IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Muhammad Shafi Siddiqui

J.M. No.09 of 2013

South Asia Geophysical Services
Versus
New Horizon Exploration & Production Ltd.

Date of Hearing:	05.03.2015, 25.11.2014 and 16.03.2015
Petitioner:	Through Mr. Amjed Sarfaraz Advocate.
Respondent:	Through Mr. Umair A. Qazi Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This is a petition where winding up of respondent company under section 305, 306 and 309of Companies Ordinance, 1984 has been sought.

2. Brief facts of the case are that the petitioner is a branch of a foreign company BGP, incorporated in the British Virgin Islands and is engaged in business of providing services in seismic exploration data processing/re-processing, interpretation and software marketing for oil and gas sector. This branch is also registered with the Security & Exchange Commission of Pakistan. The respondent is a company and member of KASB Group, which is also claimed to be principal shareholder and financer of respondent company. The respondent company was established to carry out geological and geophysical survey for exploration of oil and gas and other related activities.

3. It is urged that this winding up petition originates from two contracts for two blocks allocated to the petitioner company by the Government of Pakistan i.e. Jherruck Block and Kunri Block. The

contracts were entered into on 06.02.2008 and 13.05.2009 respectively which are identical in nature. The assignment of the petitioner was to provide 2D Seismic Data Processing and re-processing services and the charges for the aforesaid contracts was being settled at US $ 166,106.18 and US $ 130,340.06 respectively and total US $ 296,446.24.

4. It is the case of the petitioner that they have provided such services successfully in accordance with the terms of the contracts and thereafter two invoices were generated and issued to the respondent. Both the invoices were dated 24.03.2009 and in terms of clause '4' of the contract it was to be paid within 30 days of the receipt of the invoices. However, the letter in that regard was not responded until 28.04.2009 when the respondent on account of financial issue proposed its deferment. In the same letter they also proposed the payment by offering shares of the respondent company of the value equivalent to the invoices amount which was not agreed to by the petitioner. Hence, aggrieved thereof and in lieu of the correspondences exchanged between them, the petitioner fully convinced that the respondent is not capable of paying the invoices amount and commercially has become insolvent, hence the petitioner filed present winding petition on 26.03.2013.

5. Counsel for the petitioner submitted that though this petition was dismissed in terms of order dated 11.04.2014 as being time barred debt, however it was remanded by the learned Division Bench of this Court on 09.09.2014 to dispose of the same on merits as well as to decide the question of limitation afresh after taking into consideration the entire material produced by the parties and in particular an email dated 27.09.2011, which is available as Annexure 'C' with the reply of the respondent.

6. Learned counsel for the petitioner in relation to the question of limitation submitted that Annexure ‘C’ attached to the reply is in fact an acknowledgement made by the respondent as to the outstanding dues and/or its deferment and since this acknowledgement is within three years of the occurrence of the cause of action therefore the time is to be computed afresh from the date of this acknowledgement in terms whereof this petition is in time.

7. Insofar as merits of the case is concerned, learned counsel for the petitioner submitted that despite issuance of invoices dated 24.03.2009 the respondent has not responded until 28.04.2009, which reply is beyond 30 days required under the subject contracts. It is further urged that the respondent company has failed in its substratum through the constant delay in paying the outstanding it owed to the petitioner. It is further urged that they are unable to pay the bonafide debt and on account of acute financial crunch its inability has been admitted.

8. In support of case that the respondent company is commercially insolvent and hence unable to pay its debt, counsel has relied upon the correspondence wherein they (respondents) have given excuses that on account of financial crunch they are unable to pay its debt. In this regard counsel for the petitioner has again relied upon letter dated 28.04.2009. Counsel submitted that since the respondents are unable to demonstrate that they are solvent by producing auditor’s report, income tax returns and bank statement hence it can only be construed that the documents have not been filed as it is an admitted position that they are unable to pay its debts.

