5 COMPROMISE, ARRANGMENT & AMALGAMATION (SECTION 230-240)

CHAPTER XV OF COMPANIES ACT, 2013

- The term compromise has not been defined in Companies Act. The term compromise means settlement of a dispute by mutual concession. There can be no compromise, unless there is some dispute (*Sneath v. Valley Gold Ltd.,*).

- The expression arrangement includes reorganization of share capital of the company by

  (a) Consolidation of shares OR (b) Division of shares OR (c) Both

- The terms merger and amalgamation have not been defined in the companies Act. The provisions relating to merger and amalgamation are contained in Section 232 to 234 of companies Act, 2013.
- Members means both ESH and PSH. Court may direct separate meeting of ESH and PSH and then requisite majority is needed in both such meetings.
- Powers to Amalgamate

  (a) It may flow from memorandum or statute.

  (b) Section 17 of Companies Act, 1956 confers powers to company to alter MOA to give power to amalgamate.

  (c) However, in Re.Hari Krishna Lohia.

  - To amalgamate is the power of the company & not an object of the company.
  - Irrespective of the object clause, the court is empowered to sanction the scheme of amalgamation provided it is not prejudicial to public interest

SECTION-230

POWER TO COMPROMISE OR MAKE ARRANGEMENTS WITH CREDITORS AND MEMBERS

The provisions pertaining to Section 230 of the Companies Act 2013 are applicable. The steps taken to give effect to the proposed scheme are as follows:

1. Application by company or creditor or class of creditors or class of members to Tribunal.

2. Tribunal may on the application call a meeting of creditor or class of creditors or class of members to Tribunal.

3. The following documents shall be filed to the Tribunal

   - all material facts relating to the company like-financial statements, auditors report, copy of pending investigation.
   - reduction of share capital of the company, if any
   - any scheme of corporate debt restructuring consented to by not less than seventy-five per cent. of the secured creditors in value.

4. Notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by a statement disclosing the details of the compromise or arrangement, a copy of the valuation report explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders.

5. The notice shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot.

6. The notice along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and there representations shall be taken. If no representation is received within 30 days it shall be presumed that no representation is received.

7 Approval at meeting- Where, at a meeting, majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on all the parties.

8 Tribunal shall pass the necessary order to give effect to the scheme of compromise or arrangement.

9 The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

As per **Proviso to Section 230(4)** any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent. of the shareholding or having outstanding debt amounting to not less than five per cent. of the total outstanding debt as per the latest audited financial statement.

As per Section 230(10) No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.

BARE ACT OF SECTION-230

1 Where a compromise or arrangement is proposed: -

a Between a company and its creditors or any class of them; or

b Between a company and its members or any class of them, the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs

2 The company or any other person, by whom an application is made under subsection (1), shall disclose to the Tribunal by affidavit: -

a all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;

b reduction of share capital of the company, if any, included in the compromise or arrangement;

a any scheme of corporate debt restructuring consented to by not less than seventy-five per cent. of the secured creditors in value, including—

(I). a creditor's responsibility statement in the prescribed form;

(*ii*) safeguards for the protection of other secured and unsecured creditors;

(*iii*) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;

(*iv*) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and

(v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

3

Where a meeting is proposed to be called in pursuance of an order of the Tribunal under sub-section (*1*), a notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by a statement disclosing the details of the compromise or arrangement, a copy of the valuation report, if any, and explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and such other matters as may be prescribed.

Provided that such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed:

Provided further that where the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company.

4

The notice shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice:

Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent. of the shareholding or having outstanding debt amounting to not less than five per cent. of the total outstanding debt as per the latest audited financial statement.

5

The notice along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

6

Where, at a meeting, majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order,the same shall be binding on all the parties.

7

An order made by Tribunal shall provide for all or any of the following matters, namely:—

a where the compromise or arrangement provides for conversion of reference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable.

b the protection of any class of creditors;

c if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;

d If the compromise or arrangement is agreed to by the creditors any proceedings pending before the Board for Industrial and Financial Reconstruction shall abate;

e such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement.

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.

8

The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

9

The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent. value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

10

No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.

11

Any compromise or arrangement may include takeover offer made in such manner as may be prescribed:

Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

12

An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.

