

THE HIGH COURT OF SINDH, KARACHI
[COMPANY BENCH]

J.C.M. No. 17 of 2011

[New Jubilee Insurance Company Ltd. v. Three Stars Hosiery Mills (Pvt.) Ltd.]

Petitioner : New Jubilee Insurance Company Ltd., through Mr. Khurram Rashid, Advocate.

Respondent : Three Star Hosiery Mills (Pvt.) Ltd., through M/s. Zahrah Sehr Vayani and Rameez Lalani, Advocates.

Dates of hearing : 04-03-2025, 11-03-2025 & 19-03-2025.

Date of order : 24-04-2025

ORDER

Adnan Iqbal Chaudhry J. – The Petitioner claims to be a creditor and prays for an order to wind-up the Respondent on the ground that it is unable to pay its debts, a ground provided erstwhile by section 305(e) read with section 306 of the Companies Ordinance, 1984 [**Ordinance**], and presently by section 301(f) read with section 302 of the Companies Act, 2017 [**the Act**].

2. The Petitioner, an insurance company, provided services to the Respondent and associated companies under insurance policies last renewed on 30.06.2008. The Petitioner averred that despite reminders the Respondent and associated companies did not settle outstanding premium; in that regard, two cheques issued by the Respondent were dishonored for insufficient funds; therefore, the Petitioner adjusted pending insurance claims of the Respondent and associated companies to the extent of Rs. 5,721,404/-, whereafter a consolidated sum of Rs. 6,347,843/- was still payable by the Respondent and associated companies, out of which the liability of the Respondent was Rs. 3,096,286/-. It is averred that the petition was filed when the Respondent did not make payment despite legal notice dated 02.01.2010.

3. The Respondent pleaded that the petition was not maintainable as the Petitioner did not serve the requisite notice of demand under section 306 of the Ordinance; that the Respondent was a going concern with more assets than liabilities; that the Petitioner's claim was disputed as it was a composite claim against four associated companies without substantiating the amount alleged to be payable by the Respondent; that it was the Petitioner who owed the Respondent Rs. 8,827,149/- against various insurances claims; and that for the recovery of the alleged debt, the Petitioner had already filed Summary Suit No. 650/2011 against the Respondent.

4. Mr. Khurram Rashid, learned counsel for the Petitioner submitted that legal notice dated 02.01.2010 sent to the Respondent had fulfilled the requirements of a notice of demand under section 306 of the Ordinance; that since the Respondent neglected to pay, it will be deemed that it is unable to pay its debts; the averment that the Petitioner is liable to the Respondent on insurance claims, is unsubstantiated and not *bonafide*; it is at best a dispute to the quantum of the debt and not to the liability to pay; and that the suit for recovery filed by the Petitioner did not bar a winding-up petition. To support his submissions, learned counsel relied primarily on the case of *Aeroflot Russian International Airlines v. Gerry's International (Pvt.) Ltd.* (2003 CLD 1075). He submitted that even if the Court was not inclined to wind-up the Respondent, it can nonetheless exercise powers under section 308 of the Act (previously section 314 of the Ordinance) and appoint a Chartered Accountant to determine accounts between the parties.

5. Ms. Zahrah Vayani, learned counsel for the Respondent submitted that the legal notice dated 02.01.2010 relied upon by the Petitioner was never served upon the Respondent nor has any document been filed to show that it was sent to the Respondent; that such legal notice does not even mention winding-up and therefore it was not a notice of demand under clause (a) of section 306(1) of the

Ordinance. She further submitted that the debt claimed by the Petitioner was disputed *bonafide* by the Respondent as it was arrived after making a unilateral adjustment of the Respondent's insurance claims; that the Petitioner had already filed a suit for recovery for adjudication of such debt; that in any case, the Respondent was a going concern, and in such circumstances a winding-up petition is not maintainable as means of recovery. In support of her submissions, learned counsel relied on *First Dawood Investment Bank Ltd. v. Bank of Punjab* (PLD 2022 SC 769) and *Platinum Insurance Company Ltd. v. Daewoo Corporation* (PLD 1999 SC 1).

6. It was acknowledged by the Petitioner's counsel that Summary Suit No. 650/2011 filed by the Petitioner against the Respondent over the dishonored cheques was pending, although the suit has been transferred from the High Court to the 1st Senior Civil Judge, Karachi East, where it is renumbered as Suit No. 1959/2024. The Petitioner's counsel also disclosed that for the outstanding premium beyond the dishonored cheques, the Petitioner had filed Suit No. 824/2011 against the Respondent, however, that suit was dismissed by the Senior Civil Judge, Karachi (East) for want of evidence by judgment and decree dated 07-01-2013, and that Civil Appeal No. 44/2013 thereagainst was dismissed for non-prosecution on 20-05-2015.

