JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

I.C.A No.127/09.

Dewan Salman Fiber (Ltd.), Islamabad Vs Muslim Commercial Bank Ltd. and another.

Appellant by: Mr. Azid Nafees, Advocate.

Respondent No.1 by: Sardar Taimoor Aslam Khan, Advocate.

Respondent No.2 by: Ex-Parte.

Respondent No.3 by: Syed Ishfaq Hussain Shah, Advocate.

Date of Decision: 16.11.2016.

MOHSIN AKHTAR KAYANI, J:- Through instant Intra Court Appeal, the appellant has assailed order dated 24.06.2009 passed in C.M No.165/2009 by learned Single Judge in Chambers, whereby appellant's application U/O VII Rule 11, CPC was dismissed.

2. Brief facts, which are necessary for disposal of instant appeal are that respondent No.1 filed Company Original before learned Single Bench U/Ss 305(e) and 306(1) read with section 325 of the Companies Ordinance 1984 with the prayer that appellant's company Dewan Salman Fiber Limited be wound up on the ground that the said company does not have sufficient assets to meet its liabilities and therefore may not be able to pay off the debt owed towards the bank.

3. During the course of proceedings, the appellant filed C.M No.165/2009 U/O VII Rule 11(d) of CPC read with Rule 7 of the Companies Court Rules 1997 for rejection of winding up petition on the ground that respondent No.1 has already availed the remedy under Financial Institutions(Recovery of Finances) Ordinance, 2001and cannot avail the remedy of winding up of company under the Companies Ordinance, 1984.

4. Learned counsel for appellant has contended that appellant filed an application for dismissal of winding up petition with reference to sections 4, 5, 7 & 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and prayed that financial institution cannot file winding up petition as the special law of bank provides the remedy and

jurisdiction of Banking Court; that the Financial Institutions (Recovery of Finances) Ordinance, 2001 has overriding effect on any other law for the time being in force including the Companies Ordinance 1984; that respondent bank has already filed a suit for recovery of money in the Banking Court/High Court of Sindh at Karachi.

5. Conversely, learned counsel for respondent No.1 has contended that both the laws i.e. the Financial Institutions (Recovery of Finances) 2001 and the Companies Ordinance, 1984 deal with two different situations and no provision of law bars respondent No.1 from invoking jurisdiction of this Court U/S 305 of the Companies Ordinance, 1984.

6. Learned counsel for respondent No.3 adopted the arguments of learned counsel for respondent No.1.

7. We have heard the arguments and gone through the record with invaluable assistance of learned counsel for the parties.

8. From the perusal of record, it has been observed that appellant is a public limited company involved in the business of manufacturing fiber products having its registered office at 46, Nazimuddin Road, F-7/4, Islamabad and place of business at Dewan Centre, 3-A Lalazar Beach Hotel Road, Karachi as customer within the meaning of section 2(c) of the Financial Institutions (Recovery of Finances) 2001 whereas respondent No.1 is financial institution in terms of the said ordinance. The appellant and respondent No.1 has relationship of lender and borrower for the last 20 years and during the said period, the appellant has availed the financial facility from the respondent bank in order to meets its business requirements. The said facility was extended to the appellant on hypocatation charges upon its assets, which were duly notified with SECP. Similarly, the appellant has availed the running finance facility of Rs.250 Million on 04.05.2016 but subsequently the appellant failed to honour its commitment and could not fulfill its obligation in terms of section 2(e) of the ordinance, therefore, respondent No.1 filed banking suit No.12/2009 before Sindh High Court at Karachi in original banking jurisdiction titled as MCB Bank Limited vs. Dewan Salman Fibers Limited on 26.01.2009 for the recovery of due payment of Rs.268,710,000/- (Twenty Six Crore Eighty Seven Lac Ten Thousand).

9. In company petition/C.O No.4/2009 before this Court, respondent No.1 has prayed for winding up of appellant’s company due to insufficient assets, through which

the appellant could not be able to pay off debts towards the bank. The company petition was resisted by appellant through C.M No165/2009 U/S VII Rule 11(d), CPC read with Rule 7 of the Companies Rules 1997 for rejection of winding up petition.

