

2020 C L D 339

[Lahore]

Before Jawad Hassan, J

SAUDI PAK INDUSTRIAL AND AGRICULTURAL INVESTMENT COMPANY LIMITED---Appellant

Versus

CHENAB LIMITED---Respondent

Civil Original No. 43 of 2011, decided on 5th December, 2019.

(a) Companies Act (XIX of 2017)---

---Ss. 305(2) & 308---Power of court to order winding up of a company---Winding up as a 'last resort'---Matters to be considered by the court before ordering winding up---Winding up of a company was to be treated as an extreme remedy and not to be dealt with casually as it would amount to economic death of a running and live commercial organization---Winding up was the last thing that a court would do having regard to its impact and consequences, including, closing down of a unit which produced goods or provided some services; loss of employment of numerous persons and resulting grave hardship to the members of families of such employees; loss of revenue to the State by way of collection that the State could hope to make on account of customs or excise duties, sales tax, income tax, etc.---Effect of winding up must be considered - putting an end to the business or an industry or an entrepreneurship - and the court should not be too keen or too anxious to continue winding up of a company and must give weightage if there was any possibility of resurrecting the company.

Kesar Enterprises Ltd.'s case [2002] 112 Comp Cas 174 (Bom) ref.

(b) Companies Act (XIX of 2017)---

---S. 313---Power of court to stay winding up of a company---Time period of three years provided under S. 313 of the Companies Act, 2017---Such time period was directory and not mandatory in nature.

J Investment Corporation of Pakistan v. Sunshine Jute Mills Limited 2005 CLD 713 ref.

(c) Companies Act (XIX of 2017)---

---Ss. 313 & 314---Companies (Court) Rules, 1997, R. 95---Civil Procedure Code (V of 1908), O. XXXIX, Rr. 1 & 2---Power of court to stay winding up of a company---Scope--Commercial morality, concept of---Scope---High Court had power to stay the proceedings of a winding up order, even for a limited period of time, on the basis of events or situations that arose or developed after the winding up order, while keeping in mind the relevant facts and circumstances of each case---Even after passing of a winding up order, efforts should be made by the judicial forums to allow the companies to continue running commercially on the grounds that company had improved its commercial viability; or, had acquired the requisite funds to discharge its liabilities and miscellaneous expenditures for its operations; or, the cause for the winding up order had disappeared or was likely to disappear; or the company was able and willing to set its

(affairs) right either by arrangement, compromise, settlement or a proposal for the revival of the company---Before passing such an order, the Court must give regard to the benefits and interests - and not merely wishes - of the contributor, creditors and public, in proper circumstances of resumption of the business of the company --- Powers conferred on the court in such regard were discretionary in nature and could only be exercised in furtherance of the broader principles of commercial morality and after bona fides of the parties had been established on the record with regard to the proposed financial status and strength.

Hala Spinning Mills Ltd's case 2002 SCMR 450; Zulfiqar Hussain v. Bambino (Pvt.) Ltd. 2013 CLD 34; J Investment Corporation of Pakistan v. Sunshine Jute Mills Limited 2005 CLD 713; Additional Registrar of Companies, SECP v. Schon Textile Limited 2008 CLD 475; National Bank of Pakistan v. Punjab National Silk Mills Ltd. 1989 MLD 2963; Abdul Rasheed Mughal v. ECSA (PK) (Pvt.) Ltd. 2006 CLD 852; Seviar v. Morga [2012] VSC 480; Prendergast v. Roelcross [2008] NSWSC 14; Navjivan Trading Finance Pvt. Ltd's case, [1978] 48 Comp Cas 402 (Guj); Tata Iron and Steel Co. case, [2001] 104 Comp. Cas. 533 (Guj); American Express Bank Ltd. case, [1999] 96 Comp Cas 841 (Guj.); Kesar Enterprises Ltd.'s case [2002] 112 Comp Cas 174 (Bom) and Messrs Consolidated Exports Ltd. v. Messrs Dyer Textile and Printing Mills Ltd. PLD 1984 Kar. 541 ref.

(d) Companies Act (XIX of 2017)---

---Ss. 313 & 314---Companies (Court) Rules, 1997, R. 95---Civil Procedure Code (V of 1908), O. XXXIX, Rr. 1 & 2---Power of court to stay winding up of a company on the basis of 'commercial morality' and 'public interest'---Scope---Restructuring/rescheduling plan for a company undergoing winding-up---Company in question, which was in the process of winding up, was one of the leading exporters of textile in the country and winding it up would amount to economic death of not only the company but also its employees---High Court observed that in developing countries (like Pakistan), the judicial forums should provide opportunities to the sick industries to revive and to restart their business and to pay off and settle their debts and other liabilities, especially when the banks were also willing and had no objection in such regard---Situation of the company in question had changed after the winding up order, since the banks had shown their willingness to restructure the debts of the company---In view of the Scheme of Arrangement, Restructuring Plan, joint statement and other documents submitted in court and the interest of the creditors, contributors and public, there appeared to be no restriction on the High Court from staying the winding-up---Looking at the present matter pragmatically under the applicable law, in the best interest of commercial morality and condition of textile industry of the country, it would be against the public interest to deny such interim relief to the applicants---Application for interim relief was allowed and the company was temporarily allowed, till the disposal of the main application, to resume its commercial operation and the production units in terms of the undertaking made by the applicants and confirmed by official liquidators.

