

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

C.O. No. 08 of 2015

Trek Technologies Limited

Versus

Icondor Telecom (Private) Limited and Another

Petitioner By : Sardar Ejaz Ishaq and Mr. Umar Tariq,
Advocates

Respondents By : M/s Babar Sattar, Umar Rehman and
Ehsan Ali Qazi, Advocates

Date of hearing : 31.10.2017

AAMER FAROOQ, J. - This is a petition under sections 305 and 309 read with section 314(4) of the Companies Ordinance, 1984 (**"the Ordinance"**) for winding up of Icondor Telecom (Private) Limited (**"the Company"**).

2. The facts, in brief, as alleged in the petition are that the petitioner paid a sum of US \$ 3,010,538/- to the Company over a period of August 2013 to September 2015. It has also been alleged that when the said amount was demanded from the Company, it failed to pay up the same, hence the Company is liable to be wound up as it is unable to pay its debts. It has further been alleged in the petition that the Company was incorporated with minimum capital of Rs. 20/- with two shareholders holding one share each with the understanding that eventually the Company would be a 100% owned subsidiary of the petitioner and respondent No.2 shall cause initial shareholders to transfer their shares to the petitioner after licence for telecom operations was issued to the Company. On the referred understanding, the money was transmitted amounting to aforementioned sum over a period of time. It has also been claimed that on

the basis of amount remitted, the relevant machinery/equipment was purchased and day-to-day expenses were met. Even, the technical expertise is being provided by the staff of the parent Company of the petitioner. It is further contended that business did not turn out to be successful and the Company generated revenues only in the sum of US \$ 2,000/- to 20,000/- and there is no prospect that the Company makes a profit. It has been alleged that respondent No.2 is the root cause for failure of the venture inasmuch as he does not have expertise for the same.

3. Learned counsel for the petitioner, *inter alia*, contended that the Company is unable to pay its debts and is commercially insolvent, hence, it is impossible for it to operate except at a loss; that it has no liquidated assets to pay its suppliers and creditors whereas its realizable assets are in the sum of approximately US \$ 500,000/- whereas the sum of US\$ 3,010,538/- are payable to the petitioner. It was further contended that the Company is conducting its business in a manner oppressive to the petitioner who is the shareholder as well as creditor. In this behalf, it was submitted that the Company never issued any shares to the petitioner in breach of the mutual confidence, good faith and understanding.

4. It was further submitted that the Company is being run by the persons who have committed misfeasance and malfeasance in relation to the Company therefore, it is just and proper that the Company be wound up. It was emphasized by the learned counsel for the petitioner that the object of winding up is to secure discontinuation of the functions of the Company which has ceased to be commercially solvent and if the state of affair continues, the distributable assets shall stand reduced. During the course of arguments, learned counsel for the petitioner took the Court through various mails and correspondence between the petitioner and respondent No.2 vis-a-vis the state of affairs.

5. Learned counsel for the respondents, *inter alia*, contended that the petitioner has no *locus standi* to file in the instant petition; that the petitioner neither have any interest or shares in the Company nor is part of the management; that the petitioner failed to satisfy the statutory pre-requisites and conditions; that no notice in term of Section 306(1)(a) of the Ordinance was served; that documents on the basis of which petition has been filed are unverified and defective; that the stance of the petitioner that the Company has lost its substratum is self-contradictory as the Company maintains sum of US \$ 200,000/- in its bank accounts; that the petitioner in the garb of a winding up petition is seeking to takeover the Company which is not permissible; that no document has been filed establishing the terms for investment of US \$ 3 Million for starting the venture; that petition is liable to be dismissed as there is no monetary claim against the Company. It was further contended that it is a settled principle that a winding up petition which is filed to pressurize the Company is not maintainable.

6. Learned counsel for the respondents further contended that the petitioner is not an investor/sponsor, shareholder or lender and does not possess financial ability to have invested the amount claimed by it. In this behalf, it was pointed out that Icondor Telecom Argentina and an entity within the abbreviation of MTN provides expenditure to support the Company with the understanding that once the telecom venture was operative in the market and product became profitable, it shall be shared equally. The above mentioned lender channeled funds through the petitioner and the petitioner just acted as a vessel in the process on the understanding that the said lender shall maintain flow of investment equal to its operational expenditure for a period of five years. The running of affairs of the Company was done on the expertise and advice of the lender however respondent No.2 had serious reservations about prudence of the decision taken by them. Consequently, differences arose between the parties. In

the said backdrop, the petition has been filed with intention of taking over the Company in which the petitioner has no stake.

7. Learned counsel vehemently denied that substratum of the Company has been lost inasmuch as it has sufficient and capable human resource for technical and managerial matters; holds sufficient reserve funds; has commercially feasible, viable and profitable products and is capable of further investment from venture capitalists and has adequate technical equipment. Learned counsel took the Court through correspondence between the parties with respect to the controversy and understanding.

8. Learned counsel for the respondents further contended that since the petition has been filed by the petitioner therefore, burden of proof is on it to show that Company is unable to pay its debt and has lost its substratum. Reliance was placed on cases reported as Mian Said Hakim and 4 others Vs. Abdar Khan and 4 others (2017 YLR 107), Ijaz Ahmad Khan Vs Jahanzen Khan and others (2016 CLC Note 128) and Hakim-ud-Din through L.Rs. and others Faiz Bakhsh and others (2007 SCMR 870). Learned counsel for the respondents further contended that the petitioner does not fall within the definition of creditor and to support his contention, placed reliance on cases reported as Messrs James Finlay P.L.C Vs. Messrs Hellenic Lines Limited and another (1986 CLC 2933), Re Midland Coal, Coke and Iron Company [1895] 1 Ch 267 , Re Lehman Brothers International (Europe) [2010] BCC 272 and BNY Corporate Trustee Services Ltd. Vs. Eurosail – UK 2007 3BL plc and others, Supreme Court, [2013] UKSC 28. Reliance was also placed on cases reported as Faysal Bank Limited Vs. Southern Networks Ltd. (2008 CLD 1336), Smith Kline and French of Pakistan Ltd. Vs. Spencer & Co. (1989 MLD 38), National development Finance Corporation Vs. Fazal Sugar Mills Ltd. (1993 CLC 642), Mrs. Syma Mahnaz Vayani and others Vs. Molasses Export Company (Pvt.) Ltd. (2013 CLD 1229), Messrs Bankers Equity Ltd. and 5 others Vs. Messrs Balochistan Coaters Ltd. (PLD 1997

Karachi 416), Additional Registrar of Companies, Karachi Vs. Tri Star Power Ltd. (2010 CLD 1115) and Mushtaq Ahmad Vs. Messrs Sana Textile (Pvt.) Limited and 4 others (2001 YLR 1054).

9. The facts leading to filing of the instant petition have been mentioned hereinabove, therefore need not be reproduced. The petitioner seeks winding up of the Company on account of the fact that it is unable to pay its debts and its substratum has vanished. The petitioner is a company incorporated under the laws of United Arab Emirates with its registered address at SAIF Zone, Sharjah, P.O. Box: 121798, UAE. Alongwith petition, the petitioner has appended certified copies of its Memorandum and Articles of Association duly attested by the Foreign Office as well as Consulate General of Pakistan. The referred documents also confirm the position that the petitioner's registered office is situated at SAIF Zone, Sharjah P.O Box: 121798 UAE. The referred Company through resolution dated 06.10.2015, authorized Muhammad Oubay Attassi to file inter alia the instant petition. The authorized representative of the Company further delegated its authority to an attorney in Pakistan namely Tufail Hussain s/o Hafiz Fida Hussain vide General Power of Attorney dated 22.10.2015, which also is duly attested by the Ministry of Foreign Affairs. Under section 2(7) of the Ordinance, 1984, which provides definition of "company" which means a company formed and registered under this ordinance. Admittedly, documents appended with petition and mentioned hereinabove clearly shows that petitioner is not a company for the purpose of above definition as it is not incorporated in Pakistan or is registered as a foreign company.

10. The status of the petitioner in light of the fact that it is neither incorporated in Pakistan nor is registered as a foreign company is beyond any controversy. The effect of the status of the petitioner was not though objected to by the respondents but has implications vis-a-vis the maintainability of instant petition. In this regard, the relevant provisions of law are sections 451, 452 and

456 of the Ordinance. For the ease of convenience, the relevant provisions are reproduced below:-

"451. *Documents to be delivered to registrar by foreign companies.*—(1) Every foreign company which, after the commencement of this Ordinance, establishes a place of business in Pakistan shall, within thirty days of the establishment of the place of business, deliver to the registrar—

- (a) a certified copy of the charter, statute or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and if the instrument is not written in the English or Urdu language, a certified translation thereof in the English or Urdu language;
- (b) the full address of the registered or principal office of the company;
- (c) a list of the directors, chief executive and secretaries (if any) of the company;
- (d) a return showing the full present and former names and surnames, father's name or, in the case of a married woman or widow, the name of her husband or deceased husband, present and former nationality, designation and full address in Pakistan of the principal officer of the company in Pakistan by whatever name called;
- (e) the full present and former names and surnames, father's name, or, in case of a married woman or widow, the name of her husband or deceased husband, present and former nationality, occupation and full addresses of some one or more persons resident in Pakistan authorised to accept on behalf of the company service of process and any notice or other document required to be served on the company together with his consent to do so; and
- (f) The full address of that office of the company in Pakistan which is to be deemed its principal place of business in Pakistan of the company.

(2) The list referred to in clause (c) of sub-section (1) shall contain the following particulars, that is to say:-

- (a) with respect to each director,-
 - (i) in the case of an individual, his present and former name and surname in full, his usual residential address, his nationality, and if that nationality is not the nationality of origin, his nationality of origin, and his business occupation, if any, and any other directorship which he hold;
 - (ii) in the case of a body corporate, its corporate name and registered or principal office; and the full name, address, nationality and nationality of origin, if different from that nationality, of each of its director;
- (b) with respect to the secretary, or where there are joint secretaries, with respect to each of them-
 - (i) in the case of an individual, his present and former name and surname, and his usual residential address;
 - (ii) in the case of a body corporate, its corporate name and registered or principal office:

Provided that, where all the partner in a firm are joint secretaries of the company, the name and principal office of the firm may be stated instead of the particulars mentioned in clause (b).

(3) Every foreign company, other than a company mentioned in sub-section (1) shall, if it has not delivered to the registrar before the commencement of this Ordinance the documents and particulars specified in section 277 of the Companies Act, 1913 (VII of 1913), shall continue to be subject to the obligation to deliver those documents and particulars and be liable to penalties in accordance with the provisions of that Act.

452. *Return to be delivered to registrar by foreign companies whose documents, etc., altered.*-- If any alteration is made or occurs in—

- (a) the charter, statute or memorandum and articles of a foreign company or any such instrument as is referred to in section 451;
- (b) the address of the registered or principal office of the company;
- (c) the directors, chief executive or secretaries or in the particulars contained in the list referred to in section 451;
- (d) the principal officer referred to in section 451;
- (e) the name or addresses or other particulars of the persons authorised to accept service of process, notices and other documents on behalf of the company as referred to in the preceding section 451, or
- (f) the principal place of business of the company in Pakistan;

the company shall, within thirty days of the alteration, deliver to the registrar for registration a return containing the prescribed particulars of the alteration and in the case of change in persons authorized to accept service of process, notices and other documents on behalf of the company, also his consent to do so.

456. *Company's failure to comply with this part not to affect its liability under contracts, etc.*-- Any failure by a foreign company to comply with any of the requirement or section 451 or section 452 shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof; but the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction, until it has complied with the provisions of section 451 and section 452."

The bare perusal of the said provisions shows that if a company does not comply with sections 451 and 452 *ibid*, it is debarred from agitating any right through legal proceedings with respect to any contract or other transaction. The legal position of non-registration of a foreign company was discussed in China Annag Construction Corporation Vs. K.A. Construction Co. (2001 SCMR 1877). In the said judgment, it was observed that the effect of non-compliance of sections 451 and 452 is that a foreign company is debarred to enforce its rights through litigation or defend itself therefore, the said provisions being drastic are to be interpreted conservatively, however, in the subsequent judgments, the Hon'ble Supreme Court of Pakistan did not follow the said reasoning. In Hala Spinning Mills Ltd. Vs. International Finance Corporation and another (2002 SCMR 450), the august apex Court observed as follows:-

"As far as the first part of this provision is concerned on basis of it a foreign company cannot institute legal proceedings without fulfilling the requirements of sections 451 and 452 of the Ordinance."

In another judgment titled "Maulana Abdul Haque Baloch and others Vs. Government of Balochistan and others (PLD 2013 SC 641)", the Hon'ble Supreme Court of Pakistan approved the reasoning in 2002 SCMR 450 by reiterating that if a foreign company does not fulfill the requirements of sections 451 and 452 of the Ordinance, then it cannot institute legal proceedings until the needful is done.

