

**IN THE HIGH COURT OF SINDH AT KARACHI**  
**J. C. M. No. 01/2012**

**Petitioner:** M/s. Pak Brunie Investment Company Ltd.  
through Mr. Hassan Arif Advocate.

**Respondent:** M/s. New Allied Electronics Industries  
through Mr. Rizwan Ahmed Advocate.

- 1) For hearing of CMA No. 148/2012.
- 2) For hearing of main Petition.

**Date of hearing:** 02.10.2018.  
**Date of order:** 29.11.2018.

**ORDER**

**Muhammad Junaid Ghaffar, J.** This is a Petition under Section 305/306 read with Section 309 of the then Companies Ordinance, 1984 (“Ordinance, 1984”) seeking winding up of the Respondent Company on the ground that it is unable to pay its debts owed to the Petitioner Company.

2. The precise facts as stated are that the Petitioner along with several other institutions entered into a Musharaka with Respondent through Bank Islami Pakistan Limited as an Investment Agent and made such investments in the redeemable capital of the Respondent Company of a total sum of Rs. 750 million against Sukuk Certificates (“Term Finance”) out of which, Petitioner was an investor to the extent of Rs. 150 million. It is further stated that pursuant to such arrangement all relevant documents were signed by the Respondent Company including Trust Deed, Agreement to Musharaka, Asset Purchase Agreement, Payment Agreement and Service Agency Agreement, in addition to Letter of Hypothecation on current and fixed assets,

Memorandum for Constructive Deposit of Title Deeds, Personal Guarantees of the Directors and a Bank Guarantee by First Dawood Investment Bank Limited. It is the case of the Petitioner that the Respondent Company failed to meet its obligations in discharge of its agreed debts and is a continuous defaulter, whereas, the Trustee, Bank Islami Pakistan Limited ultimately filed Suit No. B-179/2009 seeking judgment and decree in the sum of Rs. 896 million approximately which includes the investment made by all Sukuk Certificate holders, whereas, instant Petition has been filed independently as the Respondent Company is no longer functional, viable and has failed to honor its commitment.

3. Learned Counsel for the Petitioner has contended that the investment to the extent of Rs. 150 million in the Sukuk Certificates by the Petitioner is not in dispute, whereas, admittedly the Respondent Company has failed to honor its commitments towards the Petitioner as well as various other creditors. He next contended that a proper notice as required under Section 305 of the Ordinance, 1984 was issued, whereas, in various correspondence, the debt has been acknowledged and the Respondent Company has set up its case that to overcome its financial difficulties a management consultant be appointed so that the issue of debts accrued to the creditors can be satisfied. Learned Counsel has also referred to the Audit Report and the financial statements of the Company and according to him these reports clearly reflect that the Company is not in a position to meet its obligations; hence, the present Petition for winding up is the only solution left with the Petitioner Company. In response to the objection raised by the Respondent Company that a Banking Suit has already filed by the Trustee i.e. Bank Islami Pakistan Limited, learned Counsel has referred

to the judgment reported as ***Messrs Central Cotton Mills Limited V. Habib Bank Limited (2004 S C M R 1443)***, and has contended that filing of such Suit is no bar to the grant of winding up Petition. As to the objection regarding Clause 3.8 of the Agreement in question, learned Counsel has contended that Clause 3.8.5 is an exception and entitles the Petitioner Company to seek its own independent remedy. In support he has relied upon the cases reported as ***Habib Credit and Exchange Bank Ltd. V. Sindh Sugar Corporation Ltd. (1999 C L C 1909)***, ***Messrs Habib Bank Limited V. Messrs Central Cotton Mills Ltd. (1998 C L C 474)***, ***Muslim Commercial Bank Ltd. V. Dewan Salman Fibre Limited and others (2009 C L D 1483)***, ***Parke Davis & Co. Ltd. Karachi V. Bliss & Co. Ltd. Karachi (P L D 1982 Karachi 94)***, ***Muhammad Ismail V. Election Authority, Sind and 3 others (P L D 1988 Karachi 71)***, ***Industrial Development Bank of Pakistan V. Modern Poultry Farm Limited (1990 C L C 1030)***, ***Messrs Al Woollen Mills Ltd. V. Industrial Development Bank of Pakistan and 3 others (P L D 1990 SC 763)***.

