

(2013) 05 DEL CK 0435

In the Delhi High Court

Case No : Co. Petition 198 of 2008

Madhya Pradesh State Industrial Development Corporation

APPELLANT

Vs

Som Distilleries and Breweries Ltd.

RESPONDENT

Date of Decision : 03-05-2013

Acts Referred:

Companies Act, 1956 — Section 433, 433(e), 434, 439, 454
Negotiable Instruments Act, 1881 (NI) — Section 138, 140

Citation : (2013) 05 DEL CK 0435

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Sushil Dutt Salwan, for the Appellant; Ravi Gupta with Mr. Mohit Gupta and Ms. Megha, for the Respondent

Judgement

S. Muralidhar, J.—Madhya Pradesh State Industrial Development Corporation ("MPSIDC") has filed this petition u/s 439 read with Sections 433(e) and 434 of the Companies Act, 1956 ("Act") seeking the winding up of the Respondent, Som Distillers and Breweries Ltd. ("SDBL"), having its registered office at New Delhi. The background facts are that MPSIDC sanctioned and disbursed a sum of Rs. 1,00,00,000 by way of financial assistance in the form of Inter Corporate Deposit ("ICD") to SDBL. In consideration thereof, SDBL executed a demand promissory note ("DPN") and a corporate guarantee in favour of MPSIDC. The due date for repayment was 21st March 2001. MPSIDC sanctioned and further disbursed Rs. 2,00,00,000 in favour of SDBL again by way of an ICD, for which SDBL executed a DPN and corporate guarantee. The date for repayment was 6th February 2002. On 9th August 1999, a third ICD in the sum of Rs. 1,00,000 was sanctioned and disbursed by MPSIDC in favour of SDBL, for which SDBL executed a DPN and corporate guarantee. The date of repayment was 13th August 2002. On 11th January 2000, a fourth ICD in the sum of Rs. 3,00,000 was disbursed to SDBL for which SDBL executed a DPN and corporate guarantee. The date of repayment was 30th October 2004.

2. On 28th March 2003, SDBL cited financial difficulties and requested MPSIDC not to pursue the recovery proceedings against it. On 16th June 2003, MPSIDC issued a legal notice calling upon SDBL to make payments under the ICDs. On 24th April 2005, SDBL submitted a proposal for a one time settlement ("OTS"). According to MPSIDC, since the proposal was not in terms of the policy/guidelines of the Government of Madhya Pradesh, it was not accepted. It is stated that on 2nd December 2005 and 27th February 2006, SDBL informed MPSIDC that it had appointed Kotak Mahindra Bank ("KBM") for negotiating a settlement on its behalf. According to MPSIDC, nothing came of this and it was simply a ruse to gain time. MPSIDC sent a statutory notice on 30th November 2007 to SDBL under Sections 433 and 434 of the Act calling upon SDBL to make payments within a period of 21 days. It is stated that as on 31st December 2005, SDBL owed MPSIDC Rs. 26,26,62,000. In the above circumstances, the present petition was filed.

3. On 13th August 2010, SDBL entered appearance and on that date itself, the parties were referred to mediation by the Court. The mediation proceedings were not successful.

4. On 1st January 2011, MPSIDC wrote to the SDBL regarding repayment of ICDs together with interest. It was pointed out by MPSIDC that being a government organisation it could not deviate from the prevailing OTS policy. A letter was sent on 18th March 2011 by MPSIDC to SDBL stating that as on 31st March 2011 SDBL owed MPSIDC a sum of Rs. 4807.06 lacs comprising ICD overdues of Rs. 700 lacs and interest overdues of Rs. 4107.06 lacs. It was stated that an OTS offer for approximately 798.96 lacs, subject to reconciliation, could be considered. SDBL was asked to submit a proposal on that basis.

