

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH

TCSP NO 799 OF 2017
AND
TCSP NO 800 OF 2017

DP World Private Limited ...Petitioner/Transferor Company III
AND

Hindustan Ports Private Limited...Petitioner /Transferee Company
In the matter of the Companies Act, 2013;

AND

In the matter of Sections 230 to 232 and Section 234 and other
applicable provisions of the Companies Act, 2013;

AND

In the matter of Scheme of Arrangement in the nature of
Amalgamation of South Asia Port Limited having Company
number C17501 (Transferor Company I), P&O Ports (Kulpi)
Limited having Company number C49765 (Transferor Company
II), DP World Private Limited having CIN
U61200MH1997PTC109065 (Transferor Company III), P&O
Ports (Mundra) Private Limited having Company number
C43602 (Transferor Company IV) and P&O Ports (Chennai)
Limited having Company number C27310 (Transferor Company
V) with Hindustan Ports Private Limited having CIN
U63010MH2008PTC177942 (Transferee Company) and their
respective Shareholders

Mr. Rafiqe Dada, Senior Counsel with Mr. Hemant Sethi i/b M/s. Hemant Sethi & Co.,
Advocates for the Petitioners

Mr. P Sheela , Joint Director in the office of Regional Director

Mr. Ramesh Gholap, Deputy Registrar of Companies, Mumbai

Mr. Santosh Dalvi, Assistant in the office of Official Liquidator.

Order delivered on 20th December 2017.

Coram: M. K. Shrawat Hon'ble Member (J)

V .Nallasenapathy Hon'ble Member (T)

Per: V .Nallasenapathy, Member (T)

ORDER

1. Heard learned counsel for parties. No objector has come before this Hon'ble Tribunal to oppose the Scheme and nor has any party controverted any averments made in the Petition.

2. The sanction of the Tribunal is sought under Sections 230 to 232 read with Section 66 of the Companies Act, 2013 to a Scheme of Arrangement in the nature of Amalgamation of South Asia Port Limited (Transferor Company I), P&O Ports (Kulpi) Limited (Transferor Company II), DP World Private Limited (Transferor Company III), P&O Ports (Mundra) Private Limited (Transferor Company IV) and P&O Ports (Chennai) Limited (Transferor Company V) with Hindustan Ports Private Limited (Transferee Company) and their respective Shareholders.
3. The Counsel for Petitioners submit that Petitioner/Transferor Company III is engaged in the business relating to ports including participation in bidding, exploring markets and business possibilities, co-ordinating and assisting persons, setting up or managing ports. The Transferee Company is engaged in the business of investment and development of port infrastructure.
4. The Counsel for the Petitioners submit that the respective Boards of Directors feel that the Scheme of Amalgamation is beneficial to the respective shareholders, creditors, employees and all stakeholders of the Applicant Company and the Transferor Companies. The proposed Scheme of Amalgamation is aimed at achieving the following business and commercial objectives:
 - *DP World Limited (hereinafter referred to as 'DPW'), a company incorporated in United Arab Emirates, which is engaged in the construction and development of ports across the world, including in India through entities incorporated therein, wishes to consolidate its holdings in entities in India into the Applicant Company.*
 - *The amalgamation under this Scheme of Amalgamation and Arrangement would result in the rationalization of multiple foreign subsidiaries in the group to ensure optimized legal entity structure more aligned with the business, by reducing the number of legal entities and reorganizing the legal entities in the group structure so as to obtain significant cost savings and /or simplification benefits.*
 - *The proposed merger will lead to a reduction in the multiplicity of legal and regulatory compliances presently carried out by the Transferor Companies and the Applicant Company.*
 - *The Scheme will enable a concentrated focus by senior management to develop the business by eliminating duplicative communication and cumbersome coordination efforts across multiple entities and countries.*

- *The proposed merger will result in economy of scales and reduction in overheads, administrative, managerial and other expenditure, operational rationalisation, organisational efficiency, and optimal utilisation of various resources.*
 - *The Scheme will result in expansion of the capital base and enabling fresh investments in ports and logistics infrastructure within India.*
5. The Learned Counsel appearing on the behalf of Petitioners states that the petitions have been filed in consonance with the orders passed in the Company Summons for Direction No 646 and 647 of 2016 of Bombay High Court.
6. The Learned Counsel appearing on the behalf of Petitioner further submits that the Petitioner Companies have complied with all requirements as per directions of this Tribunal. Moreover, Petitioner Companies undertake to comply with all the statutory requirements if any, as required under Companies Act 2013 and the rules made there under. The said Undertaking is accepted.
7. The Regional Director has filed his report dated 7th Day of November 2017 and has stated that save and except as stated in Paragraph IV of the said Report, it appears that the Scheme is not prejudicial to the interest of shareholders and public. The Regional Director in Paragraph IV of its report has stated that:
- (a) *The Transferor Companies No. 1 to 4 are registered in the Mauritius, therefore these Companies are required to apply for and obtain all such approvals of their shareholders and creditors, and shall initiate and pursue all actions necessary under the laws of Mauritius. As the Hon'ble Supreme Court of Mauritius has sanctioned the Scheme vide order dt. 26-04-17, the Transferee Company & all four Foreign Transferor Companies may be directed to comply with the said order and other Rules and Regulations to extent applicable to them.*
 - (b) *As regard Para No.111(13) of this report, the petitioners must ensure getting of all necessary approval from the concerned Regulations Authorities before sanction of the scheme.*
 - (c) *As regards Para No. 12 of the scheme for safeguarding the interest of Employees & Workmen of four Foreign Transferor Companies, the Transferee Company may be directed to comply with all Rules & Regulations of the concerned companies i.e. Mauritius or any other country, where ever they are employed.*

