MERGERS AND ACQUISITIONS (M&A): PROCESS & JUDICIAL RESPONSE

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ABSTRACT

"I believe in innovation and that the way you get innovation is you fund research and you learn the basic facts".

— Bill Gates

Mergers and Acquisitions have been over a great extent used in developed economies as a growth strategy and is now increasingly getting accepted by Indian businesses as a critical tool of business strategy.

The doctrine of merger and acquisition of companies is neither a doctrine of constitutional law nor a doctrine as such statutorily recognized. It is a common law doctrine founded on the principle of property in the hierarchy of Justice delivery system. It should be noted that law is not what is being legislated within the four wall of the parliament but also what the Judiciary decides as according to realist school of Jurisprudence.

1. INTRODUCTION

The core goal of the any corporate is to maximize its wealth[1] and shareholder's value. This objective can be achieved internally either through the process of introducing new products or by enlarging the capacity of the existing products. On the other hand, the growth process can be facilitated externally by acquisitions, takeovers, mergers and so on. There are strengths and weaknesses of both the processes of achieving goals.

1. Machhi Hetal K. and Menon Preeti V., 2004 : Corporate Merger & Acquisition, Indian Journal of Accounting Vol.XXXV(l), PP. 7-12

2. MERGERS & ACQUISITIONS, AMALGAMATION AND RECONSTRUCTION: MEANING

According to the Oxford Dictionary, the expression "Merger" or "Amalgamation" means "combining of two commercial companies into one" and "merging of two or more business concerns into one" respectively.

Merger is a fusion between two or more enterprises, whereby the identity of one or more is lost and the result is a single enterprise. Amalgamation signifies blending of two or more existing undertakings into one undertaking, the blended companies losing their identities and forming themselves into a separate legal identity.

The various courts have defined amalgamation in different ways in **Saraswati Industrial Syndicate Ltd vs. C.I.T.** Haryana, Himachal Pradesh and Delhi III.[2]

Supreme Court held that 'Amalgamation' is a blending of two or more existing undertaking. The shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by transfer of two or more undertakings to a new company, or by transfer of one or more undertaking to an existing company where two companies are merged and are so joined as two amalgamating companies lose their identity.

In the **Central India Industries Ltd. vs. C.I.T.**[3], It was held that amalgamation is an arrangement whereby the assets of two companies become vested in or under the control of one of the original two companies, which has its shareholders all or substantially all the shareholders of the two companies.

In **General Radio vs. M.A. Khader**[4] Supreme Court held, that after amalgamation, Transfers Company doesn't become tenant of premises, even if tenancy rights are transferred to transferee company.

In United Breweries vs. Commission of Execise[5]. It was held that

2. (1999) 70 com cases 184 (S.C), Hukamchand Mohanlal (1971) 82 ITR 624 (SC), General Radio and Appliances Co. Ltd.vs M.A. Khader, (1986) 2 SCC 656.
3. (1975) 99 ITR 211.
4. AIR 1986 SC, 1218.
5. (2002) 36 SCL 641

there exist 'transfer even if shareholders are same, as Transferor Company ceases to exist after amalgamation.

Reconstruction:

"There is 'reconstruction' of a company when that company's business and undertaking are transferred to another company formed for that purpose, so that as regards the new company substantially the same business is carried on and the same persons are interested in it as in the case of the old company".[6]

A reconstruction may become necessary for several purposes. A court (now Tribunal) may not, for example, sanc¬tion a radical change of objects. New objects can then be adopted only by the process of reconstruction.[7] A reconstruction may also become neces¬sary to cause material alterations of the rights of a class of shareholders or creditors.[8]

Amalgamation:

"Amalgamation occurs when two or more companies are joined to form a third entity or one is absorbed into or blended with another".[9] The effect is to wipe out the merging companies and to fuse them all into the new one created. The new company comes into existence having all the property, rights and powers and subject to all the duties and obligations, of both the constituent companies. Explaining the object of an amalgamation and the scheme of the statutory provisions, the Madras High Court observedi in **WA**

