

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMPANY PETITION NO.554 OF 2016

Madhya Pradesh State Industrial
Development Corporation

....Petitioner

Vs.

M/s. MP Toll Roads Limited

....Respondent

Mr. Akshay Patil a/w. Mr. Dhawal A. Patil I/b. M/s. K. Ashar and Co. for petitioner.

Mr. Parag Khandhar a/w. Ms. Trisha Sarkar I/b. DSK Legal for respondent.

CORAM : K.R.SHRIRAM, J.

DATE : 17th SEPTEMBER 2018

P.C.:

1 This petition is for winding up of respondent company – M/s. MP Toll Roads Limited (the company) under the provisions of the Companies Act, 1956 on the ground that the company is unable to discharge its debts and is commercially insolvent.

2 On 23rd July 2018 while admitting the petition, the Court was pleased to pass the following order :

1. This petition is filed for winding up of the respondent company MP Toll Roads Ltd (the company) on the grounds that the company is unable to discharge its debts, is incurring losses and is not in a position to pay its dues.

2. A tripartite agreement was entered into between petitioner, its subsidiary Madhya Pradesh Audyogik Kendra Vikas Nigam (Indore) Limited and IL&FS Limited on 15.6.1990 for construction of country's first (Built, Operate and Transfer (BOT) road in Madhya Pradesh. IL&FS was responsible for construction of road and was given rights to collect the toll and transfer the road to the State Government after recovery of cost and agreed return on investment. The construction of the BOT road was completed and it was put in operation w.e.f. 1.11.1993 from which date IL&FS started toll collection. Upon completion of the road project,

the company was formed as a special purpose vehicle for management and toll collection of the road. The cost of project was envisaged at Rs.100 million to be financed by debt of Rs.67 millions and equity of Rs.33 millions which was to be financed by petitioner and IL&FS to the extent of 51% and rest of the equity was proposed to be raised through strategic investors. IL&FS invited petitioner to subscribe private placement of bonds to the extent of Rs.2.50 million with coupon rate at 15% p.a. for the first three years and 18% p.a. for the residual period with interest payment at half yearly rests. The period of the bond was not to exceed 10 years from the date of allotment. After the bond matured, IL&FS called upon the petitioner to sign a transfer deed and arrange to send the same along with original letter of bond as IL&FS was willing to repurchase the bonds at face value with accrued interest, value date being 10.5.1998.

3. Petitioner agreed and communicated the same by a letter dated 20.5.1998. IL&FS however, refused to repurchase because the repurchase offer was valid only upto 10.5.1998 and as petitioner conveyed its acceptance to IL&FS offer only on 20.5.1998. Subsequently, the company offered to convert the amount payable to petitioner into deep discount bonds (DDBs) proposed to be issued by the company. Petitioner agreed for the same and the company offered its letter of offer for the DDBs issue as stated in the letter dated 10.6.1999 at (Exh.K) to the petition. As per the letter of offer, the issue price was Rs.1000 per bond, redemption 7 years from the date of allotment, yield to maturity was 17.33% p.a., interest on application money upto the date of allotment was 16% p.a. and redemption price was Rs.3060 per bond.

4. By a letter dated 21.12.1999 the company acknowledged to petitioner that an amount of Rs.25,12,329/- was due to petitioner as on 15.7.1998 pursuant to the earlier bond issued by IL&FS and that amount has to be treated as advance towards DDBs pending allotment. The amount was treated as advance towards DDBs was carrying interest @ 16% p.a. till the date of allotment of DDBs. The company also recorded that the aggregate amount of advance with interest @ 16% p.a. on the same from 16.7.1998 to 31.10.1999 works out to Rs.30,33,241/(Advance Rs.25,12,329/plus interest Rs.5,20,912/subject to tax) as on 1.11.1999. No allotment letter was issued nor the advance adjusted towards the bond issue price and was also never repaid.