- (d) *Since the Transferor Companies No. 1 to 4 are Foreign Companies, the Transferee Company prefers to issue Equity Shares to these Companies, it is subject to the compliance of the FEMA Regulations/RBI Guidelines by the Transferee Company and also compliance of terms & conditions imposed by Reserve Bank of India vide their letter No. FID/2488/10.02.001(52)/2017/18 dated 13-09-2017 or thereafter, if any.*
- (e) *As regards Para No. 6 of the scheme, the Transferee Company may be allowed in respect of fees payable by the Transferee Company on its Authorized Share Capital, subsequent to the Amalgamation for setting-off paid by the Transferor Company on its Authorized Share Capital in accordance with the provisions of section 232(3)(i) of the Companies Act, 2013.*
- (f) *The Transferee Company has insufficient Authorized Share Capital beyond the combined Authorized Share Capital for implementation of the Scheme to issue shares to the shareholders of the Transferor Companies in lieu of consideration. The said Company has proposed to increase its Authorized Share Capital to Rs. 400 crores in the Scheme, for which the company shall pay requisite fees as per Rule 12 of the Companies (Registration Offices and Fees) Rules, 2014 and applicable stamp duty for increase in Authorized Share Capital to Rs. 400 crores from Combined Authorized Capital of the Transferee Company and Indian Transferor Company.*
- (g) *The Transferee Company shall pass such Accounting Entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-14(IND S 103), AS-5(IND S 8) etc,*
- (h) *As per existing practice, the Petitioner Companies are required to service Notice for Scheme of Amalgamation to the Income Tax Department for their comments. The Petitioner Companies served copy of the Scheme along with relevant orders etc to Income Tax Department. Further, the office of the Regional Director, WR has also issued reminders on 01.11.2017.*
- (i) *The tax implications, if any arising out of the scheme is subject to final decision of Income tax authorities. The approval of the scheme by this Hon'ble Tribunal may not deter the Income Tax Authority to scrutinize the tax return filed by the Transferee Company after giving effect to the scheme. The decision of the Income Tax Authority is binding on the Petitioner Company.*
- (j) *As per Clause 1.2 Definitions of the scheme, "The Appointed Date" means December 1,2016 or such other date as the Bombay High Court may direct or fix. In this regard, it is submitted in terms of provisions of section 232(6) of the Companies Act 2013 it should be specific as 1st day of December, 2016.*

Save and except as stated in Para IV (a) to (j), it appears that the Scheme is not prejudicial to the interest of shareholders and public.

8. In so far as observations made in paragraph IV (a) & (b) of the Report of Regional Director is concerned, the Petitioners through their Counsel undertakes that the Transferee Company & all four Foreign Transferor Companies shall initiate and pursue all actions and obtain approvals necessary under the laws of Mauritius and comply with the orders passed by Supreme Court of Mauritius and shall also obtain approvals from concerned Regulatory Authorities to the extent applicable to them.
9. In so far as observations made in paragraph IV (c) of the Report of Regional Director is concerned, the Petitioners through Counsel clarifies that there are no employees and workmen in four foreign Transferor Companies. The Counsel for Petitioners further clarify that upon the coming into effect of this Scheme, all employees, if any, of Transferor Companies as on the Effective Date shall become the employees of the Transferee Company on the terms and conditions not less favourable than those on which they are engaged by Transferor Companies and without any interruption of or break in service as a result of the amalgamation of Transferor Companies with the Transferee Company. For the purpose of payment of any compensation, gratuity and other terminal benefits, the past services of such employees with Transferor Companies and such benefits to which the employees are entitled in Transferor Companies shall also be taken into account, and paid (as and when payable) by the Transferee Company. The boards of directors each of the Transferor Companies and the Transferee Company shall take such actions and execute such further documents as may be necessary or desirable for the purpose of giving effect to the provisions of this Clause.
10. In so far as observations made in paragraph IV (d) of the Report of Regional Director is concerned, the Transferee Company through their Counsel undertakes that the Transferee Company shall comply with all relevant provisions of FEMA Regulations/RBI Guidelines and also compliance of terms & conditions imposed by Reserve Bank of India vide their letter No. FID/2488/10.02.001(52)/2017/18 dated 13-09-2017 to the extent applicable.

