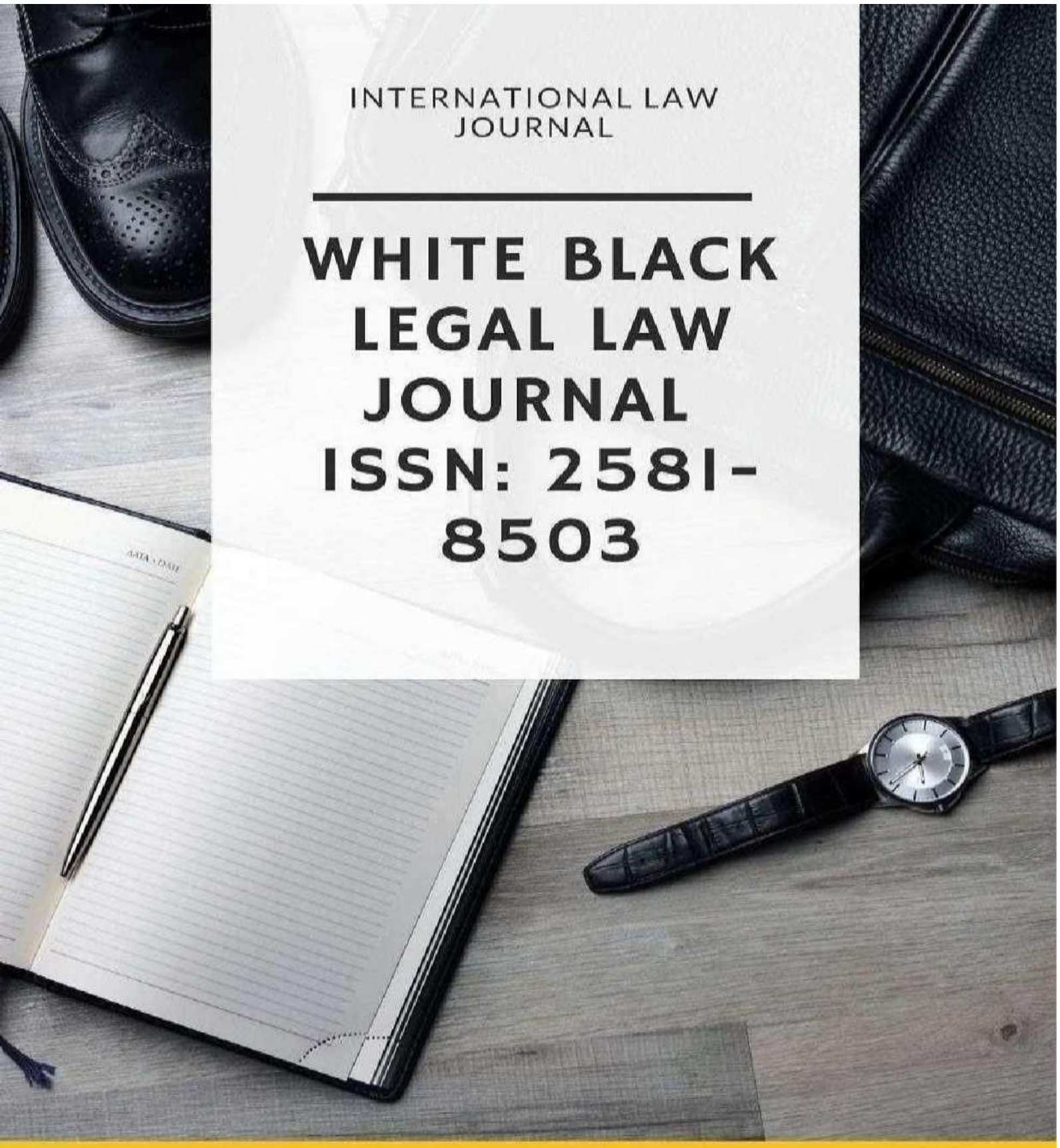

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

EMPLOYEE'S RIGHTS ARISING OUT OF MERGERS & ACQUISITIONS

AUTHORED BY - YASH GUPTA

Merger and Acquisition ('**M&A**') is an activity undertaken as part of the restructuring of a company. restructuring which involves a merger of one unit with another where the original unit loses its identity or becomes part of another entity which inspires the change of ownership for the employees or reallocating (transfer) employees between the existing and acquired units, or termination of employment contract, and designing settlement packages or even re-writing employment agreements within the permissible limits under the local laws. Merger & Acquisition activity in India touched an all-time high of $148 billion in the first nine months of 2022. It was 58.2 percent higher than in 2021, according to a report in Business Line, with 70 percent to 90 percent of all M&A failing to accomplish their anticipated strategic and financial objectives. With such M&A activity, the resources which get impacted the most are the human resources of the firm, i.e. the employees of the company. In India, when it comes to mergers and acquisitions, the employees are predominantly left to have one right given by **Section 25FF** of the Industrial Disputes Act, 1947. This research paper shall examine the impact of M&A on employees as well as the employees' rights arising from an M&A and scrutinize the lack of a law addressing the rights and responsibilities of employees during mergers and Acquisitions and various cases related to rights of the employees arising out of mergers and acquisitions.

INTRODUCTION

Companies come and go. Chief Executive Rise and fall, Industry Sector Wax and Wane, but an outstanding feature of the past decade has been the rise of business combinations, which may take forms of mergers, acquisitions, amalgamation and takeovers are the important features of corporate restructural changes. They have played an important role in the external growth of a number of leading companies worldwide. trillion of dollars' worth of corporate restructurings- mergers, acquisitions and other transactions have taken place worldwide. India, itself, in 2022, saw as many as 2,103 transactions and a 29% increase from 2021 in terms of value — aggregating to $159 billion.

With this proliferating rate of domestic and cross-border M&A transactions taking place in India and several multi-national companies involved, M&A has truly taken its revolutionary form and risen above all else and proven to be a powerful indicator of a robust and growing economy.

On the offset, it may seem like the ultimate goal of M&A transactions is financial gain and that the organizations take care of everything concerning it prudently; however, that is not the case. It is indeed true that most M&A decisions are supported by higher-level feasibility analyses that are reviewed by the senior management it is also ubiquitous for corporations to ignore the human resource issues before striking merger deals. In India, when it comes to mergers and acquisitions, the employees are predominantly left to have one right given by Section 25FF of the Industrial Disputes Act, 1947(it provides for the amount of retrenchment compensation to be paid at the time of retrenchment).