5. Mr.Patil states that even assuming that we accept interest was payable @ 16% p.a., since the company has not paid a penny despite acknowledging its liability, Mr.Patil submitted that letters were written to the company to which there was no response and even to the statutory notice dated 17.5.2014 read with letter dated 26.7.2014, the company basically issued only a holding letter vide its Advocate's letter dated 2.9.2014. Mr.Patil submitted that in this letter the advocates are only calling upon the petitioner to provide copies of documents referred to in the notice to enable their clients to deal with the same effectively as correspondence/documents were not traceable in their client's record. I

find this response of the Advocate rather strange. In the balance sheet of the company for the year ending 31.3.2014 and 31.3.2015, the company has acknowledged its liability to petitioner. Of course, the company has shrugged off its liability towards interest and has noted that the company has stopped accruing interest charge on DDBs from 1.4.2006. In the notice that form part of the financial statement for the year ending 31.3.2014 and for the year ending 31.3.2015 company has acknowledged its liability to the petitioner in the sum of Rs.25,12,329/. In the balance sheet it has also been acknowledged that no interest has been paid and had interest been provided for, the net loss for the year after tax would have been higher.

6. The defences in the affidavit in reply are as under :(a) Barred by limitation ; (b) Winding up proceeding cannot be used as a mechanism or substitute for recovery of monies ; (c) Bonafide dispute ; (d) There is no debt because petitioner failed to execute certain agreements which are necessary for the allotment of bonds ; (e) In 1998 the IL&FS had offered to repurchase the bonds but as petitioner did not revert within the time line indicated, IL&FS did not repurchase and therefore, it is due to petitioner's own wrong it could not be paid the amount.

7. In my view, each of the defence raised is bogus, moonshine and not bonafide.

8. As regards the defence of limitation, as noted earlier, even in the balance sheet the company has acknowledged its liability to petitioner. The last of the balance sheet which is annexed to the petition is for the year ending 31.3.2015 and has been signed by the company on 22.5.2015. Petition has been lodged on 15.6.2016. Hence it is within limitation.

9. So far as the defence that winding up petition cannot be utilized as a mechanism for substituting of recovery of monies, in this petition petitioner is not seeking any recovery of any monies.

10. Defences(c), (d) and (e) can be dealt with together. Bald statements are made in the affidavit. What is the dispute has not been spelt out. Which are the agreements that petitioner refused to sign have not been listed. If petitioner had not signed the agreement, that would not mean company could appropriate the monies. If what the company says is correct, then why did the company show the liability in the balance sheet. The stand of the company that because the petitioner did not respond promptly to IL&FS offers to repurchase the bonds and hence petitioner is trying to take advantage of its own wrong is also baseless because subsequently, the company has converted those amounts as advance towards DDBs.

11. Therefore, indisputably the amount is payable to petitioner and when one considers copies of the balance sheet annexed to the petition, it is rather evident that company is suffering huge losses and is commercially

insolvent. In fact the company has in its balance sheet confessed that if interest has been provided, the net loss before tax would have been higher, so also liabilities and accumulated loss.

8. In the circumstances I am satisfied that the company is unable to pay its debts and the company deserves to be wound up. In the circumstances, in my view, the petition requires to be admitted and hence the following order is passed :

ORDER

(i) The Company Petition is admitted and made returnable on 6.9.2018 ;

(ii) Petitioner is directed to advertise the petition within two weeks in two local newspapers, viz. 'Free Press Journal' (in English) and 'NavShakti' (in Marathi) and also in Maharashtra Government Gazette. Any delay in publication of the advertisement in the Maharashtra Government Gazette, and any resultant inadequacy of notice shall not invalidate such advertisement or notice and shall not constitute noncompliance with this direction or with the Companies (Court) Rules, 1959 ;

(iii) Petitioner shall also deposit an amount of Rs.15,000/- with the Prothonotary and Senior Master of this Court towards publication charges, within a period of two weeks from the date of this order, with intimation to the Company Registrar failing which the petition shall stand dismissed for non prosecution without further reference to the court. After the advertisements are issued, the balance, if any, shall be refunded to petitioner ;

(iv) Counsel for respondent waives notice under Rule 28 of Company (Courts) Rules, 1959.

