

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE IJAZ UL AHSAN

CIVIL APPEALS NO. 1406 AND 1407 OF 2016
(On appeal from the judgment dated 04.02.2016 of the Peshawar High Court, Peshawar passed in I.C.A. Nos. 06 and 07 of 2012).

*State Bank of Pakistan through Chief Manager,
Peshawar.* (in CA.1406/16)

*M/s Securities & Exchange Commission of
Pakistan, Islamabad.* (in CA.1407/16)

.... Appellants

VERSUS

*Securities and Exchange Commission of
Pakistan and others* (in CA.1406/16)

*Official Liquidator, Islamic Investment Bank
Limited and others* (in CA. 1407/16)

.... Respondents

In CA.1406/16

For the Appellant: Syed Ali Zafar, ASC
Raja Abdul Ghafoor, AOR

For Respondent No. 1: Mr. Anwar Mansoor Khan, Sr. ASC
Mr. Asim Mansoor Khan, ASC
Mr. Tariq Aziz, AOR

For Respondent No. 2: Mr. Mudassar Ameer, ASC

For Respondent No. 3: Mr. Farooq, Section Officer,
Finance Department

For Respondents No. 4-6: Qazi Ehsanullah, ASC

For Respondents No. 7, 8,
10 to 28: Not represented

For Respondent No. 9: Nemo

In CA.1407/16

For the Appellant: Mr. Anwar Mansoor Khan, Sr. ASC
Mr. Asim Mansoor Khan, ASC
Mr. Tariq Aziz, AOR

For Respondent No. 1: Mr. Mudassar Ameer, ASC

For Respondents No. 2 & 3: Mr. Farooq, Section Officer,
Finance Department

For Respondent No. 4: Raja Abdul Ghafoor, AOR/ASC

For Respondent No. 7: Nemo

For Respondents No. 5, 6,
8-16: Not represented

Date of Hearing: September 28, 2017

JUDGMENT

Qazi Faez Isa, J. Leave to appeal was granted (in Civil Petitions for Leave to Appeal Nos. 1163 and 1344 of 2016) on May 5, 2016, which order is reproduced hereunder:

"It is *inter alia* contended that in winding up proceedings pending against Islamic Investment Bank Limited, learned Bench of the Peshawar High Court, Peshawar held the petitioner State Bank of Pakistan (in Civil Petition No. 1163/2016) and so also the petitioner Securities and Exchange Commission of Pakistan (in Civil Petition No. 1344/2016) liable for the conduct of the delinquent directors who forced the Islamic Investment Bank to go into liquidation. According to learned counsel for the petitioners, the State Bank of Pakistan and so also Securities and Exchange Commission were made liable to make good the loss on misreading and mis-interpretation of Sections 412 & 413 of the Companies Ordinance, 1984, which are clearly aimed at delinquent sponsor and or directors involved in promotion and formation of a company. It is alleged that State Bank only regulates the financial and or other matter within the contemplation of State Bank of Pakistan Act, 1956 and has no other role except regulating the financial and banking business.

2. Likewise, it is urged by the learned counsel Mr. Anwar Mansoor Khan that SECP is only a regulatory body, which regulates the functioning and operation of a company covered under Companies Ordinance, 1984. It is urged that such provisions of Section 412 & 413 of the Companies Ordinance only apply to the delinquent director and not regulators as such.

3. Syed Ali Zafar, learned ASC for State Bank further contended that if at all the liability is stretched, it could be a tortuous liability which does not come within the purview of Sections 412 & 413 of the Companies Ordinance, which has been invoked by the Company Judge to held them liable and such liability if at all is denied it can be resulted in civil proceedings and not in liquidation proceedings under the Companies Ordinance.

4. Points noted above do call for examination. We, therefore, grant leave in both these petitions. Since it is a case of first impression, we would direct the office to fix the main appeals immediately after summer vacations.

