**EXEMPTIONS IN CASE OF MERGER OF A WHOLLY OWNED SUBSIDIARY WITH ITS PARENT LISTED ENTITY**

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A merger of a company (Transferor) with another (Transferee) under section 230-232 of the Companies Act 2013 has the following steps (broadly) to be followed:

1. Conduct a Board Meeting of both companies, to approve the Scheme and make an application to Hon'ble National Company Law Tribunal (NCLT)
2. Move 1st Motion Application to NCLT and obtain orders to conduct Shareholders & Creditors meeting (or place consent thereof and seek dispensation) and newspaper publication.
3. Conduct Shareholders Meeting of both Transferor and Transferee Companies
4. Conduct Creditors Meeting of both Transferor and Transferee Companies
5. Obtain report from Scrutiniser and Chairman
6. File it with Hon'ble NCLT and move 2nd Motion Application to NCLT
7. Newspaper Publication and Obtain reports from Regional Director and Official Liquidator for both the Transferor and Transferee Company
8. Complete hearing and obtain orders and file orders with ROC in each of the companies.

From the above process it is very clear that in a merger all the steps have to be followed by both Transferor Company as well as Transferee company too. In a situation where the Transferee Company is a Listed Entity it becomes all the more laborious to undertake such steps as conducting Creditors meetings and Shareholders meetings and obtain their approvals.

Ofcourse in order to reduce the burden of the Companies, the Companies Act 2013 vide Section 230(9) has provided discretionary powers to the Tribunal to dispense with the meeting of the shareholders and Creditors where 90% in value have agreed, by way of an affidavit, to the scheme.

Practically speaking, obtaining 90% consent, more specifically in an affidavit from 1000s of Shareholders and creditors of listed entities is humongous task and impossible to obtain. Therefore such listed companies are unable to avail such benefits as provided in section Sec.230(9) of the Companies Act 2013, even if they want to.



Although Companies Act 2013, does not envisage a situation where shareholders and Creditors meeting can be dispensed with for large listed entities without obtaining consent of 90% of the stakeholders involved, the judiciary has stepped in to aid corporates avoid the tedious process of obtaining consent of 90% and not hold the meeting of the shareholders and creditors and still obtain orders from the Hon'ble NCLT, approving the merger.

Listed entities merging their Wholly Owned Subsidiaries under section 230-232 of Companies Act 2013 may be exempt from making an application to the Hon'ble NCLT and may be exempt from obtaining approvals of their Creditors and Shareholders. Therefore an Application will be made only by the Wholly Owned Subsidiary (Transferor Company) who will seek permission to hold or dispensation meeting of their creditors or shareholders (as the case may be).

We will see the key case laws that cover these aspects and what are the Thumb rules that have been set by them for such exemptions to be given to the corporates.

This article will cover the following key Judicial orders and what are the Thumb rules that have been set by them for such exemptions, highlighting the relevant/operating portion of the orders for ease of reference:

1. Mahaamba Investments Limited Vs IDI Limited (Bombay High Court – 2001)
2. Mohit Agro Commodities Processing Pvt Ltd. With Gujarat Ambuja Exports Ltd. (NCLAT 2021)

**In the Bombay High Court**
**Mahaamba Investments Ltd. *Versus* IDI Limited**
(BEFORE DR. D.Y. CHANDRACHUD, J.)
Company Application (Lodg.) No. 1047 of 2000
Decided on January 31, 2001

> *In the present case, having regard to the relevant clauses of the proposed scheme and particularly the provision* ***whereby no new shares are sought to be issued to the members of the transferor-company by the transferee-company, the scheme will not affect the members of the transferee-company****.* ***The creditors of the transferee -company are not likely to be affected by the scheme in view of the financial position of the transferee-company****. In paragraphs 13 and 14 of the affidavit in support of the company application, the financial position Of the transferor and transferee companies has been set out and which would show that in so far as the transferor company is concerned, it has an excess of assets over liabilities to the extent of Rs. 508 lakhs whereas in the case of the transferee-company, there is an excess of assets over liabilities to the extent of Rs. 6,900 lakhs.*
>
> *In the circumstances, the office objection is accordingly disposed of with the clarification that filing of a separate petition by the transferee-company is not necessary, in the facts and circumstances of the present case.*

**Thumb Rule established by the said order is as under:**

1. No New share should be sought to be issued to members of Transferor Company
2. Scheme should not affect the members of the Transferee Company
3. Scheme should not affect the Creditors of the Transferee Company
4. Financial Position of the Transferee Company should be strong and positive.



