, military and air force works for any other work vital to the State, which are owned and funded out of state exchequer to the tune of minimum 51% of the total project cost; (b) provision of land for infrastructure projects of the appropriate government, where the benefits accrue to the general public; and such infrastructure project must be owned and funded out of the state exchequer to the tune of minimum 51% of the total project cost; and (c) provision of land for any other purpose useful to the general public, and necessary for planned development for which land has been purchased by a person under lawful contract to the extent of 85% but the remaining 15% of the total area of land required for removing hurdles in completion of the project.

The Bill also introduces a completely new concept of "Social Impact Assessment (SIA)". Any government intending to acquire land for a public purpose is required to carry out an SIA in consultation with the local Gram Sabha (or equivalent body in urban areas) in the affected area. This SIA report is required to contain data such as assessment of nature of public interest involved, estimation of affected families and the number of families likely to be displaced, study of socio-economic impact upon the families residing in the adjoining area of the land acquired, extent of lands, public and private, houses, settlements and other common properties likely to be affected by the proposed acquisition, whether the extent of land proposed for acquisition is the absolute bare minimum extent needed for the project, whether land acquisition at an alternate place has been considered and found not feasible, and study of social impact from the project, and the nature and cost of addressing them and their impact on the overall costs of the project and benefits vis-à-vis the social and environmental costs. Additionally, the government has to take into consideration the impact that the project is likely to have on various public and private properties, infrastructure such as roads,

transport, sanitation, sources of drinking water, parks etc. Further, a public hearing has to be conducted in the affected area, whereby consent of at least 80% of the affected families be taken so as to enable them to voice their opinion on the proposed acquisition and the same has to be incorporated in the SIA Report. The Report will be reviewed by an expert group, (to be constituted by the government) which shall give its recommendations and observations on the project in writing.

Additionally, the Bill requires constitution of a committee comprising secretaries from the various departments such as revenue, finance, tribal welfare; social justice, rural development etc and the Chief Secretary of State or Union territory shall be the ex-officio Chairperson. If the land sought to be acquired is 100 acres or more, the committee is responsible to ensure that the land is required for a legitimate and bona fide public purpose; on a balance of convenience, the public purpose serves larger public interest; only the minimum area of land required for the project is proposed to be acquired; and the option of acquisition of waste and degraded and barren lands has been explored and is not found feasible and a delegated committee shall comply with the requirements in case the land is less than 100 acres. Such a pre-condition is likely to affect various projects in India, whenever made applicable.

The Bill prohibits the acquisition of irrigated multi-cropped land except as provided for in the Bill, under exceptional circumstances as a demonstrable last resort. In order to mitigate the damage, an equivalent area of cultivable waste land shall be developed for agricultural purposes.

The Bill has also introduced the definition of 'affected families' which includes land owners, agricultural laborers, tribal's and forest dwellers, families whose livelihood have been dependant on forest and water bodies for the preceding 3 years and families who have been given land by the state or the central government. Provision for compensation to land owners will be determined by the Collector and shall be paid within 2 years from the date of declaration of acquisition.

The procedure with regard to publication of notification in the gazette and newspapers and hearing of objections more or less remains unchanged.

Rehabilitation and Resettlement Scheme

The Bill provides displaced families with rehabilitation and resettlement entitlements like the Indira Awas Yojana in rural areas, one time allowance of INR 50, 000 for affected families, option of mandatory employment, etc. In addition to these, every resettled area is provided with certain infrastructural facilities including roads, drainage, drinking water, grazing land, banks, post offices, public distribution outlets, etc. The R&R Scheme requires a preliminary notification for acquisition to be published and subsequently appointing an administrator who shall conduct a survey and prepare a scheme to be discussed in the local Gram Sabha and objections to it shall be heard by the administrator. He shall then prepare a report and submit it with the Collector for the approval of the Commissioner. Once

the scheme is approved, the government shall issue directions for its execution. The Bill also provides that R&R provisions are mandatory for all private purchases through private negotiations if the land purchased is over 100 acres in rural areas.