CMA No. 2680/2016

5. Notice. In the meantime, the operation of the impugned judgment to the extent of both the petitioners is suspended."

2. To appreciate the controversy it would be appropriate to recount certain admitted facts. The Islamic Investment Bank Limited ("**IIBL**") was incorporated as an investment finance company on June 14, 1990 in the province of Khyber Pakhtunkhwa. The Security and Exchange Commission of Pakistan ("**SECP**") submitted an application on May 11, 2005 to the High Court under sections 305 and 309 of the Companies Ordinance, 1984 ("**the Ordinance**") for winding up IIBL (Company Case No. 5/2005). IIBL was ordered to be wound up vide order dated May 18, 2009 and Syed Mudassar Ameer, Barrister-at-Law, was appointed as the official liquidator under section 321 of the Ordinance. The High Court also directed the official liquidator to *"ensure that each and every penny outstanding against any person, authority, organization, Company or institution whatsoever it may be is promptly recovered, secured and deposited"*. The following further observations were made (in paragraph 15 of the judgment):

"15. Before concluding this judgment, it is held that not only the Chief Executive and Directors of the Board are liable to pay back the money they have looted from the Company, invested by the depositors but are also liable to criminal prosecution under the special law. Similarly the high ranking officers of the State Bank (Regulation and Supervision) are equally liable to share the burden of liability because of their criminal negligence knowing well that the respondent Company was going to sink but they muffled certain facts and did not take timely action for its rehabilitation or liquidation. The SECP (petitioner herein) is also no exception because during the deep crisis period the Company was going through, it played a similar negative rule, therefore, those officers connected with the affairs of the Company supervision must be taken to task."

3. The aforesaid judgment was appealed in this Court (C. A. Nos. 135-P, 136-P, 154-P, 878 and 879 of 2009); the appeals were disposed of vide order dated September 28, 2011, reproduced hereunder:

"The learned counsel for the parties agree that as far as winding up of the Company is concerned, no one has objection and that the winding up proceedings shall continue before the Company Judge. As to the observations made, directions given by the learned Company Judge, regarding the State Bank of Pakistan, Securities & Exchange Commission of Pakistan, the Chief Executive and the Directors of the Islamic Investment Bank and the Federal Government, the same are expunged as those were made without due notice to the said Institutions or individuals. However, it will be open to the Company Judge to proceed in the matter, as he deems fit, after due notice to those against whom an action is suggested or proposed to be taken. All these appeals are disposed of in the terms mentioned above."

4. Thereafter, the official liquidator filed an application before the Company Judge of the High Court (C.M. No. 35 of 2011) under sections 412 and 413 of the Ordinance and in it also arrayed the Federal Government as respondent Nos. 1 and 2, SBP as respondent No. 3 and SECP as respondent No. 4. The depositors / account holders of IIBL filed an application (C. M. No. 7-P of 2012) under section 412 of the Ordinance and in it also arrayed SECP as respondent No. 1, the State Bank of Pakistan ("**SBP**") as respondent No. 2 and the Government of Pakistan as respondent No. 3. Both these applications ("**the said applications**") alleged that the Federal Government, SBP and SECP did not properly regulate the affairs of IIBL and / or did not take preventive measures which could have saved the deposits and investments provided to IIBL, therefore, they were liable to the extent that the properties, assets and monies of IIBL available with the official liquidator for distribution fell short. The appellants filed their objections to the maintainability of the said applications. However, vide a common order dated October 15, 2012 the learned Company Judge rejected the objections and held that the said applications were "*maintainable against them*". This order was assailed by filing intra court appeals (SECP filed ICA No. 6/2012 and by SBP filed ICA No. 7/2012), however, both the appeals were dismissed vide common judgment dated February 4, 2016. The order of the Company Judge dated October 15, 2012 which was upheld in the Division Bench's judgment dated February 4, 2016 are challenged in these two appeals.

