Form No: HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT
LAHORE.
JUDICIAL DEPARTMENT

C.O.No.46/2010.

Securities Exchange Commission of Pakistan
Vs.
Innovative Investment Bank Limited

S. No. of order/ proceeding	Date of order/ proceeding	Order with signature of Judge, and that of parties or counsel, where necessary.
	12.3.2020.	Sardar Muhammad Ali, Advocate/Joint Official Liquidator. Khawaja Waheed Raza, Joint Official Liquidator. M/S Iftikhar Riaz ud Din and Ammer Hamza Dogar, Advocates for SECP. Mr Muhammad Asif ur Rehman, Advocate for IFC. Mr. Umar Sharif, Advocate for WAPDA. Ch. Ali Muhammad, Advocate. Mr. Murtaza Hussain, Advocate. Mr. Mubashir Aslam Zar, Advocate. **C.M.No.31/2018** **IN** **C.O NO.46/2010** **ABID AZIZ SHEIKH.** This application has been presented by Joint Official Liquidators **(JOLs),** seeking fresh approval for further payment of Rs.11 Million each to eligible claimants in Category 1 and 2 of the creditors while reserving

equivalent payment of each claimant in Category-3 inline with the scheme of distribution approved earlier by this Court (herein after referred to as **distribution scheme**). Learned JOLs submits that further payment of Rs.11 million may be allowed to be paid to creditors in Category 1 and 2 while reserving equivalent amount for claimants in Category-3 as per distribution scheme in the instant application.

2. Learned counsel for the International Finance Corporation **(IFC)** vehemently opposed and raised objections on the instant scheme of distribution. He submits that IFC is a secured creditor and a first charge holder of assets of respondent Bank under liquidation **(IIBL)**, on the basis of loan agreement dated 29.6.2005, letter of hypothecation dated 29.6.2005, certificate of registration of charge dated 01.7.2005, restructuring and amendatory agreement dated 01.10.2009, assignment and custodian agreement dated July 2009 and custodian account agreement dated 15.7.2009. He therefore submits that on the basis of above charge documents, the

IFC being a secured creditor has prior claim on the amount of IIBL to be distributed to the extent of IFC claim (which is subject matter of IFC appeal in C.M.No.20/2019). He further submits that under section 61(5) of the Insolvency Act, 1920 **(Insolvency Act)** read with section 404 of the Companies Ordinance, 1984 **(Ordinance)**, all debts entered in the schedule are to be paid rateably without any preference and no amount in full can be paid to any class of creditors. He further submits that classification of creditors in Category-1, 2 and 3 is neither justified nor backed by any law. He submits that only classification of creditors under law are secured, unsecured and preferential creditors and no further classification amongst these creditors is permissible. He placed reliance on *Muhammad Rafique Bhatti vs. The Cooperative Judge etc* **(2016 SCMR 670)**. Learned counsel for the WAPDA also supported the above objections of IFC on scheme of distribution.

3. Learned JOLs as well as learned counsel for the SECP on the other hand submits that IFC is not

a secured creditor as already held by JOLs through order dated 07.5.2019 (which is subject matter of appeal filed by IFC through C.M No.20/2019). Further submits that section 61(5) of the Insolvency Act is not applicable in respect of right of unsecured creditors inter-se but it is only applicable regarding respective rights of secured and unsecured creditors. They finally submits that under section 333(1)(c) read with section 421(1)(i) of the Ordinance, the liquidators with the approval of Court may make full payment to any class of creditors. Adds that most of the individuals and charitable institutions being small depositors are different class from Financial Institutions as well from Corporate/Autonomous Bodies.

4. Arguments heard. Relevant parts of the scheme of distribution filed by JOL for approval of this Court in this application (C.M No.31/2018) is reproduced hereunder:-

> *That the position of Depositors/Certificate Holders/Investors and all creditors on our Books at the time of appointment of undersigned as Provisional Manager as on 01.7.2011 was as follows:*

Category	1		2	3
	Individuals	Trusts/Charitable Institutions	Corporate/Autonomous Bodies	Financial Institutions/Others
Amount (Rs.)	1,216,536,050	665,233,199	1,202,383,428	734,621,753
No.	217	52	40	8

That total of certificate holders in number was 309 with aggregate amount of Rs.3,084,152,677/- as mentioned above in category 1 and 2. Category 3 comprising of Finance Institutions (FI) & one other who are 8 in number have outstanding payments of Rs.734,621,753/- are subject to proof of debt as they are not in possession of Certificate of Investment/deposit (COI).