Salman Aslam Butt, Senior Advocate Supreme Court for the Contributors of Chenab Limited assisted by Shoaib Rashid, Hafsa Ahmad, Manahil Khan and M. Ali Khan, Advocates.

Barrister Mian Sultan Tanvir Ahmad, Advocate Supreme Court for the Shareholders assisted by Mr. Usman Ali Cheema, Advocate.

Abu Bakar, Advocate for Pak Libya.

Majid Ali Wajid, Advocate Supreme Court for MCB Bank.

Muhammad Irfan Hanjra, Advocate Supreme Court.

Aurangzeb Mirza, Advocate/JOL along with Jalal Ahsan, FCA/JOL.

Hafiz Talha for SECP.

Ms. Sadia Malik, Assistant Attorney General.

Barrister Umair Khan Niazi, Additional Advocate-General.

Muhammad Kashif Pasha and Hamid-ul-Rehman Nasir, Civil Judges/Research Officers of this Court.

Date of hearing: 5th December, 2019.

JUDGMENT

JAWAD HASSAN, J.---This judgment will dispose of the application, C. M. No.30-C of 2019, filed by the shareholders/ contributors/ex-management (the "Applicants") of the Chenab Limited (the "Company") for grant of interim relief, under section 313 of the Companies Act, 2017 (the "Act") read with Order XXXIX, Rules 1 and 2 and section 151 of the Code of Civil Procedure, 1908 ("C.P.C.").

A. BACKGROUND OF CASE

2. At the outset, this High Court has already allowed an application under sections 305, 306 and 309 of the Act for winding up of the Company on 20.06.2017 (the "Winding Up Order"). The Winding Up Order was assailed by the Company through an Appeal before the honourable Supreme Court of Pakistan, which was upheld vide order dated 08.01.2019 (the "Supreme Court Order"). The honourable Supreme Court has held in its order that "It was invariably reported by the auditors of the Company that 'Company may not be able to realize its assets and discharge its liabilities in the normal course of business'. Thus from record it has become clear that Company is unable to pay its debt. Even no amount is shown to have been paid towards re-payment of the outstanding liability under various facilities extended by the Respondent and availed by the Petitioner-Company since the date of filing winding up petition on 24.08.2011".

3. After passing of the Winding Up Order, the liquidators appointed by this Court took charge of the assets of the Company and they were paid remuneration under the Act and the Companies (Court) Rules 1997 (the "Rules").

4. Now, the Applicants have filed an application, C.M. No. 29-C of 2019, attaching the restructuring/rescheduling plan of the Company, along with the instant application for grant of interim relief in the form of stay of operation of the Winding Up Order, to restrain the Joint Official Liquidators (the "Official Liquidators") from proceeding further in the matter, and to allow the management of the Company to take steps for rehabilitation of the Spinning, Stitching and Weaving Units of the Company (the "Production Units").

5. On 19.09.2019, the Applicants had sought permission of this Court to file Application under Section 313 of the Act for withdrawal of the Winding Up Order. On the same day, this Court directed the concerned parties to file their objections on the instant application, if so advised.

B. SUBMISSIONS OF THE APPLICANTS

6. During pendency of main application, C.M. No. 29-C of 2019, the counsel of the Applicants, Mr. Salman Aslam Butt, Sr. ASC submitted that the Applicants, as an interim measure, want to start spinning, waiving and processing units in order to proceed with the production of the Company, as per the provisions of section 313(1) of the Act read with Rule 95 of the Rules.

7. The counsel has submitted that the Applicants have a prima facie strong case of withdrawal of the Winding Up Order. The Applicants has attached a letter dated 28.09.2019 (the "Bank Letter"), whereby the Habib Bank Limited (the "Bank") has confirmed Mian Muhammad Latif, Ex-Chief Executive Officer of the Company, that the restructuring of the debts of the Company is under process, and is being finalized, in following terms:

We, Habib Bank Limited, confirm that we are in the process of finalizing a term sheet for the restructuring of Chenab Limited's debt and entering into a scheme of arrangement for the same. We have engaged legal and financial advisors for this purpose too. Up to now, Habib Bank Limited, Bank of Punjab, Habib Metropolitan Bank and Bank Islami have obtained internal approvals for the draft term sheet and Allied Bank Ltd has also conveyed its verbal consent however their formal approvals are in process. We are still awaiting the approvals of the banks set out in the schedule hereto. Once these approvals are received, we will execute the term sheet and proceed to finalize a scheme of arrangement in accordance with our counsel's advice. (emphasis added)

8. The learned counsel has specified that the Company was wound up on the ground of its inability to pay debts, and now possess a viable restructuring/rescheduling plan and proposals to satisfy this Court under section 313(1) of the Act - which authorizes this Court to pass an order for interim relief. The reason for immediate production and revival of the Company is to increase the export of Pakistan and to revive the Production Units with the help of the Bank to increase business and employment opportunities in our country and to earn foreign exchange.