7. Heard learned counsel and perused the record.

8. The provision germane to these proceedings is section 306 of the erstwhile Companies Ordinance, 1984 which was :

"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 percent 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) if execution or other process issued on a decree or order of any Court or any other competent authority in favour of a creditor of the company is returned unsatisfied in whole or in part; or
 - (c) 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.
- (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 authorised 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."

9. The settled interpretation of section 306 of the Ordinance is that:

- (i) Clause (a) of section 306(1) raises a presumption that the company is unable to pay its debts only if the creditor serves the requisite notice of demand and the debtor company neglects to pay for thirty days, or does not secure or compound the debt to the reasonable satisfaction of the creditor. However, such presumption is rebuttable by the debtor company by showing that it is commercially solvent and can meet its liability when due.¹
- (ii) If the creditor cannot establish that notice of demand was served on the company as per clause (a) of section 306(1), then the presumption under clause (a) *viz.* that the company is unable to pay its debts, is not available to the creditor. However, the creditor can still rely on clause (c) and prove by other evidence that the company is unable to pay its debts.²
- (iii) Though clause (a) of section 306(1) is independent of clause (c), a joint reading of sections 305 and 306 of the Ordinance makes clear that the Company Judge has a discretion to order or not to order winding-up after taking into consideration all relevant facts. The approach should be whether the company is commercially insolvent and not to provide the creditor a forum for recovery.³

¹ *Platinum Insurance Company Ltd. v. Daewoo Corporation* (PLD 1999 SC 1); *First Dawood Investment Bank Ltd. v. Bank of Punjab* (PLD 2022 SC 769).

² *Ibid.*

³ *Ibid.*

- (iv) The fact that the creditor may have an alternate remedy under general or a special law, or that he has already filed a civil suit for recovery against the debtor company, that *per se* does not bar the creditor from pressing in aid the provisions of sections 306 and 309 of the Ordinance.⁴

10. The entire case of the Petitioner is that the Respondent should be deemed unable to pay its debts under clause (a) of section 306(1) of the Ordinance as it neglected to pay outstanding premium despite notice of demand. A notice of demand is *sine qua non* for deeming under clause (a) of section 306(1) that the company is unable to pay its debts, hence it is also referred to as a 'statutory notice'.

11. The notice of demand contemplated under clause (a) of section 306(1) of the Ordinance is required to be "served on the company, by causing the same to be delivered by registered post or otherwise, at its registered office". Since the provision imposes a penal obligation upon the debtor company, it is to be construed strictly.⁵ The Respondent had pleaded that no such notice was served on it. To rebut that, the Petitioner did not file any postal or courier receipt or any acknowledgment of the Respondent to show that notice was sent to or served upon the Respondent. In any case, the legal notice dated 02.01.2010 relied upon by the Petitioner as statutory for winding-up, does not strictly comply with clause (a) of section 306(1) of the Ordinance. The sum demanded thereby is a composite demand against four associate companies without specifying the quantum of the debt owed by the Respondent. The notice makes no mention of winding-up proceedings. It was addressed to the Respondent at Multan instead of the Respondent's registered office at Karachi. The time stipulated therein for making payment was 15 days, whereas clause (a) of section 306(1) of the Ordinance envisaged such period to be 30 days. In other words, even if the legal notice dated 02.01.2010 was served on the Respondent, there was no indication that it was

⁴ *Ibid.*

⁵ *Habib Bank Ltd. v. Golden Plastic (Pvt.) Ltd.* (1991 MLD 124).

intended to be the statutory notice for initiating winding-up proceedings.⁶ Therefore, the Petitioner cannot rely on clause (a) of section 306(1) of the Ordinance to raise the presumption that the Respondent is unable to pay its debts.

12. Nevertheless, and as stated above, to deem that a company is unable to pay its debts, a creditor can rely on clause (c) of 306(1) of the Ordinance independent of clause (a) and otherwise 'prove' that the company is unable to pay its debts. But no such case was set-up by the Petitioner. It was never alleged that the Respondent is commercially insolvent. The record also reflects that the Respondent is a going concern. That much was conceded by learned counsel for the Petitioner during arguments. Para 10 of the petition and the legal notice dated 02.01.2010 also reflect that the amount claimed by the Petitioner is worked-out after a unilateral adjustment of pending insurance claims of the Respondent and associate companies. Per the Respondent, the insurance claims lodged with the Petitioner were for a larger sum. However, neither side has filed documents of those pending insurance claims. In any case, the settled legal position is 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".⁷ Admittedly, the Petitioner has already availed remedy *via* civil suits. "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".⁸

13. In view of the foregoing, the petition is dismissed.

JUDGE

Karachi

Dated: 24-04-2025

SHABAN*

⁶ *Ibid.*

⁷ *Platinum Insurance Company Ltd. v. Daewoo Corporation* (PLD 1999 SC 1).

⁸ *Ibid.*