IN THE HIGH COURT OF SINDH AT KARACHI
J.C.M. No. 55 / 2009

Petitioner:	**Bank of Punjab through Mr. Naveedul Haq Choudhry Advocate.**
Respondent:	**First Dawood Investment Bank through Ms. Alizeh Bashir Advocate. Mr. Saad Abbasi Advocate for SECP.**
Date of hearing:	**29.11.2018**
Date of order:	**23.01.2019**

O R D E R

Muhammad Junaid Ghaffar, J. This is a winding up petition under Section 309 of the erstwhile Companies Ordinance, 1984 ("Ordinance") filed by the petitioner as a creditor against Respondent on the ground that it has defaulted in honoring the guarantees, and is unable to pay its debts.

2. The Precise facts as stated are that petitioner extended a Letter of Credit facility to Gharibwal Cement Limited ("**Gharibwal**") on 12.12.2006 for an amount of Euros 5,985,000/- equivalent to Rs. 488,000,000/-, whereas, Respondent issued a Letter of Commitment dated 02.08.2007 whereby, it had undertaken to pay the Letter of Credit amount of Rs. 245,000,000/- to the Petitioner in case Gharibwal was unable to discharge its payment obligations under the Letter of Credit. According to the Petitioner, Gharibwal failed to discharge its obligation, and therefore, Petitioner through Letter dated 07.08.2009 sought encashment of the commitment to pay Rs.245,000,000/- by 10.08.2009. According to the Petitioner, the Respondent failed to honor such commitment. It is further stated that the Petitioner also provided another finance facility to AMZ Ventures Limited ("**AMZ**") from time to time and such facilities were also secured against two Guarantees issued by the Respondent bearing Guarantee No. BOP/AMZ/01/2005 dated 2.9.2005 for an amount of Rs. 64,000,000/- and Guarantee No. the Bank of Punjab/First Dawood Investment Bank Limited/2005 dated 10.11.2005 for an amount of PKR 64,000,000/- ("**Guarantees**"). It is the case of the Petitioner that these Guarantees were extended from time to time and the last extension / amendment was done through a consolidated amendment dated 31.12.2007 whereby, the expiry dates of the Guarantees were extended till 31.12.2008. Again due to un-fulfillment of commitments by AMZ, the Petitioner served upon the Respondent encashment Notice on 29.09.2008 and requested payment of Rs. 128,000,000/-. It is further stated that the Respondent failed to honor these Guarantees as well, and thereafter, legal notices were

issued including a Notice as mandated under section 306 of the Ordinance; but Respondent has failed to honor such commitment and Guarantees; hence, being a creditor, instant Petition for winding up of the Respondent has been filed as an amount of Rs.245,000,000/- and Rs.128,000,000/- along with cost, markup and profit, has accrued against the Respondent for which default has been committed.

3. Learned Counsel for the Petitioner has contended that Guarantees in question have been admittedly issued and executed by the Respondent, whereas, in default of honoring its commitments, the legal remedy has been adopted as the obligations have been refused without any plausible grounds. According to the learned Counsel, the Guarantee is an autonomous contract and imposes an absolute obligation to fulfill the terms of the Guarantee, whereas, it is an independent obligation arising out of the specific contract between the parties and must be honored under all circumstances. Per learned Counsel, the claim was lodged within the validity period of the Guarantees, whereas, the Respondent Bank while issuing Guarantees must not be concerned with any underline contract between parties, and if the claim is in order, it must be honored by making payments and should not be declined on frivolous grounds. Per learned Counsel, the two transactions in question were secured on the basis of Guarantees by the Respondent and admittedly they have not been honored, whereas, filing of a recovery Suit against the defaulting customer is no ground to oppose this winding up Petition, as otherwise the amount is due and the Company is unable to pay its creditors. He has further contended that Guarantees were of a continuing nature being valid and binding and in Clause 3.2 it was undertaken that the obligation of the Guarantor shall not be modified or impaired upon happening of any event, including but not limited to, the extension of time by the Petitioner to its customers, whereas, the nature of the Guarantee was continuous and was enforceable in respect of the facility until all amounts due from the customer have been paid in full. Per learned Counsel, the stance of the Respondent that on the basis of some correspondence between the Petitioner and its customer, the Guarantees stood discharged, is misconceived inasmuch as no conclusive arrangement was ever reached between the Petitioner and the customers, whereas, the claim was lodged within the validity and is always without prejudice to the negotiations between the parties. He has further contended that the legal notices issued by the Petitioner were replied evasively without raising any proper dispute and a stance was taken that the Guarantees could not be honored due to liquidity crunch which is not a valid ground in case of a Guarantee. According to him any letter of the customer, is not a discharge of Guarantee and legal consequences under Section 134 of the Contract Act are to be followed. Per learned Counsel no rescheduling was ever agreed upon and therefore, reliance on any such correspondence is of no help. In support of his contention he has relied upon ***Messrs Platinum Insurance Company Limited, Karachi***