5. Syed Ali Zafar, the learned counsel representing SBP, and Mr. Anwar Mansoor Khan, the learned senior counsel representing SECP, state that under section 412 or section 413 of the

Ordinance, action cannot be taken against the appellants nor are they liable thereunder. They state that subsection (1) of section 412 of the Ordinance stipulates that only those who had, "*taken part in the promotion and formation of the company, or any past or present director, or officer of the company*" can be proceeded against, provided they, "*misapplied or retained or become liable or accountable for any money or property of the company*" or are "*guilty of any misfeasance or breach of trust in relation to the company*" and as the appellants are not amongst such persons nor have committed any of the stipulated acts they are not liable. Similarly, they are also not liable under subsection (1) of section 413 of the Ordinance which provides that only those carrying on "*any business of the company ... with intent to defraud creditors of the company or any other person, or for any fraudulent purpose*" and provided such persons "*were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible*". It is next contended that liability envisaged under sections 412 and 413 is personal and institutions like the SBP, which is a central bank established under the State Bank of Pakistan Act, 1956 or the SECP, which is the regulator of companies and markets and operates under the Securities and Exchange Commission of Pakistan Act, 1997, cannot be proceeded against. It was next contended that neither the SBP nor SECP were involved in the *promotion* or *formation* of IIBL, and that the words *promotion* or *formation* can not be extended to cover the appellants; Syed Ali Zafar referred to '*Company Law*' by Robert Pennington to reiterate that neither SBP nor SECP are *promoters* of IIBL as the word is understood in company law. If, as per the learned counsel, the appellants had performed any act pursuant to their respective

statutes in their ordinary course of business, this would not mean that they are promoters of IIBL in terms of section 412 or section 413 and liable thereunder. The Legislature, according to them, can not be presumed to have made a regulator and a central bank liable as it would result in their destruction because whenever any company is unable to pay its debts or its substratum disappears the appellants would be liable. The said applications, the learned counsel state, do not make any specific allegation against the appellants with regard to any matter as enunciated in section 412 or section 413 of the Ordinance, let alone there being any determination or finding with regard thereto.

6. The official liquidator and the learned Mr. Qazi Ehsanullah who represents the account holders/depositors of IIBL state, that the appellants failed to properly supervise and regulate IIBL which enabled the pilferage of deposits/investments of IIBL and accumulation of vast losses by it, and this could have been avoided if the appellants had been vigilant. They next urge that IIBL was incorporated by, or with the help, of SBP and SECP therefore they were its *promoters* and/or to have taken part in the *promotion* and *formation* of IIBL. Meeting the contention, that no specific allegation was made against the appellants in the said applications for being responsible for causing loss/damage, the learned counsel state that the liquidator has as yet not completed the liquidation of IIBL therefore the matter of loss/damage is premature and may be determined subsequently. They also rely on the impugned order of the learned Company Judge and the judgment of the learned Division Bench of the High Court, which they point out are concurrent and there is no reason to interfere therewith, particularly as sections 412 and 413 of the Ordinance had been

correctly interpreted and the appellants are liable for the loss/damage suffered by IIBL and its depositors/investors/account holders.

7. The first question which requires determination is whether the SBP or SECP can be proceeded against under either section 412 or section 413 of the Ordinance. The Ordinance has been replaced by the Companies Act, 2017 ("**the Act**") however as the said applications, objections thereto and the decision thereon pre-dates the promulgation of the Act we shall be considering sections 412 and 413 of the Ordinance. The matters stipulated in section 412 of the Ordinance are now contained in section 395 of the Act and those in section 413 of the Ordinance are now found in section 398 of the Act; the sections in the said two statutes are identical. Sections 412 and 413 of the Ordinance are reproduced hereunder:

"412. Power of Court to assess damages against delinquent directors, etc. (1) If in the course of winding up a company it appears that any person who has taken part in the promotion or formation of the company or any past or present director, liquidator or officer of the company-

- (a) has misapplied or retained or become liable or accountable for any money or property of the company; or
- (b) has been guilty of any misfeasance or breach of trust in relation to the company;

the Court may, on the application of the official liquidator or the liquidator or of any creditor or contributory, made within the time specified in that behalf in sub-section (2), examine into the conduct of the person, director, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with surcharge at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just.

(2) An application under sub-section (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in the winding up, or of the

misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer.

(3) This section shall apply notwithstanding that the matter is one for which the person concerned may be criminally liable."

"413. Liability for fraudulent conduct of business. (1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or any other person, or for any fraudulent purpose, the Court, on the application of the official liquidator or the liquidator or any creditor or contributory of the company, may, if it thinks fit, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

(2) On the hearing of an application under sub-section (1), the official liquidator or the liquidator, as the case may be, may himself give evidence or call witnesses.