10. From perusal of both the special laws i.e. the Financial Institutions (Recovery of Finances) Ordinance, 2001 and the Companies Ordinance, 1984, it has been observed that both the laws are special in nature and special jurisdiction with distinct forum for different purposes have been provided whereas respondent No.1is under obligation to prove his contention in winding up petition that the appellant has defaulted and qualifies the requirements of section 305 of the Companies Ordinance, 1984, in which the company is unable to pay its debt under clause-e of the said provision. Similarly, in order to exercise the jurisdiction in terms of Companies Ordinance, 1984, respondent bank has to meet the other requirements of section 7, however, the proceedings of winding up are subject to the circumstances, which give rise to a situation, where the Court comes to the conclusion that the appellant company is unable to pay debt. The said factor can be considered, if the respondent bank can adduce evidence before the Court, even the question as to where the substratum of the company is deemed to be gone and the objective for which it was incorporated and subsequently failed. Similarly, it is not possible to carry on business of the company except loss and there is no probability to pay existing liabilities but all these factors require evidence in the said winding up petition and cannot be ascertained in summary manner. The recent view of Apex Court in **2016 SCMR 213 (Mian Javed Amir vs. United Foam Industries Pvt. Ltd. Lahore)** is that the company bench can ascertain the factual controversy after framing of issues, recoding of oral and documentary evidence in terms of the Companies Ordinance, 1984.

11. The other important question raised in instant appeal is the doctrine of election of remedies, where respondent No.1 has also exercised the remedy under Financial Institutions (Recovery of Finances) Ordinance, 2001 in the banking jurisdiction U/S 7(4) of the ordinance and filed suit No.12/2009, which is pending in Sindh High Court at Karachi, therefore, the appellant filed C.M No.165/2009.

12. From the plain reading of section 4 of Financial Institutions (Recovery of Finances) Ordinance, 2001 it is clear that the same overrides other laws and that

provisions of this ordinance shall have effect notwithstanding anything inconsistent there with contained in any other law for the time being in force, however, section 7(5) of the said ordinance empowers the financial institution to seek any remedy, which is reproduced as under:-

> *"Section 7(5):--- Nothing in sub-section 4 shall be deemed to affect:-*
>
> *(a) the right of a financial institution to seek any remedy before any Court or otherwise that may be available to it under the law by which the financial institution may have been established; or*
>
> *(b) the powers of the financial institution or jurisdiction of any Court such as is referred to in clause (a); or*
>
> *require the transfer to a Banking Court of any proceedings pending before any financial institution or such Court immediately before the coming into force of this ordinance."*

13. Similarly, section 9(1) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 empowers a customer or a financial institution to pursue in case of default, which is reproduced as under:-

> *"Section 9(1):- Procedure of Banking Courts:- Where a customer or a financial institution commits a default in fulfillment of any obligation with regard to any finance, the financial institution or, as the case may be, the customer, may institute a suit in the Banking Court by presenting a plaint which shall be verified on Oath, in the case of financial institution by the Branch Manager or such other officer of the financial institution as may be duly authorized in this behalf by power of attorney or otherwise."*

14. The above referred provisions clearly demonstrate that Banking Court has exclusive jurisdiction with respect to any matter, which falls within jurisdiction of Banking Court, whereas the appellant has committed default in fulfillment of its obligation with regard to running finance liability, which resulted into filing of banking suit before Sindh High Court at Karachi and it has nothing to do with the provisions of the Companies Ordinance, 1984 as the winding up petition was filed on the parameter and touchstone referred in section 305(e) of the Companies Ordinance, 1984. Both the laws do not debar the exercise of their jurisdiction under the said circumstances on different forums, even otherwise it is not a case where two special laws are in conflict

with each other and it is settled law that laws should be interpreted in a manner so as to save rather than destroy. Reliance is placed upon case of **Messrs Pakland Cement Limited through Director Shamim Mushtaq Siddiqui reported as 2002 CLD 1392 [Karachi],** wherein it was held that:-

> *"---Conflict in statutes---Duty of Court---Principles---Laws should be interpreted in a manner so as to be saved rather than destroyed---Unless and until there was clear cut conflict which is irreconcilable, the Court should lean in favour of a harmonious interpretation so as to avoid any conflict and keep the laws operating in their occupied fields in order to avoid any provision becoming redundant or surplus."*

15. Similarly, we could not find any overlapping of jurisdiction of functionaries and there is no stage where Banking Court can materialize the shareholding in terms of specific kind of the company as referred in liability clause. All these issues could not be adjudicated in execution after passing of the decree by the Banking Court, therefore, it requires a forum to resolve the issues under special law i.e. Companies Ordinance, 1984. Hence, we process test of repugnancy in these two special laws and find out that there is no repugnancy in two statutes, whereas the test referred in **1993 (SCMR 941 Cantonment Board vs. District Sanitary and Food Inspector Peshawar)** is as under:-

> *"Test of Repugnancy was that the two provisions of law were irrevocable and could not exist."*

