Form No: HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

C.O.No.25683 of 2019

Presson-Descon International (Private) Limited etc **V/S** *Joint Registrar of Companies*

S.No.of order / Proceedings	**Date of order /Proceedings**	***Order with signatures of Judge, and that of parties or counsel, where necessary.***

08.06.2020 M/s Ch. Muhammad Ali and Usman Virk, Advocates for the Petitioners.
Hafiz Muhammad Talha, Advocate for SECP.

*The marriage of two or more individuals in a corporate setting is commonplace today. As long as the participants can "live" with each other, the "marriage" endures. Where the relationship between the partners or their heirs deteriorates, the burden to adjudicate rights of shareholders in a "**corporate divorce**" may fall upon the judiciary.*[1]

1. INTRODUCTION

Corporate restructuring is one of the most complex and fundamental phenomena that every management experiences from time to time. Each company has two opposing objectives from which it has to choose: to diversify or to refocus on its core business. This involves the redeployment of corporate assets through acquisitions, mergers, divestures and demergers as the corporate structure is mutable.

[1] *Stuart L Pachmanm, "Divorce Corporate Style: Dissension, Oppression and Commercial Morality" (1979) 10 Seton Hall Law Review 315*

In the present case the Petitioners invite this Court to sanction a Scheme of Arrangement for reconstruction and de-merger amongst Presson-Descon International (Private) Limited (the Petitioner No.1) ("Transferor Company"), its members, and DEL Engineering Domestic (Private) Limited (the Petitioner No.2) ("Transferee Company") its members, and Descon (Private) Limited (the Petitioner No.3) (Transferee Company") and its members. In this regard a petition under Sections 279 to 282 of the Companies Act, 2017 (the ***"Companies Act"***) has been filed by the authorized representative of the Petitioners.

2. FACTUAL TRAIL WITH DISCUSSION

2. Terse facts are that the Petitioner No.1 is a private limited company by shares with an authorized share capital of Rs.200,000,000/- divided into 20,000,000 ordinary shares of Rs.10/- each while its paid-up capital is Rs.166,580,040/- divided into 16,658,004 ordinary shares of Rs.10/- each. Similarly, the Petitioner No.2 is a private limited company by share with an authorized share capital of Rs.2,000,000/- divided into 200,000 ordinary shares of Rs.10/- each while its paid-up capital is Rs.600,000/- divided into 60,000 ordinary shares of Rs.10/- each. Conversely, the Petitioner No.3 is a private limited company by share with an authorized share capital of Rs.2,000,000/- divided into 200,000 ordinary shares of Rs.10/- each while its paid-up capital is Rs.600,000/- divided into 60,000 ordinary shares of Rs.10/- each.

3. It is noteworthy to mention that along with this petition, scheme of arrangement in terms of Sections 279 to 282 of the Companies Act between the Petitioner No.1, the Petitioner No.2 and the Petitioner No.3 and their respective shareholders is also attached as ***Annex-A.***

4. The principal object of the Scheme is to provide for the reconstruction of PDIL by separating its transferred assets and undertaking and transfer and vesting of PDIFZE Shareholding with and into the Petitioner No.2 and consequent transfer of PDIL IP into the Petitioner No.3.

5. Learned counsel for the Petitioners pointed out the copies of the Resolutions passed by the Board of Directors of the Petitioners No.1, 2 and 3 whereby the schemes were sanctioned. In the closing moments, the learned counsel contended that the Scheme of Arrangement envisages the reconstruction of PDIL by separating its transferred assets and undertaking and transfer and vesting of PDIFZE Shareholding with and into the Petitioner No.2 and transfer of PDIL IP into the Petitioner No.3.