9. It is further urged by the learned counsel for the petitioner that their major shareholder KASB Bank is placed under moratorium by the State Bank of Pakistan on account of making colossal financial losses, to protect its customers/investors from 14.11.2014, which they have learnt

through a public news. Learned counsel for the petitioner on this score relied upon the cases of Platinum Insurance Co. v. Divo Corporation (PLD 1999 SC 01), Habib Bank Limited vv. Hamza Board Mills Limited (PLD 1996 Lahore 633) and also a Hon'ble Supreme Court decision in the case of Hala Spinning Mills v. International Financial Corporation (CLD 2002 1487).

10. Learned counsel appearing for respondent on the other hand has challenged the locus standi of the petitioner to file the present proceedings in terms of Section 309 of the Companies Ordinance 1984 as, per learned counsel, it does not fall within the definition of persons/ entities entitled to file such petition.

11. He further submitted that the controversy pertains to a bonafide dispute of payments between the parties. The alleged inability of the respondent to pay any disputed amount to the petitioner does not constitute a valid and legal ground for winding up of respondent company and that the proper remedy would be in filing civil suit for recovery of the money. Learned counsel for defendant further submitted that the substratum of the company is intact and the objective for which it was incorporated continues to operate and the respondent is carrying on its business hence the instant petition is liable to be dismissed on this account.

12. On merits, learned counsel for respondent submitted that the petitioner has committed breach of contract and in particular it has violated Article 2 and 10 of the main agreement (Kunri Block) and Article 6 and 11 of the General Conditions and Article 4 of the Special Conditions read with Appendix 'D' of the agreement and have been informed of the same on 01.06.2010 regarding the unprofessional approach and substandard quality of work carried out by it.

13. He further submitted that respondent informed the petitioner of the poor quality of processing in the Jherruk Block. He submitted that the petitioner had agreed to perform its processing on seismic line NJ 08-16 free from cost to the respondent because the data that has been processed by the petitioner in respect of the Jherruk block was of poor quality. Counsel for the respondent further submitted that on this negligence, enabling the respondent to successfully rely on the data and opt for most suitable location to drill the exploratory well to discover oil and gas, the respondent contacted the new contractor who has shown remarkable improvement in the quality in comparison to the data processed by the petitioner and the drilling carried out on the basis of new data on 14.12.2010 resulted in successful exploration of gas by the respondent. Thus the respondent suffered huge losses in terms of drilling, processing and reprocessing.

14. It was further urged that such poor professional service is resulted in drilling of dry hole in Kunri Block. Thus, learned counsel for the respondent submitted that the respondent is not unable but unwilling to pay the debt on account of the dispute and failure of the petitioner to perform the contract. Hence, he submits that the petition is liable to be dismissed.

15. Heard the learned counsel and perused the material available on record.

16. As it being a preliminary and primary question I first intend to resolve the question of limitation. Learned Division Bench of this Court has remanded the matter for considering the material available on record and in particular an email dated 27.09.2011, which is also available as Annexure ‘C’ to the reply/counter-affidavit filed by respondent No.1 in this regard. The same is reproduced as under:-

> *"Dear Farooq Sb.*
>
> *Our intent is sincere to come to a fair resolution but it requires listening to each other's point of view. Please try to understand our intention toward resolution of the dispute and spare some time with us for the best workable solution of the subject dispute.*
>
> *The results of data processed by SAGeo had been re-processed with another company which bring into being substandard and full of discrepancies. We could not utilize your submission due to the substandard results and lot of discrepancies. Resultantly we compelled to process the data again from another company for the removal of predominate discrepancies in the results submitted by SAGeo. So in this way we are forced to spend more money for the same jot as we have no other option to reprocess the data. We have rights to claim from your company for the additional amount paid to new company and prepared to pay the invoices after deduction of these expenses."*

17. In the light of this correspondence it is to be seen as to whether the claim of the petitioner is time barred or otherwise as in case of time barred debt, the petition is required to be dismissed on this score alone as the petitioner cannot maintain such petition on the basis of time barred debt.

