Control of a company, the shares of which are largely held can be acquired in number of ways. Asset purchase or a takeover offer to the target company’s shareholder by offering them cash or non-cash considerations or by controlling the management are the common methods to exercise control over a company. Mergers and Acquisitions are seen as a primary method of market control, and it is the statutory right of

98 “It is the legal concept of ‘control’ that is the focus of attention with takeovers and mergers” Weinberg and Blank, “Takeovers and Mergers” Sweet and Maxwell (2010) P.1. Term ‘Control’ is defined under Section 2(1) (C) of the SEBI (Substantial Acquisition of shares and Takeovers) Regulation, 1997. According to the City Code on Takeovers and Mergers, “Control Means a holding or aggregate holdings of shares carrying 30% or more of the voting rights of the company, irrespective of whether the holding or holdings gives de facto control.

99 D.D. Prentice, ‘Take-over Bids and the system of self regulation’ 1 Oxford Journal of Legal Studies 406(1981). Also see Weinberg and Blank “Takeovers and Mergers” Sweet and Maxwell (2010)p.1035&1036 – “Various ways in which control can be exercised over a company 1) Complete ownership of shareholding 2) Majority (or voting) control, 3) Minority (or effective control), 4) Management Control, 5) Control for the purpose of takeover and merger is deemed to mean a holding or aggregate holding of shares carrying 30% or more of the voting rights of the company.

100 In the economic parlance the term ‘takeover and merger’ may be used interchangeably. But legally there is a distinction between the two. A takeover may be defined as a transaction or a series of transactions whereby a person acquires control over the assets of the company, either by becoming the owner of those assets or indirectly by obtaining the control of management of the company”. “Merger can be defined as an arrangement whereby the assets of two or more companies become vested in or come under the control of one company”. Weinberg and Blank “Takeovers and Mergers” Sweet and Maxwell (2010) P.1. See also “Palmers Company Law” Sweet and Maxwell (2007) P.12065(Loose leaf edition) “Takeover is a transaction whereby a person or two or more persons acting jointly seeks to obtain voting control of a company”. The legal distinction between the two is that in takeover direct or indirect control over the assets of the acquired company passes to the Acquirer. Whereas in merger the shareholdings in the combined entity will be spread between the shareholders of the two companies. In India, the Income Tax Act, 1961, S. 2 (IA) defines amalgamation as the merger of one or more companies with another or the merger of two or more companies to form a new company, in such a way that the assets and liabilities of the amalgamating companies become the assets and liabilities of the amalgamated companies and shareholders of the amalgamated company.

101 R.H.Coase, “The nature of the Firm” 4 Economica 386(1937) Wherein he uses the expressions “Combinations” and “Integration” to describe the nature of the firm.

102 Athanasious Kouloridas, ‘The Law and Economics of takeovers – Contemporary studies in Corporate Law’ Hart Publishing,(2008) P.1 – “Corporate Acquisitions have been an important strategy for corporate growth”.
the corporations\textsuperscript{103}. However, a company can gain control over another without acquiring all the shares of another company\textsuperscript{104}. Mergers and Acquisitions benefits the shareholders, the society, the corporations and it results in major organizational change\textsuperscript{105} and it may affect the life of the dependents of the corporations or its stakeholders\textsuperscript{106}.

This chapter proceeds by examining economic and legal motives and its impacts on mergers and acquisitions. Secondly, it concentrates on the constitutional validity of amalgamation of companies and thirdly, it examines the need for regulation of mergers and acquisitions. Fourthly, it discusses the merger routes under the Indian corporate laws. Further it compares the merger provisions of Companies Act 1956 and 2013 with Bank mergers under the Banking Regulation Act, 1949. It also traces the evolution of Corporate Restructuring Regulations in India. It then focuses on the statutory recognition of special Provisions for Banking Companies. Further it studies the Compulsory Amalgamation of banking companies and it’s Comparison under Section 44A (7) & section 45 of the Banking Regulation Act, 1949 read with S.396 of the Companies Act, 1956. It then briefly discusses the comparison of mergers and acquisitions under the Companies Act, 1956 and 2013. It also studies the changes brought to the Corporate Restructuring under the Companies Act, 2013.

\subsection*{2.1 Why companies engage in mergers and takeovers?}

\textsuperscript{103} Eita India Ltd, In Re, AIR 1997 Cal.208, in this case the scheme of amalgamation was opposed by the central government among other grounds for the reason that the memorandum of the company did not permit amalgamation. The court in this case held that the power to amalgamate is a statutory power and this may be exercised notwithstanding the fact that the memorandum of association of a particular company not containing the express power to amalgamate. Hence the court in this case made it very clear that the amalgamation or restructuring is not an object \textit{per se} of any company and thus it cannot be subject to the terms of memorandum.

\textsuperscript{104} “It is possible to have effective control of a company if there is a well coordinated resolute minority and the majority remains disorganized”.


From the economic perspective the two theories have evolved. These theories explain why companies engage in mergers and acquisitions.  

1. **Profit maximization theory** : It holds that competitive market forces motivate firms to maximize shareholder wealth. The theory says that the firm will engage in takeovers if it results in increased shareholder wealth for the Acquiring company. Increased shareholder wealth is likely to result if the firm’s profitability increases due to takeover. Profitability can increase through the creation of monopoly power, synergy or through inducting strong managers to the Board.

2. **Maximizing Management Utility** theory: This theory holds that beyond achieving certain satisfactory level of profits, managers will attempt to maximize their own self-interest and these do not necessarily correspond to maximizing shareholder wealth.

Shareholder’s wealth maximization theory requires that a takeover to increase profitability of the acquiring firm. In contrast, the maximization of management utility theory does not necessarily require increased profitability. An increase in the size and an increase in the manager’s benefits are the more likely criteria.

### 2.2 Motives for Mergers and Takeovers:

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110 Weinberg and Blank “Takeovers and Mergers” Sweet and Maxwell (2010) P.1043- They identify it as one of the causes of takeovers.

111 Dawson International Plc v. Coats Patons Plc (1988) 4 BCC 305 (Court of session) Lord Cullen stated that, with regard to the disposal of their shares during takeover directors are under a fiduciary duty to the shareholders and to act in the best interest of the shareholders. Also see Hogg v. Cramphorn Ltd [1966] 3 All ER 420 (Ch.D) which held that any defensive tactic by the directors without shareholder approval is forbidden by the Takeover Code. Also see Gething v. Kilner [1972] 1 All ER 166 and Heron International Ltd v. Lord Grade [1983] B.C.L.C 244 ( CA). Cases concerned with the issue of directors fiduciary duty during a takeover bid was in question.

I. **Trade advantage or synergy**\(^{113}\): One of the main causes for an M&A deal is to gain trade advantage or synergy. Sometimes an acquisition strategy is to create economic value, a distinctive competence\(^{114}\). Economists view that mergers are being planned and executed to achieve synergies\(^{115}\). In general three types of synergy can be achieved a) **Financial synergy**\(^{116}\) b) **operational synergy**\(^{117}\) c) **Managerial synergy**\(^{118}\). In most mergers and acquisitions, the transactions are undertaken in the belief that the earnings of the combined enterprises will be greater than those of the separate companies because of the complementary factors.

II. **Economies of Scale**\(^{119}\) and **Scope**\(^{120}\): Achieving economies of scale is an obvious explanation for some of the mergers\(^{121}\) and it is the result of synergy. If economies of scale are a decisive variable, merger activity should be inversely related to the industry growth. This is because with rapidly growing demand it is easier to achieve the requisite size for a minimum cost firm through construction of new capacity\(^{122}\). But merging of competing

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\(^{113}\) According to Weinberg and Blank, ‘Synergy’ is a term commonly used in the business literature meaning the favourable effect on overall earning caused by combining two firms in circumstances which will give rise to savings in costs or increases in revenue.


\(^{115}\) Weinberg and Blank “Takeovers and Mergers” Sweet and Maxwell (2010) at P. 1043

\(^{116}\) Financial synergies results in lower costs of capital. One way to achieve this is by lowering the systemic risk of the company’s investment portfolio by investing in unrelated businesses. Another way is increasing the company’s size, which may give it access to cheaper capital. A third way is establishing an internal capital market. An internal market may operate on superior information and therefore allocate capital more efficiently.

\(^{117}\) Operational synergies can stem from combining operations of hitherto separate units or from knowledge transfers. Both kinds of operational synergy may lower the cost of the involved business units or may enable the company to offer unique products or services.

\(^{118}\) Managerial synergies are realized when the bidders managers possess superior planning and monitoring abilities that benefit the targets performance.

\(^{119}\) Economies of scale means the average cost per unit of the output decreases with the increase in the scale of outputs produced.


firms in a market to produce a monopoly does not enable economies of scale.

III. **Method of market Entry**: Acquisition of an established and successful company reduces the risk of failure and helps solve the perennial problem of finding suitable management. The advantage of acquiring an established going concern rather than starting from the scratch will be reflected in the acquisition price. But if a company is seeking its entry through merger whereby it eliminates competition between the parties to concentration, it is deemed as an anti-competitive agreement, and it is prohibited by the Competition Act, 2002.

IV. **Acquiring Minority Shares**: Merger is seen as a method of eliminating the dissenting minority shareholders. Shareholders who object to a merger or sale of an undertaking can no longer go to the court unless they can show that the scheme as a whole is unfair. Because merger or acquisition is a statutory right of the companies and the court will not interfere with the business decisions of the company.

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124 Weinberg and Blank ‘Takeovers and Mergers’ Sweet and Maxwell (2010), P. 1055
125 Section 5 & 6 of the Competition Act, 2002. Also See Rayne holdings Plc v. European Commission (Ireland) [2011] 4 C.M.L.R 4 – Available at www.westlawindia.com visited on 20th Sep 2011 - the case concerned with merger between two airline industries. It was found by the commission that the agreement is anti-competitive and it may eliminate competition from the market.
128 Tribunal has the jurisdiction under the Companies Act, 2013. Not yet notified.
129 The Companies Act, 1956, S. 395
130 Re, Grierson Oldham and Adams Ltd, [1968] Ch.17 J. Plow Man “The court is concerned with the fairness of the offer as a whole”. Also See, Re, Buggle Press Ltd, [1960]3 All ER 791 (CA) – Lord Ever shed MR “The mechanism of the section has here been invoked by means of incorporation of holding company Jackson & Shaw (Holding) Ltd, especially for the purpose and in order to enable two persons Jackson and Shaw to expropriate the shares of their minority colleague. Even though the case fall within the strict language of the section the consequences of it would enable by a device of this kind the 90% majority shareholders always to get rid of a minority shareholder whom they did not happen to like. And that as a matter of principle would appear to be contrary to a
2.3 Takeovers and Mergers in National Interest\textsuperscript{131} : Article 39\textsuperscript{(b)}\textsuperscript{132} and Art.39\textsuperscript{(c)}\textsuperscript{133} of the Constitution of India make it obligatory on the part of the states to ensure that operation of economic system do not result in the concentration of wealth and means of production to the common detriment. This forms the basis of S. 396 of the Companies Act, 1956\textsuperscript{134}. The material resources include such resources in the hands of the private persons and not only those which are already with the state\textsuperscript{135}. But the main issue debated by the economists is not whether government should intervene in markets, but rather the extent to which they should intervene\textsuperscript{136}.

