

Criminal Liability of Transferee Company For Acts of Transferor Company After Amalgamation

The Companies Act, 2013 does not contain any express definition of amalgamation. The Black Dictionary defines the term 'amalgamation' as the act of combining or uniting or consolidation/ amalgamation of two small companies to form a new corporation. The Companies Act outlines and regulates the procedure for amalgamation and spells out its legal effect, which results in extinguishment of the corporate identity of the transferor company.



CS (Dr.) M. Govindarajan, FCS

Practising Company Secretary and Insolvency Professional,
Tamil Nadu
govind.ayyan@gmail.com

INTRODUCTION

The expression 'criminal liability' is defined by Cambridge Business English Dictionary as the responsibility for any illegal behavior that causes harm or damage to someone or something. Criminal liability was imposed only for intentional misconduct, and the requirement of fortuity generally included the coverage of criminal liabilities. The criminal case launched against a person comes to an end when he dies. Criminal action cannot be taken against a company which is a nonexistence even though it is a separate entity. The earlier notion amongst the legal historians was that corporations in their corporate capacity were incapable of committing crimes such as felony, treason or perjury, rather, only the individual members were capable of doing so and could be held liable for the same. The members of the company increasingly began pooling in resources for initiating business ventures as well as to safeguard themselves for any future losses. Thereafter, once these corporations began owning property and engaging in business, they came to be recognized in law as *person*.

ISSUE

The issue to be discussed in this article is whether the transferee company is liable for the criminal liability of the transferor company after amalgamation with reference to decided case laws.

AMALGAMATION

The Companies Act, 2013 does not contain any express definition of amalgamation. The Black Dictionary defines the term 'amalgamation' as the act of combining or uniting or consolidation/ amalgamation of two small companies to form a new corporation. The Companies Act outlines and regulates the procedure for amalgamation and spells out its legal effect, which results in extinguishment of the corporate identity of the transferor company.

The Supreme Court, in 'General Radio & Appliances Company Limited v. M.A. Khader (dead) by legal heirs' - 1986 (2) SCR 607, held that after the amalgamation of two companies, the transferor company ceases to have any entity, and the amalgamated company acquires a new status, and it is not possible to treat the two companies as partners or jointly liable in respect of their liabilities and assets.

POWERS OF RESERVE BANK OF INDIA

Section 45 of Reserve Bank of India Act provides that where it appears to the Reserve Bank that there is good reason so to do, the Reserve Bank may apply to the Central Government for an order of moratorium in respect of a banking Company. Section 45(5)(e) provides that the scheme aforesaid may contain for the continuation by or against the banking company on its reconstruction or, as the case may be, the transferee bank, of any actions or proceedings pending against the banking company immediately before the reconstruction or amalgamation.

CRIMINAL LIABILITY OF CORPORATE ENTITIES AFTER AMALGAMATION

There was some divergence of opinion amongst certain High Courts about the criminal liability of corporate entities. The Calcutta High Court, in 'Sunil Banerjee v. Krishna Nath' - AIR 1949 Cal 689, held that only natural persons, could be ascribed with intention or 'mens rea'. A juristic person such as a company could not be ascribed with criminal intent. Whereas the Bombay High Court differed in this aspect. In 'Esso Standard Inc. v. Udhamram Bhagawandas Japanwalla' - (1975) Comp cas 16 (Bom) held that that a strict test of mens rea was required to locate or ascribe criminal responsibility of a company, on the concerned decision maker. The High Court relied on

the approved opinion of Lord Diplock whose view is that what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.

In 'Iridium India Telecom v. Motorola Inc.' - (2010) 14 (ADDL) SCR 591, the Supreme Court held that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea.

The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons.

In 'Religare Finvest Limited v. State of NCT of Delhi and another' - SC - Criminal Appeal No. 2242 of 2023, decided on 11.09.2023, Religare Finvest Limited ('RFL' for short) and its group companies viz., RHC Holding Private Limited and Ranchem Private Limited obtained short term loans from the Lakshmi Vilas Bank ('LVB' for short) for which four fixed deposits of the value of Rs.750 crores were furnished as security to the Lakshmi Vilas Bank. RFL felt that LVB had conspired with RHC Holding and Ranchem. Therefore Religare Finvest Limited filed a criminal complaint against Lakshmi Vilas Bank. An FIR was filed by Economic Offences Wing under Sections 409 and 120B of the Indian Penal Code. In the complaint, it was alleged that Lakshmi Vilas Bank debited an amount of Rs.723.71 crores from Religare Finvest Limited's current account for the default of RHC Holding Private Limited and Ranchem Private Limited.

