

**ORDER SHEET
HIGH COURT OF SINDH AT KARACHI**

J.C.M.No.24 of 2016

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

**International Complex
Projects Limited & anotherPetitioners**

Date of hearing 21.06.2017

M/s.Arshad Tayyabley and Mikael Azmat Rahim,
Advocates for the Petitioners.

Mr.Salman Salim Rajan, Assistant Director (LAW), SECP

Muhammad Ali Mazhar, J: This petition has been brought under Section 284 read with Sections 285 to 288 of the Companies Ordinance, 1984 in the quest of an order under Section 287 of the Companies Ordinance for transferring to and vesting in the petitioner No.2 the specific portions of the undertaking of the petitioner No.1 i.e. the demerged assets as described in the Scheme of Arrangement filed with the instant petition.

2. The brief facts of the case are that the petitioner No.1 is engaged in the business of hotels, restaurants, boarding rooms, importers, recreation, managers, proprietors, construction, brokers, contractors, builders, land developers, as well as acquiring businesses, undertakings, real estate etc., and generally carries on

the business of builders, developers and renting out properties developed by it.

3. The learned counsel for the petitioners accentuated that the authorized share capital of the petitioner No.1 is Rs.500,000,000/- divided into 50,000,000 ordinary shares of Rs.10/- each; whereas the issued, subscribed and paid up share capital of the petitioner No.1 is currently Rs.387,265,710/-. The petitioner No.2 as a holding company, acquiring interest in groups, investing in industrial and commercial ventures and providing technical and consultancy services, whereas the principal activity of the petitioner No.2 is to act as holding company by way of acquiring interest in group and non-group companies and to acquire and hold shares, Modaraba certificates, Musharika certificates, term finance certificates, bonds, obligations and securities of companies or corporate bodies. The objects of the petitioner No.1 and the petitioner No.2 with their complete business description is set forth in Memorandum and Article of Association.

4. The learned counsel for the petitioners argued that the members of petitioner No.1 and petitioner No.2 are ardent and zealous to restructure their corporate venture and business enterprise by means of demerger of specific portions of the undertaking of the petitioner No.1 and with this aim and intention they have entered into an Scheme of Arrangement dated 04.04.2016 for the proposed demerger and amalgamation/merger, which has been duly approved by their Board of Directors. The recital and delineation of the Scheme of Arrangement (page 145) is as under:-

- “1. The undertaking, comprising the Assets, Liabilities and Obligations, of ICPL shall be spilt into 2 (two) separate segments i.e. the Continuing undertaking and the Demerged Assets.**
- 2. The segment comprising all the Assets, Liabilities and Obligations pertaining to the Demerged Assets shall be carved out and, as at the Effective Date (as defined below), stand merged with, transferred to, vested in, and be assumed by AHEPL.**
- 3. As consideration for the above, it is proposed that AHEPL Shares shall be issued to the Transferring Shareholders in accordance with this Scheme, while the existing shares of ICPL held by the Transferring Shareholders (or their nominees), along with the right to be issued shares of ICPL in respect of any advance against equity, shall stand cancelled.**
- 4. As a consequence of the de-merger and the cancellation of the shares of ICPL held by the Transferring Shareholders, there shall be a reduction in the equity (i.e. the issued and paid up share capital, share premium, general reserves and equity contribution) of ICPL in accordance with the provisions of this scheme.**
- 5. Upon the merger and transfer of the Demerged Assets to AHEPL in the manner prescribed under this Scheme, ICPL shall continue to own and operate the Continuing Undertaking while the Demerged Assets shall vest in AHEPL, and each shall continue to exist as independent companies without either company being wound up.**
- 6. This Scheme, if approved by the respective shareholders of ICPL and AHEPL through a special resolution, and sanctioned by the Court by an order passed in this respect, is to be binding on ICPL and AHEPL along with all the shareholders, creditors, employees, Customers, contracting parties, tax authorities and any other regulatory/statutory bodies of or with respect to ICPL and AHEPL (as applicable) respectively”.**

5. The learned counsel further averred that the demerger will allow the companies to effectuate the commercial arrangement envisaged by the parties, including ICPL, AHEPL and their respective shareholders and this arrangement would bring tax efficiencies for all the shareholders of the companies. In Article 2 of the Scheme of Arrangement, the petitioners have also mentioned the “Objects of Scheme” in Clause 2.1 to 2.3, which are reproduced for the ease of reference as under:-

2.1. The principal object of this Scheme is to:

(i) separate/demerge the Demerged Assets from ICPL and amalgamate the same with and into AHEPL by transferring to and vesting in AHEPL the whole of the Demerged Assets, including all Assets, Liabilities and Obligations of the Demerged Assets, as of the Effective Date, (the "Demerger") against the allotment and issue of AHEPL Shares to the Transferring Shareholders in accordance with the provisions of this Scheme;

(ii) cancel the shares of ICPL which are currently held by the Transferring Shareholders (along with any right to have further shares issued in respect of the advance against equity deposited/paid by the Transferring Shareholders); and

(iii) consequently, reduce the shareholders equity (including the issued and paid up share capital, share premium, general reserves and equity contribution) of ICPL.

