

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMPANY SCHEME PETITION NO. 99 OF 2015
WITH
COMPANY SUMMONS FOR DIRECTION NO. 892 OF 2014

In the matter of :

The Companies Act, 1956

And

In the matter of:

Sections 391 to 394 read with Sections 100 to 103 of the Companies Act, 1956 and Section 52 of the Companies Act, 2013.

And

In the matter of :

Thomas Cook Insurance Services (India) Limited, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Thomas Cook Building, Dr. D.N. Road, Fort, Mumbai – 400 001.

And

In the matter of :

The Composite Scheme of Arrangement and Amalgamation between Sterling Holiday Resorts (India) Limited and Thomas Cook Insurance Services (India) Limited and Thomas Cook (India) Limited and Their Respective Shareholders and Creditors.

Thomas Cook Insurance Services

(India) Limited, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Thomas Cook Building, Dr. D.N. Road, Fort, Mumbai – 400 001

..... Petitioner Company

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Thomas Cook (India) Limited, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Thomas Cook Building, Dr. D.N. Road, Fort, Mumbai – 400 001

....Petitioner Company

Mr.Janak Dwarkadas, Senior Advocate with Mr.Rohan Rajadhyaksha i/b. M/s.Rajesh Shah & Co. for Petitioners.

Mr.Shyam Mehta, Senior Advocate with S.I. Shah for Regional Director.

Mr.Arvind Pinto for Income-tax Department / Revenue.

CORAM : S.C. GUPTE, J.

2 JULY 2015

P.C. :

These petitions seek sanction of a composite scheme of arrangement and amalgamation of Sterling Holiday Resorts (India) Ltd. (SHRIL),

which is a transferor company, with Thomas Cook Insurance Services (India) Ltd. (TCISIL), which is a resulting company (Resulting Company No.1) and Thomas Cook (India) Ltd. (TCIL) which is another resulting company (Resulting Company No.2), and their respective shareholders and creditors.

2 The transferor company, i.e. SHRIL, is a listed public company engaged in the business of vacation ownership and leisure hospitality. The company is primarily engaged in time share, resort business and holiday activities. The two transferee or resulting companies, namely, TCISIL and TCIL, are respectively engaged in the business of corporate agency for travel insurance, and integrated travel and travel related services. Whereas TCIL is a public limited company listed on the stock exchanges including BSE and NSE, TCISIL is also a public limited but unlisted company. The scheme consists of two parts, one of which ('Part B') consists of demerger of an undertaking of SHRIL pertaining to the time share and resort business on a going concern basis from SHRIL and its transfer and vesting in TCISIL, whilst the other part ('Part C') consists of amalgamation of the residual undertaking of SHRIL (i.e. exclusive of the demerged undertaking) with TCIL as a going concern. After demerger and amalgamation as aforesaid, the scheme envisages dissolution of SHRIL on and with effect from the effective date. The consideration of the demerger and amalgamation, respectively, is allotment of 116 equity shares of TCIL of Re.1/- fully paid up for every 100 equity shares of SHRIL of Rs.10/- fully paid up and 4 equity shares of TCIL of Re. 1/- to be paid up for every 100 equity shares of SHRIL of Rs.10/-. In pursuance of an order passed by this Court on 20 September 2014 dispensing with convening and holding of the meetings of equity shareholders, and secured and unsecured creditors, the transferee companies have presented this scheme petition for sanction of this Court under Sections 391 to 394 of the Companies Act, 1956.

3 The only opposition to the scheme is from the Regional Director, Western Region, Ministry of Corporate Affairs, Mumbai. The opposition is on the ground that having regard to the provisions of Section 394 of the Companies Act, only a transferee company can allot shares towards consideration of transfer, and

not any other person, whereas for demerger and transfer of the undertaking of the resort business of SHRIL in the present case, the shares, namely, 116 equity shares of Re.1/- for every 100 shares of Rs.10/- of SHRIL, have been allotted by TCIL, which is a parent company of the transferee company, namely, TCISIL. It is submitted that TCISIL, which is the resulting company insofar as the demerger part is concerned, is not issuing any shares and therefore, the scheme is not in consonance with the provisions of the Companies Act, 1956. Secondly, the scheme is also against the provisions of Income-tax Act, 1961 having regard to the definitions of 'demerger' and 'resulting company' contained in Section 2(19AA) and 2(41A) read with Section 2(19AAA) of the Income-tax Act. The Income-tax Department's Counsel is present on notice and also supports the objections raised by the Regional Director with reference to the provisions of the Income-tax Act.

