

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On: 02.12.2016
Judgment Pronounced On: 25.01.2017

CO.PET. 438/2016

MODI-MUNDIPHARMA HEALTHCARE PVT. LTD.

Petitioner No.1/Demerged Company

AND

MODI-MUNDIPHARMA PVT. LTD.

Petitioner No.2/Resulting Company

Through: Mr. Rajeev K Goel, Advocate
for the Petitioners
Ms. Aparna Mudium, Assistant
Registrar of Companies for the
Regional Director

CORAM:
HON'BLE MR JUSTICE SIDDHARTH MRIDUL

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. This joint petition has been filed under Sections 391(2), 394 and 100 to 104 of the Companies Act, 1956 (hereinafter referred to as 'the Act'), by Modi-Mundipharma Healthcare Pvt. Ltd. (hereinafter referred to as 'Demerged Company') and Modi-Mundipharma Pvt. Ltd. (hereinafter referred to as 'Resulting Company') seeking sanction to the proposed scheme

of Arrangement (hereinafter referred to as 'proposed scheme') between the Demerged Company and the Resulting Company.

2. The Demerged Company and the Resulting Company have been hereinafter jointly referred to as 'Petitioner Companies'.

3. The registered offices of the Petitioner Companies are situated at National Capital Territory of Delhi, and therefore, this Court has the necessary jurisdiction to adjudicate the present petition.

4. The Demerged Company was originally incorporated under the provisions of the Act, on 25.03.2009, with the Registrar of Companies, N.C.T. of Delhi & Haryana at New Delhi, under the name and style of 'Modi Omega Pharma (India) Pvt. Ltd.'. Thereafter, the name of the Demerged Company was changed to its present name and fresh certificate of incorporation, dated 13.04.2015, was issued by the Registrar of Companies, N.C.T. of Delhi & Haryana at New Delhi.

5. The Resulting Company was incorporated under the provisions of the Act, on 31.10.1990, with the Registrar of Companies, N.C.T. of Delhi & Haryana at New Delhi.

6. The authorized share capital of the Demerged Company, as on 31.12.2014, is Rs.1,00,00,000/- divided into 10,00,000 equity shares of Rs.10/- each. The issued, subscribed and paid-up share capital of the

Demerged Company, as on 31.12.2014, is Rs.95,00,000/- divided into 9,50,000 equity shares of Rs.10/- each.

7. The authorized share capital of the Resulting Company, as on 31.03.2015, is Rs.1,00,00,000/- divided into 10,00,000 equity shares of Rs.10/- each. The issued, subscribed and paid-up share capital of the Resulting Company, as on 31.03.2015, is Rs.30,00,000/- divided into 3,00,000 equity shares of Rs.10/- each.

8. Copies of the Memorandum of Association and Articles of Association, of the Petitioner Companies, have been duly filed as Annexures to Company Application (M) No.19 of 2016, which earlier came to be filed by the Petitioner Companies. The same are on record. The audited financial statements pertaining to the Demerged Company and the Resulting Company as on 31.12.2014 and 31.03.2015, respectively, alongwith the auditor's report, have also been duly filed on record.

9. A copy of the proposed scheme has been placed on record and the salient features thereof have been incorporated and detailed in the present petition. The circumstances which justify and/or necessitate the proposed scheme are, *inter alia*, stated to be as follows: -

- a) The Demerged Company is engaged in the business of over the counter healthcare and Lifestyle products, including products in categories of skin-care, hair-care, dietary supplements, anti-snoring, mosquito repellants and

cholesterol management, both in the domestic and export markets.

- b) The nature of offerings; risk and returns of domestic and export segments of the business of the Demerged Company are distinct from each other in terms of:
 - (i) Regulatory requirements applicable in respective markets;
 - (ii) Marketing know-how and infrastructure requirements;
and
 - (iii) Realization and margins, and working capital requirements.
- c) Further, the management of the Demerged Company is already witnessing a clear distinction in the manner of doing business in the domestic and the export markets in terms of the marketing efforts required to promote sales, tax and regulatory compliances, skill set required in the employees to cater to the respective markets, etc. Accordingly, it is felt necessary that separate management focus should be imparted on each of these business segments.”

10. So far as the share exchange ratio is concerned, the proposed scheme provides that in pursuance to the proposed scheme the Resulting Company shall not be required to issue and allot any shares as the Demerged Company is a wholly owned subsidiary of the Resulting Company.

11. It has been averred on behalf of the Petitioner Companies that there are no proceedings pending against them, under Sections 235 to 251 of the Act (including the corresponding sections of the Companies Act, 2013), as on the date of filing of the present petition.

12. The Board of Directors of the Petitioner Companies in their separate meetings held on 21.10.2015, have approved the proposed scheme. Copies of

the resolutions passed at the Board of Directors meeting of the Petitioner Companies have been placed on record.

