

**(2017) 02 KAR CK 0087**

**In the Karnataka High Court**

**Case No :** CO. Petition Nos. 57, 121, 122, 185 and 248 of 2012 and 51, 99, 162 and 265 of 2013 and 148 of 2016

IAE International Aero Engines AG

APPELLANT

Vs

United Breweries (Holdings) Ltd.

RESPONDENT

**Date of Decision :** 07-02-2017

**Acts Referred:**

Companies Act, 1956 — Section 433, Section 434, Section 439  
Companies Act, 2013 — Section 271, Section 272

**Citation :** (2017) 140 SCL 256

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

**Bench :** Single Bench

**Advocate :** Mr. Shreyas Jayasimha, for AZB and Partners, for the Petitioner in Company Petition No.57 of 2012; Mr. Udaya Holla, Senior Counsel for M/s. Holla and Holla, Mr. Sajjan Poovayya, Mrs. Nalina Mayegowda and Mr. Praveen Kumar for Poovayya and Co., S.A. Partners, M/s. Fox Mandal Assts, for the Respondent/ Objectors in Company Petition No.57 of 2012; Mr. C.K. Nandakumar, Advocate, for the Opposing Creditors in Company Petition No.57 of 2012; Mr. Ramanand Mundkur for M/s. Munkur Law partners, for the Creditors in Company Petition No.57 of 2012; Mr. Pramod Nair, for Arista Chambers, Advocate, for the Petitioner in Company Petition No.121 of 2012; Mr. Udaya Holla, Senior Counsel for M/s. Holla and Holla, Mr. Sajjan Poovayya, Mrs. Nalina Mayegowda and Mr. Praveen Kumar for Poovayya and Co., S.A. Partners, M/s. Fox Mandal Assts, for the Respondent/Objectors in Company Petition No.121 of 2012; Mr. C.K. Nandakumar, Advocate, for the Opposing Creditors in Company Petition No.121 of 2012; Mr. Ramanand Mundkur for M/s. Mundkur Law partners, for the Creditors in Company Petition No.121 of 2012; Mr. Pramod Nair, for Arista Chambers, Advocate, for the Petitioner in Company Petition No.122 of 2012; Mr. Udaya Holla, Senior Counsel for M/s. Holla and Holla, Mr. Sajjan Poovayya, Mrs. Nalina Mayegowda and Mr. Praveen Kumar for Poovayya and Co., S.A. Partners, M/s. Fox Mandal Assts, for the Respondent/Objectors in Company Petition No.122 of 2012; Mr. C.K. Nandakumar, Advocate, for the Opposing Creditors in Company Petition No.122 of 2012; Mr. Ramanand Mundkur for M/s. Munkur Law partners, for the Creditors in Company Petition No.122 of 2012; Mr. C. Muralidhar, for Murali and Co, for the Petitioner in Company Petition No.185 of 2012; Mr. Udaya Holla, Senior Counsel for M/s. Holla and Holla, for the Respondent in Company Petition No.185 of 2012; Mrs. Fereshte Sethna, Mr. Shanthanu Singh and Mr. Prashanth G, Advocates, for the Petitioner in Company Petition No. 248 of 2012;

Mr. Udaya Holla, Senior Counsel for M/s. Holla and Holla, for the Respondent in Company Petition No. 248 of 2012; AZB and Partners, Advocate, for the Supporting Creditors in Company Petition No. 248 of 2012; Mr.C.K. Nandakumar, Advocate, for the Opposing Creditors in Company Petition No. 248 of 2012; Mr. Sajjan Poovayya and Mr.D.L.N. Rao Senior Counsel, for the Respondent in Company Petition No. 248 of 2012; Mrs. Nalina Mayegowda and Mr. Praveen kumar for Poovayya and co., Mr. A. Murali and co., Mrs. S.R Anuradha and M/s. Mundhur Law Partners, Advocates, for the Objectors in Company Petition No. 248 of 2012; Mr. M.V. Kini, Advocate, for the Petitioner in Company Petition No.51 of 2013; Mr. Udaya Holla, for M/s. Holla and Holla and Mr. Sajjan Poovayya, Senior Counsel, for the Respondent in Company Petition No.51 of 2013; Mr.C.K. Nandakumar, Advocate, for the Opposing Creditors in Company Petition No.51 of 2013; Mrs. Nalina Mayegowda and Mr. Praveen kumar for Poovayya and co., Mr. A. Murali and co., Mrs. S.R Anuradha and M/s. Mundhur Law Partners, Advocates, for the Objectors in Company Petition No.51 of 2013; Mr. V.S. Arabatti, for Mullo and Mullo and Craigie Blunt, for the Petitioner in Company Petition No.99 of 2013; Mr. M.V. Kini, Advocate, for the Petitioner in Company Petition No.99 of 2013; Mr. Udaya Holla, for M/s. Holla and Holla and Mr. Sajjan Poovayya, Senior Counsel, for the Respondent in Company Petition No.99 of 2013; Mr. C.K. Nandakumar, Advocate, for the Opposing Creditors in Company Petition No.99 of 2013; Mrs. Nalina Mayegowda and Mr. Praveen kumar for Poovayya and co., Mr. A. Murali and co., Mrs. S.R Anuradha and M/s. Mundhur Law Partners, Advocates, for the Objectors in Company Petition No.99 of 2013; Mr. S.S Naganand, Senior Counsel for Mr. Shrikara P.K., fro DUA Associates, for the Petitioner in Company Petition No.162 of 2013; Mr. Udaya Holla, for M/s. Holla and Holla and Mr. Sajjan Poovayya, Senior Counsel, for the Respondent in Company Petition No.162 of 2013; Mr.C.K. Nandakumar, Advocate, for the Opposing Creditors in Company Petition No.162 of 2013; Mrs. Nalina Mayegowda and Mr. Praveen kumar for Poovayya and co., S.A. Partners, Fox Mandal Assts.,(C.A.320/15) and Mr. Ramanand Mundkur for M/s. Mundhur Law Partners, Advocates, for the Objectors in Company Petition No.162 of 2013; Mr. M. Mohamed Ibrahim, Advocate, for the Petitioner in Company Petition No. 265/2013; Sri Udaya Holia, Senior Counsel for M/s. Holla and Holla, for the Respondent in Company Petition No. 265/2013; Mr. T.P. Muthanna, Advocate, for the Petitioner in Company Petition No.147 of 2016; Sri Udaya Holla, Senior Counsel for M/s. Holia, for the Respondent No.1 in Company Petition No.147 of 2016; Served and unrepresented, for the Respondent No.2 in Company Petition No.147 of 2016

**Final Decision :** Disposed Off

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## Judgement

Dr. Vinnet Kothari, J.&mdash;These winding up petitions have been filed by host of creditors in this Court, seeking the winding up of the Respondent - Company, United Breweries (Holdings) Limited ("UBHL" for short) and in these ten winding up petitions, the secured creditors, consortium of Banks, 14 in number, led by State Bank of India (SBI) and various unsecured creditors like suppliers of Aero Engines, Lessors of Aircrafts and Service Providers who have invoked Corporate Guarantees furnished by the Respondent - Company, UBHL, to them to secure their loans, advances and supplies to King Fisher Airlines Limited (KFAL), have approached this Court, against the Respondent Company - UBHL, which was

initially a Holding Company of the King Fisher Airlines Limited, but, later on diluting its shareholding in that, the said King Fisher Airlines Limited (KFAL) did not remain a Subsidiary Company, however, the existence and validity of Corporate Guarantees given by the Respondent Company - UBHL continued.

2. The King Fisher Airlines Limited (KFAL) has already been ordered to be wound up recently by this Court in its judgment and order dated Aerolron Ltd. v. Kingfisher Airlines Ltd. [2016] 76 taxmann.com 201 and various other winding up petitions against KFAL.

3. It is also reported that the Founder - Promoter and Chairman of the Respondent - Company UBHL, Dr. Vijay Mallya has since left the Country, India, for the last about one year and various Civil and Criminal proceedings are pending in different Forums and Courts of law in the Country against him and Group Companies including Respondent - UBHL and the concerned Enforcement Agencies, including Central Bureau of Investigation (CBI) are pursuing him for their respective recoveries.

4. The Debt Recovery Tribunal, Bengaluru Bench, recently after the arguments in the present winding up petitions were concluded before this Court on 11/01/2017, vide its judgment and order dated 19/01/2017, a copy of which was placed before the Court when the matter was again listed before the Court on 25/01/2017, has directed a sum of Rs. 6203.35 crores to be recoverable from the Respondent - Company, UBHL, for the default in repayments made by the KFAL and invoking the Corporate Guarantees given by the Respondent - Company, UBHL has been held to be under a legally valid obligation to pay off its dues and the petitioning Banks have been allowed to proceed to recover the said sum of Rs. 6203.35 crores from the Respondent Company, UBHL.

5. While the winding up petition against the KFAL Was decided ex-parte and without any contest and it was ordered to be wound up, even though both the batch of cases including the present winding up petitions against UBHL, were listed on the Board of this Court simultaneously and it was also indicated to the learned Senior Counsel who opposed the present batch of winding up petitions against the Respondent - Company, UBHL that whether the Respondent UBHL intends to defend the winding up petitions against KFAL also or not, the learned Senior Counsel, Mr. Udaya Holla answered in "negative" and therefore, the said Company, KFAL, almost defence-less and unopposing, was ordered to be wound up, on account of its failure to pay the admitted liability and the dues towards the petitioning creditors. About fifty-five (55) winding up petitions against KFAL were thus allowed by the Court and the Official Liquidator was appointed to take charge of the assets of the said Company, KFAL and file a Status Report before this Court.

6. That soon thereafter, when the present set of winding up petitions against the Respondent - Company, UBHL were taken up for hearing, a serious contest was put up against these winding up petitions by Mr. Udaya Holla, Senior counsel for

UBHL and other counsels appearing for the supporting creditors to oppose the winding up by Mr. Sajan Poovayya, Senior Advocate and Ms. S.R. Anuradha, learned counsels appearing for workmen of the Respondent - Company, UBHL and other allied companies.

7. The dues claimed from the Respondent - Company were relating to the KFAL and it is on the anvil of the Corporate Guarantees of UBHL and personal Guarantees given by Dr. Vijay Mallya to these petitioning creditors, which were invoked and on account of the failure to discharge the said Guarantee obligations, these winding up petitions were filed by the different secured and unsecured creditors and the learned counsel appearing for the petitioning creditors also made emphatic arguments before this Court for seeking the winding up of the Respondent - Company, as they submitted that not only the Respondent - Company, UBHL has failed to pay its admitted liability and debts arising under these Corporate Guarantees but the defences put forth by them are flimsy and unsustainable and the Respondent - Company, UBHL cannot wriggle out of its Guarantee obligations and the net-worth of the Respondent - Company is also in negative and there is not even an iota of hope of the said Company, UBHL reviving its net worth in positive in such a manner to meet the financial obligations of the petitioners against it and it is not only a commercially insolvent Company, but otherwise also it is absolutely just and equitable to wind up the Respondent -Company. The winding up is thus sought under Section 433(c), (e) and (f) of the Companies Act, 1956.

8. They have also contended before the Court that the surreptitious deals made by the Ex-Chairman, Dr. Vijay Mallya of transfer of shares held by Respondent Company, UBHL in its Group Company, United Spirits Limited (USL) is also a matter pending investigation and the said Ex-Chairman, Dr. Vijay Mallya has absconded from India for the last one year and the matter is being pursued even before the Hon"ble Supreme Court and various Enforcement Agencies including CBI, who are seeking the extradition of the said Dr. Vijay Mallya who is said to be residing presently in the United Kingdom.

9. Though the new Companies Act, 2013 has been enforced in India and some jurisdictions under that new Law have been transferred from this Court to National Company Law Tribunal, but under the recently issued Notification dated 07/12/2016 by the Central Government, the winding up petitions in which Respondent - Company had already been served with the Court summons have been retained in High Courts and are to be disposed of by the High Courts only.

10. The various contentions raised by both the sides will be dealt with by this Court elaborately hereinafter.

11. But before doing so, a brief introductory facts of all the ten winding up petitions filed by the various creditors, secured and unsecured, is found appropriate here.

**SBI v. UBHL : Co. Petition No.162/2013**

12. The consortium of 14 Banks led by SBI have filed this winding up petition claiming a sum of Rs. 6,203.35 crores from the Respondent-Company, UBHL as on 31/05/2013 by virtue of its obligations under the Corporate Guarantee executed by Respondent - Company, UBHL in favour of the petitioners to secure the obligations of KFA Limited (KFAL).

13. The petitioners have specifically stated in the petition that they are standing out side the winding up insofar as their secured interest are concerned and that they have not relinquished their rights and interest as secured creditors and are also pursuing other remedies available to them for realization of the Securities created in their favour, without the assistance of this Court for sale/realization of the secured assets. However since according to them, the dues of the petitioners are far in excess of the security interest, which they hold with them, therefore, they are before this Court, seeking the winding up of the Respondent - Company, UBHL.

14. The petitioners have stated before the Court that the petitioners, State Bank of India (SBI), Axis Bank Limited, Bank of Baroda, Bank of India, Central Bank of India, Corporation Bank, The Federal Bank Limited, IDBI Bank Limited, Indian Overseas Bank, Jammu and Kashmir Bank Limited, Punjab & Sind Bank, Punjab National Bank, State Bank of Mysore, and UCO Bank have stated before the Court that in April 2010, at the request of KFAL, some of the petitioners - Banks, since 2005, have provided Working Capital facilities, both fund based and non fund based and Rupee Term loan facilities including Short Term loan to KFAL and subsequently in view of the financial difficulties faced by it, KFAL requested the petitioners-Banks to re-cast the Working Capital facilities and term loan facilities. Accordingly, in April 2010, a Lenders' meeting was held between the petitioners-Banks and KFAL and a Master Debt Re-cast Agreement (MDRA) was entered into on 21/12/2010 and the various Rupee Term loan facilities provided to KFAL is treated as Single Rupee facility and the various Working Capital facilities provided to KFAL were treated as Single Working Capital facility and the financial documents and securities were created in pursuance of the said MDRA.

15. The State Bank of India was appointed as Lenders' Agent by other petitioners and the borrower, KFAL and other subsidiaries, that is, Respondent - Company, UBHL and Dr. Vijay Mallya executed the Corporate Guarantee in favour of the petitioners. The State Bank of India Cap Trustee Limited (SB1CAP) was appointed as Security Trustee for the benefit of petitioners - Banks and the KFAL, the Respondent -UBHL and King Fisher Finvest (India) Limited (KFFIL) entered into a Pledge Agreement dated 21/12/2010 for the purpose of pledging certain shares owned by the pledgors in favour of SBI, kept for the benefit of petitioners - Banks. The Respondent - Company, UBHL executed a Corporate Guarantee Agreement on 21/12/2010 with the petitioner No.1 - SBI and Dr. Vijay Mallya also executed a Personal Guarantee under the said MDRA and other financial documents, on 21 /12/2010.

16. The petitioners have submitted further that due to non servicing of the

interest to the invocation of the Letters of Credit and Bank Guarantees and non repayment of loan instalments by KFAL, all the petitioning Banks classified the Accounts of KFAL as Non-Performing Assets (NPA) and invoking the guarantees given by the Respondent Company and personal guarantee of Dr. Vijay Mallya, the petitioners - Banks called upon the Respondent - Company, UBHL to pay the debts due under the said Guarantee Agreements, amounting to Rs. 6,203.35 Crores, which the Respondent - Company, UBHL failed to pay.

17. The petitioners have also submitted that they have initiated action against the Respondent -Company, UBHL, under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement Security Interest Act, 2002 ("SARFAESI Act) and the representations and objections filed by the Respondent - UBHL, were rejected by the said Tribunal.

18. The petitioners have also stated before the Court in para. 29 of the petition that the Respondent - Company, UBHL, has filed a Civil Suit, namely Suit No.263/2013 (R311/2013) before the Bombay High Court, inter alia, challenging the validity of the Corporate Guarantee given by it and sought a declaration to that effect and also another collusive Suit filed by the United Spirits Limited in Special Civil Suit No.31 /2013/A, before the Civil Judge, (Sr.Dvn.) at Mapusa, Goa, whereas these Companies had no jurisdiction and the whole purpose of the said Suit was to some how create as many hurdles for recovery of outstanding dues to the petitioners as possible.

19. The petitioners have also submitted that the Respondent - Company, led by its Chairman, Dr. Vijay Mallya surreptitiously entered into a deal of sale of shares owned by Respondent - Company, UBHL to Diageo plc and Relay B.V., Foreign Companies and the said shares held by it in its Group Company, USL was intended to be sold at Rs. 1440/- per share as against the much higher market price available and thus on account of failure of the Respondent -Company to pay its admitted dues under the Corporate Guarantees and raising sham defences which deserve to be overruled, the petitioners have prayed for winding up of the Respondent - Company and appointment of Official Liquidator to take charge of all the remaining assets of the Company for realization and pro-rata distribution amongst the secured and unsecured creditors as per Section 529, 529A and other relevant provisions of the Indian Companies Act, 1956.

20. They also contended that Dr. Vijay Mallya took huge amount as compensation or gift for stepping down from the post of Chairman of Respondent -Company, UBHL and has diverted those funds for his personal gains and has absconded from India last year and is reported to be living in London, United Kingdom and Indian Enforcement Agencies and CBI are hotly pursuing him by seeking his extradition and come here to account for all such Civil and Criminal liabilities which he has incurred.

21. Besides all serious arguments, on lighter side to a query as to what was the subject of Ph.D. of Dr. Vijay Mallya, the learned Senior Counsels appearing on

defence side without being specific, only passed an intriguing smile.

IAE International Aero Engines AG v. UBHL [2017] 78 taxmann.com 80 (Kar.)

22. The petitioner - Company, IAE International Aero Engines AG, incorporated in Switzerland and having a permanent place of business in USA, has approached this Court by way of aforesaid winding up petition with the case that the petitioner manufactures and sells Aircraft Engines and related Equipments and it has leased a number of Aircraft Engines to KFAL, a subsidiary of the Respondent - UBHL and inter alia, executed on 27/10/2010 an Agreement called "V2500 Rework Agreement" for maintaining various Aircraft Engines to KFAL. Another Agreement between these parties on 27/10/2010 was named as "Repayment Agreement" regarding the repayment of various Bills and Invoices for these supplies of goods and services between 2005 and 2010.

23. The Respondent - Company, UBHL executed two Corporate Guarantees, Guarantee No.1 under Repayment Agreement on 10/11/2010 for USD 27,804,678 and Guarantee No.2 under "V2500 Rework Agreement" on 01/08/2011 for USD 18,500,000. Both the Guarantees were unconditional and irrevocable as Principal Obliger and it took obligation to pay all monies whether actual or contingent, due owing or incurred by KFAL under these Agreements, upon failure of KFAL to pay its dues towards petitioner - Company. The petitioner -Company, on 15/02/2012, invoked its two Guarantees and called upon the Respondent - UBHL to pay the entire outstanding amount of USD 11,877,573.01 under "V2500 Rework Agreement and USD 18,804,678 under "Repayment Agreement". The statutory notice under Sections 434 and 439 of the Companies Act, 1956 was served on 29/02/2012 which was not responded to by the Respondent -Company. However, on 21/03/2012, the Respondent-Company, UBHL only replied stating that they are trying to resolve the issue amicably. Thus, a total sum of USD 30,682,251.01 (approximately Rs. 153 crores) was due for which the petitioner-Company filed the present winding up petition in this Court on 26/03/2012.

Co. Petition No.121 of 2012 & Company Petition No.122 of 2012. RRP Engine Leasing Ltd. & Rolls-Royce & Partners Finance Ltd. v. UBHL.

24. The petitioner - Company (in Co. P. No. 121/2012) incorporated under the Laws of England is engaged in the business of renting Air Transport Equipments including Aircraft Engines.

25. The petitioner and its Holding Company, Rolls-Royce & Partners Finance Limited (RRPF) (petitioner-Company in Co. P. No. 122/2012) entered into a Master Engine Lease Agreement on 30/09/2005 with KFAL to provide a standing facility permitting the Lessee to lease Aircraft engines and Associated Equipments from the petitioner and RRPF from time to time.

26. The Engine Lease Agreement No. 1 was entered into between petitioner and KFAL on 30/09/2005 and according to that, the lessee agreed to make payment of loan to the petitioner in advance on each Rent Date and the Engine Lease

Agreement No.2 dated 30/09/2005 was in respect of the new Aircraft Engine being IAE V2527-A5 Engine with MSN VI2416 (Engine 2) and the lessee and both the parties also entered into a Maintenance Reserves Letter dated 07/10/ 2005. The Respondent - Company, UBFIL executed a Corporate Guarantee on 25/01/2006 in favour of the petitioner and RRPf in respect of amounts due and payable by the KFAL, the lessee.

27. In 2007, on 28/03/2007, the Engine Lease Agreement No.4 was also executed and Respondent UBHL again executed a Corporate Guarantee in favour of the petitioner, on 27/09/2007. Since the Respondent - UBHL, lessee failed to pay its outstanding amount of USD 11,580,055.72 (Rs. 64,28,08,893/-) despite its demand vide letter dated 08/02/2012, the petitioners demanded the said amount from the Respondent, Guarantor, UBHL to pay the said outstanding amounts to the petitioner - Company. After terminating the lease on 29/03/2012, a statutory notice was served on the Respondent - Company also under Section 434 of the Companies Act, claiming a sum of USD 533, 268, 97 (Rs.2,96,01,760.52).