One of the key elements however that the Land Acquisition Bill seems to have missed out is the scenario where the land was acquired for a public purpose, but the acquired land or part thereof has remained unutilized. There are a number of cases filed in the Supreme Court which have petitioned the court to exercise its special jurisdiction and decide the status of land. This problem is particularly stark, as the land gets acquired for public purpose at rates fixed under the land acquisition law and then is sold to private builders at commercial rates to the detriment of the poor from whom the land was acquired from. The Bill should have considered this aspect and should have a provision to the effect, that in the event the land acquired is required to be sold for any reason, the people from whom the land was acquired shall be an integral part of the selling mechanism.

It is important to safeguard the interests of the local displaced communities but increasing red tape and bureaucratic intervention will only further increase the delay and uncertainty in infrastructure projects that are critical for economic growth.

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Notifications & Circulars

India moves forward for more FDI in specified sectors

The policy of Foreign Direct Investment (FDI) in ten sectors, including telecom and defence has been further liberalized. As per reports, the decisions taken by the cabinet committee on 16-7-2013, indicate that the FDI limit in telecom sector will be 100% under approval route (FIPB) and 49% under automatic route. Foreign investment in excess of 26% will be permitted in defence sector subject to case to case approval by Cabinet Committee on Security, if the same is likely to result in access to state-of-the-art technology. Besides these two sectors, there is considerable relaxation in sectors like finance (asset reconstruction companies), oil and gas and refining, stock exchanges, commodity exchanges, courier service and power exchanges. As per news, upper limit in the insurance sector is also set to be increased to 49%, though this is likely to be subject to an amendment in the Act and hence parliamentary approval.

Securities laws amended by Ordinance - Unlisted firms involved in collective investment schemes brought under SEBI purview

Securities and Exchange Board of India Act, 1992, Securities Contracts (Regulation) Act, 1956 and the Depositories Act, 1996 have been amended by Securities Laws (Amendment) Ordinance, 2013. The amendments which

make some changes in the authority of SEBI and the way it is enforced have come into effect from 18th of July, 2013 if not specified otherwise. As per the amendments, a deeming provision has been inserted to deem any pooling of funds under any scheme or arrangement, involving a corpus amount of INR 100 crore or more, to be a collective investment scheme even if the same is not registered with SEBI or not covered under sub-section (3) of Section 11AA of the SEBI Act. Further powers for search and seizure, to be exercised by officers authorized by the Chairman, have been given, in case the person to whom notice had been issued, has failed to provide any information; would not provide any information; or would destroy, alter or falsify the information relevant to investigation. New provisions further provide for settlement of administrative and civil proceedings and establishment of special courts which for the purpose of said provisions would deem to be Court of Session. New Section 28A has been inserted to provide for recovery of penalty or fees due to the Board. These new provisions have also been incorporated in the Securities Contracts (Regulation) Act, 1956 and the Depositories Act, 1996.

Non-convertible redeemable preference shares – Regulations notified for issue and listing: SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 have been notified. These regulations, which are on the lines of Debt Regulations issued in 2008, provide for comprehensive regulatory framework for public issuance of non-convertible redeemable preference shares and also for listing of privately placed redeemable preference shares. Further, as per Basel III norms, banks can issue non-equity instruments such as Perpetual Non-Cumulative Preference Shares and Innovative Perpetual Debt Instruments, which are in compliance with the criteria specified by RBI for inclusion in Additional Tier I Capital. The regulations, notified on June 12, 2013, shall also be applicable to such instruments issued by banks.

FVCI - Reporting of issue or transfer of shares: Reserve Bank of India has clarified that wherever a SEBI registered Foreign Venture Capital Investor (FVCI) acquires shares of an Indian company under FDI Scheme in terms of Schedule 1 of Notification No. FEMA 20 / 2000-RB dated 3 May, 2000, such investments have to be reported in form FC-GPR/FC-TRS only. A.P. (DIR Series) Circular No. 110 dated 12-6-2013 further stipulates that where the investment is under Schedule 6 of the above notification ibid (Investment in an Indian venture capital undertaking by FVCI), such reporting is required by the custodian bank in the monthly reporting format as prescribed by RBI. Revised forms FC-GPR and FC-TRS are also annexed to the said circular.