In the meanwhile due to high net levels of Non-Performing Assets, inadequate Capital to Risk (Weighted) Average Ratio and Common Equity Tier-I Capital, two years of negative Return on Assets, and high leverage, the Reserve Bank of India placed Lakshmi Vilas Bank under 'Prompt Corrective Action'. Reserve Bank of India imposed moratorium on Lakshmi Vilas Bank under Section 45(2) of the Banking Regulation Act, 1949.

The Central Government directed for non voluntary amalgamation of Lakshmi Vilas Bank with DBS Bank, vide their order dated 25.11.2020, due to unstable economic condition of LVB. A supplementary charge sheet was issued impleading LVB through its Director as an accused along with the bank officials and RHC Holding Private Limited and Ranchem Private Limited. It is alleged that LVB obtained fixed deposits from RFL



@ 4.5% interest. The LVB lent the money at a rate of 10% p.a. without proper authorization from RFL. The loans advanced by LVB to RHC Holding and Ranchem against FDs of RFL were ultimately utilized by RHC Holding. In absence of sufficient documentation supporting explicit authorization from RFL led to the allegation that LVB facilitated the diversion of funds for the promoter's personal gain. LVB was benefited by earning Rs.115 crores, interest. It was alleged that the parties involved acted in connivance with each other and committed acts of commission and omission in furtherance of the conspiracy to cheat the complainant company.

DBS was issued a notice on 16.02.2021. DBS, being aggrieved against the notice, filed a Criminal Miscellaneous petition before Delhi High Court with the prayer to quash the supplementary charge sheet dated 12.02.2021 and summoning order dated 16.02.2021. The DBS alleged that LVB had ceased to exist due to the non-voluntary amalgamation scheme and that DBS should not face prosecution for the acts and omissions of the entity which it merged with, as directed by the Government of India and the RBI. Clause 3(3) of the Amalgamation scheme provides for the institution of criminal proceedings against officials of Lakshmi Vilas Bank and therefore, liability should not be attributed to the rescuer bank. The High Court quashed the summoning order against the DBS. The court directed the involved parties to seek clarification regarding the interpretation of Clause 3(3) of the scheme in respect of criminal proceedings constituted against transferor bank if be carried forward to transferee bank or not after the amalgamation from Reserve Bank of India. The High Court further held that the court stayed the summoning order issued on February 16, 2021, against DBS Bank till clarification was issued by Reserve Bank of India.

Being aggrieved against the above said order, DBS filed civil appeal before the Supreme Court. Religare Finvest Limited submitted the following before the Supreme Court-

Criminal action cannot be taken against a company which is a nonexistence even though it is a separate entity. The earlier notion amongst the legal historians was that corporations in their corporate capacity were incapable of committing crimes such as felony, treason or perjury, rather, only the individual members were capable of doing so and could be held liable for the same. The members of the company increasingly began pooling in resources for initiating business ventures as well as to safeguard themselves for any future losses. Thereafter, once these corporations began owning property and engaging in business, they came to be recognized in law as person.

- The High Court ought not to have indefinitely stayed the summoning order, especially when it observed that quashing the summoning order against DBS would not be in public interest. The High Court denied such interim measure in its previous order dated 17.12.2021.
- The direction to approach Reserve Bank of India for clarification is beyond the scope of the original petition as DBS did not assert or seek relief in its quashing petition for the parties to approach the Reserve Bank of India for clarification.
- If the High Court deemed it necessary to seek Reserve Bank of India's view, it should have ideally impleaded Reserve Bank of India as a necessary party.
- The Reserve Bank of India cannot sit in appeal over the findings of the High Court.
- The criminal proceedings do not automatically abate upon the amalgamation of a company.
- Clause 3(3) of the scheme incorporates the notion of criminal accountability, and there is no such bar on transferring criminal liability onto the transferee bank.
- The High Court's decision essentially denies the petitioner the chance to pursue the case on merits, and instead, it necessitates involving an external body to interpret the amalgamation scheme.
- As the trial is in its early stages, an indefinite stay will further delay the trial process.