(3) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration; and, in particular, may make provision for making that liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any company or person on his behalf, or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may, from time to time, make such further order as may be necessary for the purpose of enforcing any charge imposed under this sub-section.

Explanation. For the purpose of this sub-section, the expression "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which declaration is made.

(4) Where any business of a company is carried on with such intent or for such purpose as is mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid shall be punishable with imprisonment for a term which may extend to two

years, or with fine which may extend to twenty thousand rupees, or with both.

(5) This section shall apply, notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made."

8. The Division Bench of the High Court dismissed the objections of the appellants to the maintainability of the said applications; the learned Judges provided their reasons for doing so in paragraphs 9 to 13 of the impugned judgment. They observed (in paragraph 9) that "the word 'promotion' used in section 412 is of significant nature", then observed that as the word 'promotion' is not defined in the Ordinance, "therefore simple and ordinary meaning of the word 'promotion' shall be seen for ascertaining" it. The impugned judgment reproduces entries of the word "promotion" and of the word "promote" from "Webster dictionary", the entry for the word "promoter" from "Black's Law dictionary, Sixth Edition" and the word "promoter" from "The Free dictionary by Farlex", and conclude thus:

"11. From the above referred definitions of Promotion and Promoter it is manifest that any person who has taken part in influencing, persuading a person to invest or deposit his amount in a company or who advised plan for business venture or who take preliminary steps necessary for formation of the corporation, issue prospectus obtain stock subscription and secure charter would be promoter. It cannot be denied that the Security & Exchange Commission of Pakistan has a pivotal role in promotion of the companies, so much so, time to time, it arranges and provides information to promote investor education. Section 20 (4) (f) of the Security Exchange Commission Act enumerates that the commission shall be responsible for performance and function with regard to the promotion and regulating the organization including security

industries and related organization such as stock exchange and association of mutual fund, leasing company and other (NBFIs). Needless to mention that the company under liquidation is a Non-Banking Financial Institution, for regulation of which Security Commission is responsible. By inserting (20) (4) (f) in Security Exchange Act 1997 the legislature has expressly held responsible the Security Exchange Commission for promoting and regulating of Non-Banking Financial Institution. Here it would be not out of context to mention that the Security Exchange Commission Pakistan Act 1997 is latter in time, as Company Ordinance has been enforced in the year 1984. The promotion regulating of the NBFIs is the mission and vision of SECP as declared by the SECP Act, 1997. From the above, it can safely be concluded that while expressly assigning the function of promoting and regulating the NBFIs the legislature was fully aware of the intent to make section 412 of the Company Ordinance 1984 fully applicable to regulators including Security Exchange Commission of Pakistan. The Security Exchange Commission of Pakistan deals with all the companies registered under the Companies Ordinance except the Banking Companies. It is the mission of SECP to promote an efficient and transparent capital market, develop the corporate sector and protect the investor through responsive policy measure, effective regulation and enforcement of best governance practices. We are sure, rather clear in our mind that the appellant would not deny the facts that the Security & Exchange Commission Pakistan, being a regulator used to take action against companies for improving professional efficiency, sense of responsibility and healthy business environment."

"13. Record divulge that decline status of the company came into notice of the regulating wing of State Bank of Pakistan and Security & Exchange Commission of Pakistan at the initial stage and they were in position to save the company from insolvency but they remain negligent from performing their statutory duty which resulted into fall of the

company, followed by liquidation. The objections have been raised by appellants merely for choking the controversy and to stifle it in infancy on a hyper technical ground, which infact, is a step to wriggle out the appellant from their statutory liabilities through a short cut. It is an endeavour to let free the delinquent who have committed misfeasance or malfeasance and played negative role in relation with the insolvency of company under liquidation. No body can controvert the fact that the company under liquidation is registered and licensed organization being regulated, supervised and controlled by the Government of Pakistan through the State Bank of Pakistan and Security Exchange Commission of Pakistan. It was taking deposit from the public at large on the strength of its being organized and regulated by the Government of Pakistan which assurance was best source of promotion for the company."

