CORPORATE RESTRUCTURING: COMPROMISE, ARRANGEMENT, MERGERS AND AMALGAMATION

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INTRODUCTION

Corporate restructuring is an expression that connotes a restructuring process undertaken by business enterprises for the purpose of bringing about a change for the better and to make the businesses competitive. The term signifies the restructuring undertaken by a company and company secretaries play a predominant role in devising, designing, executing and completing the restructuring process. This study is intended to give a basic idea about the meaning, background, objectives, scope, modes, law and practice In relation to any chosen restructuring Programme. The study also discusses the global and national scenario in corporate restructuring today.

MEANING OF CORPORATE RESTRUCTURING

Restructuring as per Oxford dictionary means, "to give a new structure to, rebuild or rearrange". Corporate restructuring thus implies rearranging the business for increased efficiency and profitability.

The meaning of the term 'Corporate Restructuring' is quite wide and varied. Depending upon the requirements of a company, it is possible to restructure its business, financial and organizational transactions in different forms. Restructuring is a method of changing the organizational structure in order to achieve the strategic goals of the organization or to sharpen the focus on achieving them. The essentials of corporate restructuring are efficient and competitive business operations by increasing the market share, brand power and synergies.
Simply stated, corporate restructuring is a comprehensive process, by which a company can consolidate its business operations and strengthen its position for achieving its short-term and long-term corporate objectives – synergetic, dynamic and continuing as a competitive and successful entity. The expression ‘corporate restructuring’ implies restructuring or reorganizing a company or its business (or one of its businesses) or its financial structure, in such a way as to make it operate more effectively. This is not a legal term and has no precise meaning nor can it be defined with precision.

In the words of Justice Dhananjaya Y. Chandrachud, corporate restructuring is one of the means that can be employed to meet the challenges which confront business. Having understood the meaning of the expression corporate restructuring, it is necessary to reiterate that a restructuring exercise is not undertaken only by business enterprises which are run in the form of a company registered under the Companies Act, 2013. The restructuring could be undertaken by any entity or business unit, whether it is run as a sole proprietorship or partnership or society or in any other form of organization. In this study we are primarily concerned with the scope and objectives of and law and practice relating to corporate restructuring.

HISTORICAL BACKGROUND

In earlier years, India was a highly regulated economy. Though government participation was overwhelming, the economy was controlled in a centralized way by government participation and intervention. In other words, economy was closed as economic forces such as demand and supply were not allowed to have a full-fledged liberty to Rule the market. There was no scope of realignments and everything was controlled. In such a scenario, the scope and mode of corporate restructuring was very limited due to restrictive government policies and rigid regulatory framework.

These restrictions remained in vogue, practically, for over two decades. These, however, proved incompatible with the economic system in keeping pace with the global economic developments if the objective of faster economic growth were to be achieved. The government had to review its entire policy framework and under the economic liberalization measures removed the above restrictions by omitting the relevant Sections and provisions.
Consequently, financially strong entrepreneurs made their presence felt as:

Industrialists — Ram Prasad Goenka, M.R. Chabria, Sudarshan Birla, Srichand Hinduja, Vijay Mallya and Dhirubhai Ambani who were instrumental in undertaking certain major corporate restructuring exercises.

The real opening up of the economy started with the industrial policy, 1991 whereby 'continuity with change' was emphasized and main thrust was on relaxations in industrial licensing, foreign investments, and transfer of foreign technology etc. For instance, amendments were made in MRTP Act, within all restrictive Sections discouraging growth of industrial sector. With the economic liberalization, globalization and opening up of economies, the Indian corporate sector started restructuring to meet the opportunities and challenges of competition.

PRESENT SCENARIO

Today, the economic and liberalization reforms, have transformed the business scenario all over the world. The most significant development has been the integration of national economy with 'market-oriented globalized economy'. The multilateral trade agenda and the world trade organization (WTO) have been facilitating easy and free flow of technology, capital and expertise across the globe. A restructuring wave is sweeping the corporate sector the world over, taking within its fold both big and small entities, comprising old economy businesses, conglomerates and new economy companies and even the infrastructure and service sector. From banking to oil exploration and telecommunication to power generation, petrochemicals to aviation, companies are coming together as never before. Not only this new industries like e-commerce and biotechnology have been exploding and old industries are being transformed.

Mergers, amalgamations, acquisitions, consolidation and takeovers are the expressions that have become common to the corporate sector. By mergers and amalgamations, we mean a merger of two or more distinct entities. The merging entities might have similar or dissimilar Activities. Mergers take place for various reasons and simple cost – benefit analysis would tell whether the merger proposal is beneficial or not. In mergers new shares are usually issued. Payment of consideration by issue of shares of transferee company to the members of transferor companies is the usual method. Acquisitions refer to acquisition of ownership, control and management right
over enterprises. Acquisitions take place by acquisition of voting shares. In acquisitions new shares do not come into existence. In consolidation, the promoter group attempts to garner more stakes in order to strengthen their position and thereby achieve predominance. Never have the mergers and acquisitions been so popular, from all angles – policy considerations, businessmen’s outlook and even consumers’ point of view. Courts too have taken empathic view towards mergers. The classic example is the remarks of Supreme Court in the HLL – Tomco merger case; where in the court had stated that in this era of hyper competitive capitalism and technological change, industrialists have realized that mergers/acquisitions are perhaps the best route to reach a size comparable to global companies so as to effectively compete with them.

