

2013 C L D 7

[Sindh]

Before Sajjad Ali Shah, J

METRO CASH AND CARRY PAKISTAN (PRIVATE) LIMITED ETC.

Judicial Miscellaneous Application No.8 of 2012, decided on 11th June. 2012.

Badaruddin F. Vellani for Petitioners Nos. 1 and 5, Omer Soomro for Petitioners Nos.2 to 4. Shokat Hayat Alizai, Deputy Director S.E.C.P. present in person.

Date of hearing: 30th May, 2012.

ORDER

Petition accepted.

[COMPANIES ORDINANCE 1984]....Sections 284 & 287---Scheme of arrangements between two companies--Factors essential to be considered for sanctioning the scheme by High Court stated.

High Court while exercising its discretion in favour of scheme of arrangement has to ensure, firstly, as to whether all statutory requirements have been fulfilled, secondly, whether all classes of shareholders have been fairly represented, and thirdly, whether scheme of arrangement would be acceptable to an ordinary businessman. The court is not supposed to scrutinize the scheme of arrangement with that much care with which an expert would scrutinize or with the intent of picking holes in it. If the statutory required majority of the shareholders acting in a bona fide and honest manner approve a scheme of arrangement or compromise which normally a fair minded person, reasonably acquainted with the facts of the case can regard it as beneficial for those whom the majority seeks 'to represent, then, unless there are some strong and cogent grounds to show that the scheme was conceived, designed or calculated to cause injury to others, the court ordinarily would sanction the scheme.

Powers to facilitate reconstruction and amalgamation of the companies have been conferred upon the court by virtue of section 287 of the Companies Ordinance, -1984, subsection (1)(f) whereof clothes the court with the powers to direct for such incidental, consequential and supplemental matters while sanctioning the compromise or arrangements, as are necessary to carry out the reconstruction or amalgamation fully and effectively.

Reference (1997) 88 Companies Case, 596 ref.

SAJJAD ALI SHAH, J.---Petitioners Metro Cash & Carry Pakistan (Private) Limited (MCCP), Makro-Habib Pakistan Limited (MHPL), Habib-Metro Pakistan (Private) Limited (HMPL), A-One Enterprises (Private) Limited (AOEL) and Metro Group Real Estate Pakistan (Private) Limited [MGRE] seek sanction" of this Court under section 284 of the Companies Ordinance, 1984 (hereinafter referred to as "Ordinance of 1984") for adopting a scheme of arrangement for their reconstruction and of course facilitating orders under section 287 of the Companies Ordinance in connection with their proposed reconstruction.

Through the Scheme of arrangement it is proposed, to transfer and vest in HMPL the Real Estate Undertakings of MCCP and MHPL (other than the Saddar property), to transfer and vest in MCCP the MHPL Cash Carry Undertaking including the MHPL Cash & Carry Business and all assets, rights, liabilities and obligations pertaining thereto, to transfer and vest in AOEL the MHPL Multan Road Real Estate Undertaking, and to further transfer and vest in MGRE' the MCCP Sialkot Real Estate

Undertaking, the allotment of fully paid up ordinary shares of MCCC to the registered holders of the ordinary shares of MHPL in accordance with their entitlements determined by the Chartered Accountants, the allotment of fully paid up ordinary shares of HMPL to the registered holders of the ordinary shares of MCCC and MHPL in accordance with their entitlements determined by the Chartered Accounts. The allotment of fully paid up ordinary shares of the AOEL to the registered holders of the ordinary shares of MHPL in accordance with their entitlements determined by the Chartered Accountants, the allotment of fully paid up ordinary shares of MGRE to the registered holders of the ordinary shares of MCCC in accordance with their entitlements determined by the Chartered Accountants, the reduction in the issued and paid up share capital of MCCC by the cancellation of the shares of MCCC to take into account the loss of MCCC Real Estate Undertaking and the MCCC Sialkot Real Estate Undertaking less the gain arising from the transfer to and vesting in MCCC of the MHPL Cash & Carry Undertaking, the reduction in the issued and paid up share capital of MHPL by the cancellation of the shares of MHPL to take into account the loss of the MHPL Cash & Carry Undertaking, the MHPL Real Estate Undertaking and the MHPL Multan Road Real Estate Undertaking, the change of the name of MCCC to METRO-Habib Cash & Carry Pakistan (Private) Limited, the continuation by or against the MCCC of the legal proceedings pertaining to the MHPL Cash & Carry Undertaking, instituted by or against MHPL, that may be pending, the continuation by or against HMPL of the legal proceedings pertaining to the MCCC Real Estate Undertaking and the MHPL Real Estate Undertaking being transferred instituted by or against MCCC and MHPL. as the case may be. that may be pending, the continuation by or against AOEL of the legal proceedings pertaining to the MHPL Multan Road Real Estate Undertaking by or against the MHPL. that may be pending, and the continuation by or against MGRE of the legal proceedings pertaining to the MCCC Sialkot Real Estate Undertaking instituted by or against the MCCC, that may be pending.