This research paper shall examine the impact of M&A on employees as well as the employees' rights arising from an M&A and scrutinize the lack of a law addressing the rights and responsibilities of employees during mergers and Acquisitions and various cases related to rights of the employees arising out of mergers and acquisitions.

MERGER

A merger is a combination of two or more businesses into one business which may or may not lead to the emergence of a new entity. Thus, a merger can take place by the way of absorption or by the way of consolidation. Merger by the way of absorption means coming together of two or more organizations where one of the organization loses its identity and the other survives, with their combined assets, liabilities, loans, and businesses. Amalgamation is the term used for consolidation in India. Consolidation involves the creation of a new organization by coming together of two or more organizations where the merging organizations lose their identity to form an entirely new organization with their combined assets, liabilities, loans, and businesses (Godbole, 2013). Coming together of Holcim and Lafarge to form LafargeHolcim, global cement giant is the best example of the merger by consolidation. The terms merger and acquisition are used as synonyms in literature but there is a thin line of difference between the two.

ACQUISITION

The acquisition is a process through which the acquiring company gets a controlling interest in the share capital of the acquired company. In acquisitions, there is a change in management of the acquired firm but both the firms retain their separate legal identity (Godbole,2013). Acquisitions can be friendly as well as hostile. Hostile acquisitions are termed as takeovers. Acquisitions usually take place within firms of different sizes. Usually, big firms are said to have acquired small firms. But Tata Steel created a history by acquiring Corus Group of USA which was almost ten times in size as compared to Tata Steel.

MAJOR ISSUES CONCERNING LABOUR RIGHT DURING AN M&A TRANSCACTION

There are several major issues and solutions concerning labour rights during an M&A transaction that should be addressed by the companies involved:

Job Security: During an M&A transaction, job security is one of the main worries for employees. Concerns about job loss or relocation to a different location or department are common among employees. Employers should be informed clearly and transparently about their employees' employment status, and any layoffs or reorganizations should be handled in compliance with all relevant laws and regulations. Companies are required to comply with by the Industrial Disputes Act of 1947, which specifies that before implementing layoffs or retrenchments, companies must obtain prior approval from the relevant government body. Affected workers may take legal action if these laws are not followed. In the case of Workmen of **Hindustan Lever Ltd. v. Hindustan Lever Ltd. (1984),** the Supreme Court of India held that the principles of natural justice must be followed in all cases of termination of employment.

