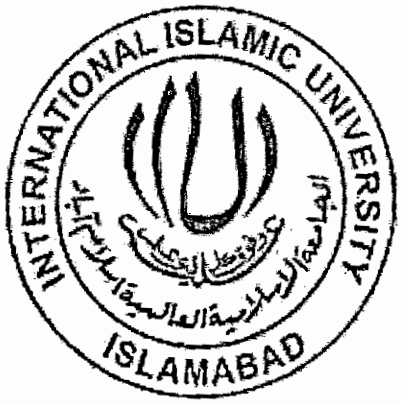
# LIQUIDATION OF CORPORATE ENTITIES AND RELATED MATTERS

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# DEDICATION

This work

is dedicated to
My mother and my (late) father
For their incessant prayers for my success
(May Allah shower His infinite mercies and blessings on them
Both in this world and in the Hereafter);

My wife
Who relentlessly
Looks after us
Does everything to support our endeavours
And who thus enabled me to accomplish my pursuit of higher studies
Side by side with my overwhelmingly heavy professional engagements;

The International Islamic University, Islamabad (Pakistan)
For bringing an opportunity of higher education in the field of law
To this part of the country by introducing few years back the LLM degree courses at its campus;

The Hon'ble Members of the Faculty of Shariah & Law
For working very hard in teaching and guiding us
In the completion of the course work as well as the research work;

And finally

To the Courts
Who owe their existence to doing justice and who have a heavy burden to discharge.

***

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All praise is to Allah (SWT), the Supreme Creator and Knower of everything, the Shaper of everything. For Him is all that is on the Earth and all that is in the Heavens. All wisdom and all knowledge belong to Him. Whom Allah wants to do good, He grants him wisdom. With His infinite mercy and bounty, He bestows as much of the wisdom and knowledge upon such of His creatures, as strive for it.

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I have the honour of being a member of the staff of the Supreme Court of Pakistan and thus having the facility of unhindered access to the Court Library, which has a good collection of books in different branches of law, company law included. I immensely benefited from the Court Library services. Actually, my work involved extensive referencing to the case law for which I would need plenty of books off and on. Mr. Muhammad Aslam, the Court Librarian and the other members of the Library Staff instantly made available whatever books and material I needed. He also assisted me in checking references. I thank him and other members of the Library Staff.

Muhammad Ali

Islamabad
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# INTRODUCTION

*In the name of Allah, the Most Beneficent, the Most Merciful.*

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## Liquidation of corporate entities and related matters

### Introduction

Anyone who is familiar with the Company Law knows perfectly well that limited companies are incorporated on certain conditions; they continue to exist on certain conditions; and they are liable to be dissolved on certain conditions.[1]

Generally, the term "winding up of a company" may be defined as the proceeding by which a company is dissolved. In other words, it is the process by which the life of a company is put to an end. During this process, an administrator called liquidator, is appointed who takes control of the company and realizes the assets of the company. The assets of the company are then disposed of, the debts of the company are paid off out of the realized assets or from the contributories, and if any surplus is left, it is distributed among the members in proportion to their shareholding in the company. In consequence, the company is dissolved and its name struck off the register of companies.

Sometimes, winding up is referred to as "liquidation". In fact, the two terms are synonymous and interchangeable and have been so used in the law.[2] The winding up of a company must be distinguished from the dissolution of a company. The company is dissolved after completion of the winding up proceedings. So, dissolution is the actual striking off of the company from the records of the Registrar of Companies[3] while winding up is the process which precedes this.

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[1] Lindley M.R., Re: Peveril Gold Mines Ltd [1898] 1 Ch. 122
[2] The Companies Ordinance, 1984, section 465
[3] The Companies Ordinance, 1984, section 350

**Introduction**

A company which has been dissolved no longer exists as a corporate entity capable of holding property, suing or being sued in any court, but a company in liquidation, although the administration of its affairs has passed to the liquidator, retains its corporate existence. If the liquidation should be annulled, the company resumes its powers, and in the meantime it retains its title to any property not taken away from it.[4] Throughout the process of winding up, the company continues in existence. There is still a corporate entity and all corporate acts in the course of liquidation, such as transfer of property, institution of legal proceedings, etc., are done in the company's name rather than by the liquidator in his own name. The company ceases to exist only by the formal act of dissolution after the whole of the winding up procedure has been completed. Thus, in a way we are looking at a situation which is analogous to a human being told that he is terminally ill. The diagnosis of the illness, like the commencement of winding up is not the end of life. This continues until the moment of death.[5]

The Company Law of Pakistan, both in form and content is British Company Law, inasmuch as on the eve of partition of Indian Sub-Continent (then under British sway) into Pakistan and India in August 1947, Pakistan adopted the existing laws, including the Companies Act, 1913, which, in the words of L.S. Sealy, "is unquestionably the primary basis of the law and the cases, though numerous, deal mainly with detailed points of construction."[6] The latest enactment in Pakistan on the subject is the Companies Ordinance, 1984 (XLVI of 1984). Any article of association of a company, which provides that the company is formed on the condition that its life shall not be ended when any of the circumstances in which a company may be wound up given in the provisions of the company law relating to winding up of the companies exist, or which limits the right of a creditor or a contributory under the provisions of the Ordinance to petition for a winding up, would be an attempt to enforce on the shareholders something which is at

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[4] Employer's Liability Assurance Corporation Ltd. v. Sedgwick, Collins & Co. Ltd. 1927 AC 95 (HL)

[5] In Salton v. New Beeston Cycle Co. [1900] 1 Ch 43, the Court held that the dissolution puts an end to the existence of the company. In Coxon v. Gorst [1891] 2 Ch 73, the words used are that "unless and until the dissolution has been set aside, it prevents any proceedings being taken against promoters, directors or officers of the company to recover money or property due from or belonging to it or to prove a debt due from it."

[6] L.S. Sealy, Cases and Materials in Company law, Second Edition, Butterworths 1978

variance with the statutory conditions and is invalid.[7] Thus, all the affairs of a company have to be carried on within the ambit of the statutory provisions, which reign supreme in all these matters including winding up proceedings.

The history of winding up goes back to Joint Stock Companies Act, 1844, which led to systematic development of this regime by introducing Winding up of Affairs of Joint Stock Companies Act in the very same year. The Companies Act, 1862 introduced the concept of –

(a) Winding up by the Court, and

(b) Voluntary winding up

The voluntary winding up is further split into –

(i) Members' voluntary winding up;

(ii) Creditors' voluntary winding up; and

(iii) Voluntary winding up under the supervision of the Court;

The Companies Winding up Act, 1890 provided the concepts of official receiver and liquidator, and their responsibilities. The Companies Act, 1929 introduced distinction between the 'voluntary winding up by members' and 'voluntary winding up by creditors'.

It is pertinent to mention that in U.K., the Insolvency Act 1985 provided for insolvency of companies and individuals, the winding up of companies, the disqualification and personal liability of persons involved in the management of companies and the avoidance of certain transactions at an undervalue, and for connected purposes. In 1986, enactments relating to company's insolvency and winding up, enactments relating to the insolvency and bankruptcy of individuals, and other enactments bearing on those two subject matters, including the functions of insolvency practitioners, the public administration of insolvency, the penalization and redress of malpractice and wrongdoing, and the avoidance of certain transactions at an undervalue were consolidated. Thus, the provisions of the Companies Act, 1985 as to receivers and winding up and the bankruptcy provisions of the Bankruptcy Act, 1914 were repealed and were continued in the Insolvency Act, 1986. The winding up of companies that are not insolvent and of

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[7] Adapted from Lindley M.R.'s judgment in Re: Peveril Gold Mines Ltd [1898] 1 Ch. 122, Court of Appeal

unregistered companies is also governed by the Insolvency Law. The consolidation of enactments relating to winding up of insolvent as well as solvent companies, bankruptcy and related matters seems to be a convenient arrangement for dealing with connected or similar matters on one forum.

As against the above, the position in Pakistan is that the provisions relating to winding up and the connected matters continue in the Company Law (the Companies Ordinance, 1984) and the Provincial Insolvency Act, 1920 exempts the corporations, associations or companies registered under any law from its operation. Section 8 of the Insolvency Act clearly bars an insolvency petition against the above entities. Though by virtue of sections 403 and 404 of the Companies Ordinance, 1984 the provisions of the Insolvency Act, 1920 are made applicable to winding up of insolvent companies, but the insolvency/bankruptcy laws as such have not developed in Pakistan. There is a need to examine these laws on the touchstone of the corresponding laws in other countries, particularly of U.K. and activate their operation, particularly the bankruptcy law in relation to the loans in the agriculture sector.

A limited company is a company, which is registered under the Companies Ordinance. It is a separate legal entity, i.e. it can sue and be sued in legal proceedings. The liability of a company's members is limited to the extent of amount remaining unpaid on the shares held by them, or to the extent of guarantee provided by them. A company may be limited by shares or limited by guarantee. In a company limited by guarantee, the members agree to contribute to the company's assets if the company is under liquidation. A sole proprietorship, also called an unlimited company, is not a company, inasmuch as the business is owned by an individual, who is solely and personally responsible for the liability of the business. A partnership is a form of business owned by two or more persons called partners, who are personally, jointly and severally liable for the liability of the business. A private company, i.e. a company not registered under the Ordinance, is a body, which has no corporate existence. There are private companies established on the basis of partnership, i.e. where the apparent structure of the company is not the real structure and upon piercing the veil it is found that in reality it is a partnership. Under section 443, unregistered companies include any partnership, association or company

consisting of more than seven members. For the dissolution of such companies, the principles governing dissolution of partnership are applicable. Under section 444, such a company may be wound up on three grounds, namely, (a) if it is dissolved, or (b) has ceased to carry on business, or (c) if it is unable to pay its debts, or if the Court is of the opinion that it is just and equitable that the company should be wound up. Thus, such a company may be wound up where there is a complete mistrust between the co-directors and/or there is a deadlock in the company on account of such mistrust and/or where there is a justifiable lack of confidence in the management.

The broad division is between compulsory winding up and voluntary winding up. A company may be wound up compulsorily, i.e. by order of the court, or voluntarily, i.e. in consequence of a special resolution passed by the shareholders. A voluntary winding up is further divided into members' voluntary winding up and creditors' voluntary winding up, which is reflected by the fact as to who has control over it.

In a compulsory winding up, the liquidator is appointed by the Court, while in a voluntary winding up, the liquidator is appointed by the shareholders if the directors are able to declare that the company is solvent otherwise the company's creditors appoint the liquidator and exercise general control over the conduct of the liquidation. It goes without saying that the one who makes the appointment has a degree of control, a sort of influence over the liquidator and consequently over the process of winding up.

The compulsory winding up commences by way of a court order following a petition for such an order being presented by someone, usually a creditor or a member of the company or the Registrar of Companies. A voluntary winding up is commenced by a resolution of the members. The court has no involvement in the commencement of this mode of winding up.

After a resolution for voluntary winding up of a company has been passed, the Court may, of its own motion, or on the application of any person entitled to apply to the Court for winding up a company, make an order that the voluntary winding up shall continue subject to supervision of the Court and the creditors, contributories or others would be at

liberty to join the proceedings. In the process, the Court may prescribe certain terms and conditions, as it thinks just and proper in the circumstances of the case.

In winding up, the company gives up its business, sells off its assets, pays off its debts in case it is solvent and distributes whatever surplus remains amongst its shareholders or otherwise as its memorandum and articles of association provide. In case of insolvency, the company pays debts to the extent its funds allow it. In case of solvency, the company discharges its liabilities and distributes the balance among the members/shareholders. The conduct of winding up is placed by law in the hands of a liquidator on whose appointment the directors' powers to manage the business of the company cease. A winding up goes through three distinct stages, viz.

(a) Commencement and appointment of the liquidator;
(b) Calling in of the assets; and
(c) Distribution of the assets.

The compulsory winding up, i.e. the winding up through the process of the Court where it is sought on the ground of the company's inability to pay the debt involves the following steps: -

(a) Issuing a written demand for debt repayment within the specified time;
(b) Presenting a winding up petition to the Court;
(c) Hearing of the petition;
(d) Passing of winding up order by the Court;
(e) Appointment of liquidator;
(f) Meeting of creditors and other concerned parties;
(g) Realization and distribution of company's assets to the creditors;
(h) Termination of the appointment of liquidator and his release from his duties; and
(i) Dissolution of the company.

The grounds for winding up of a company are: special resolution by the company for its winding up, default in delivering the statutory report to the Registrar, or in holding the

statutory meeting, or any two consecutive annual general meetings; non-commencement of business within a year from its incorporation or suspension of business for a whole year; reduction in the number of members; inability of the company to pay its debts; unlawful or fraudulent activities being carried out by the company; oppression to the members; want of proper accounts; fraud, misfeasance, or malfeasance; violation of the memorandum or articles, or provisions of the Ordinance; de-listing of the company; or where the Court considers it just and equitable to wind up a company. An overall view of the above circumstances in which a company may be wound up would suggest that the law employs winding up as a regulatory/punitive measure against a company, which fails to fulfil any of the statutory requirements or does not keep its affairs transparent and above board. It can also be said that the winding up is a death penalty for the delinquencies of a corporate entity.

The practical importance of the remedy of winding up petition on the company's inability to pay a debt is not that its use will inevitably bring the company into liquidation; indeed, liquidation is usually the last thing that a creditor, or anyone else, wants, because financially it spells disaster for all. *It is instead the threat of liquidation that is often effective in achieving redress for an aggrieved member*. He can stand beside the barrel of gunpowder with a lighted match in his hands, so to speak, demanding that he get what he wants – which in most cases is simply a good price for his shares – or else everyone, including himself, perishes swiftly and dramatically.[8]

To the contrary, a sizeable portion of the case law on winding up of a company on the ground of inability to pay its debts lays down that if a debtor company is merely unwilling to pay its debts but is otherwise commercially solvent (because there is a difference between "unwilling to pay" and "refusal to pay"), or if there is a *bona fide* dispute based on substantial grounds as to the entitlement of the creditor to the amount demanded, then the normal remedy available to a creditor is a suit for recovery of the amount and not a petition for winding up, on the ground that the object of winding up of a company on the ground of inability to pay its debts is not to coerce a debtor company to make payment to an unpaid creditor, but to secure discontinuation of functioning of a

[8] The Modern Law Review, 1973, Vol. 36, pp. 129-130

company which has ceased to be commercially solvent.[9] This position ignores the fact that the choice to file a suit for recovery of the amount due from the company or to file a petition for winding up of the company which has failed to pay the due amount as required under section 306 lies with the creditor. In filing a petition for winding up, he exposes himself to the danger of getting, may be, less than due because the assets of the company have to be disbursed according to the legal criteria and most likely he would be paid *pari passu* whereas in filing a suit for recovery he stands to the chance of getting his whole due amount. Law does not place any restriction on the choice of the creditor. Therefore, a winding up court should not be concerned with the alternate method of recovery. All that the court has to do is to determine whether the amount is due from the company and whether the company has not paid the same. An affirmative finding would warrant an order for winding up. The court would not be justified in refusing an order of winding up where the creditor makes the prayer for winding up of the company in the alternative because the law arms him with a lethal weapon (in the form of provision of section 305(e) with a licence to use the same where company does not pay him the amount of debt due and payable to him (section 306). The duty of the court to determine the existence or otherwise of the debt is established from various provisions of the Ordinance, such as section 305(e) read with section 306, the provisions of the Ordinance applicable to every mode of winding up, particularly section 403, which provides the manner of proof of debts of all description. Section 316 of the Ordinance envisages stay of suits by or against a company after an order of winding up has been passed, which means that even if a suit for recovery by or against the company is pending, the same will be stayed. The court should give a definite finding on the inability of the company to pay its debts, which is inherently linked with a prior finding whether the amount is due and payable, as claimed.

The company law being a special enactment overrides the application of general law, but a Company Bench is competent to apply general law in matters not provided for in the Ordinance. Further, all matters under the Ordinance, including the determination of the existence or otherwise of a debt with reference to a petition for winding up under section

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[9] (See, generally, Platinum Insurance Company Limited v. Daewoo Corporation, Sheikhupura (PLD 1999 SC 1).

305(e) read with section 306 have to be decided by the Court as required under sections 403 and 404 and other relevant provisions. In the exercise of its jurisdiction, the Court should first decide whether the debt is due and payable and should then go into the question of solvency or insolvency of the company. It is the duty of the Court to give finding on the existence or non-existence of the amount claimed against the company and should dismiss the winding up petition where the petitioner fails to establish the existence of the amount claimed by him. But where the petitioner succeeds in establishing the existence of the debt, the Court should not refuse the remedy of winding up. The law fixes a petty amount of debt of Rs.50,000/-, the non-payment of which is made the ground for winding up the company. If a company which is unable to discharge such a minor obligation, how can it be entitled to continue as a corporate entity? It is too dangerous to allow such a company to continue its existence and thereby jeopardize the rights of the public. Though the jurisdiction of the civil courts is not barred in all matters concerning corporate entities one way or the other, yet the law accords priority to the winding up proceedings over other proceedings. Thus, the Court should not refuse to exercise its jurisdiction on technicalities or subtle niceties, such as the existence of *bona fide* dispute, or the putting up of a substantial defence by the company against the debt claimed, the claims which otherwise may be the subject of recovery suits, etc.

This approach, however, seems to be away from the overall objects and scheme of the legislation. The Ordinance has made detailed provisions in the form of section 306 whereby the Court is required to see whether the company is liable to pay the debt claimed against it, and if so, whether the company has failed to pay the same. An affirmation of the two-fold proposition hardly leaves the Court with any other alternative but to grant winding up order, as it does where it finds that the company has not delivered the statutory report or it has not held the statutory meeting or two consecutive annual general meetings, or where the minimum number of members is reduced, or it is conducting business in a manner oppressive to its members, or it is carrying on business not authorized by its memorandum, etc., etc. All that the Court is required to do is to first issue a direction to the company to comply with the statutory requirements, but if the company fails to carry out the direction so given, the Court grants winding up order. An

additional aspect of the matter is that the Court may impose penalties in the form of fine against the company and/or its officers failing to comply with these requirements. However, it may be noted that all these grounds, in no way, suggest that only insolvent companies should be wound up, as is the view taken in the case of a company's inability to pay its debts. The issue of winding up of a company on the ground of its inability to pay its debts is not to be looked solely with reference to the solvency or insolvency of the company. The overall object of winding up should always be present in the mind.

The Securities and Exchange Commission of Pakistan has an important role in winding up of companies and various other matters. However, it is observed that this body, in comparison with its counterpart in India in particular, is saddled with too many functions. Resultantly, it is not able to do justice to the company sector. A case for bifurcation of its functions has been made out in this study.

The thesis discusses in detail the liquidation of corporate entities and related matters in the light of the case law from Pakistan, India and U.K., makes out a case for reviewing and re-examining the outlook and approach on winding up of companies and the related matters and makes various recommendations for a change, so very badly needed to achieve the goal of economic development and prosperity of the nation.

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# COMPULSORY WINDING UP

# Chapter 1 Compulsory winding up

## 1.1 Compulsory winding up generally

It is a winding up through the process of Court. Someone, usually a creditor or a contributory or anyone having a claim against the company files a petition for winding up on any of the grounds enumerated in the Companies Ordinance.

In this mode of winding up, the court appoints a liquidator who, in law, is regarded as an officer of the court acting under its direction and control. There are wider investigative powers available in a compulsory winding up, which may be useful in the event of the directors having acted wrongfully.

This, of course, is a far more expensive way of starting a winding up than the voluntary winding up. The reason is that the respondent in all cases of compulsory winding up is always the company itself. Since the company bears the costs of the winding up, therefore, there will be less money at the end of the day for creditors having a claim against it.

In the case of winding up by the court, the following expenses of winding up are additional to the voluntary winding up:

(a) The fees and expenses incurred in realizing and getting in the company's assets.

(b) The costs of petitioner, and/or of any person who appears on the hearing of the petition so far as the Court directs them to be paid.

(c) The remuneration of the special manager, if there is one.

(d) The liquidator's necessary disbursements other than those at (a) above.

(e) The costs of any person properly employed by the liquidator.

(f) The remuneration of the liquidator.

The right to seek creditors' voluntary winding up is absolute and this right cannot be interfered with by any court by means of an injunction or otherwise.[10]

## 1.2 Winding up procedures in Pakistan

In Pakistan, the provisions relating to winding up and the connected matters are part of the Company Law (the Companies Ordinance, 1984) and the Provincial Insolvency Act, 1920 exempts the corporations, associations or companies registered under any law from its operation. Section 8 of the Insolvency Act clearly bars an insolvency petition against the above entities. However, by virtue of the Companies Ordinance, certain provisions of Punjab Insolvency Act are made applicable to the winding up proceedings, but the insolvency/bankruptcy laws as such have not developed in Pakistan.

The High Court having jurisdiction in the place at which the registered office of the company is situated, has jurisdiction to decide all matters under the Companies Ordinance, 1984. Though the Federal Government is authorized to empower any civil Court to exercise the company jurisdiction within its territorial jurisdiction[11], yet no such Court has been designated as a Company Court so far. Thus, the Chief Justice of each High Court in the country has constituted Company Benches to exercise jurisdiction vested in the High Court.

Under section 317 of the Ordinance, a Company Judge may issue directions to a court subordinate to him to expedite disposal of pending suits or proceedings by or against the company (under liquidation) and where such proceedings are pending before any other court, e.g. another High Court or the Supreme Court, may make a similar request for their expeditious disposal.

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[10] British Gas Syndicate v. Notts Derby Water Gas Co. Ltd. 1889 WN 204 & Ellis v. Dadson 1891 WN 43
[11] The Companies Ordinance, 1984, section 7

## 1.3 Expeditious disposal of cases under the company law

All matters under the Companies Ordinance, 1984 are to be disposed of expeditiously, but not later than 90 days from the date of presentation of the petition or application to the Court through final judgment duly pronounced. The Court shall hear the case from day-to-day and shall follow the summary procedure, but the procedure adopted has to be fair and just which may ensure equal opportunities to the contesting parties.[12] The hearing shall not be adjourned except for sufficient cause to be recorded. The adjournment so granted shall not exceed 14 days at any one time. The total period of adjournments in any given matter shall not exceed 30 days.[13] Appeal against the decision of the Court lies to the Supreme Court, which is required to be finally disposed of within 90 days of the filing thereof.[14].

The intention of the legislature in introducing section 9 is to provide a very expeditious and summary disposal of a petition or application filed under the provisions of the Ordinance. To achieve this objective, the Ordinance envisages several measures, such as disposal of the matter through final judgment duly pronounced, following summary procedure and a strict regulation of adjournments, which are a notorious cause of delay in the quick dispensation of justice. The other measure taken for the purpose is to curtail forums. The matters under the Ordinance are to be heard by the High Court and appeal against the decision of the High Court lies before the Supreme Court.

The provisions of section 9 have undergone test of scrutiny by the superior courts. No explicit provision has been made in the Ordinance to deal with the situation where the court fails to dispose of a matter within the prescribed period. The provisions of section 9 or section 10 have been held by the Court to be directory and not mandatory.[15]

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[12] Platinum Insurance Co. Ltd. V. Daewoo Corpn, PLD 1999 SC 1
[13] The Companies Ordinance, 1984, Section 9.
[14] The Companies Ordinance, 1984, Section 10.
[15] Punjab Lamp Works Ltd. v. Investment Corpn of Pak. 1988 CLC 2127

## 1.4 Winding up procedures in U.K.

In U.K., the Insolvency Act 1985 provided for insolvency of companies and individuals, the winding up of companies, the disqualification and personal liability of persons involved in the management of companies and the avoidance of certain transactions at an undervalue, and for connected purposes. In 1986, enactments relating to company insolvency and winding up, enactments relating to the insolvency and bankruptcy of individuals and other enactments bearing on those two subject matters, including the functions of insolvency practitioners, the public administration of insolvency, the penalization and redress of malpractice and wrongdoing, and the avoidance of certain transactions at an undervalue were consolidated. Thus, the provisions of the Companies Act, 1985 as to receivers and winding up and the bankruptcy provisions of the Bankruptcy Act, 1914 were repealed and were continued in the Insolvency Act, 1986. The winding up of companies that are not insolvent and of unregistered companies is also governed by the Insolvency Law. The consolidation of enactments relating to winding up of insolvent/solvent companies, bankruptcy and related matters seems to be a convenient arrangement for dealing with connected or similar matters on one forum.

Under section 117 of the Insolvency Act, 1986 the High Court has jurisdiction to wind up companies registered in England and Wales, but where the amount of a company's share capital paid up or credited as paid up does not exceed €120,000, then the concerned county court of the district has concurrent jurisdiction with the High Court.

Under section 126 ibid, where any action or proceeding against the company is pending in the High Court or Court of Appeal in England and Wales, the company may apply to the said court for a stay of the proceedings. In the case of other courts, the company may apply to the Company Court to restrain further proceedings in the action or proceeding.

amalgamation or winding up will be avoided and all these matters will be heard and decided by the National Company Law Tribunal.[16] The establishment of an exclusive forum in India for the resolution of corporate related matters is a significant development in the area of corporate law and provides a food for thought to the developing economies.

The scope of powers and functions of the National Company Law Tribunal has been widened under the Companies (Amendment) Act of 2002 and all matters, including the winding up of companies are to be decided by the Tribunal.

### 1.6 Petition for winding up[17]

An application for the winding up of a company is presented to the Court in the form of a petition. Along with the petition, the petitioner is required to furnish the particulars of company's assets and liabilities and business operations and the suits or proceedings pending against it.

### 1.7 *Locus standi* to file winding up petition

As to who may file an application for winding up of a company, the law allows all such persons whose interests are at stake. It may be presented by the company itself, or by any creditor[18], or by any contributory, or by all or any of the aforesaid persons. They may present it jointly or separately. The Registrar of Companies, or the Securities and Exchange Commission of Pakistan (SECP), or a person authorized by the SECP is also empowered to file the petition.

A contributory is entitled to file a petition for winding up of a company only on the ground that the number of members of a private company is reduced below two and, in

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[16] Various amendments in the company law introduced by the Companies (Amendment) Act, 2002, e.g. clauses (g) to (i) of section 433, etc., have not been put into operation and will take effect from the date to be notified by the Government in the official gazette. [K.M. Ghosh & Dr. K.R. Chandratre's Company Law, 13th Edition, p. 5189]

[17] The Companies Ordinance, 1984, Section 309

[18] The creditor includes a contingent or prospective creditor.

the case of any other company, below seven. However, the shares (all or some) in respect of which he is a contributory be originally allotted to him, or are held by him and registered in his name for at least six months during the eighteen months before the commencement of the winding up, or have devolved upon him through the death of a former holder.

A contributory is a person who is liable to contribute to the assets of a company in the event of its being wound up, and includes the holder of fully paid up shares and any person alleged to be contributory till the final determination of such a person to be a contributory.[19] A member of a company is obviously a contributory. His liability begins from the date when contract is entered into whereby he becomes a member.[20] Though a person who has become a shareholder of a company relying on the prospectus might repudiate his shares on the ground that the memorandum of association differed from the prospectus on which it is professed to be founded, but he cannot do so after the failure of the company and relieve himself from the liability to contribute to the debts of the association.[21] He should have held the shares for at least six months during the eighteen months before the commencement of the winding up. A transferee of shares whose name does not appear in the register is not a contributory.[22]

In all the cases where the Registrar of Companies files a petition for winding up, he is required to obtain sanction of the SECP. In granting the sanction, the SECP is required to afford an opportunity of hearing to the company. Further, before the filing of the petition, an investigation into the affairs of the company is required to be conducted in consequence whereof any of the following eventualities is revealed, viz.,–

- The company was formed for any fraudulent or unlawful purpose;
- The company is carrying on a business not authorized by its memorandum;
- The business of the company is being conducted in a manner oppressive to any of its members or persons concerned in the formation of the company; or

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[19] The Companies Ordinance, 1984, Section 300
[20] Arshad Tanveer v. Sindh Industrial Trading Estates Ltd. 1997 CLC 456
[21] Richard Oakes v. William Turquand and R.P. Harding (1867) 2 H L 325
[22] Narayandas Girdhardas v. P.&O. Banking Corp. Ltd. AIR 1934 Mad 476

- The management of the company has been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members.

At the investigation stage too, the company has to be afforded an opportunity of hearing to the company.

### 1.8 Role of the Securities and Exchange Commission of Pakistan

It may be seen that the SECP has a crucial role in the winding up of companies. Out of a total of 13 grounds of winding up enumerated in section 305 of the Ordinance, the Registrar or the person authorized by the SECP may file petition on 11 grounds. The two grounds of winding up out of the purview of the SECP are (i) special resolution by the company and (ii) inability of the company to pay its debts. In all the rest of the cases, i.e., default in delivering the statutory report or holding the statutory meeting/two consecutive annual general meetings, non-commencement of business, reduction of members, company carrying on unlawful or fraudulent activities, or carrying on business not authorized by the memorandum, or conducting business in an oppressive manner, or is being run and managed by persons guilty of fraud, misfeasance or malfeasance in relation to the company, or is managed by persons who refuse to act according to the requirements of the memorandum or articles or the provisions of the Ordinance, or fail to carry out the directions of the Court, or the Registrar, or the SECP, or ceases to be a listed company, or ceases to have a member, or where it is just and equitable to wind up the company, the Registrar or the SECP has the power to investigate the affairs of the company, of course, after notice to the company and file a petition for its winding up. This role of the SECP, if adequately performed, can go a long way in ensuring good governance in the commercial sector. However, due to lack of requisite resources, expertise and concentration of work, the Commission is not able to discharge this important function. The result is that investigations and filing of winding up petitions at the instance of the Commission are rarely resorted to. Only in the cases of few de-listed companies, winding up petitions were filed by the SECP. It is to be noted that after de-listing, the shares of such companies cannot be traded on the stock exchanges. The result is that the shareholders suffer losses. The ground of de-listing of a company, therefore,

itself is open to debate and discussion. There is a need to re-examine whether the ground of de-listing of a company should be retained on the statute book.

The Ordinance deals with companies and certain other associations for the purpose of healthy growth of the corporate enterprises, protection of investors and creditors, promotion of investment and development of economy. Looking at the provisions of the Ordinance one finds that the Registrar of Companies or the SECP has a host of other functions and duties to perform not only in relation to companies, but several other matters. It is appropriate that this aspect is examined in some detail.

The SECP is set up under the Securities and Exchange Commission of Pakistan Act, 1997. It has replaced the erstwhile Corporate Law Authority. The Act provides for the constitution, structure, powers, and functions of the SECP. The SECP enjoys administrative, operational and financial independence in carrying out its regulatory and statutory responsibilities.

The major areas of functions of the Commission are discussed below: -

**Administrators, receivers and liquidators**

Administrators, receivers and liquidators play an important role in not only corporate insolvency but also in prevention of mismanagement of companies. This role is reflected in various sections of the Companies Ordinance, 1984 including section 295 whereby the SECP may order appointment of an administrator from a panel maintained by it to manage the affairs of a company that is not being run properly. Similarly, in winding up of companies by the court, an official liquidator is appointed from a panel maintained by the court, on the recommendations of the SECP. Presently, there is no regulatory framework in place for these professional service providers.

Rules, 1995 provide the necessary legal framework for registration and certain operational matters of credit rating companies. Under the said Rules, the SECP has powers relating to registration, renewal and cancellation of licenses of these companies. Moreover, the SECP can also give them necessary directions. It has been made mandatory on credit rating companies operating in the country to submit their annual rating reports to the SECP.

**Non-banking financial companies**

In 2002, the Corporate Law Authority was converted into SECP. The NBFCs were taken from the control and regulation of the State Bank of Pakistan and were placed under the SECP. The reason for this shift was the SBP's lack of capacity therefor. It has been observed that both the SBP and SECP lack capacity in terms of requisite size of manpower with purpose oriented skills, market knowledge and stress forecasting abilities to limit market volatility, clarity and focus of supervisory aims, and the realization that, in isolation, fines only place a price on regulatory violations, not prevent them.[23]

**Gratuities, provident funds and pension**

In Pakistan, currently, both private and public sectors offer occupational saving schemes in the shape of gratuities, provident funds and pension. Under private sector schemes recognized by the Federal Board of Revenue, the employer, participant and invested assets enjoy certain tax advantages. Public sector gratuity and pension schemes are non-contributory, unfunded and paid on a pay-as-you-go basis. In addition to this, provident fund schemes are available in which both the employer and the employee contribute.

Majority of pensions given in the country are Government sector pensions, which operate on the defined-benefit system. It not only creates huge liability for the government, but also reduces the incentive to save more than what is required by the scheme. Additionally

[23] A.B. Shahid, Financial Services: monitoring options, Article published in the Daily Dawn of August 11, 2008

employees miss out on the savings if they leave or switch jobs earlier than the qualification age or minimum service.

The concept of well regulated private pensions in Pakistan originated in 2001. The SECP was given the mandate to regulate private pensions in Pakistan under the Securities and Exchange Commission of Pakistan Act, 1997. As the first step, the SECP, after in depth discussion and consideration, in January 2005, notified the Voluntary Pension System Rules, 2005 (VPS Rules, 2005).

Under the VPS Rules, 2005 a system of private pensions has been introduced in the country. Asset management companies and life insurance companies, duly registered with the SECP under VPS Rules, 2005 are to act as pension fund managers and manage pension schemes. The life insurance companies, in addition to pension products, shall also be authorized to offer annuity plans under the Voluntary Pension System.

**Real estate investment trusts**

The SECP has prepared draft Real Estate Investment Trusts (REITs) Rules. These draft Rules, along with a Consultative Paper, have been made public for soliciting comments and suggestions from stakeholders and experts. Once received, the comments shall be considered for incorporation in the draft before approaching the Ministry of Finance and Ministry of Law for vetting and notification.

In recognition of international and regional financial market developments and in order to modernize Pakistan's financial sector, the SECP has been working on the potential of introducing REITs in Pakistan as a new investment and saving vehicle. The formulation of the draft REITs regulatory framework is a significant milestone in this regard. The REITs Rules lay down the requirements for establishment of REITs in Pakistan and are based on the study of international jurisdictions by a Task Force constituted by the SECP for the purpose. The Task Force has highlighted certain impediments in the real estate sector that are expected to hinder the growth of REITs in Pakistan. The Task Force also

gave its recommendations to the Federal and Provincial Governments on fiscal incentives and removing the various impediments, to ensure an orderly and transparent introduction of REITs in Pakistan's financial market.

In comparison, the scope of functions of the counterpart organization in the neighbouring country, India is examined below.

## 1.9 The Securities and Exchange Board of India

The Securities and Exchange Board of India (SEBI) is established under the Securities Contracts (Regulation) Act, 1956. The principal function of the SEBI is the regulation of the stock market, which it carries out in the following manner: -

### Recognition and renewal of a stock exchange

Under section 3 of the Act, application is made to the SEBI for recognition of a stock exchange on the prescribed form along with the requisite fee. Before granting recognition, the SEBI may, under section 4 of the Act, make such inquiries and require further information as it deems necessary. The recognition is granted on certain statutory conditions, such as duration, etc. The recognition may be renewed on an application.

### Qualifications for membership of the stock exchanges

The Securities Contracts (Regulation) Rules, 1957 provide qualifications for membership of the stock exchanges, e.g. 21 years age, citizenship of India, not a bankrupt, or convict, etc.

### Nominees of the SEBI on the governing bodies of stock exchanges

The SEBI may nominate one or more persons not exceeding three in number, as members of the governing body of every stock exchange.

**Disciplinary action against members of stock exchanges**

The SEBI may direct the governing body of any stock exchange to take disciplinary action against the offending member, such as fine, expulsion, suspension, etc.

The rules also provide for audit of accounts of the members and withdrawal of recognition. To ensure transparency, every stock exchange is required to submit annual report to the SEBI, which includes information such as changes in rules, bye-laws, composition of the governing body, new sub-committees, admissions etc., of members disciplinary action against members, etc. The rules also specify the requirements with respect to the listing of securities on a recognized stock exchange. The rules further provide the requirements with respect to the listing of units or any other instrument of a collective investment scheme on a recognized stock exchange.

In comparison and contrast to the functions of the SECP, the SEBI is purely the regulator of capital market. The SECP was also initially mandated to be a regulator of corporate sector and capital market, but in course of time its mandate has been expanded to include supervision and regulation of insurance companies, non-banking finance companies and private pensions. It is also entrusted with the oversight of various external service providers to the corporate and financial sectors, including chartered accountants, credit rating agencies, corporate secretaries, brokers, surveyors etc.

As against the SEBI, there is a huge collection of work and concentration of powers and authority in the SECP, which are against the concept of division of labour and the requirements of the contemporary age of specialization. Multifarious functioning of the Commission may adversely affect its performance. It is widely acknowledged that one single institution vested with a host of functions is prone to suffer from lack of requisite effectiveness and efficiency. This should not happen to the SECP, which is a vital institution of the country. Let it not be denuded of its vitality and efficacy.

Pakistan is a developing economy. It has to undertake rigorous working, address the deficiencies and plug the loopholes, particularly in the area of the corporate governance, which is crucial in the economic development and prosperity of the country. In fact, as required in any successful organization, a constant review process involving appraisal of the functioning of the Commission, the impediments in its smooth operations, the progress made in achieving its goals and targets as defined under the relevant laws, rules and regulations, and the best mechanisms that may be deemed necessary to achieve those goals based on working experience, should be in place within the hierarchy of the Commission. The progress in the economic sector is not satisfactory. Day in and day out, there are scandals in the capital market, many of which could be avoided with the presence of an effective monitoring and regulatory mechanism. It is my considered view that had there been a separate and independent organization empowered to regulate the NBFCs, which presently is part of the functions of the SECP, the Islamic Investment Bank scandal could be avoided and the lifelong savings of the small and poor investors of the far-flung areas of Pakistan not thrown to dogs. Had the Commission been the sole regulator of the securities market, may be the hard earned moneys of the small investors were not that easily grabbed by the Mega Securities, as it has been done now. A stitch in time saves nine. The concerned bodies must intervene timely and play their due role in safeguarding the rights of the investors and the public at large. There is a need to examine the SECP laws in depth and bifurcate different divisions of the Commission, such as NBFCs, Insurance, Pensions, etc., into separate, independent and, where necessary, coordinate organizations. After the BCCI debacle, Britain assigned these functions to separate regulators. Bank of England now regulates the monetary and exchange rate system, Financial Services Authority supervises all the financial services, and the Registrar of Companies regulates company-shareholders affairs. Adoption of similar patterns may prove a catalyst for change in the economic development of Pakistan.

### 1.10 Commencement of winding up

Under section 311 of the Ordinance, a winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for the winding up. The object

of this statutory fiction is to prevent fraudulent preference and other abuses attendant on transfer of assets of a company in contemplation of its liquidation. A transaction entered into by the company subsequent to the date of presentation of the petition for its winding up will not bind the liquidator unless there is specific sanction of the Court to the contrary.[24] Rather, such a transaction shall be void.[25]

### 1.11 Powers of the Court on hearing petition[26]

The Court hearing a winding up petition has the following powers: -

(a) The Court may dismiss the winding up petition with or without costs.

(b) The Court may make any interim order or an order for winding up the company or any other order that it deems just.

(c) The Court may adjourn the hearing conditionally or unconditionally. However, section 9 of the Ordinance provides that all matters under the Ordinance shall be disposed of in a period of 90 days from the date of presentation of the petition by hearing the cases on day to day basis.

(d) The Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged at an amount equal to or in excess of those assets, or that the company has no assets.

(e) Where the winding up is sought on the 'just and equitable' ground, the Court may refuse to make an order of winding up if it is of the view that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

(f) Where the petition is presented on the ground of default in delivering the statutory report or in holding the statutory meeting or any two consecutive annual general meetings, the Court may direct the delivery of the statutory report and/or the holding of the meeting in the first instance, as the case

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[24] H. Naik v. Panchanon Das AIR 1954 Orissa 7
[25] Begum Anwar Sultana v. A.B.M. Associates Ltd. PLD 1981 Lahore 322
[26] The Companies Ordinance, 1984, Sections 309, 310, 312, 313 & 314

may be. The Court may order the costs to be paid by the persons who are responsible for the default in the above respects.

(g) If, on hearing a petition, the Court is of opinion that although the facts of the case justify the making of a winding up order, or the making of such order would unfairly prejudice the members or the creditors, the Court may, instead of making an order for winding up the company, make any appropriate order in the circumstances to regulate the conduct of the affairs of the company and bring to an end the matters complained of. Even, the Court may pass an order for a change in the management of the company.

(h) Where the petition is filed by a contingent or prospective creditor, the Court shall not grant hearing unless the petitioner furnishes reasonable security and establishes a *prima facie* case for winding up to the satisfaction of the Court. [section 309]

(i) Where the petition is filed by the company, the Court shall not hear the company if it has not furnished the particulars of its assets, its business operations and the particulars of the suit pending against it, if any. [section 309]



### 1.12 Wishes of creditors or contributories

In the matter of winding up, the Court pays due regard and deference to the wishes of the contributories and creditors as shown by sufficient evidence.[27] However, the wishes of the majority of the creditors are not binding upon the Court and the Court may disregard them where the majority consists of persons whose conduct is impugned or where a single person has a controlling interest. The Court may order the company to be wound up if its substratum is gone, and particularly if majority of shareholders is deceptive. In such an event, the Court is not bound to accede to wishes of shareholders or creditors one way or other. [28]

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[27] The Companies Ordinance, 1984, Section 320

[28] Fida Yusufali v. Graxalt Refineries Ltd. PLD 1967 Karachi 637

The wishes of the creditors and contributories are ascertained in the manner laid down in section 422, viz., by calling a meeting of the creditors or contributories, which may be presided over by a person appointed by the Court to act as chairman with a view to reporting to it the result thereof. In the case of the creditors, regard shall be had to the value of each creditor's debt. To determine the wishes of the creditors, it will not suffice to merely allow each creditor one vote, rather the amount due to each creditor will also have to be taken into consideration. A creditor or a contributory may vote either in person or by proxy.[29]

Winding up order may not be made if it would unfairly prejudice the members or the creditors of the company. In Shifa Medico v. Jubilee Paper and Board Mills[30], the Court, keeping in view the wishes of the creditors as envisaged by section 320, approved change in management of company on basis of agreement arrived at between the parties and permitted withdrawal of winding up proceeding. However, in all cases for appointment of Provisional Liquidator, it is discretionary and not mandatory to consult all the creditors and contributories. There might be circumstances where the request for the appointment of Provisional Liquidator may be the result of one or more disgruntled shareholders' spite. That would require a high degree of circumspection so as to avoid dangerous consequences. In such a case it is not necessary for the Court to consult all the creditors. In PICIC v. National Silk and Rayon Mills[31], after having carefully considered all the aspects of the case and keeping in view the principles involved, the Court came to the conclusion that it was not only just and proper but also necessary in the interest of all concerned that Provisional Liquidator was appointed.

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[29] Lahore High Court Rules & Orders, r. 77

[30] NLR 1989 Civil 705

[31] PLD 1976 Lah. 1538. See also, Sh. Maqbool Ellahi v. Rasul & Co, PLD 1970 Lahore 539; Abdus Salam v. Muhammad Sharif, PLD 1952 Lahore 465; Khan Salah-ud-Din v. Frontier Sugar Mills, PLD 1957 (W. Pak) Lahore 844; Consolidated Exporters Ltd v. Dyers Textile and Printing Mills, PLD 1984 Kar 541; IDBP v. Larkana Textile Mills, PLD 1982 Kar 1; Mahmood Ahmed v. Karachi Road Transport, PLD 1970 Karachi 229

In a case from Indian jurisdiction[32], it was held that under section 557 of Companies Act, 1956 in all matters relating to the winding up of the company the Court may ascertain the wishes of the creditors. The views of the shareholders are also considered though Court may attach greater weight to the wishes of the creditors. However, the wishes of the creditors will be tested by the Court on the grounds as to whether the case of the persons opposing the winding up is reasonable; and whether there are matters which should be inquired into and investigated if a winding up order is to be made. It is also well settled that a winding up order will not be made on a creditor's petition if it does not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case.

In Re: Manmac Farmers, Ltd.[33] a case from English jurisdiction, the Court held that where, as in the present case, the figures were such as to make it virtually certain that the creditors as a class would support the substantive resolution, a preliminary meeting would not serve a useful purpose. Accordingly, the Court would make an order for the convening of a further first meeting of the creditors and contributories of the company for the purpose of appointing, if thought fit, liquidator in place of the official receiver, without directing any preliminary meeting to be convened.

