ISSUES RELATED TO MERGERS AND ACQUISITIONS IN INDIA

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INTRODUCTION

This paper explores the complex landscape of mergers and acquisitions (M&A) in India, delving into the myriad challenges and opportunities inherent in this strategic business practice. Mergers and acquisitions serve as crucial tools for corporate growth and market consolidation, offering avenues for enhanced efficiency, expanded market reach, and strategic repositioning. In recent years, India has witnessed a surge in M&A activity across diverse sectors, ranging from banking and telecommunications to information technology and business process outsourcing. The banking sector has emerged as a focal point for M&A activity, driven by regulatory imperatives and market dynamics. However, challenges such as fraudulent practices, mounting non-performing assets (NPAs), and bureaucratic hurdles have underscored the complexities inherent in banking sector consolidations. Government-led mergers aimed at bolstering financial stability have elicited mixed market responses, highlighting the need for streamlined regulatory frameworks and proactive risk management strategies.

Similarly, the telecommunications sector has witnessed landmark mergers, such as the merger between Vodafone and Idea, aimed at securing dominant market positions. Regulatory bottlenecks, including approvals from regulatory bodies like the Department of Telecommunications (DoT) and the Competition Commission of India (CCI), have posed significant challenges, prolonging the merger process and impacting market competitiveness. Beyond specific sectors, the paper examines broader regulatory challenges and procedural complexities that impede M&A transactions in India. Provisions outlined in statutes such as the Companies Act, 2013, often lead to procedural delays, bureaucratic interventions, and legal disputes. The involvement of courts in oversight further contributes to lengthy approval processes and operational uncertainties, underscoring the need for a comprehensive review of existing regulatory frameworks.

Furthermore, the paper highlights instances where regulatory interventions, such as those by the Insurance Regulatory and Development Authority (IRDA), have hindered mergers without adequately addressing underlying market dynamics. Complex court-driven processes demand extensive documentation and verification, prolonging timelines and increasing compliance burdens, as evidenced by the failed merger between Reliance Communications and Airtel. In conclusion, while M&A activities hold immense potential for economic growth and market consolidation in India, addressing regulatory inefficiencies and bureaucratic hurdles is imperative. A comprehensive overhaul of existing statutes, coupled with streamlined approval processes and greater regulatory clarity, is essential to foster a conducive environment for mergers and acquisitions, unlocking their full benefits and driving sustainable economic development.

Wave of Mergers in the Country – The ups and downs

Mergers and Acquisitions are used as tools for significant growth and are progressively getting accepted by Indian businesses as a critical instrument in formulation of business strategy. They are used in various case and in a wide array of sectors such as information technology, telecommunications, banking, and also business process outsourcing. The tool of Mergers and Acquisition is also implemented by traditional businesses to consolidate and strengthen their market position and fundamentals, to expand their customer base, to cut down on the competition or branching out into a new market, service or product segment. Mergers and Acquisitions are also in certain cases, undertaken to access the market through an already certified and established brand and capture that sector of the market. Economies of scale is also a major agenda of the corporations indulging in M&A, including few other subsequent goals including elimination of competition, reduction of tax liabilities or to acquisition of competence, and in some case to also set off losses accumulated overtime by one entity against the profits of the other entity[1].

India has seen a massive surge of Mergers and Acquisitions in the recent times. Various corporations in numerous sectors of the economy in India have undertaken this tool to increase their efficiency, increase market reach and for copious other reasons for which Mergers and Acquisitions can prove beneficial.

[1] Ministry of Corporate Affairs, Mergers and Acquisitions

The foremost industry leading with such drive related to Mergers and Acquisitions was the Banking Industry. "Section 44A of the Banking Regulation Act of 1949, states that no banking companies shall amalgamate unless a scheme of such amalgamation is required to be approved by a two-third majority of shareholders of each amalgamating company. Subsequently it is sent to RBI for its sanction, but at present either in person or in a proxy capacity at the respective general meeting so convened for the consideration of the scheme. Also, section 2A introduced by the Banking Laws (Amendment) Act, 2011 provides for the non-applicability of the provisions of the Competition Act to any banking company[2].

In 2019, the amount involved in these fraudulent practices summed up to a whopping 95,760 crores. Following such discovery an initial investigation was made into the same which revealed that there was involvement of not only mid-level employees but the hands of the senior most management were tainted by this dishonourable act. Few other factors like political influence and the spell of pro corporate decision making, also led to the commission of such an act. The banking system was suffering from an acute case of overburdening of NPAs, which was also a major cause of concern. India also became the 10th largest bad loan holding economy of the world as up to 90% of these non-performing assets are said to be held by the government itself. "The losses incurred by the four Public Sector Banks including Bank of Baroda, IDBI Bank Ltd, Oriental Bank of Commerce and Central Bank of India were an astounding in the year ended March 31, 2019, after which the government planned their merger."

