ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
J.M No.26/2007

Date	Order with signature of Judge

Date of hearing : 20.02.2008

Shaikh Muhammad Fazal Rahim & another Petitioner : through Mr.Mukhtair Ahmed Mughal Advocate.

Andrew Stearmose and others., Respondents : Nemo for Respondents No.1, 2 &3.

Ms.Nitasha Jhangir Assistant Director Law for Respondent No.4.

ORDER

KHALID ALI Z. QAZI.J.- This is a petition under Section 494 read with Section 68, 69, 70, 73, 86 and 146 of the Companies Ordinance, 1984, through this petition petitioner requested for cancellation of Form-3 dated 22.11.2006 by substitution of revised Form-3 dated 22.11.2006 and direction to SECP for issuance of commencement of business certificate filed by the petitioner on 11.7.2007 and on 08.10.2007 notice to other side was issued and matter was again listed in Court on 12.11.2007 it appears as per bailiff report that service upon the defendant No.4 Security & Exchange Commission of Pakistan is held good. On 29.11.2007 one Raja Naeem Akber Assistant Director SECP posted at Islamabad appeared and requested for some time to file comments / written statement and on 17.12.2007 Ms.Nitasha Jahengir Assistant Director Law Karachi appeared and requested time for filing comments same was filed on 09.1.2008.

Brief facts of the case requisite for disposal of this petition are that the Petitioners are the Chairman and Directors of Milergo Pakistan Limited unquoted public company limited by shares duly registered vide Registration No. K-011905 of 2005 dated 7th December, 2005 under the provisions of the Companies Ordinance, 1984 with the objects to produce wind, wave and solar energy hydel power electricity generation and its Registered Office is situated within jurisdiction of this Hon'ble Court.

1. Mr.Mukhtair Ahmed Mughal learned counsel for the petitioner contended that Respondents No. 1, 2 and 3 agreed to subscribe 100 shares stipulated in the Memorandum & Articles of Association against their names but

no subscription money / amount of above shares remitted / Deposited into the Company's Bank Account till the date of filing this petition, therefore, Hon'ble Court direct SECP to accept Form-3 dated 19.04.2007 for allotment of 600 shares stipulated in the Memorandum & Articles of Association for rectification the record of the Company. It is further urged that the Milergo Pakistan Limited is a Public unquoted Company limited by shares required as per Article 5 of the Articles of Association of the Company the minimum subscription Rs.500,000/- from the Sponsors Directors of the Company in pursuance of Section 68 (8), 69 and 146 of the Companies Ordinance, 1984 and it should have deposited in the Company's Bank account and this is mandatory requirement of law which qualify the Shareholders to become Directors of the Company and Respondents No.1, 2 and 3 not deposited / remitted a single penny into the Company's Bank Account for qualification shares to qualify to become the Directors of the Company as yet.

2. Learned counsel urged that Respondent No.1 was ineligible under section 187 (h) of the Companies Ordinance, 1984 and under Article 5 of Article of Association of the Company to act as Director. He made a first allotment of 39,400/- without intimation to other Directors / shareholders under section 86 of the Companies Ordinance, 1984 and filed with his signature as Director a Form 3 dated 22.11.2006 and also Circular 86(3) on 24.11.2006 for the said first allotment without deposit the amount fixed in Article 5 of Articles of Association and increased capital amount into the Company's Bank Account and violated Article 5 of Association and provisions of Sections 68, 69, 70, 73, 86 and 146 of the Companies Ordinance, 1984. learned counsel stated that it is pertinent to note that the Officials of Respondent No. 4 being the regulator disregarded mandatory requirements of first allotment and not demanded the Bank Certificate of the amount of first allotment deposited into the Company's Bank Account from the Respondent No. 1 and other compliance under the provisions of Sections 68, 69, 70, 73, 86 and 146 of the Companies Ordinance, 1984 and Article 5 of the Articles of Association of the Company and registered Form 3 dated 22.11.2006 and Circular 86 (3) with various defects / illegalities and violated Rule 11 of the Companies (Registration Offices) Regulations, 2003 by the officials of Respondent No. 4 by registration illegal / defective documents Form 3 dated 22.11.2003 and Circular 86 (3) learned counsel seeks direction to Respondent No.4 to cancel Form 3 dated 22.11.2006 filed and signed by Respondent No.1 and accept Revised Form 3 dated 22.11.2006 for rectification the record of the Company under Regulation 11 (3) of the Companies (Registration Offices) Regulations, 2003.