The DBS contended the following before the Supreme Court-

- Acts outlined in the charge sheet occurred well before the appointed date of the amalgamation, i.e., 27.11.2020.

- Lakshmi Vilas Bank was not implicated as an accused prior to the appointed date and was only added in the supplementary charge sheet.
- Before the amalgamation, Lakshmi Vilas Bank had no ties to DBS.
- Lakshmi Vilas Bank ceased to exist in terms of Clause 7(2) of the scheme of amalgamation.
- Only the actual wrongdoer can only be punished for its wrongdoing, and no vicarious criminal liability can be inherited by a transferee company.
- Non-voluntary scheme of amalgamation necessitated to safeguard the public interests, Lakshmi Vilas Bank ceased to exist and criminal proceedings against Lakshmi Vilas Bank shall abate.
- The transfer pertained to civil liability, with no provision concerning the continuation of criminal proceedings for the transferee company.
- Even in the case of a natural person where upon the demise of an accused person, criminal proceedings do not pass on to legal heirs or successors.
- While the Reserve Bank of India and the Central Government took proactive measures by formulating the Scheme under Section 45(7) of the Banking Act to safeguard the interests of Lakshmi Vilas Bank's depositors, employees, and others, another arm of the Government, represented by Respondent No.1, cannot vitiate the process by imposing criminal liability against DBS for the past actions of Lakshmi Vilas Bank.
- Religare Finvest Limited itself argued before the High Court that an interpretation from the Reserve Bank of India was necessary and that the Court should not make a determination on this matter.
- Subsequent to the Impugned Order, Reserve Bank of India through its letter dated 14.06.2023, provided clarification that criminal proceedings against the officials of the transferor bank do not get carried forward to the transferee.

The Supreme Court heard the submissions of the parties to this case. The issue to be discussed in this case was framed by the Supreme Court as to whether a transferee entity can be fastened with corporate criminal liability for the offences which the amalgamating entity- the erstwhile Lakshmi Vilas Bank is accused of.

The Law Commission, in its 41st and 47th Report, had stated that in every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only.



The Supreme Court noticed that a criminal liability of a company-

- is recognized where it can be attributable to individual acts of employees, directors or officials of a company or juristic persons;
- recognized even if its conviction results in a term of imprisonment;
- cannot be transferred *ipso facto*, except when it is in the nature of penalty proceeding;
- the legal effect of amalgamation of two companies is the destruction of the corporate existence of the transferor company (in this case, Lakshmi Vilas Bank); it ceases to exist;
- that apart, only defined legal proceedings, are succeeded to by the transferee company, which, in this case, is the DBS Bank.

The Supreme Court observed that clause 3 of the scheme provides that legal proceedings would be continued by or against the transferee bank. The proviso to this clause provides that where the officers of the company contravenes the provisions of the Act or scheme.

Every scheme of amalgamation is statutory and sanctioned under the Banking Act. It aims at securing larger public interest and health of the banking industry. The criminal liability of the individuals now attributed to DBS is actions of Anjani Kumar Verma, S. Venkatesh, Pradeep Kumar Parthasarathi Mukherjee. They were all officials of Lakshmi Vilas Bank. Their individual responsibility and

accountability in criminal law, is remains unaffected by the amalgamation. Therefore, there is in fact, no involvement of DBS Bank, revealed in the charge sheet filed by the Delhi Police. In completely ignoring these aspects and proceeding on a rather superficial basis, the High Court, in the opinion of Supreme Court, fell into error.

The Supreme Court set aside the impugned judgment.

CONCLUSION

A transferee bank in a merger can be held accountable for corporate criminal liability arising from offenses committed by officials of the transferor bank prior to the merger of the two entities. The Religare judgment, as discussed above, serves as a reminder of the complexities surrounding corporate criminal liability and underscores the need for adopting a tailored approach in every consensual merger. It becomes paramount to shield the transferee party from any potential liabilities, assuming such party is independent of the past activities of the transferor entity.

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