

COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS



LEARNING OUTCOMES

By the end of this Chapter, you will be able to:

- ❑ Explain the concepts of Compromise, Arrangement, Merger and Amalgamation
- ❑ Describe the powers of Company, Members, Central Government or Tribunal in respect of Compromise or Arrangements with members or creditors
- ❑ Explain Fast Track Mergers and Cross Border Mergers
- ❑ Elaborate Power of Central Government to order Mergers and Amalgamation in the public interest
- ❑ Explain as to how to acquire shares of shareholders dissenting from scheme or contract approved by majority
- ❑ Describe the provisions related to purchase of minority shareholding

1. INTRODUCTION

Mergers and acquisitions have always been a topic of corporate interest in the modern times. The complexity of the laws governing these modes of corporate restructuring makes them even more intriguing and mystifying.

Important terms:

'**Compromise**' means a **peaceful or willing settlement of a dispute** by mutual adjustments and concessions. Thus, in 'compromise' each party has to yield and give some concessions. Compromise assumes a dispute.

In '**arrangement**' there is no dispute, but **it modifies rights**. Such readjustment of rights may be with members or class of them or creditors or a class of them. The term 'arrangement' is very wide and can include a reorganization of capital.

The 'arrangement' or 'compromise' may be with the creditors or the members.

For **example** - Arrangement and compromise are as creditors agreeing to waive part of their dues; converting part or all dues of creditors into shares; extending time for payment; reduction in share capital by members; amalgamation; full or part transfer of undertaking, property or liabilities of the company to another company, etc.

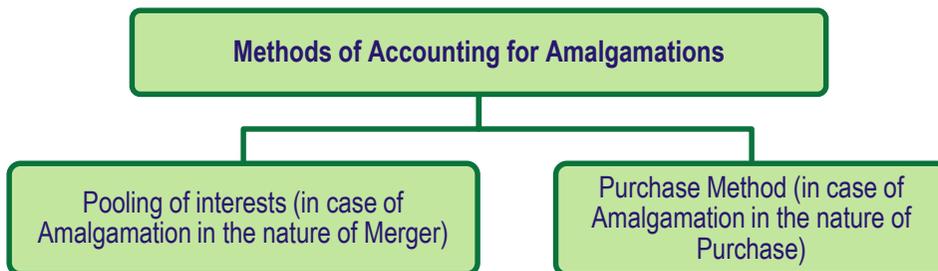
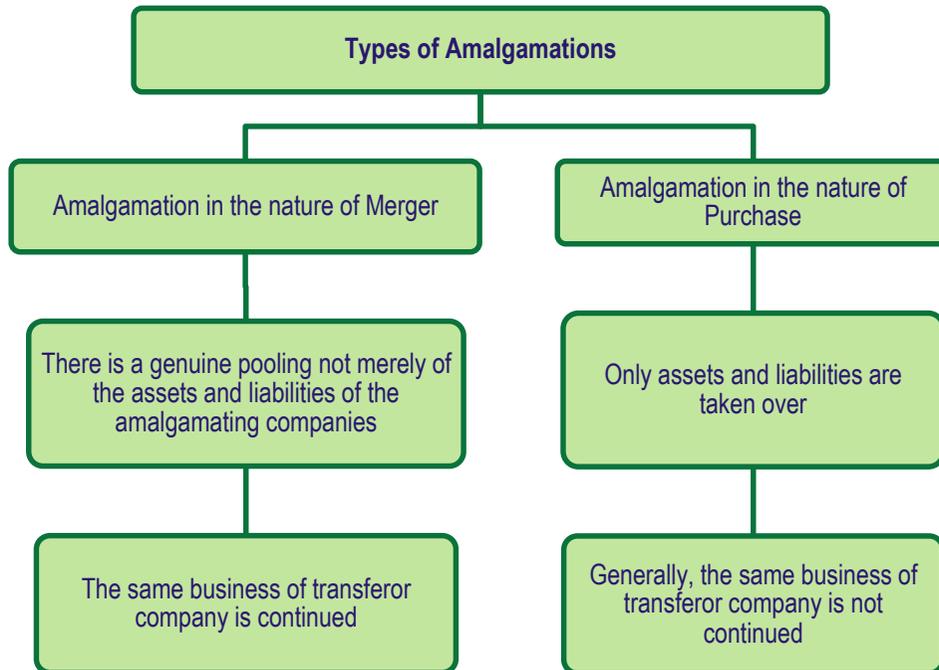
Amalgamation

- Amalgamation means an amalgamation pursuant to the provisions of the Companies Act, 2013 or any other statute which may be applicable to companies and includes 'merger'.
- Transferor Company means the company which is amalgamated into another company.
- Transferee Company means the company into which a transferor company is amalgamated.
- Merger, reconstruction and amalgamation are the schemes of compromise and arrangement.

Reconstruction

- It is usually of only one company while amalgamation involves two or more companies.
- 'Reconstruction' literally means 'building again'. It implies reorganization with alteration or modification of rights of members or creditors or both.
- Existing business is carried out in some altered form.
- Reconstruction usually involves reduction in value of shares, making fully paid up shares as partly paid so that further amounts can be called, transfer of undertaking to another company, take-over by another company, satisfaction of rights of shareholders by allotting them shares in new company etc.

Types of Amalgamations



Thus, amalgamation is blending of two or more existing undertakings into one undertaking. The shareholders of each blending company become substantially the shareholders in the company which is to carry on the blending undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company.

Now we will see the two types of amalgamations in detail -

Amalgamation in the Nature of Merger

Amalgamation in the nature of merger is an amalgamation which satisfies **all the following conditions** -

- (i) **All the assets and liabilities** of the transferor company become, after amalgamation, the assets and liabilities of the transferee company.
- (ii) Shareholders holding not less than **90% of the face value of the equity shares** of the transferor company (other than the equity shares already held therein, immediately before the amalgamation, by the transferee company or its subsidiaries or their nominees) **shall become equity shareholders of the transferee company** by virtue of the amalgamation.
- (iii) The **consideration** for the amalgamation **receivable** by those equity shareholders of the transferor company who agree to become equity shareholders of the transferee company is discharged by the transferee company **wholly by the issue of equity shares in the transferee company**, except that cash may be paid in respect of any fractional shares.
- (iv) The **business of the transferor company is intended to be carried on**, after the amalgamation, by the transferee company.
- (v) **No adjustment** is intended to be **made to the book values of the assets and liabilities of the transferor company** when they are incorporated in the financial statements of the transferee company except to ensure uniformity of accounting policies.

Amalgamation in the Nature of Purchase

Amalgamation in the nature of purchase is an amalgamation which **does not satisfy any one or more of the conditions** specified above.

Chapter XV covering Section **230 to 240** of Companies Act, 2013 contains the provisions relating to the Compromises, Arrangements and Amalgamations.

The compromise, arrangement, amalgamation and reconstruction **require the approval of National Company Law Tribunal (NCLT)**. Chapter XV is a complete code in itself which contains provisions regarding all forms of compromises with creditors and arrangements with members. The procedural aspects involved such as format of application to be made to National Company Law Tribunal (NCLT), form of notice and the procedural aspects involved with respect to the substantive law are covered under the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 made under Chapter XV of the Companies Act, 2013.

Important aspects of this Chapter are as follows:

- (i) This chapter provides the provisions which specify the **detailed disclosures to be made during the process of corporate restructuring**. This requirement of extensive disclosures is to ensure transparency and allows stakeholders to take decisions.
- (ii) Introduction of **voting by way of postal ballot** will ensure larger public participation.
- (iii) Introduction of **concept of dispensation** by providing a threshold for the dispensation of creditors' meetings.

- (iv) This chapter also requires **serving of notices to the various statutory authorities** with regard to the scheme, arrangement or restructuring, so that participation of various regulators may assist the Tribunal to take an informed decision.
- (v) Provisions relating to **takeover of listed companies** through the scheme of compromise or arrangement, emphasis on the pricing guidelines which the Securities and Exchange Board of India (SEBI) would prescribe ensuring uniformity in law.
- (vi) This chapter also contains provisions which **prohibit the maintenance of treasury stock**. The practice of indirectly holding investments through intermediaries is now prohibited and cannot be structured by companies.
- (vii) **Exit options to shareholders** through pre-determined formula or valuation can be given on merger of listed company with an unlisted company.
- (viii) Statement **certifying** implementation of the scheme shall be given by a Chartered Accountant or a Company Secretary.
- (ix) The provisions contained in this chapter are in consonance with the SEBI regulations and guidelines issued by RBI.
- (x) This chapter provides for **Fast Track amalgamations** between-
 - Two or more small companies, or
 - Holding company and its wholly owned subsidiaries.
- (xi) Enables **cross border amalgamations** between Indian Companies and Foreign Companies.
- (xii) Lays the mechanism under which the transferee company under a scheme or contract can acquire **shares of dissenting shareholders**.
- (xiii) Provides **exit method for minority shareholders**, and promoters to have 100% promoter entity so that balance between the interests of the promoters and minority shareholders may be maintained.
- (xiv) This chapter also provides the process of **amalgamation of companies in public interest**.
- (xv) **Books and Papers** of the amalgamated company/ the company whose shares have been acquired by another company shall **not be disposed** of without prior permission of the Central Government.
- (xvi) **Liability of the officers** of the transferor company on any offence committed under this Act shall be **retrospective** even after the merger, amalgamation or acquisition.