2.4 Constitutional Imperatives and Merger Laws in India: All legislations in India must be tested on the touch stone of the fundamental rights enshrined in part III of the Constitution of India\textsuperscript{137}. Amalgamations of two or more corporations either in the public interest or in order to secure proper management of any of the corporation is recognized by our Constitution\textsuperscript{138}. As far as the merger of private banking Companies in India, the Banking Regulation Act plays an important role and it protects the rights guaranteed under Art.14 and 19 of the constitution. Constitutional validity of the Banking

\textsuperscript{\textsuperscript{131} The Companies Act, 1956, Section 396 —Power of central Government to provide for amalgamation of companies in national interest}

\textsuperscript{\textsuperscript{132} Art.39( b) The state shall direct its policy towards securing , that the ownership and control of the materials resources of the community are so distributed as best to sub serve the common good .}

\textsuperscript{\textsuperscript{133} Art. 39(c ) of the Constitution of India- The state shall direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment.}

\textsuperscript{\textsuperscript{134} Comparison of Section 396 of Companies Act,1956 with Section 45 and Part IIC of Banking Regulation Act,1949, is discussed in Chapter-III.}

\textsuperscript{\textsuperscript{135} Sanjeev Coke Mfg Co v. Bharath Coking Coal Co. Ltd , ( 1983) 1 SCC 147 -This case challenged the constitutional validity of Coking Coal Mines (Nationalisation ) Act. But it was justifies by the court on the grounds given under Art. 39( b) and 39 ( c ). Also see Assam Sillimanite Ltd v. Union of India AIR 1992 SC 938 .-The distribution wealth has been interpreted to include nationalisation of private industries also .}

\textsuperscript{\textsuperscript{136} Weinberg and Blank ‘Takeovers and Mergers’ Sweet and Maxwell ( 2010) P. 1028}

\textsuperscript{\textsuperscript{137} Art-14&19(1)g) are the relevant articles of the Constitution of India. This ensures equality and right to freedom of trade respectively.}

\textsuperscript{\textsuperscript{138} Art 31A(C) of the Constitution of India}
Regulation Act was challenged in *Shivkumar Tulsian and others v. Union of India*\(^{139}\), wherein the Bombay High court speaking through Justice S.P. Sha held that section 45\(^{140}\) is in conformity with the constitutional provisions of Art 19 and 14\(^{141}\). Employee’s concerns in mergers and acquisitions in India has always been challenged on the ground of denial of certain of the fundamental as well as constitutional rights of the employees\(^{142}\). For example, in *Excel Wear v. Union of India*\(^{143}\), on the grounds of public interest in providing employment, the state attempted to impose restrictions on the employee’s right to close down his undertaking by means of an amendment to the Industrial disputes Act. This was struck down by the Supreme Court as an unreasonable restriction on the employer’s freedom of trade even as considering the socialistic background of the Indian state.

2.5 **Why Merger Regulation necessary?** Market failure is more relevant in business context because of information asymmetry\(^{144}\). Inadequate and misleading information about a company will affect its reputation and it is detriment to the society in general. It is because the existence of monopoly or oligopoly in an economy will tend to reduce overall welfare benefits to the society, hence regulations have long been in

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\(^{139}\) [1990] 68 Com Cas 720(Bom) . Cases was decided by Justice S.P. Shah and P.S. Kurdukar, In this case Central Government had imposed moratorium on Hindustan Commercial Bank(HCB) and ordered for its amalgamation with Punjab National Bank. Court examined the scope of Section 45(1),(2) & (3) of the Banking Regulation Act, 1949 and the constitutional validity of the said provisions were answered. Petitioners also challenged RBI’s power to order for a post-decisional hearing. Position of RBI taken by the Supreme Court in Palai Central Bank case ( AIR 1962 SC1371) was heavily relied on.

\(^{140}\) The Banking Regulation Act, 1949. S.45 the power of the Reserve Bank to apply to the central government for suspension of business by banking company and to prepare for a scheme of amalgamation.

\(^{141}\) See also *Reserve Bank of India v. Paul Francis Ambookan & others* [1990]69 ComCas 320(ker) wherein the petition was filed by the employees of Bank of Cochin in pursuant to a moratorium declared by the central government and its consequent amalgamation with the State Bank of India, under a scheme prepared by the RBI. They challenged the scheme of amalgamation as unjust, arbitrary and discriminatory. It was held by the Kerala high court through C.J., V. Malimath & J. Bhaskaran Nambiar that the scheme providing for amalgamation of two companies in public interest therefore protected under Art.31A and therefore constitutionally valid.

\(^{142}\) V. Mariappan, “Mergers and Acquisitions: The human issues and strategies” 39 Indian Journal of Industrial relations 2003 p.84

\(^{143}\) AIR 1979 SC25

\(^{144}\) Ibid , information asymmetry means an inequality of privately held information between different parties.
place in many jurisdictions. One objective of the regulation is, while the corporate flexibility outweighs the interest of non-consenting minority shareholders being able to continue in the type of business in which they invested, such shareholders should be treated fairly. Fairness has two components. First the minority shareholders should receive the same treatment as the controlling shareholders who voted for the merger. Second the economic value of what the shareholders of the acquired corporation receive should be equal to what they give up. The provisions of the Companies Act, 1956 embody the fundamental principle of fair treatment of the dissenting shareholders. The fact that open market and privately negotiated acquisitions have to meet relatively minimal regulatory requirements raises important policy concerns. These concerns are strongest when massive purchase is made in competition with an announced tender offer. Traditionally, comment on and regulation of takeovers has focused on three issues.

1. The maintenance of proper balance between managerial and ownership interests within the companies which are the targets of takeover attempts
2. The maintenance of a balance between the interest of predators and shareholders in the target company and
3. The protection of public interest.

The first issue can be traced to the identification by Berle and Means of a potential conflict between the interest of the owners and the interest of the controllers of the

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145 Ibid at P. 1029
148 Section 395 of the Companies Act, 2013, “...Transferee company may give notice to the dissenting shareholders...that it desires to acquire the shares...unless on the application made by the dissenting shareholders...the tribunal think fit to order otherwise “ Also under S. 394A, the tribunal shall notify the central government of every application made to it under Section 391-394 of the Companies Act, 1956
149 Edward F. Greene, and James J. Junewicz, ‘A Reappraisal of Current Regulation of Mergers and Acquisitions’ 132 University of Pennsylvania Law Review 647 (1984). Prof Greene identified some of the unaddressed problems of corporate acquisitions such as 1) Competition Equality among acquirers 2) Informed decision making and orderly transfer of control 3) Predictability in the Application of Regulatory Requirements 4) Control of the premium sharing etc.
The idea of market for corporate control seems to have originated with Berle and Means. The idea of market for corporate control seems to have originated with Berle and Means. The idea of market for corporate control seems to have originated with Berle and Means. The idea of market for corporate control seems to have originated with Berle and Means.

2.6 Merger routes under the Indian Law: Indian Companies Act, 2013 recognizes corporate restructuring as a statutory right of the corporations. Following are the routes of corporate restructuring under the Companies Act, 2013.

1) Business acquisitions under S. 180(1)(a): Section 180(1)(a) of the Companies Act, 2013 mandates the Board of directors to get the consent of the general meeting to exercises the powers mentioned therein. It confers powers on the board of directors to sell, lease or otherwise dispose of the undertakings of the company with the consent of the general meeting. The meaning of the term ‘Undertaking’ was explained by the

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152 Sections 391-396 of the 1956 and Ss.153,153A&153B of the Companies Act,1913 recognized the right of companies to prepare scheme of arrangement, amalgamation and acquisition.
153 M&A provisions under the companies Act, 2013 is not yet notified, hence the Companies Act, 1956 continues to apply for Corporate Restructuring in India.
154 Hereinafter Corresponding provisions under the companies Act,1956 given in the footnote
155 293(1)(a) of the Companies Act,1956
157 Section 180(1)(a) states that “The Board of Directors of a company shall exercise the following powers only with the consent of the company by a special resolution, namely:--(a) to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings. Explanation.--For the purposes of this clause,--(i) “undertaking” shall mean an undertaking in which the investment of the company exceeds twenty per cent. of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates twenty per cent. of the total income of the company during the previous financial year; (ii) the expression “substantially the whole of the undertaking” in any financial year shall mean twenty per cent, or more of the value of the undertaking as per the audited balance sheet of the preceding financial year;
courts through various leading cases\textsuperscript{158}. Section 180(1) (a) can be considered as an arrangement falling under S. 230-232\textsuperscript{159}.

2) **Arrangements other than mergers (Sections 230-231 of the 2013 Act):**

Companies frequently restructure their capital structure\textsuperscript{160}. Two methods, each suitable for different circumstances for the re-organization of the company’s capital structure is provided by the statute. One under Section 66 and the other under Ss. 230-231 of the 2013, which enables the company to have the internal reorganization of the share capital of the company or a scheme of arrangement with the consent of the class of creditors or class of members who will be affected by such scheme. The

\textsuperscript{158} P.S. Offshore Interland Services (P) Ltd & another v. Bombay offshore suppliers and services .[1992] 75 ComCas. 583 (Bom.) the Issue in this case was whether “Sale of a vessel by the company constitutes ‘sale of an undertaking’?” D.R.Dhanuka J., “Undertaking used in this section is liable to be interpreted to mean ‘the unit’ the business as a going concern, the activity of the company duly integrated with all its components in the form of assets and not merely some of the assets of the company … Having regard to the object of the provision, it can at the most, embrace within it all the assets of the business as a unit or practically all such constituents…..” also in Re, Yellamma cotton, woolen & silk mills Co. Ltd-Bank of maharashtra v. Official Liquidator [1970] 40 Com Cas.466 (My sore) J.,Narayana Pai. The issue in this case was Whether an English mortgage created over the property of the company by the bank amounts to disposal of the undertaking of the company under s. 293 (1)(a) ? “An undertaking is not in its real meaning anything which may be described as a tangible piece of property like land, machinery or equipment: it is in actual effect an activity engaged in with a view to earn profit.” ‘The essence of mortgage is that the company is permitted to retain the use of all its property and continue to engage in its manufacturing or business activity and is not to be interfered with so long as it continues to work and continues to repayment in the manner agreed upon between it and the lender. So long as this result is ensured and the company continues to engage in its work, the form or language of the instrument under which the money is borrowed is of little or no consequence and so long as such position is assured, the company cannot be said to have parted with its undertaking or business or disposed of its undertaking within the meaning of clause (a) of subsection (1) of section 293 of the Companies Act. The company has not disposed of the whole or any part of its undertaking understood in the correct sense’. Also see Brookebond India Ltd v. UB Ltd and others [1994]79 ComCas. 346 (Bom).

\textsuperscript{159} S. 394 (1) (b) of 1956 Act is the Corresponding provision. Section 232(8) of the Companies Act, 2013 - Explanation (i) i) in a scheme involving a merger, where under the scheme the undertaking, property and liabilities of one or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to another existing company, it is a merger by absorption, or where the undertaking, property and liabilities of two or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to a new company, whether or not a public company, it is a merger by formation of a new company.

\textsuperscript{160} Palmers Company Law, Sweet and Maxwell (2007) P.12007 (Loose leaf edition)
use of expression ‘class’ of creditors or ‘class’ of members in S. 230 use of expression ‘class’ of creditors or ‘class’ of members in S. 230 was subject to judicial scrutiny in number of cases. Court may sanction the scheme, if it is approved by majority in number representing and three-fourth in value of the members or creditors of the class. The class must have been fairly represented. The arrangement if sanctioned by the tribunal is binding on all the creditors or all the members of the class. Whether it is valid or not the shareholders cannot question it. Section 230 of the

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161 Corresponds to Section 391 under the Companies Act, 1956. The cases cited here are decided under S.391 of the Companies Act, 1956.

