

**ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI**

J.C.M. No. 37 of 2003

Petitioner No.1 : Muhammad Laeeq (Nemo)

Petitioners : Muhammad Khan and others, through
No.2 to 35 : Mr. Shahryar Mirza and Mrs. Noor Naz Agha,
Advocates

Respondent No.1 : Sindh Alkalies Limited (Nemo)

Respondent : The Secretary, Export Processing Zone
No.2. : Authority (Nemo)

Claimant : Faysal Bank Limited, through
: Mr. Ejaz Ahmed Sheerazi, Advocate

Claimant : National Bank Limited, through
: Mr. Muhammad Imtiaz Khan, advocate

Official Assignee/ :
Official Liquidator : Mr. Chaudhry Waseem Iqbal

Date of hearing : 15.03.2021
Date of order : 19.03.2021

ORDER

ZAFAR AHMED RAJPUT, J: - By this common order, I intend to answer References No.29 & 30 of 2012 and 31 of 2017 submitted by the learned Official Assignee / Official Liquidator, so also to decide C.M.A. No. 341 of 2017 filed on behalf of Faysal Bank Limited (**FBL**), under Section 151 C.P.C.

2. Learned Official Assignee/ Official Liquidator has submitted Reference No. 29 of 2012 through which he has sought approval of this Court to distribute assets of the Company under liquidation (*Sindh Alkalies Limited*) to different claimants in terms of Section 405 of the Companies Ordinance, 1984 (**Ordinance 1984**). As per Reference, in compliance of the order, dated 20.09.2004, the Official Assignee invited the claims from the creditors on 25.09.2004 through daily “Jang” Karachi and daily “Dawn” (combined) and

then again on 10.10.2011 through said newspapers and daily “Kawish” Hyderabad, and he received claims from (i) Banks and Leasing (ii) Public/Creditors with decree (iii) Public / Creditors (iv) Ex. Directors of the respondent No.1/company (v) Ex. Employees of the respondent No.1/company and (vi) shareholders of the respondent No.1/company. Subsequently, Official Assignee submitted Reference No. 30 of 2012 for the approval of the claim of Summit Bank Limited. Thereafter, on 14.09.2017 he has submitted Reference No. 31 of 2017, seeking order of this Court for the renewal lease of 30 Acres land situated in Deh Rehri, Karachi from Board of Revenue, Government of Sindh. C.M.A. No. 341 of 2017 has been filed on behalf of FBL under Section 151 C.P.C. seeking direction to learned Official Assignee to release their amount of Rs.35,860,000/00.

3. Learned counsel appearing for National Bank of Pakistan (**NBP**) has contended that upon notice to creditors vide publication dated 25.09.2004, NBP, on 10.02.2005, submitted its claim before the Official Assignee, based upon mortgaged decree, dated 17.11.2003, passed in its favour, to the tune of Rs.14,53,64,777.58 (principal and markup till 31.07.2011). He has further contended that the leases of the properties mortgaged with NBP have already expired and this Court has passed various orders and directions to Government of Sindh in this J.C.M. for extension of such leases. He has further contended that so far the land of the factory property owned by the company in liquidation is concerned, it is an admitted position that NBP handed over the original lease and other relevant documents including Memorandum of Deposit of Title Deed (**MODTD**), dated 17.11.1997, to Official Assignee; therefore, a right of NBP on the factory property emanated from the mortgage/ MODTD, which was created under section 58 of the Transfer of Property Act, 1982, and since the original title documents of the

factory were in possession of the NBP, this very fact substantiates that mortgage was infact created in favour of NBP; hence, the company in liquidation is indebted and all its immovable properties including plant and machinery is mortgaged with NBP. He has further contended that as the factory property has finally been sold out by the Official Assignee through auction in the sum of Rs.220.90 million, NBP being one of the claimants / creditors are entitled to have their claim adjusted.

4. Learned counsel appearing for FBL has contended that FBL is also a secured creditor as an amount of Rs.3,58,60,000.00 is payable to them. He has also contended that FBL had filed a suit for recovery of its outstanding amount bearing No. 34 of 2001 (*Faysal Bank Limited v. Sindh Alkalis Limited*), which was decreed by this Court on 03.08.2002 for a sum of Rs.3,58,60,000.00 alongwith cost of funds and the Official Assignee accepted the claim of FBL though its Reference No. 34 of 2017. He has further maintained that FBL has already complied with the requirements of rule 10 and 11 of the Second Schedule of the Insolvency (Karachi Division), Act 1909 (**Act of 1909**); hence, the application filed by FBL bearing C.M.A. No. 341 of 2017 may be allowed as prayed by directing the Official Assignee to release the amount of the FBL as per the decree.