6. The Additional Registrar of Companies, Companies Registration Office, Lahore in response to the main petition filed report and para-wise comments on behalf of Securities & Exchange Commission of Pakistan (SECP) wherein it was observed that *(i)* as per sub-section (2) of section 279 of the Companies Act, it is required that a majority in number representing three-forth in value of the members of the

Petitioners, present and voting either in person or, where proxies are allowed, by proxy at the meeting, agree to the Scheme of Arrangement. Further observed *(ii)* that the Petitioner No.1 may be directed to solicit no objection certificates (NOC) from United Bank Limited, Allied Bank Limited, Bank Al-Habib Limited and Askari Bank Limited to be submitted before the Court for its satisfaction. Next it was observed *(iii)* that the value of PDIL IP has not been disclosed in the Scheme of Arrangement therefore, the Petitioner No.1 may be directed to provide the value of PDIL IP alongwith details of assets.

7. In response, learned counsel for the Petitioners stated they have removed objection of the Respondent with regard to NOC from United Bank Limited, Habib Bank Limited, Allied Bank Limited, Bank Al-Habib Limited and Askari Bank Limited by filing C.M.No.01 of 2020. However, pointed out that since the Dawood Family is the beneficial owner of the Petitioners' Companies which are 100% owned by the same family, therefore, valuation of PDIL IP is neither required nor material to the Scheme of Arrangement.

8. After filing of the petition, this Court vide order dated 29.04.2019 directed that notices be issued in national dailies namely *"News"* and *"Nawa-i-Waqt"* for the purpose of informing general public about the scheme proposing reconstruction/de-merger the Petitioners and inviting objections to the scheme from members and creditors of the Petitioners as

well as from any person having interest in the business of the Petitioners. In addition, notices were also directed to be issued to the SECP, the Competition Commission of Pakistan (***the "CCP")*** and to the creditors of the Petitioner companies as per list of creditors attached with the petition.

9. The said order also directed that Extra-Ordinary General Meetings of the Petitioners' company be convened for presenting the proposed scheme to their shareholders for sanctioning of the same or otherwise. M/s Ch. Riaz Hussain and Rana M. Faiz-ur-Rehman, Advocates were appointed as Chairmen to supervise extraordinary general meeting of the shareholders of the Petitioners' company with directions to file their report on the proceedings of aforesaid meeting.

10. In compliance with the aforesaid order by the Court, public notices issued in Dailies *"News"* and *"Nawa-i-Waqt"* on 20.06.2019 were issued respectively; copies whereof are available on record.

11. The Chairpersons of the general meeting of the Petitioners submitted their report under Rule 57 of the Company (Court) Rules, 1997 on 27.06.2019 which is duly supported by the relevant record. According to the report of the Chairpersons, the Extraordinary General Meeting of the Petitioners was convened at their respective registered offices on 20.06.2019. Notices of the meeting were issued by the Petitioners company to their shareholders as well as by publication in the Dailies *"News"* and

"Nawa-i-Waqt" on 28.05.2019. The copies of the dispatched notices and names of the shareholders as well as the notices published in the aforementioned newspapers were mentioned in and attached to the Chairpersons' report. The attendance sheet of shareholders of the Petitioners have also been placed on record which shows the participation of 100% of voting of shareholders of the Petitioner No.1, the Petitioner No.2 and the Petitioner No.3. The approved Scheme of Merger is annexed as ***"Annex-A-2"*** with the report of Chairpersons.

12. I would like to preview and foretaste the recital of the Scheme of Arrangements which, for ease of reference, is reproduced as under:-

> **3. <u>Scheme of Arrangement</u>**
>
> Transfer of PDIFZE Shareholding into DEL Domestic
>
> *(i) The entire PDIFZE shareholding as subsisting immediately preceding the Sanction Date shall, without further act or deed, matter or thing, process or procedure, be separated from PDIL and shall be transferred to and vested in DEL Domestic on the Sanction Date. The transfer and vesting of the PDIFZE Shareholding shall be free from all mortgages or charges or other encumbrances.*
> *(ii) The separation from PDIL and transfer to and vesting in DEL Domestic of the PDIFZE Shareholding shall be treated as having effect from the Effective Date, and as from that time and until the Sanction Date, the PDIFZE Shareholding shall be deemed to have been owned and held for and on account and for the benefit of DEL Domestic and all profits, dividends, bonus, shares, rights shares and entitlements accruing or arising to PDIL Projects from or on account of the PDIFZE Shareholding shall be treated as profits, dividends, bonus shares, right shares and entitlements (as applicable) accruing or arising to DEL Domestic.*
> *(iii) During the period from the Effective Date till the Sanction Date, PDIL shall not sell, transfer or dispose of the PDIFZE Shareholding.*