5. In response to MPSIDC's letter dated 1st January 2011 informing SDBL of the outstanding due amount of Rs. 4807.06 lacs, SDBL wrote to MPSIDC on 7th February 2011 offering three options for settling the dues with regard to ICD of Rs. 700 lacs. This was not agreed to by MPSIDC. On 18th March 2011, MPSIDC informed SDBL that "As per prevailing OTS Policy, a minimum OTS amount of approximately Rs. 798.96 lacs, subject to reconciliation, is payable by the Company" and that "if the Company makes payment within fifteen days from the issue of the sanction letter. Besides, legal and other expenses as per actuals." By another letter dated 26th March 2011, MPSIDC wrote to SDBL stating that "as per prevailing OTS Policy, a minimum OTS amount of approximately Rs. 1415.46 lacs, subject to reconciliation, is payable by the Company, if the Company makes payment in maximum 36 equal monthly instalments carrying simple interest @ 10% per annum, from the issue of the sanction letter. Besides, legal and other expenses as per actuals are also required to be paid by the Company." It was thereafter stated in the letter dated 26th March 2011 as under:

MPSIDC may consider OTS with your Company as per the prevalent OTS Policy, subject to Down payment of Rs. 141.55 lacs being 10% of the approximate OTS amount, within three days of issue of this letter. The amount of Rs. 25.00 lacs

paid by you vide cheque no. 642219 dt. 07.02.2011 along with your referred letter currently kept by MPSIDC in miscellaneous account may be adjusted against the Down payment and Company is then required to make balance Down payment of Rs. 116.55 lacs as per the prevailing OTS Policy.

As per prevailing OTS Policy, any settlement would be subject to following terms and conditions:

1. In case of settlement of account the Company will be required to submit post dated cheques for the remaining settlement amount towards monthly payment of instalments including interest. In case of dishonour of any cheque the Corporation reserves the right to cancel the settlement.
2. Besides agreed interest, the Company/Borrower will be required to make additional 3% penal interest on defaulted amount for defaulted period.
3. In order to secure the payment of settled amount Promoters of the Company Shri J.K. Arora and Shri A.K. Arora will have to provide Personal Guarantee containing details of property in their name on an Affidavit.
4. Besides, Company will also provide Collateral Security to the extent of 10% of the settled amount.
5. If deemed necessary, the Company will be required to provide consent from other Creditors and/or Consortium to MPSIDC.

You are therefore advised to submit OTS proposal in accordance with the prevalent OTS Policy within three days of issue of this letter.

6. On 1st October 2011, SDBL filed a reply, taking the defence that it was a profit making company and that there was a dispute as to the alleged debt. It was further contended that the dues sought to be collected by MPSIDC were time-barred. SDBL also contended that the statutory notice has not been served at its registered office. It was admitted that the SDBL tried to resolve the matter by offering an OTS proposal on two occasions. It was stated that although KMB came forward to settle the claims of all the creditors of SDBL, MPSIDC did not participate. This contributed to the delay in SDBL repaying the loan. It is stated that due to change in the excise policy of the State of Madhya Pradesh, SDBL suffered setbacks which also contributed to the delay. It was stated that MPSIDC has initiated several cases under Sections 138 and 140 of the Negotiable Instruments Act, 1888 ("NI"Act) as well as civil cases against SDBL which were pending in the various Courts in Bhopal. It was further submitted that SDBL has submitted a proposal on 7th February 2011 along with a cheque amount of Rs. 25,00,000 drawn on Punjab National Bank ("PNB") with three payment options for settlement of all the dues. It was mentioned in the said proposal that if MPSIDC accepted any of the three options mentioned therein, it could encash the cheque under intimation to SDBL. It was stated that inasmuch as MPSIDC had encashed the said cheque for Rs. 25,00,000, the proposal of SDBL constituted a contract that was binding on both the parties. SDBL stated that it submitted

another proposal to MPSIDC for repayment on 15th September 2011, which was in line with the OTS policy of MPSIDC to which there was no response. It was submitted by SDBL that the winding up proceedings could not be treated as an alternative to recovery proceedings. It could not be used as a lever to exercise pressure on SDBL to pay off its debts.

7. In the rejoinder filed by MPSIDC, apart from denying the allegations in the counter affidavit, it was pointed out that in its balance sheet for the year 2007-2008, SDBL has admitted the liability owing to MPSIDC. SDBL had repeatedly sought time to repay the debts. It was further stated that the statutory notice was duly served on SDBL at its registered office and the allegations to the contrary in the reply were false. It was further stated that as on 30th June 2010, a sum of Rs. 43.44 crores was due from SDBL apart from interest. It was stated that SDBL did not choose to avail of the opportunity of OTS which envisaged payment of a reduced principal amount with simple interest ranging from 1 to 8%, in the event that the outstanding amount was paid by the debtor within fifteen days. The proposal by SDBL for swapping the principal amount with the equivalent amount of one of its alleged creditors was rejected by MPSIDC as such settlement was not permissible under the policy of the State Government. It was stated that SDBL got the disputes referred to mediation despite having no intention of settling the dispute. It was pointed out that in the balance sheet of SDBL for the year ending 31st March 2010 a sum of Rs. 10,97,70,329 was shown as an unsecured loan repayable to MPSIDC. The sum of Rs. 25,00,000 paid by SDBL was towards the outstanding amount and had been duly adjusted.

