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Comparison of Section 230-240 of the Indian Companies Act with the 1956 Act

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ABSTRACT

All the companies in India have to follow the provisions of The Companies Act in order to be registered and function within the jurisdiction of India. Previously for almost five and a half decades there was the Companies act 1956 to regulate the workings of the companies. In the present scenario it has to be abided by the provisions of the new amended act of 2013. the amendment in the act has been brought in order to improve the prevailing legal frame work. Under the new act there is a chapter specified for Compromises, Arrangements and Amalgamations which covers from Section 230-240. The 1956 Act also covered the same topics within the specified section of 391to 396A. There are certain provisions which were not been covered by the old act, but this has been remedied in the amendment. However, there exists differences between these provisions for example

1. *As per section 394 of the previous act Inbound Merger was allowed but as per the new act In as well as Outbound merger is also allowed.*
2. *Transparency in the documents have been increased in the new act, as per the act all the valuation reports of every meeting is to be disclosed to the Central Government and no merger or arrangement can take place without the sanction of the Tribunal.*
3. *Section 233 of the amended act provides for amalgamation between two or more companies without the approval of the NCLT this provision was not existing in the previous act.*
4. *For approval of any scheme 3/4th of the value of the creditors or members is required along with the Tribunal, it was done through voting in person or by proxy but now the 2013 act has also included the secret ballot as a method for approval.*

There are some other differences between both the acts which can be seen under further elaboration. Here it can clearly be seen that the main objective of the Companies Act 1956 was to setup a legal framework for the easy setting up of companies in the country, however the 2013 Act aims to simplify these objectives but speeding them up.

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I. INTRODUCTION

The purpose of this paper is to clarify the changes in the sections brought about in the Companies Act 1965 after the 2013 amendment regarding compromises, arrangement and amalgamations. The amendment was brought about in the act by the government so as to boost the economic growth of the country. With the advent of corporate in India there was a need to bring about changes in the act so as to regulate their workings. The basic features of the bill introduced in the Parliament in 2011 was to introduce new laws and concepts which were in tune with the trending corporate world and the removal of obsolete and old laws which are no longer in relevance to the modern changing world. It also introduced the system of e-filing and e-governance. The amended act aims to keep pace with the modern requirements along with the advancement of technology. One of the most significant change in the new Act is the removal of the Company Law Board, under this new act it has setup National Company Law Tribunal which deals with all the matter of dispute or conflict regarding companies.

II. DISTINCTION BETWEEN 1956 AND 2013 ACT WITH REGARD TO COMPROMISE, ARRANGEMENT AND AMALGAMATION

In order to clearly able to identify the changes we shall go through a section wise analysis of both the acts.

1. **Power to compromise or make arrangements with members and creditors-**

"Arrangement is a word of wide import and it is not synonymous with the word 'compromise' although it is something similar in that nature. As compared with the word compromise it is not necessary that there should be any kind of dispute"[2].This section talks about the power of the Tribunal to direct the company who has applied to it for a compromise either between the company and its creditors or between the company and its members to conduct a meeting between the said people for the same, which is the same between the two acts. "A company when decides to enter into a scheme of arrangement with its members/creditors shall first make an application with the court u/sec 391(1) so that the court will give order to the directors to hold a meeting of its members or creditors, as the case may be, for considering the scheme of arrangement thus proposed. If the court is satisfied that the scheme is just and fair and not against the interest of the member and creditors then only will the court sanction it"[3] However, Section 230 (2) of the 2013 Act talks about the documents which are required to be submitted by the applicant as an affidavit to the Tribunal such as the latest financial statements , latest

[2] India Flour Mills, In Re (1934)4 Comp Cas 137: AIR 1934 Sind 54.
[3] Kaveri Entertainment Ltd, In Re (2003) 117 Comp Cas 245 (Bom)