3. Learned counsel contended that the Petitioner No.2 filed a complaint dated 8th January, 2007 to Respondent No.4 for cancellation of Form 3 dated 22.11.2007 and also Circular 86(3) signed and filed by Respondent No.1 and pointed out various defects / illegalities and non compliance of the requirement of law and no payment / remittance of increased capital amount, subscription amount received in Company's Bank Account from Respondent No.4 till the date of filing this petition. It is further stated that Petitioner No. 2 again filed a complaint dated 30th March, 2007 pointed out the Respondent No.4 that no action taken on her complaint dated 08.01.2007 for cancellation of illegal filing and registration of illegal Form 3 dated 22.11.2007 and Circular 86(3) both signed filed by Respondent No.1 to Respondent No.4 without deposit / remit the amount of first allotment and increased capital amount into the Company's Bank Account by Respondent No.1, 2 and 3.

4. Learned counsel urged that the Petitioner No.2 complaint dated 30.3.2007 for not deposit of increased capital amount, minimum subscription amount and subscribed amount of 100 shares stipulate in the Memorandum and articles of Association of the Company against their names into Company's Bank Account along-with Copy of Company's Banker Certificate in which certified that no single copper amount / remittance received in the Company's Bank Account from Mr. Andrew Staermose, Mr. Simon Egan and Dirk Reidel forwarded to Respondent No.1 by the Securities & Exchange Commission of the Pakistan vide their letter No.K-11905 /Com/2007/17829 dated 09.4.2007 along with Bank Certificate which was not judicially examined by Respondent No.4. On receipt of the Respondent No.4 Letter, Complaint and Bank Certificate no single penny amount deposited in the Company's Bank Account by Respondent No.1 to 3. It appears that they have not qualified himself to be the Shareholders of the Company and in response of Respondent No.4 letter submitted their resignation letters and Form 29 through E-mail to Respondent No. 4.

5. Learned counsel contended that as per Article 40 of the Articles of Association of the Company Sheikh Muhammad Fazal Rahim shall be the Chief Executive and Chairman of the Company and the business of the Company is run and managed by the Chief Executive but Respondent No.1 violated Article 40 of the Articles of Association in exercising the powers of Chairman and Chief Executive of the Company and making the Complaints as Chairman to Respondent No.4 through E-mail and Respondent No.4, put the company dormant on the complaint of illegal Chairman, Respondent No.1 and the company could not obtain Commencement of Business Certificate and certified copies of documents from Respondent No.4 as yet. It is stated that the

Respondent No.1 allotted 32100 shares to M/s. Milergo Holdings Limited, UK in the said Form-3 dated 22.11.2006 without remit / deposit of increased capital amount into the Company's Bank Account by M/s. Milergo Holdings Limited UK and Ministry of Finance, Government of Pakistan, Finance Division has obtained financial due diligence report of Milergo Holding Ltd, UK. Learned counsel stated that according to the report the financial and corporate structure of M/s. Milergo Holdings Limited is not sound and offer for investment of US $ 500 Million is not a genuine.

