2015 C L D 2010

[Sindh]

Before Muhammad Shafi Siddiqui, J

GADOON TEXTILE MILLS LIMITED and 2 others: In the matter of

J. Misc. Petition No. 41 of 2014, decided on 4th June, 2015.

Companies Ordinance (XLVII of 1984)---

----Ss. 284, 285, 286, 287 & 288---Demerger of companies---Collective business decision---Scope---Determination of consideration including the commercial aspect of the merger along with manner of the swap ratio was primarily and substantially the prerogative of the members of the respective companies---Businessmen had to take decision considering all the pros and cons of demerger and merger of companies---While taking such decision there would be chances of success and failure but while questioning such decision the bona fides was the real test---Businessmen could take decision foreseeing the future aspect---Court could only see that all the legal formalities had been fulfilled and scheme was neither unjust nor unfair or against the national interest but could not challenge the wisdom of a decision of businessmen---While demerging shares of Real Estate and Textile the representatives or shareholders might decide to keep them separately which could not be challenged before the court---Company was conducting two business which were being separated---Advantages and disadvantages of keeping them together would remain there by disassociating the two businesses and their shareholding---Both would separately yield profit and loss hence the cumulative effect of the net result would not matter---Proposed scheme was based on the principle that each shareholder would get its respective share in terms of percentage that he was in collective business---Petition for demerger of companies was granted.

Dewan Salman Fiber v. Dhan Fibers Limited PLD 2001 Lah. 230; Brooke Bond (Pakistan) Limited v. Aslam Bin Ibrahim 1997 CLC 1873; Lipton Pakistan Limited's case 1989 CLC 818 and Aslam Bin Ibrahim v. Monopoly Control Authority PLD 1998 Kar. 295 rel.

Arshad Tayebaly for Petitioners.

Munawwar Awan along with Muhammad Nasir, Deputy Registrar, SECP for Securities and Exchange Commission of Pakistan.

Date of hearing: 6th May, 2015.

JUDGMENT

MUHAMMAD SHAFI SIDDIQUI, J.---This petition pertains to de-merger of petitioner No.2 with its merger and amalgamation arrangement as of petitioners Nos.1 and 3 respectively. The purpose of the petition is approval of the scheme of arrangement dated 29-12-2014 attached as Annexure H to the petition. In substance petitioner No.2 i.e. Fazal Textile Mills Limited is required to be de-merged and separated into two components/undertaking i.e. Real Estate Undertaking and Textile Undertaking.

It is claimed that the Real Estate Undertaking shall be merged with and into petitioner No.3 i.e. Lucky Landmark Private Limited in consideration for which shares of petitioner No.3 shall be issued to YBG shareholders, whereas Textile Undertaking shall be merged with and into petitioner No.1 i.e. Gadoon Textile Mills Limited in consideration for which shares of the petitioner No.1 shall be issued to other shareholders and YGB shareholders in different ratio. Petitioner No.2 shall then stand dissolved without winding up process.

Learned counsel for petitioners in this regard has referred to Scheme of Arrangement and recommendation, consideration and approval of swap ratio calculation in respect of the envisaged scheme of arrangement between and amongst the petitioners. It is urged by the learned counsel that in terms of order dated 1-1-2015 petitioners completed all necessary legal formalities, including holding separate meetings of shareholders and creditors, requisite publication and issuance of notices to the Securities and Exchange Commission of Pakistan. It is urged that in terms of such meetings of the shareholders and secured

creditors to the extent it is applicable and report pertaining to such meetings are available on record and not a single shareholder or secured creditor of any of the petitioners objected to the scheme. Hence, the petitioners have prayed that the petition be allowed as prayed.

In response to the above, the Joint Registrar of Companies SECP not only filed its parawise comments but its law officer appeared and contested the claim of the petitioners and argued the matter in detail and has in substance raised following points:-

(i) The other shareholders are not being issued shares of petitioner No.3

(ii) Valuation of the Real Estate Undertaking does not take into account discounted cash flow method when calculated the swap ratio and

(iii) Since the shares of the petitioner No.2 are not frequently traded as shares of the petitioner No.1, lower weightage should be given to market capitalization of the petitioner No.2's share while calculating the swap ratio.

Hence, it is submitted by the law officer SECP that the subject scheme is unjustified and prejudicial to the interests of some of the shareholders. It is further contended that since minority shareholders of petitioner No.2 have been deprived of the principal choice i.e. whether they want to retain the exposure in Real Estate Undertaking or not therefore it (subject scheme) cannot be said to be justified.

