

IN THE HIGH COURT OF SINDH AT KARACHI

J.C.M No.29 of 2016

DATE

ORDER WITH SIGNATURE OF JUDGE

Petitioners: **Pervez Arshad &
Muhammad Junaid Arshad
Through Mr. Haider Waheed, Advocate.**

**Respondents
No:1,3,4 & 11.** **Through Mr. Arshad Tayebaly,
Advocate.**

**National Bank
of Pakistan:** **Through Mr. Naveed-ul-Haq, Advocate.**

For hearing of CMA No.291/2016.

Date of Hearing: **16.05.2018**

Date of Order: **11.07.2018**

ORDER

Muhammad Junaid Ghaffar J. This is an application under Section 325 of the then Companies Ordinance, 1984, which is now Section 315 under the Companies Act 2017, and has been filed by the Petitioner in this winding up Petition seeking appointment of a Provisional Manager.

2. This winding up Petition has been filed by the Petitioner on various grounds, including but not limited to, that he has been ousted from the management of Respondent No.1, which is a family concern and now it cannot be run with mutual understanding amongst the Directors, whereas, it is presently running into losses, and therefore Respondent No.1 be wound up, and pending passing of a final order to that effect, in the interregnum, a provisional manager be appointed.

3. Learned Counsel for the Petitioner while pleading urgency on the listed application has contended that the Petitioners admittedly own the Company to the extent of 34% shares, whereas, one of the Respondents i.e. Respondent No.6, who holds 5% shares, supports the Petitioners' claim, and therefore, it is a fit case for passing of a winding up order; that since there is a deadlock amongst the directors, therefore, Respondent No.1 cannot be properly run; that three years have been passed but no elections of the Board of Directors have been held despite issuance of notices for such elections; that let the elections be held and whosoever is in majority be permitted to run the affairs of the Company; that Respondents are running the affairs of the Company for their own benefit and have made several attempts to sell the assets of Respondent No.1 for which the Petitioners have obtained restraining orders; that as per latest balance sheet there are accumulative losses incurred by Respondent No.1; that the laborers are also protesting for non-payment of their salaries; that if no Provisional Manager is appointed as prayed, the whole corpus will be lost; that Respondents have made various attempts to induct other family members as Directors, which has not been approved by Securities and Exchange Commission of Pakistan; that in view of all these facts and for the reason that a final order for winding up will take much time, hence a Provisional Manager must be appointed in the given facts. In support he has relied upon the cases of ***Sh. Maqbool Ellahi & 3 others V. Rasul & Co. Ltd. & 2 others (PLD 1970 Lahore 539), The United Bank Ltd. V. Messrs Pak Wheat Products Ltd (PLD 1970 Lahore 235), Pakistan Industrial Credit & Investment Corporation Ltd. Karachi V. National Silk & Rayon Mills Ltd.,***

Lyallpur (PLD 1976 Lahore 1538), Messrs Muhammad Baksh & Sons Ltd. And another v. Azhar Wali Muhammad and 11 others (1986 MLD 1870), Mst. Ghazala Zakir V. Muhammad Khurshid and 7 others (PLD 1989 Karachi 350), and Moinuddin Paracha & 5 others V. Sirajuddin Paracha & 22 others (1994 CLC 247).

4. On the other hand, learned Counsel for Respondents No.1,3,4 & 11, at the very outset, has contended that listed application may not be heard and decided in isolation to various Suits, Banking Suits and J.C.M No.40/2016 as any decision on this application will have crucial effect on the outcome of other proceedings; that supporting affidavit to the listed application is vague, whereas, after filing of this Petition a lot of water has flown over as the sponsoring Director i.e. father of the parties has expired; that for a period of four months in 2017, the Petitioner himself was running the affairs of the Company, hence no case is made out; that various orders passed in other proceedings have restrained Petitioners as well as Respondents from acting further; that already Respondent No.1 has been restrained from selling its assets without approval of the Court, and therefore, no prejudice is being caused; that an Inventory has already been prepared; that meeting of the Directors could not be held due to status-quo orders; that the Petitioner is running a parallel business to the disadvantage of the Respondent No.1 and is approaching the clients of Respondent No.1 as well as infringing the trademark of Respondent No.1 for which a separate Suit is already pending; that the petitioners have a personal grudge and interest for which this Petition has been filed, and therefore, listed application be dismissed. In support he has relied upon the cases of ***Sabir Ahmad and another V. Messrs Najma Sugar Mills Limited (2005 CLD***

49), In the matter of Gaya Sugar Mills Ltd. Lakhminarayan Bhadani and others (AIR (37) 1950 Patna 237) and Sh. Maqbool Ellahi & 3 others V. Rasul & Co. Ltd. & 2 others (PLD 1970 Lahore 539).