V. Daewoo Corporation, Shaikhupura (P L D 1999 SC 1), Muhammad Anwar V. Muhammad Aslam and others (2012 S C M R 345), M/s Sindh Glass Industries Ltd, Karachi V. M/s National Development Finance Corporation (N L R 1996 Civil 559), Rana Muhammad Tariq Anjum V. Messrs Ihsan Processing Mills (Pvt.) Ltd. and others (2008 C L D 889), National Bank of Pakistan through Vice President, Zonal Chief, Multan V. Effef Industries Limited and 11 others (2002 C L D 1431) and Mian Aftab A. Sheikh ETC V. M/s Trust Leasing Corporation Limited ETC (N L R 2003 Civil 651).

4. On the other hand, learned Counsel for the Respondent has contended that the claim is time barred in respect of the first transaction of Letter of Credit of Gharibwal inasmuch as the same was opened on 12.12.2006 and was valid for a period of 720 days which expired on 12.12.2008, whereas, the claim was lodged on 7.8.2009. She has further contended that the Letter of Credit of the Petitioner was contingent upon the bill of lading and its date; however, it has not been placed on record, therefore, the claim is otherwise, invalid. Per learned Counsel, since the customer Gharibwal insofar as the first facility i.e. letter of commitment is concerned, entered into negotiations with the Petitioner Company and formed a consortium to honor its commitment, therefore, by all means and conduct, the Guarantee of this customer stood discharged, whereas, no default had occurred till such time the Guarantee was invoked. She has further contended that the claim was premature and was lodged even before it was due from the customer. According to the learned Counsel, once negotiations were entered into, it was incumbent upon the Petitioner to get the Guarantee extended and so also obtain consent for modifying the original contract with the customer, which was not done and therefore, the Guarantee stood discharged and cannot be invoked. As to the second customer i.e. AMZ is concerned, she has contended that the Guarantees and amount in question and claim, is already in dispute in Suit No. B-27/2010 filed by the Petitioner against its customer as well as the Respondent; hence, till such time the Suit is decided, this Petition may not be granted. According to her, the amount in question has been disputed by the customer; therefore, the Respondent is not obligated in law to honor the Guarantee. She has further contended that a notice of willful default was issued against the Respondent which has been suspended in the Banking Suit as above; therefore, the Petitioner may pursue the remedy of seeking a Judgment and Decree before the Banking Court and not through this winding up Petition. Per learned Counsel, this Petition has been filed to pressurize the Respondent to honor its commitment which is otherwise not due. She has also argued that it is settled law that unpaid debts must have been admitted, whereas, the Company of which the winding up is being sought must have failed or is unable to pay the debts, and in the instant matter, both these conditions are not fulfilled as the Respondent Bank is a going concern, whereas, the amount being

claimed is in dispute; therefore, this winding up Petition is not maintainable; rather liable to be dismissed. In support she has relied upon the cases reported as ***Messrs Platinum Insurance Company Limited, Karachi V. Daewoo Corporation, Shaikhupura (P L D 1999 SC 1), United Bank Limited V. Golden Textile Mills Limited (P L D 1998 Karachi 330), Hala Spinning Mills Ltd. V. International Finance Corporation and another (2002 S C M R 450), Hashmi Can Company Limited V. K.K.& Co. (Private) Limited (1992 S C M R 1006), Integrated Technologies & Systems Ltd. V. Interconnect Pakistan (Pvt) Limited and others (2001 C L C 2019) and Messrs Adage Advertising, Lahore V. Messrs Shezan International Ltd., Lahore (1970 S C M R 184).***

5. I have heard both the learned Counsel and perused the record. Facts have been briefly stated hereinabove and it appears that there are two different transactions as well customers on behalf of whom the Respondent gave its letter of commitment and Guarantees, which are the subject of this winding up petition. The case of the petitioner is that since respondent has failed to honor, the said commitments, whereas, petitioner being a creditor is entitled to seek winding up of respondent company under the Ordinance. In the first transaction pertaining to Gharibwal, the petitioner opened a Letter of Credit for an amount of Euro 5,663,000 on 12.12.2006 which was valid up to 21.05.2007. To this, the Respondent issued a Letter of Commitment dated 02.08.2007 on behalf of Gharibwal, and undertook as under:-