162 Sovereign Life assurance Co. Ltd v. Dodd, (1892) 2 Q.B.573. In this case the company had two types of policy holders. Holders of policies which had matured and whose policies had not matured. The court had to consider whether certain creditors formed a single class or two different classes. Bowen L.J, said “It seems plain that we must give such a meaning to the term class as will prevent the section being so worked as to result in confiscation and injustice and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.” Further, the court found that persons whose interest were dissimilar had been treated as a single class and accordingly it refused to sanction the scheme. Also in Re, Hellenic and General Trust Ltd., [1976] 1 W.L.R.123. J. Templemen stressed that it is the responsibility of the applicants to see that the class meetings are properly constituted. It was held that majority of the shareholders, being a wholly owned subsidiary of the outside purchaser for the shares, constituted a separate class from the other shareholders and that accordingly the scheme failed. It was also suggested that a parent company owning 50% or more of the shares of the subsidiary company can be assumed to have community of interest for the purpose of S. 425. J. Templemen added “Vendors consulting together with a view to their common interest in an offer made by the purchaser would look askance at the presence among them of a wholly owned subsidiary of the purchaser.” Also in Anglo American Insurance Co. Ltd, Re (2001) I. BCLC 755(Ch. D), and in Hawk Insurance Co.Ltd., Re (2001) 2 BCLC 480. In India, Bhagwanti v. New Bank of India Ltd, (1950) 20 ComCas 68, Jaypee Cements Ltd, Re (2004) 122 ComCas.854, Maneck Chowk &Ahemedabad Manufacturing Co.Ltd, Re (1970) 40 ComCas. 819 (Guj).

163 Tribunal is having the jurisdiction under the Companies Act, 2013- Not yet notified.

164 Both conditions are cumulative.

165 Kirloskar Electric Company Ltd, Re (2003) 116 Com Cas. 413. It was held by the court that the Majority of the three fourth value must be of persons who are present and who took part in the voting. Mere presence would not be enough. Majority is to be reckoned out of valid votes. Also in B.S.Kayangoudar v. Maharashtra Apex Corporation Ltd (2007) 139 ComCas. 225, Swift Formulations P.Ltd, Re, (2004) 121 ComCas.27( P&H)

166 Majority who vote in favour of the scheme must be first a majority in number of those members of the class who are present and voting and secondly it must be three fourth in value of the holdings of such person.

167 S. 391(2) of the Companies Act, 1956

168 S.K.Gupta v. K.P.Jain (1979) 49 ComCas. 342( SC) also in Gaya Sugar Mills Ltd v. Nandakishore Bhajaria (1955) 25 ComCas.24. “Sanction ion of the court operates as a ‘judgement in rem’ and therefore can be raised by the company as a defence to any execution proceedings taken out by a creditors against the company in respect of a debt
Companies Act, 2013 corresponds to section 391 under the companies Act, 1956 and it was held by the court in number of cases that is a complete code by itself. Once a scheme of compromise or arrangement falls within the four corners of the section, it can be sanctioned, even if it involves doing acts for which the procedure is specified in other sections of the Act\(^\text{170}\).

3) **Merger or Amalgamation under S. 232 of 2013 Act:** It facilitates for reconstruction or amalgamation of companies. The duties of the court\(^\text{171}\) under this section are onerous and have to be carefully performed. The court\(^\text{172}\) cannot come to a proper conclusion under the section unless it is satisfied that the matter had been considered at an extraordinary general meeting of the members specially convened for the purpose under the directions of the court under S. 230\(^\text{173}\)\(^,\text{174}\). But an amalgamation cannot be used to by-pass the rights given under other statutes\(^\text{175}\).

\(^{169}\)Corresponds to section 391 of the Companies Act, 1956

\(^{170}\)HCL Infosystems Ltd., Re (2004) 121 ComCas.861 (Delhi) and also in Re, Maneckchowk and Ahmedabad Manufacturing Co. Ltd., (1970) 40 ComCas.819(Guj.) followed in Re, Navjian Mills Ltd Kolol (1972) 42 ComCas. 265 (Guj.). But an exception to it is that if it is for the reduction of capital under section 100-104 of the Companies Act, 1956, then the procedure under those provisions has to be mandatorily followed even if it is brought under section 391 of the Companies Act, 1956.

\(^{171}\)Tribunal under the 2013 Act. Date yet to be notified.

\(^{172}\)Tribunal, yet to be notified.


\(^{174}\)S. 394 (1) of 1956 corresponds to s.232 of the Companies Act, 2013: The court has the following specific powers under this section. 1) The transfer of the property or liabilities of one company to another 2) Allotting of shares, debentures, policies or other like interests 3) Continuity of legal proceedings 4) Dissolution of the transferor company without the procedure of winding up. 5) General Powers are given incidental, consequential or supplemental to the scheme.

\(^{175}\)General Radio & Appliances Co.Ltd v. M.A Khader AIR 1986 SC 1218- The transferor company in an amalgamation was the tenant of the premises under an agreement which specifically prohibited sub-letting without the consent in writing of the Land Lord. Under the scheme of amalgamation, all the assets of the transferor company including the tenancy passed to the transferee company. The written consent of the landlord was not taken.
4) **Takeover under S. 235** of the Companies Act, 2013: Takeover is the acquisition of majority shares in another company to give the purchaser control of that other company. Usually a takeover takes the form of a bid or offer to acquire the target company’s shares. The Companies Act, 2013, do not make any special provision for the regulation of takeover bid. But Section 235 mandates that the power of acquisition of shares of the shareholders holding less than a specified percentage of share or class of shares involved who dissent from the scheme, if the scheme has been approved by the specified majority by giving a notice to the dissenting shareholders within the stipulated time can be compulsorily acquired. Such takeovers are regulated by The SEBI (Substantial Acquisition of shares and Takeovers) Regulations, 2011. If a company intends to acquire another company by way of acquiring shares and voting rights, then it has to go through the procedure prescribed under Regulation 3 and 4 of the SEBI (Takeover) Regulations, 2011 wherein it mandates the acquirer to make an open offer if its shareholding exceeds the threshold limits.

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176 Correspond to section 395 of the Companies Act, 1956.
177 Weinberg and Blank, ‘Takeovers and Mergers‘ Sweet and Maxwell (2010) P.1
178 Law and procedure for the acquisition of shares in listed public companies is regulated by the SEBI (Substantial Acquisition of shares and Takeovers) Regulation, 2013.
179 It is commonly referred as “Squeezing out the minority”.
180 On 23rd Sep, 2011, SEBI replaced the 1997 takeover regulations by notifying the new one as The SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011.
181 Regulation 3 of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 states that “No acquirer shall acquire shares or voting rights in a target company which together taken with shares or voting rights, if any, held by him and by persons acting in concert with him in such target company, entitle them to exercise 25% or more of the shares in the target company unless the acquirer makes a public announcement of the open offer.”
182 Under the 1997 Regulation 15%, 55%, 75% but under the new regulation, 2011 requirement of public announcement starts only with 25% or more. This was recommended by the TRAC (Takeover Regulation Advisory Committee).
5) Compulsory merger\textsuperscript{183} under S. 237\textsuperscript{184} of the Companies Act, 2013: Central Government may exercise its power under this section for the amalgamation of the Companies in public interest. An amalgamation under this section need not go through the procedure laid down under S.232 and 235. The order of the Central Government made so is to be notified in the official gazette and shall state company’s constitution, property, rights, interests, authorities and privileges together with its liabilities, duties and obligations\textsuperscript{185}.

6) Mergers through voluntary winding up under Section 319\textsuperscript{186} of the Companies Act, 2013: Section 319\textsuperscript{187} is attracted in the case of merger of a company undergoing voluntary winding up. In both the cases the winding up commences with the passing of a special resolution of the members. Also in both cases the company may be merged with another company\textsuperscript{188}. Not only a company in the process of voluntary winding up may be merged with another company But a company may be voluntarily winding up for the purpose of effecting a merger with another company\textsuperscript{189}. It also provides for the consideration for such transfer\textsuperscript{190}. Unlike

\begin{itemize}
\item \textsuperscript{183} Comparison between section 396 of the Companies Act, 1956 and Section 45 of the Banking Regulation Act, 1949 is examined under point no 2.12 of this chapter.
\item \textsuperscript{184} Corresponds to section 396 of the Companies Act, 1956.
\item \textsuperscript{185} Govt of Orrisa v. Ashok Transport Agency and others(2003)123 Com Cas 226(SC) On 30.08.1991, the Ministry of Law, Justice and Company Affairs, Government of India, issued a Notification S.O. 562(E) in exercise of the powers conferred under S. 396 Sub-sections (1) and (2) of 1956, called the OMC Alloys Limited and the Orissa Mining Corporation Limited (Amalgamation) Order, 1991. Also in Hindustan Petroleum Corporation Ltd v. Shyam Co-operative Society and other AIR 1989 SC 295.
\item \textsuperscript{186} Corresponds to Section 494 of the Companies Act, 1956.
\item \textsuperscript{187} S. 494 of 1956 Act corresponds to s.319 of 2013 Act Members Voluntary winding up.
\item \textsuperscript{188} Conditions to be satisfied under S.319: Within the powers of the liquidator. But consent of the members through special resolution is to be passed and requires the Consent of committee of inspection or tribunal.
\item \textsuperscript{189} Section 319(1) of the Companies Act, 2013, “Where a company is proposed to be, or is in the course of being, wound up voluntarily and the whole or any part of its business or property is proposed to be transferred or sold to another company may, with the sanction of a special resolution of the company conferring on him either a general authority or an authority in respect of any particular arrangement…”.
\item \textsuperscript{190} S. 319 of the Companies Act, 2013- Power of liquidator to accept shares etc., as consideration for sale of the property of the company.
\end{itemize}
the cases under Ss.230-234, the dissenting shareholders may opt out and demand the liquidator to drop the proposed arrangement or ask the liquidator to purchase his shares at a price mutually agreed or through arbitration\(^{191}\).

7) Reconstruction of the sick Industrial Companies under Ss.253-262 of the Companies Act, 2013\(^{192}\): Under the Companies Act 1956 Act, Part-VIA dealt with the revival and rehabilitation of sick industrial companies\(^{193},^{194},^{195}\). Two yardsticks are employed to determine the Industrial sickness. 1) Accumulated losses in any financial year equals 50% or more of its average net worth during the four financial years immediately preceding such financial year 2) failure to repay debts during the period specified in S. 2(46 AA)ii provided the demand is made by its creditors in writing\(^{196}\). When an Industrial Company has become sick, the board of directors of the company has to follow certain steps given under Part- VIA of the companies Act, 1956\(^{197}\). The measures taken for the revival of sick industrial company is given under S. 424D(2)\(^{198}\).

9) Restructuring of banking companies under the Banking Regulation Act, 1949: The restructuring of private sector banking companies are governed by Section

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\(^{191}\) Section 494 of the Companies Act,1956

\(^{192}\) Prior to the Companies Act, 2013, it was dealt under Part -VIA of The Companies Act, 1956

\(^{193}\) Part VIA Ss. 424A to 424L inserted by the Companies ( Second Amendment) Act, 2002 .Prior to which the reconstruction of the sick industrial companies were governed by The Sick Industrial Companies ( Special Provisions) Act,1985.objective of the Act was to make special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings , the speedy determination by a board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected there with.

\(^{194}\) S. 2( 46AA) of the companies Act , 1956- “ An Industrial company which has become sick”

\(^{195}\) S. 3(1) (o) - Sick industrial company means an industrial company ( being a company registered for not less than five years ) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth .( SICA ,1985)

\(^{196}\) S. 2(46AA) of the SICA, 1985.

\(^{197}\) See S. 424 A (i) ( 1) Reference to the Tribunal ( formerly BIFR ) 2) Prepare a scheme for its revival and rehabilitation. But to which there are two exceptions -1 ) Does not apply to govt Companies - See the proviso to S. 424 A 2) No reference if the secured creditors of the company taken steps under s. 13( 4) of SARFESI Act , 2002.

