2017 C L D 696

[Lahore]

Before Shahid Karim, J

Mian WAQAR-UD-DIN and 3 others---Petitioners

Versus

Messrs UNITED INDUSTRIES LIMITED and 11 others---Respondents

C.O. No. 35 of 2006, decided on 2nd March, 2016.

(a) Companies Ordinance (XLVII of 1984)---

----Ss. 290 & 291---Prevention of oppression and mismanagement---Application under S. 290 of the Companies Ordinance, 1984---Scope---Order under S. 290 of the Companies Ordinance, 1984 could only be made upon a petition/application presented to the court and after such an application/petition had been presented, the High Court could proceed to consider the various alternate options spelt out in S. 290 of the Companies Ordinance, 1984.

(b) Companies Ordinance (XLVII of 1984)---

----Ss. 305 & 309---Winding-up of company---Circumstances in which company may be wound up by court---Adjudication of application for winding-up a company---Scope---Matters must be decided and rights must be determined and adjudged according to the legal position prevailing on the date of the institution of the proceedings for winding-up and not on the basis of changes which had been introduced pendente lite (during litigation)---Determination as to whether it was "just and equitable" to wind a company up, in terms of S. 305(h) of the Companies Ordinance, 1984 must be based on the circumstances which existed on the date of hearing of an application for winding-up a company and not thereafter, and any thing which took place after proceedings had commenced would not be taken into consideration by the Court, and would not normally augment grounds already taken in such an application.

Ladli Prasad Jaiswal v. The Kamal Distillery Co., Ltd. PLD 1965 SC 221 distinguished.

Shahbazud Din Chaudhry and 27 others v. Messrs Services Industries Textiles Limited and 4 others PLD 1988 Lah. 1 rel.

(c) Companies Ordinance (XLVII of 1984)---

----Ss. 305, 309 & 310---Winding-up of a company---Cases in which companies may be wound-up by court---Determination as to whether it was just and equitable to wind up a company in terms of S. 305(h) of the Companies Ordinance, 1984--- Scope--- Mere allegations of mismanagement or misappropriation of funds by the Directors of company, without more, would not be sufficient ground to wind-up company and similarly, when there were allegations of grouping and partisanship amongst shareholders, the same was not acceptable as sufficient basis to wind up company.

Muhammad Hussain v. Dawood Flour Mill and others 2003 CLD 1429 and Shahamatullah Qureshi v. Hi-Tech Construction (Pvt.) Ltd. 2004 CLD 640 ref.

Ladli Prasad Jaiswal v. The Kamal Distillery Co., Ltd. PLD 1965 SC 221 distinguished.

Hafiz Abdul Rehman and others v. Hafiz Abdul Majeed and others C.O. No. 45 of 2004; Tasnim and another v. Rustom Ali and others 2000 CLC 364; Shahamullah Qureshi v. Hi-Tech Construction (Pvt.) Ltd. 2004 CLD 640 and Shahbazud Din Chaudhry and 27 others v. Messrs Services Industries Textiles Limited and 4 others PLD 1988 Lah. 1 rel.

(d) Companies Ordinance (XLVII of 1984)---

----Ss. 290, 291 & 305--- Prevention of oppression and mismanagement---Remedial discretion of court where there existed unfairly prejudicial conduct in the affairs of a company towards its members/shareholders---Compulsory buy-out of shares at a fair price, as a remedy in cases of oppression/mismanagement/unfairly prejudicial conduct of company towards shareholders/members---Different standards for valuing shares in compulsory buy-out orders---Powers of the court under Ss. 290 & 305 of the Companies Ordinance, 1984 discussed in comparison to similar provisions of laws and jurisprudence of the United Kingdom---Jurisprudence, established principles and case-law, discussed.

Re: Saul D Harrison and Sons PLC (1995) 1 BCLC 14; Re: London School of Electronics Limited (1986) Ch 211; O' Neil v. Phillips (1999) 1 WLR 1092 (House of Lords); Bird Precision Bellows Ltd (1984) Ch. 419; Profinance Trust SA v. Gladstone (2002) 1 WLR 1024; Wholesale Society Ltd. v. Meyer (1959) AC 324 (House of Lords); Gower and Davies' Principles of Modern Company Law (Seventh Edition), p.526 rel.

Imtiaz Rahseed Siddiqui, Shehryar Kasuri, M. Hamza, Raza Imtiaz Siddiqui, Omer Tariq and Jamshed Alam for Petitioners.

Kh. Saeed uz Zafar, Asjad Saeed and Ch. Muhammad Naseer for Respondent No.1.

Rasaal Hassan Syed for Respondents Nos.2, 3 and 7.

Imran M. Sarwar for Respondent No.10.

Umair Mansoor for SECP.

Date of hearing: 11th February, 2016.

JUDGMENT

SHAHID KARIM, J.---This is a petition under sections 305, 309 and 290 of the Companies Ordinance, 1984 (Ordinance, 1984). It has multitudinous reliefs which are couched in the prayer clause in the following form:

a) "Admit the instant petition and order the winding up of the Respondent Company.

b) Annul the so-called Notice dated 10th and 24 December, 2005 purportedly under section 86 of the Ordinance and all actions pursuant thereto and restrain the Respondents from making any further issue of capital.

c) Direct that half of the shares unlawfully acquired by the Respondents Nos. 2 to 7 from the Ghee Corporation of Pakistan in October 2005 be transferred to the Petitioners.

d) Make an interim order restraining the respondents from using including for voting purposes, in any way the shares acquired from GCP.

e) Order the appointment of a liquidator with respect to the Respondent Company.

f) Make an interim order appointing of a provisional manager with respect to the Respondent Company.

g) Issue interim injunctions restraining the Respondent Company as well as the other Respondents from alienating any asset, whether corporate or personal, without the permission of this Hon'ble Court.

h) Make an interim order directing a financial audit be conducted by a reputable firm of chartered accountants of the affairs of the Respondent Company covering the last at least five years.

i) Direct the Provisional Manager to trace the ill-gotten gains of the Respondents and to initiate all actions and prosecutions necessary to cause punishment of the wrong doers as well restitution of the unjust gains made at the expense of the Respondent Company.

j) Make an interim order directing that all books of account and other statutory record of the Respondent Company be moved to the registered office of the Company at Lahore.

k) Make an interim order making the Petitioner No.1 a co-signatory to the operation of all accounts of the Respondent Company.

l) Make an interim order suspending the so-called Notice dated 24 December, 2005 purportedly under section 86 of the Ordinance and all actions pursuant thereto and restrain the Respondents from making any further issue of capital.

m) In the alternative, to pass any order in terms of section 290 of the Companies Ordinance, 1984 deemed just fair and appropriate in the circumstances.

2. The United Industries Limited (UIL) is a Public Limited Company and was established in the year 1962. UIL owns and operates an Oil and Solvent Plant under the name of "Kashmir". It is common ground between the parties that the manufacturing unit is a profitable unit. Both the parties rely upon the balance sheet of the previous two decades to assert the viability and profitability of the UIL. This fact will have an important bearing on the determination of this petition.

3. The UIL was nationalized in the year 1973 and till the year 1992 was a "managed establishment" of the Federal Government. In the year 1992, its shareholding was divested by Privatization Commission of Pakistan as per policy of the Federal Government at that point of time. A preemptive right was available under the privatization policy to the ex-owners/successors and thus an association of persons under the name of "M. Akbar and Associates" was formed to offer a bid for the shares of UIL proposed to be divested by the Privatization Commission. There is a dispute regarding the true nature of M. Akbar and Associates which will be adverted to in the latter part of this judgment.

4. At the time of divestment by the Privatization Commission of the shares of UIL 10% shareholding was retained by the Privatization Commission to be offered to the employees of the UIL. Ninety percent of the shares were taken by the parties. Once again there is a dispute regarding the actual modes operandi in the allotment of the shares. However, the fact remains that the shares were divested in the name of M. Akbar and Associates. From the time the privatization took place, the petitioners and the respondents Nos.2 to 5 have been directors in UIL with four directors having been appointed by the petitioners and four directors from the respondents' side. M. Akbar Maggo, the respondent No.2 has been Chief Executive of UIL since the time of its privatization.

5. Arguments have been addressed by the learned counsel for the parties. These arguments will be taken up and dealt with in the course of the decision of the issues involved in the instant petition.

<u>2% Shareholding:</u>

6. This event it seems was the last straw in the simmering disputes between the parties. According to the learned counsel for the petitioners, the remaining 2% shareholding in the Company (upon 98% divestment by the GCP) was sought to be divested by the "Ghee Corporation of Pakistan" in the year 2005. M. Akbar Maggo bid for the 2% shareholding in 2005 in his personal capacity and transferred the shares in his name in the register of members. This, according to the learned counsel for the petitioners, was unlawful and contravened the tacit agreement between the parties with regard to the bid to be offered for shares intended to be divested by the Ghee Corporation of Pakistan and their devolution on pro rata basis on the petitioners as well as the respondents. The learned counsel for the petitioners states that the bid for the 2% shares was made by M. Akbar Maggo surreptitiously and without taking the petitioners on board. According to him, this could not have been done without the approval of the petitioners and could only have been achieved jointly as the shares were to be purchased in the name of the petitioners as well as the respondents and were to be allotted to them according to their current shareholding. In this regard, the learned counsel has referred to the letter of the Privatization Commission Board which accorded the approval of the sale of 110,000 shares of UIL to M/s M. Akbar and Associates @ Rs.70 per share. Further, according to the learned counsel, the shares were not transferred in the name of M. Akbar Maggo strictly by following the mandate of law and thus any such transfer is void. He has relied upon section 178 of the Ordinance, 1984 to contend that any transfer of shares has to have the approval of the Board of Directors. The basis of the learned counsel's arguments is that there was a theme which permeated the relationship between the shareholders according to which parity had to be maintained and this has been breached by M. Akbar Maggo by bidding for 2% shares on his own and having them allotted in his name. As explicated, the learned counsel relied upon sections 76 and 77 for the proposition that a transfer of shares has to have the approval of the Board of Directors and on this basis it is asserted that the transfer was illegal and done in a clandestine manner.

7. The learned counsel for the petitioners has in this regard relied upon historical relationship between the parties. He concedes that there is no written agreement between the parties to the effect that any bidding for the shareholding divested by the Privatization Commission will be made by and on behalf of the shareholders/directors. Since the learned counsel for the petitioners does not rely upon a written agreement in this regard, the question, therefore, is in the realm of disputed, controversial and competing set of facts for which evidence is required. It is pertinent to mention that one of the reliefs prayed for in the instant petition is for this Court to "direct that half of the shares unlawfully acquired by the Respondents Nos. 2 to 7 from the Ghee Corporation of Pakistan in October 2005 be transferred to the Petitioners."

This is a prayer which merely requires that half of the shares be transferred to the petitioners. As adumbrated, no basis has been put forth by the petitioners for making such a prayer. The caption of the petition does not reflect that the petition is for the rectification of register of members. The prayer reproduced does not request for rectification of register of members to be made as well.