9. On 2nd December 2011, the Court noted the contention of Mr. Ravi Gupta, learned Senior counsel for the SDBL that the SDBL would make payment of Rs. 50,00,000 to MPSIDC by way of demand draft ("DD") on or before 5th January 2012. On 30th March 2012, the following order was passed:

In the balance sheet of the SDBL-company for the year ending 31st March, 2010 an amount of Rs. 10,97,70,329/- has been shown as due and payable to the petitioner Corporation. It is pertinent to mention that in the said balance sheet, the aforesaid amount was also shown as due and payable as of 31st March, 2009. It is thus apparent that the Respondent has not added any amount on account of interest for one year despite the said sum being due and payable.

At this stage, while this Court was in the midst of dictating the order, Mr. Ajay Arora, authorized representative of the Respondent -company states that the official of the Respondent -company shall immediately meet the officers of the petitioner Corporation and repay the entire amount that is due and payable to the petitioner Corporation within a period of three weeks.

List on 14th May, 2012.

Order dasti.

9. On 12th April 2012, SDBL wrote to MPSIDC enclosing an interest calculation sheet which showed that a sum of Rs. 7,77,00,000 was payable. It was stated that with Rs. 25,00,000 having been paid by cheque on 7th February 2011 and Rs. 50,00,000 having been paid by DD on 3rd January 2012, a sum of Rs. 75,00,000 had already been paid. According to SDBL, Rs. 77,77,000 being 10% down payment for the OTS amount was required to be made. After subtracting Rs. 75,00,000 already paid, the balance was Rs. 2,70,000. Therefore, along with the letter dated 12th April 2012, SDBL enclosed a cheque for Rs. 2,70,000 and thereby submitted an OTS proposal for Rs. 7,77,00,000 with the balance payable after deducting the above sums calculated as Rs. 69,930,000.

10. The above OTS proposal as suggested by SDBL was not acceptable to MPSIDC. It responded on 10th May 2012 referring to a meeting held on 11th May 2012 when the transactions till that date had been reconciled and the queries/objections of SDBL clarified. Enclosing the details of the calculation, it was stated by MPSIDC that SDBL should make payment of the OTS amount of Rs. 774.08 lacs (Principal Rs. 7,00,00,000+ Interest Rs. 74.08 lakhs) along with recoverable expenses of Rs. 17.12 lakhs "immediately."

11. The calculation of the OTS amount enclosed with the above letter clearly spelt out that the amount of Rs. 75,00,000 "paid prior to proposed settlement as per OTS Policy 2007, has already been adjusted against the interest dues hence this amount cannot be considered as part of the One Time Settlement amount." It was also mentioned that the cheque for the sum of Rs. 2,70,000 enclosed with SDBL's letter dated 12th April 2012 had not been deposited by MPSIDC in its account. Accordingly, the OTS proposal made by SDBL was considered to be submitted without down payment of 10% of the settlement amount. The break-up was given as under:

Summary of details of settlement amount

12. There was a dispute between the parties on the above offer of OTS made by MPSIDC. On 18th May 2012, SDBL wrote to MPSIDC stating that the deviation from the OTS Policy of 2007 was not acceptable to it. SDBL protested against the sum of Rs. 75,00,000 not being adjusted against the OTS amount. It was stated that if the OTS proposal was not going to be accepted, then the sum of Rs. 75,00,000 ought not to have been encashed. SDBL objected also to the recovery of "Brisic incentive amount on RRC of Rs. 15.48 lakhs, being 2% of the settlement amount." The SDBL enclosed a revised calculation whereby the amount payable under the OTS was calculated as Rs. 6,92,87,036 after appropriating Rs. 75,00,000 towards repayment of the principal amount in terms of the letter dated 26th March 2011.

