JUDGMENT SHEET

***IN THE LAHORE HIGH COURT LAHORE***
***JUDICIAL DEPARTMENT***

***C.O No.7 of 2016***

***Tariq Nasim Jan & others***

Versus

***Al-Hamra Hills (Pvt.) Limited & others***

**J U D G M E N T**

| | |
|---|---|
| Date of Hearing. | 29-05-2017 |
| PETITIONER BY: | M/s Babar Sattar, Shahzain Abdullah and Asghar Leghari, Advocates. |
| RESPONDENTS BY: | Ms. Ayesha Hamid, Advocate for respondents no.1to 4, 7 & 8.<br>Barrister Hamza Gulzar for respondents No.5 & 6.<br>Mr. Haroon Duggal, Advocate for respondent No.10. |

**C.M No.443 & 444 of 2017**

**Shahid Karim, J:-** This is an application under Order VII, Rule 11 read with section 151 of Code of Civil Procedure **(CPC**) for the dismissal of the petition under Sections 290, 291, 292 (**"the petition"**) of the Companies Ordinance, 1984 (**"the Ordinance, 1984"**). This application has been filed on behalf of the respondent Nos.1, 2 and 3 (**"the application"**).

2. At the heart of this application is the challenge to the competence of the petitioners to maintain the petition on the ground that they are neither covered by the term 'member' or 'creditor' as used in section 290 of the Ordinance, 1984 which only entitles either a member or a

creditor to bring the petition under Section 290 and, therefore, the petition ought to be dismissed on the threshold. The learned counsel for the parties were required to address their arguments on the baseline issue raised in this application.

***Relevant Facts***:

3. In order to lend actuality to the controversy involved and the legal question which is sought to be determined in this application, certain basic and primary facts will have to be brought forth. It is the case of the petitioners that they have collectively paid a sum of Rs.2.4 billion as consideration for plots of land in a country farm Housing scheme launched and marketed by the respondent No.1 Al-Hamra Hills (Private) Limited (**"Al-Hamra Hills"**) during 2005-06. This amount constitutes three times the amount of paid up share capital of Al-Hamra Hills and, therefore, the petitioners are allottees of the plots having deposited the consideration. Al-Hamra Hills failed to develop and hand over the plots in accordance with the legal obligations and reneged on its promises and continued to solicit additional deposits from the members of public. The petitioners No.1 to 7 claim to be professionals of eminence and petitioner No.8 is an association created under an agreement to protect the interests of allottees of respondent No.1. By that token, the petitioners claim to be the creditors and investors of respondent No.1 who were

each sold a plot of land in 2006 in Zone IV of Islamabad Capital Territory within Al-Hamra Hills Agro Farming Scheme (**"the Project"**) approved by Capital Development Authority (**CDA**). Al-Hamra Hills was incorporated on 26.01.2005 and the registered office is situated at Lahore. Respondent No.2 is the holding company of Al-Hamra Hills and is its majority shareholder. Respondent No.3, Eden Builders Limited is a public limited company incorporated under the Ordinance, 1984. Eden Builders is an associate company of both Orange and Al-Hamra Hills. Respondent Nos.5 to 8 in the main petition are directors of Al-Hamra Hills.

4. It is not necessary to narrate the entire historical facts. It would suffice to reiterate the fact that Al-Hamra Hills launched the Project in 2005-06 in which the petitioners invested their money and purchased the proposed plots by signing an agreement dated 20.05.2008 which was entered into by each of the petitioners. According to the contents of the petition the development of the Project and delivery of the plots as promised by the company, was delayed and the plots were not handed over to the allottees/petitioners in time. In the meantime and due to the inability of Al-Hamra Hills to complete the Project, the original sponsors/ shareholders issued a Request for Proposals dated 01.03.1013 for the sale of ownership and management of the company. Eden

