IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE YAHYA AFRIDI

Civil Appeal No. 1003 of 2019
(Against the order dated 23.01.2019 passed by the High Court of Sindh at Karachi in J.C.M. No. 55 of 2009)

First Dawood Investment Bank Ltd., Karachi
...Appellants

Versus

Bank of Punjab through its President, Lahore
...Respondents

For the appellants:	Mr. Muhammad Ali Raza, ASC Mr. Tariq Aziz, AOR
For the respondents:	Mr. Khurram Raza, ASC Mr. M. Ozair Chughtai, AOR *(absent)*
Date of hearing:	22.02.2022

JUDGMENT

Yahya Afridi, J. M/s First Dawood Investment Bank Limited **("appellant-company")** has through the instant appeal by leave challenged the order of the High Court of Sindh, dated 23.01.2019, whereby on a petition filed by Bank of Punjab **("respondent-bank")**, a conditional order of winding up of the appellant-company was passed under the enabling provisions of the then applicable Companies Ordinance, 1984 **("Ordinance")**.

2. The issue in hand is the winding-up of the appellant-company sought by the respondent-bank, and the same is essentially based on the stated default of the former in payment of

its liabilities arising from two transactions, the particulars whereof are discussed hereinunder:

Transaction No. 1

2.1 In the first transaction, the appellant-company, entered into an agreement with the respondent-bank, wherein the former issued a Letter of Commitment dated 02.08.2007 **("Letter of Commitment")**, agreeing to pay the latter an amount of Rs. 245 million, in case M/s. Gharibwal Cement Limited did not meet its payment obligations under the Letter of Credit facility dated 12.12.2006, opened in its favour by the respondent-bank for a total value of Rs. 488 million (equivalent to five million nine hundred and eighty-five thousand Euros only). The Letter of Commitment was to remain valid for 720 days from the date of the Bill of Lading, however, there was an additional 30 days after the expiry of the 720 days period for the respondent-bank to lodge a claim against the appellant-company under the Letter of Commitment.

Transaction No. 2

2.2 In the second transaction, the appellant-company issued two guarantees dated 02.09.2005 and 10.11.2005, each valued at Rs. 64 million **("Two Guarantees"),** securing the Bridge Finance Facility extended by the respondent-bank in favour of M/s. AMZ Ventures Limited. Subsequently, on 30.03.2007, the respondent-bank provided a new Term Finance Facility of Rs. 120 million to M/s. AMZ Ventures Limited for adjusting the earlier two finance facilities of Rs. 64 million each, wherein the expiry date of the two guarantees was extended from 31.12.2007 to 31.12.2008.

Notice demanding repayment and winding up petition

3. The respondent-bank issued a legal notice dated 07.10.2009, under section 306(1)(a) of the Ordinance, to the

appellant-company demanding repayment of amount Rs. 473 million, under the said two transactions, along with costs, mark-up and profits accrued thereon, within 30 days from the date of receipt thereof. The respondent-bank then filed a winding up petition under section 309 of the Ordinance, as a creditor, on the ground that the appellant-company had defaulted in its liabilities under the two transactions and was therefore unable to pay its debts.

4. In its reply to the winding up petition, the appellant-company responded by taking the stance that no amount was due, since in each claimed defaulted transaction, the respondent-bank's own acts had the effect of discharging the liabilities of the appellant-company, as surety under the guarantees, and thus there was no debt due from the appellant-company, within the meaning of sections 305(e) and 306(1)(a) of the Ordinance.

Order of the High Court

5. As for the contested claims of the parties, the High Court was not inclined to accept the stance taken by the appellant-company, in particular, that its liabilities under the guarantees stood discharged, as a result of the subsequent changes made by the respondent-bank in the terms of initial finance agreements.

5.1 The High Court held, as to Transaction No. 1, that the alteration in the terms of the Letter of Commitment *vide* Facility Offer letter dated 30.05.2009 by the respondent-bank could not be construed as restructuring of the liabilities of M/s. Gharibwal Cement Ltd, and further that the extension in the expiry-term of the Letter of Commitment did not discharge the liability of the appellant-company. Similarly, regarding Transaction No. 2, the

High Court held that the new Term Finance Facility dated 30.03.2007 was extended by the respondent bank to M/s. AMZ Ventures Limited did not discharge the liability of the appellant-company under the guarantees. Therefore, the High Court held that the objection of the appellant-company that, the claim of the respondent-bank was disputed had not been substantiated by any evidence.

