Compromise, Arrangement and Amalgamation-Concepts

Lesson 10

KEY CONCEPTS

■ Merger ■ Amalgamation ■ Compromise ■ Arrangement

Learning Objectives

To understand:

- The broad regulatory framework with respect to compromise/arrangement, mergers/amalgamation
- Preparation of scheme, filing of various documents including e-forms with ROC, filing of scheme of amalgamation with NCLT, etc.
- Purchase of minority shareholding

Lesson Outline

- Provisions of the Companies Act, 2013
- Power to Compromise or make arrangements with members or creditors
- Merger and amalgamation of certain companies
- Merger and amalgamation of a company with a foreign company
- Power to acquire shares of shareholders dissenting from scheme or contract approved by majority
- Purchase of minority shareholding
- Power of Central Government to provide for amalgamation of companies
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References

REGULATORY FRAMEWORK

- The Companies Act, 2013 (Sections 230, 246 and 403-405)
- The Companies (Compromise, Arrangements and Amalgamations) Rules, 2016
- The Income Tax Act, 1961
- The SEBI (Listing Obligation & Disclosure Requirements) Regulations, 2015
- The Indian Stamp Act, 1899
- The SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011
- The Competition Act, 2002
- The Foreign Exchange Management Act, 1999

INTRODUCTION

Chapter XV (Section 230 to 240) of the Companies Act, 2013 (the Act) contains provisions on 'Compromise. Arrangements and Amalgamations', that covers compromise or arrangements, mergers and amalgamations, corporate debt restructuring, demergers, fast track merger for small companies, cross border mergers, takeovers, amalgamation of companies in public interest etc. The procedural aspects involved such as format of application to be made to the Tribunal, form of notice and the procedural aspects involved with respect to the substantive law are covered under the Rules made under Chapter XV of the Act.

Compromise and Arrangement are form of corporate restructuring which is an inorganic business strategy where one or more aspects of a business are redesigned to improve commercial efficiency, manage competition effectively, drive faster pace of growth, ensure effective utilization of resource, and fulfilment of stakeholders' expectations. It serves different purpose for different companies at different points of time and may take up various forms.

'Compromise' is an amicable agreement between the parties in which they make mutual concessions in order to solve the differences between them. Whereas, 'arrangement' is the process by which the share capital of the company is reorganized either by consolidating or division of the shares or doing both.

The word 'compromise' is nowhere defined in the Companies Act, 2013. It basically connotes the settlement of dispute by mutual consents/agreements or by way of scheme of compromise. Therefore, in case of compromise, there has to be some form of conflict. Following are the situations under which a company may call for a scheme of compromise:

- If a company faces challenge to pay all the creditors in full, in the normal course of business;
- Subsidiaries/units incurring losses etc.

On the other hand the word 'arrangement' has been defined under section 230(1) of the Companies Act, 2013. The arrangement has a wider connotation than compromise. The arrangement means reorganization of rights and liabilities of the shareholders without existence of dispute. A company may opt for scheme of compromise or arrangement to take itself out from the winding up proceedings. Following are the situations under which a company may call for a scheme of compromise:

- For any variation in property;
- Conversion of one class of share to another etc.

PROVISIONS OF THE COMPANIES ACT, 2013

Power to Compromise or make Arrangements with Members or Creditors

Section 230(1) states that when a compromise or arrangement is proposed –

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

(b) between a company and its members or any class of them,

the Tribunal may, on the application of the (i) company, or (ii) any creditor or (iii) member of the company, or (iv) in the case of a company which is being wound up, of the liquidator, appointed under the Companies Act, 2013 or under Insolvency and Bankruptcy Code, 2016, as the case may be, 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.

For the purposes of this sub-section, arrangement includes a reorganisation 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 these methods.

Affidavit by the applicant to disclose certain material facts

Section 230(2) states that the company or any other person, by whom an application is made under sub-section (1), 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;

In the matter of *Morepen Laboratories Ltd. vs. Regional Director Company Appeal (AT) No.136 of 2018, NCLT Chandigarh,* it was held that where petitioner company sought sanction of scheme of arrangement with fixed deposit holders, however the company did not disclosed investigation by SFIO or pendency of various criminal proceedings against it while bringing on record scheme under consideration, application of company has to be dismissed.

(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 per cent of the secured creditors in value, including—

(i) a creditors' responsibility statement in the prescribed form;

The Creditors' Responsibility Statement shall be in **Form CAA-1** and be included in the scheme of corporate debt restructuring. A scheme of corporate debt restructuring as referred to in clause (c) of sub-section (2) of section 230 of the Act shall mean a scheme that restructures or varies the debt obligations of a company towards its creditors.

(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.

Notice of the meeting

Section 230(3) states that when a meeting is proposed to be called in pursuance of an order of the Tribunal under sub-section (1), a notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by:

- a statement disclosing the 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 prescribed.

The notice of the meeting pursuant to the order of the Tribunal shall be in **Form No. CAA.2** and shall be sent individually to each of the creditors or members. The notice shall be sent by the chairperson appointed for the meeting, or, if the Tribunal so directs, by the company (or its liquidator), or any other person as the Tribunal may direct, by registered post or speed post or by courier or by e-mail or by hand delivery or any other mode as directed by the Tribunal to their last known address at least one month before the date fixed for the meeting. The notice of the meeting to the creditors and members shall be accompanied by a copy of the scheme of compromise or arrangement. [Rule 6 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016].

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 and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed.

When 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.

The notice of the meeting shall be advertised in **Form No. CAA - 2** in at least one English newspaper and in at least one vernacular newspaper having wide circulation in the state in which the registered office of the company is situated, or such newspaper as may be directed by the Tribunal and shall also be placed, not less than thirty days before the date fixed for the meeting, on the website of the company, of the SEBI and the recognized stock exchange where the securities of the company are listed. Where separate meetings of classes of creditors or members are to be held, a joint advertisement for such meetings may be given. [Rule 7 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016].

Notice to provide for voting by themselves or through proxy or through postal ballot

Sub-section (4) of section 230 states that a notice under sub-section (3) 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.

Who can object to the scheme?

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.

Notice to be sent to the regulators seeking their representations

Section 230(5) states that a notice under sub-section (3) along with all the documents in **Form CAA- 3** as may be prescribed shall also be sent to-

- the Central Government, the Registrar of Companies, the Income-tax authorities, in all cases;
- the Reserve Bank of India, the Securities and Exchange Board, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of 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.

Affidavit of Service

The chairperson appointed for the meeting of the company or other person directed to issue the advertisement and the notices of the meeting shall file an affidavit before the Tribunal not less than seven days before the date fixed for meeting or date of the first of the meetings, as the case may be, stating that the directions regarding the issue of notices and the advertisement have been duly complied with.

In case of default, the application along with copy of the last order issued shall be posted the Tribunal for such orders as it may think fit to make. [Rule 12 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016].

Voting

The person who receives the notice may within one month from date of receipt of the notice vote in the meeting either in person of through electronics means to the adoption of the scheme of compromise and arrangement.

Explanation. For the purpose of voting by persons who receive the notice as shareholder of creditor under this rule-

(a) "shareholding" shall mean the shareholding of the members of the class who are entitled to vote on the proposal; and

(b) "outstanding debt" shall mean all debt owed by the company to the respective class or classes of creditors that remains outstanding as per the latest audited financial statement, or if such statement is more than six months old, as per provisional financial statement not preceding the date of application by more than six months.

Rule 13 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

The voting at the meeting or meetings held in pursuance of the directions of the tribunal under Rule 5 on all resolutions shall take place by poll or by voting through electronics means.

The report of the result of the meeting under sub rule (1) shall be in **Form no CAA.4** and shall state accurately the number of creditors or class of creditors, as the case may be, who were present and who voted at the meeting either in person or by proxy, and where applicable, who voted through electronics means, their individual values and the way they voted.

