
EVADING CORPORATE CRIMINAL LIABILITY THROUGH MERGERS AND ACQUISITIONS IN INDIA

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ABSTRACT

This paper explores the issue of criminal successor liability in India in the context of mergers and acquisitions (M&A). Despite statutory provisions allowing continuation of legal proceedings post-merger, Indian courts have largely shielded successor companies from inheriting criminal liability due to the doctrine of "civil death" of the transferor company. Through analysis of key judgments—such as *Religare Finvest Ltd. v. State of NCT Delhi*, *Nicholas Piramal India Ltd. v. S. Sundaranayagam*, and *Iridium India Telecom Ltd. v. Motorola Inc.*—the study reveals inconsistencies between legal frameworks like Section 232(3)(c) of the Companies Act, 2013, and judicial interpretations. These gaps allow corporations to potentially evade accountability for pre-merger offenses such as fraud and money laundering. In contrast, jurisdictions like the United States and France impose criminal liability on successor entities under doctrines such as substantial continuity and asset absorption. The paper argues that India lacks a robust mechanism to prevent corporate impunity post-M&A. It proposes reforms including adoption of the Substantial Continuity Doctrine, stricter due diligence mandates, and incorporation of whistleblower protections to align with global standards. The research underscores the need for legislative clarity and judicial reconsideration to ensure that corporate restructuring does not become a tool for escaping criminal responsibility. By addressing these lacunae, India can enhance corporate accountability and safeguard public interest in its growing M&A landscape.

1. Introduction

Mergers and Acquisitions is a broad phrase used to characterize the combination of businesses or assets through a variety of financial transactions, such as tender offers, asset purchases, management acquisitions, mergers, and acquisitions¹. The terms mergers and acquisitions are often used interchangeably, however, they have slightly different meanings. Neither the Companies Act of 2013 ("CA 2013") nor the Income Tax Act of 1961 ("ITA") define the term "merger." A "merger" is the idea of combining two or more entities into one.²

But the term merger is used in Section 2(1)(b) of the Income tax Act 1961 to define the term amalgamation. It defines "Amalgamation" as "in relation to companies , means Company B Merge company B into company A Amalgamation in relation to companies only covered and not with reference to other forms of legal entities like partnership, proprietorship etc the merger of one or more companies with another company or the merger of two or more companies to form one company." ³

But the Income Tax Act has also stated few prerequisites for what constitutes an amalgamation. The conditions are (1) All assets ought to be transferred to the resultant company that is formed because of the merger.(2) All liabilities ought to be transferred to the resultant company or amalgamated company because of the merger. From the above definition given under the Income Tax 1961 a merger can be defined as the process of combining two or more companies to form a single new entity, with the term "merger" explicitly referring to the combination of one or more companies into another company called the amalgamated company or the resultant company formed due to the merger. This concept does not apply to other types of legal bodies, such as proprietorships or partnerships. The merged firm receives all of the merging entities' assets and properties. Likewise, the combined business or the resultant company acquires all of the merging firms debts and liabilities.

Therefore a merger can be defined as the integration of companies in full which includes transfer of both assets and liabilities towards the company that's formed by virtue of the merger called the amalgamated company which in turn streamlines the business into one single

¹ Adam Hayes, *Mergers and Acquisitions Types ,Structures and Valuations*, Investopedia

² *Mergers & Acquisitions An India Legal, Regulatory and Tax Perspective*, Nishit Desai Associates

³ Income Tax Act , 1961, § 2(1)(b) (India)

corporate unit or body.

The Exxon and Mobil merger is the quintessential example of a merger that worked. Exxon and Mobil, in 1998, made news after announcing their merger move. The companies were already the first and second-largest oil producers in America at that time. The merger deal closed for an astronomical \$80 billion. When we state that the deal closed at a staggering \$80 billion, we are referring to the overall value of the merger agreement between Mobil and Exxon as being \$80 billion.⁴

An 'acquisition' or 'takeover' is the acquisition by an individual, of majority interest in the share capital or of all or virtually all the assets and/or liabilities, of the target. A takeover could be friendly or hostile and may be effected either by way of agreement between the offeror and the majority shareholders or acquisition of shares from the open market or by offering to acquire the shares of the target to the shareholders as a whole.