8. The learned counsel for the respondents, on the other hand, has taken me through various documents in order to unravel the true nature of the entity called M. Akbar Maggo and Associates. According to him, it was formed merely for the purposes of bidding of the shares of UIL. It is denied by the learned counsel for the respondents that any Memorandum of Understanding (MOU) or an agreement or any other document was executed on which the relationship was formalized between the parties. According to him, it is a mere name and cannot be termed as a formal legal entity and comprised of sponsors of the Company or their successors. This, according to him, was a condition of privatization and could not be deviated from. He submits that the petitioners No.1 and 3 were never part of the actual bidding in the year 1992 and thus the assertion that there were two separate groups is a mere delusion and is divorced from reality. Learned counsel submits that there was only one group and that comprised of the successors of the original sponsors. No proof is forthcoming from the petitioners side establishing any link with M. Akbar Maggo and Associates or that funds were made available by the petitioners.

9. In order to embark upon a determination of the 2% shareholding, which is the bone of contention between the parties, it would be necessary as a first step to ascertain the nature of M. Akbar Maggo and Associates. The learned counsel for the respondents Nos.1 to 7 has placed on record in the shape of book No.1 various documents in order to demonstrate that the petitioners Nos.1 and 3 were not part of the company at any stage. In this regard, a pedigree table has been produced which is not in dispute between the parties. According to this table, there were two brothers in the first place, Hameed Maggo and Hanif Maggo, from whom the progeny descended. Both Hameed Maggo and Hanif Maggo died and the wife of Hameed Maggo, Begum Perveen Maggo is the petitioner No.2 whereas Sultana Tajammul Chaudhry, the daughter of Hameed Maggo is the petitioner No.4. On the other hand, Begum Safia Hanif Maggo, the wife of Hanif Maggo is the respondent No.4 whereas M. Akbar Maggo and Jahangir Maggo sons of Hanif Maggo are respondents Nos.2 and 3. Afshan Maggo and Samina Maggo and Ayesha daughters of Hanif Maggo are respondents Nos.5, 6 and 7. According to the pedigree table, the petitioner No.1 is not part of Maggo family and is the brother of the wife of respondent No.2 whereas the petitioner No.3 is the wife of petitioner No.1. The first document in the line of documents, produced by the learned counsel for the respondents Nos.1 to 7, is a bidding document for UIL submitted to the Privatization Commission. It does not contain the names of the petitioners Nos.1 and 3. This, according to

the learned counsel for the respondents, is the composition of M. Akbar Maggo and Associates of which the petitioners Nos.1 and 3 are not a part. The sale agreement dated 21.05.1992, executed between Ghee Corporation of Pakistan through the Privatization Commission is also executed with Mian M. Akbar Maggo and Associates. This according to him has been signed on behalf of M. Akbar Maggo and Associates by Mian M. Akbar Maggo. The learned counsel has then referred to the Form XXIX dated 17.2.1992 of Oil Trade (Pvt.) Ltd. of which the respondents were directors. A special power of attorney was also executed by the successors of the sponsors (excluding petitioners Nos.1 and 3) in the name of Mr. M. Akbar Maggo to be the attorney to bid for the shares with the Privatization Commission. These documents, according to the learned counsel, bring home the ineluctable fact that M. Akbar Maggo and Associates was one group, comprising of the successors of the original sponsors of the petitioner No.1 and 3 were not part of it.

10. From the facts adumbrated, it is evident that the learned counsel for the petitioners has not been able to place on record a document of unimpeachable character which will establish that there were in fact two groups which conjoined together to bid for the shares of UIL from Privatization Commission. M. Akbar Maggo and Associates comprising of certain individuals who claim to be the successors of original sponsors seems to be the only group vying for shares from GCP and whose names can be ascertained from the bidding document placed before the Privatization Commission in the year 1992. It is difficult therefore to hold that there were two groups and that there was an understanding with regard to the transfer of shareholding between those two groups. As stated above, this is a controversy which cannot be resolved in the summary jurisdiction of this Court.

11. The entire foundation of the learned counsel for the petitioners for the setting aside the allotment of 2% of shareholding in the name of M. Akbar Maggo is based on the premise that there existed an oral agreement between the parties for the allotment of shares in certain ratio which were divested by the Privatization Commission. Since no formal agreement has been produced in order to establish the fact it is otiose to assert that 2% shareholding ought to be distributed in like manner and on the basis of earlier shareholding. On a parity of reasoning, and conversely, it could be argued by the respondents that any such agreement came to an end or was modified, at a later stage though the arrangement is vouched by the history of share allocations. In short, the claims and its rebuttal can only be brought home by evidence pro and contra, and not otherwise. The learned counsel for the petitioners submitted that the transfer could not have taken place without the approval of the board of directors. According to the learned counsel for the respondents, there was no requirement for the shareholding to be transferred with the approval of the board of directors as, the transfer has already taken place and the register of members now includes the transferred shareholding of 2% in the name of M. Akbar Maggo.

12. As adumbrated, no shareholding agreement has been placed on record for the allotment of shareholding on proportionate basis to the petitioners as well as the respondents. Also no condition has been shown in the privatization agreement of 21.5.1992 for the acquisition or subsequent sale of 2% shares on that basis. The shares were held by the Ghee Corporation which was the exclusive owner and which could sell without any restriction or condition and ostensibly no exception can be taken to the sale of the shares by the Ghee Corporation to any person or a group of persons. If this were the case, a challenge could be laid to the privatization process and divesting of the shares by the Ghee Corporation which has not been done by the petitioners and a prayer in the instant petition for allocation of half of its shares to the petitioners in fact goes to the root of the divestment made by the Ghee

Corporation which ought to be set aside in the first instance so as to clothe the petitioners with any right to the allotment of those shares. According to the record, an independent agreement of sale was made with the respondent No.2 in terms of which the 2% shareholding was divested in favour of the respondent No.2 in lieu of price which was made over by the respondent No.2 admittedly.

13. There are two facets to the challenge to 2% shareholding by the petitioners. One part of the challenge attacks the legality of M. Akbar Maggo to acquire those shares alone from GCP to the exclusion of the petitioners. This is premised on some shareholders' agreement which allegedly authorised M. Akbar Maggo to bid on behalf of all the parties, including the petitioners. That agreement has not been produced on record with the petition. The petition alludes to and makes a reference to an 'agreement and firm understanding' (para 2) but no document is forthcoming in this regard. Again, in paragraph 12, the petitioners state that:

> "It is submitted that as of right the offer of GCP Shares should have been communicated to the Petitioner Shareholders by Respondent No.2 so as to allow the Petitioners an opportunity to acquire a proportion equal to their original shareholding (50%) out of these shares. It is submitted that the Petitioner Shareholders were and are entitled to 50% of the GCP Shares and are ready and willing to acquire their entitlement upon payment of the sale consideration due. The action of the Respondents Nos. 2 to 7 in seeking to exclude the Petitioners from the acquisition of their entitlement in these shares is unlawful and amounts to gross bad faith."

14. This can hardly form a ground for staking a claim to GCP shares divested by it. The petitioners' claim is based on a purported historical understanding reached in the year 1992. That is not in issue in this petition. That has come to pass. What is in issue is whether there was an agreement to acquire 2% shares by the parties in proportion equal to their original shareholding in the year 2005. As adumbrated, no document evidences such an alleged agreement and this makes the case one of further enquiry eminently fit for a regular trial and outside the summary jurisdiction of this Court. The onus was on the petitioners to prove an agreement to exist in respect of 2% shareholding. Certainly, the divestment was not made in vacuum by GCP nor is it the case of the petitioners that the procedural formalities had gone abegging. By the year 2005, the relations between the parties, as per the petitioners' own showing, were at rock bottom and there was a gaping trust deficit amongst them. It is thus incredulous to think that the petitioners still held the belief that the respondent No.2 would act on their behalf too, honestly and diligently. The petitioners were certainly guilty of naivety if nothing else.

15. The second facet of the challenge relates to the transfer of shares (2%) in the name of respondent No.2 in the Register of members without the approval of the board of directors: The learned counsel for the petitioners invokes the provisions of section 76 and section 193 to canvass the proposition that the approval of the board to transfer the shares is a sine qua non.

16. Firstly, the challenge on this basis revolves around the plea of illegality to have pervaded the transaction and thus that the waters were sullied from the very inception. If, as held above, that plea has gone abegging for want of proof, the rest of the challenge must fall too. The respondents have retorted that all procedural formalities were met in making the transfers. SECP in its reply vouches that Form 'A' under section 156 was duly filed reflecting the transfer of 2% shares in the name of respondent No.2. A holistic reading of the petition would bring forth that no frontal attack has been made to the transfers on the ground of lack

of approval by the board. In paragraph 17, however, a reference has been made to the absence of the board's approval in authorizing the sale of shares in the name of M. Akbar Maggo.

17. A word regarding the assertion by the learned counsel as to the lack of approval by the directors. This is a nuanced argument and does not take into consideration the various businesses of the company and fails to distinguish between day to day affairs of the company and the business to be transacted by the directors in terms of section 196. The theme of the law is that where duties are cast upon the directors, a specific mention has been made as in sections 233, 234 and 234 which are cited as an illustration. These provisions cast a duty on the directors and lay a penalty for non-compliance. Section 76 does no such thing. It is a ministerial act to be performed by the officers of the company. The provision addresses the company and not the directors. We will bear in mind that the directors are only obliged to meet once in a quarter of a year (section 193(2)) and no more. Also the enumerated powers are given in section 196 and that does not include the specific power to approve the transfer of shares. It ineluctably follows that an approval by the board is not a necessary precondition to a valid transfer and no illegality would afflict the said transfer on this basis alone. The only requirement is that the deed of transfer be lodged with the company for the deed shall not have any effect so as to put the transferee into the position of the transfer until it has been lodged with the company and accepted by it. Until the lodgment, the transfer shall be effective between the transfer and the transferee and nothing detracts from that fact. The registration of the transfer in the register of members makes the transferee a shareholder in the full and true sense of the term with all the rights of a shareholder. The mutation in the register of members is a ministerial and clerical act. The board of directors will only be called upon to act in the case of subsection (2) where the transfer deed is lost or mutilated and the directors have to be satisfied before any transfer is effected and approved. However, notwithstanding the correct legal position, it is not clear whether the petition seeks the rectification of register of members or is merely part of the salvo for seeking winding up of the company. If it is the former, then a separate petition under section 152 of the Ordinance, 1984 ought to have been filed in order to lend seriousness to the challenge. In the latter case, an alleged fraudulent transfer of shareholding has never been considered a bona fide and valid ground for seeking a winding up order. Two judgments viz. Muhammad Hussain v. Dawood Flour Mill and others (2003 CLD 1429) and Shahamatullah Qureshi v. Hi-Tech Construction (Pvt.) Ltd. (2004 CLD 640) may be cited for the proposition.

18. In any case, respondents have brought on record documents which reflect the holding of the meeting of the board of directors on 10.10.2005 'to consider and approve the transfer of 1,10,000 shares transferred by GCP'. Thus, prima facie, the transfer was duly approved by the board. This was intimated to SECP by filing of Form 'A' on 30.11.2005 by the company (filed with the report of SECP submitted in Court). This should take care of the objection raised by the learned counsel for the petitioners on this basis.

