

(2016) 11 KAR CK 0072
In the Karnataka High Court

Case No : C.P. No. 214 of 2012 along with C. A. Nos. 1183 and 1184 of 2012

Aerotron Ltd.

APPELLANT

Vs

Kingfisher Airlines Ltd.

RESPONDENT

Date of Decision : 18-11-2016

Acts Referred:

Companies Act, 1956 — Section 433, Section 439

Citation : (2017) 2 AirKarR 684 : (2017) 200 CompCas 361

Hon'ble Judges : Dr. Vineet Kothari, J.

Bench : Single Bench

Advocate : Rajesh S.V., Ajith Anand Sietty, M/s. S.A. Partners and Shreyas Jayasimha, Advocates, for the Respondent (Supporting Creditor); S.S. Naganand, Senior Counsel for Achappa P.B. for M/s. NDA Partners Associates, for the Petitioner

Final Decision : Disposed Off

Judgement

Dr. Vikeet Kothari, J. - Heard learned counsel for the petitioner Mr. S.S. Nagao and, senior advocate. Mr. S.V. Rajesh, earlier appearing for the respondent-company, Kingfisher Airlines Lid. (KFA Ltd.), has filed a memo withdrawing his Vakalath from the said case and he submits that lie has no further instruction to appear ant argue on behalf of the respondent-company.

2. The said respondent-company is a company against which several winding up petitions have been filed in this court and several of the creditors are before this court seeking the winding up of the said company for failure to pay its admitted debts. Similarly, several winding up petitions have also been filed against its holding company, M/s. United Breweries (Holdings) Ltd., (UBHL), which had also given guarantee to discharge the debts of the respondent-KFA Ltd., and on account of alleged failure to honour and discharge its guarantee obligations, such winding up petitions were filed against UBHL by the consortium of banks and financial institutions led by SBI. But while UBHL is hotly contesting those winding up petitions filed against it, it has not put forth any defence against the present

winding up petition or against host of other winding up petitions against its own subsidiary KFA Ltd., though both batch of cases came up for hearing on the same day.

3. A detailed admission order was passed by the co-ordinate Bench of this court on December 6, 2013 against which, the respondent-company, at that point of time, took the matter before the Division Bench of this court by way of intra-court appeal, namely, O.S.A. No. 20 of 2014 (Kingfisher Airlines Ltd v. Aerotron Ltd. [2015] 192 Comp Cas 328 (Kam)) which too, came to be dismissed by the Division Bench of this court on July 15, 2015 Admittedly, even thereafter, nothing was apparently paid to any of the creditors by the respondent-company towards its admitted debts and the respondent-company also does not appear to have made any alternative arrangements whatsoever either for payment of any of its admitted dues of the petitioning creditors before this court or even appearance of any other advocate to oppose this winding up petition. Mr. Uday Holla, senior advocate, appearing for the holding company UBHL, to oppose winding up petitions against UBHL also refused to have any instruction to oppose the winding up petition against the respondent-company, KFA Ltd.

4. The relevant extract of order of admission passed on December 6, 2013 by the hon"ble Mr. Justice Anand Byrareddy, is quoted below :

"Mr. S.S. Naganand, senior advocate along with Sri A.C. Achappa, advocate, M/s. NDA Partners for the petitioner.

Mr. K.G. Raghavan, senior advocate for the respondent.

ORDER

The petitioner is said to be a company incorporated under the laws of England and Wales, having its registered office at West Sussex, United Kingdom. The petitioner seeks that the respondent-company be wound up under the provisions of the Companies Act, 1956 and for the appointment of a liquidator.

2. The respondent is a company incorporated under the Companies Act, 1956, having its registered office at Bangalore. It is said to be a scheduled commercial passenger airline and was incorporated in the year 1996. The share capital of the respondent is Rs. 4,250 crores, consisting of 165 crores equity shares of Rs. 10 each and 26 crores preference shares of Rs. 100 each. The issued and paid-up capital of the respondent is said to be Rs. 10,50,87,92,230.

The petitioner is said to be a supplier of ratable aircraft components and other allied activity. It is said to have supplied several ratable aircraft components to the respondent. One of the terms of sale was that the respondent should pay all invoices raised, within 30 days of the date of the invoice. The respondent is said to have defaulted in making payments. As of January 31, 2012 the respondent was said to be due to the petitioner, a sum of US \$ 5616024.12, including interest.