Please refer Question Bank for summarised explanation

SECTION-231

POWER OF TRIBUNAL TO ENFORCE COMPROMISE OR ARRANGEMENT

Tribunal shall have the power to supervise the implementation of compromise or arrangement and give such directions of make such modifications as it may consider necessary for the proper implementation of compromise or arrangement.

If Tribunal is satisfied that scheme of compromise or arrangement cannot be implemented and the company is unable to pay its debts as per the scheme, it may make an order for winding up of the company.

SECTION-232

MERGER AND AMALGAMATION OF COMPANIES

1

Where an application is made to Tribunal under Section 230 and it is shown to the Tribunal that:-

a The compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving mergers or the amalgamation of any two or more companies; and

b That under the scheme, the whole or any part of the undertaking , property or liabilities of any transferor company is required to be transferred to the transferee company or is proposed to be divided among and transferred to two or more companies;

The Tribunal on such application order a meeting of the creditors or class of creditors or the members or class of members and the provisions of Section 230(3) to (6) shall apply mutatis mutandis.

2 Where and order has been given by the Tribunal to merge the companies, the following shall also be circulated for the meeting so ordered by the Tribunal, namely:-

- The draft order of the proposed scheme drawn up and adopted by the directors of the merging company;
- Confirmation that a copy of the draft scheme has been filed with the Registrar;
- A report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, KMP, promoters and non-promoter's shareholding specifying the exchange ratio and valuation difficulties if any
- Report of the expert with regard to valuation, if any
- A supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purpose of approving the scheme.

"IT DOES NOT MATTER HOW SLOWLY YOU GO AS LOG AS YOU DO NOT STOP"

3 Powers of Tribunal to sanction the scheme of amalgamation

(a). the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company.

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

c). the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d). the 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 CG 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;

The transferee company shall remain an unlisted company until it becomes a listed company;

If shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre-determined price formula or after a valuation is made and the arrangements under this provision may be made by the Tribunal.{**The amount of valuation should not be less than what has been specified in SEBI regulations**}.

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

(J) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

POINT TO BE REMEMBER

In Section's 230-232, application to be made to CG instead of Tribunal in case of Government Companies.

SECTION-233

MERGER OR AMALGAMATION OF CERTAIN COMPANIES

1

Notwithstanding the provisions of section 230 and section 232, a scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed, subject to the following, namely:

i.e. Conditions for Fast Track Merger:

- Board resolution shall be passed at Board Meeting approving the scheme.
- The transferor and transferee company is required to give a notice of the proposed scheme to ROC and Official Liquidator within 30 days asking for suggestions/objections.
- the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent. Of the total number of shares
- each of the companies involved in the merger files a declaration of solvency to the ROC.
- the scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.

2

The transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.

3

On the receipt of the scheme, if the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies.

4

If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of thirty days:

Provided that if no such communication is made, it shall be presumed that he has no objection to the scheme

5

If the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors it may file an application before the Tribunal within a period of sixty days of the receipt of the scheme stating its objections and requesting that the Tribunal may consider the scheme under section 232. **(Approval of NCLT is not required for fast track merger. Only if CG rejects the scheme, CG may transfer it to NCLT.)**

6

On receipt of application from CG, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit.

SECTION-234

MERGER OR AMALGAMATION OF COMPANY WITH FOREIGN COMPANY

The provisions of this Chapter shall apply *mutatis mutandis* to foreign companies.

A foreign company, may with the prior approval of the Reserve Bank of India, may merge with an Indian company.

SECTION-235

POWER TO ACQUIRE SHARES OF SHAREHOLDERS DISSENTING FROM SCHEME OR CONTRACT APPROVED BY MAJORITY

STEP-1

Approval of holders of shares-Must be approved by at least 9/10th in value.

STEP-2

Period of Approval-within 4 months from date of offer.

STEP-2

Notice to dissenting shareholders by transferee company-within 2 months after the expiry of period of 4 months.

STEP-4

Transferee Company must acquire shares from dissenting shareholders after serving the notice.
Exception-Dissenting SH can apply to the Court within 1 month from the date of notice.

STEP-5

Now, transferee company to forward the following to transferor
a) Copy of Notice &
b) Instrument of transfer executed by transferee company and on behalf of SH, by a person appointed by transferee company.

