

Present: Syed Mansoor Ali Shah, Muhammad Ali Mazhar and Athar Minallah, JJ

Messrs TANVEER COTTON MILLS (PVT.) LTD. and another---Petitioners

Versus

SUMMIT BANK LIMITED and others---Respondents

C.Ps.L.As. Nos. 1422-L and 1423-L of 2021 and C.M.As Nos. 1636-L, 1758-L and 1759-L of 2021 and C.M.As Nos. 2160, 2161, 2216 and 2217 of 2024, decided on 28th June, 2024.

(Against the consolidated judgment of the Lahore High Court, Lahore, dated 17.06.2021, passed in C.O. Nos. 28 and 29 of 2013).

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

---Ss. 6(1) & 387, proviso---Constitution of Pakistan, Art. 10A---Company ordered to be wound up by the Court---Appointment of liquidator to manage the affairs of the company---Winding-up order challenge to---Maintainability---Directors, powers of---Company that has been ordered to be wound up can challenge the winding-up order in its name, provided the institution of appeal and the person acting on behalf of the company are authorized by a resolution of its board of directors---Section 6(1) of the Companies Act, 2017 provides that "[a]ny person aggrieved by any judgment or final order of the Court passed in its original jurisdiction under this Act may, within sixty days, file a petition for leave to appeal in the Supreme Court of Pakistan."---It uses the general expression "any person aggrieved" and does not mention the specific persons competent to file a petition for leave to appeal---Company against which a winding-up order has been passed falls within the scope of the expression "any person aggrieved" and thus can file a petition for leave to appeal in the Supreme Court under Section 6(1) of the 2017 Act---Company can exercise such right of appeal through its directors---Upon the commencement of the winding-up proceedings, despite the appointment of the liquidator, certain powers still remain with the directors of the company who, before the winding-up order, had the ultimate responsibility for managing the company and acting in its best interests in their fiduciary capacity---Such powers are usually referred to as 'residuary powers', and are not affected by the provisions of company law like the proviso to Section 387 of the Companies Act, 2017---Therefore, a company against which the winding up order has been passed is to exercise its right of appeal through the board of directors---Board of directors can, by its resolution, authorise any person, including the former chief executive of the company, to act on behalf of the company in filing an appeal or a petition for leave to appeal against the winding-up order---When the directors can defend the original winding-up proceeding, they surely can also file and pursue an appeal arising from that original proceeding, as it is an integral part of defending the company from being wound up until it stands wound up or dissolved---This continuity ensures that the company retains its right of defense throughout the legal process---It is a necessary corollary of the company's right to appeal that its directors control the conduct of the appeal, just as they had control over the defence to the winding-up petition in the first instance---Denying the directors the capacity to exercise the company's right to appeal would effectively deprive the company of its locus standi to challenge the winding-up order, which would be contrary to the fundamental right of every person, including a juristic person like a company, to a fair trial and due process in the determination of civil rights and obligations, guaranteed by Article 10A of the Constitution---Regarding the expenses/costs for filing the appeal or petition for leave to appeal, the liquidator upon his appointment takes over the charge of all the assets and funds of the company, and the directors no longer have any control or authority to make or authorize any expenditure therefrom---Given this position, the directors inevitably have to arrange the funds for payment of fees to the counsel, etc., from their personal sources other than the funds and assets of the company and also bear the costs of appeal or petition for leave to appeal, if any, in case of dismissal---However, if the company's appeal succeeds and the winding-up order is set aside, they may get reimbursement of those expenses from the company's funds under a resolution of the board of directors made after the success of the appeal.