5.2 Finally, the High Court held that the appellant-company was unable to pay its debts, and thus, liable to be wound-up under section 305(e) read with section 306 of the Ordinance. In furtherance thereof, the High Court passed a conditional order of winding up in the terms:

> In view of the above discussion and the facts and circumstances of this case, it is hereby ordered that the company/Respondent be wound up subject to the condition that if a sum of Rs. 245,000,000/- (Rupees Two Hundred and Forty Five Million), is paid to the petitioner within 45 days hereof, and an amount of Rs. 128,000,000/- (Rupees One Hundred and Twenty Eight Million) is deposited with the Nazir of this Court again within 45 days hereof; the petition shall stand dismissed. Nazir is directed to invest such amount in some Government Profit bearing instrument(s). In case of failure and non-compliance the Official Assignee is deemed to have been appointed as an Official Liquidator of Respondent Company with effect from such lapse of 45 days as above. The amount so deposited with the Nazir of this Court shall be subject to final outcome and decree in the Banking Suit No.B-27/2010.

Contentions of the parties

6.1 The learned counsel for the appellant-company contended that the terms of the Letter of Commitment, and the two guarantees were varied by the respondent bank without the knowledge and consent of the appellant-company, and hence, the appellant-company was released from its obligations under the Letter of Commitment and the two guarantees, as envisaged under section 133 to 135 of the Contract Act, 1872. It was further contended that the debt was neither definitive nor un-contested, as

is the requirement for a company to be wound-up under the enabling provisions of the Ordinance.

6.2 The respondent-bank contended that under both transactions the appellant-company, had given its express consent to the respondent-bank for any alteration in the terms of the finance facilities, and thus, waived their rights under section 133 to 135 of the Contract Act, 1872, of being absolved of its liabilities for such an alleged alteration under the Letter of Commitment and the Two Guarantees.

Opinion of this Court

Ground of winding-up – "unable to pay debt"

7. Section 305 of the Ordinance sets out the grounds for winding-up of a company. The ground provided under Section 305(e) is that "the company is unable to pay its debts", and to supplement the same, section 306(1)(a) stipulates when a company is deemed unable to pay its debts. For ease of reference, the two provisions of the Ordinance are stated hereunder:

> **305. Circumstances in which company may be wound up by Court. -**
> A company may be wound up by the Court-
> .....
> .....
> (e) if the company is unable to pay its debts;
> .....
> .....
> **306. Company when deemed unable to pay its debts. –**
> (1) A company shall be deemed to be unable to pay its debts-
> (a) 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 of 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; or
> .....
> .....
>
> (Emphasis supplied)

Presumption in favour of the creditor-petitioner

8. The legislature has, vested the creditor-petitioner with an advantage, that when the creditor has served upon a company, a statutory notice under section 306(1)(a) to pay its debt, and the company has neglected to pay the debt, within the stipulated thirty days, a presumption by a legal fiction is created in favour of the creditor, that the company is unable to pay its debt due to the creditor.

Statutory notice - Presumption of inability to pay

9. Judicial pronouncements are by now consistent in enunciating that the words 'neglect to pay' expressed in section 306(1)(a) of the Ordinance, refers to a refusal of the company to pay without any reasonable cause. If the company raises a *bona fide* dispute, as to its liability to pay the amount claimed by the creditor, then in that case, there can be no 'neglect to pay' by the company, within the meaning of section 306(1)(a). In **Re London and Paris Banking Corporation**,[1] Lord Jessel, MR, held:

> "It is very obvious, on reading that enactment, that the word "neglected" is not necessarily equivalent to the word "omitted". Negligence is a term which is well known to the law. Negligence in paying a debt on demand, as I understand it, is omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence. Therefore, I should hold, upon the words of the statute, that where a debt is bona fide disputed by the debtor..... in that case he has not neglected to pay, and is not within the wording of the statute."

Similarly, **"Palmer on Company Precedents"** (17th Edition, Part: II) explains the principle in terms:

> "The mere omission of a company to comply with a notice requiring payment of a debt, served pursuant to the above para, is not 'neglect' within the meaning of that paragraph if there is reasonable cause for the omission, and the fact that the debt in question is bona fide disputed is a reasonable cause. But of course, if it is shown that the alleged dispute is not a bona fide one, the objection to the petition fails."

[1] (1874) LR 19 Eq 444,445.