<u>Petition under section 305:</u>

19. The parties are on common ground with regard to the fact that the Company is a profit making entity generating a healthy revenue and contributing substantially to the exchequer. It provides livelihood to a large number of employees. In a nub, the Company is far from being insolvent and its production figures run into billions of rupees. Likewise, the company has paid substantial amount towards taxes and thus prima facie the company is a viable and solvent legal entity. It is clear from the order sheet of this Court that during the pendency of the present petition, substantial amounts of dividends have been paid to the shareholders including the petitioners and the respondents.

20. The learned counsel for the petitioners, however, asserts that there is a deadlock between the shareholders and affairs of the company have come to an impasse. He, therefore, contends that the affairs of the company cannot be run in accordance with the provisions of the Ordinance, 1984 and thus it is a fit case for the winding up of the company. In such circumstances, any company in the position of UIL ought to be wound up. The primary reliance of the learned counsel for the petitioners is on the judgment of the Supreme Court of Pakistan reported as Ladli Prasad Jaiswal v. The Karnal Distillery Co., Ltd. (PLD 1965 SC 221). This judgment, according to the learned counsel, lays the rule to be applicable in the present situation. The Supreme Court of Pakistan has held that the ineluctable conclusion is for a company to be wound up in case the deadlock between the shareholders makes it well-nigh impossible for it to be run effectively and free of hiccups. The learned counsel for the petitioners has referred to the subsequent conduct of the affairs of the company after the filing of the instant petition. The company, according to him, has been run on the orders of this Court and there is no board of directors of the company in place. The audited accounts of the company have not been undertaken since the year 2005 and whatever audits have taken place, have been on the orders of this Court. A reference has been made to the order of this Court passed on 27.6.2011 as also the order dated 01.07.2011 whereby this Court gave an opportunity to the parties to break the deadlock and to come to an amicable resolution. The orders of 21.10.2011 and 18.11.2011 have also been referred to in order to demonstrate that the company is being regulated by the Court. The learned counsel referred extensively to the reports filed by the auditors appointed by this Court and to assert that the reports so filed depict gross mismanagement as also pilferage of funds to have taken place in the company. This, according to the learned counsel, is the entire doing of the respondent No.2 which makes it a fit case for the winding up of the company. The learned counsel submits that an application was made to the SECP under section 234 of the Ordinance, 1984 for the conduct of a special audit which was ordered by the SECP and independent auditors were appointed. A challenge was made by the respondents to that order of the SECP before the Islamabad High Court which petition is still pending. The learned counsel argued with vehemence that proper maintenance of the audit accounts is at the heart of the functioning of a company and if that is not being done, then the confidence of four out of eight directors is seriously eroded as fair and proper accounts have not been kept. The learned counsel makes a reference to the qualifications contained in the audit of the accounts undertaken by the auditors appointed by the Court.

21. The learned counsel for the petitioners submits that the purpose of the order of this Court made on 27.6.2011 was to ascertain the proper value of the shares so as to find a solution to the deadlock. He also makes a reference to an MOU entered into between the parties on 26.2.2015 which understanding did not go through and the parties fell apart once again.

22. The learned counsel for the respondents Nos.1 to 7, on the other hand, rebutted the arguments of the learned counsel for the petitioners. He has retorted that the existence of two groups is a figment of the petitioners' imagination and M. Akbar and Associates was always an association of persons comprising of the Maggo family. The learned counsel further submitted that the shareholding was allotted in the ratio of 50% each to the respective set of shareholders. Since the year 1992, rights shares were issued and were taken by the parties which is annexed at pages 2 and 3 of book No.2 filed by the respondents. The learned counsel submits that the letter of 1.4.2006 written on behalf of the company to the petitioner No.1 has been quoted out of context. He has referred to a letter of 25.3.2006 to contend that in fact the letter at page 334 dated 01.04.2006 is a reply to the letter dated 25.3.2006 by which copy of

the minutes of the meeting of the board of directors for authorizing to purchase 10% shares through GCP was required to be given to the petitioner No.1.

23. With regard to the assertion of deadlock, the nub of the learned counsel for the respondents' arguments is that it is not an inviolable rule that where a deadlock is pleaded that a company ought to be wound up inevitably. The learned counsel submits that in fact there is no deadlock and the instances of deadlock are not particularized. He has referred copiously to various documents to state that throughout the period till the filing of the petition, all the directors were paid salaries and the audited accounts of the company were duly filed with the approvals of the directors in the meeting of the board of directors. The learned counsel submits that certain events triggered the filing of the instant petition and he has referred to the reasons which formed the backdrop for the dispute in question. All of these documents have been filed in the form of paper book No.7. Therefore, the petitioners had a motive to come to this Court and the instant petition has not been filed bona fide. The following spate of litigation has been referred in order to bolster the argument of malice by the learned counsel for the respondents:

- A suit was filed by the petitioner No.2's son Khurram Maggo against the petitioners Nos.2 and 4.

- The wife of respondent No.2 was deprived of a shareholding in the company by the petitioner No.1 (brother of respondent No.2) and, therefore, the respondent No.2 was constrained to file an application under section 12(2) of the Code of Civil Procedure against the judgment and decree dated 08.12.2003 which is at pages 97 and 99 of the book No.7. She also filed an application under section 152 of the Ordinance, 1984 which is pending as C.O No.52 of 2006.

24. A reference has been made to the documents annexed with this petition. Audited accounts, according to the learned counsel, have been submitted till 2005 and according to section 233 of the Ordinance, 1984, these accounts have to be approved by the directors and a report by the directors is required to be submitted. Since the petitioners were directors, they approved the audited accounts and cannot be heard to say otherwise. They are, therefore, responsible for the submission of the audited accounts in any case in terms of section 241 of the Ordinance, 1984. Various minutes of the meeting have been perused which betray the active participation of the petitioners in the company affairs and Forms XXIX have also been annexed. In book No.8, evidence of the salaries which were paid to the working directors has been attached. On 30.04.1998, 16.04.2003 and 23.6.2003 rights issue were made and the petitioners were beneficiaries of those rights issue. Further, documents have been referred to which bear the signatures of the petitioner No.1 whereby he made financial disbursements as also that the petitioner No.1 took care of the income tax affairs of the company which were exclusively being dealt with by him. He also claimed refunds etc. from the department on behalf of the company. These have been annexed with the book No.5 with this petition. Further, the petitioner No.1 was authorized to initiate and conduct litigation on behalf of the company and he continued to do so up till March, 2006 i.e. just before the filing of the instant petition.

25. In a nub, the learned counsel for the respondents has made a frontal rather than flanking attack on the motives and conduct of the petitioners and has cast serious doubt regarding fairness of these proceedings. According to the learned counsel, the conduct has not been in the interest of the company. In this regard, he has referred to various proceedings taken by the petitioner after filing of the instant petition. It is not necessary to refer to that

part of the litigation which is still subjudice between the parties. It is the case of the respondents that there is absolutely no deadlock between the directors or at least till the filing of the petitioner and this petition is motivated by unlawful motives and has been brought about in order to extract illegal gains.

26. As adumbrated, the entire reliance of the learned counsel for the petitioners in support of the plea for the company to be wound up is on the basis of a deadlock which has come to exist between two groups of directors, four each in number, and which has brought the functioning of the company to a grinding halt and has rendered its operation to be conducted in a smooth and transparent manner as impracticable. This, according to the learned counsel for the petitioners, is a sufficient ground for the ordering of the company to be wound up as there is no alternative under the circumstances and to his aid the learned counsel has invoked the ratio decidendi settled in the Ladli Prasad case referred to above. It would, therefore, be appropriate at this stage to dissect the structure of Ladli Prasad case and its relevance and applicability to the facts of the instant case.

27. However, before I proceed to discuss Ladi case, a reference may be made to certain intervening events which took place during the course of the proceedings before this Court. As a backdrop it may be stated that from the facts and circumstances brought forth, it is evident that acrimony and lack of trust has marred the relationship of the directors inter se. This may not precisely be the case for the substantial period of the functioning of the company since its privatization in the year 1992 but certainly this has been the case during the period immediately preceding the filing of the instant petition. This is evident from the suit filed by Jahangir Maggo against the petitioners Nos.2 and 4. Litigation also ensued after the shares of Tehmina Maggo were got transferred by the petitioner No.1 and the last nail in the coffin was the transfer of 2% shareholding in the name of M. Akbar Maggo. During the course of the proceedings by this Court, local commission was appointed to take into custody the record of the company and to prepare an inventory. This was perhaps necessitated in order to gauge the financial and economic affairs of the company. This is reflected in the order dated 4.7.2006. This also finds mention in the order dated 23.6.2006 and the report submitted in this regard by the local commission. At one stage, the election of the directors was also held under the auspices of this Court and it is evident from the order dated 20.04.2007. Since the parties were at loggerhead with regard to the payment of dividends as is evident from the order dated 20.06.2008, this Court directed the payment of certain sum of Rs.120 million as dividends to both the parties in equal share. This Court continued to exercise an oversight on the distribution of dividends by another order dated 19.1.2010. By order dated 19.4.2010 a status quo order was passed by the agreement of parties with regard to the fixation of the number of the directors of the company for the purpose of election for the next term of three years.

28. Now we come to the order dated 27.6.2011. The learned counsel for the respondents Nos.1 to 7 and other respondents have addressed their arguments by making this order as the central point. It is the peg on which their case hangs. According to the learned counsel for the respondents, the order of 27.6.2011 should alley any doubts regarding the intention of the parties which can clearly be culled out from this order. This, according to the learned counsel, is the harbinger of the future course of action agreed to by the parties and must form the foundation for the decision of this petition. The said order is reproduced in extenso for facility:

> "The parties have reached a consensus that a Chartered Accountant be appointed by the Court to determine as of 30th June, 2011, the break-up value of the shares of the

respondent-Company, United Industries Ltd., on the basis of the current/fair market value of the shares. In this regard, it has also been agreed that:

(i) For the purposes of valuation the relevant factors required by General Accepted Valuation Standards and Guidelines shall be observed.

(ii) The accounts of the Company since 1.07.2006 to 30.06.2011 shall be audited in accordance with law and the required valuation shall be based on the audited accounts.

(iii) The United Industries Ltd. shall ensure the availability of all relevant information data and documents as may be required in this behalf by the Chartered Accountant.

(iv) In consideration of the services rendered, the Chartered Accountant shall be paid remuneration in accordance with the schedule/rates prescribed by the Institute of the Chartered Accountants.

2. Accordingly, Mr. Wiqar Avais, FCA/FAC (England and Wales), Senior Partner Avais, Hyder, Liaquat, Nauman, Chartered Accountants, 1/C-5 Sikandar Malhi Road Canal Park Gulberg-ii Lahore (Phone No.35872731-3) is appointed to carry out the assignment according to the terms outlined above. The said Chartered Accountant shall submit his report by or before 31.07.2011.