4. On the other hand, Learned Counsel for the Respondent has at the very outset, raised an objection regarding maintainability of this Petition on the ground that in terms of the Agreement (sub-clause 3.8) thereof it is only a bare minimum of 51% of the Sukuk Holders in question who can file such a winding up Petition, whereas, admittedly the Petitioner does not own such shareholding in the Sukuk Certificates. Learned Counsel has further contended that filing of Suit by the Trustee puts a bar on the present Petition inasmuch as the claim of the Petitioner is also included in the said Suit which is for the entire amount of the Agreement and therefore, in absence of the other Sukuk Holders, the present Petition is not maintainable. He has raised a

further objection that along with the Petition no proper affidavit was filed and after 4½ years a supplementary affidavit has been filed and reliance is being placed on such affidavit and its documents which is impermissible in terms of Rule 813 of the Original Side Rules of this Court. He has next contended that lot of negotiations were entered into and in the circumstances this is not a fit case to order winding up. According to the learned Counsel, mere recovery of the amount does not mean that necessarily a winding up order be passed as in that case, every creditor would come up for winding up Petition which even otherwise is a very harsh action and is to be exercised sparingly. He has also argued that since long, to overcome the financial problems of the Respondent Company, a request has been made to all creditors for appointment of a management consultant so that a viable solution is brought on record for satisfying of the creditors. In support he has relied upon ***Investment Corporation of Pakistan and others V. Messrs Charagh Sun Engineering Limited (P L D 1997 Karachi 504), Pakistan Industrial Credit & Investment Corporation Ltd. Karachi V. National Silk and Rayon Mills Ltd. Lyallpur (P L D 1976 Lahore 1538), Sabir Ahmad and another V. Messrs Najma Sugar Mills Limited (2005 C L D 49), Sh. Maqbool Ellahi and 3 others V. Rasul & Co. Ltd. and 2 others (P L D 1970 Lahore 539), Shaukat Ali V. Messrs Bawany Sugar Mills Ltd. 4 others (2009 C L D 497).***

5. I have heard both the learned Counsel and perused the record with their assistance. The facts have been discussed hereinabove briefly and it is not in dispute that the Petitioner along with various other financial institutions entered into an Agreement by appointing M/s Bank Islami Pakistan Limited as a Trustee for investment of Rs. 750

million for the privately placed Sukuk Certificates by the Respondent Company. The Petitioner's share is Rs. 150.00 million, whereas, default has been committed by the Respondent Company in making timely repayments. Before coming to the merits of the case and the question that whether a winding up Petition would be competent in view of the fact that a Banking Suit is already pending, it would be relevant to decide the objection raised on behalf of the Respondent Company that in view of Trust Deed in question an independent Sukuk Holder having less than 51% share in the Sukuk investment cannot file a winding up Petition. In this regard, it would be advantageous to refer to the relevant clauses of the Trust Deed dated 26.11.2007, wherein, Clause 3.8 reads as under:-

“3.8 **Events of Default and enforcement of Security:**

3.8.1 *The obligation to purchase the Sukuk Certificates shall become immediately due and the Security created by the Security Document shall become immediately enforceable by a declaration in writing of the Trustee notified to the issuer, **that the Trustee has been notified in writing by the Certificate Holders representing at least by 51% of the outstanding face value of the Sukuk Certificate(s) or supported by an Extra Ordinary Resolution passed at the meeting of the Certificate Holder(s) certifying the occurrence of any of the following events:***

- (a) -----
- (b) -----
- (c) -----
- (d) -----
- (f) -----
- (g) making of any order or passing of a resolution for the winding up of the issuer;**
- (h) -----
- (i) -----
- (j) -----
- (k) -----
- (l) -----
- (m) -----
- (n) -----
  - i. -----
  - ii. -----
  - iii) -----
  - iv) -----
  - v) -----
- (o) -----
  - i. -----
  - ii. -----
- (p) -----
- (q) -----
- ® -----

- (s) -----
- (t) -----
- (u) -----
- (v) -----
- (w) -----
- (x) -----

3.8.2 (i) At any time after declaration of an Event of Default in terms of clause 3.8.1 above, the Trustee (subject to the Trustee being indemnified by the Certificate Holders or at its option paid by them an estimated amount in advancing to its satisfaction against all proceedings, claims and demands to which the Trustee may be liable and all costs, charges and expenses which may be incurred by the Trustee in connection therewith), and with written notice take such proceedings/actions against the issuer for the purpose of the enforcement of the Secured Obligations as it may deem fit or as instructed by the Certificate holders in terms hereof including without prejudice to any of its other rights, by notice to the issuer, terminate the Musharaka, the Payment Agreement, the Agreement to Musharaka, the Service Agency Agreement, Sale Undertaking and enforce the Purchase Undertaking (except in case of Total Loss).