"Andhra Bank and Corporation Bank were merged with Union Bank while Oriental Bank of Commerce and United Bank merged with Punjab National Bank. Syndicate Bank was merged with Canara Bank, while Allahabad Bank merged with Indian Bank. The mergers took effect from 1 April 2020. Before that, Dena Bank merged with Bank of Baroda in 2019." The shares of the aforementioned public-sector banks witnessed subsequent changes in the prices, either in the positive or negative direction. The shares of Punjab National Bank dropped by a considerable margin of 5.72% while Canara Bank fell by 0.17% on the Bombay Stock Exchange. However, Indian Bank and Union Bank saw an upward trend in their share prices post-merger by 1.86% and 0.17% respectively. The wider market spectrum, however, portrayed

[2] Satwik Sengupta, "Mergers and Acquisitions in the Banking Industry", Manupatra (2022)

a weaker trend as the SENSEX, which is considered as the index for the BSE, tanked by a whopping 1203 points or 4.08% to close at the stage of 28,265.31.

This consolidation drive of banks maintains a certain significance as it took place during a time when the entire country was plagued by the pandemic caused due to COVID-19 outbreak, which had triggered unfortunate events leading to an indefinite lockdown in the country. This also had a major adverse impact on the stock markets as businesses or banks were not running as usual. Another prominent merger which took place in the country in recent times was the merger of Vodafone and Idea. It took place in the telecommunications sector which, already, is an immensely competitive sector, and post-merger, the aim of the corporation was to come out as the corporation with the biggest market share in the telecommunication sector and would be ahead of the curb with regards to the impending competition.

However, there were various compliances which the companies had to undergo before taking such step of merging which included intimation to the Department of Telecommunications (DoT), intimation to the Competition Commission of India (CCI), and also assent from the National Company Law Tribunal (NCLT) and be governed by the Companies Act, 2013 as the statutory provisions related to compromises, amalgamations and arrangements were notified in December 2016. Prior to the constitution of NCLT, these matters required assent from the High Court. These regulatory hurdles took a toll on the merger procedure of the companies and inadvertently delayed what could have been a fruitful opportunity for the merged entity to take charge of the telecommunications market. The thresholds created by the regulatory provisions handcuffed the stride of the move and hence held them back from reaching the full potential.[3]

The problem does not lie in the procedure of mergers or acquisitions itself, but instead it lies in the provisions which facilitate such procedure. A procedure which could take mere 4-6 months stretched out for more than a year in this scenario, and gets even more elongated in other instances. In the case of the very recent merger, between Sony Pictures and Zee Entertainment Enterprises, it wasn't a problem related to the procedural delay, but there were issues related to valuation which posed a hurdle to the successful completion of the deal[4].

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[3] Gaurav Wahie & Lovejeet Singh, Regulatory challenges for Vodafone Idea merger

[4] Gaurav Laghate, "ZEE and Sony sign agreement to create India's second largest entertainment network", Economic Times, Dec 21, 2022

These provisions and regulations which are prevalent at the moment are created crevices for departmental interferences which result in unnecessary delays in the process of Mergers and Acquisitions and results in overall long-term harm for the companies in question, not just in the economic standpoint but also on the reputational front. In the case of Bharti Airtel acquiring the consumer mobile business of Tata Teleservices Ltd. (TTSL), the companies had to undergo an unnecessarily tedious procedure. The merger process was decided on October of 2017 itself but due to the various long drawn compliances and approval procedures from various bodies like Securities and Exchange Board of India and Department of Telecom along with an assent from the National Company Law Tribunal (NCLT), the merger between the companies was finalised in mid-2019.

However, that wasn't the last chapter in this story, as DoT refused to take the merger on record and asked Airtel to furnish a bank guarantee amounting to around Rs.7000 crores along with an immediate payment of Rs.287 crores before it could take the merger between both entities on record. Following this disagreement between the DoT and the companies, the matter was presented before the TDSAT (Telecom disputes Settlement and Appellate Tribunal). The TDSAT granted a partial stay on the approximate amount of Rs.8287 crores demanded by the DoT from Bharti Airtel for approving and taking on record the merger with the consumer business of Tata Teleservices. This in turn led to the DoT moving to the Supreme Court to put a stay on the order passed by the TDSAT, however the SC refused stating grounds that everything was in order as per the directions given for the arrangement by the NCLT, and only subsequent to that the merger was taken on record by the DoT condition to payment of Rs.644 crores by Airtel to the Department.