In **M/s. Platinum Insurance Company Limited v. Daewoo Corporation**,[2] the case relied upon by the High Court, the issue was one of "insolvency" of the company sought to be wound up rather than a "*bona-fide* dispute" raised by the company to the claim of debt made by the creditor, as it is in the present case. Briefly, the said case primarily related to the quantum of the liability due under the guarantees, and was premised on the clause of the guarantee, which explicitly stated that regardless of any matter affecting the contract, the liability under the guarantee would not stand released. The creditor, in the said case, not only proved the existence of the debt, but also the lack of a *bona fide* dispute by the debtor-company, and thereby established that there was 'neglect' to pay, which gave rise to the presumption against the company of being unable to pay its debts, as envisaged under section 306(1)(a) of the Ordinance. In this regard, the court laid down the general principles pertaining to a company being unable to pay its debt, and also the presumption of law deeming the company of being unable to pay its debt in such commercial state, as provided in section 305(e) and section 306(1)(a) of the Ordinance, respectively. Some of the principles so laid down, which are relevant for the present case, read:

> (i) That if a debtor company is merely unwilling to pay its debts but otherwise is commercially solvent, then the normal remedy available to a creditor is a suit for the recovery of the amount and not a petition for winding up.
>
> (ii) That if the Court finds that the negligence on the part of the debtor company to pay the sum demanded in terms of clause (a) of subsection (1) of section 306 of the Ordinance is not on account of want of commercial solvency, but because of bona fide dispute based on a substantial ground as to the entitlement of the creditor to the amount demanded, application under section 306 read with section 309 of the Ordinance will not be sustainable.

[2] PLD 1999 SC 1.

(iii) That clause (a) of subsection (1) of section 306 of the Ordinance raises a presumption as to the fact that the debtor company is deemed to be unable to pay its debts, if in spite of the receipt of demand in terms of the above clause, the debtor company neglects to pay the sum demanded within thirty days of the receipt of notice of demand, or neglects to secure or to compound for it to the reasonable satisfaction of the creditor. But this presumption is rebuttable by the debtor company, if it can show that it is commercially solvent and is in a position to meet its liability on due dates.

10. It would, thus, be safe to hold that in cases where there is a mere omission of the company to comply with the statutory notice, it would not always lead to the conclusion that the company had admitted its liability and is unable to pay the debt. The fundamental question to be decided, in order to bring about the enforcement of the deeming provisions of section 306(1)(a) of the Ordinance, is whether there exists any debt or not, which the company is liable to pay to the petitioning-creditor. If there is a genuine dispute to the very existence of the debt, the question of applying the deeming provision, that the company is unable to pay its debt, would not arise.[3] On the other hand, in cases where there is non-compliance of the statutory notice demanding payment of the debt owed by the company, and the company has placed no material before the company court to be satisfied that there is a *bona fide* dispute to the claim of the creditor or that the company is solvent and able to pay the debt, then the company court may pass a winding-up order.[4]

Discretionary Jurisdiction – Winding-up

11. We note that the word “may” employed in section 305 of the Ordinance, for the company court to admit the winding-up petition, clearly denotes the discretionary nature of the jurisdiction vested in the company court to pass a winding-up order. Thus, the

[3] Wimco Ltd. v. Sidvink Properties Ltd. (1996) 86 Comp. Cas. 610.
[4] Advent Corporation Ltd. 1969 Comp. Cas 463.

company court must, first and foremost, be fully cognisant that it is called upon to examine the merits of the need of a winding-up order, and not settling disputes of a civil nature that may arise out of a contract or obligations arising under an agreement.[5]

Bona fide dispute

12. The question whether a dispute raised by the company regarding the claimed debt is *bona fide* or not depends upon the circumstances of each case. It will always be a question of fact, as to whether the company has a *bona fide* dispute to the debt claimed by the creditor-petitioner. The *litmus* test, however, would be to adjudge, whether the dispute raised by the respondent company is only to avoid payment of the debt, and is not based on a substantial ground. In cases where the company sets up a *bona fide* dispute, based on a substantial ground, to the debt claimed by the creditor, the company court is to refuse an order of winding up.[6]

12.1 The principle on which the company courts are to act, in this regard, is to see: first, whether the dispute raised by the company is one of substance; secondly, whether the dispute is likely to succeed in point of law; and, thirdly, whether the company has adduced *prima facie* proof of the facts on which the dispute depends. If the facts of the case suggest that the debt is substantially disputed, then to continue with the winding-up proceedings would be an abuse of the process of the court.[7]

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[5] Kamadenu Enterprises v. Vivek Textile Mills P. Ltd. (Kar.) (1984) 55 Comp. Cas. 68.
[6] Madhusudan Gordhandas & Co. v. Madhu Woollen Industries (1972) 42 Comp. Cas. 125.
[7] Mann v. Goldstein (1968) 1 W.L.R. 1091.