As the respondent was unable to pay the dues, the parties had entered into an agreement dated February 24, 2012 whereby the respondent had acknowledged its liability to pay the outstanding amount in instalments spread over several months, between March and October, 2012.

It transpires that the respondent was not able to make any payments in terms of the above agreement and hence a notice under sections 433 and 434 of the Companies Act, 1956, dated June 1, 2012 was said to have been issued calling upon the respondent to pay a sum of US \$ 5939914.41. The respondent is said to have failed to make any payment even pursuant to the same. It is contended that the respondent is in a very bad financial condition and is unable to pay its debts. It is also claimed by the petitioner, that the respondent is due phenomenal amounts of money to various other third parties and is said to be in complete default in repayments. It is in this background that the petition is filed.

3. The respondent, has by way of statement of objections, resisted the petition contending that the petitioner had supplied a number of ratable aircraft components relating to V2500-A5 Engines manufactured by M/s. International Aero Engines AG ("IAE"). It is stated that there is a civil suit pending before the court of the City Civil Judge, Bangalore, against IAE and its associate companies, in O. S. No. 6406 of 2012, where in a serious dispute has been raised regarding the defects in design and manufacture of the engines made by it. On account of which the entire fleet of Airbus A320 family aircraft of the respondent have been rendered unfit for commercial use. And that the components supplied by the respondent form part of the defective engines. It is hence sought to be contended that the respondent is justified in denying payments for defective supplies.

It is contended that the respondent being a "foreign company as defined under the Companies Act, 1956, has provided support teams at all places where the customers of the petitioner are located, including India and is hence carrying on business in India, without compliance with the provisions of sections 592 to 594 of the Companies Act and is hence prohibited under section 599 of the Act from bringing any suit or instituting any legal proceeding in India, until compliance with the above.

The respondent has chosen to deny all liability to make any payment and has negated the settlement agreement referred to above. And while attributing its operational and admitted financial woes to the allegedly defective engines, some of the components for which were supplied by the petitioner, it is pleaded that the respondent be afforded an opportunity to revive its business. In this direction the respondent is said to be in dialogue with several foreign airlines who have evinced interest in investing in the respondent-company.

4. In the light of the above, the petition having been considered for admission on hearing the learned senior advocate Shri S.S. Naganand and the learned senior advocate Shri K.G. Raghavan, appearing for the respective counsel for the

parties, the matter was adjourned by four weeks as on November 8, 2013 to enable the respondent to demonstrate if there was any progress in its revival plans.

The matter having been listed again today, though there is an endeavour on the part of Shri K.G. Raghavan to demonstrate that the talks and negotiations with a certain foreign airline is progressing well, it is not shown that matters had come to a head, with any degree of certainty, to hold that the respondent was in a comfortable financial position.

Hence, the petition is admitted to file. The petition to be posted for hearing, regarding the advertisement of the petition, during the second week of January, 2014. The respondent shall not, in the meanwhile, dispose of any of its assets without the leave of this court."

5. The relevant extract of order of the Division Bench of the hon''ble Mr. Justice Vineet Saran and hon''ble Mr. Justice Aravind Kumar, dismissing O.S.A. No. 20 of 2014 dated July 15, 2015 (Kingfisher Airlines Ltd. v. Aerotron Ltd. [2015] 192 Comp Cas 328 (Kam)) is also quoted below (pages 329 to 331 of 192 Comp Cas) :

"Mr. S.V. Rajesh, advocate for the appellant.

Mr. S.S. Naganand, senior counsel along with Sri A.C. Achappa, advocate, M/s. NDA Partners for the respondent.

The respondent-company Aerotron Ltd., having its office in the United Kingdom, had filed Company Petition No. 214 of 2012 under section 433(e) and (f) read with sections 434 and 439(1)(b) of the Companies Act, 1956, for winding up of the appellant-company.

The case of the respondent is that certain amounts were admittedly due to be paid by the appellant-company to the respondent-company for which an agreement was entered into between the two companies on February 24, 2012 whereby the appellant-company had acknowledged its liability to pay the outstanding amounts in instalments spread over several months between March and October, 2012. The appellant contested the matter by denying its liability to pay the said dues, on the ground that the same were disputed dues and it also raised an objection that since the respondent-company was carrying on business in India with an established place of business in India and having failed to comply with the provisions of sections 592 to 594 of the Companies Act, it would be prohibited from bringing a suit or instituting legal proceedings in India, as provided under section 599 of the Companies Act. After hearing learned counsel for the parties, vide a reasoned order dated December 6, 2013, passed by the learned company judge, company petition has been admitted and posted for hearing on the question of advertisement of the petition. Challenging the said order of admission of the company petition, this appeal has been filed.