The 2017 acquisition of Whole Foods Market by Amazon is the perfect example of an acquisition and not a merger. In this case, the acquirer is Amazon and the target firm is Whole Foods Market. Amazon bought out Whole Foods Market for \$13.7 billion. What this means is that Amazon bought the whole company, assets, liabilities, and all along with it. Whole Foods remained under its current brand name but was a subsidiary firm of Amazon. Amazon's deal was arranged as a stock purchase agreement under which Amazon acquired all the outstanding shares of Whole Foods Market. This would enable Amazon to acquire complete control of Whole Foods' operations and fold it into its business model.⁵

2. Statement of Problem

The issue tackled in this study is the uncertainty of criminal successor liability in India in cases of mergers and acquisitions. Indian laws, including the Companies Act, 2013, provide for the transfer of legal proceedings to the successor company, yet courts acquit transferee companies of criminal liability in reliance on the doctrine of "civil death" of the transferor company. This opens up the possibility of corporations avoiding responsibility for pre-merger offenses such as environmental misconduct and financial deception. The paper discusses whether or not

⁴ *The 13 Largest Mergers and Acquisitions*, Global Expansion.com

⁵ Houqing Yin, Case Analysis of Amazon's Acquisition of Whole Foods, in Proceedings of the 3rd International Conference on Global Economy, Finance and Humanities Research (GEFHR 2020) (2020)

Indian law properly deals with criminal liability shift after merger and investigates steps toward avoiding abuse of M&A to avoid criminal prosecution, ensuring public interest in aligning corporate responsibility.

3. Research Questions

1. How far does Indian law provide recognition and enforcement of criminal successor liability in merger and acquisition situations?
2. How do foreign jurisdiction adjudicate issues regarding transfer of criminal liability post mergers and acquisitions?
3. What are the prerequisite measures that can be taken to stop corporations from using mergers and acquisitions as a means to avoid or evade criminal liability for crimes that have been committed before the merger?

4. Research Objectives

1. To analyze the extent to which Indian law acknowledges and enforces criminal successor liability in merger and acquisition (M&A) cases.
2. To compare and contrast how foreign jurisdictions decide matters pertaining to the transfer of criminal liability after mergers and acquisitions.
3. To recognize and assess pre-requisite measures that can be adopted to deter corporations from utilizing mergers and acquisitions as a means to escape or avoid criminal liability for already committed offenses.

5. Hypothesis

M&A transactions in India have the potential to enable companies to use these corporate restructuring methods as a tool for avoiding criminal liability for pre-merger crimes because of loopholes in legal provisions and judicial interpretations. To be precise the Indian judicial not recognising Corporate Criminal Liability post mergers and acquisition. But embracing tighter regulations and global best practices could prevent such avoidance of corporate criminal liability.

6. Understanding the concept of Corporate Criminal Liability

Corporate crimes are those committed by a corporation or someone related to one. Corporate crime is something that has been done by an employee of the company and not necessarily on instructions or permission of its officers.

It will do if officials applied their standard powers in the corporation's interest. So to some extent, criminality of the corporation depends upon its officials⁶. Corporate criminal liability is the legal accountability of a corporation for criminal offences committed by its officials, agents, or employees acting in the company's name. It acknowledges that a corporation can be held liable for illegal acts performed within the scope of its business, even though such acts were not specifically authorized or sanctioned by senior management or the board of directors. The liability occurs when people connected to the corporation abuse their authority or are involved in illegal acts for the benefit of the organization or in pursuit of its goals.