Re Diamond Fuel Company (1879) 13 Ch. D. 400; Ripon Press and Sugar Mill Company v. Gopal Chetti (1931) 58 Ind App 416; U.K. Jurisdiction: Re Union Accident Insurance Co. Ltd. (1972) 1 All ER 1105; Closegate Hotel Development (Durham) Ltd. v. McLean (2013) EWHC 3237 (Ch). Indian Jurisdiction; Anil

Kumar Sachdeva v. Four 'A' Asbestos [1980] 50 Comp Cas 122 (Del); Sinha Watches v. Gujarat S.F.C. (1985) 58 Com Cas 489 (Guj); Tata Finance Ltd. v. Chemox Chemical Industries, [2000] 100 Com Cas 338 (Bom); Rishabh Agro Industries v. P.N.B. Capital Services AIR 2000 SC 1583; Modi Rubber Ltd. v. Madura Coats Ltd. MANU/UP/1521/2004=2004 SCC Online All 1400 Australian Jurisdiction: Re Laverton Nickel (1979) 3 ACLR 945; Re Rick Wilson (1982) 7 ACLR 354. South African Jurisdiction: O'Connell Manthe and Partners v. Vryheid Minerale 1979 (1) SA 553 (T); Storti v. Nugent (2001) 3 SA 783 (W); Praetor v. Aqua Earth Consulting CC (162/2016) [2017] ZAWCHC 8 Malaysian Jurisdiction; Sri Hartamas Development v. MBF Finance (1991) LRC (Comm) 595; KTL v. Azrahi Hotels (2003) 3 CLJ 49. Singapore Jurisdiction; Sun Electric Power v. RCMA Asia (2021) 2 SLR 478; Hin Leong Trading v. Rajah and Tann, (2022) SGCA 28; Closegate Hotel Development (Durham) Ltd. v. McLean (2013) EWHC 3237 (Ch) and Re Rick Wilson (1982) 7 ACLR 354 ref.

(b) Appeal---

---Person adversely affected---Appeal, right of---Where a right of appeal is provided from a judgment, decree or order without specifying the persons who can avail it, every person who is adversely affected and thus aggrieved by such judgment, decree or order can avail that right of appeal.

Shahid Ikram Siddiqui, Advocate Supreme Court, Muhammad Imran Malik, Advocate Supreme Court, Tariq Aziz, Advocate-on-Record and Mian Liaqat Ali, Advocate-on-Record for Petitioners.

Salman Aslam Butt, Sr. Advocate Supreme Court, Shehzada Mazhar, Advocate Supreme Court, Muhammad Shoaib Rashid, Advocate Supreme Court, Anis M. Shahzad, Advocate-on-Record and Mobin Ahmad Siddiqui, Advocate-on-Record for Respondents.

Barrister Haris Azmat, Advocate Supreme Court, assisted by Ms. Faiza Asad, Advocate and Ch. Akhtar Ali, Advocate-on-Record for Applicants (in C.M.As. Nos. 2216, 2217 of 2024)

Uzair Karamat Bhandari, Advocate Supreme Court, Khwaja Ahmad Hosain, Advocate Supreme Court and Faisal Siddiqui, Advocate Supreme Court, Amicus Curiae.

Akif Saeed, Chairman, SECP, Muzaffar Ahmed Mirza, CP, SECP, Shamshad A. Rana, SPP, SECP. Barrister Omer Malik, SPP, SECP and Hussain Raza, SPP, SECP for the SECP.

Date of hearing: 7th May 2024.

ORDER

SYED MANSOOR ALI SHAH, J.---Two companies, Messrs Tanveer Cotton Mills (Pvt.) Ltd. and Messrs Tanveer Spinning and Weaving Mills (Pvt.) Ltd., ("petitioner-companies") have filed these petitions for leave to appeal under Section 6(14) of the Companies Act 2017 against a consolidated judgment of a Company Bench of the Lahore High Court, dated 17 June 2021 ("impugned judgment"). By the impugned judgment, the Company Bench allowed the petitions of the creditors, Summit Bank Ltd. and MCB Bank Ltd. ("respondent-banks"), for winding up the petitioner-companies and appointed official liquidators to manage the affairs of the petitioner-companies until the conclusion of the winding-up proceedings.

Further, the Company Bench ordered that since the industrial units owned by the petitioner-companies were operational, the official liquidators would ensure their continued operation through the existing employees.

