2013 C L D 34
V [Sindh]
Before Munib Akhtar, J
ZULFIQUAR HUSSAIN and 2 others»~-Petitioners
Versus
BAMBINO (PVT.) LIMITED .
through Chief Executive Officer---Respondent
J.M. No. 50 of 201.0 and C.M.As. Nos.318, 319 of 2011.
decided on 29th May, 2012.
Ijaz Ahmed for Petitioners.
Mansoor ul Arfin, Nadeem Akhtar and Muhammad Junaid Farooqi for Applicant Shareholders.
Dates of hearing: 19th, 27th October, 2010, 16th November, 20th December, 2011, 13th and 23rd May, 2012.
ORDER

[Companies Ordinance (XLVII of 1984)]--- --Section 319--- Power of court to stay winding up etc.---Scope---Jurisdiction in company matters is equitable jurisdiction and at the discretion of court and the court has to act in accordance with well established principles regulating exercise of discretionary powers--- Much depends on relevant facts and circumstances of the case before the court and relative weight and importance that it assigns to such factors---Power conferred by S.319 of Companies Ordinance, 1984, is not open ended nor can -relief thereunder be claimed ex debito justitiae--Scope of S. 319 of Companies Ordinance, 1984, is time bound and application must be moved within three years of winding up order--All such factors ensure that S. 319A of Companies Ordinance, 1984, does not become a vehicle allowing vexatious or frivolous challenges being taken to winding up order.

(b) Companies Ordinance (XLVII of 1984)---Sections 305, 309 & 319---Companies (Court) Rules, 1997,R.28--Winding up of company--Ex parte order, setting aside of--Petitioners were majority shareholders and were aggrieved of ex parte order passed by High Court winding up of company in question---Validity---Even if irregularities and defects were regarded as essentially formal in nature, there was substantial injustice---Company on account of failure to serve it property, lost the opportunity to defend itself and was proceeded against ex parte in respect of matter that was literally life-and-death issue for a legal entity; question whether it should be -wound up or not---Company was proceeded against ex parte, substantial injustice had also been caused to the majority shareholders, who had been condemned unheard, although Rule 28 of Companies (Court) Rules, 1997, made provision for notice, in appropriate circumstances, being given to them--- Such injustice could not be remedied as the company itself had been ordered to be wound up--High Court recalled the order of winding up of the company, passed ex parte---Application was allowed accordingly.

Ladli Prasad Jaiswal v. Karnal Distillery Co. Ltd. PLD 1965 SC 221; Nagina Films Ltd, v. Usman Husain and others 1987 CLC 2263; Additional Registrar of Companies v. Noorie Textile Mills Ltd. 2008 CLD 277: Additional Registrar of Companies v. Schon Textile Mills Ltd. 2008 CLD 475; Abdul Rasheed Mughal v. ECSA (PK) (Pvt.) Ltd. 2006 CLD 852; Halsbury's Laws of England, Vol. 7(3) at page 859; East India Cotton Mills Ltd. AIR 1949 Cal. 69 and Nilkanta Kolay V. Official Liquidator AIR 1996 Cal. 171 distinguished.

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MUNIB AKHTAR, J.---The present applications raise an interesting and important issue under the Companies Ordinance, 1984, namely the proper scope and extent of section 319 thereof. The applications arise in the following circumstances. The petitioners, who are the minority shareholders of Bambino (Pvt.) Ltd. ("the Company") moved the main petition on or about 14-12-2010, seeking to have it wound up. The present applicants, who are the majority shareholders, were not made party, the sole respondent being the Company itself, The present applicants were admittedly in control of the management and affairs of the Company at all material times. The Company was served in a manner presently to be described but no one put in appearance on its behalf. A learned single Judge, being satisfied 'that the Company had been properly served, heard the matter ex parte on 13-05-2011 and reserved judgment, which was announced on 23-05-2011. The operative part of the decision states as follows:-

"13. Looking at the above state of affairs of respondent and the fact that despite service the respondent has not come forward to dispute or deny the allegations, as raised in the petition and looking in to the precedents, cited this court is left with no choice but to order winding up of the respondent which would be just and equitable. The Official - Assignee Karachi is appointed as Official Liquidator of the respondent with powers to him under the Ordinance 1984 to deal with the respondent and take further actions according to law. "