Collective Bargaining Agreements: If the target firm is unionized, all applicable collective bargaining agreements must be reviewed and abided by the acquiring company. To make sure that the provisions of the contract are upheld or revised to reflect the changes brought about by the merger or acquisition, the acquiring company may need to bargain with the union or other employee representatives. The Industrial Relations Code, 2020 requires that any change in the terms and conditions of employment of unionized employees be agreed with the union, therefore if the target

firm is unionized, the acquiring company must abide by its rules. The union may take legal action if these provisions are not followed. The right to collective bargaining is a fundamental right guaranteed under the Constitution of India, according to the Supreme Court's ruling in the **National Textile Workers' Union v. P.R. Ramakrishnan (1983) case.**

Employee Benefits: To make sure that the target company's employee benefits programs are compliant with all relevant rules and regulations, companies should study and assess them. These plans might need to be modified by the purchasing firm to meet their benefits schemes. Companies must abide by the rules outlined in the Employees' Provident Funds and Miscellaneous Provisions Act of 1952, which requires companies to offer their workers perks including pensions, gratuities, and provident funds. Affected workers may take legal action if these laws are not followed. The employers must contribute to the provident fund on behalf of all employees, including those who are transferred or terminated during an M&A transaction.

Retention of Key Employees: Organizations should identify their key employees and develop retention plans for them. Offering retention incentives like stock options or possibilities for professional advancement may be one way to do this. The Industrial Employment (Standing Orders) Act of 1946, which requires employers to have standing orders in place that control the terms and circumstances of their employees' employment, must be complied with by companies. Affected workers may file a lawsuit if these provisions are not followed. Further, standing orders must provide for the procedure for the transfer of employees and that employers must follow this procedure during an M&A transaction.

Cultural Integration: As part of M&A deals, employees from various origins and cultures are frequently brought together. Companies should be aware of these disparities and endeavor to foster an inclusive and respectful culture that fosters a happy and successful workplace. Companies must abide by the Equal Remuneration Act, 1976, which provides that all employees, regardless of gender, shall get equal pay for equal labUr. Affected workers may take legal action if these laws are not India and that employers must provide equal opportunities to all employees.

Merger & Acquisition has a great impact on:

- The employees working in a company & on working conditions.
- The main reason for failure of merger in most of the cases is non-integration of human resources of both the transferor and transferee company.

Some of the significant concerns and issues related to the human resource are:

- Due to merger, there is a clash between the companies which pulls them together into different direction apart from their aims & objectives.
- An M&A activity without recognizing the impact on the human element results in lost revenue, customer dissatisfaction, employers attrition issues and so on.
- Many personnel issues such as salaries, benefits, pension of employees are also affected due to M&A.
- Ego clashes between the top management.
- Employees often become withdrawn and frustrated when their potential for future growth within the organization dwindles.
- M&A affects the CEOs of the company.
- Transfer, retrenchment and the loss of position in the hierarchical level.
- M&As shift the focus of employees from productive work to issues related to interpersonal conflicts, layoffs, career growth with the acquirer company, compensation etc.
- Conflict in values and culture increases stress level among employees

LAWS PROVIDED IN INDIA

Status Of The Employee

The primary legislation which deals with the subject is Industrial Disputes Act, 1947 (ID Act) which applies to employees called workmen. Under Section 2(s) of the ID Act, workmen has been defined as someone who is employed to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work and draws wages exceeding Rs 10,000 per month.

Employees whose duties are ‘largely’ of managerial or supervisory nature fall outside the purview of the term workmen. The Supreme Court, has laid down the ‘dominant nature’ test to determine the qualification of a person within the definition of a workman. In the case of T.P. Srivastava vs National Tobacco Co. Of India Ltd, the Supreme Court held that duties which need the imaginative and creative mind of a person cannot be termed as either manual, skilled, unskilled, or clerical, and as a result, the person was not falling under the term ‘workman’ and was not considered an employee of the organization.

Concent Of Employee

According to **Section 25FF** of the ID Act, in situations where the ownership or management of an enterprise is transferred to a new employer, whether by agreement or by operation of law, from the old employer, then all the employees who have been in continuous service for not less than 1 year in that enterprise, shall be immediately be entitled to notice and compensation in compliance with the provisions laid down in Section 25F of the Act, as if the employee has been retrenched.