The harsh reality of globalization has dawned that companies which cannot compete globally must sell out as an inevitable alternative. Today, conglomerates are being formed by combining businesses. Where synergies are not achieved, demergers do take place. Demergers connote division of business and such division could mean division of line of Activity or division of undertaking or division of territories. Demergers might take place to facilitate family arrangements of promoters controlling an enterprise. They have also become the order of the day. With the increasing competition and the economy, heading towards globalization, the corporate restructuring Activities are expected to occur at a much larger scale than at any time in the past. Corporate restructuring play a major role in enabling enterprises to achieve economies of scale, global competitiveness, right size, and a host of other benefits including reduction of cost of operations and administration.

The process of restructuring through mergers and amalgamations has been a regular feature in the developed and free economy nations like Japan, USA and European countries with special reference to UK where hundreds of mergers take place every year. Mergers and takeovers of multinational corporate houses across the borders has become a normal phenomenon. Corporate restructuring being a matter of business convenience, the role of legislation, executive and judiciary is that of a facilitator for restructuring on healthy lines. The present stand of the government is that monopoly is not necessarily bad provided market dominance is not abused. In this era of capitalism and technological advancements, industrialists have realized that mergers / acquisitions are perhaps the best route to reach a size comparable to global companies so as to
effectively compete with them. The harsh reality of globalization has ultimately dawned and companies that cannot compete globally change hands. In this process realignments take place.

**NATIONAL SCENARIO**

In India, the concept has caught like wild fire with a merger or two being reported every second day and this time Indian Companies are out to make a global presence. The Jamshedpur Based Steel Giant, TATA Steel won the two-month long battle for corus group against Anglo-Dutch Steelmaker Cia Sidemrgica National (CSN) by offering $12.2 billion for the 20 million-tonne high grade steelmaker to become the fifth largest in the world. Close on heels came another giant overseas acquisition with Hindalco, the flagship Metal Company Of Aditya Birla Group buying Atlanta based Novelis Inc. For an enterprise value of $6 billion. With this transAction, Hindalco has become world’s largest Aluminium Rolling Company and one of biggest producer of primary aluminium in Asia. During the last 2-3 years, India Inc. Acquired Several Other Foreign Companies, Viz., Arcelor (By Mittal Steel) Betapharm (By Dr. Reddy’s Lab), Terapia (By Ranbaxy), Sabah Forest Industries (By Bilt), Eight O’clock Coffee (By TATA Tea) Hansen (By Suzlan Energy Ltd.), Ritz-Carlon Bostan (By Indian Hotels). The other major takeover making waves has been the acquisition of majority interest of Hutch – Essar by Vodafone. TATA’s pioneering acquisition of Corus coupled with Hindalco’s acquisition of Novelis and other acquisitions, exemplify the arrival of Indian Inc. in the global arena. The event is path breaking and displays a level of confidence and values, which places Indian industry at an altogether new level.

The going global is rapidly becoming Indian companies’ mantra of choice. Indian companies are now looking forward to drive costs lower, innovate speedily, and increase their international presence. Companies are discovering that a global presence can help insulate them from the vagaries of domestic market and is one of the best ways to spread the risks. As mentioned earlier, Indian corporate sector has witnessed several strategically acquisitions. TATA Steel’s acquisition of Corus Group, Mittal Steel’s acquisition of Arcelor, TATA Motors acquisition of Daewoo Commercial Vehicle Company, TATA Steel Acquisition of Singapore’s NatSteel, and Reliance’s acquisition of flag is the culmination of Indian companies’ efforts to establish a presence outside
India. Not only this, to expand their operations overseas, the Indian companies are acquiring their counterparts or are making efforts towards the end viz. the merger of Air India and Indian airlines.

**NEED AND SCOPE OF CORPORATE RESTRUCTURING**

Corporate restructuring is concerned with arranging the business Activities of the corporate as a whole so as to achieve certain predetermined objectives at corporate level. Such objectives include the following:

- Orderly redirection of the firm's Activities;
- deploying surplus cash from one business to finance profitable growth in another;
- exploiting inter-dependence among present or prospective businesses within the corporate portfolio;
- risk reduction; and
- Development of core competencies.

When we say corporate level it may mean a single company engaged in single Activity or an enterprise engaged in multi Activities. It could also mean a group having many companies engaged in related or unrelated Activities. When such enterprises consider an exercise for restructuring their Activities they have to take a wholesome view of the entire Activities so as to introduce a scheme of restructuring at all levels. However such a scheme could be introduced and implemented in a phased manner. Corporate restructuring also aims at improving the competitive position of an individual business and maximizing its contribution to corporate objectives. It also aims at exploiting the strategic assets accumulated by a business i.e. natural monopolies, goodwill, exclusivity through licensing etc. To enhance the competitive advantages. Thus restructuring would help bringing an edge over competitors.

Competition drives technological development. Competition from within a country is different from cross-country competition. Innovations and inventions do not take place merely because human beings would like to be creative or simply because human beings tend to get bored with existing facilities. Innovations and inventions do happen out of necessity to meet the challenges of...
competition. Cost cutting and value addition are two mantras that get highlighted in a highly competitive world. Monies flow into the stream of production in order to be able to face competition and deliver the best possible goods at the convenience and affordability of the consumers.

Global competition drives people to think big and it makes them fit to face global challenges. In other words, global competition drives enterprises and entrepreneurs to become fit globally. Thus, competitive forces play an important role. In order to become a competitive force, corporate restructuring exercise could be taken up.