2. As the learned single Judge himself expressly noted and is even otherwise clear from the judgment, the Company was wound up on the just and equitable ground, essentially on the basis that it was in the nature of a quasi-partnership, in which the majority shareholders (the present applicants] being in control of its management had unlawfully excluded the petitioners (the minority) from its affairs. A number of acts of malfeasance and misfeasance, and other irregularities and illegalities were alleged against the majority shareholders and since the matter was ex parte, accepted as such by the learned single Judge. The official assignee started winding up proceedings and the applicants case is that it was only then that they and the Company came to know of the present petition. Thus, it is central to the applicants case that the Company was never served in the matter, The Company, through one of the present applicants, moved two applications on 31-05-2011, of which only one need be noticed (being C.M.A. No. 187 of 2011 ("C.M.A. 187"], which was an application under Order IX, Rule 13, C.P.C. (The other application was for interim injunctive relief). As is well known, this provision allows for ex parte decrees to be set aside in appropriate circumstances. The applications came up for hearing before another learned single Judge who, by order dated 12-08-2O11, dismissed them both. As presently relevant, the learned single Judge held as follows:--

"As regards the maintainability or application under Order IX, Rule 13, C.P.C. is concerned, l am convinced with the arguments of learned counsel for the petitioner that the Code of Civil Procedure has no applicability in the Companies matters as it is a special jurisdiction and only Companies Ordinance is applicable. Section 10 of the Companies Ordinance is relevant on the point, which is reproduced [the learned single Judge then-reproduced section 10]."

3. In these circumstances, the present applicants filed the two applications now under consideration on 12-10-2011. One application is for interim injunctive relief. The other. C.M.A. 318 of 2011 ("C.M.A. 318"), is under section 12(2), C.P.C. seeking to have the ex parte winding up order of 23-05-2011 set aside on the ground that the same has been obtained through fraud, misrepresentation and suppression of facts. These applications came up before me on 19-10-2011, when I made the following order:--

"After having heard learned counsel for the petitioners, who is on notice on C.M.As. Nos.318 of 2011 and 319 of 2011 as also learned counsel for the applicants, who are admittedly the majority

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shareholders of the respondent-company and were in control of the Company at the relevant time, 1 am tentatively of the View that in terms of section 319 of the Companies Ordinance, the Court can if it considers it just and convenient to do so stay winding up of the company.

Learned counsel for the petitioners strongly opposes any stay of the winding up of the company, since in his submission, the object and scope of section 319 is different and, as 1 understand him, rather limited. By consent adjourned to 27-10-2011 at 1-00 p.m. on which date let learned counsel for the applicants satisfy the Court as to Whether their application under section 12(2), C:P.C. is maintainable in the present facts and circumstances and the record as of today, and learned counsel for the petitioners along with other learned counsel may assist the Court on the proper scope and application of section 319 and also s to whether one or both of pending applications can be considered to be an application for purposes of section 319.

Till next date of hearing the Official Liquidator is directed not to take any further steps or proceedings
in the matter."

The present applications have been heard on the foregoing basis. For convenience. the present applicants are herein after referred to as the "majority shareholders" and the petitioners who filed the main petition are referred to as the "minority shareholders".

4. The first point taken by learned counsel for the majority shareholders was that the Company was never properly served in accordance with law. Learned counsel referred to various provisions of the Companies (Court) Rules, 1997 ("1997 Rules") in this regard, He submitted the Company ought to have been served through its chief executive, but this was never done, and as per the bailiffs report, service was effected on one Mr. Ayaz Sajjad, identified as an "accountant". It is to be noted that the copy of the summons signed by Mr. Ayaz Sajjad did not bear the Company`s stamp. Learned counsel referred to an affidavit of one Mr. Ayazuddin Ahmed (filed along with C.M.A.318) who stated that he was a contractor employed with the Company and no notice was ever served on him, and an affidavit sworn by Mr. Sajjad Ahmed [filed likewise), who stated that he worked as an "assistant" in the Company and also denied that any notice had been served on him. Learned counsel submitted that as the Company was never served in accordance with law, its ex parte winding up was entirely improper and liable to be set aside on this ground alone.

