Impact of Companies act 2013 on Mergers and amalgamations

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Abstract: *The Companies Act 2013 is an Act of the Parliament of India which regulates incorporation of a company, responsibilities of a company, directors, and dissolution of a company. In this era of cut throat competition companies with small capital are bound to join hands with financially strong companies and thus Mergers and Acquisitions are increasing in recent period. Other than these companies are also involving in other corporate restructuring activities like joint ventures, Takeovers, Assets Acquisitions, Divestitures, and Equity carve out etc in order to develop further. Thus it's very necessary that provisions pertaining to mergers and acquisitions in companies act 2013 should enhance reliability, transparency and relevance in said aspects.*
Relevant provisions for Merger and Amalgamation under Companies Act, 2013 are Section 230-240
In present paper attempt has been made to interpret provisions related to mergers and Amalgamation in companies act 2013 and to find deviations as compared to provisions under companies act 1956.On the basis of study what could be probable effect on mergers and amalgamations once said sections are notified has been also identified.

Key Words: *The Companies Act 2013, Merger and Amalgamation, deviations, effect on mergers and amalgamations.*

1. INTRODUCTION:

Company being legal person governed by law which is now revised after long period on implementation of companies act 2013

The **Companies Act 2013** is an Act of the Parliament of India which regulates incorporation of a company, responsibilities of a company, directors, and dissolution of a company. It is divided into 29 chapters containing 470 sections as against 658 Sections in the Companies Act, 1956 and has 7 schedules. The Act has replaced The Companies Act, 1956 (in a partial manner) after receiving the assent of the President of India on 29 August 2013. The Act came into force on 12 September 2013. (Wikipedia)

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Chapter XV (Section 230 to 240) of Companies Act, 2013(the Act) contains provisions on 'Compromises, Arrangements and Amalgamations', that covers compromise or arrangements, mergers and amalgamations, Corporate Debt Restructuring, demergers, fast track mergers for small companies/holding subsidiary 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 National Company Law Tribunal (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. (ICSI)

Following are the major deviations from earlier provisions in respect of mergers and acquisitions in companies act 2013

RELEVANT PROVISIONS FOR MERGER & AMALGAMATION:

Relevant provisions for Merger and Amalgamation under Companies Act, 2013 are Section 230-240 where as under Companies Act, 1956 its governed by Section 390-396A.

Disclosures Requirement

Under Companies Act, 1956, Tribunal had Power to sanction any compromise or arrangements with creditors and members if satisfied that company or any other person by whom an application has been made(by way of first motion Petition) has disclosed all material facts relating to company with an affidavit such as latest financial position of the Company, accounts of the company, latest auditor's report etc.

For the compliance part, the notice of meeting was required to be sent along with statement setting forth the terms of the compromise or arrangement and explaining its affect in particular, the statement must state all material interest of directors of the company, whether in their capacity as such or as member or creditors of company or otherwise. The tribunal should also give notice to Central Government (Regional Director and Registrar of Companies) and shall take into consideration the representations, if any, made to it by that government before passing any order. Also, during the same period there was a requirement of newspaper publication and any objections by any of the shareholders, creditors if any, be raised before the Court during the hearing of the second motion Petition.

Under Companies Act, 2013,The provisions of section 230 provide the additional disclosure if the proposed scheme involves; Reduction of Share Capital or the scheme is of Corporate Debt restructuring; consented not less then 75% in value of secured creditors, Every notice of meeting about scheme to disclose valuation report explaining affection various shareholders. Further, 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 of the Companies Act, 2013.Apart from this, dealing with the Arrangements; notice of meeting to consider Compromise or arrangement to be given to Central Government, Income Tax Authorities, Reserve Bank, Securities Exchange Board of India, Registrar of Companies, respective Stock Exchange, Official Liquidator, Competition Commission of India and other Authorities likely to be affected by the same. So these Authorities can voice their concern within 30 days of receipt of notice, failing which it will be presumed that they have no objection to the scheme.

CROSS BORDER MERGER

Previously according to the provisions of Companies Act, 1956, Inbound merger (Foreign Company merges into an Indian Company) was permissible however, outbound merger (Indian company cannot merge with foreign Company) was not allowed. Whereas as per Companies Act, 2013,section 234, Inbound and out bond foreign company merger are allowed, which means Foreign Company merging into Indian Company and Indian Company merging into foreign Company could be done with RBI approval This section has widen the scope for Indian Companies as now they have both options of arrangement. The consideration for merger can be in the form of Cash and / or Depository Receipts or partly in Cash and partly in Depository Receipts. This would apply to Foreign Companies in jurisdictions as notified by the Central Government.

FAST TRACK MERGER

Fast Track merger or quick form merger is the new provision added in Companies Act, 2013. As per section 233 of companies act 2013, Fast track merger is merger between two or more small companies, holding company and its wholly own subsidiary and such other company as may be prescribed. Fast Track merger does not involve Court or Tribunal, approval of National Company Law Tribunal is also not required. Small companies which meet the threshold of section 2(85) of the 2013 Act viz. definition of 'Small Company' can avail the merger route under this section.