7. The concept of Corporate Criminal Liability from the Lens of Indian Judiciary

Before the theory of corporate criminal liability came into being, Indian courts would not punish corporations on the basis that corporations did not possess the required element, mens rea, as they were abstract legal entities that could not be physically produced before the court. However, a series of legal problems arose as a consequence of this notion.⁷

The Calcutta High Court in the case of A.K. Khosla And Ors. vs T.S. Venkatesan And Ors. on 3 September, 1991⁸ dealt with allegations of cheating, forgery, and criminal conspiracy against A.K. Khosla and others, who were with General Electric Company of India Ltd. (GECI). Shaw Wallace & Co. Ltd. (SWL) alleged that they had misrepresented Genelec Limited's (GL) financial position to dispose of shares at a higher price. SWL alleged that it was induced to buy shares on the basis of false representations. The complainant made a complaint that GL's accounts were manipulated to reflect profits rather than losses. On taking cognizance, the Metropolitan Magistrate ordered issue of process against the accused. The

⁶ Jiyauddin & Sunita Banerjee, *A Critical Analysis of Corporate Criminal Liability in India*, 10 Int'l J. L. 3 (2024).

⁷ Kunal Kaushik Kally, *A Critical Study on Corporate Criminal Liability with Special Reference to US and Indian Laws*, Vol 6, SSRN, (January 23, 2020)

⁸ A.K. Khosla & Ors. v. T.S. Venkatesan & Ors., [1991] Cal. Ct. Jud.

petitioners requested quashing of proceedings under Section 482 of the Code of Criminal Procedure on the ground that the allegations were false and intended to extort money.

The defence lawyers asserted before the Calcutta High Court, among other things, that the corporations being juristic persons could not be punished for IPC offenses involving mens rea. The council of defendants clearly articulated that "the offences alleged in the complaint under Sections 420, 467, 471 and 477A of the Indian Penal Code, as also the offence under Section 120B of the Indian Penal Code, are all offences having mens rea as one of the necessary ingredients thereof."

The Calcutta High Court concurred with the council of the defendants to the effect that "mens rea is a necessary ingredient of the offences under Sections 420, 467, 471 and 477A and Section 120B of the Indian Penal Code. By definition Section 477A can have no application to a company because it can be applied to a natural person such as clerk, officer or servant only. I must, therefore, hold that the impugned prosecution against the two companies is not maintainable." The court concurred that there existed two conditions required for prosecution bodies corporate : mens rea and the capacity to sentence the corporate body to a mandatory sentence of imprisonment, and that a corporate body could not be held to possess the mens rea necessary or be sentenced to imprisonment as it did not have a bodily presence. Accordingly, the petition was dismissed and the prosecution of the two entities is not maintainable.

Thus earlier, Indian courts had only accepted that companies can act through their managers and directors, but the judgements currently now confirms the belief that companies are equally guilty as any living individual and can be prosecuted and punished for it.

The constitution bench of the Supreme court of India in the case of Standard Chartered Bank And Others vs Directorate of Enforcement And others on 24 february 2006,⁹ decided that no company is exempt from prosecution for major offences just because doing so would result in a mandatory prison term. It is clearly given in the judgment that "The majority in the Constitution Bench, held that there could be no objection to a company being prosecuted for penal offences under the FERA and the fact that a sentence of imprisonment and fine

⁹ Standard Chartered Bank & Ors. v. Directorate of Enforcement & Ors., (2006) AIR SC 3294 (India).

has to be imposed and no imprisonment can be imposed on a company or an incorporated body, would not make Section 56 of the FERA inapplicable and that a company did not enjoy any immunity from prosecution in respect of offences for which a mandatory punishment of imprisonment is prescribed.”

The Court explained that just because companies can't be jailed or imprisoned that does not give them the liberty to be exempt from prosecution. Although imprisonment cannot be used against a company as it is not a natural person, this does not mean that the accused company cannot be prosecuted for crimes where mandatory imprisonment is required. The use of fines is an effective deterrent.

In the case of Iridium India Telecom Limited vs Motorola Incorporated and Ors on 20th October 2010 ¹⁰the Apex court of our country held that a firm can be prosecuted under Section 420 of the Indian Penal Code, 1860. The Apex Court replied in the affirmative and made it crystal clear that though the offence is one which needs proof of mens rea, a company can be prosecuted though it's not a natural person may be prosecuted to the act as the criminal mind of the person managing the firm will be 'attributed' Accordingly, doctrines of attribution and imputation were adopted.¹¹

In the same case (Iridium India Telecom Limited vs Motorola Incorporated and Ors) the Supreme Court has also stated the factors that ought to be considered before determining whether or not criminal liability or charges can be brought against a company or not.

