JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Company original no. 5 of 2022
M/s Zaver Petroleum Corporation (Private) Limited
versus
Securities and Exchange Commission of Pakistan (SECP) and others
……

Petitioner by:	Barrister Salaar Khan
Objector by:	Syed Mudassar Ali Rizvi, Advocate/proxy counsel with Mr. Waseem A. Rana, Assistant Director (Law), SECP
Date of short order:	**18.04.2023**

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Sardar Ejaz Ishaq Khan, J:

1. THE SANCTION ORDER

The Scheme of Arrangement appended as Annex-A to the petition was sanctioned by this Court vide order dated 18.04.2023. This judgment sets out the background and the reasons for that sanction order.

2. THE PETITION

Through this petition under sections 279, 280 to 283 of the Companies Act, 2017, the sanction of the Company Bench is sought for the Scheme of Arrangement appended to the petition as Annex-A, as amended vide the Addendum appended to CM no. 475 of 2023 (as amended, the "**Scheme**").

3. THE PROPOSED SCHEME OF ARRANGEMENT

3.1 Primary Object of the Scheme

(a) The petitioner company – the transferor company – is Zaver Petroleum Corporation (Private) Limited (**Zaver**). By the time the members' meetings fell to be held, the transferee company Hashoo Resource Management (Private) Limited (**Hashoo**) also stood incorporated. Zaver's primary business activity, as its name suggests, are petroleum exploration and marketing. It also happened to own circa 9.6 percent shares of Pakistan Services Limited (**PSL**), a listed company, that operates in the hospitality sector. Zaver's passive investment in the shares of PSL is proposed to be spun-out of Zaver and parked under a new company formed for this purpose. Hashoo will have the same shareholders as Zaver when the reconstruction is implemented.

(b) The petition avers that Zaver proposes to spin-off non-core investments to focus on its core business. The hospitality sector investments are to be moved into Hashoo through a reconstruction by way of a 'demerger'. The Scheme is a very simple one. The shares held by Zaver in PSL, termed as "*Investment Undertaking*"[1], will be 'demerged' from Zaver's balance sheet, and will stand transferred, together with all concomitant liabilities, to Hashoo. Zaver will continue to operate with its '*Retained Undertaking*'[2]. Hashoo will issue shares in consideration of the Investment Undertaking to Zavers' shareholders. As the shareholders of the two companies will be the same, it simplifies the demerger. Both companies will continue to operate, and neither will be dissolved.

[1] As defined in the Scheme.
[2] Ditto.

3.2 **Share Valuation**

The Scheme does not contain a valuation of shares, as the Investment Undertaking is proposed to be transferred at the acquisition cost. That does not appear unreasonable, given that the shareholders of both the companies will be the same; instead of holding the PSL shares under the umbrella of Zaver, the same shareholders will hold the PSL shares under the umbrella of Hashoo instead.

3.3 **Creditors**

(a) The petition avers that all secured creditors had given their certificates of no objection. SECP's report does not take issue with that position.

(b) The unsecured creditors are minor in value, and do not necessitate any special directions for their interests.

(c) The directors have not made any disclosures of concern in terms of discharging the unsecured debts. The audited financial statements do not contain any reservations with respect to Zavers' ability to pay its unsecured debts as they fall due.

(d) Saif Energy Limited (**SEL**) applied to the Court opposing the Scheme qua an unsecured creditor in ongoing litigation with Zaver. SEL's reservations were met when Zaver agreed to include SEL in the list of its unsecured creditors appended to the Scheme subject to the corresponding note in its audited financial statement. Accordingly, SEL's objections stood addressed vide the Addendum to Annex-G to the Scheme (list of unsecured creditors) filed by Zaver vide CM no. 475 of 2023.

3.4 **Benefits of the Scheme**

The memo of petition avers several benefits from the proposed demerger. These include enabling Zaver to focus on its core business, avoidance of duplication of costs, and alignment with the shareholders' business objectives.

3.5 **Pending Investigations and Legal Proceedings**

(a) The petition avers that no investigation are pending against the applicant company.

(b) The Scheme stipulates that any pending legal actions in relation to the Investment Undertaking that will be demerged and transferred to Hashoo will be continued by or against Hashoo.

3.6 **Board Approval**

The board of Zaver has approved the Scheme for presentation to the Court for its sanction. Given that the shareholders of Hashoo are represented to be the same as that of Zaver, the board approval of Hashoo, that was formed once the directions for the members' meetings were issued, remained a formality only.

3.7 **Competition Commission**

Zaver was directed to place on record its correspondence with the Competition Commission of Pakistan (**CCP**) relating to the proposed demerger. It transpires that the CCP initially asked Zaver vide letter dated 23.08.2022 to file a pre-merger notification. Zaver responded to CCP vide letter 07.09.2022, explaining its position that pre-merger notification or approval was not required pursuant to the applicable merger regulations in the circumstances of this case. CCP never responded to Zaver's letter. Learned counsel for Zaver submits, and I agree, that CCP is to be taken to have agreed with Zaver's position by never following up, as it was over 6 months since Zaver's reply to CCP that the sanction in this petition was finally granted.

4. MEMBER'S MEETINGS

The Chairmen of the members' meetings for each company have filed the minutes of the members' meetings vide CM no. 475 of 2023, which is accompanied with an affidavit of accuracy. The meetings were held on 05.04.2023, and both meetings unanimously passed the resolutions approving the Scheme. The annexes to CM no. 475 report legal compliance through statutory notices under sections 134 and 281 accompanied with a copy of the Scheme and the audited financial statements, publications of the notices in two dailies, convening of the meetings, and the approval of the Scheme by resolutions passed by 100% in value of the shares of the members of the respective companies present in person or by proxy and voting at the meetings.

5. SECP'S COMMENTS

(a) SECP filed two replies. The first one had several objections, that stood addressed by interlocutory orders or by Zaver's compliances and clarifications to SECP. The second report had a lesser number of comments.

(b) The objection that the objective of the demerger could be achieved through a direct share transfer is addressed in paragraphs 6(b) and 6(c) below.

(c) The objection that the demerger is without a swap ratio (entailing share valuation) is answered in paragraph 3.2 above.

(d) The objection that Hashoo qua the transferee company wasn't incorporated at the time the Scheme was filed with the petition stood answered by incorporation of Hashoo by the time the meeting of its members was called.

(e) The objection that the split balance sheets – pre-and-post demerger – was answered by Zaver with reference to its letter dated 15.08.2022 to SECP that the split balance sheets will be provided after completion of the demerger. That explanation was considered satisfactory by the Court, again

for the reason averred in the petition that the shareholders of Zaver and Hashoo will remain the same, and the mere lateral movement of PSL's shares from one company to another associated company ought not raise any regulatory concerns where the latter company was meant only as a conduit for holding PSL's shares.

6. REASONS FOR SANCTION

(a) Demerger is a recognized form of reconstruction of companies[3]. The transfer of the Investment Undertaking as a going concern with all its respective assets and liabilities by Zaver qua the transferor company to Hashoo qua the transferee company conforms to the generally accepted norms of a reconstruction by demerger.

(b) During the submissions, the question came up whether Zaver's reconstruction was really essential to divest itself of a single asset comprising its shareholding in PSL, as the same objective could be achieved directly by transfer of shares of PSL held by Zaver to Hashoo, instead of the circuitous and complex route of a demerger, calling for the exercise of the jurisdiction vested in the company bench under section 279 of the Act for reconstruction of companies. That is to say, why should the sale of an asset be equated with the reconstruction of a company; divestment simpliciter of an asset is not the same as divestment of a functional business segment for which demergers take place.

(c) Learned counsel for the petitioner company reverted on the next date submitting that the current market value of the shares proposed to be transferred was circa Rs. 4.5 billion, and if they were to be transferred without the proposed demerger, then the transferee company would have to raise that sum to pay for those shares. If it were raised as a loan, that would entail heavy borrowing costs, and if it were raised as equity, that would make no sense because the same ultimate shareholders would end up paying twice over for the same asset (which would also be the case if a loan was taken). He added that if the shares were transferred for nil or for nominal consideration, then the market value of the shares would constitute deemed income of the recipient company, and it would quite needlessly be taxed thereon, despite there being no real income, which would occasion a cash outflow from the group. The entire purpose of the Scheme being that the investment portfolio currently held under the petitioner company be managed by another subsidiary of the same ultimate shareholders, this becomes a perfect occasion for the invocation of the company reconstruction jurisdiction of this Court. The capital gains tax or any other tax as a consequence of the proposed scheme is for the companies to

[3] See IGI Insurance Limited and 3 others (2018 CLD 572), cited with approval in Presson-Descon International (Private) Limited and Others versus Joint Registrar of Companies (2020 CLD 1128 [Lahore])

address, but there is before me a commercial rationale independent of tax for the demerger, which is that the lateral movement of investment portfolio assets between two associated companies of the same shareholders ought not entail funding the price of the assets twice over, and this rationale justifies the exercise of a company bench's jurisdiction for sanctioning a scheme of arrangement between the members under section 279 of the Companies Act.

(d) The Court's role in sanctioning schemes of arrangement for the reconstruction of companies is supervisory and not appellate[4]. That supervisory role is addressed by CM no. 475 of 2023 accompanied by an affidavit affirming statutory compliances, and SECP's review of that CM together with the minutes of the members' meetings signed by the Chairmen of those meetings.

(e) The proposed Scheme stands approved by the requisite majority of shareholders per §279(2). The Court is not to substitute its opinion for the commercial view taken by the shareholders[5]. Determination of the consideration and other commercial aspects of the reconstruction is primarily the prerogative of the members of the respective companies[6].

(f) None of the exceptions to sanction, namely, that the Scheme was unfair, violated any law, or was against the national interest[7], or was fraudulent[8], were asserted by the SECP nor by anyone else despite notices of the Scheme published in two dailies. I may add that the Court is not expected to apply a higher standard of fairness and reasonableness in examining the Scheme than what the shareholders have applied for their commercial affairs by approving the Scheme.

7. THE SANCTION

(a) With no reasons apparent to withhold the sanction, the Scheme approved by the requisite statutory majority of the members was sanctioned as prayed for by the Court vide order announced in open Court on 18.04.2023.

(b) Per Zaver's undertaking to SECP, post-demerger 'split balance sheets' of the Investment Undertaking and the Retained Undertaking shall be furnished by Zaver to SECP immediately on transfer of the Investment Undertaking to Hashoo.

(c) Zaver's decision to transfer the Investment Undertaking at the cost of acquisition is a business decision, that was respected by this Court in view

[4] Total Parco Pakistan Ltd. and Another (2018 C L D 838 [Sindh])
[5] Brooke Bond (Pakistan) Limited v. Aslam Bin Ibrahim (1997 CLC 1873) || International Complex Projects Limited and another (2017 CLD 1468) || Presson-Descon International (Private) Limited and Others versus Joint Registrar of Companies (2020 CLD 1128 [Lahore])
[6] Gadoon Textile Mills Limited and 2 others (2015 CLD 2010)
[7] Dewan Salman Fiber v. Dhan Fibers Limited (PLD 2001 Lahore 230)
[8] Presson-Descon International (Private) Limited and Others versus Joint Registrar of Companies (2020 CLD 1128 [Lahore])

of the Scheme. It was however clarified during the hearings, as also in the order dated 03.03.2023, that the tax consequences, if any, of this commercial decision are for the shareholders to carry.

With the aforesaid, this petition is disposed of along with all miscellaneous applications.

(Sardar Ejaz Ishaq Khan)
Judge

Fazal Elahi

Dated: 07.07.2023