Copy of compromise or arrangement to be furnished by the company :-

Every creditor or member entitled to attend the meeting shall be furnished by the company , free of charge , within one day on a requisition being made for the same, with a copy of the scheme of the proposed compromise or arrangement together with a copy of the statement required to be furnished under section 230 of the Act. [Rule 11 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016].

Approval and sanction of the scheme

Section 230(6) states that when at a meeting held in pursuance of sub-section (1), 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 this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be and the contributories of the company.

Order of the Tribunal sanctioning the scheme to provide for the following matters [Section 230(7)]

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;

> **Illustration:**
>
> A compromise is permitted between ABC Limited and its shareholders which provide for conversion of preference shares into equity shares. Mr. V is a preferential shareholder and entitled to arrear of dividend (Rs. 20,000). The order of tribunal permitting compromise shall provide that either Mr. V will receive arrears of dividend or equity shares of value Rs. 20,000.

(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.

Rule 17 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

Where the tribunal sanctions the compromise or arrangement, the order shall include such directions in regard to any matter or such modifications in the compromise or arrangement as the tribunal may think to fit to make for the proper working of the compromise or arrangement. The order shall direct that a certified copy of the same shall be filed with the registrar of companies within thirty days from the date of the receipt of copy of the order , or such other time as maybe fixed by the tribunal.

The order shall be in **Form No. CAA. 6**, with such variations as may be necessary.

Accounting treatment proposed in the scheme to be in conformity with accounting standards

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. [Proviso to Section 230(7)].

In the matter of *SMS Iron Technology (P.) Ltd Company Petition NO. 937 of 2016 NCLT-New Delhi*, it was held that the petition filed by petitioner companies including demerged company seeking their amalgamation with transferee company could not be allowed where statutory auditor of demerged company certified in his report that accounting treatment of investments of company was not in consonance with prescribed Accounting Standards.

Order of Tribunal to be filed with the Registrar

Section 230(8) states that 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.

Tribunal may dispense with calling of meeting of creditors

Section 230(9) states that the Tribunal may dispense with calling of a meeting of creditors 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.

In the matter of *In Re Visa Bao Ltd. Co. Application No. 106 of 2017, NCLT Kolkata*, it was held that where in process of implementing scheme of amalgamation, majority secured creditors of amalgamating companies gave their consent to dispensed with meeting of secured creditors, said meetings were to be dispensed, while shareholders'/unsecured creditors meetings were to be convened.

NCLT is not empowered to dispense with holding of shareholders' meetings under section 230 in case of compromise or arrangements. *In Re Quickcalls (P.) Ltd. CA (CAA) - 75 (ND) OF 2020, NCLT-New Delhi*

Compromise in respect of buy back is to be in compliance with section 68

As per Section 230(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.

Compromise includes takeover

Section 230(11) states that any compromise or arrangement may include takeover offer made in such manner as may be prescribed. In case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

Application to the Tribunal by an aggrieved party

Section 230(12) states that 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.

Do provisions of section 66 apply with respect to reduction of capital effected in pursuance of order of Tribunal under section 230?

Provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section.

An application may be made in **Form NCLT-1** and shall be accompanied with prescribed documents.

Certain statutory enactments to be considered at the time of Compromise, Arrangement & Amalgamations :

1. INCOME TAX ACT 1961

The Income Tax Act, 1961 covers aspects such as tax reliefs to amalgamating/amalgamated companies, carry forward of losses, exemptions from capital gains tax, etc. For example, when a scheme of merger or demerger involves the merger of a loss-making company or a hiving off of a loss-making division, it is necessary to check the relevant provisions of the Income Tax Act and the Rules for the purpose of ensuring, *inter alia*, the availability of the benefit of carrying forward the accumulated losses and setting of such losses against the profits of the Transferee Company. Taxation aspects of the Merger and Amalgamation have more elaborately given under the relevant module.

2. SEBI (LISTING OBLIGATIONS & DISCLOSURE REQUIREMENTS) REGULATIONS, 2015

Regulation 37 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, provides that the listed entity shall not file any scheme of arrangement under sections 391-394 and 101 of the erstwhile Companies Act, 1956 or under Sections 230-234 and Section 66 of Companies Act, 2013, whichever applicable, with any Court or Tribunal unless it has obtained the No-objection letter from the stock exchange(s).

Generally, stock exchanges raise several queries and on being satisfied that the scheme does not violate any laws concerning securities such as the Takeover Code or the SEBI (ICDR) Regulations, Stock Exchanges accord their approval.

The listed entity shall place the No-objection letter of the stock exchange(s) before the Court or Tribunal at the time of seeking approval of the scheme of arrangement. The validity of the No-objection letter of stock exchanges shall be six months from the date of issuance, within which the draft scheme of arrangement shall be submitted to the Court or Tribunal.

In addition to the above, Securities and Exchange Board of India has also provided some compliances with regard to the merger and amalgamation.

Rule 19 of the Securities Contracts (Regulation) Rules, 1957 provides basic compliance requirement for listing of securities on stock exchanges and SEBI has the power to relax listed companies from such compliances.

SEBI has issued Circular No. CFD/DIL3/CIR/2017/21 dated March 10, 2017 which *inter-alia* regulate the scheme of arrangement/ amalgamation/ merger/ etc. as filed with Stock Exchange (STX) for their NOC/ observation letter and also the provides for certain requirements to be complied with for being eligible to get relaxation under Rule 19 of Securities Contracts (Regulation) Rules, 1957 and get the specified securities, issued by the transferee company, pursuant to a Scheme, listed on the stock exchange. Circular provides for the format of Detailed Compliance Report (DCR) to be filed with STX at the time obtaining their NOC/ Observation letter duly certified by the Company Secretary, Chief Financial Officer and the Managing Director, confirming compliance with various regulatory requirements specified for schemes of arrangement and all accounting standards.

Upon sanction of the Scheme by the Court or Tribunal, the listed entity shall submit the documents, to the stock exchange(s), as prescribed by the Board and/or stock exchange(s) from time to time.

However, draft schemes which solely provide for merger of a wholly owned subsidiary with its holding company the requirement of No Objection Certification will not be apply. Provided that such draft schemes shall be filed with the stock exchanges for the purpose of disclosures.

Further, the requirements as specified in regulation 37 and under regulation 94 shall not apply to a restructuring proposal approved as part of a resolution plan by the Tribunal under section 31 of the Insolvency Code, subject

to the details being disclosed to the recognized stock exchanges within one day of the resolution plan being approved.

3. THE INDIAN STAMP ACT 1899

It is necessary to refer to the Stamp Act to check the stamp duty payable on transfer of undertaking through a merger or demerger.

The Constitution of India confers the power on the state legislature to make the laws in regard to the matters of stamp duty other than the documents specified in schedule I. The State in exercise of its legislative powers under Article 246 of the Constitution read with Entry 63 of List II (Seventh Schedule) of the Constitution levy the Stamp Duty.

Stamp duty is levied on the instrument evidencing a transfer *inter-vivos*, i.e., a conveyance. As per Section 2(10) of the Indian Stamp Act, 1899, "***Conveyance***" includes a conveyance on sale and ***every instrument*** by which property whether movable or immovable, is transferred *inter vivos* and which is not otherwise specifically provided for by Schedule I.

As per Section 2(14) of the Indian Stamp Act, 1899, "***Instrument***" includes every ***document*** by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or record.

The term Section 3(18) of the General Clauses Act, 1897, "***Document***" ***shall include any matter written***, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means ***which is intended to be used***, or which may be used, ***for the purpose or recording that matter***.