Builders made a successful acquisition proposal to purchase majority shares of the company and subsequently entered into several share purchase agreements with various shareholders. The shares were acquired and transferred in the name of Orange by Eden Builders. The share purchase agreement in its recitals clearly stated that the request for proposals had been issued for the purpose of procuring the completion of the Project. Pursuant to the terms of the sale purchase agreement and as a precondition to the transaction, respondents No.1 to 3 executed a Ring Fencing Agreement with the petitioners dated 23.5.2013 which was an integral part of the sale purchase agreement and a condition precedent. The petitioners assert that the sale purchase agreement and the Ring Fencing Agreement accept the petitioners as creditors and stakeholders in the Project. The petition further mentions that even after the change of management, the company continued to commit a breach of the mandatory terms of the Ring Fencing Agreement. The rest of the facts and the grounds mentioned in the petition are in the realm of merits of the case with which we are not concerned at this stage. The only issue which concerns this Court at this juncture is whether the petition is competent and has been brought by persons who have a standing in terms of section 290 of the Ordinance, 1984 to file such a petition.

5. The learned counsel for the applicant alluded to pending litigation brought by the petitioners at various courts. For example, a civil suit bearing COS No.1145 of 2013 has been filed at the Sindh High Court by the petitioners. The suit is for declaration, injunction, specific performance and damages. In that suit on 13.9.2013 the following interim order was passed:-

> *"Issue notice to the defendants for 02.10.2013. Till the next date of hearing, the defendants are restrained to take any coercive action against the plaintiffs No.1 to 6 and the members of plaintiff No.7, which include not to create any third party interest. Parties are directed to maintain status-quo till the next date of hearing."*

6. It is clear from a reading of the interim order, reproduced above, that the defendants in that suit which are the respondents in this petition as well, have been restrained from any coercive measures against the plaintiffs therein as also not to create any third-party interest and the parties have been directed to maintain *status-quo*. The suit is still pending and the interim order is also in place. A constitutional petition was also filed with the Islamabad High Court bearing W.P No.2659 of 2015 once again by the same set of petitioners which too is pending and sought certain directions to the CDA to ensure the completion of the Project as also to restrain the respondents not to collect any further deposits and advances from new investors for the Project. A suit bearing No.6 of 2016 was also filed with the Islamabad High Court. The suit is for specific performance,

declaration, injunction and damages. Primarily, the suit No.6 of 2016 seeks the specific performance of the sale purchase agreement and to deliver the possession and title of the plots in the name of the petitioners.

***Determination***:

7. To reiterate, the petitioners have based their claim on their standing as creditors and that the petitioners have filed consent forms as allottees who have collectively paid a sum of Rs.2.1 billion in the form of advances. The respondent No.1, according to the petitioners, owes an obligation to the petitioners by sale purchase agreement dated 20.05.2008 as also the subsequent Ring Fencing Agreement, the fulfillment of both of which allegedly have gone abegging. The respondent No.1, therefore, as brought forth in the petition, is obligated to discharge its obligations under the agreement and in case of failure to do so, the petitioners have a pecuniary claim against the company. Since the petitioners were called upon to establish their standing to maintain the instant petition, the petitioners claim to be creditors albeit contingent of Al-Hamra Hills in the broadest and holistic sense and thus entitled to maintain the instant petition.

8. As a prefatory, a reference may be made to the definition of the term “creditor” relied upon by the learned counsel for the petitioners and elucidated in various precedents and dictionaries. A summary thereof was