13. To recapitulate, the Petitioner Companies had earlier filed an application, being Company Application (M) no.19 of 2016 seeking directions of this court to, dispense with the requirement of convening the meetings of the shareholders of the Demerged Company and the secured creditors and shareholders of the Resulting Company; and to convene separate meetings of the unsecured creditors (except the statutory and other dues payable) of the Demerged Company and the Resulting Company.

14. This Court, vide order dated 05.02.2016 dispensed with the requirement of convening the meetings of the shareholders of the Demerged Company and the Resulting Company; and secured creditors of the Resulting Company. There were no secured creditors of the Demerged Company. Further, this Court vide said order dated 05.02.2016 directed for convening separate meetings of the unsecured creditors (except the statutory and other dues payable) of the Demerged Company and the Resulting Company to consider and if thought fit, approve, with or without modification, the proposed scheme.

15. In compliance to the said order dated 05.02.2016, separate meetings of the unsecured creditors of the Demerged Company and the Resulting Company were duly convened and held on 21.03.2016, and the proposed

scheme was unanimously approved by the unsecured creditors present and voting at the said meetings. The Chairpersons appointed for the said respective meetings of the unsecured creditors of the Demerged Company and the Resulting Company have filed their reports in this behalf and the same are on record.

16. However, in so far as the liabilities of the Petitioner Companies *qua* provisions made for LTA, gratuity and leave encashment are concerned, an observation has been made in the said order dated 05.02.2016 that the said liabilities of the Petitioner Companies shall be examined at the sanction/confirmation petition stage as they were not due and payable at the time of filing of the said Company Application (M) No.19 of 2016. The relevant para of the said order dated 05.02.2016, in this behalf, reads as hereinunder:

- “10.4 In so far as the provisions made *qua* LTA, leave encashment and gratuity are concerned, amounts shown against them have not been expended as due dates have not been reached.
- 10.5 In this context, the learned counsel for the applicants has made a submission that outstanding dues referred to in Table A and B should not form part of the class of persons / entities who represent unsecured creditors, at the stage of first motion. In other words, a request was made that no separate meeting be called *qua* the said statutory and other dues as reflected in Table A and B above as in point of fact the said liabilities have not become due and payable at this juncture. The prayer, in my view, is reasonable and therefore, no notice be issued *qua* liabilities as reflected in serial no.5, 6, 7 of Table A and serial no.10, 11, 12 of Table B. It is,

however, made clear that the impact of the aforesaid liabilities will be examined at the stage when a second motion is filed by the applicants with this court.”

17. In this behalf, it would be relevant to refer to Clause 6 of the proposed scheme, which reads as hereinunder: -

“6. Transfer of Demerged Undertaking:

- 6.1. Upon the Effective Date, Demerged Undertaking, comprising of all assets and liabilities of whatsoever nature and wherever situated. shall, under the provisions of Section 391 read with Section 394 and all other applicable provisions, if any, of the Act, including any statutory re-enactments thereof, without any further act or deed, be transferred to and vested in and/or be deemed to be transferred to and vested in the Resulting Company as a going concern so as to become as and from the Appointed Date the assets and liabilities of the Resulting Company and to vest in the Resulting Company all the rights, title, interest or obligations of Demerged Undertaking therein.
- 6.2. Without prejudice to the generality of the foregoing, with effect from the Appointed Date:
 - 6.2.1. Any and all movable assets including cash in hand or incorporeal property, if any, of Demerged Undertaking, capable of passing by manual delivery or by endorsement and delivery, shall be so delivered or endorsed and delivered, by actual or constructive delivery, as the case may be, to Resulting Company without any further act, instrument or deed , and shall upon such transfer become the property and an integral part of the Resulting Company. Such delivery shall be made within thirty days from the Effective Date.
 - 6.2.2. In respect of movables other than those specified in Clause 6.2.1 above, including sundry debtors, outstanding loans and advances, if any, recoverable in cash or in kind or for value to be received, bank balances, deposits and balances, if any, with Government, Semi-Government, local and other

authorities and bodies, customers and other persons, it shall not be necessary to obtain the consent of any third party or other person in order to give effect to the provisions of this Scheme, and such transfer shall be automatically effected, or in any manner as may be mutually agreed by the Demerged Company and Resulting Company, from the Effective Date.

6.2.3. Any and all immovable properties, if any, owned or held by the Demerged Undertaking, and any documents of title, rights and easements, if any, held by the Demerged Undertaking thereto shall without any further act, instrument or deed be transferred to and/or vested in and/or be deemed to have been transferred to and vested in the Resulting Company and shall belong to the Resulting Company.