Also, in order to drive competitive forces, corporate restructuring exercise could be taken up. The scope of corporate restructuring encompasses enhancing economy (cost reduction) and improving efficiency (profitability). When a company wants to grow or survive in a competitive environment, it needs to restructure itself and focus on its competitive advantage. The survival and growth of companies in this environment depends on their ability to pool all their resources and put them to optimum use. A larger company, resulting from merger of smaller ones, can achieve economies of scale. If the size is bigger, it enjoys a higher corporate status. The status allows it to leverage the same to its own advantage by being able to raise larger funds at lower costs. Reducing the cost of capital translates into profits. Availability of funds allows the enterprise to grow in all levels and thereby become more and more competitive.

Before going into the need for corporate restructuring, you can take a look at the following simple illustrations:

For Instance- ABC limited has surplus funds but it is not able to consider any viable project. Whereas XYZ limited has identified viable projects but has no money to fund the cost of the project. Assume the merger of both the said companies. A viable solution emerges resulting in mutual help and benefit and in a competitive environment; it offers more benefits than what meets your eyes.

Take the case of a company secretary in practice. His income may not be as regular as would be the case of a company secretary in employment. Assume he marries a company secretary in employment. The merger will help them meet the requirements of practice and enable the practice to grow without getting affected by the irregularity in cash flow.
Now assume ABC ltd is engaged in manufacture of injection molding machines. Naturally it will serve the needs of consumers of such machines. It means the company is engaged in a capital goods Activity and demand for its goods will vary from time to time and therefore it might not see a regular cash flow arising from its operations. Assume, there is another company in the same group engaged in manufacture of plastic molded goods. It deploys the injection molding machines for manufacturing the molded goods. Its supplies are to the consumers and therefore it has a regular cash flow. If both of them merge, the resultant company could utilize the benefit of regular cash flow in its one unit and overcome the cash flow problem in the other. If the merger does not take place, one company would see its cash bells ringing on a daily basis while in other there will be defaults in servicing the banks and financial institutions, payment of wages, settlement of dues to creditors, defaults in meeting delivery schedule and in addition the human beings of such a company will undergo a lot of stress and strain affecting their health.

Thus going by the above simple illustrations, one should be able to understand that corporate restructuring aims at different things at different times for different companies and the single common objective in every restructuring exercise is to eliminate the disadvantages and combine the advantages. The various needs for undertaking a corporate restructuring exercise are as follows:

(i) To focus on core strengths, operational synergy and efficient allocation of managerial capabilities and infrastructure.

(ii) Consolidation and economies of scale by expansion and diversion to exploit extended domestic and global markets.

(iii) Revival and rehabilitation of a sick unit by adjusting losses of the sick unit with profits of a healthy company.

(iv) Acquiring constant supply of raw materials and access to scientific research and technological developments.

(v) Capital restructuring by appropriate mix of loan and equity funds to reduce the cost of servicing and improve return on capital employed.
(vi) Improve corporate performance to bring it at par with competitors by adopting the radical changes brought out by information technology.

**KINDS OF RESTRUCTURING**

Restructuring may be of the following kinds:

*Financial restructuring* which deals with the restructuring of capital base and raising finance for new projects. This involves decisions relating to acquisitions, mergers, joint ventures and strategic alliances.

*Technological restructuring* which involves, *inter alia*, alliances with other companies to exploit technological expertise.

*Market restructuring* which involves decisions with respect to the product market segments, where the company plans to operate based on its core competencies.

*Organizational restructuring* which involves establishing internal structures and procedures for improving the capability of the personnel in the organization to respond to changes. This kind of restructuring is required in order to facilitate and implement the above three kinds of restructuring. These changes need to have the cooperation of all levels of employees to ensure that the restructuring is successful.

The most commonly applied tools of corporate restructuring are amalgamation, merger, demerger, slump sale, acquisition, joint venture, disinvestment, strategic alliances and franchises.

**PROVISIONS UNDER THE COMPANIES ACT, 1956**

Section 391 of the Companies Act, 1956 provides for all matters which the company court (hereinafter referred to as 'the court') should consider and also the conditions under which it has to exercise its powers. Court for the purposes of Sections 391 to 394 of the Act would mean the High Court having jurisdiction over the registered office of the company. In every High Court, a judge will be designated as company judge who will hear, *inter alia*, petitions under these Sections.

Section 390 contains meaning of certain important expressions used in Sections 391 and 394 of the Act.

The expression "company" means 'any company liable to be wound up under this Act'. As per Section 390(a) of the Act, "company" includes even an unregistered company under Section 582 of the Act. [*Malayalam Plantation & Harrisons ltd. In re*]. It includes companies incorporated outside India, having business operations in India under Section 591 of the Act. Simply stated, the words 'any company liable to be wound up' means a company to which the provisions relating to winding up apply. [*Khandelwal Udyog ltd In re*]. Thus, the expression in Section 390(a) covers all companies registered under the provisions of Companies Act, 1956, and companies registered under Companies Acts which were in force before the coming into force of the Companies Act, 1956. It also includes all unregistered or other companies In respect of which winding up orders can be made by a court under the provisions of the Act. The words ‘a company liable to be wound up’ does not mean that the winding up should have commenced or that there should be a state of affairs indicating that the company is liable to be wound up. It merely connotes that by virtue of enabling Provisions under the Act, a company, even if it is not a company registered under the Act, would be wound up in accordance with the provisions of the Act relating to winding up. Thus, it is not necessary that the company should be in Actual winding up i.e. the Section can apply even to a company which is a going concern. [*BOI v. Ahmedabad Manufacturing ltd*].