The definition(s) as reproduced above are inclusive in nature and are not self-explanatory. Hence, to avoid any ambiguity and confusion in this regard, with time, certain States has amended their Stamp Act and included Order of Court approving scheme of arrangement within the meaning of 'conveyance'. Maharashtra, Gujarat, Karnataka, Rajasthan, Chhattisgarh, Madhya Pradesh and Andhra Pradesh are the States which have specifically included an amalgamation order of a High Court as "Conveyance".

> In *Re. Sahayanidhi (Virudhunagar) Ltd. vs. AR.S Subramanya Nadar,* (1950) *20 Com Cases 214 (Mad)* Hon'ble Madras High Court held that, "the documents (scheme of amalgamation or reconstruction) purport to transfer movable property in the shape of book debts and promissory notes and the consideration for such transfer is partly in the shape of a cash payment and partly in the shape of covenants entered into by the transferee. We are therefore of the opinion that these two documents fall within Article 23 of Schedule I and are to be stamped as such."

Payment of Stamp Duty in Various States

Some of the States like Maharashtra, Gujarat, Karnataka, Rajasthan etc. which have enacted their own Stamp Acts have made specific provisions with respect to payment of Stamp Duty on Order of the High Court under the Companies Acts/Schedules, while some other states like Madhya Pradesh, Andhra Pradesh etc. which have adopted the Indian Stamp Act, 1899 have made state amendments to levy Stamp duty on the High Court Order. The remaining states which neither have their own Stamp Act nor have they made any State Amendment in the adopted Indian Stamp Act, 1899, levy Stamp duty as per the decision of High Court, if any, covering their states, or follow the decision of Supreme Court as laid down in the case of Hindustan Lever.

The law relating to payment of Stamp Duty on the Order of High Court in case of Merger lacks uniformity in India and levy of Stamp Duty will depend upon the Stamp Duty Law of the Concerned State. Also, in cases where the Transferor Company has its assets in different states things may get more complicated. The method of arriving at the figure of Stamp Duty also varies from State to State. Non -payment of Stamp Duty can cause legal hurdles at the time of registration of properties in the name of Transferee Company. Payment of Stamp

Duty is an important aspect to be considered before going in for a merger especially in those cases where the asset of the Transferor Company poses a significant value.

4. SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVER) REGULATIONS, 2011

If an acquisition is contemplated by way of issue of new shares, or the acquisition of existing shares or voting rights, of a listed company, to or by an acquirer, the provisions of the Takeover Code are applicable. The Takeover Code regulates both direct and indirect acquisitions of shares or voting rights in, and control over a target company. The key objectives of the Takeover Code are to provide the shareholders of a listed company with adequate information about an impending change in control of the company or substantial acquisition by an acquirer, and provide them with an exit option in case they do not wish to retain their shareholding in the company.

5. THE COMPETITION ACT, 2002

The provisions of Competition Act and the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011 are to be complied with.

6. THE FOREIGN EXCHANGE MANAGEMENT (CROSS BORDER MERGER) REGULATIONS, 2018

The Foreign Exchange Management (Cross Border Merger) Regulations, 2018 have been notified vide notification no. FEMA 389/ 2018-RB dated 20th March, 2018 and are effective from the date of notification. As per the Regulations, merger transactions in compliance with these regulations shall be deemed to have been approved by RBI, and hence, no separate approval should be required. In other cases, merger transactions require prior RBI approval.

Corporate Restructuring process in India is governed by the Companies Act, 2013, the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and various other regulatory laws such as the Income Tax Act, 1961, the Competition Act, 2002, the Foreign Exchange Management Act, 1999, the Indian and State Stamp Acts and Insolvency and Bankruptcy Code, 2016. Chapter XV of the Companies Act, 2013 (comprising sections 230 to 240) regulates compromises, arrangement and amalgamations.

POWER OF THE TRIBUNAL TO ENFORCE COMPROMISE OR ARRANGEMENT

As per section 231(1), when 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.

Sub-section (2) states that 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.

In case of Government Company - In Section 231 for the word “Tribunal” the words “Central Government” shall be substituted.

In the matter of *Joint Commissioner of Income Tax (OSD), Circle (3)(3)-1 & Ors. (Appellants) vs. Reliance Jio Infocomm Ltd. & Ors. (Respondents)*

Mere fact that a Scheme of Arrangement may result in reduction of tax liability does not furnish a basis for challenging the validity of the same.

The National Company Law Appellate Tribunal (NCLAT), held that without going to the record and without placing any evidence or substantiating the allegation of avoidance of tax by appearing before the Tribunal, it was not open to the income tax department to hold that the composite scheme of arrangement amongst the petitioner companies and their respective shareholders and creditors is giving undue favour to the shareholders of the company and also the overall scheme of arrangement results into tax avoidance.

The NCLAT observed that mere fact that a scheme may result in reduction of tax liability does not furnish a basis for challenging the validity of the same. The Income Tax Department, which sought for liberty, while accepted by the Petitioner Companies (Respondents herein) and the NCLT, Ahmedabad bench while approving the Composite Scheme of Arrangement has granted liberty. Such liberty to the Income Tax Department to enquire into the matter, if any part of the Composite Scheme of Arrangement amounts to tax avoidance or is against the provisions of the Income Tax and is to let it take appropriate steps if so required. Thus, NCLAT upheld the decision of NCLT, Ahmedabad bench and in view of the liberty given to the Income Tax Department decided not to interfere with the Scheme of Arrangement as approved by the Tribunal and dismissed the appeals filed.

MERGER AND AMALGAMATION OF COMPANIES

Merger

The term merger and amalgamation has not been defined under the Companies Act, 2013. Merger & Amalgamation is often known to be a single terminology. However, there is a thin difference between the two. 'Merger' is the fusion of two or more companies, whereby the identity of one or more is lost resulting in a single company whereas 'Amalgamation' signifies the blending of two or more undertaking into one undertaking, blending enterprises loses their identity forming themselves into a separate legal identity.

There may be amalgamation by the transfer of two or more undertakings to a new or existing company. 'Transferor company' means the company which is merging also known as amalgamating company in case of amalgamation and 'transferee company' is the company which is formed after merger or amalgamation also known as amalgamated company in case of amalgamation.

A merger is a legal consolidation of two entities into one entity which can be merged together either by way of amalgamation or absorption or by formation of a new company. The Board of Directors of two companies approve the combination and seek shareholders' approval. After the merger, the acquired company ceases to exist and becomes part of the acquiring company.

Amalgamation

Amalgamation is a legal process by which two or more companies are joined together to form a new entity or one or more companies are to be absorbed or blended with another as a consequence the amalgamating company loses its existence and its shareholders become the shareholders of new company or amalgamated company. In other words, property, assets, liabilities of one or more companies, is taken over by another or are absorbed by and transferred to an existing company or a new company. Therefore, the essence of amalgamation is to make an arrangement thereby uniting the undertakings of two or more companies so that they become vested

in, or under the control of one company which may or may not be the original of the two or more of such uniting companies. The word "amalgamation" is not defined under the Companies Act 2013 whereas section 2(1B) of Income Tax Act, 1961 defines Amalgamation as:

"Amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that –

(i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;

(ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;

(iii) shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation,

otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company.

Tribunal's power to call meeting of creditors or members, with respect to merger or amalgamation of companies

Section 232(1) states that when 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*.

As per Rule 18 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, where the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and the matters involved cannot be dealt with or dealt with adequately on the petition for sanction of the compromise or arrangement, an application shall be made to the tribunal under section 232 of the Act, by a notice of admission supported by an affidavit for directions of the Tribunal as to the proceedings to be taken.

Notice of admission in such cases shall be given in such manner and to such persons as the tribunal may direct.