5. I have heard both the learned Counsel and perused the record. It appears that instant Petition was filed on 18.07.2016 under Section 305 and 309 of the Companies Ordinance, 1984 and according to the Petition, the Petitioners No.1 & 2 approximately holds 34% shareholding in Respondent No.1. The Petitioners' main grievance is to the effect that the affairs of Respondent No.1, due to dispute amongst the Directors, cannot be run in a smooth and cordial manner, which has resulted in losses to the Company, hence the Company be wound up. The precise grievance of the petitioners appears to be that they have been excluded from the management of the Company by Respondents, whereas, they are causing losses to the Company by way of making unauthorized payments and running the affairs for their own advantages. It further appears that on 18.07.2016, on the very first date, the Court on an application of the Petitioners, appointed Nazir of this Court, as Commissioner to prepare Inventory of the goods, machinery, raw material as well as finish goods and it is a matter of record that such Inventory has already been prepared. It further appears that on 29.07.2016 on an urgent application filed by the Petitioners, the Court confronted the learned Counsel for the Petitioners that as to how instant Petition is maintainable in view of the fact that Respondent No.2, (who was the father of Petitioners as well as Respondents No.3,6 & husband of Respondent No.5) had admittedly passed away on 24.06.2016, i.e. prior to filing of this petition, whereas, instant Petition has been filed on 18.07.2016 and record reflects that thereafter no assistance has

been provided in respect of the said objections; nor any effort has been made to at least amend the title and contents of the Petition. Insofar as, the listed application is concerned, the same has been filed under Section 325 of the then Companies Ordinance, 1984 and which is now Section 315 of the Companies Act 2017 and read as under:-

“325. Appointment and powers of provisional manager. -

- (1) At any time after the presentation of winding up petition and before the making of a winding up order, the Court may appoint a person eligible for appointment as official liquidator under section 321 to be provisional manager.
- (2) Before appointing a provisional manager, the Court shall give notice to the company and afford to it a reasonable opportunity to make its representations, if any, unless, for special reasons to be recorded, the Court thinks fit to dispense with such notice.
- (3) Where a provisional manager is appointed by the Court, the Court may limit and restrict his powers by the order appointing him.”

“315. Appointment of official liquidator.–

- (1) For the purpose of the winding up of companies by the Court, the Commission shall maintain a panel of persons from whom the Court shall appoint a provisional manager or official liquidator of a company ordered to be wound up.
- (2) A person shall not be appointed as provisional manager or official liquidator of more than three companies at one point of time.
- (3) The panel for the purpose of sub-section (1) shall consist of Persons having at least ten years experience in the field of accounting, finance or law and as may be specified by the Commission such other persons, having at least ten years professional experience.
- (4) Where a provisional manager is appointed by the Court, the Court may limit and restrict his powers by the order appointing him or by a subsequent order, but otherwise he shall have the same powers as a liquidator.
- (5) On appointment as provisional manager or official liquidator, as the case may be, such liquidator shall file a declaration within seven days from the date of appointment in the specified form disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the Court and such obligation shall continue throughout the term of his appointment.
- (6) While passing a winding up order, the Court may appoint a provisional manager, if any, under clause (c) of sub-section (1) of section 308, as the official liquidator for the conduct of the proceedings for the winding up of the company.”

6. The aforesaid provisions empowers a Company Judge on presentation of a winding up Petition and before a final winding up order could be made to appoint a person, who is authorized and eligible to be appointed as an Official Liquidator, as Provisional Manager after giving notice and reasonable opportunity to make its representation and further empowers the Court to limit and restrict the powers of the Provisional Manager. It is a matter of record that in this matter a Commissioner was appointed on the very first date and an Inventory has been prepared. Two separate order(s) on the applications of the petitioners have been passed on 31.10.2016 and 8.1.2018, whereby, Respondent No.1 has been restrained from selling any of its moveable and immoveable assets without permission of the Court. It is also a matter of record that there are various other proceedings pending amongst the parties, wherein, several interim orders are also operating. JCM No.40/2016 has been filed by Respondent No.1 against Petitioners and one of their Companies alleging that a parallel business is being run by them to the detriment and disadvantage of Respondent No.1 and vide Order dated 31.10.2016 a status-quo order has been passed. Suit No.B-46/2016 has been filed by Petitioner No.1 against National Bank of Pakistan as well as Respondents No.1 & 3 and the precise case of the Petitioner No.1 is in respect of the personal guarantees executed by him for securing finance in the name of Respondent No.1. Again in that case an order has been passed on 16.12.2016, whereby, it has been ordered that the guarantee in question may not be further taken into consideration for further encumbrances. Suit No.204/2017 has been filed by Respondent No.1 against Petitioner No.1 for alleged infringement of the registered trademark of Respondent No.1. Again Suit No.635/2017 has been filed by

Respondent No.1 against Petitioner No.1 for Declaration and Injunction restraining the Petitioner No.1 from making false representations to the Customers of Respondent No.1 and lastly Suit No.750/2016 has been filed by both the Petitioners against all Respondents in respect of alleged false Board Resolutions and appointment of new Directors in the Company and on 20.03.2017 all parties have been directed to maintain status-quo in respect of the Directorship and final affairs of Respondent No.1 Company.