There are also some exceptions given under this section which state certain conditions where the employee shall not be entitled to notice and compensation. The conditions are:

- No interruption has occurred in the service because of the transfer.
- The working conditions and terms of service of an employee remain unchanged and are not less favourable than the working conditions and terms the employer had immediately before the transfer.
- The new employer is answerable and under the terms of such transfer where the new employer is legally liable to pay to the employee in case the employee retrenches, compensation on the supporting condition that the service of the employee has been continuous and has not been interrupted by the transfer.

Nonetheless, the Supreme Court took an important decision in the case of **Sunil Kr. Ghosh v. K. Ram Chandran**, about the employee’s consent to a merger or an acquisition. It was held that in the case where the employees are being transferred to a new employer, the old employer must take the consent of the employees irrespective of the fact that there have been no alterations in the working conditions and terms of the service and the employees are being transferred having the same or

favourable terms and working conditions. In case, the employees do not give their consent to such a transfer then the employees shall be provided retrenchment compensation in compliance with the provisions given under the Act. This decision given by the Supreme Court brought in a standard alteration in industrial jurisprudence concerning the right of employees in case of a merger or an acquisition. The underlying reason for the decision given by the Supreme Court to highlight the point that an employee cannot be forced to work for anyone against their wishes.

In the case of a non-workman, the employment agreement generally guides the employer- employee agreement and even some concepts of the Act come in aid for the non-workman employees. Therefore particular concepts of the Act such as taking the consent of an employee in case of a merger or an acquisition and other concepts of natural justice are looked upon in the case of non-workman employees to avoid critical observation by courts in suspicion.

In the case of **McLeod Russel India Limited v. Regional Provident Fund Commissioner Jalpaiguri and Others**, the Supreme Court held that the transferee business entity will be held liable in case of a default on part of the transferor entity even in the case of that an agreement was made to the clashing statement that the transferor entity will be held liable. This decision given by the Supreme Court focuses on the significance of in-depth due diligence which has to be organized and carried out by the organization acquiring the business and specifically identify the liabilities of the organization selling the business towards provident fund and several other labour laws and obtain reimbursement and damages from the company selling its business before the acquisition of that business if required.

The main aim of Section 25FF is to provide compensation to workmen for loss of employment and to provide him with the resources until he gets back on his feet. This section was introduced to protect the rights of workmen, who lost their jobs because of transfer of an undertaking. However, this section was not given much importance when it was first formulated in the IDA, 1956. For instance, in the case of **Hari Prasad Shiv Shankar Shukla v. A.P. Divelkar,** the employees were not given any retrenchment benefits under section 25F of the IDA. Similar cases were registered and thus in 1957, Section 25FF was amended to render justice to the employees. It is pertinent to note that the term “undertaking” has to be read in the simplest sense, hereby meaning any work, project, enterprise or business undertaking.

it is interesting to see how the law will apply in different scenarios. In case of merger which entails change in the employer, Section 25FF of the ID Act will apply.

In case of business transfer wherein the existing employer terminates the employment of the employees and the purchaser employs the employees with effect from the closing, Section 25FF will apply as there is a change in the employer. However, in case of purchase of shares, Section 25FF will not apply as there is no change in the employer.

UNITED KINGDOM ("UK")

TRANSFER OF UNDERTAKING (Protection of Employment) REGULATION 1981 ("TUPE")

Venture of Corporate Entity Survives even after transfer

Labour law framework in the UK endorses automatic transfer of employees along with their rights and obligations to the transferee company. Theory often highlighted to substantiate this is that; when the transfer is undertaken, it might perish the legal personality of the corporate entity (depending upon the type of transfer – merger, acquisition or amalgamation). However, its socio-economic venture might still continue. This venture essentially revolves around labour, management of an organization and the capital infused therein along with the assets and liabilities of the company. And the company is an entity consistently working in promotion of its socio-economic objectives.

A transfer will become futile if labours and management, who preserve this venture are not transferred along with the corporate entity. Therefore, during a transfer human resource, along with their rights and pending obligations are transferred to the transferee company.

Labour is not a commodity

A worker shall not be forced to continue working with the new employer without his willingness. This is derived from the theory "labour should not be considered as a commodity". Philadelphia Declaration, 1944 also designated it as one of the fundamental principles in the constitution of ILO.

European Court of Justice, in the case of **Katsikas v. Konstantinidis** also reasoned out that an

employee can exercise his right to refuse from working under the new employer and he cannot be forced to get transferred as then, it will be violative of his fundamental right to choose and right to trade as per his willingness.