> “1. That the Bank of Punjab, Main Branch, Lahore has extended L/C facility to the M/s Gharibwal Cement Limited, (hereinafter referred to as “the Customer”). The BOP, being the issuing bank has opened a Letter of Credit (“L/C”) of Euro 5,985,000/- (Five Million Nine Hundred and Eighty Five Thousands Euros only) to the extent of PKR. 488,000,000/- (Rupees four Hundred and Eighty Eight Million Only) for M/s. Wartsila Finland Oy.
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> 2. That FDIBL undertakes in case the Customer would not be able to discharge its payments, obligations under L/C, towards BOP, FDIBL shall pay the L/C amount to the extent of PKR 245,000,000/- (Rupees Two Hundred and Forty Five Million only) on behalf of the Customer on or before the expiry of that L/C. The FDIBL also undertakes to arrange funds for the Customer for retiring the L/C from its own source or from any source which would not be more than PKR 245,000,000/- (Rupees Two Hundred and Forty Five Million only).
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> 3. That FDIBL undertakes to indemnify the BOP from L/C amounts towards the Customer along with charges with regard to the L/C facility extended to the Customer up to the extent of PKR 245,000,000/- (Rupees Two Hundred and Forty Five Million only).
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> 4. This Letter of Commitment shall continue to remain valid in full force until 720 days from the date of Bill of Lading after which this Letter of Commitment Guarantee to be stand cancel/null and void, however, claim lodgment Date will be 30 days after the expiry of 720 days from the date of Bill of Lading.
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> 5. That FIDBL further assures that it shall continue to lend its business support to the Customer as Advisor and Arranger of the said transaction.”

6. It is not in dispute that through this letter of commitment the Respondent undertook that in case Gharibwal is unable to discharge its payment obligations under the Letter of Credit, the Respondent shall pay them the amount to the extent Rs. 245,000,000/- on or before the expiry of Letter of Credit. It further provides that Respondent undertakes to arrange funds for the Customer for retiring the Letter of Credit from its own source or from any other source which would not be more than Rs. 245,000,000/-. It further provides that the Letter of Commitment shall continue to remain valid in full force until 720 days from the date of Bill of Ladings after which this Letter of Commitment is to be cancelled / null and void; however, claims lodged within 30 days after expiry of 720 days from the date of Bill of Lading would be entertained. Though as contended, the date of Bill of Lading from which the expiry of 720 days has been calculated is not on record; however, even if the date is taken from 02.08.2007 i.e. the Letter of Commitment, the period of 720 days would expire on 01.08.2009, whereas, the first encashment Notice which has been placed on record is 07.08.2009 in respect of this Finance Facility granted to Gharibwal and according to the Letter of Commitment its claim could be lodged within 30 days after the expiry of 720 days from the date of Bill of Lading. It is but natural that the Bill of Lading date will precede the date of Letter of Credit and therefore, the stance that the claim was time barred as the letter of commitment / Guarantee stood expired is misconceived. There is no other ground or objection for not entertaining the notice for payment except as stated in Para 10 of the reply which is to the effect "*The Respondent understands that since 10 August 2009 when the petitioner made payment under the letter of credit, it has rescheduled Gharibwal Cements liability. Documents evidencing this are not available with the Respondent but are in possession of the Petitioner. It is respectfully submitted that this rescheduling has had the effect of discharging the Respondent of its liability under the Letter of Commitment by its own terms and even otherwise by operation of law and the same cannot be the basis of these or any other proceeding against the Respondent.*" The other ground which has been urged upon is that some fraud was committed by the petitioner. There is no document on record to suggest or even consider this line of argument for the sake of any indulgence to the Respondent.

As to the second transaction of AMZ two Guarantees were issued and they were extended from time to time and the last and final extension was granted collectively and the Guarantees were supposed to expire on 31.12.2008, whereas, the encashment Notice annexed as annexure G/1 in respect of this Guarantee of Rs.128.00 million on account of AMZ is 29.09.2008 which is very much within the validity period; therefore, the objection as to the claim being time barred and expiry of the Guarantee in question is not justified and or substantiated from the record. In fact the documents are a matter of record and have not been seriously disputed. The claim in respect of Gharibwal was

lodged within 30 days from the minimum possible date / period of 720 days from the issuance date of letter of credit, and therefore, was within time. Upon failure of the Respondent company to honor its commitments a proper Notice as provided under Section 306 of the Ordinance, has also been served; therefore, as to the period of limitation and fulfillment of requirement there appears to be no dispute as such.

