

CORPORATE RESTRUCTURING THROUGH CONTRACTUAL MERGERS

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Introduction

It is important to look at the scope, extent and applicability of Section 233 of the Companies Act, 2013 (the "Act") in covering various forms of corporate restructuring of small companies. Such as compromises, amalgamations, arrangements, divisions, reconstructions and so on. This enquiry is necessary, because the opening note of the Section 233 of the Act begins with a non-obstante clause, which obstructs the applicability of the Sections 230 and 232 of companies Act 2013 for the accommodation of contractual mergers formulated as an alternative to conventional merger practices¹.

The contractual merger mechanism is not formulated on the conventional fundamentals of corporate restructuring, which are contained in the Sections 230 and 232 of companies Act 2013. Under said provisions the monitoring of tribunal/court is indispensable and on the other hand under the Section 233 of the Act, in a way the corporate reorganization process of small companies is over seen by the bureaucrats to maximum extent. This variance is of complete deviation from the established legal practice. Hence considering the same, with a view to avoid inter sectional conflict, the framers of companies Act 2013 might have incorporated the non-obstante clause in Section 233(1) of the Act, by making the beginning of the section 233(1) of companies Act 2013 as "Notwithstanding the provisions of section 230 and section 232".

Effect of Non-Obstante Clause in Section 233

Sections 230 and 232 of companies Act 2013 deal with the regulation of the conventional forms of corporate restructuring, Out of which Section 230 of companies Act 2013 deals with compromises and arrangements and the Section 232 of companies Act 2013 deals with the mergers and amalgamations.

"Now the use of non obstante clause in Section 233 means these sections are overridden to start with "This means that despite what is stated in these two sections, a scheme of amalgamation or merger may be entered into : (i) between two or more small companies , or (ii) 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) A plain reading makes us understand that the simplified procedure is permissible only in the case of a merger or amalgamation and not for a compromise or arrangement as referred in section 230;

¹ S. 230 of Companies Act, 2013

- (ii) The simplified procedure is applicable to merger between small companies as well as to merger of Holding company with its wholly owned subsidiaries;”²

Sub-Section 12 of Section 233 and its Import

“Pausing here for a while, let us look at sub - section (12) which reads as under :

(12) The provisions of this section shall mutatis mutandis apply to a company or companies specified in sub - section (1) in respect of a scheme of compromise or arrangement referred to in section 230 or division or transfer of a company referred to clause (b) of sub - section (1) of section 232 : If this is what is stated at the end , then why not the provisions dealing with an arrangement or compromise can be made applicable, to small companies or for holding and its subsidiaries. The word used is “mutatis mutandis” meaning thereby the same procedure as modified appropriately will be applicable for compromise or arrangement too. In other words, this sub - section 12 enlarges the scope of section 233 to demerger (division) also. Thus, it is safe to conclude that this section is applicable also to Compromise or arrangements. This is also clear from rule 25 (8) companies (Arrangements & Amalgamation) Rules, 2016 .”³

Wider Applicability of Section 233

The Company Law Expert Committee observations on Section 233(1) and Section 233(12) of the Act, undisputedly demarked the contradictory applicability of Section 233 of the Act in regulating the various forms of corporate restructuring of small companies, on lines of the Sections 230 and 232 of companies Act 2013. The Rule 25(8) of Amalgamation Rules, quoted below, appears to strengthen the claim for the wider applicability of Section 233 of Act, covering various forms of corporate restructuring, but the provision of delegated legislation cannot alter the course of statutory intent. Therefore, it is very clear that there is a genuine need to clarify the prevailing ambiguity on the applicability of the Section 233 of companies Act 2013 to other forms of corporate restructuring apart from mergers and amalgamations. Such as compromises, arrangements, divisions, and transfer of companies, as described under the sections 230 and 232(1)(b) of companies Act 2013.

“(8) For the purpose of this rule, it is clarified that with respect to schemes of arrangement or compromise falling within the purview of section 233 of the Act, the concerned companies may, at their discretion, opt to undertake such schemes under sections 230 to 232 of the Act, including where the condition prescribed in clause (d) of sub-section (1) of section 233 of the Act has not been met.”⁴

Conclusion

² S. Ramanujam, Mergers et al Issues, Implications and Case Law in Corporate Restructuring, Pg.158 CH-6, LexisNexis 4th Edn., 2019

³ ibid

⁴ S. 233(12) of Companies Act 2013, and Rule 25(8) of Companies (Compromises, Arrangements and Amalgamation) Rules 2016



The above mentioned inter sectional ambiguity may be clarified by the incorporation of a comprehensive explanation to the Section 233(1) of the Act, with a clear description of various forms of corporate restructuring that may come under the applicable purview of Section 233(1) of the Act.

Despite of the intersectional ambiguity between the Sections 233(1) of the Act and the Section 233(12) of the Act, other forms of corporate restructuring, apart from the mergers and amalgamations appear to be entertained under the Section 233 of the Act. The following Scheme of division confirms the same.

“A scheme of Demerger between Adani Developers Private Limited and Budhpur Buildcon Private Limited was approved by the Regional Director, Ministry of Corporate Affairs, NWR, Ahmedabad in RD (NWR)/233(008)/2017/2727.”⁵

⁵ A Ramaiya Guide to the Companies Act, Pg. 4040, CH-15, 19th Edn., volume 2 LexisNexis