2. POWER TO COMPROMISE OR MAKE ARRANGEMENTS WITH CREDITORS AND MEMBERS [SECTION 230]

Power to Compromise or Make Arrangements with Creditors and Members [Section 230]

Sub-Sec. (1)	• Power of Tribunal to call for a meeting on an application filed for a compromise or arrangement
Sub-Sec. (2)	• Disclosures by Applicant
Sub-Sec. (3)	• Notice of meeting to be conducted on order of Tribunal
Sub-Sec. (4)	• Vote to the adoption of Compromise or Arrangement
Sub-Sec. (5)	• Notices to sectoral regulators to make representation, if likely to be affected by the compromise or arrangement
Sub-Sec. (6)	• Binding order of Tribunal
Sub-Sec. (7)	• Particulars to be stated in the order of Tribunal
Sub-Sec. (8)	• Filing of Order of Tribunal with Registrar
Sub-Sec. (9)	• The Tribunal may dispense with calling of a meeting
Sub-Sec. (10)	• Exemption in relation to Buy-back of Securities
Sub-Sec. (11)	• Inclusion of Takeover Offer
Sub-Sec. (12)	• Application to Tribunal by Aggrieved Party

Section 230 of Companies Act, 2013 deals with the basic procedures to be followed in respect of any compromise or arrangement, calling of meetings of creditors, members and other security-holders for approval of the scheme and other allied matters. It also describes powers of NCLT. The provisions of Section 230 are given below:

(1) **Power of Tribunal to call for a meeting on an application filed for a compromise or arrangement [Sub-section 1]):**

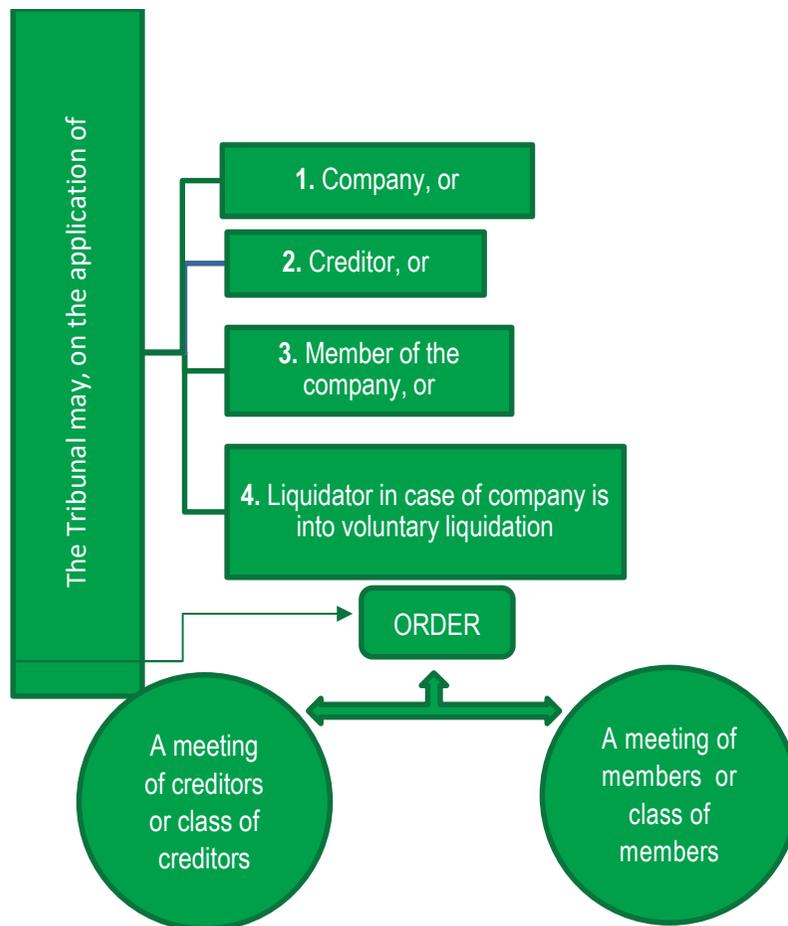
Where a compromise or arrangement is proposed between—

- (a) **a company and its creditors** or any class of them; or

(b) a company and its members or any class of them,
the Tribunal may, on the application of the-

- Company; or
- Creditor; or
- Member of the Company; or
- Liquidator (in case the company is going for voluntary liquidation)

order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be **called, held and conducted** in such manner as the Tribunal directs.



Explanation— For the purposes of this sub-section, **arrangement** includes a reorganization of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

(2) **Disclosures by person who makes an application for compromise or arrangement [Sub-section (2)]:**

The Company or any other person, by whom an application is made, shall disclose to the Tribunal by affidavit—

- (a) **all material facts** relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;
- (b) **reduction of share capital** of the company, if any, included in the compromise or arrangement;
- (c) **any scheme of corporate debt restructuring** consented to by **not less than seventy-five percent of the secured creditors in value**, including—
 - (i) a creditor's responsibility statement in the prescribed form;
 - (ii) safeguards for the protection of other secured and unsecured creditors;
 - (iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;
 - (iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and
 - (v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

(3) **Notice of meeting to be conducted on order of Tribunal [Sub-section (3)]:**

Where a meeting is proposed to be called in pursuance of an order of the Tribunal, a notice of such meeting shall be sent to:

- all the creditors or class of creditors;
- all the members or class of members; and
- the debenture-holders of the company,

individually at the address registered with the company.

Note: As per Section 230 (5), the notice of the meeting shall also be sent to the sectoral regulators and the authorities which are likely to be affected by the compromise or arrangement. This is explained later in the chapter.

The notice of the meeting to be conducted on the Order of Tribunal shall be sent to:

to all the creditors or class of creditors individually at the address registered with the company;

to all the members or class of members individually at the address registered with the company;

to the debenture-holders of the company individually at the address registered with the company;

Sectoral regulators and other authorities mentioned in section 230 (5).

Annexure with Notice: Notice of meeting shall be accompanied by a statement disclosing the following:

Annexure with Notice	details of the compromise or arrangement,
	a copy of the valuation report, if any, and
	explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and
	the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and
	such other matters as may be as prescribed under Rule 6 of the Companies (Compromises, arrangements and amalgamations) Rules, 2016.

Advertisement of notice: Such notice and other documents shall also be placed on -

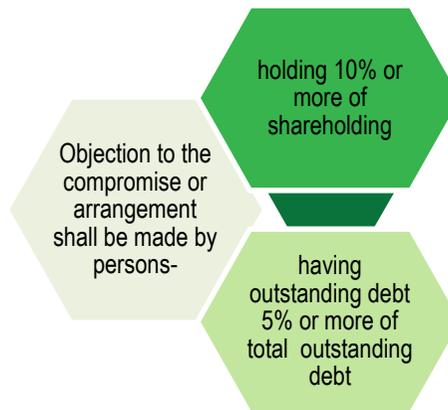
- the website of the company, if any, and
- in case of a listed company, these documents shall be sent to the Securities and Exchange Board of India (SEBI) and stock exchange where the securities of the companies are listed, for placing on their website and
- shall also be published in newspapers in the manner prescribed under Rule 7 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

Time period for the receipt of the copies of the compromise or arrangement: Where the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company.

(4) **Vote to the adoption of the compromise or arrangement [Sub-section (4)]:**

A notice shall provide that the persons **to whom the notice is sent may vote** in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within **one month** from the date of receipt of such notice:

Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent of the shareholding or having outstanding debt amounting to not less than five per cent of the total outstanding debt as per the latest audited financial statement.



(5) **Notices to sectoral regulators to make representation, if likely to be affected by the compromise or arrangement [Sub-section (5)]:**

A notice along with all the documents in such form as may be prescribed shall also be sent to-

- the Central Government,
- the income-tax authorities,
- the Reserve Bank of India,
- the Securities and Exchange Board,
- the Registrar,
- the respective stock exchanges,
- the Official Liquidator,
- the Competition Commission of India established under the Competition Act, 2002, if necessary,
- and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and

shall require that **representations**, if any, to be made by them shall be made within a period of **thirty days** from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

(6) **Binding order of Tribunal [Sub-section (6)]:**

Where, at a meeting held, majority of persons representing **three-fourths in value** of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, **agree to any compromise or arrangement** and if such compromise or arrangement is **sanctioned by the Tribunal** by an order, the same **shall be binding** on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator, "appointed under the Companies Act, 2013 or under the Insolvency and Bankruptcy Code, 2016, as the case may be," and the contributories of the company.

(7) **Particulars to be stated in the order [Sub-section (7)]:**

An order made by the Tribunal, shall provide for all or any of the following matters, namely:—

- (a) **where the compromise or arrangement provides for conversion of preference shares into equity shares**, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;
- (b) the **protection of any class** of creditors;
- (c) if the compromise or arrangement results in the **variation of the shareholders' rights**, it shall be given effect to under the provisions of section 48;
- (d) if **the compromise or arrangement is agreed to by the creditors** under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction (BIFR) established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;
- (e) **such other matters** including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement:

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

(8) **Filing of order of tribunal with registrar [Sub-section (8)]:**

The order of the Tribunal shall be filed with the Registrar by the company **within** a period of **thirty days** of the receipt of the order.

(9) **The Tribunal may dispense with calling of a meeting** of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement. **[Sub-section (9)]**

(10) **Compromise in relation to buy-back of securities [sub-section (10)]:**

No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.

(11) **Inclusion of takeover offer [Sub-section (11)]:**

Any compromise or arrangement may include **takeover offer** made in such manner as may be prescribed.

Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board of India (SEBI).

(12) **Application to Tribunal by aggrieved party [Sub-section (12)]:**

An aggrieved party may make an **application to the Tribunal** in the event of any grievances with respect to the **takeover offer of companies other than listed companies** in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.

Explanation— For the removal of doubts, it is hereby declared that the provisions of section 66 (reduction of share capital) shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section.

Since reduction of share capital requires an application to Tribunal by company after passing Special Resolution and on confirmation by Tribunal, reduction of share capital gets effected. However, in the case of compromise under section 230 if that results into reduction of capital, compliance of section 66 is not required to be made separately in such cases.

Example 1: Icon Stars Limited applied to the Tribunal for a scheme of arrangement between the company and its members under section 230 of the Companies Act, 2013. Accordingly, a meeting was ordered by the Tribunal to be conducted between the company and its members for considering the scheme of arrangement. Some of the members of the company to whom notices were sent had raised certain objections to the scheme of arrangement.

As per the proviso to the provisions section 230 (4) of the Companies Act, 2013, any objection to the compromise or arrangement shall be made only by persons holding **not less than ten percent** of the shareholding or having outstanding debt amounting to not less than five percent of the total outstanding debt as per latest audited financial statements.

1. Supreme Court in *Joint Commissioner of Income-tax (OSD) v. Reliance Jio Infocomm Ltd.*, September 9, 2022 laid that where IT department opposed composite scheme of arrangement of petitioner companies on ground that scheme was a tool to avoid and evade taxes, NCLT as well as

NCLAT having clarified that IT department was entitled to take out appropriate proceedings for recovery of any tax statutorily due from transferor or transferee company or any other person who was liable for payment of such tax due, impugned judgment and orders passed by NCLAT as well as NCLT approving scheme could not have been interfered with.

