IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:

Mr. Justice Mohammad Shafi Siddiqui

J.C.M. No.02 of 2014

Industrias Cannon de Colombia S.A
Versus
Olympia Spinning & Weaving Mills Ltd. & others

Dates of Hearing:	26.04.2016 and 11.05.2016
Petitioner:	Through Mr. Salahuddin Ahmed Advocate
Respondent No.1:	Through Mr. Hussain Ali Almani Advocate
Respondent No.2:	Through Mr. Abid Naseem Advocate
Respondent No.3:	Through Mr. Kazim Hassan Advocate

J U D G M E N T

Mohammad Shafi Siddiqui, J.- The petitioner has filed this petition under section 309 of Companies Ordinance, 1984 for the winding up of respondent No.1. Respondents No.2 and 3 were joined subsequently who claim to be the creditors. The petitioner has prayed for appointment of Official Liquidator and has also prayed for liquidation of respondent No.1's assets in favour of its creditors and has further prayed to restrain it from selling, alienating and creating third party interest in the assets belonging to respondent No.1.

2. The respondent No.1 apart from presenting a defence on merits has also raised certain preliminary objections which are necessary to be highlighted and to be responded before coming to the merits of the case, if required. The objections as raised are:

i) That the winding up petition cannot be filed by a foreign company;
ii) That the petitioner's claim is barred by limitation.

3. As to these objections learned counsel for respondent has taken me to the provisions of Section 450 of the Companies Ordinance and submitted that the compliance, as required in terms of Section 451 and 452, have not been made and as such the petitioner is legally not capable and competent to initiate any legal proceedings including but not limited to the instant petition for winding up. Learned counsel in this regard relied upon the case of Hala Spinning Mills Ltd. v. International Finance Corporation reported in 2002 SCMR 450.

4. In relation to a time barred debt learned counsel has relied upon Article 51 of the Schedule to the Limitation Act, 1908 and submitted that the limitation to claim money advanced for payment of goods to be delivered is three years from the date the goods were to be delivered and Article 115 of the ibid Act relates to the claim for compensation which also provide a period of three years as limitation from the date of breach. It is claimed by respondent No.1 that since the subject 13 contracts were to be performed on or before November, 2010 therefore all debts owed under these contracts became time barred in November, 2013 whereas winding up petition was filed in the month of January, 2014.

5. In reply to the above preliminary objections, learned counsel for the petitioner contended that the submissions as to the preliminary objections have no basis as in section 450 of Companies Ordinance applicability of Section 451 to 465 is provided to foreign company which have established place of business in Pakistan hence this alone would score off applicability of section 451 and 452 of the ibid Ordinance.

6. Insofar as contention of the claim being time barred is concerned, learned counsel has very heavily relied upon an email dated 01.12.2012 attached as Annexure F/8 at page 181 as an acknowledgment of the debt claimed in the petition. It is submitted that in terms of Section 19 of the Limitation Act, 1908 any acknowledgement before expiry of the period

prescribed in Limitation Act for filing a suit for recovery, would be considered for fresh computation of period of limitation which is to be computed from the time when the acknowledgement was so signed. It is claimed that the email referred above is sufficient to recount fresh period of limitation.

7. I have heard the learned counsel for the parties on the preliminary issues as well as on merit and also perused the material available on record.

8. I would first address the question as to the maintainability of this petition as being filed by a foreign company. The provisions of Section 450 of the Limitation Act onwards relates to the foreign companies that is to say company incorporated or formed outside Pakistan which after commencement of the Companies Ordinance established a place of business within Pakistan or which have, before the commencement of the Companies Ordinance, established a place of business in Pakistan and continue to have established place of business within Pakistan at the commencement of Ordinance. It is neither the case of the petitioner that they have established place of business in Pakistan nor the respondents have claimed contrary thereto. The point was answered in the case China Annang Construction Corporation v. K.A. Construction Co. reported in PLJ 2002 SC 261 wherein issue of dismissal of suit for non-compliance of the referred sections was considered and it was observed that when a company has established place of business in Pakistan only then provisions of Section 451 and 452 would be applicable and compliance with which provision would be imperative failing which foreign company would incur a disability to file any legal proceedings. As stated that petitioner is neither claimed to have its registered office in Pakistan nor the respondents have claim contrary to the above hence I would score of the applicability of the aforesaid provisions of the Ordinance.