Registration of electoral trusts under Companies Act: Ministry of Corporate Affairs has modified the Name Availability Guidelines for companies. As per the modification vide General Circular No.12/2013, dated 28-6-2013, use of the phrase 'Electoral Trust' shall be allowed in the name of a Section 25 Company intending to register under the Electoral Trusts Scheme, 2013 (Scheme) as notified by the

Central Board of Direct Taxes. It has been further clarified that such a company shall be a new company which shall comply with Section 293-A of the Companies Act, 1956 and that the application for name availability shall be accompanied by an affidavit declaring that the company is only for the purpose of registration under the said scheme.

Ceiling for purchase of govt. dated securities enhanced: The Reserve Bank of India through A.P. (DIR Series) Circular No.111 dated 12th June, 2013 and the Securities and Exchange Board of India through Circular No. CIR/IMD/FIIC/8/2013 dated 12th June, 2013 have notified USD 5 billion increase in the ceiling for purchase of government dated securities by foreign institutional investors (FIIs), qualified foreign investors (QFIs) and long term investors. Earlier the prescribed limit was USD 25 billion. This enhanced ceiling of USD 30 billion shall be available only for long term investors registered with the SEBI as FII i.e. sovereign wealth funds (SWFs), multilateral agencies, pension/insurance/endowment funds and foreign central banks.

Project exports – Time for submission of documents, enhanced: Reserve Bank of India has enhanced the time period for submission of forms DPX1, PEX-1 and TCS-1 to the Approving Authority (AA) i.e. AD Bank/Exim Bank/Working Group by the exporter undertaking project exports and service contracts abroad. As per A.P. (DIR Series) Circular No.118 dated 26-6-2013 the time limit is now 30 days from entering into contract for grant of post-award approval. This time period was 15 days earlier.

Investment Advisers to obtain certification: Investment advisors and their associated persons, including their representatives and partners, offering investment advice have been directed to obtain certification from the National Institute of Securities Markets by passing the NISM-Series-X-A: Investment Adviser (Level 1) Certification Examination. As per SEBI Notification No. LAD-NRO/GN/13/6109, dated 19-6-2013, such persons shall also obtain certification from NISM by passing NISM-Series-X-B: Investment Adviser (Level 2) Certification Examination, once the same is notified.

Ratio Decidendi

Enforceability of foreign arbitration awards in India – Public policy and appellate jurisdiction: The Supreme Court of India has held that enforcement of foreign award would be refused under Section 48(2)(b) of the Arbitration and Conciliation Act, 1996 only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality; and the enforcing court does not exercise appellate jurisdiction at the time of enforcing the award. It was held that that for the purposes of said section, the expression "public policy of India" must be given narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to public policy of India if it is covered by one of the three categories (enumerated above) as stated in the case of *Renusagar Power Co. Limited* v. *General Electric Company* [1994 Supp (1) SCC 644].

The Court further noted that application of 'public policy of India 'doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award. The decision in *Phulchand Exports* was hence overruled by the present three Judges Bench.

The question for consideration in this appeal was whether awards passed by the Board of Appeal of the Grain and Feed Trade Association, London (Board of Appeal) in favour of the respondent were enforceable under Section 48 of the Arbitration and Conciliation Act, 1996. The Court while holding as above also observed that Section 48 of the 1996 Act does not give an opportunity to have a 'second look' at the foreign award in the award - enforcement stage. It was held that even if the contention of the appellant relating to the non-reliance on the report of the inspection agency is considered, it does not fall under any of the 3 grounds mentioned above, based on which a foreign award can be set aside as unenforceable. [*Shri Lal Mahal Limited* v. *Progetto Grano Spa* – Supreme Court Judgment dated 3-7-2013 in Civil Appeal No. 5085 of 2013].