As per the fact, a composite scheme of arrangement between petitioner companies was approved by NCLT. Income tax department opposed said scheme on ground that conversion of preference shares into loan would substantially reduce profitability of demerged company, which would act as a tool to avoid and evade taxes. NCLAT by impugned order held that without going to record and without placing any evidence to substantiate allegation by appearing before Tribunal, it was not open to Income-tax department to hold that overall scheme of arrangement was giving undue favour to shareholders of company and resulted into tax avoidance and approval by NCLT to such scheme was not to be interfered with. On appeal before Supreme Court, Joint Commissioner of Income-tax submitted that impugned orders and/or sanction of Scheme might come in way of Department while framing assessment and to that extent, interest of revenue would be affected. However, NCLT as well as NCLAT had already clarified that IT department would be entitled to take out appropriate proceedings for recovery of any tax statutorily due from transferor or transferee company or any other person who was liable for payment of such tax due. Held, therefore, that impugned judgment and orders passed by NCLAT as well as NCLT approving scheme could not have been interfered with.

2. National Company Law Appellate Tribunal, New Delhi, in *Ramesh Kumar Chaudhary v. Anju Agarwal, Liquidator of Shree Bhawani Paper Mills Ltd.*, March 15, 2022, laid down that Scheme for Compromise or Arrangement submitted under section 230 ought to have consent of not less than 75 per cent of secured creditors, and an affidavit to that effect ought to accompany with Scheme and obligation to obtain consent of 75 per cent of creditors is on person who proposes Scheme; where no opportunity was provided to proposers to explain and clarify their scheme, they were to be allowed time to submit revised scheme.



3. POWER OF TRIBUNAL TO ENFORCE COMPROMISE OR ARRANGEMENT [SECTION 231]

The provisions of section 231 of the Companies Act, 2013 are detailed below:

- (1) **Power of Tribunal to implement the order:** Where the Tribunal makes an order under section 230 sanctioning a compromise or an arrangement in respect of a company, it—
 - (a) shall have **power to supervise the implementation** of the compromise or arrangement; and
 - (b) may, at the time of making such order or at any time thereafter, **give such directions** in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the **proper implementation** of the compromise or arrangement.

- (2) **Passing of Winding up order by Tribunal:** If the Tribunal is satisfied that the compromise or arrangement sanctioned under **section 230 cannot be implemented satisfactorily with or without modifications**, and the company is unable to pay its debts as per the scheme, it may make an order for winding up the company and such an order shall be deemed to be an order made under section 273.
- (3) **Retrospective effect of order:** The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Act sanctioning a compromise or an arrangement.

Powers of Tribunal to enforce compromise or arrangement sanctioned u/s 230 [Section 231]	Power to supervise the implementation of sanctioned compromise or arrangement.
	Power to give necessary directions or make necessary modifications in the compromise or arrangement, if required for its proper implementation .
	Power to make an order for winding up if compromise or arrangement cannot be implemented satisfactorily and the company is unable to pay its debts as per the Scheme.

The National Company Law Tribunal, New Delhi Bench, in *Tata Teleservices (Maharashtra) Ltd., In re*, under Section 231, read with sections 231 and 232, of the Companies Act, 2013 laid down that where all statutory compliance had been completed, scheme of arrangements was to be approved.

As per the facts, Telecommunication companies Bharti Airtel (resulting company) and Tata Teleservices (demerged company) sought for sanction of composite scheme of arrangement. Newspaper publication as directed by Tribunal in first motion application was effectively complied. Objection raised by unsecured creditor and shareholder was dismissed on the ground of having no locus as objectors were not meeting mandatory minimum threshold of 5 per cent prescribed in section 230 (4) of the Companies Act, 2013. Regional Director, Ministry of Corporate Affairs, Department of Income-tax and Department of Telecommunication had approved arrangement/scheme. Terms of composite scheme indicated that resulting company undertook to comply with terms/conditions, guidelines for transfer/merger and it further undertook to meet tax liabilities, debts, dues and obligations of demerged company. Accounting treatment proposed in scheme was in conformity with Accounting Standards specified in section 133 of the Companies Act, 2013. Members/creditors of resulting company had also approved the scheme in question. No investigation or proceedings were pending against these companies. Considering, since all statutory compliances had been fulfilled, it was held that impugned scheme of arrangements was to be approved and appropriate directions were to be issued.



4. MERGER AND AMALGAMATION OF COMPANIES [SECTION 232]

Section 232 of Companies Act, 2013 empowers NCLT to order merger or amalgamation. The provisions are detailed out below:

(1) **Filing of an application for purpose of reconstruction of companies involving merger/ amalgamation or transfer of undertaking, property etc. [Sub-section (1)]:**

Where an application is made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal—

- (a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and
- (b) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies,

the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (3) to (6) of section 230 shall apply *mutatis mutandis*.

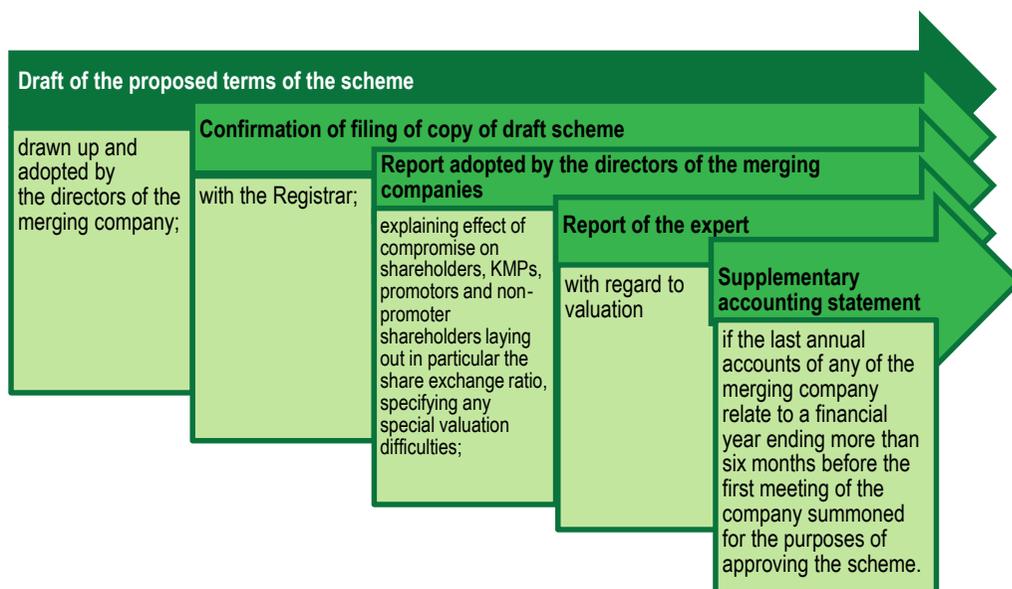
(2) **Circulation of information for the meeting by the merging companies / the companies in respect of which a division is proposed [Sub-section (2)]:**

Where an order has been made by the Tribunal as above, merging companies or the companies in respect of which a division is proposed, shall also be required to circulate the following for the meeting so ordered by the Tribunal, namely:—

- (a) the **draft** of the proposed terms of the scheme drawn up and adopted by the Directors of the merging company;
- (b) confirmation that a copy of the draft scheme has been **filed** with the Registrar;
- (c) a **report** adopted by the Directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the **share exchange ratio**, specifying any special valuation difficulties;
- (d) the report of the expert with regard to **valuation**, if any;

- (e) a supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.

Merging companies or the companies in respect of which a division is proposed, shall circulate the following for the meeting:



- (3) **Order of Tribunal on the agreement of compromise or arrangement [Sub-section (3)]:**
The Tribunal, after satisfying itself that the procedure specified in sub-sections (1) and (2) has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:—
- (a) **the transfer to the transferee company** of the whole or any part of the undertaking, property or liabilities of the transferor company from a date to be determined by the parties unless the Tribunal, for reasons to be recorded by it in writing, decides otherwise;
- (b) **the allotment or appropriation by the transferee company** of any shares, debentures, policies or other like instruments in the company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person:

Provided that a transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether

on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished;

- (c) **the continuation by or against the transferee company of any legal proceedings** pending by or against any transferor company on the date of transfer;
- (d) **dissolution, without winding-up**, of any transferor company;
- (e) **the provision to be made for any persons who**, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement;
- (f) **where share capital is held by any non-resident shareholder** under the foreign direct investment norms or guidelines specified by the Central Government or in accordance with any law for the time being in force, the allotment of shares of the transferee company to such shareholder shall be in the manner specified in the order;
- (g) **the transfer of the employees of the transferor company** to the transferee company;
- (h) **where the transferor company is a listed company and the transferee company is an unlisted company,—**
 - (A) the transferee company shall remain an unlisted company until it becomes a listed company;
 - (B) if shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre-determined price formula or after a valuation is made, and the arrangements under this provision may be made by the Tribunal:

Provided that the amount of payment or valuation under this clause for any share shall not be less than what has been specified by the Securities and Exchange Board under any regulations framed by it;

- (i) **where the transferor company is dissolved**, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation; and
- (j) such **incidental, consequential and supplemental matters** as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out:

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a **certificate by the company's auditor has been filed with the Tribunal** to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.



(4) **Effect of an order of tribunal [Sub-section (4)]:**

Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to the transferee company and the liabilities shall be transferred to and become the liabilities of the transferee company and any property may, if the order so directs, be freed from any charge which shall by virtue of the compromise or arrangement, cease to have effect.

(5) **Filing of certified copy of order with registrar [Sub-section (5)]:**

Every company in relation to which the order is made shall cause a certified copy of the order to be filed with the Registrar for registration **within thirty days** of the receipt of certified copy of the order.