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auditors report on the accounts of the company, etc. Which was not talked about in the old act. Then comes 230 (3) which states that the notice of the meeting under sub-clause (1) has to be given to all the creditors and members and debenture holders of the company which shall be accompanied with the reasons of the compromise or arrangement and its effect of the company and its employees. Clause 4 provides that the persons who have received the notice can vote either themselves or through proxies or through postal ballot within one month of the date of receipt of such notice, however the notice which is to be sent under clause 3 has to be accompanied with the relevant documents which has to be sent to the following authorities:-

a. Central Government

b. Securities Exchange Board of India

c. Reserve Bank of India

d. Income tax authorities

e. The Registrar

f. The relevant stock exchanges

g. Official Liquidator

h. Competition Commission of India

And any other authority which may be affected by such scheme of compromise or arrangement. While the order passed by the Tribunal shall be binding on everyone, provided once a certificate by the company's auditor has been submitted to the Tribunal that all the accounting treatments required under the scheme is under the conformity of Sec 133 of the Act. The order has to be filled with the Registrar within 30days. Buy-back of securities will not be sanctioned by the Tribunal if it is not in conformity with Sec 68 of the companies Act. Lastly the 2013 Act also gives a chance to the aggrieved party to make an application to the Tribunal for its grievances with regard to such scheme. In giving effect to any scheme of restructure or arrangement requires applying to the Tribunal and to acquire specific instructions that are to be followed while holding a meeting of the different interested groups. In this case any scheme of restructuring has to abide by the provisions of the 230 of the current companies act. The 1956 Act contained provisions relating to compromise, reconstruction and arrangement in chapter 5 part 6 of the Act while in the 2013 Act it is mentioned in chapter 15 under the heading of compromise, amalgamation and arrangement"[4]

[4] Sanjay Kapur and Others v. Vikram Kapur, OMP 2015

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No changes have been made regarding the Power of the Tribunal to enforce compromise and arrangement in the amended act. However, Section 393 of the 1956 Act information as to compromise or arrangement with creditors and members has not been included in the 2013 act. "the court has to ensure that the proposed scheme of merger or amalgamation is not violative of any existing laws or provisions of any other law in force. The court also needs to be satisfied that the members or creditors who vote in majority in favor of the scheme are bona fide and it also has to ensure that it doesn't approve the scheme just because it has been passed by the majority of members and that all the legal requirements have been complied with"[5]

2. **Merger and Amalgamation of companies**: -

This has been talked about in section 394 of the previous Act while the same is in Section 232 of the new Act i.e., when an application is filed to the Tribunal for a scheme of arrangement or compromise then the Tribunal may order a meeting of the creditors or class of creditors or members or class of members in the manner as it may direct. However, the first clause has not been changed but addition of clause (2) and (3) has been made in the 2013 Act as per which when the order made by the Tribunal under sub-section (1) shall require the following lists of documents to be circulated: -

a. The draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company

b. Confirmation that a copy of the draft scheme has been filed with the Registrar

c. A report adopted by the directors of the company explaining the effect of the compromise on all the people associated with the company

d. Report of an expert with regard to valuation of the report if any

e. The accounting statements of the last six months of the merging companies[6].

While sun-section 3 says if the requirements of (1) and (2) are fulfilled then The Tribunal, after satisfying itself that the procedure specified in sub-sections (1) and (2)has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:—

(a) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of the transferor company from a date to be determined by the parties unless the Tribunal, for reasons to be recorded by it in writing, decides otherwise;

[5] M/s Integrated Finance Co. Ltd v. Reserve Bank of India, [2013] INSC 687
[6] Sec 232, Companies Act 2013.

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(b) the allotment or appropriation by the transferee company of any shares, debentures, policies or other like instruments in the company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person:

Provided that a transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company on the date of transfer;

(d) dissolution, without winding-up, of any transferor company;

(e) the provision to be made for any persons who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement;

(f) where share capital is held by any non-resident shareholder under the foreign direct investment norms or guidelines specified by the Central Government or in accordance with any law for the time being in force, the allotment of shares of the transferee company to such shareholder shall be in the manner specified in the order;

(g) the transfer of the employees of the transferor company to the transferee company;

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

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

(B) if shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre-determined price formula or after a valuation is made, and the arrangements under this provision may be made by the Tribunal:

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

(i) where the transferor company is dissolved, the fee, if any, paid by the transferor company on its authorized capital shall be set-off against any fees payable by the transferee company on its authorized capital subsequent to the amalgamation; and

(j) such incidental, consequential and supplemental matters as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out:

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Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133[7]. Then clause (4) comes into the picture which was also in the 1956 Act stating that once the property and liabilities are transferred then the belong to the transferee company. While clause (5) provides the time limit of 30 days within which a certified copy of the order is to be registered with the registrar.