presented by the learned counsel, which is being reproduced as under:-

> ***[2006 CLD 895] Carvan East Fabrics Limited v. Askari Commercial Bank Ltd, Al-Baraka Islamic Bank Ltd.***
>
> ***Before Mushir Alam, J***
>
> *31. Term 'creditor' is of wide connotation. In corporate parlance creditor is a class of persons to whom company is indebted or owes a sum of money. Creditors may be preferential creditors, secured creditors and unsecured creditors…*
>
> *2.* ***Creditor defined in Palmers Company Law*** *(Geoffrey Morse ed) (Sweet & Maxwell, Looseleaf Ed, 1992-2009, Volume 2 at para 12.047 as follows:*
>
> > *"In general, any person having a pecuniary claim against the company capable of estimate is a creditor".*
>
> *3.* ***Creditor defined in Buckley on the Companies Acts*** *(Dame Mary Arden, Dan Prentice & Sir Thomas Stockdale, LexisNexis UK, Looseleaf Ed, 2007, vol 2 at para 425.19)*
>
> > *[e]very person who has a pecuniary claim against the company, whether actual or contingent".*
>
> *4.* ***Creditor and Contingent Creditor defined in Black's Law Dictionary***
>
> *"***creditor***. (15c) 1. One to whom a debt is owed; one who gives credit for money or goods.'*
>
> *"***contingent creditor***. (18c) Someone who will be owed a debt at some future time if some event occurs"*
>
> *5.* ***Creditor defined in Words and Phrases (Permanent Edition, Volume 10)***
>
> ***At page 387*** *"Creditor within meaning of act concerning fraudulent conveyances (30 Del. Laws, c. 207, 4, 7, 10) is a person having any claim, whether matured, or unmatured, liquidated or unliquidated, absolute, fixed or contingent." Richards v. Jones, 142 A. 882, 883, 16 Del Ch. 227."*
>
> ***At page 408*** *"Any one who has a right to require the fulfillment of an obligation or contract for the payment of money, a person to whom a sum of money or other thing is due by obligation, promise, or in law, any one who owns a claim or demand, is a "creditor." Commerce Trust Co. v. Farmers' Exchange Bank of*

*Gallatinn, 61 S.W.2d 928, 931, 332 Mo. 979, 89 A.L.r. 373."*

*"A creditor is a person who has a right to require the fulfillment of an obligation or contract…"*

*6.* ***Contingent Creditor defined in Words and Phrases (Legally defined, Fourth Edition, Volume 1)***

***At page 482*** *defines a contingent creditor as "A contingent creditor, like an elephant, is rather easier to recognize than to define. The following statement by Pennycuick J in Re William Hockely Ltd [1962] 1 WLR 555 at p 558; [1962] 2 All ER, is well known: "The expression 'contingent creditor' is not defined in the Companies Act, but must, I think, denote a person towards whom under an existing obligation, the company may or will become subject to a present liability upon the happening of some future event or at some future date."*

9. The learned counsel also relied upon the following observations made in the matter of *Lehman Bros International (EU) [2009] EWCA Civ 116:*

*"29. There is no statutory definition of "creditor" or "arrangement" for the purposes of Part 26 and in relation to "arrangement" the courts have been careful not to attempt to provide one beyond the limited criteria described in Re NFU Development Trust Ltd. But Mr. Snowden contends that, in order to be a creditor of the company, it is necessary to be owed money either immediately or in the future pursuant to a present obligation or to have a contingent claim for a sum against the company which depends upon the happening of a future event such as the successful outcome of some litigation. Although a creditor for the purposes of part 26 is not therefore limited to someone with an immediately provable debt in a liquidation, it does require that person to have a pecuniary claim against the company which (once payable) would be satisfied out of the assets as a debt due from the company.*

*30. As support for this, we were referred to the decision of the Court of Appeal in Re Midland Coal, Coke & Iron Company [1895] 1 Ch 267 in which it was accepted that a person with a contingent claim against the company qualified as a creditor under a scheme of arrangement made under the Joint Stock Companies Arrangement Act 1870. Lindley LJ (at page 277) said that he agreed that:*

*"…the word "creditor" is used in the Act of 1870 in the widest sense, and that it includes all persons having any pecuniary claims against the*