STEP-6

STEP-7

Registering of transferee company as the holder:
Transferor company must register the transferee company as holder of those shares, and within one month of the date of such registration, inform dissenting SH of fact of such registration and about receipt of consideration.

STEP-8

Money received
a) Money received must be kept in a separate bank account until disbursed.
b) These are to be paid to SH against deposit of relevant share certificate

STEP-9

Advice to dissenting SH:
Regarding price payable to them within one month from date of registration of shares in favour of transferee company.

SECTION-236

PURCHASE OF MINORITY SHAREHOLDING

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 cancelled, and the transferor company shall be authorized to issue shares in lieu of the cancelled shares and complete the transfer in accordance with law and make payment of the price out of deposit made under sub-section (4) by the majority in advance to the minority by dispatch of such payment.

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

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.

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.

In Section 236(4), (5), and (6), the words transferor company shall be substituted by "company whose shares are being transferred".

SECTION-237

POWER OF CENTRAL GOVERNMENT TO PROVIDE FOR AMALGAMATION OF COMPANIES IN PUBLIC INTEREST

1 Where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution, with such property, powers, rights, interests, authorities and privileges, and with such liabilities, duties and obligations, as may be specified in the order

2 The order under sub-section (1) may also provide for the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company and such consequential, incidental and supplemental provisions as may, in the opinion of the Central Government, be necessary to give effect to the amalgamation.

3 Every member or creditor, including a debenture holder, of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the transferee company as he had in the company of which he was originally a member or creditor, and in case the interest or rights of such member or creditor in or against the transferee company are less than his interest in or rights against the original company, he shall be entitled to compensation to that extent, which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the Official Gazette, and the compensation so assessed shall be paid to the member or creditor concerned by the transferee company.

4 Any person aggrieved by any assessment of compensation made by the prescribed authority under sub-section (3) may, within a period of thirty days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.

5 No order shall be made under this section unless—

a a copy of the proposed order has been sent in draft to each of the companies concerned.

b the time for preferring an appeal under sub-section (4) has expired, or where any such appeal has been preferred, the appeal has been finally disposed off; and

c the Central Government has considered, and made such modifications, if any, in the draft order as it may deem fit in the light of suggestions and objections which may be received by it from any such company within such period as the Central Government may fix in that behalf, not being less than two months from the date on which the copy aforesaid is received by that company, or from any class of shareholders therein, or from any creditors or any class of creditors thereof.

6

The copies of every order made under this section shall, as soon as may be after it has been made, be laid before each House of Parliament.

SECTION-238

- Every circular containing such offer and recommendation to the members of the transferor company shall be presented to the Registrar for registration and no such circular shall be issued until it is so registered.
- Provided that the Registrar may refuse, for reasons to be recorded in writing, to register such circular containing the required information.
- Company may appeal to the Tribunal against the order of Registrar.

SECTION-239

The books and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company under this Chapter shall not be disposed of without the prior permission of the Central Government.

SECTION-240

Liability of officers in respect of offences committed prior to merger, amalgamation, etc shall continue after such merger, amalgamation or acquisition.

Some important case laws of Companies Act 1956

Re.Hari Krishna Lohia

- To amalgamate is the power of the company & not an object of the company.
- Irrespective of the object clause, the court is empowered to sanction the scheme of amalgamation provided it is not prejudicial to public interest.

S.K.Gupta Vs. K.P.Jain

If the Court sanctions the scheme, it will be binding on all member and creditors even those who were dissenting.(**S.K Gupta vs K.P.Jain**).

Piramal Spg vs Weaving Mills Ltd	Unless the person who challenges the valuation satisfies the court that the valuation is grossly unfair, the court will not disturb the scheme of amalgamation.
Hindustan Lever Employees Vs. Hindustan Lever Ltd	If the valuation is confirmed to be fair by reputed firm of CA's and is also confirmed by majority of members, the objection raised by some shareholders of group cannot be sustained.
M.G. Investment Vs. New Shorrock Spinning & Mfg.Co.Ltd	If the CG challenges the exchange ratio, Court will not interfere in Scheme of Amalgamation unless CG proves that valuation is grossly unfair and not in public interest.
Nokes Vs Doucaster Amalgamated Collieries Ltd	Court held that employee of amalgamating company has right to refuse from joining the employment in amalgamated company. House of Lords stated that Employee is not furniture which can be silently transferred from amalgamating company to amalgamated company.