We have heard Sri S.V. Rajesh, learned counsel for the appellant as well as Sri

S.S. Naganand, learned senior counsel along with Sri A.C. Achappa, learned counsel for the respondent and perused the records.

To support his contention that the respondent-company is carrying on business activities in India, learned counsel for the appellant has placed reliance on certain print outs of the website of the respondent-company wherein it has been stated that the company provides support system to its customers in India as well as other countries by providing technical assistance, spare supplies and distribution. It is submitted that on the website of the respondent-company it is also mentioned that the company has developed new markets in Egypt, India, Kazakhstan and Jordan. On the basis of this, learned counsel for the appellant has vehemently contended that the company is carrying on business in India. However, learned counsel has not been able to show any document in support of his contention that the respondent-company is having any office, warehouse, store house, etc., within the territory of India or any of its employees are permanently posted in India. The documents on which learned counsel for the appellant has relied upon only goes to show that the respondent-company provides technical service in India by providing spare parts and other technical assistance which would not mean that they have any establishment or office in India but provide such services on demand, as and when required by staff or engineers going to India temporarily for providing such services. As such, we are not satisfied with the objection of the appellant that in such circumstances the respondent-company would be obligated to comply with sections 592 to 594 of the Companies Act, 1956.

Learned counsel for the appellant has relied upon the decision of the Delhi High Court rendered in the case of *Dabur (Nepal) P. Ltd. v. Woodworth Trade Links P. Ltd.* reported in [2012] 175 Comp Cas 338 (Delhi), to support his contention that if a company has an office or establishment within the territory of India it would have to comply with the provisions of sections 592 to 594 of the Companies Act. On facts, the said decision would not be applicable as in the said case the company in question was a subsidiary of an Indian company which admittedly had its warehouse, store house in India where the goods of the company was stored. The said company also had transactions within India and had an address of correspondence in India. As such, we are of the view that the ratio of the said judgment would not be applicable to the facts of this case.

As regards admission of the debts by the appellant-company payable to the respondent-company, the learned company judge has placed reliance on the agreement between the two companies dated February 24, 2012 whereby the appellant-company has acknowledged an outstanding of US \$ 56,16,024.12 plus accrued interest after January 31, 2012. Admittedly the said amount has not been paid within the time provided in the said agreement or even thereafter. Thus, being prima facie satisfied that the appellant-company was unable to pay its debts, company petition has been admitted. In such facts, admission of the petition cannot be faulted.

In the end, learned counsel for the appellant has also submitted that under the Foreign Exchange Management (Establishment in India of Branch or Office or other Place of Business) Regulations, 2000, there is a prohibition under regulation 3 for establishing branch office in India by a foreign company without prior approval of the Reserve Bank of India. In view of the fact that we have already held above that the appellant has not been able to place any material on record to show that the respondent-company has any office (be it a site office or project office or warehouse or store house) within the territory of India, the provisions of the Regulations of 2000 would not be applicable.

In view of the aforesaid, we do not find any good ground to interfere with the order of admission passed by learned company judge. Appeal is accordingly dismissed. However, there shall be no order as to costs."

6. Thereafter, the winding up petition was advertised on March 4, 2014 in The Hindu and Udayavani newspapers.

7. That the respondent-company filed its objections but no one else did. The relevant extract of such objections, though no body appeared for the respondent-company to press the same, is quoted below :

"6. It is pertinent to mention here that the respondent-company has been served with a copy of a substantial suit filed in the City Civil Court, Bangalore against IAE and its constituent joint venture partners, viz., Rolls-Royce Pic, Pratt and Whitney, a division of United Technologies Corporation, Japanese Aero Engines Corporation and MTU Aero Engines GmbH, by United Breweries (Holdings) Ltd., being Suit No. OS/6406 of 2012 ("the said suit") making serious charges against IAE and its constituent joint venture partners contending that the IAE manufactured V2500-A5 Engines are inherently defective both in design and manufacture. The same engines are fitted on the entire fleet of Airbus A320 family aircraft of the respondent-company (and include components supplied by the petitioner herein to the respondent-company), rendering them incapable of the Respondent Company have been primarily or in any event decisively been caused by the defective engines supplied on account of false assurances/fraudulent mis-representations given/ made by IAE and/or its constituent joint-venture partners. A copy of the plaint in the said Suit No.OS/6406 of 2012 is hereto annexed and marked "Annexure R-I"hereto.