> *company. Any other construction would render the Act practically useless."*

10. The entire purpose of the learned counsel for the petitioners in relying upon these definitions of the term 'creditor' is to bring the term 'contingent creditor' within the broad concept of the term 'creditor'. For, it is the case of the petitioners that they are at best contingent creditors and upon the happening of that contingency certain sum of money shall be owed to the petitioners for having deposited the advances in respect of the allotments of the plots with respondent No.1. However, in my opinion, the real question is not whether a contingent creditor is included within the term 'creditor' taken in its widest amplitude, for, there is little doubt that indeed a contingent creditor is included in the term 'creditor' for which authorities are ample and I do not intend to detain myself on this aspect of the matter. Also, in my opinion, the resolution of the controversy does not depend upon this aspect and there is a more nuanced aspect with which we are concerned here.

11. In any inquiry, the first step is to ask the right question. The right question in the instant case is not whether a contingent creditor is included in the term 'creditor' as used in section 290 or not, but the right question is whether the legislature intended to include a contingent creditor in that term as used in section 290 of the Ordinance, 1984. With this question in contemplation,

the issue raised by the applicant in the application under consideration will have to be looked at and resolved.

12. As a first step, we will have to contrast section 290 with section 309. The present petition, it will be recalled, is under Section 290 of the Ordinance, 1984 and section 309 relates to and enumerates the category of persons who are entitled to bring a petition for winding up of a company. For facility, these provisions are reproduced as under:-

> *"**290. Application to Court**. - (1) If any member or members holding not less than twenty per cent of the issued share capital of a company, or a creditor or creditors having interest equivalent in amount to not less than twenty per cent of the paid up capital of the company, complains or complain, or the registrar is of the opinion, that the affairs of the company are being conducted, or are likely to be conducted, in an unlawful or fraudulent manner, or in a manner not provided for in its memorandum, or in a manner oppressive to the member or any of the members or the creditor or any of the creditors or are being conducted in a manner prejudicial to the public interest, such member or members or, the creditor or creditors, as the case may be, or the registrar may make an application to the Court by petition for an order under this section.*
>
> *(2) If, on any such petition, the Court is of opinion-*
>
> > *(a) that the company's affairs are being conducted, or are likely to be conducted, as aforesaid; and*
> >
> > *(b) that to wind-up the company would unfairly prejudice the members or creditors;*
>
> *the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of purchase by the company, for the reduction accordingly of the company's capital, or otherwise."*
>
> *"**309. Provisions as to applications for winding up**. -An application to the Court for the winding up of a*

> *company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), or by any contributory or contributories, or by all or any of the aforesaid parties, together or separately, or by the registrar, or by the Commission or by a person authorised by the Commission in that behalf."*

13. A reader is at once struck by the difference in the treatment given to the term 'creditor' in section 290 and section 309 and there is no escape from the purpose which permeates the two provisions in the manner in which the term 'creditor' has been defined and the conferment of the right to bring petitions respectively under Section 290 and 309 of the Ordinance, 1984. By a deliberate act, it has been specified that any creditor or creditors including any contingent or prospective creditor or creditors may bring an application for the winding up of a company under Section 305 of the Ordinance, 1984. This is conspicuously absent in the case of an application under Section 290 where simply the term 'creditor' or 'creditors' has been used and the legislature does not include the contingent or prospective creditor within the term as used in section 290. The salutary rule of construction for all statutory instruments will at once come into play and that is that the intention of the legislature must be given effect to unless it leads to absurdity. That is not the case here and the exclusion of contingent or prospective creditors in section 290 seems to be deliberate and intentional. By the use of the words "including any contingent or prospective creditor or creditors" in section 309 of the Ordinance,

1984, the legislature conveys two things; one, that the term 'creditor' comprises and includes a contingent and a prospective creditor as well and, two that the exclusion of these set of creditors in section 290 is for a purpose and the right may be conferred or taken away by the legislature on any of the species of creditors. Thus, by one stroke of pen, two purposes are sought to be achieved by these words added in section 309 of the Ordinance, 1984. That the legislature treats a contingent and prospective creditor as a category of creditors apart and having a weak right to maintain a petition under Section 305 is accentuated by a reference to proviso (d) to section 309, which reads as under:-