Merits of the contested contentions

13. Now, we advert to and decide the merits of the findings recorded in the impugned judgment on the contested contentions of the parties.

Unable to pay debts – *bone fide* dispute

14. The main bone of contention between the parties is: whether the appellant-company should be wound up on the basis that it was unable to pay its debts under section 305(e) read with section 306(1)(a) of the Ordinance. In a nutshell, we note that the appellant-company has not disputed the amount of liability, but the very existence of the liability itself under the two transactions.

(i) Transaction No. 1

(a) Simple Agreement or Guarantee

15. Regarding Transaction No. 1, the appellant-company challenged the very nature of the Letter of Commitment, contending the same to be a contract simpliciter, and not a 'guarantee'. The respondent-bank, on the other hand, stressed that the Letter of Commitment was a 'guarantee', and as such, the same be construed in favour of the respondent-bank, being the creditor therein. In this regard, on a close perusal of the terms of the Letter of Commitment, we note that the essential purpose thereof, was to provide security to the underlying transaction entered into between M/s. Gharibwal Cement Ltd. and the respondent-bank, where the appellant-company guaranteed to pay a certain amount in case M/s. Gharibwal Cement Ltd. were to default on the underlying transaction. Accordingly, the Letter of Commitment, in essence, on the face of it appears to be a guarantee.

(b) Claim of variance of terms of the Letter of Commitment

16. The next contention of the appellant-company was that the subsequent Facility Offer letter dated 30.05.2009, varied the terms of the Letter of Commitment in terms: that the time period for repayment of the facility was altered to 21.08.2009, whereas under the Letter of Commitment, a valid call could be made within 720 plus 30 days from the date of the Bill of Lading, which was not produced; that the purpose of the facility was altered; and lastly, that the appellant-company was not party or privy to this Facility Offer letter.

17. The High Court did not positively consider the above stance taken by the appellant company. However, on a bare perusal of the Facility Offer letter, the very opening words suggested otherwise, it read:

> **'Facility Offer Letter for:**
>
> 1. Rescheduling/Restructuring and Re-pricing of Term Finance Facility-1 (Syndicated).....

Similarly, we note that the very purpose stated in the Facility Offer letter was '*For capacity expansion of GCL'*, which was starkly distinct from the purpose of the Letter of Commitment, securing the import of machinery from M/s. Wartsila Finland Oy by M/s. Gharibwal Cement Ltd.[8]

18. Furthermore, a Syndicated Consolidated Restructuring Agreement, was entered into between the respondent-bank, M/s Gharibwal Cement Ltd. and multiple other lenders of the syndicate, where once again the appellant-company was not a

[8] As per Clause 1 of the Letter of Commitment.

party to this agreement. The appellant-company contended that the terms of the Agreement were such that the liability provided under the Letter of Commitment was consolidated with the other facilities offered by the remaining members of the syndicate into "*one consolidated long-term finance....and reschedule their respective due dates so as to make one consolidated finance and one repayment schedule*".[9] Therefore, the Facility Offer letter coupled with the Syndicated Consolidated Restructuring Agreement, and the exclusion of the appellant-company, as a guarantor to both these documents, to our mind, should have alerted the company court to be more cautious. To this end, the High Court ought to have considered, whether the dispute raised by the appellant-company to the claim of the respondent-bank was merely superficial and devoid of any *bone fide*. We find that the contest made by the appellant-company raised a substantial and *bona fide* challenge to the claim of the respondent-bank seeking its winding-up, which *prima facia* required a detailed deliberation into the facts and the law pertaining to guarantees. To our mind, these considerations should best have been left to the banking court to decide, and not for the High Court (company court) to determine in its winding-up jurisdiction.

(c) <u>Production of Bill of Lading</u>

19. Similarly, a valid call to claim under Clause 4 of the Letter of Commitment, could only be made on the production or disclosure of the Bill of Lading, which was not done during the winding-up proceedings before the High Court. However, we have noted that the High Court acknowledged that the Bill of Lading was not produced before it, but goes on to presume that the Bill of

[9] As per Clause J of the Agreement dated 30.06.2010.