6. Learned counsel contended that the Respondent No.4 without care of statutory provisions of first allotment of shares under Sections 68, 69, 86, 73 and 146 of the Companies Ordinance, 1984 and Articles 5 of Articles of Association of the Company and without demanding the Bank Certificate for the amount of first allotment from the Respondent No.1 and various irregularities and illegalities registered Form-3 dated 22.11.2006 and also Circular 86 (3) of the Companies Ordinance, 1984. The Petitioner No.2 sent her complaints dated 08.01.2007 and 30.03.2007 to Chairman, Commissioner Company Law, Registrar of Companies and Additional Registrar of Respondent No.4 but the answer has not been received from the Defendant No. 4 as yet. It is stated that Revised Form-3 is liable to be processed and brought on record by the Respondent No.4 but Respondent No.4 is not performing statutory duties and Respondent No.4 are not acting in accordance with law. The Petitioner Company sent legal notice dated 13.06.2007 but the same was not replied sofar. It is further contended that the Petitioners are condemned unheard and no response is assigned to the Petitioners that why the Respondent No.4 is not issuing Commencement of Business Certificate. The Petitioner Company is public unquoted Company limited by shares is placed in dormant by the Respondent No.4 for the reasons best known to them. The Petitioners were informed through letter dated 27.04.2007 by the Respondent No.4 that Commencement of Business Certificate is not issued due to some dispute.

7. Learned counsel stated that since the respondent No.1, 2 and 3 have not paid amount in respect of subscription of their share therefore, the earlier Form 3 submitted is liable to be cancelled and direction may be issued to the respondent No. 4 to accept Form 29 dated: 16.04.2007 as respondent No. 4 him self is not entitled to cancel earlier Form 3 without orders / direction of this Hon'ble Court.

8. Petitioners through this petition have prayed for the following relief;

a) Cancellation of Form-3 dated 22.11.2006 filed with Respondent No.4 in violation of the provisions of the Companies Ordinance, 1984 and

accept Revised Form-3 dated 22.11.2006 submitted to Respondent No.4 on 22.11.2007.

b) Cancellation of 300 shares stipulated in the Memorandum & Articles of Association against the names of Respondents No. 1, 2 and 3 and accept the Form 3 dated 19.04.2007 submitted to Respondent No. 4 23.04.2007.

c) Issuance of Direction to Respondent No.4 to issue Commencement of Business Certificate which had been with held by Respondent No. 4.

9. The Additional Registrar of Companies, Karachi filed the parawise comments wherein he raised the following preliminary objections.

It is stated that M/s. Milergo Pakistan Limited (hereinafter referred as the "Company") was formed by 4 foreigners (hereinafter referred to as the Foreign Group) and 2 local shareholders (hereinafter referred as the Local Group). It is contended that there are very serious disputes among the Foreign Group and Local Group with regard to the allotment of the shares of the Company. The allotments of shares reported by both the groups have been disputed by each other. In the circumstances it is not possible for the Answering Respondent to issue a Certificate of Commencement of Business till the settlement of the disputes among the share-holders. It is pertinent to mention here that Answering Respondent has no objection whatsoever to the issuance of Certificate of Commencement of business under section 146 of the Companies Ordinance, 1984 provided that the disputes among both the groups of shareholders are resolved and all the requirements of law are complied with.

It is stated that in the titled matter, the office of the Answering Respondent was unable to take any action on the request of the Petitioners for the cancellation of the shares allotted by the Respondent No.1 as reported vide Form 3 dated 22.11.2006, since the power of declaring that shares have been allotted for inadequate consideration, and subsequent reparation to the company rests with the Honorable Court in terms of Section 494 of the Companies Ordinance, 1984. The said fact and established law was brought in the knowledge of Chief Executive of the Company vide letter dated 27.4.2004.

On the factual position parawise comments were as under:-

i. It is urged that it cannot be confirmed from the record of the Company that any of the Petitioners is the Chairman of the Company as under the provisions of the Companies Ordinance, 1984 no intimation is required to be sent to the Answering Respondent in this regard. The rest of contents of the corresponding para are correct as per the record.

ii. It is further stated that it is correct to the extent that Respondents No.1, 2 and 3 to subscribe 100 shares each as stipulated in the Memorandum and Articles of Association of the Company. It is also correct that Form 3 dated 19.4.2007 has been filed by the Local Group in the office of the Answering Respondent but keeping in view the dispute among the shareholders and a totally different position from that of the subscriber's page of the Memorandum and Articles of Association of Company the Answering Respondent has not yet accepted the same. Rests of the assertion in the para under reply are denied for want of knowledge.