2.2. It is hereby clarified that although all of the above steps will take place on the same date, the same shall be deemed to be effective as of the Effective Date.

2.3 The Continuing Undertaking shall not at any time be transferred to or vest in AHEPL and the same shall at all times remain part of ICPL.

6. In pursuance of an order dated 30.6.2016, this court directed the petitioners to convene meetings of the shareholders in terms of Rule 55 of the Companies (Court) Rules, 1997 and submit report accordingly. In compliance thereof Nadeem Riaz, Director and CEO of the petitioner No.1 submitted report on 5.9.2016 with clear statement that notices of meeting to the Members/Shareholders of the petitioner No.1 were dispatched on 8.8.2016 and also published in the newspapers on 8.8.2016 while the meeting was convened on 29.8.2016 with requisite quorum present to discuss the Scheme of Arrangement. After due contemplation and consideration, the members/shareholders resolved as under:-

"RESOLVED THAT the Scheme of Arrangement dated April 4, 2016, for, inter alia, the bifurcation /demerger of International Complex Projects Limited into two segments/undertakings i.e. the continuing undertaking and the demerged assets, and merger, by way of amalgamation, of the demerged assets of International Complex Projects Limited with and into Arif Habib Equity (Private) Limited, along with all ancillary matters thereto, placed before the meeting for consideration and approval, be and is hereby approved and adopted, along with any modifications/ amendments required or conditions imposed by the High Court of Sindh at Karachi,

subject to sanction by the Honorable High Court of Sindh at Karachi, in terms of the provisions of the Companies Ordinance, 1984.”

In the closing remarks, it is further avowed in the report that the Members of the petitioner No.1 voted in favour of the resolution thus represented one hundred percent in value of the shares possessed by the members present in person or thru proxy and voted at the meeting.

7. The Director of petitioner No.2 Muhammad Arif Habib being Chairman of the meeting also submitted the report on 5.9.2016 in which he confirmed that notices were issued to the Members/Shareholders of the petitioner No.2 and also published in the newspapers on 8.8.2016 and on 29.8.2016 the meeting was convened in which the Scheme of Arrangement was accepted and the members resolved as under:

“RESOLVED THAT the Scheme of Arrangement dated April 4, 2016, for, inter alia, the bifurcation /demerger of International Complex Projects Limited into two segments/undertakings i.e. the continuing undertaking and the demerged assets, and merger, by way of amalgamation, of the demerged assets of International Complex Projects Limited with and into Arif Habib Equity (Private) Limited, along with all ancillary matters thereto, placed before the meeting for consideration and approval, be and is hereby approved and adopted, along with any modifications/ amendments required or conditions imposed by the High Court of Sindh at Karachi, subject to sanction by the Honorable High Court of Sindh at Karachi, in terms of the provisions of the Companies Ordinance, 1984.”

The Members of the petitioner No.2 also voted in favour of the resolution thus represented hundred percent in value of the shares held by the members present in person or by proxy and voted at the meeting.

8. Learned counsel for the petitioners contended that all de rigueur and elementary formalities have been satisfied and complied with. The SECP raised the objection that

NOC of one creditor (Askari Bank Limited) is lacking and nonexistent but this creditor has also issued NOC on 9.5.2016 (available at page 399) to the proposed demerger in accordance with the Scheme of Arrangement including any modifications thereto, without effecting the substance of the Scheme of Arrangement.

9. The Assistant Director (Law), SECP at the outset pointed out from the reply that the basis of calculation of swap ratio should be duly verified by the auditor. However he conceded to the arrangement set forth and articulated in the Scheme of Arrangement including the stratagem for reduction in share capital. He further confirmed that Askari Bank Limited has issued their no objection to the scheme of arrangement.

10. Where the scheme is found to be reasonable and fair, at that juncture it is not the sense of duty or province of the court to supplement or substitute its judgment against the collective wisdom and intellect of the shareholders of the companies involved. Nevertheless, it is the duty of the court to find out and perceive whether all provisions of law and directions of the court have been complied with and when the scheme seems like in the interest of the company as well as in that of its creditors, it should be given effect to. The court has to satisfy and reassure the accomplishment of some foremost and rudimentary stipulations that is to say, the meeting was appropriately called together and conducted; the compromise was a real compromise; it was accepted by a competent majority; the majority was acting in good faith and for common advantage of the whole class; what they

did was reasonable, prudent and proper; the court should also satisfy itself as to whether the provisions of the statute have been complied with; whether the scheme is reasonable and practical or whether there is any reasonable objection to it; whether the creditors acted honestly and in good faith and had sufficient information; whether the court ought in the public interest to override the decision of the creditors and shareholders. Where all the requisite formalities were complied with including shareholders' approval, the court would not question the commercial wisdom behind the scheme. (Ref: A. Ramaiya, Guide to the Companies Act, 17th Edition 2010).