Before considering the specious reasoning of the learned appellate court Judges it would also be appropriate to reproduce the reasoning employed by the learned Company Judge in discarding the objections of the appellants:

"15. While interpreting the Act, the intention of the legislature is of supreme importance. The cardinal rule of the construction of Act of Parliament is that the word of the Act should not [*sic*] be construed according to the intention expressed in the Act themselves. In many cases, the Court will endeavour to ascertain the legislative purpose but, only as a step in the process of discovering the legislative intent. It is perhaps possible that the legislative intent and legislative purpose may coincide. Moreover, so far as legislation is concerned, the law maker may have several purposes in mind when they enact a given law. The fact, which can be taken into account in ascertaining the intention of the Legislature, is the history of the Act, the reason which led to the passing of the Act, the mischief

which had to be cured, as well as the cure proposed and also other provisions of the Statute.

16. The method of constructing Statute is not to take particular words and give them a preconceived meaning, which one may have to displace or modify. It is, to read the Statute as a whole and ask oneself the question, in this Statute, in this context, relating to the subject-matter, what is the true meaning of the word. A statute is not open to construct as a matter of course. It is open only where the language used in the Statute requires interpretation i.e. where the Statute is ambiguous or bears two or more constructions, or is of such doubtful obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.

17. The word 'misfeasance' used in section-412 (b) will generally apply to a case where a lawful act is done in improper manner. Reference is made to the statement given in para-b of the preliminary objections when seen in reference to misfeasance then arraying the said respondents seems to be necessary and lawful and the same will be determined by the end of the day when C.Ms will be decided on merits but for the time being it appears that both the respondents are necessary and legal parties for the purpose of sections 412 and 413 of the Companies Ordinance, 1984.

18. No doubt, mere negligence or neglect or duty will not by itself create liability unless there was gross negligence amounting to misfeasance or breach of duty resulting in the loss to the public interest but all this will be seen while deciding the C.Ms. on merits.

19. While keeping in view what has been said hereinabove, it appears that 'any person who has taken part in the promotion or formation of the company' brings the said respondents within the purview of necessary party. In addition to the words used in sub-section-(b) of section-412 i.e. 'any

misfeasance or breach of trust in relation to the company', thus, the objection of respondents No. 1 and 2 in C.M.No.7-P/2012 is overruled and it is held that application under sections 412 and 413 of the Companies Ordinance, 1984 is maintainable against them."

9. The learned High Court Judges did not read sections 412 and 413 of the Ordinance in its entirety and read a particular word, "promotion", in isolation. The words appearing in a section are to be read in the context in which they are used. In the matter of the Rev. James Godfrey MacManaway (PLD 1950 PC 149) Lord Radcliffe rendering the opinion for the Privy Council succinctly set out how a Court should proceed - "The primary duty of a Court of law is to find the natural meaning of the words used in the context in which they occur, that context including any other phrases in the Act which may throw light upon the sense in which the Act used the words in dispute" (page 150-151A). The reference to dictionaries by the learned Judges, without first examining the statutory provision and its context, was inappropriate. Such an approach may result in incorporating into the legislation something which it did not contain, and what the Legislature did not intend. "It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so" (*per* Lord Goddard in Renula Bose v Manmath Nath, AIR 1945 Privy Council 108, 110 column 2), which principle was reiterated by this Court in the case Rashid Textile v Labour Union (PLD 1963 Supreme Court 293, page 295 C). In the case of Zulfiqar Ali Babu v Government of the Punjab (PLD 1997 Supreme Court 11) this Court (*per* Ajmal Mian, J, page 31) held:

"20. From the above celebrated treatises on the construction of statutes, it is patent that the primary

source to ascertain the legislative intent is the language employed in the statute itself. If the legislative intent is clear, plain, unequivocal and capable of only one meaning, it is not permissible to have resort to the materials aliunde i.e. outside the statute involved. In such a case, the Court cannot decline to enforce a provision of a statute on the ground that it is harsh, or absurd or contrary to common sense. The Court must give effect to it whatever may be the consequences."