28. In Company Petition No.1 22/2012, petitioner - Company, RRPf made claim of USD 10,437,866 (Rs. 57,94,05,941.70) vide paragraph 12 of its Company Petition from the Respondent, UBHL and inter alia, both the Companies ; contended that the Respondent, UBHL has failed to discharge its Guarantee obligations and therefore deserves to be wound up by this Court.

Avions de Transport Regional GIE v. UBHL - Company Petition No. 185/2012

29. The petitioner - Company incorporated in France, engaged in the business of manufacture, sale and lease of Aircraft and related Equipments claims to have leased a number of Aircrafts to KFAL in pursuance of Agreement executed on 21 /07/2006 called, "Global Maintenance Agreement" and to supply spare parts to KFAL under the said Agreement. It claims outstanding dues against KFAL to the tune of USD 20,988,224.42 under the Payment Agreement dated 22/09/2011 and the Respondent, UBHL is said to have executed an unconditional and irrevocable Corporate Guarantee to the maximum amount of USD 25,000,000, vide Guarantee dated 14/10/2011, Annexure-E of this Company petition.

30. On 23/03/2012, the said Guarantee was invoked and upon failure of the Respondent to discharge its related obligations, the statutory legal notice was served by the petitioner on the Respondent vide Annexure on 03/08/2012 claiming an amount of USD 16,899,970.60 (Rs. 101,39,98,200/-).

BNP Paribas v. UBHL - Co. Petition No.248/2012

31. The said BNP Paribas also registered in France claims to be a Bank, having financed for the purchase of three ATR 72-212A Aircrafts or Engine bearing Number, "MSN 699", "MSN 728" and "MSN 730" under the Loan Agreements facilitated by "compagnie Francaise d" Assurance pour le Commerce Exterieur

("Coface") the Export Credit Agency of France. According to petitioner, all three parties to Agreement dated 05/06/2006 Kingfisher Airlines Limited, KF Aero, and the petitioner, BNP Paribas. The KF Aero, lessor agreed to purchase the Aircrafts from G.I.E. Avions de Transport Regional (the Manufacturer) of Blagnac, France and KF Aero agreed to immediately lease its Aircraft to KFAL pursuant to lease Agreements dated 05/06/2006, the Hypothecation lease was executed on 21/06/2006 by KFAL in favour of KF Aero. Under each Loan Agreement, a Dollar term facility loan was made available to KF Aero by the petitioner, in the aggregate amount equal to the Total Commitment. KF Aero was obliged to repay the petitioner, BNP Paribas, by way of bi-annual instalments of principal and interest under the Loan Agreements and in the event of default in payment of loan to KF Aero by KFAL, within five business days following due date, was authorised to proceed by appropriate action to enforce performance by KFAL of the relevant Lease Agreements. The governing law and the jurisdiction qua its Lease Agreements was agreed to be of the English Courts according to the petitioner-Company.

32. Learned counsel, Ms. Fereshte Sethna, appearing for BNP Paribas explained that an integral aspect to the financing arrangements was the execution and delivery by the Respondent, UBHL of three Guarantees, all dated 17/06/2006, pursuant to which the Respondent, UBHL unconditionally and irrevocably agreed to guarantee and indemnify as Principal Obliger and not merely as Surety, on demand from KF Aero or its assignee, all monies due and payable by KFAL to KF Aero under or pursuant to the Lease Agreements, within 15 days first written demand on the Respondent. The petitioner - Company has placed Security Assignments, Notices of Assignment, Lease acknowledgements and Guarantee acknowledgements, all dated 21/06/2006 as Annexure T to CC of the winding up petition and the petitioner, BNP Paribas is therefore claiming to be an assignee and charge to put in force and exercise all rights and powers in relation to the Guarantees. Since KFAL, in breach of Lease Agreements 1 failed to make payments to KF Aero for these three Aircrafts, a sum total of USD 724,246.29 and second demand of USD 742,653.77.

33. The learned counsel further submitted that the petitioner - Company sought a decree by instituting the proceedings in the High Court of Justice, Queen's Bench Division, Commercial Court, in London against KFAL and Respondent - UBHL on 23/12/2011 seeking decree of USD 2,936,175.30. Upon termination of the lease of the three Aircrafts vide terminating Notice dated 23 /02 /2012, the petitioner demanded a sum of USD 26,634,728 (approximately Rs. 146.11 crores), by serving a Notice dated 15/07/2012, under Sections 433 and 434 of the Companies Act, a copy of which is placed on record as Annexures NN and PP respectively, the present winding up petition was filed on 05/11/2012.

United Bank of India v. United Breweries (Holdings) Ltd. - Company Petition No.51/2013

34. The petitioner - Bank claims that initially it had sanctioned credit limits to M/

s. Deccan Aviation Limited since October 2003 and further credit limits were also sanctioned to KFAL since November 2005 and M/s. Deccan Aviation Limited was taken over by KFAL vide Merger of the two, sanctioned by the Karnataka High Court on 16/06/2008 in Company petition Nos. 45, 46 and 47 of 2008.

35. The Respondent - Company, UBHL had granted a Corporate Guarantee in favour of the petitioner - Bank and other Banks on 25/02/2003 which was invoked by the petitioner - Bank on 25/02/2013. The petitioner Bank is not a part of the SBI and 13 other banks in a consortium which have filed Company Petition No. 162/2013 in this Court, on its own head, claiming a sum of Rs. 386.62,31.757.07 along with interest by serving a legal notice on the Respondent Company, UBHL and KFAL on 08 /11 /2012 against various lease facilities extended to KFAL including cash credit facilities, Working Capital Term Loan (WCTL), Funded Interest Term Loan (FITL) Term Loan (PDP), with interest, the petitioner Bank claims a sum of Rs. 450,02,31,757.07 against the Respondent -UBHL and filed the present winding up petition in this Court on 21/06/2013.

Hindustan Petroleum Corp. Ltd v. UBHL Co. - Petition No. 99/2013

36. The petitioner, a Government of India Enterprise and Supplier of Aviation Fuel to KFAL, has filed this winding up petition, claiming a sum of Rs. 66,72,44,516.73 as outstanding delayed payment service charges (interest) payable by KFAL for which the Respondent, UBHL stood Guarantor. The petitioner supplied Aviation Fuel under the Aviation Fuel Agreement on 07/06/2010 with KFAL and though the Principal amount towards supply appears to be paid with delay, the said outstanding amount is claimed as interest for such delayed payments in terms of the Agreement. The petitioner -Company, serving statutory notice upon the Respondent - UBHL also under Sections 433 and 434 of the Companies Act, claimed the said amount vide statutory notice dated 06/03/2013, and upon failure to pay the same, has filed the winding up petition on 11/05/2013.

Company Petition No.265/2013 by Oriental Bank of Commerce against UBHL.

37. The petitioner - Bank has also filed this separate winding up petition, invoking its Guarantee for the dues of the KFAL and for recovery of a sum of Rs. 58,88,87,231.76 plus interest vide statutory Notice dated 07/02/2013, Annexure J, against the Respondent - UBHL.

IDBI Bank Ltd. against UBHL - Company Petition No. 148/2016

38. The petitioner - Bank claims to have granted financial assistances to M/s. U B Engineering Limited (UBEL), Respondent No.2 and Associate Company of Respondent No.1, UBHL by way of Working Capital Loan Agreement amounting to Rs. 190.00 crores and under the unconditional and irrevocable Corporate Guarantee executed by Respondent No.1, UBHL in favour of petitioner on 03/08 /2010, to the extent of Rs. 15.00 crores for Funci based limits. The

petitioner -Bank has served a statutory Notice under Sections 433 and 434 of the Companies Act on Respondent - UBHL, claiming a sum of Rs. 46,89,15,617.87 vide its Notice dated 03/03/2016 and thereafter has filed this winding up petition on 28/06/2016.

The contentions of the Petitioners

39. Since the different creditors, secured and unsecured creditors, Banks and Financial Institutions and other trading creditors like suppliers and service providers have filed various winding up petitions, it is considered appropriate to deal with the contentions of the petitioners raised by various learned counsels appearing for the different petitioners as follows:-

For SBI& 13 other Banks: Mr. S. S. Naganand, Senior Advocate for Petitioner (Co. P. No. 162/2013).

40. For State Bank of India and other Banks Mr. S. S. Naganand, Senior Advocate made submissions on behalf of the State Bank of India, the lead Bank representing the consortium of various banks who had made advances and extended loans to the Company - Kingfisher Air Lines Ltd., ("KFAL" for short) and the Respondent-company United Breweries (Holdings) Limited ("UBHL" for short) was earlier the Holding company qua its subsidiary KFAL and the claim of these petitioning creditors are based on the Corporate Guarantees given by the Respondent-company UBHL to secure the loans and advances by these petitioner-Banks to KFAL, which company has already been ordered to be wound up by this Court on 18.11.2016.

41. Mr. S. S. Naganand, learned Senior Advocate has made the following submissions:-

That Respondent - UBHL was incorporated way" back on 23.03.1915 about 100 years ago but the relevant facts for these winding up petitions have been dealt with in these petitions commenced from the year 2005 onwards, when these Banks had provided loan facilities to the KFAL and since 2010, the said Company KFAL started making losses and its business operations stopped in the year 2011 and therefore, on 21.12.2010, the Master Debt Recast Agreement (MDRA) was recast for restructuring of the various loans of KFAL and even further loans were advanced by these Banks to KFAL. The Security Trustee Agreement was also entered into and SBICAP Trustee Company Ltd., (SBICTCL) was appointed as trustee of the petitioner -Bank to receive and recover the dues from the said borrower KFAL. The Corporate Guarantee Agreement was executed by the Respondent-UBHL in favour of the petitioner-Bank on 21.12.2010. Since 2011-12, the borrower company KFAL failed to service the loans and repay the principal and interest under MDRA Agreement. The various Banks classified the loan accounts as "NPA" (Non Performing Assets) and the loans were recalled and recovery action was initiated against the said company ; KFAL.

42. Learned Senior counsel, Mr. S.S. Naganand submitted that dues of the

petitioner-Bank for which, the action was also initiated under the provisions of "SARFAEST Act, 2002 before the Debt Recovery Tribunal ("DRT" for short), vide \ \ O.A. No. 766/13, the total dues are to the extent of Rs. 6203.35 crores as on 25.06.2013 which, with continuously accruing interest, coupled with other Banks outside this consortium and unsecured creditors now may be well over Rs. 10,000 crores against UBHL.

43. Mr. S.S. Naganand, further submitted that the corporate guarantee given by the respondent-UBHL to secure the financial obligations of KFAL under various loan agreements, was co-extensive with that of the principal borrower KFAL and on account of failure to discharge its guarantee obligations under these Corporate Guarantee Agreements, the respondent- UBHL has also become commercially insolvent and is unable to pay its huge liability and dues under the said Corporate Guarantees and therefore, the Respondent company UBHL also deserves to be wound up under the provisions of Section 433(e) r/w Section 433(f) of the Companies Act, 1956.

44. Mr. S.S. Naganand submitted that the petitioner-Banks being secured creditors, standing outside the winding up proceedings, insofar as secured interest are concerned, they have initiated action against the respondent-company before the DRT, Bangalore also, but that does preclude them from pursuing the present winding up petitions against the Respondent-company UBHL. He also drew the attention of the Court towards one settlement proposal dated 29.03.2016 filed on behalf of KFAL and Respondent-company UBHL and Kingfisher Finvest (India) Ltd., through its Chairman Dr. Vijay Mallya, but he submitted that the said proposal was an eyewash and a ruse to wriggle out of " the winding up proceedings initiated by the petitioners-Bank and several other of creditors before this Court and such proposal was filed before the Hon"ble Supreme Court in Special Leave Petition Nos. 6828-6831/2016 was not accepted even by the Hon"ble Supreme Court and the counter filed by Dr. Vijay Mallya in the aforesaid SLP before the Hon"ble Supreme Court itself was clearly admitted that the assets of the Respondent company are presently worth only Rs. 4,986/- crores, whereas, the liabilities of the respondent aggregated to about Rs. 11,452 crores and thus on the own showing of the Respondent company, it was clear that it was not commercially solvent and was not capable of discharging its admitted debts and was therefore, liable to be wound up under the provisions of the Companies Act.

45. Mr. S.S. Naganand, also drew the attention of the Court towards the audited Balance Sheets of the Respondent-company in public domain for the Financial Year 2012-13 to Financial Year 2015-16 and he submitted that the Respondent-company was consistently making huge losses and it's net worth has completely eroded and turned negative and it was impossible for the Respondent Company, UBHL to pay off all its creditors who are seeking winding up of the Respondent Company, UBHL and since it was a commercially insolvent Company and there was no chance of its revival and retrieval and the substratum of the company has

been completely lost and had already run into several litigations, petitions, suits and recovery proceedings and the operations of Airlines Company KFAL, for which, it stood guarantor had stopped operations long back in 2011 and that it has already been wound up by this Court in the recent past, therefore, the present Respondent company UBHL also deserves to be wound up by this Court.

For M/s.IAE International Aero Engines AG in Co. P. No. 57/2012

46. Mr. Shreyas Jayasimha, learned counsel on behalf of petitioner-IAE International Aero Engines AG (supra) in Co. P. No. 57/12 submitted that the petitioner is a Company incorporated under the laws of Switzerland and has its Registered office in Switzerland and it was engaged in the business of manufacturing, maintaining, selling and leasing etc., of Aircraft Engines and all related equipments. He submitted that the Respondent - UBHL had executed Deeds of Guarantee in favour of the Petitioner-company as security for amounts due to the petitioner from KFAL, to whom such engines and equipments were supplied during the contemporary period under various agreements. The amount due to the petitioner- company as per the statutory notice served upon the Respondent company is to the extent of USD 3,06,82,251, equivalent to Rs. 184,09,35,060/- (an average conversion rate of Rs. 60/- for one (1) of USD for approximate value). The said amounts were due towards the supply of Aircraft Engines and expenses incurred by the petitioner towards maintaining the Aircrafts leased by the petitioner to KFAL. He submitted that the Corporate Guarantees executed by the Respondent-company in favour of the petitioner on 01.08.2011 and 10.11.2010 were unconditionally irrevocable and same contained covenant to pay to the petitioner-company within 5 business days of a written demand and the said Undertaking was given by the Respondent -UBHL in the capacity of Principal Obligor and not merely as a Surety.

47. Mr. Shreyas Jayasimha, submitted that series of Agreements were executed between the petitioner and KFAL including the Agreement called V2500 Rework Agreement dated 27.10.2010 and FP A (Fleet Power Agreement) Termination Agreement and Agreement for mutual release and waiver of claims between the petitioner and KFAL, Deeds of lease for Aircraft Engines and for repayment of outstanding amounts which fell due between 2005-10 and all these series of Agreements were executed on 27.10.2010. The Corporate Guarantees were executed by UBHL in favour of the petitioner on 10.11.2010 and on 01.08.2011 and upon the default in payment by KFAL under Rework Agreement and Repayment Agreement, the petitioner-company invoked the Guarantees by issuing two Notices to the Respondent company UBHL on 15.02.2012 and served Statutory Notice under Sections 434 and 439 of the Companies Act, 1956 on 29.02.2012 followed by a Reminder Notice on 16.03.2012. The Respondent company UBHL replied to the said Statutory Notice on 21.03.2012 denying its liability to pay the amount demanded by the petitioner-company and hence, the present winding up petition No. 57/12 was filed in this Court on 26.03.2012.

48. The learned counsel for the petitioner-company, Mr. Shreyas Jayasimha also

submitted that the defences raised by the Respondent company are merely an eyewash and moonshine defences and mere filing of the suit bearing O.S. No. 6406/12 by the Respondent-UBHL against the petitioner-company IAE International AG and others in City Civil Court at Bangalore, does not amount to a valid defence against the winding up petition filed by the petitioner-company and due to the admitted failure of Respondent-company to pay all its dues for which it stood guarantor for KFAL against the supplies of Aero Engines and Equipments made by the petitioner-company to KFAL, the Respondent Company-UBHL deserves to be wound up like KFAL itself.

49. He also submitted that the petitioner- company had obtained the decree for recovery against the Respondent-company from the Queen's Bench Division, High Court of Justice (Commercial Court in U.K.) on 05.07.2013, by which, the said Court in U.K., ordered the Respondent company UBHL to pay the guaranteed amounts or related expenses and he submitted that the Respondent company deliberately chose to remain absent and ex-parte before that Commercial Court at U.K. and the petitioner company is entitled to recover the said amounts from the Respondent company even in execution of that decree of U.K. Court held by it against the Respondent company in India.

50. He also submitted that while admitting the present winding up petition, the co-ordinate bench of this Court on 02.01.2015 held, although, prima-facie, that the defences raised by the respondent-company were not valid defences and were merely moonshine and unsustainable and therefore, admitting the present winding up petition had directed publication of the same in terms of the Companies (Court) Rules, 1959 and accordingly, publication was carried out on 02.02.2015 in Newspapers, "the Hindu" and "Udayavani".

51. He, therefore submitted that the Respondent company also deserves to be wound up, so that the Official Liquidator can take charge of whatever assets of the Respondent company are available and by realizing the sum by sale of assets of Respondent company UBHL and distribute the same to the petitioner company and others like, who have filed various winding up petitions before this Court in accordance with the provisions of the Companies Act.

The total dues of all the petitioners in the form of a Chart are given below:?

Sl No.

Case No.

Petitioner

Date of filling Co.P.

Date of Statutory Notice under section 433.434 and 439 of Co.Act,1956.

Amount claimed in USD

Amount in Indian Rupee converted in approximate rate of Rs.60/USD

1

Co.P.No.57 of 2012

IAE International Aero Engines AG(IAF)

26/03/2012

a)29/02/2012 b)16/03/2012

\*1,18,77,573 \*\*1,88,04,678=3,06,82,251

184,09,35,060/-

2

Co.P.No.121 of 2012

RRPF Engine Leasing Limited(RRELL)

12/06/12

23/03/2012

7,32,710

4,39,62,600/-

3

Co.P.No.122 of 2012

Rolls-Royce & Partners Finance Limited(RRPFL)

12/06/12

28/03/2012

1,04,37,866

62,62,71,960/-

4

Co.P.No.185 of 2012

Avions de Transport Regional(GIE)

03/09/12

03/08/12

1,68,99,970

101,39,98,200/-

5

Co.P.No.248 of 2012

BNP Paribas

05/11/12

05/07/12

2,66,34,728

159,80,83,680/-

6

Co.P.No.51 of 2013

United Bank of India(UBI)

19/03/2013

25/02/2013

450,02,31,757/-

7

Co.P.No.99 of 2013

Hindustan Petroleum Corp.Ltd.(HPCL)

27/05/2013

06/03/13

66,72,44,516/-

8

Co.P.No.162 of 2013

SBI & 13 Banks

19/08/2013

02/04/2012(Para.37 of ptn.)

\*\*\*5823,75,41,697/-

9

Co.P.No.265 of 2013

Oriental Bank of Commerce(OBC)

16/11/2013

07/02/13

58,88,87,231/-

10

Co.P.No.148 of 2012

IDBI Bank Ltd.

28/06/2016

03/03/16

46,89,15,617/-

Total

8,53,87,525

6,958,60,72,318/-

\*Amount claimed under Rework Agreement

\*\* Amount claimed under Repayment Agreement

\*\*\* Amount as determined by Debt Recovery Tribunal, Bengaluru, vide its order dated 19/01/2017 in O.A. No. 766/2013 filed by SBI & ors against KFAL, UBHL, KFIL is Rs. 6203,35,03,879-42

The contentions on behalf of the United Spirits Ltd., ("USL") (Mr.Ramanand Mundkur, Advocate)

52. Mr. Ramanand Mundkur, Advocate appearing for United Spirits Ltd., a Group company of the respondent-UBHL which was initially opposing the winding up of the respondent company-UBHL but shifted its stand from opposition to supporting of the winding up petition during the course of these winding up proceedings, was called upon to explain its position and accordingly, Mr. Ramanand Mundkur, learned Advocate filed the affidavit of one Ms. Mamata Sundara, General Counsel of USL claiming to be duly authorised to swear the affidavit.

53. Mr. Ramanand Mundkur, the learned counsel has urged that USL is a creditor of the respondent-UBHL who owes Rs. 1776.77 crores as on 31.12.2016 to USL under the Loan Agreement dated 03.07.2013 (Rs. 1337.42 crores by way of principal and Rs. 439.35 lakhs by way of interest at the rate of 9.5% p.a. simple interest computed for the period 03.07.2013 to 31.12.2016) and therefore, submitted that the Loan Agreement dated 03.07.2013 was approved by the Board of Directors of both the companies. Mr.Ramanand also submitted that the effective date of this Loan Agreement was 04.07.2013 as defined in the Shareholders Agreement amongst Respondent-UBHL and Kingfisher Finvest India Limited dated 09.11.2012, which become effective upon completion of the purchase of USL shares by Relay B.V. and Diageo pic, Relay B.V. being indirect wholly owned subsidiary of Diageo pic, pursuant to the Agreement entered into with the Respondent-UBHL on 09.11.2012, as contemplated under the Shareholders Agreement, the USL entered into Deed of Adherence and thereby become the party to that Shareholders Agreement on 04.07.2013.