13. Meetings took place on 29th May 2012 and 1st June 2012. SDBL wrote to MPSIDC again protesting against the appropriation of Rs. 75,00,000 but not adjusting it against the OTS amount. The stand of SDBL was that once the payment of Rs. 75,00,000 has been encashed by MPSIDC "it is deemed and

understood that our proposal has been accepted by MPSIDC and the same amounts to legally enforceable contract." SDBL blamed MPSIDC of being reluctant to settle the matter and termed the behaviour of MPSIDC "irresponsible" since the Economic Offences Wing had registered a First Information Report against the officials of MPSIDC on 24th July 2012. The SDBL insisted that the payment of Rs. 75,00,000 made by it should be appropriated against the 10% settlement amount of Rs. 77,70,00,000.

14. Meanwhile on 16th July 2012, on the basis of the submissions made before the Court, the following order was passed:

The parties are yet exploring the possibility of an amicable settlement. Learned senior counsel appearing on behalf of the Respondent states that as per his instructions and in terms of the communications exchanged between the parties dated 10.05.2012 as also the reply of the Respondent dated 18.05.2012 as on date the amount payable by him to the petitioner is Rs. 6,92,87,036/- which is inclusive of interest. Attention has been drawn to the first communication dated 10.05.2012 wherein the petitioner had accepted one time settlement of Rs. 774.08 lacs (principal Rs. 700.00 lacs plus interest Rs. 74.08 lacs) as One Time Settlement Policy, 2007 along with recoverable expenses of Rs. 17.12 lacs. Learned counsel for the Respondent states that the amount of Rs. 75 lacs which the petitioner has adjusted against the interest amount has to be adjusted against the principal amount and not against the interest amount. The parties will take fresh instructions from their respective clients. The learned counsel for the Respondent states that he will bring the amount of Rs. 6,92,87,036/- on the next date.

Renotify on 08.10.2012.

15. Pursuant to the above order a cheque in the sum of Rs. 6,92,87,036 was brought to the Court by SDBL on the next date i.e. 8th October 2012. The said cheque was asked to be deposited with the Registrar General ("RG") of this Court. The submission of learned counsel for MPSIDC disputing the said amount as being in satisfaction of the claim of MPSIDC was recorded by the Court. His contention that a sum of Rs. 75,00,000 was yet payable was controverted by learned counsel for SDBL.

16. On 10th December 2012, an authorised representative of SDBL was present in Court. The following order was passed on that date:

The authorized representative of the petitioner is present. He states that the board of directors of Corporation have passed a resolution whereby they are ready to forgo Rs. 25 lacs out of an amount of Rs. 7,77,66,667/-. Learned counsel for the Respondent company states that he will take instructions from his client qua this figure. In case no settlement is arrived at, the matter shall be heard on merits on the next date.

Renotify on 11.03.2013.

17. Thereafter, on 25th April 2013, the following order was passed:

1. It is seen that in the order dated 10th December 2012 it was recorded that Board of Directors of the Petitioner, Madhya Pradesh State Industrial Development Corporation, had passed a resolution stating that they were ready to forgo Rs. 25 lakhs out of an amount of Rs. 7,77,66,667 which was owing to the Petitioner by the Respondent company. It was made clear that if there was no settlement, then the case would be heard on merits on the next date, i.e., 11th March 2013.

2. Mr. Ravi Gupta, learned Senior counsel appearing for the Respondent refers to a cheque tendered in Court on that date in the sum of Rs. 6,92,87,036 and states that the Respondent is still willing to pay the same amount.

3. However, Mr. Sushil Dutt Salwan, learned counsel for the Petitioner categorically states that the said amount is not acceptable to the Petitioner. He states that as a last chance the Petitioner is prepared to give one more opportunity to the Respondent to pay to the Petitioner Rs. 7,52,66,667, that was earlier offered as a settlement figure.

4. In the considered view of this Court, the offer made by the Petitioner appears to be a reasonable one. Considering the number of opportunities the Respondent has already had, it is directed that in the event the Respondent fails to make the payment to the Petitioner in the sum of Rs. 7,52,66,667 by way of demand draft on or before the next date, i.e., 3rd May 2013 the matter will proceed on merits.