\(^{198}\) Preparation and sanction of a scheme : measures under S. 424 D(2 )1)Financial reconstruction Change in the management 3) Amalgamation 4) Transfer of an undertaking.
44A\textsuperscript{199}, 44A (7)\textsuperscript{200}, 44B\textsuperscript{201}, 45\textsuperscript{202} and 36AE-36AJ of the Banking Regulation Act, 1949. The regulatory regime applicable to merger of banking companies is discussed in Chapter –III and Chapter IV of this study.

2.7 Evolution of Corporate Restructuring Regulations in India\textsuperscript{203}: Indian legal system is favorable towards corporate growth through mergers and acquisitions. It is evident from the decision of Justice Chandrachud in Ion Exchange (India) Limited, In Re\textsuperscript{204}, \textsuperscript{205}. Mergers and acquisitions are used as instruments of growth and are increasingly getting accepted by Indian businesses as critical tool of business strategy.

\textsuperscript{199} Voluntary amalgamation of banking companies in the private sector.

\textsuperscript{200} Compulsory amalgamation of two or more private sector banking companies by the Central Government in Public Interest.

\textsuperscript{201} Scheme of arrangement between a banking company and its creditors

\textsuperscript{202} Amalgamation of banking companies pursuant to an order of moratorium by the Central Government.

\textsuperscript{203} I had the opportunities to attend Prof. Pillai’s class while I was working as a teaching associate under him. I have relied on the lecture notes of Professor in the LL.B (Hons.) class at NLSIU, Bangalore on ‘the History of modern company law’ to write this part of the study.

\textsuperscript{204} [2001]105 Com Cas.115 (Bom.) Court held that “Corporate enterprise must be armed with the ability to be efficient and to meet the requirements of a rapidly evolving business reality. Corporate restructuring is one of the means that can be employed to meet the challenges and problems which confront business. The law should be slow to retard or impede the discretion of corporate enterprise to adapt itself to the needs of changing times and to meet the demands of increasing competition.

\textsuperscript{205} Ion Exchange (India) Limited, In Re, [2001]105 Comp Cas.115 (Bom.) The case concerned with the approval of the court in an application for a scheme of amalgamation brought two companies - Ion Exchange Speciality Chemicals Limited and Ion Exchange Environmental Services Limited sought to merge with a company known as Ion Exchange (India) Limited. The two transferor-companies are wholly owned subsidiaries of the transferee-company. The case in detail dealt with the scope and nature of the jurisdiction of the court in a scheme under Ss.391-394. The court speaking through Justice Chandrachud held that “the law as it has evolved in the area of mergers and amalgamations has recognized the importance of the court not sitting as an appellate authority over the commercial wisdom of those who seek to restructure business. The need for this restatement is all the greater today where the interplay of competition and the forces of the market demand efficiency; cost effectiveness and high levels of productivity. Viewed in the context of this business reality, the scheme of amalgamation should in the present case pass muster. The holding company in the present case seeks to emerge from the economic difficulties which face its subsidiaries which have become loss-making entities. The effort is to pool together human, financial and material resources and to deploy them, upon amalgamation in a manner that would enhance profitability. This is a permissible object and nothing in the proposed scheme in the present case militates against commercial morality, the public interest or a view which a reasonable body of shareholders or creditors would adopt”.

\textsuperscript{206} Ion Exchange (India) Limited, In Re, [2001]105 Comp Cas.115 (Bom.)
They are widely used in a wide array of fields such as information technology, telecommunications, banking and business process outsourcing as well as in traditional business to gain strength, expand the customer base, encourage healthy competition or enter into a new market or product segment\textsuperscript{206}. Mergers and acquisitions may be undertaken to access the market through an established brand, to get a market share, to eliminate competition, to reduce tax liabilities or to acquire competence or to set off accumulated losses of one entity against the profits of other entity\textsuperscript{207}.

Corporate status in India, under the British regime was a privilege rarely granted. It could be attained only through a Royal Charter, Letters Patent, an Act of British Parliament or later an Act of Indian legislature\textsuperscript{208}. The necessity which led to the incorporation of the limited liability company was the amount of finance required for the construction and other business projects. Individuals contributing a modest investment for a proportionally modest return would not stake their own properties in such projects. If they were to make their investment they would require limited liability. The seed was sown by the Joint stock companies Act, 1844 of England providing for incorporation of companies by registration, together with the beginnings of the system of disclosure of information on a public register\textsuperscript{209} but it did not provided for limited liability. The Limited Liability Act, 1855\textsuperscript{210} gave the protection of limited liability to the shareholders, who contributed capital for the formation of a company limited either by guarantee or by shares.

The genesis of corporate regulations in India is traceable to The Joint stock companies Act, 1850. The 1850 Act, followed its English predecessor of The Joint stock companies Act, 1844. Under the 1850 Act, every unincorporated association of seven or more persons whose shares were transferable without the consent of all the shareholders was

\begin{footnotes}
\item[209] Andrew Hicks, ‘Corporate Form: Questioning the Unsung hero’[1997]J.B.L306. Author in this article questions whether the limited liability is appropriate even for all the small business enterprises and come to the conclusion that the limited liability is not the sole reason for the small business proprietors chooses to incorporate it.
\item[210] From Prof.MPP Pillai’s class room lecture notes.
\end{footnotes}
entitled to be registered under the Act. The Registration was however not compulsory and the Act only dealt with the Registered companies. Under the English law registration was compulsory and there is no evidence to show why a different course was adopted in India\textsuperscript{211}.

Even in a commercial country like Britain, the evolution of corporate legislations was slow, though there was nothing in the common law operating to the discouragement of partnership or companies. But the statute laws earlier required for restraining the fraudulent practices connected with them\textsuperscript{212}. The main object of companies legislations were not to encourage trade and economic development, but rather to regulate the incorporated associations so as to prevent it from being used for purposes not being envisaged by law.

The Companies Act, 1913 for the first time recognized the scheme of arrangement between members and creditors. The Companies Act, 1913 neither used the expression Merger nor amalgamations or acquisitions. Originally, there was only a single section under the Companies Act, 1913 i.e., S.153\textsuperscript{213}. It conferred the power to make arrangement or compromise with the members and creditors. Companies Act, 1913 had undergone substantial changes through the Companies Amendment Act, 1936. One of the important aspects was that it inserted Ss.153A\textsuperscript{214} and 153B\textsuperscript{215} to the 1913 Act.

\textsuperscript{211} R.S. Rungta, ‘Indian Company Law Problems in 1850’ 6 American Journal of Legal History 298(1962) Available at \url{http://heinonline.org}


\textsuperscript{213} S.153 of companies Act, 1913- Power to make compromise or arrangement with creditors and members

\textsuperscript{214} S.153A of 1913 Act –Stated that ,‘where a scheme of compromise or arrangement is contemplated for reconstruction or amalgamation and where a scheme provides for transfer of an undertaking (in whole or part) by one company to another company, the court on application made to it may order sanction of the said scheme by making provision for (a) The transfer to the transferee company of the whole or part of the undertaking of the transferor company (b) allotment or apportionment of any shares, debentures etc by the transferee company (c) continuation of the legal
Amalgamation of companies was dealt under section 153A of the Companies Act, 1913. The scope of S.153A was discussed in detail by the Madras High court in *Sahayanidhi Virindhunagar Ltd., v. ASR Subramanya Nadar and another*[^216^], wherein the court held that, “the object of S.153A was to facilitate arrangements and compromises between a company and its creditors or shareholders which involved the transfer of its assets and liabilities to other companies. Where an order of Court made under the Section provides for the transfer of the assets and liabilities of a company in liquidation to another company, the assets by virtue of that order, without anything more stand transferred to and vested in the transferee company and the liabilities of the former company are also shifted to the transferee company[^217^].”

2.8 Statutory Recognition of Special Provisions for Banking Companies: The East India Company offered relentless opposition to grant any charters for India more so regarding banking companies[^218^]. Under an Act of Parliament, it claimed that the power to Charter[^219^] Banks in India had been confined to the local government of India and therefore, unless a bank first obtained the approval of the East India Company, the establishment of such institution in India would be invalid[^220^]. The company had laid down two rules for considering the applications for grant of banking charters: (a) That the additional banking charters were required in India and (b) that, if so, proposed bank was likely to provide such facilities with benefit and security to the public interest.

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[^215^]: S.153B of the 1913 Act dealt with Acquisition of shares of the dissenting shareholders.

[^216^]: AIR1951Mad209

[^217^]: The case dealt with the stamp duty application for a transfer under S.153A of the Companies Act, 1913. The court held that for purpose of stamp duty - transfer of assets and liabilities from Transferor Company to Transferee Company takes place by virtue of Section s.153A without any further act or deed.


[^219^]: R.S.Rungta, ‘Indian Company Law Problems in 1850’ 6 American Journal of Legal History 298(1962) Available at [http://heinonline.org](http://heinonline.org) “No Charters were granted to any bank for India down to 1850. In October, 1851 however through carelessness, the company which was still powerful, consented to the grant of a Charter to the oriental bank Corporation. The Oriental Bank Charter had opened the doors to India”.

[^220^]: Ibid.
Until 1936, there was no specific provisions for banking regulations in India. By the companies (Amendment) Act, 1936, Part XA was inserted to regulate certain aspect of banking business in India. The Indian Companies Act 1913 was amended in 1936 to bring in control over the mushroom growth and failure of the banks in the country. But it was not sufficiently effective. Though Reserve Bank of India Act was enacted in the year 1934, initially it enjoyed only limited powers over the banking functions in India. The 1936 amendment hardly met the purpose and the Reserve Bank of India framed a draft bill as far back as 1939 from which has been fashioned the present Banking Companies Act. During the War years, the Indian Companies Act was amended several times to meet some special exigencies. But by July, 1946, it was realized that certain undesirable features in banking had come to exist. Banks were then getting control of non-banking companies and by the interlocking of shares, the banking companies were able to manipulate the finances at their disposal. The main features were the grant of loans to persons connected with the management of banks without adequate security extensive window-dressing at the time of preparing balance-sheets, and, in general, a tendency to utilize the bank's funds to the detriment of the interests of the depositors. It must not be forgotten that the Indian Companies Act, 1913, was concerned primarily with safeguarding the interests of the stockholders, whereas in a banking company, the interests of the depositors are invariably many times those of the stockholders, if those interests can be said to be represented by the monies invested respectively.

In 1946, an Ordinance was promulgated consisting of only six sections, of which the operative sections were the last four. This was an attempt to ensure the depositors a certain measure of safety with regard to their money. This Ordinance was followed by the

221 Ss.277F to277N of the Indian Companies Act, 1913.

222 Joseph Kuruvila Vellikunnel v. Reserve Bank of India, AIR1962 SC1371 – This case discussed in detail history of the Banking Regulation Act, 1949

223 Joseph Kuruvila Vellikunnel v. Reserve Bank of India, AIR1962 SC1371

224 Section 3 enabled the Central Government to direct the Reserve Bank to cause an inspection to be made of any banking company and its books and accounts and to make a report to the Central Government. Section 4 provided the machinery and the procedure to implement s. 3. Section 5 empowered Government to prohibit a bank from receiving fresh deposits or to direct the Reserve Bank not to include a particular bank in the Second Schedule, or to exclude it if already included. Sub-section (2) provided for certain penalties, and s. 6 authorized the Central Government to publish, after reasonable notice to the banking company concerned, any report or parts thereof.
Banking Companies (Restriction of Branches) Act, 1946, which, as its name shows, put a curb on the indiscriminate opening of branches by some banks. The evil of indiscriminate advances and loans was then sought to be met by an Ordinance promulgated in 1948 Titled “the Banking Companies Control Ordinance” (XXV of 1948). In that Ordinance, it was provided that the “Court shall appoint the Reserve Bank as the Official Liquidator of a banking company on the application of the Reserve Bank in that behalf”. The Reserve Bank of India Act was also amended to enable the Reserve Bank to give loans to banking companies with a first charge on the assets, if wound up. A large number of banking companies had failed during the years, 1947, 1948 and 1949. Between 1926 and 1937, 23 Banks had suspended payment. In 1938 and 1939, 46 Banks failed, from 1940 to 1946, 95 Banks were involved. But, in 1947, 1948 and 1949 there were as many as 123 failures involving outside liabilities of Rs. 82 crores. The largest number was in Calcutta with 83 Banks. In the winding up proceeding that followed, many unsatisfactory features were noticed. It was noticed that the realizations were insignificant, while the costs were great, and enormous expenditure of time took place. To achieve solidarity in banking operations and also to preserve the rights of the depositors while a bank continues, the Banking Companies Act was the logical, and indeed, the only answer.