That the Hon'ble Court has already approved/authorized payments of category-I, investors/certificate holders through different orders in winding up proceedings, as under.

a. *Payment up to Rs.500,000/- through order dated 04.2.2013 in C.M 68/2013.*
b. *Payment 500,001/- to 800,000/- through order dated 15.1.2014 in C.M 488/2013.*
c. *Payment Rs.800,001/- to 1 million through order dated 12.2.2014 in C.M 95/2014.*
d. *Payment COI up to Rs.1 million through order dated 12.2.2015 in C.M 67/2015.*
e. *Payment up to Rs.10 million through order dated 27.4.2016 in C.M 322/2016.*

Detailed account of each authorization attached as Annexure A.

That through above referred approvals, payments aggregating to Rs.935.673 million has been authorized in Category 1. However, payments aggregating to Rs.242.303 million is earmarked against certificate holders Category 2 and Rs.80 million earmarked against F1/others in Category 3 making total of Rs.322.303 million, approval of same pending adjudication before this honourable

Court in our CM 1071/2016. Summary attached as Annexure B.

That position of funds available to JOLs as on March 10, 2018 is attached as Annexure C, which reflects available balance for distribution amounting to Rs.488.358 million.

That with respect to funds available to JOLs for distribution to distressed claimants, next tranche of up to Rs.11 million can be distributed to certificate holders (Category 1 & 2) and equivalent sum can be earmarked for FI/others (Category 3) resultantly an amount of Rs.416.268 million shall be paid to COI holders through which 24 certificated holders shall be settled fully out of 51 and an amount of Rs.72 million shall be earmarked for F1 and others (Detail attached as Annexure-D).

That the proposal is inline with scheme of distribution as set out through this Hon'ble Court order dated 27.4.2016 on JOL's C.M 322 of 2016.

That after processing the proposed payments subject to approval of Hon'ble Court, only 30 certificate holders in category 1 and 2 with an aggregate of Rs.1.490 billion shall be left outstanding/pending. Details on Annexure-E.

5. The above proposed distribution scheme shows that three Classes/Categories of creditors constituted. The first Category comprises of individual, trusts and charitable institutions, the second Category are Corporate/Autonomous Bodies and third Category are Financial Institutions/Others.

This Court has already approved payments from time to time to individuals/ Certificate holders in Category-I through orders dated 14.2.2013, 15.1.2014, 12.2.2014, 12.2.2015 and 27.4.2016. However, now the objection has been raised mainly by IFC against above Classifications on the ground that being secured creditor, IFC has prior charge on IIBL assets and such classification amongst creditors is not permissible.

6. The above objections/argument of IFC are examined carefully in the light of available record. It is not disputed that after passing of winding up order of IIBL, the IFC has filed its claim for verification with the JOLs (through C.M. No.34/2018) for the total claim amount of Rs.565374522.76, being a secured creditor, (without deducting any amount already realized from securities of IIBL with IFC). However, through order dated 07.5.2019 passed by learned JOLs, it is held that IFC is unsecured creditor and it is also not entitled for any interest or default rate of interest. The learned JOLs further held that claim of IFC for

Rs.395000000/- may be accepted, if IFC refund amount of Rs.53049749/- already withdrawn by IFC from Custodian Account. The above said order of JOLs dated 07.5.2019 is subject matter of appeal filed by IFC through C.M No.20/2019, pending before this Court.