Circulation of documents for members'/creditors' meeting

Section 232(2) states that when an order has been made by the Tribunal under sub-section (1), 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.

Sanctioning of scheme by Tribunal

Section 232(3) states that the Tribunal, after satisfying itself that the procedure specified in sub-sections (1) and 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:

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;

No transferee company can hold shares in its own name or under any trust;

(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) when the transferor company is a listed company and the transferee company is an unlisted company,—

(i) the transferee company shall remain an unlisted company until it becomes a listed company;

(ii) 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.

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.

Auditor's certificate as to conformity with accounting standards

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.

In the matter of *Real Image LLP Vs. Qube Cinema Technologies (P.) Ltd. CP NO. 123/CAA/2018 NCLT-Chennai,* It was held that where both transferor LLP and transferee company were regularly filing its statutory return and all proposed accounting treatment was in conformity with accounting standards prescribed under section 133 and all statutory compliances had been made under section 232, amalgamation of transferor LLP with transferee company was to be allowed.

Transfer of property or liabilities

Sub-section (4) of Section 232 states that 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.

Certified copy of the order to be filed with the Registrar

An order made under section 232 read with section 230 of the act shall be in **Form No CAA.7** with such variation as the circumstances may require. [Rule 20 of the Companies (Compromise, Arrangements and Amalgamation) Rules, 2016]

Section 232(5) states that 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.

Effective date of the scheme

Section 232(6) states that 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.

Annual statement certified by CA/CS/CWA to be filed with Registrar every year until the completion of the scheme

For the purpose of section 232(7) of Act , every company in relation to which an order is made under sub section (3) of section 232 of the act shall until the scheme is fully implemented, file with the registrar of companies, the statement in **Form No.CAA.8** along with such fee as specified in the companies (Registration offices and Fees) Rules, 2014 within two hundred and ten days from the end of each financial year.

Punishment

Section 232(8) states that if a company fails to comply with provisions of section 232 (5) i.e.failure to file Certified copy of the order with the Registrar, 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 under Section 232

For the purpose of the 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.

In case of Government Company - In Section 232 for the word "Tribunal" the words "Central Government" shall be substituted.- Notification Dated 13th June, 2017.

In the matter of *Mohit Agro Commodities & Ors. NCLAT, dated June 28, 2021*

When the 'Transferor and Transferee Company' involve a Parent Company and a Wholly Owned Subsidiary the meeting of Equity Shareholders, Secured and Unsecured Creditors can be dispensed with as the rights of the Equity Shareholders of the 'Transferee Company' are not being affected

Fact of the Case

The Appellant Company ('Transferor Company' and 'Transferee Company') filed Applications under Sections 230 to 232 and other relevant provisions of the Companies Act, 2013 seeking dispensation of the meeting of the Equity Shareholders, Secured Creditors and Unsecured Creditors in respect of the

scheme of Amalgamation of the 'Transferor Company' with the 'Transferee Company' with effect from the appointed date on the aggrieved terms and conditions has set out in the scheme in accordance with Sections 230 to 232 of the Companies Act, 2013 and other applicable provisions of the Act. It is contented that there is no change in the capital structure of the 'Transferor Company' till the date of approval of the schemes by the Board of Directors.

It is further stated that the 'Transferor Company' is a Wholly Owned Subsidiary of the 'Transferee Company' and that both the Companies are incorporated in similar type of nature of activities and that the 'Transferee Company' had acquired the 'Transferor Company' as a business supportive mechanism for ease of operations.

Judgment

The NCLAT has observed that Section 232(1) of the Companies Act, 2013 uses the word 'may' which introduces an element of discretion to the Tribunal to be exercised in the interest of justice in appropriate situations. Section 232 is a specific provision carved out by the Legislature when both conditions maintained in clauses (a) and (b) of sub-Section (1) of Section 232 are met.

In the instant case the amalgamation sought for is between a Wholly Owned Subsidiary and the Holding Company. The point which needs to be noted is:

- whether such an arrangement alters the rights of the Stakeholders of the Company?
- whether such an amalgamation has any bearing internally on Creditors/Members of both the Companies?
- whether not holding the subject meeting would amount to violation of any of the provisions of the Companies Act, 2013?
- whether the Tribunal can exercise their discretion when the 'Transferor Company' is a Wholly Owned Subsidiary of the 'Transferee Company' and financial position of the 'Transferee Company' is positive and the merger is not affecting the rights of the Shareholders or the Creditors?

Therefore, it is held that the rights and liabilities of Secured and Unsecured Creditors were not getting affected in any manner by way of the proposed scheme as no new shares are being issued by the 'Transferor Company' and no compromise is offered to any Secured and Unsecured Creditors of the 'Transferee Company'. Hence, when the 'Transferor and Transferee Company' involve a Parent Company and a Wholly Owned Subsidiary the meeting of Equity Shareholders, Secured Creditors and Unsecured Creditors can be dispensed with as the rights of the Equity Shareholders of the 'Transferee Company' are not being affected.

MERGER AND AMALGAMATION OF CERTAIN COMPANIES

Section 233 prescribes simplified procedure for Merger or amalgamation of –

- two or more small companies; or
- between a holding company and its wholly-owned subsidiary company; or l such other class or classes of companies as may be prescribed.

Merger of small companies/holding and subsidiary companies

Section 233(1) states that notwithstanding the provisions of section 230 and section 232, 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 such other class or classes of companies as may be prescribed, subject to the following, namely:–

(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; Such objections or suggestions from the Registrar and official liquidator or persons affected by the scheme shall be in **Form CAA-9**;

(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 **Form No.CAA-10**, 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.

According to Rule 25, of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, the notice of the proposed scheme, under clause (a) of sub-section (1) of section 233 of the Act, to invite objections or suggestions from the Registrar and official liquidator or persons affected by the scheme shall be in Form No. CAA.9.

Provided that in case of a company regulated by a sectoral regulator such as Reserve Bank of India, Securities and Exchange Board, Insurance Regulatory and Development Authority of India or Pension Fund Regulatory and Development Authority, as the case may be, the notice shall be issued to the concerned regulator and to respective stock exchanges, for listed companies, for objections or suggestions within the period specified in clause of sub-section (1) of section 233.

The Central Government has prescribed class of Companies between which a scheme of merger or amalgamation under section 233 of the Act may be entered into, namely:-

(i) two or more start-up companies; or

(ii) one or more start-up company with one or more small company;

(iii) one or more unlisted company, (not being company referred to in section 8 of the Act) with one or more unlisted company, (not being company referred to in section 8 of the Act), where every company involved in the merger,-

(a) has, in aggregate, outstanding loans, debentures or deposits not exceeding two hundred crore rupees, and

(b) has no default in repayment of loans, debentures or deposits referred to in sub-clause (a),on a day, not more than thirty days before the date of notice referred to in clause (a) of sub-section (1) of section 233 of the Act and on the date of filing of scheme under sub-section (2) of section 233 of the Act.

Provided that a certificate from the auditor of the company that the company meets the conditions referred to in this clause shall be filed in Form No. CAA-10A along with the copy of the approved scheme referred to in sub- section (2) of section 233 of the Act;

(iv) a holding company (listed or unlisted) and a subsidiary company (listed or unlisted):

Provided that this clause shall not apply where the transferor company or companies are listed;

(v) one or more subsidiary company of a holding company with one or more other subsidiary company of the same holding company where the transferor company or companies are not listed;

Illustration:-

Company 'D' is the subsidiary of Company 'C' and Company 'C' is the subsidiary of Company 'B' and in turn Company 'B' is the wholly owned subsidiary (WOS) of Company 'A'.

In this case Company 'B' is the WOS of Company 'A'. Company 'C' and Company 'D' are subsidiaries of the same holding company i.e. Company 'A' Subject to the condition stated in the clause, schemes of merger or

amalgamation or transfer or division between Company 'A', Company 'B', Company 'C' and Company 'D' or any combination thereof would be covered under this clause.]