18. The subject email is not disputed. In the said email no doubt the respondent has agitated with reference to the issue of reprocessing of such data with another company as the data provided by the petitioner was full of discrepancies and hence substandard. It is the case of the respondent, as set out, that this email has not extended any limitation since it is not an acknowledgement of the debt. Per respondent's counsel they reserved their right to claim from petitioner the additional amount paid to the new company/contractor who also processed the data and at the end they (respondent) were prepared to pay the invoices after deduction of these expenses.

19. Section 19 of the Limitation Act relates to the acknowledgement of a debtor in writing. It provides that where before expiration of the period prescribed for a suit or application in respect of any property or

right, an acknowledgment of liability in respect of such right or property has been made in writing, a fresh period of limitation shall be computed from the time when such acknowledgment was signed. The explanation of Section 19 provides that for the purposes of this section an acknowledgement may be sufficient though it omitted to specify exact nature of the property or right or averse that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permitted to enjoy or is coupled with the claim to a set off or is addressed to a person other than a person entitled to the right. Relevant part of Section 19 of the Limitation Act is reproduced as under:-

> *"**19. Effect of acknowledgment in writing**. (1) Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.*
>
> *(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but, subject to the provision of the Evidence, Act, 1872, oral evidence of its contents shall not be received.*
>
> *Explanation I.-- For the purposes of this section an acknowledgement may be sufficient through it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, deform or permit to enjoy, or is coupled with a claim a to set-off, or is addressed to a person other than the person entitled to the property or might.*
>
> *Explanation II.-- For the purposes of this section, "signed" means signed either personally or by an agent duly authorized in this behalf.*
>
> *Explanation III.-- For the purposes of this section an application for the execution of a decree or order is an application in respect of a right."*

20. The subject email, on the basis of which the debt of the respondent is to be considered, at the most could be a case of set off. Above explanation provides that any reply, which acknowledges the debt but subject to the claim of set off, is in fact an acknowledgment of debt. In the subject email all that the respondent urged is that it has a right to claim from the company (petitioner) an additional amount paid to the newly appointed company/contractor and were prepared to pay the invoices after deduction of these expenses. To me, this adjustment of set off is in fact acknowledgement of the payment of debt within the meaning of section 19 (Explanation). Even if the date of reply of invoices were ignored, as it was replied beyond 30 days' time, this email is sufficient for computation of fresh limitation from the date of acknowledgement.

21. Furthermore the subject email was neither relied upon by the petitioner earlier when the case was heard nor formed basis of the decision dated 11.04.2014 in terms whereof the petition was dismissed. Be that as it may, learned Division Bench has remanded the matter to consider the period of limitation on the basis of this particular document (subject email) or any other record available. Hence, I am of the view that in view of the acknowledgement dated 27.09.2011, which constitutes a set of, fresh computation is provided which is subject matter of this petition and it appears to be within time and hence on the score of limitation this petition cannot be dismissed.

22. As to the maintainability of this petition in terms of Section 309 of Companies Ordinance, 1984, it is the case of the respondent that the petitioner being a branch of BGP Inc., which is a company incorporated in the British Version Island could not file this winding up petition. I have perused the relevant provision of Section 309 of the Companies Ordinance, 1984 which provides classification for

filing and maintaining the winding up petition. A careful reading of section 309 would show that a petition for winding up of a company may be filed (a) by the company; or (b) by any creditor or creditors (including any contingent or prospective creditor or creditors); or (c) by any contributory or contributories, provided in case of private limited company, the number of members is reduced to less than 2 or his name as member appears on the register for the period mentioned in the proviso (a)(ii) of section 309; or (d) by all or any of the aforesaid parties, together or separately; or (e) by the Registrar (subject to the condition that the Registrar shall not be entitled to present a petition for the winding up of a company unless the previous sanction of the Commission has been obtained to the presentation of the petition); or (f) by the Commission or by a person authorized by the Commission in that behalf.

23. The petitioner i.e. SAGeo is duly registered with the Securities & Exchange Commission of Pakistan as a Branch of BGP Inc. under Companies Ordinance, 1984.

24. While applying such classification to the petitioner, it seems to be within the frame of classification and I do not find any reason to oust the petitioner from maintaining such petition in terms of Section 309 of the Companies Ordinance, 1984. Hence, the objection as to the maintainability of the petition are not tenable under the law.