7. The winding up of a Company under the Ordinance has been provided in Section 305 whereas, 306 deals with a situation when the Company is deemed unable to pay its debts, and reads as under:-

> 305. Circumstances in which company may be wound up by Court. - A company may be wound up by the Court- (a) if the company has, by special resolution, resolved that the company be wound up by the Court;
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> (b) if default is made in delivering the statutory report to the registrar or in holding the statutory meeting or any two consecutive annual general meetings;
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> (c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
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> (d) if the number of members is reduced, in the case of private company, below two or, in the case of any other company, below seven;
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> (e) if the company is unable to pay its debts;
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> (f) if the company is-
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> (i) conceived or brought forth for, or is or has been carrying on, unlawful or fraudulent activities;
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> (ii) carrying on business not authorised by the memorandum;
> (iii) conducting its business in a manner oppressive to any of its members or persons concerned with the formation or promotion of the company or the minority shareholders;
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> (iv) run and managed by persons who fail to maintain proper and true accounts, or commit fraud, misfeasance or malfeasance in relation to the company; or
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> (v) managed by persons who refuse to act according to the requirements of the memorandum or articles or the provisions of this Ordinance or fail to carry out the directions or decisions of the Court or the registrar or the Commission given in the exercise of powers under this Ordinance;
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> (g) if, being a listed company, it ceases to be such company; or
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> (h) if the Court is of opinion that it is just and equitable that the company should be wound up; [or]
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> [(i) if a company ceases to have a member.]
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> Explanation I: The promotion or the carrying on of any scheme or business, except the business carried on under the provisions of the Insurance Act, 1938 (IV of 1938), howsoever described, whereby, in return for a deposit or contribution, whether periodically or otherwise, of a sum of money in cash or by means of coupons, certificates, tickets or other documents, payment, at future date or dates of money or grant of property, right or benefit, directly or indirectly, and whether with or without

any other right or benefit, determined by chance or lottery or any other like manner, is assured or promised shall be deemed to be an unlawful activity.

Explanation II: "Minority shareholders" means shareholders together holding not less than twenty per cent of the equity share capital of the company

"306. Company when deemed unable to pay its debts. - (1) A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one per cent of its paid-up capital or fifty thousand rupees, whichever is less, then due, has served on the company, by causing the same to be delivered by registered post or otherwise, at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for thirty days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) if execution or other process issued on a decree or order of any court or any other competent authority in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (a) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal adviser duly authorised on his behalf, or in the case of a firm if it is signed by such agent or legal adviser or by any member of the firm on behalf of the firm."

8. Perusal of s.305 reflects that there are various circumstances and situation in which the Court is empowered under the Ordinance to order winding up of a Company. For the present purposes, it is only clause(s) (e) [if the company is unable to pay its debts], and (h) [if the Court is of the opinion that it is just and equitable that the company should be wound up] which are attracted and relevant. Here in this matter the case as setup on behalf of the Petitioner is that the Company is unable to pay its debts. Section 306 provides that a company shall be deemed to be unable to pay its debts, when, if a creditor to whom the company is indebted in a sum exceeding one percent of its paid up capital or fifty thousand rupees, whichever is less, then due, has served on the company a demand under writing to pay the sum so due and the company has for thirty days thereafter, neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or 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. It is not in dispute that in compliance of the aforesaid provision, requisite notices have been served and there is no exception to it. The Hon'ble Supreme Court in the case reported as ***Messrs Platinum Insurance Company Limited, Karachi V.***

Daewoo Corporation, Shaikhupura **(PLD 1999 SC 1),** relied upon by the learned Counsel for the Respondent has been pleased to examine and interpret the said provision in the following manner:-

> "The perusal of the above-quoted subsection (1) of section 306 of the Ordinance, 1984 indicates that it provides, by fiction of law, three events/circumstances from which it can 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, E 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 i 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.
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> It may further be noticed that under above-quoted subsection (2) of g section 306 of the Ordinance, it has been laid down 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 authorised on his behalf, or in the case of a firm if it is signed by such agent or legal adviser or by any member of the firm on behalf of the firm.
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> The moot question which requires consideration is as to, whether clause (a) and clause (c) of subsection (1) of above-quoted section 306 of the Ordinance are to be read together, or the same can operate independently. Secondly, under what circumstances, a company shall be deemed to be unable to pay its debts.
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> From the above-cited and discussed cases, the following legal position emerges
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> (i) That if a debtor company is merely unwilling to pay its debts but otherwise is commercially solvent, then the normal remedy available to a creditor is a suit for the recovery of the amount and not a petition for winding up.
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> (ii) That if the Court finds that the negligence on the part of the debtor company to pay the sum demanded in terms of clause (a) of subsection (1) of section 306 of the Ordinance is not on account of want of commercial solvency, but because of bona fide dispute based on a substantial ground as to the entitlement of the creditor to the amount demanded, application under section 306 read with section 309 of the Ordinance will not be sustainable.
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> (iii) That clause (a) of subsection (1) of section 306 of the Ordinance raises a presumption as to the fact that the debtor company is deemed to be unable to pay its debts, if in spite of the receipt of demand in terms of the above clause, the debtor company neglects to pay the sum demanded within thirty days of the receipt of notice of demand, or neglects to secure or to compound for it to the reasonable satisfaction of the creditor. But this presumption is rebuttable by the debtor company, if it can show that it is commercially solvent and is in a position to meet its liability on due dates.
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> (iv) That the object of sections 305 and 306 of the Ordinance is not to coerce a debtor company to make payment to an unpaid creditor, but to secure, discontinuation of functioning of such company which has ceased to be commercially solvent.