3. Learned Local Commission, Mr. Khalifa Shujaat Amin, Advocate, has pointed out that he is rendering services as Local Commission since 2006 but has not been paid adequate remuneration. Learned counsel for the parties agree that the learned Local Commission be paid minimum remuneration of Rs.25,000/- per month with effect from the date of his appointment. Accordingly, the learned Local Commission shall be paid arrears of remuneration on the aforesaid basis within a fortnight.

4. Learned counsel for the petitioners has pointed out that till the value of the shares is determined, it would be expedient that a neutral person is appointed to run the affairs of the company so that the job of the Chartered Accountant is facilitated. Learned counsel for the respondents shall respond on this point on the next date of hearing, which is fixed for 29.06.2011."

29. It is clear from a reading of the order, reproduced above, that upon a consensus reached by the parties, a Chartered Accountant was appointed by the Court to determine as of 30.06.2011 the breakup value of the shares of UIL. For the purpose, certain factors were delineated in the order to be taken into account by the Chartered Accountant for the purposes of calculating the breakup value of the shares. The Chartered Accountant was required to submit his report before 31.07.2011. It is clear in my mind that by the said order, the Chartered Accountant was appointed exclusively for the purposes of determination of the breakup value of the shares of the UIL and no more, no less. In the course of the determination, the auditor was also required to audit the accounts of the company from 01.07.2006 to 30.06.2011. The said audit has been conducted by the auditor and the learned counsel for the petitioners has heavily relied upon these reports to submit that the auditor has brought forth serious instances of mismanagement and pilferage in the accounts of the company. This aspect will be dealt with in the latter part of this judgment. Suffice to say that for the present purposes, the order had a limited scope and was for the purposes of the calculation of the breakup value of the shares of UIL and must be taken as such. This order

has been signed on the margins by the parties and their respective learned counsel as a token of its correctness.

30. It is very difficult to construe the clear intention behind the passing of the said order as it cannot be ascertained with any degree of exactitude upon a reading of the order. Certainly, it does mention that a Chartered Accountant was being appointed upon consensus of the parties to determine the breakup value of the shares of the company. However, it does not spell out clearly whether the consensus extended beyond the determination of the breakup value of the shares and what was the next course to be followed upon such determination made by the Chartered Accountant. Therefore, any consensus reached by the parties is lacking in material particulars as to the conclusion of the entire exercise. However, one thing is certain. That the parties were embarked on a course of action by which an offer could be made on the basis of the breakup value determined by the Chartered Accountant to either of the group of litigating directors and a buyout plan could be worked out. The statement made by the learned counsel for the petitioners at the fag end of his arguments certainly lends credence to this aspect. This order in my opinion was not passed without reason and must be given the proper place that it deserves in the entire setting of the litigation between the parties. Clearly, it was an agreement under the auspices of this Court. By necessary inference also it reflects the intent of the parties that a winding up was not an option in the contemplation of the parties any more. This begs the question; to what avail was the entire exercise if it were to come to a naught and to result in a waste of judicial resources and the fee expanded on the work accomplished by the Chartered Accountant. I may make a reference to the order dated 15.9.2011 in this regard by which the learned counsel submitted and informed the Court that efforts for an amicable settlements between the parties were still in progress and that there were good prospects that such a settlement shall be reached in due course. The tenor and intent of the parties reflected in the order of 27.6.2011 was reiterated in the order of this Court dated 31.12.2014 by which this Court directed the Chartered Accountant to submit his report along with current/ fair market value of the shares as on 31.12.2014 strictly in accordance with the order dated 27.6.2011. A reference to order dated 01.07.2011 may also be made by which certain amount was distributed as dividend equally between the parties. By that order, the parties agreed that M. Akbar Maggo, Chief Executive, will continue to operate the business and operations of the company while Mian Waqar ud Din and/or his nominee shall verify and monitor the income and expenditure of the company on daily basis. Further that Mian Waqar ud Din the petitioner No.1 shall be provided with an office at the Head Office as well as at the Mills premises and shall have access to all available information as a director. Once again, it was reiterated that the parties shall, in good faith endeavour to resolve their differences so that the future deadlock is avoided. All of these events lead to the ineluctable conclusion that the scope of the petition had diverted towards a settlement between the parties and a buyout arrangement on the basis of break up value of shares determined by the Chartered Accountant. To complete the narration with regard to the settlement of disputes between the parties, an MOU was signed between the parties which has been filed by the petitioners through C. M. No.642 of 2015. For the present purposes, suffice to say that the MOU is another instance which contributes to the inference drawn that the parties had realigned their focus to be other than winding up of the company.

<u>Ladli Prasad Case:</u>

31. Ladli Prasad Case is at the forefront of the arguments advanced by the learned counsel for the petitioners. This case was at the heart of the entire proposition built by the petitioners. Ladli Prasad case has been quoted more often than not as a binding precedent in support of

the proposition that where there is an impasse and a deadlock between the shareholders of a company, it is just and equitable that the company be wound up. However, Ladli Prasad case must find a permanent resting place in the commercial jurisprudence of this country. Like any other case, it is an authority for its own facts and must be considered in that context. It cannot be applied generally and across the board to the facts of every case that comes up for the winding up of a company on the ground that the directors or shareholders had locked horns and the dispute amongst them has crippled the functioning of the company. In a recent case, C.O No.45 of 2004 Hafiz Abdul Rehman etc. v. Hafiz Abdul Majeed etc, the applicability of Ladli Prasad case has been analyzed in the following manner:

> "5. During the course of arguments, it became apparent that the principles propounded in Ladli Prasad's case may not be attracted to the facts of this case. The oft repeated passage from the said judgment reads as follows.
>
> "Now in the cases of a private limited company the tendency of the Courts has uniformly been to treat it more or less as a partnership and to apply the same principles in the winding up of a private limited company as would entitle a partner to have a partnership dissolved. Commonly the exclusion of partner from the management of the firm, the existence of a state of deadlock between the partners or the justifiable lack of confidence in the management have been regarded as just and proper grounds for dissolving a private limited company."
>
> The petitioners were admittedly at all material times minority shareholders and as such there was no deadlock of management in respondent No.1 company and none was established through affidavits or documents. It is not the ratio of Ladli Prasad that every time a dispute arises between the shareholders of a private limited company and a shareholder or a set of shareholders are excluded from the management of the company, the Court has no option but to order the winding up of the company. On the contrary, in order for the ratio of Ladli Prasad to be attracted to a case, the dispute between the shareholders/directors of a private limited company ought to be of such a nature that it becomes virtually impossible to smoothly run the affairs of the company. It may be pointed out that the facts of Ladli Prasad were that through a resolution it was mandated that all the decisions were to be taken unanimously by the directors who had equal shareholding and the purpose of such resolution was explained in the said judgment to be "….to give the three branches equal shares and equal voice in the management of the business which could henceforward be run only with the assent of all the three branches. No meeting could be held unless all the three directors were present and no decision was to be valid unless it was passed by all the directors." Obviously, the facts in Ladli Prasad's case are quite different from the present case where the petitioner is a minority shareholder and there was never any arrangement between the parties for sharing management of respondent No.1 company.
>
> 6. In the case of Kruddson Limited, Karachi PLD 1972 Karachi 376, wherein the minority shareholders had presented a winding up petition which ultimately failed to find favour with the Court, with respect to Ladli Prasad's case, it was held as follows.
>
> "14. Neither in principle, therefore, not on authority, am I persuaded that a private limited company is required to be wound up whenever a shareholder wises that it should be, as would be the case in a partnership at will when one of the partners desires the dissolution of the firm. If that had been the intention of the Legislature nothing would have been simpler than to have provided that a private limited

company is to be wound up upon notice to that effect being given by any shareholder or to have used other language comparable to the provisions of section 43 of the Partnership Act.

15. In none of the cases to which I have referred was an order of winding up made on the ground, simpliciter, that one of the shareholders desired such an order. In each of them there was a ground such as a deadlock in the management, a justified lack of confidence in those who were managing the Company or conduct on their part calculated to deprive a minority of their due share in the profits or management of the Company. Indeed, in some case, a winding up order was refused when grounds were urged which did not, in the opinion of the Court, made it just and equitable to wind up the Company; obviously in these cases if the wishes of the petitioning shareholders sufficed, an order of winding up would have been made. I think that the true position is that a private limited company is to be treated as a partnership firm in the sense only that such circumstances as would justify the dissolution of the firm under section 44 of the Partnership Act on the ground that it was just and equitable to order a firm to be dissolved would also justify the winding up of a private Company. In the Supreme Court case of Ladli Prasad, for example, each of the three directors had equal voting power in the company and decisions were to be taken only unanimously, in these circumstances, the resolution purporting to remove one of them was held to be illegal and relations between the three were found to be so embittered that there was truly a deadlock." (emphasis supplied)

The above passage makes it clear that even when shareholders of a private limited company are in dispute and a winding up petition is presented on the analogy of Ladli Prasad's case, the only consideration that ought to weigh with the Court is whether it is just and equitable to wind up the company."

32. Let me now proceed to analyse the factual basis of the Ladli Prasad case. The case related to Karnal Distillery Co., Ltd. which was converted into a private limited company on 23rd of March, 1941, from a partnership firm. From July, 1941 onward, differences arose between the appellant in that case and other directors. A spate of litigation ensued between the directors where suit was filed by one set of directors and Ladli Prasad, the appellant retaliated by filing a suit for declaration of his own. During the pendency of the litigation, a compromise was effected between the parties and one of the planks of the compromise was that henceforth all resolutions, whether of a general meeting or of the directors were to be passed unanimously. As a result of the compromise, a general meeting of the company was held on 16.10.1945 and one of the resolutions passed in that meeting was that all decisions must be taken at a meeting of the directors unanimously. Further, that no meeting could be held unless all the three directors were present and any decision was to be invalid unless it was passed by all the directors. The case of the appellant Ladli Prasad was that the terms of the compromise were breached by the other set of directors and meetings were held without notice to the appellant and certain acts were performed which adversely affected the status of the appellant as a director. Thereupon, the appellant filed a petition for winding up on 1st of May, 1946. The learned Single Judge of the High Court at Lahore came to the conclusion that there was a deadlock in the affairs of the company as the relations between the parties had deteriorated to such an extent that they could not possibly agree to anything. A winding up order was accordingly made on 26th of January, 1955. A Letters Patent Appeal was filed and a Division Bench of the High Court reversed the decision of the Single Judge. While doing so, reliance was placed on a new section 153-C, introduced in 1951 in India in the Companies

Act, 1913. This provision enabled the Courts in India to make appropriate orders for putting an end to dispute between the shareholders of a company without putting an end to the company itself. The question, therefore, before the Supreme Court of Pakistan was whether Letters Patent Bench was right in taking a view that it was not just and equitable to order the winding up of the company in the facts and circumstances of the case. An important observation by the Supreme Court of Pakistan which will impact the determination of this petition as well was that:

> "…We are unable to accept this contention, firstly, because the rights of the parties in this matter are to be adjudged according to the legal position prevailing on the date of the institution of the proceedings for winding up and not on the basis of changes which have since been introduced without the consent of the appellant pendente lite by the unilateral acts of the others…"

33. It was emphasized that the real reason for the holding by the learned Single Judge that it was just and equitable to wind up the company was that the constitution of the company required that the business should be carried on with the consent of all. This, in the estimation of the learned Single Judge, was impossible to attain as the relations between the parties had become so bitter that they could not possibly carry on the business jointly.