54. Mr. Ramanand Mundkur further submitted that in view of the events as developed later on, the prior affidavit of USL filed in this Court on 25.01.2016 seeking protection of the Court by appropriate orders in the present winding up petitions, the change of stand shifting from opposing winding up petition to supporting the same now by this Affidavit 10.01.2017 happened in the following circumstances:-

55. That the Company USL originally filed its Affidavit dated 25.02.2015 opposing the winding up of UBHL but slightly shifted its stand by subsequent affidavit dated 25.01.2016, seeking protection against the respondent-UBHL from the court of its own interest and the financial exposure by way of loans given to UBHL and finally took a stand for supporting the winding up of the Respondent - UBHL by its Affidavit filed during the course of arguments on 10.01.2017.

56. When the Respondent - Company, UBHL failed to discharge its loan obligations towards its own Group Company, the creditor USL, the USL started proceedings for recovery of the amounts owned under the Loan Agreement dated 03.07.2013 and initiated the arbitration proceedings by nominating former Supreme Court Judge Mr. Justice Santhosh Hegde (Retd.,) as an Arbitrator, by Arbitration Notice dated 14.07.2016 and the respondent company UBHL replied to USL Arbitration Notice on 13.08.2016 and UBHL appointed former Supreme Court Judge Hon''ble Mr. Justice B.P. Singh (Retd.,) as its arbitrator. These two Arbitrators jointly appointed the third arbitrator, namely, Former Supreme Court Judge Hon''ble Mr. Justice B.P. Jeevan Reddy (Retd.,) as the presiding Arbitrator, who accepted the said offer on 13.10.2016 and the first meeting of the said Arbitration Tribunal took place on 16.11.2016, in the recent past.

57. The learned counsel for USL, Mr.Ramanand Mundkur, also submitted that the Respondent company UBHL started publicly disowning any loan outstanding towards USL and from the un-audited financial results for the period ended on 30.09.2016 submitted by the Respondent UBHL to Stock Exchanges on 10.11.2016, the respondent company UBHL acknowledged that the effective date of loan agreements was the date of completion of the sale of the USL shares by the respondent company to the Diageo plc/Relay BV. In these un-audited results, the respondent company UBHL notes that the sale of shares in question was completed on 04.07.2013, pursuant to the permission given by the High Court in its order dated 24.05.2013 and the said order dated 24.05.2013 was appealed against and the same was set aside by the Division Bench of this Court on 20.12.2013 and thereafter the appeal came to be filed before the Hon''ble Supreme Court which by its order dated 11.02.2014 directed status-quo with regard to transaction of sales of shares.

58. Learned counsel further submitted that thereafter the respondent company UBFIL for the first time in its response to USL notice of arbitration vide its reply dated 13.08.2016, for the first time stated that since the Hon''ble Supreme Court did not stay the operation of the order of the Division Bench of this Court, the

Loan Agreement had not become effective and as a consequence thereof, there was no loan outstanding or interest payable by UBHL to USL under the said Loan Agreement. This disclosure of the Respondent UBHL according to the learned counsel, Mr. Ramanand Mundkur, was clearly a moonshine and demonstrates its mala fide intention to evade and avoid payment of its legitimate dues. He further submitted that in all its audited statements and Balance Sheets, after the order of the Hon"ble Supreme Court dated 11.02.2014, for the Financial Years ending on 31.03.2014, 31.03.2015 and 31.03.2016, the respondent company UBHL has clearly recognised and recorded the amount owed to USL under the Loan Agreement as a liability and therefore, its U-turn taken in the un-audited financial statements submitted to the Stock Exchanges on 10.11.2016 that there is no loan outstanding to USL is completely contrary to the admission of the liability made by the Respondent company in its audited statements and the correspondence issued by the respondent company to USL in the year 2015-16.

59. Therefore, in paragraphs 8 and 9 of the said Affidavit dated 10.01.2017, the said USL company submits that it now supports the winding up petitions filed by the other petitioner-Creditors against UBHL for these reasons.

60. Paragraphs 8 and 9 of the said Affidavit dated 10.01.2017 are quoted below for ready reference:-

"8. In the above-circumstances, USL respectfully submits that the basis on which USL earlier opposed the winding-up of the Respondent-Company has been vitiated by the Respondent-Company's conduct that has occurred subsequent to February 2015.

9. In light of the changed facts and the said subsequent conduct of the Respondent-Company, USL respectfully seeks leave of this Hon"ble Court to withdraw its earlier opposition to the winding-up of the Respondent-Company, and to instead support the winding-up of the Respondent-Company. It is further submitted that the interests of justice and equity require that this Hon"ble Court may also be pleased to pass such further orders protecting the interest of USL, one of the largest single unsecured creditors of the Respondent-Company, as also a large body of unsecured creditors. This is in the background of the facts that the Respondent-Company is unable to discharge its debts in the ordinary course and is desperately making every effort to dispute indisputable debts".

The Defences/contentions on behalf of Respondent - UBHL by (Mr. Udaya Holla, Senior Advocate)

61. Mr. Udaya Holla, learned Senior Counsel representing the Respondent -UBHL made the following submissions and raised vehemently the following defences for opposing the host of winding up petitions and since the defences are common in nature against all the winding up petitions filed either by secured creditors like SBI and consortium of Banks or unsecured creditors like supplier of Aero Engines, IAE International Aero Engines and Lessor like BNP Paribas, which financed the lease of Aircrafts made by the Foreign Company KA Aero to King

Fisher Airlines Limited (KFAL) the said submissions are noted below:-

62. The first and foremost submission made by Mr. Udaya Holla, before the Court was that the petitioner-Banks led by SBI in Co. P. No. 162/2013 have initiated multiple recovery proceedings against the Respondent - UBHL which is not permissible in law and the winding up petitions filed by these Banks cannot be converted into money recovery suits resulting in deadly consequences of winding up against the Respondent - Company, UBFIL which is a serious most consequence, against the Respondent - Company. He submitted that the recovery suits have been filed by these Banks before Debt Recovery Tribunal and they have initiated proceedings for recovery under special enactment, the Securitization and reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("S ARFAEST Act) and have also filed the winding up petitions.

63. The second most emphatic argument made by" Mr. Udaya Holla, Senior Counsel is that the Respondent - UBHL itself has filed Civil Suit No. 6406/2012 in Bangalore City Civil Court against the supplier of Aero Engines to KFAL not only claiming declaratory relief of declaring Corporate Guarantees given by UBHL to IAE International Aero Engines and others as void and non est but have also claimed compensation to a large extent against these suppliers for supplying defective Aero Engines to KFAL which have not only resulted in huge losses to the said erstwhile subsidiary Company of the Respondent - UBHL, but for whose financial obligations, it gave the Corporate Guarantees in question in the year 2010-2011 when the Master Debt Re-structuring Agreement was executed between the parties and thus on account of failure of these suppliers and other Companies, who are defendants in the said Civil Suit No.6406/2012, in which KFAL itself is a defendant in the Bangalore City Civil Court and on account of non-execution of their part of the contract by these suppliers, the said Company, KFAL suffered huge losses and its business operations completely stopped in the year 2011 and unless and until the said Civil Suit is decided and decreed by the Court concerned in which the effort made by the defendants for dismissal of the suit at the threshold by filing Applications under Order 7, Rule 11 , of the Civil Procedure Code was rejected by the Trial Court and the Suit is now pending for trial. He urged that unless and until the said Suit is decreed, it would be wholly unjust and improper to wind up the Respondent -Company, UBHL.

64. Mr. Udaya Holla also submitted that another Civil Suit No.311/2013 has been filed by the Respondent - UBHL in Bombay High Court also for declaration of the said Corporate Guarantees as void and non est on the ground that the said Corporate Guarantees were obtained under duress and coercion exerted upon the Respondent - UBHL and the Bombay High Court in its original jurisdiction is yet to try the said Suit and till such Suit is decreed by Bombay High Court, the winding up petitions deserve to wait and deserve to be stayed.

65. Another issue raised on behalf of the Respondent -Company, by Mr. Udaya Holla, Senior Counsel is that the law applicable as per the contracts between the Foreign Companies and KFAL clearly goes to say that they would be governed by

the English law and in fact, the petitioner, IAE International Aero Engines obtained an ex-parte decree from English Court against the Respondent -UBHL also, but unless such English law is pleaded and proved as a fact as per the provisions of Section 57 of the Indian Evidence Act, the recovery of debt from the Respondent - UBHL on the basis of such ex-parte decree by English Court cannot be made and no such applicability of English law or English Court decree, as a fact has been pleaded or proved by the petitioners and creditors like IAE International Aero Engines and therefore, they cannot seek the winding up from this Court of the Respondent - UBHL.

66. Mr. Udaya Holla also submitted that Section 599 of the Companies Act, 1956 bars the Foreign Companies to take any legal proceedings including the winding up proceedings before this Court without complying with the mandatory provisions of Section 592 of the Companies Act, 1956, which requires a Foreign Company which has an establishment in India, to seek requisite approval and Registration from the Registrar of Companies and RBI and since the petitioner - M/s. IAE International Aero Engines, while it was actively engaged in the business of supply of Aero Engines to KFAL, had a business establishment in India and was admittedly neither registered with the Registrar of Companies in India nor had obtained any approval from RBI and other competent Authorities, the winding up petitions filed by such Foreign Company before this Court was not maintainable and deserved to be dismissed.

67. Mr. Udaya Flolla, Senior Advocate also submitted that the Debt Recovery Tribunal where the secured creditors like SBI and other consortium of Banks had filed recovery proceedings was seized of the said case in O. A. No. 766/2013 filed on 25/06/2013 and the Debt Recovery Tribunal is yet to finally determine the amount outstanding and due to be paid by the Respondent Company to them and therefore the winding up proceedings cannot be undertaken in view of the yet un ascertained amount of debt due to the petitioners.

68. Besides raising the aforesaid contentions, the learned Senior Counsel for the Respondent - Company, UBHL, Mr. Udaya Holla has also submitted the written arguments after the judgment was reserved on 11/01/2017, i.e. on 19/01/2017 and the summary of this written arguments is also reproduced below for ready reference.

69. The Respondent Company (United Breweries (Holdings) Limited) is the Holding Company for the UB Group and has investments in several other Companies. The Respondent - Company was incorporated way back in the year 1912 and has been in existence for over a century.

70. The Respondent - Company is a profit making Company and has been consistently making profits for the last several years. The revenues of the Respondent - Company is over Rs. 400 crores. The Respondent -Company also has assets of over Rs. 7,500 crores, which are detailed in Annexure A hereto. The Respondent Company directly and indirectly employs over 2000 persons. It

is a Going concern which is carrying on business, inter alia, as a Holding Company and as a Trading and Manufacturing concern.

71. This Respondent - Company also submits that there are deposits before this Hon'ble Court to the tune of nearly Rs. 1250 crores which more than adequately covers all the petitioners other than the Banks.

72. Thus, in all the winding up petitions, the Respondent - Company has put forth a bona fide defence and based on the same, the very petitions are not maintainable as against the Respondent and deserve to be dismissed. The Respondent - Company also has substantial assets and is a Going concern. Thus, having regard to the judgment of the Supreme Court in *Pradeshia Industrial & Investment Corp. v. North India Petrochemicals Ltd.*, [1994] 3 SCC 348, the petition for winding up ought to be dismissed.

73. Without prejudice to the foregoing, the Respondent sets forth its contentions in each of the company petitions as under:

CO. P. No.162/2013 - State Bank of India v. United Breweries (Holdings) Ltd..

74. On 19th August, 2013, State Bank of India ("SBI") and other members of the Consortium of Banks ("Consortium") that had advanced facilities to Kingfisher Airlines Ltd. ("KFA") filed a winding up petition against UBHL, being State Bank of India (supra) The Consortium's claim arises out of a purported Corporate Guarantee dated 21st December, 2010 issued by UBHL in favour of the Consortium.

Suit pending before the Bombay High Court challenging the very validity of the guarantees

75. UBHL, along with Kingfisher Finvest India Limited ("KFIL") and Dr. Vijay Mallya have filed a Suit in the Hon'ble Bombay High Court, being Suit No. 311 of 2013 on 26th March, 2013 ("Bombay High Court Suit"), inter alia, seeking a declaration that the Corporate Guarantee dated 21st December, 2010 given by UBHL ("Corporate Guarantee") and the Personal Guarantee dated 21st December, 2010 given by Dr. Vijay Mallya ("Personal Guarantee") are void ab initio and non est, inter alia, on the ground of coercion and duress. It is pertinent to note that the Bombay High Court Suit was filed even prior to recall of the Kingfisher Airlines facilities and/or invocation of either the Corporate Guarantee or the Personal Guarantee.

76. Each of the members comprising the Consortium is a party defendant to the Bombay High Court Suit. The issues raised in the Bombay High Court, are still pending, and are sub-judice. The Respondent herein has also made a counter claim of Rs. 3200 crores against the petitioners - Banks in the said Suit. In fact, none of the members of the Consortium have filed their Written Statement in Suit No. 311 of 2013.

77. In these circumstances, it is submitted that in the absence of a valid, binding

and subsisting Corporate Guarantee from UBHL, the question of UBHL being liable to make any payment or being wound up does not and cannot arise.

78. Given that UBHL and others have previously instituted the Bombay High Court Suit, inter alia, for a declaration that the Corporate Guarantee is void ab initio and non est, it is submitted that there being a bona fide dispute raised by UBHL as to the very validity of the Corporate Guarantee which forms the basis of the Petition, the Petition ought to be dismissed with costs.

79. The Karnataka High Court has in *Globe Detective Agency v. Subbaiah Machine Tools* 1984 (2) Kar LJ 207 held that where there are claims and counter claims and disputed questions of fact, the Court will not entertain the petition for winding up. In the present case, the Respondent has instituted a Suit before the High Court of Judicature at Bombay and has sought for damages to the tune of Rs. 3200 crores in addition to a declaration that the guarantees are void and non est. This being the case and there being claims and counter-claims, the winding up petition is not maintainable and deserves to be dismissed.

#### Breach of obligations by the Petitioner Consortium

80. Despite the fundamental terms of the Master Debt Recast Agreement dated 21st December, 2010 ("MDRA") entered into between KFA and the Consortium casting an obligation on the Consortium to provide for adequate working capital as agreed in the MDRA, and despite repeated requests to the Consortium to fulfil their obligations under the MDRA and disburse the much needed working capital, the same was not provided to KFA. UBHL submitted that this is a breach of a fundamental term of the MDRA, releasing and discharging not only KFA, but also UBHL and Dr. Vijay Mallya from their respective obligations, if any, under the MDRA, the alleged Corporate Guarantee and the alleged Personal Guarantee.

81. The serious breaches of the Consortium's obligations under the "Lender's Liability" principles and especially the obligations of strict confidentiality with regard to which all the members of the Consortium have signed an undertaking binding themselves to maintain confidentiality of the information with regard to KFA, UBHL and Dr. Vijay Mallya, by the barrage of disparaging statements made in the media by or on behalf of the Consortium have hindered investment into KFA by external investors, resulting in UBHL and KFIL, by themselves, and through their subsidiaries and associates, being compelled to fund KFA in an aggregate amount of Rs. 3199.68 crores just from 1st April, 2011 till the end of March, 2013. UBHL has claimed the said amount from the Petitioner Banks in Suit No. 311 of 2013 filed in the Hon'ble Bombay High Court.

82. The aforesaid constitute unlawful acts by the Consortium and are clearly in breach of the principles of good faith and fair dealings between the parties and the Consortium has now even gone to the length of attempting to initiate draconian measures in an attempt to leave KFA, UBHL and Dr. vijay Mallya, without an avenue to pursue their legal remedies according to the procedure established by law.

83. The concerted action of the consortium in targeting KFA, UBHL and Dr. Vijay Mallya is a blatant example of a private enterprise being victimized and being made an example to others in similar situations. In proceeding against KFAL, UBHL and Dr. Vijay Mallya in the manner as aforesaid, the Consortium has reinforced its decision to apply selective measures against KFAL, UBHL and Dr. Vijay Mallya to the detriment of KFAL, UBHL and Dr. Vijay Mallya. By reason of the Consortium's failure to ensure that its discretion is exercised in a fair and reasonable manner, the rights guaranteed to KFAL, UBHL and Dr. Vijay Mallya under the Constitution of India have been violated. For instance, as set out in a note dated 2nd February, 2013 handed over by KFA to the Consortium, there are a number of precedents of large borrowers where banks (including one or more of the Consortium) have shown considerable forbearance-and/or facilitated multiple restructuring, viz. Suzlon (Rs. 13,000 crores - 2nd restructuring under CDR), Jindal Stainless (Rs. 7,900 crores - 2nd restructuring under CDR), Hindustan Construction (Rs. 11,000 crores restructuring approved under CDR), Bharati Shipyard (Rs. 11,000 crores-restructuring approved under CDR), Sterling Group (Rs. 7,000 crores) and Ispat Group (Rs. 7,800 crores). It is not without significance that each of the aforesaid restructuring cases, the total outstanding due to the banks was more than what which is demanded in Company Petition No. 162 of 2013.

#### Proceedings Pending before the Debts Recovery Tribunal

84. The Respondent submits that proceedings in O.A. No. 766/2013 filed by the petitioner banks is pending adjudication before the Debts Recovery Tribunal. The banks resorted to the proceedings before the Debt Recovery Tribunal prior to the very filing of the present winding up petition.

85. There is no final adjudication till date as against the Respondent herein in respect of the alleged corporate guarantees and its liability there under. Therefore, the winding up petition does not survive. In fact, the Respondent has contested its liability before the Debts Recovery Tribunal and has also demonstrated the disparity in the interest charged as also the over charging of interest.

The Petitioners have sought to pursue parallel remedies which are not maintainable.

86. That petitioners have invoked and are pursuing two parallel remedies i.e. before the DRT and winding up against UBHL, both the claims cannot be invoked on same subject matter, simultaneously. Hence same is bad in law.

87. The Supreme Court in [1977] 1 SCC 1 and the Karnataka High Court in AIR 2000 Kar. 393 have held that two parallel remedies cannot be pursued by a party in respect of the same matter at the same time. The Bombay High Court in Dalmia Cement v. Indian Seamless Steels & Alloys reported in 2002 (112) Comp. case 314 and QSS Investors v. Allied Fibres reported in 2001 comp. case 587 and the Himachal Pradesh High Court in Azeet International v. HPH Produce

Marketing, reported in 2001 (107) comp. case. 587 have held that even in respect of winding up petitions, parallel remedies cannot be pursued.

The petitioners have admitted that Respondent is solvent

88. The State Bank of India (which is the lead bank in the consortium) has on the one hand declared UBHL as a Wilful Defaulter stating that although UBHL has the means to pay, it has not paid the dues of the petitioners and therefore UBHL has been declared as a Wilful Defaulter. A copy of the order has been produced by way of a memo. Further, the consortium of banks in their arguments before the DRT on 10th January, 2017 have categorically made a statement that the Respondent has substantial assets to recover the whole of the claim before DRT in O.A. No. 766/2013 (approximately Rs. 6,280 crores), and if sold the realizable value of these assets will be sufficient for recovery of almost the entire dues of the Banks.

Proposals for Settlement have not been considered by the Petitioners

89. It is an admitted position that Banks make One Time Settlements with various defaulting customers, based upon their own Board approved policy, as directed by RBI to all the commercial banks in India. It is understood that the RBI has put in place a framework for Banks to consider such settlement offers. It is understood via RTI queries that each of the Public Sector Banks is required to consider an application through a process laid down by the Board of the respective bank. Two offers dated 29th March, 2016 and 6th April, 2016, made to the Banks for settlement were rejected patently without following due process and no offer was made by the Banks to engage with the Borrower/ Guarantor in accordance with a settlement frame work approved by the respective Boards. The proposal of settlement which was rejected by the Consortium led by SBI bank was without justification/ reasoning and had no approval from the competent authority as envisaged in the policy.

90. The Consortium led by SBI has deliberately failed to give valid reasons for rejecting the proposal for settlement. Although, in absence of any counter offer the option of a negotiated settlement was not closed thereby. Whereas, in spite of being aware of their internal individual policies, the banks chose not to disclose the same, through which a reasonable settlement could have been arrived at. UBHL and KFA have not had an opportunity of a fit and proper consideration of a settlement offer. It is to be noted that it is imperative for the banks to abide and adhere with their own Board Approved policies, which has to be non-discriminatory and non-prejudiced. It is submitted that based on representative information received from certain Banks the qualifying amount for settlement in KFA's case would in fact have been far lower than the offer made and referred to above. It will be seen that the settlement offer already made is largely from distribution of cash deposits and from the disposal of liquid assets with a transparent price determination on the Stock Exchange and therefore not subject to any conditionalities.

Pending Proceedings against IAE before the City Civil Court

91. The alleged debt that the Petitioner Company claims is allegedly due and payable by the Respondent Company, is the subject matter of a serious dispute arising out of and in view of the inherently defective, both in design and manufacture, IAE V 2500 - A5 Engines fitted on the entire fleet of Airbus A320 family aircraft of KFA, rendering them incapable of commercial use. The investment of the Respondent Company and its subsidiaries (including by way of equity share capital and shareholder loans) in KFA has been seriously damaged primarily on account of the operational and financial woes of KFA, which in turn has been primarily or in any event decisively caused by the defective engines supplied, and further on account of the false assurances/ representations given made by IAE (the Petitioner Company) and/or its constituent joint-venture partners, viz. Rolls-Royce plc, Pratt & Whitney, a division of United Technologies Corporation, Japanese Aero Engines Corporation and MTU Aero Engines GMBH.