6. J.A. Hornby, AN INTRODUCTION TO COMPANY LAW (1957) 174.

7. North of England Protecting & Indemnity Assn, re, (1929) 45 TLR 296.

8. See, Bank of India Ltd v Ahmedabad Mfg & Calico Printing Co, (1972) 42 Comp Cas 211 (Bom). Where the companies are situated in two different jurisdictions, the sanction of both the courts would be necessary to give to the scheme an all-round binding efficacy. Industrial Credit & Investment Corpn of India v Financial and Management Services Ltd, AIR 1998 Bom 305: (1998) 3 Bom CR 471: (1998) 3 Bom LR 677: (1999) 98 Comp Cas 241. The supervisory jurisdiction of the court was also stressed in this case. Mafatlal Denim Ltd v Sicom Ltd, AIR 2010 NOC 602 (Guj), on reconstruction of debts under a sanctioned scheme, the contract undergoes radical changes, only the altered contract can be enforced, course of recovery under the RBD Act are not interfered with.

9. Somayajula v Hope Prudhomme & Co Ltd, (1963) 2 Comp LJ 61. It is necessary that the trans ¬feree company should be in existence at the "appointed day" though not at the time of the preparation of the scheme. HCL Ltd, re, (1994) 80 Comp Cas 22.8 (Del). It is not necessary that both companies should have common objects. PMP Auto Industries Ltd, re, (1991) 4 Bom CR 387: (1994) 80 Comp Cas 289. The court can authorise necessary alterations in the memorandum after inviting the Cl.B to state its objections, if any. Rangkala Investments Ltd, re, (1995) 16 CLA 280 (Guj); Gujarat Organics Ltd, re, (1995) 16 CLA 280 (Guj).

Beardscll & Co (P) Ltd, re:[10]

"The word 'amalgamation' has not been defined in the Act. The ordi¬nary dictionary meaning of the expression is 'combination'. Judging from the context and from the marginal note of Section 394 which appears in Chapter-V relating to arbitration, compromises, arrangements and reconstructions, the primary object of amalgamation of one company with another is to facilitate reconstruction of the amalgamating compa¬nies and this is a matter which is entirely left to the body of shareholders, (and) essentially an affair relating to the internal administration of the transferor company. The decision of the body of the shareholders ought not to be lightly interfered with".

3. MERGERS & ACQUISITIONS, AMALGAMATION AND RECONSTRUCTION: TYPES

Mergers, Acquisitions and Takeovers etc. are terms that are commonly used interchangeably[11] but often differ by situation. Merger generally refers to unification of two equal players into one unit, while Acquisition refers to one competitor buying out another to combine the bought entity with itself.

A takeover may be defined as obtaining of control over management of a company by another. A company may have effective control over another company by holding minority ownership. As per **Accounting Standard-14**[12] which is for the purpose of amalgamations and mergers, the exhaustive classification of these terms is provided as:

i) Transfer of all the assets and liabilities from the transferor to the transferee,

10. (1968) 38 Comp Cas 197, 204 (Mad). See also, Reliance Jute & Industries Ltd, re, (1983) 53 Comp Cas 591 (Cal), here a holding company absorbed its subsidiary and objections under S. 372 [now S. 232] were not sustained. The transferor company which is going to be amalgamated can be a foreign company, Bombay Cas Co (P) Ltd v Central Govt, (1996) 3 Bom CR 312: (1997) 89 Comp Cas 195. The court followed the decision to the same effect in Khandelwal Udyog Ltd, re, (1977) 47 Comp Cas 503, 511 (Bom). Banaras Breads Ltd, re, (2006) Comp Cas 548 (All), in a scheme of amalgamation, the arbitration award directed convening of a meeting for approval of the scheme. Certain applications alleging oppres¬sion and mismanagement were pending before CLB. The court said that the petition for confirmation of the scheme could not be kept pending till CLB decisions.

11. ICFAI - ARF GROUP, 2004 : Procedure for Merger and Amalgamation, The Chartered Accountant, PP. 1234- 1239.

12. Issued by Chartered Accountants of India, New Delhi.

ii) Acceptance of shareholding in the transferee company by at least 90% of the shareholders of the transferor by exchange of equity shares,

iii) Intention to carry on the transferor's business after amalgamation and

iv) Non-adjustment in the value of assets and liabilities other than to ensure uniform accounting policies.