9. To strengthen his claim, he has emphasized that the Court must consider winding up of the company as a last resort because of its attached impact and consequences on the tax generation, economy and employment in the country and on general public. He identified that winding up shall certainly amount to heavy tax losses to the Government in the form of customs, excise duties, sales tax etc. and would also be detrimental to the concept of "commercial morality". In order to support his contentions, he has relied on "Consolidated Exports Ltd. v. Messrs Dyer Textile and Printing Mills Ltd." (PLD 1984 Karachi 541) wherein doctrine of "commercial morality" was discussed.

10. He has presented following facts about financial and economic impacts of winding up of the Company:

(1) Economic Impact on Export

Before winding up, the Company was exporting textile goods from 1990 to 2019 with the total export over Rs.85 billion and had local sales of Rs.70 billion approximately. The learned counsel has attached a chart at page 10 of C.M. No. 31/C/2019, which is verified by the Faisalabad Chambers of Commerce ("FCC") on 03.01.2019. He has emphasized on the export need of Pakistan as compared to Vietnam, Sri Lanka and India, in textile.

(2) Employment

The learned Counsel submitted that before winding up, the Company had approximately fifteen thousand skilled and unskilled employees, which contributed towards huge employment in the country.

(3) Tax Benefits

The learned counsel stated that before winding up of the Company, it was the largest taxpayer from the Faisalabad Region. He further stated that the Company has paid all applicable dues/taxes amounting to Rs.1.3 billion to the Government from 2000 to 2017 including (a) the Income Tax amounting to Rs.704,616,859/-, (b) the Sales Tax amounting to Rs.32,812,433/-, (c) Property Tax amounting to Rs.30,596,542/-, (d) PESSI amounting to Rs.234,694,939/-, (e) EOBI amounting to Rs.213,870,719/- and (f) other Government taxes/levies amounting to Rs.13,133,146/-.

C. SUBMISSIONS OF THE JOINT OFFICIAL LIQUIDATORS

11. The Official Liquidators appeared before this Court and stated that they have no objection on acceptance of the Scheme of Arrangement but have certain reservations qua interim relief and start of the Production Units keeping in view financial discipline. However, they assented to the following proposal submitted by the Applicants:

- (1) Take steps for rehabilitation and operations of the Production Units;
- (2) Engage/hire staff and labour for the said purposes;
- (3) Commence and undertake business operations of the Company; and
- (4) Maintain Books of Accounts of the Company, and operate its bank accounts, for meeting the expenses and running the affairs of the Company.

12. Mr. Jalal Ahsan, FCA, also appeared and stated that he has no objection on the issues of commercial morality if the Company will run the production in order to generate the revenue for foreign exchequer and pay taxes. He relies on Rule 275 of the Rules and Section 387 of the Act. He further submitted that he has no objection if the ex-management of the Company maintains the financial discipline with the proper procedure and accounting of the said commercial production. He stated that they have given various chances by the Court before the winding up order was made but with the new management including JOLs they will not do any measure/step without their consent.

13. It is joint submission of the Parties that direction be also issued that all above mentioned actions with respect to the affairs of the Company may be managed by the Ex-Management of the Company, including, Mian Muhammad Latif (Ex-Chief Executive Officer) and Mian Muhammad Naeem (Ex-Director), after consultation with the following:

- (1) Joint Official Liquidators appointed by this honorable Court, namely Mr. Aurangzeb Mirza (Advocate Supreme Court) and Mr. Jalal Ahsan (FCA); and
- (2) Nominee of the Habib Bank Limited (Lead Bank) today filed in the Court the joint statement.

D. APPLICABLE LAW

14. It is essential to note that the preamble to the Act highlights its purpose, inter alia, to regulate the corporate entities for protecting interest of shareholders, creditors, stake holders, and ensure general public principles of good governance

15. Section 2(23) of the Act defines the "Court" as the "Company Bench of a High Court having jurisdiction". Section 313(1) of the Act provides powers of the honorable High Court to stay the winding up proceedings, and to make an order on such terms and conditions as the Court thinks fit, subject to the following conditions: (a) within three (3) years after an order for winding up; (b) on application of any creditor, contributory, Registrar or the Commission; and (c) on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, withdrawn, cancelled or revoked. During such application, this honorable Court is also authorized, under section 313(2), to seek a report of the official liquidators on necessary facts or matters. Section 313 of the Act is reproduced hereunder for clarity:

Section 313. Power of Court to stay winding up.-

(1) The Court may at any time not later than three years after an order for winding up, on the application of any creditor or contributory or of the registrar or the Commission or a person authorised by it, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, withdrawn, cancelled or revoked, make an order accordingly, on such terms and conditions as the Court thinks fit.