2. The petitioner-companies have filed these petitions through their former chief executive, Mian Azhar Saleem, who is duly authorized by the resolutions of the board of directors of the petitioner-companies. However, before the Court could proceed to hear these petitions on their merits, the learned counsel for the respondent-banks raised a preliminary objection. He argued that since the petitioner-companies had been ordered to be wound up and the official liquidator appointed by the impugned judgment, they could not maintain these petitions in their names, especially through their former chief executive, who no longer has any authority in managing the affairs of the petitioner-companies after the appointment of the official liquidators. In support of his argument, he cited two judgments of the High Courts: (i) Hala Spinning Ltd. v. Industrial Development Bank (2002 CLD 978), and (ii) Muhammad Akbar v. Masood Baghpati (2019 CLD 1). This objection of the learned counsel for the respondent-banks thus gave rise to an important question of law, that is:

Whether a company that has been ordered to be wound up can challenge the winding-up order in its name through its board of directors or the chief executive officer.

The cases referred to by the learned counsel for the respondent-banks, however, were found not relevant, as they do not deal with the said question. The learned counsel for the petitioner-companies also could not cite any case of this Court or of any of the High Courts of the country that has dealt with the said question.

3. In this view of the matter and considering the importance of the question, we appointed Messrs Uzair Karamat Bhandari, Khawaja Ahmad Hosain and Faisal Siddiqi, distinguished practitioners in corporate law, as *amici curiae* to assist the Court in the matter. The learned *amici curiae* submitted comprehensive written briefs and presented detailed oral arguments on the said question of law. We appreciate their invaluable assistance and express our gratitude for their contribution. Additionally, Mr. Shahzada Mazhar, learned counsel for one of the respondent-banks, Barrister Haris Azmat, learned counsel for the applicants in the connected C.M.As. 2216-17 of 2024, and Mr. Akif Saeed, the Chairman, SECP, filed written submissions on the question.

4. We have read the cases referred to and considered the arguments on the aforementioned question of law.

5. While the question before us appears new in our jurisdiction, it has many precedents in other jurisdictions. The cases referred to us from other jurisdictions have answered the question in the affirmative, holding that a company that has been ordered to be wound up can challenge the winding-up order in its name, provided the institution of appeal and the person acting on behalf of the company are authorized by a resolution of its board of directors. No judgment from any jurisdiction has been cited by the learned *amici curiae* that takes a divergent view. Having reviewed the cases referred to, we concur with the view taken therein and the reasons stated. An in-depth discussion of these cases, we think, is unnecessary; instead, we find it appropriate to briefly state the main reasons that persuaded us to agree with the said view.

6. A well-settled principle of law, which hardly needs any references, is that where a right of appeal is provided from a judgment, decree or order without specifying the persons who can avail it, every person who is adversely affected and thus aggrieved by such judgment, decree or order can avail that right of appeal. A company is a separate juristic person, distinct from its directors and shareholders. When every person has a right to appeal a judgment, decree or order made against him, a company, which is also a person, cannot be treated differently. Just as any other person against whom an order is made can do, a company also has the right to argue before the appellate court that an order made against it is wrong. A winding-up petition is filed against a company. The winding-up order is made against the company. The company is thus a person aggrieved by such an order. Therefore, a company against which a winding-up order is passed does have the right to appeal it.¹

7. Section 6(1) of the Companies Act 2017 provides that "[a]ny person aggrieved by any judgment or final order of the Court passed in its original jurisdiction under this Act may, within sixty days, file a petition for leave to appeal in the Supreme Court of Pakistan." It uses the general expression "any person aggrieved" and does not mention the specific persons competent to file a petition for leave to appeal. However, given the above legal position, a company against which a winding-up order has been passed falls within the scope of the expression "any person aggrieved" and thus can file a petition for leave to appeal in this Court under that Section.

8. However, the matter does not end here. The next question arises: how is the company to exercise its right of appeal? Being a juristic person, it needs to act through natural persons. Who are those natural persons: directors, chief executive officer or liquidator? The cases referred to by the learned *amici curiae* answer this question in favor of the directors, with which we agree. The reasons for our agreement with and adoption of the same view on this point are as follows.