### 1.13 Suits stayed on winding up order

Section 316 of the Companies Ordinance, 1984 provides that when a winding up order has been made or provisional manager has been appointed, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose. Thus, the Court which is

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[32] Madhusudan Gordhandas v. Madhu Woolen Industries AIR 1971 SC 2600. See also, Ripon Press v. Gopal Chetti, AIR 1932 PC 1 (DB); Madan Gopal v. Peoples Bank of Northern India, AIR 1935 Lahore 779 (DB); Calcutta v. Punjab Pulp and Paper, AIR 1930 Lahore 777 (DB); Deccan Farms & Distilleries Ltd. v. Velabai Laxmidas Bhanji. 322 Company Cases Vol. 49 (1979) 321 [Bombay]

[33] [1968] 1 All ER 1150. See also, In Re: J. D. Swain Limited. [1965] 2 All ER 761; In Re: A.B.C. Coupler & Engineering Co., Ltd. [1961] 1 All ER 354 the Court held that in deciding whether to make a compulsory winding-up order the court should, under section 346(1) of the Companies Act, 1948, *have regard to the wishes of the majority of the creditors*, because those *wishes, although not conclusive, possess great weight and, if they were reasonable*, the court would follow them in the absence of special circumstances; in the present case, the wishes of the majority of the creditors, the opposing creditors, being reasonable, an order for compulsory winding-up was not made.

winding up the company, notwithstanding anything contained in any other law for the time being in force, has exclusive jurisdiction to entertain, or dispose of, any suit or proceeding by or against the company. The suits or proceedings by or against the company pending in any other Court are to be transferred to and disposed of by the Company Judge. The purpose of vesting exclusive jurisdiction by insertion of *non obstante* clauses is to ensure that the suits/proceedings in relation to the companies do not suffer from multiplicity because that would hamper their expeditious disposal and have a negative impact on the commercial activities, which are sine qua non for the economic growth in any country.

Mere pendency of a suit for recovery of the debt against the company is not a bar to the filing of a winding up petition.[34] However, case law under section 306 of the Ordinance does not provide a precedent where a suit for recovery and a winding up petition have been filed simultaneously. In many cases where winding up petition was not found competent in view of the solvency of the company, the creditor's remedy was found to be a suit for recovery.

In Sabir Ahmad v. Najma Sugar Mills[35], the grounds taken for winding up of the company were that the company was unable to discharge its liabilities in fulfillment of a contract *inter se* the parties; that according to the balance sheet of the company, it was not operateable, that the company was commercially insolvent and, therefore, a liquidator was to be appointed for taking over the assets of the company and for selling the same, so that the liabilities of the company could be met from the sale proceeds of the company; that company remained nonfunctional and it was during the last year that the same had started operating empirically and the balance sheet reflected that there was a loss of Rs.4

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[34] In re: Parke Davis & Co. Ltd. (PLD 1982 Karachi 94), it was held that pendency of suit filed by the company claiming damages against creditors and company's willingness to give an undertaking for amount of difference (between amount of debt and amount of damages) could not come in way of passing an order of winding up, particularly when the claim against the company was much more than the amount claimed in the suit.

See, generally, Sabir Ahamad v. Najma Sugar Mills, 2005 CLD 151, Habib Credit and Exchange Bank Limited v. Sindh Sugar Corporation Limited, 1999 CLC 1909 and Industrial Development Bank of Pakistan v. Trade and Industries Publications Limited, 1989 MLD 374

[35] 2005 C L D 151

crore; that the company in the years 2002 and 2003 had been securing bridge finance loans from the bank and a comparison showed that the loan had been increased in the year 2003 and there was nothing on record to suggest that any repayment was made against said loans by the company; that on the basis of figures, company was no longer a viable project and the substratum had gone and that a statutory notice having been given, there was presumption of truth regarding inability to pay which the company had failed to rebut. The company resisted the petition by stating that the petition had been moved because of *mala fides* and referred to a civil suit for specific performance of a contract against the petitioners and for recovery of damages and prayed that until the suit was adjudicated, the matter for winding up of the company be kept pending. It was held that pendency of civil suit for specific performance of contract by the company against the petitioner was no bar to an order of winding up of the company by the Court. Thus, the High Court allowed the petition under section 305 and appointed the Official Liquidators giving them specific directions for compliance. Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the estate or effects or any sale held without leave of the Court of any of the properties of the company after the commencement of the winding up shall be void.[36] However, the proceedings by the Government are not covered by the above rule.

Section 446 of the Indian Companies Act though provides that when a winding up order has been made, no suit or other legal proceeding shall be commenced or proceeded with except by leave of the Company Court, but the Supreme Court of India has held that no such leave is necessary for initiating/continuing proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.[37]

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[36] The Companies Ordinance, 1984, section 410

[37] Allahabad Bank v. Canara Bank (2000) 4 SCC 406; In the case of the Bank of Nova Scotia v. RPG Transmission Ltd (Civil Appeal No. 2 of 2003, decided on 30.11.2004) by High Court of Delhi & Rajasthan Financial Corpn. v. The Official Liquidator, Appeal (civil) 4055 of 1998 decided on 5.10.2005.

### 1.14 Statement of affairs to be made to official liquidator

Section 328 of the Ordinance lays down that in all cases where the Court has made a winding up order or appointed an official liquidator or provisional manager, the company management (directors, chief executive and the company secretary) is required to submit to the official liquidator or provisional manager a statement as to the affairs of the company giving the following information:-

(a) the assets of the company, cash balance in hand and at the bank, and the negotiable securities held by the company;

(b) the debts and liabilities of the company;

(c) the names, residences and occupations of the creditors of the company, stating separately the amount of secured/unsecured debts, particulars of the securities given where required, their value and the dates when they were given;

(d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realized therefrom;

(e) details of the property of the company, its location and custody;

(f) full address of the places where the business of the company was conducted during the six months preceding the relevant date and the names and particulars of the persons in charge of the same;

(g) details of any pending suits or proceedings in which the company is a party; and

(h) such other particulars as may be prescribed or as the Court may order or the official liquidator or provisional manager may require in writing, including any information relating to secret reserves and personal assets of directors.

The aforesaid statement is to be submitted, duly verified by the directors, chief executive, officers, employees and/or promoters of the company who have acted as such during the last year preceding the appointment of the liquidator.

The statement is to be submitted within 21 days from the date of appointment of the liquidator, or within such extended time not exceeding 45 days from the date fixed by the official liquidator or provisional manager or the Court.

The costs and expenses incurred in connection with the preparation and making of the statement and affidavit, as may be determined/considered reasonable by the official liquidator or provisional manager are allowed to the person making/preparing such statement. The costs are paid by the official liquidator or provisional manager out of the assets of the company. Right of appeal in the matter of determination of costs is provided.

A creditor or contributory of the company, on payment of the prescribed fee, is entitled to inspect the statement of affairs of the company, and to a copy thereof or an extract therefrom. But a person untruthfully stating himself to be a creditor or contributory shall be guilty of an offence under section 182 of the Pakistan Penal Code, 1860, and shall, on the application of the official liquidator or provisional manager, be punishable accordingly.

The preparation/submission of the statement of affairs is an important step in the winding up proceedings, inasmuch as it facilitates the liquidator in the collection of all the assets of the company and disbursement thereof to all concerned, which is the basic object of winding up proceedings. The law, therefore, has made exhaustive provisions regarding it and has also provided penalties for default in its submission.

The non-submission of the statement is an offence and the person concerned is liable to a fine not exceeding five hundred rupees for every day during which the default continues. The Court may take cognizance of the offence of default under subsection (5) of section 328 and try the offence itself in accordance with the procedure laid down in the Code of

Criminal Procedure, 1898, for the trial of cases by Magistrates.[38] The Court is also empowered to fix time for complying with these provisions.

With minor variations as to the amount of fine etc., similar provisions exist in the English and Indian law.[39]

### 1.15 Effect of winding up order

A winding up order operates for the benefit of all the creditors and the contributories of the company as if made on the joint petition of the creditors and of contributories.[40] If a creditor or a contributory files a petition for winding up and an order for winding up the company is passed, it does not mean that the petitioning creditor will get his claim satisfied in preference to other creditors. After the passing of winding up order, no suit or other proceeding are proceeded with or commenced against a company which is being wound up except with the consent of the winding up Court.[41] The outcome of the order of winding up by the competent court on any ground enumerated in section 305 would be like the death of an individual. Once the winding up order is passed, the entire managerial functions and decision making authority is shifted and ordinarily entrusted to the Official Liquidator, or an Administrator.[42] The effect of winding up order is to stop the statute of limitation in favour of company.[43] A company continues to exist until it is wound up and that every action of the Official Liquidator is on behalf, or for the benefit, of the company.[44]

Within three years of the passing of the order of winding up of a company, the Court may pass an order regarding stay, withdrawal, cancellation or revocation of all proceedings in relation to the winding up. The Court will pass such an order on the application of any

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[38] Under section 90 of the Criminal Procedure Code, 1898 a Magistrate of the first class is competent to take cognizance of an offence upon a complaint, etc.
[39] Corresponding provision in the U.K. law (Insolvency Act, 1986) is section 22 while it is section 454 in the Indian Companies Act.
[40] The Companies Ordinance, 1984, Section 318
[41] United Commercial Finance Ltd v. Government of Pakistan PLD 1982 Lahore 810
[42] K.M. Ghosh & Dr. K.R. Chandratre's Company Law, 13th Edition, p. 5365
[43] Joint Stock Discount Co.'s Claim (1872) 7 Ch App 646
[44] B. Pattnaik Mines Pvt Ltd v. Bijoyanada Pattnaik (1994) 80 Comp. Cases 237 (Orissa)

creditor or contributory or of the Registrar of Companies or the SECP or a person authorized by it subject to its satisfaction. In doing so, the Court may impose terms and conditions as it thinks fit.[45] The winding up order automatically terminates the contracts of employees and agents. The directors are also dismissed and their powers to act on behalf of the company cease, but the directors may lodge an appeal or seek to discharge a provisional liquidator.[46]

Similar provisions exist in Indian as well as U.K. Companies Laws. Corresponding provisions are section 447 of the Companies Act, 1956 and section 525 of the Companies Act, 1985 respectively.

### 1.16 Winding up order and antecedent and other transactions

Section 408, which, *inter alia*, lays down the procedure for conducting winding up, terms certain alienations of the property of the company, such as conveyances, mortgages, delivery of goods, payments, execution or other acts relating to property of the company during the six months preceding commencement of its winding up as fraudulent preferences and invalid, as is the case with similar actions of an individual who is adjudged insolvent. A transaction would be fraudulent preference if the dominant consideration in the mind of the debtor company (directors, etc.) was to prefer any particular creditor. It is a state of mind, which is to be gathered from the attending circumstances.

Section 408 further provides that the rights and liabilities of the persons preferred will be similar to a surety for a debt. The value of the said person's interest is to be determined as at the date of the transaction constituting the fraudulent preference, as if the interest were free of all encumbrances except for the charge for the company's debt.

The position in English law is that all such acts are voidable in law. Further, transactions by which the company parts with property or rights for less than full value or purchases

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[45] The Companies Ordinance, 1984, Section 319
[46] Palmer's Company Law, Vol. I, 22nd Edition, pp. 995, 996

property or rights for an exorbitant sum are called gratuitous alienations. Thus, a transaction made within six months preceding liquidation, by which one creditor obtains an advantage over another is illegal under the Bankruptcy Act, 1676.[47]

Detailed procedure for determining whether a particular payment was a fraudulent preference is laid down in section 409 and the Court is empowered to go into questions arising between the person to whom the payment was made and the surety or guarantor and to grant appropriate relief as is done in the case of a suit for the recovery of the sum paid.

### 1.17 Status of companies being wound-up

During the course of winding up, a company retains its corporate status and ceases to exist by means of the final act of dissolution in accordance with the provisions of the Ordinance. From the date of commencement of the winding up of a company, the Official Liquidator or the liquidator shall be deemed to have taken the place of the directors, chief executive and managing agents of the company, as the case may be.[48] All provisions and requirements of the Ordinance relating to companies continue to apply mutatis mutandis in the case of companies being wound up. The object of appointing a liquidator and his functions including carrying on business of company is to take steps to wind up the company with a view to its eventual dissolution. This object can be achieved by liquidator by exercising powers of directors who, upon order for winding up being made, would be divested of all powers to act on behalf of the company.[49]

### 1.18 Dissolution of company

A company stands dissolved from the date of an order passed by the Court for this purpose in either of the following circumstances:-

- Complete winding up of the affairs of a company;

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[47] Palmer's Company Law, Vol. I, 22nd Edition, p. 996
[48] The Companies Ordinance, 1984, Section 402
[49] Shaukat Mahmood, Nadeem Shaukat, Company Law, Third Edition 1997

- The Court is of the opinion that the official liquidator cannot proceed with the winding up of the company and it is reasonable in the circumstances of the case that an order of dissolution of the company be made

On its dissolution, the separate entity of the company capable of holding property, suing and being sued in any court, ceases to exist, which it retains during the process of liquidation although the administration of its affairs has passed to the liquidator. After dissolution, the company and its officers become functus officio, though the liquidator can complete formal acts. However, the dissolution of a company does not extinguish any right of, or debt due to, the company against or from any person. Within fifteen days of the making of the order of winding up, its copy is to be forwarded by the official liquidator to the Registrar of Companies, who is required to enter the factum of the dissolution of the company in his books. If the official liquidator does not forward the copy of the winding up order, he renders himself liable to a fine not exceeding one hundred rupees for each day of default. [50]

### 1.19 Winding up of an unregistered company

A company not registered under the Ordinance is a body, which has no corporate existence. Under section 443, unregistered companies include any partnership, association or company consisting of more than seven members. Under section 444, such a company may be wound up on three grounds, namely, (a) if it is dissolved, or has ceased to carry on business, or (b) if it is unable to pay its debts, or (c) if the Court is of the opinion that it is just and equitable that the company should be wound up.

There are private companies established on the basis of partnership, i.e. where the apparent structure of the company is not the real structure and upon piercing the veil of incorporation it is found that in reality it is a partnership. For the dissolution of such companies, the principles governing dissolution of partnership are applicable. Such a company may be wound up on the ground that there is a complete mistrust between the

[50] The Companies Ordinance, 1984, Section 350

co-directors and/or there is a deadlock in the company on account of such mistrust and/or where there is a justifiable lack of confidence in the management.[51]

Further, there is authority in Indian and English law that the things which might be a ground for dissolution of a partnership will apply also in the case of a private company if such a company can be fairly called a quasi-partnership in the guise of a private company.[52]

In coming to the conclusion that a company is in the nature of a quasi-partnership, the court shall have regard to the articles of association, the nature of the relationship between the parties, any agreement entered into between the parties, whether express or implied and also any settled and accepted course of conduct between them in the form of a contract, etc.[53] The superior courts of U.K have laid down the following guiding principles for winding up of private companies on the 'just and equitable' ground, as provided in the Partnership Act for dissolution of partnership concerns: -

(1) Formation of the company based on personal relationship and mutual confidence (an essential feature of partnership business);
(2) An agreement or understanding that all or some of the shareholders will participate in the conduct of the business; and
(3) Restriction on the transfer of the member's interests in the company.[54]

The Indian courts have reiterated the same guidelines and have added that the shareholding should be more or less equal.[55]

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[51] See, generally, Shahamatullah Qureshi v. Hi-tech Construction (Private) Limited, 2004 CLD 640; Associated Biscuits International Limited v. English Biscuits Manufacturers (Private) Limited (EBM), 2003 CLD 815; Iqbal Alam v. Messrs Plasticrafters (Private) Limited, 1991 CLC 589; Messrs Nagina Films Limited v. Usman Hussain, 1987 CLC 2263; Muhammad Shabbir Khan v. Muhammad Anwar, 1988 CLC 1955; Mansoor Ali Bandeali v. Marine Food Industries Limited, 1985 CLC 1239; In re: Companies Act, 1913, PLD 1983 Karachi 45; and Ladli Prasad Jaiswol v. Karnal Distillery Company Limited, PLD 1965 SC 221).

[52] See, generally, In re Yenidje Tobacco Company Limited (1916) 2 Ch 426 (CA); Virendra Singh Bhandari v. Nandlal Bhandari & Sons Limited 1982 Comp Cas 36 (MP)

[53] See, Re Fildes Brothers Limited, (1970) 1 WLR 592

[54] See, Ebrahimin v. Westbourne Galleries Limited (1972) 2 All ER 492

[55] See, Synchron Machine Tools (Private) Limited v. U.M. Suresh Rao, (1994) 79 Comp Cas 868 (Karn)

# PROPOSITIONS AND CONSIDERATIONS IN COMPULSORY WINDING UP

# Chapter 2 Propositions and considerations in compulsory winding up of companies

The circumstances in which a company may be wound up, as given in section 305 of the Companies Ordinance, 1984, briefly stated, are: the company's special resolution to wind it up, default in delivering the statutory report to the Registrar, or in holding the statutory meeting, or any two consecutive annual general meetings, non-commencement of business within a year from its incorporation or suspension of business for a whole year, reduction in the number of members, inability of the company to pay its debts, unlawful or fraudulent activities being carried out by the company, oppression to the members, want of proper accounts, fraud, misfeasance, malfeasance, violation of the memorandum or articles, or provisions of the Ordinance, de-listing of the company, or where the Court considers it just and equitable to wind up a company. Each of the grounds of winding up is discussed below: -

## 2.1 Winding up of the company on special resolution

The first ground for winding up is that the company has, by special resolution, resolved that the company be wound up by the Court. A majority of three-fourth of the shareholders at one meeting can require the company to be compulsorily wound up under clause (a) of section 305.[56] In the absence of a resolution passed by the members at a general meeting, a petition for winding up made in the name of the company by the directors must be held to be one without authority.[57] However, prior sanction by the members given at a general meeting is not a condition precedent to the directors having authority to file a petition in the name of the company for its winding up. Therefore, when such a petition is before the Court, it should not dismiss the petition but must adjourn it to enable the directors to convene a meeting of the members and obtain the

[56] Oriental Navigation Co. Ltd. v. Bhanaram Agarwalla AIR 1922 Cal. 365
[57] *In re*: Patiala Banaspati etc. AIR 1953 Papsu 195

authority.[58] The Court may wind up the company in the public interest where it finds that the resolution for winding up of the company is based on the circumstances that it has closed its business and is heavily indebted without any prospect of revival. The liquidator cannot absolve the directors of their responsibility who had defrauded the depositors and had brought the petition to avoid civil and criminal proceedings and with a *mala fide* intention to save their skin. The order of winding up will not stand in the way of any penal or other proceedings initiated by any court against them.[59]

### 2.2 Winding up of the company on the ground of default in delivering statutory report or holding statutory meeting

The second circumstance in which a petition for winding up may be filed is the default made in delivering the statutory report to the Registrar or in holding the statutory meeting or any two consecutive annual general meetings. The default in filing the statutory report justifies the passing of order of winding up.[60] However, section 157(10) of the Ordinance provides that if a petition for winding up the company on this ground is presented to the Court in the manner provided in Part XI, the Court may, instead of ordering winding up, direct the statutory report to be filed or the meeting to be held. Under sub-section (11) *ibid*, penalties in the form of fine are provided where default is made in complying with the direction of the Court. Under section 314(3) the Court may direct the management of the company to deliver the statutory report, or to hold the statutory meeting, as the case may be. The difference is that under section 157(10) & (11) the Court may straightaway impose costs on the person responsible for the default whereas under section 314(3) the Court gives a direction to remove the deficiency.

Through the above procedures, the law makes double check against straightaway initiation of the process of winding up. Therefore, the Court ordinarily refuses to pass an order of winding up where winding up is sought on the ground of default in delivering statutory report or in holding the statutory meeting or any two consecutive annual general

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[58] Galway & Salt Hill Tramways Co., 1918 IR 62, State of Madrass v. Madrass Electric Tramways Ltd., AIR 1956 Mad 131

[59] Antariksh Credit & Commercial Ltd v. Union Government of India (1999) 96 Comp Cas 79 (All)

[60] Kent Outcrop Coal Co. 1912 WN 26

meetings as laid down in section 305(b) of the Ordinance because grievance may be effectively remedied under section 314(3) of the Ordinance, by directing the company to deliver its statutory report or to hold the requisite meeting, as the case may be. However, the Court will pass the winding up order where the default in delivering statutory report or in holding the statutory meeting or any two consecutive annual general meetings persists despite a direction having been given under section 314(3) of the Ordinance.[61] Here, the powers of the Court to wind up a company are circumscribed by the limitation as to the default in delivering the statutory report or holding the statutory meeting.

### 2.3 Non-commencement of business by the company within a year or suspension of business

The third ground is non-commencement of business by the company within a year from its incorporation, or suspension of its business for a whole year. However, the court will not exercise the discretionary power conferred on it to wind up a company which has not commenced its business within a year of its incorporation where the delay has been sufficiently accounted for, and there is no evidence of any improbability of its commencing its business within a reasonable time.[62] But, if a company fails to start business in terms of its incorporation and shareholders do not oppose the petition, direction for winding up may be given.[63]

In Javid A. Zia v. Sahiwal Textile Mills Ltd,[64] the Court found that the respondent company had not commenced business as required by law and made false statements to confuse the date of its incorporation, therefore, it was ordered to be wound up even without framing a specific issue on the matter.

Under section 439 of the Companies Ordinance, 1984, the Registrar may strike off the name of the company if he finds that the company is not carrying any business. The

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[61] Subsection (10) of section 157 of the Ordinance also refers to the same power of the Court to give a similar direction. However, under subsection (11) *ibid,* failure to comply with the above provision is punishable with different amounts of fine for the listed companies and private companies.
[62] Malabar I. & S. Works v. Registrar of Companies AIR 1965 Ker 35
[63] Delhi Automobiles (P) Ltd v. Maruti Ltd (1978) 48 Comp Cas 676 (P&H)
[64] NLR 1980 Civil Lah. 896

Registrar may come to that conclusion when the company specially so states. In such a case, the Registrar may not publish a notice in the official Gazette as no prejudice is likely to be caused to the company or its shareholders. The Registrar is not bound to remove the company from the register on discovering that it is carrying no business. For the purposes of this section, it is important that the company is not carrying on business, otherwise the company will be restored.

The company should take steps to start business. There should be certain stocks, necessary equipment and machinery at the site and the project should be operational. In Bankers Equity Ltd. v. Balochistan Coaters Ltd.[65], the company neither took pains to start commercial production nor were there sufficient stocks at the site to justify an inference that the project was ready for commencement, but was in fact lying closed without any progress at the site when inspected by the official of petitioners. Thus, there was ample material on record to suggest that company had not commenced its business within one year of its incorporation and also that it had failed to pay its debts or a part thereof. Therefore, the Court found that non-commencement of commercial production within one year of company's incorporation *per se* was strong and valid ground to direct winding up of company. Even the company had not cared to bring on record any material to show whether assets of company were in excess of its liabilities. The company's plea that commercial production having not commenced it was not liable for repayment of loan in installments as agreed and undertaken, was not found warranted by the terms of the agreement. The Court thus ordered winding up of the company.

In Sheikh Mazhar Ali v. Lasani Straw Board Mills,[66] winding up of the company was sought on the grounds that the company had suspended its business, annual general meetings had not been held, no balance sheet or profit and loss account was prepared, no dividends were ever declared and no reasonable hope existed that in future the object of trading with profit would be achieved. It was found that the parties had sold out assets of the company and misappropriated the funds/property of the company. The balance sheet produced in the court did not pertain to the company alone, rather a joint balance sheet

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[65] (PLD 1997 Karachi 416)
[66] 2003 CLD 1494

with another concern's ledger was shown. Further, there were irregularities in its maintenance. Accounts of the company were never audited. Thus substratum of the company had disappeared. In the circumstances, the company was wound up by the Court.

### 2.4 Reduction of members

The next ground for winding up of a company is the reduction of the number of members, that is to say, in the case of private company, below two or, in the case of any other company below seven. The members mean actual members and do not include past members, or representatives of deceased members, or trustees of bankrupt members.[67]

Besides the penalty of winding up provided for in the above situation, the law also fixes the responsibility of the person carrying on business in the name of a company but without the requisite minimum number of members. Section 47 provides that where a company carries on business with less than the legal minimum of members, every person who is a member during such time is severally liable for the payment of the whole debt of the company contracted during that time, and may be sued therefor without joinder in the suit of any other member. Under the U.K. Company Law, such a person is also jointly liable.[68]

The grounds for winding up enumerated in clause (f) of section 305 relate to unlawful or fraudulent activities of the company, carrying on business not authorized by the memorandum, conducting business in a manner oppressive to any member/promoter, not maintaining proper and true accounts, etc., and a listed company may be wound up if it ceases to be a listed company. If a company is engaged in a business which assures or promises return in any form on a deposit or contribution, to be made periodically or otherwise, carries on unlawful activity, which is prohibited under the Ordinance. Chance

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[67] Bowling and Welby's Contract (1895) 1 Ch 663
[68] Companies Act, 1985, Para. 24 (U.K.)

or lottery dealings also fall within the ambit of unlawful activity. As an exception, the business carried on under the provisions of the Insurance Act, 1938[69] is allowed.

Under clause (g), a company may be wound up if the court is of the opinion that it is just and equitable to do so.

### 2.5 Inability to pay debts

The most common ground for a compulsory winding up order in practice is that a company is unable to pay its debts.[70] The inability to pay debts is explained in section 306(1) which mentions the circumstances in which a company shall be deemed to be unable to pay its debts. The presumption of inability to pay debts in the first instance would arise where following prerequisite conditions are met:-

- The company should be indebted in the sum of Rs.50,000/- or a sum more than one per cent of its paid up capital;
- The creditor makes demand by sending it through registered post or by delivering the same at the registered office of the company;
- The creditor may make the demand himself or through his agent or a legal advisor duly authorized in that behalf; and
- The debtor company neglects to make the payment or settle the matter to the reasonable satisfaction of the creditor within a period of 30 days after the making of the said demand.

The onus to rebut the presumption of inability to pay its debts arising in the above situation shall be on the company and the company will be required to show that it is able to pay the amount claimed by the creditor but the amount claimed is not due.

The presumption of inability to pay debt also arises where the execution or other process is issued by a court or any other competent authority through a decree or order in favour of a creditor of the company and the same is returned unsatisfied in whole or in part.

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[69] Repealed by the Insurance Ordinance, 2000 (No. XXXIX of 2000)
[70] The Companies Ordinance 1984, section 305(e)

The last situation is where it is proved to the satisfaction of the Court that the company is unable to pay its debts after taking into consideration the contingent and prospective liabilities of the company.

A survey of the case law is undertaken to see where the Courts have wound up companies and where they have not done so, particularly on the ground of their inability to pay debt.

## 2.6 Cases where the courts have wound up companies

The cases have been discussed in line with the scheme of legislation, viz. the three situations described in section 306 of the Ordinance: presumption of inability to pay after service of statutory notice, judgment or decree or order passed against a company remaining unsatisfied in whole or in part, and the proof of inability to pay in a state of commercial insolvency. In some cases, winding up is sought on more than one ground, while there are cases in which the grounds of winding up are inter-linked, such as inability to pay debt and non-commencement of business where obviously if a company does not commence its business, how will it earn profits and where from will it pay its debts or discharge its liabilities? For the purposes of the present study, as far as possible, it has been thought fit to follow the scheme of legislation.

### 2.6.1 Where debt is found due but the company neglects to pay – presumption of inability arises under section 306(1)(a)

(1) In C. Hariprasad v. Amalgamated Commercial Traders (Pvt.) Ltd.[71] the facts were that the shareholders who were not paid the declared dividend brought a petition for winding up of the company. It was held that the amount of dividend would become payable forthwith on the declaration thereof and that the same not having been paid, there would be a valid debt on which the petition for winding up of the company could be founded. The petition for winding up was allowed on the ground that the company was unable to pay its debts but at the same time the Court directed that the order of winding up was to be kept in abeyance for a period of three weeks in order to enable the company

[71] AIR 1964 Madras 5118

to pay the dividend to the two creditors for the year 1959 whose winding up petition was found competent.

(2) In National Bank of Pakistan v. Punjab National Silk Mills Ltd.[72] the respondent had obtained loan from the petitioner bank by pledging goods. The statement of accounts showed that the paid-up capital of the respondent company was Rs.500,000 whereas it owed a sum of Rs.6,99,899.73 to the petitioner bank and did not pay any amount despite repeated notices given to it in this behalf. The bank was not allowed to seize the goods. The respondent had suspended its business for more than three years and had also discharged all of its employees. The Court held that the winding up petition was a legitimate method of enforcing payment of just debt and the creditor who was unable to obtain payment of his debt had the right *ex debito justitiae* to a winding up order. It was further held that the debt being time-barred was not itself sufficient to conclude that the debt was disputed *bona fide* on sound, legitimate and substantial grounds.

(3) In Trade and Industry Publications Ltd. v. Industrial Development Bank of Pakistan[73] the Supreme Court dismissed the appeal of the company ordered to be wound up by the Company Judge of the High Court of Sindh by holding, *inter alia*, as follows:

> "As regards the submission that the respondent should have proceeded under section 38 of the I.D.B.P. Ordinance and not by way of a petition for winding up, it may be stated that unless a debtor *bona fide* disputes the claim of the creditor or is able to show that notwithstanding the dispute he is in a position to pay his debts, the plea is not of much substance. Now it is well-settled that when there has been a failure to pay a debt in accordance with the statutory notice of demand, insolvency is to be presumed though no doubt it may also be proved in other ways. Reliance is placed on Bengal Luxmi Cotton Mills Ltd. and others v. Mahaluxmi Cotton Mills Ltd. and others AIR 1955 Cal. 273. Reference may also be made to Re: Douglas (Griggs) Engineering Ltd. (1962) All ER 498. In this case it was observed by Pennycuick, J.:-
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> > 'It seems to me that, thus, the *prima facie* right of the petitioning creditor to a winding up order based on the judgment of November 14, 1961, was not displaced merely by showing that the company had a disputed claim against

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[72] PLD 1969 Lahore 194
[73] PLD 1990 SC 768

the petitioning creditor which was the subject of litigation in other proceedings'. "

(4) In Industrial Development Bank of Pakistan v. Modern Poultry Farm Ltd.,[74] the debtor company failed to pay to the bank various instalments as and when they fell due and also failed to comply with various undertakings given by it to the bank. In the petition for winding up filed by the bank, the company furnished no documentary proof worth consideration to show that it was commercially solvent. On the other hand, record indicated that the debtor company owed large sums of money to the creditor which it had neglected to pay. In the circumstances, the presumption was that the debtor company was unable to pay its debt. Hence, it was ordered to be wound up. The plea of the company that the bank had alternate remedies to recover the debt and hence the winding up petition be rejected was not entertained.

(5) In PICIC v. Indus Steel Pipe Ltd.[75] winding up of the respondent company was sought on the ground, *inter alia*, of its inability to pay its debts in pursuance of a loan agreement for which the company had mortgaged its property to the petitioner and executed promissory note. A learned Single Judge of the High Court of Sindh while dealing with a petition of winding up under section 305 read with section 306 held that a company could not be wound up if there was substantial and *bona fide* dispute regarding the debt claimed, and that presenting a petition for winding up with the sole object of bringing pressure on the company to pay the debt was not within the contemplation of the law. However, since no *bona fide* dispute about the debt in issue was brought on record and it was found that the respondent company was unable to pay its debts, the petition for winding up was allowed. The Judge rejected the contention that the assets of the company were greater than its liabilities.

(6) In Messrs Sindh Glass Industries Ltd, Karachi v. Messrs National Development Finance Corporation, Karachi[76] the Supreme Court declined the appeal against the

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[74] 1990 CLC 1030
[75] 1993 MLD 94
[76] PLD 1996 SC 601

judgment of the learned Company Judge and upheld the order of winding up of the appellant company by holding as follows: -

> "The inability to pay its debts can be demonstrated from the company's contingent and prospective liability and the debts which are immediately payable. The insolvency of the company is established if it is unable to pay debts due and payable from the realizable assets in hand and the fact that the debts can be paid out of the assets over a lengthy period of time will be immaterial. According to Pennington, 'the company will also be unable to pay its debts if it has no reasonable prospect of paying all of them, both accrued and prospective, by a steady realization of all its assets, and in this case it will be immaterial that it can pay its accrued debts out of its liquid resources.'
>
> Applying these principles to the facts of the present case, we find that the indebtedness has not been denied, but it has been alleged that the winding up petition is not *bona fide*. If a party challenges *bona fides*, it must state facts to show that the action taken against it suffers from *mala fides*. Mere statement that it was intended to frustrate the proceedings before the Ombudsman can hardly demonstrate *mala fides* of the respondent because considering the nature of jurisdiction Ombudsman exercises, this plea can hardly sustain. Even otherwise, the Ombudsman had heard the case and decided it, which is not of much help to the appellant."

(7) In the case of M/S Glorex Textile Ltd. Karachi,[77] the Investment Corporation of Pakistan filed winding up petition on the ground that in spite of notice, the company failed to clear instalments on due dates. The company did not offer satisfactory explanation, as such the same was ordered to be wound up by the High Court. In the appeal,[78] the Hon'ble Supreme Court upheld the winding up order with the observation that the company has a right to seek revival of the winding up order if it pays full amount to the Investment Corporation of Pakistan.

(8) In Habib Credit and Exchange Bank Ltd. v. Sindh Sugar Corporation Ltd.[79] the Court, in granting the winding up petition filed against the respondent company for its failure to liquidate its liability by paying borrowed amount after service of notice, held that mere pendency of suit would not, by itself, bar entertainment or grant of a winding up petition, especially when defence raised by company which was based on a pure

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[77] 1998 CLC 731
[78] Glorex Textile Ltd. Karachi v. Investment Corpn of Pakistan, 1999 SCMR 1850
[79] 1999 CLC 1909

question of law, *ex facie*, was frivolous and was a mere cloak to avoid payment of amount. The Court found the following propositions as well-established: -

(i) Section 306 of the Companies Ordinance stipulates that if within thirty (30) days of receipt of demand to pay its debts exceeding Rs.50,000/- or 1% of its paid up capital, the company does not pay the due or secure or compound for it to the reasonable satisfaction of the creditor, it would be deemed to be unable to pay its debts;

(ii) Even otherwise the question that the company is unable to pay its debts is to be resolved not from the stain point of the value of its assets but from its capacity to settle current demand and liabilities;

(iii) Mere pendency of civil litigation between the creditor and the borrower company does not by itself bar the entertainment or grant of a winding up petition;

(iv) If the claim of the creditor is genuinely disputed by the company and, in the event of pending litigation, a *bona fide* defence raising triable issue is pleaded, an application for winding up may not be granted and such application could be treated as an attempt to coerce the company to settle an unwarranted claim;

(v) On the other hand, if the defence raised is considered to be sham or a mere cloak to avoid payment, the petition may be readily granted.

(9) In PICIC Ltd. v. Waseem Beverages Limited[80] petition for winding up of the respondent company was filed by the petitioner, a financial institution, which had provided financial assistance to the respondent company on grounds of its inability to pay its debts and the business having been suspended for over a period of three years. Despite many opportunities granted to file written statement, the same was not done, therefore, defence of the company was struck off and the matter was proceeded against *ex parte*. It was found that liability for the debts was not denied by the company in its reply to the notice under section 306 of the Companies Ordinance, 1984. It was held that the non-payment of debts and suspension of project for over a period of 2/3 years were enough to conclude that substratum of the company had vanished. Consequently, the company was compulsorily wound up.

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[80] 2000 MLD 660

(10) In International Finance Corpn. v. Hala Spinning[81] the respondent company was sought to be wound up on the ground of its inability to pay its debts. The Court held that the following aspects needed to be considered in such a case: -

(i) There was a failure or refusal to pay the loan amount to the creditors after statutory notice;

(ii) The debts were more than paid up capital;

(iii) There was no earning capacity to pay the debts in present or future;

(iv) The balance sheet of the company sought to be wound up disclosed that the company was running into losses without there being any hope of its revival.

The pleas taken by the debtor company that the petitioning creditor (IFC) had failed to provide financial assistance in time, or to provide advice on the technical side of the project, or to re-schedule the loan were not suggestive of any *bona fide* dispute justifying withholding of the order of winding up. It was held that the auditors had expressed serious doubts about the running and functioning of the project, the company had not paid the total amount of the loan, the interest on the loan was increasing day by day and though the company was a running concern and was producing quality yarn, yet the same was without any profitability. Thus, the company was ordered to be wound up, though it was observed that lack of profitability was really not necessary for every company to be liquidated and that before liquidating any company, it was also to be considered as to what was in the best interest of the country for it was not intended that the economic activity be stopped or clogged.

(11) In PICIC Ltd v. Electric Lamp Manufacturers of Pak. Ltd.[82] the respondent company failed to pay debt in respect of the foreign currency loan granted to it by the petitioner. Even the company failed to respond to the notice under section 306. The Court held that the plea that the company had assets far in excess of its liabilities, hence it was commercially solvent and its liabilities were fully secured would be no ground for refusing its winding up. The Court also noted that the company had failed to show that a *bona fide* dispute existed in relation to the amount claimed by the creditor.

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[81] PLD 2000 Lahore 323

[82] 2001 MLD 1885

(12) In American Marbles Products v. I.C.P.,[83] the court adjudged the winding up of the company on the ground of its inability to pay its debts and for its failure to commence business since incorporation and appointment of Official Assignee as the Official Liquidator by the Company Judge. Appeal before the Supreme Court was preferred solely urging the plea of lack of competence viz., the respondent Syndicate (Investment Corporation of Pakistan) being investors on profit and loss basis were not the creditors within the contemplation of the banked upon statutory provision and thus were not competent to move the winding-up petition when they had even failed to invest the covenanted sum. The court held that conjunctive reading of the agreements, the demand promissory note, the trust deed and the registered mortgages, charges, hypothecations and the correspondence exchanged between the parties patently demonstrated the intendment of the parties and the nature of the arrangements made as to its juridical classification, a loan facility explicitly described as a loan in the agreement comprising long term PTCs and LFM refinancing by the Syndicate secured through mortgage of all present and future movable and immovable assets, uncalled capital, continuing floating charges, to rank *pari passu* with the existing mortgage charges with other creditors at fixed rate of profit, payable biannually to be credited as expenses in the profit and loss account of the company, restraining the company from alienating any of its assets during subsistence of encumbrances or charges of mortgages in favour of the Syndicate in the event of default rendering the entire sum due and payable upon expiry of the notice period. Such factum was admitted even by the company in the reply to the notice rendering unambiguously clear that the availed facility by the company from the Syndicate for all intents and purposes was a loan fully secured through proper documentation and not investment simpliciter. The company, since its incorporation nearly a decade ago, admittedly had not even commenced its business. Contention of company as to failure of the Syndicate to disburse the entire loan facility on time was ill-founded since the term of agreement of the loan facility preconceived performance of the undertaking by the company which was lacking. The Supreme Court held that, in the circumstances, no exception could be taken

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[83] 2003 CLD 515

to the order of the High Court directing winding up of the company and dismissed the appeal.

(13) In Messrs Central Cotton Mills Ltd. v. Habib Bank Ltd.,[84] the court discussed right of the bank to initiate winding up proceedings against defaulter company. The company failed to demonstrate that it was in a functional condition and was making profits. The company also failed to prove that it was capable of discharging its liabilities/ debts owed to the bank as per record of the company nor the company had come out with the statement showing how much amount could be deposited by it to discharge the liabilities of the bank. In written statement, the company made no specific denial regarding liabilities towards the bank. Civil suits were pending between the parties against each other particularly one filed by the bank for recovery of amount of loan. The learned Company Judge concluded that the company was not commercially viable unit and continued proceedings of winding up. The plea raised by the company was that the bank had instituted winding up proceedings for the recovery of its outstanding amounts and such proceedings could not be substituted for the recovery of amount and that the company had assets more than the alleged outstanding dues. It was held that demand of bank requiring the company to pay the due amount was neither fulfilled nor the security was enhanced within a period of 30 days, therefore, notwithstanding any development which had taken place later on, including the furnishing of security, would not affect the winding up proceedings, which had been initiated after furnishing of security because strictly construing the provisions of section 306(1)(a), cause of action had accrued to bank for winding up. The company might have liabilities which it owed to the bank but the fact remained that it was not in a running condition nor was it commercially viable because it could not show profit for the purpose of discharging its debts/loans obtained by it from the bank. It was found that the Company Judge had rightly wound up the company and appeal filed by the company was dismissed.

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[84] 2004 CLD 1272. In this case, reference was made to Kamadenu Enterprises v. Vivek Textile Mills Pvt. Ltd. (1984) 55 Company Cases 68; Ambala Bus Syndicate Pvt. Ltd. v. Bala Financiers Pvt. Ltd. (1986) 69 Company Cases 838; Re: Douglas (Griggs) Engineering Ltd. 1962 (1) All England Law Reports 498; Sindh Glass Industries Ltd. v. National Development Finance Corporation PLD 1996 SC 601; Platinum Insurance Co. Ltd. v. Daewoo Corporation PLD 1999 SC 1; Punjab National Silk Mills Ltd. v. National Bank of Pakistan 1986 SCMR 1126; Brush Rehman Ltd. v. Brush Electrical Engineering Co. Ltd. 1986 SCMR 1612 and Ali Woolen Mills Ltd. v. I. D. B. P. PLD 1990 SC 763

(14) In Sabir Ahamad v. Najma Sugar Mills[85], winding up of the respondent company was ordered on the ground of its inability to discharge its liabilities in fulfillment of a contract between the parties, according to the balance sheet it had incurred a loss of Rs.4 crore, it had secured bridge loans but had made no repayment against them, it was not operateable and viable, its substratum had gone and was commercially insolvent.

### 2.6.2 Commercial insolvency

(15) In Habib Bank Ltd v. Central Cotton Mills Ltd,[86] the winding up of the respondent company was sought on the ground of its inability to pay its debt. It was found that though the company undeniably possessed assets, yet amount of liability was increasing everyday with accruing interest. The company was also not functioning for the last three years. The Court took into account contingent and prospective liabilities of the company and ordered its winding up. The Official Assignee was appointed as the Official Liquidator to take over company and proceed according to law. It was directed that the disputed amount could meanwhile be adjudicated upon by the Court where suit was pending adjudication.

(16) In Aeroflot Russian International v. Gerry's International,[87] it was held that the powers of the Court to wind up a company on the ground that it is unable to pay its debts were not circumscribed by the limitation as provided for winding up orders on the ground that it was just and equitable to wind up a company. The assertion that the company was a going concern or that it was a viable company was not a good defence in a case where winding up was sought on the ground of the company's inability to pay its debts, which had been established by the petitioner in terms of deeming provision of section 306(1) of the Ordinance. Assets of the company were insufficient to discharge its liabilities toward the petitioner alone, what to talk of other creditors.

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[85] 2005 CLD 151
[86] 1998 CLC 474
[87] 2003 CLD 1075

(17) In Sri Shanmuear Mills Ltd. by Managing Agents Sri Alasai Ltd. v. S.K. Dharmaraia Nadar[88] a winding up petition was filed under sections 433(e) and 434(c) of the Indian Companies Act, 1956, on the ground that the company was unable to pay its debts within the meaning of the above provisions of the Act. The petition was resisted by the company and it was pleaded, *inter alia,* that the company's liability amounted only to Rs.8,72,414 whereas the value of its assets was Rs.10,79,130, which also included the value of the building and machinery without which the company could not function. A Division Bench of the Madras High Court held that for determining the question as to whether the company would be able to meet its then demands, the value of such assets without which it could not carry on business, should not be taken into account. It was further held that the test of inability to pay the debt under section 433(e) was not whether the company, if it converted all its assets into cash, would be able to discharge its debts, but whether in a commercial sense the existing liabilities could be paid by it while it continued to carry on as a company, and thus, the company must be considered unable to pay its debts within the meaning of the above provision for the reason that after the value of the building and machinery the total amount available was a sum of Rs.300,000 against the aforesaid liability of Rs.872,414. Accordingly the winding up petition was granted.

In appeal, the company entered into an arrangement with a third party who took the company's mills on lease with a condition to discharge debts owed by the company. The third party later on surrendered the lease prematurely with a condition that the money advanced by them was paid and even agreed to give up substantial sum if the payment was immediately or in near future paid to them. In such a situation, the Court held that the Court should not hand over a commercially insolvent company to the shareholders and let the shareholders loose upon the market free to raise loans, the Court owed a duty to the public in such a matter.

(18) The Madras High Court, while interpreting section 434 of the Indian Companies Act, 1956, held that a company could be wound up on the petition of a creditor for its

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[88] AIR 1970 Madras 203 = Avent Corporation Pvt Ltd., In re: (1969) 39 Comp Cas 463 (Bombay)

nability to pay his claim after proper demand was made by him and on the lapse of three veeks from the date of service of such demand, even though the company was ommercially solvent. It was further held that the object of above section 434 was to reate a fiction as to when a company would be deemed to be unable to pay its debts, and f the facts of the case came within the scope of that fiction, it would not be open to the ompany to say that in reality it was in a position to pay its debts. It was also held that in uch a case it would be really unnecessary to enquire whether the company is in fact olvent or not.

19) In Cornhill Insurance PLC v. Improvement Services Ltd.[89] the plaintiff company ought an injunction against the respondent restraining it from presenting a petition for vinding up. The company had paid to the defendants greater part of their claim. There vas an oral agreement to settle the outstanding part of the claim for €1,154. The efendants made a written request for payment and upon receiving no reply wrote to the laintiff giving notice that unless the sum was received within 21 days, they would resent petition to wind up the company on the ground that it was unable to pay its debts. he company moved an application for injunction to restrain the presentation of the etition. Herman, J., while declining the application for injunction held that where a ompany was under an undisputed obligation to pay a specific sum and failed to do so, it ould be inferred that it was unable to do so, and the defendants (creditors) could roperly swear to their belief in the plaintiff company's insolvency, and present a petition or its winding up.

he Court took into consideration the following exposition of law made in Mann v. oldstein (post): -

> "When the creditor's debt is clearly established it seems to me to follow that this court would not, in general at any rate, interfere even though the company would appear to be solvent, for the creditor would, as such, be entitled to present a petition and the debtor would have his own remedy in paying the undisputed debt which he should pay. So, to persist in non-payment of the debt in such circumstances would itself either suggest inability to pay or that the application

[89] (1986) 1 Weekly Law Reports 114

was an application that the court should give the debtor relief which it itself could provide, but would not provide, by paying the debt.

