IN THE HIGH COURT OF SINDH AT KARACHI

J. C. M. NO. 16 / 2010

Petitioner:	**M/s Nishat (Chunian) Ltd. through Mr. Tassawar Ali Hashmi Advocate.**
Respondent:	**M/s Nina Industries Ltd. through Mr. Malik Muhammad Ayaz Advocate.** **Mr. Syed Ebad Advocate for SECP.**
Date of hearing:	**31.01.2019.**
Date of order:	**22.03.2019.**

O R D E R

Muhammad Junaid Ghaffar, J. This is a winding up Petition under Section 305, 306 and 309 of the Companies Ordinance, 1984 (since Repealed), and briefly stated facts are that during the course of business the Petitioner supplied / sold fabric from time to time to Respondent Company and issued various invoices for payments in respect of supply of the said fabric. It is further stated that a total amount of Rs. 20,912,445/- was outstanding, out of which the Respondent paid an amount of Rs. 2,893,015/- but has failed to pay the balance amount of Rs. 18,019,430/-. It is further stated that Respondent in order to liquidate its liability issued six cheques in favour of the Petitioner but never paid the amount and kept on requesting the Petitioner not to encash such cheques, and thereafter, having left with no option, the Petitioner issued a Legal Notice dated 20.02.2010 calling upon the Respondent to pay the balance outstanding amount with a further notice to treat the same as a Notice under Section 305 and 306 of the Ordinance, whereas, such Notice was sent through TCS; but was never responded; hence, instant Petition.

2. Learned Counsel for the Petitioner submits that admittedly cheques were given against supply of fabric and were never honored, whereas, the Petitioner was kept on false promises, therefore, instant Petition is maintainable and must be granted. Per learned Counsel, the Company in question is in huge debts and is unable to pay the same; therefore, in terms of the Ordinance, a winding up order is a must. Learned Counsel has also referred to the counter affidavit of the

Respondent as well as his rejoinder, and submits that no specific denial has been made in respect of the amount; therefore, the Company is liable to be wound up. According to him an amount of Rs. 5.6 billion approximately is outstanding against the Company being owed to its creditors, which the Company is unable to pay, and is neither a viable concern nor solvent, whereas, its substratum has been lost; therefore, a winding up order be passed to safeguard the interest of the petitioner and other creditors. In support he has relied upon ***Hala Spinning Mills Ltd., V. Industrial Finance Corporation and another (2002 S C M R 450), Messrs Sindh Glass Industries Ltd. Karachi V. Messrs National Development Finance Corporation, Karachi and 2 others (P L D 1996 SC 601), Eridania (Suisse) SA V. Rajby International (Pvt.) Ltd. (2008 C L D 1343), Industrial Development Bank of Pakistan V. Modern Poultry Farm Limited (1990 C L C 1030) and Messrs Industrial Development Bank of Pakistan V. Messrs Trade and Industries Publications Limited (1989 M L D 374).***

3. On the other hand, learned Counsel for the Respondent Company has contended that the amount being claimed is disputed as it is the case of the Respondent Company that the goods supplied were not according to the agreed quality and after making partial payment the payments were withheld. According to him this is a disputed amount and in these circumstances, the provisions of the Ordinance, 1984 cannot be invoked. Per learned Counsel, if cheques were issued then Petitioner Company ought to have taken recourse to appropriate legal remedy including filing a Suit under Order 37 CPC and it is the case of the Respondent Company that the claim is time barred and thereafter instant Petition has been filed. He has further argued that the Company is very much viable, therefore, no case for winding up is made out. He has read out Section 305 and has relied upon subsection (e) to support his stance. As to the notice issued by the Petitioner Company, learned Counsel has contended that the said notice was never served upon the Respondent Company, nor the notice in question can be termed as a notice under the Ordinance, 1984 as it has been issued by their legal Counsel as a legal notice, which does not fulfill the requirement of law. He has lastly raised an objection regarding maintainability of this Petition as according to him it has not been filed through a proper Board Resolution; hence not maintainable. In support he has relied upon ***Mst. Surriya Rehman V. Siemens Pakistan Engineering***