Lading would be dated 02.08.2007, that is, a date succeeding the Letter of Credit dated 12.12.2006. The Bill of Lading, when produced before us, was found to be dated 21.08.2007. The Letter of Commitment, as per its terms, was to remain valid until 720 days plus 30 days from the date of the Bill of Lading, after which it was to "stand cancel/null and void". Furthermore, we also note that there exists *prima facie* no waiver of consent by the appellant-company for rescheduling or altering that date of expiry of the guarantee in the Letter of Commitment. Thus, the non-production of the Bill of Lading, being a condition upon which a valid call could have been made by the respondent-bank within the specified period, should have prompted the High Court to consider the case with more caution before making the winding up order.

(ii) Transaction No. 2

(a) *Bone Fide* dispute to the claim

20. Regarding Transaction No. 2, without giving any conclusive finding, as the matter is *sub-judice* before the banking court,[10] the factual issues that can be noted from the record are such that, as per Clause 3.2 the guarantees were permitted to be extended, wherein the last extension was till 31.12.2007. However, subsequently, an agreement for a Term Finance Facility was entered into between the respondent-bank and M/s. AMZ Ventures Ltd., on 30.03.2007, wherein the expiry period of the two guarantees was extended, but neither with notice to the appellant-company nor by making the appellant-company a privy to the subsequent Term Finance Facility. This raises important issues for determination: firstly, what would be the effect of a unilateral

[10] The Bank of Punjab v. AMZ Ventures Limited and another (Suit No. B-27 of 2010 before the High Court of Sindh, Karachi).

action of the respondent-bank, and that too without the knowledge of the appellant-company; secondly, whether the term of the guarantees stood validly extended to 31.12.2008 under the subsequent Term Finance Facility, or whether the same expired on 31.12.2007 under the guarantees to which the appellant-company was a party. Furthermore, two other related issues, which required consideration, were whether the subsequent Term Finance Facility varied the terms of the guarantees, and thereby had the effect of discharging the appellant-company from its liability under the guarantees, or whether the Term Finance Facility discharged the liabilities of M/s. AMZ Ventures Ltd. (principal debtor) under the Bridge Finance Facility and consequentially also of the appellant-company (surety) under the guarantees given for the Bridge Finance Facility .

21. The High Court rendered a definite finding in favour of the respondent-bank holding that the guarantees entered by the appellant-company were continuing guarantees, and thus there was no 'variance' in the guarantees, so as to discharge the appellant-company from its liabilities within the terms of Section 133 read with Section 128 of the Contract Act, 1872. Passing such definite findings on the contested issues raised by the parties, when they were locked in litigation on the same dispute before the banking court, appears to be exceeding the jurisdiction vested in the company court to decide upon winding-up petitions under the Ordinance.

(b) Matter *sub judice* before Banking Court

22. As for the recovery suit, we have been informed that the respondent-bank has filed the same on 11.03.2010, against

M/s. AMZ Ventures Ltd. and the appellant-company, and that the same is still pending adjudication. We are cognisant that a civil suit does not bar a petition for winding up; but in the circumstances of the present case, where we have noted that significant factual contentions and substantial points of law required deliberation and determination, the matter ought to have been left for the banking court to adjudicate upon, and it was not appropriate for the company court to render definite findings thereon.

Conclusion

23. In view of the above, it would be safe to state that: the High Court in its winding up jurisdiction cannot conduct a detailed analysis and minute examination of the facts to determine the complex questions of law, as to the liability arising under a contract of guarantee or some other financial contract; and more so, when debt claimed by the creditor is disputed on the grounds that *prima facie* make out a *bona fide* dispute; and thus, in such circumstances, the High Court should show restrain from passing a winding up order of the company, as the proper forum for determination of such a *bona fide* dispute is the civil court or the banking court, as the case may be.

24. For the reasons stated hereinabove, we find that in the present case, the multiple factual controversies, requiring interpretation of the documents relied upon by both parties, read in conjunction with the principles applicable to guarantees under the Contract Act, 1872, was sufficient to establish a *bona fide* dispute of substance in the facts and circumstances of the case.

25. Accordingly, we hold that, due to the factual contentions and legal questions raised by the appellant-company, the winding-up petition filed by the respondent-bank against the appellant-company, was not maintainable under section 305(e) read with section 306 (1)(a) of the Ordinance, and the High Court has legally erred in allowing the conditional winding up petition against the appellant-company.

26. Therefore, we allow the appeal, set aside the impugned order of the High Court, and dismiss the winding up petition of the respondent-bank.

Judge

Judge

Announced in open Court

On 18th August 2022, at Islamabad.

Judge

Approved for reporting
Arif