The Judge referred to In re: A Company (1950) 94 S.J. 369 wherein Vaisely J., had observed that where a company was well known and wealthy it was more likely that the delay in settlement of its obligations would create some suspicion of financial embarrassment:

> "Rich men and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them."

The Judge held that it was a case of a rich company which could pay an undoubted debt and had chosen not to do so, therefore, the creditor was entitled to (a) threaten to and (b), to present a winding up petition, if, in fact, it chose to. In refusing to restrain presentation of winding up petition, the Judge observed as under: -

> "I concede that the matter is sad and unfortunate because it may be there were other and out of court remedies which might effectively have got the money before now. Nonetheless it is my business to give people their rights, according to their proper entitlement in the law and not to force them into other courses, and in my judgment each defendant was entitled to say: "I am undoubtedly owed €1,154. If you don't pay me I must suspect you can't. Therefore, I can properly swear that you are insolvent and I can properly present a winding up petition to the Companies Court."

### 2.6.3 Just and equitable ground - Loss of substratum, company's inability to meet its current demands and the assets of the company being insufficient to meet its liabilities

(20) In Ali Woolen Mills Ltd. v. I.D.B.P.,[90] the petitioner company did not give any reply to the notice of appointment of provisional manager under section 325 of the Companies Ordinance, 1984 nor did they produce their annual balance sheet and the profit and loss account in rebuttal of the evidence that the company was plainly insolvent and their liabilities greatly exceeded their assets and they lacked liquidity. They also failed to produce any evidence in rebuttal of the evidence that the substratum of the company had disappeared and it was not reasonably possible for the company to carry on

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[90] PLD 1990 Supreme Court 763

business except at a great loss. As the company's mill was closed since 1983 and it had been incurring losses year after year with no immediate prospects of reversing the position. The substratum of the company is also deemed to be gone when the subject matter of the company is gone or the object for which it was incorporated has substantially failed, or it was impossible to carry on the business of the company except at a loss or the existing or probable assets were insufficient to meet the existing liabilities. In the circumstances, the Court would be justified in winding up the company. However, in refusing to make an order for winding up of a company, the Court first has to come to the conclusion that some other remedy is available to the petitioner and the petitioner is acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy. A company may be rich, yet it may be commercially insolvent. The real criterion is whether it can meet its liabilities. The Court has to see whether the company is commercially insolvent i.e. whether it is unable to meet its current demands although assets, when realized, may exceed its liabilities.

(21) In Habib Bank Ltd v. Hamza Board Mills[91] the respondent company was ordered to be wound on the ground of its inability to pay its debt. The learned Judge interpreted the expression "inability" of a company to pay its debts used in sections 305 and 306 and pointed out that the expression "insolvency" as one of the grounds for seeking winding up of a company has not been used in these provisions of the Ordinance. Instead of using the word "insolvency", the law makers used the word "inability", which is very significant and has to be construed in the manner as provided in the law itself. There is a difference between "inability of a company to pay debt on its becoming due" and its "capacity to meet all the liabilities ultimately from the fixed assets." The creditor is only concerned with the payment of its debt when it becomes due and if a company is unable to pay the same when demanded it would fall within the scope of the expression "inability" to pay debt even if the value of the fixed assets may far exceed the total liabilities.

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[91] PLD 1996 Lahore 633

It was further held that the question of ability or inability of the company to pay its debts which became due is to be determined with reference to the conduct of the company and the income or the profits earned by it from the business, for if the company does not earn sufficient profits to pay its debt or if earns profit but does not pay the debt or its management acts in a manner that instead of paying the debt the profits are applied to some other use, it will be a case of inability to pay debt as contemplated under the law.

The matter went before the Supreme Court in the case reported as 2005 SCMR 1314. It was found that the company had adjusted all its liabilities with the bank and there was nothing outstanding against it. The order of winding up passed by the High Court was set aside and the matter remanded with a direction to decide it afresh on merits regarding restoring the previous status of the company taking into consideration the interests of other creditors as well.

### 2.6.4 Carrying on business not authorized by the memorandum

(22) In Pak. State Oil Co. Ltd. v. Pak. Oil Pipelines Ltd[92]petition for winding up of the respondent company, *inter alia*, on the grounds that it had failed to pay its debts; it could not carry on business save at a loss; the very object for which the company was incorporated was not tenable; its substratum had gone, as such it was just and equitable that the company be wound up. The Court held that it had been established beyond any doubt that not only the minor paramount object but the sole object of the company was to operate pipeline for the supply and transfer of all kinds of petroleum products, the other objects were of no importance or significance despite their being incorporated as independent, separate and equally important objects in the memorandum. Such objects would remain subservient and ancillary to the main object and exist side by side with the main object but with the destruction of the latter shall have no independent existence of their own. The main object of the company being not feasible, it was held that the substratum of the company had gone and the company was ordered to be wound up.

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[92] NLR 1994 Civil 15

### 2.6.5 Deadlock

(23) In Qamar Lone v. Kashmirian (Pvt) Ltd.[93] the relationship between the parties was that of partnership firm in the form of company limited by shares with equal shareholding, inasmuch as there were only two directors from each of parties with 50 percent shareholding, which indicated that company itself was incorporated by two brothers as a family concern. Conduct and attitude of parties towards each other indicated that there was complete lack of faith and confidence and business of company was at standstill for more than two and half years. Parties had been attempting to distribute assets and properties in the name of company for considerable period of time but no mutual settlement could be arrived at. In the circumstances, a fit case for winding up had been made out on several grounds, amongst others, that there was complete deadlock in relation to conduct of affairs of company and that affairs of the company were not being conducted in accordance with provisions of Companies Ordinance, 1984 nor were they likely to be so conducted. Accordingly, the company was ordered to be wound up and the Official Assignee was appointed Official Liquidator with all powers to take over assets, liabilities, debts and securities of company.

(24) In Rauf B. Kadri v. State Bank of Pakistan,[94] the financial institution had incurred losses over Rs.4 billion against its capital of Rs.0.656 billion and was unable to pay its debts despite service of statutory notice by the aggrieved party under section 306 of the Ordinance. Presumption of inability to pay debt in case demand was not secured or debts not settled, existed. The company was neither viable nor commercially solvent to discharge its huge liabilities. Winding up in the circumstances was just and equitable. In the appeal filed by the company against the winding up order passed by the Company Judge, the Supreme Court held that the company had completely lost its substratum and

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[93] PLD 1997 Karachi 376

[94] 2002 CLD 1794. Reference was made to Investment Corporation of Pakistan v. Sindh Tech. Industries Ltd. 1999 MLD 2609 (upheld by the Supreme Court in the case reported as 1998 SCMR 1533 holding that "participation term certificate in finance was nothing more than debenture, which was acknowledgement of loan, therefore, the money advanced to the company was loan, hence the petition was competent); Sindh Glass Industries Ltd. v. National Development Finance Corporation PLD 1996 SC 601; Platinum Insurance Company Ltd. v. Daewoo Corporation PLD 1999 SC 1 and Hala Spinning Mills Ltd. v. International Finance Corporation 2002 SCMR 450.

was neither viable nor commercially solvent to discharge its huge liabilities. Nothing was available on record except a bald statement of the counsel in appeal on behalf of an unauthorized person to suggest that winding up order suffered from any illegality or factual and legal infirmity. It was held that the High Court, in circumstances, was perfectly justified in arriving at the conclusion that it was just and equitable to order the winding-up of the company.

### 2.7 Cases where the courts have not wound up companies

(25) In re: Lympne Investments Ltd[95], the petitioner served a demand under section 223 of the Companies Act, 1948 on the company for payment of a debt of €3500. The company denied indebtedness and asserted that the €3500 was payment for shares in the investment company, which were to be held by the company in trust for the petitioner. On expiry of the statutory period of 21 days, the petitioner presented the petition for the winding up of the company on the grounds that it had failed to comply with the statutory demand and it was insolvent, and that it was just and equitable that it should be wound up. It was held that there were such allegations of fraud or dishonesty that they could not be resolved without proper pleadings and cross-examination of witnesses. The winding up petition was dismissed.

(26) In Bukhtiarpur Bihar Light Railway Co. Ltd. v. Union of India[96] the respondent claimed that a large sum had become due from the appellant company, which remained unpaid despite service of notice. The company took the plea that it was not liable for the whole of the demand. The company was ordered to be wound up, but in appeal, a Division Bench of the Calcutta High Court while construing section 163(1)(i) of the late Companies Act held that the respondent had failed to establish that there had been a non-compliance with the statutory notice of demand or the company was unable to pay its debts within the meaning of section 162 (v) of the Act. In the result, the winding up order was set aside.

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[95] (1972) 1 Weekly Law Reports 523
[96] AIR 1954 Calcutta 499:

As to the ground that the substratum of the company had gone and the object for which it was formed had become impossible of further pursuit, it was held that such matters usually are the concerns of shareholders and contributories; a creditor cannot properly be allowed to use it as a ground for breaking up the company, unless by the disappearance of the substratum, the recovery of his debt has been imperiled. It was held that the reason that the substratum of a company is gone is not one of the specific grounds given in section 162 of the Act for making a winding up order. The disappearance of the substratum is a circumstance, in view of which the Court may consider it just and equitable that a winding up order should be made. The company was shown to be having sufficient money and the respondent could prove in the ordinary way for the realization of their debt. It was held that a winding up order may be a form of equitable execution, but there is no equity in making such an order when the debt of the creditor is not in peril, although the substratum of the company may be gone, and when matters remain outstanding which can be best attended to in the interest of the shareholders by the company functioning as a company through its directors. A winding up order is not a normal alternative in the case of a solvent company to the ordinary procedure for the realization of debts due from it. It was added that the facts on which the substratum of the company was alleged to have gone were very much in dispute between the parties and on the basis of the material placed before the Court, it was impossible to come to a definite finding one way or the other. Further, since it was not possible to come to a conclusion that the railway was taken over from the company by the District Board of Patna and unless that could be done, the question that the substratum of the company was gone could not be entertained as the basis for making an order for winding up.

(27) In Adage Advertising v. Shezan International Ltd[97], the Supreme Court declined a petition for leave to appeal against the dismissal of a Letters Patent Appeal by a Division Bench against the order of the Company Judge rejecting a petition for winding up by holding as under: -

> "In all cases where an application under section 162 of the Companies Act is based on the allegation that the respondent company is unable to pay its

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[97] 1970 SCMR 184

debt, the question always arises whether the respondent company is not in a position to pay its debt and whether the company concerned has a *bona fide* dispute with the petitioner who has come to the Court. This point was considered at length by the learned Judges of the High Court and on the facts of the present case they have come to the conclusion that there is a *bona fide* dispute between the parties about the amount due to the petitioner from the respondent. In Halsbury's Laws of England (Vol.6), the statement of law on this subject is as under:-

> "A winding up order will not be made on a debt which is *bona fide* disputed by the company, but the Court must see that the dispute is based on a substantial ground. If there is a genuine dispute, the petition may be dismissed or stayed and an injunction may be granted restraining the advertisement of the petition."

The Supreme Court noted that though it was proved that a sum of Rs.58,933.72 was due to the petitioner, but the respondent company was disputing to pay the entire amount on the ground that they had paid a large amount out of it to the principals of the petitioner. Their case was that the petitioner firm was only entitled to 15% commission and the amount claimed from them was payable to their principals. Further, it was not disputed that the respondent company had paid some amount to the principals of the petitioner, though it was pleaded that the respondent company had no business to pay any amount directly to the principals of the petitioner and they were liable to pay the entire amount to them. The Court, therefore, concluded that on the facts of the present case, it could not be said that there was no genuine dispute between the parties. The said dispute could only be resolved in the civil court. The Court opined that the provisions of the Companies Act (now Ordinance) were not vehicle of oppression, hence the refusal to wind up the company was upheld.

(28) In Mullah Abdullah Bhai v. Saria Rope Mills Ltd.[98] it was held that the word "unable" does not mean "unwilling" and the word "debts" refers to all the creditors as a class and not separately to the interests of each individual. The ingredients necessary for sustaining a petition for winding up a company were highlighted in the following words:

> "There should, firstly, exist a debt, secondly, it should not be the subject of an honest dispute, and, thirdly, the company should be unable to pay its

[98] PLD 1971 Karachi 597

debts. The basic object of scrutiny in such proceedings is the solvency or insolvency of the company and not the truth of the claims of the creditors. There may be a company which is in reality under an obligation to pay huge debts but may be honestly disputing them and, therefore, refusing to pay them. In such circumstances, if the winding up proceedings were continued, they would be converted into proof and disproof of the debts and the main object which is scrutiny into the solvency or insolvency of the company will be relegated to the background. A company which is able to pay its debts cannot in terms of section 162(v) be ordered to be wound up except in the sense that refusal to pay a genuine debt is usually accompanied with the existence of a state of insolvency.

If a debtor is merely unwilling to pay his debts, then the normal remedy is a suit. If a creditor, instead of instituting a suit against debtor company files an application for winding it up, I always ask myself, why has he done so, instead of following the straightforward course of proving his claim directly and then executing the decree? If his debt is undisputed, then the decree will follow easily. If he simply desires to save court-fee, then the consideration of loss to the State revenue may not be in his way, but he involves himself in a problem of proving insolvency of the company which is different from a temporary misfortune of a company."

(29) In Federation of Pakistan v. Standard Insurance Company Ltd. Karachi[99] winding up of the respondent company was sought on its refusal to pay amount it had agreed to pay unconditionally on demand as per Insurance Guarantee Advance Payment Bond. The learned Judge held that the denial made by the respondent company was based on triable issue and was neither frivolous nor merely a cloak to avoid payment under the bond, rather was based on substantial ground, thus remedy by way of winding up order was neither equitable nor justified in the circumstances of the case. The learned Judge cited the following passage from a judgment of the Supreme Court of India[100]:-

"The principles on which the Court acts are first that the defence of the company is in good faith and one of substance; secondly, the defence is likely to succeed in point of law, and thirdly the company adduces *prima facie* proof of the facts on which the defence depends."

In the Indian case, the winding up was prayed on the ground that the company was unable to pay its debt. According to the balance sheet, the liabilities of the company were far above its liquid assets. Besides, it was pleaded that the company had incurred losses

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[99] PLD 1986 Karachi 409

[100] Madhusudan Gordhandas & Co. v. Madhu Woolen Industries (Private) Ltd. (AIR 1971 SC 2600)

and had stopped its functioning. The company disputed the claim and pleaded that a sum of Rs.72,556 was payable by the company to the appellant and there was a settlement of Rs.14,850 for payment. The appellant denied such a compromise. In such a situation, the learned Judge refused to wind up the company and asked the respondent company to deposit the disputed amount of Rs.72,556 in Court. It was further directed that if within six weeks the appellants did not file the suit in respect of the recovery of the amount, the company would be able to withdraw the amount and if the suit was filed the amount would stand credited to the suit. In appeal against the above order, time for depositing the amount and filing the suit was extended on the same terms.

(30) In Abdur Rasheed v. Nippon Robbin Company (Pak.) Ltd.[101] the petitioner had agreed with the Directors of the respondent company to become a shareholder of the company and had paid a sum of Rs.627,000/- accordingly. It was due to the non-payment of this amount that the petitioner filed a petition for winding up of the respondent company. The Court held that in consequence of the agreement, the petitioner would either be entitled to the shares in accordance with the agreement, or in case the agreement was not honoured, the respective rights and liabilities of the parties shall have to be determined. Thus, the winding up petition was dismissed on the ground that no due debt was shown to exist. It was further held that the petitioner's right under the agreement, which according to him, was not honoured, depended on the respective rights and liabilities of the parties to be determined, which could have been done only after evidence was led by the parties and not in a summary jurisdiction under section 162 of the late Act.

(31) In Khyber Textile Mills Ltd. v. Allied Textile Mills Ltd.[102] a learned Single Judge of the High Court of Sindh held that the forum created under the Companies Act for winding up of companies under section 162 of the late Companies Act was not a substitute for a suit to recover debts, and that the main object of winding up proceedings was to find out solvency or insolvency of the company and not to settle claims of creditors.

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[101] PLD 1982 Lahore 103
[102] 1989 CLC 1167

The court referred to judgments from the Indian jurisdiction where on analysis of the case law (D. Devis & Co. Ltd. V. Brunswick (Australia) Ltd[103] etc., it was held that following tests were to be applied to determine whether the company was commercially solvent or insolvent: -

(i) Whether the substratum of the company was deemed to be gone;

(ii) Whether the object for which it was incorporated had substantially failed;

(iii) Whether it was impossible to carry on the business of the company except at a loss;

(iv) There was no reasonable hope that the object of the trading at a profit could be achieved;

(v) The existing and probable assets were insufficient to meet the existing liability.

Thus, winding up petition was dismissed as it was found that the petitioner had failed to prove that the company was unable to pay its debts.

(32) In IDBP v. Sarela Cement Ltd.[104] the petitioner sought winding up of the respondent company on the ground of its inability to pay huge outstanding dues being commercially insolvent. A learned Single Judge of the High Court of Balochistan, while construing section 9(3) of the Ordinance held that no doubt the above provision permitted adoption of summary procedure, but nevertheless to effectively decide the matter the Court was under obligation to carefully apply its judicial mind. It was further held that the company's inability to discharge its liability was to be presumed when the required notice in terms of section 306 of the Ordinance was sent by registered post or otherwise delivered at the registered office of the company, calling upon the company to repay the outstanding amount and the company neglected within thirty days after the receipt of the notice to pay the due amount or to secure or compound for such demand to the reasonable satisfaction of the creditor.

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[103] AIR 1936 PC 114
[104] 1993 CLC 1540

The Court reiterated the tests referred to in the case of Khyber Textile Mills Ltd.[105] and also went on to say that before passing the final order of winding up against any company, the Court would be under legal obligation to form opinion under section 305, clause (h) of the Ordinance on the question whether it was just and equitable that the company should be wound up, keeping in view that the company had become commercially insolvent and there were no chances of its future prospects. It was held that *prima facie* there was no evidence on record to make the assessment of assets owned by the respondent company, therefore, it was difficult to hold that to what extent the claim of each creditor shall be satisfied if the company is ordered to be wound up. It was observed that alternate remedy was able to the creditor for the recovery of outstanding amount by way of instituting civil suit, consequently the company was not wound up.

(33) In Ulbricht's Wwe. Ges M.B.H., Austria v. Ulbricht's (Pak.) Ltd.[106] in seeking winding up of the respondent company, the petitioner relied upon an agreement between the parties pursuant to which, in the event of default in payment of the price or interest and on the happening of other events enumerated in the agreement, the petitioner was entitled to terminate the agreement and the entire balance amount would become due immediately. There were two repayment agreements, one made in 1979 and the other in 1985 under which the company undertook to repay the dues of the petitioner. On failure of the company to make payment, the petitioner served it with the statutory notice and later filed the petition for winding up. The learned Single Judge of the High Court of Sindh held that the petitioner was alleged to have carried on business in competition with the respondent company and made huge profit at the cost of the company, besides other allegations of serious nature against the petitioner in which compensation had been claimed by the company, therefore, proper course for the petitioning creditor was to file a suit for recovery of its dues rather than to pressurize the respondent to pay its alleged debt by filing the winding up petition. It was observed that a petition for winding up by a creditor was not a substitute for a suit for recovery of debts, and that if the object of the creditor in applying for winding up was to bring pressure on debtor company, the same would be an abuse of legal process and, by itself, sufficient to displace *prima facie*

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[105] Referred at serial No. 31/ante
[106] PLD 1992 Karachi 249

position that a creditor was entitled *ex debito justitiae* to winding up order. The petition for winding up was dismissed as it was found that there was dispute as to the entitlement to the share under the agreement of collaboration between a foreign company and a local company in Pakistan.

(34) In Hashmi Can Company Ltd. v. K.K. & Co. (Pvt.) Ltd.[107] the petitioner sought winding up of the respondent on the ground of the latter's inability to pay outstanding amount of Rs.15,10,840 after service of statutory notice with which statement of accounts was also annexed. The respondent company, in its reply to the notice, disputed the correctness of the accounts on the ground that the cans supplied by the petitioner were defective and of substandard quality resulting in huge losses to the respondent and the respondent had approached the competent court with a suit for rendition of accounts. The winding up petition was dismissed. The Supreme Court maintained the judgment of a Division Bench of the Peshawar High Court dismissing Intra Court Appeal against the order of the learned Company Judge refusing to wind up the company under section 305 of the Ordinance and, thus, declined leave to appeal by holding as follows:-

> "The conjoint reading of sections 305 and 306 makes it amply clear that the Company Judge has a discretion to order winding up of a company if it is unable to pay its debts and in spite of demand made by the creditor the debt remains unpaid."

However, the Supreme Court made it clear that the above proposition referred to the undisputed amounts payable by the company and not to those which would be in dispute *bona fide*. More so, when immediately on receipt of notice under section 306 the creditor is informed of the reasons why the alleged debt is disputed and the matter is taken to the court of law for adjudication. Further, refusal for cause to pay such debts cannot be regarded as negligence to pay as contemplated under section 306. The Court concluded that both the lower forums had the discretion to allow or disallow winding up of the company and since no illegality or material irregularity in the exercise of discretion by the lower forums in not winding up the company was shown to exist on record, the same was upheld.

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[107] 1992 SCMR 1006

(35) In Messrs Metito Arabia Industries Ltd. v. Messrs Gammon (Pakistan) Ltd.[108] a learned Single Judge of the High Court of Sindh refused to wind up the respondent company on the ground of its inability to pay its debts. The respondent had placed an order with the petitioner for supplying, installing and commissioning the project of sea water reverse osmosis plant at Al-Ahli Sports Club, Jeddah. An amount of SR 69,550 was paid by the respondent to the petitioner as 25% of the down payment. On maturity, a cheque for SR 153,010 dated 10 April 1986 was issued by the respondent in favour of the petitioner, which was dishonoured by the bankers at Jeddah. This gave rise to a dispute and the petitioner filed a claim before the Office of Settlement and Commercial Instruments Disputes in Riyadh, Ministry of Commerce and an award was passed in favour of the petitioner. Thus, the petitioner approached the Company Court with the prayer for winding up of the respondent after service of statutory notice. The learned Judge held that service of notice was not the only condition for passing an order of winding up, but there were other factors, such as the existence of *bona fide* dispute regarding the debts of the company, utilizing the winding up proceedings as a tool to recover money, etc.

The Court referred to the case of Abdul Malik Badruddin[109] wherein it was held that a foreign judgment or decree did not operate *proprio vigori* in this country and was not capable of automatic execution by the Pakistani courts. In the instant case, the petitioner had based its claim on an award passed by a foreign tribunal and not a judgment or decree passed by a foreign court within the contemplation of sections 2(6) and 13 of the Code of Civil Procedure. Further, it was not clear whether such an award could be executed through courts in Pakistan without adopting the procedures as prescribed in the Arbitration (Protocol and Convention) Act, 1937. No other instance was cited to show that the respondent company was incapable of paying its debts to other creditors or was heading towards insolvency. Consequently, the winding up proceedings were held to be meant to pressurize the respondent company to pay its debts. Thus, the law laid down in some earlier cases on the interpretation of sections 305 and 306 of the Ordinance was reiterated where it was said that the object of the law was not to coerce a company to

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[108] 1997 CLC 230

[109] PLD 1993 Karachi 449 (upheld by the Supreme Court in the case reported as 1997 SCMR 323)

make payment to unpaid creditors, but to secure discontinuation of functioning of a company which had ceased to be commercially solvent, and that mere "unwillingness" on the part of company to pay its debt would not mean "inability". It was further said that when company persistently failed to pay its debts, only then it was liable to be wound up at the instance of its creditors.

(36) In Pakistan Industrial Credit and Investment Corporation Ltd. v. Bawany Industries Ltd.[110] winding up of the respondent company was sought on the ground of its inability to pay its debts after issuance of statutory notices (first of which was returned un-served with the endorsement that the company had left the premises long back, and second registered notice was returned undelivered with the endorsement of refusal). At the hearing the respondent company objected to the maintainability of the petition for want of service of statutory notice and for the reason that the petitioner had filed a suit for recovery, which was pending adjudication. The learned Judge took the view that the issues requiring decision in the civil suit included a specific issue as to what amount was due and recoverable from the respondent company, therefore, any expression of opinion about the liability of the respondent company for payment of debt or its inability to pay in the peculiar circumstances of the case would not be just and proper. The pendency of the suit for the recovery of the amount was taken as a sufficient ground for holding that there was a *bona fide* and substantial dispute regarding the debt claimed by the petitioner, therefore, the winding up petition was dismissed. Regarding the effect of non-service of statutory notice on the respondent company, it was said that it would not be of much consequence for, in that event only a presumption arising under section 306 of the Companies Ordinance might not be lawfully drawn.

(37) In I.C.P. v. M/s. Noor Silk Mills Ltd[111] the petitioner sought impleadment as a party to the winding up proceedings pending against the respondent company claiming to be a creditor of the company on the strength of a decree passed in its favour and against the respondent company. It was held that a decree per se was no ground to implead the applicant as a party as remedy by way of execution application was available to the

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[110] PLD 1998 Karachi 45
[111] 1997 CLJ 511

petitioner. The position of the intervener was held to be no better than that of a creditor and hence at liberty to seek remedy without being joined as party to the present proceedings. On the application for winding up, it was noted that the petitioner had granted a loan of Rs.10,00,000/- to the respondent mills and on account of heavy financial liabilities, the substratum of the company had disappeared, the company had violated the terms and conditions of the loan agreement and had not paid the installments of loan on the due dates. It was further noted that the respondent was liable to pay a sum of Rs.81,66,330 as on 30.9.1994 whereas as per earlier letter, the amount due as on 30.6.1994 was Rs.12,92,968/-. The learned Judge held that it was difficult to understand as to how the liability had escalated. Further, the petitioner did not issue notice to the respondent to pay the amount as shown in the petition. On the basis of the counter affidavit filed by the respondent, it was observed that textile and silk industries were passing through a financial and marketing crisis for the last many years and in view of the vast difference in the assets and liabilities of the respondent, it was neither just nor equitable to direct winding up of the respondent company which was trying its best to flourish and to make up the losses and a huge claim by itself was not a sufficient ground for winding up as remedy by way of suit or a claim before the appropriate forum was always available to the petitioner.

(38) In Kaikobad Pestanjee Kakalia v. Almas (Pvt.) Ltd[112] winding up of the respondent company was sought for the reason that there was a running account between the parties and the respondent had shown its inability to clear the outstanding dues amounting to more than five lacs of rupees for two consignments cleared on different dates and the respondent had failed to discharge its liability despite repeated notices and fax messages, hence the company was not commercially solvent and was not in a position to pay outstanding debt and liable to be wound up. The respondent took up the plea that there was a running account between the parties and the respondent had paid huge amount of Rs.97,20,807 during a period of less than two years towards the claim, despite contingent liabilities the company had earned pre-tax profits to the tune of Rs.2,39,7813 and unappropriated profits worth Rs.652,255 were carried over to the next year,

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[112] 1997 MLD 149

therefore, the company could not be termed as commercially insolvent. The petitioners referred to the liabilities shown in the balance sheet, but the respondent offered explanation that under income tax laws, the assesses are required to acknowledge their debts, present and future liabilities even if not admitted or disputed. In this background, the learned Judge held that settlement of disputed claims between the parties could be undertaken in the winding up proceedings, which were unique in nature. Debt or claim of a party against a company cannot be settled in winding up proceedings, which are not a substitute for sorting out the dispute before a Court of plenary jurisdiction. Decree in the sum of over Rs.700,00,000 which was not satisfied by the respondent company was also brushed aside on the ground that the petitioner had not been able to establish that the company was unable to pay its debts including that of the petitioner. The case of Sindh Glass Industries[113] was held not applicable wherein it was, *inter alia*, held that statutory notice raises a presumption of inability to pay debts, but such presumption is rebuttable and if the company is able to show that it has sufficient assets to pay the debts, then Court will inquire into it to satisfy itself whether it is unable to pay its debts. In the discharge of this burden, the company cannot by mere denial of liability avoid winding up action under this provision. It is the first and foremost duty of the creditor to show that an amount as required by law is due and the company is indebted in a sum of money presently due and payable.

(39) In I.C.P. v. M/s. Charagh Sun Eng. Ltd[114] the petitioner Syndicate sought winding up of the respondent company for the latter's inability to pay its debts in respect of the loan advanced by the petitioner against the Term Finance Certificates issued by the respondent company. The amount was redeemable on demand along with profit due thereon up to 31.12.1992 out of the proceeds of the public issue. The petitioners sent notice in terms of section 306 for non-payment of the amount. The learned Judge treated the notice as un-served, but observed that the issuance of statutory notice was not at all fatal to the maintainability of the petition, which could be heard and decided on merits. On merits, the learned Judge held that there was a stipulation that the amount was payable by the company by 31.12.1992 or earlier, but was conditioned by the clause that

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[113] PLD 1996 SC 601
[114] NLR 1998 Civil 120

such amount shall be paid out of the proceeds of public issue if made before the said date. Obviously, the respondent was prevented from offering public issue with the result that it was not in a position to pay up this amount out of the proceeds of the public issue. The learned Judge gave a finding on the financial soundness and health of the respondent company by taking into consideration various payments made by it and treated the refusal to pay by the company as a plausible defence, therefore, it could not be said that the company had lost its liquidity or that it was commercially insolvent. Finally, the learned Judge observed that "*the spirit of law is to encourage and save the institutions rather than to destroy them by winding up orders*," and thus refused to wind up the company.

(40) In New State of India Insurance Co. v. Superintendent of Insurance, New Delhi[115] the appellant company was sought to be wound up by the Superintendent of Insurance on the ground that on an examination of the returns of accounts of the company it appeared that the company was really insolvent, that it was not likely to work at profit and that its continuance was prejudicial to the interests of the policy holders. The company traversed the allegation of insolvency or its continuance being prejudicial to the interest of the policy holders and averred that its assets were more than sufficient to meet the liability of the policy holders. On these pleas, the learned District Judge framed the following issues:-

(i) Is the company insolvent?

(ii) Is the company's continuance prejudicial to the interests of the policy holders?

(iii) Is the company liable to be wound up?

The learned District Judge recorded evidence led by the parties and found these issues in the affirmative and ordered that the company be wound up. However, in appeal, a Division Bench of the Lahore High Court held that the fact that the Insurance Company was carrying on business at a loss, was no ground for winding it up, especially when not a single shareholder had come forward to support the petition for winding up. In the same case while construing section 53(2)(b)(iii) of the Insurance Act, 1938, it was held that in

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[115] AIR 1943 Lahore 109

judging the financial position of an insurance company at a given moment, while it was not possible to regard the entire unpaid capital as available to the creditors at its face value, it was equally wrong to leave it out of consideration altogether regardless of the position and solvency of the shareholders. Therefore, the order of winding up was set aside.

(41) In Bengal Luxmi Cotton Mills Ltd. v. Mahaluxmi Cotton Mills Ltd.[116] the issue of inability of a company to pay its debts where a dispute was raised by the company was examined in quite some detail. In this case, the appellants, who were creditors of the respondent company applied for a winding up order on the ground that the first instalment of their debts, which had already become payable under the provisions of a certain scheme, had not been paid in spite of notices of demand. The company's reply was that the debts claimed by the appellants were undoubtedly due to them, but this scheme provided that the debts were to be paid out of the profits and inasmuch as the company had not made sufficient profits since the date of the scheme, the debts had not yet become payable. The learned Judge held that the provision as to payment out of profits was an integral part of the scheme which could not be ignored and since the company had yet made no sufficient profits, its liability to pay the debts had not yet arisen and, therefore, the company's failure to pay the first instalment of the appellant's debts could not be a ground for making a winding up order.

The judgment discusses the nature of jurisdiction of the Companies Courts, the extent of inquiry that these Courts should undertake and the kind of orders that they should pass. Rather, this is the only judgment among the plethora of case-law discussed in the present study that touches some aspects of the thesis proposal. Therefore, the case is examined in quite some detail.

The Division Bench of the High Court of Calcutta, in deciding the appeal had in mind a passage in "Buckley on the Companies Acts" in which the effect of English decisions on the subject had been summarized. The learned Advocate General contended that there was no dispute in the present case as to the existence of the debts, but only a dispute as to

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[116] AIR 1955 Calcutta 273

the time of payment and in such a case, the winding up court was entitled to, and indeed ought to go into the dispute itself and proceed to dispose of the petition for winding up according to its finding. On a reference to the decision of the Court of Appeal – 'In Re Welsh Brick Industries Ltd.'[117] the Court observed that the decision was relied on as having modified the statement of law, as contained in Buckley, therefore, it was necessary to read the statement, which ran as follows: -

> "A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is '*bona fide*' disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed and under circumstances may be stigmatized as a scandalous abuse of the process of the court. Some years ago petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed.
>
> The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the Court may decide it on the petition and make the order."

The Court recalled that the basis of an order of winding up of a company on the ground of its inability to pay debts is that the company has ceased to be commercially solvent and, accordingly, it is fit and proper, in the interest of the creditors and shareholders, not to allow it to function further as a company. When there has been a failure to pay a debt in accordance with a statutory notice of demand, insolvency is to be presumed, but it may also be proved in other ways. The basis of a winding up order on the ground of company's inability to pay its debts is, however, always insolvency.

On the basis of the above, the Court held that when a company has failed to pay a debt, but it appears that the failure occurred, not because the company was unable to pay, but because it disputed the liability on a substantial ground and there is nothing to show that if the dispute is decided against the company, it will not or will be unable to pay the debt, there is no present proof of insolvency and therefore no sufficient basis for making a winding up order. In such a case, the winding up court will only see if the grounds on which the liability is disputed are substantial, and if the dispute is in that sense '*bona*

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[117] 1946-2 All ER 197

*fide*'. If it finds the issue in favour of the company, it will ordinarily not proceed further and decide the dispute itself and determine whether or not a debt exists and has become payable. In such a case, the Court will either dismiss the petition for winding up or keep it pending till the creditor has established his claim in a regular action. The principle on which the court will forbear from deciding the dispute and making a winding up order in case it decides it against the company, is that winding up proceedings are not intended to be exploited as a normal alternative to the ordinary mode of debt-realization and that it is more convenient that claims should be investigated and decided in a regular action.

The Advocate General contended that In Re Welsh Brick Industries Ltd (supra) it was held that the winding up court would not only consider whether the dispute was *bona fide*, but would also decide the dispute itself, at least in a case where the only contention of the company was that it was entitled to refuse payment until some future date. The Court, however, did not agree with the contention of the Advocate General and proceeded to distinguish the cited case considering the facts that a creditor issued a writ in the King's Bench Division for the recovery of certain sums advanced by him to a company and thereafter, on a summons for a summary judgment, the Court granted unconditional leave to the company to defend. Some two months afterwards, the creditor presented a petition in a county court for a winding up order. The company's defence was that the creditor was under an obligation to make advances up to the limit of €5000 which he had not yet done and that under an agreement with the creditor, the company's obligation to repay was to be deferred till after he had completed the advances and the company had acquired certain properties and become self-sufficient. On the strength of the unconditional leave, it was urged that the case ought to be treated as one where there was a *bona fide* dispute about the debt and where no winding up order ought to be made. The County Court Judge overruled the contention, went into the evidence, found that a debt existed and proceeded to make a winding up order. In appeal, the Court of Appeal held that an order granting unconditional leave would not necessarily imply that the debt was disputed on a substantial ground. Further, in absence of any material, the County Judge competently considered the issue as to whether there was a substantial defence and examined the question of whether or not a debt was owed.

The Division Bench, however, held that the cited case was no authority for the proposition that even after the winding up court has found a dispute to be *bona fide*, it can or ought to proceed to decide the dispute itself and make or not make a winding up order itself according as it found a debt, due and payable to exist or not to exist. Rather, the case only decides that the winding up court can decide whether the dispute set up by the company is based on a substantial ground and therefore *bona fide* and that if it finds that there is no valid basis for a dispute, it can then decide the so-called dispute for itself and if it finds that a debt exists, it can make a winding up order.

The Division Bench held that the County Judge had to find, first whether the dispute raised by the company was a *bona fide* dispute and he found that issue not in favour of the company but against it, and it was only thereafter that he proceeded to consider for himself if a debt existed and to make a winding up order when he found that a debt did exist. It is not as if he found that there was a *bona fide* dispute and yet proceeded to decide the dispute himself and make a winding up order.

As to the case in hand, the Division Bench held that if the debts were not immediately payable, the omission or failure to pay them could not entail a winding up order because there being yet no debts to pay, the question of ability or inability to pay did not really arise. Moreover, where there was evidence that if the dispute about the debt was decided against the company, it would be paid, the fact that the dispute was only as regards the time of payment was all the greater reason why the winding up court should not proceed to decide the dispute because no issue of insolvency was involved. There being a *bona fide* dispute as to the maturity of the appellant's claim and as to the company's liability for immediate payment, no winding up order can be made till the dispute is decided and till it is established that the company's reading of the scheme was wrong and that being liable thereunder to pay the first instalment of the debts immediately, it failed to pay. It was found that admittedly the company had made no profits since the date of the scheme, sufficient to pay all its debts and, therefore, if it be found that the scheme required the company to pay the first instalment of its debts immediately, it could do so, if at all, only by selling its capital assets. A company which has to sell its capital assets in order to pay

its debts cannot ordinarily be said to be commercially solvent, unless the assets are surplus assets. The case in hand was not the one where it could be said that there was evidence that if the dispute was decided against the company, it would or would be in a position to pay the debts immediately. The appeal, therefore, was kept pending till the appellants or some other creditor obtained a decision in a regular suit. The Court was informed that a suit had already been brought on the original side for a construction of the scheme and was awaiting decision. It was opined that the dispute could be more conveniently decided in the suit already brought and the winding up court ought not to undertake the task of construction.

The Court, before parting with the judgment, added a note of caution in the following words: -

> "I desire to make it clear that we are not laying down any general law as regards what the winding up court should or should not do when a debt is disputed. The question is one of convenience and practice and we have only indicated what, as a rule the practice ought to be when the dispute is a *bona fide* one and when it is not so. I desire also to add that if the dispute regarding the construction of the scheme be decided against the company, the company will still have the liberty to urge that no winding up order should be made against it on such other grounds as may be open to it. Equally, it will be open to the creditors, when the appeal comes up for further hearing, to urge the two remaining grounds on which also they claimed a winding up order before the learned trial Judge."

In the above background, the Division Bench said that the winding up proceedings were not intended to be exploited as a normal alternative to the ordinary mode of debt realization, and that it was more convenient that claims should be investigated and decided in a regular manner. It was further held that the basis of an order for winding up against a company was that the company had ceased to be commercially solvent and accordingly, it was fit and proper in the interest of the creditors and shareholders not to allow it to function further as a company. The Division Bench adjourned the hearing of the appeal against the order of the Company Judge refusing to order the winding up of the company till the decision of a suit then pending.

(42) In M/s. Madhusudan Gordhandas & Co. v. Modhu Woollen Industries Pvt. Ltd.[118] the Indian Supreme Court, while dealing with an appeal against the order of the High Court of Bombay confirming the order of the learned Single Judge refusing to wind up the respondent company, dismissed the same, but observed that improper motive could be spelt out when the petition was presented to coerce the company in satisfying some groundless claims made against it by the petitioner. However, while dismissing the appeal it was ordered that the amount of Rs.72,000 which was deposited in the Court would remain deposited in the Court for a period of eight weeks from the date of the order, and if, in the meantime, no suit was filed by the appellant within the said eight weeks, the company would be at liberty to withdraw the amount by filing the necessary application. It was further ordered that in the event of suit being filed within the aforesaid period, the amount would remain to the credit of the suit.

(43) In Stonegate Securities Ltd v. Gregory[119] the respondent served the appellant company with a notice to pay an amount of 33,000 Pounds. The company denied that it presently owed the amount claimed from it and claimed that he was merely a contingent creditor of the company for the said amount. The company, therefore, sought an injunction restraining him from presenting petition for winding up. The Company Judge granted an injunction restraining the defendant, Philip Howard Gregory, for a period of three weeks from 20th March 1979 (if during that period of three weeks all the directors of the company made a declaration of solvency of the company as at 21st March, 1979) and thereafter until the trial of the company's action against the defendant or further order, from presenting a petition under the Companies Act, 1948 for winding up the company in respect of an alleged debt of 33,000 Pounds. The Court of Appeal of England, while allowing an appeal held that the imposition of condition of filing a declaration of solvency was not justified. Further, there was a *bona fide* dispute whether the money was presently due from the company to the defendant and there was evidence that the defendant was nonetheless threatening to present a petition on the basis that it was so due, the company was entitled as of right to an injunction restraining the defendant from presenting a petition for the winding up of the company on that basis or

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[118] AIR 1971 SC 2600
[119] (1980)1 All ER 241

any basis other than being treated for the purpose of the petition as a contingent creditor of the company for 33,000 Pounds.

Per Curiam:

Winding up proceedings are not suitable proceedings in which to determine a genuine dispute whether the company owes the sum in question. Neither are such proceedings suitable for determining whether that liability is an immediate liability or only a prospective or contingent one. It may be that in some cases the point is so simple and straightforward that the Companies Court may be able to deal with it, but it is not right to say that, in a case where there is a dispute of that nature, the only course which the court, to which the application is made to restrain presentation of the petition, can follow is to leave it to the Companies Court to resolve all the issues between the parties.

The following propositions from Mann v. Goldstein[120] were noted in the above judgment:-

(a) A creditor's petition can only be presented by a creditor;

(b) The winding up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, until a creditor is established as a creditor, he is not entitled to present the petition and has no *locus standi* in the companies court;

(c) To invoke the winding up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the Court.

It was said that if the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in the normal way. But if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed or if the matter is brought before a court before the petition is issued, its presentation will, in normal circumstances, be restrained. That is because a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed. A

[120] [1968] 2 All ER 769 at 775

petition founded on a debt which is disputed in good faith and on substantial grounds is demurrable for the reason that the petitioner is not a creditor of the company within the meaning of section 224(i) at all, and the question whether he is or is not a creditor of the company is not appropriate for adjudication in winding up proceedings.

(44) In Re: A Company[121] the creditor served a notice on the company to pay a sum of €12,435.75 for the work done. The company paid €2,234.38 that left a claimed balance of €10,201.37. The company's contention was that with the payment of €2,234.38 the company ceased to be indebted to the petitioner and sought an order for dismissal of winding up petition on the ground that it had not neglected to pay the sum demanded in pursuance of section 223(a) since the sum demanded was disputed. It was held that a statutory demand for payment under section 223(a) of the 1948 Act could not be made unless the creditor was in a position to make a genuine demand for a specified sum exceeding Pounds 200 that could not be seriously questioned. Since at the date when the section 223 demand was made, the amount due to the creditors was not known to the company, but on the contrary was in dispute, and since the fact that the company had previously offered to pay €2,234.38 did not mean that they knew the sum which was due from them, the winding up petition was dismissed. The Court had taken into consideration the position stated in Stonegate Securities (supra).

(45) In Messrs Platinum Insurance Co. Ltd v. Daewoo Corporation[122] the Supreme Court examined the issue in quite some detail in the following background: In

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[121] (1984) 3 All ER 78

[122] P L D 1999 SC 1. Reference was made to Mullah Abdullah Bhai v. Saria Rope Mills Ltd. PLD 1971 Kar. 597; Messrs Adage Advertising, Lahore v. Messrs Shezan International Ltd., Lahore 1970 SCMR 184; Hashmi Can Company Ltd v. K.K. & Co. (Pvt.) Ltd 1992 SCMR 1006; Federation of Pakistan v. The Standard Insurance Company Ltd., Karachi PLD 1986 Kar. 409; Messrs Khyber Textile Mills Ltd. v. Messrs Allied Textile Mills Ltd. 1989 CLC 1167; Ulbricht's Wwe. GES M.B.H., Austria v. Ulbricht's (Pakistan) (Private) Ltd. PLD 1992 Kar. 249; Messrs Metito Arabia Industries Limited v. Messrs Gammon (Pakistan) Ltd 1997 CLC 230; Messrs Industrial Development Bank of Pakistan v. Messrs Sarela Cement Limited Company 1993 CLC 1540; Bengal Luxmi Cotton Mills Ltd v. Mahaluxmi Cotton Mills Ltd AIR 1955 Cal. 273; New State of India Insurance Co. v. Superintendent of Insurance, New Delhi AIR 1943 Lah. 109; Stonegate Securities Ltd v. Gregory (1980)1 All ER 241; Re: A Company (1984) 3 All ER 78; Pakistan Industrial Credit and Investment Corporation Ltd. v. Bawany Industries Ltd. PLD 1998 Kar. 45; Bukhtiarpur Bihar Light Railway Co. Ltd. v. Union of India AIR 1954 Cal. 499; Messrs Madhusudan Gordhandas & Co. v. Madhu Woolen Industries (Pvt.) Ltd AIR 1971 SC 2600; National Bank of Pakistan v. The Punjab National Silk Mills Ltd. PLD 1969 Lah. 194; Abdur Rasheed v. Messrs Nippon Robbin Company (Pakistan) Ltd. PLD 1982 Lah. 103; Comhill Insurance PLC v. Improvement Services Ltd (1986)

building/construction contracts it is common practice that an employer pays certain amount as mobilization advance to the contractor upon the execution of the contract document against an unconditional bank guarantee or an insurance company guarantee in order to enable the contractor to commence execution of the work by bringing at the site the equipment and material, whereas a performance bond is executed on behalf of a contractor in order to ensure that the contract work is completed and in case of failure, the surety who executes the performance bond has to indemnify the employer. If one were to compare the language used in the mobilization advance guarantee and the language employed in the performance bond, it would become evident that the former is unconditional whereas the latter is conditional. In the case in hand, on perusal of the mobilization advance guarantee, the Court found that the appellant company undertook irrevocably and unconditionally to pay forthwith to the contractor without reference to the sub-contractor, on the contractor's first demand in writing the mobilization advance, or any part thereof which was due. The Court held that once a creditor proved the service of a demand notice in terms of clause (a) of subsection (1) of section 306 of the Ordinance, the burden would shift on the debtor company to rebut the presumption created by fiction of law by showing that it, in fact, was commercially solvent and would be able to pay its contingent and prospective liabilities. In the instant case, the company did not show that it was commercially solvent and hence in a position to pay the debt. The Court held that in case the debtor company failed to pay the debt in question, the winding up order passed by the Company Judge would hold the field.