It is Petitioners' vehemence that the de-merger contemplated under the Scheme of Arrangement would have significant benefits for the Petitioners' companies and their respective stakeholders, which are stipulated in the Scheme of Arrangement.

13. Pursuant to order dated 29.04.2019, reports along with the resolutions passed in the meetings under Section 279(2) of the Companies Act have been submitted. For the ease of reference, the core of the resolution is reproduced as under:-

> "RESOLVED THAT *the Scheme of Arrangement for inter alia reconstruction, bifurcation and amalgamation (the "Scheme") between M/s Presson Descon International (Private) Limited and its members, M/s DEL Engineering Domestic (Private) Limited and its members and M/s Descon (Private) Limited and its members, considered by this meeting and initiated by the chairman of this meeting for purposes of identification, be and is hereby approved, adopted and agreed".*

14. As a result, the observation by the SECP relating to Section 279(2) of the Companies Act is concerned, it is evident from perusal of Chairpersons' report that 100% of the shareholders of the DEL Projects (Private) Limited were present at the extraordinary general meeting who voted, unanimously consented and approved proposed Scheme of Arrangement for reconstruction, bifurcation and de-merger of Petitioner No.1 with and into Petitioner No.2 and the Petitioner No.3.

15. Another observation of SECP with regard to NOC from registered secured creditors of the Petitioner No.1 stands cured as

the same were duly filed by the Petitioners through C.M.No.01 of 2020.

3. VALUATION OF INTELLECTUAL PROPERTY

16. In order to understand the Intellectual Property Valuation (IPV), the concept of valuation needs to be understood first. Primarily valuation[2] has been defined as, *"the action of estimating or fixing the monetary or other value of something, especially by a professional evaluator."* In fact, valuation of IP is an act of estimating or fixing the monetary and other values of intellectual property rights (such as patents, copyright, design, trademark, trade secret and other recognized intangible rights). The World Intellectual Property Organization (WIPO) in its IP panorama Module 11, defined IPV as, "*a process to determine the monetary value of subject IP"*. It is pertinent to mention here that Intellectual property (IP) refers to creation of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce and in general sense, it is used for a set of intangible assets owned and legally protected by a company from outside use or implementation without consent. In Pakistan, intellectual property rights have been protected and are regulated under various laws which include the Intellectual Property Organization of Pakistan Act, 2012 ***(the "IPO Act")***, The Trade Marks Ordinance, 2001, the Copyright Ordinance, 1962, the Patents Ordinance, 2000, The Registered Designs

[2] Alococer GA and Woodworth C, "Reasons for Valuation" (2005) Issue 150 managing Intellectual Property 76-8

Ordinance, 2000, The Registered Layout-Designs of Integrated Circuits Ordinance, 2000 and Sections 478, 479, 480, 481, 482, 483, 485, 486, 487, 488 and 489 of Pakistan Penal Code, 1860. The term *'Intellectual Property'* has been defined under Section 2(g) of the IPO Act which reads as follows:

> *"Intellectual Property includes a trademark, patent, industrial design, layout-design (topographies) of integrated circuits, copyright and related rights and all other ancillary rights".*