7. The Respondent Company says and submits that a number of the components supplied by the Petitioner relate to the said inherently defective in design and manufacture V2500-A5 engines manufactured by IAE and its constituent Joint Venture partners. The Respondent Company is in the process of considering the said Suit("Annexure R1 hereto") and its implications as it has a direct bearing on the present Company Petition and is in the process of seeking legal advice in respect of the same. Therefore, assuming without admitting that the present Company Petition is maintainable it is humbly submitted that the present Company Petition be stayed pending final hearing and disposal of the said Suit

("Annexure R-1 hereto").

12. It is therefore evident that the Petitioner Company, being a "foreign Company", is carrying on business in India, has an established place of business in India but has failed to comply with the provisions of Section 592 to 594 of the Companies Act-the Petitioner Company is therefore expressly prohibited under Section 599 of the Companies Act from bringing any suit, claiming any set off, making any counterclaim or instituting any legal proceeding in India in respect of any contract, dealing or transaction-including the present Company Petition-until it has complied, inter alia, with the aforesaid provisions of the Companies Act. On this ground alone the present Company Petition is not maintainable and is liable to be dismissed in limine with costs, and the Respondent Company prays accordingly. Hereto annexed and marked "Annexure R-4" is an extract from the portal of the Ministry of Corporate Affairs which clearly states " No matches found" against the name of the Petitioner Company.

21. With reference to paragraph 11 of the Company Petition, the Respondent Company repeats and reiterates what is stated here in above including that many of the components supplied by the Petitioner relate to the said inherently defective in design and manufacture V250C-A5 engines manufactured by IAE and its constituent Joint Venture partners in respect of which as mentioned here in above, the Respondent Company has recently been served with a copy of the said suit. The Respondent Company is in the process of considering the said suit("Annexure R-1 hereto) and its implications as it has a direct bearing on the present company petition and is in the process of seeking legal advice in respect of the same. The Respondent Company craves leave to refer to and rely upon the "Terms and Conditions" referred to therein when produced, for their true meaning and effect thereof. In view of what is stated here in above, it is denied that the Respondent Company was supplied Components by the petitioner as per the Terms and Conditions or that the Respondent Company is obliged to make any payment to the Petitioner in respect of such Components, let alone there being any default in payment on the part of the Respondent Company to pay, as alleged or otherwise. In view of what is stated here in above, it is denied that any amounts were due from the Respondent Company to the Petitioner or that the Petitioner was entitled to call upon the Respondent to pay any amounts in respect of the Components supplied, as alleged or otherwise.

25. With reference to paragraph 15 of the Company petition, in view of what is stated here in above, it is denied that the Respondent company owes any obligations to the petitioner either under the Settlement Agreement or otherwise, so the question of any alleged breaches of the alleged Settlement Agreement by the Respondent Company or the Petitioner calling upon the respondent-Company to remedy any such alleged breaches or there being any failure or neglect on the part of the Respondent Company to make payment of any alleged amount due or owing to the Petitioner, under the Settlement Agreement or/otherwise, as alleged or at all, does not and cannot arise.

26. With reference to paragraph 16 of the Company petition, in view of what is stated herein above, it is denied that the Respondent Company was or is obliged to make any payments to the petitioner, and therefore the question of the any alleged failure, on the part of the respondent Company to pay any amounts either under the Settlement Agreement or otherwise, does not and cannot arise. The question therefore of any alleged breaches of the alleged Settlement Agreement by the Respondent Company or the Petitioner calling upon the Respondent Company to remedy any such alleged breaches or there being any failure or neglect on the part of the Respondent Company to make payment of any alleged amount due or owing to the Petitioner, under the Settlement Agreement or otherwise, as alleged or at all, does not and cannot arise. In view of what is stated herein above, it is denied that the petitioner was entitled to serve any notice on the Respondent company or call upon the Respondent Company to pay any amount pursuant to the Settlement Agreement or otherwise, much less an amount of US\$ 5,854,825.62 or any part thereof, as alleged or otherwise.