5. Learned counsel appearing for the petitioners, except petitioner No. 1, while referring section 405 of the Ordinance 1984 has argued that the wages and salaries of the employees of a winding up company comes first as preferential payment; as such, the employees of the company are first entitled to receive their claims from the auctioned money and its accumulated profit as well. She has added that loan advanced by a bank to a company by pledge of goods does not fall within the definition of “secured loan or advance” and

such loan does not qualify to be treated as a preferential debt under section 405 of the Ordinance 1984. She has further argued that the claims of the NBP and FBL are based on decrees and it is an admitted position that the auctioned land of the company in liquidation was not mortgaged with the NBP or FBL but some other lands of the company; therefore, their claim cannot be treated as secured claim against the auctioned land of the company.

6. Heard the learned counsel for the parties and perused the material available on record with their assistance.

7. It appears from the perusal of the record that vide order dated 04.06.2004, the respondent No.1/ M/s. Sindh Alkalies Limited was ordered to be wound up in terms of section 305 (h) of the Ordinance 1984 by appointing the Official Assignee as Official Liquidator of respondent company in this J.C.M. Thereafter, by subsequent order, dated 20.09.2004, this Court permitted him to sell the assets of the respondent company and invite claims from the creditors. The claims were received which were accordingly assessed and report was filed by him, vide Reference No.29/2012. FBL claiming to be a secured creditor filed C.M.A No.341/2017. Besides, NBP has also come forward as a secured creditor. Thereafter, one of the assets of the respondent company i.e. factory known as Sindh Al-Kalis, situated in Naclas No. 26, Deh Rehri, Tapo Landhi, District Malir, Karachi, measuring about 68-28 acres with plant, machinery and building constructed thereon, were sold out to M/s. 5 Star & Co. through auction by the Official Assignee, which was confirmed by this Court vide order dated 08.06.2011. The sale proceed thereof is deposited with the Official Assignee for the adjustment of the claims of the creditors.

8. The banks i.e. FBL and NBP have claimed their charge over the said auctioned land; however, it is an admitted position that in pleadings of their respective banking suits they have not claimed any charge against the auctioned property and no decree exists in their favour for receiving decretal amount through sale of auctioned land, as admittedly their finance is secured against other immovable land of the respondent company through a charge / mortgage. Besides, it may be observed that Section 404 of the Ordinance 1984 provides application of the Insolvency Rules in winding up of the Company; as such, the Rules provided in Second Schedule of the Insolvency (Karachi Division), Act 1909 enacted under Section 48 of the said Act describes the procedure for admitting the secured creditors for the value of the claim; however, in the instant case no procedure was applied by the secured creditors; therefore, Rule 16 of the Second Schedule of the Insolvency Act comes in action, which provides that “*If a secured creditor does not comply with the foregoing rules, he shall be excluded from all share in any dividend*”.

9. The same proposition of law has come up in the case of *Pakistan Industrial Credit and Investment Corporation Limited vs. M/s. Ajma Corporation Ltd. (2014 CLD 1097)*, wherein this Court has observed that *Section 404 of Companies Ordinance, 1984 read with section 47 of Provincial Insolvency Act, 1920 makes clear that the secured creditor is free to relinquish his security. He may choose not to do so. But if, and once, he does then his position alters. The option that was earlier available to secured creditor (i.e. to realize his security by standing outside winding up) is no longer at hand. His position is relegated to that of any other creditor who had proved his debit before the official liquidator, in accordance with relevant provisions. Since the security was relinquished, claim of revenue must be accorded preference under Section 405 of Companies Ordinance, 1984.*

This Court in said case directed Official Liquidator to pay the amounts to revenue out of with-held amount and if there was a balance remaining (whether on account of any accrued remaining profit/mark up or otherwise) that was to be distributed amongst the company's creditors on the same terms as before.

10. In view of the above, I allow the References to the extent that the admitted amount of the secured creditors FBL and NBP is/be considered as un-secured; however, their claims shall be paid after the preferential claim is released under Section 405 of the Ordinance 1984. The official Assignee is directed to proceed further for the renewal of the lease of the immovable properties of the company in liquidation. The C.M.A. No. 341 of 2017 stands disposed of in terms of the order on References.

11. All applications pending adjudication in J.C.M. No. 37 of 2003, Suit No. 1283 of 2010 and Execution Application No. 58 of 2010 are adjourned to a date in office. Let a copy of this order be placed in other connected matters.

JUDGE

Athar Zai