34. The Letters Patent Bench, however, was influenced in its findings by the amendment brought about in India in 1951 by the insertion of section 153-C. The Supreme Court of Pakistan while rejecting the basis of the Letters Patent Bench observed that that section had not been inserted in the Pakistani law and, therefore, could not be used for the determination of the rights of the parties in a winding up petition. In other words, the powers given by section 153-C in India were found to be inapplicable in the context of Pakistani law. It was further held that in any case, section 153-C merely gave an alternative remedy to a member of a company to apply to the Court for making the kind of order mentioned therein in support of winding up of a company. It gives no power to the Court to suo motu resort to exercise the powers mentioned therein. In the circumstances, therefore, it was held that the petition for winding up was either to be allowed or rejected and there was no third course open to the courts in Pakistan. The Supreme Court of Pakistan thereafter proceeded to consider the facts of the case and to hold that the subsequent conduct of the other co-directors of the appellant left no room for doubt that feelings had become so embittered that reconciliation was well-nigh impossible.

35. From the facts brought forth above, it is clear that the issues and controversy involved in Ladli Prasad case was materially different from the case in hand. Much water has flowed under the bridge since Ladli Prasad case and there is a sea-change in the law relating to companies by the insertion of sections 314(2) and 290 of the Ordinance, 1984. These provisions were not found in the Act of 1913 and thus there can be no parallels which can be drawn in terms of the legal setting obtaining at the time of the decision of Ladli Prasad case and under the present dispensation. A comparison of the provisions of the Act, 1913 and the Ordinance, 1984 would reveal that section 290 has been introduced by the legislature with the purpose of prevention of oppression and mismanagement. It specifically applies to a situation where the Court is of the opinion that to wind up the company would unfairly prejudice the members or creditors. Part X of the Ordinance, 1984 has been newly added and does not find any comparable provisions in the Act, 1913. It confers powers on the Court to make certain orders with a view to bringing to an end the matters complained of and for regulating the conduct of the Company's affairs in future. It also includes the power in the Court to order for the purchase of the shares of any members of the company by other members of the company

or by the company. It may be recalled that the instant petition is also a petition under section 290 of the Ordinance, 1984 and makes an alternate prayer in case the prayer for the winding up of the company is not accepted. Therefore, the petitioners themselves are aware of the alternate procedure which may be triggered in the circumstances of the case and which were not found in the Act, 1913. The mere fact that new provisions in the form of sections 290 and 291 have been inserted, enlarge the suo motu powers of this Court to make such order as it deems fit. This was not the case hithertobefore and thus it was not within the contemplation of the Supreme Court of Pakistan at the time of the decision of Ladli Prasad case.

36. Another provision which is of recent origin and has been inserted in Ordinance, 1984 is subsection (2) of section 314 which relates to the powers of Court on hearing a petition. By subsection (2) of section 314, where a petition is presented on the ground that it is just and equitable that the company should be wound up, the Court may refuse to make an order of winding up if it is of the opinion that some other remedy is available to the petitioners and they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. Subsection (4) of section 314 confers further powers on the Court to make such orders as it thinks fit in the circumstances for regulating the conduct of the affairs of the company and bringing to an end the matters complained of. The petitioners obviously had these provisions in mind when an alternate prayer under section 290 was made. It is obvious, therefore, that the arguments of the learned counsel for the petitioners to the effect that in case of a deadlock amongst the shareholders the only option left with the Court is to wind up the company, is flawed and no more good law. It does not take into account the change in law which has been brought about after the decision so rendered in Ladli Prasad case. The correct view, in my opinion, would be that in case of allegations of a deadlock between the shareholders, winding up of the company is not the only option with the Court and with the change in law periphery of the powers of the Court have been enlarged by the insertion of section 290 read with section 314(2) of the Ordinance, 1984 and thus the Court has sufficient powers to make such orders as it thinks fit in the facts and circumstances of the case. This should not however be taken to mean that the Court is denuded of the powers to order the winding up of a company in appropriate cases. That will not be in consonance with the true state of law in a given set of circumstances, that may still be resorted to. However, the correct position is that the Court is now vested with wide range of powers with greater latitude when a petition on this ground is presented.

37. I may hasten to add that an order under section 290 can only be made upon a petition so presented to the Court. The petitioners have made that petition and so this Court can proceed to consider the alternate options spelt out in section 290. Had there been no petition, the only option for this Court was either to order for winding up of the Company or to dismiss it on the basis of section 314(2) by forming an opinion that some other remedy was available to the petitioners and that they are acting unreasonably in seeking to have the Company wound up instead of pursuing that other remedy.

38. The circumstances of the present case, in my opinion, do not justify the passing of an order for the winding up of the company. For all intents, UIL is a viable and robust company and has been functioning satisfactorily on choppy waters even during the course of the present litigation. It has earned profits which can be demonstrated from the accounts of the company and dividends have been distributed amongst the shareholders under the supervision of this Court. A chart given below of the dividend payment history will vouch to this fact:

"UNITED INDUSTRIES LIMITED

DIVIDEND PAYMENT HISTORY

YEAR ENDED	AFTER TAX PROFIT	PAID ON	TOTAL AMOUNT OF DIVIDEND PAID	%AGE TO AFTER TAX PROFIT
30-06-2007	416,129,832	05-08-2008	120,000,000	28.84%
30-06-2008	507,043,314	02-02-2010	126,760,829	25.00%
30-06-2009	228,477,142	06-07-2011	82,251,771	36.00%
30-06-2010	274,681,818	06-07-2011	98,885,454	36.00%
30-06-2011	316,995,564	25-11-2011	120,000,000	37.86%
30-06-2012	201,479,765	02-02-2013	80,591,906	40.00%
30-06-2013	202,489,582	09-01-2015	80,995,833	40.00%
30-06-2014	240,458,159	09-01-2015	96,183,264	40.00%
Total	2,387,755,176		805,669,057	33.74%

30-06-2015	424,017,522	Payable @ 40% as per last practice (requested by the Petitioners vide CM # 946/2015)	169,607,009	40.00%
Total (A + B)	2,811,772,698		975,276,006	34.69%

39. Thus, since the year 2007 an amount of Rs.975,276,066/- as dividend has been remitted to the shareholders. In respect of the shareholding of the petitioners and the respondents, for the time being at least, the respondents seem to hold a majority in the affairs of the company and it is not a case of an equal shareholding to vest in the petitioners and the respondents.

40. The learned counsel for the petitioners has sought to built his arguments around the audit reports filed by the auditor appointed by this Court on 27.6.2011. Suffice to say that the observations of the Supreme Court of Pakistan in Ladli Prasad case and reproduced above would squarely apply to rebut the arguments of the learned counsel for the petitioners. Matters must be decided and rights must be determined and adjudged according to the legal

position prevailing of the date of the institution of the proceedings for winding up and not on the basis of changes which have since been introduced pendente lite. The auditor was appointed by the consent of the parties and by this Court. It is, therefore, an act of the Court and must not prejudice any of the parties. The auditor was appointed purely for the purposes of determining the breakup value of the shares and no more. It was not meant to add to the armoury to any of the parties in attacking the other party or to build upon the case set up in the petition itself. This cannot be countenanced. The audit report submitted can only be used for the purposes of the determination of breakup value and the petitioners cannot be heard to resile from that position to the detriment of the respondents. Be that as it may, it is the petitioners' own case that a special audit was directed to be conducted by the SECP, which issue is sub judice before the Islamabad High Court and can be determined on its own merits. It cannot be used to the advantage of the petitioners or to bolster the case set up initially by the petitioners.

41. The facts brought forth do not justify the winding up of the Company on just and equitable grounds. The ground of oppression contained in clause (f) of section 305, too, has not been brought home by the petitioners. From the documents brought on record, it seems that the petitioner No.1 has been an active member of the management of the Company. Things got pear-shaped only upon commencement of litigation between the shareholders (who are related inter se) and a race for control of the Company ensued thereafter. It is highly doubtful if the ground of there being a deadlock remains available to the petitioners after the acquisition of 2% shares by respondent No.2 which tilts the balance in favour of the respondents. Upon a holistic consideration of the facts laid bare, the instant petition seems a culmination in the struggle for wresting control of the company by the two groups and serves individual and private interest rather than the public interest or the interest of the members generally. It is not based on just and equitable considerations but for narrow and pedantic motives. In the process the goose that lays golden eggs is sought to be culled. The pendency of C.O. No.52 of 2006, is an indication of the means employed by the parties to take control of the Company. This petition, it will be recalled, was filed by the respondent No.2 to have the register of members rectified against the petitioner No.1. That the lack of confidence and the allegations of mismanagement which form the fundamental sinew of the petitioners' case does not give rise to the lack of probity in the affairs of the Company is also starkly evident from two related documents brought on record by the petitioners. C.M. No. 642 of 2015 was filed by the petitioners for placing on record certain documents which, according to the petitioners, were "germane for the disposal of the titled petition". The document which is relevant for the purposes of the issue relating to the winding up of the Company on just and equitable grounds is a Memorandum of Understanding signed on 26.02.2015 between the petitioners and the respondent No.2 (ostensibly acting on behalf of the respondents as well). This document is not denied by the learned counsel for the parties. However, the fact is that the understanding contained in this document did not materialize and the parties decided not to adhere to the terms of this MOU/agreement. In order to cull out the intention of the parties and to have an insight in the real dispute between the parties, the contents are being reproduced hereunder:

> 1. "M. Akbar Muggo shall be the Chief Executive of UIL.
>
> 2. Mian Waqar Uddin shall be the Chairman BoD of UIL and shall have one vote at par with other directors. In case of a tie during voting in a BoD meeting, the chair of the meeting shall not have a second/casting vote and the business/agenda item

would be left over as not passed. Necessary amendment is to be made in the Articles of Association.

3. Mian Waqar Uddin (MWU) and Mr. Akbar Muggo (AM) shall be cheque signatories in all the bank accounts of UIL signing them singly.

4. The sons of Mr. Akbar Muggo and the son of Mian Waqar Uddin shall be joint cheque signatories of the main bank accounts of UIL. The joint signatures shall work such that either of the sons of Mr. Akbar Muggo may sign the cheques whereas the other signature shall be that of the son of Mian Waqar Uddin.

5. The two matters relating to:

a) Two percent shares acquired by Mr. Akbar Muggo from the Government

&

b) Mrs. Tehmina Akbar Muggo's application for rectification of Shares Register of UIL (CO # 52/2006 titled 'Tehmina Akbar Muggo v. Mian Waqar-Ud-Din and UIL') shall be kept in abeyance for the time being and shall be decided amongst the parties upon Mrs. Muggo's return from abroad.

6. All monetary dispute up to 26th of February, 2015 are being settled through a separate agreement which is mandatory and shall be part of this agreement.

