



this arrangement, the petitioner supplied products from time to time to the respondent no. 1 company against invoices duly acknowledged by the respondent no. 1. Some payments were made towards these invoices however the respondent no. 1 had failed to pay an aggregate amount of Rs.49,19,492.28 to the respondent against supplies claimed to have been made. My attention is drawn to the invoices evidencing the receipt of the supplies effected by the petitioner in respect of which these dues have been asserted. The petitioners have also placed a tabulation on record setting out a summarisation and the details of all the supplies made to the respondents and the amounts due from it for the same.

4. In the letter dated 5th December, 2000 the respondent has admitted liability. This letter was faxed to the petitioner. The respondent undertook to pay the outstanding amount due and payable by it. The respondent also issued three cheques, one being a cheque dated 15th October, 2000 in the sum of Rs.5,20,983.34; the second being a cheque dated 27th December, 2000 in the sum of Rs.50000/- and a third cheque dated 18th January, 2001 in the sum of Rs.3 lakh pursuant thereto towards partial discharge of its liability. Thereby the respondent had tendered three cheques for the total sum of Rs.8,70,983.34 to the petitioner.

5. Reliance is placed by the petitioner on the assurance given by the respondent no. 2 on behalf of respondent no. 1 in the meeting held on 21st December, 2000 to make substantial payment out of the outstanding dues by the 30th December, 2000. In terms of such assurance, the petitioner made a payment of a negligible amount of Rs.50000/- only on 27th December, 2000 by a cheque on 27th December, 2000 which was honoured on presentation. As a result an outstanding of Rs.48,69,492.28 remained due and payable by the respondent no. 1 thereafter.

6. The petitioner also placed reliance on a further meeting held on 5th January, 2001 wherein the respondent assured the petitioner that they would make substantial payment of the outstanding on or before 10th January, 2001 by pay orders and consequently requested the petitioner not to deposit the remaining two cheques till such time. The petitioner acceded to the request received on behalf of respondent no. 1. However the respondent company failed to make payment of the assured amount on or before 10th January, 2001.

7. As a result the petitioner was left with no option but to deposit the post dated cheques for Rs.3 lakhs and Rs.5,20,983.34. On their presentation, both cheques were dishonoured by the respondent bankers with the remarks that the account holder had not arranged for payment the amount of the cheques. 8. The petitioner caused to be issued a composite legal notice dated 9th February, 2001 to the respondents under Sections 138 of the Negotiable Instruments Act as well as Sections 433 and 434 of the Companies Act, 1956. This notice was duly received on the 9th February, 2001 at the registered office of the respondent. Copy of the dishonoured cheques as well as the notice dated 9th February, 2001 alongwith the duly receipted acknowledgment card has been placed on record. 9. It is informed that the petitioner has separately initiated proceedings against the company and other authorised signatories thereof under section 138 of the Negotiable

Instruments Act, 1881 before the court of the learned Magistrate at Bangalore. The criminal complaint stand transferred to Mumbai and is pending in the court of competent jurisdiction.

10. The petitioners have also placed on record a letter dated 29th January, 2001 addressed by Mr. Harish Madan, the managing director of the respondent no. 1, on behalf of the respondent company making a grievance that the cheques had been purportedly deposited despite a decision not to deposit the same. I find that even in this communication, there is, however, no dispute to either the claim of the petitioner or the liability of the respondents to make a payment. On the contrary the letter clearly suggests admission of liability on the part of the respondents.

11. The respondent has admittedly sent no reply to the legal notice dated 9th February, 2001. The petitioner had separately invoked remedy under Section 138 of the Negotiable Instruments Act before the concerned courts at Bangalore which stands transferred to Mumbai.

12. In this background, the present petition was filed on or about the 3rd September, 2003 when notice was directed to issue to the respondents. The respondents entered appearance and have filed a reply on record. In the reply an objection has been taken that the notice issued to the respondent by the petitioner was a composite notice under section 138 of the Negotiable Instruments Act as well as under section 434 of the Companies Act, 1956 and was consequently bad in law. I see no prohibition in law to issuance of such a notice. Perusal of the legal notice would show that it meets the statutory requirements of the Companies Act, 1956 and provides the statutory period to the respondent to reply to the notice and to make good its default.

13. The petitioner has not disputed receipt of the legal notice dated 9th February, 2001 even in the reply which has been filed before this court. Prima facie it appears that the defence raised in the reply is moonshine and is an afterthought only to defence to the present petition.

14. The admitted position therefore which emerges from the record is that despite receipt of the legal notice, the respondent did not dispute the supplies made by the petitioner to it. The receipted invoices placed on record manifest the correctness of the petitioner's submissions. Even otherwise, it would be unnecessary to closely examine the invoices in view of the admissions of the petitioner as contained in its communication dated 5th September, 2000, as well as the letters dated 27th January, 2001 and 5th September, 2000. It may be noted that the petitioner had a period of over two years between 9th February, 2001 and 3rd September, 2003 when the winding up petition was filed to raise any controversy to the supplies which were made by the petitioner as well as amounts claimed by it. No such thing was ever done.

15. Section 434 of the Companies Act, 1956 has mandated that a company shall be deemed to be unable pay its debt if a creditor to whom the company is indebted in a sum

exceeding Rs. 1 lakh has served a notice on the company by registered post or otherwise in statutory compliance.

16. In its communication dated 5th September, 2000 the respondents have admitted liability of the petitioner to the tune of Rs.5 lakhs to the respondent. In this regard, the respondent had also informed the anticipated payment schedule to the respondents whereby they had undertaken to pay the said amounts in instalments of Rs.8 lakhs each in September and October, Rupees nine lakhs each in November and December and Rupees twenty lakhs again in December.

17. In the instant case the company admitted its debt, handed over post- dated cheques as part of its liability, provided an amount of Rs.50000/- towards one of the cheques and caused dishonouring of the other two cheques which were also issued towards part liability of the company. There is substance in the submissions made by learned counsel that the cheques which were issued by the respondents also manifest the admission of the liability.

18. No reply has been sent to the legal notice.

19. In this background it has to be held that the company is unable to pay its debt within the meaning of the expression under section 434 of the Companies Act, 1956. This petition is consequently allowed. Accordingly I appoint the Official Liquidator as the provisional liquidator to take over the assets, books of accounts and statutory records of the company. Citation be published in the newspapers 'Statesman (English) and 'Jansatta' (Hindi). The citation be also published in the Delhi Gazette. The petitioner will file an affidavit by way of evidence within a period of four weeks. The respondent-company will file a detailed affidavit giving details of existing directors, their addresses as well as the registered office of the company and the place where the books of accounts and statutory records of the company are available. Copy of the last balance sheet will also be filed alongwith the affidavit. Copy of the said affidavit be also furnished to the Official Liquidator. List on 31st October, 2008.

Sd./-  
GITA MITTAL, J

August 25, 2008