9. At this stage, Mr.Karl Tamboly states that parties have almost settled the matter and are only waiting for endorsement from the Hon'ble Chief Minister of Madhya Pradesh for settlement. Mr.Tamboly states that within two weeks, Chief Minister will be approving the settlement. Therefore, two weeks period granted to advertise the petition will commence on 7.8.2018.

3 Naturally the endorsement of the Hon'ble Chief Minister of Madhya Pradesh for settlement has not come through because the petition has been advertised. No further affidavit in reply has been filed for the Court to take a view different from what it took while admitting the

petition. On 6th September 2018 a statement was made by the counsel that settlement talks are almost through and therefore, the petition was stood over to today. Even today there is no settlement talks and Mr. Patil, counsel for petitioner states that his instructions are to go on with the petition.

4 Mr. Patil tenders an affidavit of one Mangesh More affirmed on 6th September 2018 confirming advertising the petition in Free Press Journal and Navshakti on 11th August 2018 and in the Maharashtra Government Gazette for the period 23rd - 29th August 2018 at serial no.M-18153. Notice under Rule 28 of the Companies (Court) Rules, 1959 had been waived.

5 This Court has dealt with each of the defence raised by the company and at the time of admission has come to a conclusion that each of the defence raised is bogus, moonshine and not bonafide. No case is made out as to why that observation and conclusion should be changed today. No further affidavit in reply also has been filed. The debt has been acknowledged in the balance sheet, last of which has been filed, I am told, for year ending 31st March 2015. Mr. Khandhar, counsel for respondent states that subsequently no balance sheet seems to have been filed or atleast he has not received subsequent balance sheet from the company to show a different situation. In the balance sheets, the liability is acknowledged. The balance sheets also indicate that the company has suffered huge losses and commercially insolvent.

6 In the circumstances, I am satisfied that the company is indebted to petitioner, unable to discharge its debts and commercially insolvent.

7 Therefore, the company petition is allowed in terms of prayer clauses – (a) and (b) which read as under :

(a) The Respondent Company M/s. MP Toll Roads Limited having registered office at ILF&S Financial Center, Plot No.C-22, G-Block, Bandra Kurla Complex, Bandra (East), Mumbai – 400 051 (CIN-U45203 MH1996 PLC252098) be wound up under the provisions of the Companies Act, 1956 and/or the Companies Act, 2013 as may be applicable under the order and direction of this Hon'ble Court;

(b) The Official Liquidator may kindly be appointed as Provisional Liquidator of the said Respondent Company to take charge of all the assets, properties, books of accounts, under the provisions of the Companies Act, 1956 and the Companies Act, 2013 as may be applicable.

8 Official Liquidator, within two weeks, to take steps upon receiving an authenticated copy of this order from the advocate for petitioner without waiting for any notification. The counsel for petitioner is also directed to forward a copy of this order to National Company Law Tribunal for information.

9 Upon receipt of the authenticated copy from petitioner's advocate, Official Liquidator shall forthwith cause notice to all concerned Directors calling upon them to file their respective statement of affairs strictly in consonance with the provision of law. All Directors of respondent

company, now in liquidation, are hereby directed to file their respective statement of affairs as required under Section 454 of the Companies Act 1956, failing which Official Liquidator shall proceed further and lodge criminal complaint against the erring Directors, without seeking prior sanction of this Court for initiation of criminal prosecution.

10 Company petition accordingly stands disposed.

11 At this stage, Mr. Khandhar states that hopefully within two weeks from today, the matter will be settled.

12 Therefore, this order to take effect after two weeks.

(K.R. SHRIRAM, J.)

Gauri
Amit
Gaekwad

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signed by
Gauri Amit
Gaekwad
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