Equity investor with veto rights categorised as 'promoter' under RERA

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An order has been passed by the Maharashtra Real Estate Regulatory Authority (**MahaRERA**) in the matter of *Rare Township Private Limited v IIRF India Realty VIII Limited* on 30 June 2022 whereby an equity investor in a company has been categorised to be a '*promoter*' under the Real Estate (Regulation and Development) Act, 2016 (**RERA**) based on certain veto rights of the Investor, and accordingly, all obligations applicable to a '*promoter*' under the RERA would be applicable to such investor.

In the matter of Rare Township Private Limited v IIRF India Realty VIII Limited, the Maharashtra Real Estate Regulatory Authority held that an equity investor holding certain veto rights would be categorised as a 'promoter' under the Real Estate (Regulation and Development) Act, 2016. Given this order, equity investors holding significant veto /affirmative rights in a company will have to assess whether they could be categorised as 'promoters' under the Act.

1 FACTS

Rare Township Private Limited (**Complainant**), being the developer and promoter of the project *'Rising City'*, filed a complaint before MahaRERA against one of its shareholders, IIRF India Realty VIII Limited (**Investor**) to *inter alia*:

a. declare the Investor as a *'promoter'* under the RERA;

b. to take cognizance of the actions of the Investor which have caused delays in completion of the projects; and

c. to restrain the Investor from creating any hindrance in completing the projects.

2 ISSUE

Whether the Investor can be categorised as a *'promoter'* under RERA?

3 ARGUMENTS

It was argued by the Complainant that the Investor is vested with requisite powers and rights under the share subscription and shareholders agreement (executed in relation to the Investor's shareholding held in the Complainant) (**SSHA**) which enable the Investor to stop and delay the execution of the projects through various acts (specifically, through the veto rights available to the Investor under such SSHA). The veto rights include, among others, seeking prior consent of the Investor for project expenses exceeding INR 25,00,000, approval of sales plan, change in capital structure of the company and any significant change in the liability structure.

On the other hand, the Investor, while citing an order passed by the Supreme Court of India on scope of *'control'*, argued that reactive rights are not controlling rights and hence veto rights being exercised by a minority shareholder cannot be taken to mean exercising control.

4 OBSERVATIONS OF RERA AUTHORITY

a. The definition of Promoter not only includes the one who constructs but also the one who **causes to construct** *inter alia* an independent building or a building consisting of apartments. The term *'causes'* is not limited to just causing something to be done <u>but goes beyond to also include causing something not to be done</u> or causing something to be done in a particular manner.

b. Considering no resolution can be validly passed, or decision taken by the board of directors of the Complainant or by management in any manner pertaining to the veto matters unless the consent of the Investor has been obtained, it can be concluded that the Investor through its veto rights can *'cause'* the construction of the projects and therefore, be categorised as a *'promoter'* under the RERA (along with all liabilities applicable to a *'promoter'* under the RERA being applicable to the Investor).

c. Having said the above, the order states that it "*cannot be and should not be used to force every Investor into the shoes of the Promoter. Each Investor agreement shall have to be examined individually to determine and identify recitals which fastens the definition of the Promoter on him. This order shall surely not be used as a paint brush to paint every Investor in the colour of a Promoter*".

5 IMPACT

While it has been stated that the order "*should not be used to force every Investor into the shoes of the Promoter*", an equity investor holding significant veto/affirmative rights in a company will have to consider whether it would be categorised as a *'promoter'* under the RERA.

Going forward, financial investors would have to carefully assess what rights they can reserve for themselves without risking the liability associated with being classified as a *'promoter'* under the RERA.