This excruciatingly long and tiring delay could have easily been avoided if the structure of the Merger and Acquisition procedure was amended in the first place, instead the long standing and dated provisions resulted in unnecessary interferences and delays which led to the overall delay in merger being of about 3 to 3.5 years.

There have been scenarios wherein the mergers have failed due to such arbitrary provisions present in the statutes. In the case of HDFC Life Insurance Company and Max Life Insurance Company, the merger was disallowed by the IRDA (Insurance Regulatory and Development Authority) merely because the structure of the deal was not in consonance to the provisions laid down in section 35 of the Insurance Act, 1938. "The concern of the IRDA was that an insurance company cannot merge with a non-insurance company according to the aforementioned provision, and in pursuance of the same referred the matter to the union law ministry for approval, during the decision making of which the deadline of the court approval was passed. Which resulted in further delay and brainstorming regarding restructuring of the M&A deal."[5] What both the Union Ministry and the IRDA failed to recognise is that the final merger was happening between two insurance companies itself, and the merger between Max Life Insurance co. and its parent company Max Financial Services was merely a procedural step, which would help in HDFC life convert from being an unlisted company to a listed company without going through the inconvenient and lengthy procedure of an Initial Public Offering. It would have no outward harm on the society at large and would've helped establish a private insurance player in the market with the market reach in competition with LIC. However, due to the cumbersome procedures regarding taking assent from the ministries and the courts, and such arbitrary provisions in place, the merger never saw the light of day.

These provisions and interventions not only cause unnecessary hurdles and delays, but also create scope for manipulation and deception. In the case of the merger between Punjab National Bank and Canara HSBC OBC Life Insurance company Ltd., PNB was allowed by the IRDA itself to hold promoter stakes in two different insurance entities, which is not in consonance with the provisions of the Insurance Act. Even on asking for clarifications from the IRDA regarding the reasons for allowing such an act, no answer has been given from them. This clearly shows that departmental intervention clearly runs on vested interest and is not at all efficient in the bigger picture[6].

Although it is pretty clear, but the question which needs to be asked, still remains, in this scenario, is pertaining to where and how does it go wrong and how the process of mergers and acquisitions can be very easily simplified in this scenario. The various provisions of related to Mergers and Acquisitions in the Country need to be put under scrutiny and need to be understood properly to figure out why the problem arises in the first place. The next section of this Chapter will focus upon that very question – Where does it go wrong?

Where does it go wrong?

Post perusal of the introductory section discussed above it is more or less clear as to what the

[5] Deborshi Chaki, Merger of HDFC Standard Life Insurance and Max Life fails to get IRDA approval
[6] Guruswaminaathan, Top 10 merger/acquisition in insurance industry, iPleaaders

core issues are regarding the lapses in the current scenario pertaining to Mergers and Acquisitions. However, it is imperative to discuss such issues in acute detail so as to properly understand the issues and how it is affecting the corporations who are attempting to Merge or Acquire stakes in other entities.

Intervention of Courts

The core problem with Mergers and Acquisitions in India at the moment is that the process is court driven. Courts are already burdened with a plethora of cases encompassing a large array of statutes, some of which are of absolute importance. In the midst of those, mere allowance and compliance procedure of Mergers and Acquisitions take an immediate backseat. This just results in a long drawn and problematic process which in turn neither benefits the corporations, nor the courts and not even the public at large. The process of Mergers and Acquisitions is initiated between the two corporations via common agreements, however it is not deemed sufficient by the current statutes, to provide legal cover to the procedure. The sanction of the High Court (earlier), and now, other tribunals like the National Company Law Tribunal, is required to bring the process into effect.

The Companies Act, 2013 consolidates the provisions related to Mergers and Acquisitions and other such related issues of arrangements, reconstructions and compromises. However, different provisions of the act get attracted at different times of the procedure, which in turn complicates the whole procedure. Amidst all that chaos, the Central Government also plays a role in this process and it acts via an Official Liquidator (OL) or the Regional Director (RD) of the Ministry of Company Affairs (MCA). This procedure in turn has to be to the utmost satisfaction of the court, which results in unnecessary and avoidable delays.