11. The role and character of the court in the alike matter is of supervisory nature which is also close to judicial review of administrative action. However, in case court finds that the scheme is fraudulent or intended to be cloak to recover the misdeeds of the directors, the court may reject the scheme in the beginning. The court can lift the corporate veil for the purpose of ascertaining the real motive behind the scheme. In the case of Sidhpur Mills Co. Ltd. (AIR 1962 Guj. 305), the learned Judge while pointing out the correct approach for sanctioning of scheme held that the scheme should not be scrutinized in the way a carping critic, a hairsplitting expert, a meticulous accountant or a fastidious counsel would do it, each trying to find out from his professional point of view what loopholes are present in the scheme, what technical mistakes have been committed, what accounting errors have crept in or what legal rights of one or the other sides have or have not been protected. But it must be tested from the point of view of an

ordinary reasonable shareholder acting in a business-like manner taking with his comprehension and bearing in mind all the circumstances prevailing at the time when the meeting was called upon to consider the scheme in question.

12. At the moment, the petitioners have applied for demerger so that they may transfer the petitioner No.2 specific portions of the undertaking of the petitioner No.1 (demerged assets) as depicted in the Scheme of Arrangement. The demerged company connotes and exemplifies a conglomerate (transferor company) whose undertaking is transferred pursuant to demerger to a resulting company (transferee company) whereas the resulting company (transferee company) means a company to which the undertaking of the demerged company is transferred in a demerger and the resulting company in consideration of such transfer of undertaking issues shares to the shareholders of the demerged company. The transfer pursuant to a scheme of arrangement becomes the property of the resulting company by virtue of the demerger; all the liabilities relating to the undertaking, being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting company by virtue of the demerger; the property and the liabilities of the undertaking or undertakings being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger; the resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis.

13. So far as the connotation and ramification of “Swap ratio” is concerned, it is basically an exchange ratio in which the shares of the target company are swapped for a share in the acquiring company. This ratio largely depends on the total value of assets of the target company; though, at times, it can also depend on negotiations and the benefits that the acquiring company will be receiving by taking over the operations of the target company. A swap ratio's rationale is to give investors the same relative value in the shares of the new company so that the investment remains relatively unaffected from an investor's perspective. Such an arrangement is essential in giving the same amount of confidence to investors even after the merger or acquisition goes through. At the same time, it is not fair for the investors of the acquiring company to offer high returns for the investors of the target company. This is why the swap ratio is kept reasonable to maintain an equilibrium between the investors of both companies.

(<https://www.divestopedia.com/definition/5596/swap-ratio>)

14. Being a sanctioning court I have noticed that all requisite statutory procedure and formalities have been complied with by the petitioners including the holding/convening the requisite meetings as contemplated under the relevant provisions and rules of Companies Ordinance 1984 and the resolutions passed by the members have already been highlighted. The scheme set up for sanction has been reinforced and fortified by the requisite majority which decision seems to be just and fair. The report/minutes of meetings unequivocally convey that all essential and fundamental characteristics and attributes of scheme of arrangement

were placed before the voters at the concerned meetings to live up to statutory obligations. The proposed scheme of compromise and arrangement is not found to be violative of any provision of law and or contrary to public policy. The scheme as a whole look like evenhanded and serviceable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant. Once the requirements of a scheme for getting sanction of the court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval of the scheme. The attribute and module with regard to swap ratio is mentioned in Article 9 of the scheme and before accepting or conceding to the scheme of arrangement the ins and outs with its finer points were comprehended and discussed by the voters in their separate meetings thereafter they accepted the arrangement by majority. Neither any objection was raised by them to the scheme of arrangement nor did they point out any mistake in the process of valuation with regard to swap ratio, nor could the representative of SECP point out any conspicuous or detectable shortcoming or flaw. However one important factor cannot be disregarded which is manifesting from paragraph 11 of the petition that due to urgency in the matter, the petitioners could not file pre-merger application for approval of Competition Commission in terms of Competition Act 2010 and started merger procedure without prior approval but simultaneously they have assured and undertaken that consummation of merger/demerger shall be subject to the approval/no

objection of Competition Commission of Pakistan if required.

15. As a result of above discussion, the Scheme of Arrangement for the transfer of specific portions of undertaking of petitioner No.1 (demerged assets) to the petitioner No.2 is sanctioned as prayed in terms of Section 287 of the Companies Ordinance 1984 but before demerger implementation, the petitioners shall also obtain approval of Competition Commission of Pakistan if required under Section 11 of the Competition Act 2010. The petition is disposed of accordingly.

Judge