
(2002) 10 MAD CK 0016

In the Madras High Court

Case No : Company Petition No. 232 of 1998

Indian Oil Corporation Ltd.

APPELLANT

Vs

NEPC India Ltd.

RESPONDENT

Date of Decision : 25-10-2002

Acts Referred:

Companies Act, 1956 — Section 433, 434

Citation : (2003) 41 SCL 493

Hon'ble Judges : N.V. Balasubramanian, J

Bench : Single Bench

Advocate : Nalini Chidambaram, for the Appellant; C.A. Sundaram, for the Respondent

Final Decision : Allowed

Judgement

N.V. Balasubramanian, J.—This petition is filed u/s 433(e), read with Section 434 of the Companies Act, 1956, hereinafter referred to as

the Act". The petitioner is a public sector undertaking. The respondent is M/s. NEPC India Limited, formerly known as NEPC Micon Limited. It

is the case of the petitioner that NEPC India Limited has its registered office at No. 36, Wallajah Road, Chennai 600 002. The petitioner has given

the details of the authorised capital and paid up capital and also the main objects of the NEPC India Limited. In the petition it is stated that NEPC

India Limited and M/s. Skyline NEPC Limited are sister concerns belonging to the NEPC Group of Companies and NEPC Airlines in which name

NEPC India Limited operates is a division of NEPC India Limited and Skyline NEPC Limited runs its airlines in the name of Skyline NEPC. The

petitioner had entered into an aviation fuel supply contract on 23-7-1996 at Chennai with NEPC India Limited and the petitioner had agreed to

supply aircraft fuel on terms and conditions contained in the agreement. It is stated that separate agreement was also entered into between Skyline

NEPC Limited and the petitioner. It is also stated that in terms of the agreement, NEPC India Limited and Skyline NEPC Limited had received

supply of aviation turbine fuel, aviation lubricants, etc., collectively referred to as "aircraft fuel" from the petitioner on several dates for their airline

services. It is stated that on 30-4-1997, a sum of Rs. 6 crores was due and payable by NEPC India Limited and a sum of Rs. 13 crores was due

and payable by Skyline NEPC Limited to the petitioner under the aircraft fuel account. It is stated that in order to secure the said sums, NEPC

Airlines by letters dated 28-3-1997 and 15-4-1997 undertook to hypothecate its two aircraft having registration Nos. VT-NEJ, Aircraft SL. No.

10684 (model Fokker make F27-500) and VT-NEK, Aircraft SL.No. 10687 (model Fokker make F27-500) in favour of the petitioner. It is

stated that NEPC India Limited also executed a deed of hypothecation dated 1-5-1997 hypothecating the above mentioned two aircrafts in favour

of the petitioner for securing the repayment of the dues and the said hypothecation deed was registered with the Registrar of Companies on 8-5-

1997. It is stated that the hypothecation deed empowered the petitioner to bring the aircrafts to sale in case of default in the payment as per the

schedule. The petitioner also sets out the schedule of repayment of the total amount and the deed of hypothecation provided that the entire amount

should be paid on or before 31-1-1998. It is stated that a deed of undertaking and indemnity was also executed on 1-5-1997 by NEPC Airlines

declaring that the aircrafts hypothecated to the petitioner are free from encumbrances. In the deed it was also agreed to indemnify the petitioner

against any loss, damage, detriment and cost or expenditure that may be caused to the petitioner.

2. It is stated that on 6-5-1997, a tripartite agreement was entered into between the petitioner, NEPC India Limited and Skyline NEPC Limited to

confirm the deed of hypothecation executed on 1-5-1997 and to secure the amounts due and payable by NEPC India Limited and Skyline NEPC

Limited to the petitioner. It is stated that as per the agreement, both NEPC India Limited and Skyline NEPC Limited agreed to clear all the

outstanding dues to the petitioner as per the schedule mentioned therein. It is stated in the petition that the NEPC India Limited and Skyline NEPC

Limited failed to keep up the schedule of payment. The petitioner referred to the directions issued by the Government of India by which the

petitioner was advised to supply fuel only on cash and carry basis. It is stated that NEPC India Limited and Skyline NEPC Limited again defaulted

in payment for fuel supplied after 1-4-1997. It is further stated that the cheques for Rs. 183.5 lakhs were issued by NEPC Airlines to discharge

the liability, but the cheques were returned by the bankers for insufficiency of funds. It is stated that insofar as the amount due under the

dishonoured cheques are concerned, NEPC paid a sum of Rs. 70 lakhs keeping a balance of a sum of Rs. 113.5 lakhs. It is also stated that on

14-5-1997, Skyline NEPC Limited executed a deed of hypothecation hypothecating its aircraft having registration No. VT-ECP (SI. No. 20960)

Boeing 737-200 in favour of the petitioner. It is stated that the deed of hypothecation empowered the petitioner to bring the said aircraft for sale in

case of default in payment as per the schedule mentioned in the tripartite agreement dated 6-5-1997.

