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### REFORMING THE MINING SECTOR IN INDIA: AN ANALYSIS OF THE LATEST AMENDMENTS TO THE MMDR ACT

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In a major push for mining reforms in India, the Parliament recently enacted the Mines & Minerals (Development & Regulation) Amendment Act, 2021 (Amendment Act).

The President of India gave his assent to the Amendment Act on 28 March 2021 and all the provisions of the Amendment Act (other than Section 3(v)(i)) were notified on the same date by the Central Government.

The Amendment Act seeks to amend the Mines & Minerals (Development & Regulation) Act, 1957 (Principal Act) with a view to meet the following broad objectives:

- Fully harness the potential of the mineral sector;
- Increase employment and investment in the mining sector including coal;
- Increase the revenue to the States;
- Increase production and time bound operationalization of mines;
- Maintain continuity in mining operations after change of lessee
- Increase the pace of exploration and auction of mineral resources;
- Resolve long pending issues that have slowed the growth of the sector.

Some of the significant changes introduced in the Amendment Act have been discussed below.

#### **Involvement of the Private Sector**

Section 4(1) of the Principal Act has been amended with the objective of allowing private entities (notified by the Central Government) with enhanced technology to undertake mineral exploration activities.

In Parliament, the Hon'ble Union Minister of Mines, Government of India underscored the need for opening up mineral exploration to private entities. He highlighted that the mining potential in India was vast and the mining sector was the second largest employment generator after agriculture. However, India still continues to remain significantly under-explored when compared to nations with similar potential like South Africa and Australia. With this amendment, therefore, the Central Government aims to tap the technology and expertise available with the private sector.

In the above context, the amendment to Section 9C of the Principal Act is also extremely significant by way of which the National Mineral Exploration Trust (NMET) has been designated as an autonomous body. It is worth recollecting that the NMET was established for the purposes of funding regional and detailed exploration of minerals. In the Amendment Act, a new sub-section (5) to Section 9C has been introduced, which enables the notified private entities to seek funding from the NMET.

#### Termination of the mining lease

Prior to the Amendment Act, in terms of Section 4A(4) of the Principal Act, if a mining lease holder failed to undertake mining operations for a period of 2 (two) years or having commenced mining operations, discontinued the same for a period of 2 (two) years, the mining lease would automatically lapse. However, it was open for the State Government to order continuation of the lease where it was not possible for the mining lease holder to undertake or continue mining operations for reasons beyond the control of the lease holder. It was also open for the State Government to revive a lapsed mining lease provided an application was made by the mining lease holder within 6 (six) months from the date of its lapse.

The Amendment Act has replaced the expression "mining operations" in Section 4A(4) of the Principal Act with the words "production" and "dispatch". Accordingly, the termination of the lease in Section 4A(4) will have to be considered from the standpoint of whether the holder of the lease has undertaken or continued "production" and "dispatch". The definitions of "production" and "dispatch" have also been inserted in the Amendment Act. "Production" has been defined to mean the winning or raising of mineral within the leased area for the purpose of processing or dispatch. Further, "dispatch" has been defined as the removal of minerals or mineral products from the leased area and includes the consumption of minerals and mineral products within such leased area.

The Amendment Act also envisages an extension for a period of one year in cases where the holder of a mining lease fails to undertake production and dispatch for a period of two years either after the execution of the lease or having discontinued production and dispatch, for a period of two years after having commenced the same. It has also been clarified that this extension can only be granted once during the entire period of the lease.

Significantly, the Amendment Act does not allow for a revival of the mining lease after it has lapsed. Therefore, the mining lease holder will necessarily be required to make an application to the State Government before the lapse of the mining lease.

#### Doing away with end-use restrictions for captive mines

The Amendment Act has allowed existing captive mines (including captive coal mines) to sell up to 50% of the minerals produced after meeting the requirement of the linked end use plants. The captive mine holder will be required to pay an "additional" sum, to be calculated in accordance with the newly inserted Sixth Schedule.

The Statement of Objects and Reasons of the Mines and Minerals (Development & Regulation) Amendment Bill, 2021 (Bill) stated that this amendment would "*facilitate increase in production and supply of minerals, ensure economies of scale in mineral production, stabilize prices of ore in the market and bring additional revenue to the States...*"

#### Transfer of statutory clearances

Section 8B in the Principal Act has been substituted by way of the Amendment Act and it has been clarified that all valid rights, approvals, clearances, licences, etc. granted to a lessee in respect of a mine (other than those granted under the provisions of the Atomic Energy Act, 1962) shall continue to be valid even after expiry or termination of the lease and such rights, approvals, clearances, licences, etc. shall be transferred to,

and shall vest (subject to the relevant conditions) in the successful bidder of the mining lease selected through auction.