25. With this I now take up the issue which relates to winding up of the respondent company. In order to appreciate the arguments of the

learned counsel I deem it appropriate to first reproduce the relevant articles of the contract, which are reproduced as under:-

> *"2. **Nature of Work***
>
> *2.1 Contractor, shall process seismic data using the basic processing sequence set forth in the Schedule or such other services as may be mutually agreed to by the parties, from time to time, and incorporated herein by an amended Schedule. The date processed shall be as specified in the Schedule.*
>
> *2.2 Contractor represents and warrants that it possesses the skills, organization, personnel, equipment and other resources necessary to carry out the processing of seismic data and shall in accordance with the provisions hereof with all due care, diligence and expedition carry out the services as may be required by Company from time to time.*
>
> *12. **Processed Data***
>
> *All processed data delivered by Contractor to Company under the terms hereof shall be and shall remain the sole and exclusive property of company. Contractor shall ensure such processed date conforms with generally accepted standards of the seismic data processing industry.*
>
> *Art. **4 – Work Schedule***
>
> *4.1 The estimated number of kilometers to be processed under the Contract is set forth in Appendix "D", however no minimum work commitment is guaranteed.*
>
> *4.2. The processing, in respect of each project, shall commence when Contractor has received the recorded field tapes and/or associated documents at its processing Center.*
>
> *Contractor shall inform Company's Technical Department by fax the date of receipt of the above mentioned material and/or documents.*
>
> *4.3 Contractor shall, within three (3) weeks after the receipt of the field tapes and/or documents at its Processing Center, furnish Company with preliminary tests with parameters agreed upon with Company. Upon completion of the analysis of the above mentioned data, work Schedule in writing can be agreed upon between the Parties. Work Schedule can be also defined in the Contract.*
>
> *However, should the final processing sequence selected by Company necessitate the repetition of any processing step(s), Company and Contractor will agree on an appropriate extension of the delivery schedule. The three (3) week period as aforesaid does not include the time spent by Contractor*

waiting on Company's decisions or instructions to start/proceed with the processing.

ART. 6 – <u>Standard of Performance</u>

6.1 Contractor shall, at Contractor's sole cost and expense, furnish/use Supervision, Labor, Equipment and/or Materials and Supplies necessary for the performance of the Service in a diligent, good and workmanlike manner.

Contractor shall not employ in any work for Company any employee whose employment violates applicable labor laws.

6.2 All Equipment and/or Materials or Supplies furnished or used by Contractor in the performance of the Service shall be the best quality for their respective purposes and shall be free from all defects, latent or patent. Any portion of the Service found defective or unsuitable shall be promptly removed, replaced or corrected by Contractor without additional charge to Company.

Also, Contractor shall be liable for all defects of any equipment and/or materials bought or received from Third Parties.

6.3 <u>Rate of Progress</u>

a) Contractor shall give the service the highest priority, and Contractor shall prosecute the Service diligently without interruption to completion. A bar chart for activities to be provided.

b) Without prejudice to the generality of Contractor's obligations under the Contract, if in the reasonable opinion of Company the Service falls behind schedule or if it becomes evident that progress has been too slow to ensure completion of the Service in the prescribed time, Contractor shall submit its proposal to expedite the Service, and subject to Company's approval, take all necessary steps at Contractor's expense to expedite the rate of progress of the Service, including but not limited to re-scheduling activities, supplying additional manpower, Equipment and/or Materials and facilities as may be required."

26. It is indeed a point that it is the duty of the Company Judge to examine the matter differently from a company which is not functioning in accordance with its articles and memorandum and where the company appears to have been functioning. Accordingly efforts should be made to

adopt such device so that the project/company may continue to run and the financial liabilities may also be reduced accordingly. In this matter the petitioner has stated that the respondent company is incapable of paying its debt and that it has lost its substratum.