> *"(d) the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a prima facie case for winding up has been established to the satisfaction of the Court."*

14. Thus, the legislature deems that even a petition for winding up of a company by such class of creditors must be looked upon with suspicion by the Court and such class of creditors be required to give security for costs and put on notice to establish a prima facie case for winding up to the satisfaction of the Court. Thus, even a petition for winding up under Section 305 of the Ordinance, 1984 does not by that very fact entitle a contingent or a prospective creditor to the issuance of notice on the petition and the hearing of that petition without the prerequisites of proviso

(d) to section 309 being complied with. A contingent and prospective creditor has been treated as a category apart in the scheme of the Ordinance and it cannot be argued that the term 'creditor' used anywhere in the Ordinance, must be taken to include contingent and prospective creditor or creditors for the simple reason that the legislature treats them as distinct and whenever a contingent and prospective creditor is sought to be included in the term 'creditor', so far as conferring a right to maintain a certain application, the intention has clearly been expressed by the legislature and no inference can be drawn in this regard.

15. The canon of construction regarding presumption of consistent usage will be called in aid in the peculiar circumstances of the issue involved. In essence, that canon provides that "a word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning." (*Reading Law: The Interpretation of Legal Texts by Antonin Scalia and Bryan A. Garner*). The word or phrase is not defeasible by context. The canon was further elaborated in the following words in the same treaties:

> *"The correlative points of the presumption of consistent usage make intuitive sense. The preparation of a legal instrument has traditionally been seen as a solemn and deliberative act that requires verbal exactitude. Hence it has long been considered "a sound rule of construction that where a word has a clear and definite meaning when used in one part of a . . . document, but has not when used in another, the presumption is that the word is intended to have the same meaning in the latter as in the former part". And likewise, where the*

> *document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea. It is says land in one place and real estate later, the second provision presumably includes improvement as well as raw land."*
>
> *"The presumption of consistent usage applies also when different sections of an act or code are at issue…"*

16. It was said by the Supreme Court of the United States in *Atlantic Cleaners & Dyers, Inc. v United States, 286 U.S 427 (1932)* (per Sutherland, J.) that:

> *"There is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."*

Also "where congress includes particular language in one section of a statute but omits it in another …… it is generally presumed that congress acts intentionally and purposely in the disparate inclusion or exclusion." (*Keene Corp. v United States, 508 U.S 200, 208 (1993*).

17. This maxim has been applied by the U.S Supreme Court in distinguishing among different categories of persons and benefits. For instance, in *King v St. Viscounts' Hospital, 502 U.S 215, 220-21 (1991)*, it was held that:

> *"Given the examples of affirmative limitations on reemployment benefits conferred by neighboring provisions, we infer that the simplicity of sub-section (d) was deliberate, consistent with a plain meaning to provide its benefit without conditions on length of service."*

18. The inherent disability of a contingent or prospective creditor in bringing a petition under Section 305 of the Ordinance, 1984 and succeeding on the basis of a contingent debt has been brought forth in *Creek marina*

*(Private) Limited v. Pakistan Defence Officers' Housing Authority through Administrator* (**2012 CLD 1525**), a Sindh High Court judgment in which it was held:-

> *"...In other words, the obligation is conditional and contingent upon an eventuality that has not yet come to pass. Therefore, prima facie, the defendant is not yet a creditor of the plaintiff. I note that section 309 permits even a "contingent" or "prospective" creditor to present a winding up petition. However, the chances of success of a petition presented by such a creditor are rather remote (and certainly remoter than an actual creditor), and a strong case indeed would have to be presented by such a creditor before a winding up order would be made. In my view, the present case does not cross the requisite threshold. I would therefore conclude that the first branch of the principle enunciated in Fortuna Holdings is applicable to the facts and circumstances of the present case."*