The meaning of the expression 'arrangement' as given under Section 390(b) of the Act includes reorganization of share capital of the company by consolidation of shares of different classes or division into different classes of shares or both. 'Compromise' presupposes the existence of a dispute which it seeks to settle.
Nothing like that is implied in the word 'arrangement' which has wider meaning than 'compromise'. An arrangement involves an exchange of one set of rights and liabilities for another. An arrangement, for example, could result in the exchange of shares of one class for shares of a different class. All modes of reorganizing the share capital, takeover of shares of one company by another including interference with preferential and other special rights attached to shares can form part of an arrangement proposed with members. [General Motor Cars Co.; Hindustan Bank Ltd v. Hindustan General Corp]. The Supreme Court said: "generally, where only one company is involved in a change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganization or scheme of arrangement." [Saraswati limited v. CIT].

Section 391 of the Companies Act, 1956 is a boon to corporate restructuring. This Section along with Section 394, has proved to be a major legislative blessing for corporate restructuring in a variety of ways, such as amalgamation (merger) of two or more companies, demerger, division or partition of a company into two or more companies, hiving off a unit, as well as a compromise with the members or creditors of a company or an arrangement with respect to the share capital, assets or liabilities of the company etc.

Section 391(1) of the Companies Act, 1956 provides that where a compromise or arrangement is proposed between company and its creditors or any class of them or between company and its members or any class of them, the court may on the application of the company or any creditor or member of the company or liquidator (where company is being wound up), order a meeting of creditors or class of creditors or members or class of members, as the case may be, to be called, held and conducted in such manner as it directs. From the above provision of law, it is clear that there could be a compromise or arrangement between a company on the one side and its creditors or any class of them on the other side. There could be an arrangement between a company and its members or any class of them. In such a scheme of compromise or arrangement, the creditors or members could be the interested parties. In the case of a company in winding up, the liquidator becomes the party entitled to present the scheme to the court. All or any one of the interested parties have to make an application to the court praying for sanctioning the scheme of compromise or arrangement.

Pertinently, it has been held in several cases that Section 391 is a ‘complete code’ or ‘single window clearance system’, and that the court has been given wide powers under this Section, to
frame a scheme for the revival of a company. Being a complete code, the court can, under this ‘Section’, sanction a scheme containing all the alterations required in the structure of the company for the purpose of carrying out of the scheme. Section 391 contemplates a compromise or arrangement between a company and its creditors or any class of them, or its members or any class of them, and provides machinery whereby such a compromise or arrangement may be binding on dissentient persons by an order of the court. \[\textit{Oceanic Steam Co In re}\].

When an application is made, the court will naturally consider the merits of the scheme. The court will also see whether all interested parties or whether all parties whose rights are likely to be affected have been put on notice about the scheme. In other words, court gives an opportunity to all persons who are concerned or interested in the scheme. The court may order a meeting of the creditors and / or the members. While ordering the convening of a meeting, the court has the power to direct the manner in which the meeting should be conducted and how the proceedings and the result of the meeting should be reported. The court has the discretion to sanction the scheme. You may note the use of the word ‘may’ in sub-Section (1) of Section 391 of the Act. It clearly implies that the court has the discretion to make or not to make the order. As already stated, even before convening a meeting, the court should pay attention to the fairness of the proposed scheme because it would be no use putting before the meeting a scheme, which is not fair. The court may also refuse a meeting to be called where the proposals contained therein are illegal, or in violation of provisions of the Act or incapable of modification. \[\textit{Travancore Quilon Bank, In re}\]. Thus, the court does not have to compulsorily call for a meeting, but in its discretion, dismiss the application at that stage itself \[\textit{Sakamari Limited, In re}\].

The court is duty bound to ascertain the \textit{bona fides} of the scheme and whether the scheme is \textit{prima facie} feasible. The court will not Act merely as a rubber stamp while sanctioning a scheme. The court must consider the application on merits. \[\textit{N.A.P v. Guruswamy}\].

The court should examine the nuts and bolts of the scheme and should not hesitate to reject the scheme or ask for additional material or even point to creditors, members, etc. Of pitfalls in the scheme and the court's role under Section 391(1) is equally useful, vital and pragmatic as under Section 391(2) \[\textit{Sakamari Metals In re}\]. Where a large number of creditors opposed the scheme, it was obvious that there was no possibility of its being implemented \[\textit{Krishnakumar Mills Co. In re}\].
The Companies Act, 2013 is a voluminous piece of legislation on the statute book with Sections And 7 Schedules. However, there are only seven Sections here on Corporate restructuring including mergers, de mergers etc. Although corporate re-engineering physically occupies a small portion of the Companies Act comprising barely seven Sections from 230 to 240 therein, yet its impact on industry and commerce has been far reaching. These provisions have been borrowed from the English Companies Act and have withstood the test of times.

**BROAD PRINCIPLES**

[In re. Mcleod Russel Ltd]. The Calcutta High Court laid down the following principles: sanction by court cannot be withheld to a scheme of compromise or arrangement (scheme), if:

— The scheme is not for evading law, nor manifestly unfair, nor seeks to defraud shareholders and creditors of merging companies.

— The companies are under common management, but engaged in dissimilar business. Even otherwise, the scheme may be for mutual benefit in reducing expenses, streamlining the administration and creating a larger financial base.

— The scheme is between wholly owned subsidiary of another transferor company, which is itself merging with transferee company; then question of consideration does not arise.

— The statutory majority under Section 391(2), i.e., members are not only present but also voting at the meeting, approves the scheme.