Notwithstanding terminological differences, mergers can be usefully distinguished in to three kinds

1. **Horizontal Merger** takes place when two or more corporate firms dealing in comparable lines of activity combine together due to variety of reasons such as reduction in competition, putting an end to price cutting and to get the advantages of economies of scale in production, research and development and marketing and management.

2. **Vertical Merger** is a grouping of two or more corporate firms involved in different stages of production or distribution. When electronic goods manufacturing company and electronic goods marketing company merged with each other.

3. **Conglomerate Merger** is a combination of corporate firms engaged in unmatched and unrelated lines of business activity. Diversification of risk constitutes the rationale for such kind of mergers. The mergers of L&T and Voltas Ltd. is the model of conglomerate companies.

4. LEGAL FRAMEWORK FOR MERGERS & ACQUISITIONS

The beginning to amalgamation may be made through common agreements between the transferor and the transferee but plain agreement does not provide a legal cover to the transaction unless it carries the sanction of company court for which the procedure laid down under section 232[13] of the Companies Act,2013.

Procedure for merger and amalgamation is different from takeover. Formers are regulated under the provisions of the Companies Act,

13. Corresponds in Section 392 of the company Act,1956

2013 whereas takeovers are regulated under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations.

A. THE COMPANIES ACT, 2013

The following is the outline of legal procedures for merger or acquisitions laid down in the said Act are as follows-

(i) Two or more companies can only be amalgamated if memorandum of association of such companies is permitted to do so. In the absence of this, permission of the shareholders, board of directors and the Company Law Board should be taken before affecting the merger.

(ii) Both the companies should inform the stock exchanges where they are listed about the merger.

(iii) The board of directors (BOD)[14] of the individual companies should approve the draft proposal of mergers.

(iv) A copy of draft proposal approved by the BOD of both the companies should be submitted to high court. High Court would convene a meeting of shareholders and creditors to approve the mergers but the notice of such meeting should be sent to them at least 30 days in advance[15].

(v) The individual companies should hold the meeting and at least, 75% of shareholders and creditors should approve the scheme[16].

(vi) After the approval of shareholders and creditors, on the petitions of the companies the high court will pass order to sanction the merger scheme.

(vii) The true copies of high court's order will be submitted to the Registrar of Companies.

(viii) Transfer of assets and liabilities of acquired company will take place as per approved scheme and

14. See Sec.232(2) of Company Act,2013
15. See Sec.230(4) of Company Act,2013
16. See Sec.230(2)(c) of Company Act,2013

(ix) As per scheme the acquiring company will exchange share or debentures or cash for the shares and debentures of the acquired company.

B. SEBI GUIDELINES

Securities Exchange Board of India (SEBI) has provided guidelines for takeover only. The prominent features of the guidelines are:

(i) When an individual or a company acquires five per cent or more of the voting capital of a company then Target Company and the concern stock exchange shall be notified immediately.

(ii) There is a limit in acquiring shares of another company without making any offer to other shareholders that is ten per cent of the voting capital.

(iii) If the holding of the acquiring company exceeds ten per cent, a public offer to purchase a minimum of twenty per cent of the shares shall be made to the remaining shareholders by a public announcement.

(iv) If offer is made to the shareholders the minimum offer price shall not be less than the average of the weekly high and low of the closing prices during the last six months before the date of announcement of such offer.

(v) The offer should disclose the detailed terms of the offer, identity of the offerer, details of the offerer's existing holdings in the offeree company etc. and this information should be made available to all the shareholders at the same time and in the same mode.

The main objective of the Companies Act and the SEBI guidelines for takeovers are to ensure full disclosure about the mergers and takeovers and to protect the interests of the shareholder especially the small shareholders.

C. Banking Regulation Act, 1949

Merger & Acquisitions of banking companies is controlled by the special provisions of Banking Regulation Act, 1949 as well as Reserve Bank of India Act, 1934. In India no company may carry on Banking company business except

under a license issued by the Reserve Bank of India and all such Banking companies are subject to provisions of the Banking Regulation Act and Reserve Bank of India Act.