The problem is not just the fact that there is intervention by the court, but also the procedure which needs to be followed to obtain the assent of the court in this matter. In the present scenario, in case of a proposed plan of action regarding an amalgamation or acquisition of a company, which is subject to dissolution without the process of winding up, the current law requires a report from the Official Liquidator (OL) or the Registrar of companies (ROC) that all the affairs of the company are in order and have not, in any way, been conducted in prejudice to the interest of the members of the company and also upholds public interest. The current provisions also mandates that no such order of dissolution of any of the transferor companies shall be made by the court unless and until the OL submits a verified report to the Court that the affairs of the company are in order and have not, in any way, been conducted in prejudice to the interest of the members of the company and also upholds public interest.

The procedure of independent verification and formation of report is entirely unnecessary and cumbersome and leads to such unreasonable delays and also leave loopholes for manipulation and corruption. Overall, the whole intervention procedure of the courts, is a major reason for the delays caused in the process of M&A.

A prime example of a failed merger due to these lengthy approval procedures would be of the failed merger between RCOM (Reliance Communications) and Aircel. The scheme of arrangement between RCOM and Aircel was that RCOM would construct a separate SPV (Special Purpose Vehicle) by slump sale, to hive off its wireless business sector and leave behind the overseas arm and tower, which subsequently would merge with Aircel to form a new separate entity. The new entity would have joint ownership with 50:50 stake by both corporations. The main purpose behind this merger however, was transferring the prevalent debt in both corporations to the newly formed entity. The synergy out of this merger would have proved to be beneficial in cost and debt reduction from both the entities and helped in streamlining their capital expenditure and operational expenditure. This would subsequently help them survive the highly competitive telecommunications market and help make better use of their infrastructure.

However, due to the objections of creditors before the NCLT and the time-consuming procedure put in place by the current provisions, which led to need for approval from numerous authorities and courts, the deal was called of mutually by both the parties and the companies went into deep financial crisis post failure of such merger.

Issues regarding Valuation of the Companies

Valuation is a very important aspect when considering a proposal for merger and acquisition. Valuation basically refers to the evaluation of the assets and liabilities of the company to determine the economic value of a whole business or company unit. The procedure is used to determine the fair value of business for a variety of reasons which include sale value, ownership, taxation and is also an important aspect when undergoing an amalgamation procedure. There are no current provisions which mandate or regulate the standards required to evaluate the companies, which in turn create immense hurdles with respect to either overly high valuations, with hollow fundamentals, or a fundamentally strong company being grossly undervalued as various assets were not put into consideration. Additionally, even in the case of valuation of the company, there is intervention of courts as to the appointment of the evaluators.

Such undervaluation of overvaluation leads to disparities in the long-term business. An undervalued company would be acquired for a lesser amount than what it actually is worth which would adversely harm the existing shareholders. In case of overvaluation, a company may be bought for a price higher than its worth, but in actuality then the merger is complete, the debts and liabilities of the company could way down the other entity as well, which would be counteractive to the whole procedure of Mergers and Acquisitions.

An example of failure of merger due to this issue can be seen in the case of the merger between Bharti Airtel and Zain. Bharti airtel acquired a Kuwait based telecom company, by the name of Zain, which, on paper, had assets in Africa's 15 countries, which raised the value of the company substantially. However, after the merger proceedings went through, it was discovered that the amount of investments made by Zain in the assets present in Africa were not enough and were just placeholders. This can be attributed to the lack of due diligence on part of airtel as well, but it was primarily because there was no accepted uniform valuation standards and corner cutting was made easy due to that factor.

Issues regarding Registration – Differential Stamp Duty

For a long time, it has been a question of consideration, whether an order of a court sanctioning a compromise/arrangement between two companies, under Section 391-394 of the Companies Act, 1956, would be stamp able as a conveyance at the rates applicable to entry in the various state Stamp Acts. The problem stems from the differential stamp duty regime prevalent in different States. Although certain states like Gujarat, Maharashtra, Karnataka and Rajasthan have tried to address this problem by amending their stamp legislations, in order to make an order of the High Court under Sections 391-394 stamp able, however, majority states have yet to take a step in that direction, which results in ambiguity on the issue. It affects those entities the most which are undergoing or proposing to undergo the process of mergers and acquisitions, and have registered offices in two different states.

Apart from being differential in nature, the stamp duties are also very highly priced which is a very undesirable aspect as competition requires cost reduction and in that context Indian firms need to be competitive in restructuring exercises in order to stand a chance to compete with the global players in the market in the similar sector, and to expand their market reach to achieve the feat.

Merger of Listed Company with an Unlisted Company and vice versa

Major questions arise in case of mergers taking place between listed and unlisted companies as there is no specification pertaining to the same in the provisions of the Companies Act. This in turn creates an ambiguity as regards to the position of the shareholders of the company as there remains no surety as to what percentage of ownership would be retained by them and what value will be maintained in the existing holdings. This ambiguity in turn could derail the plan of action implemented by the corporations and result in failure of the merger altogether.