9. The question of a time bar debt is a crucial question which goes to the root of the case. In the light of the arguments it is to be seen whether the subject email could be considered as a sufficient acknowledgement of the debt claimed in the petition. Before considering this email it is necessary that a brief history be traced.

10. The claim of the petitioner pertains to 13 contracts executed between the parties to be performed between August 2010 and November, 2010. The chart of the contacts available shows that the last consignment out of 13 contracts was to be shipped in the month of November, 2010. The petition was filed on 02.01.2014. The purported acknowledgement of debt shows that the respondent No.1 has addressed an email to one David Bergmann of Cannon/petitioner, wherein respondent No.1 has shown their intention to settle the Cannon's outstanding.

11. Prior to this email, a letter dated 02.07.2013 shows that there was some arrangement between the petitioner and respondent No.1 and that they agreed to a monthly instalment or adjustment of US $.35,000/- to cover the debt and in relation thereto the petitioner agreed to continue purchasing the cotton at a discounted price on every delivery of subsequent contracts. The letter further shows that the petitioner was required to open LC for the deliveries in order to recover the alleged money hence they were coerced to pay 100% LC for further shipment and it is claimed by the petitioner in the said letter that they continued with such arrangement and the debt was reduced to Rs.1,734,849.19.

12. It is with this background that the email dated 01.12.2012 was forwarded and prima facie was not a coerced arrangement (earlier one). The respondent No.1 made shipment to the petitioner in between 01.01.2011 to 30.06.2012 meaning thereby that based on certain

arrangement certain goods were shipped between the period from 01.01.2011 to 30.06.2012.

13. It is claimed by the respondent that under this new arrangement respondent No.1 shipped yarn worth over US $.5 Million. These shipments are not denied. It appears that the petitioner did not find this new arrangement feasible and hence did not open the follow up required LCs and that the respondent No.1 was unable to ship any further container to the petitioner and also unable to settle accounts between them on the basis of this new arrangement.

14. It prima facie seems to be a case of reciprocal promise and unless a promise is fulfilled the earlier promise cannot be performed and that too when it is dependent on reciprocal arrangement or promise. The case of Muhammad Saleem v. Ashfaq Ahmad Khan reported in 1989 CLC 1883 and Abdul Lateef Dar v. District Alltoment Committee reported in 1980 SCMR 322 are relevant in this regard.

15. It is in this regard that the respondent No.1 has claimed that the parties entered into seven contracts for delivery of 38 containers for which the petitioner was supposed to open LC and as a result of non-compliance of this understanding reached between them the respondent No.1 was forced to sell the purchased yarn (purchased for petitioner) at a lower rate in the market and faced the consequences of a loss of US $.1,270,253/-. Apart from that the respondent's claim of regulatory duty is yet to be settled as payable by the petitioner.

16. It seems that it is not the case that the respondent No.1 is not in a position to repay but they are unwilling to pay in view of contingencies referred above and it is clear that when a bonafide dispute in relation to claim is shown, a company cannot be wound up under the circumstances and a company cannot be coerced to pay such disputed amount which is yet to be settled. The email relied upon by the petitioner itself is not clear as to what amount is in dispute/outstanding or has been admitted

as it only relates to settling the accounts of Cannons but has not admitted any specific amount to be paid by the respondent No.1. The word ‘settle’ does not mean that any amount is accepted or admitted, rather it means that they would come to an agreement about it. It thus appears to be a mixed question of law and facts and require evidence.