D. Intellectual Property Due Diligence in Mergers and Acquisitions.

The increased profile, frequency, and value of intellectual property related transactions have elevated the need for all legal and financial professionals and intellectual property (IP) owner to have thorough understanding of the assessment and the valuation of these assets, and their role in commercial transition.

A detailed assessment of intellectual property asset is becoming an increasingly integrated part of commercial transaction. Due diligence is the process of investigating a party's ownership, right to use , and right to stop others from using the IP rights involved in sale or merger. The nature of transaction and the rights being acquired will determine the extent and focus of the due diligence review.

Due diligence in IP for valuation would help in building strategy, where in:

i) If intellectual property asset is underplayed the plans for maximization would be discussed.

ii) If the trademark has been maximized to the point that it has lost its cachet in the market place, reclaiming may be considered.

iii) If mark is undergoing generalization and is becoming generic, reclaiming the mark from slipping to generic status would need to be considered.

iv) Certain events can devalue an intellectual property asset, in the same way a fire can suddenly destroy a piece of real property. These sudden events in respect of IP could be adverse publicity or personal injury arising from a product. An essential part of the due diligence and valuation process accounts for the impact of product and company – related events on assets – management can use risk information revealed in the due diligence.

v) Due diligence could highlight contingent risk which do not always arise from intellectual property law itself but may be significantly affected by product liability and contract law and other non intellectual property realms.

Therefore intellectual property due diligence and valuation can be correlated with the overall legal due diligence to provide an accurate conclusion the asset present and future value'.

E. The Depositories Act, 1996-

Depository Law to Facilitate Hostile or Friendly Takeovers:

Central government introduced the depository system to smoothen the registration of transfer of shares by the companies and eliminate refusal to such transfer, hereby facilitating takeovers both hostile and friendly.

The Depositories Act, 1996 has been enforced on September 20, 1995, and it will remove hindrance in transfer and transmission of shares and create healthy conditions in corporate world followed by SEBI (Depositories and participant) Regulations, 1996, providing for the rights and obligations of the depository and other constituents.

F. Provisions Relating to Stamp Duty for Mergers and Acquisitions:

Corporate combination (such as merger and acquisitions provides revenue to state exchanger in certain states stamp duty acts. Indian stamp Act provides for stamping of instruments.

While Maharashtra has amended definition of instruments to in order of mergers. Indian stamp act applicable to Delhi has not been so amended Gujarat state also levy stamp duty on business combination.[17]

In a recent case[18] definition of instruments has been defined and their transfer has been declared transfer of assets and liabilities takes effect by an order of the court. Once

17. www.feeleminds.com/forum/stam duty-on-merger-P38472

18. Hindustan Lever vs. State of Maharashtra (2003). 48 SCL 630

shareholders of Transferee Company receive consideration, it would deemed as owner, has received the consideration.

In recent Judgment[19] of Delhi High Court held that "the transferor company is a hundred percent subsidiaries of the transferee company. In view of the requirement of item 55 of the notification, dated 25th Dec, 1937 requires a certificate to be produced by the parties to the instrument that the conditions prescribed in the instant case are fulfilled. Compliance with the notification cannot be waived. It is also held that the Notification dated 25th Dec, 1937 is applicable and binding. As a result, the stamp duty chargeable on approved scheme of amalgamation would stand remitted in terms thereof.

However, stamp duty being a state subject, the above would only be applicable in those states where the state government follows the notification of the centre. At present stamp duty payable as under-

i) Maharashtra – 0.7% of value of shares allotted, or 7% of value of immovable properties in Maharashtra subject to ceiling of 10% of value of shares allotted.

ii) Gujarat – Maximum 2% of value of shares allotted and other consideration (as per slab).

iii) Karnataka-0.1% of value of properties in Karnataka. At present no stamp duty is payable in other states.

G. Income- Tax Act, 1961- Provisions for Mergers and Acquisitions

Income Tax is life-sustaining among all tax laws, which affect the amalgamation of companies, from the point of view of tax saving and treatment of company's books of accounts.