7. Cases filed by Mr. Akbar Muggo Group and Mian Waqar ud Din Group would be withdrawn by both parties at the earliest.

8. Mian Waqar Uddin and nominees to have complete access to all UIL affairs.

9. The current management of UIL to continue without change.

10. MWU can induct a few people in UIL.

42. At first blush, the impression that one gets from the reading of the contends, reproduced above, is that the matter between the parties relates to individual disputes and in essence, the running of the day to day affairs of the Company. These include the signing of the cheques as also certain monetary disputes between the parties which was agreed to be settled through a separate agreement. Obviously, the petitioners would have agitated certain sums to be due to the petitioners in this regard over and above the dividends etc. remitted to them. It was also agreed in the MOU that the current management of UIL shall continue without change. This also means that the petitioners reposed from confidence in the management being led by the respondent No.2 and that there was no dispute on that account. No mention was made in the MOU with regard to the serious management issues or oppression of the minority nor was it reflected in the MOU that diversion or siphoning off of the funds had taken place.

43. The second document which may be referred to in this behalf has also been relied upon by the learned counsel for the petitioners. This documents is the minutes of the meeting of the BoD of UIL held on 21.6.2005. In this meeting, the petitioner No.1 proposed that:

"In the end Mian Waqar ud Din proposed that the following steps be taken for the smooth running of the affairs of the company. His proposal was voted by 3 other directors associated with him;

i. That a Committee of Management from amongst the directors comprising of two members, one of them being Mian Waqar ud Din and his 3 other associates be formed to manage and carry out the day to day affairs of the company.

ii. That the chief executive be directed to obtain the consent of the committee of management to all actions and decisions concerning purchase of raw materials, incurring of unusual production expenses and organization of distribution and sales of the Company's products.

iii. That a meeting of the committee of management shall be held at least once a month and a meeting of the Board of Directors shall be held at least once in every three (3) months. In case of urgency, resolution by circulation be passed.

iv. That the details of all bank accounts of the Company be presented before the Board of Directors.

v. That all the bank accounts of the company be operated jointly by the two (2) members of the committee of management.

vi. That the salary of the directors be fixed as per articles of the company."

44. Once again it can be clearly gleaned from the proposals made by the petitioner No.1 that the dispute primarily related to the dispute between the shareholders inter se and they were very little which actually relate to the lack of probity in the running of the affairs of the company. Also no particular instances were mentioned nor specified which would show with exactitude that serious mismanagement and oppression had crept in the functioning of the Company and which resulted in a conduct which was lacking in probity.

45. The case of Tasnim and another v. Rustom Ali and others (2000 CLC 364) was heavily relied upon by the learned counsel for the respondents Nos.1 to 7 in support of the proposition that in the facts and circumstances of the case which form the basis for the instant petition, the rule is that this Court will exercise its powers conferred under section 290 of the Ordinance, 1984 and direct a buy-out arrangement to be put in place amongst the parties and a winding up order should not be made as this would adversely affect the interest of the shareholders and runs counter to the concept of a viable and functional company. The facts in the case of Tasnim and another bear a similarity to the facts of the instant petition. Differences arose between the petitioners and the respondents in the management and administration of the affairs of the Company leading to the filing of a winding up petition by some of the shareholders on the ground that the majority shareholders were running the affairs of the Company in oppressive and illegal manner by ousting the petitioners from participating in the affairs of the Company and having taken over the entire control of general administration, finance accounts and other matters. During the pendency of the winding up petition, an application was submitted under section 290 of the Ordinance, 1984 with the prayer that the respondents be directed to sell their shares to the applicants who were willing to purchase the same in proportion of the shareholding on a price fixed by the auditors of the Company. On this application, the Company Bench proceeded to appoint two firms of chartered accountants in order to fix the value of the shares of the Company. The following

portions of the judgment of the Karachi High Court in the said case have been relied upon by the learned counsel for the respondents as being fully applicable to the facts in the instant petition. It was held by the Karachi High Court that:

> "…This contention does not carry weight. A plain reading of section 290 of the Companies Ordinance is sufficient to suggest that an application under section 290 of the Companies Ordinance could be made by any of the parties to the winding up petition if the requirements of subsection (1) of section 290 are in-existence and also empowers the Court to make such order as may be deemed fit with a view to bring an end to the matters complained of either by regularizing the affairs of the company in future or directing the purchase of shares of the oppressed members of the company either by the company or by other members if the winding up of the company would unfairly prejudice the share-holders and creditors of the company…"
>
> "…It follows that if the Court instead of ordering winding up of a company and appointing a Liquidator has the power to appoint an administrator to run and manage the company as winding up would not be just and equitable, the Court would also have the power to take action in the nature of directions for sale of the share-holdings of minority members to the majority share-holders for keeping the company alive and to continue to run its affairs provided that such action is in the interest of the majority share-holders, creditors and the persons having dealings with the company. In the circumstances, the contention of Mr. A.I. Chundrigar that in a situation where the two erring parties are relating to each other and have lost confidence in each other on account of mismanagement and oppression the only solution would be to wind up the company by having recourse to section 290 of the Companies Ordinance is without any substance and merits no consideration."
>
> "…The argument advanced by Mr. A.I. Chundrigar is devoid of force in view of the fact that respondents 1 and 2 had consented to have the price or the value of the share of Shan Hospital fixed by the two Chartered Accountants appointed by each of the erring parties, whereby they had consented to accept the price/value of the share determined or fixed by the two Chartered Accountants. Admittedly both the Chartered Accountants had not arrived at one and the same value and had valued the share differently. This fact would not deter the Court from itself determining the fair value/price of the share…"
>
> "….and further that respondents 1 and 2 having agreed and consented to a procedure for determining/fixation of the value of the share of Shan Hospital by appointment of two Chartered Accountants could not avoid or wriggle out of the consent given by them. The two Chartered Accountants had determined the price/value of the share of Shan Hospital in accordance with the consent of the parties and in spite of differences in the value/prices fixed by the two Chartered Accountants their findings could not be said to be unfair, unjust and improper so as to discard or ignore them…"

46. It follows from the portions reproduced above that the Karachi High Court dilated upon the scope of section 290 and the powers conferred therein upon the Company Bench. It was held that if the requirements of section 290 were in existence, the Court was empowered to make such order as it deems fit with a view to bring an end to the matters complained of and one of the modes in which the matters could be redressed was by directing the purchase of shares of the oppressed members of the company either by the company or by other members. Another factor which bears similarity between the Tasnim case and the present

case is that application was made by the respondents in that case to have the price or value of the shares determined by two Chartered Accountants and thereby consent was given to accept the price of the shares determined by the Chartered Accountants. This aspect is relatable to the order passed by this Court on 27.06.2011 whereby by the consent of both the parties a Chartered Accountant was appointed to determine the break-up value of the UIL. This was reiterated on 31.12.2014 and the Chartered Accountant was required to file his report before the next date of hearing. By all means, this was a consensual order and in acknowledgement thereof signatures have been fixed on the margins of the order sheet by the respective parties. The learned Judges of the Karachi High Court did not find any hesitation in holding that when a consent is given for the determination of the break-up value and fair price of the shares of the Company, the only course open was to direct that the shares of one of the parties be purchased by the other and winding up of the company was not a course to be adopted.

47. The case of Shahamatullah Qureshi v. Hi-Tech Construction (Pvt.) Ltd. (2004 CLD 640) has been relied upon for its encapsulation of the principles relating to the winding up of companies. The Karachi High Court after a survey of the case law regarding the winding up of company on just and equitable ground held as follows:

> "From the above cited case, inter alia, the following principles are deducible:--
>
> (1) That in a particular case, the principles of dissolution of partnership may be applied if the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality it is a partnership.
>
> (2) That simpliciter factum that some Directors having preponderating voting power have not allowed the other shareholders to join in the management of the company is no ground for winding up of the company.
>
> (3) That the ground "just and equitable" is not controlled by the grounds preceding it in section 305 of the Companies Ordinance and is also not confined to cases in which there are grounds analogous to those mentioned earlier.
>
> (4) That in the absence anything contrary in a partnership deed every partner is entitled under the Partnership Act to share in the management of the firm but a shareholder generally in a company, in the absence of a pre-incorporation agreement/ understanding cannot claim any right to manage the company.
>
> (5) That if a shareholder brings a petition for winding up of a company, the Court will, inter alia, consider the factum whether majority of shareholders and large number of creditors are opposing the petition.
>
> (6) That while considering a petition for winding up the ground of lack of probity must be against the interest of the company itself and on behalf of the company and not in relation to the public exchequer.
>
> (7) That there is a marked distinction between a private partnership firm-at-will, of which dissolution can be sought by a partner as a matter of right and a private limited company, of which winding up cannot be obtained by a shareholder without any recognized justifiable ground.
>
> ………

The allegations relating to internal management or mismanagement of the company's affairs is a matter for the shareholders themselves to deal with and it is not a matter that would call for interference by the Court. Macleod, J. in re Pioneer Bank, Ltd. AIR 1914 Bombay 190 stated that a petition by a shareholder for winding up stands on a different footing to a petition by a creditor. It should be scrutinized more carefully.

The misconduct of the Director or that the business has been carried on a heavy loss are even not a ground on which the Court would order for winding up. The Courts have laid down special rule in exercising their discretion in winding up a company on the petition of a shareholder that the Court to bear in mind that the internal management of the company is its own concern, and it is a much better judge of business prospects of a trading venture than the Court can ever hope to be. If, therefore, the majority of the shareholders show confidence in the management of the company and have faith in its future prospects, the Court has rarely interfered.

……..

On the following grounds the Courts have refused to make a winding up order on "just and equitable" ground:--

(a) where there were allegations of mismanagement or misappropriation of funds by Directors and nothing more (Rajahmundry Elec. Supply Corpn. Ltd. v. A. Nageshwara Rao AIR 1956 SC 213);

(b) where there were quarrels and groupings among shareholders (C.P. Gnanasambandam v. Tamilnadu Transport (Coimbatore) (P.) Ltd. 1971 41 Comp. Case 26);

(c) where there were general or mere allegation of oppression of minority shareholders (Bilasrai Juharmal AIR 1962 Bombay 133);

(d) where petitioner had an alternative remedy (Lokenath Gupta v. Credits Pvt. Ltd., (1986) 1 Comp. L.J. 253);

(e) where company was running at a loss (Krishan lyer and Sons v. New Era Mfg. Co. Ltd., (1965) 1 Comp. L.J. 179);

(f) where petition was not motivated by desire to do justice to company or to see that justice was done to shareholders but for private reasons (Jagannath Gupta v. Mulchand Gupta AIR 1969 Calcutta 363);

(g) where there was deadlock in the management but the allegations were wholly unparticularized (W.R. Willcocks & Co., Ltd., (1973) 2 All E.R. 93)."