(6) **Effective date specified in scheme [Sub-section (6)]:**

The scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

(7) **Filing of duly certified statement of compliance of scheme with registrar [Sub-section (7)]:**

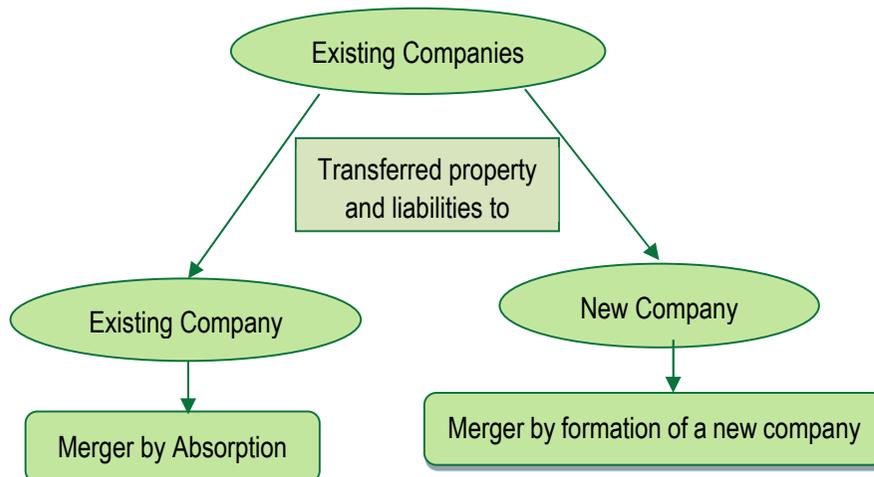
Every company in relation to which the order is made shall, until the completion of the scheme, file a statement in such form and within such time as may be prescribed with the Registrar every year duly certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.

(8) **In case of contravention [Sub-section (8)]:**

If a company fails to comply with sub-section (5), the company and every officer of the company who is in default shall be liable to a penalty of twenty thousand rupees, and where the failure is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such failure continues, subject to a maximum of three lakh rupees.

Explanation — For the purposes of this section,—

- (i) **in a scheme involving a merger**, where under the scheme the undertaking, property and liabilities of one or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to another existing company, it is a **merger by absorption**, or where the undertaking, property and liabilities of two or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to a new company, whether or not a public company, it is a **merger by formation of a new company**;



- (ii) **references to merging companies** are in relation to a merger by absorption, to the transferor and transferee companies, and, in relation to a merger by formation of a new company, to the transferor companies;
- (iii) **a scheme involves a division**, where under the scheme the undertaking, property and liabilities of the company in respect of which the compromise or arrangement is

proposed are to be divided among and transferred to two or more companies each of which is either an existing company or a new company; and

- (iv) **property includes** assets, rights and interests of every description and liabilities include debts and obligations of every description.

1. The National Company Law Tribunal of Chandigarh Bench in *Panasonic India (P.) Ltd., In re*, May 19, 2022 passed an order based on the principle that where proposed scheme of amalgamation between petitioner companies was for business consolidation and tax arrangements were merely a consequential fall out of implementation of scheme, it was to be sanctioned.

In the said case, the companies filed instant application under sections 230 to 232 seeking sanction of proposed scheme of amalgamation between them. Income-tax department raised objection against scheme on ground that there was huge accumulated loss in hands of Transferor Company and scheme was a vehicle to transfer accumulated losses to Transferee Company. It was held that since treatment of carrying forward and set-off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger etc. of companies are clearly spelt out under section 72A and said issue could be examined at time of assessment of petitioner companies, there was no merit in objection of income-tax department. As proposed scheme was for business consolidation and tax arrangements were merely consequential fall out of implementation of scheme and scheme contemplated between petitioner companies appeared to be prima facie in compliance with requirement stipulated under relevant sections of the Companies Act, the proposed scheme was to be sanctioned.

2. The National Company Law Appellate Tribunal, New Delhi in *Ericsson India (P.) Ltd., In re*, laid down that where merger was of a wholly owned subsidiary company into its holding company, no shares would be allotted as consideration pursuant to merger; proposed scheme would not result in any dilution in shareholding of shareholders of transferee company and net worth of transferee company being positive, meeting of shareholders was to be dispensed with.



5. POWER TO ACQUIRE SHARES OF SHAREHOLDERS DISSENTING FROM SCHEME OR CONTRACT APPROVED BY MAJORITY [SECTION 235]

Section 235 of the Companies Act, 2013 contains provisions providing for acquiring of shares of shareholders dissenting from the scheme or contract approved by majority.

(1) Basic requirements as to acquisition of shares [Sub-section (1)]:

- **Approval by majority of shareholders:** The scheme or contract involving the transfer of shares or any class of shares in a company (the transferor company) to another company (the transferee company) has been **approved by the holders of not less than 9/10th in value of the shares** whose transfer is involved.

- **Time Limit for receiving approval:** The approval from 9/10th of the shareholders in value or more shall be received within **four months** after making of an offer in that behalf by the transferee company.
- **Acquisition of the remaining shares of dissenting shareholders:** The transferee company shall express its desire to acquire the remaining shares of dissenting shareholders within **two months** after the expiry of the said four months and shall give notice in the prescribed manner [as per Rule 26 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, notice needs to be sent in Form No. CAA-14] to any dissenting shareholder that it desires to acquire his shares. The shares already held at the date of the offer by Transferee Company, or by a nominee of the transferee company or its subsidiary companies shall not be counted for this purpose.

(2) Order of Tribunal to acquire shares of dissenting shareholders [Sub-section (2)]:

Where a notice under sub-section (1) is given, the transferee company shall, unless on an application made by the dissenting shareholder to the Tribunal, **within one month** from the date on which the notice was given and the Tribunal thinks fit to order otherwise, be entitled to and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company.

Explanation — “**Dissenting shareholder**” includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

(3) Application by dissenting shareholders [Sub-section (3)]:

- (i) Where a notice has been given by the transferee company **on an application made by the dissenting shareholder** and the Tribunal has not, made an order to the contrary (*i.e.* order made in favor of the company), the transferee company shall, on the expiry of one month from the date on which the notice has been given, or,
- (ii) if an application to the Tribunal by the dissenting shareholder is then pending (nothing is required to be done); after that **application has been disposed of-**
shall send a copy of the notice to the transferor company together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferor company and on its own behalf by the transferee company, and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which that company is entitled to acquire,
- (iii) The **transferor company shall—**
 - (a) thereupon register the transferee company as the holder of those shares; and
 - (b) within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the amount or

other consideration representing the price payable to them by the transferee company.

- (4) **Separate Bank account for disbursement to entitled shareholders [Sub-section (4)]:** Any sum received by the transferor company under this section shall be paid into a separate bank account, and any such sum and any other consideration so received shall be held by that company in trust for the several persons entitled to the shares in respect of which the said sum or other consideration were respectively received and **shall be disbursed to the entitled shareholders within sixty days.**

- (5) **Scheme/contract made before the commencement of Act[Sub-section (5)]:**

In relation to an offer made by a transferee company to shareholders of a transferor company before the commencement of this Act, this section shall have effect with the following modifications, namely:—

- (a) in sub-section (1), for the words “the shares whose transfer is involved other than shares already held at the date of the offer by, or by a nominee of, the transferee company or its subsidiaries,”, the words “the shares affected” shall be substituted; and
- (b) in sub-section (3), the words “together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferee company and on its own behalf by the transferor company” shall be omitted.

Example 2: Special Furnishings Limited, a company incorporated under the Companies Act, 2013 applied to the Tribunal for a scheme of arrangement under section 230 of the Companies Act, 2013. The Tribunal by way of an order approved the scheme of arrangement involving amalgamation with Flip Furnitures and Fixtures Limited under section 232 of the Act. After due formalities, the requisite number of shareholders gave the approval to become the shareholders of Flip Furnitures and Fixtures Limited under section 235 of the Act. However, some of the shareholders did not consent to become the shareholders of Flip Furnitures and Fixtures Limited. In this case specified legal procedure shall be followed by dissenting shareholders considering the notice which has been given by Flip Furnitures and Fixtures Limited to dissenting shareholders mentioning that it desires to acquire their shares.

As per the provisions of section 235 of the Act, where a notice by the transferee company has been given to dissenting shareholders that it desires to acquire their shares, the dissenting shareholders may make an application to the Tribunal within one month from the date on which the notice was given for the Tribunal to pass an order otherwise than the acquisition of shares by transferee company. Accordingly, the dissenting shareholders shall make an application to the Tribunal within a period of one month from the date of notice given by Flip Furnitures and Fixtures Limited to pass an order otherwise than the acquisition of shares by Flip Furnitures and Fixtures Limited.



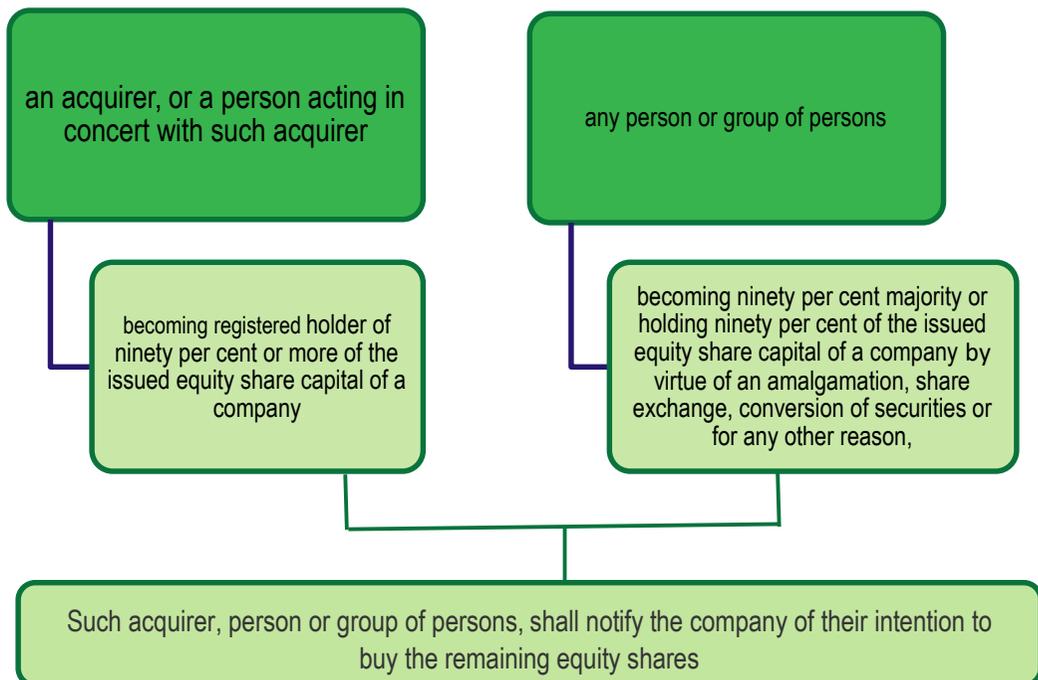
6. PURCHASE OF MINORITY SHAREHOLDING [SECTION 236]

The provisions of Section 236 of the Companies Act, 2013 deal with purchase of minority shareholding.