For fast track merger board of directors of both the Companies would approve the scheme. However, notice has to be issued to ROC and official liquidator and objections / suggestions has to be placed before the members. The scheme needs to be approved by members holding at least 90 percent of the total number of shares or by creditors representing 90% in value of the creditors or class of creditors of respective companies .Once the scheme is approved, notice would have to be given to the Central Government, ROC and Official Liquidator. NCLT may confirm the scheme or order that consider as normal merger under section 232 of Companies Act, 2013.

Therefore Fast track merger will be a speedy process as it does not require approval for NCLT. It opens the scope for small companies who wanted to merge and can propose the scheme of Merger or Amalgamation through their Board of directors. There is also no requirement for sending notices to RBI or income-tax or providing a valuation report or providing auditor certificate for complying with the accounting standard. Such provision was missing in Companies act 1956.

OBJECTION TO SCHEME OF AMALGAMATION

Scheme of Amalgamation can be objected as per section 230(4) of Companies Act, 2013, only by shareholders having not less than 10% holdings or creditors debt is not less than 5% of total outstanding debt as per the last audited financial statement. whereas earlier under Companies Act, 1956 there was no such limit which state that person holding even 1% of the shareholding in the company can object the scheme which was not fair at all therefore the new threshold limit for raising objections in regard to scheme of amalgamation will protect the scheme from small shareholders' and creditors' which results in to unnecessary litigation and objection.

MEETING OF CREDITORS/SHAREHOLDERS TO APPROVE THE SCHEME

Under companies act 2013 Scheme if approved by 3/4th of creditors (value or class) or members, and if sanctioned by National Company Law Tribunal, the same shall be binding as stated under section 230(6)(1).The 2013 Act additionally allows the approval of scheme by postal ballot and E-voting. However previously under companies act 1956, Scheme if approved by 3/4th value of creditors or members, it will be binding if sanctioned by court as stated under section 391(2), voting in person or a proxy at meeting .E-Voting was not permitted under Companies act 1956.

MERGER OF A LISTED COMPANY INTO UNLISTED COMPANY

The Companies Act, 2013, section 232 requires that in case of merger between a listed transferor company and an unlisted transferee company, Transferee Company would continue to be unlisted until it becomes listed. Shareholders of listed Company have the option to exit on payment of value of their shares, as otherwise they will continue as a shareholder of the unlisted company. The Payment to such shareholders willing to exit shall be made on pre-determined price formula or after valuation However under companies act 1956, there was no specific provision governing merger of listed company with unlisted company.

Offer to sell by Minority shareholders to Majority shareholders

Under companies act 1956 No specific provision was there for offer to sell by the minority shareholder to the majority shareholders however under companies act 2013, Section 236 it is specified that The minority shareholders of the company may also offer to sell their shares to the majority shareholders at a price determined by registered valuer in accordance with the rules as may be prescribed.

Liability of officers of the Transferor Company

As per companies act 2013,Section 240,The liability in respect of offences committed by the officers of the Transferor Company prior to its merger, amalgamation or acquisition shall be liable for the offence committed post merger, amalgamation or acquisition whereas in previous act i.e. companies act 1956 no such provision was there. This section has been inserted to ensure that the officers of the Transferor Company do not escape any liability which might have arisen on account of violation under the Act.

BODY APPROVING MERGER

It is need of a time that approval of scheme requires an independent body of oversight and fairness. Under Companies Act, 2013 National Company Law Tribunal will deal with matters related to Merger & Acquisition Whereas as per 1956 Companies Act, scheme of arrangement was to be approved by respective High Court which has jurisdiction over Acquirer and Target companies .NCLT would be one specified body dealing with cases against multiple High Court in case of the companies falling under the jurisdiction of different high courts.

VALUATION REPORT

Under companies act 2013, it is mandatory that notice of meeting to discuss a scheme must be accompanied by valuation report prepared by an expert whereas under companies act 1956, it does not mandate disclosing the valuation report to the shareholders. Though in practice, valuation reports are included in documents shared with the shareholders and also to the Court as part of the appraisal process of the scheme by the Courts. (Gandhi & Arora, 2015)

2. FINDINGS AND CONCLUSIONS (Tushar, 2015)

Once above sections as discussed are notified, following will be impact seen

- The extensive disclosures are in addition to the disclosures required by companies act 1956 Act. The intent of increased disclosures is to ensure transparency and empower stakeholders by allowing them to take informed decisions
- Introduction of voting by way of postal ballot which will ensure larger public participation is a welcome measure.
- Exit options which were structured through selective capital reduction petitions have now found support through the provisions of this section wherein on merger of a listed company with an unlisted company, the exit option to shareholders through a pre-determined formula or valuation can be given.
- Internal Restructuring will increase due to separate provision for Small Companies (Only Private Companies) and Holding and Wholly Owned Subsidiary Company under Fast Track Merger
- Only relevant issue on Compromise, Arrangement, Mergers and Amalgamation will be raised due to prescribed limit for objecting the scheme
- Dissenting Shareholder will easily exit the Compromise, Arrangement, Merger and Amalgamation

- There will be more Cross- Border transactions in form of Mergers and Amalgamation
- The liability in respect of offences committed by the officers of the Transferor Company prior to its merger, amalgamation or acquisition shall be liable for the offence committed post merger, amalgamation or acquisition will ensure that officers are not escaped from their liability arisen due to violation under act.
- Role of other authority like Income Tax, Reserve Bank of India, etc. becomes important.

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