5. Referring to C.M.A. 187 (the earlier application under Order IX, Rule 13, that had been dismissed) learned counsel contended that that application was no bar to the filing of the present application under section 12(2) nor was such-an application barred by reason of the fact that the Company could have filed an appeal against the winding up order, He referred to certain case-law in this regard, Learned counsel contended that a case under section 12(2) was fully made out in the facts and circumstances of the present case.

6. Learned counsel also submitted that the majority shareholders' were necessary parties to the main petition since they were admittedly, in control of the Company and the case for winding up was based, on alleged acts of misfeasance and malfeasance and other illegalities said to have been committed by them. While totally denying such allegations, learned counsel submitted that the majority shareholders had a right of hearing separate and distinct from the Company itself, which had been denied to them and they had been condemned unheard. He submitted that the learned single Judge who had ordered the winding up had accepted all the allegations made against them and the judgment was based squarely on the material that had been placed before the Court by the minority shareholders. Referring to various cases, learned counsel submitted that the Court had ample powers, whether under section 319 of the Companies Ordinance or section 12(2), C.P.C.

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to make appropriate orders in respect of the winding up order, which was wholly contrary to law and even otherwise not sustainable. He prayed for relief accordingly.

7. learned counsel for the minority shareholders strongly opposed the present applications. He submitted that in C.M.A. 318 (the application under section 12(2), C.P.C., the majority shareholders had taken two grounds, viz., that the majority shareholders ought to have been joined as respondents in the main petition (para 7 of the application)and that notice had not been properly served on the Company (para 10). He contended that both these grounds had already been taken in C.M.A,187, which had been dismissed. The earlier application had been supported by the affidavits of both the majority shareholders. Thus. C.M.A. 318 was nothing but a repetition and an attempt to re-agitate issues already raised and decided. He submitted that even if the provisions of Order IX, Rule 13, and section 12(2), C.P.C. were distinct and proceedings could be maintained separately in terms thereof that did not mean that a party could resuscitate the same objections already dismissed under one provision in the garb of an application under the other. As regards the issue of service; learned counsel submitted that the Company had been properly served and that the person on whom the bailiff had served notice had been properly identified. The objection that the provisions of the Rules had not been adhered to Was unavailable to both the Company and the majority shareholders. In this regard, learned counsel also referred to certain case-law.

8. Learned counsel further submitted that section 319 had no application in the facts and circumstances of the present case. He submitted that this section Was in part materia section 173 of the (repealed) Companies Act, 1913. Learned counsel contended that the scope of section 319 was well established and referred to certain cases in support of his contention. He submitted that the section presupposed the validity of the winding up order and came into operation only if there were circumstances after the winding up that justified an order in terms thereof. In other words, his case was that the validity of a winding up order could only be challenged in appeal, Whereas if there were anew or changed situation or circumstances after the winding up order, ,then (and then alone) could the Court exercise powers under the section, but without touching, the validity of the order itself. Inasmuch as the majority shareholders sought to challenge and have set aside, the very order itself, section 319 had no application. Learned counsel submitted that the present applications were entirely without merit and prayed that they be dismissed.

9. I allowed learned counsel to submit synopses and each learned counsel submitted his synopsis making reference to certain cases, which I will consider as and to the extent necessary and appropriate.

10. I have heard learned counsel as above, examined the record with their assistance and considered the case-law relied upon. I begin with section 319 of the Companies Ordinance, which provides in material part as follows:--

"319. Power of Court to stay winding up, etc. (I) 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."

Section 173 of the precedent legislation, the Companies Act, 1913 had provided as follows:-

"The Court may at any time after making a winding up order, on the application of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the

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winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit."

Section 466 of the (Indian) Companies Act, 1956 states in its subsection (1) as follows:--

"The Court may at any time after making a winding up order, on the application either of the Official Liquidator or of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit."

(It may be noted that this subsection has been substituted with a provision not yet brought into force, but the new subsection is the same insofar as is presently relevant.) Reference may also be made to English legislation. Section 256(1) of the Companies Act, 1948 had provided as follows:-

"The court may at any time after an order for winding up, on the application either of the liquidator or the official receiver or any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit."

Section 147(1) of the Insolvency Act, 1986 that is currently applicable in England is in the same terms in all material respects.