(1) Notifying company for purchase of minority shareholding [Sub-section (1)]:

- **In the event of an acquirer, or a person acting in concert with such acquirer** becoming registered holder of ninety per cent. or more of the issued equity share capital of a company, or
- **In the event of any person or group of persons** becoming ninety per cent. majority or holding ninety per cent. of the issued equity share capital of a company, by virtue of an amalgamation, share exchange, conversion of securities or for any other reason,

such acquirer, person or group of persons, as the case may be, shall notify the company of their intention to buy the remaining equity shares.



(2) Offer of equity shares to minority shareholders by acquirer, person or group of persons [Sub-section (2)]:

The acquirer, person or group of persons shall offer to the minority shareholders of the company for buying the equity shares held by such shareholders at a price determined on

the basis of valuation by a registered valuer in accordance with Rule 27 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

(3) **Offer to majority shareholder to purchase the minority equity shareholding [Sub-section (3)]:**

The minority shareholders of the company may offer to the majority shareholders to purchase the minority equity shareholding of the company at the price determined in accordance with Rule 27 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

(4) **Deposit of amount in separate bank account [Sub-section (4)]:**

The majority shareholders shall deposit an amount equal to the value of shares to be acquired by them under sub-section (2) or sub-section (3), as the case may be, in a separate bank account to be operated by the company whose shares are being transferred for at least one year for payment to the minority shareholders and such amount shall be disbursed to the entitled shareholders within sixty days:

Provided that such disbursement shall continue to be made to the entitled shareholders for a period of one year, who for any reason had not been made disbursement within the said period of sixty days or if the disbursement have been made within the aforesaid period of sixty days, fail to receive or claim payment arising out of such disbursement.

(5) **Company whose shares are being transferred to act as a transfer agent in the event of purchase [Sub-section (5)]:**

In the event of a purchase under this section, the company whose shares are being transferred shall act as a transfer agent for receiving and paying the price to the minority shareholders and for taking delivery of the shares and delivering such shares to the majority, as the case may be.

(6) **Company whose shares are being transferred to issue shares [Sub-section (6)]:**

In the absence of a physical delivery of shares by the shareholders within the time specified by the company,

- the share certificates shall be deemed to be cancelled, and
- the company whose shares are being transferred shall be authorised to issue shares in lieu of the cancelled shares and complete the transfer in accordance with law, and
- make payment of the price out of deposit made under sub-section (4) by the majority in advance to the minority by despatch of such payment.

(7) **Right of shareholders to make an offer for sale of minority equity shareholding [Sub-section (7)]:**

In the event of a majority shareholder or shareholders requiring a full purchase and making payment of price by deposit with the company for-

- any shareholder or shareholders who have died or ceased to exist, or
- whose heirs, successors, administrators or assignees have not been brought on record by transmission,

the right of such shareholders to make an offer for sale of minority equity shareholding shall continue and be available for a period of three years from the date of majority acquisition or majority shareholding.

(8) **Sharing of additional compensation [Sub-section (8)]:**

Where the shares of minority shareholders have been acquired in pursuance of this section, and as on or prior to the date of transfer following such acquisition, the shareholders holding seventy-five per cent. or more minority equity shareholding negotiate or reach an understanding on a higher price for any transfer, proposed or agreed upon, of the shares held by them without disclosing the fact or likelihood of transfer taking place on the basis of such negotiation, understanding or agreement,-

the majority shareholders shall share the additional compensation so received by them with such minority shareholders on a pro rata basis.

Explanation—For the purposes of this section, the expressions “acquirer” and “person acting in concert” shall have the meanings respectively assigned to them in clause (b) and clause (e) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

Example 3: The issued equity share capital of ABC Limited is INR 50 crore and 90% of such issued capital has been acquired by the XYZ Limited as a part of amalgamation. Out of remaining minority shareholding of INR 5 crore, share worth INR 4 crore are held by Mr. “A”. Hence, if he negotiates with the company a price higher than that decided under the scheme, the extra amount / compensation received by Mr. “A” shall be allocated to all minority shareholders on *pro-rata* basis.

(9) **Determination of price for purchase of minority shareholders:**

Rule 27 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 prescribes that the registered valuer shall determine the price to be paid by the acquirer, person or group of persons referred to in sub-section (1) of section 236 of the Act for purchase of equity shares of the minority shareholders of the company in accordance with the prescribed rules.

(10) **On failure of acquisition of shares [Sub-section (9)]:**

When a shareholder or the majority equity shareholder fails to acquire full purchase of the shares of the minority equity shareholders, then, the provisions of this section shall continue to apply to the residual minority equity shareholders, even though,—

- (a) the shares of the company of the residual minority equity shareholder had been delisted; and

- (b) the period of one year or the period specified in the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, had elapsed.

Example 4: Ram Software Developers Limited, a company incorporated under the Companies Act, 2013 has paid up equity share capital of ₹ 1,00,00,000 (face value of ₹ 10 each divided into 10,00,000 shares). The company's financial position is gradually deteriorating since last 3 years. Rajan Software Limited, which is in the same line of business as that of Ram Software Developers Limited, has paid up equity share capital of ₹ 5,00,00,000 divided into 5,00,00,000 equity shares of Re. 1 each. It has proposed to take over Ram Software Developers Limited.

In order to complete the amalgamation in the nature of merger, minimum shareholders who are required to become the shareholders of Rajan Software Limited shall be such shareholders who hold shares not less than 90% in value of Ram Software Developers Limited.

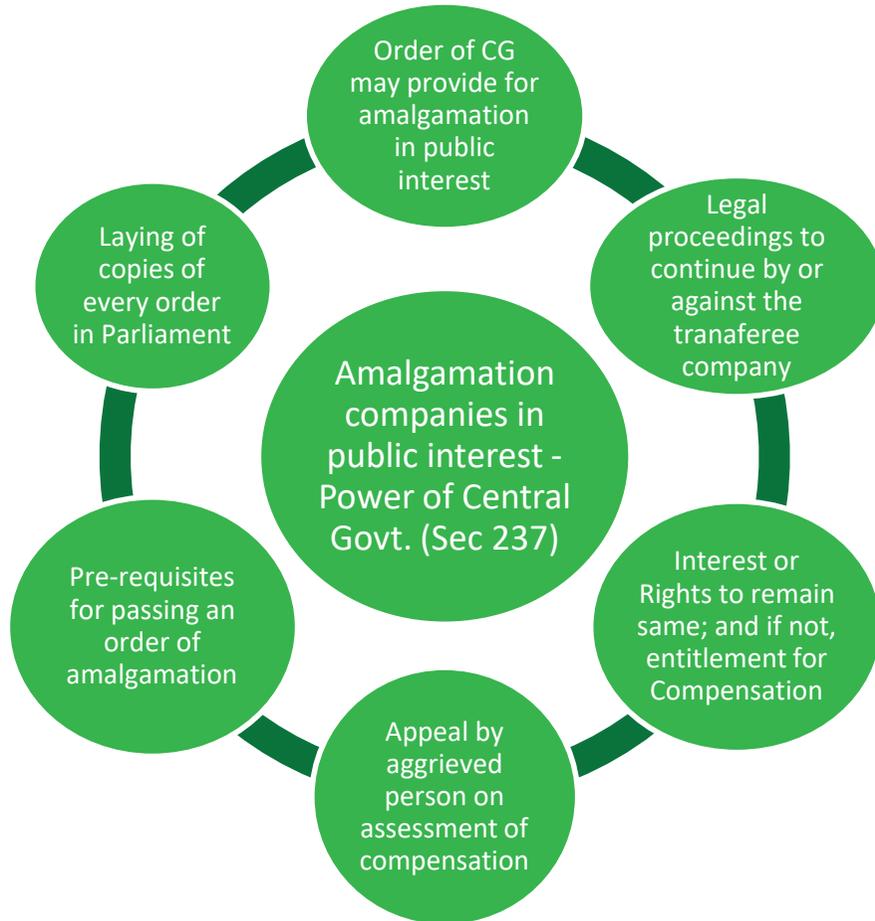
The National Company Law Appellate Tribunal, New Delhi, in *S. Gopakumar Nair v. OBO Bettermann India (P.) Ltd.* held that where majority shareholders of company purchased shareholding of minority shareholders at an agreed price to be decided by mutually acceptable Chartered Accountant and did not get it valued from registered valuer, same was in violation of provisions of section 236.

In the given case, Respondent 2 was holding 76 per cent shareholding in Respondent 1 company. Appellants, the minority shareholders filed oppression and mismanagement petition against respondents alleging that Respondent 2 made attempts to buy out their minority shareholdings and when they did not respond, Respondent 2 issued notices under section 236 and went ahead to buy shares of appellants in spite of their resistance. It was noted that section 236 (2) provides that offer to minority shareholders of company for buying equity shares held by said shareholders has to be at a price determined on basis of valuation by a registered valuer. Admittedly, Respondent 2 issued notice to appellants to sell their shares at agreed price to be decided by mutually acceptable Chartered Accountant and did not get it valued from registered valuer. It was thus held that notice given to appellants under section 236 and subsequent act of cancelling shares of appellants were illegal and was to be set aside.



7. POWER OF CENTRAL GOVERNMENT TO PROVIDE FOR AMALGAMATION OF COMPANIES IN PUBLIC INTEREST [SECTION 237]

Section 237 of the Companies Act, 2013 states the power of Central Government to provide for Amalgamation of companies in public interest.



(1) **Central Government may by order provide for amalgamation in public interest [Sub-section (1)]:**

Where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution, with such property, powers, rights, interests, authorities and privileges, and with such liabilities, duties and obligations, as may be specified in the order.

(2) **Continuation of any legal proceedings by or against the transferee company [Sub-section (2)]:**

The order may also provide for the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company and such consequential, incidental and supplemental provisions as may, in the opinion of the Central Government, be necessary to give effect to the amalgamation.

(3) **Interest or Rights to remain same; and if not, entitlement for Compensation [Sub-section (3)]:**

Every member or creditor, including a debenture holder, of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the transferee company as he had in the company of which he was originally a member or creditor, and in case the interest or rights of such member or creditor in or against the transferee company are less than his interest in or rights against the original company, he shall be entitled to compensation to that extent, which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the Official Gazette, and the compensation so assessed shall be paid to the member or creditor concerned by the transferee company.

(4) **Appeal by aggrieved person on assessment of compensation [Sub-section (4)]:**

Any person aggrieved by any assessment of compensation made by the prescribed authority under sub-section (3) may, within a period of thirty days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.