4 Mr.Mehta, learned Senior Counsel appearing for the Regional Director, submits that the scheme in the present case consists of two separate parts, Part B consisting of demerger and Part C consisting of amalgamation. It is submitted that each of these parts must separately satisfy the requirements of law insofar as the arrangement is concerned. It is submitted that whilst in the case of amalgamation, shares of the transferee company are being allotted to the shareholders of the transferor company, in the case of demerger, it is not the shares of TCISIL, which is the resulting or transferee company, but the shares of TCIL, which is a holding company of TCISIL, which are allotted to the shareholders of the demerged company. It is submitted that such allotment is in contravention of Clause (ii) of Section 394(1) of the Companies Act. Mr.Mehta submits that the scheme, thus, being against the provisions of the Companies Act, ought not to be sanctioned by this Court. Mr.Mehta further submits that the demerger contained in the present scheme is not a demerger within the meaning of Section 2(19AA) of the Income-tax Act read with Section 2(19AAA) and 2(41A). Mr.Mehta submits that it is stated in the scheme that the scheme complies with all provisions of the Income-tax Act and this statement is not correct, since the demerger contemplated in the scheme is not in accordance with the definition of 'demerger' contained in the Income-tax Act. It is submitted that if

this Court sanctions the scheme on the footing that it complies with the requirements of Income-tax Act and thereby puts its imprimatur on the position taken by the company regarding such compliance, the Income-tax Department would be bound by the position and that the companies would be entitled to claim tax benefits despite not being entitled to do so.

5 At the outset, we may deal with the objections raised with reference to the provisions of the Income-tax Act. It is firstly to be noted that there is no prohibition contained in the Income-tax Act to a scheme such as the one proposed here. It is merely that if a scheme of arrangement, which is otherwise permissible both under the Companies Act and the Income-tax Act, does not amount to 'demerger' within the meaning of the Income-tax Act, it may have certain tax implications for the companies in question. There is a provision in the present scheme that the part of the scheme, namely, the demerger, has been drawn up to comply with the conditions relating to demerger as specified under Section 2(19AA) of the Income-tax Act 1961. The scheme at the same time makes it clear that if any terms or provisions of the scheme are inconsistent with the provisions of Section 2(19AA) of the Income-tax Act 1961, the provisions of Section 2(19AA) of the Income-tax Act shall prevail and the scheme shall stand modified to the extent, if necessary, to comply with Section 2(19AA). It is thus very clear that the framing of the scheme and the corresponding sanction by this Court do not in any way prejudice the application of Section 2(19AA) of the Income-tax Act 1961. In any event, by sanctioning the present scheme, this Court is not in any way accepting the company's case that the scheme, as framed, complies with the provisions of 'demerger' within the meaning of 2(19AA). In fact, this Court is inclined to clarify that the sanction of the scheme, as proposed by this Court, does not in any way bind the Income-tax Department to take any particular view of the scheme of arrangement sanctioned by this Court insofar as the tax implications of the transaction are concerned. In the face of this clarification, learned Counsel for Regional Director and Income-tax Department have no further objections to the scheme on the ground of non-compliance with the provisions of the Income-tax Act referred to above.