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.

Transferee company to file a copy of scheme approved

Section 233(2) states that 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 Liquidator where the registered office of the company is situated.

According to Rule 25(4)(a) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, For the purposes of sub-section (2) of section 233 of the Act, the transferee company shall, within a period of fifteen days after the conclusion of the meeting of members or class of members or creditors or class of creditors, file a copy of the scheme as agreed to by the members and creditors, along with a report of the result of each of the meetings and the report of the registered valuer in Form No. CAA.11 (as attachment to Form RD-1), with the Central Government, along with the fees as provided under the Companies (Registration Offices and Fees) Rules, 2014:

Provided that in case of a company referred to in proviso to sub-rule (1), a statement about the manner in which the objections or suggestions, if any, of the sectoral Regulator or the stock exchanges, as the case may be, have been addressed in the scheme shall be attached with the scheme

Further, as per Rule 25(4)(b) Copy of the scheme shall also be filed, along with **Form No. CAA.11** with –

(i) the registrar of companies in **Form No. GNL-1** along with fees provided under the Companies (Registration Offices and Fees) Rules, 2014; and

(ii) the official liquidator through hand delivery or by registered post or speed post.

Central Government to issue confirmation order, where there are no objections or suggestions from Registrar or Official Liquidator

Section 233(3) states that 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.

Where no objection or suggestion is received within a period of thirty days of receipt of copy of scheme under sub-section (2) of section 233, from the Registrar of Companies and Official Liquidator by the Central Government and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, it may, within a period of fifteen days after the expiry of said thirty days, issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12.

Provided that if the Central Government does not issue the confirmation order within a period of sixty days of the receipt of the scheme under sub-section (2) of section 233, it shall be deemed that it has no objection to the scheme and a confirmation order shall be issued accordingly.[Rule 25(5)]

Objections if any by the Registrar or Official Liquidator to be communicated to the Central Government

Section 233(4) provides that 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.

Application by Central Government to the Tribunal

Section 233(5) states that 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 under sub-section stating its objections and requesting that the Tribunal may consider the scheme under section 232.

Rule 25(6) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 mandate where objections or suggestions are received within a period of thirty days of receipt of copy of scheme under sub-section (2) of section 233 from the Registrar of Companies or Official Liquidator or both by the Central Government and –

(a) such objections or suggestions of Registrar of Companies or Official Liquidator, are not sustainable and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, it may within a period of thirty days after expiry of thirty days referred to above, issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12;

(b) the Central Government is of the opinion, whether on the basis of such objections or otherwise, that the scheme is not in the public interest or in the interest of creditors, it may within sixty days of the receipt of the scheme file an application before the Tribunal in Form No. CAA.13 stating the objections or opinion and requesting that Tribunal may consider the scheme under section 232 of the Act:

Provided that if the Central Government does not issue a confirmation order under clause (a) or does not file any application under clause (b) within a period of sixty days of the receipt of the scheme under subsection (2) of section 233 of the Act, it shall be deemed that it has no objection to the scheme and a confirmation order shall be issued accordingly.

Tribunal's Action to Central Government's application

Section 233(6) states that 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:

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.

Registrar having jurisdiction over transferee company has to be communicated

Section 233(7) states that a copy of the order under sub-section (6) 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.

Rule 25(7) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 states that the confirmation order of the scheme issued by the Central Government or tribunal under sub section (7) of section 233 of the Act, shall be filed, within thirty days of the receipt of the order of confirmation, in **Form INC-28** along with the fees as provided under Companies (Registration Offices and Fees) Rules 2014 with the Registrar of companies respectively.

Effect of registration of the scheme

Section 233(8) states that registration of the scheme under sub-section (3) or sub-section (7) shall be deemed to have the effect of dissolution of the transferor company without process of winding-up.

Section 233(9) states that 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.

Transferee Company not to hold any share in its own name or trust and all such shares are to be cancelled or extinguished

Section 233(10) states that 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.

Transferee Company to file an application with Registrar along with the scheme registered

Section 233(11) provides that 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. 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.

Section 233(12) provides that the provisions of Section 233 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.

The Central Government may provide for the merger or amalgamation of companies in such manner as may be prescribed.

It is clarified that with respect to schemes of arrangement 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.

As per rule 25(9): The provisions of this rule shall, mutatis mutandis, apply in respect of a scheme of division or transfer of undertaking of a company referred to in clause (b) of sub-section (1) of section 232 and while passing such order, the Central Government may make provisions of the nature specified in clauses (a) to (j) of sub-section (3) of section 232 to the extent they are applicable.

A company covered under this section may use the provisions of section 232 for the approval of any scheme for merger or amalgamation.

MERGER OR AMALGAMATION OF A COMPANY WITH A FOREIGN COMPANY

Section 234(2) states that subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this

Act or *vice versa* and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.

The expression "foreign company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

Section 234(1) states that the provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply *mutatis mutandis* to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government. The Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.

Rule 25A of the of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

(1) A foreign company incorporated outside India may merge with an Indian company after obtaining prior approval of Reserve Bank of India and after complying with the provisions of sections 230 to 232 of the Act and these rules.

(2) (a) A company may merge with a foreign company incorporated in any of the jurisdictions specified in Annexure B after obtaining prior approval of the Reserve Bank of India and after complying with provisions of sections 230 to 232 of the Act and these rules.

(b) The transferee company shall ensure that valuation is conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on accounting and valuation. A declaration to this effect shall be attached with the application made to Reserve Bank of India for obtaining its approval under clause (a) of this sub-rule.

(3) The concerned company shall file an application before the Tribunal as per provisions of section 230 to section 232 of the Act and these rules after obtaining approvals specified in sub-rule (1) and sub-rule (2), as the case may be.

(4) Notwithstanding anything contained in sub-rule (3), in case of a compromise or an arrangement or merger or demerger between an Indian company and a company or body corporate which has been incorporated in a country which shares land border with India, a declaration in Form No. CAA-16 shall be required at the stage of submission of application under section 230 of the Act.

Explanation 1. For the purposes of this rule the term "company" means a company as defined in clause (20) of section 2 of the Act and the term "foreign company" means a company or body corporate incorporated outside India whether having a place of business in India or not.

Explanation 2. For the purposes of this rule, it is clarified that no amendment shall be made in this rule without consultation of the Reserve Bank of India.

In exercise of the powers conferred by sub-sections (1) and (2) of section 469 read with sections 233 and 234 of the Companies Act, 2013, the Central Government has notified the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2024 which came into effect from 17th day of September, 2024.

In rule 25A, new sub rule (5) is inserted, namely:

Where the transferor foreign company incorporated outside India being a holding company and the

transferee Indian company being a wholly owned subsidiary company incorporated in India, enter into merger or amalgamation, –

(i) both the companies shall obtain the prior approval of the Reserve Bank of India;

(ii) the transferee Indian company shall comply with the provisions of section 233;

(iii) the application shall be made by the transferee Indian company to the Central Government under section 233 of the Act and provisions of rule 25 shall apply to such application; and

(iv) the declaration referred to in sub-rule (4) shall be made at the stage of making application under section 233 of the Act."

POWER TO ACQUIRE SHARES OF SHAREHOLDERS DISSENTING FROM SCHEME OR CONTRACT APPROVED BY MAJORITY [Section 235(1)]

Offer to dissenting shareholders

Where a 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, within four months after making of an offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of 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 subsidiary companies, the transferee company may, at any time within two months after the expiry of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares.

For the purposes of sub-section (1) of section 235 of the Act, the transferee company shall send a notice to the dissenting shareholder(s) of the transferor company, in **Form No. CAA.14** at the last intimated address of such shareholder for acquiring the shares of such dissenting shareholders.