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. Learned counsel for the minority shareholders submitted that all of these words had essentially the same meaning but I cannot, with respect, agree. If the intent had been to simply empower the court to "stay", proceedings, section 319 could easily have achieved that result by the simple expedient of limiting itself to that word. There was nothing preventing the law maker from (e.g.) copying out section 173 of the precedent legislation, which is in fact what in substance happened in India. I may also note here that in most respects, the Companies Ordinance tends to faithfully follow the (English) Companies Act, 1948 (which was still in force when the Ordinance was promulgated) but the language of section 3l9 differs from that of section 256 of the latter. 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. Furthermore, the additional words do not have the same 'meaning or connotation as "stay": it would be entirely inappropriate to hold that to "withdraw", "revoke" or "cancel" proceedings is the same thing as to "stay" them. Each of the first three words has a rather different meaning and connotation, and even if they are to be regarded as having the same or similar shades of meanings, these are essentially different from the meaning conveyed by the word "stay".

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. However, can proceedings be "withdrawn", "cancelled" or "revoked" to like effect? 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). While it is not difficult to conceive of all the winding up proceedings being stayed with the order itself remaining intact, can this happen in a meaningful

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sense in relation to the withdrawal, cancellation or revocation of the proceedings? Once (for example) all winding up proceedings have been cancelled, what is there left in and of the order itself? One possible answer could perhaps be to conclude that the power to cancel or revoke all proceedings operates, as it were, as a sort of certiorari, wiping the liquidation slate clean and permitting the winding up proceedings to be begun de novo. This solution is perhaps conceivable, but I find it quite unattractive and in any case, would not apply in a case where the Court orders the withdrawal of all the proceedings. If 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. Whether the order remains in existence or not is then a mere formality without any substance. Now these Words, "either altogether or for a limited time", have been omitted in section 319. Once it is accepted (as in my view it ought to be) that the additional words are intended to have a meaning and effect qualitatively different from merely staying the proceedings. this omission makes sense. This is so because it would be incongruous .to postulate winding up proceedings being "withdrawn", "cancelled" or "revoked" only for a limited time. The effect of an order in these terms would be incompatible with limiting its duration in time. 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. As noted above, learned counsel for the minority shareholders submitted that the validity of a winding up order could only be challenged in appeal. 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. As is clear from the foregoing discussion, I cannot accept these submissions, at least in the broad manner as submitted. At the same time, it must be accepted that section 319 is not an open invitation to re-agitate or reargue matters that must be regarded as having been settled elsewhere. In my view, the following points will help establish the correct position and balance. Firstly, if an appeal is preferred against a winding up order and decided before an application under section 319 is disposed of. Then any matter or issue covered by the appellate decision would be final and not open for consideration (or reconsideration, as the case may be] under section 319. This is so for the obvious reason that the decision of the appellate court would be binding on the court exercising the section 319 jurisdiction. Secondly, even if no appeal is preferred and the matter is before the court under section 319, the court is not bound to grant relief in terms thereof. 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. In my view, all of these factors ensure that section 319 does not become a vehicle allowing vexatious or frivolous challenges being taken (and perhaps taken repeatedly) to winding up orders.

14. Applying these principles to the facts of the present case, in my view if a winding up order is made on a contested petition, i.e., where the company (and/or other respondents) have been heard by the court on the merits, it would be scarcely possible for an application under section 319 to succeed in respect of a matter or issue so decided, or indeed, in respect of any matter or issue that could or ought to have properly been taken by the contesting respondent(s) at the

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hearing of the winding up petition. The position however, is somewhat different when the winding up order is made ex parte. Here, in my view, the two matters that were raised by learned counsel for the majority shareholders would indeed require attention: what is the basis on which winding up was sought and the order made, and was the company [and other persons, if any, so entitled) properly served or not emphasize that an answer adverse to those petitioning for the winding up on either or both of these issues would not mean that the applicant(s) under section 319 are entitled to an order as of right. That would still be at the discretion of the court. However, these factors are important and relevant and the answer to be given to them must be carefully weighed and considered by the Court in disposing off the application under section 319.

