

ORDER SHEET  
**IN THE HIGH COURT OF SINDH AT KARACHI**  
**J. C. M. NO. 3 / 2009**

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DATE

ORDER WITH SIGNATURE OF JUDGE

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- 1) For hearing of CMA No. 151/2012.
- 2) For hearing of main petition.

**28.08.2018.**

Mr. M. Salim Mangrio Advocate for Petitioner.  
Mr. Badar Alam Advocate for Objector.

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- 1) This is an application filed on behalf of the Objector under Section 265(a)(ii) of the then Companies Ordinance, 1984 seeking appointment of an Inspector to investigate the affairs of the Respondent Company.

Learned Counsel for the Applicant submits that this is a winding up Petition in respect of Respondent Company filed by the Securities & Exchange Commission of Pakistan (“**SECP**”) and the precise reason for filing instant petition has been stated in Para 13, as according to SECP, the Company has stopped functioning since 2001 and all its assets have been sold; however, per learned Counsel this is not a correct and true picture of the affairs of the Company as the Objector who is an unsecured creditor of the Company, has filed a Suit bearing No. 1413/2004 for recovery of more than Rs. 8 billion, which is pending, wherein, written statement has been filed by the said Company with a counter claim in the year 2007; and therefore, it cannot be presumed that the Company is not functional. Per learned Counsel proper investigation should be made as to the affairs of the Company as well as the assets, which may or may not be available, as without doing so, serious prejudice would be caused to the Objector. He further submits that according to the Objector, SECP and the Company in question are

in collusion. He has also read out the provision of Section 265 and 277 of the Companies Ordinance, 1984 and has contended that it would be just and proper to investigate the matter as requested. In support he has relied upon ***Light Metal and Rubber Industries (Private) Limited and others V. Sarfraz Qaudri (2011 CLD 1485) and Brothers Steel Ltd. and others V. Mian Mirajuddin and 15 others (PLD 1995 SC 320)***.

On the other hand, learned Counsel for Petitioner (SECP) submits that immediately upon filing of this Petition in 2009, certain objections were raised on behalf for the Applicant, and in 2012 listed application was filed and due to these proceedings, winding up is pending since its filing, whereas, mere pendency of the Suit is no ground to object a winding up Petition. Per learned Counsel, the Suit in question is pending since 2004 and no effort has been made to get a Judgment and Decree; therefore, the objections as well as listed application is misconceived. He further submits that even if an Official Liquidator is appointed the claims could be entertained in accordance with law by the Official Liquidator; hence, no prejudice would be caused. Learned Counsel has read out Para 14 of the Petition and submits that the Company itself responded to SECP by stating certain facts and is no more functional; hence, the Petition is competent and should be granted.

I have heard both the learned Counsel and perused the record. It would be advantageous to refer the provisions of Section 265 of the then Companies Ordinance, 1984 which reads as under:-

**"265. Investigation of company's affairs in other cases.**- Without prejudice to its power under section 263, the Commission—

- (a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Commission may direct, if—

- (i) the company, by a resolution in general meeting, or
- (ii) **the Court, by order,**

**declares that the affairs of the company ought to be investigated by an inspector appointed by the Commission; and**

- (b) may appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Commission may direct if in the opinion of the Commission there are circumstances suggesting—
  - (i) that the business of the company is being or has been conducted with intent to defraud its creditors, members or any other person or for a fraudulent or unlawful purpose, or in a manner oppressive of any of its members or that the company was formed for any fraudulent or unlawful purpose; or
  - (ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance, breach of trust or other misconduct towards the company or towards any of its members or have been carrying on unauthorized business; or
  - (iii) that the affairs of the company have been so conducted or managed as to deprive the members thereof of a reasonable return; or
  - (iv) that the member of the company have not been given all the information with respect to its affairs which they might reasonably expect; or
  - (v) that any shares of the company have been allotted for inadequate consideration; or
  - (vi) that the affairs of the company are not being managed in accordance with sound business principles or prudent commercial practices; or
  - (vii) that the financial position of the company is such as to endanger its solvency:

Provided that, before making an order under clause (b), the Commission shall give the company an opportunity to show cause against the action proposed to be taken.”

The relevant provision for the present purposes and as relied upon on behalf of the objector is S.265(a)(ii), which provides for investigation of Company’s affairs and states that without prejudice to the powers conferred under Section 263 *ibid* the Commission i.e. SECP shall appoint one or more competent persons as Inspector to investigate the affairs of a Company and to report thereon in such manner as may be directed by the Court through an order declaring that the affairs of the Company ought to be investigated by Inspector appointed by SECP.

There is another provision (s.263) conferring similar powers on SECP, to take such measure on the complaint of not less than one-tenth of the total voting powers therein in respect of a company having a share capital. The provision of section 265 *ibid* is without prejudice to s.263 and also confers powers on the Court to investigate in addition to SECP. At the very outset I had confronted the learned Counsel for the Objector that as to how the application in question is competent by an unsecured creditor (as objector) who is neither a member of the Company, nor a shareholder, and to this learned Counsel responded that anybody can come before the Court under this provision seeking investigation into the affairs of the Company. However, *prima facie* this does not appear to be a correct approach. Insofar as the present Objector is concerned, the only ground which has been alleged in support of the application is pendency of a Suit for Recovery. This do not appear to be a justifiable cause in the present circumstances. It is yet to be ascertained that whether the Objector finally succeeds in its case or not. It is a matter of record and has not been disputed (except by the objector) that the Company is no more functional, whereas, the assets have already been sold out. The Petitioner has also annexed a report of the Chartered Accountant / Auditors wherein such fact has come on record; therefore, even otherwise I am of the view that for the present purposes, the facts as stated do not require any further investigation merely for the fact that the applicant has come before this Court and opposes this winding up Petition on the basis of a pending Suit. It is not that the Court is bound to exercise this option merely for the fact that some application has been filed, rather facts are to be scrutinized independently, and if a case is made out, only then this power is to be exercised, specially in a matter, where the applicant is not even a

member, shareholder or otherwise an owner of the company; but merely an unsecured creditor, against whom there is admittedly a counter claim pending as well. It is settled law that in such matters an investigation can be ordered only when public interest or shareholders interest is involved. It is not to be ordered merely on the basis of dissatisfaction of a person who is not even a shareholder, and has even otherwise failed to make out a case.

Insofar as the case law relied upon by the learned Counsel for the Objector is concerned, it may be observed that in those cases the parties were litigating before the Court(s) being shareholders and members inter-se. Both these cases are not premised on a fact wherein, some unsecured creditor had come before the Court; rather they were family members and or shareholders having substantial interest in the shareholding and ownership of the Companies in question and therefore, perhaps, they had made out a case of further investigation prior to a winding up order. The facts in the present case are materially different; hence, the ratio of these two cases do not render any assistance to the applicant's case, and therefore, need not be considered.

In view of above facts and circumstances of this case, I am of the view that this is not a situation wherein any investigation is to be carried out into the affairs of the Company as pleaded on behalf of the Objector, and therefore, the listed application as well as objections filed on their behalf are dismissed.

2) Adjourned. To come up after 4 weeks for hearing of main petition.

**J U D G E**

ARSHAD/