Meaning of dissenting shareholders [Explanation to Section 235]

As per the explanation to Section 235, 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.

Acquisition of shares of dissenting shareholders [Section 235(2)]

After the notice under section 235(1) of the Act, 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.

Process of acquisition of shares from dissenting shareholders [Section 235(3)]

Where a notice has been given by the transferee company under Section 235(1) and the tribunal has not, on an application made by the dissenting shareholder, made an order to the contrary, the transferee company shall, on the expiry of one month from the date on which the notice has been given, or, if an application to the Tribunal by the dissenting shareholder is then pending, after that application has been disposed of, 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, by virtue of this section, that company is entitled to acquire, and 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.

Utilization of funds [Section 235(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.

Illustration:

ABC Ltd, made an offer to acquire share of EFG Ltd on 01.01.2021. 90% shareholders of EFG Ltd agreed but one shareholder has not assented to the scheme or contract. By 01.02.2021 ABC Ltd is entitled to acquire shares. For this ABC Ltd shall send notice along with instrument of transfer and pay for share. EFG Ltd shall keep the consideration received in a separate bank and hall distribute that money within 60 days to the concerned shareholders.

PURCHASE OF MINORITY SHAREHOLDING – SECTION 236

Definition of Acquirer and Person acting in concert

The expressions "acquirer" and "person acting in concert" shall have the meanings respectively assigned to them in clause (a) and clause (q) of sub regulation (1) of regulation 2 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

According to Regulation 2(1)(a) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 "acquirer" means any person who, directly or indirectly, acquires or agrees to acquire whether by himself, or through, or with persons acting in concert with him, shares or voting rights in, or control over a target company;

According to Regulation 2(1)(q) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 "persons acting in concert" means,–

(1) persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.

(2) Without prejudice to the generality of the foregoing, the persons falling within the following categories shall be deemed to be persons acting in concert with other persons within the same category, unless the contrary is established,–

(i) a company, its holding company, subsidiary company and any company under the same management or control;

(ii) a company, its directors, and any person entrusted with the management of the company;

(iii) directors of companies referred to in item (i) and (ii) of this sub-clause and associates of such directors;

(iv) promoters and members of the promoter group;

(v) immediate relatives;

(vi) a mutual fund, its sponsor, trustees, trustee company, and asset management company;

(vii) a collective investment scheme and its collective investment management company, trustees and trustee company;

(viii) a venture capital fund and its sponsor, trustees, trustee company and asset management company;

(viiia) an alternative investment fund and its sponsor, trustees, trustee company and manager;

(ix) a merchant banker and its client, who is an acquirer;

(x) a portfolio manager and its client, who is an acquirer;

(xi) banks, financial advisors and stock brokers of the acquirer, or of any company which is a holding company or subsidiary of the acquirer, and where the acquirer is an individual, of the immediate relative of such individual:

Provided that this sub-clause shall not apply to a bank whose sole role is that of providing normal commercial banking services or activities in relation to an open offer under these regulations;

(xii) an investment company or fund and any person who has an interest in such investment company or fund as a shareholder or unitholder having not less than 10 per cent of the paid-up capital of the investment company or unit capital of the fund, and any other investment company or fund in which such person or his associate holds not less than 10 per cent of the paid-up capital of that investment company or unit capital of that fund:

Provided that nothing contained in this sub-clause shall apply to holding of units of mutual funds registered with the Board;

Explanation. – For the purposes of this clause "associate" of a person means,–

(a) any immediate relative of such person;

(b) trusts of which such person or his immediate relative is a trustee;

(c) partnership firm in which such person or his immediate relative is a partner; and

(d) members of Hindu undivided families of which such person is a coparcener.

As per Section 236(1) of the Act, 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.

As per Section 236(2) of the Act, the acquirer, person or group of persons under sub-section (1) 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 such rules as may be prescribed.

For the purposes of sub-section (2) of section 236 of the Act, the registered valuer shall determine the price (hereinafter called as offer price) to be paid by acquirer, person or group of persons referred to in sub-section of section 236 of the Act for purchase of equity shares of the minority shareholders of the company.

Without prejudice to the provisions of sub-sections (1) and (2), 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 as in accordance with Rule 27 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, which is as under:

Determination of price for purchase of minority shareholding:-

The registered valuer shall determine the price (hereinafter called as offer price) to be paid by 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 following:

In case of a listed company;

(i) The offer price shall be determined in the manner as may be specified by the Securities and Exchange Board of India under the relevant regulations framed by it, as may be applicable; and

(ii) The registered valuer shall also provide a valuation report on the basis of valuation addressed to the Board of directors of the company giving justification for such valuation.

In the case of an unlisted company and a private company,

(i) the offer price shall be determined after taking into account the following factors:-

  (a) the highest price paid by the acquirer, person or group of persons for acquisition during last twelve months;

  (b) the fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters including return on net worth, book value of shares, earning per share, price earning multiple vis-à-vis the industry average, and such other parameters as are customary for valuation of shares of such companies; and

(ii) the registered valuer shall also provide a valuation report on the basis of valuation addressed to the Board of directors of the company giving justification for such valuation.

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 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.

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 has been made within the aforesaid period of sixty days, fail to receive or claim payment arising out of such disbursement [Section 236(4)].

In the event of a purchase under this section, 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 [Section 236(5)].

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 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 dispatch of such payment [Section 236(6)].

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 [Section 236(7)].

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 negotiates 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 [Section 236(8)].

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 [Section 236(9)].

Power of Central Government to provide for Amalgamation of Companies in public interest [Section 237]

- If 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.

  In Re *Cello Pens (P.) Ltd, CSP. NO. 818/2016 NCLT-Ahmedabad,* it was held that where petition seeking sanction of scheme of amalgamation was found to be genuine, bona fide and in interest of shareholders and creditors as well as in public interest and questions raised by Regional Director was satisfied, same was to be sanctioned.

- The order under sub-section (1) 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.

- 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.

- 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.

- 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.

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.

Registration of offer of schemes involving transfer of shares [Section 238]

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 the manner as prescribed under Rule 28 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 which states that every circular containing the offer of scheme or contract involving transfer of shares or any class of shares and recommendation to the members of the transferor company by its directors to accept such offer, shall be accompanied by such information as set out in **Form No. CAA.15**. The circular shall be presented to the Registrar for registration.

(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.

An appeal shall lie to the Tribunal against an order of the Registrar refusing to register any circular under sub-section (1).

Any aggrieved party may file an appeal against the order of the Registrar of Companies refusing to register any circular under sub-section (2) of section 238 of the Act and the said appeal shall be in the **Form No. NCLT.9** (appended in the National Company Law Tribunal Rules, 2016) supported with an affidavit in the **Form No. NCLT.6** (appended in the National Company Law Tribunal Rules, 2016).

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.

Preservation of books and papers of Amalgamated Companies [Section 239]

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.

Liability of Officers in Respect of Offences Committed Prior to Merger, Amalgamation, etc. [Section 240]

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.

"MAJORITY RULE AND MINORITY RIGHTS"

The Principle of Non-interference (Rule in *Foss v. Harbottle*)

The general principle of company law is that every member holds equal rights with other members of the company in the same class. The scale of rights of members of the same class must be held evenly for smooth functioning of the company. In case of difference(s) amongst the members the issue is decided by a vote of the majority. Since the majority of the members are in an advantageous position to run the company according to their command, the minorities of shareholders are often oppressed. The company law provides for adequate protection for the minority shareholders when their rights are trampled by the majority. But the protection of the minority is not generally available when the majority does anything in the exercise of the powers for internal administration of a company. The court will not usually intervene at the instance of shareholders in matters of internal administration, and will not interfere with the management of a company by its directors so long they are acting within the powers conferred on them under the articles of the company. In other words, the articles are the protective shield for the majority of shareholders who compose the Board of directors for carrying out their object at the cost of minority of shareholders. The basic principle of non-interference with the internal management of company by the court is laid down in a celebrated case of *Foss v. Harbottle 67 E.R. 189; (1843) 2 Hare 461* that no action can be brought by a member against the directors in respect of a wrong alleged to be committed to a company. The company itself is the proper party of such an action.