(v) That though under section 9(3) of the Ordinance it is permissible to adopt summary procedure, but the procedure adopted should be fair and just which may ensure equal opportunities to the contesting parties.

(vi) That the effect of lack of proof of service of a demand notice by a creditor in terms of clause (a) of subsection (1) of section 306 of the Companies Ordinance is that the presumption that the debtor company shall be deemed to be unable to pay its debts will not be available to the f creditor in a petition for winding up, but the creditor will be at liberty to prove that, in fact, the company is unable to pay its debts within the meaning of clause (c) of subsection (1) of section 306 of the Ordinance by other evidence.

(vii) That though clause (a) of subsection (1) of section 306 of the Companies Ordinance seems to be independent of clause (c) thereof, but the conjoint reading of sections 305 and 306 makes it amply clear that the Company Judge has a discretion to order, or not to order, winding 1 up of a company after taking into consideration all the relevant facts. The approach should be to see that a commercially insolvent company ceases to operate and not to provide a forum for the recovery of certain due amounts to a particular creditor.

(viii) That in order to determine whether a debtor company is commercially insolvent, the value of such assets without which it could not carry on its business should not be taken into account, but the amount available to the debtor company, or which may become available in normal course of business without disposing of the above assets will have to, be taken into consideration.

(ix) That the factum that a creditor has other or alternate remedy under general law or a special law, does not debar him from pressing in aid the provision of section 306 read with section 309 of the Ordinance for seeking the winding up of the debtor company.

(x) That a debtor company is unable to pay debts can be demonstrated from the company's contingent and prospective liabilities and the debts which are immediately payable.

Even if we were to read with above clauses (a) and (c) of subsection (1) of section 306 of the Ordinance together or in conjunction, the conclusion recorded by the learned Company Judge that the appellant Company is deemed to be unable to pay its debts seems to be correct. In our view 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 the above 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. In the instant case, the appellant-Company had not shown) that it was in a position to pay Rs.1,26,00,000 and was commercially solvent keeping in view its contingent and prospective liabilities in terms of clause (c) of subsection (1) of section 306 of the Ordinance.

As regards the fourth contention of Mr. Fazel-e-Ghani Khan; learned counsel, that the respondent Company failed to bring any material on record to show that the appellant Company was unable to pay its debts in terms of clause (c) of the subsection (1) of section 306 of the Ordinance, it may be observed that the above submission has been dealt with hereinabove while dealing with the above mentioned third submission and need not be repeated. It will suffice to observe that the burden to prove otherwise, was on the appellant Company as the respondent Company was able to prove that it had served the notice in terms of clause (a) of-subsection (1) of section 306 of the Ordinance, and that the appellant Company neglected to pay the due amount within the notice period of thirty days.

> Adverting to the fifth submission of the learned counsel for the appellant Company that the respondent Company cannot invoke the provisions of sections 306 and 309 of the Ordinance, with the object to bring pressure on the appellant Company and to coerce it to pay the above amount under the Mobilisation Advance Guarantee, it may be stated that though it is correct that the above provision of the Ordinance cannot be invoked to bring pressure on the appellant or to coerce them to pay the amount of debt, bust in the present case we have held that the conclusion of the Company Judge that the appellant Company is unable to pay its debts is correct and therefore, it is wrong to urge that the above provisions of the Ordinance were invoked mala fidely by the respondent Company."