Similarly, the general principals of interpretation in two different statues regarding two common filed in different case laws are as under:-

2006 P Cr. L J 921 [Karachi] (Reference by Judge Special Court-II), wherein it was held that:

> *"Conflict between two special Acts---When there was conflict between two special Acts, each of which could be described as special in some particular sense, question would arise as to how far later Act should prevail over the earlier Act---Court should lean against repeal of earlier Act by implication and unless it was absolutely clear that the operation of first Act had to be curtailed by the later Act, the previous Act should be held to continue and in force, even though later Act Could be regarded as special in some other sense---Sometimes one finds two or more enactments in the same field each containing non-obstante clause, stating that provisions would have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force---Conflict in such cases had to be resolved on consideration of purpose and policy of the Act---Legislator had before him all the laws at the time of legislation and thus, amendment made in any statute should be given due weight as the same spoke not only about the intention of law-maker, but also*

> *that legislator felt it necessary to make necessary amendment in law either to fill lacuna in the statue or to provide additional remedy."*

AIR 1991 SC 855 (Ashoka Marketing Ltd. and others v. Punjab National Bank), wherein it was held that:-

> *"In the case of inconsistency between the provisions of two enactments, both of which can be regarded as special in nature, the conflict to be resolved by reference to the purpose and policy underlining the two enactments and the clear intendment conveyed by the language of the relevant provisions therein."*

PLD 1956 FC 157 (The Punjab Province v. (1) Sita Ram and others (2) Custodian of Evacuee Property, Punjab), wherein it was held that:-

> *"Subsequent statue in general terms does not repeal previous particular statue and where two statutes covered common field then in case of conflict with each other the later will have to be prevailed". But in the instant case it is very difficult to say that A.T.C., Narcotic Courts and Juvenile Courts covered the same field."*

PLD 2010 [Lahore] 353 (A Rehman Malik and another vs. The State and another), wherein it was held that:-

> *"In case of controversy or lis between two special laws, later prevails."*

2007 MLD 118 [Lahore] (Muhammad Qasim vs. Tahir Saleem and others), wherein it was held that:-

> *"Later provision of law would hold the field."*

PLD 2008 SC 779 (Aftab Shahban Mirani and others vs. Muhammad Ibrahim and others), wherein it was held that:-

> *"---Conflict between the two provisions of the Constitution--- Principle---where there is conflict between the two provisions, the entire provisions of the Constitution are required to be read as a whole, and the basic features of the Constitution taken into consideration.*
> *---Conflict of two provisions---Principle---Redundancy cannot be attributed to any provision of law rather the wisdom of the legislature in case of any conflict of two provisions, the rule of harmonious interpretation is followed."*

Similar proposition has been discussed in **1990 CLC 1030 (Industrial Development Bank of Pakistan vs. Modern Poultry Farm Limited),** which is as under:-

> *"It will thus be seen that none of the remedies referred to in the aforesaid provisions is akin to the remedy which the petitioner has sought in the present petition. It is therefore clear that the Ordinance and the I.D.B.P Ordinance do not occupy the same field. No doubt the Bank, in order to recover its debt from an industrial concern etc. can*

> *have resort to any of the remedies referred to in sections 38, 39, 40 or 41 of the I.D.B.P Ordinance, which by no means are less effective, but nothing can be spelt out from the said provisions to suggest that they are in derogation of the provisions of the Ordinance. The Ordinance itself is a special enactment which provides for special remedies in the form of section 309 thereof. Since no intention has been expressed either in the I.D.B.P Ordinance or in the Companies Ordinance that the provisions contained therein are in derogation of any other law."*

16. If the company is merely unwilling to pay its debt but otherwise is commercial solvent then normal remedy of suit for recovery has to be applied, however, the question raised in winding up petition can only be adjudicated through evidence and the presumption of inability of company to pay its debt has to be rebutted by the appellant in the proceedings of the winding up and the same cannot be decided in slipshod manner. Reliance is placed upon **PLD 1999 Supreme Court 1 (Messrs Platinum Insurance Company Limited Karachi vs. Daewoo Corporation, Sheikhupura)**, in which it was held that:-

> *"Winding up of company by Court--- Circumstances/events from which it can be inferred that a company is deemed to be unable to pay its debts for the purpose of winding up, enumerated---Demand referred to in S.306(1)(a) of the Companies Ordinance, 1984 shall be deemed to have been duly given under the hand of the creditor if same is singed by an agent or legal adviser duly authorized on his behalf, or in the case of a firm if that is signed by such agent or legal adviser or by any member of the firm on behalf of the firm.*
> *Subsection (1) of section 306 of the Companies 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 winding up petition, namely, (i) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one per cent. of its paid-up capital or fifty thousand rupees, whichever is less, than due, has served on the company, by causing the same to be delivered by registered post or otherwise, at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for thirty days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; (ii) if execution or other process issued on a decree or order of any Court or any other competent Authority in favour of a creditor of the company is returned unsatisfied in whole or in part; and (iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company."*