7. With above back ground, the moot issue is that even if IFC is treated to be a secured creditor, whether it has any prior or preferential claim/charge on assets of IIBL. Though ordinance has been repealed and substituted by Companies Act, 2017 (Act), however, in view of section 509 of the Act, the provision of ordinance shall continue to apply to this winding up petition. Section 405 of the Ordinance provide preferential payments to certain creditors, but the secured creditors are not covered under section 405 of the Ordinance. However, section 404 of the Ordinance provide that insolvency rules will apply in winding up of the insolvent company. Under Section 47 of the Insolvency Act, not only the interest of secured creditors are protected but it also provides procedure

for proof of debts by a secured creditor and reads as follows:-

> *47--(1) Where a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized.*
>
> *(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.*
>
> *(3) Where a secured creditor does not either realize or relinquish his security, he shall before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.*
>
> *(4) Where a security is so valued, the Court may at any time before realization redeem it on payment to the creditor of the assessed value.*
>
> *(5) Where a creditor after having valued his security, subsequently realizes it, the net amount realized shall be submitted for the amount of any valuation previously made by the creditor and shall be treated in all respects as an amended valuation made by the creditor.*
>
> *(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all shares in any dividend."*
>
> *Section 47 clearly demonstrates that it deals with three situations:-*
>
> *(1) Where the secured creditors realizes his security.*
>
> *(2) Where the secured creditor relinquishes his security for the general benefit of the creditors.*

(3) Where the secured creditor does not realize or relinquish his security.

8. The Hon'ble Supreme Court in *UBL vs. PICIC* **(1992 SCMR 1731)** while interpreting section 47 of the Insolvency Act held as under:-.

> *"In the first situation if the secured creditor realizes his security, he will be entitled to prove the debt to the extent of the balance left after satisfaction from the securities. He has, thus been benefitted with the security in full. The second category of secured creditor is that who relinquishes his security for the benefit of the creditors and, therefore, he is entitled to prove his entire debt. No credit is given for the security he holds. In the third category falls such a creditor who has neither realized nor relinquished his security. He holds the security intact for satisfaction of his debt. Before the debt of such a creditor is entered in the schedule he is required to state the particulars of his security and the value at which he assesses it. At the time of distribution of the insolvent properties such a creditor will be entitled to receive dividend in respect of the balance due to him after deducting the value of the security, so assessed. A secured creditor if he has not relinquished his security is, thus, provided adjustment of the security and he can make claim in respect of such balance amount of debt which remains unsatisfied after realization of the security."*
>
> (emphasis supplied)

9. In view of law settled by Hon'ble Supreme Court in afore-noted judgment, secured creditor, will have no prior claim on the payments if secured

creditors has neither realized nor exercised its option to remain outside the winding up, rather relinquished its security for the general benefits of the creditors by filing its total claim with the official liquidators. Notwithstanding the fact that IFC is found to be unsecured creditor by learned JOLs and appeal is still sub-judice but even, for the sake of argument, it is assumed that IFC is a secured creditor as defined under section 2 (e) of the Insolvency Act for purpose of section 47 ibid, the IFC will have no prior charge on the funds available in the liquidation pool, for the reason that by filing entire claim of Rs.565374522.76/- with JOLs, unconditionally, the IFC has relinquished its security for the benefit of general creditors under section 47 of the Insolvency Act, therefore, IFC will be entitled to approve its entire debt and no creditor is to be given to the IFC for the security it holds. The same law was also laid down by Sindh High Court in *PICIC vs. Ajma Corporation Ltd* **(2014 CLD 1097)**.

10. The next legal question is that whether JOLs could make classifications amongst creditors as suggested in the proposed distribution scheme and can pay in full to any class of creditors. In this regard, provision of section 333 (1)(c) and 421(1)(i) of the Ordinance are relevant, which are reproduced hereunder:-

> ***333.Powers of official liquidator.-(1)*** *The liquidator in a winding up by the Court shall have power, with the sanction either of the Court or of the committee of inspection,-*
>
> *(c) to pay any classes of creditors in full;*
>
> ***421. Liquidator to exercise certain powers subject to sanction.-*** *(1) The liquidator may, with the sanction of the Court when the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of a special resolution of the company in the case of a voluntary winding up, do the following things or any of them;*
>
> *(i) pay any classes of creditors in full;*