5. List on 3rd May 2013. Order be given dasti.

18. Mr. Ravi Gupta, learned Senior counsel for SDBL, stated that SDBL was not willing to make the payment of Rs. 7,52,66,667, since according to it no sum higher than the cheque amount already deposited in the Court was due to MPSIDC. After taking the Court through the entire correspondence referred to above, Mr. Gupta submitted that the two main considerations as far as the present petition is concerned were the nature of the claim and the inability of SDBL to pay the admitted liability. He submitted that the present proceedings were merely in the nature of proceedings for the recovery of a money claim which was disputed. He submitted that the winding up proceedings should not be used merely for recovering moneys due. Secondly, he submitted that there was no admission of liability by SDBL. He submitted that SDBL had demonstrated its willingness to make payment of the OTS amount by depositing the cheque in this Court. MPSIDC was acting unreasonably in not adjusting the sum of Rs. 75,00,000 already paid by SDBL towards the OTS amount. In the circumstances, it could hardly be said that SDBL was unwilling to make the payment of its liability. He pointed out that SDBL was a profit making company and there was no reason for any winding up proceedings to be invoked against it. He referred to certain proceedings instituted in the High Court of Madhya Pradesh at Jabalpur, in which an order had been passed by that Court.

19. Mr. Gupta referred to a letter dated 18th March 2011 written by SDBL to MPSIDC referring to "recent proceedings held on 15.12.12 before Mega Lok Adalat ("MLA"), Bhopal". According to him, the only point of difference at the MLA was on the question of apportionment of Rs. 50,00,000 which according to SDBL was to be adjusted against the OTS amount. He submitted that even in terms of the letter issued by Madhya Pradesh Legal Services Authority ("MPSLA") on 21st November 2012 to MPSIDC regarding settlement of pending cases of MPSIDC under Sections 138 and 140 of the NI Act, a decision has been taken by the Cabinet of the Madhya Pradesh Government that "all arrears deposited by the people availing loan should not be settled towards interest. It should be deposited in OTS." (This is the English translation of the Hindi letter which was shown to this Court by Mr. Gupta). Mr. Gupta, therefore, insisted that MPSIDC was being unfair in not adjusting the sum of Rs. 50,00,000 towards the principal OTS amount. He referred to the offer made by SDBL in its letter dated 18th March 2013 that they were ready to pay Rs. 7.05 crore after adjusting the sum of Rs. 75,00,000 against the sum of Rs. 7,79,66,000 demanded by MPSIDC before the MLA and submitted that it was a reasonable offer which ought not to have been rejected by MPSIDC.

20. Mr. Sushil Dutt Salwan, learned counsel for MPSIDC submitted that the whole object of the OTS was that the amount should be immediately paid by SDBL. In the instant case there was no dispute about the fact that as on 31st December 2010 the amount payable by SDBL was over Rs. 48 crores. Even the amount admitted by SDBL as due to MPSIDC and as reflected in its balance sheet as on 31st March 2010 was Rs. 10,97,70,329. This did not include interest till date. MPSIDC had in its letter dated 10th May 2012 offered to settle for an OTS sum of Rs. 774.08 lacs (Principal Rs. 7,00,00,000+ Interest Rs. 74.08 lakhs) alongwith recoverable expenses of Rs. 17.12 lakhs. It was made clear to SDBL that the sum of Rs. 75,00,000 paid by it was already adjusted against the outstanding amount prior to the date of the OTS and would not be adjusted against the OTS amount. It was also made clear that the said payment would be adjusted first against the interest due. It was not open to SDBL to insist to the contrary. He submitted that "valuable taxpayers" money had been advanced to SDBL by MPSIDC which was accountable for it to the public. He submitted that inasmuch as SDBL had clearly demonstrated its inability to pay even the admitted sum in its balance sheet, this was an open and shut case for invoking the jurisdiction of this Court u/s 433 read with Section 434 of the Act.

21. Before proceeding to examine the above submissions, the Court would like to recapitulate the scope of its powers under Sections 433 and 434 of the Act as explained in several decisions. The Court has to examine if the debt is bonafide disputed and whether the company has the ability to and is willing to pay the debt. In *Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd.* 1972 (42) Comp. Cas. 125 it was held by the Supreme Court:

Two rules are well settled. First if the debt is bona fide disputed and the defence

is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the, creditor was unreasonable (See *London and Paris Banking Corporation* [1874] L.R. 19 Eq. 444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See *Re. Brighton Club and Norfolk Hotel Co. Ltd.* [1962] Ch. 406)

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (See *Re. A Company* 94 S.J. 369). Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely (See *Re. Tweeds Garages Ltd.* [1865] 35 Beav. 204, 208)

The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.