— There is reduction of share capital; Rule 85 of the companies (court) Rules, 1959 has no application where the scheme involves transfer of entire assets and liabilities of transferor companies.

[Feedback Reach Ltd] the ruling held that there is no need to have in the memorandum a clause empowering a company to amalgamate with another company, and held: “it is quite clear that the power under Sections 391 to 394 of the 1956 Act are not circumscribed or predicated on the applicant company possessing powers under its objects clause to amalgamate with any other company.”
Mergers and Amalgamation: An Introduction

A company may decide to accelerate its growth by developing into new business areas, which may or may not be connected with its traditional business areas, or by exploiting some competitive advantage that it may have. Once a company has decided to enter into a new business area, it has to explore various alternatives to achieve its aims.

Basically, there can be three alternatives available to it:

(i) The formation of a new company;
(ii) The acquisition of an existing company;
(iii) Merger with an existing company.

The decision as to which of these three options are to be accepted, will depend on the company’s assessment of various factors including in particular:

(i) The cost that it is prepared to incur;
(ii) The likelihood of success that is expected;
(iii) The degree of managerial control that it requires to retain.

For a firm desiring immediate growth and quick returns, mergers can offer an attractive opportunity as they obviate the need to start from ‘scratch’ and reduce the cost of entry into an existing business. However, this will need to be weighed against the fact that unless the shareholders of the transferor company (merging company) are paid the consideration in cash, part of the ownership of the existing business remains with the former owners.

Merger with an existing company will, generally, have the same features as an acquisition of an existing company. However, identifying the right candidate for a merger or acquisition is an art, which requires sufficient care and caliber.

Once an organization has identified the various strategic possibilities, it has to make a selection amongst them. There are several managerial factors which moderate the ultimate choice of strategy. This would depend upon its growth objectives, attitude towards risk, the present nature of business and technology in use, resources at its command, its own internal strengths and
weaknesses, government policy, etc. The changing economic environment is creating its own compulsions for consolidation of capacities. With growing competition and economic liberalization, the last two decades have witnessed a large number of corporate mergers.

CONCEPT OF MERGER AND AMALGAMATION

A merger can be defined as the fusion or absorption of one company by another. It may also be understood as an arrangement, whereby the assets of two (or more) companies get transferred to, or come under the control of one company (which may or may not be one of the original two companies).

In a merger one of the two existing companies merges its identity into another existing company or one or more existing companies may form a new company and merge their identities into a new company by transferring their businesses and undertakings including all assets and liabilities to the new company (hereinafter referred to as the merged company). The shareholders of the company or companies, whose identity/ies has/have been merged (hereinafter referred to as the merging company or companies, as the case may be) are then issued shares in the capital of the merged company. For the purpose of issue of shares in exchange for the shares held by the shareholders of the merging companies, the value of shares of merging companies, and the merged company is computed and thereafter the share exchange ratio is fixed as part and parcel of the scheme of merger. The scheme requires approval of the board of directors of the respective companies, approval of the shareholders of both the company exercised by means of a resolution with the prescribed majority and in addition the sanction of the respective High Courts.

Therefore, a merger may mean absorption of one company by another company, wherein one of the two existing companies loses its legal identity after transferring all its assets, liabilities and other properties to the other company as per a scheme of arrangement approved by all or the statutory majority of the shareholders of both the companies in their separate general meetings and sanctioned by the court.
AMALGAMATION MEANING

Amalgamation is an ‘arrangement’ or ‘reconstruction’. 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 and as a consequence the amalgamating company loses its existence and its shareholders become the shareholders of new company or the amalgamated company. Similar to merger the shareholders of amalgamating companies get shares of amalgamated company. All the approvals explained in the case of merger are required to be obtained in the case of amalgamations also.

The shareholders of each amalgamating company become the shareholders in the amalgamated company. To give a simple example of amalgamation, we may say

A Ltd. and B Ltd. Form C Ltd. And Merge Their Legal Identities Into C Ltd. It May Be Said In another way that A Ltd. + B Ltd. = C. Ltd.

The Word ‘Amalgamation’ or ‘Merger’ Is Not Defined Anywhere In the Companies Act, 1956. However Section 2(1b) Of the Income Tax Act, 1961 Defines ‘Amalgamation’ As Follows:

“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 amalgamating company or companies and the company with which they merge or which is formed as 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-fourth 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 it 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.”

Thus, for a merger to qualify as an ‘amalgamation’ for the purpose of the Income Tax Act, the above three conditions have to be satisfied. This definition is relevant *inter alia* for Sections 35(5), 35a (6), 35e (7), 41(4) explanation 2, 43(1) explanation 7, 43(6) explanation 2, 43c, 47 (vi) & (vii), 49(1)(iii)(e), 49(2), 72a of Income Tax Act.

Transfer of assets to the transferee company pursuant to a scheme of amalgamation is not a ‘transfer’ and does not attract capital gains tax under Section 47(vi). Likewise, shares allotted to shareholders of the transferor company are not a transfer attracting capital gains tax under Section 47(vii).

**DIFFERENCE BETWEEN MERGER AND AMALGAMATION**

The terms merger, amalgamation and consolidation are sometimes used interchangeably and denote the situation where two or more companies, keeping in view their long term business interests, combine into one economic entity to share risks and financial rewards. However, in strict sense, merger is commonly used for the fusion of two companies. Merger is normally a strategic vehicle to achieve expansion, diversification, entry into new markets, and acquisition of desired resources, patents and technology. It also helps companies in choosing business partners with a view to advance long term corporate strategic plans. Mergers are also considered as a revival measure for industrial sickness.