15. I turn therefore to consider these questions, and take up first the issue of service: The learned single Judge who made the winding up order noted (in pars 8 thereof) as follows:-- p "After presentation of the petition, notices were rdered and issued to the respondent through bailiff, courier, publication and official gazette. The record shows that the respondent was served, Despite CLD A 2013] Zugfiquar Hussain v. Bambini (Pvt.) Limited 45 (Munib Akhtar. J)service, there is no response, reply or rebuttal by the respondent."

The reference to "publication and official gazette" is to the requirement, as per Rules 19 and 78 of the 1997 Rules, to advertise the winding up petition (in the required form) in the press and publish the notice in the official gazette. The purpose of such publication however, is not to give notice to the company itself but rather to put other persons (such as a creditor or a contributory) on notice regarding the filing of the winding up petition. With respect therefore, such publication is not relevant insofar as the question of whether the company was properly served or not is concerned.

16. insofar as service on the Company is concerned, learned counsel for the majority shareholders referred to various provisions of the 1997 Rules to establish that there had been no proper service. Learned counsel for the minority shareholders on the other hand contended that service had been properly effected especially through the bailiff. I have carefully considered the question, which if I may say so, has proved rather less tractable and requiring of greater attention than one would have thought. In my view, the starting point must be' section 48 of the Companies Ordinance, which provides as follows:--

"Service of documents on a company.---A document--may be served on a company or an officer thereof by sending it to the company or officer at the registered office of the company by post under a certificate of posting or by registered post, or by leaving it at the registered office of the company."

Section 2(1)(14) provides that "document" includes summons. Thus, summons can be served in either (or both) of two ways; either by sending it to the company at its registered office by registered post, etc., or by "leaving" it at the registered office.

17. Rule 23 expands on section 48 by providing, in sub-rules (1) and (2), how the summons is to be served through post "or through other approved mode". Sub-rule (3) explains how summons can be served by "leaving" it at the company's registered address, and provides in material part as follows (emphasis supplied):--

"Every petition and, save as otherwise provided by these Rules or by an order of the Court, every application, shall… be served on the company at its registered office, or if there is no registered office, at its principal or last known principal place of business, by leaving a copy thereof with an officer or employee of the company ...."

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Thus, service may be effected by leaving a copy of the petition or application with an "officer or employee" of the company. Section 2(1)(24) defines an "officer" in material part as follows:-- "

"'officer` includes any director, chief executive, managing agent, secretary or other executive of the company, howsoever designated .... "

Before proceeding further, it will be appropriate also to refer to the relevant provisions of the precedent legislation. Section 148 of the Companies Act, 1913 had provided as follows:-

"Service of documents on a company.---A document may be served on a company by leaving it at, or sending it by post, to the registered office of the company."

Rule 782 of the Sindh Chief Court Rules (OS) provided, in terms substantially similar to Rule 23(3) of the 1997 Rules, that summons could be served on a company, inter alia, by leaving a copy thereof with any "officer or servant" of the company at its registered office. Section 2(1)(11) of the Companies Act, 1913 had defined "officer" (in material part) as including "any director, managing agent, manager, or secretary".

18. In my view, the crucial question is the proper meaning of the words "officer or employee" as used in Rule 23(3) (or "officer or servant" in the more traditional language of Rule 782). The reason why this question arises is because in my View the definition of "officer" is intended to apply only to a restricted category of persons. This is so notwithstanding that the definition is inclusive and not exhaustive. The offices or posts specifically listed constitute the` top or senior management or officials of the Company, Of course. all such offices or posts cannot be exhaustively listed, and the definition sensibly uses the word "includes". However, it is obvious that even if the net cast 'by the definition is wider than the senior or top management, ultimately it is only a limited cadre that can be designated as "officers", This class would normally be a small proportion of the company's staff. An officer may well also be an employee, but the reverse is not necessarily (or even normally) true. (Of course, the directors of a company are only officers, and not employees.) The employees of a company would normally be a far larger class greatly exceeding the officers in number, Thus, (e.g.) a peon or security guard cannot conceivably be an "officer", but they are certainly "employees" of the company. Now. Ones initial inclination would be to read and apply the words "officer or employee" disjunctively. However. in light of the foregoing discussion that could, in my view, pose a problem. For example, suppose a company has its registered office at its factory premises. Applied literally and read disjunctively, the aforesaid words in Rule 23(3) would permit the summons to be served simply by "leaving" it with any "employee". As is at once obvious, this would include a very large number of persons. Even a factory worker or sentry at the gate would qualify as would, potentially, hundreds of other "employees". The larger the company, the more acute the problem. In other words, service on the lowliest person would have to be held good as long as he is an "employee". On this approach, service by leaving the summons or petition with an "officer" would essentially become moot. This surely cannot be right.