(2) On any application under subsection (1), the Court may, before making an order, require the official liquidator to furnish to the Court a report with respect to any facts or matters which are in his opinion relevant to the application.

(3) A copy of every order made under subsection (1) shall forthwith be forwarded by the Court to the registrar, who shall make a minute of the order in his books relating to the company. (emphasis added)

16. Section 314 of the Act, further, empowers the Court to "ascertain" as well as "have regard" to the wishes, value of each debt of the creditor, or voting power exercised by each contributor, of the company in all matters relating to the winding up of such company. Section 314 is reproduced hereunder:

314. Court may ascertain wishes of creditors or contributories.-

(1) In all matters relating to the winding up of a company, the Court may -

(a) have regard to the wishes of creditors or contributories of the company, as proved to it by any sufficient evidence in a manner as provided under this Act;

(b) if it thinks fit for the purpose of ascertaining their wishes, order meetings of the creditors or contributories to be called, held and conducted in such manner as may be directed; and

(c) appoint a person to act as chairman of any such meeting and to submit a report in this regard.

(2) While ascertaining the wishes of creditors or contributories under subsection (1), regard shall be had to the value of each debt of the creditor or the voting power exercised by each contributory, as the case may be. (emphasis added)

17. Moreover, Rule 95 of Rules requires an application for stay of winding up proceedings to be made upon notice to the parties to the winding up petition and other persons and the official liquidator. It further requires the Court to pass a direction to file a certified copy of the such order with the Registrar of Companies. Rule 95 of the Rules is produced hereunder:

95. Application for stay of winding up proceedings.-

(1) An application under section 319 (now, 313 of the Act) for stay of proceedings in the winding up shall be made upon notice to the parties to the winding up petition and to such other persons as the Court may direct, and where the application is made by any person other than the official liquidator, notice shall be given to the official liquidator.

(2) Where an order is made for stay of the winding up proceedings, the order shall direct that the applicant shall forthwith file a certified copy thereof with the Registrar of Companies. (emphasis added)

E. RELEVANT CASE LAW FROM PAKISTANI JURISDICTION

18. The august Supreme Court in Hala Spinning Mills Ltd. (2002 SCMR 450) has held as follows:

"It is to be observed that whenever a case of winding up of a running company is placed before a Company Judge or the Appellate Court they should examine such matter differently other than a company which is not in a running condition. In this behalf efforts should be made by the judicial forums to adopt such a device so the project may remain continue running commercially so its financial liabilities start reducing gradually. The business trend in the market is that if running concern is put to sale it fetches high price of its assets which can substantially clear proportionate liability of the creditors".

19. The honorable Sindh High Court has already set the criteria for similar section 319 of the Companies Ordinance, 1984 (now section 313 of the Act) for stay of the winding up proceedings, in the case of Zulfiqar Hussain v. Bambino (Pvt.) Ltd. (2013 CLD 34 Sindh), and has exercised its jurisdiction in following terms:

11. As these provisions immediately make clear, section 319 is cast in terms rather different from other legislation. Whereas all the other sections are (or were) limited to the "stay" of winding up proceedings, section 319 uses broader language, empowering the court not merely to stay but also to "withdraw", "cancel" or "revoke" the proceedings. ... In my view the clear intent of the law maker in using words in addition to "stay" was to change the law, and this intent must be given due effect.

12. The second point that requires attention is that although the additional words have been used, they all (like "stay") refer to the winding up "proceedings" and not, as such, to the winding up order itself. Proceedings pursuant to an order can certainly be stayed while leaving the order intact. ... It must be kept in mind that the section provides for "all" proceedings to be stayed, withdrawn, cancelled or revoked (as the case may be). ... I would also note that, as is clear from the statutory provisions other than section 319 reproduced above, where the power of the court is limited only to grant a stay, such order may stay the proceedings "altogether" or for a limited time. Clearly, if a winding up proceedings are stayed altogether, the order itself is essentially rendered redundant: it is not thereafter to be given effect. ... Keeping all of the foregoing factors in mind, in my view, the only sensible meaning and effect of the additional words used is that the Court is now armed with power to withdraw, cancel or revoke (as the case may be) the winding up order itself, while still retaining the power as before, in appropriate cases, to simply stay the proceedings and leave the order intact.