A prime example in this case can be taken from the failed merger scenario between Shriram finance and IDFC. "The structure proposed by both the entities included that Shriram Transport Finance would be delisted from the Financial Markets and subsequently become subsidiary of IDFC Ltd. Following which Shriram City Union Finance would then merge with IDFC Bank, and in finality Shriram Life and General Insurance would become subsidiaries of IDFC Ltd. However, this structure was rejected and a new structure was proposed wherein Shriram Transport Finance would remain as an independent listed entity, Shriram Capital would merge with IDFC Ltd and then subsequently Shriram City Union Finance would merge with IDFC Bank. The main objective behind this merger was for diversification of the business branches by IDFC Bank."

However, few investors from IDFC demanded that 60 percent of premium shall be given on fear that the holdings would be subject to diminution due to the swap. IDFC Ltd could not go below the threshold of 40 percent shareholding and therefore could not provide a good valuation to Shriram Transport. Subsequently, the shareholders of Shriram feared the onset of Holding Company Discount and hence the structure and valuation were not held to be mutually acceptable.

Hence the failure could be majorly attributed to two reasons:

1) No value for the shareholders

2) Disagreement in share swap ratio due to listing and delisting disparities

This is a clear indication that the ambiguity in this regard caused turmoil which derailed the whole procedure.

Inadequacy in Disclosure Requirement Rules

One of the major steps to be taken while becoming part of a merger and acquisition deal is disclosure of the necessary documents, as the shareholders need to be in possession of complete information in the case of a scheme of merger or acquisition. However, there are no rules or provisions which clearly set a standard or delineate the required documents and complete disclosure requirements required in pursuance of the amalgamation or acquisition procedure. This in turn, results in inadvertent defaults which lead to failed attempted at M&A.

An example of such a case can be derived from the study of the failed merger between Apollo Ltd. and Cooper Tire and Rubber Company. “Cooper Tire and Rubber co. is a US-based listed company and is the second largest tire making company in the US and ranked 11th globally having an annual turnover of $4.2 billion. Cooper main investors are institutes are backed by Black Rock Institutional Trust Co. and Vanguard Group Inc.”

The aim of Apollo Ltd. was to acquire Cooper Tire and Rubber Co. which was thrice the value of the acquiring company, via an all-cash transaction. Apollo would derive immense benefit out of this merger as it would step foot into the international market and there was no situation arising which would lead to immediate equity dilution in this regard as well. The proposal put in place by Apollo was that they would purchase all the common shares in the company with a premium of almost 40%. The capital was raised and everything was in order.

“However, it was found out that Cooper failed to provide their latest financial statements of its subsidiary in China, Cooper Chengshan Tire. The management and workers stopped working after they were aware of the Apollo-Cooper deal resulting cut in the revenue. One of the main concerns being the surety of success between Indian and Chinese work culture, management being Indian and workers Chinese. The Dispute between Chengshan and Cooper mired in the local courts sending an impression that Cooper had no control over its subsidiaries. To hide the same, Cooper did not disclose these financial statements which would radically alter the current valuation of the company. Thus, upon such disclosure and the news coming into the public forum, the merger was cancelled."[7]

This shows the clear importance of disclosure rules and regulations which are currently lacking in the provisions of the country.

Problems regarding Approval Procedures

The existing provisions in place, regarding the approval procedures for a scheme of merger and/or any such arrangement, state that it should be approved by a majority in number representing also 3/4th in value of shareholders or creditors who are present and voting.

This requirement with regards to majority in number does not serve any useful purpose, primarily considering that value is also simultaneously being adjudged as a relevant criterion. Additionally, the internationally accepted practice recognizes solely value as the determining factor and does not prima facie impose any such unnecessary additional conditions. Moreover, the present scheme of the Act directs that the manner of holding the meetings of the creditors and the shareholders, and also, dispensing of the same, is left to the sole discretion of the courts. The primary issue in this regard being that different courts follow different procedures which could create hindrances pertaining to the uniformity in carrying out the procedure.

Another hurdle faced during the approval stage, is regarding the hindrances and roadblocks caused by the minority shareholders and/or creditors of the corporation with more or less an insignificant amount of stake in the corporation, raise objections to schemes of merger/acquisition and subsequently the course of action of dealing with such objections becomes cumbersome.