Further, clauses (6) to (8) has been incorporated in the new act, as per clause (6) an appointment date has to be setup which would indicate the date from which the scheme of such arrangement is to be deemed effective. Clause (7) till the completion of the scheme of arrangement every company shall file a statement in such form, time and manner as prescribed by the Registrar every year which has to be certified by a chartered accountant or cost accountant or a company secretary to show that the order of the Tribunal has been complied with.

Finally, clause (8) is a penal provision providing for the time period of the punishment which is to be abided by the party who ever contravenes to any of the above stated requirements. In a case in Bombay High Court regarding the amalgamation between the Wadala Commodities Ltd and Godrej Industries Ltd it was said that "matters regarding section 391/394 of the 1956 Act and section 230/232 of the 2013 Act are called by the Tribunal where it can also dispense with its voting procedure irrespective of the fact that the provision provides for secret ballot for voting. It can be said that in court convened meetings the provisions for voting can be unlawful and in contradiction to sec 230/232 of the 2013 Act and sec 391/394 of the 1956 Act, the postal ballot and electronic voting can be optional in a general meeting but not in replacement to it"[8]

3. **Merger and amalgamation of certain companies:**

This section 233 is an new addition to the Act which specifies that a scheme of arrangement can be entered upon by two or more companies or between a subsidiary company and its wholly owned company or any other such class or classes of companies, and a notice of such scheme is to be proposed and objections or suggestions from the Registrar and Official Liquidator or in the general meetings of the companies to be approved by the members. Then each of the company has to file an solvency declaration with the Registrar.

Clause 2 says that such approved scheme has to be filed with the Central Government, Registrar

[7] Sec 232 (3), Companies Act 2013.
[8] 2014, Bombay.

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and Official Liquidator within its territorial jurisdiction. Then if the scheme has no objections to it then the Central Government shall register the same and issue a confirmation. However, if any objection is raised by the Registrar it has to be communicated to the Central Government within 30days.

Clause (5) aids that if after all such suggestions and objections if the Government still feels that the scheme is not public interest then it shall file an application to the Tribunal within 60days and stating its objections. After which if Tribunal is of the opinion that the procedure laid under section 232 is to be followed then it shall give directions to do so accordingly.

The order given by the Tribunal has to be communicated to the Registrar confirming the scheme passed and shall issue confirmation of such to the companies.

It has to be deemed over here that the transferee company shall have the effect of dissolution without following the process of winding up.

Clause (10) states the Registration of the scheme shall have the following effects:

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

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

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

(d) where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company[9].

Clause 10 states that the transferee company once the scheme is into effect shall hold any shares on its own name, if there exists any it shall be canceled or extinguished on the effect of such merger or amalgamation. The company then shall file an application with the Registrar the revised authorized capital and the prescribed fees due on the revived capital.

4. **Merger and amalgamation of company with foreign companies: -**

This has been talked about in Section 234 of the Amended Act as per which a foreign company with the approval of the Reserve Bank of India has the authority to merger with any company

9 Sec 233 (9), Companies Act 2013.

which has been registered under the Companies Act and the scheme of merger may provide for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts or both in parts. The Government makes rules with the Reserve Bank of India for such inter-border mergers or amalgamation. This provision was not present in the previous Act.