33. With reference to paragraph 23 of the Company petition, in view of what is stated herein above, it is denied that it is just or equitable that the Respondent Company be wound up as alleged or for the reasons alleged or at all. The Respondent Company until its operational and financial woes, which have been primarily or in any event decisively been caused by the defective IAE V2500-A5 engines, was India's largest airline by market share operating more than 375 flights daily and had widest network of domestic destinations, with regional and long haul international services. It was consistently rated the best airline in India in terms of customer satisfaction, on-time performance, and operational reliability-the Respondent Company was India's only 5 Star-Airline, with an outstanding reputation and goodwill with its passengers which was one of its most valuable assets-and the brand continues to enjoy significant support although its value has been considerably eroded on account of the financial and operational problems faced by it on account of the inherently defective, both in design and manufacture IAE-V2500-A5 engines. It is submitted that since the Respondent Company had suspended its flight operations, the public has had to contend with exorbitantly high air fares. It is therefore also in the public interest that the Respondent-Company is given a reasonable opportunity to take advantage of the recently announced policy permitting Foreign direct investment in airlines, to try and revive its flight operations. In addition, revival of the Respondent Company Airlines will also be in the interest of its approx.3150 employees and their families, whose livelihood depends on the revival of the respondent company. It is public knowledge that the Respondent company is in discussions with a number of foreign airlines who have shown interest in investing in the Respondent-Company. It is also public knowledge that the Respondent Company has submitted a revival plan to the Director General of Civil Aviation which is under consideration. In fact, recently Hindustan Petroleum Corporation Limited, Bharat Petroleum Corporation Ltd., Indian Oil Corporation Limited and Reliance Industries Limited, the principal suppliers of aviation fuel in

the country have come forward to support the said revival plan by issuing their No objection Certificates for supply of aviation fuel to the Respondent Company. The Respondent Company craves leave to refer to and rely upon the aforesaid No objection Certificates. Any adverse order at this crucial stage will have a devastating impact on the revival of the airline operations, which would be against public interest.

8. The objection raised on behalf of the respondent-company were pressed at the admission stage only and thereafter, before Division Bench in its appeal filed against admission order but were not accepted or were overruled. Nobody appeared to press the same at the stage of hearing of this petition.

9. In the facts of the Company Petition 214/2012, M/s. Aerotron Limited v. Kingfisher Airlines Limited, the learned counsel for petitioner, Mr. Naganand, Senior Advocate has urged before the Court that the Petitioner-Company originally incorporated under the Laws of England and Wales, had supplied certain ratable air-crafts components to the respondent-Company-Kingfisher Airlines, KFAL for short, and for the dues of the petitioner-Company-Aerotron Limited, a Settlement Agreement was finally arrived at between the parties on 24th February 2012, under which, the respondent-company had agreed to pay the outstanding dues of the petitioner-Company to the extent of 5,616,024.12 in US Dollars (Five Million Six Hundred Sixteen Thousand and Twenty Four United States Dollars and Twelve Cents only) and despite the said Settlement Agreement, respondent-company failed to pay anything against these admitted dues of the petitioner-Company.

10. The relevant extract from the Legal Notice served by the Attorneys of the petitioner's Company vide Document-6 dated 9th May 2012 is quoted below for ready reference:-

"We address this Notice to you for and on behalf of our client, Aerotron Limited, a company incorporated and existing under the laws of England and Wales, having its registered office at Westley House, Fleming Way, West Sussex, RH 10(GA) United Kingdom ("Aerotron"), with instructions to state as under:

1. Aerotron had from time to time supplied a number of rotatable aircraft components to Kingfisher (the "Components") pursuant to various orders placed by Kingfisher on Aerotron. Kingfisher defaulted in payment of the consideration in respect of the Components supplied by Aerotron to Kingfisher, as per the "Terms and Conditions" agreed upon between Aerotron and Kingfisher for the supply of the Components and as of 31st January, 2012 Kingfisher owed US\$5,616,024.12 (Five Million Six Hundred Sixteen Thousand Twenty Four United States Dollars and Twelve Cents) (US\$5,192,483.00 (Five Million One Hundred Ninety-Two Thousand Four Hundred and Eight-Three United States Dollars and Eighty Cents) being the principal amount payable and USD 423,540.32 (Four Hundred and Twenty-Three Thousand Five Hundred and Forty United States Dollars and Thirty-Two Cents) being payable by way of interest) ("Total

Outstanding Amount".

2. Since Kingfisher expressed its inability to pay its dues in accordance with the agreed Terms and Conditions, Kingfisher and Aerotron entered into the Agreement whereby Kingfisher agreed to make payment of the Total Outstanding Amount in instalments as more particularly set out in the Agreement.