19. As regards contingency debt, it was defined in *Kier Regional Limited v. City & General (Holborn) Ltd. [2008] EWHC 2454* that:-

> *"Many debts are not payable either presently or in the future until the satisfaction of a contingent or the occurrence of a contingency."*

20. These are debts subject to contingent or contingency. Although a contingent debt is within the broad definition of a debt for the purposes of Insolvency Act, 1920, the fact remains that it is a contingent debt where the contingency has not occurred. It is not a debt "then due" and was a contingent debt. It seems that section 290 of the Ordinance, 1984 is relatable to and concerns itself with a debt 'then due' and which has become crystallized on the happening of a contingency and not in respect of a debt for which the contingency has yet to happen and the debt has not actually become due. This

is also magnified by the use of the words "having interest equivalent in an amount but not less than 20% of the paid up capital of the company". A contingent creditor will not be covered by the condition of having an interest equivalent in amount but not less than 20% as the interest and the debt has yet to become due so as to transform into an actual interest subsisting at the time of the filing of the petition. If the debt has not become due and depends upon a contingency which is yet to happen, the necessary inference would be that a person does not have an existing interest equivalent to 20% so as to be clothed with the right to maintain an application under Section 290.

21. As a backcloth, a recapitulation of certain essential facts may be made. This is necessary in order to apply the principles adumbrated to the actual facts. The primary documents between the petitioners and the respondent No.1 is an agreement to sell executed on 20.05.2008 and the purpose of the agreement has been stated thus in the recitals:

> *"1. The Seller is developer of a country housing scheme known as Al-Hamra Hills Country Housing Scheme situated at* ***Islamabad*** *(the "Scheme"). The Seller has developed plots of 20 Kanal each in the Scheme and is the lawful owner of each such plot with full authority to alienate and transfer the same.*
>
> *2. The Purchaser is desirous of purchasing a plot (without any construction) measuring approximately 20 kanal 4 Marla bearing number (s)* ***Plot # 10 Hills Boulevard Sector A*** *(the "Plot") in the Scheme for, subject to clause 1.4 hereof, a total consideration of Rs._____/- and the Seller is willing to sell the same subject to the terms contained herein below."*

22. Primarily, therefore, the relationship between the parties is covered by an agreement to sell of a plot measuring approximately 20 Kanal 4 Marla in a scheme to be developed by the respondent-company and situated at Islamabad. Since the terms of the agreement could not be fulfilled, a Ring Fencing Agreement was executed by and between Orange Real Estate Development Company Limited, respondent No.2, Eden Builders Limited respondent No.3 and the allottees of the plots of the land in the Project. This agreement was executed on 23.5.2013. Once again, the recitals lend an insight into the purposes of the agreement:-

> *A.* *The Company is engaged in developing a real estate project involving country/farm-housing scheme in Zone-IV, Islamabad which is to be developed over an area of approximately 6,613 kanals of land, comprising of 212 individual plots (the "**Project**").*
>
> *B.* *Pursuant to Share Purchase Agreements executed between Eden and the existing shareholders of the Company, Eden (through Orange as the nominee of Eden, which is an associated company of Eden) has agreed to acquire up to 100% (one hundred percent) of the issued and paid up shares of the Company from the existing shareholders along with management control and to further procure the completion of the Project by making available necessary funding and utilizing its expertise in the real estate development sector (the "**Proposed Transaction**").*
>
> *C.* *In consideration of the Allottees consenting to the sale of up to 100% of the shareholding of the existing shareholders of the Company to Eden (through Orange) and as a condition for the implementation of the Proposed Transaction, Orange and Eden are required and have agreed to, inter alia, enter into his Agreement for the benefit of the Allottees.*

23. We now straightway come to the suit No.6 of 2016 filed by the petitioners at Islamabad High Court. The suit

is for specific performance, declaration, injunction and damages and the following prayers *inter alia* have been made in that suit:-