13. ... An application under section 319 had to accept the order as valid and thus applied only in relation to events or situations that arose or developed after the order. ... The section itself uses the word "may" but in any case, it is well settled that jurisdiction in company law matters is equitable jurisdiction and at the discretion of the court. The court will act in accordance with well established principles regulating the exercise of equitable and discretionary powers. Much would of course depend on the relevant facts and circumstances of the case before the court and the relative weight and importance that it assigns to these factors, but certainly the power conferred by section 319 is not open ended nor can relief thereunder be claimed *ex debito justitiae*. Thirdly, the scope of section 319 is time bound: the application must be moved within three years of the winding up order. ... (emphasis added)

20. In the case of *J Investment Corporation of Pakistan v. Sunshine Jute Mills Limited* (2005 CLD 713 (Lahore)), the honorable Lahore High Court has held that the time limit of three years prescribed in section 319 of the Companies Ordinance, 1984 (now 313 of the Act) is directory and not mandatory as the violation has not been visited with any consequence or penalty, and the High Court has also the power, in the case of a company being wound up to sanction any compromise or arrangement. Similarly, in the case of *Additional Registrar of Companies, SECP v. Schon Textile Limited* (2008 CLD 475 Sindh), the honorable Sindh High Court has decided the application for suspension of winding up order filed on the ground that company had improved its commercial viability. The honorable Court has held that the company had sufficiently fixed assets and interest of shareholders could be safeguarded by imposing restriction upon company not to dispose of fixed assets without permission of the court; if winding up order was maintained, the shareholders would get a meagre amount against their investment; if the company was allowed to function under the supervision and control of SECP and official liquidator, the same would be beneficial to the shareholders; by revival of the company, there was a chance that value of shares would be increased and share-holders would be benefited; and bona fides of the company could also be judged by suspending winding up order and to allow the company to implement scheme of revival under supervision of official liquidator and SECP. In another case, *National Bank of Pakistan v. Punjab National Silk Mills Ltd.* (1989 MLD 2963 Lahore), the honorable Lahore High Court has withdrawn the winding up order which was passed only because the company was unable to pay its debts, and now had the requisite funds to discharge its liabilities and miscellaneous expenditures.

21. Further, in the case titled *Abdul Rasheed Mughal v. ECSA (PK) (Pvt.) Ltd.* (2006 CLD 852 Lahore), the honorable Lahore High Court has held that

7. The nature, extent and the principles for exercise of the powers to stay winding up proceedings as set out in *Halsbury's Laws of England Fourth Edition 1996 Reissue Volume 7(3)* reads as follows:-

"2662. Exercise of power to stay winding-up proceedings. In the exercise of its jurisdiction to stay the Court will refuse to act upon the mere assent of the creditors in the matter, and will consider whether what is proposed is for their benefit, and also whether the stay will be conducive or detrimental to commercial morality and to the interests of the public at large. ...

8. The principle for exercise of powers invoked by the instant application has also been dilated upon in the judgment reported as *Mahabir Prasad Agarwala v.*

Ashkaran Chattar Singh, (1980-81) 85 CWN 557 at 581, 582, (as reproduced in AIR 1996 Calcutta 171) in the following terms: (1) if the Court is satisfied on the materials before it that the application is bona fide; (2) the Court would be guided by the principles and definitely come to the finding that the principles are applicable to the facts of a particular case; (3) mere consent of all the creditors for stay of winding up is not enough; (4) the offer to pay in full or make satisfactory provisions for the payment of the creditors is not enough; (5) Court will consider the interest of commercial morality and not merely the wishes of the creditors and contributories; (6) Court will refuse an order if there is evidence of misfeasance or of irregularity demanding investigation; (7) a firm and accepted proposal for satisfying all the creditors must be before the Court with material particulars; (8) the jurisdiction for stay can be used only to allow in proper circumstances of resumption of the business of the company; (9) the Court is to consider not only the question whether the proposal for revival of the company is for benefit of the creditors but also whether the stay will be conducive or detrimental to commercial morality and to the interest of the public at large; (10) before making any order Court must see whether the ex-directors have complied with their statutory duties as to giving information to the Official Liquidator by furnishing the statement of affairs; (11) and any other relevant fact which the Court thinks fit to be considered for granting or not granting the stay having regard to the particular facts of a particular case.

9. ... And a close and careful analysis of the statutory provision (section 319) and the aforementioned judicial precedents reveal that in essence a power has been conferred upon the Court to stay winding up proceedings on an application of a person or party mentioned in the said provision and within the period specified therein where it is proved to the satisfaction of the Court that the cause for the winding up order has disappeared or is likely to disappear. In other words, the mischief prompting the winding up order has been set at right or the company or its shareholders are able and willing to set it right either by arrangement, compromise or settlement and a proposal in this behalf for the revival of the company is submitted to the Court. Usually, such proposal would include an arrangement or settlement with the creditors especially if the winding up order has been passed on account of the inability of the company and its debts. The power conferred is primarily to consider a proposal for revival of the company and an eventual revocation or withdrawal of the winding up order. This is also evident from the wording of the statutory provision (section 319) whereby the word stay has been used along with withdrawn, cancelled or revoked, with reference to the winding up order. It is no coincidence that such power and jurisdiction has been exercised by this Court and by the apex Court to consider and approve arrangements for payment of debts and revocation of winding up order. Some of such cases in our jurisdiction include *Mst. Dilshad Hussain v. PICIC and others* 1986 SCMR 276, *National Bank of Pakistan v. The Punjab National Silk Mills Ltd. and 2 others* 1989 MLD 2963 and *Messrs Consolidated Exports Ltd. v. Messrs Dyer Textile and Printing Mills Ltd.* PLD 1984 Karachi 541.