Company Ltd. and another (P L D 2011 Karachi 571), Ulbricht's Wwe. GES M.B.H., Austria V. Ulbricht's (Pakistan) (Private) Ltd. (P L D 1992 Karachi 249), Investment Corporation of Pakistan and others V. Messrs Charagh Sun Engineering Limited (P L D 1997 Karachi 504), Messrs Habib Bank Ltd. V. Messrs Golden Plastic (Pvt.) Ltd. (1991 M L D 124), Joint Registrar of Companies V. Sh. Fazal Rehman & Sons Ltd. (2008 C L D 465), United Bank Limited V. Golden Textile Mills Limited (P L D 1998 Karachi 330), Humera Abdul Aziz Essa V. Al-Abbas Cement Industries Limited (2008 C L D 214) and Messrs Platinum Indus trance Company Limited Karachi V. Daewoo Corporation, Shaikhupura (P L D 1999 SC 1).

4. I have heard both the learned Counsel and perused the record. As per the Petitioner's claim certain goods were sold and supplied and a total amount of Rs. 20,912,445/- was outstanding out of which an amount of Rs. 2,893,015/- has been repaid and at the time of filing of this Petition an amount of Rs. 18,019,430/- is outstanding. It is further case of the Petitioner that the Respondent in order to liquidate its liability in respect of the outstanding amount, issued various cheques amounting to Rs. 18,614,398/-. It is the case of the Petitioner that since cheques were issued; therefore, the amount is admitted. On the other hand, such assertion of the Petitioner is seriously disputed in the counter affidavit and it is the case of the Company that such amount is disputed, whereas, if cheques were issued the Petitioner ought to have sought appropriate legal remedy. It needs to be appreciated that for a winding up petition to be entertained and being competent under the Ordinance, 1984 in terms of Section 305 and 306, it is incumbent upon the Petitioner to establish its case as that of, and as a *creditor*, and secondly; that the Company is *unable to pay its debts*. It would be advantageous to refer to the relevant provisions of Sections 305, 306 and 309 of the Ordinance, 1984 which reads as under:-

> **"305**. Circumstances in which company may be wound up by Court. - A company may be wound up by the Court-
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> (a)--------
>
> (b)--------
>
> (c)--------
>
> (d)--------

(e) if the company is unable to pay its debts;

(f)--------

(g)-------or

(h) if the Court is of opinion that it is just and equitable that the company should be wound up; 1 [or] 2

[(i)-------

Explanation I: ------

Explanation II:------

"306. Company when deemed unable to pay its debts. - (1) A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one per cent of its paid-up capital or fifty thousand rupees, whichever is less, then due, has served on the company, by causing the same to be delivered by registered post or otherwise, at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for thirty days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) ------

(c) ------

(2) The demand referred to in clause (a) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal adviser duly authorized on his behalf, or in the case of a firm if it is signed by such agent or legal adviser or by any member of the firm on behalf of the firm."

309. Provisions as to applications for winding up. - An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), or by any contributory or contributories, or by all or any of the aforesaid parties, together or separately, or by the registrar, or by the Commission or by a person authorized by the Commission in that behalf.

Provided that-

(a) ------

(i) -------

(ii) ------

(b) ------

(c) ------

(d) the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a prima facie case for winding up has been established to the satisfaction of the Court;

(e) ------

5. Perusal of s.305 reflects that there are various circumstances and situations in which the Court is empowered under the Ordinance to order winding up of a Company. For the present purposes, it is only clause(s) (e) [if the company is unable to pay its debts], and (h) [if the Court is of the opinion that it is just and equitable that the company should be wound up]

which are attracted and relevant, in addition to the fact that it has to be filed by a creditor. Here in this matter the case as setup on behalf of the Petitioner is that the Company is unable to pay its debts. Section 306 provides that a company shall be deemed to be unable to pay its debts, when, if a creditor to whom the company is indebted in a sum exceeding one percent of its paid up capital or fifty thousand rupees, whichever is less, then due, has served on the company a demand under writing to pay the sum so due and the company has for thirty days thereafter, neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company. Insofar as the objection to the effect that the notice was not properly issued as it was sent by the Advocate, and not by the Petitioner, it would suffice to observe that in view of sub-section (2) of s.306, this objection is misconceived.