48. In the judgment of the Karachi High Court, referred to above, the principles which were adduced from a cluster of case law on the question of winding up of a company were elaborately dealt with. The holding of the Karachi High Court was that the allegations relating to internal management or mismanagement of the company's affairs is a matter for the shareholders to deal with and this Court will be loathe to interfere in such matters. Also a winding up petition by a shareholder must be analysed on standards which are more scrupulously stringent as compared to a petition brought by a creditor. Since element of malice and ulterior motives cannot be discounted in the case of a petition presented by a

shareholder, therefore, there is always an element of an individual interest getting the better of the overall interest of the shareholders and the Court will be called upon to weigh the competing interests which must prevail in the given set of circumstances of the case. An important finding of the Karachi High Court was that if the majority of the shareholders show confidence in the management of the company and have voted for its future prospect the Court must give way and should not interfere on a winding up petition.

49. Giving a survey of the grounds on which the Courts have generally refused to order a winding up on the just and equitable ground, it was held that mere allegations of mismanagement or misappropriation of funds by the directors without more will not be a ground sufficient to wind up the company. Similar is the position when there are allegations of grouping and partisanship amongst the shareholders which too has not been accepted as sufficient to wind up the company. It was concluded by the Karachi High Court that:

> "The word 'may' used in the opening part of the section 305 ibid clearly indicates that it is the matter of discretion of the Court whether, in the circumstances of the case, it would be in the interest of justice to wind up the company. I am of the view that although the power to wind up is discretionary, it has to be exercised judicially. This means that it is only where the balance of equities is shown by petition to tilt appreciably in favour of a winding up order that it will be made 'ex debito justitiae'. It is in this special sense that a petition relying on grounds contained in section 305 can get a winding up order as a matter of right. It is issued as a matter of right when it produces a compelling effect. It is not granted mechanically as a matter of course on proof of certain fact. In other words, equitable considerations have a decisive effect even when the power to wind up a company is involved under a clause of section 305 of the Ordinance."

50. Shahbazud Din Chaudhry and 27 others v. Messrs Services Industries Textiles Limited and 4 others (PLD 1988 Lahore 1) is a watershed case and eruditely deals with the powers of the court under sections 290 and 305 of the Ordinance, 1984 and the basic scope and contours of these provisions. Khalil ur Rehman Khan J., explained the nature of the powers to be exercised by the Court under section 290 with reference to the case law of different jurisdictions which was in pari materia. It was held as a principle that the Court before taking corrective measures under section 290, has to form an opinion that to wind up the company would unfairly prejudice the members or the creditors of the company. A distinction was brought forth between powers to be exercised under section 290 and clause 'h' of section 305 which both deal with the oppression of members and the grounds of just and equitable although leading to different consequences. It was found that the scope of intervention for taking corrective measures envisaged in section 290 has been enlarged and broadened, firstly in terms of the members who may apply under section 290 and the relief which may be given by this Court and which might not necessarily be confined to winding up order. An important part of the holding was that the courts will not intervene at the instance of the shareholders in matters of internal management of the company by directors so long they are acting within the powers conferred on them by the Articles of the company. It was further held that the lack of confidence amongst the shareholders must arise not because the aggrieved party is in minority but must arise from the lack of probity in the conduct of the affairs of the company and unless such misconduct produces insolvency, an order for winding up under just and equitable clause would not be made. In reaching this conclusion reliance was placed on plethora of case law on the subject including the Ladli Prasad case relied upon

by the learned counsel for the petitioners. It will be sufficient to quote the following extracts of the judgment which aptly apply to the facts of the instant case:

> "…In this case Indian Supreme Court accepted and approved the well-recognized principle of Company Law namely that where nothing more is established than that the directors had misappropriated the company's funds unless such misconduct has produced insolvency, an order for winding up under "just and equitable" clause would not be made. The second principle approved was that the Courts will not intervene at the instance of shareholders in matters of internal management of the company by directors so long as they are acting within the powers conferred on them by the Articles of the Company. The third principle approved was that the doctrine initiated in Loch's case (1924) All ER 200 namely that if a private company or in a public company which is in the nature of private company there is lack of confidence that would be the ground for an order for winding up but that lack of confidence must arise not because the aggrieved party is in minority but must arise from the lack of probity in the conduct of the affairs of the Company."
>
> 29. Some of the important principles which clearly emerge from the precedents analysed above are that unwise, inefficient or careless conduct of a director in pursuance of the duties cannot give rise to a claim for relief under section 290 Companies Ordinance, 1984. The person complaining of "oppression" must show that he has been constrained to submit to a conduct which lacks in probity or to a conduct which is unfair to him and when causes prejudice to him in the exercise of his legal and proprietary rights as shareholder and not as a director or employee of the company. It is also clear that where the 'just and equitable' jurisdiction has been applied, the circumstances have always been such as to warrant the interference that there has been at least unfair conduct, abuse of powers and an impairment of confidence in the probity with which the affairs of the company were being conducted as distinguished from mere resentment on the part of minority at being out-voted on some issue of domestic policy.
>
> 30. Moreover, in an application under section 290 Pakistan Companies Ordinance, 1984 or section 397 of Indian Companies Act, 1956 as under section 210 of the English Companies Act, 1948 before granting relief the Court has to satisfy itself that to wind up the company, will unfairly prejudice the members complaining of oppression but that otherwise the facts will justify the making of a winding up order on the ground that it is just and equitable that the company be wound up and that the circumstances relied on must exist at the date of hearing of the petition Re: Fildes Bros. Ltd. (1970) 1 All ER 923. The petitioner who is seeking equity must not himself be guilty of questionable conduct and must not be abusing the process of Court or for ulterior purpose see section 314(2) Companies Ordinance, 1984."

51. Apart from the general propositions which were laid down in the judgment referred to above, one important aspect which was flagged was that the ground of just and equitable must be based on circumstances which exist on the date of hearing of the petition and not thereafter. Therefore, anything which takes place after the proceedings have commenced will not be taken into consideration by the Court and will not normally augment the grounds already taken in the petition.

52. At this point, I may refer to the comparable law in England. Most of the relevant provisions governing the operations of the companies is to be found within the 1300

provisions and 16 Schedules of Companies Act, 2006. The predecessor of Companies Act, 2006 was Companies Act, 1985 and Companies Act, 1989. Companies Act, 2006 either restates or amends almost all provisions of Act, 1985 and Act, 1989. The matters relating to the unlawful conduct of the companies' affairs are contained in section 994(f) of Act, 2006, which gives the Court on the application of a member a wide ranging power of remedying the conduct of company's affairs that is unfairly prejudicial to the interest of the members generally or to some part of its members. However, the doctrinal basis of section 994 can still be derived from the earlier provisions of section 459 in Companies Act, 1985 and those provisions and the case law developed on their basis still remains relevant. Section 994 requires the petitioner to show that "the companies affairs are being or have been conducted in a manner unfairly prejudicial to the interest of members generally or to some part of its members" or that "an actual or proposed act or omission of the company is or would be so prejudicial". For the meaning of the term 'unfairly prejudicial' a reference may be made to the Re: Saul D Harrison and Sons PLC (1995) 1 BCLC 14 (Court of Appeal) and Re: London School of Electronics Limited (1986) Ch 211. Section 996(1) gives the Court the power to make such order as it thinks fit. This has been interpreted to mean that the Court is not limited to giving the relief asked for by the petitioner. Section 996(2) provides examples of possible orders, including commonly used compulsory share buy-back. For a detailed elaboration of the term "unfairly prejudicial" see O' Neil v. Phillips (1999) 1 WLR 1092 (House of Lords). It was held by the House of Lords that:

> "Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ('it's not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.
>
> In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers…"

53. As stated above, the buy-out of shares is the most common remedy which is available to a petitioner in a petition alleging unfairly prejudicial conduct. The courts in England have laid down different standards for valuing shares in buy-out orders. The relevance of parties'

conduct to the valuation of shares has been taken into consideration. In Bird Precision Bellows Ltd. (1984) Ch 419, Nourse J had the following comments to make with regard to the relevance of parties' conduct:

> "I would expect that in a majority of cases where purchase orders are made under section 75 in relation to quasi-partnerships the vendor is unwilling in the sense that the sale has been forced upon him. Usually he will be a minority shareholder whose interests have been unfairly prejudiced by the manner in which the affairs of the company have been conducted by the majority. On the assumption that the unfair prejudice has made it no longer tolerable for him to retain his interest in the company, a sale of his shares will invariably be his only practical way out short of a winding up. In that kind of case it seems to me that it would not merely not be fair, but most unfair, that he should be bought out on the fictional basis applicable to a free election to sell his shares in accordance with the company's articles of association, or indeed on any other basis which involved a discounted price. In my judgment the correct course would be to fix the price pro rata according to the value of the shares as a whole and without any discount, as being the only fair method of compensating an unwilling vendor of the equivalent of a partnership share. Equally, if the order provided…for the purchase of the shares of the delinquent majority, it would not merely not be fair, but most unfair, that they should receive a price which involved an element of premium."

54. The date of valuation of shares is another issue which will confront the Court making a buyout order. In Profinance Trust SA v. Gladstone (2002) 1 WLR 1024, it was held that:

> "The starting point should in our view be the general proposition stated by Nourse J in In re London School of Electronic Ltd (1986) Ch 211, 224: "Prima facie an interest in a going concern ought to be valued at the date on which it is ordered to be purchased." That is, as Nourse J said, subject to the overriding requirement that the valuation should be fair on the facts of the particular case.
>
> The general trend of authority over the last 15 years appears to us to support that as the starting point, while recognising that there are many cases in which fairness (to one side or the other) requires the court to take another date…"

55. But one of the classic statements on the value to be put on the shares is found in Scottish Cooperative Wholesale Society Ltd v Meyer (1959) AC 324 (House of Lords) in the words of Lord Denning:

> "Your Lordships were referred to Bell v Lever Bros Ltd, where Lord Blanesburgh said that a director of one company was at liberty to become a director also of a rival company. That may have been so at that time. But it is at the risk now of an application under section 210 if he subordinates the interests of the one company to those of the other.
>
> So I would hold that the affairs of the textile company were being conducted in a manner oppressive to Dr Meyer and Mr Lucas…
>
> One of the most useful orders mentioned in the section-which will enable the court to do justice to the injured shareholders-is to order the oppressor to buy their shares at a

fair price: and a fair price would be, I think, the value which the shares would have had at the date of the petition, if there had been no oppression…"

56. To reiterate, a compulsory buy-out at a fair price has become the most useful remedy in England and in the majority of cases, it has become almost the only remedy called upon in these cases. We may also make a reference to the observations on the subject made in Gower and Davies' Principles of Modern Company Law Seventh Edition. While discussing the remedy under section 461 and the wide remedial discretion of the Court to make such order as it does have, it has been stated that:

> "…A share purchase order gives the petitioner an opportunity to exit from the company with the fair value of his or her investment, something which, in the absence of a court order, is often not available to the shareholder in a small company, because no potential purchasers of the shares are available or, even if they were, because of pre-emption rights in the articles in favour of the other shareholders, i.e. the controllers.
>
> The crucial question in this buy-out process is how is the court to assess the fairness of the price to be paid for the shares. Two important issues have emerged in the valuation process. The first is whether the petitioner's shareholding should be valued pro rata to the total value of the company or whether its value should be discounted on the basis that it is ex hypothesi a minority holding and so does not carry with it control of the company. In Re Bird Precision Bellows Ltd it was established the principle was pro rata valuation because the buy-out had been forced upon the minority by the unlawful acts of the controllers. However, the court accepted that, if the petitioner's conduct had not been blameless, the value of the shareholding might be discounted for its minority status. Further, if the petitioner had bought the shareholding at a price which reflected its minority status or it had devolved upon him or her by operation of law, the full pro rata value might not be appropriate.
>
> The court's power of valuation will normally override any provisions of the company's articles on this matter, at least where they are less favourable to the minority. At one time it was thought that the minority could, in effect, be forced to use the sharepurchase and associated valuation provisions in the articles, where they existed, on the grounds that an offer by the controllers to purchase on the basis set out in the articles deprived their previous conduct of its quality of unfair prejudice. Although motivated by a laudable desire to encourage the parties to settle their differences without coming to court, the approach suffered from the fact that the articles often did not guarantee the minority pro rata valuation. It now seems to have been abandoned although an open offer on a pro rata basis, which would give the petitioner all he could reasonably expect if the petition were successful, will make it an abuse of process for the petitioner to continue.
>
> The second issue concerns timing. The value put on shares, whether on a pro rata or on a discounted basis, will often crucially depend on when the value of the company is assessed. The courts have given themselves the widest discretion to choose the most appropriate date. The normally competing dates are a date close to when the shares are to be purchased and the date when the petition was presented. In Profinance Trust SA v Gladstone, the Court of Appeal thought that the former had become the presumptive valuation date, but that there were many circumstances when an earlier date might be chosen, for example, where the unfairly prejudicial conduct had

reconstructed its business or even that there had been a general fall in the market since the presentation of the petition."