Even in the approval stages there are numerous lacunas and speed bumps which can be easily rectified but have been overlooked since the inception and no reforms as such are being planned in context of the same[8].

Ambiguity in Existing Provisions

Section 233 of the Companies Act, 1956 contains, the rule for vesting of assets and liabilities of a transferor company upon the transferee company, post sanction of Ashish K Mishra, How

[7] Ashish K Mishra, How the Apollo, Cooper Deal Was Botched, Forbes India, Jan 31, 2014
[8] Ministry of Corporate Affairs, Mergers and Acquisitions

the Apollo, Cooper Deal Was Botched, Forbes India, Jan 31, 2014 40. Ministry of Corporate Affairs, Mergers and Acquisitions the scheme of amalgamation/merger done by the high court. Although, as the section does not contain a non-obstante clause, it leads to extensive practical difficulties during the course of actual transfer of the various properties/assets belonging to the transferor company into the transferee company[9].

It is imperative to mention here that the Sick Industrial Companies (Special Provisions) Act, 1985 and Section 32 thereof, contained unambiguous provisions in the nature of a non-obstante declaratory order, along with sanctioning a scheme of restructuring. The Sick Industrial Companies Act, was subsequently subsumed into the Companies Act, along with the principles therein, hence, it is eminent, that these sections are capable of being amended and applied as per the present scenario regarding company laws[10].

Moreover, Section 237 of the Companies Act, allows the Central Government to issue an order of amalgamation or merger of two or more corporations if its in the interest of the public. However, it can never be ascertained in a sure manner, as to if the merger will actually benefit the public in the first place. Consideration should also be given to the corporations which are being ordered to merge, as per how their fundamentals and financials will weather the storm of the merger. There is no supervision upon such mergers, and no authority to double check the feasibility and practicality of such mergers, which makes it an extremely arbitrary provision.

Mandatory filing procedure pre-closing, as per Competition Act

The competition and antitrust laws of various countries have different kinds of merger control regimes. They either have the provision of mandatory filing or provisions which give a bit more breathing space, in terms of permitting voluntary notifications either prior to or subsequent to closing of a Merger and Acquisition Transaction. In light of the same, the provisions of the Competition Act, 2002, provides for mandatory filing of merger regimes and that too pre closing of the amalgamation/acquisition deal. This creates a very constricted environment for the corporations amalgamating or any corporation acquiring another such entity, as there is always a fear of sanction, which hinders the growth prospect of the entity.

[9] Avtar Singh, Company Law, 628 (EBC Publications, Lucknow, 17th Edition, 2018)
[10] 42. Ministry of Corporate Affairs, Mergers and Acquisitions

The Countries which allow merger notifications on a voluntary basis do not totally give up their right to supervise such mergers and flout the competition or anti-trust laws of the state, but they have the provision which facilitates that, if the transaction potentially raises serious questions regarding the compatibility with the competition/antitrust laws in each jurisdiction, then these regulatory bodies contain the power to interject and seek necessary injunctions in order to facilitate a merger that is fair and just to the already existing players in the relevant market.

However, the core difference between mandatory pre-closing intimation and voluntary intimation, is that even if there is a subsequent interjection by the regulatory bodies in the latter case, the reduction in the liberty will always be lesser as compared to pre-closing intimation.

Problems in the present Insolvency Laws

As discussed earlier, The Insolvency and Bankruptcy Code, 2016, also contains provisions which facilitate mergers or acquisitions but in an unorthodox manner i.e., acquisition through the purchase of distressed assets of the acquire entity.

Under the Insolvency and Bankruptcy Code, 2016, there are two primary avenues for Amalgamation/acquisition of assets:

• "The first being the fast-track process. Herein the unencumbered assets, (which refer to the assets existing outside the course of the business which is the personal property of the corporate debtor/proprietor), of the corporate debtor are left out and the new promoter takes over the business on acquisition of the already existing assets."

• "The second avenue being where the assets are all encumbered (already an existing part of the business) and the creditors of the corporation have already initiated a Corporate Insolvency Resolution Process (CIRP) against the corporate debtor."

Through these new provisions the Insolvency and Bankruptcy Code, 2016, has been able to facilitate the recovery of Non-Performing Assets (NPAs) by banking institutions through the Mergers and Acquisitions Route and through the process of Corporate Restructuring.

However, the new route of Mergers and Acquisitions through the purchase of distressed assets is already facing a few challenges. Primary challenges being the ones related to bidding and acquisition of distressed assets. The Valuation of such assets need to be insulated enough from its former promoters and owners, who have the temperament to utilise proxies, either with the objective of derailing the bidding process or to skyrocket the valuations of such assets to make them sell for a much higher price.