19. The position postulated above may be compared with that obtaining under Order XXIX, Rule 2(1), C.P.C., which allows summons to be served "on the secretary, or on any director, or other principal officer of the corporation". The contrast with Rule 23(3) is immediate and striking. The persons on whom service can be effected under Order XXIX are strictly limited to the top or senior management or officers of the company, No one else, whether employee or servant, is relevant for purposes of service. Of course, this provision is no longer applicable to companies since it applies "subject to any statutory provision regulating service of process", and the matter for companies is now regulated by the 1997 Rules.

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20. In my view, the correct approach to take is to apply the words "officer or employee" not disjunctively but sequentially-In other words, for proper and lawful service, an effort must first be made to "leave" the summons or petition etc. with an officer at the registered office. It is only if this proves unsuccessful or not possible that the summons can be left with an employee. In this manner, not merely will both terms be given meaningful effect but the hierarchy that necessarily exists between them will also be recognized and given proper application. I appreciate that nice questions may sometimes arise as to whether a particular person is an officer or "merely" an employee. That is perhaps inevitable; there will always be borderline cases. It would therefore be advisable for the person effecting service to have the copy being signed in acknowledgement of receipt of summons, etc. also stamped with the company's stamp. A company's stamps invariably in the custody of some responsible person or at least is affixed to a document with the knowledge or concurrence of some such person. Certainly. and at the very least. the bailiffs report should indicate that he attempted to have the company's stamp affixed on the copy being returned.

21. Applying the foregoing principles to the present case, it will be recalled that the bailiff reported that he had served the summons (i.e. left it with) one Mr. Ayaz Sajjad, identified as an "accountant" of the Company. The first question therefore is whether an accountant can be an officer of a company within the meaning of section 2(1)(24). In this context, it will be appropriate to keep in mind the Form 'A' that section 156 requires every company having a share capital to file with the Registrar, SECP on an annual basis. The format of Form 'A' is given in the Third Schedule to the Companies Ordinance and among the information that must be supplied is the name and particulars of the chief accountant of the company. The chief accountant is therefore clearly an "officer" within the meaning of section 2(1)(24). In my view, it is doubtful whether any other accountant can also be so categorized. On the view that I take of the definition of "officer", every accountant (or person employed in the accounts department) would not necessarily come within its ambit. Now, in the present case, SECP filed its comments to the main petition, and along with the same, the Form 'A' of the Company, made up to 30-10-2010 was also placed on record. This Form 'A' shows that the chief accountant was one Mr. Muhammad Asim. In my view, it is questionable whether the Company was properly served in the matter, even assuming that Mr. Ayaz Sajjad was indeed an accountant employed with the Company, which is something that the latter contests. Mr. Ayaz Sajjad would seem to be merely an employee of the Company and it appears that no effort was made to first serve an officer in the manner that It have just indicated. It is also to be noted that there is some discrepancy, between the statement made on oath by the bailiff regarding service and the endorsement appearing on the returned copy. In the statement (which is in Urdu) the bailiff appears to be speaking of one person alone, one Mr. Ayaz Sajjad. The endorsement on the returned copy gives the impression that there may have been two persons, one Mr. Ayaz and the other Mr. Sajjad. The Company's stamp is also not affixed thereon. Therefore, there in my view reasonable doubt whether the Company was properly served through the bailiff. Since it is also not clear whether service through courier was properly effected it would seem that it is questionable whether the Company was at all served in accordance with law.