9. The learned Counsel for the Respondent has relied upon this judgment of the Hon'ble Supreme Court specially Clause (i), (ii) and (iv) as above and has contended that if a debtor company is merely unwilling to pay its debts; but otherwise is commercially solvent, then the remedy is by way of normal Suit and not a Petition for winding up. She has further relied upon that if the negligence on the part of the debtor company to pay the sum demanded is not on account of want of commercial solvency, but because of bonafide dispute based on a substantial ground, the winding up petition will not be sustainable. She has also relied upon the observations that the object of Section 305 and 306 of the Ordinance, is not to coerce a debtor company to make payment to an unpaid creditor, but to secure discontinuation or functioning of such company which has ceased to be commercially solvent. Though there cannot be any cavil to the above proposition and the law settled by the Hon'ble Supreme Court; however, the applicability of the same is always dependent on the peculiar facts of each case individually. In fact even in the cited case as above the Hon'ble Supreme Court after laying down the principles for entertaining or otherwise of a winding up Petition was pleased to dismissed the Appeal of the debtor against a winding up order of the High Court. Therefore, in each and every case while deciding a winding up Petition, the peculiar facts of that case are very much relevant and there cannot be any hard and fast rule to apply the above dictum laid down by the Hon'ble Supreme Court as contended. It is also observed by the Hon'ble Supreme Court, at para (ix) that the factum that a creditor has other or alternate remedy under general law or special law does not debar him from pressing in aid the provision of winding up of a company. The final observations and finding of the Hon'ble Supreme Court is to the effect that once a creditor proves service of a demand notice in terms of clause (a) of Sub-section (1) ibid, the burden is shifted upon the debtor company to rebut the presumption created by fiction of law by virtue of the above clause, 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. In that case a conditional order of winding-up was made and was maintained, and reliance on any part of the judgment, without considering the overall effect and the peculiar facts of that

case is of no help to the case of the Respondent. In the present case, it is not merely that the Respondent is a creditor of the Petitioner, but that credit is by way of letter of Commitment and Guarantees which are not in dispute (except that they have been discharged). It is also a fact that Respondent is an Investment Bank / Non-Banking Finance Company ("NBFC"). The letter of Commitment / Guarantees have been issued as well as renewed on specific request(s) and the amount claimed by the Petitioner Company has not been paid. The objection that there is a dispute as to the claim is not substantiated as argued from the pleadings of the Respondent Company. Insofar as the claim in respect of Gharibwal is concerned, reliance has been placed on Letter dated 30.07.2009 issued by them and addressed to the Respondent wherein, there is some discussion regarding joined *Pari-pasu* charge and the agreement with the Petitioner Company as well as other creditors; however, it is a matter of record that in this very Letter the Respondent Company has been requested to extend the Letter of Commitment for a further 360 days up to 05.08.2010. This correspondence in any manner cannot be construed so as to justify the stance that the customer had entered into a restructuring process which was also accepted by the Petitioner Company. It is settled law that mere offer in this manner would not discharge the Guarantee by itself. A Guarantee is always independent of the understanding between the parties, whereas, the wording of the Guarantee in question also does not support the stance of the Respondent. The intent and object of obtaining a letter of commitment / guarantee and that too from an Investment Bank / NBFC is to secure, and underwrite the transaction with the customer. Now if the Guarantor itself fails to honor the commitment, and to pay the claim lodged within the validity of the Guarantee, then there remains no recourse available to the party in whose favour the Guarantee has been issued. The Respondent / Bank has not been able to bring on record any such material so as to convince the Court that; firstly the letter of commitment / Guarantee had expired when the claim was lodged; and secondly, the terms of the agreement between the Petitioner and its two customers on whose behalf the letter of commitment and Guarantees were executed, altered or restructured in a manner that it had amended and or discharged the very letter of commitment / Guarantees itself. In fact the letter of Gharibwal as above is contrary to what has been argued on behalf of the Respondent inasmuch as though it is stated by the customer that some negotiations are going on, but at the same time, the customer of Respondent is requesting to extend the Letter of Commitment for another 360 days. This would only justify that the commitment was even otherwise, supposed to remain extended and valid, notwithstanding any restructuring or refinance or any other arrangement between the parties. Nothing of that sort has been made out to even consider the implication of s.134 of the Contract Act, 1872, as contended. In Para wise comments stance has been taken by the Respondent that encashment and the call of

payment was fraudulent as well as premature. It would be advantageous to refer to such pleadings which read as under:-