Hamoodur Rahman, CJ, in the case of Muhammad Ismail v. The State (PLD 1969 Supreme Court 241, 247 A), expounded how statutes should be interpreted:

"The purpose of construction or interpretation of a statutory provision is no doubt to ascertain the true intention of the Legislature, yet that intention has, of necessity, to be gathered from the words used by the Legislature itself. If those words are so clear and unmistakable that they cannot be given any meaning other than that which they carry in their ordinary grammatical sense, then the Courts are not concerned with the consequences of the interpretation however drastic or inconvenient the result, for, the function of the Court is interpretation, not legislation."

10. The learned High Court Judges also did not ascertain the meaning of the word "promoter" or those who are involved in the "promotion or formation of the company" by examining legal treatise on company law. They instead proceeded straightaway to dictionaries and the meanings of the words 'promoter and promotion'. Dictionaries provide the entire spectrum of meaning of words, most of which with reference to the words in the Ordinance would be irrelevant. Ordinary English language dictionaries may also not accurately give the meaning of word/s used with

regard to company law matters. The principles of statutory interpretation were also not kept under consideration before interpreting the Ordinance. The learned Judges had set out to break new ground, by holding that a regulator and a central bank were *promoters* and *involved in the promotion of a company* and were liable, but did not support their conclusion with reference to any company law treatise or legal precedent.

11. '*Palmer's Company Law* (twenty-fourth edition) states that, "Any person who undertakes to take part in forming a company, or who, with regard to a proposed or newly formed company, takes part in raising capital for it, is *prima facie* a promoter of the company". And, "anyone who assists in the promotion, *e.g.* by obtaining a director, or agreeing to place shares, or negotiating an agreement, or merely by putting a vendor in touch with persons who may form a company to exploit or purchase his goods, may find himself a promoter of any company which is consequently formed" (Volume 1, 259). According to Cockburn, C.J., a "Promoter is one who undertakes to form a company with reference to a given object and to set it going, and who takes the necessary steps to accomplish that purpose" (*Twycross v Grant*, 1877, 2 C.P.D. 469, 541). '*Company Law by Alan Dignam and John Lowry*' (ninth edition, 2016) defines the term promoter, as under:

"A 'promoter' is the person responsible for forming a company. Whether or not a person is a promoter is a question of fact to be determined according to the role he played in the creation of the company. Typically, the promotion process involves effecting the registration of the company with Companies House, negotiating pre-incorporation contracts on behalf of the putative company, and finding the initial directors and shareholders. In the case of

public companies the promoter will also be responsible for registering and issuing any prospectus. Although the company's constitution is generally drafted by a professional adviser such as a lawyer or an accountant, such a person will not be deemed to be a promoter merely on that account (*Re Great Wheal Polgooth Co* (1883))."

12. 'Promoters' of a company, in the context of company law, stand in fiduciary relationship to it. "The promoters of a company, as Lord Cairns said in *Erlanger v. Sombrero Phosphate Co.*, 'stand undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company. They have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation' " ('Palmer's Company Law, *Fiduciary Position of Promoters*, page 262). "It was in consequence of their [promoters] often unscrupulous methods for raising capital from the investing public" ('*Company Law* by Robert Pennington, third edition, page 463) that the concept of holding them liable developed and "The two fiduciary duties imposed on a promoter are: (a) not to make a secret profit out of the promotion of the company without the company's consent; and (b) to disclose to the company any interest which he has in a transaction entered into by it" (page 464) and it is probably for this reason that, "The courts have declined to give it a precise definition". To ensure that the public is protected the term promoter has not been defined in the Companies Act of the United Kingdom, the reason for which was bluntly stated to be, "to ensure that enough flexibility was retained to catch the next ingenious rogue which the pre-incorporation period might produce"

(*Sealy and Worthington's Text, Cases, and Materials in Company Law*, eleventh edition, 2016).

13. The learned Judges of the High Court did not refer to any precedent or legal treatise on company law before holding that the regulator of companies and a central bank were “promoters” of IIBL and were also liable under section 412 and/or section 413 of the Ordinance. The official liquidator and the learned counsel opposing the appeals also did not cite precedent nor any company law treatise to sustain the impugned judgment. Precedents and company law treatises examined by us do not state that the authority which incorporates or regulates companies or a central bank are the “promoters” of a company, let alone hold them liable for losses suffered by the shareholders, investors or depositors of a company. If for the sake of argument it be assumed that the appellants were promoters of IIBL, while also being responsible for incorporating and regulating it, they would be conflicted in their duties. We can also not assume that the Legislature had purposely created such an anomalous situation.

