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In order to engage with our readers and simplify the legal complexities of the infrastructure sector, EPC World has partnered with Rajani Associates, a full-service law firm for a series of legal Q&As. Through this Legal Q&A column, **SHISHAM PRIYADARSHINI**, Partner, Rajani Associates and **AMISH SHROFF**, Principal Associate, Rajani Associates, will endeavour to address the queries and challenges faced by our readers.

Why is the hybrid annuity model introduced?

The road projects in India have been awarded under one of the three formats, which being, (i) Built, Operate, Transfer and Toll (BOT- Toll), BOT (annuity), and Engineering, Procurement and Construction (EPC). Under the BOT-Toll model, the private party bears the construction risk (i.e. the risk of undertaking and constructing the project), O & M risk (i.e. obligation to operate and maintain the road during concession period as per agreed specifications). During the concession period, the private party collect the toll. The cost of construction is recovered by the private party through toll collected during the concession period. Hence, the private party also bears commercial risk. BOT (annuity) model is similar to BOT-Toll, except that private party does not bear commercial risk and the authority pays regular annuity to the private party during concession period. As far as constructing the project under the EPC Model, popularly known as the cash contract is concerned the private party bears only construction risk and the onus for funding, getting approvals, among others, lies on the Government.

The Hybrid Annuity Model (HAM) as the name suggests is a hybrid model and is a combination of BOT Annuity and EPC model, introduced by the Government earlier this year. As per this model, the government will contribute 40% of the project cost in the first five years in equal annual instalments (annuity). The remaining 60% payment is paid as variable annuity amount after the completion of the project depending upon the value of assets created and the performance of the developer. Under this model all regulatory clearances risk, compensation risk, commercial risk and traffic is borne by Government. Hence, the risk for private sector is minimal.

This new model of HAM was introduced as a panacea to the problems with the existing models, especially the financial and the risk burden which was undertaken by the private players. During the last few years, there were many stalled projects hampering the overall infrastructure development in the country and at the same time adding to NPAs for the banks. The main object to introduce HAM is to revive highway projects in the country and especially stalled projects. The advantage of HAM is that it gives enough liquidity to the concessionaire and at the same time the financial risk is shared by the Government.

What is the need to have provisions on oppression and mismanagement under the Companies Act in India?

A company is a separate legal entity made up of an association of persons, which persons can be a natural, legal, or a combination of both. The purpose to set up any company is to carry on a business activity with a common aim to earn profit. While the shareholders or members of the company have a common purpose, there are difference of interests and opinions among individuals which results in forming of minority group and the majority group.

The minority group is a group of shareholders who hold small percentage of share capital and as a result has less control over the decisions taken by the company. As for the majority group of shareholders, they hold larger percentage of share capital, and for all practical purposes, they have more control over the company and can take decisions without being questioned. Even where the proposed decisions are questioned in the general meeting, the majority because of their greater voting strength comes out as winners.

The majority rule is a hallmark of democracy and this rule is also applicable to the management of the affairs of the company. The members are required to pass resolutions on various subjects, either by simple or three-fourth majority. Once a resolution is passed by majority it is binding on all the members and the court ordinarily will not intervene to protect the minority

interest affected by any such resolution. Although the management of a company is based on the majority rule, the interests of the minority cannot be overlooked. In order to protect the minority group from being oppressed, the companies act contain certain provisions so that the position of the majority is not misused in any unfair manner. These provisions are dealt under the head of prevention of oppression and mismanagement under the companies act.

What does oppression and mismanagement mean?

The terms "oppression" and "mismanagement" are not per se defined under the statue and the same can be more clearly understood from the observations made and the orders passed by the court in various instances.

Talking about oppression, the same would mean any conduct complained of which involves a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which condition every shareholder entrusts his money to the company.

Some of the instances of oppression would be an attempt to force new and more risky objects upon an unwilling minority, not calling a general meeting and keeping shareholders in dark, non-maintenance of statutory records and not conducting affairs of the company in accordance with the act, depriving a member of the right to dividend, refusal to register transmission of shares under will, issue of further shares benefiting a section of shareholders. The instances which may not be construed as oppressive would be an unwise, inefficient or careless conduct of director, non-holding of the meeting of the directors, not declaring dividends when company is making losses, denial of inspection of certain books to a shareholder. An act of mismanagement would be when the affairs of the company are being conducted in a manner prejudicial to the interests of the company or a material change has taken place in the management of control of the company, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to the interests of the company.

Few of the instances of mismanagement would be a serious infighting between directors, bank account(s) was/were operated by unauthorised person(s), directors not taking serious action to recover amounts embezzled, continuation in office after expiry of the term of the directors, violation of Memorandum and Articles of Association and the other statutory provisions. The acts held as not mismanagement could be building up of reserves, non-declaration of dividend especially when it does not result in devaluation of shares merely because company is incurring loss, arrangement with creditors in company's bona fide interest, removal of director. Where the members feel that they have been oppressed by the other section of members or they have reasons to believe that the company is not being managed properly, then such aggrieved members can make an application to the Tribunal to seek relief for such actions.

Are there any condition required to be fulfilled by the members to invoke the provisions of oppression and mismanagement under the Indian companies act?

Any members of a company who complain that the affairs of the company are being conducted in a manner oppressive to any member or members (including any one or more of themselves) or the affairs otherwise are mismanaged can apply to the Tribunal to seek relief against such oppression and mismanagement. However, it is not that every shareholder can avail the remedy and the companies act specifically sets out certain conditions to be fulfilled before any member can apply to the Tribunal.

Such requirement varies with the fact as to whether the company has a share capital or not. In case of a company having a share capital, the requirement is that not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less can make an application to the Tribunal. Alternatively, or any member or members holding not less than one-tenth of the issued share capital of the company (provided that the applicant or applicants have paid all calls and other sums due on their shares) can also make an application to the Tribunal. For a company not having a share capital, not less than one-fifth of the total number of its members can apply to the Tribunal. It may however be noted that when any share or shares are held by two or more persons jointly, they shall be counted as one member. Moreover, the issued share capital would include both equity as well as preference share capital.

While these are prerequisite conditions to be fulfilled by the members, but the Tribunal may at its discretion waive these requirements.

In the event, the members do not fulfil the requirements or the conditions otherwise are not waived off by the Tribunal, then, the petition to seek relief under oppression and mismanagement will not be maintainable. Here, it may be noted that the issue of maintainability of the petition can be raised at any stage (i.e. during the middle of the proceedings or at the final stage) and not necessarily at the initial stage. The object of prescribing the qualifying conditions to discourage frivolous litigation by persons who have no real stake in the company.

It may also be noted that right to apply under this provision is not confined to minority and even majority can seek relief under against oppression and mismanagement. EPC World