> "d. As evidenced by Gharibwal Cement's letter of 30 July 2009 (copy attached herewith as **Annexure "B"**) shortly before payment under the letter of credit was to have been made, Gharibwal Cement was in the process of putting together certain facilities to be able to liquidate its payment obligations under the letter of credit facility extended to it by the Petitioner. In this letter Gharibwal Cement requested the Respondent to extend the validity of the Letter of Commitment up to 5 August 2010 but this request was not accepted by the Respondent. These efforts also included a syndicated lease facility to be provided by the Respondent which did not materialize.
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> e. As evidenced by paragraph 2 of the Letter of Commitment, the Respondent's obligation there under was to crystalize "in case the Customer (Gharibwal Cement) would be able to discharge its payments, obligations under L/C."
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> f) In the circumstances the Petitioner called on the Letter of Commitment by its letter of 7 August 2009 (copy attached herewith as **Annexure "C"**). This letter reiterated the contents of the Letter of Commitment by noting that the Respondent had undertaken to discharge Gharibwal Cement's obligation if it failed to pay the same and called upon the Respondent to pay the sum of Rs. 245,000,000/- on or before 10 August 2009. As evidenced by the contents of the immediately following sub-paragraph, this call was fraudulent to the knowledge of the Petitioner and hence of no legal effect;
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> g. As evidenced by the Petitioner's letter of 10 August 2009 addressed to Gharibwal Cement (copy attached herewith as **Annexure "D"**) payment under the letter of credit was made by the Petitioner on 10 August 2009 by creating overdue acceptance due to non-availability of sufficient funds in Gharibwal Cement's default was clearly unwarranted and fraudulent to the knowledge of the Petitioner. Not having been made in accordance with the Letter of Commitment, the demand was and is not binding on the Respondent and cannot be conceivably have the effect of invoking the Respondent's liability there under:-
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> h. The Respondent understands that since 10 August 2009 when the Petitioner made payment under the Letter of Credit, it has rescheduled Gharibwal Cement's liability. Documents evidencing this are not available with the Respondent but are in the possession of the Petitioner. It is respectfully submitted that this rescheduling has had the effect of discharging the Respondent of its liability under the Letter of Commitment by its own terms and even otherwise by operation of law and the same cannot be the basis of these or any other proceeding against the Respondent."

10. Perusal of the aforesaid stance of the Respondent reflects that the only ground which has been urged upon is to the effect that the purported rescheduling between the parties had the effect of discharging Respondent of its liability under the Letter of Commitment in respect of Gharibwal. This does not appear to be a justifiable cause as it is not a matter of any rescheduling which could be substantiated from the record placed before the Court. It is a mere assertion without any supporting material, whereas, it is claimed that all documents in this regard are with the Petitioner. This argument is absurd and misconceived. If there was a restructuring as contended, then at least Gharibwal (customer) must be in possession of the same and being a customer of

Respondent, it would not have been much difficult to place such material on record. Moreover, it need not be reiterated that while issuing a letter of commitment or a guarantee, a company like the respondent, must, rather should have taken a collateral, and insofar as the petitioner is concerned, their claim ought to have been honored by the respondent, as unlike normal cases of lending, this was a guarantee by a third party i.e. respondent, which otherwise is an Investment Bank / NBFC. As to the claim of AMZ the only stance which has been taken is to the effect that since the Petitioner has filed a Suit under the Financial Institution (Recovery of Finances) Ordinance, 2001 therefore, a winding up Petition is not maintainable. This stance again is misconceived in view of the dicta laid down in the case ***Sindh Glass Industries Ltd., v National Development Finance Corporation*** (**PLD 1996 SC 101**) wherein the Hon'ble Supreme Court has been pleased to repel this objection, by holding that *"pendency of the Suit is no bar to filing a petition for winding up unless it is proved that it has been filed merely to pressurize the debtor and without bona fide intention"*. Here in this matter, the Respondent Company has not been able to show or substantiate this aspect from the record; rather, the stance is altogether different in that the Guarantees and Commitment stands discharged. I am afraid this stance of Respondent Company is nothing but a lame excuse. It needs to be kept in mind that this is not a case of any ordinary recovery of money and refusal; but a case of issuing letter of Commitment and Guarantees by a Financial Institution, which has much higher encashment ability viz-a-viz an ordinary instrument or promissory note. Again in the case reported as ***Central Cotton Mills Limited v Habib Bank Limited*** (**2004 SCMR 1443**), the same view has been reiterated by the Hon'ble Supreme Court.

11. After having considered the above proposition of law and the judgments on the issue, now it is to be discussed that whether in all such situations, is it mandatory and or necessary for the Company Court to pass an order for winding-up of a Company. I believe certainly not. This all depends on the peculiar facts of a case primarily, and after ascertaining the same, the Court has to exercise the discretion vested in it in a judicious manner. It is settled law that a Court exercising a discretionary power must not do it in an arbitrary or capricious manner; but by having guidance from the sound judicial principles. It is in fact an equity jurisdiction which is flexible inherently. The decision of the Court after examination of the facts must yield to justice and not to hardship for the sake of applying the law only. It is not that if a Suit is pending, the winding up petition ought to be dismissed; and vice versa, it is also not mandatory that such a petition be granted necessarily. The Court can always pass a conditional order is mitigating circumstances to meet the ends of justice and giving the parties to avoid such an extreme order. After all the words used in s.305 of the Ordinance is "may" and not "shall" and is therefore discretionary. It is well settled by now that even if the Court