92. As a result, the Respondent Company has been constrained to file a suit in the City Civil Court, Bangalore, being Suit No. O.S.No.6406 of 2012, inter alia, against IAE (the Petitioner Company) and its aforesaid constituent joint-venture partners. From a mere perusal of the plaint it is clear that the Respondent Company has a substantial claim in excess of Rs. 1500 crores, inter alia, against the Petitioner Company herein, which is far in excess of the alleged debt claimed by the Petitioner Company to be allegedly due and payable. Since by an order dated 18th November, 2016, Kingfisher Airlines has been ordered to be wound up, and Kingfisher Airlines is a defendant in Suit No. O. S. No. 6406 of 2012, the Respondent Company has filed an application before the Company Court to transfer Suit No. O. S. No. 6406 of 2012 to the Company Court, which application is pending.

93. It is the specific case of the Respondent in the suit before the City Civil Court that the problems with the V 2500-A5 Engines emerged on and from the end of 2008. At least two serious inherent defects in design and manufacture of the IAE V2500-A5 Engines emerged, which were as follows:?

- a. The defect in the High Pressure Compressor 3 to 8 Drum ("HPC Stage 3 to 8 Drum"); and
- b. The Hot Section Distress Defect in the combustion chamber of the engines.

94. As on 31st March, 2010 the aggregate accumulated losses incurred by KFA totalled Rs. 4,321 crores - the root cause of these operational and financial woes of Kingfisher Airlines being principally attributable to the inherently defective and commercially un viable IAE V2500 - A5 Engines. Thus, by this time KFA was exposed as a soft target of economic duress at the hands of IAE.

95. Since KFA encountered problems with the IAE V 2500 - A5 engines it had

been constrained to operate on a significantly truncated fleet - primarily on account of the engine problems. This had a dramatic effect on KFA's cash flow and revenue stream. The Indian business environment for civil aviation is very competitive, and thus the only way an airline can survive is by volumes of business. The operating margins are so small that any fall in volumes completely dislocates the cash flow. Fall in volumes are inevitable when aircraft remain grounded for want of and/or poor performance of engines, which was the result of the defective engines supplied by IAE to KFA.

96. In or around mid 2010, Kingfisher Airlines, which was already overburdened on account of the aforesaid huge accumulated losses totalling Rs. 4,321 crores, occasioned principally on account of the sub-standard, inherently defective and commercially unviable IAE V 2500 - A5 engines, was faced with no real choice. If it had to survive as an airline, it had to come to terms with IAE and get its fleet back in the air. It is in this background that KFA commenced negotiations with IAE sometime in mid 2010 to try and reach an amicable resolution of this issue. Oral representations were made, in the course of negotiations, by senior officials and officers of IAE to the representatives of KFA and the Respondent to the effect that steps taken by LAE by way of replacing the drums with fully silver coated nuts with new drums without fully silver coated nuts, and the proposed installation of Single Crystal Panels in the combustion chamber, were allegedly a "complete fix" for the HPC Stages 3 to 8 Drum defect and the Hot Section Distress defect respectively. KFA and the Respondent were left with no alternative but to rely upon these representations. KFA and the Respondent accepted at face value the representations made by IAE regarding the complete fix of the problem of the engines. On the basis of such representations, KFA entered into the various Agreements and UBHL entered into the guarantee.

97. It has now come to the attention of KFA and the Respondent herein that the mandatory terminating action prescribed in the AD of the FAA of replacing the existing drums with new drums without fully silver plated nuts, is not a permanent fix to the HPC Stage 3 to 8 Drum defect. KFA and the Respondent were misled by IAE based on IAE's misrepresentations that there was a complete fix to the engine problems and were misled to execute the various Agreements including the corporate guarantee by the Respondent. Even as of 2011 and 2012, LAE has not been able to completely rectify the defect which is evident in the various directives that have been issued by IAE itself and which are part of the record. The representations made as to a solution being found by replacing the nuts was thus either false or at least made negligently. In any event, since the representation constitutes the fundamental basis of the aforesaid Agreements, as well as the guarantees given by the Respondent, the Agreements as well as the guarantees have been obtained on the basis of a misrepresentation, and thus, are void and/or in any event voidable. This necessitated the filing of the suit seeking a declaration that the guarantees obtained by misrepresentation are void and for recovery of an amount of Rs. 1500 crores from TAE.

98. Thus, it is evident that there are claims and counter claims between LAE and the Respondent. As held by courts when there are claims and counter claims and having regard to the fact that the very guarantees have been challenged before the City Civil Court, Bangalore, the winding up proceedings are liable to be dismissed. In the light of the same, no amounts whatsoever are payable by the Respondent Company to the Petitioner Company.

99. The Respondent has also sought a relief of an indemnity from IAE against all the claims against the Respondent herein as the petitioner herein (IAE) is the root cause of the downfall of KFA and it was based on the representations of IAE that Respondent gave corporate guarantees even to the consortium of banks.

Guarantees are governed by Foreign Law and the same needs to be pleaded and proved

100. The alleged guarantees are governed by English Law, which is a foreign law. The petitioner herein has in the petition neither pleaded the foreign law in respect of the invocation of the guarantees nor proved the same.

101. The Supreme Court in *Hari Shankar Jain v. Sonia Gandhi*, [2001] 8 SCC 233 has held that a Court shall take judicial notice of all laws within the territory of India. Foreign law is not included. As the court does not take judicial notice of foreign law, it should be pleaded as any other fact, if a party wants to rely on the same.

102. The Bombay High Court in *Iridium India Telecom v. Motorola Inc.*, has held that the legal position is well settled that foreign law is a question of fact and must be pleaded by the parties who relies upon it.

103. The petitioner in the present winding up petition has neither pleaded nor proved English law which is the foreign law. This being the case, the guarantees being governed also English law, the same cannot be regarded by this Hon"ble Court and consequently the very petition is not maintainable as the very enforcement of guarantees is not shown before this Hon"ble Court.

Ex Parte Decrees of Foreign Courts are not binding

104. The petitioner has contended that it has obtained a foreign judgment from the English Court in summary proceedings on the basis of which it is seeking to foist a liability on the Respondent in support of the winding up petition.

105. It is submitted that the said judgment of the English Court is a summary judgment which has been passed with the Respondent being ex-parte. Therefore, the same is contrary to Section 13(d) read with Section 44A of the Code of Civil Procedure, 1908.

106. The Supreme Court in *International Woollen Mills v. Standard Wool* [2001] 5 SCC 265, has held that an ex-parte decree generally is not a judgment on merits and that decree and judgment granted by a foreign court can be said to be on merits by looking into the evidence lead by the plaintiff and documents proved

before it as per its rules. The Supreme Court has also held that a decree would not be on merits if the court has not gone through and considered the case of the plaintiff and taken evidence of witnesses of the plaintiff.

107. The Madras High Court in *K.M Abdul Jabbar v. Indo Singapore Traders P. Ltd.*, AIR 1981 Mad. 118, has held that a decree passed by a foreign court under summary proceedings after refusing leave to defend sought for by the defendant is not a judgment on merits and hence, the judgment cannot be considered as conclusive as contemplated under Section 13(b) of the C.P.Code.

108. The Delhi High Court in *A.S. Sandhu v. Mithals International (P.) Ltd.* 2001 (93) DLT 700, has held that if case is covered in any of the exceptions under Section 13(a) to (e) of the Code of Civil Procedure, 1908, decree passed by a foreign court will not be conclusive or binding.

Petitioner being a foreign Company has not complied with Section 592

109. The petitioner is a foreign company which is incorporated under the Laws of England is carrying on business in India. It has dedicated persons who are in India servicing the customer airlines in India. Therefore, there is a place of business in India and the petitioner ought to have complied with the provisions Section 592 of the Companies Act, 1956. The petitioner not having complied with the provisions of Section 592 is in terms of Section 599 of the Companies Act, 1956 barred from prosecuting any legal proceedings in India.

110. The Chancery Division in *Re. Tovarishstvo Mfg. Liudvig Rabenek*, [1944] 2 All ER 556, if the representatives of foreign company were often coming and staying in hotel in England for purchase of machinery etc., the foreign company is deemed to have a place of business in England. The judgment of the Chancery Division has been affirmed in the judgment of the Delhi High Court in *Dabur (Nepal) (P.) Ltd. v. Woodworth Trade Links (P.) Ltd.*, 2012 (175) comp. cas.338.

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111. The Respondent had agreed to guarantee the amounts due to M/s KF Aero. In this regard an application was submitted to the Reserve Bank of India (RBI) seeking permission to provide such a guarantee, guaranteeing the dues of KF Aero. However, the RBI gave permission only to issue the corporate guarantee in favour of KF Aero and not to its successors and assigns. KF Aero in turn appears to have assigned its rights in favour of BNP Paribas which is the petitioner in the present petition. Since RBI permission was not there for assigning the Corporate Guarantee in favour of BNP Paribas the same is void. It is hit by provisions of Section 13 of Foreign Exchange Management Act. Further, the very assignment has not been effected as BNP Paribas has not yet notified the Respondent in writing about the same as required by the very documents. In fact, even post the purported assignment by KF Aero in favour of BNP Paribas, KF Aero continued to raise invoices for lease rentals till termination of the lease in favour of Kingfisher Airlines. Thus, without prejudice, the petition would be maintainable only by KF

Aero and not BNP Paribas.

Obligation on the Assignee (BNP Paribas) to notify UBHL of the Assignment, which has not been done

112. In this respect, on 17.06.2006, three corporate guarantees (Annexures Q (pg. 530), R (pg. 549) and S (pg. 568) to the Petition) came to be given to KF Aero. On 21.06.2006, there was a notice of assignment. However, this notice of assignment itself was qualified in that it expressly stated (notwithstanding the assignment) that the Respondent "shall owe your obligations under the guarantee exclusively in favour of the Assignor unless the Assignee notifies you in writing otherwise, from which time your obligations under the Guarantee falling due for performance after such notice shall be owed to the Assignee... ". (Annexures A A (pg. 634), BB (pg. 636) and CC (pg. 638) to the Petition). UBHL put its signature on 21.06.2006 itself on this very document. However, admittedly, no notice was given to the UBHL on or after 21.06.2006.

113. UBHL submits that the assignment which took place on 21.06.2006 was only partially complete in that the assignor's rights stood assigned to the BNP Paribas, but qua UBHL, there was no assignment because the notification of such assignment was deferred to a future date. UBHL acknowledged the first part and thereby accepted that if and when it was notified of a transfer of its obligations to the assignee under clause 2, the obligations would stand so transferred. No such notice was ever given and therefore, no obligations exist vis-a-vis BNP Paribas and the present petition is not maintainable.

No permission of the RBI allowing assignment of the three corporate guarantees to KF Aero's assignees:

114. As stated earlier, at the time of issuance of the three corporate guarantees. Kingfisher Airlines had by its letter dated 7th June, 2006 applied for prior RBI approval through UTI Bank Ltd. to permit issuance of the three corporate guarantees by UBHL in favour of "KF Aero, its successors and assigns" (Annexure R-2 to the Objections of UBHL (pgs. 20-23)). However, by its letter dated 12th June 2006 RBI conveyed that it had "no objection from FEMA angle to issuance of corporate guarantee by M/s. United Breweries (Holdings) Ltd., Bangalore, in favour of lessor M/s. KF Aero". (Annexure R-3 to the Objections of UBHL (pg. 24)). Thus, there was no permission of the RBI allowing assignment of the three corporate guarantees to KF Aero's assignees, and although such permission had been expressly sought, it had not been granted.

115. It is submitted that unless prior permission was duly obtained from the RBI, the purported assignment of the three corporate guarantees in favour of BNP Paribas would be void and/or unenforceable in law for such permission would have to precede and not follow the assignment. That BNP Paribas was aware of this position in law is evident from the legal opinion(s) given by M/s Rajinder Narain & Co. (Annexures R-2 (Pg. 34), R-3 (Pg. 46) and R-4 (Pg. 58) of the Additional Objections of the Respondent dated 28.02.2014) to, inter alia, BNP

Paribas who had duly examined the RBI Permission dated 12th June, 2006 and, inter alia, opined as follows:?

"The RBI has given approval for issuing the Guarantee in favour of the Lessor. Any change in its terms would require RBI's approval."

(Emphasis supplied)

116. This position also emerges from the plain language of Regulation 3 of the Foreign Exchange Management (Guarantees) Regulations, 2000 as well as in light of the judgment of the Supreme Court in Mannalal Khetan v. Kedar Nath Khetan [1997] 2 SCC 424. Regulation 3 of the Foreign Exchange Management (Guarantees) Regulations 2000 ("FEMA Guarantee Regulations") expressly provides as follows:?

"3. Prohibition: Save as otherwise provided in these regulations, or with the general or special permission of the Reserve Bank, no person resident in India shall give a guarantee or surety in respect of, or undertake a transaction, by whatever name called, which has the effect of guaranteeing a debt, obligation or other liability owed by person resident in India to, or incurred by, a person resident outside India."

117. In Mannalal Khetan (supra), the Supreme Court held that:?

"The contract is void if prohibited by statute under a penalty, even without explicit declaration that the contract is void because such a penalty implies a prohibition. If contract is made to do is prohibited act, that contract will be unenforceable. This contract is expressly or impliedly prohibited by statute, one has see not what acts the statute prohibits but what contracts is prohibits. One is not concerned with the intent of the parties."

118. It is submitted that Section 13 of the Foreign Exchange Management Act, 1999 expressly stipulates penalties for contravention of provisions of the Act, any rule, regulation, notification, direction or order issued in exercise of the powers under the Act, or any conditions subject to which an authorization is issued by the RBI. Therefore, in light of the aforesaid Regulation 3 and the judgment of the Supreme Court in Mannalal Khetan v. Kedarnath Khetan (supra), it is submitted that the purported assignments of the corporate guarantees in favour of BNP Paribas are in violation of the law in India and unenforceable. Hence, BNP Paribas has no locus standi to file the present Company Petition, and the same ought to be dismissed in limine with costs.

119. It is pertinent to note that before the Division Bench of this Hon'ble Court, BNP Paribas cited the decision of the Calcutta High Court in Eurometal Ltd. v. Aluminium Cables & Conductors [1983] 53 Comp. Cas. 744 in support of its proposition that absence of a permission under the provisions of erstwhile FERA would not render a contract void. However, it is submitted that Eurometal as well as all the decisions following Eurometal (including Eurometal) do not refer to the decision of the Supreme Court in Mannalal Khetan and therefore are per incuriam

and not good law.

120. The contention that the corporate guarantees are void and/or unenforceable in law is further buttressed by a perusal of Article VIII 2(b) of the Articles of Agreement of the International Monetary Fund. The said article states:

"Article VIII: General Obligations of Members

Section 2. Avoidance of restrictions on current payments

(b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either (member more effective, provided that such measures and regulations are consistent with this Agreement."

121. The International Monetary Fund has clarified that the meaning and effect of this provision is that Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained or imposed consistently with the Fund Agreement will not receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example by decreeing performance of the contracts or by awarding damages for their non performance. India joined the IMF on December 27, 1945, as one of the IMF's original members and adopted the Articles of Agreement. Furthermore, India expressly accepted the obligations of Article VIII of the IMF Articles of Agreement on current account convertibility on August 20, 1994.

BNP Paribas was obliged to invoke the Asset Value Guarantees provided by Avions De Transport Regionale (ATR) before approaching this Hon'ble Court by way of the present Petition.

122. The three aircraft in question were covered by Asset Value Guarantees provided by Avions De Transport Regionale (ATR) under its purchase Agreement with erstwhile Kingfisher Airlines under which ATR guaranteed the Guaranteed Amount (as defined in Letter Agreement No.2 between ATR and erstwhile Kingfisher Airlines) which is an amount equal to the outstanding principal related to the portion of the Aircraft Final Price funded under the financing Agreement. By three tripartite Agreements all dated 21st June, 2006 by and between the erstwhile Kingfisher Airlines, KF Aero and ATR ("the Tripartite Agreements") (Annexures R-8 (pg. 96), R-9 (pg. 114) and R-10 (pg. 132) to the Objections filed by UBHL to the Company Petition), KF Aero in effect stepped into the shoes of erstwhile Kingfisher Airlines under the Purchase Agreement (as defined in the Tripartite Agreements - which, inter alia, includes the Letter Agreement between

ATR and erstwhile Kingfisher Airlines which provided for Asset Value Guarantees from ATR in respect of the three Aircraft in question) between ATR and erstwhile Kingfisher Airlines. KF Aero and its assignee - BNP Paribas were duty bound to invoke the Asset Value Guarantees against ATR. If KF Aero and/or BNP Paribas have or had so invoked the Asset Value Guarantees, ATR is contractually bound to pay to KF Aero and/or BNP Paribas the Guaranteed Amount, i.e. the entire alleged debt or at least the entire alleged outstanding principal amount claimed in the present Petition.

123. BNP Paribas was therefore, obliged to invoke the Asset Value Guarantees before approaching this Hon"ble Court by way of the present Company Petition.

The Guarantees are governed by Foreign Law, which has to be pleaded and proved

124. The guarantees are governed by English Law. The petitioner in the petition has neither pleaded nor proved English Law. Under the circumstances, the very petition is not maintainable and no order of winding up can be passed against this Respondent.

CO. P. No. 121/2012 - RRP Engine Leasing Ltd. v. United Breweries (Holdings) Ltd.

CO. P. No. 122/2012 - Rolls-Royce & Partners Finance Ltd v. United Breweries (Holdings) Ltd.

Petitioners are part of the Rolls Royce group, which is a party to the IAE Suit

125. From (i) the websites of Rolls-Royce and IAE, (ii) the Annual Report of Rolls-Royce Holdings pic, and (iii) the Directors Report and Financial Statements for 2011 for Rolls-Royce plc - the details of which are set out in the statement of objections, it is clear that the petitioners are a constituent of the Rolls-Royce Group of companies which includes Rolls-Royce Plc - which admittedly was at all material times a constituent joint venture partner in IAE and a key participant in the manufacture and supply of the IAE V 2500 - A 5 Engines. In fact, the registered office of the petitioners is located at the same address as the registered of Rolls-Royce pic.

126. It is evident that the petitioners are an instrumentality used by IAE and/ or the Rolls-Royce Group to facilitate and actively market and/or lease the defective IAE V 2500-A5 Engines. If the corporate veil is lifted, it is clear that these entities are instrumentalities of Rolls Royce Plc. UBHL has a claim in the aforesaid suit against IAE and its aforesaid constituent partners, including Rolls Royce Pic., far in excess of the alleged amount claimed in the present company petition.

Petitioners being Foreign Companies have failed to comply with Section 592

127. Petitioners are companies organized and existing under the laws of England having their registered office and principal place of business in England. Petitions therefore are "foreign companies" as defined in the Companies, 1956

("Companies Act"). From the aforesaid facts objections it is evident that Rolls-Royce being a "foreign company", is carrying on business in India, but has failed to comply with the provisions of Sections 592 to 594 of the Companies Act. It is therefore expressly prohibited under Section 599 of the Companies Act from instituting any legal proceedings in India, including the present Company Petition.

128. Under the provisions of the Foreign Exchange Management Act, 1999 ("FEMA") and the Foreign Exchange Management (Establishment in India of a Branch Office or other Place of Business) Regulations, 2000 ("the Regulations"), prior approval of the Reserve Bank of India is required for establishment of a branch or liaison office or office or any other place of business in India by any entity resident outside India other than a banking company. Petitioners are admittedly not banking companies and have established a place of business in India as is evident from what is stated in the aforesaid objections. Petitioners have not obtain the requisite prior permission from the Reserve Bank of India prior to establishing such places of business in India and hence, are illegally carrying on business in India.

On this ground also the petition is liable to be dismissed.

ATR v. United Breweries (Holdings) Ltd CO. P. No. 185/2012

Petitioner being a Foreign Company has failed to comply with Section 592

129. The Respondent Company submits that erstwhile Kingfisher Airlines Limited ("erstwhile Kingfisher"), which inter alia, operated Scheduled Air Transport Services within India and was a part of the UB Group of Companies, had entered into Agreements with the Petitioner for purchase of ATR 72-500 aircraft as well as General Maintenance Agreements ("GMA") for maintenance of these aircraft. Erstwhile Kingfisher had entered into a Purchase Agreement dated 13th December, 2005 ("the erstwhile Kingfisher PA"), and GMA dated 21st June, 2006 with the Petitioner ("the erstwhile Kingfisher GMA"). Similarly, Deccan Aviation Limited (now known as KFA) had also entered into a Purchase Agreement dated 11th February, 2005 ("the Deccan PA"), and GMA dated 11th June, 2003 with the Petitioner ("the Deccan GMA"). Both erstwhile Kingfisher and Deccan Aviation Limited prior to the de-merger, made payments titled "Pre Delivery Payments" to the Petitioner in respect of the aircraft booked under these purchase Agreements as also payments under the GMA for maintenance services and supply of parts by the Petitioner. Thereafter, subsequent to the de-merger mentioned above, the Deccan PA and the Deccan GMA were terminated and, inter alia, the enlarged fleet was consolidated into the erstwhile Kingfisher GMA.

130. Further in terms of the Deccan GMA, the Repairer (petitioner) was to provide or cause to provide technical and operational support to Operator (KFA), including assistance and advise on engine performance and conditions follow-up, airworthiness and OEM publications follow-up, life limited parts follow-up, technical events follow up and engines removal forecast and staggering plan. This service was to be provided by the Repairer by assigning at Operator's main

base of one (1) Engine specialist to assist and advise Operator's personnel on engines monitoring and follow-up activities at Operator's main base. The Operator was to provide, at no cost to Repairer, suitable facilities with office, telephone, fax, Internet access line in order to enable the specialist to fulfil its task properly. (Under the Deccan GMA entered into prior to the de-merger mentioned above, Deccan Aviation Limited (the Respondent Company herein) is the Operator and the Petitioner is the Repairer).