Amalgamation is an arrangement for bringing the assets of two companies under the control of one company, which may or may not be one of the original two companies. Amalgamation signifies the transfer of all or some part of the assets and liabilities of one or more existing business entities to another existing or new company. In an amalgamation by purchase, one company’s assets and liabilities are taken over by another and a lump sum is paid by the latter to the former as consideration, which is within the purview of Sections 391 and 394 of the Act – re. [*Sps Pharma Ltd*].
Thus, an amalgamation is an organic unification or amalgam of two or more legal entities or undertakings or a fusion of one with the other. There is no bar to more than two companies being amalgamated under one scheme – [Patrakar. Ltd].

Chapter V containing Sections 230-240 of the Companies Act contain provisions on ‘Compromise, Arrangements and Reconstructions’.

RIGHT TO AMALGAMATE

No company involved in amalgamation need be financially unsound or under winding-up though as per Section 390(a), for purposes of Section 391 ‘company’ means “any company liable to be wound up”. But it does not debar amalgamation of financially sound companies. [BOI v. Ahmedabad Printing; Rossell Ltd].

Section 390(A) of the Companies Act 1956 is applicable to a company incorporated outside India. If court has jurisdiction to wind up such a company on any of the grounds specified in the Act, court has jurisdiction to sanction scheme of amalgamation if a company incorporated outside India is a transferor-company. [Bombay Gas Ltd. v. Regional Director]. There is no bar to a company amalgamating with a fifteen-day old company having no assets and business. [Apco Industries Ltd.]. Amalgamation calls for compliance with both Sections 391 and 394. While Section 391 requires sanction of court for ‘compromise or arrangement’, Section 394 empowers the court to provide for the matters stated in that Section to facilitate amalgamation.


Amalgamation of a company licensed under Section 25 of the Companies Act, 1956 with a commercial, trading or manufacturing company could be sanctioned under Section 391/394. [Mathurdasi Foundation; Re. Walvis Flour Mills Ltd.]. There is nothing in law to prevent a company carrying on business in shares from amalgamating with one engaged in transport. [Re Eita India Ltd].
UNDERLYING OBJECTIVES IN MERGERS

Major objectives and their benefits are given below:

- **Market Leadership**

  The amalgamation can enhance value for shareholders of both companies through the amalgamated entity’s access to greater number of market resources. With the addition to market share, a company can afford to control the price in a better manner with a consequent increase in profitability. The bargaining power of the firm *vis-a-vis* labour, suppliers and buyers is also enhanced. In the case of the amalgamation of reliance petroleum limited with reliance industries limited, the main consideration had been that the amalgamation will contribute towards strengthening reliance’s existing market leadership in all its major products. It was foreseen that the amalgamated entity will be a major player in the energy and petrochemical sector, bringing together reliance’s leading positions in different product categories.

- **Improving economies of scale**

  One of the most frequent reason given for mergers is to improve the economies of scale. Economies of scale arise when increase in volume of production leads to a reduction in cost of production per unit. They are generally associated with the manufacturing operations, so that the ratio of output to input improves with the volume of operations. Mergers and amalgamations help to expand the volume of production without a corresponding increase in fixed costs. Thus, the fixed costs are distributed over a large volume causing the unit cost of production to decline. Economies of scale may also be obtained from the optimum utilization of management resources and systems of planning, budgeting, reporting and control. A combined firm with a large size can make the optimum use of the management resources and systems resulting in economies of scale. This gives the company a competitive advantage by gaining an ability to reduce the prices to increase market share, or earn higher profits while maintaining a price.

- **Operating economics**

  Apart from economies of scale, a combination of two or more firms may result in reduction of costs due to operating economies. A combined firm may avoid overlapping of function and facilities. Various functions may be consolidated and duplicate channels may be eliminated by
implementing an integrated planning and control system. The merger of Sundaram Clayton Ltd. (SCL) With TVS Suzuki Ltd. (TSL) Was Motivated by Operating Economies and By Virtue Of This, TSL Became the Second Largest Producer of Two Wheelers. TSL Needed to Increase Its Volume of Production but Also Needed a Large manufacturing base to reduce its production costs. Large amount of funds would have been required for creating additional production capacity. SCL was also required to upgrade its technology and increase its production. Both the firms’ plants were closely located offering various advantages, the most versatile being the capability to share common research and development facilities.

- **Financial Benefits**

A merger or amalgamation is capable of offering various financial synergies and benefits such as eliminating financial constraints, deployment of surplus cash, enhancing debt capacity and lowering the costs of financing. Mergers and amalgamations enable external growth by exchange of shares releasing thereby, the financial constraint. Also, sometimes cash rich companies may not have enough internal opportunities to invest surplus cash. Their wealth may increase through an increase in the market value of their shares if surplus cash is used to acquire another company. A merger can bring stability of cash flows of the combined company; enhance the capacity of the new entity to service a larger amount of debt, allowing a higher interest tax shield thereby adding to the shareholders wealth. Also, in a merger since the probability of insolvency is reduced due to financial stability, the merged firm should be able to borrow at a lower rate of interest. Apart from this, a merged firm is able to realize economies of scale in floatation and transaction costs related to an issue of capital i.e. issue costs are saved when the merged firm makes a larger security issue.