10. It is equally clear that powers conferred are discretionary in nature and can only be exercised in furtherance of commercial morality and after bona fides of the parties have been established on the record. Such powers will not be exercised to permit the cover up of any malfeasances illegality or irregularity in the conduct of the affairs of the company. (emphasis added)

F. RELEVANT CASE LAW FROM FOREIGN JURISDICTIONS

22. I would like to reproduce some judicial pronouncements from foreign jurisdictions as well, while discussing pros and cons of winding up of a running company. In *Sevior v. Morga*, [2012] VSC 480, the Victorian Supreme Court, Australia has discussed some parameters and things to be taken into consideration by the court while deciding a petition regarding winding up of a company:

[28] Secondly, in considering the application, the Court is to have regard not merely to the interests of creditors but to the public interest, including whether granting the order would be detrimental to commercial morality:

[29] In the context of public interest and commercial morality Buckley J in *Re Telescriptor Syndicate Ltd* required to be satisfied that the trading operations of the company had been "fair and above board" and that there was not "an ugly side to the picture",

[30] However, concepts of commercial morality and public interest are not narrow.

23. In *Prendergast v. Roclcross* [2008] NSWSC 14, the New South Wales Supreme Court, Australia, after exhaustive discussion on an application to terminate winding up proceedings of a company has held as under:

[25] The question rather is whether it appears that it would be, or may be, contrary to the public interest if the company were permitted to resume operations. In a case such as the present where all of the shares are held by the plaintiff, the public interest means primarily the interests of existing and future creditors.

[29] There are other matters to be taken into account in assessing the public interest. The liquidation is causing significant harm to Worthbrook, or may be doing so, as Worthbrook is servicing the whole of the interest due to the St George Bank.

[33] ... I should conclude that it would be contrary to the public interest for the winding-up of the company to be terminated. I have regard in that respect, of course, to the undertakings proffered by Mr. Prendergast to the Court.

24. Likewise, in *Navjivan Trading Finance Pvt. Ltd.'s case* [1978] 48 Comp Cas 402 (Guj), the Gujarat High Court, India has discussed the ramifications of winding up of a company in the following words:

13. It is no doubt true that the modern trend as etched by a number of pioneering decisions rendered by D. A. Desai J. of this High Court (no wonder tens of thousands of workers with gratitude filed eyes feel beholden to him for it) is against winding up of a company so long as it is possible to resurrect the company. Winding up is the last thing that the court would do and not the first thing that the court would do having regard to its impact and consequences, for winding up of a company would result in, (1) closing down of a unit which produces some goods or provides some services; (2) it would throw out of employment numerous persons and resulting grave hardship to the members of families of such employees; (3) loss of revenue to the State by way of collection that the State could hope to make on account of customs or excise duties, sales tax, Income Tax, etc; (4) scarcity of goods and in diminishing of employment opportunities. The court would not, therefore, be too keen or too anxious to wind up a company by an

order of court only on the ground that the company is unable to pay its debts. In fact, it would be a blow to do so, so long as there is any possibility of resurrecting the company. It would not be right to say that creditors can insist on winding up of the company by court as a matter of right if the position of the company is such that it would be unable to pay its debts to them even if the company can be resurrected. When the persons to whom the company becomes indebted enter into dealings with the company, they do so because they hope to make profits out of the transactions with the company in the usual course of business. It is an incidental risk and an occupational hazard for the persons who enter into such dealings which they undertake in order to earn profits. In fact, it is possible that in the course of their dealings for several years, they would have made huge profits out of the transactions entered into with the company. It would not, therefore, be right to wind up the company merely because the company is unable to pay its debts so long as it can be resurrected by a scheme or arrangement".

25. Additionally, in Tata Iron and Steel Co. case, [2001] 104 Comp. Cas. 533 (Guj), the Gujarat High Court, India has discussed the same matter as under:

20. Certain important chronicles and contours to be kept in the mental radar, before reaching the conclusion in a winding up petition can be articulated as under: ...

(4) It is necessary for the company court to consider the financial status, strength and substratum of the company, in the overall context. It is possible, at times, that there may be a cash crunch. It may be also, possible, at times, that there is temporary cash crisis despite high sales and heavy turnover and, therefore, in such a situation, mere disability or only on the ground of inability to pay would not constitute a ground empowering the court to wind up the company.