3. Under Clause 1.2 of the Agreement, Kingfisher was squired to make payment of the first instalment of US\$500,000 (Five Hundred Thousand United States Dollars) to Aerotron on 15th March, 2012. However, Kingfisher failed and neglected to make payment of the said amount of US\$500,000 to Aerotron on 15th March, 2012.

4. The second instalment of US\$500,000 under the Agreement was due on 30th March 2012, however Kingfisher once again defaulted in making payment of the said amount of US\$500,000 to Aerotron, this being Kingfisher's second successive default under the Agreement.

5. Kingfisher further failed to pay the 3rd instalment of US\$500,000 (Five Hundred Thousand United States Dollars) due on 30th April, 2012 to Aerotron.

6. As of as of 3rd May 2012, the total amount due and payable by Kingfisher to Aerotron is US\$5,854,825.62 (Five Million Eight Hundred Fifty-Four Thousand Eight Hundred and Twenty-Five United States Dollars and Sixty Two cents) (US\$5,193,107.19) (Five Million One Hundred Ninety-Three Thousand one Hundred and Seven United States Dollars and Nineteen Cents only) being the principal amount payable and USD\$661,718.43 (Six Hundred Sixty One Thousand Seven Hundred and Eighteen United States Dollars and Forty three Cents) being payable by way of interest).

7. Aerotron has by its e-mails dated 2nd April 2012 (sent at 12.24 p.m.), 10th April, 2012 (sent at 11.36 a.m.) and 29:" April, 2012 (sent at 10.53 a.m.) called upon Kingfisher to remedy the breaches under the Agreement. However; Kingfisher has failed and neglected to make payment of the amounts due and owing to Aerotron under the agreement.

8. In view of the aforesaid facts and circumstances, pursuant to Clause 2.3 of the Agreement, we hereby call upon Kingfisher to make payment to our client of the amount of USD\$S,854,825.62 (Five Million Eight Hundred and Fifty-Four Thousand Eight Hundred and Twenty-Five United States Dollars and Sixty Two Cents) being the total outstanding amount as of date within a period of 5 (Five) days from the date of receipt of this Notice by Kingfisher, failing which our client shall be constrained to adopt appropriate legal proceedings against Kingfisher, as may be advised, which shall be at your sole risks as to costs and consequences, which you may please note."

11. Thereafter also, since the respondent-company failed to pay anything on account of the said admitted dues of the petitioner-Company, another Statutory Notice under Sections 433 and 434 of the Companies Act, 1956, came to be

served by the Advocates and Attorneys of the petitioner's Company, M/s. Wadia Ghandy & Co., Mumbai, vide document-dated 1st June 2012 and referring the earlier correspondence which took place between these two parties, a demand was again made from the respondent-company to pay the admitted dues to the petitioner-Company. Paras 9 to 11 of the said Statutory Notice is also quoted below for the reference :-

"9. In view of the aforesaid facts and circumstances, we hereby call upon you to make payment to our client of the amount of US\$5,939,914.41 (Five Million Nine Hundred Thirty Nine Thousand and Nine Hundred Fourteen United States Dollars and Forty One Cents Only) being the total outstanding amount as of date, due and owing by you to our client, for Components supplied to you by our client, within 21 (Twenty one) days from the date of receipt of this notice by you, failing which our client shall be constrained to adopt appropriate legal proceedings against you, at your sole risks as to costs and consequences.

10. Please treat this as a statutory notice under Sections 433 and 434 of the Companies Act, 1956.

11. This notice and the actions proposed to be taken by of our client hereunder are without prejudice to, any other rights and remedies which are client may have against you at law and at equity, with respect to your defaults under the Agreement and/or otherwise."

12. Learned counsel for petitioner further urged that, despite all such notices and correspondences, without even replying to them, the respondent-company has failed to pay anything towards its admitted liability to the petitioner's Company against supply of goods and on the contrary, in its statement of objections tiled before this Court, they have admitted in para-33 of their reply that the respondent-Company, was not operational and was in financial woes, but sham defences were sought to be raised against the present winding up petition in the said statement of objections, like, pendency of a Civil Suit, vii., O.S.6406 of 25)12 which was filed by the holding Company of the respondent-Company M/s. United Breweries (Holdings) Limited and not by the Respondent-KFA Ltd. itself for the reasons best known to them and in the said suit filed for the alleged defective supply of Aero-engines to the respondent-KFA Ltd, which caused a huge loss to the respondent-Company and that is why, the respondent-Company was not able to pay all the dues of the petitioner-Company within the stipulated time. The said suit filed by the Holding Company UBHL of the respondent-KFAL against the manufacturers of the engines, namely, M/s. IAE International Aero Engines AG, Switzerland, M/s. Rolls Royce Pic, U.K., M/s. Pratt & Whitney, USA, Japanese Aero Engines Corporation, MTU Aero Engines GmbH, and Kingfisher Airlines Limited and the petitioner company, Aerotron Limited, who only supplied such engines, is not even arrayed as defendant in that suit, again for the reasons best known to the plaintiff, UBHL, was stated to be still pending and no decree as of yet has been passed in that Civil suit, but the learned counsel for the petitioner has urged before the Court that the pendency of that Civil Suit can not