Furthermore, even after protection being rendered by the Supreme Court, via the judgement of Ghanshyam v. Edelweiss, of April 2021, and the rule barring any kind of interference from any civil court with respect to any action already taken or to be taken in regards to any relevant order passed by the competent Adjudicating Authority i.e., the National Company Law Tribunal, some acquirers and investors have had to face some acute legal complications in this very regard, which circles us back to the very core problem discussed, which is regarding the undue and unnecessary intervention of courts in matters related to Mergers and Acquisitions. Rules and provisions in the current Insolvency and Bankruptcy Code, 2016, involve ambiguous instances wherein the stand of the laws very unclear and has no logical justification to support the same. For example, the rule establishing that the penalty for regularising any sort of non-compliance of the previous management is to be imposed upon the new management. This rule completely frees the previous owners who flouted the assets of the company and shifts the whole onus and burden up onto the new owners/promoters, leading to the actual culprits go scot-free, making no logical sense as to how it is in a way justifiable. Moreover, there is blanket ambiguity regarding how the previous regularizations/clearances are to be treated in the first place.

Even though the provisions pertaining to Mergers and Acquisitions in the current Insolvency and Bankruptcy Code, 2016 might be a step in the right direction, but it still needs to undergo a lot of refinement in order to be fully optimised and efficient to actually make a positive difference in the relevant sector.

Related-party transactions

"Merger and acquisition transactions that entail related parties often find themselves as the subject matter of shareholder claims. Owing to the group or conglomerate holding patterns of Indian companies, this is a recurrent issue in M&A disputes. One case where a related-party M&A came under the radar of the authorities was Satyam Computer Services Limited's (Satyam) proposed acquisition of two related entities, Maytas Properties Limited (MPL) and Maytas Infra Limited (MIL) in December 2008 at a deal value of a whopping US$1.6 billion, because these entities were owned by the family and friends of the promoter of Satyam. The announcement of the deal attracted strong and vehement opposition from the shareholders, with questions on the ambit of corporate governance, which resulted in the deal being called off. Soon after, on 7 January 2009, massive corporate fraud involving systematic auditing failures came to light that exposed an intended cover up by Satyam in the guise of its acquisition of MPL and MIL".

Therefore, it can be clearly seen in this aforementioned instance, that there is dire need for provisions which help to regulate and curtail such acts, in order to uphold the sanctity of the law in this regard, or it can be very easily flouted if no supervision is given to it.

Oppression and Mismanagement

Claims on the lines of oppression and mismanagement may be preferred by the members against the company as per Section 241 of the Companies Act, 2013. These claims take place when any member or members feel that certain affairs of the company are being conducted in any manner which might seem prejudicial to the interests of the company or in any way oppressive to some members or any one member of the company. In this regard the Companies Act of 2013 sets forth a mandate regarding the number threshold as to how many of the members can bring forth such claims of oppression and mismanagement. The criteria is divided into two parts

- Number threshold - The lesser of 100 shareholders or 1/10th of the total number of shareholder
- Percentage Threshold- Shareholders holding not less than 1/10th of the issued share capital

However, what the Companies Act, 2013 fails to do in this regard is that it fails to specify precisely, the nature of actions or conduct that would necessarily amount to oppression or mismanagement and that leaves it open for interpretation, which again falls in the hands of the judicial authorities. This interpretation is then thus done based solely on the prudence of the adjudicating authority, the facts of the case and the existing judicial precedents. This in turn opens up this aspect of a Merger/Acquisition deal to outside intervention which might not even need any supervision in the first place, and leaves scope for malice and false claims harming the reputation and the market value of the company altogether.

A recent example of such a situation can be attributed to the case of Tata Sons Ltd, the holding company of one of India's largest conglomerates, the Tata Group, which was subject to an oppression and mismanagement claim by its second-largest shareholder, the Shapoorji Pallonji Group. The challenge in this case was focused on what was alleged by the challengers, to be the illegal removal of Mr Cyrus Mistry as the executive chair of Tata Sons, and the alleged wrongful interference by Mr Ratan Tata and the Tata Trust in the management of Tata Group companies. The Hon'ble Supreme Court however, in its judgement, acted in a prudent manner to overturn the decision of NCLAT which had reinstated Mr Cyrus Mistry as the chair. The Supreme Court, inter alia, held that neither the removal of a person from the post of executive chair, nor affirmative voting rights provided in the articles of association of a company, can be termed as oppressive or prejudicial in nature[11].