It is further contended on behalf of SECP that Messrs A.F. Ferguson and Co. Chartered Accountants were engaged for calculating swap ratio in respect of envisaged scheme of arrangement between FTML and its members, GDML and its members and LLPL and its members and they have worked out the swap ratio without realizing it (the subject scheme) to be just and equitable.

Heard learned counsel for the parties and perused the material available on record.

The scope of this petition is to the extent of sanctioning the scheme of arrangement between and amongst the petitioners. The SECP in substance has raised questions as to the valuation of Real Estate Undertaking which has not been considered on the basis of discounted cash flow method and that since the petitioner No.2 are not frequently traded as the shares, of the petitioner No.1, therefore, lower weightage should be given to market capitalization of the petitioner No.2's shares while calculating the swap ratio.

In this regard I may observe that the determination of the consideration, including the commercial aspect of the merger along with manner of the swap ratio, is primarily and substantially the prerogative of the members of the respective companies.

In the case of Dewan Salman Fiber v. Dhan Fibers Limited reported in PLD 2001 Lahore 230 it has been observed that where required majority of the members of both of the company has approved the resolution for merger of both the companies the sanction for merger could not be withheld unless it was shown that same was unfair, unreasonable or against the national interest. It was further observed that the shareholders were best judges of their interest and were better informed with the market trends than the Court, which was least equipped in evaluating such trends.

In the case of Brooke Bond (Pakistan) Limited v. Aslam Bin Ibrahim reported in 1997 CLC 1873, the approach was channelized to ascertain (i) whether the statutory requirements were complied with and (ii) to determine whether the scheme as a whole has been arrived at by the majority, bona fide and the interest of whole body of shareholders in whose interest the majority purported to act and (iii) whether scheme is such that fair and reasonable shareholder will consider it to be for the benefit of the company for himself. The Court went on to observe that it should not be scrutinized in a way a craping critic, a hair splitting expert, a meticulous accountant or a fastidious counsel would do it. Each try 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 side have or have not been protected. It must be decided from the point of view of an ordinary reasonable shareholder acting in a businesslike manner. It was further observed in the cited judgment that if a required majority of the members of the company have approved the resolution for a merger or de-merger, in such circumstances sanction cannot be withheld unless it is shown that it is unfair, unreasonable or against national interest.

In another case of Lipton Pakistan Limited reported in 1989 CLC 818 after considering and agreeing with the judgment of Lord Lindley L.J.S. in the case of Alabama New Orleans, Texas and Pacific Junction Railway Company (1891) 1 Ch. 213 observed that the Court is required to see whether the provisions of Statute have been complied with and that the majority has been acting in favour and that the minority is not being overridden by majority. The Court has to look at the scheme and see whether it is one as to which persons acting honestly and viewing the scheme laid before them in the interest of those whom they represent, take a view which can be reasonably taken by businessmen.

In the case of Aslam Bin Ibrahim v. Monopoly Control Authority reported in PLD 1998 Karachi 295, learned Division Bench of this Court observed that the Court is to see whether the Resolution has been passed by the requisite majority and that the members participating in the meeting were real representative of the class to which they belonged. As to victimization, the Court would cautiously address the question whether merger was not calculated to neutralize and render toothless an effective minority.

To question the de-merger and merger it is rather to be seen from the perception that a wise group of businessmen has taken a decision considering all its pros and cons. While taking such decision there are chances of success and failure but then while questioning such decision the bona fide is the real litmus test. A businessman takes decision foreseeing the future aspect. The Court could only see that all legal formalities have been fulfilled and that the scheme is neither unjust nor unfair or against the national interest but cannot challenge the wisdom of a decision of businessman as by doing that the Court would be overriding the wisdom of a businessman and their prerogative. There are advantages and disadvantages attached to a business decision and if the majority of group has subscribed to it, prima facie bona fide stands proved. While de-merging shares of Real Estate and Textile the representatives or shareholders may have in their collective wisdom decide to keep them separately which could not be challenged before the Court as it is a collective business decision. Prima facie it appears that the petitioner No.2 was conducting two businesses i.e. of Real Estate and Textile which are being separated. Advantages and disadvantages of keeping them together would remain there by disassociating the two businesses and their shareholding. Both separately would yield profit and loss and hence the cumulative effect of the net result would not matter.

Thus, the financial or any other advantage or disadvantage in a corresponding ratio are divided but not in a manner which could deprive any of the shareholders as the proposed scheme is based on the principle that each shareholder would get its respective share in terms of percentage that he is in collective business. In that regard the report of Messrs A.F. Ferguson and Co. Chartered Accounts is also very material who were engaged for calculating the swap ratio in respect of envisaged scheme of arrangement between the companies.

In view of the above, I do not see any impediment in granting this petition, which is accordingly allowed as prayed.

ZC/G-15/Sindh Petition allowed.