11. Under above provisions, the liquidators has power with the sanction of Court, to pay off any classes of creditors in full. Similar provision is also available under section 234(1)(i) of the Indian Companies Act, 1913. The said provision came under discussion in *People Bank of Northern India*

Ltd,Lahore vs. Lucknow Supgar **(AIR 1936 Oudh 338)**. In said case, classification of unsecured creditors were made under six different heads by trial Court and the said decision was upheld by the learned Appellate Court by observing that Court under section 234 has a discretion to order payment in full to any class of creditors. Relevant part of the judgment is reproduced hereunder:-

> *"It was next contended by the learned counsel for the appellants that the learned Judge should not have given priority and ordered payment in full under S.234(1)(i), Companies Act, to the other creditors whose claim did not fall under S.230 of the Act. It was urged that the intention of this clause could not be to give priority to creditors who could not being their claims under either of the Cls (a) (b) and (c),S.230. We agree with the opinion of the learned trial Judge that the creditors referred to in S.230 are persons entitled to priority under the statute and as of right, but the Court has under S.234 been allowed a discretion to order payment in full to any classes of creditors other than those referred to in S.230. No authority has been cited by the learned counsel for the appellants to the contrary. The learned Judge has given very good reasons in his order of 11th May 1934, for allowing payment in full to the creditors mentioned under the different heads. The liquidation will take years and some of the creditors to whom payment has been ordered are entitled to very petty sums".*

12. In the present case, the individuals, trusts/charitable institutions (Category-1) are mostly small depositors and in possession of Certificate of Investment/Deposit (CO1), are treated as different class from Financial Institutions, which is justified, considering that they had invested, their life long savings with IIBL and are in much dire and urgent need of these payments for their livelihood, comparing to Financial Institutions. Similar is the position with the corporate/autonomous bodies who are in possession of certificate of investment/deposits and can be treated as different class from financial institutions.

13. Though, section 284 of the Ordinance, is not directly relevant but it mentions different classes of creditors in the context of a winding up. For convenience, section 284(1) and (6) are reproduced as follows:

> ***284. Power to compromise with creditors and members.-(1)*** *Where as compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company*

> *or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, or a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.*
>
> *(6) In this section the expression "company" means and company liable to be wound up under this Ordinance and the expression "arrangement" includes a reorganization of the share-capital of the company by the consolidation of share of different classes or by both those methods, and for the purpose of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.*

Section 284(6) may also not be directly relevant in the present winding up, however, this provision is mentioned to establish that there is the possibility of unsecured creditors being of different classes but being deemed by statutory fiction to be of the same class for the limited purposes of section 284 of the Ordinance. Thus, because of the statutory fiction the distinction between these two different classes of unsecured creditors has been removed.

14. The discussion in following case law on section 284 of the Ordinance will be relevant, to examine that how a class of creditors is to be determined.

(i) *Sovereign Life Assurance Company vs. Dodd* **(1892) 2 QB 573 (89)**. This was a case in which the relevant statute involved a meeting of creditors that was called after the winding up of the company and it was held that insured persons whose polices had matured formed a distinct class of creditors from those whose policies had not matured (where both classes were unsecured). The relevant observations by Court are as under:-

> *"The Act says that the persons to be summoned to the meeting (all of whom, be it said in passing, are creditors) are persons who can be divided into different classes- classes which the Act of Parliament recognizes, though it does not define them. This, therefore, must be done; they must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and judgment, they must be divided into different classes".*

(ii) *Gulshan Weaving Mills Limited vs. Al-Baraka Bank (Pakistan) Limited* **(2018 CLD 737).** In this case, while discussing the meaning of class, learned Court relied upon the findings in the case of