In this case, the Supreme Court summarized and reproduced the propositions involved in compulsory winding up of the company where the same was sought on the ground of its inability to pay its debts. A bare reading of these propositions, or the principles governing winding up, as they are called, clearly brings out the contradictions that have manifestly resulted from the interpretation of the relevant provisions. Those propositions are

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1 WLR 114; C. Hariprasad v. Amalgamated Commercial Traders (Pvt.) Ltd. AIR 1964 Mad. 519; Sri Shanmugar Mills Ltd. by Managing Agents Sri Alagai Ltd. v. S.K. Dharmaraja Nadar AIR 1970 Mad. 203; Pakistan Industrial Credit and Investment Corporation Ltd v. Messrs Indus Steel Pipe Limited 1993 MLD 94; Trade and Industry Publications Limited v. Industrial Development Bank of Pakistan PLD 1990 SC 768 and Messrs Sindh Glass Industries Ltd Karachi v. Messrs National Development Finance Corporation, Karachi PLD 1996 SC 601

mentioned below, but in an arrangement, which points out the contradictions to the reader without going much deeper: -

(1) If the Court finds that the negligence on the part of debtor company to pay sum demanded in terms of section 306(1)(a) is not on account of want of commercial insolvency, but because of *bona fide* dispute based on substantial grounds as to the entitlement of the creditor to the amount demanded, application under section 306 read with section 309 of the Ordinance would not be sustainable.

(2) 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.

(3) The fact that the 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 winding up of debtor company.

(4) The object of sections 305 and 306 read with section 309 is not to coerce a debtor company to make payment to an unpaid creditor but to secure discontinuation of functioning of a company which has ceased to be commercially solvent. Where, however, the Court is of the view that the company is unable to pay its debts, invoking these provisions cannot be said to be *mala fide*.

(5) Winding up of company on ground of failure to pay debts is a matter of discretion of Company Judge. 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.

(6) Section 306(1)(a) 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 demand in terms of section 306(1)(a), 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 same to the reasonable satisfaction of the creditor. Such presumption, however, is rebuttable if the debtor company can show that it is commercially solvent and is in a position to meet its liability on due dates.

(7) Once a creditor proves the service of a demand notice in terms of clause (a) of subsection (1) of section 306 of the Ordinance the burden is shifted on the debtor company to rebut the presumption created by fiction of law by virtue of clause (a) of subsection (1) of section 306 of the Ordinance, 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. Company has to show that it is in a position to pay the debts and is commercially solvent keeping in view its contingent and prospective liabilities in terms of clause (c) of subsection (1) of section 306 of the Ordinance.

(8) The burden to prove otherwise is on the debtor company if the creditor is able to prove that it has served notice in terms of clause (a) of subsection (1) of section 306 of the Ordinance, and that the company has neglected to pay the due amount within the notice period of thirty days.

(9) 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 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 by other evidence 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.

(10) 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 such assets will have to be taken into consideration.

(11) The company has to show that it is in a position to pay debts and is commercially solvent keeping in view its contingent and prospective liabilities in terms of section 306(l)(c).

(12) The fact that the 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.

(13) 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.

### 2.8 Issues and considerations in compulsory winding up at a glance

From a survey of the case law, it is clear that the Courts have wound up or not wound up companies on the following considerations: -

(a) Where the company has not commenced business within one year of its incorporation or had suspended business after its incorporation for more than two years;

(b) Inability to pay debts where the company is unable to agitate *bona fide* dispute on substantial grounds. Presumption of inability arises on failure of the company to pay after statutory notice or where there is a refusal to pay creditors without cause. After statutory notice, burden is on the debtor company to show that it is commercially solvent taking into consideration the balance sheet and is in a position to meet its liabilities on due dates. Debtor company's inability to pay debts can be demonstrated from its contingent and prospective liabilities and the debts which are immediately payable. Inability to pay even to the extent of undisputed amount or the

Some of the considerations[123] on which the courts in U.K. have wound up companies are mentioned below: -

(1) Where a creditor had done work for the company and under a private arrangement with the Company Secretary, the sum was to be paid out of the funds in his hands.

(2) The court refused to dismiss the petition of the holder of a policy issued by an insurance company merely on the strength of an allegation that the petitioner had failed to disclose material facts to it when the policy was taken out, for the company did not support the allegation with any vestige of proof. If the creditor has reason to expect that the company will raise a plausible defence to his claim, his best course is to sue the company by action and to present a winding up petition when he has obtained judgment against it. The company will then be estopped by the judgment from disputing the petitioner's claim on its merits, and the only possible defences which it will be able to plead to the winding up petition will be that the judgment was obtained fraudulently or by collusion with the company's directors.

(3) Where the company admits that it is indebted to the petitioning creditor for an amount which, taken by itself, would be sufficient for making a winding up order. Pendency of an appeal against the judgment on which the petition is based, or has a cross claim against the petitioner, which it is asserting in pending litigation, is no reason for the refusal of a winding up order, but if the cross claim equals or exceeds the debt claimed by the petitioning creditor, even if it is disputed by him, the court may in its discretion stay the proceedings on the petition until the litigation on the cross claim has been concluded.

(4) The court cannot exercise discretion to refuse a winding up order because the closure of the company's business will put its employees out of work, or because the public generally has some interest in the continuation of the company's business.

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[123] Pennington's Company Law, Fourth edition, p. 679

Some of the considerations[124] on which the courts in U.K. have not wound up companies are given below: –

(i) Where the creditor claims a sum for goods sold to the company when no price was agreed upon and the company contends that the sum demanded by the creditor was unreasonable;

(ii) Where the creditor claims payment of an agreed sum for work done for the company when the company contends that the work was not done properly;

(iii) Where the company contends that the payment made to it by the petitioner was for purchasing investment on his behalf as his agent.

## 2.9 Nature of winding up proceedings – scope of jurisdiction

At this stage, it is necessary to examine the nature of the winding up proceedings, particularly the extent of inquiry that a winding up court makes in the exercise of its jurisdiction to wind up a company. In this behalf, some of the considerations/propositions in winding up of companies from the English law[125] are mentioned below:

### 2.9.1 Determination of wishes of other creditors and shareholders

A creditor whose debt is immediately payable and who has not been paid is entitled to a winding up order as of right as between himself and the company. But if there is opposition to the making of a winding up order from other creditors or from shareholders, the court will consider their wishes, and may in its discretion decline to make the order. This is particularly so if the opposing creditors belong to the same class as the petitioning creditor, for example, if they hold debentures of the same series, but the wishes of creditors who rank for payment after the petitioner and the wishes of shareholders also merit consideration, although obviously less weight will be attached to them. The court

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[124] Pennington's Company Law, Fourth edition, p. 678
[125] Pennington's Company Law, Fourth edition, p. 680

will consider as to whether the opponents would gain an unjust advantage over the petitioner by the refusal of a winding up order, and as to whether there are matters which should be inquired into and which can only be investigated properly if a winding up order is made, and if the opponents' case appears unmeritorious in the light of any of these considerations, a winding up order will be made.

### 2.9.2 Winding up order must benefit creditors

The general rule is that a winding up order will be made only if it will benefit the petitioning creditor. However, a winding up order should not be made where the company has no saleable assets at present, but does have a good prospect of being able to pay its debts if it is allowed to carry on its business as a going concern.

In Pakistan, most of the creditors of companies make a demand as contemplated by section 306 and on expiry of the statutory period file a petition for winding up. The petition proceeds for some time. At the hearing it is concluded that the company is not insolvent, though it is indebted but disputes the debt *bona fide* on substantial grounds. The Court then dismisses the winding up petition and directs the creditor to seek his remedy elsewhere, usually in the form of a suit for recovery. In some cases, the matter is decided by the Company Judge and the aggrieved party files an appeal. Despite several statutory measures for expeditious disposal of company cases both at the level of the Company Judge as well as the appellate Court, the cases mostly linger on much beyond the statutory limits provided for decision of the cases at the respective levels. In many cases, it was found at the final hearing of the appeal that the winding up petition did not lie in the peculiar circumstances of the case and the proper remedy for the petitioner (creditor) was to file a suit for recovery. This is a most puzzling situation for a creditor. There are contradictions and there are confusions. Detailed analysis of these issues is made in the Chapter titled "Review and Conclusions" and a remedy suggested.

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# VOLUNTARY WINDING UP

## Chapter 3 Voluntary winding up

A company may be wound up voluntarily in any of the following two ways[126]: -

- When the company has passed a special resolution to wind up voluntarily (for any reason).
- When the company has been formed for a fixed time or for a specific purpose by the Articles, it may be wound up following an ordinary resolution passed by the members in general meeting when that time has expired or the purpose has been achieved. Thus, a company can be wound up by an ordinary resolution only when it is bound to cease according to its regulations.

For a voluntary winding up of a company in the first situation, no reason need be given at all but it is necessary that a special resolution for winding up of the company must be passed. The voluntary winding up commences on the date when the resolution for it, whether it be ordinary or special is passed.[127]

The second situation is seldom encountered in practice. Companies are rarely formed for a set period of time or for a single purpose. Because of the initial cost of setting up a company, they are almost always looked upon as continuing entities.

### 3.1 Members' voluntary winding up

A voluntary winding up is of two kinds, viz., a members' voluntary winding up and a creditors' voluntary winding up. In a members' voluntary winding up, the liquidator is appointed by the members. The directors make inquiry into the affairs of the company

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[126] The Companies Ordinance, 1984, Section 358. It corresponds to Section 484 of the Indian Companies Act, 1956, which is in the same terms. It also corresponds to Section 84 of the English Insolvency Act, 1986, but the latter provides an additional ground for voluntary winding up, viz., if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

[127] Section 359 ibid.

and make a statement of solvency. Thus, this mode of winding up is favoured by the directors since their conduct is likely to be less vigorously investigated by the liquidator than if he were the creditors' nominee.

### 3.2 Declaration of solvency

As stated at item 3.1, in a members' voluntary winding up, the directors make a statement of solvency, commonly referred to as Declaration of Solvency. Where it is proposed to wind up a company voluntarily, the directors, or a majority of them if they are more than three, may at a meeting of the board of directors, make a statutory declaration. This declaration must state that the directors have made a full inquiry into the company's affairs and that, having done so, they have formed the opinion that the company is solvent, i.e. either the company has no debts or where it has debts, it will be able to pay the same in full within a period not exceeding 12 months from the passing of the resolution. They must obtain the auditor's report on the profit and loss account, balance sheet and assets and liabilities of the company as at the latest practicable date prior to the making of the declaration and convene a duly constituted meeting at which the majority of directors make the statutory declaration required by section 362(1). The declaration must be made within five weeks immediately before the passing of the resolution. The declaration of solvency and the auditor's report should be sent to the Registrar of Joint Stock Companies.

A director making such a declaration without having reasonable grounds for the opinion that the company will be able to pay its debts in full commits a criminal offence and he shall be punishable with imprisonment for a term of six months, or fine which may extend to ten thousand rupees, or both. The term of punishment and the amount of fine varies from country to country. [128]

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[128] The Companies Ordinance, 1984, Section 362. Section 362 corresponds to Section 89 of the English Insolvency Act, 1986, subsection (4) whereof provides that a director making a declaration under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full, together with interest at the official rate, within the period specified is liable to imprisonment or a fine, or both. Section 488 of the Indian Companies Act, 1956 provides six months imprisonment or fine of Rs.50,000. In Australia, such a director is liable to a fine of $ 5500 or one year in jail, or both. [The Companies Ordinance, 1981, Section 494 Australia]

The declaration of solvency is the dividing line between the two types of voluntary windings up. Where such a declaration is made, it is members' voluntary winding up and in absence of such a declaration, it is creditors' voluntary winding up of a company.

### 3.3 Creditors' voluntary winding up

A winding up where no declaration of solvency has been made is known as a creditors' voluntary winding up.

The significant difference between members' voluntary winding up and creditors' voluntary winding up is that in the former the company is solvent while in the latter it is insolvent. However, in case of creditors' winding up, it is the sole discretion of the creditors to opt for a remedy deemed best to safeguard their interests in order to recover the debts owed to them.[129]

### 3.4 Winding up resolution

For winding up of a company formed for a fixed time or for a specific purpose by the Articles, an ordinary resolution is passed by the members in general meeting when that time has expired or the purpose has been achieved. For voluntary winding up of a company on any other ground, whether it be members' voluntary winding up or creditors' voluntary winding, a special resolution is passed. In this case, the notice must state that it will be a special resolution giving full and frank disclosure of the facts and the effect of the resolution. The resolution in either case is decided on a show of hands unless a poll is demanded.[130]

Notice of resolution for winding up a company voluntarily is to be given by the company within ten days of the passing thereof by advertisement in the official gazette and also in a newspaper circulating in the Province where the registered office of the company is

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[129] IDBP v. M/s Sheikh Impex PTCL 1995 CLC 146
[130] The Companies Ordinance, 1984, Section 165

situated. In case of a listed company, such notice must also be published in one daily English newspaper and one daily Urdu newspaper and a copy thereof is to be sent to the Registrar immediately thereafter.[131]

Where the liquidator is appointed, the company shall give notice to the Registrar of Companies of the appointment of the liquidator within 10 days of the event.[132]

In A. M. Varkey v. Motishan[133] the High Court made it clear that a special resolution by members is a must for voluntary winding up of a company. However, in Ch. M. Saleem v. Combined Industries Ltd,[134] the Court held that a resolution by creditors is not a mandatory requirement but is directory in nature and in case of failure to call a meeting, the winding up process does not become illegal but the proper course is to pass a resolution in a fresh meeting.

### 3.5 Effects of the resolution for a voluntary winding up

The passing of a resolution to wind up a company has the following effects: -

(a) The company must cease to carry on its business except insofar as may be required for its beneficial winding up. The corporate status and corporate powers of the company continue until the company is dissolved[135];

(b) With the passing of the resolution for a voluntary winding up of the company and the appointment of liquidator, all the powers of the directors cease, particularly where it is creditors' voluntary winding up[136];

(c) Within 15 days of the discontinuance of the business a notice must be sent to the Income Tax Officer having jurisdiction, in accordance with section 117 of the Income Tax Ordinance, 2001;

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[131] The Companies Ordinance, 1984, Section 361
[132] The Companies Ordinance, 1984, Section 366
[133] AIR 1964 Kerala 114
[134] PLD 1952 Lah 148
[135] The Companies Ordinance, 1984, Section 360 = Section 487 of the Indian Companies Act, 1956
[136] Section 378 *ibid*

(d) The business of the company, from the date of the winding up order, is carried on by the Court for the purpose of liquidation with the assistance of the official liquidator, who is an officer of the Court. [137]

(e) Any transfer of shares made other than with the sanction of the liquidator is void;

(f) The voluntary liquidation of a company does not by itself suspend the right of a person to commence or continue a legal proceeding against the company[138].

### 3.6 Appointment of liquidator in members' voluntary winding up

In a members' voluntary winding up the liquidator is appointed by the members in general meeting with his consent and notice of the same must be given to Registrar.[139] Within 14 days of his appointment, the liquidator must file notice of his appointment with the Registrar in the prescribed form and also in the official Gazette. In the event of a vacancy occurring in the office of liquidator, whether by death, resignation or otherwise, the company in general meeting may appoint a person who has given his written consent to act as liquidator.

The procedure for a members' voluntary winding up may be summarized as follows: -

(a) Directors inquire into the affairs of the company;

(b) Directors make a declaration of solvency;

(c) A general meeting of the company is convened for passing a special resolution putting the company into liquidation and appointing a liquidator; and

(d) The powers of the directors cease and the liquidator proceeds with the winding up of the company.

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[137] Midland Countries District Bank Limited v. Attwood (1905) I Ch. 357
[138] Jyoti Prasad v. Patmohana Collieries, AIR 1931 Cal 569 (570)
[139] The Companies Ordinance, 1984, Sections 346 & 366

### 3.7 Appointment of liquidator in creditors' voluntary winding up

In a creditors' voluntary winding up the liquidator is appointed by the creditors. The company calls a meeting of its creditors for the day, or the day next following the day on which the resolution for a voluntary winding up is to be passed.

The directors and chief executive must draw up a statement of the affairs of the company which they must lay before the creditors' meeting. Notice of the passing of the resolution in terms of section 361 as described above in the case of members' voluntary winding up is to be given.

### 3.8 Powers and duties of the liquidator in a voluntary winding up

The liquidator, in a voluntary winding up of the company, exercises his powers with the sanction of a special resolution of the company where it is members' voluntary winding up and with the sanction of the Court or committee of inspection in the case of creditors' voluntary winding up. The liquidator in a voluntary winding up exercises all the powers of the official liquidator in a compulsory winding up. Besides, he may exercise powers of the Court in a winding up by the Court of settling list of contributories and making calls. He may also summon general meetings of the company and creditors for obtaining sanction of the company by special resolution. [140]

A summary of the powers and duties of the liquidator is given below: -

(a) Bring or defend any action or any other legal proceedings on behalf of the company;
(b) Carry on the business of the company so far as is necessary for its beneficial winding up;
(c) Pay any classes of creditors in full;
(d) Make any compromise or arrangement with creditors, etc.

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[140] The Companies Ordinance, 1984, Section 387

(e) Sell any of the company's property by public auction or private contract/negotiation;

(f) Carry out all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and to use, where necessary, the company's seal;

(g) Draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;

(h) Raise on the security of the assets of the company any money;

(i) Appoint an agent to do any business which the liquidator is unable to do himself;

(j) Exercise powers of the Court in a winding up by the Court of settling list of contributories, making calls;

(k) Summon general meetings of the company and creditors for obtaining sanction of the company by special resolution;

(l) Distribute funds within 30 days of the receipt thereof.

The liquidator in distributing the accumulated profits merely acts as agent or administrator for and on behalf of company. The liquidator must complete the proceedings within a period of one year from the date of commencement of winding up.[141] If the winding up continues for more than one year, the liquidator must summon a general meeting of the company at the end of the first year and if the proceedings are not concluded during the first year and extension is granted under Section 387, within 30 days of such extension and lay before it: -

- an audited accounts of his receipts and payments of the preceding year;
- statement in the prescribed form containing the particulars with respect to the proceedings;
- reasons for delays, steps taken to expedite and the time required for such purposes.

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[141] The Companies Ordinance, 1984, Subsection (5) of Section 387

### 3.9 Provisions applicable to every voluntary winding up

The provisions of Sections 384 to 395 of the Ordinance relating to audit of accounts and statements, distribution of property, powers of the liquidator in a winding up by the Court, appointment and removal of liquidator by the Court, public examination of promoters, directors, etc. costs of winding up, saving of the rights of creditors and contributories in a voluntary winding up and adoption of proceedings of voluntary winding up in a subsequent winding up by the Court apply to every voluntary winding up. As such, all accounts and statements, before being placed before the meeting of the creditors or contributories, shall be duly audited by an auditor, who shall submit his report within two months of the end of the period to which the accounts relate, or within such extended period as may be allowed to him by the Registrar.[142] The property of the company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu* and, subject to such application, shall be distributed among the members according to their rights and interests in the company.[143]

In every voluntary winding up, the company shall submit to the liquidator a statement as to the affairs of the company in terms of section 328 (assets and liabilities etc., of the company). The liquidator shall take into his custody or control all the books, papers, property, effects and actionable claims of the company from directors, chief executives, managers, officers, servants, bankers, auditors, agents of the company and in case of default by any of these persons, they are liable to penalties (imprisonment and fine). The liquidator may seek assistance of the District Magistrate in realizing the property of the company. The liquidator will also prepare a report in terms of Section 329 for information and use by the members, creditors, or others concerned. The report of the liquidator will mention the following details: –

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[142] The Companies Ordinance, 1984, Section 384
[143] The Companies Ordinance, 1984, Section 385

(a) the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities, giving separately, under the heading of assets, particulars of –

(i) cash, bank balances and negotiable securities;

(ii) debts due from contributories;

(iii) debts due to the company and securities, if any, available in respect thereof;

(iv) movable and immovable properties belonging to the company;

(v) unpaid calls; and

(b) if the company has failed, as to the causes of the failure; and

(c) desirability of making further inquiry as to the matters relating to promotion, formation, failure of the company or the conduct of its business.[144]

On an application filed by the liquidator, a creditor or a contributory, the Court may determine any question arising in the winding up of the company, or it may exercise its powers regarding enforcement of calls, stay of proceedings, or any other matter as it may do in the winding up by the Court.[145] Likewise, on a report of the liquidator, the Court may direct a person who has committed fraud or other actionable irregularity in the promotion of the company to attend the Court for a public examination as to the promotion or formation, or the conduct of the business, of the company in the manner provided for examination in the case of winding up of a company by the Court.[146]

### 3.10 Compulsory liquidation after commencement of voluntary liquidation

A voluntary liquidation does not prevent any creditor or contributory applying to have it wound up by the court.[147] Before the Court will make an order that the company being wound up voluntarily be wound up by the Court, it must be satisfied that there are sound reasons as to why a voluntary winding up is inappropriate in the circumstances. This

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[144] The Companies Ordinance, 1984, Section 329
[145] The Companies Ordinance, 1984, Section 391
[146] The Companies Ordinance, 1984, Section 392
[147] The Companies Ordinance, 1984, Section 394

might, for example, be the case where there is no liquidator acting or he is found to have some personal interest in the company other than by reason simply of his appointment. When a compulsory winding up follows a voluntary winding up, all proceedings taken in the voluntary winding up are treated as having been validly taken unless the Court, on proof of fraud or mistake, directs otherwise.

### 3.11 Winding up subject to supervision of Court

When a company has passed a resolution for voluntary winding up, the Court may, of its own motion, or on the application of any person entitled to apply to the Court for winding up a company, make an order that the voluntary winding up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories or others to apply to the Court, and generally on such terms and conditions, as the Court thinks just.[148] The Court shall appoint an official liquidator who shall have the same powers, be subject to the same obligations and in all respects stand in the same position as if he had been appointed by the company.[149] The liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court in the same manner as if the company were being wound up altogether voluntarily.[150] The Court has full authority to make calls or to enforce calls made by the liquidator, and to exercise all other powers which it might have exercised if an order for winding up the company had been made altogether by the Court.[151]

Once the affairs of the company are finally wound up, the liquidator must make a report and account of the winding up and call a general meeting of the company and lay the same before it. Within one week, the liquidator must send to the Registrar a copy of his report and account. The Registrar on receiving the report and account shall register them if he thinks fit and after a lapse of 3 months the company shall be deemed to be dissolved. Furthermore, the Court on application of the liquidator or any other person may make an order deferring the date at which the dissolution of the company is to take

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[148] The Companies Ordinance, 1984, Section 396
[149] The Companies Ordinance, 1984, Subsection (1) of Section 399
[150] The Companies Ordinance, 1984, Subsection (1) of Section 400
[151] The Companies Ordinance, 1984, Subsection (2) of Section 400

effect. The liquidator must deliver a certified copy of the order to the Registrar within 14 days after the making of the order.[152]

The law, through the above provisions, ensures protection of the rights and interests of the members/creditors of the company.

In Re: Powerstore Ltd[153] the company was under administration order. During the administration new debts were acquired by the company. The company had to go into winding up. Creditors and the shareholders wanted a voluntary winding up. However, in voluntary winding up the new creditors would have become the preferential creditors. The majority of creditors wanted the ranking of creditors as at the date of making of administration order, which is the case when a compulsory winding up order is made. In order to save cost and time (on account of other procedural requirements), the liquidator, at the behest of the creditors approached the Court to allow it, in voluntary liquidation, to rank the creditors as in the compulsory winding up. The Court held that the voluntary liquidation would achieve considerable savings in terms of costs and convenience for all the creditors.

In conclusion, it may be stated that the declaration of solvency is borderline between members' and creditors' voluntary winding up of a company. The advantage to the company of such a declaration is that the winding up is then a members' voluntary winding up. On account of a sort of influence over the liquidator, who is appointed by the members/director in this case, on the one hand they are exposed to lesser criticism/investigation at the hands of the liquidator and on the other hand they also avoid the additional costs, which are incurred in the winding up by the court. This way the object of preservation and protection of wealth is also achieved. In the absence of the members' declaration it must be a creditors' voluntary winding up. Here, the creditors have the advantage of appointing their own liquidator who would be exercising his powers in the best interests of the creditors.

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[152] The Companies Ordinance, 1984, Subsection (7), Section 370
[153] [1998] 1 All ER 121

# LIQUIDATOR

## Chapter 4 Liquidator

According to the Concise Oxford Dictionary,[154] the word 'liquidate' means 'to pay, clear off (debt), put an end to, wind up, ascertain liabilities and apportion assets of (company)'. Hence, liquidator is a person who does all or any of the things just mentioned, viz., who ascertains liabilities and apportions assets of the company in liquidation. Going into liquidation means to have the affairs of the company wound up where it has become insolvent, i.e. it is unable to pay its debts and discharge its liabilities. To get an idea of the functions of liquidator, it may be useful to refer to Article 2(b) of the Insolvency Proceedings Regulation – Council Regulation (EC) No. 1346/2000, which defines "liquidator" as "any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs".

In Hemanga v. Chakravati[155] the Court held that it is one of the primary duties of the liquidator to collect or realize the assets of the company and liquidate them into funds for payments of debts and liabilities. However, it is not the function of the liquidator to carry on the business of the company, but he may continue the operations of the company insofar as they facilitate proper winding up of the company. The liquidator is assigned the task of handling the affairs of the company being wound up in such a manner that it may be wound up as speedily and effectively as possible. Thus, the liquidator is a key person in the winding up of the company.

A person appointed as liquidator in a winding up by the Court is called an official liquidator and as such he is an official of the Court. He must act with complete impartiality between different creditors contending for priority of their debts and refuse to take sides. His duty is to consider and decide the admissibility or inadmissibility of claims, but he is not bound to require the claimant to appear before him and make an inquiry. He is bound to inform the Court, when asked for, any facts and circumstances in relation to the company's affairs,

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[154] New Edition 1982
[155] AIR 1952 Cal. 732

which in his judgment the Court ought to know. He remains under the control, direction and supervision of the Court till he is discharged of his duties as a liquidator.

In re: Synthetic Chemical Co. Ltd. Karachi[156] it was held that where the Court orders winding up of a company and appoints a liquidator, he must act in accordance with the directions of the Court that are given or may be given to him, or in absence of any such direction, in accordance with law.

### 4.1 Who may be appointed a liquidator?

The insolvency/bankruptcy laws have not developed in Pakistan. There are no professional bodies of insolvency/bankruptcy practitioners. Though under section 321, a Company Bench is supposed to appoint one or more provisional managers or official liquidators of a company ordered to be wound up by the Court from the panel of persons recommended by it on the Securities and Exchange Commission of Pakistan (SECP), but since this role is not being performed by the SECP presently, the Court appoints liquidators from among the advocates practicing company law. Persons outside the panel can also be appointed as liquidators in the discretion of the Court for reasons to be recorded or on the application of the creditors.[157] Under section 364, the company in a general meeting appoints one or more liquidators in members' voluntary winding up of the company with their consent. Thus, in relation to winding up by the Court, the law talks of 'provisional manager' or 'official liquidator' whereas in the case of voluntary winding up, the terms used are 'liquidator' and 'committee of inspection'.

Under the Indian law, a body corporate may not be appointed a liquidator in a voluntary winding up and if such a body corporate is formed, its directors or managers shall be punishable with fine.[158]

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[156] PLD 1985 Karachi 193

[157] Thus, in practice, the provision as to the maintenance of panel on the recommendation of the SECP, as also the appointment of the liquidator in the discretion of the Court on the application of the creditors or otherwise is redundant.

[158] The Companies Act , 1956, Section 513

The English law[159] makes provisions relating to insolvency practitioners, which term covers liquidator, provisional liquidator, administrator or administrative receiver and supervisor of voluntary arrangement. Persons duly authorized by the relevant competent authority are allowed to act as insolvency practitioners. A person who is not an individual is not qualified to act as an insolvency practitioner, i.e. only natural persons fulfilling the requisite qualifications and criteria, whether as individuals or as members of any professional body are allowed to act as insolvency practitioners. A person acting without qualification is liable to punishment (imprisonment and fine). If a receiving order in bankruptcy is made against a liquidator, his tenure of office is automatically terminated.

In U.K., there are professional bodies, e.g. the Chartered Association of Certified Accountants, the Insolvency Practitioners Association, etc., duly recognized under the Insolvency Practitioners (Recognized Professional Bodies) Order, 1986. A professional body may be recognized if it regulates the practice of a profession and maintains and enforces rules regarding fitness and suitability of its members to act as insolvency practitioners who fulfil requirements as to education and practical training and experience.

### 4.2 Joint liquidators

Section 321(2) empowers the Court to appoint one or more of the persons on the panel maintained by it to act as official liquidators of the company. The persons so appointed are to start performing the duties and functions of the liquidator forthwith unless they express their inability to act as liquidators within three days. Where the Court appoints more persons than one as official liquidators, it may also specify their duties whether any act required or authorized to be done under the Ordinance is to be done by all or any one or more of such persons.

### 4.3 Committee of inspection

Under section 331, the liquidator in a winding up by the Court has to convene separate meetings of the creditors and contributories of the company to determine whether or not the

[159] Insolvency Act, 1986, Part XIII (Sections 388 -398)

Court may be approached for appointment of a committee of inspection to act with the liquidator. The differences, if any, in the views of the creditors and the contributories are to be resolved by the Court. The duty of the committee of inspection is to assist in the administration of the assets of the company in liquidation. The liquidator, or for that matter, the members of the committee have a fiduciary character and are debarred from buying or trafficking in the property.

Under section 375, in a creditors' voluntary winding up the creditors and the company at their respective meetings nominate a person with his consent to act as liquidator for the purpose of winding up the affairs and distributing the assets of the company. Under section 376, the creditors at the meeting may also appoint a committee of inspection consisting of not more than five persons and the company may also nominate same number of persons as members of the committee if the creditors do not object to their inclusion. The Court may, on an application, appoint persons other than the nominees of the creditors.

### 4.4 Powers of liquidator

There are three different types of winding up, viz., winding up by the Court, members' voluntary winding up and creditors' voluntary winding up. The powers of the liquidator with reference to each type of winding up are discussed below: -

#### 4.4.1 Powers of liquidator in a winding up by the Court

Section 333 enumerates the powers of the liquidator. The liquidator exercises some of his powers with the sanction either of the Court or of the committee of inspection. In this category, he has the power --

(a) to institute or defend any suit, action, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company;

(b) to carry on the business of the company so far as may be necessary for its beneficial winding up;

(c) to pay any classes of creditors in full;

(d) to make any compromise or arrangement with creditors or other persons having any claims;

(e) to compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, on such terms as may be agreed; and

(f) to sell the movable and immovable property and things in action of the company by public auction or private contract.

There are other powers that the liquidator may exercise, not with prior sanction or approval of the Court, but such exercise may be subject to any general or special direction of the Court or the committee of inspection. In this category, the liquidator has the power --

(a) to do all acts and to execute in the name and on behalf of the company all deeds, receipts and other documents and use the company's seal;

(b) to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate and to receive dividends in respect of balance thereof;

(c) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;

(d) to raise on the security of the assets of the company any requisite money;

(e) to take out in his official name letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate;

(f) to appoint an agent to do any business which the liquidator is unable to do himself; and

(g) to do all such other acts and things as may be necessary for winding up the affairs of the company and distributing its assets.

In both the categories of powers described above, the Court has jurisdiction to sanction/direct any reasonable step which the liquidator may desire to take in the interest of the winding up in which the primary concern is the interest of the creditors and shareholders. However,

under section 334, in absence of committee of inspection, the Court may allow the liquidator to exercise powers in relation to legal proceedings and the carrying on of the business of the company without prior sanction of the Court.

### 4.4.2 Powers and duties of liquidator in a voluntary winding up

Basically, a liquidator in a voluntary winding up exercises all the powers of the official liquidator in a compulsory winding up. Besides, he may exercise powers of the Court in a winding up by the Court of settling list of contributories and making calls. He may also summon general meetings of the company and creditors for obtaining sanction of the company by special resolution.[160] However, in the members' voluntary winding up of the company, he exercises his powers with the sanction of a special resolution of the company, and with the sanction of the Court or committee of inspection in the case of creditors' voluntary winding up.

## 4.5 Restrictions on the powers of liquidator

The exercise and control of liquidator's powers is governed by the provisions of the Companies Ordinance, 1984.

Under section 336, the liquidator of a company which is being wound up by the Court is required to keep proper books and papers containing entries or minutes of proceedings at meetings and of such other matters as may be prescribed and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect any such books.

Under section 337, an official liquidator is required to present to the Court an account of his receipts and payments and dealings as liquidator and other requisite information at least twice in each year during his tenure of office. The Court shall cause the account and the books and papers of the official liquidator to be audited in such manner as it thinks fit and the report of the auditor is open to inspection on payment of prescribed fee.

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[160] The Companies Ordinance, 1984, Section 387

The liquidator exercises his powers, firstly under or subject to the orders of the Court, and secondly, under the direction of the creditors, or the committee of inspection. Under section 338, in the administration of the assets of the company and in the distribution thereof among its creditors, the liquidator of a company shall have regard to the directions of the creditors or contributories given through a resolution passed at any general meeting or by the committee of inspection. The liquidator has to summon meetings of the creditors or contributories and ascertain their wishes as may be expressed by means of resolution whenever requested in writing to do so by the creditors or contributories having one-tenth share value.

If any person is aggrieved by any act or decision of the liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just in the circumstances.

The liquidator is required to take into his possession all the property to which the company is entitled and use it to satisfy the claims of the creditors and contributories. The liquidator in distributing the accumulated profits merely acts as agent or administrator for and on behalf of company. The liquidator must complete the proceedings within a period of one year from the date of commencement of winding up.[161] If the proceedings are not concluded during the first year and extension is granted under Section 387, the liquidator must summon a general meeting of the company at the end of the first year, within 30 days of such extension and lay before it: -

(a) an audited account of his receipts and payments of the preceding year;
(b) statement in the prescribed form containing the particulars with respect to the proceedings; and
(c) reasons for delays, steps taken to expedite and the time required for such purposes.

[161] The Companies Ordinance, 1984, Subsection (5) of Section 387

It is the duty of the liquidator to decide what is properly due from the company to various claimants and they are entitled to go behind decrees which they consider were not properly obtained.[162]

Official liquidators are not permitted to examine the correctness of the adjudication of the Industrial Tribunal on a reference to which the company is a party represented by the debenture trustee, when there is no allegation of fraud or collusion. No doubt the official liquidator can refuse to accept a debt, though it is the subject of a decree against the insolvent if there is evidence that the decree was fraudulently and collusively obtained and there was no real debt at all. But in the absence of fraud and collusion, or apparent miscarriage of justice, the Official Liquidator would have no power to go behind the decrees and adjudications of competent Courts and tribunals.[163]

### 4.6 Appointment of provisional manager (liquidator)

Section 325 empowers the Court to appoint a person eligible for appointment as official liquidator to be provisional manager after giving notice and providing opportunity of hearing to the company. A provisional manager has the same powers as a liquidator, but the Court may limit and restrict his powers at any time. A provisional manager ceases to hold office as such when the winding up order is passed. Though the above provision specifically mentions 'provisional manager', in practice the Courts have dealt with the appointment of 'provisional liquidator' and distinction between the two terms is hardly found in the case law on the subject.

#### 4.6.1 Issues and considerations in appointment of provisional manager (liquidator)

Issues and considerations in the appointment of the official liquidator in a winding up by the Court are part and parcel of the winding up proceedings. Where the Court makes an order of

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[162] Official Liquidators, Gorakhpur Electric Supply Co. Ltd. v. Messers Siemens (India) Ltd. AIR 1940 Allahabad 514

[163] Official liquidator of the Andhra Paper Mills Co. Ltd. v. President Andhara Paper Mills Workers' Union, AIR 1951 Madras 987

winding up of a company, it simultaneously makes appointment of the official liquidator. However, apart from the terms 'liquidator' or 'official liquidator', the law uses different terms 'provisional manager' or 'administrator'. So, the issues and considerations in the appointment of provisional manager or administrator may also be different.

The Court will appoint a provisional manager only when it is required in the interest of all concerned. The object in appointing a provisional manager is to preserve and protect the assets of the company and to ensure that there will be a fair distribution thereof and that one creditor will not be permitted to benefit at the expense of the others. There is no hard and fast rule in the matter and the issue is determined by the Court on the facts and circumstances of each particular case. The proceedings under the Ordinance are judicial in nature, therefore, all powers, including the power to appoint a provisional manager are exercised reasonably and in accordance with the principles of natural justice. Some of the important cases governing appointment of provisional manager decided by the Superior Courts, both in and outside Pakistan are examined to see on what considerations and in what circumstances the Courts have appointed or not appointed provisional manager or provisional liquidator.

(1) In Salah-ud-Din v. Frontier Sugar Mills & Distillery Ltd[164] six out of 1200 shareholders of the respondent company petitioned for its winding up and also applied for appointment of provisional liquidator. In refusing to appoint the provisional liquidator, the Judge formulated three points for determination of the matter, viz. –

(a) Is the company plainly, commercially and technically insolvent?
(b) Has the company failed to meet the demands of the creditors?
(c) Is it the wish, or in the interest of the shareholders or the contributories, that the provisional liquidator should be appointed in this case?

On the first point, the Judge opined that the company was not plainly, commercially or technically insolvent. On the second point, he held that the petitioners had not addressed him on the issue in the first instance, and secondly no creditor had come forward to support the

[164] PLD 1957 (W.P.) Lahore 844

petitioners in their demand for appointment of provisional liquidator. On the third point, he held that according to the material made available on record, the company was carrying on business successfully, getting the accounts regularly audited and was also paying dividends to the shareholders and was meeting its current demands, no debts were existing which the company was unable to pay or had failed to pay in accordance with a statutory notice of demand, therefore, there was nothing to show that it was the wish of, or would be in the interest of the general body of the shareholders to appoint a provisional liquidator. The Judge held that in fact the petitioners had grievances against the Managing Director of the company, but then it was open to the petitioners, if they were sure that the Managing Director had misappropriated the money or tampered with the record, to lodge a report at the police station, or put in a complaint in a court of law, or pass a resolution to that effect by simple majority in the shareholders' meeting.

(2) In National Bank of Pakistan v. Punjab National Silk Mills[165] the petitioner bank sought winding up of the respondent company on the ground of its inability to pay a sum of Rs.56,569.78 and also prayed for the appointment of provisional liquidator. The Court held that it was not necessary for the Court before appointing a provisional liquidator to come to a definite finding that the company must ultimately "go into liquidation". The matters which the Court has to take into consideration at the time of the appointment of the provisional liquidator are not necessarily the same which it has to consider for the winding up of the company. In this case, the company had incurred debts, which were more than its paid-up capital, it had refused to pay the debts which necessitated the institution of suits by the petitioning as well as other banks, it had not functioned for more than three years without any plausible reason, its stocks were pledged with the petitioner bank, it made no attempt to have the stocks released. In these circumstances, the Court considered it just and proper to appoint a provisional liquidator.

(3) In United Bank Ltd v. Pak. Wheat Products Ltd,[166] in appointing provisional liquidator, the Court was influenced, *inter alia*, by the consideration that the company was

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[165] PLD 1969 Lahore 194
[166] PLD 1970 Lahore 235

unable to meet its current demands and, therefore, unable to pay back its debts. Accordingly, the Court considered it just, equitable and fair to place it in the charge of a provisional liquidator. The Court clarified that in such a case, the Court will not be influenced by the worth of the company after conversion of its fixed assets into liquid ones.

(4) In Maqbool Ellahi v. Rasul & Co. Ltd,[167] in the background of serious disputes among the shareholders who had originally formed a two-man private company, which created deadlock for want of mutual trust and reliance essential for its smooth running, the Court considered the issue of appointment of provisional liquidator and held that it is made with a view to protecting the assets of the company and to safeguard them from jeopardy and for a fair and equitable distribution among its contributories after the company has been wound up. The appointment of a provisional liquidator, before the winding up, is a drastic step fraught with grave consequences and dangers to the company and any decision in this respect must not be lightly made. The consequences flowing from a wrong order in the appointment of provisional liquidator are far more serious if afterwards the Court finds that the company was not at all liable to be wound up. By the time the business may have come to a stop and the company may not be able to survive after the shock. The courts do not appoint a provisional liquidator unless it is clear that the company is bound to be wound up and its liquidation has become inevitable. The appointment of provisional liquidator is not only provisional but also contingent in the sense that it operates to protect the property for an equal distribution only in the event of an order for compulsory winding up being made, and if no such order be made, then the appointment ought not to interfere with the rights of third persons.

(5) In Pakistan Industrial Credit & Investment Corporation Ltd v. National Silk & Rayon Mills Ltd[168] the question of appointment of provisional manager was examined in quite some detail. In this case, the winding up of the respondent company was sought on the ground of its inability to pay its debts. Later, application was filed for appointment of provisional liquidator. The respondent company contended that there was a genuine dispute between the

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[167] PLD 1970 Lahore 539
[168] PLD 1976 Lahore 1538

parties on the question of debt liability on account of the nature of the loan in foreign currency and both the parties differed on the method of computation, one asking for pre-devaluation exchange rate, the other insisting on the post-devaluation rate. Therefore, petition for liquidation was not a proper remedy for a creditor so as to effect recovery of debt. Further, the appointment of provisional liquidator would cause irreparable damage and should not be made till it becomes certain for the Court that ultimately the company has to be wound up. According to the respondents, the company was a going concern with enough assets and was commercially solvent for which reliance was placed on the annual report for the year 1975. Having considered all the aspects of the case and the relevant law, the Court found it not only just and proper, but also necessary in the interest of all concerned that provisional liquidator be appointed. However, the Court, with a view to providing a further opportunity to the company/its functionaries to come out of slumberous or motivated complacency and/or to show *bona fides*, postponed for six months the taking over by the provisional liquidator in view of the phrase 'at any time' used in Section 175(2) of the Companies Act, 1913.

In the course of the judgment, the Court held that the question of appointment of provisional liquidator is to be determined by the Court with reference to the facts and circumstances of each particular case. This power, however, should not be exercised arbitrarily or capriciously, but reasonably, and in accordance with the recognized principles of natural justice. While appointing provisional manager, it must be borne in mind that the consequences that may flow from it may well be very grave. It may paralyze the affairs of the company permanently and disrupt it while it still has all the prospects of being run smoothly and without being insolvent. It is a serious matter and undoubtedly a drastic step, which should not be taken merely for effecting recovery of debt, or for the benefit of a creditor. The Court, however, made it clear that to say that because liquidation was likely to result in the recovery of debt, this should deter the Court from either appointing a provisional liquidator or proceeding to pass an order of liquidation, was unacceptable as a proposition of law.[169]

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[169] National Bank of Pakistan v. The Punjab National Silk Mills Ltd, PLD 1975 Karachi 327

The Court further held that the matters which the Court has to take into consideration at the time of the appointment of the provisional liquidator are not necessarily the same which it has to consider for the winding up of the company. The petition for the appointment of provisional liquidator is often decided on affidavits, whereas whether or not the winding up order should be passed ordinarily depends upon other evidence which may be produced. For this reason, any observation made in the order appointing provisional liquidator will have no direct effect on the order which is ultimately to be passed on the petition for winding up. The law does not lay down any circumstances and situations in which a provisional liquidator may be appointed and the matter is left to the discretion of the Court. The Court differed with the observation in earlier cases[170] where it was held that provisional liquidator should not be appointed unless it was clear that the company was to be wound up, or the view that the courts generally have not appointed provisional liquidators unless the company is plainly, commercially and technically insolvent. Further, the observation that 'if the company suspends its business and refuses to pay to its creditors and no doubt whatsoever is left that it must go into liquidation, then it is plainly, commercially and technically insolvent and, therefore, the appointment of a provisional liquidator is urgently called for' was also considered too wide to be accepted as the law applicable in all cases. The Court held that for appointment of provisional liquidator it was not necessary to give a finding on facts and circumstances before making such an order.