- (ii) -----
- 3.8.3 (i) -----
- (ii) -----
- (iii) -----

3.8.4 The Trustee shall be entitled to prove in any winding up of the issuer in respect of any amounts payable in relation to the Sukuk Certificates or other moneys payable under any provision of this Trust Deed and the Security Documents.

3.8.5 **Notwithstanding anything stated in this Trust Deed, in case the issuer fails to pay the Rental Payment and/or the Buy Out Price on the Payment Date and/or Buy Out Payment date (as the case may be), the Certificate Holder shall be entitled to any remedy (whether by way of action, petition or otherwise howsoever) for the recovery of any amounts due in respect of the Sukuk Certificates held by such Certificate Holder. The Certificate Holder may, after giving 30 (thirty days) written notice to the Trustee and the issuer take any action or institute any proceedings against the issuer to recover the amount due in respect of the Sukuk Certificates held by such Certificate Holder and the indemnity of the issuer provided to the Trustee under Clause 3.6, shall be available to the Certificate Holder taking such action mutatis mutandis, PROVIDED that the breach is not remedied by the issuer within the notified period of five business days.**

6. Perusal of the above clause (3.8.1) regarding default and enforcement of security reflects that the obligation to purchase the Sukuk Certificates shall become immediately due and the Security created by the Security Document shall become immediately enforceable by a declaration in writing of the Trustee notified to the issuer, that the Trustee has been notified in writing by the Certificate Holders representing at least by 51% of the outstanding face value of the Sukuk Certificate(s) or supported by an Extra Ordinary Resolution

passed at the meeting of the Certificate Holder(s) certifying the occurrence of any of the following events i.e. events mentioned in sub-clauses “a” to “x”. In more simple words, it empowers the Trustee by a bare minimum of 51% of the Sukuk investors to do any of the acts provided therein in clause 3.8.1 and in clause (g) *it is provided that making of any order or passing of a resolution for the winding up of the issuer is one of the events which can only be taken up or acted upon if the Trustee is empowered to do so by at least 51% of the Sukuk Holders.* Clause 3.8.4 further provides that it is only the Trustee who shall be entitled to prove in any winding up of the issuer, in respect of any amounts payable in relation to the Sukuk Certificates or other moneys payable under any provision of the Trust Deed and the Security Documents. And finally, it is clause 3.8.5 which is the bone of contention amongst the parties, as it is the case of the Petitioner that notwithstanding the authority as well as requirement in clause 3.8.1, the Petitioner is still entitled to seek its own remedy by filing a winding up Petition. It is on the ground that the clause provides a *notwithstanding clause* in respect of anything stated in the Trust Deed, and further provides that if issuer fails to pay the Rental Payment or the Buy Out Price on the agreed date the Certificate Holder shall be entitled to any remedy (whether by way of action, *petition* or otherwise howsoever) for the recovery of any amounts due and the only requirement is a 30 days’ notice to be given to the Trustee and the issuer, whereafter such action can be instituted. However, to my understanding the protection being sought for maintaining the present proceedings in terms of clause 3.8.5 is not correct and it is for the reason that though it empowers the Sukuk Holder(s) to initiate proceedings for recovery of any amount due; however, this has to be read as an exception to clause 3.8.1(g) which deals specifically as to how and in what manner the winding up of the

issuer can take place and i.e. only by the Trustee when at least 51% of the Certificate Holders resolve to that effect. Admittedly, this is not the case here, therefore, I am of the view that the exception in clause 3.8.5 may permit the Sukuk Holder(s) independently to go ahead with recovery proceedings; but not through a winding up Petition and this is also for a very good reason as there are joint creditors in this matter on the basis of a single Agreement signed by the Trustee with the Respondent Company. To my understanding, clause 3.8.1(g) is a special clause in respect of filing of a winding up petition, whereas, clause 3.8.5 is for general recovery of the debt, if any, by way of any action except a winding up petition. This is a case of a maxim "*Generalia Specialibus nor derogant*" (general words do not derogate from special). It is settled principle of interpretation that if a power or an act has been provided specifically in a clause of an instrument, then any subsequent clause in respect of such power or an act, will not override the earlier clause by mere use of the word notwithstanding. It is also a well-established rule of interpretation that where in a statute there are both general provisions as well as special provisions for meeting a particular situation, then it is the special provisions which must be applied to that particular case or situation instead of the general provision<sup>1</sup>.