(5) If the company is an ongoing concern having regular business and employment of employees, the court cannot remain oblivious to this aspect. The effect of winding up would be of putting an end to the business or an industry or an entrepreneurship and, in turn, resulting in loss of employment to several employees and loss of production and effect on the larger interest of the society.
...

(7) Winding up of a company, as such, is nothing but a commercial death or insolvency and, therefore, the company court is obliged to take into consideration not only the temporary inability, or disability to make the payment of debts, but the entire status and position of the company in the market.

(10) If the company has shown considerable growth in a reasonable span and is a growth oriented enterprise, even in a case of temporary inability would not be sufficient to drive it to winding up. ...

(14) The court is also obliged to consider that it would be in the interest of justice to give the company some time to come out of the momentary financial crisis or any other temporary difficulty as winding up is a measure of last resort.

(15) Winding up course cannot be adopted as a recourse to recovery of the debt.

(16) The court must bear in mind one more celebrated principle and consider whether the company has reached a stage where it is obviously and plainly and commercially insolvent, that is to say, that its assets are such and its existing

liabilities are such as to make the court feel clearly satisfied that current assets would be insufficient to meet the current liabilities, along with other principles.

(18) The element of public policy in regard to commercial morality has, likewise, to be taken into account before determining the winding up issue. The court has also to consider the purpose and policy behind sections 443 and 557 of the Companies Act.

(19) Winding up is the last thing the court would do and not the first thing to do having regard to its impact and consequences. Winding up of a company would ensue:

(a) closing down of a company which is engaged in production or manufacture or which provides some services;

(b) it would throw out of employment numerous persons and result in gross hardship to the members of families of the employees;

(c) loss of revenue to the State by way of collection of taxes which otherwise should have been collected, on account of customs, excise duties, sales tax, Income Tax, etc.;

(d) scarcity of goods and diminishing of employment opportunities

26. Regarding element of public policy with respect to commercial morality, the Gujarat High Court, in *American Express Bank Ltd. case*, [1999] 96 Comp Cas 841 (Guj.), has stated as follows:

The element of public policy in regard to commercial morality has likewise to be taken into consideration when the propriety of a winding up order is examined.

39. The above passages from *Palmer* suggest that where immediate winding up is not warranted it would be equally unsound to allow it to stand over for a long duration as it acts at cross purpose for which winding up is not considered advisable. It also brings into consideration the element of public policy in decision making while exercising discretion by the court.

49. With the company there is at stake the livelihood of about 3,500 people who are employed with it.

50. In the circumstances when there is unimpeachable evidence of secured conditions having a faith in bank strength and capability of the company to survive the present crisis with a little patience on the part of those who have a demand to make against the company, the continuing threat of the company on the fringe of being wound up is to cause fear psychosis in the market and an aura of suspicion and uncertainty in the mind of those who are otherwise willing to deal with the company commercially. Aiding the creation of such an atmosphere in a case like the present one will ensure for the benefit of those who seek destruction of the company rather than helping in salvaging it.

27. It has also been held by the Bombay High Court in *Kesar Enterprises Ltd. case*, [2002] 112 Comp Cas 174 (Bom), that winding up of a company should be treated as an extreme remedy and should not be dealt with casually as it would amount to economic death of a running and live commercial organization:

9. The winding up petition is an extreme remedy which has to be resorted to sparingly and in cases where there is absolutely no bona fide dispute. Seeking winding up of a petition is praying for the economic death of a running and live commercial organisation. In the present case, it is clear that the substratum of the respondent-company is as strong as it was before. The fact that the respondent-company is earning huge foreign exchange and paying a large amount of central excise to Government and contributing to the revenue of the State Government and that it employs more than 3,000 workers is enough for me not to order winding up of the respondent-company on the ground that the petitioners have to recover an amount of debt which is bona fide disputed. The Supreme Court has time and again pronounced that the winding up petition is not a legitimate proceeding resorted to for recovery of debts. There is a judicial unanimity.

G. ANALYSIS BY THIS COURT

28. In view of the Preamble, Sections 313 and 314 of the Act read with Rule 95 of the Rules, it is apparent that the honorable High Court has jurisdiction and power to stay the winding up proceedings, and to make an order on such terms and conditions as the Court thinks fit, (a) within three (3) years after an order for winding up; (b) on application of any creditor, contributory, Registrar or the Commission; and (c) on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, withdrawn, cancelled or revoked (section 313(1)). The J Investment Corporation of Pakistan case (supra) has already established the above time period of three (3) years as directory, and not mandatory. Similarly, the above referred case law also suggests that the High Court has power to stay the proceedings of the Winding Up Order, also for a limited period of time, on the basis of events or situations that arose or developed after the winding up order, while keeping in mind the relevant facts and circumstances of each case. Sindh High Court in "Messrs Consolidated Exports Ltd. v. Messrs Dyer Textile and Printing Mills Ltd." (PLD 1984 Karachi 541) had held as under:-

"19. I also find it in the public interest if the winding up proceedings are, stayed to allow the respondents an opportunity to run their textile mills as this course would not only benefit the economy of the country but would also provide employment to a large number of workmen. It will not be out of place to mention that the Government has financially supported the sick textile mills under its various schemes. I was informed at the bar that respondents Mills was the largest textile Mill before its closure in the private sector, having 1,612 workers out of which 1,264 workers have filed the claims and would be benefited by the present scheme."