(emphasis supplied)

22. The admitted liability of SDBL as reflected in its balance sheet as on 31st March 2010 under the caption "Schedule D unsecured loans" shows that the sum owing to MPSIDC is Rs. 10,97,70,329. Consequently, the objection of SDBL that the claim of MPSIDC is time-barred is without basis. The registered office of SDBL is in New Delhi and, therefore, the objection as to the jurisdiction of this Court is also without basis. On the question of receipt of notice, the Court is satisfied that the statutory notice was served by MPSIDC at SDBL at its registered office by registered post. Senior Superintendent, Post Office has, by a communication dated 7th November 2008, confirmed the delivery of the notices at the New Delhi address. Consequently, even this objection is without merit. Merely because SDBL is a profit making company will not preclude the Court from examining if the defence of SDBL to the petition for winding up is a bonafide one and whether SDBL is choosing not to pay an admitted liability despite having the means to do so.

23. SDBL overlooks the fact that the determination of the OTS sum is at the discretion of MPSIDC. As far as the Court is concerned, it cannot possibly dictate to MPSIDC what its OTS policy should be. If MPSIDC has after studying the offer made by SDBL determined the OTS sum, the Court cannot at the instance of SDBL insist that MPSIDC must accept a lesser sum as OTS. The scope of the proceedings u/s 433 of the Act does not permit the Company Court to examine the reasonableness of an OTS offer. It is also not open to the Company Judge to

direct that any payment made by SDBL towards the OTS should be first adjusted towards the principal sum and not the interest. The OTS sum determined by MPSIDC was itself a large concession to SDBL, given that the total outstanding as on 31st December 2010 was in excess of Rs. 48 crores. Even the liability admitted by SDBL in its balance sheet as on 31st March 2010 was Rs. 10,97,70,329. While it not for the Company Court to speculate why MPSIDC would settle for an OTS amount, from a purportedly profit making company like SDBL, that is even less than 20% of the outstanding amount, or why such a case would be referred to the MLA, it would like to observe that as far as SDBL was concerned it was in "a take it or leave it situation" as far as the OTS sum determined by MPSIDC was concerned.

24. From the correspondence, it appears that SDBL was unmindful of the fact that it was for MPSIDC to determine, on the basis of the offer made by SDBL, what the OTS amount should be. The sequence of events shows that on 18th March 2011, MPSIDC had only worked out an approximate OTS amount of Rs. 789.96 lacs which was subject to reconciliation. SDBL was advised on that basis "to submit OTS proposal in accordance with the prevailing OTS policy within three days." On 26th March 2011, MPSIDC clearly informed SDBL that the proposal made by SDBL by its letter dated 21st March 2011 was not acceptable to it. It conveyed to SDBL on what basis it might consider an OTS proposal and on that basis again, SDBL was advised "to submit OTS proposal in accordance with prevailing OTS policy." On 12th April 2012 also, a letter was written by MPSIDC, following the order dated 30th March 2012 by this Court to SDBL stating that "so far MPSIDC has not received any settlement proposal in accordance to the government approved OTS proposal 2007 from your company." It was also pointed out that as per the demand letter dated 7th April 2012 of MPSIDC, the ICD overdues of SDBL as on 31st March 2012 was Rs. 6,098.75 lacs (ICD overdues Rs. 700 lacs + interest overdues Rs. 5398.75). On 12th April 2012, SDBL made its OTS proposal of repaying Rs. 7.77 crores and that was rejected by MPSIDC by its letter dated 10th May 2012.

25. The Court has to proceed on the basis of OTS sum that has been finally determined by MPSIDC. To recapitulate, the OTS amount determined by MPSIDC was Rs. 791.20 lacs i.e. Rs. 774.08 lacs (Principal Rs. 7,00,00,000+ Interest Rs. 74.08 lakhs) along with recoverable expenses of Rs. 17.12 lakhs. Also, the said sum was asked by MPSIDC by its letter dated 10th May 2012 to be paid by SDBL "immediately". The submission of SDBL that there was a deemed acceptance of its earlier OTS offer only because MPSIDC encashed Rs. 75,00,000 is not tenable. MPSIDC made it clear by its letter dated 10th May 2012 that the sum of Rs. 75 lakhs already stood adjusted and would not be adjusted against the OTS sum. Even while SDBL deposited in this Court a cheque in the sum of Rs. 6,92,87,036, MPSIDC had protested showing that it was not in full and final settlement of the OTS amount. That protest was justified since SDBL had in calculating the said sum unilaterally adjusted Rs. 75 lakhs against the OTS amount, which clearly it could not.