The Reserve Bank was already functioning as a Central bank with a certain measure of control over the other banks, scheduled or unscheduled. This control was tightened in the Banking Companies Act by making provisions which were intended to protect the interests of the depositors.

Originally, the title of the Act was Banking Companies Act, 1949 which was changed to Banking Regulation Act by the Amendment Act 23 of 1965\(^{225}\). By the said Amendment Act, the provisions of the Banking Companies Act were extended to Co-operative Banks and since the applicability of the Act was no longer restricted only to companies, the title of the Act was changed from Banking Companies Act to Banking

\(^{225}\) Draft report of the working group to review The Banking Regulation Act, 1949 available at [www.iba.org.in/events/DraftBRReportMAY08.doc](http://www.iba.org.in/events/DraftBRReportMAY08.doc).
Regulation Act\textsuperscript{226}. Consequent on some banks being nationalized and becoming public sector banks, applicability of the Act had to be modified\textsuperscript{227}. The Act which so applied to banking companies, co-operative banks and public sector banks was further modified when the Regional Rural Banks (RRBs) were constituted by the RRB Act, 1976\textsuperscript{228}. It can thus be seen that the BR Act which was originally enacted to be applicable to banking companies which are registered as companies under the applicable company law, has been modified from time to time to extend to banks having a structure other than a company under the Companies Act\textsuperscript{229}. A situation is thereby created where the law which originally applied to banking companies i.e. the companies incorporated under the Companies Act, 1956, applies to entities other than companies. This has created an anomalous situation, considering that matters such as capital, rights of shareholders, requirements of holding Annual General Meeting and number of other issues relating to the administration, management and business activities as applicable to companies are different from those as applicable to the other entities\textsuperscript{230}. Though these are largely non-banking matters, they do have a bearing on the proper conduct of banking business and the entity’s viability as a bank\textsuperscript{231}. However, there are many provisions in the Banking Regulation Act, 1949 which are enacted on the assumption that the basic law i.e. the Companies Act would apply to a bank which assumption has ceased to be valid on extending application of the Act to entities other than companies. Some such provisions may be noted as under: Section 9 which provides that no banking company shall hold any immovable property howsoever acquired except such, as is required for its own use, for any period exceeding 7 years from the acquisition thereof. Section 11 of the Banking Regulation Act, 1949 makes detailed provisions regarding requirement as to minimum paid-up

\textsuperscript{226} Ibid.,  
\textsuperscript{227} Ibid.,  
\textsuperscript{228} Ibid.,  
\textsuperscript{229} Ibid.,  
\textsuperscript{230} Draft report of the working group to review The Banking Regulation Act, 1949 available at www.iba.org.in/events/DraftBRRReportMAY08.doc.(2008).  
\textsuperscript{231} Draft report of the working group to review The Banking Regulation Act, 1949 available at www.iba.org.in/events/DraftBRRReportMAY08.doc.(2008).
capital and reserves. This provision applies only to the private sector banks, which are companies under the Companies Act, 1956.\(^{232}\)

Section 12 of the Banking Regulation Act, 1949 contains provisions relating to regulation of paid-up capital, subscribed capital and authorized capital and voting rights of shareholders. These provisions are not applicable to public sector banks and other banking institutions which are not companies. Voting rights of a shareholder in a banking company are capped at 10% but voting rights of a shareholder of a public sector bank are restricted at one per cent of total voting rights of all the shareholders of the corresponding new bank. Section 16 contains provisions prohibiting common directors on the board of directors of the bank which apply only to private sector banks. Provisions relating to suspension of business and winding up of banking companies contained in sections 37 to 45 are not applicable to public sector banks.\(^{233}\)

Incorporation of these provisions in the Banking Regulation Act, 1949 per se signifies that the matters covered therein have a bearing vis-à-vis the regulation of banking business, and hence it follows that those provisions should similarly apply to all entities conducting banking business. That being not the position under the current situation, it has created a regulatory gap with respect to those matters and need to be rectified. From that angle, there is a clear need to review the entire Banking Regulation Act, 1949, which is the basic law providing for exclusive powers to regulate and supervise business of banking irrespective of the status or structure of the entity which is undertaking the banking business. There are certain basic norms and regulatory requirements which have to be observed by every entity undertaking banking business and the Banking Regulation Act needs to be revised to incorporate

\(^{232}\) Draft report of the working group to review The Banking Regulation Act, 1949 available at www.iba.org.in/events/DraftBRReportMAY08.doc.(2008).

\(^{233}\) Draft report of the working group to review The Banking Regulation Act, 1949 available at www.iba.org.in/events/DraftBRReportMAY08.doc.(2008).
such basic regulatory requirements and the powers of the RBI to prescribe such requirements irrespective of the status of the entity undertaking banking business\textsuperscript{234}.

Differences noticeable between the Banking Companies Act, on the one hand and the Companies Act, on the other, which have been characterized as discriminatory, are thus explainable on the basis of the object to be achieved. “Banking companies cannot be compared with other companies. The ordinary companies deal with the money of the stockholders, who own a share in the assets, who appoint their own Directors, for better or for worse, and whose liability is also limited. The banking companies are in an entirely different class, as they deal with the money of the depositors, who have no security except the solvency of the banking company and its sound dealings with their money. Ex facie, the banking companies must be regulated somewhat differently, and the interests of the depositors must be paramount”\textsuperscript{235}. When the Banking Companies Act was originally enacted, the main objects were to prescribe minimum capital standards, to prohibit the non-banking companies to accept deposits repayable on demand and to limit dividends payable. But included in the Act was a comprehensive scheme for licensing of banks and a conferral on the Reserve Bank of power to call for periodical returns and balance sheets and to inspect books and accounts of banking companies. The Act also empowered the Central Government to take action against banks conducting their affairs in a manner detrimental to the interests of the depositors, and provided for a quicker procedure for amalgamation and winding up banking companies\textsuperscript{236}.

2.9 Rationale of Introduction of Section 45 and Part IIC (Section 36AE to 36AJ) to the Banking Regulation Act, 1949\textsuperscript{237} : Until 1950 the amalgamation of banking companies were governed by the Companies Act, 1913. Though banking

\textsuperscript{234} Draft report of the working group to review The Banking Regulation Act, 1949 available at www.iba.org.in/events/DraftBRReportMAY08.doc.(2008).
\textsuperscript{235} Joseph Kuruvila Vellikunnel v. Reserve Bank of India , AIR1962 SC1371
\textsuperscript{236} Ibid
\textsuperscript{237} 1961(31) Com Cas( Statutes) 182
Regulation Act was passed in 1949, the Act originally did not contain any special provision for bank mergers.

The Banking Companies Act, 1949, was amended in 1960 in order to facilitate the grant of expeditious relief in the case of banking companies which may be taken into liquidation and the reconstruction or amalgamation of other banking companies, wherever this may be considered necessary or desirable. The question of transferring the assets and liabilities of certain banking companies to other institutions, which may be in a position to serve the interest of the depositors has since been under considerations, but certain practical difficulties have been encountered in brining into force or implementing the schemes which have been formulated for this purpose. In order to eliminate the difficulties and to clarify the legal position beyond any doubt, the banking companies amendment was passed.

Banking Companies (Second) Amendment Bill, 1960 proposed for the introduction of Section 45 and Section 44A(7) to the Banking Regulation Act, 1949. The reason for introducing the bill was stated as “The procedure prescribed under the Banking companies Act, 1949 read with the Companies Act, 1956 for the liquidation of banking companies is somewhat elaborate, and in the absence of any provision in the law indicating the time schedule according to which certain payments may be made to the depositors, a great deal of hardship is caused to such depositors, who have to wait for considerably long period for realizing the sum due to them. It is proposed, in order to facilitate the expeditious payment of certain minimum amounts in such cases, that the procedure relating to the liquidation of banking companies should be suitably modified. The opportunity provided by these amendments has also been utilized to simplify the provisions of law relating to the grant of moratorium in respect of banking companies.

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238 1961(31) Com Cas (Statutes) 182

239 Section 44A(7) of the Banking Regulation Act, 1949 permit the central government to amalgamate two or more banking companies in public interest. Section 44A was inserted in the year 1950.
which may be experiencing difficulties and to facilitate the formulation and implementation of schemes of reconstruction or amalgamation of such companies\textsuperscript{240}.

Section 44A\textsuperscript{241} of the Banking Regulation Act lays down the procedure for the amalgamation of private sector banking companies\textsuperscript{242}. The scheme containing the terms of amalgamation is to be approved by a majority in number representing two thirds in value of the shareholders in the general meeting. A dissenting shareholder is entitled to receive the value of his shares as may be determined by the Reserve Bank of India\textsuperscript{243}. The Reserve bank has to sanction the scheme after the shareholders approval. On such sanction, the assets and liabilities of the bank are transferred to the transferee company. The Reserve bank is empowered to order that the first bank is dissolved on a specified date\textsuperscript{244}. Section 44A is a self contained provision and a complete code by itself\textsuperscript{245}.

The major distinction between Merger under the Companies Act and Banking Regulation Act is that the scheme of amalgamation of companies under the companies Act has to be sanctioned by the tribunal. It enjoys substantial power in regulating and supervising the merger. Whereas Under the Banking Regulation Act, voluntary amalgamation of bank mergers has to be approved only by the Reserve bank of India\textsuperscript{246} and it is the sole authority in all matters relating to the banking companies. As stated by the Supreme Court in \textit{Joseph Kuruvila Vellikunnel v. Reserve Bank of India}\textsuperscript{247}, that the banking companies cannot be compared with the ordinary companies as in a banking company depositor’s interest is paramount and in India RBI is an expert body in determining and protecting the best interest of banking companies.

\textsuperscript{240} [1960] 30 Com Cas. (Statutes) 157 - The Banking Companies (Second Amendment) Bill 1960- Statement of objects and reasons.

\textsuperscript{241} It is examined in detail under Chapter-III of this study.

\textsuperscript{242} A detailed chapter on amalgamation of banking companies is discussed in Chapter-III of this study.

\textsuperscript{243} Section 44A of the Banking Regulation Act.1949.

\textsuperscript{244} M.L. Tannan, ‘Tannan’s Banking Law and Practice in India’ 23rd Edn.,(2012) P.55

\textsuperscript{245} Seth’s Commentaries on Banking Regulation Act along with allied banking Laws’ 3rd Edn.,Law Publishers India Pvt Ltd, P.112

\textsuperscript{246} Chapter IV in detail discusses the role of RBI with the help of decided cases.

\textsuperscript{247} AIR1962SC1371
2.10. Compulsory amalgamation of banking companies by Central Government under S.396 of the Companies Act, 1956: The Banking Regulation Act recognizes different routes for compulsory amalgamation and acquisition of banking companies. One under Section 45 and Second under Section 44A(7)\textsuperscript{248}, where it confers the power to the Central Government to provide for amalgamation of banking companies under section 396 of the companies Act, 1956. But central government can exercise such power only after the approval of the Reserve Bank of India. Section 36 AE of the Banking Regulation Act, 1949 is the only section dealing with the central government’s power to compulsorily acquire the banking companies.