17. The other point that has been taken by the petitioner’s Counsel is in relation to a financial statement and closure of factory. In this regard it is claimed that the company is deemed unable to pay its debts pursuant to Section 306 of the Ordinance in view of the disclosure of the financial affairs in the company’s audit. It is claimed that the company’s current liabilities exceeds its current assets and that the company’s factory is shutdown since May, 2014. Counsel further relied upon the annual audit report for the year 2014 which relates to the company’s ability to operate and use to going concern since company is unable to realize its assets and discharge its liabilities in the normal course of business. Learned Counsel in this regard has relied upon the case of Halla Spinning Mills reported in 2002 SCMR 450 and submits that while considering the aforesaid point the annual accounts are to be considered as material documents for the purposes of exercising discretion to allow a winding up petition.

18. On the other hand respondent No.1 claimed that it has been paying to all his legitimate creditors such as respondents No.2 and 3 who have in fact opposed the subject winding up petition and since it has been meeting all its liabilities it cannot be considered as insolvent and hence not liable to be wound up. Counsel without prejudice submitted that even if the current liabilities of the company exceeds its current assets it does not necessarily means that the company is unable pay its debts and has relied upon the case of ACK Krishina Swami reported in AIR 64 Maddras 191. Counsel for the respondent No.1 has further relied upon an interim order dated 06.1.2014 under which respondent No.1 has

been restrained from creating any third party interest on any of its assets and hence they are not in a position to negotiate with the bank for restructuring their liabilities and obtaining new lines of finances.

19. I have scrutinized this particular issue of the petitioner that on account of the company being insolvent provide independent cause to the petitioner to initiate proceedings for winding up of the company. No doubt it does provide an independent cause to a creditor if the current liabilities of the company exceed its current assets and that they are also commercially insolvent, however this is also a matter of fact that none of the alleged creditors have come forward to support the petitioner's cause. The claim of the petitioner itself is yet to be ascertained on the touchstone of Article 51 and Section 19 of the Limitation Act which summarily cannot be decided here. Even in the case of Halla Spinning Mills the observation of the Hon'ble Supreme Court was that efforts should be made by the judicial forums to adopt such device so that the project may continue running commercially and its financial liabilities starts reducing gradually. In the instant case it is not claimed that the company is not running but it is claimed that the company is facing losses. The financial institutions who have provided accommodation to the company have opined that it would not viable to wrap up the company in view of purported claim of the petitioner since the majority creditors whose finances are not even denied are of the view that the company is still in a position to fetch business on account of having roots in the local and international market. It is only when there is absolutely no hope to carry on business by the company except at losses and there is no reasonable hope that the object to the trading and profit can be achieved, winding up of the company becomes inevitable. The major financer still willing to restructure the finances to provide support to the going concern and the company only started facing losses ever-since the litigation started which has disabled them to

have any kind of financial restructuring from any of the major creditors including but not limited to respondent Nos.2 and 3.

20. The statutory notice of demand under clause (a) of subsection (1) of Section 306 of the Companies ordinance is in relation to a debt claimed by the petitioner which as observed is to be ascertained and is also subjected to a limitation clause and hence such statutory notice would also loses its strength when not only the claim is bonafidely disputed but is also subjected to the Limitation Act, which in this particular case appears to be a mixed question of law and facts.

21. In the case of Mulla Abdullah reported in PLD 1971 Karachi 597 the Bench held that an application for winding up by creditor is not a substitute for a suit of recovery of debts and that the expression that the company is unable to pay its debts does not mean unwilling to pay as it may have a bonafide dispute.

22. In another case of Metito Arabia Industries Limited report in 1997 CLC 230 it was held that failure to pay debts by a company on service of statutory notice was not the only condition for passing order of winding up against such company as in these circumstances bonafide dispute regarding the debt and the intention of the petitioner seeking winding up is also to be considered as prime consideration. It is further observed that object of the winding up is not to coerce the company but to secure continuation of functions of such company which ceased to be commercially solvent.

23. In the case of M/s. Adage Advertising Lahore reported in 1970 SCMR 184 the Hon'ble Supreme Court has held that a winding up order will not be made on debts which is bonafide disputed by the company.

24. Hence, in view of facts and circumstances I do not consider this case is fit for winding up of company and hence petition is dismissed.

Judge