22. The next question that requires consideration is Whether the present applicants, the majority shareholders, were entitled to be served or not. Learned counsel for the minority shareholders submitted that they were not, and the Company was properly the sole respondent to the main petition and service was only to be effected on it. To address this question, the following provisions of the 1997 Rules will have to be considered:--

"21. Service of petition.---Every petition shall be served on the respondent, if any, named in the petition and on such other persons as the Ordinance or these rules may require or as the Judge or the

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Registrar may direct and a copy of the petition and the affidavit shall be served alone with the notice
of the petition." This is a general provision and as will be seen, it does recognize the possibility of persons other than the respondent being served with the petition. This is however, at the discretion of the Court or the Registrar [of the court). There is also a more specific provision, which relate s to winding up petitions:--

"76. Admission of petition and directions as to advertisement.---Upon the filing of the petition, it shall be placed before the Judge for admission of the ' petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served and the Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition."

It will be seen that in the specific context of winding up petitions, the 1997 Rules again empower the Court to give directions as to the persons, if any, upon whom copies of the petition are to be served, The question that naturally arises is what was the need for repeating in Rule 76 something that was already contained in Rule 21? It will be noted from Rule 76 that a winding up petition must be placed before the Court for admission, which is not the case with other petitions and matters, which may be admitted by the Registrar. In other words. for fairly obvious and understandable reasons. it would appear that the Court is required to apply its mind to the winding up petition before further proceedings are taken with regard to notices, advertisement, etc. When viewed in this perspective, it appears to me that the Court must direct its mind to the question whether there are any persons who ought to be served with copies of the winding up petition in addition to the company itself (i.e._ any persons other than those arrayed in the petition as respondents). This exercise assumes particular significance when the company is sought to be wound up on the just and equitable ground, i.e.. as a quasi partnership in accordance with the principles affirmed by the Supreme Court in Ladli Prasad Jaiswal v. Karnal Distillery Co. Ltd. PLD 1965 SC 221 and applied, among others, by a Division Bench of this Court in Nagina Films Ltd. v. Usman Husain and others 1987 CLC 2263. It may be that the Court. after so considering the matter, is satisfied that notice should go to the company alone if it is the sole respondent. However, in my view, in the specific context of winding up on the just and equitable ground, the Court ought to consider whether notice should also go to the shareholders who stand accused by the petitioners of wrongdoing, especially if such shareholders are said to be in control of the company. This, to my mind, is at least part of the reason why Rule 76 has specifically empowered the Court to give necessary directions in this regard notwithstanding, the general provisions contained in Rule 21. This is all the more so when the company sought to be wound up is being proceeded against ex parte. It would therefore seem that in the present case, where the record does not indicate that the attention of the learned single Judge was drawn to this aspect of the matter, there does appear to be merit to the majority shareholders grievance that they have been condemned unheard and ought to have been specifically given notice by the Court of the Winding up petition. At the very least, if I may say so with respect, there should have been some consideration given to this aspect of the matter.

23. On the foregoing basis. I would conclude and hold. with utmost respect to the learned single Judge who made the winding up order, that there have been. at the very least. irregularities in the service on the Company which was proceeded against ex parte, and in considering the question whether notice ought to have been issued to the majority shareholders especially when the Company was ex parte in a winding up on the just and equitable ground. To revert now to the issues identified in para 14 what is the effect of these irregularities? To answer this question, reference will have to be made to Rule 28, which states in material part as follows:--

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"28. Validity of service and of proceedings.--- No proceedings under the Ordinance or these rules shall be invalidated by reason of any formal defect or irregularity [in service], unless the Judge before whom the objection is taken is of the opinion that substantial injustice has been caused by such defect or irregularity and that the injustice cannot be remedied by an order of the Court." The objections having been taken before me in the present proceedings on the basis of the foregoing defects and irregularities in service, I have to consider whether there has been "substantial injustice" as a result thereof and if so. whether that injustice can be remedied by an order of the Court. In my view, even if the irregularities and defects in the present case are regarded as essentially formal in nature. there has clearly been substantial injustice. The Company, on account of the failure to serve it properly, lost the opportunity to defend itself and was proceeded against ex parte in respect of a matter that is literally a life-and-death issue for a legal entity: the question whether it should be wound up or not. Precisely because the Company was proceeded against ex parte, substantial injustice has also been caused to the majority shareholders. who have been condemned unheard although the 1997 Rules make provision for notice. in appropriate circumstances, being given to them. I my view, the present circumstances appropriately come within the scope of Rule 28. Obviously. this injustice cannot be remedied since the Company itself has been ordered to be wound up. I would also note in the present context that the Company (acting through the majority shareholders) immediately filed C,M.A. 187 (on 31-05-2011), as soon as the winding up proceedings were initiated on the making of the winding up order on 23-05-2011. The alacrity of the response in the immediate aftermath of the winding up order also indicates that neither the Company nor the majority shareholders had any knowledge of the winding up petition since it would serve no purpose for the majority shareholders, who were admittedly in control' of the Company, to let its (and their) case go by default and risk the making of what in fact did happen a winding up order.