The main difference lies in the exercise of power by two different authorities. Under Section 44A(7), Central Government is taking a *suo-moto* action to amalgamate two banking companies in the public interest and it’s done only after consulting the RBI. But under Section 45, the object is to rescue an ailing bank from financial distress and its failure. Thus, the application is moved to the Central Government by the Reserve Bank and the scheme is prepared by the Reserve Bank, the role of Central Government is only to sanction the same.

Section 396 of the Companies Act, 1956 provide for amalgamation of companies in Public Interest. This section came along with the companies Act, 1956. Neither the companies Act, 1913 nor the Companies (Amendment) Act, 1936, dealt with the amalgamation of companies in Public interest. The procedure of compulsory merger under Section 396 is different from that of a scheme under section 391-394 of the companies Act, 1956. The observance of ‘the usual procedure prescribed by the existing Act in such cases will lead to prolonged delays which will be detrimental to the national interest. Any order made by the government under this clause will be laid before both the houses of the parliament and will therefore be subject to parliamentary scrutiny\textsuperscript{249}.

In case of compulsory merger between two companies in the national interest Central Government prepares, supervises and executes the same. In such cases the tribunal has no power over a scheme under section 396 of the companies Act by virtue of a non-obstante

\textsuperscript{248} Inserted by the Banking Companies Amendment Act, 1960.

\textsuperscript{249} Ramaiah’s commentaries on Companies Act, 1956, 2010 Edn., P.4244
clause$^{250}$. But if it is the amalgamation of two banking companies by virtue of S.44A (7) of the Banking Regulation Act, 1949 under Section 396 of the companies Act,1956, then both authorities have the power. Central Government and the RBI have decisive voice in approving the scheme. A scheme under S.44A (7) of the Banking Regulation Act, 1949 can be initiated only by the Central Government and it has to follow the procedure for the same given under section 396 of the Companies Act. But the said scheme should satisfy the ‘test of public interest’ mandated by section 396 of the companies Act, 1956. The scheme shall come into effect if it is approved by the Reserve bank of India. It is important to note that even though it is a case of merger between two banking companies by virtue of s.44A (7) of the Banking Regulation Act, 1949 under section 396 of the companies Act, RBI comes into picture only after the Central government prepares the scheme. By virtue of Section 44A (7), no specific power is conferred on the Reserve Bank of India.

2.11 **Comparison of Ss. 44A (7) and 45 of the Banking Regulation Act, 1949 with Section 396 of the Companies Act, 1956:** Section 45 of the banking regulation Act,1949, confer power to the Reserve bank of India to apply to the Central Government for suspension of business by banking companies and to prepare a scheme of amalgamation$^{251}$. The said provision states that where it appears to the Reserve bank that ‘There is a good reason to do so’. What appears to be a ‘good reason to the Reserve bank’ is not explained under the Banking Regulation Act, 1949. However clause 4 of section 45 seeks the satisfaction of Reserve bank of India for the reconstruction or amalgamation of the banking company$^{252}$. A scheme under section 396 of the companies Act, 1956 can be prepared only if it is in the public interest. RBI has invoked this section in number of

$^{250}$ Section 396(1) of the Companies Act, 1956.

$^{251}$ The law and procedure of compulsory amalgamation of banking companies are dealt in Chapter III of this study.

$^{252}$ Section 45(4) of the Banking Regulation Act,1949- During the period of moratorium, if the Reserve Bank is satisfied that:(a) in the public interest; or(b) in the interests of the depositors; or (c) in order to secure the proper management of the banking company; or (d) in the interest of the banking system of the country as a whole, it is necessary so to do, the Reserve Bank may prepare a scheme- (i) for the reconstruction of the banking company, or (ii)for the amalgamation of the banking company with any other banking institution (in this section referred to as “the transferee bank”).
times in the interest of depositors\textsuperscript{253}. RBI prepares the scheme and makes an application to the central government.

RBI is not the sole authority under Section 45 but it requires the approval of the Central Government for finalizing the amalgamation. Kerala High Court in Reserve bank of India and others v. Paul Francis ambookan and others\textsuperscript{254} held that “The Reserve Bank not only has powers over banking companies while they are carrying on business, but it has also powers when the banking companies wish or are forced to cease to function. If a banking company wants to suspend its business and applies to the High Court for a moratorium, the application is not maintainable; unless it is accompanied by a report of the Reserve Bank indicating that in the opinion of the Reserve Bank, the banking company will be able to pay its debts. When the High Court grants the relief without such report, it has to call for a report from the Reserve Bank. The High Court is also required to have regard to the interests of the depositors and even during the period of moratorium granted by the High Court, the Reserve Bank can apply for the winding up of the banking company”. The court further held that ‘Even in the case of amalgamation, the scheme has to be approved by the Reserve Bank. Similarly, in compromises or arrangements between the banking company and its creditors, the Reserve Bank has to be satisfied. In all these matters, the satisfaction, inter alia, must be as to the interests of the depositors. In reconstruction of a banking company after an application by the Reserve Bank for an order of moratorium, the Reserve Bank has to satisfy itself and prepare a scheme which, inter alia, must be in the interests of the depositors\textsuperscript{255}. A clear distinction can be made between Sections 44A and 45. In compulsory amalgamation RBI has the power to...

\textsuperscript{253} Merger between BANK of Baroda with Banaras State BANK, PUNJAB NATIONAL BANK AND NEDUNGANDI BANK MERGER, Merger between Global Trust Bank and Oriental Bank of Commerce, Merger between BANK of PUNJAB & Centurion Bank, Centurion Bank of Punjab with Lord Krishna Bank etc.

\textsuperscript{254} Reserve bank of India and others v. Paul Francis ambookan and others [1990] 69Com.Cas.320 (Ker.) In this case order of moratorium by the Central Government on the Bank of Cochin and its scheme of amalgamation with State Bank of India prepared by RBI was challenged on the ground that it violated Article 14,19 and 31A of the Constitution of India. Justice Bhaskaran Nambiar decided the case.

\textsuperscript{255} Reserve bank of India and others v. Paul Francis ambookan and others [1990] 69Com.Cas.320 (Ker.)
amalgamate a banking company with any other banking company, nationalized bank, SBI and subsidiary of SBI. Whereas under voluntary amalgamation, a banking company can be amalgamated with another private sector banking company only. Merger under the Companies Act and amalgamation of banking companies under Banking Regulation Act differ in various aspects. Amalgamation in Ss. 391-394 of the companies Act, the objective is ‘to protect the interest of members and creditors. Objective of special provision of bank merger is to protect the interest of the depositors’. High Court is not given the power to grant its approval to the scheme of merger of banking companies and but RBI is conferred the power to sanction the mergers of banking companies. In other words it can be said that the High Court sanctions the scheme under the Companies Act, whereas the RBI is the final authority under the Banking Regulation Act for merger of banks. RBI is empowered to determine the market value of the shares of the dissenting shareholders who have either voted against the scheme or who have given written notice of objection before the meeting of the banking company to the Presiding Officer concerned. Aggrieved shareholders of the amalgamating banking companies are entitled to such value of the shares as evaluated by the RBI. Whenever an application is made by a banking company under Section 230 of the Companies Act, 2013, the High Court has the powers to direct the RBI to make inquiry in relation to the affairs of the banking company and the conduct of its directors. However, under Companies Act, the Court has the power to seek report, before passing an order of amalgamation, from the Registrar of the Companies that the affairs of the company have not been conducted in the manner prejudicial to the interests of the public. The BR Act mentions “High Court” and not the “National Company Law Tribunal”. However, it is to be noted that under Section 408 of the Companies Act, 2013, it provides that the powers and functions of the Tribunal will be “as are or may be conferred on it by or

256 S.45 (4)(ii) “ For the amalgamation of banking company with any other banking company’. Expression ‘Any other banking company’ is interpreted to mean Nationalized banks, State Bank of India and its associates or with any other private sector banking company. Whereas under section 44A, amalgamation is between two private sector banking companies.

257 Section 44B(2) of the Banking Regulation Act,1949

258 Not yet notified.

259 Section 10FB of the Companies Act, 1956
under the Act or any other law for the time being in force’. Therefore there are possibilities that the powers under the BR Act may also be vested with the Tribunal. The provisions regarding compulsory merger of private banks are dealt under Section 45 of the BR Act, this is very similar to the compulsory mergers of companies under Section 237 of the Companies Act, 2013 except that under Section 396, the central government prepares the scheme whereas in Section 45 RBI prepares the scheme.

2.12 Mergers and Acquisitions under the Companies Act, 1956 and 2013 - A Comparative study: Though the companies Act, 1913 recognized the statutory right of corporations for mergers and acquisitions, it did not provide the procedures in detail. The Indian companies Act, 1956 was enacted to incorporate the changes recognized by the English Companies Act, 1948. The Companies Act, 1956 recognized corporate restructuring though various provisions such as Ss.293 (1)(a)\(^{261}\), 391-393\(^{262}\), 394\(^{263}\), 395\(^{264}\), 396\(^{265}\), 494\(^{266}\) and specific provisions for the revival and rehabilitation of sick industrial companies.\(^{267}\)

Section 390(a) of the 1956 Act; have given some difficulties to the court in interpreting the expression “any company liable to be wound up under this Act”. Under Ss.391 and 393 an arrangement could be made between the company and its members or with its creditors or with any other unregistered company. Courts through series of cases\(^{268}\)

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\(^{260}\) Section 396 of the Companies Act, 1956

\(^{261}\) S.293 (1) (a) of the Companies Act, 1956, provided for the sale of undertaking of the company. Board of directors had to get the consent of the shareholders for the same.

\(^{262}\) Ss.391-393 of the Companies Act, 1956 provided for scheme of arrangement. It corresponds to S.153 of the 1913 Act

\(^{263}\) S.394 of the Companies Act,1956- facilitated mergers/amalgamation procedure

\(^{264}\) S.395 of the Companies Act,1956 -Facilitated the acquisition of dissenting shareholders shares by following the procedure laid down therein and the relief to the dissenting shareholder in case of an application under s.395.

\(^{265}\) S.396 of the Companies Act, 1956 – Power of central government to provide for Amalgamation of companies in National interest.

\(^{266}\) S.494 & 507 of the companies Act, 1956, facilitated the merger through winding up in the case of members or creditor’s voluntary winding up.

\(^{267}\) Part VI A was inserted to the companies Act,1956 by the companies (second amendment Act),2002.

\(^{268}\) Kandelwal Udyog Ltd & ACME Mfg Ltd, Re(1977) 47 Com Cas503 (Bom) “ The expression ‘company liable to be wound up under the Act means all companies to which provisions relating to the winding up may apply. Thus the
examined the ambit of the expression ‘Company liable to be wound up under the companies Act’ and thus came to the conclusion that the expression ‘company liable to be wound up’ under the Companies Act means not only the companies registered under the companies Act, 1956 but also any association, partnership or an unregistered company etc, to which the winding up provisions of the Indian companies Act 1956 can be invoked. Whereas the 2013 Act is silent about the expression ‘Company liable to be wound up.’

The 2013 Act provides corporate regulations more contemporary, as also potentially to make corporate regulatory structure a model to follow for other economies with similar characteristics. The 2013 Act is more of a rule-based legislation containing only 470 sections, which means that the substantial part of the legislation will be in the form of rules. There are over 180 sections in the 2013 Act where rules have been prescribed and the draft rules were released by the MCA in three batches. Chapter XV of the 2013 Act deals with “Compromises, Arrangements and Amalgamations.” In this chapter, the Act consolidates expression in s. 390 (a) takes within its sweep all companies registered under the companies Act, 1956 as also all unregistered or other companies in respect of which winding up orders can be made by the court under the provisions of the Act. In other words the expression embraces not only companies which are registered under the provisions of the companies Act but also companies which come within the purview of the provisions of the companies Act, 1956 and can be wound up by the provisions thereof. “The view of the Bombay High court was upheld in- Bank of India v. Ahemadabad Manufacturing Companies (1972) 42 ComCas 211(Bom), Rossel Industries Ltd, AIR 1996 Cal 257, Telesound India Ltd, In re (1983) 53 ComCas 926 (Del.), Malayalam Plantations India Ltd In re (1985) 2 CompLj 409 (Ker). Other cases in which the same issue came up for consideration are Rossel Industries and another Ltd AIR1996Cal257,[1998]91CompCas333(Cal),Macho Food Pvt Ltd v. Modiluft Ltd [2004]118CompCas676(Delhi), Meghal Homes Ltd v. Shrinivas Girni KKSamithi and others AIR2007SC3079 etc.