The respective Board of Directors of each petitioners on 21-03-2012 approved in the board meeting the scheme of arrangement, the certified copies whereof have been placed on record.

The creditors of MCCC and MHPL have consented to the Scheme of Arrangements by recording their no objection. No objections from the charge holders of MHPL as pointed out by the SECP have also been placed on record, Whereas there are no creditors so far petitioners HMPL, AOEL and MGEPL are concern.

Upon filing the instant petition an application under section 284(I) of the Companies Ordinance, 1984 was filed for necessary directions as contemplated under Rules 953 and 954 of the Sindh Chief Court Rules (Original Side) and Rule 56 of the Companies (Court) Rules 1997 for seeking permission to call separate meetings of the Members of the petitioners for the purposes of considering and if thought fit adopt and agreeing to the scheme of arrangements. The petition as well as application was duly advertised in various newspapers and since no objection was received this Court allowed the application and consequently petitioners in compliance of the order convened the meeting of its Members.

All the petitioners on 17th May, 2012 convened separate meetings of their members and in those meeting the members of petitioners Nos. 1 and 2, passed two resolutions respectively, the first one for approving and adopting the scheme of arrangement as required under section 284 of the Companies, Ordinance and the second for approving the reduction in paid up capital of petitioners Nos. 1 and 2. The Members of the petitioner No.1 approved and adopted the scheme of arrangement by the shareholders who represented 100% in value of the shares, present at the meeting either in person or by proxy. whereas the members of the petitioner No.2 approved and adopted the scheme of arrangement by the shareholders who represented 99% in value of the shares present at the meeting either in person or by proxy. Likewise both the petitioners adopted

the second resolution approving the reduction in paid up capital of petitioners Nos. 1 and 2 under section 96 of the Companies Ordinance by shareholders representing 100% and 99% in value of the shares respectively. The petitioner No.1 also adopted the resolution approving the change of name by shareholders representing 100% in value of the shares.

In the like manner members of petitioners Nos. 3, 4 and 5 also on 17th May, 2012 convened a meeting of its members and in the said meeting adopted the resolution approving and adopting the scheme of arrangement as required under section 284 of the Companies Ordinance through shareholders who represented 81.8%, 100% and 100% respectively in value of the shares either in person or by proxy.

The petitioners therefore seek following prayers:-

(a) sanction the Scheme of Arrangement as set forth in "Annexure A" hereto so as to make the Scheme binding on the petitioners and their members;

(b) the following orders under section 287 of the Companies Ordinance;