6 Coming now to the main objection of the Regional Director to the present scheme, namely, its non-compliance with Section 394 of the Companies Act, it is pertinent to note at the very outset that provisions referred to in Clauses (i) to (vi) of sub-section (1) of Section 394, which the Court may make whilst sanctioning a scheme, are merely enabling provisions. The Company Court, while sanctioning the scheme, may or may not make any of the provisions contained in Clauses (i) to (vi) thereof. The provisions referred to in Clauses (i) to (vi) are not in the nature of conditions for exercise of power of the company court under Section 394. These enabling provisions, therefore, cannot be construed as compulsory in any sense. Clause (ii) provides that if and to the extent the compromise or arrangement provides for allotment or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company as part of the consideration of the scheme, then the company court while sanctioning the scheme may make appropriate provision in respect of such allotment or appropriation. It is not that in every case the consideration for transfer of an undertaking as part of a scheme of arrangement must come in the form of an allotment of shares of a transferee company or for that matter allotment of any shares. The consideration for such transfer can be any legitimate consideration, which the transferor is entitled to accept for contract of transfer. The scheme may, thus, not provide for any allotment of shares at all or provide any other appropriate consideration including allotment of shares of a holding company of the transferee company. Acceptance of any particular consideration is part of the commercial wisdom to be exercised by the shareholders of the transferor company. As long as such consideration is not against public interest or in any other manner illegal or inappropriate, it is not for the company court to accept or reject such consideration. That is the principle of the decision of the Supreme Court in the case of **Miheer Mafatlal vs. Mafatlal Industries Ltd.**¹

7 It is not the case of the Regional Director that there is any harm to public interest insofar as the transfer proposed in the scheme, or the consideration provided therefor, is concerned. In fact, the Regional Director makes it clear that there is no harm to public interest insofar as the present

¹ 1997 (1) SCC 579

scheme is concerned. If that is so, it is not for this Court to reject the consideration, which is accepted by the shareholders of the transferor company, who are parties to the present arrangement.

8 This Court as well as other High Courts have accepted several schemes where consideration for transfer of an undertaking is issued in the form of shares of a company other than the transferee company. This Court, in the case of **Pantaloon Retail (India) Limited**², approved a scheme of arrangement between Pantaloon Retail (India) Limited and two resulting companies, Future Mall Management Limited ('FMML') and Future Merchandising Limited ('FML') and their respective shareholders and creditors, wherein FMML alone issued shares to the shareholders of the demerged company. Similarly, in the case of **Keva Aromatics Private Limited**³ amalgamation and arrangement between Kelkar Investment Company Pvt.Ltd. and S H Kelkar and Company Pvt.Ltd. ('SHK') and Keva Aromatics Private Limited ('KAPL') and Keva Constructions Pvt.Ltd. (KCPL) and their respective shareholders and creditors was approved by this Court, where KAPL (one of the resulting companies) alone issued shares to the shareholders of SHK in lieu of transfer of business to itself and KCPL. The other courts including Delhi Court (in the case of **Seven Wonders Holidays Private Limited**⁴) and Andhra Pradesh High Court (in **M/s.IVRCL Limited**⁵) have also approved similar schemes, where as part of the consideration for transfer of undertaking, the shareholders of transferor company were issued shares by the holding company of the transferee. Thus, after considering the merits of the respective schemes in those cases, this Court as well as other High Courts have thought it fit to approve of the schemes, making provisions for consideration in terms of allotment of shares of companies other than the transferee companies including, for that matter, the holding companies of the transferee companies.

9 In that view of the matter, there is no merit in the objection raised by the Regional Director.

² Company Scheme Petition No.338/2010 decided on 24.8.2010

³ Company Application No.455/2013 decided on 10.12.2013

⁴ Company Petition Nos.184 & 185 of 2010 decided on 1.8.2010 (Delhi High Court)

⁵ Company Petition Nos.58, 59, 60 and 61 of 2012 decided on 2 July 2012

10 In the premises, both the scheme petitions are allowed

11 The Petitioner Companies are directed to lodge a copy of this order and Scheme, duly authenticated by the Company Registrar, High Court (O.S.), Bombay, with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable, if any, on the same within 60 days from the date of receipt of the Order.

12 The Petitioner Companies are directed to file a copy of this order along with a copy of the Scheme with the concerned Registrar of Companies, electronically, along with E-Form INC 28 in addition to physical copy as per the provisions of the Companies Act 1956 / 2013.

13 The Petitioner Companies in both the Company Scheme Petitions to pay costs of Rs.10,000/- each to the Regional Director, Western Region, Mumbai within four weeks from the date of the order.

14 Filing and issuance of the drawn up order is dispensed with.

15 All concerned regulatory authorities to act on a copy of this order along with Scheme duly authenticated by the Company Registrar, High Court (O.S.), Bombay.

(S.C. Gupte, J.)