17. Now coming to the case in hand, the Respondent-SECP has taken an objection in the report and parawise comments with regard to non-provision/disclosure of PDIL IP value by the Petitioner No.1 in the Scheme of Arrangement. Perusal of letter dated 04.07.2019 issued by the CCP reveals that the Petitioners moved a pre-merger Application along with requisite fee which was received by the CCP on 19.06.2019 regarding reconstruction and de-merger as well as transfer of assets and undertaking of the Petitioner No.1 into the Petitioner No.2 and the Petitioner No.3. On that application, the CCP pointed out certain missing information. However, the Petitioners through letter dated 15.07.2019 replied and mentioned the PDIL IP value as NIL. Furthermore, learned counsel for the Petitioner has drawn the attention of the Court towards letter dated 19.12.2019 issued by the CCP wherein the Commission held the transaction of the Petitioners as exempt from notification in terms of Regulation 4(2) of the Competition (Merger Control) Regulation 2016. Perusal of aforesaid letter reveals that the Petitioners moved a

pre-merger application and the Commission upon investigation, held the transaction is exempted from Notification of CCP, mentioned above, and also reimbursed the fee submitted at the time of submission of application for process of case. It is reflected from the perusal of record that PDIL (the Petitioner No.1) is an integrated engineering, procurement, construction and commissioning (EPCC) company with its primary expertise in providing seamless services for supply of production & processing equipment, their related utilities as well as for setting up complete production and processing facilities to the oil & gas sector on turnkey basis. Schedule 1 of the Scheme of Arrangement expresses PDIL IP value in the following manner:

> *(a) all rights, title and interest of PDIL anywhere in the world in any patents, trademarks, service marks, designs, copyrights and inventions, including without limitation, any licenses (inclusive of the benefits and burdens of such licenses) for the same, and any applications or the rights to apply for protection or registration of any of the same having an effective filing date or priority date on or earlier than the Sanction Date, and any continuing, reissue, divisional and re-examination patent applications;*
> (b) *all rights, title and interest of PDIL in technical data and know-how, industrial and technical information, trade secrets, secret processes, confidential information, drawings, formulations, technical reports, operating and testing procedures, instruction manuals, raw material or production specifications, the results of research and development work, whether in hard copy or in computer held form (including, for the avoidance of doubt, such media as microfilm and microfiche).*

18. Through present petition, PDIL IP value is being transferred and vested into DPL as described in Article 3 of the

Scheme of Arrangement. Relevant portion is reproduced as below:

> *i The entire PDIL IP as subsisting immediately preceding the Sanction Date, shall without further act or deed, matter or thing, process or procedure, be separated from PDIL and shall be transferred to and vested in DPL on the Sanction Date. The transfer and vesting of the PDIL IP shall be free from all mortgages or charges or other encumbrances.*
> *ii. The separation from PDIL and transfer to and vesting in DPL of the PDIL IP shall be treated as having taken effect from the Effective Date, and as from that time and until the Sanction Date, the PDIL IP shall be deemed to have been owned and held for and on account and for the benefit of DPL.*

19. The raison d'etre given by the Petitioners for non-valuation appears to have due strength due to the reason that since the Dawood Family is the beneficial owner of the Petitioners' Companies which are 100% owned by the same family, therefore, valuation of PDIL IP is neither required nor material to the Scheme of Arrangement. Article 4 of the Scheme speaks about 100% owning of Petitioners' company in the following manner:

> <u>Consideration</u>
>
> (i) PDIL is 100% owned by Descon Engineering Limited which is 100% owned by DEL Projects (Private) Limited which is 100% owned by Dawood Family in the below proportions:

Category of Shareholders	Shares Held	%
i) Directors		
Mehreen Dawood	342	0.57
Taimur Dawood	690	1.15
Faisal Dawood	690	1.15
ii) Others		
Bilquis Dawood	1,716	2.86
Abdul Razak Dawood	56,562	94.27
Total	**60,000**	**100**

(i) Since DEL Domestic is 100% owned by Dawood Family (in the same proportions specified above), effectively Dawood Family is 100% beneficial owner of both PDIL and DEL Domestic in the same proportions. Therefore, no new shares of DEL Domestic are intended to be issued and/or allotted to PDIL or its shareholders as consideration for the transfer to, and vesting in, DEL Domestic of the PDIFZE Shareholding.