6.2.4. Any and all debts, liabilities, contingent liabilities, duties and obligations of every kind, nature and description of Demerged Undertaking shall also, under the provisions of Sections 391 to 394 of the Act, without any further act or deed, be transferred to or be deemed to be transferred to the Resulting Company so as to become the debts, liabilities, contingent liabilities, duties and obligations of Resulting Company and it shall not be necessary to obtain the consent of any third party or other person who is a party to any contract or arrangement by virtue of which such debts, liabilities, contingent liabilities, duties and obligations have arisen, in order to give effect to the provisions of this sub-clause.

6.3. The transfer and vesting of the Demerged Undertaking as aforesaid shall be subject to the existing securities, hypothecation, charges and mortgages, if any, subsisting over or in respect of the property and assets or any part thereof of Demerged Undertaking.

6.4. Loans, debt or other obligations, if any, due between or amongst Demerged Undertaking and the Resulting Company as of close of the date immediately preceding the Effective Date shall stand discharged and there shall be no liability! obligation in that behalf.

- 6.5. For the avoidance of doubt and without prejudice to the generality of the foregoing, it is clarified that in accordance with the provisions of relevant laws, consents, permissions, licenses, registrations, certificates, authorities, powers of attorneys given by. issued to or executed in favour of Demerged Undertaking, and the rights and benefits under the same and all other interests of the Demerged Undertaking, be without any further act or deed, be transferred to and vested in the Resulting Company.
(Emphasis supplied)”

18. A bare reading of the above-extracted clause of the proposed scheme makes it evident that all the debts, liabilities, contingent liabilities, duties and obligations of the Demerged Undertaking (as defined in the proposed scheme) of the Demerged Company shall stand transferred to the Resulting Company. Therefore, all the liabilities of the said Demerged Undertaking of the Demerged Company, including towards provisions made for LTA, gratuity and leave encashment, shall stand transferred to the Resulting Company and shall continue to be enforceable against the Resulting Company, in accordance with the terms and conditions of the proposed scheme. In so far as the liabilities of the Resulting Company are concerned, including towards provisions made for LTA, gratuity and leave encashment, the same shall continue to be enforceable against the Resulting Company, with no variation in the rights of the claimants pre and post sanction being accorded to the proposed scheme.

19. Pursuant to the said order dated 05.02.2016, the Petitioner Companies have filed the present petition. Vide order dated 18.05.2016, notice in the present petition was issued to the Regional Director, Northern Region, Ministry of Corporate Affairs. Furthermore, vide said order dated 18.05.2016, citations were directed to be published in the newspapers, namely, 'Business Standard' (English) and 'Business Standard' (Hindi). Affidavit of service and publication, dated 28.07.2016, showing compliance regarding publication of citations in the aforesaid newspapers and service of petition paper book on the Regional Director and the Registrar of Companies, has been filed by the Resulting Company. Copies of the newspaper clippings, regarding publication carried out on 30.06.2016 have also been filed alongwith the said affidavit.

20. Further, in response to the notices issued in the present petition, the Regional Director, Northern Region, Ministry of Corporate Affairs, has filed its affidavit dated 04.10.2016, wherein, *inter alia*, no objection has been raised to the proposed scheme subject to clarification by the Petitioner Companies with respect to the following observations made by the Registrar of Companies: -

“9. That the Deponent states that the Registrar of Companies, Delhi & Haryana vide para 31 of his report has following observations:-

- (i) The Valuation Report for the consideration of Rs. 1.00 lac for cancelation of 9,00,000 equity shares of

Rs. 10/- each of the Demerged Company may be given by the concerned company.

- (ii) The Balance Sheet as at 31.03.2015 of Resulting Company reveals in Note 2.12 regarding 'Non-current Investments' that during the said year, the company had purchased 475000 equity shares of Rs.,10/- each of Demerged Company on a payment of total consideration of Rs. 68/- only. In addition, it has also purchased 632400 Debentures of Rs. 100/- each of the Demerged Company by paying of a total consideration of Rs. 68/- only. The impact on post demerger Balance Sheet may be clarified.
- (iii) It has been further observed that the Demerged Company by way of the present Scheme of Demerger has proposed payment of an aggregate cash consideration of Rs. 1,00,000/- for cancellation of its 900000 equity shares held by the Resulting Company without disclosing the justification to arriving at such cash consideration of Rs. 1,00,000/-.”