26. The position that emerges from the above discussion is that in the balance sheet of SDBL as on 31st March 2010 there is an admitted liability of Rs. 10,97,70,329. The OTS amount payable by SDBL was far less than the said amount. Despite numerous opportunities, SDBL has not made payment of the OTS amount to MPSIDC till date. The order passed by this Court on 30th March 2012 noted that "While this Court was in the midst of dictating the order" for provisionally winding up SDBL, its representative stated that SDBL "shall immediately meet the officers of the Petitioner corporation and repay the entire amount that is due and payable to the Petitioner corporation within three weeks." More than a year has passed since then. There had been numerous opportunities available to SDBL to comply with the requirements of OTS amount offered by MPSIDC. Even as late as 25th April 2013 MPSIDC gave yet another chance to SDBL to pay Rs. 7,52,66,77 after forgoing Rs. 25 lakhs out of the OTS amount of Rs. 7,77,66,667. Instead, SDBL has been consistently haggling what the OTS amount should be and its stand has been demonstrably untenable. With SDBL failing to meet the deadlines for paying the OTS amount repeatedly, the OTS no longer holds good as far as MPSIDC is concerned.

27. In the circumstances, the Court concludes that SDBL has no bonafide defence in the winding up petition and is unwilling and, therefore, unable to pay the admitted liability. In other words, the defence of SDBL as to why it will not pay the admitted debt is neither one of substance nor in good faith. SDBL has also not been able to satisfy the Court that it is willing to make payment of the admitted debt. The Court is, therefore, satisfied that a case has been made out for admitting the petition and appointing a provisional liquidator for SDBL.

28. The petition is, therefore, admitted. A copy of this petition be served on the Official Liquidator ("OL") attached to this Court. The OL is appointed as the Provisional Liquidator ("PL") of the SDBL. The OL is directed to take over all the assets, books of accounts and records of the SDBL immediately upon this order becoming effective as indicated hereafter. The OL shall in that event also prepare a complete inventory of all the assets of the SDBL before sealing the premises in which they are kept. He may also seek the assistance of a valuer to value the assets. He is permitted to take the assistance of the local police authorities, if required.

29. Publication of the citation of the petition be effected in the Official Gazette, "The Statesman" (English) and "Veer Arjun" (Hindi) in terms of Rule 24 of the Companies (Court) Rules, 1959 ("Rules"). The cost of publication shall be borne by MPSIDC.

30. The Directors of the SDBL are directed to strictly comply with the requirements of Section 454 of the Act and Rule 130 of the Rules and furnish to the OL a statement of affairs in the prescribed form verified by an affidavit within a period of 21 days from the date that this order become operative as indicated in para 32 below. They will also file affidavits in this Court, with advance copies to the OL, within four weeks thereafter setting out the details of all the assets,

both movable and immovable, of the SDBL company and enclose therewith the balance sheets, profit and loss accounts and copies of the statements of all the bank accounts for the last three years.

31. Given the history of this litigation, and the fact that SDBL claims that it is a profit making company that has the capacity to pay the admitted liability, the Court considers it appropriate to grant one more opportunity to SDBL to pay to MPSIDC the admitted liability as shown in its balance sheet as on 31st March 2010, minus the payments made by SDBL to MPSIDC thereafter, together with interest up-to-date within a period of six weeks from today. Accordingly this order is kept in abeyance for a period of six weeks from today. If the payment as directed above is made by SDBL to MPSIDC within six weeks, then the present petition will be disposed of leaving it open to MPSIDC to institute other appropriate proceedings in accordance with law to recover the balance amount claimed by it. If such payment is not made to MPSIDC within six weeks then this order, and in particular para 29 to 31 above, will become immediately operational. MPSIDC will immediately inform the OL and the OL will proceed to take steps in terms of paras 29 to 31 of this order. In that event, a compliance report shall be filed by the OL before the next date of hearing. List on 5th August 2013.