(ii) Since DPL is 100% owned by Dawood Family in the proportions specified in Article 2(III)(a), and PDIL is 100% owned by Descon Engineering Limited which is 100% owned by DEL Projects (Private) Limited which is 100% owned by Dawood Family (In the same proportions mentioned above), effectively Dawood Family is 100% beneficial owner of both PDIL and DPL in the same proportions. Therefore, no new shares of DPL are intended to be issued and/or allotted to PDIL or its shareholders as consideration for the transfer to, and vesting in, DPL of the PDIL IP.

4. DEMERGER- A CORPORATE DIVORCE METAPHOR

20. Under the Companies Act, companies continuously change their scope of business in Pakistan under Part-VIII (Sections 276 to 285). The preamble of the Companies Act clearly provides reforming company law with the objective of facilitating corporatization and promoting development of corporate sector, regulating corporate entities for protecting interests of shareholders, creditors, other stakeholders and general public, inculcating principles of good governance and safeguarding minority interests in corporate entities. Although the expressions ‘merger’ and ‘de-merger’ are not defined under the Companies Act but the Company is defined under Section 2(17) of the Companies Act. The power to merge the companies is given to

the Commission which is defined under Section 2(16) of the Companies Act. The word 'Commission' is also defined under Section 2(g) of Securities and Exchange Commission of Pakistan Act, 1997 (the ***"SECP Act"***) which means the Securities and Exchange Commission of Pakistan established under Section 3 of the Act *ibid*. The said Commission thus consists of Commissioners in terms of Section 5 and headed by the Chairman under Section 6 of the SECP Act. The Commission also has a Security and Exchange Policy Board established under Section 12 and has powers and functions under Section 20 of the SECP Act whereas the functions and powers of the Board are defined under Section 21 of the SECP Act. It is important to mention here that the powers given to the Commission under Section 2(16) of the Companies Act have been delegated to the Court by the Government of Pakistan, Finance Division's Notification S.R.O.No.840(I)/2017 dated 17th August, 2017. The Court is defined in Section 2(23) of the Companies Act which means a Company Bench of a High Court.

21. A frequent metaphor of mergers and acquisitions is the marriage of companies. The antonym to marriage is the divorce, and the term "corporate divorce" is used to define how previously merged companies are separated.[3] Demerger is defined in the

[3] Cartwright, S. & Cooper, C.L. (1995). Organizational marriage: "hard" versus "soft" issues? *Personnel Review,24* (3), 32-42.
Schmid, S. & Daniel, A. (2009). Telia—a Swedish-Finnish marriage after a failed Norwegian courtship. *Thunderbird International Business Review,51* (3), 297-310.
Schmitz, P.W. & Sliwka, D. (2001). On synergies and vertical integration. *International Journal of Industrial Organization,19*, 1281-1295.

Business Dictionary[4] as "a situation where an entity undertakes a reorganization of its operations and structure, leaving its members in the same economic position as they were immediately before the reorganization. It is a form of structural readjustment for corporations in which a corporate or trust group splits into two more entities or groups. Similarly some jurists[5] have defined demerger as "a corporate strategy to sell off subsidiaries or divisions of a company is called demerger."

5. CONCEPTUAL FRAMEWORK AND LAW REQUIREMENTS

22. The basic requirement of Section 279 of the Companies Act is as follows

(i) there must be a compromise / arrangement/ Scheme
(ii) proposed between a company and its creditors
(iii) application to be made to the Commission now the High Court, as defined above;
(iv) supported by meetings
(v) mandatory filing of material facts relating to the company which is;
  (a) financial position
  (b) auditor's report
  (c) latest accounts of the company
  (d) the pendency of any investigation proceedings
  (e) supported by the affidavits

Now moving forward, as highlighted above, the expression 'demerger' is not expressly defined in the Companies Act. Sections 279 to 282 of the Companies Act contain provisions

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Sherman, A.J. & Badillo, A. (2007). Marriage rehearsal: How to prepare for the deal. *Journal of Corporate Accounting & Finance,18* (2), 3-11.