The factors stated in the above case are:

- 1.The claimed illegal act should have occurred during the time of while the employee was carrying out the work or performing his duty.
2. The company must gain any benefit through the act either directly or indirectly.
- 3.The claimed illegal act should be followed by mens rea, or a guilty mind. ¹²

¹⁰ Iridium India Telecom Limited. v Motorol Incorporated and Ors., (2011) AIR SC 20(India)

¹¹ Aditya Saurabh, *Criminal Liability of Corporate and it's officials in India: analysis*, ipleaders

¹² Pranav Gupta ,*Corporate Criminal Liability in post merger Scenarios: Critical Analysis and Implications*, Centre For Corporate Law NLU Odhisa

In this case the above factors are given for both the transferor and the transferee company.

8. Corporate Criminal Liability in India post Mergers and Acquisition

From the above chapter it is clear that criminal liability can be passed to a corporate for the action of its employees irrespective of men's ream and the penalty being imprisonment. But the main question here is does the Indian Judiciary admit the concept of criminal successor liability of a company. In simple words does Supreme Court pass the criminal liability of the company to the successor company post the merger and acquisition?

The Supreme Court has deliberated in detail about this issue in the case of Religare Finvest Limited vs State of NCT Delhi 11 September, 2023,¹³. Religare Finvest Limited (RFL) had filed a commercial suit claiming ₹791 Crores from Laxmi Vilas Bank (LVB), accusing LVB of having embezzled Fixed Deposits (FDs) furnished by RFL and its group firms as collateral against short-term advances. On 23 September 2019, RFL filed a criminal complaint, resulting in the registration of an FIR under Sections 409 and 120B of the Indian Penal Code, 1860. It was alleged in the FIR that RFL had deposited FDs of ₹750 Crores with LVB, which were used as collateral for loans granted to RHC Holding and Ranchem. When these firms defaulted, LVB drew ₹723.71 crores from RFL's account without sufficient authority.

In view of financial unsustainability, the Reserve Bank of India (RBI) placed LVB under moratorium and ordered its merger with DBS Bank India Limited (DBS). Reserve Bank of India (RBI) moratorium refers to a temporary suspension of certain activities, generally financial, such as loan repayment or bank services. Reserve Bank of India (RBI) had put Lakshmi Vilas Bank under moratorium for 1 month from November 16 2020 to december 17 2020. Withdrawals by account holders and creditors during this 1 month moratorium period were limited to Rs 25,000. The merger of Laxmi Vilas Bank (LVB) with DBS Bank India Limited took place under Section 45 of the Banking Regulation Act¹⁴.

By virtue of Subsection 4 of section 45 of the Act. If RBI considers it necessary in public interest, interests of the depositors, proper management, or the banking system, it

¹³ Religare Finvest Ltd. v. State of NCT Delhi, Criminal Appeal No. 2242 of 2023 (Supreme Court of India Sept. 11, 2023).

¹⁴ Banking Regulation Act, No. 10, § 45, 1949 (India).

may draw up a scheme for the reconstruction or amalgamation of the banking company. Then under 45(6) of the act duplicates of the scheme are forwarded to the Transferor bank and transferee bank and then to the Union Government for its approval under 45(7). Once the "reconstitution" or the "amalgamation" scheme receives the approval on the union government it's binding upon both the transferor bank and transferee bank. A supplementary chargesheet was also filed, impleading LVB (now DBS) as an accused along with bank officials and other companies. DBS moved a challenge to the summoning order before the Delhi High Court, contending it should not be prosecuted for actions prior to the amalgamation.