7. Here in this matter in clause (g), the words "*making of any order or passing of a resolution for the winding up of the issuer*" has been specifically provided, whereas, in clause 3.8.5, it is only the entitlement of a Sukuk Holder to seek remedy, "*whether by way of action, petition or otherwise howsoever*". And this to my understanding, will not entitle an individual Sukuk Holder, to resolve by itself and file a winding up petition by the mere use of words "*notwithstanding*" in clause 3.8.5. Much stress was laid

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<sup>1</sup> See The State v Zia-ur-Rahman & Others (PLD 1973 SC 49)

by the learned Counsel for the Petitioner on the use of this word in opening part of clause 3.8.5 by contending that this overrides the earlier clause 3.8.1, as it also covers filing of a petition, which could be a winding up petition. However, as discussed earlier, I am not impressed with such line of argument, as the word winding-up has been specifically provided in clause 3.8.1 with certain restrictions as to its filing, and mere use of the word “petition” in the subsequent clause i.e. 3.8.5 would not override the earlier clause just because it starts with a non-obstante (notwithstanding) clause. These two clauses appear to be independent of each other and are at variance and must not be mixed up together, just because of commonality of words in respect of recovery of debt of any Sukuk Holder. And this is for a very good reason as well. A non-obstante clause will operate as an ouster only if an inconsistency between the two is found to exist, and when the case is of an irreconcilable conflict. It is trite law that while interpreting a Non-obstante clause, first it must be determined that whether there exists any conflict between the two situations or clauses or the statute, and only then some reconciliation methods are to be applied. A ‘non obstante’ clause operates as an ouster of the earlier provisions only where there is a conflict and inconsistency between the earlier provision and those contained in the later provisions and, therefore must be read in the context in which it is operating<sup>2</sup>. It is in this context and the manner that these two clauses as above are to be understood and interpreted. In my opinion in clause 3.8.1 for a winding up petition to be competent against the Respondent, the specific condition of at least 51% is for a specific purpose and to safeguard the interest of all Sukuk Holders. As it is settled law that normally if a creditor of a Company

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<sup>2</sup> Packages Limited v Muhammad Maqbool & Others (PLD 1991 SC 258)

who cannot get paid his debt after having served his proper notice to that effect is entitled *ex debito justitiae* as between him and the Company to an order for winding up, yet at the same time the Courts are always reluctant to grant a winding up petition if other creditors are opposing it, notwithstanding the fact that under ordinary circumstances it ought to have been granted. Here, though there is no formal opposition by other creditors, but then again there is not even a consent. Moreover, the condition of meeting a threshold of 51% for taking such an action, is within itself a restriction and failure to meet the same amounts to opposition in other words. If the case had been as is being pressed upon on behalf of the petitioner, then clause (g) would not have been provided therein in the manner as it is presently. It is specifically in respect of a resolution of winding up of Respondent, and that too only by 51% or more of the Sukuk Holders. This bars the authority and relief of winding up at least to the petitioner independently. There may be a case that for any reason the Respondent Company may have been making payment(s) to other Sukuk Holder(s), or may have made part payments, notwithstanding the filing of a Banking Suit, and in that case, a winding-up order at the behest of the present petitioner may have its consequences, which may be detrimental to their interests. In these circumstances, the intention appears to be clear that seeking recovery through a winding up Petition is not permitted to an independent Sukuk Holder, and it only vests in the Trustee through a resolution of a bare minimum of 51% of the Sukuk Holders, whereas, it is only other proceedings, which are permitted to the independent Sukuk Holders in case of default. Since I have come to the conclusion that by virtue of the very Trust Deed in question, the permission to proceed with the winding up of the

Respondent Company in case of default has been entrusted to the Trustee i.e. Bank Islami Pakistan Limited, after fulfilling the conditions in clause 3.8.1(g) the present Petition is misconceived and is not maintainable and for this reason the other grounds so raised in this Petition need not be addressed as it would not serve any useful purpose.

8. In view of hereinabove facts and circumstances of this case, I am of the view that by virtue of the Trust Deed in question, the Sukuk Holders have themselves resolved and agreed (including the petitioner), that a winding up petition against the Respondent can only be filed with the consent of at least 51% of the Sukuk Holders, therefore, this Petition which has been filed independently by a Sukuk Holder, who has failed to meet this threshold, is incompetent and is hereby dismissed with pending application.

Dated: 29.11.2018

**J U D G E**

ARSHAD/