[4] www.businessdictionery.com

[5]Hasan, N., Agarwal, B., Bansal, S., & Chandra, S. (n.d.). *MERGER AND ACQUISITION: TO STAND ALONG IS BETTER THAN TO STAND ALONE.* Retrieved December 12, 2013, from Teerthankar Mahaveer University: http://tmu.ac.in/gallery/viewpointsdcip2013/pdf/track3/T-314.pdf

regarding Compromises, Arrangement and Reconstruction. However, it could very well be said that the same is covered under the expression arrangement, as defined in subsection (6) of Section 279 of the Companies Act which reads as follows:

> "*….the expression "arrangement" includes a re-organization of the share-capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods,….*"

23. Moreover the term demerger has also not been defined in the Indian Companies Act of 2013 which repealed the Companies Act of 1956. However the term demerger finds mention in sub-section (19AA) of Section 2 of the Indian Income Tax Act, 1961. According to the said sub-section, demerger in relation to companies, means transfer, pursuant to a scheme of arrangement under Sections 391 to 394 of the Companies Act, 1956, by a demerged company of its one or more undertakings to any resulting company in such a manner that:

> i. All the property of the undertaking being transferred by the demerged company, immediately before the demerger, becomes the property of the resulting company.
> ii. All the liabilities relatable to the undertaking, being transferred by the demerged company, immediately before the demerger, become the liabilities of resulting company of virtue of the demerger.
> iii. The property and the liabilities of the undertaking, being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger;
> iv. The resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis;

v. The shareholders holding not less than three fourths in value of the share in the demerged company (other than shares already held therein immediately before the demerger or by a nominee for, the resulting company or, its subsidiary) become shareholders of the resulting company or companies by virtue of the demerger.
vi. The transfer of the undertaking is on a going concern basis;
vii. The demerger is in accordance with the conditions, if any, notified under Sub section (5) of Section 72A of the Income Tax Act 1961 by the Central Government in this behalf.

6. COURT CASES AND VIEWS ON DEMERGER

24. In in the matter of IGI Insurance Limited and 3 others (**2018 CLD 572**) the Court has explained the meaning and significance of demerger and has held as follows:

> *10. .... [D]emerger connotes and designates some or all of the transferor company's assets, rights and obligations which are to be divided between one or more transferee companies in return for the shareholders in the transferor company receiving consideration in the form of shares in the company. The de-merger is a business stratagem in which a single business is broken into components. This allows a conglomerate to split off its different varieties to invite or prevent an acquisition, to raise capital by selling off components that are no longer part of the business's fundamental merchandise line or to generate distinct lawful entities to manage diverse managements. It is in fact a method of corporate streamlining and restructuring by dint of which business operations are segregated into one or more components. The demerged company connotes and exemplifies a conglomerate (transferor company) whose undertaking is transferred pursuant to demerger to a resulting company (transferee company) whereas the resulting company (transferee company) means a company to which the undertaking of the demerged company is transferred in a demerger and the resulting company in consideration of such transfer of undertaking issues shares to the shareholders of the demerged company. The transfer pursuant to a scheme of arrangement becomes the property of the resulting company and by virtue of the demerger, all the liabilities relatable to the undertaking, being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting*

> *company. The assets and the liabilities of the undertaking or undertakings being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger and the resulting company issues in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis".*