Herein, we can see that on just a bare perusal of the current scenario and circumstances surrounding the current laws and provisions related to Mergers and Acquisitions, in light of few recent and few predominant cases, it can easily be pointed out where the whole structure regarding Mergers and Acquisitions is lacking. The provisions and rules already present, contribute to a shallow and hollow structure, which still has a very long way to go before it is properly optimised.

There are so many easily avoidable loopholes present at this stage, which need to be rectified at the earliest. Before the step of rectification is taken it is imperative to ascertain what the root cause of such issues are.

Root Cause

As discussed in detail in the previous section, the current scenario regarding Mergers and Acquisitions has an immense number of loopholes and lacunas present which cause unnecessary and undue delays in circumstances wherein a Merger or Acquisition process is to be instituted. However, to completely understand why such loopholes, a scrutinizing view needs to be put upon the current acts and provisions that are in interplay which are contributing towards the Mergers and Acquisitions structuring.

[11] Tata Consultancy Services Limited v. Cyrus Investments Pvt Ltd, 2021 SCC OnLine SC 272.

As we know that there are multiple statutes in play which in co-existence form the whole picture regarding Mergers and Acquisitions in the Country, like the Contract Act and Specific Relief Act, Companies Act, SEBI Regulations, Foreign exchange control regulations, Competition Act and the Insolvency code to name a few. However, what needs to be focused upon and studied is the interplay between all such statutes and the need of oiling the machinery which is facilitating such interplay.

Therefore, the way out is to approach the provisions in a holistic manner and to understand why and how these problems are arising and how they can be rectified. On such way to at least take a step in the right direction and to understand what is going wrong and how it can be rectified is to conduct a comparative analysis between the mergers and acquisitions laws which are predominant in other countries like the United States of America and the United Kingdom, which have a structurally different outlook regarding the provisions of Mergers and Acquisitions.

A comparative analysis between the laws and provisions of our country alongside other prima facie more advanced countries in terms of the subject matter, could help us pinpoint the issue and press upon the instability which ensues because of the current provisions. In the upcoming chapters, the focus will be shifted to examine in detail the laws of the United States of America and the United Kingdom, which have an impact on the Mergers and Acquisitions structure of those countries and to analyse such laws in comparison to the laws prevalent in India in that regard, with the sole objective of identifying the core issues, and suggest ways to remedy them in order to achieve an efficient set of rules and laws which would bolster the Mergers and Acquisitions picture in our country.

CONCLUSION

The landscape of mergers and acquisitions (M&A) in India reflects both promise and peril. While these strategic manoeuvres hold the potential to catalyse growth, streamline operations, and enhance market competitiveness, they are often mired in regulatory complexities, procedural bottlenecks, and bureaucratic interventions. As India's economy evolves and businesses navigate a dynamic market environment, addressing these challenges is paramount to harnessing the transformative power of M&A effectively. At the heart of the issue lies the need for a recalibration of India's regulatory framework governing M&A activities. Existing statutes, such as the Companies Act, 2013, while well-intentioned, often lead to protracted approval processes, cumbersome compliance requirements, and legal ambiguities. The involvement of multiple regulatory bodies, including courts and sector-specific authorities, further exacerbates these challenges, resulting in prolonged timelines and operational uncertainties.

To unlock the full potential of M&A activities, policymakers must undertake a comprehensive review of existing laws and regulations. Streamlining approval processes, enhancing regulatory clarity, and fostering a conducive environment for business consolidation are critical steps towards achieving this goal. Moreover, facilitating greater transparency, efficiency, and accountability within regulatory bodies can help mitigate the risk of arbitrary interventions and bureaucratic delays. In addition to regulatory reforms, fostering a culture of collaboration and dialogue between stakeholders is essential. Industry associations, business leaders, and policymakers must work together to identify common challenges, share best practices, and advocate for policy reforms that promote M&A activity while safeguarding the interests of all stakeholders. Building consensus around key issues, such as regulatory harmonisation, dispute resolution mechanisms, and investor protection, can help create a more predictable and investor-friendly environment for M&A transactions.

Furthermore, investing in capacity-building initiatives, such as training programs for regulatory officials and legal professionals, can enhance expertise and facilitate smoother M&A processes. Embracing technological innovations, such as digital platforms for document management and regulatory filings, can also streamline administrative processes and reduce compliance burdens. In conclusion, while the path to successful M&A transactions in India may be fraught with challenges, the potential rewards are significant. By embracing regulatory reforms, fostering collaboration, and investing in capacity-building initiatives, India can unlock new opportunities for growth, innovation, and market leadership through strategic mergers and acquisitions.

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