29. While deciding such application, the honorable High Court has discretion to seek a report of the official liquidators on necessary facts or matters, in all matters related to winding up of the company (section 313(2)). It is also obligatory for the honourable High Court to "ascertain" and "have regard" to the wishes, value of each debt of the creditor(s), or voting power exercised by each contributor, of the company (section 314). The honorable High Court is also required to regulate the corporate entities for protecting interest of shareholders, creditors, stake holders and general public and ensure principles of good governance (Preamble). The honorable High Court is required to give notice to the concerned persons and to forward order for stay of winding up of the Company to the Registrar of Companies (section 313(3) and Rule 95).

30. The case law mentioned above has clearly established that even after passing of a winding up order, efforts should be made by the judicial forums to allow the companies to continue running commercially on the ground that company has improved its commercial viability; has acquired the requisite funds to discharge its liabilities and miscellaneous expenditures for its operations; the cause for the winding up order has disappeared or is likely to disappear; or the company is able and willing to set it right either by arrangement, compromise, settlement or a proposal for the revival of the company. However, before passing such an order, the Court must give regard to the benefit and interest - and not merely wishes - of the contributor, creditors and public, in proper circumstances of resumption of the business of the company. It is equally clear that powers conferred are discretionary in nature and can only be exercised in furtherance of the mentioned broader principles of commercial morality and after bona fides of the parties have been established on the record with regard to the proposed financial status and strength.

31. Similarly, it is apparent from the above cited case laws that winding up is the last thing that the court would do and not the first thing that the court would do having regard to its impact and consequences, including (a) closing down of a unit which produces some goods or provides some services; (b) loss of employment of numerous persons and resulting grave hardship to the members of families of such employees; (c) loss of revenue to the State by way of collection that the State could hope to make on account of customs or excise duties, sales tax, Income Tax, etc.. The effect of winding up must be considered - putting an end to the business or an industry or an entrepreneurship - and the court should not be too keen or too anxious to continue winding up of a company and must give weightage if there is any possibility of resurrecting the company.

32. It is an admitted fact that the Company was one of the leading exporters of textile in the country and winding up of this company will amount to economic death of not only of the Company but also all employees of the Company. In developing countries like Pakistan, the judicial forums should provide opportunities to the sick industries to revive and to restart their business at full pace and to pay off and settle their debts and other liabilities, especially when the banks are also willing and have no objection in this regard. Admittedly, during the period of 2000 -2015, electricity short fall was a major contributor to overall shrinkage of commercial activities.

33. However, since the situation has changed after the Winding Up Order; the Bank has shown their willingness to restructure the debts of the Company; in view of the Scheme of Arrangement, Restructuring Plan, joint statement and other documents submitted by the Applicants; and the interest of the creditors, contributors and public, there appears to be no other restriction to refrain this Court from allowing the instant interim application. By looking at the matter pragmatically under the applicable law, in the best interest of commercial morality and condition of textile industry of the country, it will be against the public interest to deny such interim relief to the Applicants, who have prima facie established their case for interim relief.

H. RELIEF AND WAY FORWARD

34. Accordingly, in view of the above case law and applicable provisions of the law, particularly Sections of the Act and the Rules, the prayer of the Applicants for interim relief is accepted, and the Company is temporarily allowed, till the disposal of the main application, to resume the commercial operation and the Production Units of the Company. As per undertaking made by the Applicants in writing today and confirmed by

official liquidators, production units shall be managed by the Ex-Management of the Company, including Mian Muhammad Latif (Ex-Chief Executive Officer) and Mian Muhammad Naeem (Ex-Director) after consultation with the JOLs and the nominee of Habib Bank Limited (Lead Bank) in the following manners:

- (a) steps shall be taken for rehabilitation and operations of the Company and its Production Units;
- (b) necessary staff, labour and employees shall be hired for the said purposes;
- (c) commencement and undertaking of business operations;
- (d) Books of Accounts of the Company shall be maintained in accordance with the law;
- (e) the operations of banks accounts of the Company shall be allowed for meeting the expenses related to the above purposes as well as for running the affairs of the Company;
- (f) RSM Avais Hyder Liaqat Nauman and Co. (Chartered Accountants) will look after the financial affairs of the Company; and
- (g) The Company shall keep this Court informed of the developments in operations of the Company by filing monthly statements through the official liquidators and finalization of the Rescheduling Plan and the Scheme of Arrangement.

35. The office is also directed to forward this order to the Registrar of the Companies in compliance of the applicable law.

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Appeals allowed.