24. Learned counsel for the majority shareholders relied on Additional Registrar of Companies v. Noorie Textile Mills Ltd. 2008 CLD 277 (SHC; SB), wherein an ex parte order of winding up was set aside. It appears that this decision was not brought to the attention of the learned single Judge who made the order dated 12-08-2012 whereby C.M.A. 187 was dismissed. However, I would not like to say anything more on this point since l understand that an appeal is pending against that order. Learned counsel also relied on Additional Registrar of Companies v. Schon Textile Mills Ltd. 2008 CLD 475. In this case, a winding up order was revoked pursuant to section 319 though on account of the situation that developed after the making of the winding up order. It was observed as follows (pg. 481):--

"The powers contained in section 319 of the Companies Ordinance appear to be independent and not subject to any order in appeal and the same can be exercised irrespective of filing of appeal. The only condition is that the application has to be made within three years of the order. However, the Court while revoking the winding up order may put conditions to safeguard the interest of the creditor/ contributors."

25. Learned counsel for the minority shareholders relied on Abdul Rasheed Mughal v. ECSA (PK) (Pvt.) Ltd. 2006 CLD 852 [LHC; SB). In that case it appears that the company was put in members voluntary liquidation subject to the supervision of the court and subsequently one of the shareholders filed an application under section 319. The learned single Judge referred to the relevant principles applicable under English law, reproducing extracts from Halsbury's Laws of England, Vol. 7(3) at pg. 859. He also referred to In re: East India Cotton Mills Ltd. AIR 1949 Calcutta 69 and Nilkanta Kolay v. Official Liquidator AIR 1995 Calcutta 171, and reproduced the relevant extract from the latter decision at pp. 859-60. These Indian decisions were also cited by learned counsel for the minority shareholders. After considering the matter, the learned single Judge was pleased to dismiss the application under section 319. The statutory context in which

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English and Indian law has developed has already been stated above, namely. that the power of the court is only to stay winding up proceedings. Therefore, while I do not have any cavil with the propositions so developed in that context (and as so applied by the learned single Judge) in my view they are only of direct assistance when one is 'considering whether to stay winding up proceedings' under section 319. Those principles cannot, in my view, limit the jurisdiction of the Court when considering whether Winding up proceedings should be cancelled withdrawn or revoked. Furthermore, on the facts also, the cited case was quite different from the one at hand. Firstly, the manner and reasons for which the company was put in liquidation were different from those at hand. Secondly, the applicant before the Lahore High Court held only one share in the company out of an issued share capital of 105,900 shares (pg. 862). Thirdly, the learned single Judge also expressly noted (pg. 861) that the applicant did not wish for the winding up order to be revoked, but merely for a stay of proceedings pending an investigation into the title of a property claimed by the company. The conclusion (pg. 862) was that the application was not bona fide and hence it was dismissed. This decision does not therefore directly apply in the facts and circumstances of the present case.

26. In my view. keeping in mind and taking into account all the relevant factors and applicable principles as stated herein above, the present order of winding up cannot, with respect, be sustained and accordingly a case has been made out for the exercise of jurisdiction under section 319. It is not therefore necessary for 1 me to consider in detail the submissions made by learned counsel in relation to section 12(2), C.P.C. and the applicability thereof and the maintainability of an application thereunder on account of the earlier dismissal of the application under Order IX, Rule 13. C.P.C.

27. Accordingly, in light of my order dated 19-10-2011. I treat C.M.A. 318 of 2011 as an application under section 319 and allow the same on that basis, The judgment dated 23-05-2011, and the winding up order made thereby, stand recalled and vacated. In the circumstances. C.M.A. 319 of 2011 has become infructuous and is disposed off as such. The main petition may now be listed for hearing on a date to be fixed by office. The Company and the majority shareholders may file their replies within eight weeks from today.
Application allowed.

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