6. Insofar as the first part i.e. of being a creditor to whom debt is owned by the Company is concerned, the case of the Petitioner does not seem to be of any significance as apparently the cheques in question do not correspond with the individual amount of invoices mentioned in Para 4 of the Petition. Though, this Court is not in a potion to hold that such cheques were not issued by the Respondent Company; however, at the same time, once the amount being claimed is disputed, and in absence of any other document or agreement to that effect, the Court is at least required to ascertain that whether the Petitioner is a creditor of the Company in question or not and on a tentative assessment of the claim of the Petitioner on the basis of the cheques in question it does not reflect that any case to that effect is made out. Moreover, the Petitioner for reasons best known to it, has failed to file a recovery Suit in terms of Order 37 CPC or for that matter has neither initiated any criminal proceedings under Section 489-F of the Pakistan Penal Code, if the cheques were dishonored. In fact nothing has been placed on record that even cheques were presented and were dishonored. There is nothing on record that any of these two remedies were availed and therefore, filing of this Petition amounts to an attempt to force the Petitioner to pay the said amount. It is settled law that these proceedings are not for the purposes of recovery or settlement of

accounts; but only in respect of an insolvency of the Company and consequent proceedings to safeguard the interest of the creditors. The Petitioner apparently has failed to fulfill the first requirement. Insofar as the second requirement of the Company being insolvent or being unable to pay its debts is concerned, again the Petitioner has not placed on record any financial accounts or statement of the Company in question which apparently is a Public Limited Company. It is not clear from the record that at the time of filing of the Petition, status of the Company in question was such so as to pass an order of winding up. On the other hand enough material has been placed on record by the Company, suggesting that it is a going concern and is involved in business and is paying salaries to its employees. It is of utmost importance to note that exercise of this jurisdiction is discretionary in nature, and the Court has to see that whether a case for passing of such an extreme order is made out or not. It is more on facts of the case and the satisfaction of the Court, than any other consideration. It has to be prima facie established by the petitioner that a debt is due, and the Company must also is unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and the inability referred to in the expression "*unable to pay its debts*" in s.305 ibid should be taken in the commercial sense and that the machinery for wining up will not be allowed to be utilized merely as a means for realizing debts due from a Company. (For reference see ***Mediquip Systems Pvt. Ltd. V Proxima Medical System GMBH***- **AIR 2005 SC 4175**). Reference may also be made to the case of ***Madhusudan Gordhandas & Co v Madhu Woolen Industries Pvt. Ltd.*** **[1972] 2 SCR 201**, in somewhat similar circumstances in relation to supply of goods has been pleased to observe that:

> 21. Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable (See London and Paris Banking Corporation [1874] L.R. 19 Eq. 444. Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Re. Brighton Club and Norfold Hotel Co. Ltd. [1865] 35 Beav. 204.

7. The Hon'ble Supreme Court in the case reported as ***Messrs. Platinum Insurance Company Limited, Karachi V. Daewoo Corporation, Shaikhupura*** (**PLD 1999 SC 1**), has been pleased to examine and interpret the provisions of s.305 and 306 in the following manner and has arrived at various legal propositions which are a source of guidance as well as a binding precedent for the Courts.