Winding up of unregistered companies are dealt under Part X of the companies Act, 1956- Wherein S.582(b) limit the applicability of winding up provisions to unregistered companies by interpreting the expression ‘unregistered company it says “save as aforesaid, shall include any partnership, association or company consisting of more than seven members at the time when the petition for winding up the partnership, association or company, as the case may be, is presented before the Court”. Further S.583 states the procedures etc of winding up of unregistered companies under the companies Act, 1956.


Ss.230, 231, 232,233, 234,235,236 and 237 of the Companies Act, 2013. While comparing these provisions with the companies Act 1956 one can find that under the companies Act, 1956, there was no specific classification and procedure for the merger between small companies and Holding companies and its wholly owned subsidiaries.
the applicable provisions and related issues of compromises, arrangements and amalgamations; however, other provisions are also attracted at different stages of the process. The element of preparing the Scheme has been retained under the 2013 Act. Unlike the 1956 Act, the new regime (a) recognizes cross border mergers, (b) sets out separate procedure for merger of small companies and those of holding with wholly-owned, (c) prescribes thresholds for objections, and (d) describes mandatory filings to ensure legal compliance. There are some pragmatic reforms such as: fast-track schemes, which being cost and time effective will encourage corporate restructurings for small and group companies; merger of an Indian company into a foreign company should give impetus to cross-border M&A activity; introducing the threshold for raising objections to a scheme would deter frivolous objections and postal ballot approval would ensure a wider participation of the stakeholders. However, multi-authority appraisal of

However, section 233 of the companies Act, 2013 deals with the merger of small companies etc. Secondly, there was no provision for merger of an Indian company with a foreign company, because under the 1956 Act, the transferee company had to be an Indian company by virtue of S.394 (4)(b) it read as “transferee company” does not include any company other than a company within the meaning of this Act; but “transferor company” includes anybody corporate, whether a company within the meaning of this Act or not”. This explanation is not found under the companies Act, 2013. Secondly, For the first time cross border mergers have received the statutory recognition by virtue of S.234 it says “(1) The provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply mutatis mutandis to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government: Provided that the Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.(2) Subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose .Explanation.--For the purposes of sub-section (2), the expression “foreign company” means any company or body corporate incorporated outside India whether having a place of business in India or not. Thirdly, Section 395 of the Companies Act, 1956 conferred the power to acquire the shares of the dissenting shareholder after acquiring 9/10th in value of the total paid up share capital of the target company. The said section also conferred power to the dissenting shareholder to apply to the tribunal to seek relief in certain instances. But under the 2013 Act acquisition of shares and related matters are dealt under Ss.235 and 236. Section 235 deals with The “Power to acquire shares of shareholders dissenting from scheme or contract approved by majority” and Section 236 is titled as “Purchase of minority shareholding”.

the restructuring scheme in the 2013 Act may be a dampener, considering that the present framework envisages a single-window clearance\(^\text{273}\).

### 2.13 Changes brought to Corporate Restructuring Under the Companies Act 2013:

The 2013 Act, requires that notice of meeting\(^\text{274}, 275\) for approval of the scheme of compromise or arrangement along with other documents shall be sent to various other regulatory authorities in addition to Central Government\(^\text{276}\) such as: Income Tax authorities, Reserve Bank Of India, SEBI, the Registrar, the Stock Exchanges, the official liquidator, the Competition Commission of India, if necessary Other sector regulators or authorities which are likely to be affected by the compromise or arrangement. The existing simple procedure of submitting documents with Court will become multi-party with the inclusion of various regulatory authorities. It will increase the paperwork and the process may become more cumbersome with the direct involvement of other regulatory authorities.

**The other notable addition to the 2013 Act** is that any intercompany investment would have to be cancelled in a scheme and holding shares in the name of transferee through a trust would not be allowed\(^\text{277}\). The 2013 Act abolishes the practice of companies to hold

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\(^{274}\) S.230 (3) First Proviso and (5) of the Companies Act,2013. Whereas under s.393 of the companies Act, 1956 required the notice of meeting of the compromise or arrangement under S.391 had to be mandatorily be given to creditors and members.

\(^{275}\) S.230( 9) of the 2013 Act confers the tribunal to dispense with the requirement of calling a meeting of creditors or class of creditors where such creditors or class of creditors having at least 90% value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement. But companies Act,1956 did not deal with the same.

\(^{276}\) Tribunal had the duty to give notice of every application made to it under S.391 or 394 to the central government. But under the 2013 Act the notice have to be given by the company to the central Government and various other regulatory authorities.

\(^{277}\) S.233 facilitates merger between small companies and between a holding company and its wholly owned subsidiary. S.233(10) provides that “A transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation”. At present there is no specific provision governing treasury stock in India. Section 77 of the Companies Act, 1956 specifically restricts a company from issuing shares to itself or through its own holding company. However the proviso to the Section allows a company to purchase, or subscribe to fully paid shares in itself or its holding company where the subscription is by trustees or to be held by or for the benefit of employees of the company, including any director holding a salaries office or employment in the
their own shares through a trust\textsuperscript{278}, which could provide them liquidity in future, while still allowing the promoters to retain a controlling stake over the company.

**Approval of scheme through postal ballot:** Under the 1956 Act, scheme of compromise / arrangement needs to be approved by majority in number representing 3/4th in value of the creditors and members or class thereof present and voting in person or by proxy\textsuperscript{279}. The 2013 Act additionally allows the approval of the scheme by postal ballot\textsuperscript{280}. This will involve wider participation of the shareholders of the company in voting and will protect shareholders interest.

**Valuation certificate**\textsuperscript{281}: The 1956 Act does not mandate disclosing the valuation report to the shareholders. Though in practice, valuation reports are included in documents shared with the shareholders and also to the Court as part of the appraisal process of the scheme by the Courts. The 2013 Act mandatorily requires the scheme to contain the valuation certificate. The valuation report also needs to be annexed to the notice for meetings for approval of the scheme\textsuperscript{282}. This will enable the shareholders to understand the business rationale of the transaction and take an informed decision.

\textsuperscript{278} Mahafrin Sidhwa “Treasury Shares: A Dying Enigma”
http://www.jsalaw.com/Admin/uploadedfiles/PublicationFiles/Treasury%20Stock-%20A%20Dying%20Enigma%20_2_.pdf. Treasury stock is stock that is created by mergers and amalgamations or a buy back. However the question of Treasury stock created by a buy back is not relevant in the Indian context since as per the Securities and Exchange Board of India (Buy-Back of Securities) Regulation 1998 the shares so created have to be extinguished within seven days of such a buy back. In case of a merger and amalgamation it is created on account of the ‘cross holding’ between the acquiring company and the target.

\textsuperscript{279} S. 391(2) of the Companies Act, 1956
\textsuperscript{280} S. 230(6) of the Companies Act, 2013
\textsuperscript{281} S. 230(2)(v) of the Companies Act, 2013
\textsuperscript{282} S. 230(3) of the Companies Act, 2013
Compliance with accounting standards: The 2013 Act has introduced a new requirement, that no scheme of compromise or arrangement, whether for listed company or unlisted company shall be sanctioned unless the company’s auditor has given a certificate that the accounting treatment of the proposed scheme is in conformity with the prescribed accounting standards. Further, the application with respect to reduction of share capital has to be sent to the Tribunal along with the auditor’s certificate stating it is in compliance with accounting standards.

Objection to compromise or arrangement: Under the 1956 Act, any shareholder, creditor or other “interested person” can object to the scheme of compromise or arrangement before a court if such person’s interests are adversely affected. The 2013 Act states that the objection to compromise or arrangement can be made only by persons: Holding not less than 10% of shareholding or; Having debt amounting not less than 5% of the total debt as per latest audited financial statements. The new threshold limit for raising objections in regard to scheme of arrangement will protect the scheme from small shareholders’ and creditors’ frivolous litigation and objection.

Merger or amalgamation of company with foreign company: The 1956 Act does not contain provisions for merger of Indian company into a foreign company. Where a

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283 Proviso to S.230 (7) of the Companies Act, 2013. “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”. Similar provision was contained under S.391 (2) proviso as well. But it required the latest financial position of the company and latest auditor’s report on accounts of the company and it was silent about the same being complied with the accounting standards.

284 The 2013 Act aligns the SEBI requirement which existed for listed companies for all companies, to ensure that the scheme aimed to use innovative accounting treatments for financial re-modeling are not sanctioned by the Courts. As the scheme tends to have overriding effect with respect to accounting treatment (specifically mentioned in accounting standard 14 with respect to treatment of reserves), the onus has been shifted on the auditor to confirm that accounting standards have been followed.

285 S.391(6) of the Companies Act,1956

286 Proviso to clause 4 of s.230 of the Companies Act 2013
transferee company has to be an Indian company. The 2013 Act states that merger between Indian companies and companies in notified foreign jurisdiction shall also be governed by the same provisions of the 2013 Act. Prior approval of Reserve Bank of India would be required and the consideration for the merger can be in the form of cash and or of depository receipts or both. The 2013 Act will provide an opportunity of growth and expansion to Indian Company by permitting amalgamation with foreign company or vice versa. This will provide opportunity to form corporate strategies on a global scale. It has to be seen if the implementation mechanism is smooth enough. The 2013 Act suggests that all cross border merger will now be governed by the said chapter. Presently, it’s possible for a foreign company of any jurisdiction to merge into an Indian company. This may now be limited to only companies in notified jurisdiction.

The changes brought out under the 2013 Act would encourage more companies to adopt M&A strategy for their corporate growth. It would speed up the procedure of getting the approval of the concerned regulatory authorities. It enables the regulatory authorities and company stake holders to take an informed decision regarding Mergers and Acquisition. It encourages foreign companies to expand the business through restructuring with Indian companies. Small companies and wholly owned subsidiaries are given a special treatment for merger. It ensures compulsory disclosure of relevant information governing companies.

The Banking Regulation Act also needs to be in conformity with the changing environment of business. The B.R. Act and other banking laws must include provisions facilitating cross border bank mergers. The B.R Act should incorporate provisions for amalgamation between banking companies and non-banking financial companies. It should clearly limit the power of court in such matters.

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287 S. 394(4)(b) of the Companies Act,1956 -” transferee company” does not include any company other than a company within the meaning of this Act; but” transferor company” includes anybody corporate, whether a company within the meaning of this Act or not.”
2.14 Bank Mergers - Comparison with Company mergers- Critique

Key differences exist between the merger of banks under the Banking Regulation Act, 1949 and companies under the companies Act, 1956 or under the 2013 Act. It is important to note that the function of the bank is essentially to protect the interest of various stakeholders, but most particularly the depositors, and consequently, banks are required to be subject to a more stringent regulatory regime than companies engaged in other business.

A detailed procedure is provided under section 45 of the Banking Regulation Act, 1949 for the compulsory amalgamation of banking companies. Section 45 is similar to some extent, in Section 396 of the Companies Act, 1956, which provides for the power of Central Government to amalgamate the companies in the public interest. Banking companies are compelled to amalgamate under Section 45 of the B.R.Act on the application of the Reserve Bank of India and by the Central Government under Section 36AE and 36AF. Reserve Bank of India may request the Central Government to

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288 Chapter-III discusses in detail with the help of cases the law and procedure of bank mergers under Banking Regulation Act.