CASE LAWS

In *Foss v. Harbottle*, two shareholders, Foss and Turton brought an action on behalf of themselves and all other shareholders against the directors and solicitor of the company alleging that by their concerted and illegal transactions they had caused the company's property to be lost to the company. It was also alleged that there was no qualified Board. Foss and Turton claimed damages to be paid by the defendants to the company. It was held by the court that the action could not be brought by the minority shareholders although there was nothing to prevent the company itself, acting through the majority of its shareholders, bringing action. The wrong done to the company was not which could be ratified by the majority of members. The company (i.e., the majority) is the proper plaintiff for wrong done to the company, so the majority of members are competent to decide whether to commence proceedings against the directors. The reasons for rule were nicely stated by Melish L.J. in *MacDougall v. Gardiner, (1875) 1 Ch. D. 13 (C.A.) at p. 25* in the following words:

"If the thing complained of is a thing which in substance the majority of company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes."

In *Rajahmundry Electric Supply Co. v. Nageshwara Rao AIR 1956 SC 213*, the Supreme Court observed that:

"The courts will not, in general, intervene at the instance of shareholders in matters of internal administration, and will not interfere with the management of the company by its directors so long as they are acting within the powers conferred on them under articles of the company. Moreover, if the directors are supported by the majority shareholders in what they do, the minority shareholders can, in general do nothing about it."

From the above it follows then that a company being a separate legal person from the members who compose it, the company is the proper person to bring an action.

CASE LAWS

In *Pavlides v. Jensen (*1956) Ch. 565, a minority shareholder brought an action for damages against three directors and against the company itself on the ground that they have been negligent in selling a mine owned by the company for £ 82,000, whereas its real value was about £ 10,00,000. It was held that the action was not maintainable. The judge observed, "It was open to the company, on the resolution of a majority of the shareholders to sell the mine at a price decided by the company in that manner, and it was open to the company by a vote of majority to decide that if the directors by their negligence or error of judgement has sold the company's mine at an undervalue, proceedings should not be taken against the directors".

In *Edwards v. Halliwell* (1950) 2 All. E.R. 1064, Jenkins, L.J. restated the rule in the following terms: "The rule in *Foss v. Harbottle* comes to no more than this. First, the proper plaintiff in respect of wrong alleged to be done to company is prima facie the company itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company by a simple majority of members, no individual member is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company is in favour of what has been done, then *cadit quaestio*... (cannot be questioned). If on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company itself should not sue".

Justification and Advantages of the Rule in Foss *v.* Harbottle

The justification for the rule laid down in *Foss* v. *Harbottle* is that the will of the majority prevails. On becoming a member of a company, a shareholder agrees to submit to the will of the majority. The rule really preserves the right of the majority to decide how the company's affairs shall be conducted. If any wrong is done to the company, it is only the company itself, acting, as it must always act, through its majority, that can seek to redress and not an individual shareholder.

Moreover, a company is a person at law, the action is vested in it and cannot be brought by a single shareholder. Where there is a corporate body capable of filing a suit for itself to recover property either from its directors or officers or from any other person then that corporate body is the proper plaintiff and the only proper plaintiff [*Gray* v. *Lewis,* (1873) 8 Ch. Appl. 1035].

The main advantages that flow from the Rule in *Foss* v. *Harbottle* are of a purely practical nature and are as follows:

1. ***Recognition of the separate legal personality of company:*** If a company has suffered some injury, and not the individual members, it is the company itself that should seek to redress.
2. ***Need to preserve right of majority to decide:*** The principle in *Foss* v. *Harbottle* preserves the right of majority to decide how the affairs of the company shall be conducted. It is fair that the wishes of the majority should prevail.

3. ***Multiplicity of futile suits avoided:*** Clearly, if every individual member were permitted to sue anyone who had injured the company through a breach of duty, there could be as many suits as there are shareholders. Legal proceedings would never cease, and there would be enormous wastage of time and money.

4. ***Litigation at suit of a minority futile if majority does not wish it:*** If the irregularity complained of is one which can be subsequently ratified by the majority it is futile to have litigation about it except with the consent of the majority in a general meeting. In *Mac Dougall* v. *Gardiner,* (1875) 1 Ch. 13 (C.A.), the articles empowered the chairman, with the consent of the meeting, to adjourn a meeting and also provided for taking a poll if demanded by the shareholders. The adjournment was moved, and declared by the chairman to be carried; a poll was then demanded and refused by the chairman. A shareholder brought an action for a declaration that the chairman's conduct was illegal. Held, the action could not be brought by the shareholder; if the chairman was wrong, the company alone could sue.

Application of *Foss* v. *Harbottle* Rule in Indian context — The Delhi High Court in *ICICI* v. *Parasrampuria Synthetic Ltd.* SSL, July 5, 1998 has held that an automatic application of *Foss v. Harbottle* Rule to the Indian corporate realities would be improper. Here the Indian corporate sector does not involve a large number of small individual investors but predominantly financial institutions funding atleast 80% of the finance. It is these financial institutions which provide entire funds for the continuous existence and corporate activities. Though they hold only a small percentage of shares, it is these financial institutions which have really provided the finance for the company's existence and, therefore, to exclude them or to render them voiceless on an application of the principles of *Foss* v. *Harbottle* Rule would be unjust and unfair.

Exception to the Rule in *Foss v. Harbottle*

The rule in *Foss* v. *Harbottle* is not absolute but is subject to certain exceptions. In other words, the rule of supremacy of the majority is subject to certain exceptions and thus, minority shareholders are not left helpless, but they are protected by:

(a) the common law; and

(b) the provisions of the Companies Act.

The cases in which the majority rule does not prevail are commonly known as exceptions to the rule in *Foss* v. *Harbottle* and are available to the minority. In all these cases an individual member may sue for declaration that the resolution complained of is void, or for an injunction to restrain the company from passing it. The said rule will not apply in the following case:

The minority shareholders are empowered to bring action with a view to preventing the majority from oppression and mismanagement. These are the statutory rights of the minority shareholders and find detailed discussion later in the study.

In *Bennet Coleman & Co. and Ors.* v. *Union of India & Ors.,* (1977) 47 Com Cases 92 (Bom), the Division Bench of the Bombay High Court held that Sections 397 and 398 of the Companies Act, 1956 are intended to avoid winding up of the company if possible and keep it going while at the same time relieving the minority shareholders from acts of oppression and mismanagement or preventing its affairs from being conducted in a manner prejudicial to public interest. Thus, the Court has wide powers to supplant the entire corporate management by resorting to non- corporate management which may take the form of appointing an administrator or a special officer or a committee of advisers etc., who will be in charge of the affairs of the company.

The exceptions to the rule in *Foss* v. *Harbottle* are not limited to those covered above. Further exceptions may be admitted where the rules of justice require that an exception to the rule should be made.

It should be noted that the ordinary civil courts are not deprived of the jurisdiction to decide the matters except

where the Companies Act expressly excludes it such as matters relating to winding up [*Panipat Woollen & General Mills Co.Ltd.* v. *R.L. Kaushik,* (1969) 39 Com Cases 249 (Punj & Har)].