3. It is stated that the petitioner issued a legal notice dated 23-5-1997 calling upon NEPC India Limited and Skyline NEPC Limited to pay a sum

of Rs. 10 crores which fell due on 7-5-1997 within 15 days from the date of receipt of the notice. It is stated that the counsel for NEPC India

Limited and Skyline NEPC Limited sent a letter requesting time to give a detailed reply, but no reply was sent. It is stated that in view of the

outstanding liability, the petitioner, by letter dated 20-5-1997 addressed to NEPC Airlines and Skyline NEPC Limited, requested them to issue

necessary instructions to the concerned officials to make full payment. It is stated that NEPC Airlines by Fax dated 23-5-1997, reported that daily

payment would put them to tremendous difficulty and requested the petitioner to consider and approve payment for monthly supplies in two

instalments on 14th and 28th of every month. In that letter, NEPC Airlines further assured to provide immovable property as security for monthly

upliftment and offered to increase the existing security against outstanding dues. The petitioner has also stated that NEPC India Limited handed

over seven original documents of title deeds/agreements to the petitioner stating that the properties are to be treated as security for the payment

owed by NEPC India Limited and Skyline NEPC Limited for the aircraft fuel supplied prior to 31-3-1997 and also for the payment due for

supplies made from 1-4-1997.

4. It is stated that the Collector of Customs, Mumbai seized two aircrafts hypothecated to the petitioner, one belonging to NEPC India Limited

and the other belonging to Skyline NEPC Limited (VT-NEK F27 Fokker and VT-ECP Boeing 737-200 respectively) for non-payment of Inland

Air Travel tax amounting to Rs. 4 crores and Rs. 13.39 crores payable by NEPC India Limited and Skyline NEPC Limited respectively. Since

there was a statutory charge over the aircrafts for arrears of Inland Air travel Tax, the petitioner, by letter dated 28-5-1997, directed NEPC India

Limited and Skyline NEPC Limited to create mortgage in respect of all immovable properties belonging to them in favour of the petitioner with the

right of sale without intervention of court in case of default in payment of dues. It is stated that NEPC India Limited, by letter dated 31-5-1997,

informed that the charge created in favour of the petitioner under the hypothecation deed is the first and paramount charge. In that letter it was also

stated that NEPC India Limited filed a writ petition, W.P. No. 799 of 1997 before the Bombay High Court against the seizure of the two aircrafts

by the Customs. It is stated by the petitioner that a copy of the writ petition was not furnished to the petitioner in spite of its request. It is stated that

the aircrafts seized by the Customs authorities were released without NEPC India Limited and Skyline NEPC Limited making payment of the

Inland Air Travel Tax.

5. It is stated by the petitioner that NEPC Airlines, by letter dated 17-6-1997, came out with a fresh proposal which are set out in the petition. The

petitioner has stated that in view of the huge outstanding on account of failure on the part of NEPC India Limited and Skyline NEPC Limited to

keep up the payment schedule, the petitioner was not inclined to accede to the request of NEPC Airlines.

The petitioner has issued a letter dated 17-6-1997 directing NEPC India Limited to make satisfactory arrangements to pay all instalments which

fell due under the hypothecation deed. It is stated that no reply was sent by NEPC India Limited and Skyline NEPC Limited and the petitioner

issued a notice to NEPC India Limited u/s 433 of the Act calling upon the respondent-company to pay the debts due to the petitioner within 21

days from the date of receipt of the notice. It is stated that NEPC India Limited,

even after the receipt of notice, did not pay the dues. It is stated that as on 11-8-1997 a sum of Rs. 7,03,08,688.83 was payable and due by NEPC Micon Limited, and the petitioner also enclosed a statement to that effect.