It is concern for mergers/demergers between two Indian companies. These mergers/demergers need to satisfy the conditions pertaining to section 2 (19AA) and section 2(1B) of the Indian Income Tax Act as per applicable situation.

In case of an Indian merger when transfer of shares occurs for a company they are entitled to a specific exemption from capital gains tax under Indian Income -Tax act. These

19. Delhi Towers Ltd vs. GNCT of Delhi (C.A. No. 466 of 2008 in Company Petition No. 50 of 2003 (Delhi)

companies can either be Indian origin or foreign ones. But there is different set of rules in foreign company mergers.

It can be noted that for foreign company mergers the share allotment in the merged company in place of shares surrendered by the amalgamating foreign company would be termed as a transfer, which would be taxable under Indian tax law. And under section 5(1), the global income accruing to an Indian company would also be included under the head of **'Scope of income'** for Indian company[20].

Section 2(B) of Income Tax Act, 1961 defines Amalgamation as[21]-

"Merger of one or more companies with another company or merger of two or more companies to form one company in such a manner that-

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

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

iii) shareholders holding not less than 3/4[22] in value of the shares in amalgamating company or companies become shareholders of the amalgamated company by virtue of amalgamation,

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

Section 47(IV) of the Income Tax Act, 1961 provides that amalgamation is not considered as transfer and hence there is no liability of capital gains tax.

20. www.economywatch.com/merger acquisition/laws.html.

21. A.K. Majumdar and Dr. G.K. Kapoor, Company Law, 2004 at Pg.543; For details see section 2(1B) of the Income Tax Act.1961.

22. Substituted for "9/10" by Finance Act, 1999 w.e.f. 1st April 2000.

Section 2(22)(a) of the Income Tax Act, 1961 provides that the transfer of assets by one company to another in a scheme of amalgamation is not regarded as distribution of profits. Amalgamation involves merger and not liquidation and hence **Section 2 (22C)** of Income Tax Act, 1961 is also excluded. After amalgamation, profits of amalgamating and amalgamated company are calculated together.

Proviso to section 32 of Income Tax Act, 1961 provides that total depreciation allowable to amalgamating company and the amalgamated company cannot exceed the normal depreciation allowable under the Act if the amalgamation had not taken place.

In respect of unabsorbed losses (accumulated losses) of amalgamating company, these are permitted to be carried forward in hands of amalgamated company only if conditions of **section 72A** of Income Tax Act, 1961 are prescribed.

Sections 35AB (3), 35ABB(7) and **35E(7A)** of Income Tax Act, 1961 deals with expenditure on license to operate telecommunication services or expenditure on prospecting is tax deductible in the hand of amalgamated company.

Under **section 35(DD)(1)** of the Income Tax Act, 1961 the expenditure incurred on amalgamation is deductible in 5-years in equal instalments@20% per year.

Section 72 of Income Tax Act, 1961 provides that loss of business can be set off against profits of subsequent year or years. Such carry forward loss is permitted up to 8-assessment year.

Section 72(A) of Income Tax Act, 1961[23] provides that loss of the amalgamating company can be carried forward in the amalgamated company subject to following conditions.

i) Amalgamated company should hold at least 75% of the assets of amalgamating company acquired as a result of amalgamation, at least for 5 year.

ii) The amalgamated company should continue business of amalgamating company at least for 5 years.

23. For details see, Section 72 (A) of Income Tax Act, 1961.

iii) It should make efforts to ensure revival of the business of amalgamating company, as per conditions prescribed in Rule 9(c) of information Technology Act, 2000. After 5-years, the business of amalgamating company need not be carried by amalgamated company.

iv) Rule 9(c) of information Technology Act, 2000 the amalgamated company shall achieve level of production of at least 50% of the installed capacity of the undertaking which was amalgamated (i.e. of amalgamating company). Within 4 years from date of amalgamation and continue to maintain the minimum leave till end of 5 years from date of amalgamation.

Section 47 was amended w.e.f. 1.4.1967 providing exemption from applicability of section 45 to taxation of capital gains on transfer of assets in case of amalgamation. After 1967 amendment, the Supreme Court need in **CIT vs. Madurain Mills Company Ltd.**[24] that no transfer is involved in getting shares from Transferee Company on amalgamation.