In Shifa Medico v. Jubilee Paper and Board Mills[171], the Court, keeping in view the wishes of the creditors, as envisaged by section 320, approved change in management of company on the basis of agreement arrived at between the parties, and permitted withdrawal of winding up proceeding and held that winding up order may not be made if it would unfairly prejudice the members or the creditors of the company. However, in all cases of appointment of provisional liquidator, it is discretionary and not mandatory to consult all the creditors and contributories. There might be circumstances, where the request for appointment of provisional liquidator may be the result of one or more disgruntled shareholders' spite. That

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[170] Khan Salah-ud-Din Khan v. The Frontier Sugar Mills & Distillery Ltd, PLD 1957 Lahore 844 & Sh. Maqbool Ellahi v. Rasul & Co. Ltd, PLD 1970 Lahore 539

[171] NLR 1989 Civil 705

would require a high degree of circumspection so as to avoid dangerous consequences. In such a case it is not necessary for the Court to consult all the creditors.

(7) In re: Eurofood IFSC Ltd[172], E Ltd, a company with its registered office in Ireland, was a wholly-owned subsidiary of an Italian holding company, which was admitted to extraordinary administration proceedings in Italy after having been found to be in financial crisis. A petition was presented to the Irish High Court for the winding of E Ltd on the ground of its insolvency. The court appointed a provisional liquidator of the company with powers, *inter alia*, to take possession of all its assets and manage its affairs. The Court of Justice of the European Communities delivered judgment on the reference made by the Supreme Court of Ireland on several questions. The issues concerning appointment of provisional liquidator dealt with in the judgment have been noted below in the context of the present study. Article 38 of the Regulation provides as under: -

> "Where the court of a member state which has jurisdiction pursuant to article 3(I) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another member state, provided for under the law of that state, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings."

Section 226(I) of the Companies Act, 1963 [Ireland] provides as under: -

> "The court may appoint a liquidator provisionally at any time after the presentation of a winding up petition and before the first appointment of liquidators, which by virtue of section 225 is otherwise made at the time the winding up order is made. Pursuant to section 229(I), a provisional liquidator, once appointed, is obliged to "take into his custody or under his control all the property and things in action to which the company is or appears to be entitled."

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[172] [2006] 3 WLR 309

A provisional liquidator appointed in proceedings for compulsory winding up by the court in Ireland, however, falls within the definition of 'liquidator'. The order appointing the provisional liquidator gives him extensive powers (to take possession of all of the assets of the company, to manage its affairs, to open a bank account in its name and to retain the services of a solicitor).

The provisional liquidator's role is accordingly much wider than the role of the temporary administrator. A petition for winding up may be analyzed as a "request for the opening of insolvency proceedings", which may be followed firstly by "temporary appointment" and then by "opening of the insolvency proceedings". These stages, put differently, are "presentation of the winding up petition", "appointment of administrator or provisional liquidator" and "the passing of winding up order including the order appointing a liquidator". Some considerations that the Courts have found relevant in the appointment of provisional liquidator are summarized below: -

(a) Where the company suspends its business and refuses to pay to its creditors;

(b) The adverse conduct of the directors coupled with the bad state of affairs of the company qua its income, assets and/or liabilities;

(c) The rate and speed of geometrical increase in debt liability exceeding the paid up capital on the one hand, and refusal to pay the debts on the other;

(d) Inability of the company to meet its current demands, but for this purpose the conversion of the fixed assets into liquid assets will not be considered. To say that the company is plainly, commercially and technically solvent because either it has enough assets or that it is a running concern or that its current balance sheet gives a good picture, in the context of appointment of provisional liquidator is to lay down a too wide proposition, which is not in accord either with the language of the statute or its plain meaning;

(e) It is not necessary that if the company has paid certain debts, it might be presumed that it is able and/or willing to meet all its current demands;

(f) Motives and *bona fides* of the company in not repaying the loan of a public sector lending institution, such as a desire to get extraordinary concession or

to get away with huge sums, which might, in utter desperation be expected to be written off or rescheduled;

(g) It is discretionary and not mandatory, in all the cases for appointment of provisional liquidator to consult all the creditors and contributories. In a given case, enough material might be brought on the record of the petition to satisfy the Court that unless such a drastic step was taken, the consequences would be more damaging and obviously more drastic for all concerned including the company, would justify appointment of a provisional liquidator; and

(h) A high degree of circumspection is required where it appears that the request for appointment of provisional liquidator may be the result of one or more disgruntled shareholders' spite.

### 4.7 Appointment of receivers and managers

Though in relation to the winding up of companies by the Court, the discussion and deliberation in Courts have mostly remained confined to the appointment of official liquidator, provisional liquidator, provisional manager or administrator, and it is very rare that the issue of appointment of receiver has attracted and engaged the attention of the Courts. There is a whole chapter in the Ordinance titled "Receivers and Managers" (sections 137 to 141). Section 137 lays down that a person may obtain an order of appointment of receiver or a person to manage the property of a company. This provision also recognizes the power of any person given to him under any instrument to appoint a receiver or manager. The person obtaining an order of appointment of receiver or manager or himself appointing receiver or manager has to file notice of the same with the Registrar and default in this regard is punishable with fine. Under section 138, the receiver or manager who has taken possession of the property of the company has to file with the Registrar every six months abstract of receipts and payments and when such a person ceases to be receiver or manager, he shall also notify the same to the Registrar. All the correspondence of the company, after the appointment of receiver has to contain a statement about the appointment of receiver and any default in this behalf is punishable with fine.

Section 139 lays down that a minor, a person of unsound mind, a body corporate, a director of the company and an undischarged insolvent are not qualified to be appointed as receiver or manager. Under section 140, the receiver or manager appointed under any instrument may apply to the Court for any direction in connection with the performance of his functions. Such a receiver or manager is answerable and responsible for his acts to the Court as if he had been appointed as such by the Court. Section 141 authorizes the Court to fix the remuneration to be paid to such a receiver or manager.

Another provision of the Ordinance that refers to the appointment of receiver is section 327. Section 327 is expressed in negative terms. It says that a receiver shall not be appointed of assets in the hands of a liquidator except by or with the leave of the Court. Thus, there is a general prohibition against the appointment of a receiver of assets in the custody of the liquidator. However, as an exception to the above general rule, the Court, in an appropriate case, may do so.

At this stage, it is pertinent to refer to the provisions of Order XL of the Code of Civil Procedure, 1908, which deals with the appointment of receivers. This provision empowers the Court to appoint receiver of any property, to remove any person from the possession or custody of the property, commit the same to the possession, custody or management of the receiver and confer upon the receiver all such powers, such as bringing and defending suits, realizing, managing, protecting, preserving and improving the property, collecting rents and profits including their application and disposal and executing documents.

The party seeking appointment of receiver has to show some emergency or danger or loss demanding immediate action. The Superior Courts have laid down the following principles as to the appointment of receivers: -

(a) The power of appointment of a receiver should be sparingly used;

(b) It would be exercised for safeguarding the interests of all the parties;

(c) The persons in *bona fide* occupation of the property would not be disturbed unless there are allegations of wastage or dissipation of property or there is an apprehension of irreparable loss or injury.

Under rule 3 *ibid,* the receiver is duty bound to –

(a) furnish security to duly account for what he will receive in respect of the property;
(b) submit periodical accounts;
(c) pay the amounts due from him; and
(d) be responsible for any loss occasioned to the property by his willful default or gross negligence.

Receiver is appointed by the Court. He is not the agent of any party, but an official of the Court and is responsible to the Court in the discharge of his functions. He receives remuneration as determined by the Court for his services.

### 4.7.1 Issues and considerations in appointment of receiver

A pertinent issue, which at times arises in the course of the winding up proceedings, is whether a receiver can be appointed on the application of the creditors to avoid any pilferage of the assets of the company?

In Eastern Company v. Gul Begum[173] it was held that where a set of circumstances does not, for the time being, attract the provisions of the Ordinance, but attracts the provisions of Order XL, rule 1 of the Code of Civil Procedure, there can be no objection to applying the latter provision to appoint a receiver who may take up the business of the company and the management of its property and its property affairs pending the decision of the Court in the litigation. However, in Muhammad Ismail Ali v. Pakpur Ceramics[174] it was held that if a

[173] PLD 1980 Lahore 69
[174] PLD 1973 Karachi 491

company was well run and its board of directors was functioning, the appointment of an interim receiver would result in drastic interference with its business and might do untold harm. Since the interests of the aggrieved party could be protected by methods other than the appointment of an interim receiver, the Court directed the respondent company to prepare, at the end of every calendar month, a statement of the company's sales and expenses and to send a copy of it to the petitioner within two weeks of the preparation of the statement and this would be sufficient to protect his legitimate interests.

In Pakistan Industrial Credit & Investment Corporation Ltd v. National Silk & Rayon Mills Ltd[175], on behalf of the petitioning creditor (PICIC) it was represented that the respondent company was an industrial undertaking of national importance and should continue to function after a mediation between the parties in the interest of the company. The PICIC and the other major creditor of the company, namely, Habib Bank Ltd also requested for appointment as joint provisional liquidators along with the representatives of the parties. However, the Court decided to take a less drastic step by inducting a receiver in this company with the specific powers conferred on him from time to time in the interest of the company and its business, instead of appointing a provisional liquidator for it with all its grave consequences. In this behalf, the Court placed reliance on two judgments[176] where it was held that it was wrong to say that the appointment of a receiver was unheard of to conduct the business of a company, and that there could be no objection to the appointment of a receiver in a case under the provisions of Order XL rule 1 CPC to take charge of the business of the company and manage its assets and properties pending the disposal of main case. This was also justified on the ground that where dissolution of the partnership was inevitable and the partners were on bad terms, the usual way of guarding their interests was by appointing a receiver.

The Court placed reliance on another case[177] from Indian jurisdiction where winding up of the company was sought on the grounds that large amounts were owing to the Government

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[175] PLD 1976 Lahore 1538

[176] Ratan Lal v. Jagadhri Light Railway Company, AIR 1946 Lahore 193 and Muhammad Arjumand Malik v. Haji Abdul Ghani, AIR 1953 Assam 25

[177] Rajamandry Electrical Supply Corporation Ltd v. Nageswara Rao, PLD 1956 SC (Ind.) 266

for charges for electrical energy supplied by it, that the directors had misappropriated the funds of the company and that the directorate, which had the majority in voting strength was riding rough shod over the rights of the shareholders. In that case, it was held as under: -

> "And where accordingly a case had been made out for winding up under section 162, the appointment of administrator under section 153-C cannot be attacked on the grounds that it is an interference with the internal management of the officers of the company. If a liquidator can be appointed to manage the affairs of a company, when an order for winding up is made under section 162, an administrator could also be appointed to manage its affairs when action is taken under section 153-C."

Though it was noted that there was no provision of law in the Companies Act, 1913 in force in Pakistan corresponding to section 153-C of the Indian Companies Act, 1913, but under the law in force in Pakistan there was nothing to prevent the Court from appointing a receiver in a fit case by resorting to the provisions of Order XL rule 1 of the Code of Civil Procedure in the interest of the company and its business. Accordingly, the Court appointed a receiver for the company. In the aforesaid case of Pakistan Industrial Credit & Investment Corporation v. National Silk & Rayon Mills Ltd[178], while dealing with the application of the petitioner for appointment of provisional liquidator, the Court also considered the alternative suggestion of the respondent company for appointing official receiver instead of appointing provisional liquidator, but refused to accept it though it was observed that it may not be illegal to appoint an official receiver in a given case. Thus, in the circumstances of the case, the Court did not appoint an official receiver.

In Muhammad Ismail Ali v. Pakpur Ceramics[179] it was held that if a suit was filed by a partner for the dissolution of a firm, and the plaintiff alleged only exclusion and not waste or malversation, the Court would appoint a receiver from amongst the defending partners. But if the plaintiff in such a suit could show that there was a reasonable apprehension of waste or malversation of the firm's assets, the court would remove the defending partners from the

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[178] PLD 1976 Lahore 1538
[179] PLD 1973 Karachi 491

management of the firm and appoint the plaintiff or a third party as an interim receiver. This second rule can be invoked by any plaintiff who can show that there will be a reasonable apprehension of waste or malversation if the defendants are allowed to remain in possession of the disputed property, and this rule is applicable to winding up petitions even when the company sought to be wound up is prosperous.

In Eastern Company v. Gul Begum[180] the Court formulated two points for examination, viz.

(a) Whether the Court during the winding up proceedings could appoint receiver in relation to the company which was sought to be wound up?

(b) Whether the receiver appointed could be empowered to run the business of the company?

While dealing with the above propositions, it was held that there was no provision in the Companies Act which excluded the jurisdiction of a Court to appoint a receiver and the Court possessed ample powers, *ex debito justitiae,* to pass such orders as may be called for to protect the corpus of the assets of the company sought to be wound up and/or if otherwise found conducive to the interests of the shareholders and all others concerned. It is well recognized that the appointment of liquidator is meant more for preservation of the assets of the company for distribution following the winding up than for the conduct of day-to-day business of the company. For the latter purpose, the appointment of receiver appears to be an appropriate remedy. The appointment of a liquidator, it may be pointed out, should be taken by the contracts of a company more adversely than appointment of a receiver because the former implies that the company is bound to be liquidated whilst the appointment of a receiver still leaves a hope that the company may survive. Therefore, where it is clear that a company is being mismanaged, but there is a hope that it can survive if managed properly, it is better for the Court to appoint a receiver with power to manage the affairs of the company and, if it is beneficial for the company, to complete contracts already entered into by its

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[180] PLD 1980 Lahore 69. Also see Muhammad Bakhsh v. Azhar Wali 1986 MLD 1870 where it was held that that there was no provision in the Companies Act, which excluded the jurisdiction of the Court to appoint a receiver though there were provisions which dealt with the circumstances in which a company was mismanaged.

management. The power to appoint a receiver in a fit case is impliedly available under the Ordinance itself when we find that the appointment of receiver is prohibited only in respect of assets of a company in the hands of an Official Liquidator. It means that the appointment of a receiver during the winding up proceedings is envisaged except where the Official Liquidator has taken over the assets.

### 4.8 Remuneration of official liquidator

Under section 323, an official liquidator, not being a salaried officer of the Government or of the Court, is entitled to remuneration by way of percentage of the amount realized by him by disposal of assets or otherwise as may be fixed by the Court keeping in view the amount and nature of the work actually done and subject to such limits as may be prescribed. Different percentage rates may be fixed for different types of assets and items. Subject to the rights of secured creditors, all costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator are payable out of the assets of the company in priority to all other claims.[181]

The Court may permit payment of a monthly allowance to the official liquidator to meet the expenses of the winding up for a period not exceeding twelve months from the date of the winding up order. The remuneration cannot be enhanced subsequently but, on the other hand, it may be reduced by the Court at any time. In case the official liquidator resigns, is removed from office or otherwise ceases to hold office before conclusion of the winding up proceedings, he is not entitled to any remuneration and the remuneration already received by him, if any, shall be refunded by him to the company. No remuneration is payable to an official liquidator who fails to complete the winding up proceedings within the prescribed period.

[181] The Companies Ordinance, 1984, Section 393

percentage. It was held that under section 176(3) of the Companies Act, 1913[184] the compensation was to be fixed in proportion to the amount of work performed by the liquidators and that it was the discretion of the Court to grant to a liquidator both monthly remuneration as well as percentage on the sale proceeds, provided it would constitute a reasonable amount of compensation. However, the records showed that Mr. S.M. Hussain was not given any understanding that he would be given percentage in addition to the monthly remuneration and that the percentage fixed by the Court did not bear any proportion to the work performed by him. In addition, the amounts fixed by the Court were without any justification and inconsistent with the principle of quantum merit, since Mr. S.M. Hussain had already been paid separate fee by PICIC for appearing in the cases. Therefore, the appellate Court set aside the order and reconsidered the question of payment of fee. As to the commission awarded to the other two liquidators, it was held that while awarding percentage to the other two liquidators the Court should take into account the monthly remuneration already received by them, the amount of work performed by them and the amount of work required to be performed by them.

### 4.9 Liquidator's role in the legal proceedings

A company is a legal or a juristic person and it retains its corporate state after the winding up order till its final dissolution. All the powers of a company whether under the Articles of Association or under the law, when it goes in liquidation are exercised by the liquidator under, or subject to the authority of the Court.[185] The liquidator is vested with the powers, with the sanction either of the Court or of the committee of inspection, *inter alia*, to institute or defend any suit, action, prosecution or other legal proceeding, civil or criminal in the name and on behalf of the company.[186]

Rule 266 of the Rules provides that the official liquidator shall, as far as possible, personally appear and conduct all proceedings before the Court in the liquidation. However, under

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[184] Section 176 of the repealed Companies Act, 1913 corresponds to section 323 of the Companies Ordinance, 1984

[185] City Bank of Lahore v. Shiv Sharma AIR 1951 Punjab 144

[186] The Companies Ordinance, 1984, Section 333

section 335, the official liquidator is authorized to appoint an advocate or any other person to assist him in the performance of his duties.

A creditor and a shareholder of a company cannot file an appeal on behalf of a company against a decision of a court in which he was a co-plaintiff with the liquidator. A shareholder is not entitled to maintain an action when a liquidator is functioning.[187]

Where during the pendency of a recovery suit before the Banking Court, an order for winding up of the company is made and official liquidator appointed, but not made a party to the recovery suit, the objection, if any, against the continuation of proceedings in the recovery suit can be raised either by the previous management or the Official Liquidator. The decree in such a suit even without impleadment of the Official Liquidator is not void and, at the most, can be held to be voidable at the instance of the Official Liquidator.[188]

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[187] Ulahannan Job v. The Prudential Trust, AIR 1965 Kerala 16
[188] Bashir Ahmad v. Nippon Bobins (Pvt,) Ltd. 1997 CLC 1295

## Chapter 5 Disbursements in liquidations

The property of the company, on its winding up, after meeting the expenses of winding up is to be applied in satisfaction of its liabilities *pari passu*,[187] both with regard to the general creditors as well as the preferred creditors, but where there are both the categories of creditors, the preferential payments[188] shall be made first while the ordinary creditors will take the back seat.

Immediately after the appointment of the provisional liquidator or the liquidator, as the case may be, the directors of the company are required to prepare statement of affairs of the company in terms of section 328 (details of assets, liabilities, directors, chief executives, employees, location of properties, etc.) and submit the same to the liquidator who takes into his custody all the books, papers, property, effects and actionable claims belonging to the company.[189] Under section 329, the liquidator prepares a report as to the amount of capital issued, subscribed and paid up and the estimated amount of assets and liabilities, cash, bank balance, negotiable securities, debts due from contributories due to the company, movable and immovable properties belonging to the company, unpaid calls, causes of failure of the company, etc. The liquidator is entitled to receive the aid of the District Magistrate in realizing the properties of the company. On and from the order of winding up, the assets of the company are deemed to be in the custody of the Court.[190]

A liquidator in a compulsory winding up must pay all moneys received by him on account of the company into a bank account. If a liquidator retains money in his own hands for more than ten days, he is liable to pay to the company interest on the excess amount. Payments out of the bank account are made by cheques signed by the liquidator and countersigned by the committee of inspection, where there is one.

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[187] The Companies Ordinance, 1984, Section 385
[188] The Companies Ordinance, 1984, Section 405
[189] The Companies Ordinance, 1984, Section 330
[190] Sub-section (4) *ibid*

Under the English law[191], the moneys are deposited into the Insolvency Services Account at the Bank of England and the liquidator is allowed to retain in his hands not more than 100 pounds. In case of default, the liquidator is liable to pay interest @ 20 per cent per annum on the excess retained. Further, he may also be dismissed and may be disallowed a part of his remuneration.

The object of the whole exercise of the statement of affairs of the company, the report of the liquidator and his possession or control of the assets and liabilities is to ensure that the assets of the company in all forms are collected and consolidated for payment of debts to the creditors and/or distribution among the shareholders, either in their present form or after being converted into funds by sale, etc. The sale is made by the liquidator acting under the control and direction of the Court. As a fiction of law, the sale is by the Court acting through the liquidator.[192]

Simultaneously with the making of the winding up order, the Court undertakes the settlement of list of contributories and rectification, if any, in the register of members.[193] In a voluntary winding up, the liquidator is empowered to settle the list of contributories. The Court may require any contributory, trustee, receiver, banker, agent, officer or employee, auditor of the company to pay, deliver, convey, surrender or transfer to the official liquidator any money, property or books belonging to the company.[194] The Court may order any contributory to pay any money due from him to the company with a provision for set off in respect of the money due to him from the company.[195] A contributory can be summarily directed to pay the amount due from him whether his liability for that amount arose on the ground of his being a contributory or otherwise.[196] The power of the Court to order payment is discretionary. However, the Court cannot make such an order overriding the provisions of section 86 of the Code of Civil

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[191] Pennington's Company Law, Fourth Edition, p. 782
[192] Ch. Muhammad Sharif v. M/s Ramay Industries Ltd Faisalabad PLD 1984 Lahore 415
[193] Section 339, *ibid*
[194] Section 340, *ibid*
[195] Section 341, *ibid*
[196] Lahore Bank Ltd. v. Kidar Nath AIR 1915 Lahore 271

Procedure.[197] The Court may, after sufficiency of the assets of the company has been ascertained, make calls on, and order payment thereof by all or any of the contributories to the extent of their liability to satisfy the debts and liabilities of the company and the costs, charges and expenses of winding up. It is likely that some of the contributories may fail to pay the calls.[198] The Court may fix time within which creditors are to prove their debts or claims or to be excluded from the benefit of distribution made before those debts are proved.[199] The Court may adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto.[200] The official liquidator is required to distribute the funds among the creditors or contributories within 30 days of the receipt thereof.[201]

After the company's debts and liabilities have been discharged, the remaining assets are to be distributed among its members in accordance with the memorandum or articles of association of the company. The shareholders have a right to participate only in the assets of the company, which are left over after the winding up is over and not in assets as a whole.[202] Such assets may be divided in proportion to the nominal value of the shares. However, preference shares may be given priority for repayment of capital over ordinary shares. But where the memorandum and the articles rank ratably the preference and the ordinary shares on a distribution of assets in the winding up, and the preference shares have no priority over the ordinary stocks and shares to the repayment of the capital, the preference and the ordinary stocks and shares would rank ratably *inter se* subject only to a claim for equalization in respect of those fully paid and those partly paid.[203] The members who hold shares on which a premium was paid or a discount properly allowed are treated in the same way as other members. No additional payment is made to them as a return of the premium and no deduction is made from their share of the residual assets in respect of the discount. If unequal amounts have been paid on shares which rank equally in the distribution of the company's residual assets, the difference must be

[197] D.D.M.E.P. Co. v. N. State Regency AIR 1936 All. 826
[198] The Companies Ordinance, 1984, Section 342
[199] Section 346 *ibid*
[200] Section 347, *ibid*
[201] Section 349, *ibid*
[202] Bacha F. Guzdar v. Commissioner of Income Tax Bombay AIR 1955 SC 74
[203] In re: Home and Foreign Investment and Agency Company, Limited (1912) 1 Ch. 72

eliminated, either by a call being made on the shareholders who have paid the lesser amount, and the proceeds of the call being added to the company's residual assets and distributed accordingly. If a company has no share capital, in the absence of any different provisions in its memorandum or articles, its residual assets are distributable among its members at the commencement of the winding up, either in equal shares on a per capita basis, or in proportion to their contributions to its assets in fulfilment of obligations imposed on them by the memorandum or articles.[204]

In a compulsory winding up, it is the function of the Court to distribute the residual assets of the company and to adjust the rights of the contributories among them. Therefore, the liquidator must apply to the Court for an order sanctioning the distribution he proposes and when the Court has given its sanction, the liquidator must notify each contributory of the amount payable to him.[205] In a voluntary winding up, the liquidator distributes the residual assets and adjusts the rights of contributories in his discretion and does not require the sanction of the Court.

### 5.1 Preferential payments

As the term 'preferential payments' itself suggests, there are certain payments which are to be made in preference to others. Thus, in every winding up, certain claims or debts against the company are to be paid in priority over others. In the case of insolvent companies, such claims or debts are to be paid in full even though the others may remain wholly or partly unpaid. If the company has insufficient assets to satisfy even the preferential claims, then such claims are to be paid *pari passu*, i.e. ratably.

Section 403 of the Ordinance provides that all debts payable on a contingency or claims against the company, present or future, certain or contingent, ascertained or sounding only in damages may be proved against the company being wound up. Where the debts or claims are subject to any contingency or sound only in damages, or for some other reason

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[204] Pennington's Company Law, Fourth Edition, p. 778
[205] The Company (Court) Rules, 1997

do not bear a certain value, a just estimate of their value will be made. In the case of winding up of insolvent companies, the debts or claims against the company may be proved in accordance with the provisions of the Insolvency Act, 1920.

On realization of the assets of the company, the liquidator will set apart funds to meet the expenses of the winding up and for other preferential payments. Likewise, he will retain appropriate amounts of funds to meet claims against the company, which may be *sub judice* or subject matter of adjudication or assessment and will disburse the same as and when finally decided. Until then, the amounts so retained are invested by the official liquidator in Khas Deposit Certificates.[206]

A successful litigant against a company in liquidation is entitled to be paid his full costs in priority over other ordinary creditors except where there are other creditors in the same position as himself in which case they will rank *pari passu* depending on the availability of funds.[207] The Court may order costs, charges and expenses incurred in the winding up to be paid in such priority as may be fixed by the Court.[208]

Under section 404, priority is given to certain debts due from the company, such as government revenues, taxes, cesses and rates payable to the Government and local authority, the salaries, wages (each claimant getting not more than 2000 rupees), holiday remuneration, amounts due in respect of contributions towards insurance, sums due from a provident, pension, gratuity, or welfare fund, expenses of investigations into the affairs of the company held in pursuance of sections 263 or section 264, or compensation due and payable to workers, servants, labourers and workmen, sum due to a labourer working in husbandry under a contract, as determined by the Court, etc.

All the debts rank equally among themselves and are to be paid in full unless the assets are insufficient to meet them in which case they abate in equal proportion, or put differently, they will be paid *pari passu*.

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[206] Section 349, *ibid*
[207] Kilash Picture Palace Ltd v. Kidar Nath AIR 1942 Lahore 10
[208] Section 348, *ibid*

The general creditors, so far as the assets of the company are available for payment of their debts, if insufficient, have priority over the claims of debenture holders under any floating charge created by the company.

In Food Controller v. Cork,[209] the House of Lords examined the effect of priority attached to Crown debts in the context of the provisions of section 186,[210] which enacts all liabilities shall be satisfied *pari passu* and section 209, which enacts that some debts shall have priority over others. It was observed that the specified Crown debts are to be paid *pari passu* with the other debts in the class created by section 209 and in priority to all other debts, whether Crown debts or not, which are not in that class. Further, all debts, whether Crown debts or not, which are not in that class are to be paid *pari passu* after satisfying the above priority.

### 5.2 Secured creditors

In the distribution of assets of the company in the course of its winding up, following important issues arise: -

(1) Whether the secured creditors are to be paid in priority to all other creditors?

(2) Whether by filing a claim a secured creditor still retains the ability to sell shares outside the winding up process?

A "secured creditor" as applied to companies means a person who holds a mortgage, charge or lien on the company's property or any part of it as security for any debt due to him from the company.[211]

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[209] Lord Wrenburg, 1923 AC 647
[210] The Companies (Consolidation) Act, 1908 [U.K.]
[211] The Provincial Insolvency Act, 1920, Section 2(d)

The lien may be of any kind, i.e., a vendor's lien, a banker's lien, a solicitor's lien, etc. A financier under hypothecation is also a secured creditor.[212]

Section 405 of the Companies Ordinance deals with preferential payments,[213] but makes no mention of any secured creditor. This should not worry a secured creditor because such a creditor is governed by the provisions of section 404 of the Ordinance, which provides that the proof of debts or claims against an insolvent company under winding up is subject to the provisions of the Provincial Insolvency Act, 1920 (the "Act"). Therefore, by virtue of this section the provisions of the Act are attracted.[214] Section 47 of the Act allows a secured creditor to do any one of the following: -

(1) He may enforce his security and prove for the balance that may be due to him;
(2) He may relinquish his security for the general body of creditors and prove his whole debt;
(3) He may value his security and receive a dividend for the balance and the Court may, on realization, redeem it on payment to the creditor.

Thus, a secured creditor has his remedy independent of the Insolvency Court, here winding up Court, to realize his security, though he may participate in the insolvency proceedings as an unsecured creditor on relinquishment of his security or by deducting the value of his security. Some cases decided by the Superior Courts are examined to see how the Courts have dealt with the cases involving claims of secured creditors.

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[212] Official Liquidator, Manuba & Company Private Limited v. Commissioner of Police (1968) 38 Com Cases 884 (Mad).
[213] Corresponding provision dealing with the subject of preferential payments in the Indian Companies Act is Section 530. The principle underlying this section is that the debts and liabilities enumerated in it are treated as preferential debts as compared to ordinary unsecured debts. The rights of secured creditors other than debenture holders secured by a floating charge are not affected in any way. They remain outside the scope of the winding up proceedings and their security remains unaffected by the provisions of the section.
[214] United Bank Limited v. P.I.C.I.C, 1992 SCMR 1731

In Sant Prasad Singh v. Sheodut Singh,[215] the appellant claimed priority in payment of his debt. It was held that the claim must be considered in the light of the provisions of the Companies Act (now the Companies Ordinance, 1984) under which the petition for winding up was filed. The Companies Ordinance is a complete code to regulate proceedings of winding up. Section 405 of the Ordinance specifies the claims which are to be paid in priority to all other debts but it does not include any debt as claimed by the appellant. However, section 404 of the Ordinance provides that in winding up of an insolvent company the insolvency law shall prevail and be observed as is applicable to the respective rights of secured and unsecured creditors. It was also held that where a creditor has not elected at any time to relinquish his security for the general body of the creditors, the Court cannot direct that the property should be sold and that the creditor should merely be given priority in the payment of the debts. Thus, if the secured creditors do not relinquish their security in favor of the general body of creditors (which include Government, labourers and other unsecured creditors as mentioned under section 405), then they are entitled to the sale proceeds realized from the sale of their security provided they realize their security outside the winding up process.

In re: Mahaluxmi Cotton Mills Ltd.[216] a secured creditor had the Official Liquidator appointed as receiver for his security and permitted the receiver to run the Mills. It was held that the amounts payable for purchase of cotton for the secured creditor would have priority over all other creditors.

It can be concluded that a secured creditor may stand outside the winding up proceedings and enforce his securities. Section 405 of the Companies Ordinance only applies to unsecured creditors and to those secured creditors who give up their security for the overall benefit of all creditors. The winding up Court wrongly concluded, that the appellant, a secured creditor, could not reap the benefits of his securities.

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[215] AIR 1924 Patna 259
[216] (1962) 32 Comp Cas 1186

In Habib Bank Ltd. v. Hamza Board Mills[217] the law laid down in Punjab National Silk Mills v. National Bank of Pakistan[218] was followed wherein it was held that a secured creditor could also maintain a petition for winding up and merely because the debt had been secured was no ground to hold that the winding up of the company at the instance of such a creditor could not be maintained.

In Food Controller v. Cork (supra), it was said that the Crown might remain "outside the winding up" and might exercise its remedy by writ of extent, because the statutory scheme of administration of the assets in the winding up could not affect the Crown if it remained "outside the winding up". The phrase "outside the winding up" is an intelligible phrase if used, as it often is, with reference to a secured creditor, say a mortgagee. The mortgagee of a company in liquidation is in a position to say "the mortgaged property is to the extent of the mortgage my property. It is immaterial to me whether my mortgagor is in winding up or not. I remain 'outside the winding up' and shall enforce my rights as a mortgagee." This is to be contrasted with the case in which such a creditor prefers to assert his right, not as a mortgagee, but as a creditor. He may say "I will prove in respect of my debt". If so, he comes into the winding up. But an unsecured creditor cannot remain "outside the winding up". He must, if he is bound by the Act, obtain in the winding up such relief as the statute gives him." It was also observed that if the statute by express words or by necessary implication provides that, notwithstanding the winding up, the rights of a defined person shall remain unaffected, then no doubt he is "outside the winding up" for all purposes. It was concluded that by the provisions of section 209, the Crown is obviously within the Act.

### 5.3 Estoppel against a secured creditor

A secured creditor by filing his claim before the liquidator is not estopped from enforcing his securities outside the winding up process.

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[217] PLD 1996 Lahore 633
[218] 1986 SCMR 1126

In Ranganathan MK v. Government of Madras[219] it was held that the secured creditor is outside the winding up and he can realize his security without the intervention of the Court by effecting sale of the mortgaged premises by private agreement or by public auction. It is only when intervention of the Court is sought either by putting in force any attachment, distress or execution within the meaning of section 171 that leave of the Court is necessary.

In the case of Saifee Development Corporation Ltd.,[220] it was held that a secured creditor is thus outside the winding up and can realize his security without the leave of the winding up Court though if he files a suit or takes other legal proceedings for the realization of his security he is bound under section 231[221] to obtain the leave of the winding up Court before he can do so, although such leave would automatically be granted.

In United Bank Limited v. PICIC[222] the Supreme Court held that the appellant cannot claim priority on the basis of the pledge which was obtained by it as security for repayment of the loan, therefore, appeal dismissed. However, it is significant to note that under section 28 of the Insolvency Act on making of an order of adjudication the whole of the property of the insolvent shall vest in court or in the receiver but, subsection (6) provides that "nothing in this section shall affect the power of any secured creditor to realize or otherwise deal with the security in the same manner as he would have been entitled to realize or deal with if this section had not been passed. A secured creditor as defined, is, therefore, free to deal with his security and to realize it for the repayment of the debt. The order of adjudication does not affect the position of a secured creditor.

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[219] AIR 1955 SC 604

[220] 1989 MLD 3909

[221] Corresponding provision in the Indian Companies Act is section 171

[222] 1992 SCMR 1731 Also see, Saifee Development Corporation Ltd. 1989 MLD 3909; Ranganathan M. K. v. Government of Madras AIR 1955 SC 604; Gujrat State financial Corporation v. Official Liquidator (1996) 87 Comp Cas 658 (Gujrat-DB); Mahaluxmi Cotton Mills Ltd. (1962) 32 Comp Cas 1186, 1189 (Cal.); Imperial Chit Funds (Private) Ltd. v. ITO (1996) 86 Comp Cas 555 at p. 564 (SC); Mysore Surgical Cotton (Pvt.) Ltd. v. Karnataka State Financial Corporation (1999) 96 Comp Cas 933 (Karnatka)

In conclusion, it may be stated that by filing his claim before the liquidator, a secured creditor is not estopped from enforcing its securities outside the winding up process and such a secured creditor takes priority over the preferential payments made under section 405 and can stand outside the winding up proceedings and enforce his securities. Where he waives his secured right, he may prove his claim and receive *pari passu* from the assets of the company in winding up.

### 5.4 Transfers of property after commencement of winding up

Transfer of shares of a company after the commencement of its winding up, unless approved by the liquidator is void. Like transfers of property, movable or immovable including actionable claims, any delivery of goods made within a period of one year before the presentation of petition for winding up or the passing of resolution for voluntary winding up are also void unless made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration.[223]

The object in prohibiting transfer of the property of the company around its winding up is to safeguard the interests of the creditors. The appointment of a provisional liquidator or the passing of an order for winding up makes every disposition of property of the company and every transfer of shares or alteration in the status of its members, after the commencement of the winding up void unless the Court orders otherwise under section 406.[224] In pursuance of the provisions of section 406(2), any director or other employee who had disposed of the property of the company becomes liable for all monies of the company expended by him since the commencement of the winding up. However, it is open to the Court to validate transactions *bona fide* entered into by the company for its benefit.[225]

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[223] The Companies Ordinance, 1984, Section 406
[224] Muhammad Ikhlaque v. U.C.F. Ltd. PLJ 1982 Lah. 439
[225] First National Bank v. O.M. Parkash AIR 1962 Punj. 433

### 5.5 Fraudulent preferences

Any transaction in the nature of conveyance, mortgage, delivery of goods, payment, execution, etc., made by or against the company within six months before the commencement of its winding up is considered a fraudulent preference and is invalid accordingly on the analogy of a similar transaction made or done by an individual within six months before the presentation of an insolvency petition on which he is adjudged insolvent.[226] The transactions by or against an individual made within six months before the presentation of an insolvency petition on which he is adjudged insolvent are treated as fraudulent preferences. This principle of the insolvency law is extended to the transactions of the companies in winding up with the object again of safeguarding the interests of the creditors.

Where the liquidator finds any transaction doubtful, he may apply to the Court and obtain a declaration in the matter. *Bona fide* transfers or transactions, which are not meant to give fraudulent preference to any of the creditors should neither be regarded as void under section 406 nor be declared invalid under section 408.[227] Where money is paid to a creditor by way of fraudulent preference, there is no summary method of recovering it and a regular suit should be filed by the liquidator.[228] A winding up Court, unlike an insolvency Court cannot take cognizance of and adjudicate on the title of third persons except to the limited extent mentioned in sections 408 and 410 and the liquidator, to impeach title, should have recourse to regular suits in ordinary civil Courts.[229]

#### 5.5.1 Liabilities and rights of fraudulent preferences

Where there is a fraudulent preference of a person interested in property mortgaged or charged to secure the company's debts, the person preferred is subject to the same liabilities and has the same rights as if he had undertaken to be personally liable as surety

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[226] The Companies Ordinance, 1984, Section 408
[227] 1957 27 Com Cas. 581 (Punj.) referred by Shaukat Mahmood, Nadeem Shaukat in his book 'Company Law', Vol. I, Fourth Edition, p. 746
[228] Karachi Bank Ltd v. J.R. Castallino AIR 1932 Sind 106
[229] Hansraj v. Official Liquidator, Dehra Dun Co. AIR 1929 All. 353

for the debt to the extent of the charge on the property or the value of his interest. Thus, the person preferred is made liable to the extent of his interest in the property mortgaged or charged to secure the company's debts. In dealing with application concerning any payment on the plea that the payment was a fraudulent preference of a surety or guarantor, the Court has jurisdiction to determine any question regarding the payment arising between the person to whom the payment was made and the surety or guarantor. The Court may give leave to bring in the surety or guarantor as a third party as in the case of a suit for recovery.[230]

As a further step to safeguard the interests of the creditors, the person preferred is made liable to the extent of his interest and the Court is empowered to grant relief in application regarding any preferred payment, including the power to array as a party any surety or guarantor as a third party. The powers of the Court are not confined to preferred payments alone, rather are available in relation to all transactions by or against the company in winding up.

Section 410 does not affect the validity of sales effected by secured creditors outside the winding up and without the intervention of Court.[231] The dispositions of properties of the company made after presentation of the winding up petition are void. Even any attachment, distress or execution, held in force against the assets or effects of any sale of any of the properties of the company in liquidation without leave of the Court after commencement of the winding up are void.[232]

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[230] The Companies Ordinance, 1984, Section 409
[231] Eastern Auto Mobile Syndicate Ltd v. Babu Rajendra Kumar Singh AIR 1959 Madh Pra. 95
[232] The Companies Ordinance, 1984, Section 410

# REVIEW AND CONCLUSIONS

## Chapter 6 Review and conclusions

Clause (e) of section 305 of the Companies Ordinance, 1984 provides that a company may be wound up if it is unable to pay its debts. Section 306 provides that a company shall be deemed to be unable to pay its debts if a creditor serves a notice of demand on the company requiring it to pay the sum due and the company neglects to pay the same, or to secure or compound for it to the reasonable satisfaction of the creditor within 30 days, or execution or other process issued on a decree or order of any Court is returned unsatisfied in whole or in part, or if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts. Clause (a) of subsection (1) of section 306 talks of 'sum due'. Under clause (c) it may be proved to the satisfaction of the Court that the company is unable to pay its debts. Reading the language of section 305(e) and section 306, a lawyer is tempted to file a petition for winding up where the company has not paid its debt despite statutory notice of demand. In countless cases, the Courts have not wound up companies on the ground of their inability to pay debts where the company pleads a *bona fide* dispute on substantial grounds. In such cases, the Courts have advised the petitioning creditor to file a suit for recovery in the civil court and seek his remedy there. It is also laid down that the object of the winding up proceedings is the scrutiny into solvency or insolvency of the company and not the proof or disproof of the claims of a person against a company. Further, it has been held that the winding up proceedings cannot be used to pressurize a debtor company to pay its debts to the creditor. Actually, countless propositions on this issue have been evolved in course of time, rather every case seems to have given rise to a new proposition and added a new dimension to the existing propositions. A large number of cases have been discussed at length in Chapter 2 titled "Propositions and considerations in compulsory winding up". An important question with reference to these two aspects is how a Court can know what sum is due and how it can be proved to the satisfaction of the Court that the company is unable to pay its debts. It is to be noted that winding up petition on the ground of inability to pay debt is neither confined to admitted claims nor to the claims based on a decree of a court alone. Rather, the inability of the company to pay its debts may be proved before the

winding up Court in other ways.[233] However, the Courts have not wound up companies where they find that the company has disputed the debt on substantial grounds. What are the substantial grounds is left at the discretion of the Court, to be determined keeping in view the facts and circumstances of each case. The Courts do not take upon themselves the exercise to determine whether the amount claimed by the creditor is due[234] and payable by the company, for which exercise, according to them, the proper forum is the civil court by means of a regular action (civil suit for recovery). They say that winding up proceedings cannot be used to pressurize the debtor company to pay disputed debts. They confine the winding up proceedings to scrutiny into the solvency or insolvency of the company. The result is that the abstinence on the part of Courts in the matter of determination of 'sum due' within the contemplation of section 306, in particular clause (1)(a), or the refusal to allow an opportunity to the petitioning creditor to prove the existence of debt and its non-payment in other ways makes the Courts, day in and day out, to lay down new propositions and add new dimensions to the ground of inability to pay debts and further complicate the already complex situation. If the Court frames a two-fold issue, viz., whether the sum claimed by the creditor is due and payable by the company and whether the company has not paid the sum so due and payable and decides the same one way or the other, no injustice would be done to any party, inasmuch as right of appeal against the decision of the Company Bench is provided under the law and the party aggrieved by any decision can get the errors corrected from the appellate forum.

To throw light on the complexity that has surrounded the issue of inability of a company to pay its debts, initially it was intended to summarize the finding of the Court and ratio of the decision in each case referred to, and discussed, in different parts of the study, but considering that such a venture may lengthen the exercise not with a very useful purpose, it is now proposed to be content with such selections from the case law as would be sufficient to elaborate the issues in their entirety and provide enough basis to draw certain conclusions. With the above prelude, the following survey of the case law is undertaken:-

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[233] The Companies Ordinance, 1984, Section 306(1)(c)
[234] The Companies Ordinance, 1984, Section 306(1)(c)

### 6.1 Brief review of the case law

In the case of Mullah Abdullah Bhai v. Saria Rope Mills Ltd.[235] the High Court of Sindh (Pakistan) holds that the word "unable" does not mean "unwilling" and the word "debts" refers to all the creditors as a class and not separately to the interests of each individual. To be able to invoke the ground of inability to pay debt for the winding up of a company, the following ingredients, it is said, must exist: -

(1) There should exist a debt;

(2) It should not be the subject of an honest dispute;

(3) The company should be unable to pay its debts;

(4) The basic object of scrutiny in such proceedings is the solvency or insolvency of the company and not the truth of the claims of the creditors because there may be a company which is in reality under an obligation to pay huge debts but may be honestly disputing them and, therefore, refusing to pay them. In such circumstances, if the winding up proceedings were continued, they would be converted into proof and disproof of the debts and the main object which is scrutiny into the solvency or insolvency of the company will be relegated to the background;

(5) A company which is able to pay its debts cannot, in terms of section 162(v)[236] of the Companies Act, 1913, be ordered to be wound up except in the sense that refusal to pay a genuine debt is usually accompanied with the existence of a state of insolvency. If a debtor is merely unwilling to pay his debts, then the normal remedy is a suit where the creditor should prove his claim and execute the decree. If his debt is undisputed, then the decree will follow easily. If he simply desires to save court-fee, then the consideration of loss to the State revenue may not be in his way,

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[235] PLD 1971 Karachi 597

[236] Equivalent to section 305(e) of the Companies Ordinance, 1984

but he involves himself in a problem of proving insolvency of the company, which is different from a temporary misfortune of a company.

In the case under discussion, apart from the other elements required to be proved in the winding up petition, the object of winding up proceedings is stated to be the "scrutiny of the solvency or insolvency of the company" and not the "proof or disproof of the debts" or the "truth or otherwise of the claims of the creditors". It is further laid down that "if a debtor is merely unwilling to pay his debts, then the normal remedy is a suit where the creditor should prove his claim and execute the decree" and "if his debt is undisputed, then the decree will follow easily", but "if he simply desires to save court fee, then the consideration of loss to the State revenue may not be in his way, but he involves himself in a problem of proving insolvency of the company which is different from a temporary misfortune of a company."