- (i) with effect from the Completion Date (as defined in the Scheme), the M CCP Real Estate Undertaking [as defined in the Scheme) as more particularly described in paragraph 1 of the Scheme as set forth in "Annexure A", hereto be transferred to and vested in petitioner No. 3 provided that if transfer of the M CCP - University Road Property (as defined in the Scheme) is restrained, the M CCP University Road Property shall not transfer to and vest in the petitioner No.3 with effect from the Completion Date but shall transfer to and vest in the petitioner No.3 ipso facto upon such restrain being vacated or upon permission being granted for the transfer of the M CCP University Road Property;
- (ii) with effect from the Completion Date, the MHPL Cash & Carry Undertaking (as defined in the Scheme) as more particularly described in paragraph 1 of the Scheme as set forth in "Annexure A" hereto be transferred to and vested in petitioner No. 1.
- (iii) with effect from the Completion Date, the MHPL Real Estate Undertaking [as defined in the Scheme] as more particularly described in paragraph 1 of the Scheme as set forth in "Annexure A" hereto be transferred to and vested in petitioner No.3;
- (iv) with effect from the Completion Date, the MHPL Multan Road Real Estate Undertaking (as defined in the Scheme) as more particularly described in paragraph 1 of the Scheme as set forth in "Annexure A" hereto be transferred to and vested in petitioner No. 4;
- (v) with effect from the Completion Date, the M CCP Sialkot Real Estate Undertaking (as defined in the Scheme) as more particularly described in paragraph 1 of the Scheme as set forth in "Annexure A" hereto be transferred to and vested in petitioner No.5;
- (vi) with effect from the Completion Date, the issued and paid up share capital of the petitioner No.1 be reduced by the cancellation of 551,776,678 shares of the petitioner No.1 and that notwithstanding the reduction aforesaid in the issued and paid up share capital of the petitioner No.1, the use of the words "and reduced" in relation to the name of the petitioner No.1 be dispensed, and that the Minute as set forth in paragraph 19 of this petition be confirmed and that the notice of the registration of

such Minute be published in at least one issue each of a daily newspaper in the English language and a daily newspaper in the Urdu language having circulation in the Province of Sindh;

- (vii) with effect from 90 days from the Completion Date, the issued and paid up share capital of the petitioner No.2 be reduced by cancellation of the shares as determined by A. F. Ferguson and notwithstanding the reduction aforesaid in the issued and paid up share capital of the petitioner No.2. the use of the words "and reduced" in relation to the name of the petitioner No.2 be dispensed with, and that the Minute as set forth in paragraph 20 of this petition be confirmed and that the notice of the registration of such Minute be published in at least one issue each of a daily newspaper in the English language and a daily newspaper in the Urdu language having circulation in the Province of Sindh;
- (viii) on the Completion Date, 201,529,290 ordinary shares of the petitioner No.1 be issued at par to Thal Limited and petitioner No.1 to issue share certificates in respect thereof;
- (ix) on the Completion Date. 136,035,408 ordinary shares of the petitioner No.3 be issued to METRO Cash & Carry International Holding B.V. and petitioner No.3 to issue share certificates in respect thereof;
- (x) on the Completion Date, 204,053,101 ordinary shares of the petitioner No. 3 be issued to Thal Limited and petitioner No.3 to issue share certificates in respect thereof;
- (xi) on the Completion Date, 17,749,310 ordinary shares of the petitioner No.4 be issued. to Thal Limited and petitioner No.4 to issue share certificates in respect thereof;
- (xii) on the Completion Date, 30,921,133 ordinary shares of the petitioner No.5 be issued to METRO Cash & Carry International Holding B.V. and petitioner No.5 to issue share certificates in respect thereof;
- (xiii) with effect from the Completion Date, the name of petitioner No.1 be changed to METRO-Habib Cash & Carry Pakistan (Private) Limited;
- (xiv) with effect from the Completion Date, all legal proceedings instituted by or against the petitioner No.1 in respect of the MCCP Real Estate Undertaking (as defined in the Scheme), which may be pending, shall be continued by or against the petitioner No.3 provided that all legal proceedings instituted by or against the petitioner No.1 in respect of the MCCP University Road Property (as defined in the Scheme) shall be continued by or against the petitioner No.3 only upon the transfer. to and vesting in the petitioner No.3 of the MCCP University Road Property;
- (xv) with effect from the Completion Date, all legal proceedings instituted by or against the petitioner No.2 in respect of the MHPL Cash & Carry Undertaking (as defined in the Scheme), which may be pending shall be continued by or against the petitioner No. 1;
- (xvi) with effect from the Completion Date, all legal proceedings instituted by or against the petitioner No.2 in respect of the MHPL Real Estate Undertaking (as defined in the Scheme), which may be pending shall be continued by or against the petitioner No.3;