In **CIT vs. Master Raghuveer Trust,**[25] the Karnataka court held that no transfer is involved when a shareholder gets some shares or cash from the amalgamated company in lieu of his shares in the amalgamating company.

In **Shaw Wallace and Co. vs. CIT,**[26] it was pointed out that under the scheme of amalgamation, the amalgamating company, transfers their capital assets to amalgamated company, the scheme of amalgamation further provides that the amalgamating companies would be subsequently dissolved. It was held that transaction would not be classed as a transfer, or of any capital gains or loss resulting there from, even though their may be the extinguishment of rights. Similarly, any allotment of the shares as a result of amalgamation would not be treated as involving a transfer in the hands of the shareholders.

24. (1973) 89ITR45 SC.
25. (1985) 151 ITR 368 (KAR)
26. (1979) 119 ITR 399 (Col)

H. Accounting Standard (AS)-14

i) Accounting treatment of Mergers &Acquisitions under Corporate Accounting-

In India, Merger, Amalgamation and Takeover accounting is done in the traditional basis and in the case of vendor, whose books of accounts are to be closed as the business goes into liquidation. The transferee or the acquirer assumes the status as purchaser in whose books of accounts the acquisition is recorded as purchase transaction. All the companies are expected to follow the Accounting Standard (AS) -14 to record the merger transactions in their books. This standard is mandatory in nature.

There exist two main methods of accounting for amalgamations:

a) Polling of Interest Method-

Under the pooling of the Interest method, the assets, liabilities and reserves of the transferor company are recorded by the transferee company at their existing carrying amounts, after making adjustment required. If at the time of the amalgamation, the transferor and transferee companies have conflicting accounting policies, a uniform set of accounting policies is adopted following amalgamation.

The effects on the financial statements of any changes in accounting policies are reported in accordance with Accounting Standard (AS)-5 (Prior Period and Extraordinary items and changes in accounting period).

b) Purchase Method-

Under the purchase method the transferee company accounts for amalgamation either by incorporating assets and liabilities at the existing carrying amounts or by allocating the consideration to individual identifiable assets and liabilities of Transferor Company on the basis of their face values at the date of amalgamation. The identifiable assets and liabilities may include assets and liabilities not recorded in the financial statements of Transferor Company.

Where assets and liabilities are restarted on the basis of their face value, the determination of fair values may be influenced by the intention of Transferee Company.

For example-The transferee company may intend to effect changes in activities of the transferor company which necessitate the creation of specific provisions of expected costs, i.e. planned employee termination and relocation costs etc. The consideration for amalgamation consists of securities, cash or other assets.

ii) Provisions relating to Valuation of Shares and Exchange Ratio During Merger and Acquisitions of Companies-

Valuation is a device to assess the worth of the enterprise which is subject to merger or takeover so that consideration amount could be quantified and price of one enterprise for the other could be fixed which in turn is to be paid in the form of exchange of shares, in merger and amalgamation, shares of companies are expert valuers comprising financial experts, accounting specialists technical and legal experts.

In case of amalgamation in third company, the shareholders of both the companies get shares in third company in proportion to share valuation.. In case of merger, the shareholders of the company being merged get shares of the company in which it is merging, in proportion to the valuation of shares of both the companies.

Valuation of shares is the matter of judgment and is often subjective as no strait jacket mathematical formula can be established. Valuation can be done on various methods like yield method, asset value method and market value method, but ultimately the valuer has to consider various intangible aspects.

5. JUDICIAL RESPONSE AS PER APEX COURTS IN INDIA

I. National Company Law Tribunal can reject expert's opinion if he acts negligently.

In **Mihir Chakraborty. vs. Multi Technology Computers,**[27]

27. (2001) 43 CLA 259.

It was held that values is an expert, he cannot claim if he acts negligently in making valuation. He can be sued for negligence.

In **Sugar Cane Growers. Shakti Sugar Ltd.,**[28] Madras High Court held that if valuation is found to be erroneous National Company Law Tribunal is not bound to accept expert's opinion.