iii. It is contended that it is confirmed that Article-5 of the Articles of Association of the company requires a minimum subscription of Rs. 500,000/- only. The remaining contents of the corresponding paragraph are denied for want of knowledge.

iv. It is urged that all the allegations leveled against the Answering Respondent in the corresponding paragraph are incorrect, false, against the law and facts, hence vehemently denied. It is confirmed that Respondent No. 1 has filed a circular under section 86(3) and Form-3 dated 22.11.2006 reporting the allotment of 39,400 shares of the Company worth Rs. 394,000/-. Since no dispute between the parties was on the record of the Answering Respondent, the said documents were duly registered on 28.11.2006 in accordance with provisions of the Companies Ordinances, 1984.

v. It is correct as per the record of the Answering Respondent that a complaint from Petitioner No. 2 dated 8.01.2007 for the cancellation of Form-3 and Circular 86(3), dated 22.11.2006 (Incorrectly stated as 22.11.2007 in the petition) was received. It is incorrect to suggest that no action was taken by the Answering Respondent, in fact a copy of the complaint from the petitioner No. 2 was referred to the Company vide Letter No. K-11905/Com/2007/11281 dated 9.1.2007 for their comments but no response was received. However, Respondent No. 1 vide his email of 9.3.2007 informed that the CEO i.e. Petitioner No. 1 and his wife were trying to register allocation of shares and increase the share capital without the required board resolution. It is further urged that above mentioned complaint of the Petitioners is questioning allotment of shares to the Respondent No.1 to 3 without deposit/remittance of amount. It is pointed out that the power for cancellation of shares allotted for inadequate consideration rests with this Honorable Court in terms of Section 494 of the Companies Ordinance, 1984.

vi. It is stated that the contents of the corresponding para are admitted to the extent that Answering Respondent had received a complaint from Petitioner No.2 dated 31.01.2007. it is further stated that the rest of the assertions in the para under reply are denied as incorrect and false.

vii. It is urged that no comments on the fact as to whether or not money has been received/deposited in the company's bank account, as these facts are neither required nor known to the Answering Respondent. It is stated that rests of the assertions and allegation made against the Answering Respondent are

denied for as being, incorrect and against the law and facts of the matter. It is important for the brevity of the facts that a copy of the complaint from the Petitioner No.2 was referred to respondent No.1 vide Letter No. K-11905/Com/2007/17829 dated 9.4.2007. It is stated that in response thereof Respondent No.1 vide email dated 17th April 2007 supported with the resignations of Respondent No.2 and 3, informed about his decision regarding his resignations from the office of Chairman and Director as well as the other two foreigners Mr.Simon Egan and Mr.Dirk Reidel from the office of the Director.

viii. It is stated that contents are correct to the extent that Respondent No.1 has shown himself to be the Chairman of the Company in his e-mail of March 9, 2007 i.e. more than one year after the date of incorporation of the Company, and the referred letter dated 27.04.2007 by the Answering Respondent simply states that there is a dispute among he shareholders of the company and the Chief Executive was advised to settle the matter through the Court. It is stated that rest of the assertion in the corresponding para needs no comments.

ix. It is urged that contents are correct as per the record that Form-3 dated 22.11.2006 reports the allotment of 32,100 shares of Milergo Pakistan Limited to Milergo Holdings Limited, UK. It is further urged that rest of the assertions need no comments as do not pertain to answering Respondent.

x. It is contended that the contents of the corresponding para are vehemently denied as being incorrect and false. It is stated that it is important to point out that Form-3 dated 22.11.2006 was recorded accordingly. It is also incorrect to suggest that the complaint of Petitioner No.2 was not responded to, in fact the said complaint was forwarded to the Respondent No.1 and his reply was consequent forwarded to the Petitioner No.2 vide letter dated 27.4.2007.

xi. It is urged that the contents of the corresponding para are denied as being incorrect and false. It is admitted that revised Form-3, dated 22.11.2006 was received in the office of the answering Respondent on 22.05.2007. The said form is not recorded as same contain a completely different position of allotment of shares from the earlier Form-3 dated 22.11.2006 already accepted/recorded by the answering Respondent. It is correct that legal notice dated 13.6.2007 was received in the office of the answering Respondent on 14.6.2007. It is further stated that however, it is denied as being incorrect that same was not replied. In fact, the answering Respondent replied to the said legal notice vide letter No. CLD/RD/602(1)2006-07-1457 dated 10.07.2007.