Transfer of Undertaking: Meaning and Scope

"Transfer of Undertaking" happens when the employer's undertaking is sold off or being transferred, whole or in part as a going concern to another employer. It is also considered as transfer when there is "service provision change" i.e. a service is being outsourced or insourced. Such transfer may include any transfer of assets, tangible or intangible.

Transfer not governed under this Regulation - Jurisdiction of this law is limited to those undertakings which are situated in the UK. Transfer of Company by sale of shares is not covered under this regulation unless the identity of employer changes. Apart from this, asset sale transactions are not considered as transfer of undertaking and are thus outside the ambit of TUPE Regulations.

TUPE

TUPE Regulations govern any transfer of commercial undertaking. Regulations govern both represented and unrepresented employees. Regulations also concerns re-organisation of governmental entities.

Regulation 5 ***provides that:*** **"**transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred, but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee**"**

Employees are provided remedies under Regulation 8 if they are unfairly dismissed because of transfer. General rule is that an employee cannot be terminated either by the former or latter employer, before or after the transfer of undertaking; only because of this reason. It will be judged as unfair. Moreover, if the proper procedure is not followed for their termination it will beconsidered as unfair dismissal, in those exceptional cases where termination is allowed. Exception to this general rule is created in case of **Litster v. Forth Dry Dock and Engineering**, wherein it was said that employees cannot be unfairly terminated because of transfer of undertaking and their rights are safeguarded,

however, termination is allowed for economic, technical and organizational (ETO) reasons, which may be listed as follows:

i. **Economic Reason –**For instance, where it is not possible to sustain profitability of thebusiness due to a fall in the demand for the output without dismissing the staff.

ii. **Technical Reason** –For instance, where the employees of the entity being acquired do not possess the skills required to use the new technology.

iii. **Organisational Reason** –For instance, where it is not feasible to transfer the employees to a different location where the new employer operates.

There may be circumstances in which an employee opposes transfer. If such an employee is terminated, it will not be listed as unfair. However, there are two situations in which objection can be taken for termination –

- When there is "substantial change in working conditions to the material detriment" because of transfe*r".*
- When there is "**major detrimental change in terms and conditions amountingto a serious breach of contract**"

Safeguards to Employees under TUPE Regulation

1. It provides for automatic transfer of all the employees working in the undertaking with the existing employment contract to the transferor

2. It provides for transferring all the liability in relation to employees dismissed prior to transfer,to the transferee if the reason for dismissal was connected with the transfer.

3. Transfers recognizes any trade union as well as any collective agreements and makes them applicable to the transferred employees.

4. It mandates sharing of information with the elected representatives of the with a well- documented information memorandum. This information memorandum must contain information with respect to:

a. The reason of transfer

b. Approximate time when it will happen including a timetable for meetings for negotiations

c. The legal, social and economic implications of affected employees including change in terms and conditions of the employment contract.

d. What would be the process of such transfer and the rights of the employees after such a transfer.

ANALYSIS & CONCLUSION

In the Indian scenario, interests of the employees are considered only at the time of winding up of the company. It can be clearly concluded that at the time of mergers and acquisitions, the employees are left with only one right which is given under Section 25FF of the Act. Moreover, this section also provides only two options to a labors i.e., either gets compensation or carry on with the assured employment after transfer.

the Supreme Court has ruled that prior consent of an employee is necessary while transfer of undertaking, even when there are no changes in terms of contract and work environment provided by the transferee company. As per Section 9A, of the IDA any notice pertaining to change of terms is required to be given at least 21 days in advance.

However, certain changes are required to be introduced by way of amendments in the legislation landscape providing for enforcement provisions under Section 25F of the Act. Service of adequate notice must be there prior to transfer and compensation to workers should be there. Section 25H of the Act, must be expanded to provide re-employment of those employees that areretrenched because of transfer of undertaking

It is crucial at this point to enforce a legislation to provide protection to employees and safeguardtheir rights. There is extreme vagueness on the issue of workmen' rights during transfer of an undertaking. Therefore, the most pressing need is to provide scope of transfer and to provide rights of workmen in a comprehensive manner. In addition to this, there is an urgent need to provide for a concept of corporate governance to encourage democracy in the workplace as the Industrial Disputes Act, 1947 which regulates the transfer of employees is misled in the present day's corporate environment.

Therefore, given the drastic rise of M&A in India and the lack of a law addressing the rights and responsibilities of employees and employers during an amalgamation, a national law similar to the TUPE Regulations of the UK, should be considered to be made by either the Ministry of Corporate Affairs or the Parliament of India.

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