14. With respect, the learned Judges of the High Court also overlooked the wordings of sections 412 and 413 of the Ordinance. Liability under these sections attaches when there is misapplication or retention of the money or property of the company or any misfeasance or breach of trust in relation to the company. Section 412 of the Ordinance stipulates that, if a person has misapplied, retained, committed misfeasance or breach of trust with regard to any money or property of the company he is liable to restore it. And section 413 of the Ordinance provides that if the business of the company is conducted with intent to defraud

creditors of the company or any other person, or for any other fraudulent purpose then those who knowingly did so are personally responsible for the debts or other liabilities incurred as a consequence. A statutory regulatory body, such as the SECP, and a central bank established by statute, can not be deemed to commit the illegal acts mentioned in the said sections. It was also not the case, either of the official liquidator or the investors/depositors of IIBL, that SBP or SECP as institutions had misapplied or retained any money of IIBL or transferred directly or indirectly any property of IIBL to themselves. Nor was it their case that SBP or SECP had conducted the "*business*" of IIBL or that they defrauded IIBL or any person.

15. There is yet another aspect to the matter, both sections 412 and 413 are penal provisions and placed in the Ordinance under the title, "*Offences Antecedent to or in Course of Winding Up*". It is by now well established that a penal statutory provision is to be construed strictly. And, if any penal provision is susceptible to two or more interpretations then the one which does not extend the penalty/liability is to be preferred to one that does. *Maxwell on the Interpretation of Statutes* (twelfth edition) under the title "*Strict Construction of Penal Law*", states:

"The principle applied in construing a penal Act is that if, in construing the relevant provisions, "there appears any reasonable doubt or ambiguity," it will be resolved in favour of the person who would be liable to the penalty. "If there is a reasonable interpretation which will avoid the penalty in any particular case," said Lord Esher M.R., "we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

"If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted." The court must always see that the person to be penalised comes fairly and squarely within the plain words of the enactment. It is not enough that what he has done comes substantially within the mischief aimed at by the statute: "the sooner this misunderstanding is dispelled and the supposed doctrine given its quietus the better it will be for all concerned, for the doctrine seems to involve substituting 'the incertain and crooked cord of discretion' for 'the golden and straight metwand of the law.' "

In the case M. V. Joshi v M. U. Shimpi (AIR 1961 Supreme Court 1494) the language employed in the Food Adulteration Act was considered, and the Indian Supreme Court, held (paragraph 11, page 1498) that:

"When it is said that all penal statutes are to be construed strictly it only means that the court must see that the thing charged is an offence within the plain meaning of the words used and must not strain the words. To put it in other words, the rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute. It has also been held that in construing a penal statute it is a cardinal principle that in case of doubt, the construction favourable to the subject should be preferred."

Interpreting the Foreign Exchange Regulations Act this Court, in the case Muhammad Ali v State Bank of Pakistan (1973 SCMR 140, 143 A), reiterated the well settled principle regarding the interpretation of penal statutes:

“...we are dealing here with a penal statute, the provisions of which must be interpreted strictly, and in case of any ambiguity or doubt arising from the construction, the benefit must go to the accused person.”

16. The designated statutory authority which incorporates companies and/or ensures that the law and regulations are complied with are not “promoters” of the company nor take “part in the promotion or formation of the company” as envisaged in section 412 of the Ordinance nor are they liable under section 413 of the Ordinance. Even if it be assumed that the appellants were promoters or took part in the promotion of the company, which assumption we do not make, liability will ensue only if they had misapplied or retained the monies or properties of IIBL. The said applications do not allege that the monies or properties of IIBL were misapplied by the appellants or retained by them in terms of clause (a) of subsection (1) of section 412 or that the appellants had committed “misfeasance or breach of trust in relation to the company” in terms of clause (b) of subsection (1) of section 412. In the absence of such an allegation neither SBP nor SECP would be liable either under section 412 or under section 413 of the Ordinance.