25. In the matter of International Complex Projects Limited and another (**2017 CLD 1468**), the Court has held that where a scheme of arrangement was found to be reasonable and fair, at such juncture, it was not duty or province of the Court to supplement or substitute its judgment against collective wisdom and intellect of all shareholders of the company involved. Nevertheless it was the duty of the court to find out and perceive whether all provisions of law and direction(s) of court had been complied with and when a scheme seemed like it was in the interest of the company and its creditors, same should be given effect. The Court had to satisfy and reassure accomplishment of some foremost and rudimentary stipulations such as to consider whether meeting of shareholders was appropriately called and conducted; whether a compromise was a real compromise which was accepted by the competent majority; with such majority acting in good faith and for common advantage and that the actions were reasonable, prudent and proper. The Court should also satisfy itself as to whether provisions of the statute had been complied with, whether the scheme was reasonable and practical and whether there existed any reasonable objection to the same.

26. Where all requisite formalities were complied with including the shareholders' approval, Court would not question the commercial wisdom behind a scheme. The role and character of the Court was of a supervisory nature, which was close to judicial review of administrative actions. The Court, if found a scheme to be fraudulent or that the same intended to be cloaked to cover misdeeds of Directors, then it may reject the scheme. The Court could lift the corporate veil for purposes of ascertaining real motive behind a scheme and a scheme must be tested from the point of view of an ordinary reasonable shareholder acting in a business-like manner, considering it with his comprehension and bearing in mind all circumstances prevailing at the time when a meeting was called upon to consider the scheme in question. In this regard, para 10 of the above cited judgment (supra) is instructive and reads as follows:

> *10. Where the scheme is found to be reasonable and fair, at that juncture it is not the sense of duty or province of the court to supplement or substitute its judgment against the collective wisdom and intellect of the shareholders of the companies involved. Nevertheless, it is the duty of the court to find out and perceive whether all provisions of law and directions of the court have been complied with and when the scheme seems like in the interest of the company as well as in that of its creditors, it should be given effect to. The court has to satisfy and reassure the accomplishment of some foremost and rudimentary stipulations that is to say, the meeting was appropriately called together and conducted; the compromise was a real compromise; it was accepted by a competent majority; the majority was acting in good faith and for common advantage of the whole class; what they did was reasonable, prudent and proper; the court should also satisfy itself as to whether the provisions of the statute have been complied with: whether the scheme is reasonable and practical or whether there is any*

> *reasonable objection to it; whether the creditors acted honestly and in good faith and had sufficient information; whether the court ought in the public interest to override the decision of the creditors and shareholders. Where all the requisite formalities were complied with including shareholders' approval, the court would not question the commercial wisdom behind the scheme. (**Ref: A. Ramaiya, Guide to the Companies Act, 17th Edition 2010**)".*

27. Furthermore in the case of Sidhpur Mills Co. Ltd. (**AIR 1962 Guj. 305**), the learned Judge while pointing out the correct approach for sanctioning of scheme held that the scheme should not be scrutinized in the way a carping critic, a hairsplitting expert, a meticulous accountant or a fastidious counsel would do it, each trying 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 sides have or have not been protected. But it must be tested from the point of view of an ordinary reasonable shareholder acting in a business-like manner taking with his comprehension and bearing in mind all the circumstances prevailing at the time when the meeting was called upon to consider the scheme in question.

28. By examining sections 279 to 284 of the Companies Act it is clear where the scheme is found to be reasonable and fair, at that moment in time it is not the sense of duty or province of the Court to supplement or substitute its judgment against the collective wisdom and intellect of the shareholders of the companies involved. Nevertheless, it is the duty of the Court to find out and perceive whether all provisions of law and directions

of the court have been complied with and when the scheme seems like in the interest of the company as well as in that of its creditors, it should be given effect to. However the Court has to satisfy and reassure the accomplishment of some foremost and rudimentary stipulations that is to say, the meeting was appropriately called together and conducted; the compromise was a real compromise; it was accepted by a competent majority; the majority was acting in good faith and for common advantage of the whole class; what they did was reasonable, prudent and proper; the Court should also satisfy itself as to whether the provisions of the statute have been complied with; whether the scheme is reasonable and practical or whether there is any reasonable objection to it; whether the creditors acted honestly and in good faith and had sufficient information; whether the court ought in the public interest to override the decision of the creditors and shareholders.