The High Court had stayed the order of summoning against DBS until clarification from RBI on how to interpret the amalgamation scheme. RFL opposed this stay, stating that criminal proceedings do not come to an end upon amalgamation and Clause 3(3) of the scheme allows for continuance of such proceedings against the transferee bank. The Supreme Court had to examine whether DBS could be held criminally liable for LVB's conduct before amalgamation.

The Supreme Court did not shift the criminal liability from Laxmi Vilas Bank (LVB) to DBS Bank India Limited (DBS). The Supreme Court, while setting aside the criminal proceedings against DBS Bank India Limited, depended upon a few important principles of corporate criminal responsibility and provisions under the amalgamation scheme under Section 45 of the Banking Regulation Act, 1949. The court reiterates that criminal liability remains firmly with the real wrongdoers and cannot be shifted ipso facto to a successor company such as DBS. Referencing earlier precedents like *Sham Sunder & Others v. State of Haryana* and *McLeod Russel India Limited v. Regional Provident Fund Commissioner*, the court reaffirmed that only the person whose actions are the crime can be criminally liable, and this is not automatically attributed to a transferee company.

The court examined Clause 3(3) of the scheme of amalgamation, under which continuation of legal proceedings against the transferee bank is permissible but specifically states that criminal proceedings initiated against directors, officers, or employees of the transferor bank prior bank prior to the appointed date shall continue as if the transferor bank did not exist. The proviso to this provision reinforces that only the persons who so remain liable, reiterating the principle of criminal liability being personal and incapable of being devolved on the

transferee bank. The court observed that the object of the amalgamation scheme was to secure the depositors, creditors, and public interest and to facilitate the stability and continuity of the banking business and that subjecting DBS to criminal liability would be against the said objectives.

It is explicitly given in the case of “Nicholas Piramal India Limited v. S. Sundaranayagam¹⁵” a Delhi High Court Case that an organisation or an entities distinct legal personality is lost post merger. It’s clearly given in the judgement that “The entity which has developed on amalgamation cannot be prosecuted for an offence caused by the transferor company and the transferor company is dead as far as civil life is concerned”. From this we can conclude that neither the entity the entity that survives the amalgamation process or the transferee company can’t be prosecuted nor the entity that lost its existing legal entity by virtue of the amalgamation can be held liable as it ceases to exist.

Though Indian case laws may not favour the notion of transfer of criminal liability post merger or amalgamation as the transferor company ceases to exist post amalgamation what the company act has to state is different. Additionally, the liability may also be governed by provisions under Section 232 (3)(c) of the Companies Act¹⁶. Section 232 (3)(c) of the Companies Act 2013 authorizes the National Company Law Tribunal to provide for "the continuation by or against the transferee company of any legal proceeding by or against any transferor company on the date of transfer".

Section 232(3)(c) of the Companies Act, 2013 simply says that if there are any pending legal cases or proceedings against the original company (transferor company) when it is being merged or transferred, such cases will be continued with the new company (transferee company).¹⁷

9. The View about Corporate Criminal Liability post mergers in Foreign Jurisdictions

Since decades, United States courts have applied criminal successor liability with regard to mergers in which the company to be acquired is dissolved and merged into the acquiring

¹⁵ Nicholas Piramal India Ltd. v. S. Sundaranayagam, Cri. M.C. No. 5392 of 2005, decided Aug. 23, 2007 (Delhi High Ct.).

¹⁶ *Companies Act*, No. 18, § 232(3)(c) (India 2013).

¹⁷ Shaswat Kashyap, *Merging Entities, Emerging Challenges: Post-Merger Criminal Liability in India*, 12 Global Bus. L. Rev. 45 (2023).

company. The United States Court of Appeals for the Tenth Circuit in *United States v Mobile Materials*¹⁸, Inc held that the court stressed that corporations and partnerships under Oklahoma law remain in existence for some purposes after dissolution, including being, criminally prosecutable for acts done before dissolution. To be specific Oklahoma Statute Title 54 "Partnership" section 230 and Oklahoma Statute Title 18 "Corporation" section 188. The court explained: "It would surely be unjust to permit state law to maintain corporate existence for certain purposes, namely civil proceedings, while immunizing a dissolved corporation from criminal culpability."