(5) **Pre-requisites for passing an order of amalgamation [Sub-section (5)]:**

No order shall be made under this section unless—

- (a) a copy of the **proposed order has been sent in draft** to each of the companies concerned;
- (b) the **time for preferring an appeal** under sub-section (4) has expired, or where any such appeal has been preferred, the appeal has been **finally disposed off**; and
- (c) the Central Government has considered, and made such **modifications**, if any, in the **draft order** as it may deem fit in the light of suggestions and objections which may be received by it from any such company within such period as the Central Government may fix in that behalf, not being less than two months from the date on which the copy aforesaid is received by that company, or from any class of shareholders therein, or from any creditors or any class of creditors thereof.

(6) **Copies of every order to be laid in Parliament [Sub-section (6)]:**

The copies of every order made under this section shall, as soon as may be after it has been made, be laid before each House of Parliament.



8. REGISTRATION OF OFFER OF SCHEMES INVOLVING TRANSFER OF SHARES [SECTION 238]

The provisions of Section 238 of the Companies act, 2013 provide for registration of offer of schemes involving transfer of shares.

(1) **Registration of circular / offer involving transfer of shares [Sub-section (1)]:**

In relation to every offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company under section 235,—

- (a) **every circular containing such offer and recommendation** to the members of the transferor company by its directors to accept such offer shall be accompanied by such information and in such manner as prescribed in Rule 28 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016;
- (b) **every such offer** shall contain a statement by or on behalf of the transferee company, disclosing the steps it has taken to ensure that necessary cash will be available; and
- (c) **every such circular shall be presented to the Registrar** for registration and no such circular shall be issued until it is so registered:

Provided that the Registrar may refuse, for reasons to be recorded in writing, to register any such circular which does not contain the information required to be given under clause (a) or which sets out such information in a manner likely to give a false impression, and communicate such refusal to the parties within **thirty days** of the application.

- (2) **Appeal against the order of the Registrar [Sub-section (2)]:** An appeal shall lie to the Tribunal against an order of the Registrar refusing to register any circular under sub-section (1).

(3) **Penalty for non-registration [Sub-section (3)]:**

The director who issues a circular which has not been presented for registration and registered under clause (c) of sub-section (1), shall be liable to a penalty of one lakh rupees.



9. PRESERVATION OF BOOKS AND PAPERS OF AMALGAMATED COMPANIES [SECTION 239]

According to Section 239 of the Companies Act, 2013, the books and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company under this Chapter shall **not be disposed of without the prior permission of the Central Government** and before granting such permission, that Government may **appoint a person to examine** the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.



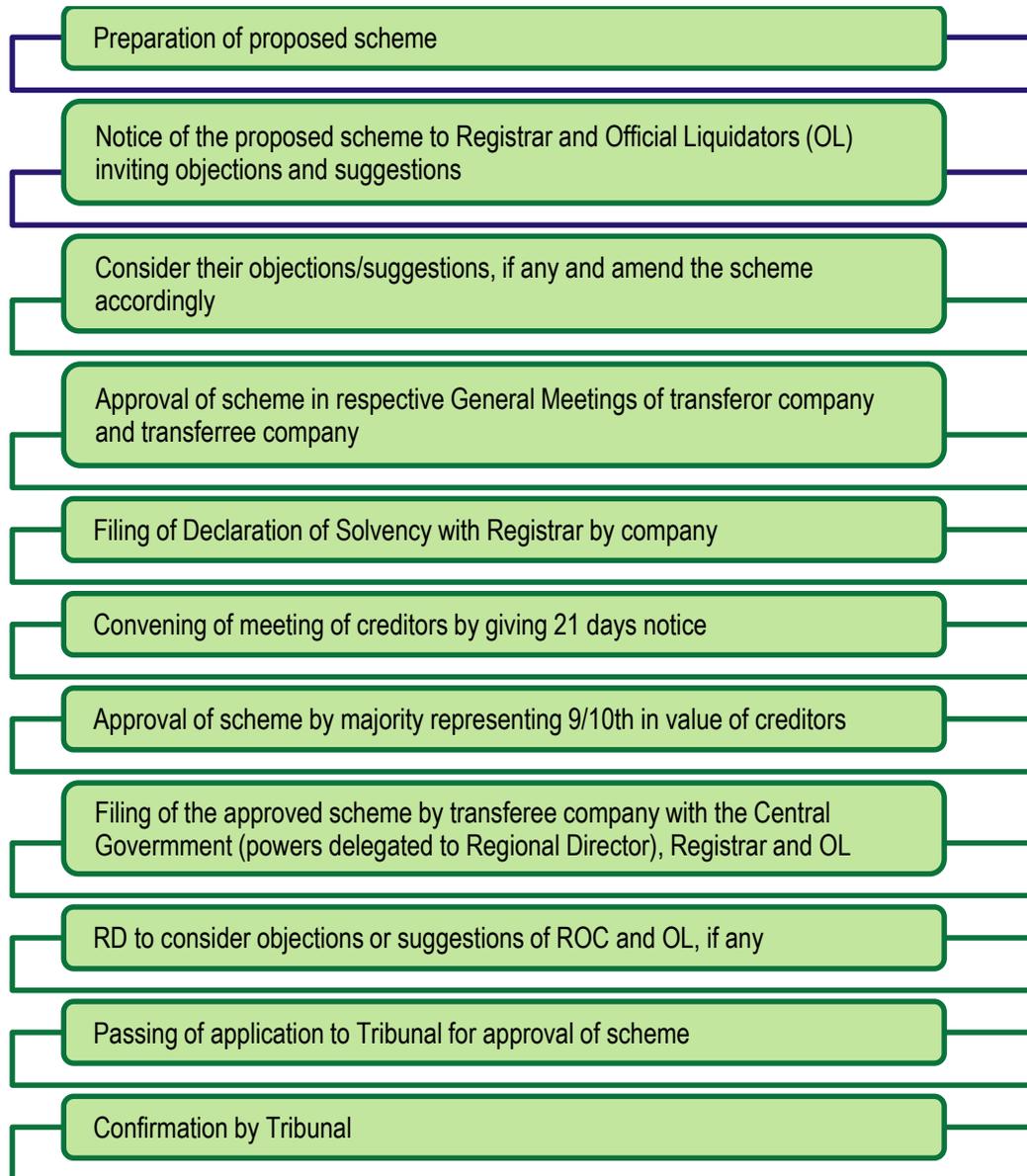
10. LIABILITY OF OFFICERS IN RESPECT OF OFFENCES COMMITTED PRIOR TO MERGER, AMALGAMATION, ETC. [SECTION 240]

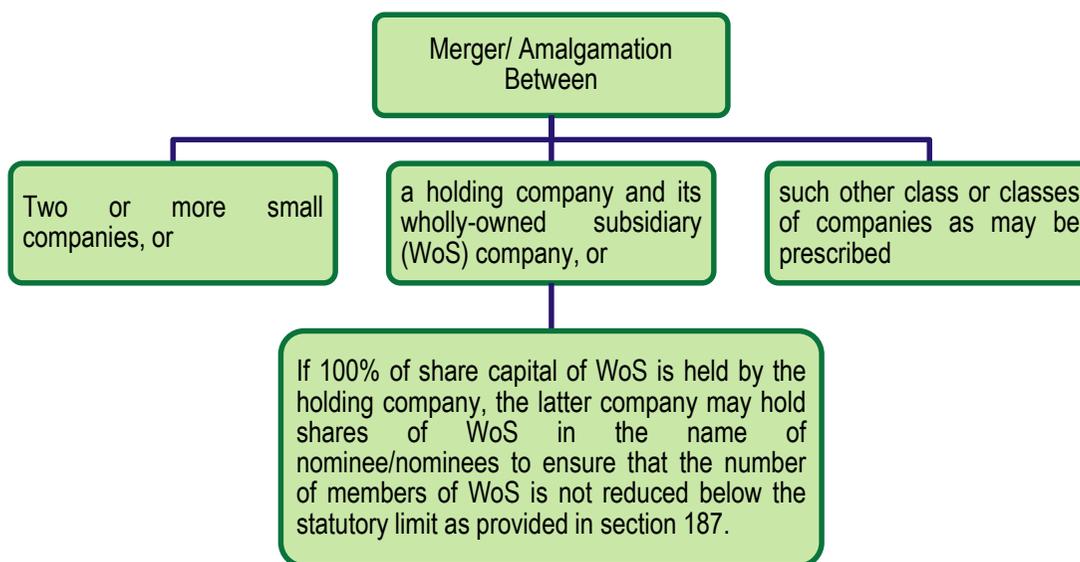
Retrospective effect of liability: Section 240 of the Companies Act, 2013 states that notwithstanding anything in any other law for the time being in force, the liability in respect of offences committed under this Act by the officers in default, of the transferor company prior to its merger, amalgamation or acquisition **shall continue after such merger, amalgamation or acquisition.**



11. FAST TRACK MODE OF MERGER OR AMALGAMATION OF CERTAIN COMPANIES [SECTION 233]

Overview of Section 233 of the Companies Act, 2013 is given below:





(1) **Companies who may enter into scheme of merger or amalgamation [Sub-section (1)]:**

A scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or class or classes of companies *i.e.*, between two or more start-up companies or one or more start-up company with one or more small company [given in Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016].

Explanation- For the purposes of this sub-rule, “start-up company” means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognised as such in accordance with notification number G.S.R. 127 (E), dated the 19th February, 2019 issued by the Department for Promotion of Industry and Internal Trade.

A scheme of merger or amalgamation may be entered, subject to following conditions:

- (a) a **notice of the proposed scheme inviting objections or suggestions**, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within thirty days is issued by the transferor company or companies and the transferee company;
- (b) the **objections and suggestions received are considered by the companies** in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent. of the total number of shares;
- (c) each of the companies involved in the merger files a **declaration of solvency**, in the prescribed form, with the Registrar of the place where the registered office of the company is situated; and

- (d) the **scheme is approved by majority** representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.
- (2) **Filing of copy of scheme with the Central Government, Registrar and the Official Liquidators [Sub-section (2)]:**
- The transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidators where the registered office of the company is situated.
- (3) **Approval or Rejection of scheme [Sub-sections (3) and (4)]:**
- On the receipt of the scheme if the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies.
- If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of **thirty days**.
- If no such communication is made, it shall be presumed that he has no objection to the scheme.
- (4) **Filing of application by Central government with Tribunal [Sub-section (5)]:**
- If the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application before the Tribunal **within a period of sixty days of the receipt of the scheme**, stating its objections and requesting that the Tribunal may consider the scheme under section 232.
- (5) **Passing of an order of Tribunal [Sub-section (6)]:**
- On receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit:
- Provided that if the Central Government does not have any objection to the scheme or it does not file any application under this section before the Tribunal, it shall be deemed that it has no objection to the scheme.
- (6) **Communication of order to Registrar [Sub-section (7)]:**
- A copy of the order confirming the scheme shall be communicated to the Registrar having jurisdiction over the transferee company and the persons concerned and the Registrar shall register the scheme and issue a confirmation thereof to the companies and such confirmation shall be communicated to the Registrars where transferor company or companies were situated.