5. **Power to acquire shares of shareholders dissenting from scheme or contract approved by majority:**

This is mentioned as Section 395 of the previous act and Section 235 of the present one, while the first clause of both stays the same which is regarding the transfer of shares of a class or classes in a company within four months from which the offer is made in behalf of the transferee company which has to be approved by nine-tenths in value of the shares. However the transferee company within two months before the expiry of the four months shall send a notice to the dissenting shareholders regarding acquiring of their shares. clause (2) of the old act have now been removed from it and replaced by the 3rd clause in its place as per which the dissenting shareholders can file an application with the Tribunal within one month of the receipt of such notice and the Tribunal shall make order as it thinks fit else it is bound to sell its shares to the company at the same price at the assenting shareholders. The rest of the clauses between both the acts remain the same which describes the further procedure as per which if the Tribunal does not pass an order to the contrary during which if the application of the dissenting shareholders is pending before the Tribunal then a copy of the notice to the transferor company along with an instrument of transfer is to be sent on behalf of the shareholder and to pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company shares which the company is entitled to acquire.

The sum received by the transferor company has to be paid into a separate bank account or any other sum which is received by the company in trust for several persons entitled for shares. The sums thus received is to be disbursed to the entitled shareholders within 60 days. "The objective of investigation under Sec 235(2) of the Companies Act is to check for errors which is not visible to the naked eye and where a petition contains only facts which are apparent in the balance sheet of the company the such investigation is not required"[10].

6. **Purchase of minority shareholding: -**

This section has been incorporated in the 2013 Act as it was not a part of the 1956 Act

[10] Binod Kumar Kasera v. Nandlall and Sons Tea Industries Ltd (2010) 153 Comp Cas 184(CLB).

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(1) In the event of an acquirer, or a person acting in concert with such acquirer, becoming registered holder of ninety per cent. or more of the issued equity share capital of a company, or in the event of any person or group of persons becoming ninety per cent majority or holding ninety per cent. of the issued equity share capital of a company, by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, such acquirer, person or group of persons, as the case may be, shall notify the company of their intention to buy the remaining equity shares.

(2) The acquirer, person or group of persons under sub-section (1) shall offer to the minority shareholders of the company for buying the equity shares held by such shareholders at a price determined on the basis of valuation by a registered valuer in accordance with such rules as may be prescribed.

(3) Without prejudice to the provisions of sub-sections (1) and (2), the minority shareholders of the company may offer to the majority shareholders to purchase the minority equity shareholding of the company at the price determined in accordance with such rules as may be prescribed under sub-section (2).

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

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

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

(6) In the absence of a physical delivery of shares by the shareholders within the time specified by the company, the share certificates shall be deemed to be canceled, and the transferor company shall be authorized to issue shares in lieu of the canceled shares and complete the transfer in accordance with law and make payment of the price out of deposit made under sub-section (4) by the majority in advance to the minority by dispatch of such payment.

(7) In the event of a majority shareholder or shareholders requiring a full purchase and making

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payment of price by deposit with the company for any shareholder or shareholders who have died or ceased to exist, or whose heirs, successors, administrators or assignee have not been brought on record by transmission, the right of such shareholders to make an offer for sale of minority equity shareholding shall continue and be available for a period of three years from the date of majority acquisition or majority shareholding.

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

Explanation. — For the purposes of this section, the expressions "acquirer" and

"person acting in concert" shall have the meanings respectively assigned to them in clause (b) and clause (e) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

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

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

(b) the period of one year or the period specified in the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, had elapsed[11].
"It is the general principle that the company has the power to determine the extent, mode and incidence of reduction of its share capital. However the court before approving the scheme of reduction of capital has to check on the minorities and creditor's rights are being safe and there is no unfairness to them in spite of this being the internal matter of the company. It is the power of the Tribunal to accept or reject the special resolution passed by the company and to check on the rights of the dissenting shareholders as well as those who did not appear before the court"[12].

[11] Section 236, Companies Act, 2013.
[12] In Re National Press, MANU/MP/0068/1986.