17. The learned High Court Judges discuss the regulatory role of SBP, under the Banking Companies Ordinance, 1962, and of the SECP, under the Securities and Exchange Commission of Pakistan Act, 1997, however, these statutes are not mentioned in section 412 or section 413 of the Ordinance nor have any relevance with regard to determining who the “promoters” of a company are for the purpose of the said sections. The impugned judgment castigates the appellants for not properly regulating, supervising

and controlling IIBL. Even if it be assumed that the appellants did not properly regulate, supervise and or control IIBL it does not follow that the appellants are liable under section 412 or section 413 of the Ordinance. The learned Company Judge on his part even incorporated elements of the Code of Civil Procedure into a company law case, as he deemed the appellants to be "*necessary party*" (see Order I rule 10(2) of the Code of Civil Procedure): "It appears that 'any person who has taken part in the promotion or formation of the company' brings the said respondents within the purview of necessary party."

18. Judges should not create liability by interpretative techniques. It will be apt to quote Lord Diplock (Duport Steels Ltd v Sirs, (1980) 1 AER 529, 542):

"It endangers continued public confidence in the political impartiality of the judiciary which is essential to the continuance of the rule of law, if judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to the public interest."

Nor should judges try to rectify what they may assume should have been incorporated in a statute. Hamoodur Rahman, CJ, writing for this in the case of Muhammad Ismail v The State (above, 246-7 A) cited with approval the following extract from *Craies on Statute Law*, that, "As a general rule a Court of law is not authorised to supply a *cassus omissus*, or to alter the language of a statute for the purpose of supplying a meaning, if the language used in the statute is incapable of one, even though they may be of opinion that a mistake has been made in drawing the Act".

19. We have determined that SBP and SECP are not liable under sections 412 and 413 of the Ordinance for the reasons which can be summarized as under:

- (1) Sections 412 and 413 of the Ordinance do not mention SBP or SECP particularly nor refer to regulatory authorities and/or a central bank generally;
- (2) The phrases, "taken part in the promotion or formation of a company" (in section 412 of the Ordinance) and carrying out "any business of the company" (in section 413 of the Ordinance) do not include the regulator of companies, regulatory authorities or a central bank;
- (3) If a promoter of a company misapplies or retains or is accountable for any money or property of a company or is guilty of any misfeasance or breach of trust in relation to the company, (mentioned in clauses (a) and (b) of subsection (1) of section 412 of the Ordinance), such promoter would be liable; however, such allegations are not even made against SBP and SECP in the said applications;
- (4) Subsection (1) of section 413 of the Ordinance stipulates that if a person has carried on "the business of the company" with "the intent to defraud the creditors of the company or any other person" or "for any fraudulent purpose" such person is liable; however, these allegations are not made against SBP and SECP in the said applications.
- (5) Sections 412 and 413 of the Ordinance are penal provisions, and penal provisions cannot be given an extended meaning to include SBP and SECP;

- (6) Any word or phrase in a company statute is to be read and understood in the context of the particular section and then in the context of the statute, and, if its meaning remains ambiguous then reference to judicial precedents on company law and legal treatise on company law explaining the said word or phrase may be had, however, if the meaning still eludes one then legal dictionaries and English language dictionaries can be examined; and
- (7) The role of a regulator of companies and a central bank is altogether different from the promoters of a company envisaged in Section 412 of the Ordinance.

20. Therefore, for the aforesaid reasons, both these appeals are allowed and the common judgment dated February 4, 2016 of the learned Division Bench in ICA Nos. 6 and 7 of 2012 and the common order dated October 15, 2012 of the learned Single Judge dismissing the objections of the appellants in C.M. 35/2011 and C.M. No.7-P/2012 in respect of Company Case No.5/2005 are set aside as the appellants are not liable under section 412 or 413 of the Companies Ordinance, 1984.

Judge

Judge

Judge

Bench-III
Islamabad

Announced in open Court at Islamabad on October 27, 2017.

Judge

Approved for Reporting

(Farrukh)