**In Nation Company Law Appellate Tribunal (NCLAT)**
**Mohit Agro Commodities Processing Pvt Ltd. with Gujarat Ambuja Exports Ltd.**
COMPANY APPEAL (AT) No. 59 of 2021
Decided on June 28, 2021

Interestingly in this case, despite the Company quoting multiple orders of the various courts in India, the Hon'ble NCLT Ahmedabad Bench were not convinced with the facts and had rejected request made by the company to dispense with making an application by the Public listed entity (Transferee Company) which had also sought exemptions to hold Creditors and Shareholders meeting. They went on an appeal to the Hon'ble NCLAT, which reads as under:

> *It is seen that Section 232(1) of the Companies Act, 2013 uses the word 'may' which introduces an element of discretion to the Tribunal to be exercised in the interest of justice in appropriate situations. It is evident from the aforesaid citations that the High Courts have exercised this discretion dispensing with the requirement of convening the meetings, if the Bench is satisfied in all respects. Section 232 is a specific provision carved out by the Legislature when both*

*conditions maintained in clauses (a) and (b) of sub- Section (1) of Section 232 are met. In the instant case the amalgamation sought for is between a Wholly Owned Subsidiary and the Holding Company. The point which needs to be noted is whether such an arrangement alters the rights of the Stakeholders of the Company; whether such an amalgamation has any bearing internally on Creditors/Members of both the Companies; whether not holding the subject meeting would amount to violation of any of the provisions of the Companies Act, 2013; whether the Tribunal can exercise their discretion when the 'Transferor Company' is a Wholly Owned Subsidiary of the 'Transferee Company' and financial position of the 'Transferee Company' is positive and the merger is not affecting the rights of the Shareholders or the Creditors.*

*The material on record establishes that the 'Transferor Company' is a Wholly Owned Subsidiary of the 'Transferee Company' and there is no issuance of any new shares and therefore there is no reorganization of share capital and consequently no arrangement wherein Shareholders have to compromise with Creditors of the 'Transferor Company'. The documentary evidence substantiates that the net worth of the 'Transferee Company' is definitely positive.*

*19. We find force in the contention of the Learned Counsel appearing for the Appellants that there are no Creditors in the subsidiary Companies and that the 'Transferee Company' is the only Shareholder of the 'Transferor Company'.*

***This Tribunal has placed reliance in 'DLF Phase IV, Commercial Developers Limited and Ors.' in Company Appeal (AT) No. 180 of 2019 and observed that the scheme would not prejudicially affect the Creditors or Shareholders of the Appellant Company when an Application is filed by the 'Transferor Company' or 'Transferee Company', a separate Application is not necessary and dispensed with the meeting of the equity Shareholders and Creditors of the Appellant Company.*** *At the cost of repetition, keeping in view that the financial position of the 'Transferee Company' is highly positive, the merger does not involve any compromise/arrangement with any Creditor of the Company, that there would be a positive net worth and Creditors would not be compromised, the Tribunal ought to have exercised the discretion in dispensing with the requirement of convening the meeting which would facilitate ease of doing business and save time and resources. To reiterate, we observe that the rights and liabilities of Secured and Unsecured Creditors were not getting affected in any manner by way of the proposed scheme as no new shares are being issued by the 'Transferor Company' and no compromise is offered to any Secured and Unsecured Creditors of the 'Transferee Company'.*

*Therefore, we are of the considered view that when the 'Transferor and Transferee Company' involve a parent Company and a Wholly Owned Subsidiary the meeting of Equity Shareholders, Secured Creditors and Unsecured Creditors can be dispensed with as the facts of this case substantiate that the rights of the Equity Shareholders of the 'Transferee Company' are not being affected.*

***21. For all the aforenoted reasons, we allow this Application and set aside the direction in respect of the Transferee Company issued by the NCLT, to convene the meetings of the Equity Shareholders, Secured Creditors and Unsecured Creditors on 22.04.2021***

**Key points in the above-mentioned case law:**

The Hon'ble NCLAT had re-established that the NCLT should have considered and passed orders as sought by the Company, as the rights of the Shareholders of Transferee (listed entity) do not get affected by virtue of such merger.

Hon'ble NCLAT stated in their order that the Hon'ble NCLT to consider the following:

1. Whether such an arrangement alters the rights of the Stakeholders of the Company
2. No new share sought to be issued to members of Transferor Company
3. Scheme will not affect the members of the Transferee company
4. Creditors of Transferee company not likely to be affected by the Scheme
5. Positive Networth of the Transferee Company

**Conclusion:**

Therefore, from the above cases it is clear that the Hon'ble NCLT and NCLAT are considering a complete waiver of even making an application by Transferee company, in case it is a merger of a wholly owned subsidiary with its Parent entity where the parent entity is a public listed company.

Of course, there are multiple judicial orders, where despite the facts being similar, the Hon'ble NCLT has disallowed such exemptions and have specifically directed the listed companies to hold Shareholders and Creditors meeting and obtain approvals. Since such powers are the discretion of the Judges, it varies from Bench to Bench depending on the facts and circumstances of each case.

Thus it is advisable that the professional handling such merger applications, may consider the above and make an application before the Hon'ble NCLT accordingly.