II. Absence of company's power to amalgamation memorandum of association.

In **Armco Pesticides Ltd., In.re.**[29] Bombay High Court held that there exists statutory power of amalgamation under the act even if the objects of the company are construed as not specifically empowering companies to amalgamate.

In **Feedback Reach Consultancy Services (Pvt) Ltd., In.re,**[30] Delhi High Court held that if power of amalgamation is contained in memorandum of company it need not seek the permission and approval of Court.

III. Court is authorized to reject the scheme when it is unfair against majority decision and public interest as well as oppressive to minority interests.

In **Lanco Kalahasthi casting Ltd, In.re,**[31] and **Gernman Remedies Ltd., In.re.**[32] It was held that Court has limited Jurisdiction that lies in checking whether the exchange ratio was so wrong or erroneous as would make the scheme of amalgamation unfair or oppressive to the minority members or any class of them.

IV. Notice to the Central Government under section 394-A.

In **YKIN Holdings Pvt. Ltd., In.re,** Delhi High Court held that notice is required to be given to the Central Government under section-394A if an application is made under section-

28. (1998) 93, Comp Case 646 (Mad), Indo continental Hotels, Inre, (1990) 3 Camp. LJ 150 (Raj) Coimbatore Cotton Mills, Inre (1980) 50 Comp Case 623 (Mad)

29. (2001) 103 Comp Case 416 (Bom)

30. (2002) 115 Comp Case. 897 (Delhi)

31. (2005) 124 Comp. Case 523.

32. (2001) 105 Comp. Case 249 (Del HC) In.re Bangshwari Cotton mills Ltd., (1967) 37 Comp. Case. 195 (Cal) In.re. W.A. Bearshell and co. (1968) 38 Comp. Case. 197 (mad).

391(2) and 394 but not required to be given at the initial stage of an application under Sec. 391(1).

In **Eita organic Ltd., vs. Narayan Prasad Lohia,**[33] Calcutta High Court held that while considering an application for sanction under section 391(2) of Act, 1956 following have to be considered.

Whether statutory requirement under sections 391-394 has been compiled with -

i) Whether meeting duly convened and scheme approved by requisite majority so that section 391(2) can be applied.

ii) That the fact that transferor and Transferee Company carry on dissimilar business is no ground why the Court should not sanction scheme of amalgamation.

iii) In the absence of objection from shareholders the central government has no right to raise the point.

In another case of **Vikram Organics Pvt. Ltd., vs. Anirox pigments Ltd.,** Calcutta high court held that one notice is sufficient to be given to the central government under section 394-A of companies Act, 1956 and companies (Court) Rules 1959, at the stage of an application for grant of sanction to a proposed scheme of amalgamation and also a prayer for dissolution of a transferor company to be dissolved without winding up.

V. Power of Reserve Bank of India in case of amalgamation of Banks.

In **Bank of Madura Shareholders Association vs. Reserve Bank of India,**[34] Madras High Court held that section 44A of Banking regulation Act empower Reserve Bank of India to grant approved for scheme of merger of the Banking companies and determining market value of shares hence NCLT won't express its opinion on valuation of shares for swap ratio.

33. (2000) 99 Comp. Case 276 (Cal)

34. (2002) 40 SCL 1 (Mad)

VI. SEBI Takeover regulation not applicable in case of scheme of amalgamation

In **Eaton Corporation vs. Chairman SEBI**[35], it was held that SEBI Takeover Regulations are not applicable in case of amalgamation or merger under any law or regulation, Indian or foreign. Hence the exemption is available even when foreign company due to which there exists change in ownership of Indian subsidiary company.

VII. Income Tax concessions under the scheme of amalgamation.

In **Castrol India Limited vs. State of Tamil Nadu**[36] Madras High Court held that 'Stock' transfer between Transferor Company and Transferee Company in amalgamation form transfer date cannot be considered and thus cannot be subjected to sale tax.

Major question arise after Vodafone case in last year about income tax provisions related to cross border mergers in industry.