On 25 November 2020, France's supreme court, the Court of Cassation, followed US's approach to criminal successor liability. On November 25, 2020, the French Court of Cassation (France's Supreme Court) delivered a landmark ruling under which public limited liability companies can now be criminally liable for previous criminal activities of the companies they merge into via "mergers by acquisition." This ruling breaks from prior case law. It will most probably generate a heightened post-merger criminal risk of liability for acquiring firms and a correlative incentive to step up their pre-merger due diligence efforts.

Where a merger by absorption is not fraudulent and occurs after the 25th day of November, 2020, the criminal liability of the absorbed entity will be shifted to the absorbing entity, but only confiscation penalties and fines can be incurred. Penalties are limited this way because criminal liability transfer subsequent to merger by absorption is contingent upon upon the idea of complete transfer of assets and liabilities from the absorbed entity to the absorbing entity.¹⁹

10. Conclusion

While other foreign jurisdictions have started incorporating the process of not providing immunity to the company formed post merger or amalgamation for the offences committed by the transferor company there is scope that companies would use merger as a tool to evade their criminal liability.

¹⁸ 776 F.2d 1476 (10th Cir. 1985)

¹⁹ Alexandre Bisch, "U-turn: France aligns with US criminal successor liability", IBA, <https://www.ibanet.org/article/fb2cbc9c-bba2-4815-8701-1832d45fe2a1>.

For example, the firms can escape environmental regulations by merely merging the firm after an environmental tragedy, outsmart money laundering regulations and abate actions to forfeit 'proceeds of crime'. A very good example of such a scenario is the Joint Director Directorate of Enforcement, Hyderabad vs M/S. Embassy Property Developments Pvt. Ltd²⁰ case decided by the Appellate Tribunal under the Prevention of Money Laundering Act (PMLA).

The amalgamation of two firms—M/s Embassy Realtors Private Ltd (ERPL) and M/s Dynasty Developers Private Ltd (DDPL) —into a new firm, M/s Embassy Property Developments Pvt. Ltd (EPDPL), was instrumental in establishing the legal responsibility of the transferee firm (EPDPL) towards the suspected money laundering crimes committed by the transferor firms (ERPL and DDPL).

The amalgamation brought about an effective protection against criminal accountability to EPDPL.

The most important legal principle used in this case is that on amalgamation, the transferor company suffers a "civil death." Once a company is dissolved by amalgamation, any criminal action against it is suspended because the company no longer exists to be prosecuted. As ERPL and DDPL dissolved on amalgamation, their criminal liabilities shall not be transferred to EPDPL. As observed in this judgment, The merger of ERPL and DDPL was instrumental in protecting the transferee company from criminal prosecution for the offences alleged. By invoking the "civil death" principle of the transferor, EPDPL managed to evade criminal liability.

The Indian courts can adopt the "Substantial Continuity Doctrine" to achieve consistency in cases of transfer of criminal liability after mergers and acquisitions. According to this doctrine, a successor company can be held liable for the acts of the predecessor if it continues the same operations after a merger or asset purchase. The factors such as job duties, supervisors, working conditions, and employee retention all contribute to determining liability²¹.

²⁰ M/S Embassy Prop. Dev. Pvt. Ltd. v. State of Karnataka, (2019) AIR ONLINE SC 1652 (India).

²¹ *Pranav Gupta, Corporate Criminal Liability in Post-Merger Scenarios: Critical Analysis and Implication*, CCL NLUO

Other than the three prerequisites stated in the case of Iridium India Telecom Ltd v. Motorola Incorporated Co, the NCLT or the Central Government, whichever body that sanctions the scheme of amalgamation or corporate restructuring, should consider the financial and legal background of the targeted company while sanctioning a scheme of arrangement, which can assist in the revelation of probable criminality prior to the merger. Furthermore, the implementation of whistle-blowing legislation in India will enable workers in the target firm to disclose possible criminal conduct prior to or simultaneously with a merger such as the "European Union's Directive on Whistleblowing Protection."