- **Acquiring A New Product Or Brand Name**

Acquiring a new product is different from acquiring a brand name. A company may be able to build a brand name for a particular line of business. In a related field, the company might think of introducing another product so that reputation and goodwill associated with a brand name of the company could be advantageously exploited. In this situation, the company would be either installing a manufacturing facility for the new product or looking for a good party in the market
with a reasonable market share. If the company acquires its manufacturing facility, the company can save a lot of time and energy in creating a new industry. The combination of the ability of the company to take over the manufacturing facility and build the said product with the company’s brand name develops a great market for the company.

- **Diversifying The Portfolio**

Another reason for merger is to diversify the company’s dependence on a number of segments of the economy. Diversification implies growth through the combination of firms in unrelated businesses. All businesses go through cycles and if the fortunes of a company were linked to only one or a few products then in the decline stage of their product life cycles, the company would find it difficult to sustain itself. The company therefore looks for either related or unrelated diversifications, and may decide to do so not internally by setting up new projects, but externally by merging with companies of the desired product profile. Such diversification helps to widen the growth opportunities for the company and smoothen the ups and downs of their life cycles.

- **Synergies**

Synergy refers to a situation where the combined firm is more valuable than the sum of individual combining firms (2+2=5). The combination of operations can create a unique level of integration for the amalgamated entity spanning the entire value chain in the line of business. This will enable the amalgamated entity to achieve substantial savings in costs, significantly enhancing its earnings potential. Synergies can be expected to flow from more focused operational efforts, rationalization, standardization and simplification of business processes, productivity improvements, improved procurement, and the elimination of duplication. The main criterion for synergy lies in the ability of an organization to leverage in resources to deliver more than its optimum levels. By combining the strengths of two complementary organizations, not only one could achieve synergy but also eliminate the disadvantages each had. Consider the garment manufacturer acquiring a spinning mill. The garment manufacturer can assure him of quality of cotton and the yarn that goes into the production of garments and expand your imagination by enabling him acquire processing facilities. Imagination, competitor watch, constant vigil, conservation of resources is the key drivers and amalgamations happen in this process only. One of the most important reason for mergers and
amalgamations is to realize synergies; either through cheaper production bases as in case of Jindal strips purchase of two units from Bethlehem in us, or by cost savings and pooling of resources in R&D marketing and distribution as in case Of Astra’s $36 Billion Merger With Zeneca, Hoechst Merger With Rhone Poulene Or Other Pharma Mergers.

- **Taxation Or Investment Incentives**
  
  A company, which has incurred losses in the past, can carry forward such losses and offset them against future taxable profits and reduce tax liabilities. Such a company when merged with a company with large taxable profits would help to absorb the tax liability of the latter. A similar advantage exists when a company is modernizing or investing heavily in plant and machinery, which entitles it to substantial investment incentives, but has not much taxable profits to offset them with. Acquiring or merging such a company with a highly profitable company would help make full use of the investment incentives for the latter.

**COMPROMISE, ARRANGEMENT, RECONSTRUCTION AND AMALGAMATION: THE LEGISLATIVE PROPOSITION**

Chapter V of the Companies Act deals with Schemes of Compromises, Arrangements and Reconstructions Covering Sections 390 to 396a. ‘Arrangement’ has a very wide meaning and is wider than ‘compromise’. ‘Compromise’ hints at some element of accommodation on each side. ‘Arrangement’ or ‘reconstruction’ describes any form of restructuring of the company for its betterment and includes merger of two or more companies and the division of one company into two or more companies. Generally in such schemes the rights of the concerned creditors and members have to be curtailed. The value of the provisions of the said chapter v of the Companies Act is clearly evident where dissenting stakeholders are concerned. For reduction of rights individual agreement with or consent of each affected member or creditor would have been required. In such eventuality, dissenting or untraced members or creditors, though in a minority, could frustrate any arrangement. The provisions of statutory scheme ensure that such minority become bound by the restructuring exercise supported by the affected majority for betterment of the company and cannot scuttle it.
POWERS OF COURT TO SANCTION COMPROMISE OR ARRANGEMENT

According to Section 230 where a compromise or arrangement is proposed between a company on one hand and its creditors or a class of them or with its members or a class of them, the court may on an application of concerned member or creditor order a meeting of the creditors or members or concerned class of them, as the case may be for consideration of such proposals. Such proposals for compromise or arrangement under Section 391 of the Companies Act can also involve a scheme of reconstruction or amalgamation of companies by virtue of Section 230 of the said Act.

Reconstruction here is a generic term, which also includes within its ambit division, takeover, spin offs, divestitures etc. of corporate enterprises.

Under Section 230 (2) if a majority in number of, however, at least 3/4th In value of such creditors or members, as the case may be, present and voting either in person Or by proxy agree, such compromise or arrangement shall be binding and enforceable, if sanctioned by the court. However, no order sanctioning any arrangement or compromise shall be made by the court unless it is satisfied that the company or any person by whom the application is made has disclosed to the court by affidavit or otherwise that all material facts relating to the company, such as its latest financial position, the latest auditor’s report on the accounts of the company, particulars of any pending investigation or proceedings In relation to the company under Sections 235 to 251 of the said Act and the like. Under Section 230 (3) the order of the court shall not have any effect unless a certified copy of the same has been filed with the registrar of companies of the state in which the registered office of the company is situated.

Under Section 230 (6) the court may at any time after the application has been made stay the commencement or continuation of any suit or proceedings against the company on such terms the court thinks fit, until the application is finally disposed of.