Perusal of all these proceedings and passing of various orders in these matters reflect that insofar as the present Petitioners are concerned, their interest and shareholding in the Company in question has been protected on various occasions and they appear to be fully protected and secured to that extent. Further it has not been denied that the petitioners were controlling the affairs of Respondent No.1 for a period of 4 months in the year 2017 (except that at that point of time the Company was in profit), which in my view cannot be conclusively taken into consideration at this stage of the proceedings. It may be of relevance to observe that this is not a Petition for winding up by the Creditors of the Company; but by brothers against each other. This is a family concern and all sons of Late Respondent No.2 are its Directors. The intention of parties appear to be to either run the affairs of the Company by themselves; and if not possible, then to have the company wound up. Though it is a sad state of affairs, but since law permits a shareholder of more than 20% to seek winding up of a Company, the Court is left with no other choice but to entertain and decide the claim on its own merits. However, the request and prayer made through listed application appears to be of such a nature that it amounts to grant of the entire prayer so made in the petition i.e. winding up. Again

the law permits appointment of a Provisional Manager; but such powers are to be exercised sparingly and for extra-ordinary reasons and facts which in my view are lacking presently in this matter. The parties are contesting on various issues in Company Petition, Civil Suits, Banking Suits, and therefore, any order passed on the listed application at this stage may have bearing and cause serious prejudice to the losing party, and therefore, this Court must show restraint in passing of such an order. This is also not appropriate for the reason that under the banking jurisdiction as well as civil jurisdiction of this Court, various orders have been passed, whereby, status-quo order has been directed to be maintained and till such orders are in field, Company Judge must not pass an order for appointment of Provisional Manager as it can upset the said orders and may result in abating all other litigation between the parties. It is also a settled proposition that an order for appointment of a provisional manager shall only be passed, when at the interim stage there are valid and justified grounds available that ultimately an order of winding will definitely be passed by the Court, as the provisional manager appointed by the Court under this Section has the same powers as an official liquidator appointed by the Court through a final order of winding up. The appointment of a provisional manager has serious consequences, and if ultimately, the winding up petition is dismissed, then there is no way to undo the acts performed by the provisional manager. The remedy is an exceptional one, and the Court invariably has a discretion whether to appoint a provisional manager or not. The Court must be satisfied to the fullest that there is a strong likelihood that finally a winding up order will be passed and a liquidator will be appointed. Notwithstanding this even if the company is likely to go into

liquidation, appointment of a provisional manager is still an exceptional interim or emergent remedy. And for that there needs to be special reasons for the appointment of a provisional manager in the interim period.

7. The discretion and prerogative vested in the Court is well tempered by the established consideration that such an appointment is a drastic intrusion into the affairs of the Company, and must not be resorted to, if other measures would be adequate to preserve the status-quo, hence, the petitioner must show valid and goods reasons to the Court to go for such a drastic measure. The well-established principles in this regard have been settled in the case of ***Australian Securities and Investments Commission v Active Super Pty Ltd (No 2) [2013] FCA 234***, and reads as under;

- a) whether there is a reasonable prospect that a winding up order will be made;
- b) whether the assets of the company are at risk;
- c) the degree of urgency;
- d) the need for an independent examination of the state of the accounts of the corporation;
- e) whether the affairs of the company have been carried out casually and without due regard to the legal requirements so as to leave the court with no confidence that the company's affairs are being properly conducted; and
- f) the need to preserve the status quo so to ensure the least possible harm to all concerned.

After having perused the record before me, wherein, as already observed, various orders have already been passed, which in effect is to maintain status quo, as well as restriction on selling the assets of Respondent No.1, I am of the view that presently, in the given facts there are no valid grounds to take such extreme action against Respondent No.1.

8. In the case of **Sabir Ahmed (Supra)** a learned Single Judge of the Lahore High Court has been pleased to hold as under;

2. The submission made in that regard viz. inability of the respondent to meet its current demands, being commercially and technically insolvent, that substratum of the company has gone and that it is not meeting its current demands are relevant to the final disposal of the winding up. Therefore, it does not appear appropriate to make a direction at this stage merely for the reason that a company is going in loss. All these aspects will be considered at the time of final arguments. Therefore, for the moment this application cannot be granted. Dismissed.

9. In the case reported as In the matter of **Gaya Sugar Mills Ltd., (Supra)** a learned Single Judge of the Patna High Court has been pleased to hold as under;

3.....Moreover, what I am now concerned with is not the making of a winding up order but the application for the appointment of a provisional liquidator. Such an application is not ordinarily allowed except on the petition of a creditor who has been unable to obtain payment of his money, or unless the company asks for or agrees to the appointment. The dangers involved in appointing a provisional liquidator and then finding that there is no justification for making a winding up order are obvious. The consequences to the company of the making of a wrong order in such a matter are far more serious than the granting of an injunction which has ultimately to be dissolved. The object in appointing a provisional liquidator is to ensure that there will be a fair distribution of the assets of the company and that one creditor will not be permitted to benefit at the expense of the others.....

10. In view of hereinabove facts and circumstances of this case, I am of the view that this is not a case, whereby, a Provisional Manager could be appointed by the Court, and therefore, listed application is hereby dismissed.

Dated: 11.07.2018

Judge