xii. It is contended that the contents of the corresponding para are denied as being incorrect, false and against the law and facts. The following are the grounds on which the answering Respondent is not issuing Commencement of Business Certificate to Milergo Pakistan Limited. These are very serious dispute among the Local and Foreigner Groups of shareholders of the company, various conflicting returns have been filed with the answering Respondent and incomplete documents submitted by the Company.

10. Learned Addl. Registrar of Companies stated that he has no objection to the issuance of certificate of commencement of business under Section 146 of the Companies Ordinance, 1984.

11. The notices of main petition were served on 24.3.2008 the non-official respondents through Ministry of Foreign officials Government of Pakistan. Their report was taken on rec ord on 8.4.2008. The summons were also dispatched earlier by this Court through courier service on 2.11.2007 and through Fax. Original fax report and couriers service were filed by the learned advocate for petitioner on 20.11.2007. The service was held good on 8.4.2008 and matter was ordered to be proceeded exparte against non-official respondents and fixed for final disposal on 15.4.2008. The Respondent No.1, 2 & 3 did not filed any comments or written statement. The respondent No.4 filed written parawise comments and had given their no objection for issuance of certificate of commencement of business under Section 146 of the Companies Ordinance, 1984, provided the dispute between the local and foreign shareholders are settled and complete documents for commencement are filed as required in law.

12. In the given circumstances of the petition. I am of the view that respondent No.1 allotted 32100 shares to M/s.Milergo Holdings Ltd., UK in the said Form 3 dated 22.11.2006 without remit/deposit of increased capital amount into the company's bank account by M/s.Milergo Holdings Limited UK and Ministry of Finance, Government of Pakistan has obtained Financial due diligence report of M/s.Milergo Holdings Ltd., U.K. According to the report, the financial and corporate structure of M/s.Milergo Holdings Ltd., is not sound and offer for investment of US$ 500 million was not a genuine. Furthermore, the respondents No.1, 2 & 3 had not deposited the required amount of increased capital amount, minimum subscription amount and subscribed amount of 100 share as stipulated in the Memorandum and Articles of Association of the company against their names into the company's Bank Account. It appears that they have not qualified themselves to be the shareholders of the company in view of the facts disclosed in para 4 of the petition, consequently, the petitioner, had successfully made out a case for grant of the relief as claimed.

In view of the above, petition is allowed as prayed in main application with no order as to costs.

Karachi
Dated:_____ J U D G E

SYNOPSIS

The petitioner above named filed the present petition with the prayer for cancellation of Form 3 dated: 22.11.2006 filed with the respondent No. 4 which is the violation of provisions of the Companies Ordinance 1984 and accept revised Form 3 submitted to the respondent No. 4 on 22.05.2007. Further prayed for cancellation of 300 Shares stipulated in the Memorandum and Article of Association against the names of respondent No. 1, 2 and 3 and accept the Form 3 dated 19/04.2007 to the respondent No. 4 and direction is to be issued to the respondent No. 4 for the issue of commencement of business certificate.

It is the settled law as per Sec 69 of the Companies Ordinance 1984 that the first allotment is to be made on payment of Rs.5 Lac i.e. 50,000/- shares of Rs.10 each and all the directors shall subscribe the payment of Rs.5 Lac each.

That the respondent No. 1, 2 and 3 have not fulfilled the requirement of Sec 146 of the Companies Ordinance 1984 therefore, the respondent No. 1, 2 and 3 are not entitled for the post of Director Ship as no payment or foreign remittance was made by the above said respondents for which Allied Bank Limited issued certificate dated: 21.03.2007 which is available as Annexure “B-3” on page No. 47.

That the respondent No. 4 in their reply has given No Objection to the issuance of Certificate of Commencement of business U/S 146 of the Companies Ordinance 1984.