6. The petitioner has stated that the financial position of NEPC Airlines has weakened to such an extent that it was not able to lift fuel on cash and carry basis and the cheques issued by NEPC airlines were returned for insufficiency of funds. It is stated that fuel supply was stopped with effect from 3-6-1997 by the petitioner and after protracted negotiations, a further agreement was entered into between NEPC Group of Companies and the petitioner on 20-9-1997. It is stated that under the agreement/the petitioner would supply fuel to NEPC Airlines and Skyline NEPC Limited on cash and carry basis subject to the condition that NEPC Airlines makes satisfactory arrangements for liquidating the arrears due from both the airlines. The agreement also suggested that NEPC India Limited and Skyline NEPC Limited would sell and lease back the aircrafts and pay the sale proceeds to liquidate the arrears. It was also agreed that a sum of Rs. 113.50 lakhs with interest due under the dishonoured cheques would be cleared in equal monthly instalments and in default, the petitioner should have the right to take possession of the aircrafts and sell them and appropriate the sale proceeds. The details of outstanding due as on 11-8-1997 are annexed to the agreement. It is stated that NEPC Airlines cleared the arrears under the dishonoured cheques of a sum of Rs. 113.5 lakhs, but failed to pay the arrears due under the aviation fuel account. It is also stated that NEPC Airlines failed to lift fuel and stopped its operations. The petitioner referred to the impounding of the aircrafts by the Collector of Customs, Mumbai. The petitioner has also alleged that NEPC India Limited removed the engines from the aircrafts. The petitioner also referred to the civil suit filed on the file of this Court and also the suit filed before the City Civil Court, Chennai for injunction. It is stated that several crores of rupees are due from NEPC India Limited to the petitioner and the aircrafts belonging to NEPC India Limited and hypothecated to the petitioner were grounded and no business is conducted by NEPC India Limited and NEPC India Limited is not able to clear the outstanding dues of Rs. 2454.90 lakhs as on 31-3-1998. It is therefore stated that NEPC

India Limited has commercially become insolvent. Therefore the petitioner prays for the winding up of the respondent-company.

7. The respondent has filed a detailed counter affidavit raising objections as to the maintainability of the company petition on several grounds.

According to the respondent, the petition is an abuse of process of the Court and statutory notice has not been sent to the registered office of the

respondent-company. According to the respondent, the respondent does not owe money to the petitioner, but it is the petitioner who owes money

to the respondent as per the statement of the respondent. Another objection was that the petitioner is a secured creditor. Yet another objection

was that the petitioner has already filed a civil suit in C.S. No. 425 of 1997 and hence, the company petition is not maintainable. The respondent

also referred to the arbitration agreement.

8. The case of the respondent is that the payments made by the respondent had been appropriated to the credit of Skyline NEPC Limited without

consent and knowledge of the respondent and if true account of two companies are taken, there would be no amount due and payable by the

respondent. It is stated that the respondent was kept under pressure of stoppage of fuel and was made to execute several agreements which were

prepared and kept ready by the petitioner. The respondent has denied various averments and the main case of the respondent is that no amount is

due and payable by the respondent and the agreements entered into were all prepared by the petitioner and the petitioner, taking advantage of its

dominant position, included various clauses in the agreements in its favour. The case of the respondent is that the respondent has paid the entire

amount due on the dishonoured cheques and the petitioner is secured with respect to the balance amount. It is stated that no amount is due and

payable by the respondent and the respondent has suffered loss on account of the attitude of the petitioner. It is stated that the respondent had

virtually no choice but to enter into agreements with the petitioner as the petitioner was the only supplier of fuel to the respondent. It is stated that

the petitioner entered into an agreement dated 23-7-1996 wherein the petitioner agreed to supply fuel on 100% basis and also agreed to settle for

payment terms on mutually agreed basis. It is also stated that the respondent has been making monthly payments. The case of the respondent is

that the petitioner taking advantage of its position imposed certain impractical payment schedules and all the terms are one-sided terms. It is stated

that the tripartite agreement was entered into on 6-5-1997 and payment schedule called for a payment of Rs. 10 crores on 7-5-1997 giving the

respondent not even a day to pay Rs. 10 crores. The respondent has denied that the respondent removed engines from the aircrafts.

9. The main case of the respondent is that the allegation that several crores of rupees are due from NEPC India Limited to the petitioner is false.