"MAJORITY RULE AND MINORITY RIGHTS" UNDER THE COMPANIES ACT, 2013

In India, the Companies Act attempts to maintain a balance between the rights of majority and minority shareholders by admitting in the rule of the majority but limiting it at the same time by a number of well-defined minority rights, and thus protecting the minority shareholders.

Chapter XVI of the Companies Act, 2013 deals with the provisions relating to prevention of oppression and mismanagement of a company. Oppression and mismanagement of a company mean that the affairs of the company are being conducted in a manner that is oppressive and biased against the minority shareholders or any member or members of the company. To prevent the same, there are provisions for the prevention and mismanagement of a company.

The Ministry of Corporate Affairs *vide* its Notification S.O.1934 (E) dated 1st June 2016 notified section 241 to 245 of the Companies Act, 2013. Section 246 was notified *vide* Notification S.O.2912 (E) dated 9th September, 2016. These provisions are discussed in detail hereunder.

COMPANIES TO FURNISH INFORMATION OR STATISTICS

Power of Central Government to Direct Companies to Furnish Information or Statistics

Section 405(1) of the Companies, Act, 2013 states that the Central Government may, by order, require companies or any class of companies, to furnish such information or statistics with regard to their or its constitution or working, and within such time, as may be specified in the order.

Every such order shall be published in the Official Gazette and may be addressed to companies or to any class of companies, in such manner, as the Central Government may think fit and the date of such publication shall be deemed to be the date on which requirement for information or statistics is made on such companies or class of companies, as the case may be.

For the purpose of satisfying itself that any information or statistics furnished by a company or companies in pursuance of any order stated above is correct and complete, the Central Government may by order require such company or companies to produce such records or documents in its possession or allow inspection thereof by such officer or furnish such further information as that Government may consider necessary [Sec 405(3)].

Failure to furnish information or statistics by the companies required by the Central Government

As per Section 405(4), if any company fails to comply with an order specified above, or furnishes any information or statistics which is incorrect or incomplete in any material respect, the company and every officer of the company who is in default shall be liable to a penalty of twenty thousand rupees and in case of continuing failure, 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.

In case of Foreign Companies

Where a foreign company carries on business in India, all references to a company in Section 405 this section shall be deemed to include references to the foreign company in relation, and only in relation, to such business.

The Specified Companies (Furnishing of information about Payment to Micro and Small Enterprise Suppliers) Order, 2019

The Central Government vide notification number S.O. 5622(E), dated the 2nd November, 2018 has directed that all companies, who get supplies of goods or services from micro and small enterprises and whose payments to micro and small enterprise suppliers exceed forty five days from the date of acceptance or the date of

deemed acceptance of the goods or services as per the provisions of section 9 of the Micro, Small and Medium Enterprises Development Act, 2006 referred to as "Specified Companies", shall submit a half yearly return to the Ministry of Corporate Affairs stating the following:

(a) the amount of payment due; and

(b) the reasons of the delay.

In exercise of the powers conferred by section 405 of the Companies Act, 2013, the Central Government hereby vide MCA Notification No. S.O. 368 (E), dated 22nd January, 2019 has notified the Specified Companies (Furnishing of information about payment to micro and small enterprise suppliers) Order, 2019.

Under this order:

(i) Every specified Company had to file initial return in **MSME Form I** regarding details of all outstanding dues to Micro or small enterprises suppliers existing on the date of notification of this order (22nd January, 2019) within the prescribed period.

(ii) Every specified company have to file a half-yearly return as per **MSME Form I** by 31st October for the period from April to September and by 30th April for the period from October to March.

Specified Companies (Furnishing of information about payment to micro and small enterprise suppliers) Amendment Order, 2024 (July 15, 2024)

In exercise of the powers conferred by section 405 of the Companies Act, 2013 the Central Government issued Specified Companies (Furnishing of information about payment to micro and small enterprise suppliers) Order, 2024. In paragraph 3, the following proviso is inserted.

Provided that only those specified companies which are having payments pending to any micro or small enterprises for more than 45 days from the date of acceptance or the date of deemed acceptance of the goods or services under section 9 of the Micro, Small and Medium Enterprises Development Act, 2006 shall furnish the information in MSME Form-1.

MSME Form-1 form has been substituted.

LESSON ROUND-UP

- Section 230(1) states that when a compromise or arrangement is proposed–
  - between a company and its creditors or any class of them; or
  - between a company and its members or any class of them.
- the Tribunal may, on the application of the (i) company, or (ii) of any creditor or (iii) member of the company, or (iv) in the case of a company which is being wound up, of the liquidator appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, 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.
- Section 230(6) states that where at a meeting held in pursuance of sub-section (1), 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.

- Section 230(8) states that 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 232(1) states that when 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 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 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*.
- Section 233 prescribes simplified procedure for Merger or amalgamation of two or more small companies or between a holding company and its wholly-owned subsidiary company, or such other class or classes of companies as may be prescribed
- Section 234(2) states that subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.
- Section 237(1) states that when 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.

GLOSSARY

Merger: A 'merger' is a combination of two or more entities into one; the desired effect being not just the accumulation of assets and liabilities of the distinct entities, but organization of such entity into one business. The possible objectives of mergers are manifold - economies of scale, acquisition of technologies, access to sectors / markets etc. Generally, in a merger, the merging entities would cease to be in existence and would merge into a single surviving entity.

Tribunal: Tribunal refers to National Company Law Tribunal

Banking Company "banking company" means any company which transacts the business of banking in India. Explanation.—Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking. [Sec 5(c) of banking Regulation Act 1949]

TEST YOURSELF

(These are meant for recapitulation only. Answers to these questions are not required to be submitted for evaluation).

1. What are the requirements relating to notice required under Section 230 of the Companies Act, 2013?
2. Describe the powers of Central Government to provide for amalgamation of companies in public interest.
3. "Power to compromise or make arrangements with creditors and members is conferred on the company". Comment.
4. Explain law relating to power to acquire shares of shareholders dissenting from scheme or contract approved by a majority.
5. Write short notes on:
   (a) Purchase of minority shareholding
   (b) Preservation of books and papers of amalgamated companies
   (c) Liability of officers in respect of offences committed prior to corporate restructuring by way of merger or amalgamation etc.
6. M/s ABC Ltd is amalgamated with M/s XYZ Ltd. now the amalgamated company is of the opinion to dispose off the books and papers of M/s ABC Ltd. after 8 years of amalgamation. Whether it is of correct opinion, choose the correct option:
   (a) The books and papers can be disposed of after completion of 8 years by passing special resolution
   (b) The books and papers cannot be disposed of without the order of Tribunal
   (c) The books and papers can be disposed of after completion of 8 years
   (d) The books and papers cannot be disposed of without the prior permission of the Central Government
7. Globe Limited, a BSE listed company filed a petition to the NCLT for the scheme of Compromise and Arrangement under Section 230. The petition included a takeover offer. The NCLT approved the scheme of scheme of Compromise and Arrangement but the company not followed compliance as per the SEBI (SAST) Regulations, 2011. Choose on the correct option:
   (a) The NCLT has sanctioned the scheme and hence binding on company, members, creditors or class thereof and no further compliance is necessary
   (b) Compromise or Arrangement may include takeover offer but for listed companies, takeover offer shall be according to SEBI (SAST) Regulations, 2011 and compliance needs to be done according to
   (c) The Company require approval in Annual General Meeting
   (d) None of the above.

LIST OF FURTHER READINGS
• Company Law Exploring Procedural Dimensions VOL I / II / III – by ICSI • ICSI Premier on Company Law • Bare Act- Companies Act, 2013 and Rules made thereunder

OTHER REFERENCES (Including Websites/Video Links)
• https://www.mca.gov.in/content/mca/global/en/acts-rules/ebooks/acts.html?act=NTk2MQ==