According to Section 230 (1) where the High Court makes an order under Section 231 it shall have the power to supervise the implementation of the scheme and may make necessary directions for implementation or modification as it finds necessary. Under Section 231 (2) if the court finds that the scheme cannot be worked satisfactorily with or without modifications, it may order for winding up of the company. According to Section 230 (1) where a meeting of creditors or members or any
class of them has been called under Section 230, with every notice convening meeting a statement shall be attached containing the terms of compromise or arrangement or its effect; and the material interests in it of the directors or managers of the company in any capacity and the special effect of such interest, if any, and when notice is given by advertisement then either it shall contain the aforesaid statement or an intimation as to where and how a creditor or member entitled to attend the meeting can get a copy of the aforesaid statement.

Under Section 230 (3) where the compromise or arrangement is concerning the debenture holders the statement of interests in it of the trustees of the debenture holders, if any, shall be likewise attached to the notice.

Under Section 230 (6) where it is given in the advertisement that a member or creditor can get a copy of the statement, the company shall provide it free of charge.

SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVER) REGULATIONS, 1994

For taking over companies listed on the stock exchange SEBI (substantial acquisition of shares and takeover) regulations, 1994 are applicable. A buyer who intends to acquire shares which along with his existing shareholding would give him more than 15% voting rights, can purchase such shares only after making a public announcement to acquire at least additional 20% of the voting capital of the target company from the shareholders through an open offer.

An acquirer who is having 15% or more but less than 75% of shares or voting rights of a target company, can increase his holding by only 5% of the voting rights in any financial year. However, any additional purchase in excess of 5% can be made after making a public announcement to buy through open offer.

Buyer having 75% or more shares or voting rights of target company, can acquire further shares or voting rights only after making public announcement of number of shares to be acquired through open offer from shareholders of target company.
PUBLIC ANNOUNCEMENT

A public announcement is made in the newspapers by the buyer regarding his intention to acquire a minimum of 20% of the voting capital of the target company from the shareholders through an open offer.

However, an acquirer holding 75% or more voting rights/ shares in the target company can also make an offer for less than 20% shares of Target Company upon depositing in an escrow account 50% of the price payable under the public offer. The disclosures in public announcement would include the offer price, the number of shares to be acquired from the public the procedure to be followed for buying the shares from the shareholders and the time limit within which the same would be completed. The public offer informs the shareholders of the target company of the exit opportunity available to them. They can either choose to stay with the target company or exit from it by selling to the bidder.

MAJOR JUDICIAL PRONOUNCEMENTS

The following important judicial rulings throw light on the main issues of corporate restructuring in India. [Commercial Wisdom Prevails].

The Supreme Court In [Miheer H v. Mafatlal] has Ruled that the court in sanctioning any scheme of merger or amalgamation has no jurisdiction to Act as a court of appeal and sit in judgement over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties.

The court has neither the expertise nor the jurisdiction to develop deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme of merger by the requisite majority. Consequently, the company court’s jurisdiction to that extent is peripheral and supervisory and not appellate. Justice S.B. Majumdar remarked:

While deciding the issue of amalgamation or merger, the company court Acts like an umpire in a game of cricket who has to see that both the teams play their game according to the Rules and do not overstep the limits. But subject to that, how best the game is to be played is left to the players and not to the umpire.
The Supreme Court Ruled that the company court could not, therefore, undertake the exercise of scrutinizing the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and in the realm of commercial democracy permitting the Activities of the concerned creditors and members of the company who in their best commercial and economic interest by majority agree to give green signal to such a compromise or arrangement.

The court also held that in the case of a scheme under Sections 391 and 394, the court will see whether it is lawful, just and fair to the whole class of creditors or members who had approved it with the requisite majority vote including the dissenting minority which will be bound by it.

In re [Centex Petro-Chemical Ltd]. It was held that it is not the court's duty to launch an investigation into commercial merits or demerits of a scheme of amalgamation provided by shareholders when no lack of good faith was evident on the part of majority and provisions of the Act had been complied with. The court cannot substitute its wisdom for the collective wisdom of shareholders when overwhelming majority has approved the scheme. Though it is the statutory duty of the court to satisfy itself that amalgamation scheme will not be prejudicial not only to shareholders of company i.e. transferor and transferee companies but also to the public at large, but the court cannot question commercial wisdom of shareholders, with their open eyes are accepting ratio of exchange of shares. [Operations Research (India) Ltd].

TRANSFER OF ASSETS

In [United Breweries v Commissioner] it was held that since in an amalgamation, the transferor company ceases to exist with effect from the date on which the amalgamation is made effective, the ownership of the assets held by the transferor company stands transferred to the transferee company on that day. Merely because the shareholders of the transferor and transferee companies are the same, it does not follow that there is no transfer when the assets of the transferor company pass to the transferee company on the transferor company's ceasing to exist as an independent entity. A company is a juristic person entirely distinct from its shareholders who may change from time to time.
In re. [New Vision Ltd]. It was held that Sections 77 and 42 of the Companies Act, 1956 are not intended to be read with Sections 391, 392 or 394 at the time when a scheme of amalgamation is pending before the court for approval, after the shareholders and the creditors have approved it and affidavits have been filed to the effect that the affairs of the transferee company are not conducted in a manner prejudicial to the shareholders or to the public interest.

In [Electricals (P) Ltd] it was held that there can be no objection to a private limited company having its assets revalue by an expert and then amalgamating with a public limited company within a few days after its incorporation.

CONCLUSION

In the light of above study undertaken in order to develop this project it can safely be concluded that while drafting the new law a broader perspective has been take into account by the legislators and the new Companies Act of 2013 tries to cast a balance between the rights of the stakeholders and the public at large thereby benefitting the both.
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