21. In response to the aforesaid observations made by the Regional Director, the Resulting Company has filed a reply affidavit dated 26.10.2016 stating as follows:

“5. That with respect to the aforesaid observations of the Learned RD, we wish to make the following respectful submissions:

- a) The Demerged Company - Modi-Mundipharma Healthcare Pvt. Ltd. (MMHPL) was initially started a Joint Venture between the Resulting Company - Modi-Mundipharma Pvt. Ltd. (MMPL) and Omega Group. Due to various reasons, the Demerged Company suffered substantial losses. As on 31st December, 2014, the Demerged Company had accumulated losses of Rs.12,55,57,233 as against a total paid up share capital of Rs.95,00,000.
- b) Subsequently, Omega Group exited the Joint Venture by divesting its entire stake in the Demerged Company in favour of the Resulting Company, based on mutual agreement between the

Joint Venture partners. During the financial year 2014-15, Omega Group sold 4,75,000 Equity Shares and 6,32,400 fully convertible debentures to the Resulting Company at a consideration of Rs. 68 each.

- c) Correspondingly, the Demerged Company Modi-Mundipharma Healthcare Pvt. Ltd. became a wholly owned subsidiary company of the Resulting Company–Modi Mundipharma Pvt. Ltd. Post-acquisition, the Resulting Company, being the parent company, holds the entire share capital as well as the debentures of the Demerged Company.
- d) Post Scheme, all the fully Convertible Debentures issued by the Demerged Company, which are held by the Parent Resulting Company, will be cancelled in terms of the Scheme as the same represents an inter-corporate loan between the Demerged Undertaking and the Resulting Company.
- e) Further, as part of re-organization of share capital of the Demerged Company post De-merger, out of the total issued and paid up share capital consisting of 9,50,000 Equity Shares of Rs.10 each, 9,00,000 Equity Shares of Rs. 10 each will be cancelled against a payment of Rs. 1,00,000 to the Resulting Company. Post De-merger, the Demerged Company will have 50,000 Equity Shares of Rs. 10 each aggregating Rs. 5.00 lakhs held by the Resulting Company.
- f) The consideration of Rs 1.00 lakh for cancellation of 9,00,000 equity shares of Rs. 10 each aggregating Rs 90.00 lakhs has been determined in view of the accumulated losses of the Demerged Company.
- g) It is submitted that Sections 100 to 104 of the Companies Act, 1956 do not prescribe any requirement for obtaining a Valuation Report for the consideration paid on reduction of share capital. Further, all shareholders have consented to the Scheme by way of written consents/ NOC.
- h) It is pertinent to note that the Demerged Company is a wholly owned subsidiary of the Resulting Company. Both the Demerged and Resulting Companies are private limited companies and hence no public shareholder is interested in the aforesaid reduction of capital.”

22. In view of the said affidavit dated 26.10.2016 filed by the Resulting Company, it has been stated on behalf of the Regional Director that the observations made by the latter in the said affidavit dated 04.10.2016, stand satisfied.

23. It has been noted that no objections have been received to the proposed scheme from any other party. The Resulting Company, vide affidavits dated 21.09.2016 and 26.10.2016, has submitted that neither the Resulting Company nor the Demerged Company has received any objection to the proposed scheme till the date of filing of the respective affidavits.

24. Considering the approval accorded by the shareholders and creditors of the Petitioner Companies to the proposed scheme; and the circumstance that the objections/observations raised by the Regional Director having been satisfied, by way of said affidavit dated 04.10.2016, there appears to be no impediment to the grant of sanction to the proposed scheme. Consequently, sanction is hereby granted to the proposed scheme. The Petitioner Companies will comply with the statutory requirements in accordance with law. Upon the sanction to the proposed scheme being effective from the appointed date of the proposed scheme, i.e. 1st January, 2015, the Demerged Undertaking (as defined in the proposed scheme) of the Demerged Company shall stand merged in the Resulting Company.

25. In any event, notwithstanding what has been stated on behalf of the Petitioner Companies hereinabove, the Resulting Company shall file an undertaking with this Court, within two weeks from today, stating therein, that it will take over and defray all the liabilities of the Demerged Undertaking (as defined in the proposed scheme) of the Demerged Company.

26. Notwithstanding the above, if there is any deficiency found or, violation committed *qua* any enactment, statutory rule or regulation, the sanction granted by this Court to the proposed scheme will not come in the way of action being taken, *albeit*, in accordance with law, against the concerned persons, directors and officials of the Petitioner Companies.

27. It is made clear, that this order shall not be construed as an order granting exemption, *inter alia*, from, payment of stamp duty or, taxes or, any other charges, if, payable, as per the relevant provisions of law or, from any applicable permissions that may have to be obtained or, even compliances that may have to be made, as per the mandate of law.

28. A certified copy of the order, sanctioning the proposed scheme, be filed with the ROC within thirty days of its receipt.

29. The Petitioner Companies are directed to deposit a sum of Rs.50,000/- (Rupees Fifty Thousand only) with the Delhi High Court Bar Association Lawyers Social Security and Welfare Fund, New Delhi, within a period of two weeks from today.

30. Consequently, the petition is allowed in the aforesaid terms and is accordingly disposed of.

SIDDHARTH MRIDUL, J

JANUARY 25, 2017

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