(7) **Dissolution of transferor company [Sub-section (8)]:**

The registration of the scheme, shall be deemed to have the effect of dissolution of the transferor company without process of winding-up.

(8) **Effect of Registration of Scheme [Sub-section (9)]:**

The registration of the scheme shall have the following effects, namely:—

(a) **transfer of property or liabilities of the transferor company to the transferee company** so that the property becomes the property of the transferee company and the liabilities become the liabilities of the transferee company;

(b) the **charges**, if any, on the property of the transferor company shall be applicable and enforceable as if the charges were on the property of the transferee company;

(c) **legal proceedings** by or against the transferor company pending before any court of law shall be continued by or against the transferee company; and

(d) where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the **liability of the transferee company**.

Effect of Registration of Scheme

transfer of property or liabilities of the transferor company to the transferee company;

the charges, if any, on the property of the transferor company shall be applicable to and enforceable against the transferee company;

legal proceedings by or against the transferor company pending before any court of law shall be continued by or against the transferee company; and

where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company.

(9) **Effect of merger and amalgamation on transferee company [Sub-section (10)]:**

A transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation.

(10) **Filing of application by transferee company with the Registrar [Sub-section (11)]:**

The transferee company shall file an application with the Registrar along with the scheme registered, indicating the revised authorised capital and pay the prescribed fees due on revised capital:

Provided that the fee, if any, paid by the transferor company on its authorised capital prior to its merger or amalgamation with the transferee company shall be set-off against the fees payable by the transferee company on its authorised capital enhanced by the merger or amalgamation.

(11) **Applicability of the provisions [Sub-section (12)]:** The provisions of this section shall *mutatis mutandis* apply to-

- a company or companies specified in sub-section (1) in respect of a scheme of compromise or arrangement referred to in section 230, or
- division or transfer of a company referred to clause (b) of subsection (1) of section 232.

(12) The Central Government may provide for the merger or amalgamation of companies in such manner as may be prescribed. **[Sub-section (13)]**

(13) A company covered under this section may use the provisions of section 232 for the approval of any scheme for merger or amalgamation. **[Sub-section (14)]**

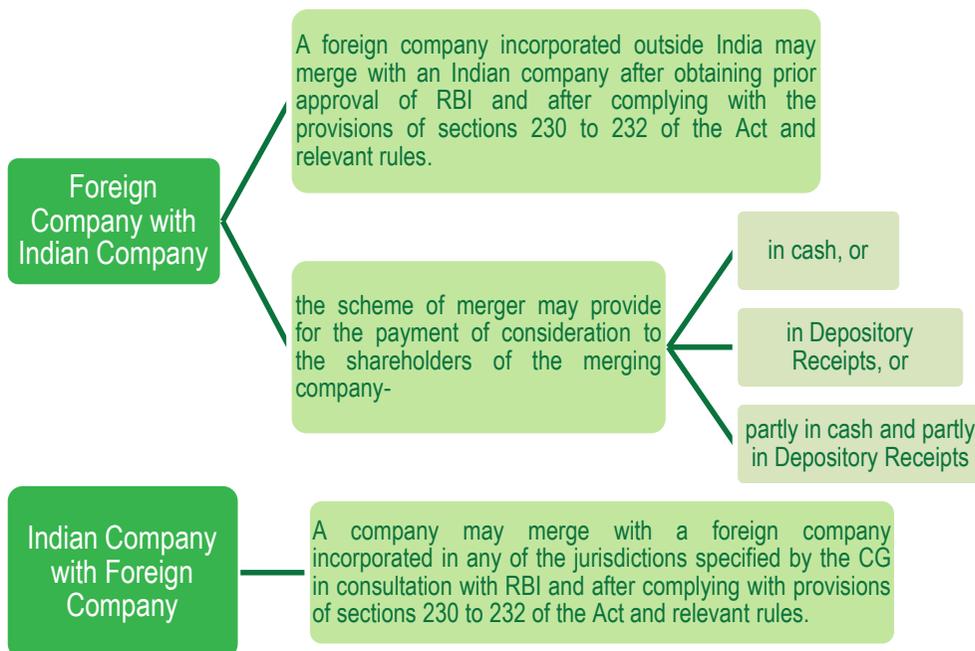
(14) According to sub-rule (8) of Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, it is clarified that with respect to schemes of arrangements or compromise falling within the purview of section 233 of the Act, the concerned companies may, at their discretion, opt to undertake such schemes under sections 230 to 232 of the Act, including where the condition prescribed in clause (d) of sub-section (1) of section 233 of the Act has not been met.

12. MERGER OR AMALGAMATION OF COMPANY WITH FOREIGN COMPANY [SECTION 234]

Section 234 of Companies Act, 2013 makes provisions in respect of cross border mergers and amalgamations *i.e.* between Indian company and a foreign body corporate.

Procedure has been prescribed in rule 25A of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

The expression “**foreign company**” means ‘any company or body corporate incorporated outside India whether having a place of business in India or not.’



The National Company Law Tribunal, Ahmedabad Bench in *Sun Pharmaceutical Industries Ltd., In re*, laid that Compromise / arrangement / demerger of Indian companies with foreign company and vice versa is not permitted.

In the instant case, NCLT gave the decision as per Section 234 of the Companies Act, 2013, read with rule 25A of Companies (Compromise, Arrangements and Amalgamations) Rules, 2016. Here the Petitioner, a leading pharmaceutical company filed a petition seeking sanction of scheme of arrangement in nature of demerger and transfer of its 'Specified Investment Undertakings' to two overseas companies which were directly and indirectly wholly owned subsidiary of petitioner company. It was noted that provision of section 234 did not permit 'compromise' and/or 'arrangement' and/or 'demerger' of Indian companies with foreign company and vice versa. Further Rule 25A of Companies Rules in which detailed procedure and requirements were enumerated with respect to cross border mergers, was silent on 'demergers' and mentions only 'merger' and 'amalgamation'. Thus, it was held that instant petition for sanction of scheme of arrangement was to be disallowed.

TEST YOUR KNOWLEDGE**Multiple Choice Questions**

1. Sectoral Regulators shall make representation, if any, within _____ from the date of receipt of Notice of the Meeting to be called, held and conducted by the National Company Law Tribunal (NCLT) in respect of a scheme of compromise or arrangement.
 - (a) 45 days.
 - (b) 30 days.
 - (c) 60 days.
 - (d) 90 days.

2. It is imperative that the Scheme of Compromise or Arrangement needs to be approved by the members or class of members or creditors or class of creditors. From the given options, select the one which correctly indicates the minimum requirement for such approval:
 - (a) The Scheme of Compromise or Arrangement shall be approved by more than 50% majority in number of members or class of members or creditors or class of creditors, as the case may be, who are present and voting at the meeting.
 - (b) The Scheme of Compromise or Arrangement shall be approved by more than 75% majority in value of members or class of members or creditors or class of creditors, as the case may be, who are present and voting at the meeting.
 - (c) The Scheme of Compromise or Arrangement shall be approved by more than 75% majority in number of members or class of members or creditors or class of creditors, as the case may be, who are present and voting at the meeting.
 - (d) Both (a) and (b) together.

3. Mr. Aman is a registered holder of 15,000 equity shares of Kanha Textiles Limited whose issued capital is ₹ 1,00,00,000 divided into 10,00,000 equity shares of ₹ 10 each. He was offered a price, as determined by the registered valuer, for purchase of his shares by the majority shareholders. Since he has agreed to the proposal of selling his shares at the offered price, you are required to select the correct option from those given below that indicates the period within which such amount shall be disbursed to him:
 - (a) Maximum within 15 days, such offered amount shall be disbursed to him.
 - (b) Maximum within 30 days, such offered amount shall be disbursed to him.
 - (c) Maximum within 60 days, such offered amount shall be disbursed to him.
 - (d) Maximum within 90 days, such offered amount shall be disbursed to him.

4. *Navneet Textiles Limited, with a view to save itself from the looming liquidation, proposed a scheme of compromise to its creditors which valued ₹ 75,00,000. In the process, the company filed the said Scheme with the jurisdictional National Company Law Tribunal (NCLT). From the following options, select the one which correctly depicts the minimum strength of creditors in value that must confirm to the scheme of compromise so that Tribunal may dispense with calling of a meeting of the creditors:*
- (a) *The strength of creditors in value of Navneet Textiles Limited that must confirm to the scheme of compromise so that Tribunal may dispense with calling of a meeting of the creditors is minimum 70%.*
 - (b) *The strength of creditors in value of Navneet Textiles Limited that must confirm to the scheme of compromise so that Tribunal may dispense with calling of a meeting of the creditors is minimum 80%.*
 - (c) *The strength of creditors in value of Navneet Textiles Limited that must confirm to the scheme of compromise so that Tribunal may dispense with calling of a meeting of the creditors is minimum 90%.*
 - (d) *The strength of creditors in value of Navneet Textiles Limited that must confirm to the scheme of compromise so that Tribunal may dispense with calling of a meeting of the creditors is minimum 95%.*
5. *In respect of a scheme of compromise submitted by Neon Colour Prints Limited to the jurisdictional National Company Law Tribunal (NCLT), a meeting of the shareholders was held on the specified date and time and at the designated place. The company had 1200 shareholders holding equity shares of ₹ 1,20,00,000 (12,00,000 equity shares of ₹ 10 each) who all voted using the prescribed modes. However, 100 shareholders holding ₹ 36,00,000 worth of shares voted against the approval of the scheme of compromise. Choose the correct option from those stated below as to whether the scheme of compromise submitted by Neon Colour Prints Limited to the jurisdictional National Company Law Tribunal (NCLT) is to be considered as approved or not:*
- (a) *The scheme of compromise submitted by Neon Colour Prints Limited to the jurisdictional National Company Law Tribunal (NCLT) is to be considered as approved since shareholders holding more than one-half worth of shares in value voted in favour of the scheme.*
 - (b) *The scheme of compromise submitted by Neon Colour Prints Limited to the jurisdictional National Company Law Tribunal (NCLT) is to be considered as approved since shareholders holding more than fifty-five percent worth of shares in value voted in favour of the scheme.*
 - (c) *The scheme of compromise submitted by Neon Colour Prints Limited to the jurisdictional National Company Law Tribunal (NCLT) is to be considered as approved since*

shareholders holding more than sixty percent worth of shares in value voted in favour of the scheme.