> From the above-cited and discussed cases, the following legal position emerges
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> (i) That if a debtor company is merely unwilling to pay its debts but otherwise is commercially solvent, then the normal remedy available to a creditor is a suit for the recovery of the amount and not a petition for winding up.
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> (ii) That if the Court finds that the negligence on the part of the debtor company to pay the sum demanded in terms of clause (a) of subsection (1) of section 306 of the Ordinance is not on account of want of commercial solvency, but because of bona fide dispute based on a substantial ground as to the entitlement of the creditor to the amount demanded, application under section 306 read with section 309 of the Ordinance will not be sustainable.
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> (iii) That clause (a) of subsection (1) of section 306 of the Ordinance raises a presumption as to the fact that the debtor company is deemed to be unable to pay its debts, if in spite of the receipt of demand in terms of the above clause, the debtor company neglects to pay the sum demanded within thirty days of the receipt of notice of demand, or neglects to secure or to compound for it to the reasonable satisfaction of the creditor. But this presumption is rebuttable by the debtor company, if it can show that it is commercially solvent and is in a position to meet its liability on due dates.
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> (iv) That the object of sections 305 and 306 of the Ordinance is not to coerce a debtor company to make payment to an unpaid creditor, but to secure, discontinuation of functioning of such company which has ceased to be commercially solvent.
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> (v) That though under section 9(3) of the Ordinance it is permissible to adopt summary procedure, but the procedure adopted should be fair and just which may ensure equal opportunities to the contesting parties.
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> (vi) That the effect of lack of proof of service of a demand notice by a creditor in terms of clause (a) of subsection (1) of section 306 of the Companies Ordinance is that the presumption that the debtor company shall be deemed to be unable to pay its debts will not be available to the f creditor in a petition for winding up, but the creditor will be at liberty to prove that, in fact, the company is unable to pay its debts within the meaning of clause (c) of subsection (1) of section 306 of the Ordinance by other evidence.
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> (vii) That though clause (a) of subsection (1) of section 306 of the Companies Ordinance seems to be independent of clause (c) thereof, but the conjoint reading of sections 305 and 306 makes it amply clear that the Company Judge has a discretion to order, or not to order, winding 1 up of a company after taking into consideration all the relevant facts. The approach should be to see that a commercially insolvent company ceases to operate and not to provide a forum for the recovery of certain due amounts to a particular creditor.
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> (viii) That in order to determine whether a debtor company is commercially insolvent, the value of such assets without which it could not carry on its

> business should not be taken into account, but the amount available to the debtor company, or which may become available in normal course of business without disposing of the above assets will have to, be taken into consideration.
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> (ix) That the factum that a creditor has other or alternate remedy under general law or a special law, does not debar him from pressing in aid the provision of section 306 read with section 309 of the Ordinance for seeking the winding up of the debtor company.
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> (x) That a debtor company is unable to pay debts can be demonstrated from the company's contingent and prospective liabilities and the debts which are immediately payable.

8. The Hon'ble Supreme Court in the aforesaid judgment has been pleased to observe that if a debtor company is merely unwilling to pay its debts; but otherwise is commercially solvent, then the remedy is by way of normal Suit and not a Petition for winding up. It has been further held that if the negligence on the part of the debtor company to pay the sum demanded is not on account of want of commercial solvency, but because of bonafide dispute based on a substantial grounds, the winding up petition will not be sustainable. In respect of the object of Sections 305 and 306 of the Ordinance, it has been observed that is not to coerce a debtor company to make payment to an unpaid creditor, but to secure discontinuation or functioning of such company which has ceased to be commercially solvent. To these observations of the Hon'ble Supreme Court there cannot be any cavil and the law settled by the Hon'ble Supreme Court must be followed in letter in spirit by keeping in view the peculiar facts of each case individually. As in each and every case while deciding a winding up Petition, the peculiar facts of that case are very much relevant and there cannot be any hard and fast rule to apply and to decide a winding up petition. It is also observed by the Hon'ble Supreme Court, that the factum that a creditor has other or alternate remedy under general law or special law does not debar him from pressing in aid the provision of winding up of a company. The final observations and finding of the Hon'ble Supreme Court is to the effect that once a creditor proves service of a demand notice in terms of clause (a) of Sub-section (1) ibid, the burden is shifted upon the debtor company to rebut the presumption created by fiction of law by virtue of the above clause, by showing that it is, in fact, commercially solvent and will be able to pay its contingent and prospective liabilities and the debts which are

immediately payable by bringing sufficient material on record. Here in this matter as already noted sufficient material has been placed on record to establish that the Company in question is not insolvent so as to pass a winding up order. In the present case, firstly, the claim of the petitioner being a creditor of the Company has been seriously objected to. Moreover, it is not a case of a Bank or a Financial Institution who has given any loan or has lend money; but is of a business transaction. In these circumstances of the case, the case law relied upon by the learned Counsel for the Petitioner is not relevant as in all those cases the petitioners were Financial Institutions and had lend money, whereas, otherwise the debts were substantially not in dispute.

9. In view of hereinabove facts and circumstances of this case, it appears that the Petitioner has failed to make out a case for passing of a winding up order as apparently the amount in question is disputed, whereas, nothing has been placed on record to justify as to the insolvency or inability of the Company in question to pay its debts. Accordingly, the Petition is dismissed.

Dated: 22.03.2019

J U D G E

ARSHAD/