Sovereign Life Assurance Company vs. Dodd supra

and held as under:-

> *"the word 'class' is vague and to find out what is meant by it, one must look at the scope of the section which in the instant case, enables the Court to order a meeting of a Class of creditors to be called. One must interpret the term 'class' in such a manner that it may prevent injustice and disadvantage to all the shareholders and creditors, and must be confined to those persons whose rights are not dissimilar as to make it impossible for them to consult together with a view to their common interest. Similarly in the case of Maneckchown and Ahmedabad Manufacturing Co. Ltd (1970) 40 Company Cases 819, it was observed as under:-*
>
> *'Broadly speaking a group of persons would constitute one class when it is shown that they have conveyed all interest and their claims are capable of being ascertained by any common system of valuation. The group styled as class should ordinarily be homogenous and must have commonality of interest and the compromise offered to them must be identical.*

(iii) *D.A Swamy vs. India Meters Ltd* **(1994) 79 Com Cas 27 (Mad) (75).**This case did not concern a winding up but there is a relevant observation on the meaning of "class" as follows:-

> *"It seems that the learned Judge was not informed that there were objections to the clubbing of the fixed deposit holders with the sundry creditors for the goods supplied or sundry creditors for expenses as well as other loans and short-term loans. The interest of*

> *fixed deposit holders in retaining their deposits is not similar to a person who advanced loans on hundis or otherwise advanced money to the company for earning profits'.*

15. In view of above case law, it is the commonality of the interests held which can be considered for treating the holders of such interest as one Class. The argument that classes of creditors are only confined to secured, preferred, or general (unsecured) creditors is not a complete answer. In other laws, creditors are classified other than as only preferred, secured or unsecured. There are other classes as for example set out under the Banking Companies Ordinance, 1962. The provisions of the 1962 Ordinance relating to winding up of banks may be treated as pari materia to the provisions in the Ordinance relating to the winding up of NBFCs. Sub-section (2),(4)(a),4(b) and (6) of section 58 of the 1962 Ordinance shows that depositors can be and are treated as a different class to preferred or general creditors; and that financial institutions are treated as general creditors.

16. The case of *Muhammad Rafique Bhatti*, supra relied upon by learned counsel for the IFC does not pertain to the power of the liquidator with the sanction of this Court for full payment to any classes of creditors under section 333(1)(c) and 421(1)(i) of the Ordinance. The said judgment pertains to winding up of undesirable cooperative societies under the winding up provision of the Punjab Undesirable Cooperative Societies Act, 1993, under which, the scheme of winding up is different from winding up under Ordinance, hence same is distinguishable.

17. So far as the argument that under section 61(5) of the Insolvency Act, only rateable distribution can be made amongst creditors without any preference, suffice it to note that under section 404 of the Ordinance, the rules under the law of insolvency will be observed with regard to "respective right of secured and unsecured creditors". Similar provision is available under section 529(1) of the Indian Companies Act, 1913 **(Act)** and while interpreting the words "respective

right of secured and unsecured creditor" the Court repeatedly held that above words mean the right of class of secured creditors on one hand as against the class of unsecured creditors on the other and not the right of the secured creditors inter-se and of unsecured creditors inter-se. In the instant matter, classification and distribution of claim is inter-se unsecured creditors, therefore, the provision of section 61(5) of the Insolvency Act, is not applicable. In this regarding, reliance is placed on *State of Kerala vs. Kerala Water Transport Corporation Limited (***AIR 1967 Kerala 150),** *Bokiyu Tanneries Ltd vs. Unknown* **(2006 (89) DRJ 513 (Delhi),** *Rikhabchand Mohanlal Surana vs. The Sholapur Spinning and Weaving* **(1974 (76) BOMLR 748** and *Hedge And Golay Limited vs. State Bank of India* **(ILR 1987 Kar 2673)**. In any case, provision of the Ordinance being special law will over ride the provision of Insolvency Act, in case of any conflict. In this regard, reliance is placed on *Sec. of State vs. Punjab Industrial Bank Limited (***AIR 1931 Lahore 351)**.

18. In view of above discussion, objections raised by learned counsel for **IFC and WAPDA** on scheme of distribution **are over ruled**. Resultantly, the scheme of distribution mentioned in **C.M.No.31/2018 filed by learned JOLs is approved.** Learned JOLs shall proceed for the distribution of funds as per scheme approved above.

(ABID AZIZ SHEIKH)
JUDGE.

Approved for Reporting.

JUDGE

Rizwan