Section 2 (1B) relating to income tax act provide condition to be followed in merger process for tax liabilities on both companies. According to Supreme Courts's recent judgement in this case, liability of $ 5 billion arise on Vodafone group.

A. Merger under the Income Tax Act in the case of **S. Shanmugavel Nadar vs. State of Tamil Nadu**[37] following principles emerged with regard to the merger of on order of an inferior authority on that of superior authority.

   i) Application of doctrine of merger cannot be rendered applicable by drawing a distinction between an application for revision and an appeal.

   ii) Doctrine of merger doesn't apply where appeal is dismissed[38].

35. (2001) 43 CLA 249 (SAT)
36. (1999) 114 STC 468 (Mad)
37. (2003) 263 ITR 658 ;
38. V.M. Salgaocar and Bros. Pvt. Ltd. Vs. C.I.T. (2000) 243 ITR 383.

a) For default.

b) As barred by limitation.

c) Having abated by reason of the omission of the appellant to implead.

B. The legal presentative of a deceased respondent.

Application of doctrine of merger depends on the nature of appellate or revisional order in each case and on the scope of the statutory provision conferring the appellate or the revisional Jurisdiction.

VIII. Scheme to be sanctioned even if alteration done in the memorandum of association of the transferee company.

In **Asian Investments Ltd., and others; In.re.,**[39] and **Gujarat organic Ltd.,** Gujarat High Court held that it would be permissible for the Court to accord sanction to a scheme of amalgamation under section 394 of companies Act, 1956, even if the scheme contemplates a consequential alteration in the object clause of memorandum of association of the transferor company[40].

IX. No statutory need for company Judge to decide question relating to allotment of certain shares to the appellant while considering the scheme.

In **National Organic Chemical Industries Limited vs. Miheer H. Mafatlal,**[41] It was held that company Court exercising Jurisdiction under sections- 391 to 394 cannot decide on the issue of validity of certain shares allotted to the appellant which were pending adjudication before the Civil Court. No statutory need for the company Judge to decide this question while considering the scheme. It is only city civil Court which could decide the validity of the shares acquired by the appellate during the injunction.

6. SOME CONCLUDING OBSERVATIONS

In real terms, the rationale behind mergers and acquisitions is that

39. (1992) 73 Comp. Case 517 (Mad)

40. (1997) 86 Comp. Case. 754 (GUJ)

41. (2004) 121 Comp. Case. 5119.

the two companies are more valuable, profitable than individual companies and that the shareholder value is also over and above that of the sum of the two companies. Despite negative studies and resistance from the economists, M&A's continue to be an important tool behind growth of a company[42]. Reason being ,the expansion is not limited by internal recourses, no drain on working capital - can use exchange of stocks , is attractive as tax benefit and above all can consolidate industry- increase firm's market power.

With the FDI policies[43] becoming more liberalized, mergers, acquisitions and alliance talks are heating up in India and are growing with an ever increasing cadence. They are no more limited to one particular type of business. The list of past and anticipated mergers covers every size and variety of business - mergers are on the increase over the whole marketplace, providing platforms for the small companies being acquired by bigger ones.

The basic reason behind mergers and acquisitions is that organizations merge and form a single entity to achieve economies of scale, widen their reach, acquire strategic skills, and gain competitive advantage[44]. In simple terminology, mergers are considered as an important tool by companies for purpose of expanding their operation and increasing their profits, which in facade depends on the kind of companies being merged.

Indian markets have witnessed burgeoning trend in mergers which may be due to business consolidation by large industrial houses, consolidation of business by multinationals operating in India, increasing competition against imports and acquisition activities. Therefore, it is ripe time for business houses and corporate to watch the Indian market, and grab the opportunity.

42. Schweiger David M., 2003 : M&A Integration : A Framework for Executives and Managers, ICFAI Journal of Applied Finance Vol.9, No.2, PP. 71-79.

43. Biswas Joydeep, 2004 : Corporate Mergers & Acquisitions in India, Indian Journal of Accounting Vol.XXXV(l), PP. 67-72.

44. Rathi Amit K., 2004 : M&A - Common Pitfalls and Remedies, The Management Accountant, Vol.39(12), PP. 952-958