affect or discharge the admitted liability of the respondent-Company towards the petitioner-Company to pay off the said debt and in view of the clear inability of the Company to pay its admitted dues towards petitioner-Company as well as several of the creditors who have filed the winding up petitions before this Court against the respondent-company, the said respondent-company deserves to be wound up. He further submitted that all aeroplanes of the respondent-company have been repossessed and taken back by the supplier-lessors and except some skeletal assets, there are not many realizable assets left with the company against the huge debt liability and the main Promoter Mr. Vijay Mallya. the Chairman of the company has also left India or rather has absconded and various lenders, Banks and Financial Institutions and other Enforcement Agencies who opposed his effort to flee the country even before the Hon'ble Supreme Court of India and who are now seeking his extradition back to India. He also drew the attention of the Court towards the last Balance Sheet of the Company as on 31st March 2012 and thereafter, no such current Balance Sheet for last 4 years appears to have been filed by the respondent-company before this Court. The last Balance Sheet as on 31st March 2012 itself shows, prima-facie, that net worth of the respondent-company is in negative. It is no longer operational and a going concern and the substratum of the company has been completely lost and there are no chances of any revival of the respondent-company.

13. Learned counsel for the petitioner also relied upon the following case laws in support of his submissions, viz., (i) M/s. Madhusudan Gordhandas & Co. v. Madhu Wollen Industries Pvt. Ltd.(1971 (3) SCC 632) para 20 and 21 thereon and the latest judgment from the Hon'ble Supreme Court in the case of IBA Health (India) Private Limited v. Infor-Drive Systems Sdn. Bhd (2010) 10 SCC 553 paras 20, 22, 23 and 24 of the said judgment. These paras are quoted below for ready reference.

(i) M/s. Madhusudan Gordhandas & Co., v. Madhu Wollen Industries Pvt. Ltd. (1971 (3) SCC 632)"

20. Two rules are well settled. First, if the debt is bona fide disputed and the defence is 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 sum demanded by contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. See London and Paris Banking Corporation. 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 properly was not allowed. See Re. Brighton Club Horfold Hotel Co.Ltd., (1865) 35 Beav. 204,

21. 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 (1894) 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.*, (1962) 32 Comp Cas 795 (Ch D). The principles 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."

(ii) *IBA Health (India) Private Limited v. Infor-Drive Systems Sdn. Bhd* (2010)10 SCC 553:

"20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding-up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding-up-procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bona fide disputed debt.

21. xxx xxxx

22. The above mentioned decision was later followed by this Court in *Madhusudan Gcrdhandas and Co. v. Madhu Woollen Industries Pvt. Ltd*, 15/1) 3 SCC 632. The principles laid down in the above mentioned judgment have again been reiterated by this Court in *Mediquip Systems (P) Ltd. v. Proxima Medical Systems (GMBH)* (2005) 7 SCC 42, wherein this Court held that the defence raised by the appellant-company was a substantial one and not mere moonshine and had to be finally adjudicated upon on the merits before the appropriate forum. The above mentioned judgments were later followed by this Court in *Vijay Industries v. NATL Technologies Ltd.* (2009) 3 SCC 527.

23. The principles laid down in the above mentioned cases indicate that if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(I)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" so as to incur the liability under Section 433(e) read with Section 434(I)(a) of the Companies Act, 1956.

COMMERCIALLY SOLVENT

24. The Appellant Company raised a contention that it is commercially solvent and, in such a situation, the question may arise that the factum of commercial solvency, as such, would be sufficient to reject the petition for winding up, unless substantial grounds for its rejection are made out. A determination of examination of the company's insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the company's liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under Section 434 (1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1)(a) that the company is unable to pay its debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption."