57. The restatement of the principles of law can also be found in Gower and Davies' Principles of Modern Company Law (Seventh Edition), p 526):

> "The area of general legal protection for minority shareholders is now dominated by the unfair prejudice remedy, but, despite the remedial flexibility of section 461, the court cannot order the winding up of the company in question. The Law Commission recommended that that part should be added to the range of remedies available to the court for the redress of unfair prejudice, but the CLR rejected it on the grounds that it was open to abuse for the reasons discussed below. Nevertheless there is a separate procedure which a minority shareholder may seek to use to have the company wound up. A company may be wound up compulsorily by the court on a petition presented to it by a contributory if the court is of the opinion that it is just and equitable to do so. This provision, now contained in section 122(1)(g) of the Insolvency Act, 1986, has a long pedigree in the law relating to companies, and the power can be traced back to the Joint Stock Companies Winding up Act 1848. The provision was influenced by the (then uncodified) partnership law and was originally used mainly in cases where the company was deadlocked. In the course of this century it has been moulded by the courts into a means of subjecting small private companies to equitable principles derived from partnership law then they were in reality incorporated partnerships. As we have seen, the apotheosis of this use of the section, the decision of the House of Lords in Ebrahimi v Vestbourne Galleries Ltd., was highly influential in the courts development of their powers under section 459. Despite its remarkable substantive development, the provision always suffered from a weakness at the remedial level: if the company was prospering, presenting a "just and equitable" petition was tantamount to killing the goose that might lay the golden egg. So long as the alternative remedy was hobbled by the restrictive wording and interpretation of section 210 of the Companies Act 1948, the winding up petition was better than nothing. But, with the introduction of the unfair prejudice remedy, one may wonder what its appropriate role in the scheme of things now is.
>
> Pt of the answer to this question lies in purely tactical considerations on the part of the petitioners. A winding up petitioner triggers section 127 of the Insolvency Act 1986, which requires the courts consent for any disposition of the companies' property after the petition is presented. This ability to paralyze or at least disrupt, the normal running of the companies' business adds to the negotiating strength of the petitioner but is hardly legitimate if a section 459 petition could give him or her all that is required. Consequently, a Practice Direction seeks to discourage the routine joining of winding up petitions to unfair prejudice claims, unless a winding up remedy is what is genuinely sought. The force behind the Practice Direction is provided by section 125(2) of the Insolvency Act 1986, to the effect that the court need not grant a winding up order if it is of the opinion that some alternative remedy is available to the petitioners and that they have acted unreasonably is not pursuing it. It would not seen an unreasonable use of this power for the courts to insist that, where a more flexible section 459 remedy is available, the petitioner should be confined to it. That would be a natural consequence of the fact that the statutory alternative to a winding up order has finally come of age.

> However, another part of the answer lies in the long running controversy over whether the grounds of unfairness upon which a company can be wound up under section 122(1)(g) of the 1986 Act are wider than those which will found an unfair prejudice remedy under section 459 of the 1985 Act. There are reported cases in which the court has denied a petition based on unfair prejudice because of the conduct of the petitioner did not merit it, but has granted a winding up order on the grounds that mutual confidence among the quasi partners had broken down. In other words, in these cases the mere fact of break down is sufficient to ground a winding up order, mere as an unfair prejudice petition is seen as requiring some assessment of the comparative blame worthiness of petitioners and controllers. However, in the wake of the decision of the House of Lords in O' Neil v Phillips the view has been taken at first instance "that the winding up jurisdiction is, at the very least, no wider than the section 459 jurisdiction", for otherwise the effect of their Lordships decision were simply be that "of transferring business from the section 459 jurisdiction to the winding up jurisdiction".

<u>Report of break-up value of shares:</u>

58. As adumbrated, the order of this Court dated 27.6.2011 brought a shift in the course of the proceedings in the instant petition. By consensus, a Chartered Accountant was appointed by this Court to determine as of 30th June, 2011 the break-up value of the shares of the UIL on the basis of current/fair market value of the shares. The terms of the reference to the Chartered Accountant were agreed to by the parties by acknowledging and by affixing their signatures on the sideline of the order. One of the terms of reference was that the accounts of the company were to be audited in accordance with law and the required valuation of the shares shall be comprised on the audited accounts. A report in pursuance of the order of this Court was submitted by the Chartered Accountant so appointed on 10.09.2012. The parties have filed objections to the report submitted by the Chartered Accountant. In my opinion, however, since the matter was referred to the Chartered Accountant by consent, by implication, the parties chose not to raise any objection to the valuation made by the Chartered Accountant as this would involve the parties in a never ending vortex of objections and cross objections which runs counter to the intention and spirit of the order dated 27.6.2011. On 31.12.2014, this Court once again required the auditors to carryout the audit of UIL for the period from 01.7.2011 to 31.12.2014 and to submit the report together with the value of the shares calculated in terms of the order dated 27.6.2011. This order has not been challenged by any of the parties and effectively overrides the objections which any party may have to the earlier report submitted by the auditor. It also reinforces the intention of the parties to enter into an arrangement in the nature of buy-out of shares. The auditors in pursuance of the order of this Court passed on 31.12.2014 have now submitted a report dated 18.02.2016. The report gives a break-up value of the shares of UIL together with audited financial statement of UIL for the years ended June 30, 2012 to June 30, 2014 and for the six months ended 31.12.2014 (3-½ years in all). According to the report, the break-up value of the shares of UIL has been carefully arrived at after giving due consideration to the element of qualifications in the reports of the auditors of respective years as well as goodwill which has been carefully quantified on the basis given in the report.

59. In terms of the report of the auditors, the detailed calculation of the break-up value of the shares is given in Annexure-I to the report. The results are summarized below:

Breakup value per share based on:	**Audited Accounts as on December 31,**

	2014 (Rupees)
As per book value appearing in the Financial Statements	292
After incorporating surplus on revaluation of fixed assets	326
After incorporating surplus on revaluation of fixed assets and effect of audit qualifications	386
After incorporating surplus on revaluation of fixed assets, effect of audit qualifications and amount of goodwill	601

60. The report also mentions the calculation of the breakup value of the amount of goodwill as well. It will be noticed that the effect of audit qualifications has been added back while calculating the valuation of the shares of the Company. The breakup value per share based on the various factors which have been reproduced above, comes to Rs.601/-. This is based on the audited accounts as on December 31, 2014.

61. The learned counsel for the petitioners at the conclusions of his arguments passionately urged that the petitioners would acquiesce on a buy-out arrangements under section 290 if a special audit was conducted. By this, the learned counsel sought to bring home his allegation that massive and serious fraud had been conducted in the running of the affairs of the Company and thus it was well-nigh impossible to calculate the breakup value of the shares and any calculation, therefore, without a special audit being conducted, would be a nullity and an exercise without purpose. Firstly, no prayer has been made in the petition for a special audit to be conducted. It purely lies within the discretion of this Court to conduct a special audit or not. Secondly, a special audit can only be conducted by the Commission on its own motion or upon an application made by members holding not less than 20% voting right in a company. That right has been exercised by the petitioners and of which proceedings have been set in motion by the SECP. Thos proceedings are under challenge before the Islamabad High Court. It would thus not serve any purpose for this Court to order a special audit which would only result in duplication. Further, this stance of the learned counsel for the petitioners is a deviation from the consensual order of 27.6.2011 and the petitioners cannot be permitted to change their stance at their whim according to the circumstances. The plea of special audit has been developed by the learned counsel for the petitioners after the report of the auditors had been submitted on 10.09.2012 in which, according to the learned counsel, certain qualifications had been mentioned which allegedly point to fraudulent activities in the conduct of the affairs of the company. It is thus evident that the plea is of recent origin and has been triggered by the last report of the auditors. Therefore, I am not inclined to accept this request of the learned counsel for the petitioners. For the purpose of valuation, this Court will predicate its order on the latest report submitted by the auditor. I have not put that report to the parties for inviting objections as that was not the mandate of the appointment by consent. This will only lead to issues to be spawned off without an end in sight. This Court is amply empowered to make that report as the basis for any buy-out. Moreover, the report is based on objective assessment of the accounts and factors in various qualifications etc. in the valuation so arrived at.

62. It is, therefore, ordered as follows:

a) The petition for winding up of the Company is dismissed.

b) In the exercise of powers under section 290 of the Ordinance, 1984, it is directed that the respondents Nos.1 to 7 shall buy-out the petitioners in the proportion of the shares held by the said respondents on the basis of the valuation determined by the auditors appointed by this Court on 27.6.2011 in the report submitted on 18.02.2016.

c) The respondents Nos.1 to 7 shall complete the transaction of purchase of the petitioners' shares within three months of the passing of the order of this Court. The necessary transfer in the register of members shall also be made simultaneously.

d) The auditors shall calculate the profit accrued to the Company for the period from 01.01.2015 till the passing of the order of this Court and after deducting the dividend paid during this period, the profits shall be ratably distributed amongst the members of the Company including the petitioners and the respondents Nos.1 to 7.

e) In terms of the report filed by the auditors, the audited financial accounts of each year/period have been addressed to the Board of Directors which shall be approved by the Board of Directors who shall sign the said financial statements along with other items of the Board letter and presented to the auditors for their signatures. This shall be done after the transfer of shares has taken place.

f) Further, as recommended by the auditors, the Directors of the Company are required to hold a formal meeting of the Board of Directors and Annual General Meeting to approve the financial statements so that the formality of duly approved audited financial statements is achieved.

KMZ/W-3/L Order accordingly.