comes to the conclusion that a Company is unable to pay its debts within the meaning of the relevant provisions of the Ordinance, it may yet in exercise of its discretion refuse to pass an order of winding-up. Here in this matter though a Suit (in respect of AMZ) is pending; but it must also be kept in mind that it is primarily against the principal borrower wherein the Respondent is also a defendant being a guarantor. Secondly, it is still pending and neither any leave to defend has been granted, nor any evidence recorded. It is also of utmost importance as well as relevance to mention that this petition was filed on 18.12.2009, whereas, the Suit bearing No.B-27/2010 was filed on 11.3.2010, i.e. subsequently. Therefore, the contention that this petition is only a threat and is a coercive measure is not justified. It is also noted that the Suit is only in respect of one transaction regarding AMZ, and not in respect of the other pertaining to Gharibwal. Therefore, even otherwise is not a valid ground not to entertain this petition, merely for filing of a Suit and its pendency. It has its own complexities which as a matter of course, is to be considered. The stance of the Respondent Company here is not that they are unable to pay the debts or the Guaranteed and committed amount; but it is only unwillingness on their part due the arguments as recorded hereinabove, in respect of pendency of the Suit and the purported discharge of the Guarantees. This with respect is not at all established so as to be considered by this Court. Such unwillingness is not supported by plausible reasons or documents, except the issue raised and discussed hereinabove which has already been rejected by this Court. If this is permitted that there is a pending Suit, or the amount is disputed, or the Guarantee stands discharged, then in that case hardly any Company would ever be wound-up, because this is always a defense is these petitions. Therefore, with respect I am not convinced with this line of arguments and unable to subscribe to it. This is a case which in my view requires the Court to exercise the discretion vested in it on the basis of the material placed as well the mitigating circumstances and the pendency of the Suit as well. It is also to be considered that in this case the claim of the petitioner is in respect of letters of commitment as well proper guarantees, and not of any amount due in course of some buying or selling of goods or otherwise. In support reliance may also be placed on the following observations of a learned Single Judge in the case reported as ***Nazeer Ahmed Khan v Admore Gas (Pvt.) Limited*** (**2015 CLD 203**), which in the given facts fully applies to the present case and reads as under;

> 21. After considering the matter and taking into account the relevant factors I am of the view that in the present case, while the company ought to be wound up it would be appropriate to make a conditional order. This is so primarily for two reasons. Firstly, the present petition was filed after such a prolonged period of the institution of Suit 1739 of 2009 that a substantial portion of the relevant debts would have become barred by limitation. In respect of such debts there has therefore been such unreasonable delay as would amount to laches. This is a factor that in my view must be given due weight. Secondly, there has been no material change in the intervening period, especially insofar as the petitioner and the company are concerned. In all

> respects relevant for present purposes, matters appear to have been the same on the date when the petition was filed as they were on the date on which Suit 1789 of 2009 was instituted. This also is a factor that needs to be given due consideration. The discretionary power of the Court ought therefore to be exercised accordingly.
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> 22. In view of the foregoing, I hereby order that the respondent company be wound up subject to the condition that if a sum of Rs.22,00,000 is deposited with the Nazir of the Court within a period of 45 days, then the petition shall be deemed to have been dismissed; otherwise, the order shall take effect and the official/assignee shall act as the official liquidator. If the aforesaid sum is deposited, it shall be held pending the outcome of Suit 1789 of 2009. If that suit is decreed and a sum of money is awarded as part of the decree, then the aforesaid amount of Rs. 22,00,000 (plus accrued markup/profit) or such portion thereof as is relevant shall be released to the petitioner and the balance, if any, be returned to the company. If however, Suit 1789 of 2009 is decreed and no sum of money is awarded as part of the decree or the said suit is dismissed, then the aforesaid amount shall be returned to the company.

12. In view of the above discussion and the facts and circumstances of this case, it is hereby ordered that the company / Respondent be wound up subject to the condition that if a sum of Rs.245,000,000/- (Rupees Two Hundred and Forty Five Million), is paid to the petitioner within 45 days hereof, and an amount of Rs.128,000,000/- (Rupees One Hundred and Twenty Eight Million) is deposited with the Nazir of this Court again within 45 days hereof; the petition shall stand dismissed. Nazir is directed to invest such amount in some Government Profit bearing instrument(s). In case of failure and non-compliance the Official Assignee is deemed to have been appointed as an Official Liquidator of Respondent Company with effect from such lapse of 45 days as above. The amount so deposited with the Nazir of this Court shall be subject to final outcome and decree in the Banking Suit No.B-27/2010.

13. The petition is allowed by a conditional order of winding-up in the above terms.

Dated: 23.01.2019

J U D G E

ARSHAD