14. All these submissions made by the learned counsel for petitioner-Company have remained unanswered and un-rebutted, as nobody has appealed on behalf of the respondent-company-KFA Ltd, to controvert any of these submissions and the learned counsel who was earlier appearing in the said matter on behalf of respondent-Company, Mr.Rajesh S.V. has also today filed his Retirement Memo before this Court which was taken on record.

15. One of the counsel Mr. Ajith Anand Shetty, for M/s. S.A.Partners, appearing on behalf of the Creditor, urged that his client provided manpower under the contractual agreement to the respondent-company and for the dues of those workmen, he submitted that, if the respondent-company somehow survives or becomes operational, then, the workmen dues may be paid off by the respondent-company. The learned counsel for the said creditor, however, fairly submitted that, he has only a fond hope that the respondent-company-KFAL may again become operational.

16. This submission raised on behalf of the Creditors is not really in opposition of the winding up of the respondent-company but is only to safeguard the interest of his own clients viz., the workmen supplied through contractual agreement to the respondent-company. These workmen like any other workmen of the respondent-company and other creditors of the Company are certainly entitled in law under the provisions of the Companies Act, to make their respective claims before the Official Liquidator, once the winding up order is passed by this Court and the Official Liquidator is appointed to take the control and possession of the assets of the respondent-company and proceed further for the winding up of the respondent-company under the provisions of the Companies Act and Rules made there-under.

17. There has been no opposition as such to the present winding up petition and such of other winding up petitions against the respondent-company. The alleged defences of pendency of civil suit filed by holding company against the manufacturers but not against petitioner-Aerotron Ltd., locus standi of petitioner company to file this winding up petition, there being chance of revival of the business etc., are all, moonshine and sham defences raised without any material basis for them. The respondent-company is commercially insolvent and is unable to pay its huge debts and there appears to be no useful purpose to keep this company out of the process of winding up or to keep these winding up petitions pending unnecessarily waiting for some magic to happen for a turnaround of this company, which has been left to fend for itself even by its own holding company, even though UBHL facing similar winding up petitions against itself filed allegedly for not discharging its own guarantee obligations for discharging the debts of its own subsidiary-the Respondent company, and UBHL is hotly contesting winding up petitions filed against itself. This is nothing but self serving suicidal contradiction of these two companies.

18. The failure of the respondent-company even to make any alternative arrangement to argue and oppose the present case and other such petitions on behalf of the respondent-company against the petitioning creditors also shows that the Company is not interested in seriously opposing these winding up petitions against it. The objections raised in the statement of objection though not pressed again were considered but are found to be unsustainable and flimsy. There is no bona fide dispute against the admitted liability of the respondent-company and no substantial defence has been put-forth by it to show that it is not commercially insolvent.

19. Therefore, this Court, considers it just and proper to wind up the respondent-company for failure to pay the admitted liability and accordingly, the said respondent, Company-Kingfisher Airlines Limited deserves to be wound-up. Therefore, this Court is of the considered opinion that respondent-company, KFA Ltd., deserves to be wound up under the provisions of 433 (e) and (f) read with 439 of the Companies Act, 1956. Accordingly, the respondent-company, Kingfisher Airlines Limited having its registered office at U.B. Tower, Level-12, U.B.City, No.24, Vittal Malya Road, Bangalore-560 001, is ordered to be wound up.

This winding up order be published in "The Hindu" and "Udayavani" having circulation in Karnataka in terms of Rule 114 of Companies (Court) Rules, 1959, read with relevant provisions and notice of this order may also be sent to Official Liquidator, Regional Director and the Registrar of Companies, Karnataka, the respondent company itself and the petitioner company.

The Official Liquidator is appointed as the Liquidator of the said Company and is further directed to proceed further in accordance with the provisions of the Act and Company Court Rules, in pursuance of this Winding Up order.

The Official Liquidator may file a status report within a period of four weeks from today about taking over the control and possession of the assets of the respondent-company and also about the pending litigation or cases against the respondent-company at various other forums/courts or Tribunals or before this Court, within a period of four weeks.

In view of the disposal of main Company petition, prayers sought in C.A.No.1183/2012 for appointment of provisional liquidator of the Company to take charge immediately of the business affairs and assets of the company with all powers under the Companies Act, 1956 and in C.A.No.1184/2012 for restraining the respondent by itself, its servants and agents by an order of injunction from in any manner alienating, encumbering, transferring, creating third party rights or selling or disposing of or in any manner parting with possession or dealing with the properties or any of its assets or properties, do not survive for any further consideration and hence, they are disposed of in aforesaid terms of main winding up order, accordingly.