131. The Respondent Company believes and understands that the Petitioner Company has similar arrangements with other airlines in India who operate ATR fleet.

132. Accordingly, the Petitioner provided KFA, (and the Respondent Company verily believes is being provided by the Petitioner to other airlines in India who operate an ATR fleet) field service representation and/or a Customer Support Representative ("CSR") and/or a Logistics and Material Representative ("LMR") and/or an engine specialist at all material times.

133. KFA at all material times provided at no cost to the Petitioner Company in KFA's office space and other facilities to the Petitioner's representatives which included use of telephone, telefax, copying machine, Internet access etc. to assist the field service representation and/or the CSR and/or the LMR and/or the engine specialist to fulfil their task properly.

134. These representatives referred to herein above carried out the various functions required to be carried out by them under the relevant Agreements including providing dedicated technical support to the products and services supplied by the Petitioner, assistance as well as customer service support to the airline on a day to day basis in respect of the operating fleet of ATR aircraft and also acted as a communication channel between the airline and the Petitioner.

135. Thus, the petitioner had a place of business in India and accordingly had to comply with the requirements of Section 592 of the Companies Act, 1956, which the petitioner has not complied with. As a result of such non-compliance, Section 599 of the Companies Act bars the petitioner from instituting any legal proceedings. Thus, there is a bar to the present proceedings and the present proceedings are not maintainable.

HPCL v. United Breweries (Holdings) Ltd CO. P. No. 99/2013

Petitioners' claim is for interest

136. It is submitted that the entire claim of the petitioner herein is for delayed payment service charges (interest). The entire outstanding amount with respect to the fuel supplied has been paid in full by KFA. What is being claimed in the present petition is only the amounts allegedly due from KFA on account of the interest.

137. The High Court of Karnataka in Southern Industrial Polymers (P.) Ltd. v.

Amur Pharmalators and Electronics (P.) Ltd. [1984] 56 Comp. Cas. 77 has held that where the agreed amount towards the principal amount was paid but the dispute was raised with regard to payment of the interest, the Karnataka High Court dismissed the winding-up petition in respect of the payment of interest of the principal sum on the ground that there was a dispute about the claim of interest.

138. The Allahabad High Court in Ultimate Advertising v. GB Marketing Laboratories Ltd [1989] 66 Comp. Cas. 232 has held that where there is a bona fide dispute regarding the interest, the petition for winding up cannot be maintained.

139. Thus, the claim is in the nature of damages, which will have to be proved by leading evidence and in respect of a claim for damages, before the same is ascertained by a court, the same does not amount to a debt and the very winding-up petition deserves to be dismissed.

140. The Supreme Court in Union of India v. Raman Iron Foundry, AIK 1974 SC 1265 and the Karnataka High Court in Green hills Exports (P.) Ltd. v. Coffee Board [2001] 34 SCL 717 have held that a claim for damages is not a debt and becomes a debt only when the same is quantified by a competent court on enquiry. Thus, a winding-up petition on a claim for damages would not lie.

Supporting Creditors, who are opposing Winding-up of UBHL

141. The contentions of the unsecured creditors opposing the winding-up petitions, are as follows:-

142. Mr. Sajjan Poovaiah, learned Senior Advocate representing M/s. Prestige Estate Projects Limited (PEPL), an unsecured creditor of the Respondent -United Breweries (Holdings) Limited (UBHL) and also representing HDFC Bank Limited (HDFC), Lakshmi Vilas Bank Limited (LV Bank) and IFIN Securities Finance Limited (IFIN), all three secured creditors of the Respondent - Company, opposed the present set of winding-up petitions to support the Respondent - UBHL and made the following submissions:-

143. Mr. Sajjan Poovaiah urged that Respondent - UBHL is a profit making Company and is a Going concern and employs about 70 to 100 employees in its On-Going business of Leather Products manufacturing and Beer business and therefore, need not be wound up.

144. He submitted that as against the petitioning Trade creditors who have filed these winding-up petitions, the objector, unsecured creditor, M/s. Prestige Estate Projects Limited, which has constructed the prestigious King Fisher building in Bengaluru for the Respondent - UBHL itself, has dues to the extent of Rs. 94.33 crores against the Respondent - Company. But, it is hopeful and quite positive that the Respondent - UBHL will repay its dues and winding-up of UBHL therefore will not be the solution of the financial crisis, which the Respondent - UBHL may be temporarily facing.

145. He submitted that even the secured creditors like HDFC Bank who have their financial exposure in the Respondent - UBHL, want to oppose these winding-up petitions. He urged that of course, with the sale of some of the share holding of the UBHL, by the said HDFC Bank, their exposure is much less when compared to the debts claimed by the petitioning creditors, but they are also opposing these winding-up petitions, because they are hopeful of the recoveries from the "Going concern" of the Respondent - Company, UBHL.

146. Mr. Poovaiah also urged that under different orders passed by this Court in various proceedings, there is a huge sum of approximately Rs. 1,280 crores lying deposited in the Account of the Respondent - UBHL with this Court itself, which is more than the total claims of the petitioning creditors, who are also unsecured creditors like the objector, Prestige Estate Projects Limited and except the secured creditors like SBI and consortium of 13 Banks, the dues of the other petitioning creditors Company can be squared-up by the funds lying deposited with this Court itself and therefore, there is no justification for winding-up the Respondent - Company.

147. He also submitted that as far as the Consortium of Banks led by SBI is concerned, who are petitioners before this Court in Company Petition No. 162/2013, since they have already approached the Debt Recovery Tribunal (DRT) for adjudication of quantum of their due recovery of their respective claims against the Respondent - UBHL and whereas the Debt Recovery Tribunal is yet to pass a final decree, if at all in their favour, adjudicating the exact amount of debt, the very basis on which the Respondent - UBHL is liable to be yet adjudicated in favour of these Banks, there is no justification for prematurely winding-up the Respondent - UBHL at their instance without even awaiting for the Debt Recovery Tribunal to pass the final decree in favour of these petitioner - Banks. This argument stands negated by the decree of the Debt Recovery Tribunal given later on 19/01/2017, as discussed hereinafter in more detail.

148. He further urged that the substratum of the Company is not lost. He also drew the attention of the Court towards the Civil Suit No.263/2013 filed by the Respondent - UBHL against IAE and others before the Bombay High Court, seeking declaration that the Corporate Guarantees given to the petitioning Banks including SBI was void ab initio and non-est on the ground that the said guarantee was executed under the duress and coercion and that is a question still pending trial before the Bombay High Court and therefore, the very basis for these creditors to seek winding up against the Respondent - UBHL on the basis of such Corporate Guarantee Agreements, is subject matter of adjudication before the Bombay High Court and therefore, winding up petitions cannot be proceeded and prosecuted by them.

149. He also drew the attention of the Court towards another Suit, in O.S. No. 6406/2012 filed by the Respondent - UBHL in Bangalore City Civil Court, similarly raising a question on the validity of the Corporate Guarantee Agreements of the Respondent -UBHL with the Banks and other unsecured creditors on the ground

that the Engines supplied by the creditor, IAE International were defective and various other grounds and even that suit is pending trial at Bengaluru and the application filed by the defendants under Order 7, Rule 11 of the Civil Procedure Code, 1908 seeking dismissal of the suit at the threshold has already been rejected by the learned Trial Court on 30/04/2016 and even though the Revision Petitions have been filed by the defendants before this Court, however, there is no stay order granted by this Court in such Revision Petitions and they are pending consideration before this Court.

150. Finally, Mr. Poovaiah also submitted that the winding up petitions cannot be converted into Money Recovery Suits and as per the well settled legal position, if the liability to pay is seriously and bona fide disputed by the Respondent - UBHL, the present objecting creditors also have the right to save the Respondent - UBHL from winding up, in which, nobody's interest would be served and the economic and production activity of the Respondent - UBHL will come to a standstill causing loss of employment, devaluation of the worth of the assets of the Company and various other negative fallouts and therefore, the present winding up petitions deserve to be dismissed by this Court.

The contentions on behalf of the Workmen of UBHL:

151. The learned counsel, Ms. S.R. Anuradha has also made number of written submission on behalf of the workmen of UBHL, opposing the winding up petitions on the following grounds:

152. The learned counsel for the workmen contended before the Court by seeking intervention that the Respondent Company UBHL has a large workforce in its Associate Company and subsidiary Company which is dependent on the Respondent's Company for all support and the said workforce apprising of about 110 in number will not be able to make their survival if the Respondent - Company, UBHL is directed to be wound up.

153. They have stated in paragraphs 11 and 12 of their Written submissions that the subsidiary of Respondent, UBHL namely SEPL has been engaged in the manufacture and sale of ready to wear Apparels for the last ten years, which has employed a workforce of 1813 employees, comprising of 1587 workers and 220 staff and all of them are permanent employees of the said Company, SEPL and the winding up of the Respondent - Company, UBHL will perversely affect the business of their employer Company, SEPL. They have also stated that the UBITL (M/s. UB International Trading Limited) is engaged in the footwear manufacturing business since 2002, exporting leather footwear to Europe, USA and UK and employs about 450 workers directly and 500 workers indirectly and therefore for their survival, they have submitted before the Court that the Respondent - Company does not deserve to be wound up.

The following case laws are relied upon by the learned counsel for the petitioners:-

154. The learned counsel for the petitioners relied upon the following judgments in support of their contentions and also to meet the objections raised by the Respondent company UBHL, they are also briefly discussed and quoted below for ready reference.

(i) In *Hegde & Golay Ltd., v. State Bank of India* ILR 1987 KAR 2673, the Division Bench of this Court held that the secured creditor like Bank does not have to give up its security in order to pursue the winding up petition against the Respondent company and filing of the suit by the Creditor-Bank for recovery of the dues against the respondent-company does not bar the filing up of the winding up petition as well. The relevant portions of the judgment are quoted below for ready reference:?

"These observations, in our opinion, do not advance the contention of Sri. Shetty any further. Section 529(1) of the "Act" attracts the rules of insolvency to winding up in relation to "the respective rights of secured and unsecured creditors" and confines these Rules so attracted to matters that arise between these two classes of creditors. Sections 528 and 529 of the "Act" are in the chapter "Proof and Ranking of Claims" and deal with the question of proof of debts and the rights of secured and unsecured creditors. Section 529(2) itself, in so far it expressly envisages, and provides for, the contingency that if a secured creditor proceeds to realize his security he should pay the expenses incurred by the Liquidator, by implication, rules out the construction contended for by Sri Shetty. The words "in winding-up of insolvent company" in Section 529(1) of the "Act" has obvious reference to a post winding up stage.

The point to note is that this rule of insolvency is attracted to winding up in the matter of proof of debts. That is after the stage of the winding up order. A secured creditor is, under Section 439(2) of the "Act" as much a creditor entitled to present a winding up petition as any other. The law in regard to the right of Secured Creditor to present a petition for adjudication under the Insolvency law is different from the right of a secured creditor to present a winding up petition".

"49. It is no doubt true that the Bank had, subsequent to filing of winding-up petition, instituted three suits. Sri. Shekar Shetty stated that the claim in the first suit was Rs. 14 lakhs and that the Company would, if so directed, deposit this amount under protest, subject to the result of the suit. So far as the other two suits are concerned, Sri. Shekhar Shetty's contention is that the claims in the subsequent suits and the entire rest of the Bank's claim were hit at by Order 11, Rule 2 of the Code of Civil Procedure. In our opinion, the sanctions of limits from time to time were distinct transactions giving rise to distinct causes of action. In some cases the sanctioned limits were operated, wholly or partially, in one account. In other cases, the sanctioned limits were operated upon in one current account. That would not make the limits, sanctioned from time to time, one transaction.

The pendency of a suit is no bar to the maintainability of a winding up petition. If

the Company fails to show that the debt is bona fide disputed it would not render the claim any the more dispute or any the less just, merely because the Creditor is driven to file suits for its recovery. Though a winding up petition is a mode for recovery of a Just debt, the proceedings in winding up do not partake of the nature of a suit. Therefore, incidents of Order 11, Rule 2 CPC are not attracted".

(ii) The Delhi High Court Division Bench in the case of Bank of Nova Scotia v. RPG Transmission Limited [2005] 64 SCL 261, held that the Companies Act 1956 and Recovery of Debts due to the Banks and Financial Institutions Act of 1993 (RDB Act) operate in two different and distinct fields and mutually exclusive jurisdiction and while the purpose of initiating proceedings under RDB Act is to recover the amount due and payable to the Bank/Financial Institutions, the purpose of invoking the winding up jurisdiction is to wind up the company on the ground that it has become commercially insolvent. Paragraph-30 is quoted below for ready reference.

"30. Therefore, it cannot be said that RDB Act covers the field for winding up an insolvent company and, therefore, the contentions of Mr. Tripathi are misconceived and are accordingly rejected. The contention that the petitioner could chose one of the remedies available in case where two or more than two remedies are available is applicable when the remedy provided for is one and the same but when two different remedies are provided for two different reliefs, in that event the plea of election of remedies is not applicable. We, therefore, hold that the winding up court is concerned with the issue as to whether or not a company could be declared as commercially insolvent and, therefore, comes within the ambit of provisions of Section 433 of the Companies Act. The Debt Recovery Tribunal does not have any jurisdiction to entertain any such application for winding up of a company whether the same is by any bank and/or other financial institution. We also hold that both the remedies are jurisdictions are mutually exclusive of each other and, therefore, there cannot be any inconsistency between the two different remedies provided for in two different legislations".

(iii) The Division Bench of this Court in the case of Kingfisher Airlines Ltd. v. State Bank of India [2015] 130 SCL 378 : [2014] 52 taxmann.com 523 (Kar.) itself, when the said company challenged the action of the Respondent-State Bank of India to stand outside the liquidation and realize its security with respect to "Kingfisher House" held in the case of Kingfisher Airlines Ltd. (supra) that the proceedings initiated by the Respondent-Bank under SARFAESI Act are not alternate to winding up petition. Paragraph-24 of the judgment is quoted below for ready reference.

"24. In the present case, the proceedings under the provisions of SARFAESI Act were initiated much before filing of winding up petition. Winding up petition was filed on 19-08-2013. While after completing other formalities contemplated under Section 13(1)(3A), notice under Section 13(4) of the SARFAESI Act, was issued on 13-7-2013 and symbolic possession of the Kingfisher House was also

taken on 10-08-2013. When the winding up petition was filed, the respondents-Banks being certain that even if all secured assets are sold they would not realize all of their outstanding dues, which admittedly as of today are more than 6000 crores. In this backdrop they were constrained to file company petition. They clarified it in the petition, making their position unequivocally clear at the time of filing of company petition. In paragraph 4 of the memorandum of company petition, the respondents-Banks, specifically stated that they are "standing outside winding up" insofar as their secured interest, including Kingfisher House and the same is being filed without relinquishing their rights and interest as secured creditors. They also made it clear in the petition that they were pursuing other remedies available to them for realization of securities created in their favour without seeking assistance of this Court for sale/realization of secured assets. In the petition, they have also made a categorical statement that even if all secured assets are sold and their value realized, they would still not realize substantial/large portion of the outstanding dues. Learned Counsel for the parties are ad idem that the worth of Kingfisher House in any case may not be more than Rs. 300 Crores as against total outstanding of Rs. 6200 Crores. The proceedings under the Act are not recovery proceedings and need to be filed for winding up of the company which is unable to pay its debts. The proceedings initiated by the respondent-Banks under SARFAESI are not alternate to the winding up petition".

(iv) In the case of Official Liquidator, Uttar Pradesh v. Allahabad Bank [2013] 14 SCC 381, the Hon'ble Supreme Court has held that RDB Act is a complete code in itself and DRT has exclusive jurisdiction for sale of properties for realization of dues of Banks and Financial Institutions. However, being protector of interests of workmen and creditors of the company in winding up petition, the Official liquidator shall mandatorily be associated at the time of auction and sale by Recovery Officer under RDB Act and if the Official Liquidator is not satisfied with the manner in which auction was conducted he can challenge the said auction by filing the appeal before the Debt Recovery Appellate Tribunal as a person aggrieved under Section 30 of the RDB Act. However, the official liquidator cannot approach the Company Court to set aside the auction/confirmation of sale under RDB Act, 1993.

(v) In Bank of New York Mellon v. Cranes Software International Ltd. [2016] 195 Comp Case 17 (Karn.), the Division Bench of this Court held that Section 9 of the Companies Act provides that the provisions of the Act shall have effect, notwithstanding anything to the contrary contained in any agreement which may be executed, and therefore the Agreement which provided for applicability of the English law under clause 20.2 of the Trust Deed, it does not impose the blanket ban on the jurisdiction of Indian Courts to try the winding up here in the State where the registered office of the Respondent's company was situated. The relevant portion of the judgment is quoted below for ready reference.

"Section 9 of the Companies Act provides that the provisions of the Act shall

have effect, notwithstanding anything to the contrary contained in any agreement which may be executed, meaning thereby that the Companies Act would override the provisions of the agreement or the trust deed. Section 10 of the Act provides that the court having jurisdiction under the Act would be the High Court having territorial jurisdiction in relation to the place at which the registered office of the company is situate. In the present case, it is not disputed that the: registered office of the company is at Bangalore, which is within the territorial jurisdiction of the Karnataka High Court at Bangalore. Sub-section (11) of section 2 defines "court" to mean the court having jurisdiction under the Act, "with respect to that mater relating to that company, as provided in section 10". Sub-section (2) of section 439 provides that any trustee/s having been appointed in respect of the debentures, and the trustee for holders of debentures, shall have a right to file a petition for winding up of the company. Clause (e) of section 433 provides that the company can be would up if it is unable to pay it debts. Section 434 gives the details as to when the company would be deemed to be unable to pay its debts.

While passing the impugned order dismissing the company petition for lack of jurisdiction, the learned company judge has relied on the decision of *Swastik Gases P. Ltd. v. Indian Oil Corporation Ltd.* [2013] 9 SCC 32, wherein the issue was with regard to invoking of jurisdiction in Jaipur court, where a part of the contract had been performed by the parties in Jaipur and also in Kolkata, but the agreement provided that the Kolkata court would have jurisdiction to entertain all cases arising out of the dispute with regard to the agreement. In such facts, it was held that Kolkata court would have the jurisdiction and not Jaipur court. Relying on the said decision, the learned company judge has considered and interpreted clause 20 of the agreement and held that the English courts alone would have jurisdiction to try any case regarding a dispute with regard to the trust deed.

There cannot be any quarrel with regard to the law laid down by the apex court in the case of *Swastik Gases P. Ltd v. Indian Oil Corporation Ltd.* [2013] 9 SCC 32. However, the facts in the present case are quite different. The trust deed (clause 20) does not impose a blanket ban on the jurisdiction of the Indian courts to try any matter. It may be reiterated that what is stated in clause 20.1 is that the cases relating to the trust deed would be decided as per English law, and in clause 20.2, though it has been mentioned that the courts of England would have exclusive jurisdiction, but clause 20.4 would clarify that the embargo is not for t he trustee/ appellant or the bondholders. Clause 13.3 relates to legal proceedings which may be taken by the trustee "at any time after the bonds have become due and payable" and it provides that the trustee may, at his discretion and without further notice, take such proceedings against the issuer, i.e., the company, as it may think fit to enforce repayment of the bonds and to enforce the provisions of the t rust deed or the conditions.

In the case of *Swastik Gases P. Ltd. v. Indian Oil Corporation Ltd.* [2013] 9 SCC

32, part of the contract was performed both at Kolkata and Jaipur and parties had agreed to the jurisdiction of Kolkata court to entertain all cases arising out of any dispute. Such is not the position in the present case. As such, in our view, the ratio of the said case will not apply to the facts of the present case".

(vi) The learned single Judge of Mumbai High Court while admitting the winding up petition against the Respondent's company in the case of *Intesa Sanpaolo S.P.A. v. Videocon Industries Limited v.* [2014] 49 taxmcinn.com 433/183 Comp. Cas. 395 (Bom.), dealt with the objections raised by the Respondent's company that since the creditor held an ex parte decree from a Foreign court and had filed execution proceedings in Indian Court, such creditor could not maintain a winding up petition before the High Court. The learned single Judge held that such an objection was unsustainable. The following relevant extract of paragraphs 46, 47, 48 & 67 are quoted below for ready reference: -

"46. If a creditor with or without a decree of an Indian Court can file a petition for winding up based upon a original cause or action, pending the suit and after decree, there is no warrant to deprive a creditor with a decree of foreign Court to present a petition for winding up, independently of the decree, in the Company court having jurisdiction. The Companies Act does not contemplate such exclusion. To deprive a creditor with a decree of foreign court of this statutory right, will also not be in larger public interest. If a foreign creditor with decree of foreign . Court is barred from presenting a petition for winding-up on the original course of action and till the decree by Indian Court is passed in it's favour, it will make a distinction between two classes of creditors. This will lead to the Indian companies adopting unhealthy practices of borrowing capital abroad and then refuse to repay admitted debts and resist winding up. This will have negative effect on the cross border flow of capital and international commerce. Thus there is no warrant to read such an exclusion of the statutory" right by way of interpretation.

47. Therefore, there is no impediment in the way of the Petitioner to proceed on the basis of the Patronage Letter as a creditor of the Company for presenting this petition for winding-up. There is no question of merger of the Patronage Letter into the decree. The admissions as regards the liability given in the correspondence is sufficient to form basis of the petition for winding-up. Even assuming that there is a suit filed for enforcement of a foreign decree it cannot be said that the Petitioner has ceased to become a creditor of the Company.