Similarly, in the following dispute the company can be wound up. Reliance is placed upon **2000 Lahore 323(International Finance Corporation, Washington D.C. 20433 U.S.A vs. Hala Spinning Ltd., Gulberg II, Lahore)**, wherein it was held that:-

> *"Company's inability to pay its debts---Compulsory winding up of such company---Aspects of commercial insolvency of a company---Aspects to be considered were failure or refusal to pay the loan amount to the creditors after statutory notice; whether debts were more than paid up capital; that there was no earning capacity to pay the debts in present or future and that the balance sheet of the company sought to be wound up disclosed that the company was running into losses without there being any company should in normal course be wound up."*

In **2002 CLD 1487 (Hala Spinning Mills Ltd. Vs. International Finance Corporation and another),** wherein it was held that:-

> *"Winding up of company while in running condition---Duty of Company Judge---Whenever case of a running company is placed before Company Judge or appellate Court, they should examine such matter differently from a company which is not in a running condition---Supreme Court observed that in such a case efforts should be made by judicial forums to adopt such a device so that the project may continue running commercially and its financial liabilities start reducing gradually; business trend in the market being that if running concern is put to sale, it fetches high price of its assets which can substantiality clear proportionate liability of the creditors."*

In **2001 CLC 2019 (Integrated Technologies & System Ltd. vs. Interconnect Pakistan (Pvt.) Ltd through Acting Chief Executive and others)**, wherein it was held that:-

> *"Petition for winding up of company by the Court---Petitioner though had successfully demonstrated the existence of justification for making of a winding up order, but in view of the fact that company was fully operational and had undertaken very substantial projects which were being executed and also substantial sums, by way of direct foreign investment, had been arranged by the company for functioning and completing the said projects, and being not unmindful of the fact that the making of winding up order was likely to prejudice the shareholders of the company and those having dealings with it, including the petitioner and also possibly the creditors of the company, High Court found the case fit where the Court should have exercised its powers under S.314(4) of the Companies Ordinance, 1984 to pass an order which could result in bringing to an end the matters complained of by the petitioner without straightaway ordering the winding up of the company---High Court, in circumstances, made an order providing for an alternative to winding up which potentially could enable the company to continue functioning as a viable entity---While considering the terms of the order under S.314(4) of the Ordinance, High Court, took into account the price of the shares of the company freely negotiated between the petitioner and the Chief Executive of the Company (as set out in unexecuted agreement between them) and laid down the terms of the order under S.314(4), Companies Ordinance, 1984 accordingly."*

17. In view of above referred cases, if we put both the laws in juxta position, it can safely be concluded that Financial Institutions (Recovery of Finances) Ordinance, 2001 deals with issues where customer or financial institution commits default in fulfillment of obligation with regard to finance and both the customer and financial institution as the case may be institute suit before Banking Court. Similarly, in such circumstances, the commercial solvency of any company cannot be adjudicated. Neither the assets of any company be verified for the purpose of its creditors or other debts and the Banking Court cannot adjudicate the disputes of the share holders vis-a-vis their rights referred in the memorandum of association, therefore, the aggrieved person may approach both the forums for distinct and separate remedies under two different laws and doctrine of election of remedies cannot debar respondent No.1 from exercising both the remedies as both these remedies under separate laws are meant to protect the rights of financial institution in two different ways but the process and procedure and results are different.

18. In view of above discussion, the appellant has failed to demonstrate any illegality in the impugned order, which is well reasoned and based upon known legal principles, even otherwise the appellant has failed to demonstrate the requirements of order VII Rule 11(d), CPC. Similarly, it is settled law that when matter requires recording of evidence in order to resolve factual dispute, the provisions of order VII Rule 11(d) cannot be applied in summary manner. As in company original petition, the controversy requires evidence to be adduced by the parties in order to substantiate their pleas, therefore, C.M No.165/2009 U/O VII Rule 11(d), CPC was rightly dismissed. Resultantly, instant I.C.A is dismissed being devoid of merits.

(SHAUKAT AZIZ SIDDIQUI)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

APPROVED FOR REPORTING.

(SHAUKAT AZIZ SIDDIQUI)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE