

118/18

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE SAJJAD ALI SHAH

CIVIL PETITION NO.2669 OF 2016

(Against the judgment dated 30.6.2016 of
the Islamabad High Court, Islamabad
passed in C.O. No.07 of 2014)

Control Risk (Pvt.) Ltd.

...Petitioner(s)

VERSUS

Additional Registrar Companies Registration Office SECP, Islamabad

...Respondent(s)

For the petitioner(s): Barrister Yousaf Khosa, ASC
Mr. M. S. Khattak, AOR

For the respondent(s): Syed Hamid Ali Shah, ASC

Date of hearing: 31.10.2018

ORDER

MIAN SAQIB NISAR, CJ.- The petitioner-company was incorporated under the Companies Ordinance, 1984 (*the Ordinance*) on 10.09.2009 with the Company Registration Office, Islamabad (*CRO*), and as per the Memorandum of Association (*MOA*) its object is to carry on the business of, *inter alia*, risks assessments, analysis and management, business consultancy, project implementation consultancy, with an emphasis on market entry advisory, project implementation support and risk management consultancy, etc. *Vide* letter dated 10.02.2014 the Additional Registrar CRO reported that the petitioner was engaged in security related matters, such as provision of security services to foreigners, using trackers during movements, attempting to visit restricted areas, collecting information about armed forces, using fake number plates, which activities/business were not only *ultra vires* its MOA but also pose a security risk to the country. He sought sanction from the Securities and Exchange Commission of Pakistan (*SECP*) under Section

309(b) of the Ordinance to present a petition before the Court of competent jurisdiction for winding up of the petitioner-company in terms of Section 305(f)(i), (ii), (iv) and (v) of the Ordinance. Thereafter, a show cause notice dated 17.02.2014 was issued to the petitioner affording it an opportunity to make representation and to explain as to why sanction for filing of a winding up petition may not be granted. The petitioner-company filed its response dated 26.02.2014 refuting the allegations contained in the show cause notice and was also given an opportunity of hearing on 05.03.2014. Then, the SECP granted sanction to the Additional Registrar CRO under Section 309(b) of the Ordinance *vide* order dated 29.04.2014 to present a petition for winding up of the petitioner-company which was filed before the learned Islamabad High Court and allowed *vide* impugned judgment, hence the instant petition.

2. We have gone through the record and heard the arguments of the learned counsel for the parties which shall be reflected during the course of this opinion. Section 305 of the Ordinance provides the circumstances in which a company may be wound up by the Court:-

- (a) *if the company has, by special resolution, resolved that the company be wound up by the Court;*
- (b) *if default is made in delivering the statutory report to the registrar or in holding the statutory meeting or any two consecutive annual general meetings;*
- (c) *if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;*
- (d) *if the number of members is reduced, in the case of private company, below two or, in the case of any other company, below seven;*
- (e) *if the company is unable to pay its debts;*
- (f) *if the company is-*
 - (i) *conceived or brought forth for, or is or has been carrying on, unlawful or fraudulent activities;*

- (ii) carrying on business not authorised by the memorandum;
- (iii) conducting its business in a manner oppressive to any of its members or persons concerned with the formation or promotion of the company or the minority shareholders;
- (iv) run and managed by persons who fail to maintain proper and true accounts, or commit fraud, misfeasance or malfeasance in relation to the company; or
- (v) managed by persons who refuse to act according to the requirements of the memorandum or articles or the provisions of this Ordinance or fail to carry out the directions or decisions of the Court or the registrar or the Commission given in the exercise of powers under this Ordinance;
- (g) if, being a listed company, it ceases to be such company;
or
- (h) if the Court is of opinion that it is just and equitable that the company should be wound up; or
- (i) if a company ceases to have a member.

Explanation I...

Explanation II...

[Emphasis supplied]

Section 309 of the Ordinance provides the persons and requirements with respect to the petitions for winding up and reads as under:-

309. Provisions as to applications for winding up.- An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), or by any contributory or contributories, or by all or any of the aforesaid parties, together or separately, or by the registrar, or by the Commission or by a person authorised by the Commission in that behalf.

Provided that-

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(a)

(b) the registrar shall not be entitled to present a petition for the winding up of a company unless the previous sanction of the Commission has been obtained to the presentation of the petition;

Provided that no such sanction shall be given unless the company has first been afforded an opportunity of making a representation and of being heard;

(c) the Commission or a person authorised by the Commission in that behalf shall not be entitled to present a petition for the winding up of a company unless an investigation into the affairs of the company has revealed that it was formed for any fraudulent or unlawful purpose or that it is carrying on a business not authorised by its memorandum or that its business is being conducted in a manner oppressive to any of its members or persons concerned in the formation of the company or that its management has been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; and such petition shall not be presented or authorised to be presented by the Commission unless the company has been afforded an opportunity of making a representation and of being heard;

(d)

(e)

[Emphasis supplied]

3. Section 309(b) *supra* entitles the registrar to present a petition for the winding up of a company with the previous sanction of the SECP to this effect and provided that prior to the grant of such sanction the company was afforded an opportunity of making a representation and of being heard, whereas Section 309(c) *supra* entitles the SECP, or a person authorised by the SECP, to present a petition for the winding up of a company when an investigation into the affairs of the company has

vealed that (1) it was formed for any fraudulent or unlawful purpose; or (2) it is carrying on a business not authorised by its memorandum; or (3) its business is being conducted in a manner oppressive to any of its members or persons concerned in the formation of the company; or (4) its management has been guilty of fraud, misfeasance or other misconduct towards the company or towards any to its members; and provided that the company has been afforded an opportunity of making a representation and of being heard. It is manifest that parts (b) and (c) of Section 309 *ibid* are distinct and separate from each other, and are neither co-dependent nor do they correspond to any particular part of Section 305 *supra*. If Section 309(c) of the Ordinance was to be made a condition precedent for Section 209(b) thereof (*which was essentially the argument of the learned counsel for the petitioner*), that would be tantamount to reading the requirements of the former into those of the latter which this Court is not prepared to do when a bare perusal of the noted provisions makes the intent of the legislature clear. Doing so would take away the powers of the registrar which have been duly conferred upon him by the statute, i.e. Section 309(b) of the Ordinance. Consequently, an investigation was not required to be conducted in terms of Section 309(c) of the Ordinance as it was not the SECP or anyone authorized in that behalf who was presenting the winding up petition, but the Additional Registrar CRO under Section 309(b) thereof who duly falls under the definition of "registrar" which as per Section 2(1)(31) of the Ordinance means "*a registrar, an additional registrar, a joint registrar, a deputy registrar or an assistant registrar, performing under this Ordinance the duty of registration of companies.*" [Emphasis supplied] Therefore, the learned High Court has rightly observed that the Additional Registrar CRO in the instant case was competent to present the petition under Section 309(b) of the Ordinance.

4. Adverting to the question as to whether the petitioner's operations fell within the scope of the MOA, it would be relevant to reproduce Clauses III(1) and (2) thereof which read as follows:-

- (1) *To carry on the business of, inter alia, risks assessments, analysis and management, business consultancy, project implementation support and services, and risk analysis and management consultancy, with an emphasis on market entry advisory, project implementation services, with a focus on project set up advisory, support and management.*
- (2) *To act as provider of international best practice, via international policy advice, training and standards monitoring, to support projects in mitigating risks via technology, logistics and intellectual support, international and local consultants will transfer such knowledge and skills to locally based Pakistani and international companies and their staff.*

The petitioner-company was found to have been engaging in security related matters, such as provision of security services to foreigners, using trackers during movements, attempting to visit restricted areas, collecting information about armed forces, using fake number plates, etc. As mentioned in the order dated 29.04.2014 it has been observed that reports of intelligence agencies were received in support of the allegations communicated to the petitioner and its representatives were confronted with such reports and were asked to explain whether the provision of risk assessment and intelligence reports with respect to the security scenario in Pakistan fell within the ambit of the MOA, however, the representatives of the petitioner-company were unable to provide a plausible answer in this regard. Although the petitioner has appended certain contracts and invoices which *prima facie* show that it had engaged the services of a local Pakistani security company, this evidence was never produced before the SECP or the learned High Court. In any case, it is an admitted position

that the petitioner was providing risk management and security-related services to foreign companies and foreign embassies and that the petitioner had ex-foreign military officials on its payroll. Furthermore, it is worthy to note that the record clearly suggests that the petitioner's response has throughout been evasive, as correctly pointed out by the learned High Court in the impugned judgment. It is clear, beyond any doubt, from the foregoing discussion that the petitioner-company was indeed providing services that were beyond the scope of its MOA.

5. As regards the argument that the notice of opportunity is not to be treated as a show cause notice for the purposes of Section 309(b) of the Ordinance, we find such argument to be baseless. The proviso to Section 309(b) *supra* provides that the company ought to be "*afforded an opportunity of making a representation and of being heard*" and a perusal of the letter dated 17.02.2014 issued to the petitioner-company makes it manifest in the subject and in paragraph No.5 that "*pursuant to clause (b) of the proviso to section 309 of the Ordinance, you are, hereby, provided with an opportunity of making representation and being heard and to explain as to why requisite sanction may not be granted for filing a winding up petition in the Court of competent jurisdiction.*" [Emphasis supplied] Thereafter, the petitioner-company not only submitted their written reply but Mr. Ahsan Bokhari, Director, Senior Consultant and Country Representative and Mr. Mohsin Ejaz, Accountant, appeared on its behalf on two dates of hearing, i.e. 05.03.2014 and 20.03.2014, after which the order dated 29.04.2014 was passed granting permission to file the winding up petition. Thus, this argument is repelled.

6. As far as the argument that the petitioner has not been duly heard on merits before the learned High Court is concerned, it is evident from a perusal of the impugned judgment that the petitioner (*respondent before the learned High Court*) was duly represented by one Barrister Mustafa Munir Ahmed and there was no reason for him not to argue the case on

merits on the date of hearing, i.e. 20.05.2016. Therefore this argument too is repelled.

7. Finally with respect to the submission that the learned Islamabad High Court failed to follow the procedure set out in the Court Rules for winding up rendering the impugned judgment invalid, we have gone through the relevant provisions of the Ordinance and the Companies (Court) Rules, 1997 and do not find any mandatory requirement to have been disregarded by the learned High Court. Hence, this argument is also rejected.

8. In light of the above, we do not find any factual or legal infirmity in the impugned judgment warranting interference by this Court. The learned High Court has ordered for winding up of the petitioner-company for cogent reasons which are hereby upheld. Consequently, the instant petition is dismissed.

9. The foregoing are the detailed reasons for our short order of even date which is reproduced as under:-

"For the reasons to be recorded, this petition being without merit is dismissed."