289 Corresponds to section 237 of the Companies Act, 2013

290 36AE. Power of Central Government to acquire undertakings of banking companies in certain cases.—

(1) If, upon receipt of a report from the Reserve Bank, the Central Government is satisfied that a banking company—

(a) has, on more than one occasion, failed to comply with the directions given to it in writing under section 21 or section 35A, in so far as such directions relate to banking policy, or

(b) is being managed in a manner detrimental to the interests of its depositors, and that—

(i) in the interests of the depositors of such banking company, or

(ii) in the interest of banking policy, or

(iii) for the better provision of credit generally or of credit to any particular section of the community or in any particular area,

it is necessary to acquire the undertaking of such banking company, the Central Government may, after such consultation with the Reserve Bank as it thinks fit, by notified order, acquire the undertaking of such company (hereinafter referred to as the acquired bank) with effect from such date as may be specified in this behalf by the Central Government (hereinafter referred to as the appointed day): Provided that no undertaking of any banking company shall be so acquired unless such banking company has been given a reasonable opportunity of showing cause against the proposed action. Explanation.—In this Part,—

(a) “notified order” means an order published in the Official Gazette;

(b) “Undertaking”, in relation to a banking company incorporated outside India, means the undertaking of the company in India.
Subject to the other provisions contained in this Part, on the appointed day, the undertaking of the acquired bank and all the assets and liabilities of the acquired bank shall stand transferred to, and vest in, the Central Government.

The undertaking of the acquired bank and its assets and liabilities shall be deemed to include all rights, powers, authorities and privileges and all property, whether movable or immovable, including, in particular, cash balances, reserve funds, investments, deposits and all other interests and rights in, or arising out of, such property as may be in the possession of or held by, the acquired bank immediately before the appointed day and all books, accounts and documents relating thereto, and shall also be deemed to include all debts, liabilities and obligations, of whatever kind, then existing of the acquired bank.

Notwithstanding anything contained in sub-section (2), the Central Government may, if it is satisfied that the undertaking of the acquired bank and its assets and liabilities should, instead of vesting in the Central Government, or continuing to so vest, vest in a company established under any scheme made under this Part or in any corporation (hereinafter in this Part and in the Fifth Schedule referred to as the transferee bank) that Government may, by order, direct that the said undertaking, including the assets and liabilities thereof, shall vest in the transferee bank either on the publication of the notified order or on such other date as may be specified in this behalf by the Central Government.

Where the undertaking of the acquired bank and the assets and liabilities thereof vest in the transferee bank under sub-section (4), the transferee bank, shall, on and from the date of such vesting, be deemed to have become the transferee of the acquired bank and all the rights and liabilities in relation to the acquired bank shall, on and from the date of such vesting, be deemed to have been the rights and liabilities of the transferee bank.

Unless otherwise expressly provided by or under this Part, all contracts, deeds, bonds, agreements, powers of attorney, grants of legal representation and other instruments of whatever nature subsisting or having effect immediately before the appointed day and to which the acquired bank is a party or which are in favour of the acquired bank shall be of as full force and effect against or in favour of the Central Government, or as the case may be, of the transferee bank, and may be enforced or acted upon as fully and effectually as if in the place of the acquired bank the Central Government or the transferee bank had been a party thereto or as if they had been issued in favour of the Central Government or the transferee bank, as the case may be.

If, on the appointed day, any suit, appeal or other proceeding of whatever nature is pending by or against the acquired bank, the same shall not abate, be discontinued or be, in any way, prejudicially affected by reason of the transfer of the undertaking of the acquired bank or of anything contained in this Part, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the Central Government or the transferee bank as the case may be.

The Central Government may, after consultation with the Reserve Bank, make a scheme for carrying out the purposes of this Part in relation to any acquired bank.

In particular, and without prejudice to the generality of the foregoing power, the said scheme may provide for all or any of the following matters, namely:

(a) the corporation, or the company incorporated for the purpose, to which the undertaking including the property, assets and liabilities of the acquired bank may be transferred, and the capital, constitution, name and office thereof;

(b) the constitution of the first Board of management (by whatever name called) of the transferee bank, and all such matters in connection therewith or incidental thereto as the Central Government may consider to be necessary or expedient;

36AF. Power of the Central Government to make scheme.—
declare a moratorium on the activities of the banking company under Section 45(1) for a period of six months. During this period Reserve Bank may prepare a scheme of reconstruction or amalgamation, if it is satisfied that the scheme is (1) In the public interest (2) the interest of depositors (3) to secure proper management of the banking company (4) of the interest of the banking system as a whole. Section 396 of the

(c) the continuance of the services of all the employees of the acquired bank [excepting such of them as, not being workmen within the meaning of the Industrial Disputes Act, 1947 (14 of 1947), are specifically mentioned in the scheme] in the Central Government or in the transferee bank, as the case may be, on the same terms and conditions so far as may be, as are specified in clauses (i) and (j) of sub-section (5) of section 45;

(d) the continuance of the right of any person who, on the appointed day, is entitled to or is in receipt of, a pension or other superannuation or compassionate allowance or benefit, from the acquired bank or any provident, pension or other fund or any authority administering such fund, to be paid by, and to receive from, the Central Government or the transferee bank, as the case may be, or any provident, pension or other fund or any authority administering such fund, the same pension, allowance or benefit so long as he observes the conditions on which the pension, allowance or benefit was granted, and if any question arises whether he has so observed such conditions, the question shall be determined by the Central Government and the decision of the Central Government thereon shall be final;

(e) the manner of payment of the compensation payable in accordance with the provisions of this Part to the shareholders of the acquired bank, or where the acquired bank is a banking company incorporated outside India, to the acquired bank in full satisfaction of their, or as the case may be, its claims;

(f) the provision, if any, for completing the effectual transfer to the Central Government or the transferee bank of any asset or any liability which forms part of the undertaking of the acquired bank in any country outside India;

(g) Such incidental, consequential and supplemental matters as may be necessary to secure that the transfer of the business, property, assets and liabilities of the acquired bank to the Central Government or transferee bank, as the case may be, is effectual and complete.

(3) The Central Government may, after consultation with the Reserve Bank, by notification in the Official Gazette, add to, amend or vary any scheme made under this section.

(4) Every scheme made under this section shall be published in the Official Gazette.

(5) Copies of every scheme made under this section shall be laid before each House of Parliament as soon as may be after it is made.

(6) The provisions of this Part and of any scheme made thereunder shall have effect notwithstanding anything to the contrary contained in any other provisions of this Act or in any other law or any agreement, award or other instrument for the time being in force.

(7) Every scheme made under this section shall be binding on the Central Government or, as the case may be, on the transferee bank and also on all members, creditors, depositors and employees of the acquired bank and of the transferee bank and on any other person having any right, liability, power or function in relation to, or in connection with, the acquired bank or the transferee bank, as the case may be.

292 S.45 (2) of the Banking Regulation Act, 1949.
merger is proposed by the Central Government under the companies Act, only in the public interest\textsuperscript{293}.

Vesting of substantial power with RBI under section 45 of the Banking Regulation Act, 1949, was challenged in *Shivkumar Tulsian v. Union of India*\textsuperscript{294}, on the grounds that, firstly, the provision under Section 45 permitted discrimination between banking companies and non-banking companies; secondly, that they permitted discrimination between banking companies *inter se*; thirdly, that there were unreasonable restrictions on the banking trade, and fourthly, that they denied access to courts and hence violated principles of natural justice\textsuperscript{295}. The court dismissed this argument on two grounds—firstly, that the provisions themselves did not rule out pre-decisional hearings, and secondly, that the order on moratorium was only a temporal measure\textsuperscript{296}. The final holding on the court was that in the light of the fact that the moratorium was temporary, and further since a pre-decisional hearing would frustrate the purpose of bringing action under Section 45(1) and (2), the hearing was necessarily excluded, and that this was not in violation of the principles of natural justice or the constitution. In deciding thus, the court reaffirmed the role of RBI as the regulator of the bank and upheld the decision in *Joseph Kuruvila’s case*\textsuperscript{297}.

\textsuperscript{293} Words ‘Public interest’ were substituted for the phrase ‘National interest’ in the provision. This has led to some conflict over whether the concept of national interest is distinct from or equivalent to public interest, and the scope of such distinction. However, the legislative history of the provision, and more particularly, the notes on clauses on the Companies (Amendment) Act, 1960 reveal that the amendment is meant to be of a drafting nature., Jehangir M Sethna, ‘Sethna’s Indian Company Law, Vol. 3(11th Ed., Modern Law Publications, 2005) 3401.

\textsuperscript{294} [1990]68CompCas 720(Bom)(P.S. Shah and S.P Kurdukar, J.J)

\textsuperscript{295} Ibid, Para 11.

\textsuperscript{296} 1990\textsuperscript{[6]} CompCas 720(Bom)(P.S. Shah and S.P Kurdukar, J.J)

\textsuperscript{297} The Applicable operative part of the judgment states that “From the ratio laid down by the Supreme Court, the following propositions emerge, firstly, a banking company could not be compared with an ordinary company because in the case of a banking company, the interests of the depositors are paramount; secondly, parliament intended that the Reserve Bank to have decisive voice in respect of certain matters pertaining to banking companies, thirdly, where inspections have been carried out and directions given, the bank had sufficient opportunity to be heard; fourthly, the action to wind up is not punitive action but an action to preserve the rights of the depositors; fifthly, as the Reserve Bank has statutory assses to facts and acts on proved facts, the power conferred is not unguided; sixthly, a law may be upheld if the legislature leaves an issue to an expert body like the Reserve Bank and, lastly, the impugned provision is
Consequently, the role of RBI in this regard is subject to limited judicial review, and a great deal of freedom has been vested in the RBI. In view of the irreparable and almost fatal damage that could be rendered to banking companies if such moratorium is wrongly declared, the absence of a hearing in this regard is a serious lacuna.

The Madras High Court identifies two main departures from Company Law in the procedure for bank mergers outlined under the Banking Regulation Act, 1949, firstly, that the High Court is not given power to approve the scheme; rather such power is vested with the Reserve Bank of India, and secondly, the Reserve Bank of India is empowered to determine the market value of shares of the dissenting shareholder. Further, notice of the meeting has to be given to each shareholders concerned in accordance with the provisions of S. 45(2) of the B.R.Act, 1949. Subsequently, the scheme is presented before the RBI for sanction, and if sanctioned, is binding on the companies.

Conversely, the procedure provided under Ss.391-394 provides for the material disclosure by interested persons before mergers may actually takes place between two companies, in addition to the requirements of notice, company meetings, resolution by majority, approval by the High Court. The absence of a material disclosure requirement in the provision relating to bank merger constitutes a significant lacuna in the law. While major commercial disputes have not arisen regarding this, thus far, the policy of the reserve bank of India, in encouraging mergers between private banks will necessitate some form of law governing the possibility of non-disclosure, insider trading and other malpractices that occur during the process of merger.

The role of the High court in approving company mergers, and the role of the RBI in approving mergers of banking company differ in the extent to which they exert control over the power to merge. Both, Ss.391-394 of the Companies Act, and S.44A of the B.R.Act, 1949, require that the High Court and the RBI (respectively) must ‘sanction’ the scheme proposed, the impact of the sanction in each case has differing effects. While

not unreasonable because it excludes judicial scrutiny as the court would act as guided by the reserve bank nor is it unreasonable because of appeal or review is provided for‖. Para 16.

298 Bank of Madura, Shareholders Welfare Association v. Governor, RBI and others, [2001]105 ComCas 663 (Mad).