In re: Douglas (Griggs) Engineering Ltd.[237] the ratio of the decision of the House of Lords is as under: -

> The *prima facie* right of the petitioning creditor to a winding up order based on judgment is not displaced merely by showing that the company had a disputed claim against the petitioning creditor which was the subject of litigation in other proceedings.

Here, the Court nullifies the effect of disputed claim, which is pleaded on the basis of pending litigation. However, if the Court had undertaken the simple exercise of determining the amount due under the claim of the creditor against the company and its non-payment by the company, the Court would not have been obliged to give the above reasoning, which would be the subject of further explanations and elucidations.

In re: C. Hariprasad v. Amalgamated Commercial Traders (Pvt.) Ltd.[238] the law laid down by the Madras High Court of India is as under: -

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[237] 1962 All ER 498

(1) The amount of dividend becomes payable forthwith on the declaration thereof and that the same not having been paid, there would be a valid debt on which the petition for winding up of the company could be founded.

(2) The petition for winding up was allowed on the ground that the company was unable to pay its debts but at the same time the Court directed that the order of winding up was to be kept in abeyance for a period of three weeks in order to enable the company to pay the dividend to the two creditors whose winding up petition was found competent.

In this case, the Court treats the amount of dividend payable by the company and orders winding up of the company on its non-payment. The act of the Court in keeping in abeyance the winding up order for a period of three weeks stultifies the proposition that the winding up proceedings cannot be used to pressurize the debtor company to pay its debts.

In re: Sri Shanmuear Mills Ltd. by Managing Agents Sri Alasai Ltd. v. S.K. Dharmaraia Nadar[239], another case from Indian jurisdiction, the Court deals with the issue in the following manner: -

(1) A winding up petition was filed under sections 433(e) and 434(c) of the Companies Act, 1956, on the ground that the company was unable to pay its debts within the meaning of the above provisions of the Act. The petition was resisted by the company and it was, *inter alia,* pleaded that the company's liability amounted only to Rs.8,72,414 whereas the value of its assets was Rs.10,79,130, which also included the value of the building and machinery without which the company could not function. It was held that for determining the question as to whether the company

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[238] AIR 1964 Madras 5118
[239] AIR 1970 Madras 203

would be able to meet its then demands, the value of such assets without which it could not carry on business, should not be taken into account. It was further held that the test of inability to pay the debt under section 433(e) was not whether the company, if it converted all its assets into cash, would be able to discharge its debts, but whether in a commercial sense the existing liabilities could be paid by it while it continued to carry on as a company, and thus, the company must be considered unable to pay its debts within the meaning of the above provision for the reason that after the value of the building and machinery the total amount available was a sum of Rs.300,000 as against the aforesaid liability of Rs.872,414. Accordingly the winding up petition was granted.

(2) A company could be wound up on the petition of a creditor for its inability to pay his claim after proper demand was made by him and on the lapse of three weeks from the date of service of such demand, even though the company was commercially solvent. It was further held that the object of section 434 was to create a fiction as to when a company would be deemed to be unable to pay its debts, and if the facts of the case came within the scope of that fiction, it would not be open to the company to say that in reality it was in a position to pay its debts. It has also been held that in such a case it will be really unnecessary to enquire whether the company is in fact solvent or not.

A new dimension is added that in determining the question as to whether the company would be able to meet its current demands, the value of such assets without which it cannot not carry on business, should not be taken into account. Other dimension is that the test of inability to pay the debt under section 433(e) is not whether the company, if it converts all its assets into cash, will be able to discharge its debts, but whether in a commercial sense the existing liabilities can be paid by it while it continues to carry on as a company. Next is that in certain cases it is not necessary to inquire into the solvency of the company. Here, the contradiction is that the proposition with regard to object of

winding up proceedings being the scrutiny into solvency or insolvency of the company is nullified, or at the most an exception to that proposition is created. The propositions are piling up with every new case.

However, the above long reasoning process would not be called for if the Court had followed the straightforward course of determining the amount due and payable and its non-payment within the contemplation of section 306.

In National Bank of Pakistan v. Punjab National Silk Mills Ltd.,[240] the ratio of the decision of the Lahore High Court (Pakistan) is as under: -

> If a company does not pay any amount despite repeated notices given to it in this behalf, suspends its business (for more than three years) and also discharges all of its employees, the winding up petition is a legitimate method of enforcing payment of a just debt and the creditor who is unable to obtain payment of his debt has the right *ex debito justitiae* (in accordance with the requirements of justice) to a winding up order.

In this case, the propositions have been stated in somewhat simple terms, viz., (1) a creditor who is unable to obtain payment of his debt has the right *ex debito justitiae* to a winding up order, and (2) the winding up petition is a legitimate method of enforcing payment of just debt. However, the problem arises with reference to the qualification attached to a debt by adding word 'just' because here the Court is called upon to determine whether the debt claimed against the company is just or not. Further, the direction of the Court has been diverted to other channels, such as the suspension of business (otherwise an independent ground for winding up), discharge of employees, etc. Certainly, beyond this point, the Courts deciding winding up petitions would be required to keep these considerations as well in their mind. The law is thus denuded of certainty, or more complexity added.

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[240] PLD 1969 Lahore 194

The second proposition is against the proposition that the winding up proceedings cannot be used as a means of debt realization, which should be done through a suit for recovery. It is a clear contradiction. These propositions and contradictions have come into existence on account of the trend and approach to avoid determination of the amount 'due and payable'.

In Madhusudan Gordhandas & Co. v. Madhu Woolen Industries (Private) Ltd.[241] a yet another case from the Indian jurisdiction, the following principles have been noted: -

- The defence of the company should be in good faith and one of substance;
- The defence is likely to succeed in point of law; and
- The company adduces *prima facie* proof of the facts on which the defence depends.

In this case, the winding up was prayed on the ground that the company was unable to pay its debt. It was pleaded that according to the balance sheet, the liabilities of the company were far above its liquid assets. Besides, the company had incurred losses and had stopped its functioning. The company disputed the claim. It was stated that a sum of Rs.72,556 was payable by the company to the creditor and there was a settlement in respect of payment of Rs.14,850. The appellant denied such a compromise. In such a situation, the learned Judge refused to wind up the company and asked the respondent company to deposit the disputed amount of Rs.72,556 in Court. It was further directed that if within six weeks the appellants did not file the suit in respect of the recovery of the amount, the company would be able to withdraw the amount and if the suit was filed the amount would stand credited to the suit. In appeal against the above order, time for depositing the amount and filing the suit was extended on the same terms.

In this case, the Court, in the first instance, lays down the ingredients that a company is required to show to dissuade the Court from passing a winding up order. Thus, the onus is on the company to show its defence is in good faith and one of substance; the defence is

[241] AIR 1971 SC 2600

likely to succeed in point of law; and the company adduces *prima facie* proof of the facts on which the defence depends. Here, the scope of inquiry in winding up proceedings is made subject to very wide and loose propositions. Each Judge takes a different view of these propositions in the same set of circumstances, which is borne out from the survey of the case law.

In the instant case, the Court found that the company had disputed the claim as a sum of Rs.72,556 was payable by the company to the appellant and there was a settlement in respect of payment of Rs.14,850, but the creditor denied such a compromise. What the Court did in the above background was to ask the company to deposit the disputed amount of Rs.72,556 in Court and further directed that if within six weeks the appellant (creditor) did not file suit for recovery of the amount, the company would be at liberty to withdraw the amount and if the suit was filed, the amount would stand credited to the suit. In appeal against the above order, the appellate Court extended time for depositing the amount and filing the suit.

What is discernible from the circumstances of the case is that the Court feels that the company owes certain amount to the creditor. That is why it asks the company to deposit the same with it. But, then directs him to approach the civil court and file a suit for recovery of the amount.

The whole reasoning is employed not to undertake the exercise of proof or disproof of debts, which is the basic issue in winding up proceedings requiring determination by the winding up Court. This is because of the approach that the Company Court does not undertake the exercise of determining whether the amount claimed against the company is 'due and payable'. The Company Court also does not see whether the debtor companies make any efforts to 'compound or settle the claim' within a period of 30 days of the statutory notice.

In the same string is the case of Federation of Pakistan v. Standard Insurance Company Ltd. Karachi[242] where the Court held that the denial made by the respondent company was based on a triable issue and was neither frivolous nor merely a cloak to avoid payment under the bond, rather was based on substantial ground; thus remedy by way of winding up order was neither equitable nor justified in the circumstances of the case. Here, the Court says that the denial by the company is based on a triable issue, and the defence is neither frivolous nor merely a cloak to avoid payment and refuses to make winding up order. Thus, the creditor is pushed to a fresh round of litigation elsewhere. The question is whether it is difficult to raise a dispute – a dispute that looks *bona fide* or genuine? One of the aims of the Company Law is to protect the rights and interests of the creditors. This approach does not serve that purpose of the law and is directly responsible not only for renewing the agony of the creditor, but has also led to multiplicity of litigation and wastage of time of the Courts.

In Trade and Industry Publications Ltd. v. Industrial Development Bank of Pakistan,[243] the Hon'ble Supreme Court of Pakistan lays down the following propositions: -

(1) It is well-settled that when there has been a failure to pay a debt in accordance with the statutory notice of demand, insolvency is to be presumed though no doubt it may also be proved in other ways.[244]

(2) The choice is with the creditor to go for winding up or to seek any other remedy available to him under the law.[245]

(3) Winding up order may not be passed where the debtor *bona fide* disputes the claim of the creditor or is able to show that notwithstanding the dispute he is in a position to pay the debts.[246]

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[242] PLD 1986 Karachi 409

[243] PLD 1990 SC 768

[244] Bengal Luxmi Cotton Mills Ltd. v. Mahaluxmi Cotton Mills Ltd. AIR 1955 Cal. 273. This reference to "proof of debts in other ways" too lends support to the proposition that "proof or disproof of debts is the basic aim and purpose of winding up proceedings".

[245] When the choice is with the creditor, it is against the spirit of the law to ask the creditor to seek his remedy by filing a suit for recovery. Under section 314, such a course is open to the Court only where the winding up is sought on the just and equitable ground, but not on other grounds.

[246] Actually, the third proposition should be "Winding up order may not be passed where the creditor fails to prove his claim."

Here, it is laid down that insolvency is to be presumed if the company fails to pay its debt in accordance with the statutory notice, and seeking winding up of the company making default in payment of debt, or availing any other remedy provided under the law is the choice of the creditor. However, having said that, clog is placed upon the creditor that the debt should not be disputed *bona fide* by the company.

In Indus Development Bank of Pakistan v. Modern Poultry Farm Ltd.[247] the Court clarifies the position as under: -

> Where the debtor company owes large sums of money to the creditor which it neglects to pay, the presumption is that the debtor is unable to pay its debt. The plea of the company that the petitioner-bank has alternate remedies to recover the debt and hence the winding up petition be rejected is not entertainable.

The *ratio decidendi* of the above two cases is directly against the *ratio decidendi* of cases[248] where it is said that availability of alternative remedy is no ground to refuse winding up order where it is found that the company owes a debt and has failed to pay the same in accordance with section 306 of the Ordinance.

In Pakistan Industrial Credit and Investment Corporation Ltd. v. M/S Indus Steel Pipe Ltd.[249] the company was wound up, *inter alia*, holding as under: –

(1) A company cannot be wound up if there is a substantial and *bona fide* dispute regarding the debt claimed, and that presenting a petition for winding up with the sole object of bringing pressure on the company to pay the debt is not within the contemplation of the law.

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[247] 1990 CLC 1030
[248] e.g. PLD 1999 SC 1
[249] 1993 MLD 94

(2) Where inability to pay debts is established, the petition for winding up will be allowed and the contention that the assets of the company are greater than its liabilities merits no consideration.

In Messrs Sindh Glass Industries Ltd, Karachi v. Messrs National Development Finance Corporation, Karachi[250] the propositions of law were stated by the Hon'ble Supreme Court of Pakistan as under: -

(1) The inability to pay its debts can be demonstrated from the company's contingent and prospective liabilities and the debts which are immediately payable. The insolvency of the company is established if it is unable to pay debts due and payable from the realizable assets in hand and the fact that the debts can be paid out of the assets over a lengthy period of time is immaterial.

(2) According to Pennington, 'the company will also be unable to pay its debts if it has no reasonable prospect of paying all of them, both accrued and prospective, by a steady realization of all its assets, and in this case it will be immaterial that it can pay its accrued debts out of its liquid resources.'

(3) In the present case, the indebtedness has not been denied, but it has been alleged that the winding up petition is not *bona fide*. If a party challenges *bona fides*, it must state facts to show that the action taken against it suffers from *mala fides*. Mere statement that it was intended to frustrate the proceedings before the Ombudsman can hardly demonstrate *mala fides* of the respondent because considering the nature of jurisdiction Ombudsman exercises, this plea can hardly sustain. Even otherwise, the Ombudsman had heard the case and decided it, therefore, the same was not of much help to the appellant."

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[250] PLD 1996 SC 601

As to what debts are immediately payable, can be known after the issue is determined by the Court. In these two cases, new dimensions to the earlier propositions have been added.

In Bukhtiarpur Bihar Light Railway Co. Ltd. v. Union of India[251] the Court lays down the following propositions: -

(1) Where it is said that a creditor cannot rely upon any statutory notice of demand in the given circumstances merely means that no presumptive or constructive liability to pay the debts, as contemplated by section 163(1)(i) of the Companies Act, 1956 is available to the creditor.

(2) A creditor is at liberty to prove[252] still in other ways that in fact the company is unable to pay its debts within the meaning of item (v) of section 162 of the Act.

In Habib Credit and Exchange Bank Ltd. v. Sindh Sugar Corporation Ltd.[253] the propositions on the issue are summed up in the following words: -

(1) Section 306 of the Companies Ordinance stipulates that if within thirty days of receipt of demand to pay its debts exceeding Rs.50,000/- or 1% of its paid up capital, the company does not pay the due debt or secure its settlement or compound it to the reasonable satisfaction of the creditor, it would be deemed to be unable to pay its debts;

(2) Even otherwise the question whether the company is unable to pay its debts is to be resolved not from the stand point of the value of its assets but from its capacity to settle current demand and liabilities;

(3) Mere pendency of civil litigation between the creditor and the borrower company does not by itself bar the entertainment or grant of a winding up petition;

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[251] AIR 1954 Calcutta 499:

[252] The Courts do not allow creditors to prove their debts, on one or the other ground.

[253] 1999 CLC 1909

(4) If the claim of the creditor is genuinely disputed by the company and, in the event of pending litigation, a *bona fide* defence raising triable issue is pleaded, application for winding up may be liable to be treated as an attempt to coerce the company to settle an unwarranted claim and as such may not be granted; and

(5) On the other hand if the defence raised is considered to be sham or a mere cloak to avoid payment, the petition may be readily granted.

Proposition No. (3) is clearly against the *ratio decidendi* of the cases where it is laid down that winding up is not a mode of debt realization and that the creditor should prove his claim in a regular suit before the Civil Court.

All these propositions would not be required to be laid down if the straightforward course of allowing the creditor to prove his claim was adopted.

In American Marbles Products v. I.C.P.[254] the Court deals with the issue as under: -

(1) Plea of lack of competence viz., the respondent Syndicate (Investment Corporation of Pakistan) being investors on profit and loss basis were not the creditors within the contemplation of the statutory provision and thus were not competent to move the winding up petition when they had even failed to invest the covenanted sum. Conjunctive reading of the agreements, the demand promissory note, the trust deed and the registered mortgages, charges, hypothecations and the correspondence exchanged between the parties patently demonstrated the intendment of the parties and the nature of the arrangements made as to its juridical classification, a facility explicitly described as a loan in the agreement comprising long term PTCs and LFM refinancing by the Syndicate secured through mortgage of all present and future movable and immovable assets, uncalled capital, continuing floating charges, to rank *pari passu* with the

[254] 2003 CLD 515

existing mortgages/charges with other creditors at fixed rate of profit, payable biannually to be credited as expenses in the profit and loss account of the company, restraining the company from alienating any of its assets during subsistence of encumbrances or charges of mortgages in favour of the Syndicate in the event of default rendering the entire sum due and payable upon expiry of the notice period;

(2) Such factum had been admitted even by the company in the reply to the notice rendering unambiguously clear that the availed facility by the company from the Syndicate for all intents and purposes was a loan fully secured through proper documentation and not an investment simpliciter; and

(3) The company, admittedly since its incorporation nearly a decade ago, had not even commenced its business. The contention of the company as to failure of the Syndicate to disburse the entire loan facility on time was ill-founded since the terms of agreement of the facility preconceived performance of the undertaking by the company, which was lacking.

Here, the Court adopts the right course, inasmuch as it determines the sum due and payable by the company and makes the winding up order accordingly.

In re: Aeroflot Russian International v. Gerry's International[255] the Court comes to the following conclusions: -

(1) The powers of the Court to wind up a company on the ground that it is unable to pay its debts are not circumscribed by the limitation as provided for winding up orders on the ground that it is just and equitable to wind up a company;[256] and

(2) The assertion that the company is a going concern or that it is a viable company is not a good defence in a case where winding up is sought on

[255] 2003 CLD 1075

[256] The proposition of law with regard to the scope of discretion in winding up orders is correctly stated here. In many cases, the Courts may not be left with any discretion to refuse winding up order.

the ground that company is unable to pay its debts, such inability in terms of deeming provision of section 306(1) of the Ordinance having been established by the petitioner in present case.

New dimension of 'a going concern' or a 'viable company' is added in this case. These considerations are relevant where winding up is sought on the just and equitable ground.

In Messrs Platinum Insurance Co. Ltd v. Daewoo Corporation[257] the Supreme Court examined the case law on the subject at some length and summarized and reproduced some of the propositions involved in compulsory winding up of the company where the same was sought on the ground of its inability to pay its debts. A bare reading of these propositions, or the principles governing winding up, as they are called, clearly brings out the contradictions that have manifestly resulted from the interpretation of the relevant provisions. Those propositions are mentioned below, but in an arrangement, which points out the contradictions to the reader without going much deeper: -

(1) If the Court finds that the negligence on the part of debtor company to pay sum demanded in terms of section 306(1)(a) is not on account of want of commercial insolvency, but because of *bona fide* dispute based on substantial grounds as to the entitlement of the creditor to the amount demanded, application under section 306 read with section 309 of the Ordinance would not be sustainable.

(2) 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.

(3) The fact that the 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 winding up of debtor company.

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[257] PLD 1999 SC 1

(4) The object of sections 305 and 306 read with section 309 is not to coerce a debtor company to make payment to an unpaid creditor but to secure discontinuation of functioning of such a company which has ceased to be commercially solvent. Where, however, the Court is of the view that the company is unable to pay its debts, invoking these provisions cannot be said to be *mala fide*.

(5) Winding up of company on the ground of its failure to pay debts is a matter of discretion of Court. 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.

(6) Section 306(1)(a) 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 demand in terms of section 306(1)(a), the debtor company neglects to pay the sum demanded within thirty days of the receipt of notice of demand, or neglects to secure settlement or to compound for the same to the reasonable satisfaction of the creditor. Such presumption, however, is rebuttable if the debtor company can show that it is commercially solvent and is in a position to meet its liability on due dates.

(7) Once a creditor proves the service of a demand notice in terms of clause (a) of subsection (1) of section 306 of the Ordinance, the burden is shifted on the debtor company to rebut the presumption created by fiction of law by virtue of above clause (a), 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. A company has to show that it is in a position to pay the debts and is commercially solvent keeping in view its contingent and

prospective liabilities in terms of clause (c) of subsection (1) of section 306 of the Ordinance.

(8) The burden to prove otherwise is on the debtor company if the creditor is able to prove that it has served notice in terms of clause (a) of subsection (1) of section 306 of the Ordinance, and that the company has neglected to pay the due amount within the notice period of thirty days.

(9) 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.

(10) 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 such assets will have to be taken into consideration.

(11) The company has to show that it is in a position to pay debts and is commercially solvent keeping in view its contingent and prospective liabilities in terms of section 306(1)(c).

(12) The fact that the 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.

(13) 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.

A brief reference may also be made to the last ground of winding up, viz., just and equitable ground. The circumstance, *inter alia*, pleaded under this ground is the loss of

substratum of the company, such as the company's omission to pay coupled with its inability to meet its current demand or its assets are insufficient to meet its liabilities. In Ali Woolen Mills Ltd. v. I.D.B.P.,[258] the company did not give any reply to the notice of appointment of provisional manager under section 325 of the Companies Ordinance, 1984 nor did they produce their annual balance sheet and the profit and loss account in rebuttal of the evidence that the company was plainly insolvent and their liabilities greatly exceeded their assets and they lacked liquidity. They also failed to produce any evidence in rebuttal of the evidence that the substratum of the company had disappeared and it was not reasonably possible for the company to carry on business except at a great loss. As the company's mill was closed since long and it had been incurring losses year after year with no immediate prospects of reversing the position, therefore, the substratum of the company was gone. The substratum of the company is also deemed to be gone when the subject matter of the company is gone, or the object for which it is incorporated had substantially failed, or it is impossible to carry on the business of the company except at a loss or the existing or probable assets are insufficient to meet the existing liabilities. In such circumstances, the Court would be justified in winding up the company. However, in refusing to make an order for winding up of a company, the Court first has to come to the conclusion that some other remedy is available to the petitioner and the petitioner is acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. A company may be rich, yet it may be commercially insolvent. The real criterion is whether it can meet its liabilities. The Court has to see whether the company is commercially insolvent i.e. whether it is unable to meet its current demands although assets when realized may exceed its liabilities.

In this case, the Court talks of evidence in rebuttal and many other considerations, which shows that the Court is required to examine evidence obviously with a view to determining whether the amount is due as also the evidence of non-payment of the debt. If the Court had straightaway determined the sum due and payable by the company, it would not be required to enter into such a long reasoning process or to deal with so many propositions. Thus, complexities have been further complicated.

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[258] PLD 1990 Supreme Court 763

In Messrs Industrial Development Bank of Pakistan v. Messrs Sarela Cement Ltd. Co.[259] a learned Single Judge of the High Court of Balochistan, while construing section 9(3) of the Ordinance held that no doubt the above provision permitted adoption of summary procedure, but nevertheless to effectively decide the matter the Court was under obligation to carefully apply its judicial mind. It was further held that the company's inability to discharge its liability was to be presumed when the required notice in terms of section 306 of the Ordinance was sent by registered post or otherwise delivered at the registered office of the company calling upon the company to repay the outstanding amount and the company neglected within thirty days after the receipt of the notice to pay the sum due or to secure or compound for such demand to the reasonable satisfaction of the creditor. It was also held that before passing the final order of winding up against any company, the Court would be under legal obligation to form opinion under section 305, clause (h) of the Ordinance on the question whether it was just and equitable that the company should be wound up, keeping in view that the company had become commercially insolvent and there were no chances of its future prospects.

Here, the Court, by laying down that before passing winding up order, it is obligatory upon the Court to form opinion that it is just and equitable to winding up the company, introduces a new and a unique proposition. This proposition, in effect, nullifies the statutory weightage attached to each ground of winding up enumerated in section 305.

In PICIC Ltd. v. Waseem Beverages Limited,[260] petition for winding up of company was filed by a financial institution, which had provided financial assistance to the respondent company on grounds of its inability to pay its debts and its business having been suspended for over a period of three years. Despite many opportunities granted to file written statement, the same was not done, therefore, defence of the company was struck off and the matter was proceeded *ex parte*. Liability for the debts was not denied by the company in its reply to the notice under section 306 of the Companies Ordinance, 1984.

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[259] 1993 CLC 1540
[260] 2000 MLD 660

Non-payment of debts and suspension of business for over a period of 2/3 years was enough to conclude that substratum of the company had vanished. Consequently, the company was compulsorily wound up.

Where different grounds for winding up of the company are pleaded, as in the present case, in all such cases, separate issue should be framed on each ground to facilitate a clear cut finding and determination.

In Rauf B. Kadri v. State Bank of Pakistan,[261] the company had incurred losses over Rs.4 billion against its capital of Rs.0.656 billion and was unable to pay its debts despite service of statutory notice by the financial institution under section 306 of the Companies Ordinance 1984. Presumption of inability to pay debt in case demand was not secured or debts not settled, existed. The company was neither viable nor commercially solvent to discharge its huge liabilities. Winding up in the circumstances was just and equitable. In the appeal filed by the company against the winding up order passed by the Company Judge, the Supreme Court held that the company had completely lost its substratum and was neither viable nor commercially solvent to discharge its huge liabilities. Nothing was available on record except a bald statement of the counsel on behalf of an unauthorized person to suggest that winding up order suffered from any illegality or a factual or a legal infirmity. It was held that it was just and equitable to order the winding up of the company.

In Messrs Central Cotton Mills Ltd. v. Habib Bank Ltd.,[262] the Court discussed right of the bank to initiate winding up proceedings against a defaulter company. The company failed to demonstrate that the company was in a functional condition and was making profits. It also failed to prove that it was able to discharge its liabilities or to point out from its records the debts it owed to the bank. It also did not come out with a statement showing how much amount could be deposited by it to discharge its liabilities towards the bank. In its written statement, the company made no specific denial regarding

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[261] 2002 CLD 1794
[262] 2004 CLD 1272

liabilities towards the bank. Civil suits were pending between the parties against each other particularly one filed by the bank for recovery of the amount of loan. The Company Judge concluded that the company was not commercially viable unit and continued proceedings of winding up. The plea raised by the company was that the bank had instituted winding up proceedings for the recovery of its outstanding amounts and such proceedings could not be substituted for the recovery of amount and that the company had assets more than the alleged outstanding dues. It was held that demand of the bank requiring the company to pay the amount which was due was neither fulfilled nor the security was enhanced within a period of 30 days, therefore, notwithstanding any development which had taken place later on, including the furnishing of security, would not affect the winding up proceedings, which had been initiated after furnishing of security because strictly construing the provisions of section 306(1)(a), cause of action had accrued to bank for winding up. The company might have liabilities which it owed to the bank but the fact remained that it was not in a running condition nor was it commercially viable because it could not show profit so as to be able to discharge its liabilities. Thus, case for winding up on the just and equitable ground was made out.

In winding up on the ground of just and equitable ground, the propositions are whether the company is in a running condition, whether it is commercially viable, whether it is earning profits so as to discharge its debts, etc.

In all cases of winding up of companies where it is sought by a financial institution due to non-payment of loan by the company, the Courts in Pakistan in particular need to be more careful. Such companies obtain loans from the financial institutions and then create circumstances in which the company may be wound up.

Another circumstance pleaded for winding up under the just and equitable ground is deadlock existing among the management of the company. In Qamar Lone v. Kashmirian (Pvt) Ltd.[263] it was held that relationship between the parties was that of partnership firm i.e., a company limited by shares with equal shareholding. Two directors from each of

[263] PLD 1997 Karachi 376

parties with 50 percent shareholding indicated that company itself was incorporated by two brothers as a family concern. Conduct and attitude of parties towards each other indicated that there was complete lack of faith and confidence and business of company was at a standstill for more than two and a half years. The parties had been attempting to distribute assets and properties in the name of company for considerable period of time, but no mutual settlement could be arrived at. In the circumstances, a fit case for winding up was made out on several grounds, amongst others, that there was complete deadlock in relation to conduct of affairs of company and that affairs of company were not being conducted in accordance with provisions of Companies Ordinance, 1984 nor were they likely to be so conducted. Accordingly, the company was ordered to be wound up and the Official Assignee was appointed as Official Liquidator with all powers to take over assets, liabilities, debts and securities of company.

It may be seen that in every case, the Courts add a new dimension to the issue of inability of a company to pay its debts. On the basis of the above analysis of the propositions and issues, an effort is made to find the real object of the winding up proceedings, the scope of jurisdiction of the winding up Court and the other related matters under the following topics: -

### 6.2 Scope of jurisdiction of winding up court

The statement of objects given in the Companies Ordinance, 1984 shows that it is a consolidating and amending law relating to companies and aims at healthy growth of the corporate enterprises, protection of investors and creditors, promotion of investment and development of economy. It is a special law and has overriding effect over the general laws, which may be at variance with it. Pendency of legal proceedings between the parties is no bar to the initiation of proceedings under the Ordinance because the provisions of the Ordinance are not subservient to proceedings in any other forum including civil litigation.[264] Rather, the proceedings under the Ordinance have primacy over the proceedings pending in other courts.

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[264] Khaqan Industries Ltd v. Islamic Republic of Pakistan PLJ 1979 SC 381

To elaborate this primacy of the proceedings under the Ordinance and to know the scope of jurisdiction of the Company Court as also the extent of its powers in winding up of the companies and related matters, reference is made, in the first instance, to various provisions of the Companies Ordinance itself. Section 316 says that when a winding up order has been made or a provisional manager has been appointed, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Company Court. Subsection (2) *ibid* provides that the winding up Court, shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of any suit or proceeding by or against the company. Under subsection (3), any suit or proceeding by or against the company, which is pending in any court other than that in which the winding up of the company is proceeding, may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by the Company Court. Where the Court transfers a suit to its file, what will it do with it? Will it try the same, or will it just see whether a triable issue is raised therein and in case of an affirmative response will refer it back to the Civil Court? The case, particularly a suit so transferred, is to be tried and disposed of by the Company Court. In such a case, the Court acts as a trial Court. Thus, it is a Court of plenary jurisdiction. It is a court of fact as also a court of law. This position of law also obtains in other jurisdictions. This aspect has never engaged the attention of the Hon'ble Courts. Rather, the scope of jurisdiction of the Company Court has never been examined in detail or determined in any case.

A whole chapter under the title "Powers of Court" comprising sections 339 to 357 of the Ordinance enumerates the powers of the Court in matters, such as settlement of list of contributories and application of assets, requiring delivery of property of the company, ordering payment of debts by contributory, making calls, ordering payment into bank, regulation of account with Court (moneys, bills, etc. in the liquidator's account to be subject to the orders of the Court), an order on a contributory to be conclusive evidence that the money is due, exclusion of creditors not proving in time, adjustment of rights of contributories, imposition of costs, summoning persons suspected of having property of

company, public examination of promoters, directors, etc., arrest of absconding contributory, etc.

Under section 351, the Court has the power to summon persons suspected of having property of the company, examine them on oath, require them to produce books and papers in their custody, etc. Under section 352, the Court is empowered to order public examination on oath of a company's promoters, directors, etc., where the official liquidator has reported to the Court that in his opinion a fraud or other actionable irregularity has been committed by any such person. Notes of such examination may be used in evidence against that person and are open to inspection by any creditor or contributory. The Court may direct that such examination be held before the Official Referee, Master, Registrar of Companies, Additional Registrar or Deputy Registrar. Under section 353, the Court has power to arrest absconding contributory. Likewise, on a report of the liquidator under section 329(3), the Court may direct a person who has committed fraud or other actionable irregularity in the promotion of the company to attend the Court for a public examination as to the promotion or formation, or the conduct of the business of the company in the manner provided for examination in the case of winding up of a company by the Court.

Under section 391, the liquidator or any contributory in a voluntary winding up may apply to the Court to determine any question arising in the winding up of the company, or the Court may exercise its powers regarding enforcement of calls, stay of proceedings, or any other matter as it may do in a winding up by the Court. Any attachment, distress or execution in force against the estate or effects of the company may be got set aside from the concerned Court.

Under section 397, a petition for the continuance of a voluntary winding up subject to the supervision of the Court gives jurisdiction to the Court over suits and other legal proceedings as in a winding up by the Court.

Section 403 of the Ordinance provides that all debts payable on a contingency or claims against the company, present or future, certain or contingent, ascertained or sounding only in damages may be proved against the company being wound up. Where the debts or claims are subject to any contingency or sound only in damages, or for some other reason do not bear a certain value, a just estimate of their value will be made.

Section 412 of the Ordinance empowers the Court to assess, in the course of winding up of a company, damages against delinquent directors who have misapplied any money or property of the company and to compel them to repay or restore the money or property with surcharge at such rate as the Court thinks just by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust.

There are authorities suggesting resort to regular suits, e.g., where money is paid to a creditor by way of fraudulent preference, there is no summary method of recovering it and a regular suit should be filed by the liquidator.[265] A winding up Court, unlike an insolvency Court cannot take cognizance of, and adjudicate on, the title of third persons except to the limited extent mentioned in sections 408 and 410 and the liquidator, to impeach title, should have recourse to regular suits in ordinary Civil Courts.[266] The liquidator is required to complete the winding up in a period of one year. If the liquidator has to follow the above course, how much time he would take in being able to be released from the winding up proceedings, what to talk of finishing the winding up in a period of one year? Decision of the suit by the trial Court, appellate Court, High Court and the Supreme Court may prolong for decades altogether.

In the case of winding up of insolvent companies, the debts or claims against the company may be proved in accordance with the provisions of the law of insolvency. Therefore, reference to certain provisions of that law so far they govern the proof of debts, is necessary. This actually explains the nature of the jurisdiction of the Company Court.

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[265] Karachi Bank Ltd v. J.R. Castellino AIR 1932 Sind 106
[266] Hansrag and others v. Official Liquidator Dera Dun AIR 1929 All. 353

Section 2(3) of the Provincial Insolvency Act, 1920 (the Insolvency Act) defines the word 'creditor', which includes a judgment-debtor. The word 'creditor' means a person who can compel the performance of an obligation by another person who is called the debtor. Any person who at the date of the payment is entitled to prove in the bankruptcy and share in the distribution of the bankrupt's estate is a creditor.[267] The term retains its ordinary meaning and includes a decree-holder who has obtained judgment in respect of a tort as well as of a debt.

Under section 4, the Insolvency Court has full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making complete distribution of property in any such case. Finality is attached to such determinations. Under subsection (3), a roving power is available to the Court to sell a saleable interest of the debtor without a formal determination thereof in the first instance by the Court. Under section 9(1)(b) of the Insolvency Act, a debt must be a liquidated sum payable either immediately or at some certain future time.

Under section 33 of the Insolvency Act, all persons alleging themselves to be creditors of the insolvent in respect of debts are to tender proof of their respective debts by producing evidence of the amount and particulars thereof and the Court will prepare a schedule of such persons and debts. However, if in the opinion of the Court, the value of any debt is incapable of being fairly estimated, the Court may not include such a debt in the schedule. The framing of the schedule is the duty of the Court and not of the Receiver. Though a report from the Receiver may, in some cases, assist the Court, it is for the Court to decide on each claim on evidence, and in the case of contest after hearing necessary parties.[268] It is not a mere piece of empty formality but the Legislature has intended the

[267] In re: Paine, Ex parte Read 1897 1 QB 122
[268] Behary Lal Sikdar v. Harsukh Das Chakmal 25 CWN 137

Court to perform a judicial act and therefore there should be either a formal order proving the debts of the insolvent or at any rate some proceedings on the record indicating that the Court had applied its mind to the provisions of section 33 and the debts must be deemed to have been proved.[269] Under section 49, a debt may be proved by affidavit containing or referring to a statement of account showing the particulars of the debt, which may be substantiated by specifying the vouchers, if any. The Court may call for the production of those vouchers.

Indeed, many of the powers referred to above are exercisable after an order for winding up the company has been made, yet the fact remains that the kind of orders the winding up Court passes in the course of the winding up, or for that matter the insolvency court in insolvency proceedings depicts the whole spectrum of the business carried out by the Court. Here, a question arises if a winding up Court can exercise the above kind of powers after a winding up order has been made, why it can't exercise those types of powers at the stage when it is to be determined whether winding up order should be made or not.

Reference to various provisions of the Ordinance in the preceding paragraphs has thrown light on the object of winding up proceeding and the nature of jurisdiction of the Company Court. The Court tries suits and determines questions of fact and of law. It is, therefore, possible that either the Court should determine the existence or otherwise of the debt or get it determined through any other forum. It could be a firm of accountants/assessors. Such a course would be in line with the provisions of section 352, which permit examination of a person before the Official Referee, Registrar of Companies, etc.

### 6.3 Other remedy

In a large number of cases, it has been held that the availability of other remedy is no barrier in the way of a creditor to file a petition for winding up. In case of creditors'

[269] Walaiti Ram v. Partab Singh (1931) 32 Punjab Law Reporter 905

winding up, it is the sole discretion of the creditors to opt for a remedy deemed best to safeguard their interests in order to recover the debts owed to them.[270] At the same time, it has also been held in different cases that where the company pleads *bona fide* dispute on substantial grounds regarding the debt claimed against it, then the normal remedy available to such a creditor is a suit for recovery of the amount and not a petition for winding up.

There are a number of cases where the property of the company is mortgaged with the bank and the bank has a direct course to seize the property and sell the same to recover the amount owed to it by the company. However, instead of availing that option, the banks go for winding up. The Courts have held that availability of alternate remedy is no ground to refuse winding up where it is shown that the company has failed to pay its debt.

In Trade and Industry Publications Ltd. v. Industrial Development Bank of Pakistan[271] the company pleaded that the petitioning creditor IDBP should have proceeded under section 38 of the IDBP Ordinance (selling the mortgaged property) and not by way of a petition for winding up. The Court held that unless a debtor *bona fide* disputes the claim of the creditor, or is able to show that notwithstanding the dispute it is in a position to pay its debts, the plea is not of much substance. Now it is well-settled that when there has been a failure to pay a debt in accordance with the statutory notice of demand, insolvency is to be presumed though no doubt it may also be proved in other ways.

At this stage, it is relevant to look at the other grounds of winding up given in section 305 to see whether any procedure is provided in the Ordinance, which may be resorted to instead of ordering winding up of the company. The first is a resolution by the company for its winding up. In the context of the companies being formed in Pakistan by the members of the family, there is a need to take extraordinary caution because those companies obtain huge amounts of loans from the banks, raise capital from the public by floating their shares, obtain credits in the case of banking companies, and then get

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[270] IDBP v. M/s Sheikh Impex PTCL 1995 CLC 146

[271] Trade and Industry Publications Ltd v. Industrial Development Bank of Pakistan PLD 1990 SC 768

themselves declared insolvent. In consequence, the nominal assets of such companies are put to sale, that too to planted parties. That is how the amounts of the financial institutions are being devoured by the ghost companies.[272] In appropriate cases, the Courts may have recourse to the provisions of section 265 and get the affairs of the company investigated.

Under section 265, the Securities and Exchange Commission of Pakistan (SECP) as well as the Court is empowered to order that the affairs of the company may be investigated by an inspector appointed by the SECP where the business of the company is being conducted to defraud its creditors, members, etc, or in a manner oppressive to any of its members, or the company is formed for any fraudulent or unlawful purpose, members are being deprived of reasonable return, or full information is not being given to them, shares are allotted without adequate consideration, company is not being managed on sound business principles or prudent commercial practices, or the financial position of the company has been endangered. Thus, in appropriate cases, the Court may, instead of straightaway ordering winding up of the company as provided in section 305, order investigation envisaged by section 265. However, where such a course is adopted, the Court may, depending on the circumstances of the case, either appoint a receiver or administrator of the company so as to take charge of the affairs of the company for its smooth functioning, or in the alternative, appoint provisional manager or liquidator of the company. Thus, holding of investigation and appointment of receiver or provisional manager in the meantime may be an alternative to winding up order. Such investigation should invariably be resorted to where the issue of insolvency of a company has come under consideration.

Here, reference is made to the case of the Islamic Investment Bank.[273] This bank had obtained loans, had entered into fraudulent preferences, had entertained investments, but failed to honour its commitments in terms of return of the principal as also the mark up

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[272] Discussion with Mr. Mian Mohibullah Kakakhail, *Senior Advocate, Supreme Court of Pakistan* – the author of "Company Law in Pakistan"

[273] M/S Fecto Belarus Tractors Ltd. v. Government of Pakistan, Crl. Review Petition No. 22 of 2005 in Crl. Orig. No. 15 of 2002 decided by the Supreme Court of Pakistan on 4.6.2008

thereon. On account of the inability of the bank to discharge its obligations in terms of return of principal as well as mark up, a petition for its winding up was filed in the Peshawar High Court. An interim order passed in the matter is under appeal before the Appellate Bench of that Court.

The case of the Islamic Investment Bank presents a unique situation. The bank is left with very little assets. The directors of the bank have transferred the properties of the bank fraudulently. Investigation under section 265 was undertaken and the matter referred to the National Accountability Bureau (NAB) under the orders of the Supreme Court of Pakistan. The NAB, however, took too long to complete the investigation. The trial of the accused on criminal charges of misappropriations, embezzlements, fraudulent preferences, etc. is still pending before the NAB court. In such a case, winding up proceedings alone do not provide the appropriate relief because there is little left for distribution among the creditors/shareholders.

In such cases, the criminal offences committed by the directors and others concerned must be tried and concluded expeditiously. On proof of the charges, apart from the sentences of imprisonment and fine, attachment of properties of the convicts must be made and the grievance of the investors/creditors in terms of return of their money, both principal as well as mark up accrued thereon, redressed to their full satisfaction.

In the case of winding up on the just and equitable ground, section 314(2) provides that the Court may refuse to make an order of winding up, if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. However, this provision is not applicable to winding up on other grounds enumerated in section 305.

In the case of winding up on the ground of default in delivering the statutory report or holding statutory meeting, section 314(3) of the Ordinance provides that the Court may, instead of ordering winding up of the company, in the first instance direct the company to

deliver the statutory report or hold the statutory meeting,[274] as the case may be, and may also impose penalties on the persons responsible for not complying with the provisions of the Ordinance in this behalf.

A company may be wound up on the ground of non-commencement of business within a year of its incorporation,[275] or where the number of members is reduced below the legal minimum, i.e. below two in the case of a private company and below seven in the case of other companies. Under section 439 of the Companies Ordinance, 1984, the Registrar may strike off the name of the company if he finds that the company is not carrying on any business. The Registrar may come to that conclusion when the company specially so states. In such a case, the Registrar may not publish a notice in the official Gazette as no prejudice is likely to be caused to the company or its shareholders. For the purposes of this section, it is important that the company is not carrying on business otherwise the company will be restored.

Therefore, it is necessary that where a company pleads, in a petition for winding up against it that an alternate remedy is available to the petitioning creditor, it should be examined in the first instance, what other remedy or procedure is provided in the Ordinance itself to deal with the situation and the company law being a special law, an effort should be made to remain within the procedure laid down in the Ordinance.

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[274] ICP v. Charagh Sun Engineering, PLD 1997 Karachi 504

[275] Malabar I. & S. Works v. Registrar of Companies AIR 1965 Ker 35 The court does not exercise the discretionary power conferred on it to wind up a company which has not commenced its business within a year of its incorporation where the delay has been sufficiently accounted for, and there is no evidence of any improbability of its commencing its business within a reasonable time. Thus, the Court has to go into factual aspects and determine the issue on the basis of some tangible evidence. It is not a pure summary jurisdiction where the matter is to be decided on the pleadings of the parties, rather has to be decided on the basis of evidence produced before it.

## 6.4 Object of winding up proceedings

In Mullah Abdullah Bhai v. Saria Rope Mills Limited,[276] it was held that the winding up petition is not a substitute for a suit and if the object of a creditor applying for winding up a debtor company is to bring pressure on it, then it is an abuse of the legal process and by itself sufficient to displace the *prima facie* position that a creditor is entitled *ex debito justitiae* to a winding up order. Also, it is wrong to unnecessarily resort to winding up proceedings because there is an implied threat in them of bringing disaster to the company and because odium is also attached to such proceedings. The reason why an application for winding up is not a substitute for a suit is that in a suit for the recovery of a debt the creditor has to prove what is due to him, whereas in winding up proceedings under section 162(v) of the Companies Act, 1913 he has also to establish that the "company is unable to pay its debts".

It was held that the word "unable" does not mean "unwilling" and creditors are clearly in error in entertaining the view that winding up proceedings are a substitute for a suit to recover their debts. If a debtor is merely unwilling to pay his debt, then the normal remedy is a suit as a straightforward course of proving his claim directly and then executing the decree. If his debt is undisputed then the decree will follow easily. If he simply desires to save court-fee, then the consideration of loss to the State revenue may not be in his way, but he involves himself in the problem of proving insolvency of the company which is different from a temporary misfortune of a company. The word "unable" does not mean "unwilling" and the word "debts" refers to all the creditors as a class and not separately to the interests of each individual creditor. The general principle is that winding up shall not be ordered if it does not benefit the petitioning creditor.

The scope of jurisdiction of the Company Court as also the object of winding up proceedings, as stated in this judgment is "to establish that the company is unable to pay its debts". If that is all about the winding up proceedings, was it not possible for the

[276] PLD 1971 Karachi 597

legislature to use the words "if the company has become insolvent" in place of the words "if the company is unable to pay its debts" used in section 305. Further, if the inquiry in winding up proceedings were to remain confined to solvency or insolvency of the company, what was the need, or the occasion for the legislature to lay down exhaustive provisions of section 306, which elucidate the inability of a company? In this behalf, reference is made to In re: Avent Corporation Pvt. Ltd.,[277] where it was held that commercial insolvency need not be established in every case as it would lead to a logical absurdity, that, though section 434[278] lays down six grounds on which a winding up order could be made by the court, in the ultimate analysis, it boils down to only one ground, viz. actual inability to pay debt laid down in clause (e) of section 433. Such a construction would render all other clauses of section 433 redundant. Moreover, if that were to be construction to be placed upon section 434(1)(a) there would be no reason why section 434(1)(a) should have been enacted.