- (d) *The scheme of compromise submitted by Neon Colour Prints Limited to the jurisdictional National Company Law Tribunal (NCLT) is not to be considered as approved by the shareholders.*
6. *Orange Communications Limited is planning to merge with itself its Wholly-owned Subsidiary (WoS) Vaartalaap Tech Limited under the scheme of fast track merger. After due approval of the Merger Scheme, the same was filed with the Central Government for its approval. However, the Central Government is of the opinion that the said Merger Scheme is not in the public interest. In case such an opinion is formed, then with which authority the Central Government can file an application stating its objections?*
- (a) *The Central Government cannot file an application in this respect except to decide the matter on its own.*
- (b) *The Central Government can file an application before the National Company Law Tribunal (NCLT) stating its objections.*
- (c) *The Central Government can file an application before the Delhi High Court stating its objections.*
- (d) *The Central Government can file a 'Special Leave Petition' before the Hon'ble Supreme Court stating its objections.*
7. *Abhik Trading and Marketing Company Limited is wholly owned subsidiary (WOS) of Eternal Cosmetics Limited. Keeping in view the expansion plans, Swapna and Shilpa, the two Directors of latter company are contemplating to make an application before the appropriate forum for merger of the subsidiary company Abhik Trading and Marketing Company Limited with holding company Eternal Cosmetics Limited under Section 232 of the Companies Act, 2013. However, Vibha Kumar, the Company Secretary of Eternal Cosmetics Limited is of the opinion that the merger between a holding and subsidiary company should have been undertaken as per the provisions of Section 233 which state procedure for fast track merger and not under Section 232. Which statement, out of the four given below, is applicable in the above stated situation:*
- (a) *The opinion of Vibha, the Company Secretary of the Eternal Cosmetics Limited, holds ground since merger between a holding and subsidiary company should have been undertaken as per the provisions of Section 233 of the Companies Act, 2013 which states procedure for fast track merger.*
- (b) *The opinion of Vibha, the Company Secretary of the Eternal Cosmetics Limited, does not hold ground since merger between a holding and subsidiary company is validly possible only as per Section 232 of the Companies Act, 2013.*

- (c) *The opinion of Vibha, the Company Secretary of the Eternal Cosmetics Limited, does not hold ground since the provisions given for fast track merger under Section 233 of the Companies Act, 2013 are of the optional nature.*
- (d) *The opinion of Vibha, the Company Secretary of the Eternal Cosmetics Limited, does not hold ground since the provisions given for fast track merger under Section 233 of the Companies Act, 2013 can be applied for merging only small companies.*

Descriptive Questions

- ABC Limited is a wholly owned subsidiary company of XYZ Limited. The Company wants to make application for merger of Holding and Subsidiary Companies under Section 232. The Company Secretary of the XYZ Limited is of the opinion that company cannot apply for merger as per section 232. The company shall have to apply for merger as per section 233 i.e. Fast Track Merger. Is it a valid contention expressed by the Company Secretary?*
- A meeting of members of ABC Limited was convened under the orders of National Company Law Tribunal (NCLT) to consider a scheme of compromise and arrangement. Notice of the meeting was sent in the prescribed manner to all the 600 members holding in the aggregate 25,00,000 shares. The meeting was attended by 450 members holding 15,00,000 shares. 210 members holding 11,00,000 shares voted in favour of the scheme. 180 members holding 3,00,000 shares voted against the scheme. The remaining members abstained from voting.*

Examine with reference to the relevant provisions of the Companies Act, 2013 whether the scheme was approved by the requisite majority.
- A meeting of members of DEF Limited was convened under the orders of the Court for the purpose of considering a scheme of compromise and arrangement. The meeting was attended by 300 members holding 10,00,000 shares. 120 members holding 7,00,000 shares in the aggregate voted for the scheme. 140 members holding 2,00,000 shares in aggregate voted against the scheme. 40 members holding 1,00,000 shares abstained from voting. Examine with reference to the relevant provisions of the Companies Act, 2013 whether the scheme was approved by the requisite majority?*
- At the meeting of the members of QRS Limited, a scheme of compromise and arrangement was approved by requisite majority. The National Company Law Tribunal (NCLT) after complying with the provisions, issued an Order, approving the scheme of compromise and arrangement.*

List the matters to be provided in the Order issued by NCLT under Section 230 (7) of the Companies Act, 2013. Also state as to when shall the Order be filed with ROC?
- A Ltd. (transferee company) decides to acquire B Ltd. (transferor company) by acquiring its shares via a process of takeover u/s 235 of the Companies Act, 2013. A Ltd. prepared a scheme by which an offer was made to the shareholders of B Ltd. The offer was made on 1st*

August, 2019. The offer remained open for four months. Such offer was approved by shareholders having 92% value of the shares. Subsequently A Ltd. gave a notice to the remaining dissenting shareholders that it desires to acquire their shares. Such notice was given on 5th January, 2019. Certain dissenting shareholders made an application to the Tribunal that acquisition of their shares should not be permitted. However, their application was dismissed by the Tribunal. Hence A Ltd. acquired shares of 5% of the dissenting shareholders (out of balance 8%). The shareholding of balance 3% shareholders continued to remain with them. Comment on the validity of such a takeover by A Ltd.

ANSWERS

Answer to Multiple Choice Questions

1.	b	2.	d	3.	c	4.	c	5.	d
6.	b	7.	c						

Answer to Descriptive Questions

- As per section 233 (1)**, notwithstanding the provisions of section 230 and section 232, a scheme of merger or amalgamation may be entered between,

 - Two or more small companies
 - A holding company and its wholly-owned subsidiary company. If 100% of share capital of subsidiary company is held by the holding company, the latter company may hold the shares of subsidiary company in the name of any nominee or nominees with a view to ensure that the number of members of subsidiary company is not reduced below the statutory limit as mentioned in section 187.
 - such other class or classes of companies as may be prescribed.

The provisions given for fast track merger in the section 233 are optional in nature and not mandatorily applicable to the company. If a company wants to make application for merger as per section 232, it can do so.

Hence, here the Company Secretary of the XYZ limited has erred in the law and his contention is not valid. The company shall have an option to choose between normal process of merger and fast track merger.

- As per section 230 (6)**, of the Companies Act, 2013 where majority of persons at a meeting held shares **representing 3/4th in value**, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and further such compromise or arrangement was sanctioned by the Tribunal by an order. The majority of persons representing 3/4th in value shall be counted considering the following:

- the creditors, or
- class of creditors or
- members or
- class of members, as the case may be,

The majority is dual, in number and in value. A simple majority of those voting is sufficient; whereas the 'three-fourths' requirement relates to value. The three-fourths value is to be computed with reference to paid-up capital held by members present and voting at the meeting.

In this case out of 600 members, 450 members attended the meeting, but only 390 members voted at the meeting. As 210 members voted in favour of the scheme the requirement relating to majority in number (i.e. 196) is satisfied. 390 members who participated in the meeting held 14,00,000, three-fourth of which works out to 10,50,000 while 210 members who voted for the scheme held 11,00,000 shares. As both the requirements are fulfilled, the scheme is approved by the requisite majority.

3. **As per section 230 (6)**, of the Companies Act, 2013 where majority of persons at a meeting held shares **representing 3/4th in value**, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order. The majority of persons representing 3/4th in value shall be counted considering the following:

- the creditors, or
- class of creditors or
- members or
- class of members, as the case may be,

The majority is dual, in number and in value. A simple majority of those voting is sufficient; whereas the 'three-fourths' requirement relates to value. The three-fourths value is to be computed with reference to paid-up capital held by members present and voting at the meeting.

In this case 300 members attended the meeting, but only 260 members voted at the meeting. As 120 members voted in favor of the scheme the requirement relating to majority in number (i.e. 131) is not satisfied.

260 members who participated in the meeting held 9,00,000 shares, three-fourth of which works out to 6,75,000 while 120 members who voted for the scheme held 7,00,000 shares. The majority representing three-fourths in value is satisfied.

Thus, in the instant case, the scheme of compromise and arrangement of DEF Limited is not approved as though the value of shares voting in favor is significantly more, the number of members voting in favor do not exceed the number of members voting against.

4. According to section 230(7) of the Companies Act, 2013, an order made by the Tribunal under sub-section (6) shall provide for all or any of the following matters, namely:—
- (a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;
 - (b) the protection of any class of creditors;
 - (c) if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;
 - (d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;
 - (e) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement.

The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order. [Section 230(8)]

5. The basic requirements as to acquisition of shares mentioned in Section 235 of the Companies Act, 2013 are as follows:-
1. The scheme or contract involving the transfer of shares in a company (transferor company) to another company (transferee company) has been approved by the holders of not less than 9/10th (90%) in value of the shares whose transfer is involved.
 2. The approval of 9/10th shareholders in value shall be received within 4 months after making of an offer in that behalf by the transferee company.
 3. The transferee company shall express his desire to acquire the remaining shares of dissenting shareholder in 2 months after the expiry of the said 4 months and shall give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares.

The transferee company shall be entitled as well as bound to acquire the shares of the dissenting shareholders where no application is made by any dissenting shareholders to the tribunal in 1 month of receipt of notice of acquisition of shares or where an application is made by any dissenting shareholder but such application is dismissed by the Tribunal.

In the given case, since application made by the dissenting shareholders has been dismissed by the Tribunal, A Ltd is bound to acquire all the shares of the dissenting shareholders *i.e.* entire 8% shareholding.

Since A Ltd acquired only 5% shareholding of the dissenting shareholders, this is in contravention of Section 235 of the Companies Act, 2013. Hence, the takeover of B Ltd. by A Ltd. is invalid.