27. In this matter the notices involving the remuneration of both the contracts of respondents was issued on 24.3.2009 which prima facie due for payment after 30 days on 23.4.2009 in terms of clause '4' of the contract. Both these invoices as well as the reply are available on record. In particular the reply of respondent is very essential for further development in reaching the conclusion. In reply the respondent Counsel stated that the billing schedule was delayed on account of the recent financial crunch and liquidity which is worldwide. They have further proposed restructuring and deferment of the outstanding bill. They have further offered NHEPL's shares of equivalent amount. This letter was replied on 28.4.2009. Clause '4' of the agreement for providing seismic data and reprocessing services provided that if the company disputes an item invoiced, it shall within thirty days after receipt of invoice notify contractor of the item disputed, specifying the reason therefore, and payment of the disputed item to be withheld until settlement of the dispute but payment to be made on any undisputed portion. In pursuance of clause '4' aforesaid it is the items which company may dispute for its incorporation in the bill/invoice.

28. Here dispute is of a nature which developed subsequently. Certainly none of the items were denied as reflected in the invoices as they were only on paper that the job was done but subsequently what the respondent came up with is the reprocessing of data with another company which is annexed as annexure-C. Now the question arose is whether at this point of time the company is unable to pay or unwilling to pay its debt. It is the case of the respondent that they have engaged

another company as the report/data provided by the petitioner was full of discrepancies and the respondent was not able to utilize the same and compelled them to process the data again from another company and hence all that was suggested in the email of 27.09.2011 was to deduct the additional amount spent by the respondent. Though the notices of the claim of petitioner was replied after 30 days period but that only shifted burden on the respondent as to it being commercially solvent. Once the creditors prove the service of demand notice in terms of clause (a) of subsection (1) of Section 306 of the Ordinance the burden is shifted on the company to rebut the presumption created by this fiction of law by virtue of clause (a) of subsection (1) of Section 306 of the Ordinance by showing that it is commercially solvent and will be able to pay the contingent and prospective liabilities and the debts which are immediately payable by bringing sufficient material on record. The company was further required to show that it was in a position to pay the debts and was commercially solvent keeping in view its contingent and prospective liabilities. In the case of Messrs Platinum Insurance Company Limited vs. Daewoo Corporation the Hon'ble Supreme Court while considering a number of judgments was able to formulate the following legal position.

(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.

(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 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.

(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.

(iv) That the object of section 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.

(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.

(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 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.

(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 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.

(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.

(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

provisions of section 306 read with section 309 of the Ordinance for seeking the winding up of the debtor company.

(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."

29. These are some of the dynamic principles carved out by the Hon'ble Supreme Court in the cited case to determine the crucial questions of winding up of a company. The petitioner throughout has insisted upon a belated reply to invoice generated to the respondents. That reply was made four days beyond the prescribed time however considering the crucial facts and peculiar circumstances one should not be misled by a belated reply, which amounts to acknowledging the items dealt with by petitioner. The contract awarded to the petitioner was to provide seismic data and on providing the same the invoices were generated. As has been stated and demonstrated by the respondents' counsel that out of the seismic data provided by the petitioner when some of the data were processed, they only ended up in drilling the dry hole and this period is later to the date of acknowledging the invoices. The said caused disappointment to respondent and led to appointment of other contractor for re-processing the seismic data. Certainly this dispute was not available to the respondents when the invoice generated by the petitioner and was replied by respondent. They (respondents) only came to know about the same when the data provided by the petitioner was practically used and excavated and they ruled out further application of such data in terms of its practical implementation and thus provided a bona fide dispute as to the outstanding amount. All the salient features highlighted in the case of M/s Platinum Insurance Company Limited (Supra), when applied lead to the conclusion that the respondent company is not commercially insolvent as they are carrying out and functioning by excavating on the basis of re-processed seismic

data and that they have established a bona fide dispute with the petitioner and it could not be proper that such company who has a bona fide dispute and is also functioning could be wound up on the basis of claim of the petitioner against which valid defence is available.

30. Upshot of the above discussion is that the petitioner has failed to make out a case of winding up the respondent company and hence the petition is dismissed.

Dated: **Judge**