A. *"Permanently restrain Defendants No.1 to 3, their agents and representatives from cancelling the Agro-Farms allotted to the Plaintiffs and from usurping the property rights of the Plaintiffs protected under Article 24 of the Constitution and direct them to deliver Agro-Farms to the Plaintiffs in accordance with the provisions of the Ring Fencing Agreement and the NOC without changing the layout or character of the Project in relying on which the plaintiffs made their investments therein;*

B. *Permanently restrain defendants No.1 to 3, their agents and representatives from taking any coercive or adverse action against the plaintiffs;*

C. *Permanently restrain defendants No.1 to 3 from changing the layout of the Project on the basis of which the Plaintiffs invested their life savings in the Project and from re-allocating the Agro-Farms meant to be delivered to the Plaintiffs in accordance with the Ring Fencing Agreement to any other person or new investor;*

D. *Declare that Defendants No.1 to 3 cannot demand any further funds from the Plaintiffs and the allottees of the Project save in accordance with the terms of the Ring Fencing Agreement;*

E. *Direct defendant No.1 to 3 not to collect any further deposits and advances from new investors within the Project or any new housing schemes or Projects owned, controlled or managed by defendants No.1 to 3 without first discharging the commitments made to deliver developed Agro-Farms to the plaintiffs in accordance with the Ring Fencing Agreement in lieu of the deposits and advances already made by them;*

F. *Direct defendant No.4 to ensure that the Project is completed in accordance with the ICT Zoning Regulations, the NOC and the approved layout and that Agro-Plots in the Project are delivered to the plaintiffs in accordance with law at the earliest;*

G. *Direct defendant No.4 to ensure that defendants No.1 to 3 do not change the layout of the Project and do not create any third-party rights in relation to the Project by selling or promising land to new investors that is presently earmarked for and committed to the delivery of 20 Kanal Agro-Farms to the plaintiffs."*

24. Thus, by their own showing, the petitioners have filed a suit for specific performance of the agreements as well as the Ring Fencing Agreement and the filing of this petition is a contradiction in terms. Clearly, the petitioners are pursuing a remedy in the terms of the agreements to be fulfilled by the respondent-Company and there is no inclination on the part of the petitioners to abandon that part of relief in order to seek the relief claimed in the instant petition and to demand the refund and reimbursement of the advances deposited with the company so as to confer them with the character of a creditor and not a contingent creditor. As adumbrated, the term 'creditor' as used in section 290 does not include contingent creditor and the fact that the petitioners have filed a suit for specific performance also exercises a gravitational pull on the decision to be rendered on the instant application.

25. The petitioners have, in present, a claim for the agreements to be specifically performed which they have chosen to enforce. The petitioners could, in the alternative, rescind the contact and claim compensation including restitution of the moneys advanced. That will be the stage when the contingency will have come to pass and the petitioners can truly claim to have the status of creditors. Thus, at the moment and presently, the petitioners are not conferred with that status and do not have an interest

equivalent to twenty per cent of shareholding in terms of section 290.

26. Notwithstanding the foregoing, it is doubtful whether the petitioners are, in the strict sense of the term, creditors of the company. In terms of the two agreements, the petitioners have contracted to be allotted and handed over possession of a plot of certain area in the Project. They still seek the allotment of that plot. This is certainly not the claim of a creditor to whom money is owed by the company. *A. Ramaiya in Guide to the Companies Act, 17th edition*, has brought forth the various shades of a creditor in the following manner:-