- (xvii) with effect from the Completion Date, all legal proceedings instituted by or against the petitioner No.2 in respect of the MHPL Multan Road Real Estate (as defined in the Scheme), which may be pending shall be, continued by or against the petitioner No.4;
- (xviii) with effect from the Completion Date, all legal proceedings instituted by or against the petitioner No.1 in respect of the MCCP Sialkot Real Estate Undertaking (as defined in the Scheme), which may be pending shall be continued by or against the petitioner No.5;

Notices of the application as well as main petition were duly published in various newspapers throughout the country including Sindh Government gazette as well as gazette of Pakistan and pasted on the court's notice board but no objection has been received from any corner. Parawise comments on behalf of SECP have been placed on record in which SECP without any objection has left it for the Court to pass appropriate orders.

Though there may not be any objection before the Court opposing proposed scheme of reconstruction or reduction of share capital despite it is the mandate of law to scrutinize the proposed scheme of reconstruction to ascertain its benevolence before sanctioning it and by now it is well settled principle of law that the Court While exercising its discretion in favour of scheme of arrangement has to ensure, firstly, as to whether all statutory requirements have been fulfilled, secondly, whether all classes of shareholders have been fairly represented and thirdly, whether scheme of arrangement would be acceptable to an ordinary businessman. The Court is not supposed to scrutinize the scheme of arrangement with that much care with which an expert would scrutinize or with the intent of picking holes in it. If the statutory required majority of the shareholders acting in a bona fide and honest manner approve a scheme of arrangement or compromise which normally a fair minded person, reasonably acquainted with the facts of the case can regarded it as beneficial for those whom the majority seeks to represent, then, unless there are some strong and cogent grounds to show that the scheme was conceived, designed or calculated to cause injury to others, the Court ordinarily would sanction the scheme [reference (1997) 88 Companies Case, 5961. Keeping in View the principle of scrutiny and the fact that the scheme of arrangement after complying all statutory pre-requisites has been approved by over whelming majority of the shareholders I do not see any reason to reject the same and therefore, would approve it.

As to reduction in share capital of petitioners MCCP and MHPL, Mr. Badaruddin Vellani referred to an unreported order of this Court in the case of ICI Pakistan Limited (Judicial Miscellaneous Application No.46 of 2011 decided on 17-05-2012 where this Court while sanctioning scheme of arrangement has allowed reduction of share capital) to seek simultaneous reduction of share capital of the said petitioners. Suffice it to observe that powers to facilitate reconstruction and amalgamation of the companies have been conferred upon the Court by virtue of section 287 of the Companies Ordinance, 1984. Subsection (1)(f) whereof cloths the Courts with the powers to direct for such incidental, consequential and supplemental matters While sanctioning the compromise or arrangements. as are necessary to carry out the reconstruction or amalgamation fully and effectively. In the instant case, there is no dispute that the petitioners have met all statutory pre- requisites as required under section 96 of the Companies Ordinance, 1984 and Companies (Court) Rules 1997. Even Companies (Court) Rules 1997 provides that where a proposed compromise or arrangement involves a reduction of capital of a company, the procedure prescribed by the Ordinance and the Rules relating thereto shall be complied with, before the compromise or arrangement so far it relates to reduction of capital is sanctioned. There is no dispute that the statutory pre-requisites have been complied with by the petitioners by passing

and adopting a resolution approving the reduction in paid up capital in the case of MCCP unanimously by all the shareholders and in the case of MHPL by shareholders representing 99% of total share holding. Further no objections from the creditors in respect of proposed reduction of share capital have also been placed on record. The notices were also duly published in the newspapers as Well as in the Gazette of Province and Pakistan informing the reduction in issued and paid up share capital of the petitioners MCCP and MHPL. Therefore. I see no reason to decline reduction in share capital or direct the petitioners to go through the whole gamut of the procedure afresh and therefore, also allow the reduction in share capital as proposed in the scheme.

For the above reasons I allow this petition as prayed.