With the above preface, case law on the object of winding up proceedings is examined below: -

In Federation of Pakistan v. Standard Insurance[279] it was held that if denial of liability by the company to a particular debt is based on a substantial ground, then the Court will refuse to make an order of winding up, as the object of these proceedings is not to coerce the company to make payment to an unpaid creditor, but to secure discontinuation of the functioning of the company, which has ceased to be commercially solvent.

In HBL v. Golden Plastic[280], it was held that petition for winding up can be refused when claim of the petitioner is disputed by the company *bona fide* and the petition is filed to coerce the company and for satisfying some groundless claim made against it by the petitioner. It was held that reference has to be made to the balance sheets of the company to see that the company has sufficient liquidity or readily available assets to meet the

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[277] (1969) 39 Comp Cas 463 (Bombay)
[278] Equivalent to section 305 of the Companies Ordinance, 1984
[279] PLD 1986 Kar 409
[280] 1991 MLD 124

current liabilities. In this case, it was also held that fixed assets, plants and machinery are not to be ignored in assessing the solvency of the company, which is contrary to the ratio of many other cases.

In GES M.B. H Austria v. Ulbricht's (Pakistan)[281], it was held that the petition for winding up by a creditor was not a substitute for a suit for recovery of debt, and if the object of a creditor in applying for winding up was to bring pressure on debtor company, the same would be an abuse of legal process and by itself sufficient to displace *prima facie* position that a creditor was entitled to winding up order *ex debito justitiae*.

In Kaikobad Pestanjee Kakalia v. Almas (Pvt.) Ltd.[282] it was held that settlement of disputed claims between parties could not be undertaken in exercise of company jurisdiction, which is unique in its nature. Debts or claims of party against company could not be settled in winding up proceedings which were not substitute for sorting out disputes before courts of plenary jurisdiction. However, the "unique nature" of the jurisdiction of the Company Court is not explained in the judgment.

In Sindh Glass v. NDFC[283] it was held that winding up order would not be made on a debt which is *bona fide* disputed by the company, but the Court must see that the dispute is based on a substantial ground.

In Metito Arabia Industries v. Messer's Gammon[284] it was held that the object of winding up was not to coerce a company to make payment to unpaid creditors, but to secure discontinuation of functioning of a company which had ceased to be commercially solvent, and that mere unwillingness on the part of company to pay its debt would not mean "inability".

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[281] PLD 1992 Kar 249
[282] 1997 MLD 149
[283] PLD 1996 SC 601 Also see Hashmi Cans v. K.K. & co., 1992 SCMR 1006, Trade Industry v. IDBP, PLD 1990 SC 768, Adage Advertising v. Shezan International, 1970 SCMR 184.
[284] 1997 CLC 230

In PICIC v. Bawany Industries[285] it was held that winding up proceeding in any event could not be used as a lever for pressurizing company to pay debt which was severely disputed by it.

If what is held in Mullah Abdullah Bhai's case or the other cases noted above were the trite law, then it is useless to retain the ground of inability to pay debt in section 305 of the Ordinance. This should be deleted and a straightforward course provided to the creditors to file suits for recovery, but this is not the intention of the legislature. The legislature has kept this ground, as in the case of other grounds of winding up, as a threat to keep the company on the right track.

In Platinum Insurance Company v. Daewoo Corporation[286] it was held 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 and not a petition of winding up and the winding up proceedings cannot be used to pressurize the company to pay its debts. However, having held that, the Hon'ble Supreme Court maintained the order of winding up, but held it in abeyance for two weeks to enable the company to pay the debt and in case the company failed to pay the sum, the winding up order would hold the field. What is this "holding in abeyance the winding up order"? What is this "giving time to the company to pay its debt failing which the winding up order will come into operation? Does it not constitute pressure on the company? Exactly the same *modus operandi* is envisaged by section 306, which envisages the circumstances/events from which it is to be inferred that a company is deemed to be unable to pay its debts. Said provision requires the company to pay the sum due within 30 days of the service of notice, or to secure its settlement with the creditor. If the company does not do that, it would be deemed to be unable to pay its debts and liable to be wound up. How can it be justifiably argued that the winding up proceedings are not intended to pressurize the company to pay its debts?

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[285] PLD 1998 Kar 45
[286] PLD 1999 SC 1

Subsection (1) of section 306 of the Companies Ordinance, 1984 provides, by fiction of law, three events/circumstances from which it is to be inferred that a company is deemed to be unable to pay its debts for the purpose of a winding up petition, namely, (i) 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, than 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; (ii) 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; and (iii) 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.

Subsection (2) of section 306 of the Ordinance provides that the demand referred to in clause (a) of subsection (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.

The provisions of section 306 have been enacted in aid of the creditor. However, the manner these provisions have been interpreted, the measures taken by the legislature to regulate the conduct of the companies has been rendered ineffective.

In the same direction has gone the interpretation of the word 'neglected' used in section 434(1)(a), which is considered not necessarily equivalent to 'omitted'. It is laid down that it really means 'omitted to pay without a reasonable excuse'[287] and the expression 'neglects to pay the sum demanded' in section 434(1)(a) is not equivalent to the word

[287] Gautam Electric Motors v. Shanti Lal, ILR 1969 Del 708

'omitted'. Likewise, neglect to pay a debt on demand is omission to pay without reasonable cause. Failure to pay in spite of several communications including service of statutory notice is evidence of 'neglect' and 'inability'.[288]

It is also laid down that the *bona fide* dispute with a conditional offer cannot be taken as "neglect to pay" within the meaning of section 334(1)(a). If there is no neglect in the strict sense, the deeming provision of section 434(1)(a) does not come into the picture at all. It must be a neglect to pay an undisputed debt in the sense that it is a debt on which the dispute of the company is not *bona fide*. Further, in order to apply section 434(1(a) there must be demand satisfying the formalities provided therein. Even though it is not necessary to specify that the demand is under section 434(1)(a), there must be some indication to the company by the contents of the notice that in the event of non-compliance, the creditor will take steps to apply for winding up. Neglect is not a mere omission. It is omission to pay on demand without reasonable cause and with notice of the consequences.[289]

New dimensions have been added to the deeming provision, rather the simplified procedure under section 306 has been complicated by recourse to interpretative process. No useful purpose seems to have been served by spending time and energy on the definition of, and distinction between, the terms 'neglected' and 'omitted'. All that the Court should see is whether the company has not paid the amount.

The propositions of law evolved in the course of decisions of cases, such as where the defence taken by the company raises a triable issue, or if the Court finds that the negligence on the part of debtor company to pay sum demanded in terms of section 306(1)(a) is not on account of want of commercial insolvency, but because of *bona fide* dispute based on substantial grounds as to the entitlement of the creditor to the amount demanded, application under section 306 read with section 309 of the Ordinance would not be sustainable, or if a debtor company is merely unwilling to pay its debts but

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[288] Aero Electronics International Inc. v. Niful Data System Pvt. Ltd. (1997) 88 Comp Cas 234
[289] Suresh Shenoy (K) v. Cochin Stock Exchange Ltd (1989) 65 Comp Cas 240

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, and many more different propositions have created a setting whereby the issues that can be conveniently decided by the winding up Court are left to be taken up somewhere else. This type of approach is directly responsible for a two-fold consequence. One aspect is that a creditor of the company is deprived of the position that the law bestows upon him to overawe a debtor company and thereby keep it on the right track of conducting its affairs above board all the time. Actually, the law adopts zero tolerance approach against the delinquencies of the corporate entities. The other is that the approach has led to multiplicity of proceedings. Mostly, the winding up proceedings are initiated in the first instance, but then a civil suit is required to be filed.

It is apparent from the survey of the case law that the Hon'ble Courts have spent huge amount of time and energy in stating and re-stating the object of winding up proceedings where the winding up is sought on the ground of the company's inability to pay its debts. However, not in a single case, they have looked at the object of winding up proceedings on this ground in juxtaposition with the object of winding up on other grounds enumerated in section 305. This aspect is examined here, so as to reach an appropriate conclusion.

The circumstances in which a company may be wound up are, the company's special resolution to wind it up, default in delivering the statutory report to the Registrar, or in holding the statutory meeting, or any two consecutive annual general meetings, non-commencement of business within a year from its incorporation or suspension of business for a whole year, reduction in the number of members, inability of the company to pay its debts, unlawful or fraudulent activities being carried out by the company, oppression to the members, want of proper accounts, fraud, misfeasance, malfeasance, violation of the memorandum or articles, or provisions of the Ordinance, ceasing to be a listed company, or where the Court considers it just and equitable to wind up a company. A question arises what is the object of winding up in all these grounds. Correct, that different yardsticks apply to different grounds of winding up, yet the Courts should not be

oblivious of the overall scheme of the legislation, which is apparent from the nature of the grounds of winding up in their totality. In the case of a company's inability to pay its debts, the view that only insolvent company is to be wound up is against the overall scheme of the legislation and requires to be reconsidered. There may be companies, which are solvent, but neglect to pay their debts. There may be companies, which may be very rich, but may not be solvent.

In effect, the law employs the remedy of winding up as a means of compelling the company to perform its obligations and duties in accordance with the provisions of law, to conduct its affairs above board and to compel it to discharge its obligations, including the obligation to pay its debts. In support of this view, reference is made to the following passage: -

> The practical importance of the remedy of winding up petition on the company's inability to pay a debt is not that its use will inevitably bring the company into liquidation; indeed, liquidation is usually the last thing that a creditor, or anyone else, wants, because financially it spells disaster for all. It is instead the threat of liquidation that is often effective in achieving redress for an aggrieved member. He can stand beside the barrel of gunpowder with a lighted match in his hands, so to speak, demanding that he get what he wants – which in most cases is simply a good price for his shares – or else everyone, including himself, perishes swiftly and dramatically.[290]

The legislature intends to secure discontinuation of the functioning of the companies, which are not conducting their affairs in accordance with the provisions of the Ordinance, e.g., where the company is conceived or brought forth for carrying on unlawful or fraudulent activities, or it is carrying on unauthorized business, or it is conducting business in a manner oppressive to other members, or it fails to maintain proper and true accounts, or it is guilty of commission of fraud, misfeasance or malfeasance in relation to the company, or it refuses to act according to the requirements of the memorandum or

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[290] The Modern Law Review, *1973*, Vol. 36, pp. *129-130*

articles or the provisions of the Ordinance, or to carry out the directions or decisions of the Court, Registrar of Companies, etc., or it ceases to be a listed company and of course where it is unable to pay its debts as elucidated in section 306 of the Ordinance.

An overall view of the above circumstances in which a company may be wound up would suggest that the law employs winding up as a regulatory/punitive measure against a company, which fails to fulfil any of the statutory requirements or does not keep its affairs transparent and above board. It can also be said that the winding up is a death penalty for the delinquencies of a corporate entity. It is in the nature of penalty with a deterrent effect. The Courts in many cases have used it as such, though at times they say that this is not to be used as a pressure technique, which is a contradiction in terms.

### 6.5 Discretion of the Courts in winding up of the companies

Under section 314(1), the court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to, or in excess of those assets, or that the company has no assets. The position of law stated in sections 305 and 306 has become complicated with every successive judgment and voluminous case law on the subject of winding up of a company on the ground of its inability to pay its debts has been produced. The courts have landed themselves in a sea of uncertainty because in each new case they have yet to find other propositions to keep themselves on the position that the basic object of the winding up proceedings is the scrutiny into the solvency or insolvency of the company and not the determination of the sum due and payable by the company and its non-payment by the company. It is an unending process and they never find the shore.

Given the different grounds of winding up of a company enumerated in section 305 and the provisions of section 306, the discretion of the Court in refusing winding up order is not unfettered, though there may be a good deal of discretion where winding up is sought on the ground that it is just and equitable to wind up the company as laid down in section 314 and the Court may refuse to make an order of winding up if it is of opinion that some

other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. However, this may not be the position with regard to other grounds of winding up.

In the case of Ali Woolen Mills Ltd[291], it was held that the Court has discretion under section 314 subsection (2) of the Ordinance to refuse to make an order of winding up of the company if the petition is presented on the ground that it is just and equitable that the company should be wound up, but in refusing to exercise discretion in favour of a petitioner, first the Court has to come to the conclusion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. In this case, the Court came to the conclusion that it was just and equitable that the company be wound up inasmuch the company was undisputedly running in loss year after year and the mills of the company were closed since long, hence substratum of the company had gone.

In Habib Bank Ltd v. Hamza Board Mills[292] it is laid down that the Court is required to examine whether dispute regarding payability of debt in order to oppose winding up petition is raised *bona fide* and on substantial grounds on account of which the Court is satisfied that proper remedy would be to file civil suit in given circumstances. In such a situation, the Court is required to record reasons and give a definite finding that the dispute between the parties is not capable of being resolved in the proceedings under the Companies Ordinance and it is advisable to have the issue determined before the Civil Court.

### 6.6 Cause of action in winding up proceedings

The cause of action in winding up proceedings is the liability of company to pay its debt and not as in an action for recovery of debt. The question of recovery does not arise until

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[291] PLD 1990 SC 763
[292] PLD 1996 Lahore 633

the winding up order has been made and a liquidator appointed.[293] Where a creditor files a petition for winding up, he is not asking for recovery of his debt, but he is seeking winding up of the company. It is the choice of the creditor to file a suit for recovery of the amount due from the company, or to file a petition for winding up of the company which has failed to pay the due amount as required under section 306. In filing a petition for winding up, he exposes himself to the danger of getting, may be, less than due because the assets of the company have to be disbursed according to the legal criteria, and most likely he would be paid *pari passu* whereas in filing a suit for recovery he stands a chance of getting his whole due amount. Law does not place any restriction on the choice of the creditor except where winding up is sought on the just and equitable ground. Therefore, a winding up Court should not be concerned with the other modes of recovery. The Court would be justified in taking the view that the winding up proceedings are not substitute of recovery suit if the creditor makes the prayer for winding up of the company in the alternative where his prayer for issuing a direction to the debtor company to make the payment in question is not granted.

## 6.7 Framing of issues and determination of the sum due and payable

In New State of India Insurance Co. v. Superintendent of Insurance, New Delhi[294] a Division Bench of the Lahore High Court held that the fact that the insurance company was carrying on business at a loss, was no ground for its winding up, especially when not a single shareholder had come forward to support the petition for winding up. In this case, on the pleas of the parties, the learned District Judge, acting as a Company Court, framed the following issues:-

(i) Is the company insolvent?

(ii) Is the company's continuance prejudicial to the interests of the policy holders?

(iii) Is the company liable to be wound up?

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[293] Kashinath Shankarappa v. New Akot C.G. & Pressing Co. Ltd. AIR 1951 Nag 255; 1950 ILR Nag 585; (1950) 20 Comp Cas 225

[294] AIR 1943 Lahore 109

The learned District Judge recorded evidence led by the parties and found these issues in the affirmative and ordered that the company be wound up.

In this case, while construing section 53(2)(b)(iii) of the Insurance Act, 1938, the Division Bench held that in judging the financial position of an insurance company at a given moment, while it was not possible to regard the entire unpaid capital as available to the creditors at its face value, it was equally wrong to leave it out of consideration altogether regardless of the position and solvency of the shareholders. Therefore, the order of winding up was set aside.

In Javid A. Zia v. Sahiwal Textile Mills Ltd[295] it was held that the Court may wind up a company if the records of the company show that it did not commence business within one year of its incorporation. The company made false statements to confuse the date of its incorporation but the Court found from the record that it had not commenced business as required by law. Thus, it was held that it was not necessary to frame any issues since from the statements it was clear that a case for passing order of liquidation of the company had been made out. Accordingly, the Court ordered liquidation of the company and appointed liquidator.

There is an indication that the Company Court has to frame issues for a systematic resolution of the controversies involved in the case.

One of the objects of any law is to provide certainty. The Companies Ordinance achieves this object by making detailed provisions governing different aspects of corporate affairs. A question arises whether the interpretation of "inability of pay debts as a ground for winding up of companies" has, in any way, served the above purpose or the issue has been rendered obscure with every judgment giving a new meaning to the phrase "inability to pay debts" or the deeming clause in section 306? In one case with a more or less similar set of circumstances, the Court decides the matter itself and gives a finding;

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[295] NLR 1980 Civil Lah. 896

in others it asks the parties with almost similar stance to seek their remedy elsewhere. How to overcome the difficulty of thus bewildered litigant?

The amount of legal literature that has piled up on the cases relating to winding up of companies on the ground of their inability to pay debts, and the vicious circle that has surrounded the law on the subject calls for a review of the whole perspective. Either the ground of inability to pay debts should be excluded from the grounds of winding up of a company and made subject to determination by the Civil Court, or the straightforward course of determining the amount due and payable by the Company Court should be adopted and the litigants relieved of the uncertainty and unambiguity.

If the latter course is adopted, all that the Court would be required to do would be to frame issue, take evidence and determine whether the amount is due and payable by the company and whether the company has not paid the same. An affirmative finding would warrant an order for winding up. The duty of the Court to determine the existence or otherwise of the debt is established from various provisions of the Ordinance noted in section 6.2 ante.

In Sales Tax Officer, Petlad v. Rajratha Naranbhai Mills Co. Ltd. & another[296] the Court interpreted the word 'due' used in the Sales Tax Act and laid down that it implies or conveys meanings in juxtaposition in which it is used in the two parts of the same clause. It was held that the word 'due' in the first part of the clause must mean 'outstanding at the relevant date'. The word 'due' in the expression 'having become due' means that the event which brought the debt into existence occurred and also it became payable, meaning thereby that its payment could have been enforced against the company within the twelve months before the relevant date, that is, the date of the order of winding up. It was held that three specific conditions prescribed in the relevant clause must co-exist and be satisfied in respect of any particular debt for which priority is claimed. The three conditions are: -

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[296] [1974] 44 Company Cases 65

(i) Debt of the kind mentioned in the clause must be outstanding on the relevant date;

(ii) The debt must have become due in the sense that it must have been incurred at any time within the twelve months next before the relevant date; and

(iii) The debt must have been payable at any time within the twelve months next before the relevant date.

In this case, it was concluded that the tax became due when taxing event occurred and not when assessment orders were passed and that the claim for priority was rightly negatived by the liquidator because even though amount for which priority was claimed was the amount of arrears of tax that became payable at the time of making assessment orders after giving credit for what was paid along with return, yet it was due for a period much prior to 12 months next before the relevant date and even if it had become payable on the assessment order being made and demand notice being issued, as both the conditions did not co-exist and were not satisfied, claim for priority had been rightly negatived by the official liquidator requiring no interference in his order. The appeal on that score was rejected but was allowed to the extent of a small amount of Rs.1225.36 being the amount of penalty under the Bombay Sales Tax Act and the Central Sales Tax Act up to the relevant date and the liquidator was directed to admit the said claim over and above the claim admitted by him. So, there was a determination of the amount due and payable by the company.

The case of Welsh Brick Industries Ltd[297] is one of the few judgments among the plethora of case-law discussed in the present study that touches some aspects of the thesis proposal. In this case, the learned County Court Judge, acting as Company Court went into the evidence, found that a debt existed and proceeded to make a winding up order. The case has been examined in quite some detail in Chapter 2 titled "Propositions and Considerations in Compulsory winding up". The High Court of Calcutta examined and analyzed the aforesaid case in Bengal Luxmi Cotton Mills Ltd. v. Mahaluxmi Cotton

[297] 1946(2) All ER 197

Mills Ltd.[298] The learned author Judge, before parting with the judgment, added a note of caution in the following words: -

> "I desire to make it clear that we are not laying down any general law as regards what the winding up court should or should not do when a debt is disputed. The question is one of convenience and practice and we have only indicated what, as a rule the practice ought to be when the dispute is a *bona fide* one and when it is not so. I desire also to add that if the dispute regarding the construction of the scheme be decided against the company, the company will still have the liberty to urge that no winding up order should be made against it on such other grounds as may be open to it. Equally, it will be open to the creditors, when the appeal comes up for further hearing, to urge the two remaining grounds on which also they claimed a winding up order before the learned trial Judge."

In India[299], the Companies (Second Amendment) Act, 2002 provides for the establishment of the National Company Law Tribunal to exercise powers and discharge functions as may be conferred on it under the Companies Act or under any other law for the time being in force. The Tribunal will consist of such number of judicial and technical members, not exceeding sixty two as the Central Government deems fit. A person who has been, or is qualified to be a Judge of a High Court will be appointed as President of the Tribunal by the Central Government. Appeals against orders or decisions of the Tribunal will lie before an Appellate Tribunal known as National Company Law Appellate Tribunal. Appeal against a decision or order of the Appellate Tribunal will lie in the Supreme Court. While trying a suit, the Tribunal and the Appellate Tribunal shall have the powers of a Civil Court and no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine.

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[298] AIR 1955 Calcutta 273

[299] Avtar Singh, Company Law, Fourteenth Edition, p. 522

## 6.8 Summary of the conclusions and recommendations

Winding up is the most important part of the company law. All the litigation under the company law is directly or indirectly concerned with winding up. As a natural corollary, therefore, the case law on the subject abounds. It is noted that more the issue has been litigated, the more complexity added to it. The legislature contemplated winding up of companies on certain grounds, including the ground of their inability to pay their debts. Petitions for winding up on the ground of inability of the company to pay its debts continued to be filed under different sets of circumstances, but the courts, instead of determining the amount due and payable by the company continued to lay down new propositions. Centuries ago, the English courts expounded that winding up petition would not lie if the company pleaded a *bona fide* dispute against the claim of the creditor. However, such exposition of law did not settle the issue. Petitions for winding up on this ground continued to be filed, that too mostly in a background of dispute over the debt. The petitions would proceed. In some, the winding up order would be granted, while in others, it would not be. The propositions, as highlighted in this dissertation, have continued to expand. There is no end to it. Clear contradictions in those propositions have been pointed out in the detailed survey of the case law. One judgment is laying down that the winding up proceedings are not meant to recover the disputed debts and the appropriate remedy is to file a suit for recovery. The other is saying that it is the choice of the creditor to file a petition for winding up of the company or to file a suit for recovery of the amount, which has not been paid by the company.

### 6.8.1 Winding up of companies and the Courts

There is a need to change the perspective on the issue. In saying that winding up order should be made where the company is unable to pay its debt, it is not intended that businesses should be put to end, but the purpose is to ask to act according to the letter and the spirit of the law. And, the ultimate objective is to eliminate the delay in the disposal of commercial cases in the interest of economic growth and development. In many cases,

liquidation may spell disaster for many and the Court, in an appropriate case, may not make the order. But still in a fairly good number of cases, it may be the other way round and the refusal to make the winding up order may bring complete disaster to the creditors and even the shareholders. Therefore, the discretion of the courts in winding up matters needs to be narrowed down by appropriate legislation. The ambiguities in the law should be removed and lacunae filled. The Judge should not be left to guessing in the vast majority of cases.

### 6.8.2 Winding up as a pressure technique

The law employs winding up as a threat and a pressure technique against the defaulting company. As seen in the foregoing pages, the Courts have used winding up as a means to pressurize the company to make the payment. In several cases, the winding up order was held in abeyance and the company was given time to make the payment failing which the winding up order would hold the field. In some cases, even the company was directed to deposit the disputed amount with the Company Court and the creditor was asked to file a suit for recovery and on filing of the suit the amount would be transferred to the court trying the suit.

- If the above view is to prevail, then the ground of inability to pay debts should be deleted from the grounds of winding up given in section 305 of the Ordinance and made subject of suit for recovery.

After all, why the Company Court should waste its time in determining whether the dispute raised by the company is *bona fide*? That having been done, mostly the decision of the Company Court is challenged before the Supreme Court of Pakistan and it takes years, in the vast majority of cases, to conclude the appeal or the petition for leave to appeal, as the case may, before that forum. If the decision of the Company Court that the debt is *bona fide* disputed one and the same is to be litigated before the civil court, is ultimately upheld by the Supreme Court, then a fresh round of litigation commences, which again may reach the apex Court. If the decree for recovery is ultimately upheld, the

creditor will initiate execution proceedings. A decree holder starts his journey afresh. What is the need of then having a full-fledged code in the form of Companies Ordinance, 1984, and what are the benefits of establishing Company Courts?

### 6.8.3 Winding up as a punitive measure

The remedy of winding up is indeed a regulatory method and a punitive measure against a company, which fails to fulfil any of the statutory requirements or does not conduct its affairs transparently and above board. It should be granted where a case for the same is made out. In some cases, the winding up of a company may enable its shareholders to form a new company where they would be able to utilize their resources, earn profits and maximize their wealth, which is the ultimate objective of any business activity. To say that the spirit of law is to encourage and save the institutions rather than to destroy them by winding up orders is against the letter and the policy of the law. The commercial entities are not institutions. There is an irreconcilable difference in an institution and a business concern. Nobody carries on business for the benefit of the general public. The purpose of any business is always to earn profits. A business is a means of making private gains, though it is possible that in the process the others may also benefit from it. In any case, the loss or profit of others is not the consideration in any business.

### 6.8.4 Practice and procedure in winding up proceedings

The courts have reduced the winding up proceedings to a bare perusal of statement of assets and liabilities, balance sheets, statement of accounts, etc. of a company. The net result of the ratio of the case law on the subject is that winding up petition will lie only where the debt is undisputed. This is against the spirit of the law relating to winding up of companies. The approach is open to serious objections, which have been highlighted in the previous pages.

The Court under the Ordinance is a court of plenary jurisdiction. It has the powers of civil court. There is a plenty of provisions in the Ordinance, which lay down that where

winding up order is made, any suit or proceeding by or against the company being wound up, pending in any other court should be transferred to the Court where the winding up proceedings are pending and the winding up Court is obliged to dispose of the same. In disposing of the suit, or any other proceeding, naturally the Court will determine and decide all the matters. In the process, it will have to record evidence, frame issues and give decision on those issues. The purpose is to avoid multiplicity of proceedings and conflict of decisions and protect the interests of the shareholders and creditors of the company. Therefore, in all winding up petitions, the Court should frame the two-fold issue, viz., whether the amount claimed against the company is due and payable? If so, whether the company has failed to pay the due amount? The Court, where necessary, should record evidence and decide the issue. However, the courts have not done this. They have not spent their time and energy in deciding the controversies brought before them in the light of the provisions of the company law, but have wasted their time and energy in laying down more and more propositions so as to refrain from deciding the matter themselves.

The law says that inability of company to pay its debts may be proved in other ways (section 306), but the Courts are not allowing the creditors to do it before them. Rather they are being asked to prove inability of the debtor company to pay its debt before the civil courts by means of a regular action.

It is not in line with the policy of the law to say that settlement of disputed claims cannot be undertaken in winding up proceedings, which are said to be unique in nature. On the contrary, settlement of disputed claims lies at the heart of the winding up proceedings and that is the very function of the Company Bench making a winding up order. In this behalf, reference may be made to the provisions of section 306, section 316 (transfer and disposal of suit by the Company Bench), sections 339 to 357 (powers of the Company Bench, e.g. power to summon persons for public examination, etc.,), sections 351 & 352, summoning of persons arrest of absconding contributory, section 353, direction to a person guilty of fraud to attend the Court for public examination, section 329(3), power to determine any question arising in winding up proceedings, section 391, jurisdiction

over suits and legal proceedings in a voluntary winding up subject to supervision of court, section 397, proof of debts payable on a contingency or claims against the company, section 403, assessment of damages against the delinquent directors, section 412, and various provisions of the insolvency law. Thus, there is ample indication that the Company Bench has the power and jurisdiction to try suits and determine questions of fact and of law. The Court should determine the existence or otherwise of the debt itself or get it determined through any other forum. It could be a firm of accountants/auditors/assessors. Such a course would be in line with the provisions of section 352, which permit examination of a person before Official Referee, Registrar, etc.

### 6.8.5 Role of the liquidators

In Chapter 4, titled "Liquidator" case law has been exhaustively examined. The law uses different terms, such as "receiver", administrator", provisional manager, provisional liquidator, or liquidator. The appointment of receiver is prohibited in respect of assets of a company in the hands of an official liquidator. Thus, except to the above extent, power to appoint a receiver in a fit case is impliedly available under the Ordinance. However, the Courts have not elucidated the circumstances in which a receiver or a provisional manager is to be appointed. What is the significance of the provisional liquidator and liquidator, and what are the circumstances in which provisional manager or liquidator is to be appointed, is also little known. Even the case law on the issue does not throw sufficient light on this aspect. It should be laid down clearly where receiver or manager is to be appointed and where provisional manager or liquidator is to be appointed. It is in the interest of certainty, which is the bottom line of every law, and efficiency to fill these lacunae by appropriate legislation.

Section 326 of the Ordinance requires the liquidator to complete the winding up proceedings within a period of one year from the date of the commencement of winding up. However, on an application of the liquidator, the Court may grant extension by one month at any one time, but the extensions so granted shall not exceed a period of six months in all, and shall be allowed only for the reason that any proceedings for or against

the company are pending in a court superior to the Company Bench. There is a need to ensure that winding up proceedings are completed within the contemplation of the law.

### 6.8.6 Protracted litigation

Section 306 of the Ordinance raises a presumption of inability to pay debt where the creditor has served notice of demand on the company and the company fails to pay the same or secure its settlement within 30 days. In the interest of economic efficiency, there is a need to develop a settlement mechanism where the claims against the companies can be settled and the creditors/investors are saved from the unending litigation process. The present trend of the case law has encouraged alternative channels of litigation for the scrupulous litigants. There are companies which obtain loans from the financial institutions, but do not pay the instalments of the loans as per agreements. In the petition for winding up against such a company, the Courts, sometimes innocently, spend their time and energy in laying down propositions in favour of such companies on the clever pleas of lawyers engaged by the companies on payment of heavy fees. The financial institutions are pushed to litigation. At times, the legal departments of the financial institutions also do not properly pursue their cases. To some extent, the Financial Institutions (Recovery of Finances) Ordinance, 2001 has come to the rescue of the financial institutions, inasmuch as they have been saved from resorting to separate execution proceedings. Under section 19 of the Ordinance, the decree-holder is not required to file a separate application and no fresh notice is required to be issued to the judgment-debtor. The proceedings in the suit are treated as execution proceedings. The Banking Court starts hearing of the matter for execution of the decree after 30 days of the judgment and decree. Where the record of the suit is summoned by the High Court in connection with the hearing of the appeal, the Banking Court retains copies of the decree and other property documents for the purpose of continuing the execution proceedings. Finally, the decree is executed in accordance with the provisions of the Code of Civil Procedure, 1908. In cases of mortgaged, pledged or hypothecated property, the financial institutions may sell or cause the same to be sold with or without the intervention of the Banking Court either by public auction or by inviting sealed tenders and appropriate the

proceeds towards the total or partial satisfaction of the decree. However, the procedure provided in the aforesaid Ordinance is not applicable to the company cases and the decree obtained here is subject to the normal provisions of the Code of Civil Procedure. Long time back in 1872, the Privy Council stated that the difficulties of a litigant in India begin when he has obtained a decree.[300]

Here, reference is made to Pakistan Industrial Credit and Investment Corporation Limited v. Dilshad Hussain.[301] This case is discussed in the Chapter on Liquidator with reference to determination of remuneration of the joint liquidators. But, here the objective is to highlight other dimensions, viz., the protracted litigation process a company may go through, involving different amounts of expenditure and leaving little for the creditors and the shareholders. In this case, order for winding up of the Mills was passed. Three provisional official liquidators were appointed and the Court fixed remuneration of 7% for one Mr. S.M. Hussain and two other official liquidators were to be paid in the ratio of 2:1, calculated at an amount of Rs.50 million – the amount realized upon sale of the Mills. The amount of commission was determined at Rs.37,50,000. Out of this Rs.25,00,000 went to Mr. S.M. Hussain whereas the other two liquidators were given Rs.6,25,000 each. A sum of Rs.15,000 for the salaries of stenographer etc. plus a sum of Rs.5,000 for stationary plus a sum of Rs.12,500 per case in respect of suits pending before the Banking Judge and Civil Judge, Rs.10,000 per case in respect of suits before the Civil Court and Rs.5,000 for First Appeal against Order pending before the High Court and an additional amount of Rs.7,200 for travel and daily allowances were ordered by Court to be paid to Mr. S.M. Hussain. It may be noted that in this case, different sums of money were allocated to meet the expenses of the litigation pending at different tiers of the judicial hierarchy of the country. The winding up proceedings were pending before the Company Bench. A suit was pending before the Banking Judge while another was pending before the Civil Judge. A first appeal against order was pending before the High Court. Certainly, the different channels of litigation would go up to the Supreme Court. Indeed, that was a vicious circle. One could easily imagine how long it would take to

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[300] Aamer Raza A. Khan, Commentary on the Code of Civil Procedure, 9th Edition (2005) p. 173
[301] 1986 MLD 823 (Lahore)

finalize all those proceedings, how much expense, time and energy would be spent all through, and finally and more importantly, what would be left at the end of the day for the creditors and the shareholders, the initial and final beneficiaries of any business concern.

### 6.8.7 Role of the lawyers

In the above backdrop, the financial institutions of the country have been deprived of huge amounts. The miseries of a private creditor (litigant) can be well imagined in the above scenario. At any rate, this factor has negatively impacted on the economic growth of the country to the utter disadvantage of the common man. The lawyers don't pay attention to this aspect because that suits them, but the institutions, the legislature and, above all, the courts have to do it.

### 6.9.8 Bar to the jurisdiction of the civil courts in company matters

It is also for consideration whether the jurisdiction of the civil courts may be barred in respect of all matters relating to companies and made triable before the Company Bench, as is proposed in India by virtue of the 2002 amendment in the company law. This is to be considered in the backdrop of the concerns, particularly of the international investors who hesitate to make investments in Pakistan due to the protracted litigation and thus not finding quick settlement of their disputes.

### 6.8.9 Expeditious disposal of company cases

One of the objects of the Companies Ordinance is the quick disposal of business related disputes in an exclusive forum of a higher stature, viz. High Court with a right of appeal provided before the Supreme Court in the case of certain companies with a requisite amount of paid up share capital. In the case of others, the appeal lies with the leave of the Court. The purpose is to save the investors and creditors from the unending litigation in the Civil Courts.

Under section 9, all matters under of the Ordinance are to be disposed of expeditiously through final judgment duly pronounced, but not later than 90 days from the date of presentation of the petition or application to the Company Bench. The law requires the Bench to follow the summary procedure and hear the case from day-to-day. The hearing is not to be adjourned for more than 14 days at any one time, but the total period of adjournments in any given matter should not exceed 30 days. Appeal is to be decided by the Supreme Court within 90 days.

The provisions requiring early settlement of disputes and expeditious disposal of cases are not being adhered to. The Courts have held that these provisions are not mandatory, but only directory in nature. The result is that the winding up proceedings are not completed within the prescribed period of one year but they continue much beyond the legally permissible extension of six months. The courts, by routine orders, permit such procrastination. The result is that the cases linger on for years, rather for decades altogether. This is apparent from the lists of different categories of company cases, winding up inclusive, pending before the different High Courts and the Supreme Court of Pakistan. Two company cases, in all, are pending before the High Court of Balochistan, one of 2006 and the other of 2007. In the Lahore High Court, there are still older cases. One relates to the year 1975, one to 1980 and one to 1984. There are cases of 1990 and onward. In all, there are 292 cases pending in that High Court. The oldest case in the Peshawar High Court relates to the year 1995. Two cases relate to 2000, three to 2004 and one to 2005. In the High Court of Sindh, the oldest case dates back to the year 1990. One is of 1991, three of 1993, one of 1998, and the rest are of 2000 and onward. In all, there are 67 company cases pending before that High Court. Once decided, most of these cases would go to the Supreme Court where they would be taking yet further considerable time. Presently, there are 45 company cases pending before the Supreme Court, the oldest being of 2001. Surprisingly, it arises out of an interim order.[302]

[302] Data collection by the author pursuant to visits to the Courts Registries, interviews and discussions with the Court officials and study of the Courts records(appended as Annexure to this study).

### 6.8.10 Need for an exclusive forum

There is a need to provide an exclusive forum for resolution of company law disputes and clearly lay down the scope of jurisdiction of such forum. In the meantime, the scope of jurisdiction of the Company Bench needs to be elaborated in the light of the relevant provisions of the Ordinance.

Under the amendments of 2002 in the Indian Companies Act, 1956 the powers and jurisdiction presently being exercised by various bodies, viz. Company Law Board, Board for Industrial and Financial Reconstruction, Appellate Authority for Industrial and Financial Reconstruction or High Courts have been consolidated and entrusted to the National Company Law Tribunal. To consolidate the litigation process in Pakistan too, particularly in relation to the company law, the proposed Indian model of setting up a separate hierarchy of Tribunals, viz., National Company Law Tribunal, National Company Law Appellate Tribunal and finally an appeal to the Supreme Court needs to be studied in detail to benefit from it.

### 6.8.11 Role of the Securities and Exchange Commission of Pakistan

The role of the Securities and Exchange Commission of Pakistan has been discussed in the Chapter on Compulsory winding up. It has been observed that the Commission is assigned multifarious functions. It is the regulator of securities market, i.e. the affairs of the brokers and agents, etc. It has a role in the appointment of administrators, receivers and liquidators of companies and investigations into the affairs of the companies. It deals with insurance agents and insurance brokers. It regulates credit rating companies as well as private pensions management companies. It provides guidance in the investment sector. In 2002, the non-banking financial companies were brought under the supervision and control of the SECP for the reason that the State Bank of Pakistan, their erstwhile regulator had not been able to do the job satisfactorily.

This huge collection of functions and duties in one single institution is against the principle of division of labour and the requirements of specialization, which call for establishment of separate and independent organizations for proper performance of different functions. Regulation of the corporate sector in terms of the Companies Ordinance, 1984 itself is a gigantic task and calls for an exclusive forum. The regulation of securities markets or the financial institutions also requires the services of independent and separate bodies. The Commission is also saddled with the responsibility of dealing with private pensions/voluntary pension schemes (VPS), insurance and non-banking financial companies. This combination of diverse functions in one single institution has not allowed the Commission to play its role with the vigour and efficiency that are required for ensuring good governance in the respective sectors. In the present scenario, the Commission is a jack of all trades, but master of none. It is wearing too many hats at the cost of not being able to provide services with the required efficiency, speed and accuracy. As a result, the securities markets of the country continue to suffer from lack of adequate supervision and regulation and, day in and day out, are afflicted with financial scandals. Unfortunately, in such scandals, the small investors are the big losers, rather the only losers. It is time that the Commission is relieved of some of its functions to be entrusted to separate, independent and, where necessary, coordinate organizations so that each body is able to deliver the goods in its primary sphere of duty.

After the BCCI debacle, Britain bifurcated the supervisory and regulatory functions and assigned them to separate and independent regulators. Consequently, now the Bank of England regulates the monetary and exchange rates system, Financial Services Authority supervises all the financial services, and the Registrar of Companies regulates company-shareholders affairs.

In the sphere of company law, the Commission is charged with the duty of conducting investigations and inquiries into the affairs of the companies on a host of grounds, some of which are given in section 305 of the Ordinance. Again, for the same considerations, the Commission is not able to ensure good governance in the affairs of the companies envisaged by the Companies Ordinance, 1984 through its medium. These functions

should be assigned to the Registrar of Companies exclusively for proper regulation and supervision of this sector. The office of Registrar of Companies should be upgraded to a separate and independent body. Likewise, various other functions of the SECP, such as the regulation and supervision of securities markets, financial institutions, NBFCs, Insurance and Pensions also need to be bifurcated and different divisions of the Commission converted into separate, independent and, where necessary, coordinate organizations.

The UK and the Indian models provide a good deal of guidance. Those mechanisms and procedure can be beneficially adapted to suit our local conditions, *mutatis mutandis*, keeping in view the past experiences, may be without incurring much additional liabilities and expenditures. This may prove a catalyst for change in the economic sector of Pakistan.