Territorial jurisdiction of courts – Implied exclusion in agreement: The Supreme Court of India has held that by making a provision that the agreement is subject to the jurisdiction of the courts at particular place, the parties had impliedly excluded the jurisdiction of other courts. The court in this regard noted that absence of words like "alone", "only", "exclusive" or "exclusive jurisdiction" in the jurisdiction clause of the agreement, is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The Apex Court further observed that since the ouster clause is included in the agreement between the parties, it conveys their clear intention to exclude the jurisdiction of Courts other than those mentioned in the concerned clause. It was also held that such clause in the agreement should be given its natural meaning and that this clause will not be hit by Section 23 or offend Section 28 of the Contract Act. The appellant, in the present case, had filed an application, before the Rajasthan High Court at Jaipur, under Section 11 of Arbitration and Conciliation Act, 1996, while the respondent had pleaded that Calcutta High Court would have jurisdiction as per their agreement. [*Swastik Gases P. Ltd.* v. *Indian Oil Corp.* – Civil Appeal No. 5086 of 2013 decided on 3-7-2013].

Minimum public share holding requirement – Re-classification of promoter as public share-holder, not valid: The Securities Appellate Tribunal has held the methods, as prescribed by SEBI, to increase public shareholding as perfectly executable methods, whereas, in the case before it, the method applied by the appellant were dubious. The appellant had proposed to transfer 4% shares of the Indian promoter to the foreign promoter, which would reclassify the Indian promoter as public shareholder, also taking away all its powers as promoter. Then the foreign promoter would cause for selling of its 4.9% shares to the public. The method would eventually bring down the holding of the foreign promoter down from 75.9% to 75%. The SAT while rejecting the method observed that underlying philosophy behind the requirement of a minimum public holding of 25%, as per first proviso to Rule 19A(1) of Securities Contracts (Regulation)

Rules, is prevention of concentration of shares in the hands of a few market players and that the present proposal of the appellant does not, talk about offering shares to the public, rather it involves the reclassification of a promoter as a public shareholder by changing the nomenclature from a promoter to a public shareholder which is contrary to the spirit of Rule 19A(1). The Tribunal also noted that the appellant was already violating the law by first raising the share holding of the foreign promoter to well above the 75% limit and then releasing the shares for public. [*Gillette India Limited* v. *SEBI* – Securities Appellate Tribunal Order dated 3-7-2013 in Appeal No. 65 of 2013].

Competition law – No abuse of dominant position when several players operate and services available as per choice: When several players operate in the relevant market and services are available to people as per their choices, there is no abuse of dominant position, as per a recent order of the Competition Commission of India. The informant had contended that when the members of the association had applied for allotment of residential units in colonies constructed by the developer, they were promised facility of a club as a part of community services via advertisements in newspapers and layout plans. However, instead of establishing a club to be managed by the members through a managing committee, the developer was running the club as a commercial enterprise. It was alleged that the members of the developer's colonies had no say in the management of the club, even though the club was on their land as part of community services in terms of the provisions of the Haryana Development and Regulation of Urban Areas Act, 1975. As per the informant these clubs enjoyed dominant position in the relevant geographical and product market, which was being exploited by charging high membership fees and fees for use of gym, etc., with irrational increase over the years and that the rules of the clubs to be signed mandatorily by members were one-sided and unfair.

The Commission after examining that the provision of recreational and other facilities through clubs would be the product market and the city of Gurgaon would be appropriate geographical market, observed there are many clubs in the city of Gurgaon which are also open to non-residents, albeit at a differential fee. Further there are stand alone clubs open to public at large and various clubs maintained by HUDA. Thus, there are a number of players operating in the relevant market and services are available to people as per their choices. According to the CCI, prima facie case was not made out to issue directions for investigations. [*DLF City Club Members Welfare Association* v. *DLF Recreational Foundation Limited* – CCI Order dated 1-7-2013 in Case No. 25 of 2013]