48. It was further contended by the Respondent in the Patronage Letter that the decree of Turin Court was an ex parte decree and obtained by fraud and is opposed to principles of natural justice. In view above discussion this point does not have much relevance. Even other wise there is no substance in this grievance".

67. To sum up: the petition is based on the guarantee contained in the Patronage Letter and the admissions, and not on the decree of the Turin court. Question of

merger of the Patronage Letter in the decree of Turin Court therefore does not arise. Merely because the Petitioner has obtained a decree from the Turin court and has instituted a suit for enforcement of the same, the Petitioner cannot be deprived of its right to file a winding-up petition. The jurisdiction to entertain a winding up petition is only with this court. No bona fide defence on merits has been raised by the respondent. The events of default contemplated under the Patronage Letter are clearly admitted in the correspondence between the parties. The ad interim order in the suit instituted in Calcutta by one of the bond holders is not a bar for entertaining the petition. Commercial solvency of the Company is not a stand alone ground. Commercial morality and the need to instill confidence in the mind of international investors, are also matters of public interest".

(vii) In *P.J. Johnson & Sons v. Astrofiel Armadorn S.A. of Panama*, AIR 1989 Ker. 53, the Full bench of the Kerala High Court dealt with the question of residence of a foreign company in India with regard to its right to maintain the legal proceedings in India and had concluded that mere presence of a representative of Foreign Corporation in India is not sufficient if his only authority is to elicit orders from customers but not to make contracts on behalf of the corporation. The Court held that unless the corporation has a fixed place of business in India for sufficiently and reasonably long period of time, it cannot be said to hold as being present in India. Paragraph-20 of the judgment is quoted below for ready reference.

"20. To sum up: The decisions discussed above evidence what is now generally accepted as a rule of Private International Law See Dicey & Morris, on CIT; and Cheshire & North, e.g. CIT; and what may be regarded as part of Indian Law, namely, that a foreign corporation is resident in India only if it carries on business in India. A foreign corporation carrying on business in India is amenable to the jurisdiction of the local courts and is for all practical purposes present in India. This test is satisfied only if its business is carried on at a fixed and definite place which is, to a reasonable extent a permanent place within India. The mere presence of a representative of the foreign corporation is not sufficient if his only authority is to elicit orders from customers, but not to make contracts on behalf of the corporation. The question really is, as stated by Lord Loraborn, does the corporation really keep house and does business in India? Its real business is carried on where the "central management and control actually abides". *De Beers Consolidated Mines Ltd. v. Howe* [1906] AC 455,458 (see above). While a company is domiciled where it is incorporated, it is resident where its controlling power and authority is vested. Although dual residence is conceivable where there is division of management and control, it is nevertheless imperative that in some degree, in some measure, to some extent it can be said that the foreign corporation is centrally managed and controlled in India. This test can by no means be satisfied unless the corporation has a fixed place of business in India for sufficiently and reasonably long period of time. Although in *Dunlop Pneumatic Tyre Co. Ltd. v. Actien-Gesellschaft Fur Motor Und Motor-fahrzeunbau Vorm. Cudell & Co.* [1902] 1 KB 342, a very short period of residence at a fixed place

was considered to be sufficient on the special and peculiar facts of that case, it was nevertheless recognised in that case by Romer, LJ. that, in principle, to satisfy the concept of residence the business should be carried on for a "substantial period of time" (p.349). These are the essential tests which must be satisfied if a foreign corporation has to be treated as present in India".

(viii) About the foreign decrees where ex parte order on merits and whether such a decree would be enforceable in Indian court or not, with reference to Section 13(6) and Section 44A of the Code of Civil Procedure, 1908, the Hon"ble Supreme Court in the case of International Woollen Mills v. Standard Wool (U.K.) Ltd.,(2001)5 SCC 265 held as under:-

"The broad proposition that any decree passed in the absence of the defendant, is a decree on merits as it would be the same as if the defendant had appeared and contested the judgment cannot be accepted.

"The proposition that the decree was on merits as all documents and particulars had been endorsed with the statement of claim also cannot be accepted. It must not be forgotten that at the stage of issuance of writ of summons the court only forms, if it at all does, a prima facie opinion. Thereafter the court has to consider the case on merits by looking into the evidence led and documents proved before it, as per its rules. It is only if this is done that the decree can be said to be on merits.

Decree would not be on merits if the court has not gone through and considered the case of the plaintiff and taken evidence of the witnesses of the plaintiff.

In a given case it is possible that even though the defendant has not entered evidence the plaintiff may prove its case through oral and documentary evidence. If after consideration of oral and/or documentary evidence an ex parte decree is passed, it would be a decree on merits.

Where, however, no evidence is adduced on the plaintiff's side and his suit is decreed merely because of the absence of the defendant either by way of penalty or in a formal manner, the judgment may not be one based on the merits of the case".

(ix) The leading case on the maintainability of the winding up petition when there is a bona fide dispute about the debt was rendered by the Hon"ble Supreme Court in the case of Madhusudan Gordhandas & Co., v. Madhu Woollen Industries (P.) Ltd., AIR 1971 SC 2600, the Hon"ble Supreme Court has laid down the principles in the following terms:-

"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). 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.*)

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.*) 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.

Another rule which the court follows is that if there is opposition to the making of the winding up order by the creditors the court will consider their wishes and may decline to make the winding up order. Under Section 557 of the Company Act 1956 in all matters relating to the winding up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered though perhaps the court may attach greater weight to the views of the creditors. The law on this point is stated in *Palmer's Company Law*, 21st Edition page 742 as follows: "This right to a winding up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the court in its discretion may refuse the order". The wishes of the creditors will however be tested by the court on the grounds as to whether the case of the persons opposing the winding up is reasonable, secondly, whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well settled that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case (See *Re. P. & Macrae Ltd.*).

155. The brief discussion of the case laws relied upon by Mr. Udaya Holla on behalf of the Respondent - UBHL at this stage would be appropriate.

156. In *IBA Health (India) (P.) Ltd. v. Info-Driver Systems SDN. BHD.* [2010] 10 SCC 553, decided on 23/09/2010, the Hon'ble Supreme Court held that where the Company has a bona fide dispute, the petitioner cannot be regarded as a creditor of the Company for the purpose of winding up. In fact, the dispute implies the existence of a substantial ground for the dispute raised. The Court should dismiss the winding up petition and leave the creditor first to establish his claim in an action, lest, there is danger of abuse of winding-up procedure. A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court in a winding up

proceedings is not expected to hold a full trial of the matter. If the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. The relevant portion of the judgment is quoted below for ready reference.

"A party to the dispute should not be allowed to use the threat of winding-up petition as a means of enforcing the company to pay a bona fide disputed debt. A Company Court cannot be reduced to a debt collecting agency or as a means of bringing improper pressure on the company to pay a bona fide disputed debt and should not permit a party to unreasonably set the law in motion, especially when the aggrieved party has a remedy elsewhere. Of late, there are several instances where the jurisdiction of the Company Court is being abused by filing winding-up petitions to pressurize the companies to pay the debts which are substantially disputed and the courts are very casual in issuing notices and ordering publication in the newspapers which may attract adverse publicity. A creditor's winding-up petition implies insolvency and is likely to damage the company's creditworthiness or its financial standing with its creditors or customers and even among the public and which may also have other economic and social ramifications. Competitors will be all the more happy and the sale of its products may go down in the market and it may also trigger a series of cross-defaults, and may further push the company into a state of acute insolvency much more than what it was when the petition was filed. The Company Court, at times, has not only to look into the interest of the creditors, but also the interests of the public at large. The Company Courts are to be more vigilant so that its medium would not be misused. A Company Court, therefore, should act with circumspection, care and caution and examine as to whether an attempt is made to pressurize the company to pay a debt which is substantially disputed.

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."

157. The Karnataka High Court in *K.S. Ramakrishna Setty v. Clarian Fisheries (P.) Ltd.* [1986] 59 Comp. Case. 734, a learned Single Judge of this Court held that the Company Court, while exercising its jurisdiction under Section 433 of the Act, cannot convert itself into a Court of Original Jurisdiction settling civil dispute including drawing up of a decree in favour of one or the other parties in proceedings under Section 433 of the Act and then convert itself into a kind of Executing Court by passing a winding up order and such an exercise of

jurisdiction should be avoided. In paragraph 4 of the judgment, the Court has held as under:

"4. The Company Court under the provisions of the Act cannot convert itself into a Court of original jurisdiction setting civil disputes including drawing up of a decree in favour of one or the other of the parties in proceedings under Section 433 of the Act. It is true, the Company Court does have original jurisdiction to settle claims of all kinds when it exercises its power under Section 446 of the Act. But the nature of jurisdiction and the nature of power exercised under the two sections are widely different. Under the latter section jurisdiction is acquired only if an order is made under Section 433 of the Act and not otherwise. If there is no order under Section 433 of the Act, including the appointment of a provisional liquidator then there is no jurisdiction acquired by the Court under Section 446 of the Act. If this is borne in mind then Section 433 of the Act which is normally a discretionary jurisdiction should necessarily be so understood only when the Court is fully satisfied that it is called upon to examine the merit of the need of a winding-up order and not settling the disputes of civil nature that may arise out of a contract or obligations arising under an Agreement. In fact, will go to the extent of stating that even if a company is sought to be wound up on the basis of a promissory note, if the Company disputes either receipt of consideration or the execution thereof, then this Court would be compelled to refer such a petitioner to the civil Court for obtaining the necessary decree before he can move the Company Court for a winding up order. In other words, the test would be whether this Court should first grant a decree for an alleged debt and then convert itself into a kind of executing Court by passing the winding up order. That should be avoided."

158. Mr. Udaya Holla also relied upon the Supreme Court decision in the case of *Amalgamated Commercial Traders (P.) Ltd. v. A.C.K. Krishnaswami* [1965] 35 Comp. Cas. 456 at page 463, where the Hon"ble Supreme Court held that a winding up petition is not a legitimate means of seeking to enforce payment of debt which is in fact disputed by the Company. The petition presented ostensibly for a winding up order, but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the Court.

159. Similarly, in *Madhusudan Gordhandas and Co. (supra)*, the Hon"ble Supreme Court held, that the principles on which the Court acts are first, that the defence of the Company is good faith and one of substance, secondly, the defence is likely to succeed in a point of law and thirdly, the Company adduces prima facie proof of the facts on which the defence depends.

160. Another case relied upon by Mr. Holla was also rendered by the same learned Single Judge of this Court, (Hon"ble Justice M.P. Chandrakantaraj Urs.) in the case of *Globe Detective Agency v. Subbiah Machine Toole (P.) Ltd.* [1985] 58 Comp. Cas. 271 (Kar.), wherein the winding up petition was filed by the petitioner - M/s. Globe Detective Agency had provided security guards to the

Respondent - Company and some of the security guards employed by the petitioner - Company took away the key bunch of the Factory premises resulting in loss of machine hours in one shift on 24/02/1982 and the Respondent - Company refused to pay the security charges to that extent of Rs. 4,450-60. The Court held that where there were certain allegations and counter allegations and claims and counter claims involving disputed question of facts, the substance of the defence of the Respondent - Company was that it was under no obligation to pay the amounts claimed by the petitioner -Company on account of the loss suffered by it due to the negligence of the Guards furnished by the petitioner - Company and in such circumstances, leaving the parties to settle the disputes in an appropriate Civil Court, the learned single Judge dismissed the winding up petition against the Respondent - Company.

161. The argument of Mr. Holla based on this case was, that when the Respondent - UBHL also has raised claims against the petitioning creditors in Civil Suits filed by it and has disowned its Corporate Guarantees and there are claims and counter claims between the parties, the winding up petitions deserve to be dismissed.

162. On the issue of Foreign Law to be proved as a matter of fact, Mr. Holla relied upon the Supreme Court decision in the case of Hari Shanker Jain v. Sonia Gandhi, decided on 12/09/2001, [(2001) 8 SCC 233], paragraphs 27 to 28 where dealing with the question, whether the returned candidate, Mrs. Sonia Gandhi was a citizen of India and was so qualified to contest the election or not, the Court held, Italian Law is a Foreign Law so far as the Courts in India are concerned and under Section 57(1) of the Indian Evidence Act, 1872, the Court shall take judicial note of, inter alia, all laws in force in the territory of India. Foreign laws are not included therein and as the Court does not take judicial notice of Foreign law, it should be pleaded like any other fact, if a party wants to rely on the same.

163. In para 28, the Court said that there is no doubt that in the Courts in India, a point of Foreign law is a matter of fact and therefore a plea based on a point of Foreign law must satisfy the requirement of pleading a material fact in an election petition filed before the High Court.

164. Mr. Holla submitted that similarly in the absence of English law applicable as claimed by the petitioner - Company in the present case, was not pleaded or proved as a fact by the petitioner and no judicial notice of that English law" could be taken by the Courts in India, including this Court.

165. He also relied upon to the same effect the judgment of the Bombay High Court in the case of Chloro Controls (India) (P.) Ltd. v. Severn Trent Water Purification Inc. [2006] 71 SCL 396, in which the Division Bench of the Bombay High Court in the said judgment authored by Hon"ble Mr. Justice R.M. Lodha (as his lordship then was) held as under:

"The legal position is well settled that foreign law is a question of fact and must

be pleaded by the party who relies upon it. The petitioner has not pleaded about the relevant laws of merger. The documents that have been placed on record only show that certain documents were filed by the petitioner in the office of the secretary of the State of Delaware. Nothing is pleaded about its legal effect. These documents only show that the certificate of ownership and merger merging Capital Controls (Delaware) Inc. (Delaware Corporation) into Severn Trent Water Purification Inc. were filed before the same authority. In the absence of pleading of the relevant laws of merger prevalent in the State of Delaware or under the law of the commonwealth of Pennsylvania under which merger is said to have taken place, it is very difficult to examine the aspect as to whether by virtue of the said merger, there is a blending of the two entities and the status of the two companies thereafter."

166. In support of his contention that where the Civil Suit had been filed by the petitioning creditor for recovery of the money in question, the same creditor cannot pursue the winding up proceedings against the Respondent - Company like the petitioning Banks, SBI and others are pleading before this Court, Mr. Udaya Holla relied upon the judgment of the Bombay High Court in the case of Dalmia Cement (Bharat) Ltd. v. Indian Seamless Steels and Alloys Ltd. decided on 31.8.2001 [2002 (112) comp.case 314(Bom)], in which the learned Single Judge of the Bombay High Court held that the winding up petition is not a legitimate means to seek to enforce payment of a debt which is bona fide disputed by the Company and merely because one creditor claiming a large amount of debt seeks the winding up of a Company, the Court will not admit such petitions and advertise the same to cause further damage and injury to the Company. The Court further held that the petitioner - Company had already resorted to its legitimate civil remedy by way of filing a Civil Suit which would examine the correctness of the contention of both the parties and thus having resorted to alternative remedy, it was not proper and legitimate for the petitioner - Company to seek winding up of the Respondent - UBHL on the basis of the same debt.

167. To the same effect, he relied upon the Himachal Pradesh High Court judgment in the case of Azeet International (P.) Ltd. v. Himachal Pradesh Horticultural Produce Marketing and Processing corporation Ltd., decided on 10.12.1997, [1998 (92)comp.P. case 356(HP)], the relevant portion of the said judgment is also quoted below for ready reference.

"There is yet another aspect of the case. Admittedly, a civil suit for the recovery of the amount, claimed in the present petition, has been filed by the petitioner-company against the Respondent-Company and such suit is pending adjudication. Under these circumstances, the machinery for winding up cannot be allowed merely as a means for realizing a debt, which is disputed and is subject matter of a suit. The High Court of Punjab and Haryana in State Trading Corporation of India Ltd. v. Punjab Tanneries Ltd. [1989] 66 Comp. Cas. 634, also had declined to exercise the powers under section 433 of the Act, in view of

the fact that the petitioner therein had already resorted to a civil suit for recovery of the disputed debt."

168. In QSS Investors (P.) Ltd. v. Allied Fibres Limited, decided on 8.9.2001, [(2001) 107 company case 587(Bom)] the learned Single Judge of Bombay High Court held on facts that although according to the petitioners, the sum advanced was a loan, the Respondent - Company had treated it as share application money in its Balance Sheet and there was no written Agreement to pay the interest at the rate of 24% as claimed by the petitioners on the alleged loan, the Court held, that the liability was bona fide disputed by the Respondent Company and the winding up petition was liable to be dismissed. Moreover, the petitioners had resorted to the civil remedy and therefore the petition could not be entertained.

169. In Divya Export Enterprises v. Producin (P) Ltd (I.L.R. 1990 Kar. 1610), the learned Single Judge of this Court held, that a mere assertion of debt payable was not sufficient to attract the discretion of winding up under Section 433(e) of the Companies Act, 1956.

170. On the issue of compliance of Sections 592 and 599 of the Companies Act, 1956, Mr. Udaya Holla also relied upon a Foreign judgment, in the case of Re Tovarishestvo Mfg. Liudvig Rabenek, decided on 12.6.1994, [1944 (2) All E. Reporter 556], in which the Court there found that where it was the practise of the Director on such visits to stay at a Manchester Hotel which was used as regular place of business for the Company and to which, the correspondence was addressed and the Company kept Banking Accounts in London, but it was contended by the Respondent -Company that the Company could not be wound up under Section 338 of the Indian Companies Act, 1929, since it never had an established place of business under the jurisdiction of the Courts within the meaning of the Companies Act, 1929. Section 343, which refers to "companies incorporated outside Great Britain which....establish a place of business within Great Britain" it was held, that it was sufficient for the purposes of the Companies Act, 1929. Section 338 for the Company to have a place, not an "established" place of business in England and thus there was jurisdiction of the Court to wind up the Company, since it had, through its Directors carried on business in England for a substantial period and at a fixed place.

171. In Green hills Exports (P) Ltd. and others v. Coffee Board, decided on 16.3.2001, (ILR 2001 Kar. 2950), a Division bench of this Court held that the petition for winding up on the ground that the Company is unable to pay its debts under Section 433(e) of the Companies Act cannot be filed or claiming damages as the term "debts" in that provision does not refer to the claims for damages. Since the Court held that a "debt" is a sum of money which is now payable or will become payable in future by reason of a present obligation. The "damages" is money claimed by, or ordered to be paid to a person as compensation for loss or injury, and it merely remains as a claim till adjudication by a Court and becomes a "debt" only after a Court awards it.

## Court's Reasons & Findings:

172. Having considered the rival submissions made at length on both the sides with all vehemence and seriousness of the learned respective counsels and having given my earnest and dispassionate consideration to those rival submissions with the help of material and documents placed for my consideration during the course of arguments, my findings coupled with the reasons therefor are given below:

173. Indisputably, the Respondent - Company, UBHL extended its Corporate Guarantees for the dues and financial obligations of the Company, KFAL which was its Subsidiary Company at the relevant point of time and these Guarantees created in favour of the lenders and creditors by separate Agreements executed at the contemporary period of time are valid Agreements in the eye of law. There is no dispute before me that the obligations of the Guarantor in law are co-extensive and co-terminus with that of the principal borrower and therefore on account of the admitted failure of KFAL to meet its financial obligations towards the secured and unsecured creditors who are petitioners before this Court, the liability of Respondent UBHL exists in law and there is also no dispute that the principal borrower, KFAL has failed to pay off and discharge its financial obligations towards the creditors and was accordingly ordered to be wound up by this Court on 18/11/2016 and those winding-up petitions by the secured and unsecured creditors against it were not even defended and contested by the Respondent KFAL itself nor by the extended arm of the Guarantor and its Holding Company, Respondent, UBHL.

174. The findings recorded in the judgment and order dated 18/11/2016 winding up Respondent KFAL therein are also extracted below for ready reference.

"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 Section 433(e) and (J) read with Section 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."

175. The defences put up by the Respondent - Company, UBHL to contest the present set of winding-up petitions against it as noted above, are not worthy of acceptance, as they do not inspire any confidence that such defences may succeed in point of law.

176. On the other hand, this Court finds a tinge of doubt and mischief, cavalier manner, lack of bona fides and find them to be too far-fetched without any solid foundation and it is difficult to see such defences to really succeed either before this Court or at appropriate Forums where they have been raised against and instituted as legal proceedings against the petitioning creditors.

177. Taking up the arguments of Mr. Udaya Holla, learned senior counsel for Respondent - Company, UBHL, that UBHL has instituted Civil Suits in Bombay High Court and Bengaluru City Civil Court, challenging the validity of the Corporate Guarantees itself as having been given under duress or coercion or that on account of defective supply of Aero Engines, the said company, KFAL suffered huge losses and went out of business operations and therefore the Respondent-Company has claimed huge damages against the suppliers and also to declare the Corporate Guarantees itself as non est and void, this Court does not find any substantial ground in law upon which the Respondent - UBHL hopes to succeed in such proceedings.

178. The assertion of duress or coercion on a corporate body like Respondent - Company, UBHL, at the point of time when these Guarantees were extended to the creditors for securing the financial obligations of KFAL towards them, firstly, is a question of fact to be established by the plaintiff, UBHL and secondly these guarantees were extended in normal course of business in the contemporary period on account of business exigencies as normal business contracts and not

any grudge or grievance against their execution was ever raised by the respondent UBHL during the contemporary period at the time of execution of these Corporate Guarantees or even thereafter before filing of these Suits. Now raising such a grievance and alleging that there was some kind of coercion at that point of time is too far-fetched a claim rather than any modicum of fact or truth on the face of it. This kind of Suits whatever worth or merit they have, will of course be examined by the competent Courts where they are pending but this Court does not find the mere institution of these Civil Suits as a defence good enough, much less substantial enough to put-off the winding-up proceedings against the Respondent-Company itself which in law was bound to honour its Corporate Guarantees, at the given point of time when they were invoked and UBHL was called upon to honour them.