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## Bibliography


1. Aamer Raza A. Khan, Commentary on the Code of Civil Procedure 9th Edition (2005)
2. Amjad Saeed, Company Law and Practice in Pakistan
3. Avatar Singh, Company Law, Fourteenth Edition, EBC, Lucknow, 2005
4. A.B. Shahid, Financial Services: monitoring options Article published in the Daily Dawn of August 11, 2008
5. A.G. Chaudhry, The Companies Ordinance, 1984, Edition 1996
6. British Companies Legislation, Edition 2001, Sweet & Maxwell
7. Buckley on the Companies Acts, Fourteenth Edition, 1981, Butterworths
8. Butterworths Company Cases, 1983
9. Butterworths' Company Law Handbook, Eleventh Edition, 1997
10. Charu Chaudhri, Indian Company Guide
11. Concise Oxford Dictionary [New Edition 1982]
12. Daver's Elements of Indian Company Law (Sohrab H. Daver)
13. Dr. Khalid Ranjha, Company Law and Shareholders
14. Dr. P. Meinhardt, Company Law in Europe
15. Dr. P. Meinhardt, The Company Law on Great Britain
16. Encyclopedia of Company Law, Vol. II, 1958
17. GHOSH on the Company Law by Mian Irshad Mahmood (Pakistan Edition)
18. GHOSH Company Law by Justice Dr. P.D.Mukharji & others
19. Gower's Modern Company Law, 4TH Edition 1987
20. Griffiths & Miles Taylor, The Principles of Company Law
21. Irfan Ahmed Sheikh & Mian Asad Hakim Company Law in Pakistan, Edition 1997
22. Jawed Hussain, Judgments (Head Notes) on Company Law 1947 – 2003, B.M. Publishers, Karachi
23. K Smith and D J Keenan, Company Law, Second Edition Pitman Publishing, 1975
24. Lahore High Court Rules & Orders
25. K.M. Ghosh & Dr. K.R. Chandratre's Company Law, 13th Edition
26. L.B. Bhopatkar, The Indian Companies Act, 1930

27. L.S. Sealy, Cases and Materials in Company law
Second Edition, 1978 Butterworths

28. Magnus and Estrin on Company Law & Practice, Magnas and Estrin

29. Mary Oliver, Cases in Company Law, Second Edition, 1976
Macdonald and Evans

30. Mohibullah Kakakhel, Company Law in Pakistan with Companies (Court) Rules 1997

31. Muhammad Aslam Hayat, Company Law Digest (1947 – 1994)

32. Muhammad Faridul Haq, Commentary on the Companies Ordinance, 1984 (XLVII of 1984) with Rules

33. M. Farani of Lincoln's Inn, Manual of Companies Law

34. M. I. Sethna, Indian Company Act

35. Nazir Ahmed Shaheen, Practical Approach to the Companies Ordinance, 1984 2004 Edition

36. Palmer's Company Law, 22nd Edition 1976, Stevens & Sons, London

37. Palmer's Shareholders, Directors and Voluntary Liquidator

38. Pennington's Company Law, Fourth Edition, London Butterworths, 1979

39. Ramaya's *Guide to Companies Act*, 12th Edition 1992

40. RIS Sim, Case Book on Company Law

41. Shaukat Mahmood, Company Law, L.R.C. 1986

42. Shaukat Mahmood, Company Law, L.R.C. 1995

43. Shaukat Mahmood, Nadeem Shaukat, Company Law, Third Edition 1997

44. The Australian Companies Ordinance, 1981

45. The *Companies Act, 1913, [PLD 1983 Karachi 45]*

46. The Companies (Consolidation) Act, 1908 [U.K.]

47. The English Companies Act, 1948

48. The English Companies Act, 1967

49. The English Companies Act, 1980

50. The English Companies Act, 1985

51. The English Insolvency Act, 1986

52. The Indian Companies Act, 1956 [AIR Manual]

53. The Modern Law Review, 1973, Vol. 36

54. The Provincial Insolvency Act, 1920

55. T.E. Cain, Charlesworth's Company Law, 8th Edition, London Stevens & Sons, 1965

56. Zaka Ali, The Companies Ordinance, 1984 with Rules & Regulations Revised Edition 2006

**Websites**

57. www.app.minlaw.gov.sg Last visited on April 8, 2008

58. www.app.supremecourt.gov.sg Last visited on April 4, 2008

59. www.asic.gov.au Last visited on April 4, 2008

60. www.caselaw.findlaw.com Last visited on April 4, 2008

61. www.delhicourts.nic.in Last visited on April 4, 2008

62. www.digitallibrary.edu.pk Last visited on August 9, 2008

63. www.ezinearticles.com Last visited on April 4, 2008

64. www.geplaw.com Last visited on April 8, 2008

65. www.goliath.ecnext.com Last visited on April 4, 2008

66. www.india.gov.in Last visited on April 4, 2008

67. www.insolvencyhelpline.co.uk Last visited on April 4, 2008

68. www.opsi.gov.uk Last visited on April 4, 2008

69. www.pakistanlawsite.com Last visited on August 8, 2008

70. www.pakistanlawsite.com/pk Last visited on August 9, 2008

71. www.secp.gov.pk Last visited on August 6, 2008

72. www.thehindubusinessline.com Last visited on April 5, 2008

73. www.turksandcaicoslaw.com Last visited on April 4, 2008

74. www.wikipedia.com Last visited on August 9, 2008

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# ANNEXURE

## LIST OF COMPANY CASES

## PENDING BEFORE

## THE HIGH COURTS OF THE PROVINCES

## AND

## THE SUPREME COURT OF PAKISTAN

# THE HIGH COURT OF BALOCHISTAN

| S.No | Case No. | Name of Parties | Remarks |
|---|---|---|---|
| 1 | C.P. No.1/2006 | Assistant Registrar Companies v. Pak Fibre Industries | |
| 2 | C.P. No.1/2007 | M/s Universal Exports Import Company v. M/s Polyron Limited | |

# THE LAHORE HIGH COURT LAHORE

| S.No | Case No. | Name of Parties | Remarks |
|---|---|---|---|
| 1 | 23/75 | United Textile Mills v. PICIC | |
| 2 | 67/80 | A.B.M. Associates v. Begum Anwar Sultana | |
| 3. | 17/84 | The Muslim Commercial Bank Ltd. v. Zeenat Textile Mills Ltd. | |
| 4 | 2/90 | Investment Corporation of Pak. V. M/s Leathrite Ltd. | |
| 5 | 10/91 | PICIC v. Zamrock Fiberglass Corp. Ltd. | |
| 6 | 1/92 | Bankers Equity Ltd. v. Bela Commercial Industries Ltd. | |
| 7 | 65/92 | Habib Bank Ltd. v. M/s Okara Textile Mills etc. | |
| 8 | 12/93 | IDBP v. Sh. Impex Ltd. Co. | |
| 9 | 64/93 | National Tubewell Construction v. Usman Shah Afraidi Liquidator | |
| 10 | 4/94 | Daewoo Corporation v. Highway Bridges International Ltd. | |
| 11 | 94/94 | Miraj-ud-Din v. Ittefaq Sugar Mills | |
| 12 | 103/94 | Orix Leasing Pakistan Ltd. v. Pak Ghee Industries Ltd. | |
| 13 | 104/94 | Orix Leasing Pakistan Ltd. v. Pak Ghee Industries Ltd. | |
| 14 | 111/94 | H.B.P. Ltd. v. Ittefaq Foundries Pvt. Ltd. | |
| 15 | 121/94 | Ghee Corporation of Pakistan v. Suraj Ghee Industries Ltd. | |
| 16 | 132/94 | PICIC Ltd. v. Extraction Pakistan Ltd. etc. | |
| 17 | 08-L/95 | Nusrat Begum v. Rashid Pervaiz etc. | |
| 18 | 10/95 | PILCL v. M/s Sunrise Textile Mills | |
| 19 | 09-L/96 | Brothers Sugar Mills v. C.L.A. etc. | |
| 20 | 10/96 | Habib Bank Ltd v. ..... | |
| 21 | 10-L/96 | Ramzan Sugar Mills v. C.L.A. etc. | |
| 22 | 14/96 | Habib Credit & Exchange Bank v. Hamaliya Textile Mills Ltd. | |
| 23 | 131/96 | Phil Corp. v. Ch. Cables Pvt. Ltd. | |
| 24 | 137/96 | Anwar Ali Cheema v. Ghazi Muhammad Ajmal | |
| 25 | 08-L/97 | Brothers Steel Mills v. Mian Kiraj Din etc | |
| 26 | 09-L/97 | Ramzan Baksh Textile Mills | |

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| 27 | 11-L/97 | Ittefaq Foundary v. Mian Miraj-ud-Din etc | |
| 28 | 12-L/97 | Khalid Miraj v. Khalid Siraj | |
| 29 | 13-L/97 | Ittefaq Sugar Mills v. Mian Miraj ud Din etc | |
| 30 | 14-L/97 | Ilyas Enterprises Pvt. v. Mian Miraj ud Din etc. | |
| 31 | 18/97 | I.C.P etc. v. Crystal Chemicals Ltd. | |
| 32 | 23/97 | City Bank N.A. v. Chaudhry Wire Cables Pvt. Ltd. | |
| 33 | 38/97 | Arif Latif v. C.M. Latif etc. | |
| 34 | 75/97 | Orix Leasing Pakistan v. Sunshine Cloth Ltd. | |
| 35 | 99/97 | Hamid Mahmood & co v. Weavers Pvt. Ltd. | |
| 36 | 113/97 | UBL v. Crescent Spinning Mills Ltd. | |
| 37 | 62/98 | The S.M.J. Trust etc. v. M/s Global Telecom Pvt. Ltd. | |
| 38 | 63/98 | National Bank of Pakistan v. Ittefaq Foundries Pvt. Ltd. | |
| 39 | 64/98 | National Bank of Pakistan v. Ittefaq Brothers Pvt. Ltd. | |
| 40 | 65/98 | National Bank of Pakistan v. Brothers Steel Ltd. | |
| 41 | 100/98 | N.B.P. v. Mohib Textile Mills | |
| 42 | 118/98 | Kamran Khurshid etc. v. Farrukh Manzoor etc. | |
| 43 | 02-L/99 | Mian Javed Shafi v. Ittefaq Sugar Mills | |
| 44 | 03-L/99 | Mst. Shamim Begum etc. v. Ittefaq Sugar Mills | |
| 45 | 4/99 | Deputy Registrar of Co. v. Capital Bank Ltd. | |
| 46 | 04-L/99 | Mian Mira-ud-Din v. Brothers Sugar Mills | |
| 47 | 05-L/99 | Mian Mira-ud-Din v. Ilyas Enterprises etc. | |
| 48 | 06-L/99 | Mian Mira-ud-Din v. Ittefaq Foundries etc. | |
| 49 | 07-L/99 | Mian Mira-ud-Din v. Brothers Sugar Mills | |
| 50 | 08-L/99 | Mian Mira-ud-Din v. Ramzan Brothers Textile | |
| 51 | 09-L/99 | Mian Mira-ud-Din v. Ramzan Sugar Mills | |

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| 52 | 10/99 | Muhammad Abdullah v. M/s Asia Compac Pvt. Ltd. | |
| 53 | 10-L/99 | Mian Mira-ud-Din v. Ittefaq Sugar Mills | |
| 54 | 11-L/99 | Mian Khalid Siraj etc. v. Brothers Sugar Mills | |
| 55 | 12-L/99 | Mian Khalid Siraj etc. v. Ittefaq Foundries | |
| 56 | 13-L/99 | Mian Khalid Siraj etc. v. Ramzan Brothers Textile | |
| 57 | 13-L/02 in 4/99 | Deputy Registrar of Co. v. Capital Bank Ltd. | |
| 58 | 14-L/99 | Mian Khalid Siraj etc. v. Ittefaq Sugar Mills | |
| 59 | 15-L/99 | Mian Khalid Siraj etc. v. Brothers Steel Mills | |
| 60 | 16-L/99 | Mian Khalid Siraj etc. v. Ilyas Enterprises | |
| 61 | 17-L/99 | Mian Khalid Siraj etc. v. Ramzan Sugar Mills | |
| 62 | 18-L/99 | Mian Khalid Siraj etc. v. Ittefaq Textile Mills | |
| 63 | 19-L/99 | Mian Yousaf Aziz v. Mian Muhammad Sharif etc. | |
| 64 | 20-L/99 | Mian Yousaf Aziz v. Mian Muhammad Sharif etc. | |
| 65 | 21-L/99 | Mian Yousaf Aziz v. Mian Muhammad Sharif etc. | |
| 66 | 22-L/99 | Mian Yousaf Aziz v. Mian Muhammad Sharif etc. | |
| 67 | 23-L/99 | Mian Yousaf Aziz v. Mian Muhammad Sharif etc. | |
| 68 | 24-L/99 | Mian Yousaf Aziz v. Mian Muhammad Sharif etc. | |
| 69 | 25-L/99 | Mian Yousaf Aziz v. Mian Muhammad Sharif etc. | |
| 70 | 39/99 | Muhammad Aslam Lone v. Marshal Tiles Ind. Ltd. | |
| 71 | 64/99 | Tradex Pvt. Ltd. v. Niaz Muhammad Khan Textile | |
| 72 | 88/99 | M. Zaheer Asif v. M/s Shalimar Liverstock (Pvt) | |
| 73 | 846-L/01 in 4/99 | Deputy Registrar of Co. v. Capital Bank Ltd. | |
| 74 | 01-L/00 | Hamid Iftikhar v. Siddique M. Malik | |
| 75 | 03-L/00 | Malik Aziz ul Haq v. Anwar Ali Cheema etc. | |
| 76 | 29/00 | Shakeel Mehmood Bhatti v. Anwar Ali Cheema etc. | |

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| 77 | 38/00 | Muhammad Mahbood Bhutta v. National Sugar & etc. | |
| 78 | 39/00 | First Crescent Modoaraba v. First Crescent Modaraba Ltd. | |
| 79 | 45/00 | Nisar Ahmad v. M. Ayub Bhatti | |
| 80 | 51/00 | Sharafat Abbas v. Asia Insurance Company | |
| 81 | 67/00 | Vandana (Pvt) Ltd. v. Ahmad Shahzad Advocate | |
| 82 | 81/00 | Sh. M. Munir v. Rehmania Textile Mills | |
| 83 | 86/00 | Mechanised Construction of Pakistan v. Pak Atomic Energy Com. Etc. | |
| 84 | 87/00 | NDLC v. Siko Pak Ltd. | |
| 85 | 87/00 | Machanised Construction of Pakistan v. C.D.A. etc. | |
| 86 | 93-C/00 | Arshad Latif Sheikh v. M/s Izhar Construction | |
| 87 | 94/00 | Machanised Construction of Pak v. Govt. of NWFP etc. | |
| 88 | 2/01 | Enlney Enterprises Pvt. v. Enlney Rice Mills | |
| 89 | 4/01 | The Bank of Khyber v. Oberoi Textile Ltd. | |
| 90 | 10/01 | Muhammad Aslam Lone v. Marshal Ceramics Ltd. | |
| 91 | 17/01 | Maqbool Textile Mills Ltd. v. M/s Pak. Gen. Ins. Co. Ltd | |
| 92 | 21/01 | Khalid Mehmood v. National Sugar Mills | |
| 93 | 33/01 | Integrated Techn. & Systems v. Interconnect Pak Ltd. | |
| 94 | 38/01 | Rag Line Pvt. v. ..... | |
| 95 | 42/01 | Ahmad Pasha etc. v. M/s Atta Oils Pvt. Ltd. | |
| 96 | 45/01 | Mashreq bank PSC v. Crescent Knitwear Ltd. | |
| 97 | 51/01 | Zafar Ullah Khan v. Ch. Zafar Ullah Khan etc. | |
| 98 | 52/01 | Omar Farooq Sh. Etc. v. Lahore Chemical & Pharma Works Ltd. etc. | |
| 99 | 53/01 | Omar Farooq Sh. Etc. v. Fazal Din & Sons | |
| 100 | 54/01 | Sheikh Mazhar Ali v. Lasani Straw Board Mills Pvt. Ltd. | |
| 101 | 56/01 | ADBP v. M/s Fresh Juices Ltd. etc. | |
| 102 | 62/01 | HBL v. M/s Juma Habish Trading Co | |
| 103 | 73/01 | M/s Chiesi Pharmaceuticals v. M/s Spenser Diskbution Ltd | |
| 104 | 2/02 | Malik Ghulam Noor etc. v. EFFEF Industries Ltd. | |

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| 105 | 2/02 | Labour Union CBA v. Privatization Commission Govt. | |
| 106 | 4/02 | Muhammad Ijaz Chaudhry etc. v. Plastic Bigs Packaging (Pvt) | |
| 107 | 6/02 | Salman Saif Ullah Cheema v. ..... | |
| 108 | 8/02 | M/s Hextor Chemical v. Archar Chemical Pvt. Ltd. | |
| 109 | 10/02 | Muhammad Saeed etc v. Ethmed Pharmacutical Pakistan | |
| 110 | 16/02 | M/s Darson Industries Ltd v. S&ECP | |
| 111 | 18/02 | Travel Shop Pvt Limited v. Shanza Travel Pvt Limited | |
| 112 | 46/02 | Pachwell Industries Limited v. S&ECP etc. | |
| 113 | 52/02 | M/s SLCL v. M/s Acid Industries | |
| 114 | 53/02 | M/s SLCL v. M/s Televoice Communication | |
| 115 | 54/02 | Muhammad Saeed Malik v. Registrar S.E.C.P | |
| 116 | 64/02 | Tawakal Industries Pvt. Ltd. v. S&ECP | |
| 117 | 77/02 | Muhamad Riaz etc. v. Mountain Vista Pvt. Ltd. etc | |
| 118 | 80/02 | Nafees Cotton Mills Ltd. etc. v..... | |
| 119 | 86/02 | National Bank of Pakistan v. Kohinoor Looms Ltd. etc. | |
| 120 | 86/02 | Mechanized Construction v. Pakistan Atomic Energy Commission | |
| 121 | 101/02 | Teepu Sheikh etc. v. Sockers Pvt. Ltd. | |
| 122 | 103/02 | Abdul Rehman v. Crystal Glass Industries etc. | |
| 123 | 519/02 | SLCL v. M/s Acid Industries Pvt. | |
| 124 | 8/03 | Maqsood Ahmad v. M/s Qand Ghar Ltd | |
| 125 | 12/03 | Pakistan National Chemical Ind. v..... | |
| 126 | 13/03 | Haji Muhammad Shafiq v. M/s Coldage Pvt Ltd. | |
| 127 | 14/03 | M/s coldage Pvt Ltd. v. The Addl. Registrar of Comp. | |
| 128 | 20/03 | Muhammad Shamshad v. Televoice Communication | |
| 129 | 22/03 | Raziud Din etc v. Aziz Spinning Mills etc. | |
| 130 | 23/03 | Hamid Khan Durrani v. Naubahar Botting Co. Pvt. Ltd. | |
| 131 | 35/03 | English Leasing v. Sargodha Textile Mills Ltd. | |
| 132 | 39/03 | Bank of Credit and Commerce v. M/s Ali Akbar Spinning Mills | |

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| 133 | 40/03 | Bank of Credit and Commerce v. M/s Ali Akbar Spinning Mills | |
| 134 | 47/03 | Addl. Registrar of Companies v..... | |
| 135 | 48/03 | Companies 1984 v. M/s World Business Consultants Pvt. Ltd. | |
| 136 | 49/03 | Addl. Registrar Consultants Pvt v. United Brakerage Consultants Pvt. Ltd. | |
| 137 | 50/03 | Addl. Registrar of Comp. v. Bulls and Bears Pvt. Ltd. | |
| 138 | 51/03 | Addl. Registrar of Comp. v. M/s Forex Services | |
| 139 | 52/03 | Addl. Registrar of Comp v. Trade Station Securities Pvt Ltd. | |
| 140 | 52/03 | Tariq Zafar v. Oberoi Textile Mills | |
| 141 | 53/03 | Addl. Registrar of Comp. v. M/s Rauf International | |
| 142 | 54/03 | Addl. Registrar of Comp. v. M/s harvest International | |
| 143 | 55/03 | Addl. Registrar of Comp. v. M/s Pindex Pvt Ltd. | |
| 144 | 57/03 | Addl. Registrar of Comp. v. Sterling Insurance Company Ltd | |
| 145 | 63/03 | Ch. M. Akram v. Suffah Schools College etc. | |
| 146 | 63/03 | Merchanised Construction v. Secretary Irrigation Power | |
| 147 | 68/03 | Mrs. Nasreen Arshad etc. v. Sunshine Biscuits Ltd. | |
| 148 | 69/03 | Mrs. Darkhashan Aqeel etc. v. Sunny Biscuits | |
| 149 | 70/03 | Mrs. Darkhsashan Aqeel etc. v. Elastoplasts Ind. etc. | |
| 150 | 2/04 | Manzar Latif etc. v. Privatization Commission | |
| 151 | 2/04 | Pakistan Engineering Co Ltd. v. Pakistan Commission of Pak. | |
| 152 | 3/04 | Mrs. Firdous Riaz Chuchhai v. Sky Lark Pvt. Ltd. | |
| 153 | 4/04 | Abdul Jabbar Khan v. Trust Shoes International | |
| 154 | 8/04 | M. Shafi & Company Ltd. etc. v. M. Iqbal Shafi etc. | |
| 155 | 9/04 | M. Iftikhar & Company v. M. Iqbal Shafi etc. | |
| 156 | 10/04 | SMEDA v. M/s Infinitex Pvt | |
| 157 | 11/04 | Aly Basher Agha v. M/s Karvan Travel etc. | |

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| 158 | 15/04 | M/s Abson Diffusion Pvt Ltd. v. Rashid Iqbal | |
| 159 | 19/04 | Muhammad Akram v. Travelodge Pak Ltd. etc. | |
| 160 | 21/04 | Tasneem Kauser v..... | |
| 161 | 26/04 | Sh. Faiz Ullah v. Capital Insurance Co. | |
| 162 | 27/04 | Abdul Hameed v. M/s G.T. Surgical Ltd. Etc. | |
| 163 | 28/04 | M/s Haider Zaman Spining Mills v. Security Exchange Commission | |
| 164 | 29/04 | Tahkik Ahmad etc. v. M/s. Styuel Enterprises Pvt. | |
| 165 | 30/04 | Addl. Registrar of Companies v. Kohinoor Edible Oils Ltd. | |
| 166 | 32/04 | Khalid Pervaiz etc. v. M/s Kamal Food Inds. Pvt. Ltd | |
| 167 | 34/04 | Additional Registrar Company v. M/s Apnaa Pvt. Ltd. | |
| 168 | 35/04 | Union Bank Ltd. v. Kohinoor Edible Oils Ltd. Etc. | |
| 169 | 36/04 | Maj. Gen. (R) Saeed Uz Zaman v. Lahore Race Club. | |
| 170 | 38/04 | Mrs. Rasheeda Shaheen v. M/s. Ahbaba Housing Society Pvt. | |
| 171 | 39/04 | Mr. Sohail A. Kabir v. Lahore Chemical and Pharmec Utical, etc | |
| 172 | 40/04 | Muhammad Ramzan v. S.H. Bukhari Securities. | |
| 173 | 44/04 | Inter Asia Leasing Ltd. v. Syed Bhais Lighting Ltd. | |
| 174 | 45/04 | Hafiz Abdul Rehman etc. v. Hafiz Abdul Waheed & Brothers | |
| 175 | 46/04 | In the matter of First Hajveri v. Modaraba | |
| 176 | 47/04 | Sh. Mashhood Ur Rehman v. The Lion Press Pvt. | |
| 177 | 53/04 | Abdul Rashid Mughal v. M/s ECSA (Pk) Pvt. Ltd. | |
| 178 | 56/04 | Mansoor Ul Hassan v. Chandani Banquet Hall Pvt. | |
| 179 | 57/04 | M/s Standard Oils Co. v. IBEX Textile Pvt. | |
| 180 | 61/04 | Professor Dr. Zafrullah Ch. v. Specialists Care Hospital Ltd. | |
| 181 | 63/04 | Mechavised Construction of Pak v. The Sect. Irrigation Power | |
| 182 | 66/04 | M/s. Nabi Steels Pvt. Ltd. v. Registrar SECP, etc | |

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| 183 | 74/04 | Mst. Hanifa Bibi v. M/s Pakistan Textile Printing Mills | |
| 184 | 79/04 | ..... | |
| 185 | 1/05 | Agha Kamran Zaman Khan v. President UBL | |
| 186 | 3/05 | Mian Javaid Amir v. ..... | |
| 187 | 12/05 | Mst. Safia Bano etc v. M/s. Sani & Co. Pvt. Ltd. | |
| 188 | 13/05 | Abdul Qavi Khan v. M/s Your Tel Pb. Ltd. | |
| 189 | 16/05 | Hafiz Abdul Waheed V. Hafiz Abdul Waheed & Brothers | |
| 190 | 23/05 | Dr. Arif Humayoon Agha v. The Registrar SECP, etc. | |
| 191 | 25/05 | Khawar Tehsin v. M/s Mina Leathers Ltd, etc | |
| 192 | 27/05 | Jahangir Engineering Co. Pvt. v. Mirza Hakeem Ud Din, etc | |
| 193 | 28/05 | Muhammad Saeed Amin v. M/s. Shaheen Beverages Pvt. | |
| 194 | 29/05 | Muhammad Nazir v. Shaheen Beverages Pvt. Ltd. | |
| 195 | 30/05 | Muhammad Nazir v. Shaheen Beverages Pvt. Ltd. | |
| 196 | 32/05 | Mechanized Construction Pak. v. National Tubewell Construction | |
| 197 | 41/05 | Polyco International v. Seok Jin Kang | |
| 198 | 42/05 | Abdul Ghaffar v. Mushtaq Ahmed | |
| 199 | 45/05 | Hafiz Abdul Waheed v. Hafiz Abdul Waheed & Brothers | |
| 200 | 46/05 | Mr. Omar Farooq Sheikh v. Lahore Chemicals & Pharma | |
| 201 | 48/05 | Nestle Pakistan Ltd. v. Universal Aqua (Pvt) Ltd. | |
| 202 | 59/05 | Maliks Pvt. v..... | |
| 203 | 60/05 | Additional Registrar of Companies v. Sky Bizint Pvt. Ltd. Etc. | |
| 204 | 61/05 | Sheikh Muhammad Ashraf v. M/s. Diamond Textile Ind. Pvt. Ltd. | |
| 205 | 63/05 | Saghir Ahmad Soofi v. M/s Saga Sports Pvt. Ltd. | |
| 206 | 63/05 | Nadeem A. Mumtaz v. Fazal Din & Sons Ltd. Etc. | |
| 207 | 64/05 | Nadeem A. Mumtaz v. Fazal Din & Sons Ltd. Etc. | |

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| 208 | 1194/W/05 | Muhammad Ibrahim v. Muhammad Asif Qureshi. | |
| 209 | 2/06 | In the matter of Allied Bank v. | |
| 210 | 3/06 | H.B.L. v. M. Iqbal Bhatti | |
| 211 | 4/06 | Addl. Registrar Co. v. M/s. Macro Business Pvt. Ltd. | |
| 212 | 5/06 | Muhammad Asghar v. Director Endeavour Pvt. | |
| 213 | 6/06 | Zia ur Rehman etc v. M/s. Alf International Pvt. Ltd. | |
| 214 | 7/06 | Muhammad Zafar Ullah v..... | |
| 215 | 10/06 | Muhammad Aslam Shami etc. v. Medicinal management Pvt. Etc | |
| 216 | 14/06 | Zahoor ul Haq Siddiqui etc. v. Breeders International etc. | |
| 217 | 15/06 | Mst. Azra begum v. M/s. S.Z. Ahmed etc | |
| 218 | 17/06 | Mr. Sohail A. Kabir v. Lahore Chemicals & Pharmaceutical Works Pvt Ltd. | |
| 219 | 18/06 | Ghani Glass Ltd v. Ghani Float Glass Ltd. | |
| 220 | 21/06 | Hafiz Abdul Rehman Madni V. hafiz Abdul Waheed | |
| 221 | 22/06 | Dr. Asad Ullah v. Special Care Hospital Ltd. | |
| 222 | 23/06 | Dr. Asad Ullah v. Special Care Hospital Ltd. | |
| 223 | 24/06 | Muhammad Ashraf etc. v. Hajvairi Textile Pvt. Ltd. | |
| 224 | 25/06 | In the matter of colony v. textile Mills Ltd. | |
| 225 | 26/06 | Print Aid Pvt. Ltd. v. SECP | |
| 226 | 29/06 | In the matter of Netsol Pvt. Ltd. v. ... | |
| 227 | 30/06 | Citi Bank Housing Finance Co. v..... | |
| 228 | 31/06 | In the matter of National v. Security insurance Co. Ltd. V. | |
| 229 | 34/06 | AlBarak Enterprises Ltd. v. Premier Trading Services Pvt. | |
| 230 | 35/06 | Mian Waqar ud Din etc. v. M/s United Inds. Ltd. Etc | |
| 231 | 37/06 | Union Bank Ltd. v. M/s M.R. Electric Concern Pvt. Ltd. | |
| 232 | 38/06 | Union Bank Ltd. v. M/s Cables & Conductor Ltd. | |
| 233 | 40/06 | Qaiser Idrees etc V. Joint Registrar of Co. | |
| 234 | 42/06 | Sh. Zafar Ahsraf etc. v. Aziz Tanneries Pvt. Ltd. | |

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| 235 | 45/06 | M/s. Chem Cord Proprietor Ship v. Klass Textile Pvt. Ltd. | |
| 236 | 46/06 | Asim leasing Corp. Ltd. v. ..... | |
| 237 | 47/06 | Diamond Chemical Ind Pvt Ltd v. Diamond Home Textile Pvt. Ltd. | |
| 238 | 48/06 | Addl. Registrar of Co. v. M.G. Realters Pvt. Ltd. | |
| 239 | 50/06 | Crescent Commercial Bank v. M/s Elahi Knits Pvt Limited. | |
| 240 | 52/06 | Tehmina Akbar Muggo v. Mia Waqaruddin. | |
| 241 | 53/06 | In the matter of Ravi Royan Ltd. | |
| 242 | 55/06 | M/s IOhan Processing Mills v. Rana Muhammad Tariq Anjum | |
| 243 | 58/06 | Mst. Zahida Perveen v. Lamrey Ceramics, etc. | |
| 244 | 61/06 | In the matter of v. Bilaj textile Mills | |
| 245 | 63/06 | In the matter of Meehanized v. | |
| 246 | 64/06 | Brig (R) Zaher Ullah v. SECP, etc | |
| 247 | 65/06 | Addl Registrar of Co. v. Ittefaq Textile Mills | |
| 248 | 1/07 | Tamim Tufail Aulia v. Ali Tamim Agro Dev. Pvt Ltd. | |
| 249 | 01/07 | Mirza Sardar baig v. Mr. Khalid | |
| 250 | 2/07 | Bank Alfalah Ltd. v. M/s Angora Textile Ltd. | |
| 251 | 2/07 | Joint Registrar of Co. v. Asia Challenge Investment | |
| 252 | 3/07 | Currentage International v. M/s. Presson Descon Inter. | |
| 253 | 4/07 | Muhammad Jamil Ch. v. Muhammad Latif Ch. | |
| 254 | 05/07 | In the matter of mechanized v. Construction of Pakistan Pvt. | |
| 255 | 5/07 | In the matter of MCP Ltd. | |
| 256 | 6/07 | Kh. Abdul jalil v. Orient Tenneries Pvt. Ltd. | |
| 257 | 7/07 | Tariq Zubair V. Aero China Ltd. | |
| 258 | 8/07 | Muhammad Raza v. Crescent Chemicals, etc. | |
| 259 | 10/07 | Mian Aftab Ahmed Sh. v. M/s. Sunshine Cotton Mills Ltd | |
| 260 | 11/07 | Anjum Rehman etc. v. Indus Valey Rice Mills Ltd. | |

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| 261 | 12/07 | Ejaz Ahmad v. Green Teeh International etc. | |
| 262 | 13/07 | Javed Akhtar v. Al Madina Spinning Mills | |
| 263 | 14/07 | Shahzad Khan Khakwani v. Zasha Ltd. Etc. | |
| 264 | 15/07 | Muhammad Sayeyd etc. v. Ahmad Nasir etc. | |
| 265 | 16/07 | Addl. Registrar of Cloys v. Happy Family Mini Business. | |
| 266 | 18/07 | Khawaja Mohammad Farooq v. Orient Tanneries Pvt. Ltd. | |
| 267 | 19/07 | Be Be Jan Fabrics Pvt. Ltd. v. be Be Jan Colours. Ltd. | |
| 268 | 20/07 | Sh. Mohammad Pervaiz v. basher Tanneries Pvt. Ltd. | |
| 269 | 22/07 | Amzollc v. Munda Hydropower Ltd. Etc. | |
| 270 | 24/07 | Engerqiue Beverages Pvt. Ltd. v. Fraz Food Pvt Ltd. | |
| 271 | 25/07 | Sh. Muhammad Latif v. Madina packages etc. | |
| 272 | 26/07 in 26/07 | In the matter of Diamond Corp. v. Ration & Symbol Inds. Pvt. Ltd. | |
| 273 | 28/07 | Brig. (r) Zaheer Ullah v. SECP, etc | |
| 274 | 29/07 | Saitex Spinning Mills Ltd. v. SECP | |
| 275 | 30/07 | Southern Agencies Pvt. Ltd v. Royal rice Mills Ltd. | |
| 276 | 31/07 | Rashid Iqbal etc. v. M/s. Ahsan Diffusion Pvt. Ltd. Etc | |
| 277 | 33/07 | M/s Hafiz Abdul Rehman Madni v. Hafiz Abdul Waheed & Brothers | |
| 278 | 35/07 | Mechanized Construction Pak v. | |
| 279 | 36/07 | M/s First Dawood Investment v. Punjab Cotton Mills | |
| 280 | 37/07 | M/s Emirates Consulting Serv. v. M/s Consisted Pakistan Ltd. | |
| 281 | 38/07 | Lahore Regency Ltd. v. Gullberg Enterprises Ltd. | |
| 282 | 39/07 | Natives Resources Ltd. v. RDC International Pak Ltd. | |
| 283 | 40/07 | Crescent Commercial Bank v. M/s Zahoor Textile Mills Ltd. | |
| 284 | 41/07 | United Bank Ltd. v. Saga Sport Pvt. Ltd. | |
| 285 | 42/07 | Dr. M. Anwar v. Azhar Corp. Pvt. Ltd. | |
| 286 | 43/07 | Siddique Akbar Bosan V. Global Designe Pvt. Ltd. | |

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| 287 | 44/07 | The Imperial Electric Co. Ltd. v. M/s. Gamman Pakistan Ltd. | |
| 288 | 46/07 | Mahyar Nadir Mumtaz v. M/s Reditech Pvt. Ltd. Etc. | |
| 289 | 47/07 | Muhammad Zaheer V. Shalimar Livestock Pvt. Ltd. | |
| 290 | 48/07 | Pervaiz Iqbal v. | |
| 291 | 460/07 | ..... | |
| 292 | 611/07 | Mst. Fozia Bibi v. Tazeem etc. | |

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# THE PESHAWAR HIGH COURT

| S.No | Case No. | Name of Parties | Remarks |
|---|---|---|---|
| 1 | 06/1995 | IDBP v. M/s Khyber Steel Mills | |
| 2 | 08/2000 | State Bank of Pakistan v. Indus Bank | |
| 3 | 12/2000 | SECP v. Frinklin Investment Bank | |
| 4 | 05/2004 | SECP v. M/s Amazai Textile Mills | |
| 5 | 09/2004 | SECP v. Adil Polyproplene | |
| 6 | 10/2004 | Shahnaz Kaleem v. Voyger (Pvt) Ltd | |
| 7 | 05/2005 | SECP v. Islamic Investment Bank | |
| 8 | 02/2007 | Israr Muhammad v. Joint Registrar etc. | |
| 9 | 03/2007 | Fazal Muhammad v. Joint Registrar etc. | |
| 10 | 04/2007 | Islamic Investment Bank v. Joint Registrar etc. | |
| 11 | 05/2007 | M/s Quice Food Ind. V. Executive Director etc. | |
| 12 | 06/2007 | M/s Quice Food Ind. V. Executive Director etc. | |
| 13 | 07/2007 | M/s Quice Food Ind. V. Executive Director etc. | |
| 14 | 08/2007 | Muhammad Afaq Shamsi v. Raees ud Din Sheikh | |
| 15 | 09/2007 | Mirza Ibrahim Baig v. Syed Akhtar Hussain etc. | |
| 16 | 01/2008 | Syed Akhtar Hussain Shah v. M/s Hi Waves etc. | |

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# THE HIGH COURT OF SINDH

| S.No | Case No. | Name of Parties | Remarks |
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| 1 | J.Misc. No. 60/1990 | S.M.Idrees Allahwala v. Merchantile Ind. Ltd. | |
| 2 | J.Misc No. 10/1991 | S.M. Idrees Allahwala v. Merchantile Ind. Ltd. | |
| 3 | J.Misc. no. 38/1993 | Kohinoor chemical Company v. S.M. Idrees Allahwala | |
| 4 | J.Misc. No. 48/1993 | M/s Tasneem A. Hashmi v. M/s Cannon Textile Mills | |
| 5 | J.Misc. No. 73/1993 | Shakeel Anees v. Kohinoor Chemical Company | |
| 6 | J.Misc. No. 08/1998 | Nadir Imam Patel v. alamgir Ravon Mills | |
| 7 | J.Misc. No. 32/2000 | IDBP v. Hussain Rice Mills | |
| 8 | J. Misc. No. 39/2000 | Tahir Mehmud v. Star Pvt. Ltd | |
| 9 | J.Misc. No. 11/2001 | Pak Libya Holding Co v. Prudential Bank | |
| 10 | J.Misc. No. 12/2001 | Pak Libya Holding Co v. Zeal Pak Cement Factory & others | |
| 11 | J.Misc. No. 13/2001 | Pak Libya Holding Co v. Inter Asia Leasing Company | |
| 12 | J.Misc. No. 31/2002 | IDBP v. Muhammad Ismail Mills Ltd & Others | |
| 13 | J.Misc. No.21/2002 | IDBP v. Shahbaz Papers Cone Factory | |
| 14 | J.Misc. No. 22/2002 | IDBP v. Medicare Pak. Ltd | |
| 15 | J.Misc. No. 06/2003 | IDBP v. M/s Agripak Industries Pvt.Ltd & Others | |
| 16 | J.Misc. No. 11/2003 | IDBP v. M/s Gloris Textile Mills Ltd. | |
| 17 | J.Misc. No. 13/2003 | Muhammad Anwar Younus & Others v. G.M. fisheries Ltd. | |
| 18 | J.Misc. No. 24/2003 | IDBP v. M/s Galadari Cement Gulf | |
| 19 | J.Misc. No. 12/2004 | Pakistan Motor Car Company v. Engine System Ltd. | |
| 20 | J.Misc. No. 13/2004 | Pakistan Automobile Cort. Ltd. v. Younus Mobile Ltd. | |

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| 21 | J.Misc. No. 14/2004 | Pakistan Automobile Corp. Ltd. V. Excel Products Ltd. | |
| 22 | J.Misc. No. 19/2004 | Muhamad Fashatullah Khan v. FG International Ltd | |
| 23 | J.Misc. No.34/2004 | Mrs. Rajkumari & Others v. M/s Papa Sierray Fibre Company | |
| 24 | J.Misc. No. 05/2005 | Ghulam Beg v. M/s Rescue Security Agency & Others | |
| 25 | J.Misc. No. 8/2005 | Hassan Ali Adwai v. Huma International Ltd | |
| 26 | J.Misc. No. 32/2005 | Muhammad Iqbal v. M/s. Prudential Stock funds Ltd. & Others | |
| 27 | J.Misc. No. 37/2005 | Modaraba Company v. Prudential Stock Funds Ltd. | |
| 28 | J.Misc. No. 33/2005 | HBL v. Shakz International Leather Company | |
| 29 | J.Misc. No. 29/2005 | Muhammad Saeed ..... Petitioner | |
| 30 | J.Misc. No. 07/2006 | M/s Kazmia Trust Pvt. Ltd. V. Caaz Pvt. Ltd. | |
| 31 | J.Misc. No. 08/2006 | PICIC v. Spectrum Fisheries Ltd. | |
| 32 | J.Misc. No.12/2006 | Shaikh Muhammad Asif v. Anwar Ahmed Tata & Others | |
| 33 | J.Misc. No. 21/2006 | SECP v. Nadeem Anwar & Others | |
| 34 | J.Misc. No. 22/2006 | Shaukat Ali v. Amina Fabrics Pvt. Ltd & Others | |
| 35 | J.Misc. No. 24/2006 | Dost Mohammad & Others v. ARD Corporation Ltd. | |
| 36 | J.Misc. No. 28/2206 | Mrs. Shirley Amiruddin v. M/s. Arina Associates Pvt. Ltd. & Others | |
| 37 | J.Misc. No. 29/2006 | Mrs. Shirley Amiruddin v. M/s Arina Associates Pvt. Ltd. & Others | |
| 38 | J.Misc. No. 30/2006 | Mrs. Shirley Amiruddin v. M/s Arina Associates Pvt. Ltd. & Others | |
| 39 | J.Misc. No. 31/2006 | Mrs. Shirley Amiruddin v. Nasir Ali | |
| 40 | J.Misc. No. 36/2006 | Eplanet Ventures Ltd. v. Eplanet Devlopment Ltd. & Others | |
| 41 | J.Misc. No. 08/2007 | Neelofar Sikandar v. Sana Pvt. Ltd | |
| 42 | J.Misc. No. 12/2007 A/w. J.M.04/2005 | Shaukat Ali v. Bawany Sugar Mills (same parties in both cases) | |

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| 43 | J.Misc. No. 13/2007 | Faisal Bank Ltd. v. southern Network | |
| 44 | J.Misc. No. 16/2007 | Arif Ali Muhammad Dawood v. Baluchistant Engineering & Others | |
| 45 | J.Misc. No. 17/2007 | Arif Ali Muhammad Dawood v. Central Trading Pvt. Ltd. & Others | |
| 46 | J.Misc. No. 18/2007 | Arif Ali Muhammad Dawood v. PGL Pvt Ltd. | |
| 47 | J.Misc. No. 19/2007 | Arif ali Muhammad Dawood v. CMPS Association Pvt Ltd & Others | |
| 48 | J.Misc. No. 23/2007 | P.C.P & Others Petitioners | |
| 49 | J.Misc. No. 24/2007 | Eridania (Suisse) SA v. Rajby International Ltd | |
| 50 | J.Misc. No. 28/2007 | Medipharm Pvt Ltd & another | |
| 51 | J.Misc. No. 31/2007 | Mst. Neelofar Shah & Others v. Ofspace Ltd & Others | |
| 52 | J.Misc. No. 32/2007 | Baluchistan Engineering v. Dawood Engineering | |
| 53 | J.Misc. No. 33/2007 | SECP v. Beema Pakistan Co. Ltd. | |
| 54 | J.Misc. No. 34/2007 | Shamim Ahmed & Others v. M/s N.A. Canvas Industries Ltd. & Others | |
| 55 | J.Misc. No. 35/2007 | Muhammad Nasir Ghazi v. G.M. Printo Pack Pvt. Ltd. | |
| 56 | J.Misc. No. 37/2007 | Additional Registrar Companies v. Karim Silk Mills | |
| 57 | J.Misc. No. 38/2007 | Al Abbas Holding Pvt. Ltd & Other | |
| 58 | J.Misc. No. 01/2008 | Sigma Leasing Pvt Ltd. v. classic Denim Company | |
| 59 | J.Misc. No. 02/2008 | Allied Rental Pvt Ltd & another | |
| 60 | J.Misc. No. 03/2008 | Raza Fecto Tractors Ltd. & Others ..... Petitioners | |
| 61 | J.Misc. No. 04/2008 | Usman Textile Mills Ltd & another | |
| 62 | J.Misc. No. 05/2008 | Bank Al Falah v. Callmate Telups Telecom Ltd. | |
| 63 | J.Misc. No. 06/2008 | JS Bank Ltd & Others v. UIG Ltd. & Others | |
| 64 | J.Misc. No. 08/2008 | S. Fayyaz Ahmed Shah v. Khazan Tec (Pvt) Ltd. & others | |
| 65 | J.Misc. No. | SECP v. The English Leasing Ltd. | |

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| No. | Bank Al Falah v. Al Ameen Denim Mills Ltd. | |
| No. | Rustam Baga v. Syed Ahmed Ali & Others | |

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# THE SUPREME COURT OF PAKISTAN

| S.No | Case No. | Name of Parties | Remarks |
|---|---|---|---|
| 1 | C.A.599/2002 | Bankers Equity Ltd. v. Common Wealth Development Corp. etc. | |
| 2 | C.A.609/2002 | Common Wealth Development Corp. v. Minaco Fabrics Ltd. etc. | |
| 3 | C.A.1822/2003 | National Bank of Pakistan v. Mohib Textile Mills Ltd. etc. | |
| 4 | C.A.1823/2003 | National Bank of Pakistan v. Joint Official Liquidator of Mohib Textile Mills Ltd. | |
| 5 | C.A.1824/2003 | American Express Bank Ltd. v. Joint Official Liquidator of Mohib Textile Mills (Pvt) Ltd. | |
| 6 | C.A.1825/2003 | Askari Commercial Bank Ltd. v. Joint Official Liquidator of Mohib Textile Mills | |
| 7 | C.A.1826/2003 | First Punjab Madraba v. Joint Official Liquidator of Mohib Textile Mills (Pvt) Ltd. | |
| 8 | C.A.1844/2003 | Civil Aviation Authority v. Hajveri Airlines (Pvt) Ltd. | |
| 9 | C.A.1871/2003 | Muhammad Qasim Saeed Malik v. International Multi Leasing Corporation Ltd. | |
| 10 | C.P.1318-L/2003 | M/s 3 Star Motors Pvt. Ltd. v. Mohammad Siddique, etc. | |
| 11 | C.P.2727-L/2003 | Anjuman-e-Bahbood-e-Mutasreen Taj Co. Lahore v. chairman, co-op Law authority, etc. | |
| 12 | C.A.587/2004 | Muhammad Suleman v. Official Liquidator A.B.M. Associates Ltd. Faisalabad & others | |
| 13 | C.P.538-L/2004 | Muhammad Iqbal v. PICIC Ltd etc. | |
| 14 | C.P.2843-L/2004 | Sunrise Textiles Ltd v. Islamic Investment Bank Ltd. | |
| 15 | C.P.3152-L/2004 | Pakistan Wapda v. M/s Zephyr Textile Mills Ltd. | |
| 16 | C.M.A.2213/2004 | Muhammad Suleman v. Official Liquidator A.B.M. Associates Ltd. Faisalabad & others | |

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| 17 | C.A.1442/2004 | Arsam Pulp and Paper Board Industries v. Official Liquidator of M/s Sampak Paper and Board and others | |
| 18 | C.A.2023/2004 | Sh. Muhammad Mumtaz and others v. PICIC | |
| 19 | C.A.2024/2004 | PICIC v. Syed Naghman Haider Zaidi and others | |
| 20 | C.A.2031/2004 | Muhammad Sadiq & others v. Exposures International (Pvt) Ltd. | |
| 21 | C.P.573-L/2005 | Mechanized Construction of Pakistan (Pvt) Ltd v. Nazir & Co | |
| 22 | C.P.810-L/2005 | M/s Darson Securities (Pvt) Ltd Gujranwala v. M/s Darson Industries (Pvt) Ltd etc. | |
| 23 | C.A.946/2005 | The Security and Exchange Commission of Pakistan v. First Capital Securities Corporation Ltd. and another | |
| 24 | C.A.968/2005 | The Security and Exchange Commission of Pakistan v. First Capital Securities Corporation Ltd. and another | |
| 25 | C.A.1616/2005 | Muhammad Asif Saigol v. Mohib Textile Mills and others | |
| 26 | C.P.2651/2005 | M/s Transworld Cargo Despatch Company v. The Trustees of the Port of Karachi thr. The Board of Trustees and others | |
| 27 | C.M.A.910/2006 | Member Board Revenue (Sett.) Lahore etc. v. Eden Developers | |
| 28 | C.A.616/2006 | Mian Javaid Aamir etc. v. United Foam Industries (Pvt) Ltd. Lahore | |
| 29 | C.A.617/2006 | Mian Javaid Aamir etc. v. Sh. Combined Industries (Pvt) Ltd. and others | |
| 30 | C.A.651/2006 | Executive Director (E&M), SECP and others v. Tahir Hasan & another | |
| 31 | C.A.686/2006 | Maj. Gen. ® Saeed uz Zaman Janjua v. Lahore Race Club Lahore thr. its Secy. | |
| 32 | C.P.619-L/2006 | Muhammad Hashim v. Agro Steel Industries (Pvt) Ltd Lahore etc. | |
| 33 | C.P.1233-L/2006 | Securities & Exchange Commission of Pakistan etc v. Lahore Stock exchange (Guarantee) Ltd Lahore etc. | |
| 34 | C.P.1330-L/2006 | Pakistan National Shipping Corp. Karachi v. Lahore Stock Exchange (Guarantee) Ltd Lahore etc. | |
| 35 | C.P.717-L/2007 | Falak Sher etc v. Falak Enterprises (Pvt) Ltd. etc | |

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| 36 | C.P.908-L/2007 | Asghar ali etc v. Official Liquidator M/s Awana Commercial Financial Ltd. Lahore etc. | |
| 37 | C.P.355-P/2007 | Secretary Industries Commerce & Mineral Development & Others v. M/s Pakistan Paper Corporation Ltd & another | |
| 38 | C.A.1170/2007 | Waseem Ahmad Siddiqui v. Securities & Exchange Commission of Pakistan through Chairman & others | |
| 39 | C.A.1656/2007 | Soneri Bank Ltd. v. Fatima Food Industires (Pvt). Ltd and another | |
| 40 | C.A.2053/2007 | M/s Razak (Pvt) Ltd. & others v. Muhammad Iqbal & others | |
| 41 | C.M.A.735/2007 | Muhammad Suleman v. Official Liquidator A.B.M. Associates Ltd. Faisalabad & others | |
| 42 | C.A.422/2008 | National Bank of Pakistan v. Medi Glass Limited etc. | |
| 43 | C.P.565/2008 | M/s Sephan Oil Companyv. Zia ur Rehman and others | |
| 44 | C.M.A.58/2008 | Muhammad Suleman v. Official Liquidator A.B.M. Associates Ltd. Faisalabad & others | |
| 45 | C.M.A.1066/2008 in C.A.1887/2002 | IDBP v. M/s Khushal Industries Pvt. Ltd. etc. | |

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