> *"The term 'creditor' means a creditor to whom money is owed by the Company; whether he can claim immediate payment of that debt or whether his right to demand payment is deferred by his agreement with the company to a future time, he still remains a creditor. It is by no means limited to a creditor to whom a debt is due at the date of the petition and who can demand immediate payment from the Company. The term 'debts' used in cl.(d) of section 433 is not used in the restricted sense given under Section 528. Bombay Cotton Mfrg. Co. Re, (1909) 11 Bom LR 1302. The decision of the Supreme Court in State of Kerala v. V.R. kalliyanikutty, [1999] 3 SCC 657 lays down the proposition that an amount "due" normally refers to an amount which the creditor has a right to recover. The decision of the Supreme Court in Pankaj Mehra v. State of Maharashtra, (2000) 2 SCC 756 lays down the proposition that enforceability of a debt from a company is not to be tested on the touchstone of the modality or the procedure provided for its realization or recovery.*
>
> *Every person who has a pecuniary claim against the company, whether actual or contingent, will be a creditor within the meaning of this term in section 439. State of A. P. v. Hyderabad Vegetable Products Ltd. (1962) 32 Com Cases 64 (AP).*
>
> *A creditor is one who is capable of giving a valid discharge. Re Steel Wing Co. Ltd., (1921) 1 Ch. 349. The term creditor includes the Central Government or*

*any State Government or municipal or other local authority to whom any tax or other public charge is due. See Re, North Bucks Furniture Depositories Ltd., (1939) 2 All ER 549 : (1939) 9 Com Cases 258; Muhammed Amin Bros. v. Dominion of India, AIR 1952 Cal 323. An assignee of a debt is a creditor in equity. He can present a winding up petition. Montgomery Moore Ship Collision Doors Syndicate ltd., (1903) 72 LJ Ch. 624. In paris Skating Rink Co., (1877) 5 Ch D. 959. A creditor presented a petition for winding up of the company. Before the petition was heard, he sold his debt and right to proceed with the petition to a shareholder of the company who obtained leave to amend the petition by making himself a co-petitioner. Dismissing the petition, it was held that the sale of right to proceed with the winding up petition should not be allowed.*

*The term "creditor" does not include the garnishee of a debt due from the company as garnishee is not a creditor of the company either at law or in equity, his right being merely a lien on the debt: Cf. Re, Steel Wing Co. Ltd., (1921) 1 Ch 349; Pritchett v. English & Colonial Syndicate, (1899) 2 QB 428 at 346. But the receiver of a creditor's properties is a creditor entitled to present a petition, as he is a creditor by statutory assignment: Harinagar Sugar Mills Co. Ltd. v. M.W. Pradhan (Court Receiver), (1966) 36 Com Cases 426 : AIR 1966 SC 1707."*

27. A reading of the various clauses of the two agreements brings forth ineluctably that the allottees are interested in the implementation of the Project and the two agreements do not even remotely allude to the refund of the advance/ installments paid by them. Thus the agreements and their tenor do not refer to a contingency on the happening of which, the petitioners shall become entitled to lay a claim as creditor to the entire restitution of that amount so deposited. Any such claim may arise under the Contract Act, 1872 upon the obligation having become impossible to perform on the part of the company. So much so that the agreements do not mention a timeline to be observed by the company for the performance of the

Project and clause 4 of the Ring Fencing Agreement merely states that:-

> *"…The determination of the stage of completion of the Project shall be made by Progressive Consultants or such firm of consultants recognized by Pakistan Engineering Council, proposed by Orange and agreed by the Project Progress Monitoring Committee, which confirmation of agreements shall not be withheld unreasonably."*

28. Thus, the commercial purpose of the contract was the implementation and completion of the Project and not the valid discharge of the pecuniary claim. If the petitioners as promisees elect to terminate, the unperformed obligations of both the parties are discharged and the petitioners can claim for breach of contract. That stage has yet to arrive and the Petition is clearly premature. The petitioners may have a cause of action at a future time upon the contingency having occurred but the right, for the present, is inchoate.

29. As a result, the ***Application is allowed*** and the ***Petition (C.O No.7 of 2016) is dismissed*** being incompetently filed.

***(SHAHID KARIM)***
JUDGE

***Announced in open Court on 19.06.2017.***

***Approved for reporting.***

JUDGE

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*Rafaqat Ali`*