7. ANALYSIS

29. Under the Companies Act and the previous Companies Ordinance, 1984 (the ***"Ordinance"***), the Courts have allowed mergers by stating where all the requisite formalities were complied with including shareholders' approval, the Court would not question the commercial wisdom behind the scheme. One of the effects of the sanction of the Court is that it becomes binding upon the company and its members including those who voted against the scheme once the scheme of compromise and

arrangement is approved by statutory majority it binds the dissenting minority and the company. The Court has the power to give effect to all the incidental and ancillary questions in the effort to satisfy itself whether the scheme has the approval of the requisite majority. It is not the function of the Court to examine whether there is a scope for better scheme. However, where the Court finds that scheme is patently fraudulent, it may not respond or function as mere rubber stamp or post office but reject the scheme of arrangement.

30. Furthermore, in the Indian Supreme Court case of Miheer H. Mafatlal v. Mafatlal Industries Ltd, reported in **AIR 1997 Supreme Court 506,** it was held that the court certainly would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate.

31. Based on the jurisprudence in Company Law developed by Pakistani, English and Indian cases, discussed above, and in light of the applicable sections of the Companies Act, the Court acts like an umpire in a game of cricket who has to see that both the

teams play their game according to the rules and do not overstep the limits. The propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the Scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement.

32. In case titled as Dawood Hercules Chemicals and others **(2012 CLD 582)** the Court has held that since the scheme was approved by majority of the shareholders of the companies in extraordinary general meeting, all creditors of the company had consented to the scheme being implemented, SECP and FBR had no further objections, and objections by non-members were already rejected on account of irrelevance, there remained no ground for militating sanction of scheme of arrangement approved by huge majority of shareholders of both petitioner companies and duly supported by creditors of such companies, and requirements imposing statutory safeguards for finalization and sanction of scheme of arrangement were duly met by the petitioners.

33. The Court cannot, therefore, undertake the exercise of scrutinizing the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. So far as the exchange ratio of equity shareholders and the transferee-company is concerned, the court held that the valuation of shares is a technical and complex problem which can

be appropriately left to the consideration of experts in the field of accountancy.

34. In another case of Gadoon Textile Mills and others **(2015 CLD 2010)**, the honorable Sindh High Court has held that 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. The 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.

8. CONCLUSION

35. Being a sanctioning Court, I have noticed that all indispensable statutory benchmarks, requirements and formalities have been accomplished and adhered to by the petitioners as envisioned under the relevant provisions of the law, including the holding/convening of the requisite meetings as contemplated under the relevant provisions and rules and the resolutions passed by the members have already been highlighted. The scheme set up for sanction has been reinforced and fortified by the requisite majority which decision seems to be just and fair. The report/minutes of meetings unequivocally convey that all essential and fundamental characteristics and attributes of

schemes were placed before the voters at the concerned meetings to live up to statutory obligations. The proposed schemes are not found to be violative of any provision of law and/or contrary to public policy but as a whole looks like evenhanded and serviceable from the point of view of a prudent man of business taking a commercial decision beneficial to the class represented by him for whom the scheme is meant. As explained in the above case precedents, once the requirements of a scheme for getting sanction of the court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval of the scheme. There does not remain any objection to the scheme of arrangement and no mistake, conspicuous, detectable shortcoming or flaw has further been pointed out in the present matter before me.

36. In view of the forgoing reasons, there remains no impediment to grant and sanction of the Scheme of Arrangement. Accordingly, this petition is allowed and the Scheme attached at **Annex-A** is hereby sanctioned in terms thereof.

(JAWAD HASSAN)
JUDGE

Approved for Reporting

JUDGE

*Usman**