179. That as far as admission of liabilities towards secured and unsecured creditors in the present case is concerned, two facts stand out very clearly against the Respondent, UBHL.

180. That as far as pendency of the case before the Debt Recovery Tribunal, Bengaluru, instituted by SBI and other consortium of Banks by way of O.A.No.766/2013 is concerned, that liability stands now crystallized with the passing of the decree and order by the learned Debt Recovery Tribunal, Bengaluru dated 19/01/2017. Therefore, the arguments before this Court at the time of hearing that the said O.A.No.766/2013 was yet pending before the Debt Recovery Tribunal and the debts allegedly due from the Respondent UBHL were not yet determined and ascertained, goes away.

181. The learned Member of the Debt Recovery Tribunal, Bengaluru, has made the following observations and referred the findings while answering Issue No. 2 about the validity of the Corporate and Personal Guarantees, on the issue whether they were vitiated by coercion by Applicants in the following manner and to quote the relevant portion from the order dated 19/01/2017 of the Debt Recovery Tribunal:?

"The above contention of coercion raised by second and third defendants are so unworthy of any consideration for the simple reason that there was none. Not only the applicant banks are dealing with the public money, but it was also the defendants 1 to 3, who knowingly availed public money as loans from the Banks with a promise to repay the same. It is the bounden legal duty of the banks and the borrowers to ensure that such loans are properly secured by mortgage over immovable properties, hypothecation over movables and guarantees of directors and all other types of guarantees including even that of third parties wherever offered or possible. The second and third defendants cannot expect the banks to give away public money as loans to them without even guarantee from them for the repayment in addition to other securities and loan documents. In fact, the second and third defendants would have done well to have volunteered execution of such guarantees, being the holding company and the Chairman and as Rajya Sabha member. It is unfortunate that the defendants are challenging these

guarantees without any basis or material to support their contention of coercion. If insistence on guarantees by the banks for realizing the loans are to be considered as coercion, then no loan can be properly secured by any bank. In fact, the banks will be failing in their legal and public duty in discharging of their functions if such guarantees are not obtained. Further, the defendant 2 being the parent company of first defendant and third defendant being the Group Chairman and man of sufficient net worth and as Member of Rajya Sabha, were bound to execute guarantee documents for the repayment of loan availed by first defendant. The third defendant who was also a Member of Parliament cannot be heard to say without any basis or material that he was coerced by Nationalized banks into execution of personal guarantee at the time of availing thousands of crores as loans from the banks. At best, this claim of defendants 2 and 3 can add a bit of humour value in this otherwise serious claim for recovery of thousands of crores of public money. In fact the 3rd defendant by alleging coercion has hardly set a role model in himself as Rajya Sabha member.

One of the contentions raised by the Learned Counsel appearing for Defendants 2 and 3 is that the Bank being in a dominant position have given undue pressure to Defendants 2 and 3 to sign their guarantees by withholding the credit facilities and also by charging very high rate of interest when the defendants were in dire need of funds. This contention is also unacceptable. In fact one of the judgment cited by the learned counsel for Defendants 2 and 3 is directly on the point (AIR 1924 PC 60). That was the case where alleged unconscionable interest charged was challenged as coercion since lender was considered to be in a dominating position. The argument was that the lender took advantage of the position of the borrower as the borrower was in urgent need of money. The learned counsel for the appellant therein argued that the mortgagees were thereby placed in position to dominate the will of the mortgagor. In the said decision, their Lordship have clearly held that urgent need of money on the part of the borrower will of itself not place the parties in that position. In para 13 of the said judgment, it is observed as follows:-

"Their lordship think it right to observe that the judgment now pronounced is not in accord with the principles laid down by the Appellate Civil Court of Calcutta in Abdul Majeed v. Khirode Chandra Pal I.L.R. 42 C.690, that "where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate". Their Lordships think that decision to be wrong. There is no such presumption until the question has first been settled as to the lender being in a position to dominate the borrower's will"

In the present case no pleadings or documents are produced to prove that the banks have dominated the will of defendants 2 and 3. In fact as stated above vice versa may be true in this case with worries for the banks to recover such a huge outstanding.

Therefore, it is clear from the above that the question of coercion on the basis of

banks being in an advantageous/dominant position to take guarantee, charge interest etc. raised by the defendants 2 to 3 are baseless. In fact, in my view, it was the defendants 1 to 3 herein who were in dominant position of demanding restructuring of the loan by not repaying the huge loans already availed by them from the banks. In my opinion, therefore, it was the bank which, just for the sake of arguments, can be heard to say that they were coerced into entering into MDRA so as to recover its huge outstandings and not the other way around. However, in view" of the above, am therefore of the considered view" that the defendants have not experienced any coercion at any stage and they have entered into the guarantee agreements MDRA and all other documents voluntarily.

xx xx xx xx

## ORDER

1. Present OA stands allowed as prayed for with costs in the following manner

(a) Defendants No.1 to 4 jointly and severally shall pay a sum of Rs. 6203,35,03,879.42 (Rupees Six Thousand Two Hundred and three Crores Thirty Five Lakhs Three Thousand Eight Hundred and Seventy Nine and Paise Forty Two only) with further interest at the rate of 11.50% p.a. with yearly rests from the date of the application till the date of complete realization.

(b) The charge of 6th defendant shall rank as 2nd charges over the schedule properties and other receivable after satisfaction of all claims of applicant banks.

(c) In the event of failure of defendants to pay the said OA amount, the applicant bank is at liberty to sell the hypothecated/mortgaged movables/immovables properties described in schedule of the main petition according to law as sought by the applicant bank in the OA.

(d) In spite of sale of the properties mentioned in the Schedule/s, if the OA amount is not fully realized, then the Applicant Bank is at liberty to proceed against the person and other properties of the defendants as required under law and also as advised.

(e) Applicant Bank shall file latest Memo of calculation of OA amount together with interest, costs etc., to be paid by Defendants duly taking into account the amount/s if any paid by the Defendants and/or amount realized by sale of assets, etc., during the intervening period after filing the OA, to enable the office to prepare Recovery Certificate for the amount to be paid by the Defendants to the Applicant Bank.

(f) Office is directed to issue Recovery Certificate as sought by the Applicant Bank in the OA and do the needful as required under law forthwith.

All other orders in I.A.s shall merge with the order passed in the main OA."

182. That besides the aforesaid judgment and decree of the Debt Recovery

Tribunal now existing against the Respondent UBHL, during the contemporary period also there was not much a serious contest to the liability of the Respondent, UBHL as a Guarantor towards the petitioning creditors and learned counsels for the petitioners brought to the notice of the Court, the letter written by the Chairman of the Respondent - Company, Dr. Vijay Mallya himself to one Mr. Ian of petitioner - IAE International Aero Engines, AG, the supplier of the Aero Engines on 30th December 2011 in which the said Chairman, Dr. Vijay Mallya not only acknowledged all the debts towards the said Company and expressed his difficulties faced by the Company in meeting its obligations towards the company KFAL but sought for the co-operation of the said creditor supplier, IAE International Aero Engines AG, in the following manner and to complete this contextual background, the entire letter is quoted in-extenso below:?

"From: Vijay Mallya

To: Aitken, Ian (IAE)

Cc: sanjay.aggarwal@flykingfisher.com

Sent: Fri Dec 30 17:08:11 2011

Subject: Kingfisher

Dear Ian

December has been an unusually hard month for me to get anything meaningful done.

We have had one of the most stormy sessions of Parliament in recent history that has occupied the minds and time of the Government and my own.

The Indian economy has slowed considerably with growth forecasts now pegged at 7.5% of GDP. Certainly better than most developed economies but disappointing given our own expectations, and the inevitable comparison with China.

The Indian currency is in free fall against the USD and has depreciated by almost 20% in the last 8 weeks. Any USD payments cost us significantly more as a result. Forward contracts have also been banned for the time being.

Inflation has been a major cause for concern and the RBI (Federal Bank) has raised interest rates more than a dozen times with the current rate being 14% per annum.

Despite all this, the Civil Aviation sector continues to grow strongly but with yields that are insufficient to cover high jet fuel costs and the even higher ad valorem sales tax that is added.

The depreciation of our Indian currency has added a straight 20% increase in our USD denominated costs including lease rentals and maintenance reserves. As a

result every Airlines in India is losing money currently.

The good news is that the Aviation industry has caught the attention of our Prime Minister who has made two public pronouncements about assisting Kingfisher Airlines. I have forwarded these reports to you.

Some important policy change announcements are expected in the next couple of weeks pertaining to direct import of jet fuel and to allow investment by Foreign Airlines to invest in Indian carries. This will have a direct financial impact.

However, we have been negotiating with our Bankers for the past few months on a restructuring package so as to achieve reduction in Interest costs and to enhance free working capital cash flow.

As Kingfisher operates with a consortium of 16 Banks, the lead Bank - State Bank of India (SBI) established an escrow mechanism for our sales collections. Thus, in the normal course, would have functioned properly but due to inexperience and technological glitches, SBI has not been receiving credit of the funds on time from various bank accounts.

On the contrary, when this escrow mechanism was agreed, SBI decided to "retain" all our cash pending their own interpretation of Law which is the most frustrating aspect for me.

As I leave Delhi tonight, I would like to share my optimism with you that in the first few weeks of 2012, you shall see a slew of positive policy changes which would impact the entire Aviation industry and Kingfisher in particular.

I am painfully aware that Kingfisher is in serious default on its payments to you and that quarterly financial reporting as of tomorrow is important.

I write to first acknowledge that you have put your faith in me and trusted me for which I am truly grateful.

I also know that our ongoing out standings which you wanted to be paid this week is a major cause of concern.

You have the ability both legally and morally to ground and repossess your planes and you are entitled to take such action.

Keeping all your rights in mind, I am writing to appeal to you to continue your trust in me. I have put USD 800 million into Kingfisher which should demonstrate my absolute commitment to making the Airlines a success.

I was confident that all our negotiations with the Government, Ministry of Finance, Banks and all those involved would be concluded before mid December and that you would be paid your overdues. Sadly, this did not happen due to the preoccupation of Government Ministers that have explained.

However, I write with confidence that everything will get sorted out and put in place during the month of January 2012.

Specifically, we will secure:

1. USD 130 million of new funding
2. Cashflow relief from Government owned fuel suppliers/direct importation of fuel thereby improving cash flow throughout.
3. A new policy allowing foreign airlines to invest in our share capital
4. Equity Raise-first tranche-USD 50 million
5. Further rescheduling of Kingfisher''s debt and financial costs.

All or a combination of some of what have stated will make us break even financially.

Further grounding of Aircraft for lack of engines or parts will cause unnecessary and serious damage to Kingfisher.

You have had the faith-please continue to have faith. If, during the course of January 2012,<sup>1</sup> sense that nothing is progressing, I will myself come back to you and keep you informed.

Till then please bear with me and let us work together.

With my best regards and wishes for the new year.

Vijay Mallya

3/24/2012

Member of Parliament-India

Chairman, The UB Group."

183. That not only the aforesaid letter of the Chairman of the Respondent Company, UBHL, a look at the financial figures of the various Balance Sheets, Audit Reports, Independent Auditors'' Reports and their qualifications in the Annual Reports commencing from the year 2011-12 till the year 2015-16 which are produced before this Court will also be opportune here:-

184. By way of strange coincidence, this Court also felt that the Front Logo of each year''s Annual Report of UBHL with a Logo printed on the front page to be giving some indications of the things reflected in the financial affairs of the Company as recorded in the duly audited Balance Sheets of the Respondent - Company.

185. A brief narration of the same is given hereunder:

For Annual Report 2011-12, the title "Ties that Bind" with a photo of the Earth with Monogram of a Flying Horse of UB Group of Companies with different hands holding each other the said Earth is there.

For Annual Report 2012-13, the title of Annual Report is again "Moving Forward"

with Beautiful Flower Petals making a rotation.

The next Annual Report of 2013-14 has the title of "Standing Tall" with a Big Tree curiously grown between the crevices of Dry Hills, as if the Respondent Company is standing tall and still growing although there are no apparent water resources thereon.

The Annual Report for the next year, 2014-15, gives the picture of a Dry Tree on a Stone or Hillock in a pond and the base stone has a reflection in the water body also and no title is given to this Annual Report.

Similarly for Annual Report 2015-16, with no separate title given, the Flying Horse of UB Group is on the Front Cover of the Annual Report.

186. While these photographs and description of Annual Reports do not indicate or establish anything in particular, but the selection of the photos and Logos by the Company, UBHL, carries some hidden message.... Be that as it may.

187. These winding-up petitions have to be dealt with on harder facts and figures and financial results as reflected in these Balance Sheets and commented upon by the Auditors including independent Auditors. Therefore, a glance through their comments and financial figures follows herein:

188. In the Audit Report dated 24/08/2012, for the year 2011-12, the Auditor, Mr. S. Vishnu Murthy, Chartered Accountant of M/s. Vishnu Ram and Company, vide Note No. 4 in his Audit Report drew the attention of the stake holders including Government, Creditors and public at large towards the said Guarantee obligations of the Respondent - Company in the following manner.

189. What stands out in the aforesaid comment, is that the Respondent-Company chose to make no provision for the said Guarantee obligations even though it noted that KFAL, in which the Respondent UBHL has huge financial exposure is in severe financial stress, not a prudent commercially good stand by UBHL. The said Note No.4 is quoted below:

"Note: 4. Attention is invited to the following:

(i) Note no 39 regarding inclusion in the income for the year, an amount of Rs. 521.143 million of guarantee/security commission charged to Kingfisher Airlines Limited (KFA). KFA has not accrued the charge in view of the restrictions imposed by its lenders for the period commencing from 01-01-2011. The total of such charge, accrued by the company for the period from 01-01-2011 to 31-03-2012 is Rs. 646.770 million.

(ii) Note No. 35 regarding inclusion in the income for the year, interest of Rs. 1,285.272 million charged to certain subsidiaries and associates, the ultimate realization of which may take protracted period of time.

(iii) Note no. 40 regarding significant financial exposure to KFA in the form of investments in equity, loans and advances and guarantees. KFA has considerably

scaled down its operations and it is under severe financial stress. No provision has been made in the accounts for the probable loss that may arise due to non recovery of loans and advances and other receivables, decline in the value of investments and invocation of guarantees.

(iv) Note No. 32(f) and note No. 34 regarding non provision for significant decline in the value of investments aggregating Rs. 700.610 million in certain subsidiaries whose networth is eroded/partially eroded besides non provision for probable loss that may arise due to non-recovery of outstanding Loans and advances of Rs. 1,627.300 million due from such subsidiaries."

190 For the year 2012-2013, by which time the KFAL had already stopped its operations, the Respondent UBHL also turned from a profit-making position to a loss-making position. As compared to profit from operations to the tune of Rs. 185.315 millions in the year 2011-12 it went into red (losses) to the extent of Rs. 1,577.425 millions for the Financial Year 2012-13.

191 From the Report of Directors for the next year 2013-14, the Chairman of the Company, Dr. Vijay Mallya while giving his over-view of the Company's performance under the heading of "Management Discussion Analysis", noted the position as under:?

"While Kingfisher Airlines was an unquestionable success in terms of consumer satisfaction, the still restrictive regulatory environment and prohibitory cost of operations resulted in the entire sector incurring huge losses. As one of the largest players in the industry, Kingfisher Airlines incurred very significant losses. The global financial environment, during this period, triggered by the collapse of Lehman Brothers in 2008 meant that the Company could not raise equity in a timely fashion, thus increasing its dependence on borrowings, some of which necessitated underlying support from the Company.

Kingfisher Airlines ceased operations in October 2012 primarily on account of suspension of license by the Civil Aviation Regulator in response to constant disruption by crew and staff. Your Company has continued its efforts to find a suitable investor who could capitalize on the still strong reputation and license. With this intent, your Company continues to fund Kingfisher Airlines.

Certain lenders and other creditors have approached the Hon'ble High Court of Karnataka seeking winding-up of Kingfisher Airlines and consequently also of the Company, relying upon purported guarantees issued in their favour by your Company. The validity of the guarantees had been challenged by your Company in a suit filed in the Hon'ble Bombay High Court well before the commencement of legal action by lenders and creditors."

192. It is significant that no reference was made by the Respondent - Company in this Report given on 13/08/2014 to the Original Suit, O.S. No. 6406/2012, instituted by the Respondent - Company in the Bangalore City Civil Court, on 05/09/2012 even while referring to the Suit filed by it in the Bombay High Court.

The Auditor in the Report dated 13/08/2014, by the same Chartered Accountant, Mr. Vishnu Murthy, in this very year, clearly noted that "accumulated losses of the Company are more than 50% of its net worth". The relevant extract from Auditor's Report is quoted below for ready reference.

"(x) Accumulated losses of the company are more than fifty per cent of its net worth. The company has incurred cash losses during the financial year covered by our audit and during the immediately preceding financial year.

(xi) As per the information and explanations given to us, the company has defaulted in repayment of dues to a bank. The unpaid dues to the bank as at March 31, 2014 were Rs 2,292 million. Out of this Rs. 29 million has been paid in May 2014 and Rs. 17 million has been paid in June 2014. The company is in negotiation with the banker. The company has not issued any debentures."

193. For the year 2014-15 Annual Report, the Auditor, Mr. S. Vishnu Murthy, Chartered Accountant in his Report dated 29/05/2015 in which Balance Sheet also, the Respondent - Company, UBHL had registered a profit of Rs. 433.974 crores taking into account the exceptional gain of Rs. 965 crores for the said year on account of sale of "Pledged Shares" with certain lenders, namely Banks of the Company to recover their dues and which was challenged and is the subject matter of litigation even now before the Hon'ble Supreme Court of India as to whether the sale of such "Pledged Shares" by UBHL was valid or not.

194. The Company in the previous year 2013-14 had registered losses of Rs. 2023.302 crores and therefore the said profits of Rs. 433.970 on account of such impugned sale of "Pledged Shares" was shown as profits which is a misleading picture, but taking note of the said profits shown in the Balance Sheet, the Auditors gave the following remarks:

"Winding-up petitions filed against the Company have been admitted by the Hon'ble High Court of Karnataka and are being heard (Ref. Note No. 45); the Hon'ble High Court of Karnataka has restrained the Company from disposing of any of its assets [Ref. Note No. 52(e)]; the Company is a defendant in recovery" suits instituted by certain creditors/lenders for recovery of their dues of Rs. 62,033 million [ Ref. Note No. 45]; some of the lenders have recovered their dues by disposing of the securities pledged by the company [Ref. Note No. 37]. Yet, the company has prepared its financial statements on going concern basis for the reasons stated in Note No. 52. The appropriateness of preparation of financial statements on going concern basis in subject to the Company being able to successfully defend itself in the petitions/ suits filed against it and obtaining substantial reliefs in the suits filed by it as mentioned in Note No. 45.

The Company has not recognised in its financial statements, disputed liabilities amounting to Rs. 77,309 million arising out of invocation of its corporate guarantees [Ref. Note No. 31] and claims of Rs. 1,463 million made against it under agreements entered into with a banker [Ref. Note No. 31]. Had the company recognised the above, current liabilities in the Balance Sheet would

have been higher by that amounts and guarantees under contingent liabilities and claims not acknowledged as debt would have been lower by Rs. 77,309 million and Rs. 1,463 million, respectively."

195. The Notes of Financial Statements in the said Annual Report of 2015-16, taking the basis of the Respondent-Company as a "Going concern", was qualified in the following manner:

"(a) The Company is defending recovery proceedings by the consortium of banks of KFA based on corporate guarantees, the validity of which is being contested. As stated herein above, the company has filed in Bombay High Court, a suit seeking to declare the corporate guarantee null, void ab initio and non-est. The suit is still pending adjudication.

(b) Connected with the Corporate Guarantees, the winding-up petitions filed in Hon'ble Karnataka High Court referred to in the Directors report, in the opinion of Counsel, can be successfully resisted.

(c) The company has filed a suit for damages against the aircraft engine manufacturers for supply of inherently defective engines, both in design and manufacture, to KFA. The suit is pending. The company is pursuing without prejudice, negotiations with two of the creditors who have filed winding-up petitions against the Company, to try and settle the disputes amicably. Two members of the Consortium of Bankers of KFA have assigned their debt to an Asset Reconstruction Company (ARC).

(d) Under direction of Court pending resolution of various disputes, amounts totalling Rs. 794.38 crores are held as cash deposits.

(e) Due to restraint orders passed by the High Court of Karnataka, rentable commercial office space could not be leased out resulting in continued loss of significant rental revenue. The Company has filed an Application vide CA No. 1428 of 2014 in COP 185/2012 with a prayer to permit the Company to lease/rent out the vacant premises at UB City and grant such other further orders as are just. Also, high value residential units in Kingfisher Towers, could not be sold which has impacted the cash flow. The said application is pending.

Having regard to the totality of all the above facts and also the substantial assets of the Company which can be monetized in case of necessity, the financial statements for the year ended 31st March 2015 have been presented on principles applicable to Going Concern."

196. For the latest year, the Balance Sheet for the year 2015-16, for the Financial Year ending 31st March 2016, the loss shown in the Profit and Loss Account as on 31/3/2016, soared upto Rs. 451.304 crores and the seriousness of the qualifications by the Auditor of the Company also increased and while noting that the lenders of KFAL have taken the possession of the Company's property in Goa to recover its dues, the Auditor reported the following qualifications in his Report dated 31/08/2016.