The respondent denied the allegation that no business is conducted by the respondent. The respondent also denied the other allegation that it is a

commercially insolvent company. Hence, the respondent prays that the company petition should be dismissed.

10. Mr. C.A. Sundaram, learned senior counsel appearing for the respondent, has produced before this Court 17 issues to be considered for the

proper appreciation of the case and the issues are as under:--

(1) Whether, when the respondent has paid all amounts due for fuel supplied to them, the petitioner is entitled to any monies?

(2) Whether, the respondent took on a joint and several liability for alleged dues of Skyline NEPC Ltd.?

(3) Whether even assuming that it was so taken there is novation to the terms of the Tripartite agreement dated 6-5-1997 in the light of the

agreements entered into subsequently?

(4) Whether there was any consideration to the respondent for executing the agreement dated 6-5-1997 and whether it would be an enforceable

agreement between parties?

(5) Whether the suit in C.S. No. 998/99 filed against NEPC India Ltd. and others is barred under Order II Rule 2 of CPC in the light of a suit in

C.S. No. 425/97 filed and pending before this Hon"ble Court on the same cause of action?

(6) Whether the suit in C.S. No. 11 /OO is barred under Order II Rule 2 of CPC in the light of the pendency of the earlier suits in C.S. No.

25/97, C.S. No. 998/97 and O.S. No. 3327/98 between the parties on the same cause of action initiated by the petitioner?

(7) Whether IOC was entitled to appropriate and adjust the amount paid by NEPC India Ltd. towards claims against Skyline without any authority

therefore ?

(8) Whether, IOC had any right to appropriate the amounts paid prior to 6-5-1997 towards Skyline dues?

(9) Whether, NEPC India Ltd. having discharged the liability and made payment in excess are liable to be proceeded against?

(10) Whether, the petitioner, secured creditor, who has wasted the security can maintain the petition and whether NEPC India Ltd. has the right to set off for counter claim against the petitioner for wastage of security?

(11) Whether, the petition can be maintained when the same has not been served on the Registered Office and the wrong description of the petitioner's address in the petitioner?

(12) Whether, the petitioner/secured creditor having exercised its right to proceed against the security and not describing as to whether they have proceeded against the security or given up their right against the security is entitled to maintain the company petition?

(13) Admittedly when the claim is based on running accounts on a balance alleged to be due on a particular date, a mere acknowledgement without supporting statement of accounts be sufficient to fasten a liability on a person and a company petition on a mere acknowledgement, without supporting statement, is maintainable?

(14) Whether when the claim is based on running accounts, mere entries in account is sufficient to fasten a liability of a person?

(15) Whether in the light of the documents produced by the petitioners there is any liability?

(16) Assuming the liability as alleged to be joint and several, whether the petitioner can proceed against the guarantor without establishing or proving the debt to be due as on the date of demand from the principal debtor?

(17) Whether the petitioner has discharged his burden of stating as to when the debt fell due and how the same fell due can maintain a company petition?

11. The petitioner has filed an affidavit raising its submissions to the issues framed on behalf of the respondent. The respondent has filed an affidavit dealing with the affidavit filed by the petitioner for which a reply affidavit has also been filed. The petitioner has produced typed-set of papers and

the respondent has also produced typed-set of papers along with statement of account. The following cases, instituted by the petitioner against the

NEPC, are pending before various courts :

(1) 26-6-1997 - Complaint in C.C. No. 4865/97 for alleged dishonour of cheques before the Hon''ble XIII Metropolitan Magistrate, Egmore,

Madras.

(2) 26-6-1997 - Complaint in C.C. No. 4866/97 for alleged dishonour of cheques before Hon''ble XIII Metropolitan Magistrate, Egmore,

Madras.

(3) 7-7-1997 - Suit in C.S. No. 425/97 against Chairman, Airport Authority, DGCA, NEPC and Skyline for mandatory injunction before the

Hon''ble High Court, Madras.

(4) 21-8-1997 - Petition in C.P. No. 232/97 for winding up claiming Rs. 7,03,08,688.83 to be due from NEPC before the Hon''ble High Court,

Madras.

(5) 21-5-1998 - Suit in O.S. No. 3327/98 against NEPC Airlines and two others for permanent injunction before the Hon''ble XVI Asstt. City

Civil Court, Madras.

(6) 13-7-1998 - Complaint in CC. No. 286/98 before the Hon''ble Judicial Magistrate, Alandur, Madras.