It has also been clarified that it shall be lawful for the new lessee to continue mining operations on the land, till the expiry or termination of the mining lease granted to it, in which mining operations were being carried out by the previous lessee.

This amendment ensures continuity of mining operations, even with the change of the lessee and helps to avoid the repetitive process of obtaining clearances again for the same mine. The industry seems to have received this amendment very well. The general view is that a tremendous amount of time was spent to seek the same permissions/approvals afresh and this amendment would facilitate the early commencement of the mining operations. At the time of discussions on the Bill in Parliament, it was highlighted that about 904 mines will expire in the next 10 years and if the new lessee is compelled to obtain statutory clearances all over again, it would cause unnecessary disruption.

#### **Legacy cases under Sections 10A(2)(b) and (2)(c)**

In Section 10A(2)(b) of the Principal Act, the following provisos have been inserted:

*"Provided that for the cases covered under this clause including the pending cases, the right to obtain a prospecting licence followed by a mining lease or a mining lease, as the case may be, shall lapse on the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2021:*

*Provided further that the holder of a reconnaissance permit or prospecting licence whose rights lapsed under the first proviso, shall be reimbursed the expenditure incurred towards reconnaissance or prospecting operations in such manner as may be prescribed by the Central Government."*

Further, after Section 10A(2)(c) of the Principal Act, the following clause has been inserted:

*"(d) in cases where right to obtain licence or lease has lapsed under, clauses (b) and (c), such areas shall be put up for auction as per the provisions of this Act."*

This is a very significant and contentious amendment. The Federation of Indian Mineral Industries (FIMI), a representative body, had also written to the Central Government in 2020 opposing the amendment to Section 10A, on the ground that it would slow down investment in the sector and result in multiple litigations. However, the Central Government went ahead with this amendment with the objective to close the pending cases of non-auctioned concession holders, which had not resulted in the grant of mining leases despite passage of a considerable time of more than 5 (five) years.

For cases under Section 10A(2)(b), the Amendment Act provides that the Government shall reimburse the expenditure incurred towards reconnaissance permit or prospecting operations in cases where the rights lapsed. However, the industry does not seem to be satisfied. The view is that the reimbursement sum may not be enough since the expenditure incurred by the mining lease holders is likely to be much more.

The Amendment Act has also introduced Section 13(2)(u), to empower the Government to frame rules to prescribe the manner for reimbursement of the expenditure incurred by lease holders towards reconnaissance or prospecting operations.

For cases under 10A(2)(c), unlike Section 10A(2)(b), a specific provision for lapsing of the rights has not been made. However, this is presumably because in terms of Section 10A(2)(c) of the Principal Act read with Rule 8 of the Mineral Concession Rules, 2016, the mining lease was required to be executed and registered on or before 11 January 2017 failing which the right for a grant of a mining lease stood forfeited. For this reason, the Government may argue that cases under Section 10A(2)(c) had already lapsed on

11 January 2017 and therefore, there was no need for a specific provision similar to Section 10A(2)(b) in the Amendment Act.

However, it remains to be seen how cases where applicants had already filed writ petitions against lapsing of rights and were granted relief by the respective courts on the ground that the delay in execution of the mining lease was beyond their control and/or in fact, attributable to the Government will be dealt with going forward.

### Transfer of mineral concessions

A new proviso to Section 12A(2)(b) in the Principal Act has been inserted, in terms of which, the transfer of a mining lease would no longer entail the payment of any charges. However, it has also been clarified that the charges already paid for transfer shall not be refunded.

Further, Section 12A(6) in the Principal Act, which provided that the transfer of mineral concessions shall be allowed only for concessions which were granted through auction, has also been removed. The objective appears to be to remove the restrictions on transfer of mineral concessions for non-auctioned mines to attract fresh investment and new technology in the sector.

### Comment

The Government has been seeking to push these reforms since early 2020. While most of the amendments have been welcomed as being progressive, some of them have been mired in controversy from the very beginning.

In particular, the issue of legacy cases falling under Sections 10A(2)(b) and 2(c) has been a subject of extensive debate. At one point, even the Niti Aayog wrote to the Hon'ble Prime Minister's Office opposing this amendment on the ground that it could invite litigation and disrupt existing investments. However, the Statement of Objects and Reasons of the Bill seeks to justify this amendment on the ground that the existence of such cases is anachronistic and antagonistic to the auction regime. A challenge to some of these amendments is likely.

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