"The company had extended corporate guarantees of Rs. 87,072 million in favour of lenders/lessors/creditors of Kingfisher Airlines Limited (KFA) an erstwhile subsidiary of the company (Refer Note No. 31 to financial statements). The beneficiaries of such guarantees have invoked the guarantees and are pursuing recovery actions against the company. This may result in loss to the company (Refer Note No. 31 to financial statements). No provision has been made in the accounts for such possible loss.

Xx xx xx xx xx xx xx

The company has shown Rs. 358 million as due from a banker who has unilaterally encashed company's deposits lying with it and appropriated the amount toward its claims against a group company. The possible loss on account of this development has not been recognised in the financial statements (Refer Note No. 42 to financial statements). An amount of Rs. 8,074 million is shown as dues from a contributory trust ("Trust") managed by a financial company which had sold the company's investments that were pledged with it and had appropriated part of the sale proceeds against dues from KFA (Ref. Note Nos. 43 & 33(e)). Further, the said Trust still holds custody of 59,150,000 shares in KFA, belonging to the company (Ref Note No. 33(c)). The company has petitioned the City Civil Court of Calcutta and High Court of Karnataka challenging the validity of the pledge and for rendering full accounts. Pending outcome of the petitions, the company has shown the above amounts as good and recoverable. Should the company fail to get the reliefs as sought, there would be losses. The company has not provided for any possible losses in this regard. According to the management, it is not possible to estimate the losses if any and consequently quantify the amount of provisions required in the above cases."

197. Thus, on the basis of summary of the aforesaid Financial Reports and constant increase in the losses and complete erosion of net worth and reticent refusal of the Respondent-Company, UBHL to square up its Guarantee obligations and raising sham and moonshine defences to avoid winding-up of the Respondent Company, this Court comes to a fair, reasonable and firm conclusion that the Respondent - Company, UBHL is a commercially insolvent Company and is unable to meet its admitted financial obligations and square up its admitted liability towards the petitioning creditors.

198. The details of the proposal submitted before the Hon''ble Supreme Court of India are extracted below for ready reference:

The Chairperson State Bank of India Mumbai.

Madam,

29th March 2016

Re: Settlement Offer on behalf of Kingfisher Airlines Ltd. ("KFA"), United Breweries (Holdings) Ltd ("UBHL"), Dr. Vijay Mallya & Kingfisher Fin vest (India) Ltd. ("KFIL") (collectively the "Offerors")

The Consortium of Banks through SBICAP Trustees Limited had issued a Notice dated 3rd May, 2013 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") to the Offerors, in which it was alleged that the aggregate outstanding principal amount (both fund based and non-fund based outstanding) was Rs. 5,440 crores plus unapplied interest of Rs. 1,131 crores. In addition thereto, 4 Banks (PNB, OBC, UBI and Corporation Bank) have filed Original Application No. 158 of 2014 before the Debt Recovery Tribunal, Bangalore ("DRT"), inter alia, against the Offerors in respect of Pre-Delivery Payment Loans raising an aggregate claim of Rs. 192 crores plus interest thereon. PNB has also filed O.A. No. 1844 of 2014 in the DRT, inter alia, against the Offerors in respect of Pre-Delivery Payment Loans raising an aggregate claim of Rs. 18 crores plus interest thereon.

In the Original Application No. 766 of 2013 filed by the Consortium of Banks before DRT, it is alleged that the alleged dues of the Consortium of Banks are guaranteed by a Personal Guarantee of Dr. Vijay Mallya and a Corporate Guarantee of UBHL (collectively "Alleged Guarantees"). It is further stated in the Original Application No. 766 of 2013 filed by the Consortium of Banks, that between 28-03-2013 and 25-04-2013 the Consortium of Banks recovered an aggregate sum of Rs. 544 crores from the sale of shares pledged by UBHL and Kingfisher Finvest (India) Ltd. ("KFIL") to secure the loans advanced to KFA.

The Offerors maintain that the various proceedings adopted against the Offerors are misconceived and without basis.

The total liabilities of UBHL aggregate to approximately Rs. 12,012 crores as set out in Annexure " 1 " hereto.

The total value of assets of UBHL (net of taxes) aggregates to approximately Rs. 4,968 crores as set out in Annexure "Z" hereto.

The total value of shares held by KFIL in United Spirits Ltd. (net of taxes), shares held by Dr. Vijay Mallya in United Breweries Ltd. (net of taxes) and shares held by companies controlled by the Mallya family in United Breweries Ltd. (net of taxes) aggregate to approximately Rs. 3,175 crores (of which the average shareholding of Dr. Mallya is less than 10% in the family controlled companies) as set out in Annexure "3" hereto.

In the light of the aforesaid facts, and without prejudice to the respective rights and contentions of the Consortium of Banks and the Offerors in various pending proceedings, and subject to the Hon'ble Supreme Court/ Company Court granting the requisite permission under Section 536 of the Companies Act, 1956 to KFA and UBHL, the Offerors with a view to amicably settle all disputes and differences with the Consortium of Banks/Asset Re-construction Company shall, in full and final Settlement of all the dues and claims made or raised by the Consortium of Banks/ Asset Re-construction Company against the Offerors in various pending proceedings, make payment to the Consortium of Bank/Asset Re-

construction company an aggregate amount of Rs. 4,000 crores in the manner following:

(i) The Consortium of Banks shall adjust and appropriate against the principal amount outstanding, the aggregate amount of Rs. 544 crores already recovered by the Consortium of Banks from sale of pledged shares referred to herein above.

(ii) Upon acceptance in writing of this Offer by the Consortium of Banks/Asset Reconstruction Company, an aggregate amount of Rs. 1,603 crores shall forthwith in the first instance be paid/secured in the manner following:

(a) Rs. 700 crores, consisting of a sum of Rs. 651 crores together with accrued interest thereon, are lying deposited in the Hon'ble Karnataka High Court to the credit of O.S. No. 25877 of 2013 filed by the Consortium of Banks before the Hon'ble City Court, Bangalore pursuant to the order dated 20th June, 2014 passed in Writ Petition No. 28577 of 2014. The Offerors will cause KFA, UBHL and KFIL to consent to the aforesaid sum of Rs. 700 crores being paid over to the Consortium of Banks in full and final settlement of their claims in O.S. No. 25877 of 2013;

(b) The residual value of 4,116,306 equity shares of United Spirits Ltd. held by UBHL shall be pledged in favour of the Consortium of Banks (Petitioners), the current residual value of which (net of MAT and dues payable to pledgees) being approximately Rs. 660 crores. These shares shall be liquidated so as to maximize the total amount recovered, subject to the Offerors receiving a minimum credit of Rs. 660 crores (net of MAT and dues payable to pledgees); and

(c) The residual value of 1,208,180 equity shares of United Spirits Ltd. held by KFIL shall be caused to be pledged in favour of the Consortium of Banks, the current residual value of which (net of MAT and dues payable to pledgees) being approximately Rs. 243 crores. These shares shall be liquidated so as to maximize : the total amount recovered, subject to the Offerors receiving a minimum credit of Rs. 243 crores (net of MAT and dues payable to pledgees).

(iii) The balance Rs. 1,853 crores shall be paid by the Offerors on or before 30th September, 2016 in the manner following:

(a) An aggregate amount of approximately US\$ 101,000,000 (equivalent to approximately Rs. 688 crores) is lying deposited with Airbus Industries S.A. which includes an amount of US\$ 32 million (equivalent to approximately Rs. 217.60 crores) towards Pre-Delivery Payments ("PDP's") funded by the Pre-Deliver)" Payment Loans referred to herein above. Pursuant to orders to be passed by the DRT in O.A. No. 158 of 2014 and/or O.A. No. 1844 of 2014 or by the Hon'ble Supreme Court, Airbus Industries S.A. be directed to pay the aggregate amount of US\$ 101,000,000 (equivalent to approximately Rs. 688 crores) to the Consortium of Banks.

(b) Rs. 1,165 cores by the Offerors to the Consortium of Banks, failing which the Offerors shall cause the residual value of 17,773,404 equity shares held by

companies controlled by the Mallya family and/or UBHL in United Breweries Ltd. to be pledged in favour of the Consortium of Banks, the current residual value of which (net of MAT and dues payable to pledgees) being approximately Rs. 1,165 crores.

In addition to payment of the aforesaid aggregate amount of Rs. 4,000 crores, the Offerors shall cause UBHL to assign all and any amount that UBHL may recover against the claim of USD 210,400,000 plus Rs. 162,10,00,000 (aggregating to approximately Rs. 2,000 crores) made against the Defendants (International Aero Engines Inc. & Ors.) in O.S. No. 6406 of 2012 filed in the City Civil Court at Bangalore.

Upon the Offerors making payment/securing the aforesaid amount of Rs. 1,603 crores in the first instance as aforesaid, inter alia.

(i) all legal proceedings filed by the Consortium of Banks against the Offerors shall be stayed and shall not be proceeded with further.

(ii) IDBI Bank shall forthwith release 3,459,090 equity shares of United Spirits Ltd. in favour of USL Benefit Trust which are the subject matter of Writ Petition Nos. 49864-49865 of 2013 pending in the Hon'ble Karnataka High Court.

(iii) all orders passed by any of the Banks against any of the Offerors declaring them wilful defaulters shall be kept in abeyance and not acted upon. The Consortium of Banks shall inform the Reserve Bank of India and CIBIL accordingly.

Upon the Offerors making payment of the balance amount of Rs. 1,853 crores and causing assignment of all and any amount that UBHL may recover under that claim made against the Defendants in O.S. No. 6406 of 2012 as aforesaid, inter alia.

(i) all legal proceedings filed by the Consortium of Banks against the Offerors shall stand dismissed as withdrawn, and all ad-interim and interim orders passed therein shall stand vacated.

(ii) all security/security interests other than those created herein above, shall stand released in favour of the party which created the security/security interest in favour of the Consortium of Banks.

(iii) all orders passed by any of the Banks against any of the Offerors declaring them wilful defaulters shall stand quashed, and the Reserve Bank of India and CIBIL informed accordingly.

Upon acceptance in writing of this Offer by the Consortium of Banks, the Parties shall mutually agree to and execute suitable documentation to record the settlement.

It is clarified that none of the ad-interim or interim orders passed by any court(s) against the Offerors shall prevent the Offerors from fulfilling this Offer if accepted

in writing by the Consortium of Banks.

This offer is being made on the basis that the contents hereof are STRICTLY CONFIDENTIAL, and that the Consortium of Banks/ Asset Re-construction Company shall not disclose or disseminate the contents hereof to any third party, save and except such of their officers who are required to consider the same, but on condition that such officers maintain strict confidentiality of the contents hereof.

Yours sincerely,

Dr. Vijay Mallya)

Ends: As above.

199. Thereafter, the Hon"ble Apex Court by its order dated 07/04/2016 on I.A. Nos. 5 to 8 of 2016, in the aforesaid Special Leave Petitions, made the following order:?

"LA. Nos. 5 to 8 of 2016 - applications for impleadment on behalf of Oriental Bank of Commerce are allowed.

Mr. Shyam Divan and Mr. S.S. Naganand, learned senior counsel appearing for the petitioners have submitted that the offer made by Respondent Nos.I to 4, which is referred to in our order dated 30.03.2016, has been considered and the consortium is of the view that the offer is not acceptable. However, the consortium is not against a negotiated settlement, provided the respondents show their bona fide for a meaningful negotiation. As a pre-condition to such steps on bona fides, it is submitted that the third respondent should first of all disclose, on oath, the details of all the properties-movable, immovable, tangible, intangible, share holdings and any right, title or interest including beneficial interest and those held in fiduciary capacity, in private trusts, public trusts, companies, partnerships, limited liability partnerships, and/or any other entity/ies both in India and abroad etc. in any form and there should be a substantial deposit made before this Court.

Mr. C.S. Vaidyanathan and Mr. Parag P. Tripathi, learned senior counsel appearing for Respondent Nos.I to 4 have submitted that on receipt of the response from the Consortium, they have made another proposal.

Mr. Shyam Divan, learned senior counsel, has submitted, on instruction, that even the said proposal is not acceptable and still, the Consortium is not against a negotiated settlement. It is further submitted by Mr. Shyam Divan that for a meaningful negotiation, the presence of the third respondent is absolutely necessary.

Mr. C.S. Vaidyanathan and Mr. Parag P. Tripathi, learned senior counsel appearing for Respondent Nos. 1 to 4 have submitted that they may be given short time to file their response to the main petition.

Accordingly, they are granted time upto 21.04.2016 to file their response. In the response filed by the third respondent, he shall disclose the details of all his properties - movable, immovable, tangible, intangible, share holdings and any right, title or interest including beneficial interest and those held in fiduciary capacity, in private trusts, public trusts, companies, partnerships, limited liability partnerships, and/or any other entities both in India and abroad etc. in any form whatsoever and also the rights, indicated above, in the name also of his wife and children, as on 31.03.2016.

It shall also be indicated in the response as to what is the amount he is prepared to deposit before this Court so as to show his bona fide for a meaningful negotiation. Mr. C.S. Vaidyanathan and Mr. Parag P. Tripathi, learned senior counsel, have submitted that on the next date of hearing, specific instruction shall be obtained from the third respondent as to his probable date of appearance in person before this Court.

The petitioners and the intervenor are free to file reply to the response of Respondent Nos.1 to 4 on or before 25.04.2016.

Post the matters on 26.04.2016 as first item."

200. That as far as other technical objections or defences raised by the learned Senior Counsel for the Respondent Company, UBHL, Mr. Udaya Holla is concerned, they are also found to be devoid of any merit. They are dealt with below.

201. The contention of the learned Senior Advocate of UBHL that the applicability of the English law under the Contracts executed between the petitioning creditors and KFAL and UBHL was to be pleaded as a fact and proved in accordance with Section 57 of the Indian Evidence Act, does not impress this Court at all.

202. The petitioners are not seeking execution of any decree passed by English Courts or other Foreign jurisdiction against the Respondent - Company. They have invoked the winding-up of Respondent- Company before this Court under Section 433 read with Sections 434 and 439 of the Companies Act, 1956 and have been able to satisfy this Court with the relevant and cogent material that the specified amounts of debts are due to be recovered by them from the Respondent - Company and the Respondent - UBHL under its contractual Guarantee obligations incurred by it for the financial obligations of the KFAL, which it has failed to discharge, despite due notice without any cogent reasons. It is neither a question of treating these winding-up petitions as civil Suits for recovery of monies but it is a matter of forming a reasonable and fair opinion that whether from the facts and figures, contentions and defences, this Court can form a reasonable opinion about the commercial insolvency and erosion of its net worth and inability of the Respondent Company, UBHL, to pay-off its admitted dues or not. This Court does hold this opinion against the Respondent -Company, UBHL. Therefore, the contention that the applicability of the English law was required to be pleaded and proved as a fact, as if in the realm of trial of a Civil

Suit, does not merit acceptance of such a contention by this Court. The same is therefore liable to be rejected and is accordingly rejected.

203. Another contention about the petitioning Companies other than the secured creditors like SBI and consortium of Banks and others that such Foreign Companies ought to have obtained due permissions from Registrar of Companies (ROC) or Reserve Bank of India (RBI) in terms of Sections 592 and 599 of the Companies Act, 1956, also is equally devoid of merit. If the Respondent - Company wanted to challenge the locus standi of the petitioners, it was for them to establish before the Court that such Companies had a "permanent establishment" of business in India so as to fall within the definition of a Foreign Company, requiring registration and permissions in terms of Sections 592 and 599 of the Act. No such material has been placed by them before this Court to question the locus standi of the petitioning creditors. Mere presence of some sales representatives while undertaking business of supply of Aero Engines and Allied Equipments does not establish in any manner that such Companies had their permanent establishment in India so as to attract rigor of Sections 592 and 599 of the Companies Act. The said contention also is therefore liable to be rejected and is accordingly hereby rejected.

204. The contentions raised against locus standi of petitioner, BNP Paribas are also equally devoid of any merit. The assignment of debt by KF Aero in favour of BNP Paribas has never been questioned by KF Aero itself. The Deed of Assignment and its due Notice to UBHL are on record. The RBI approval for Corporate Guarantee in favour of KF Aero will be equally good for BNP Paribas also. RBI has never objected to the execution of Corporate Guarantee by UBHL in favour of BNP Paribas. No additional approval could be insisted upon by the Respondent, UBHL itself.

205. The contention that multiplicity of the proceedings has been initiated by the petitioning creditors and therefore the winding-up petitions should not be entertained, is also equally devoid of any merit. The petitioning creditors are entitled in law to take all suitable measures and remedies for not only to recover their just debts but if on the basis of that material they can establish the commercial insolvency of the Respondent- Company in terms of the provisions of the Companies Act for winding-up, there is no legal bar in the institution and pursuing of two or more remedies against the Respondent - Company, UBHL, while the effect of the relief granted upon such institution of legal proceedings is bound to be different.

206. The winding-up order of course results in divesting the existing Management of the Respondent - Company of their control, possession and effective management of day-to-day affairs of the Company ordered to be wound-up but it does not partake the character of a money decree against the Respondent -Company. Therefore the institution of Civil Suits, recover)" proceedings in Debt Recovery Tribunal proceedings does not and cannot prohibit the institution and pursuing of the winding-up petitions by the secured creditors

like SBI and others and unsecured creditors like IAE International Aero Engines AG and BNP Paribas, etc. On the other hand, the interest of the creditors, workmen and other stakeholders in the Respondent - Company can be better safeguarded, if the Government Authority, like Official Liquidator undertakes the control of the affairs of the Respondent - Company and winds up the Respondent - Company, UBHL in accordance with the provisions of the Companies Act, 1956. Therefore, these defences are also without any merit and the same are hereby rejected.

207. If the Respondent - Company, UBHL had any bona fides in the matter and they had some reasonable and concrete proposal to salvage the Respondent Company and settle its financial obligations amicably with the petitioning creditors, a viable, reasonable and bona fide arrangement or Scheme could always be produced before the Court, after consultation and concurrence of the creditors even during the course of these winding-up petitions. But no such effort was made by the Respondent - Company before this Court. On the contrary, it was brought to the notice of the Court that one such proposal submitted before the Hon'ble Supreme Court in Special Leave Petition Nos.6828-6831 of 2016 (SBI v. KFAL) and the relevant extract of which proposal is also given above, was not approved and not accepted by the Banks before the Hon'ble Supreme Court itself. Even if such a proposal was to come before this Court also, ex facie, it reflects lack of bona fides on the part of the Respondent Company, because such a proposal is hedged with the conditions, practically impossible of compliance and therefore, this Court finds no serious and sincere efforts made by the Respondent - Company to save itself from the winding-up of the Company in accordance with law.

208. This Court also finds that if one of the Group Companies itself, viz. the United Spirits Limited (USL), on account of its financial help extended to UBHL and KFAL and now later on upon change of its management by the purchase of shares by Foreign Companies like Diageo plc and Relay B.V., had to change its stand from initial opposing winding-up petitions but now supporting the winding-up petitions, it appears that something seriously wrong has taken place in the Respondent - Company's Management and affairs, where it has been unable to perform its contractual obligations even towards its own group Company, what to talk of all other creditors, who are petitioners herein. This Court finds such a change of stand very serious turn of events and has no reason to disbelieve the genuineness of the strong reasons for the said Company, USL to change its stand for which the detailed Affidavits were filed before this Court explaining such reasons.

209. That as far as the contention of Supporting Creditors and Workmen of Respondent - Company, UBHL are concerned, they were more of the nature of proxy arguments raised on behalf of the UBHL itself and for the reasons aforesaid they also deserve to be rejected for the same reasons.

210. The deposits of Rs. 1280.00 crores made in the Court under Interim Orders

of the Court will of course be utilized for distribution, if the Respondent - Company, UBHL is to be wound up. The argument that such deposit being in excess of claims of unsecured creditors or suppliers and therefore the Respondent-Company does not deserve winding-up ignores the much larger claim of Secured Creditors, Banks led by SBI, whose dues are far in excess of said deposits and their preferential claim cannot be ignored. It is that huge gap which renders the Respondent - Company, UBHL commercially insolvent and a mere skeleton of some assets and liquidity. The presentation of the same as a Going Concern in Annual Reports by skewed, distorted and misleading presentation of facts and figures in Balance Sheets leads one to draw an adverse inference against the Respondent - Company, UBHL rather than being swayed by false picture sought to be projected by Company itself and its Supporting Creditors. All these contentions are, not bona fide and are therefore rejected.

211. Therefore, on a totality of the facts and circumstances, this Court is of the firm and clear opinion that the Respondent Company, UBHL also deserves to be wound up for its failure to discharge its admittedly liability towards the petitioning creditors, which is far in excess of its net worth and the assets of the Respondent - Company whatever they are left now and which cannot be left in the control, possession and active management of the Respondent - Company as it exists now and it would be necessary, safe, reasonable and expedient to takeover these Assets from the Respondent - Company and hand over the same to the Official Liquidator to proceed further for winding-up the Respondent - Company, UBHL, in accordance with law. Accordingly, the Respondent Company, UBHL is ordered to be wound-up. All I.As. filed in various Company Petitions also stand disposed of by separate orders in terms of this order.

212. 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 petitioners.

213. 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.

214. 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, UBHL and also about the pending litigation or cases against the Respondent, UBHL at various other Forums/Courts or Tribunals or before this Court, within a period of four weeks.