(7) 15-7-1998 - Complaint in CC. No. 299/99 before the Hon''ble Judicial Magistrate IV, Coimbatore.

(8) 27-8-1998 - Application for contempt in C.A. No. 318/98 for alleged violation of interim orders in C.S. No. 425/97.

(9) 20-9-1999 - Plaint in C.S. No. 998/99 for recovery of Rs. 5,28,23,501.90 against NEPC and 5 others before the High Court, Madras.

(10) 20-9-1999-Plaint in C.S. No. 11/00 against Skyline NEPC, NEPC and others for recovery of Rs. 13,12,76,421.25 before the Hon''ble

High Court, Madras.

12. Mrs. Nalini Chidambaram, learned senior counsel appearing for the petitioner referred to various agreements and submitted that after giving

credit to all the payments made, a sum of Rs. 6 crores was due and payable by the respondent to the petitioner. She referred to two aviation fuel

supply contracts entered into by the petitioner with NEPC India Limited and

Skyline NEPC Limited respectively. She also referred to the deeds of hypothecation dated 1-5-1997 and 14-5-1997. Her submission was that NEPC India Limited undertook to clear all the arrears and also gave cheques to the tune of Rs. 183.50 lakhs. She submitted that the cheques, when presented for payment, were returned by the banker for insufficiency of funds and NEPC India Limited agreed to replace the cheques by demand drafts. Learned senior counsel submitted that NEPC India Limited has paid a sum of Rs. 70 lakhs only and the balance amount to be paid was Rs. 113.50 lakhs on account of dishonoured cheques.

She also referred to the tripartite agreement entered into between NEPC India Limited, Skyline NEPC Limited and the petitioner on 6-5-1997 wherein NEPC India Limited and Skyline NEPC Limited agreed to clear the entire outstanding amount of Rs. 19 crores jointly and severally in instalments on or before 31-1-1998. She submitted that the respondent company did not adhere to the schedule of payments. She submitted that with effect from 30-6-1997, the petitioner has not supplied fuel. She referred to the letters dated 11-9-1997, 12-9-1997, 16-9-1997 and 17-9-1997 wherein NEPC India Limited offered proposals for liquidating the outstanding due from both NEPC India Limited and Skyline NEPC Limited. Her submission was that NEPC India Limited had acknowledged the liability in all the agreements and agreed to clear the outstanding amount due from NEPC India Limited as well as Skyline NEPC Limited, but the respondent failed to do so. She further submitted that NEPC India Limited admitted the liability. She referred to certain paragraphs in the company petition as well as in the counter affidavit and submitted that NEPC India Limited undertook to clear jointly and severally its dues and also the dues of Skyline NEPC Limited. Learned senior counsel submitted that in all correspondence and legal notices exchanged between the parties, NEPC India Limited has categorically admitted and agreed to clear the liability of both NEPC India Limited and Skyline NEPC Limited. Learned senior counsel submitted that there was no novation to the terms of the agreement dated 6-5-1997 by entering into an agreement dated 20-9-1997 and the agreement dated 20-9-1997 was in addition to the tripartite agreement. She also submitted that the agreements are supported by consideration.

13. According to the learned senior counsel, cause of action for each suit instituted by the petitioner is different and hence, the provisions of Order

II, Rule 2 C.P.C. have no application. She referred to the suit filed on the file of the City Civil Court for injunction and submitted that the conduct

of NEPC India limited and Skyline NEPC Limited in not permitting the petitioner from taking possession of the aircrafts shows that NEPC India

Limited is not interested in clearing the arrears. She therefore submitted that the causes of action for filing the suits, C.S. No. 425 of 1997, O.S.

No. 3327 of 1998, C.S. No. 998 of 1999 and C.S. No. 11 of 2000 are different and the suits are not barred by Order II Rule 2 C.P.C. She also

submitted that NEPC India limited is liable to pay in any event a sum of Rs. 6 crores and for the non-payment of the said sum, the company is

liable to be wound up. She also denied that the amount paid by NEPC India Limited was adjusted by the petitioner towards the dues payable by

Skyline NEPC Limited. She submitted that the statement of account filed by NEPC India Limited is erroneous. As far as the security is concerned,

she submitted that the aircrafts do not have the value as the engines of both the aircrafts have already been removed from the aircrafts by NEPC

India Limited and the aircrafts have been reduced to scrap metal. She referred to the contradictory stand taken by NEPC India Limited in several

letters. As far as immovable properties are concerned, she submitted that the Government valuer valued the lands at Rs. 1,34,60,000. She also

submitted that NEPC India Limited was granted permission to hold the lands beyond the ceiling limit subject to the condition that the lands have to

be utilised for business purposes relating to wind energy or aviation. She therefore submitted that the petitioner could not bring the lands for sale.