7. **Power of the Central Government to provide for amalgamation of companies in public interest:**

This section is common to both the acts as it gives power to the Central Government to determine if a company or any merger of two companies is benefiting the public at large then it can amalgamate the two by passing an order in the Official Gazette along with the details of both the companies in it. Such order shall also provide for to continue or discontinue any legal proceeding against any of the companies which shall be necessary to amalgamate the two. As a result of such amalgamation any debenture holder or any share holder shall have the same interest in rights against the transferee company and in case the rights of the transferee company are less than the interest in or rights against the original company for which he shall be compensated by the company to that extent. The government can pass an order under this section only when: -

a. a proposed order has been sent in draft to each pf the companies

b. When as appeal is filed under clause (4) has been disposed off or its time period has expired.

c. The central government has considered and made modifications in the draft order as it may seem necessary based on the suggestions received to it by any company.

If any person is aggrieved by the assessment of compensation made by the company can file an appeal to the Tribunal within 30 days of the publication in the Official Gazette after which the compensation shall be determined by the Tribunal.

If all such procedure has been successfully carried out then this scheme has to be placed before both the houses of the Parliament.

This section was invoked by the Ministry of Corporate Affairs in 2014, it was regarding the revival of the National Spot Exchange Limited (NSEL). The Forward Market Commission had proposed such merger with NSEL and its holding company with regard to public interest. However this matter was rejected by the Supreme Court stating that it is ultra vires to the scope of sec 396 of the companies Act 1956, it was held that the intention here was to pay back the dues of the investors which is a private interest cannot be carried out in the name of public interest. The bench said that it was an administrative merger not a legislative as it had directly affected the rights and liabilities of its shareholders and creditors[13].

8. **Registration of offer of schemes involving transfer of shares: -**

This is also a new entry in the 2013 act under section 238. According to this section if a scheme

[13] http://www.mca.gov.in/Ministry/pdf/Notice_NSEL_FTIL.pdf

or contract involving transfer of shares takes place as per section 235 then every circular having such offer shall also include all the information in the manner prescribed, it should contain a statement by or on behalf of the transferee company disclosing the steps to be taken by them to make available the cash and every circular has to be registered with the Registrar. If the registrar refuses to register any circular an application can be filed against him in the Tribunal. If the director fails to get the circular registered, he has to pay fine.

9. Preservation of books and papers of amalgamated companies:

This is the last section under this chapter in the 1956 Act which is also present in the 2013 Act. This act imposes a duty on the companies that no documents regarding the scheme of merger or the transfer of shares can be disposed without the prior permission of the Government and in order to do so the government shall first appoint an person to examine the books and papers to ascertain if there is any commission of offence with regard to the amalgamation and acquisition of the shares.

10. Liability of officers in respect of offence committed prior to merger, amalgamation etc:

Any offence committed by any officer under this Act by the officer in default prior to such merger, amalgamation etc shall continue even after such arrangement takes places. This section has been talked about only in the 2013 Act.

III. CONCLUSION

This shows a clear distinction regarding the changes and comparisons between all the sections of both the 1956 and the 2013 Act coming under the purview of compromise and amalgamation. These changes are brought by the Legislature keeping in mind the mild intricacies of law. This is an attempt made by them to remove any loopholes which were present in the previous act and were being taken advantage of by the trouble makers to escape any form of liability whatsoever.

The current procedural requirements in case of a merger and acquisition in any form are quite complex. There are no exemptions even in the case of mergers between a company and its wholly owned subsidiaries. The 2013 Act now introduces simplification of procedures in two areas, firstly, for holding wholly owned subsidiaries and secondly, for arrangements between small companies (section 233 of the 2013 Act). Small companies is a new category of companies, introduced within the 2013 Act. Along with the benefits of this Act there also lie restrictions proposed in situations where the transferee company can hold any shares either in

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its own name or in the name of a trust, subsidiary or associate, as all the shares will be cancelled or extinguished on merger or amalgamation. This requirement will instill the practice which has been followed by various companies which have in the past followed this method. Further, in certain cases, it has also rationalized the requirements, for example in the case of the reduction of the share capital, which is part of compromise or arrangement, the company will need to comply with the provisions of this section only, and not of the existing legal requirements under the 1956 Act[14]. This comparative study helps us to have a clear view in the understanding of the changes that are being eventually being brought about in the law keeping in mind the present changing world.

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14 https://www.pwc.in/assets/pdfs/publications/2013/companies-act-2013-key-highlights-and-analysis.pdf

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