11. During the course of proceedings the Companies Ordinance, 1984 was repealed and replaced with the Companies Act, 2017. Sections 451, 452 and 456 of the Ordinance have been replaced with sections 435, 436 and 441 of Act of 2017. New provisions are as follows:-

"435. Documents to be delivered to registrar by foreign companies. — (1) Every foreign company which, after the commencement of this Act, establishes a place of business in Pakistan shall, within thirty days of the establishment of the place of business or conduct of business activity, deliver to the registrar—

- (a) a certified copy of the charter, statute or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and if the instrument is not written in the English or Urdu language, a certified translation thereof in the English or Urdu language;
- (b) the full address of the registered or principal office of the company;
- (c) a list of the directors, chief executive and secretary (if any) of the company;
- (d) a return showing the full present and former names and surnames, father's name or, in the case of a married woman or widow, the name of her husband or deceased husband, present and former nationality, designation and full address in Pakistan of the principal officer of the company in Pakistan by whatever name called;
- (e) the full present and former names and surnames, father's name, or, in case of a married woman or widow, the name of her husband or deceased husband, present and former nationality, occupation and full addresses of some one or more persons resident in Pakistan authorised to accept on behalf of the company service of process and any notice or other document required to be served on the company together with his consent to do so; and
- (f) the full address of that office of the company in Pakistan which is to be deemed its principal place of business in Pakistan of the company.

Explanation.— For the purposes of this section the term "conduct of business activity" includes any business to be undertaken by a foreign

company by virtue of its memorandum and articles of association or as licensed or authorized by any law.

(2) The list referred to in clause (c) of sub-section (1) shall contain the following particulars, that is to say—

- (a) with respect to each director—
 - (i) in the case of an individual, his present and former name and surname in full, his usual residential address, his nationality, and if that nationality is not the nationality of origin, his nationality of origin, and his business occupation, if any, and any other directorship which he holds;
 - (ii) in the case of a body corporate, its corporate name and registered or principal office; and the full name, address, nationality and nationality of origin, if different from that nationality, of each of its director;
- (b) with respect to the secretary, or where there are joint secretaries, with respect to each of them—
 - (i) in the case of an individual, his present and former name and surname, and his usual residential address;
 - (ii) in the case of a body corporate, its corporate name and registered or principal office:

Provided that, where all the partner in a firm are joint secretaries of the company, the name and principal office of the firm may be stated instead of the particulars mentioned in clause (b).

(3) Every foreign company, other than a company mentioned in sub-section (1) shall, if it has not delivered to the registrar before the commencement of this Act the documents and particulars specified in section 451 of the Companies Ordinance, 1984 (XLVII of 1984), shall continue to be subject to the obligation to deliver those documents and particulars and be liable to penalties in accordance with the provisions of that Ordinance.

436. Return to be delivered to registrar by foreign companies whose documents altered. If any alteration is made or occurs in—

- (a) the charter, statute or memorandum and articles of a foreign company or any such instrument as is referred to in section 435;
- (b) the address of the registered or principal office of the company
- (c) the directors, chief executive or secretary or in the particulars contained in the list referred to in section 435;
- (d) the principal officer referred to in section 435;
- (e) the name or addresses or other particulars of the persons authorised to accept service of process, notices and other documents on behalf of the company as referred to in the preceding section 435, or
- (f) the principal place of business of the company in Pakistan;

the company shall, within thirty days of the alteration, deliver to the registrar for registration a return containing the specified particulars of the alteration and in the case of change in persons authorised to accept service of process, notices and other documents on behalf of the company, also his consent to do so.

441. Company's failure to comply with this part not to affect its liability under contracts.— Any failure by a foreign company to comply with any of the requirement or section 435 or section 436 shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof; but the company shall not be entitled to bring any suit, claim any set-off,

make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction, until it has complied with the provisions of section 435 and section 436.”

12. In light of the above position of law and the detailed examination of the documents appended with petition regarding status of the petitioner company, it is clear that the petitioner being registered in United Arab Emirates does not fulfill the requirements of sections 451 and 452 of the Ordinance; consequently, the implications provided in section 456 *ibid* shall ensue, the effect whereof is that the petitioner is not competent to file the instant petition. The fact that the petitioner has appointed an attorney is inconsequential because the referred attorney is to act on behalf of the company which due to the above position of law cannot initiate legal proceedings.

13. In view of above, the instant petition is not maintainable and is accordingly **dismissed**.

(AAMER FAROOQ)
JUDGE

Announced in open Court this _____ day of January, 2018.

JUDGE

M.Shah/.