11. In so far as observations made in paragraph IV (e) of the Report of Regional Director is concerned, the Transferee Company through their Counsel clarifies that the Authorized Share capital of Transferor Company III shall be merged with that of the Transferee Company in terms of clause 6.1 of the Scheme.
12. In so far as observations made in paragraph IV (f) of the Report of Regional Director is concerned, the Transferee Company through their Counsel clarifies that in terms of clause 6 of the Scheme, the Authorized share capital of the Transferee Company shall be increased to Rs. 400 Crores for the purpose of issuance and allotment of shares to the shareholders of the Transferor Companies in terms of clause 5.1 of the Scheme. The Transferee Company through their Counsel further undertakes that it shall make payment of requisite fees as per Rule 12 of the Companies (Registration Offices and Fees) Rules, 2014 and applicable stamp duty for increase in Authorized Share Capital from Rs. 75 crores (being the combined authorized share capital of the Transferee Company and the Indian Transferor Company) to Rs. 400 crores and shall file requisite forms with the Registrar of Companies.
13. In so far as observations made in paragraph IV (g) of the Report of Regional Director is concerned, the Transferee Company through their Counsel undertakes it shall pass such Accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-14(IND S 103). AS-5(IND S 8) to the extent applicable.
14. In so far as observations made in paragraph IV (h) & (i) of the Report of Regional Director is concerned, Petitioner Companies through its Counsel undertakes to comply with all applicable provision of the Income Tax Act, 1961 and all tax issues arising out of the Scheme will be met and answered in accordance with law.
15. In so far as observations made in paragraph IV (j) of the Report of Regional Director is concerned, the Counsel for the Petitioners clarify and confirm that the Appointed Date shall be December 1, 2016 as mentioned in clause 1.2 of the Scheme under the head definitions.
16. The Registrar of Company has filed his Report dated 17th October 2017 to the Regional Director and has made the following observations in paragraph 33 of his report :-

33. (1) *In Clause 6.1 of the Scheme , it is shown after merger , the Authorized capital will become Rs. 400 Crores. Whereas, as per Master Data of the Indian Companies (Transferor & Transferee) the total capital would be Rs. 40 Crores+ Rs 35 Crores is equal to Rs. 75 Crores . Company to clarify as to how the Capital will become Rs. 400 Crores.*
- (2) *the addition of Share Capital of Foreign Companies would not be allowed being the Stamp duty & ROC fees on that capital has not been paid to Indian Government. However, increase in Capital (Foreign & India) is allowed subject to payment of stamp duty & Registration fees of Registrar of Companies.*
17. In so far as observations made by the Registrar of Companies in paragraph 33(1) & (2) of his report, the Petitioners through their Counsel clarifies that the Authorized share capital of the Transferee Company shall be increased in terms of clause 6 of the Scheme, to Rs. 400 Crores, for the purpose of issuance and allotment of shares in terms of clause 5.1 of the Scheme. The Transferee Company through their Counsel further undertakes that it shall make payment of requisite fees as per Rule 12 of the Companies (Registration Offices and Fees) Rules, 2014 and applicable stamp duty for increase in Authorized Share Capital from Rs. 75 crores (being the combined authorized share capital of the Transferee Company and the Indian Transferor Company) to Rs. 400 crores and shall file requisite forms with the Registrar of Companies.
18. The Observations made by the Regional Director and Registrar of Companies have been explained by the Petitioner Companies in Paragraph 8 to 17 above. The clarifications and undertakings given by the Petitioner Companies are accepted.
19. The Official Liquidator filed his report dated 1st August, 2017 stating that the affairs of the Transferor Company III has been conducted in proper manner and that the Transferor Company III may be ordered to be dissolved.
20. From the material on record, the scheme appears to be fair and reasonable and is not in violation of any provisions of law and is not contrary to public policy.
21. Since all the requisite statutory compliances have been fulfilled, Company Scheme Petition No. 799 and 800 of 2017 are made absolute in terms of prayers clauses (a) of the respective Petitions.

22. The Petitioner Companies are directed to file a certified copy of this order and the scheme with the concerned Superintendent of Stamps, within 60 working days from the date of the receipt of certified true Copy of Order, for the purpose of adjudication of stamp duty payable, if any, on the same.
23. Petitioner Companies are directed to file a copy of this order along with a copy of Scheme of Amalgamation with the concerned Registrar of Companies, electronically, along with E-Form INC-28, within 30 days from the date of issuance of the order by the Registry.
24. The Petitioner Companies to pay costs of Rs. 25,000/- each to the Regional Director, Western Region, Mumbai and the Petitioner in the Transferred Company Petition No. 799 of 2017 filed by the Transferor Company III to pay costs of Rs. 25,000/- to the Official Liquidator, High Court, Bombay. The cost to be paid within four weeks from the date of receipt of certified true copy of order.
25. All concerned regulatory authorities to act on a copy of this order along with Scheme duly certified by the Assistant Director/ Deputy Registrar, National Company Law Tribunal, Mumbai Bench.

Sd/-

V. Nallasenapathy, Member (T)

Sd/-

M. K. Shrawat, Member (J)

Date: 20.12.2017