9. Under company law, as stated in the proviso to Section 387 of the Companies Act 2017, upon the commencement of the winding-up of a company, the liquidator takes the place of the board of directors and the chief executive of the company. They become *functus officio*, and their powers are assumed by the liquidator. Before the winding-up order, the power to institute or defend litigation in the name of the company regarding its affairs usually vests in the board of directors under its articles. Upon the commencement of the

winding-up proceedings, all powers and functions that were previously vested in the board of directors devolve upon the liquidator, who then acts on behalf of the company for its affairs. The winding-up order, however, is the very order under which the liquidator derives his authority to act on behalf of the company. It would be absurd and self-contradictory to suggest that the liquidator should act under the winding-up order to wind up the company and also challenge the same order in an appeal to save the company from being wound up. The very object of the appeal is to revoke the winding-up order and discharge the liquidator, causing the liquidator to lose his position and remuneration if the appeal succeeds. One is not expected or required to saw off the tree's branch he is sitting on. Further, it is the duty of the liquidator to act with complete impartiality between the parties contesting for and against the winding-up of the company. He is not to be a party in this contest. Consequently, the legal position emerges that despite the appointment of the liquidator, certain powers still remain with the directors of the company who, before the winding-up order, had the ultimate responsibility for managing the company and acting in its best interests in their fiduciary capacity. Such powers are usually referred to as 'residuary powers', and are not affected by the provisions of company law like the proviso to Section 387 of the Companies Act 2017.²

10. The criterion to determine the 'residuary powers' of the board of directors is to see whether or not the power in question has been passed on to the liquidator. If the answer is that it has not, that is a valid reason to conclude that the board of directors still retains the same.³ Since the liquidator cannot act on behalf of the company in filing an appeal against the winding-up order, the board of directors retains this power. Therefore, a company against which the winding-up order has been passed is to exercise its right of appeal through the board of directors. The board of directors can, by its resolution, authorise any person, including the former chief executive of the company, to act on behalf of the company in filing an appeal or a petition for leave to appeal against the winding-up order, as has been done in the present case.

11. Another well-established principle of law also supports the above conclusion: an appeal is a continuation of the original proceeding. No one disputes, or can dispute, that the directors of a company can, and usually do, contest the original proceeding initiated for winding up the company, i.e., the petition filed for winding up the company. A company that is ordered to be wound up does not stand wound up or dissolved upon the making of a winding-up order. The winding-up order does not mark the culmination of the winding-up proceedings but rather, in fact, initiates such proceedings.⁴ When the directors can defend the original winding-up proceeding, they surely can also file and pursue an appeal arising from that original proceeding, as it is an integral part of defending the company from being wound up until it stands wound up or dissolved. This continuity ensures that the company retains its right of defense throughout the legal process. It is a necessary corollary of the company's right to appeal that its directors control the conduct of the appeal, just as they had control over the defence to the winding-up petition in the first instance.⁵ Denying the directors the capacity to exercise the company's right to appeal would effectively deprive the company of its locus standi to challenge the winding-up order, which would be contrary to the fundamental right of every person, including a juristic person like a company, to a fair trial and due process in the determination of civil rights and obligations, guaranteed by Article 10A of our Constitution.

12. A minor point remains to be addressed: who would pay the counsel for the company in filing the appeal or petition for leave to appeal against the winding-up order, as well as the costs to the respondents if the Court awards the same while dismissing the appeal or petition. Upon his appointment, the liquidator takes over the charge of all the assets and funds of the company, and the directors no longer have any control or authority to make or authorize any expenditure therefrom. Given this position, the directors inevitably have to arrange the funds for payment of fees to the counsel, etc., from their personal sources other than the funds and assets of the company and also bear the costs of appeal or petition for leave to appeal, if any, in case of dismissal.⁶ However, if the company's appeal succeeds and the winding-up order is set aside, they may get reimbursement of those expenses from the company's funds under a resolution of the board of directors made after the success of the appeal.

13. Having thus answered the question of law raised and the ancillary points involved therein, we find the preliminary objection of the learned counsel for the respondent-banks to be not maintainable and therefore reject the same.

14. The office shall fix the case for hearing arguments on its merits after the summer vacation.

MWA/T-7/SC

Order accordingly.