She also referred to the properties situate in other States and submitted that the properties also could not be sold and hence, it cannot be stated

that the petitioner has wasted the securities.

14. As far as the issue of statutory notice is concerned, she submitted that the notice was sent to the Registered Office of the respondent-company

and the notice was also received. She also referred to various letters to show that the Registered Office of the respondent-company was situate at

No. 36, Wallajah Road, Chennai, She submitted that if there is any change in the address of the Registered Office, it should be intimated to the

Registrar of Companies and on the date of issuance of the statutory notice, the Registered Office of the respondent-company was only at 36, Wallajah Road, Chennai. She submitted that the respondent has not produced any documentary proof to show that the address of its Registered Office got changed. Since the liability is not disputed, learned senior counsel submitted that it is not necessary to file statement of account. Learned senior counsel therefore submitted that NEPC India Limited agreed to pay a sum of Rs. 6 crores being its liability and also agreed to pay a sum of Rs. 13 crores being the liability of Skyline NEPC Limited and both the companies have acknowledged their liability and hence, the question of proving the debt does not arise. She therefore submitted that in the absence of any proof for payment of Rs. 6 crores, the respondent-company is liable to be wound up.

15. Mr. C.A. Sundaram, learned senior counsel appearing for the respondent, on the other hand, submitted that the company petition is not maintainable as no amount is due and the existence of debt is also disputed by the respondent. Learned senior counsel submitted that the respondent has paid its debts and there is no consideration for the subsequent agreement. His submission was that the statement of account clearly shows that the respondent has paid the amount due by it and the two companies are separate companies and claims are also separate and the respondent cannot be sought to be wound up for the dues of the other company, viz., Skyline NEPC Limited. Learned senior counsel also submitted that there was novation of contract and there are triable issues and the questions whether the respondent has violated the terms of the hypothecation deed and which one of the agreements would prevail are all triable issues.

16. Learned senior counsel referred to the complaints filed in the civil courts and submitted that the amount due has to be ascertained. Learned senior counsel submitted that it is necessary to lead evidence on the interpretation of documents and in such a case, the company petition is not a proper remedy. Learned senior counsel submitted that the respondent has raised a bona fide dispute. Learned senior counsel submitted that the petitioner has not produced the statement of account and the respondent was maintaining running account and it cannot be stated that the respondent is liable

to pay the amount. Learned senior counsel referred to the affidavit filed by one Srinivasan on behalf of the petitioner and submitted that the respondent cannot be presumed to be the guarantor for the liability of Skyline NEPC Limited. Learned senior counsel referred to certain documents and submitted that those documents are not relevant for the company petition. Learned senior counsel submitted that there is no evidence to show that the liability of Skyline NEPC Limited was taken over by NEPC India Limited. He also submitted that there is no plea regarding the value of the security and the petitioner has not valued the security on the date of filing of the petition and there is no pleading that the security is worthless. He submitted that there is no admission that the respondent stood as guarantor for the liability of Skyline NEPC Limited and the petitioner has to establish the same. His further submission was that it cannot be stated that cause of action for each suit is different and two suits were filed on the same cause of action. As far as the claim of Rs. 6 crores is concerned, he submitted that the amount has been paid, but the question whether the appropriation has been correctly done or not is a matter for evidence. Learned senior counsel submitted that even assuming that the amount has not been paid by NEPC India Limited, the list of securities clearly shows that there is substantial security furnished and when substantial security is available, the petition for winding up is not maintainable.

17. I heard learned senior counsel for the petitioner and the learned senior counsel for the respondent. At the outset, I would like to make it clear that the practice of filing affidavit, counter affidavit, further affidavit and reply affidavit in supplement to the company petition filed or to the counter affidavit filed is not a healthy practice. I am of the view the proper course would be to amend the company petition itself and not to improve the case in stages by filing affidavit and reply affidavit during the course of hearing of the company petition. Another difficulty also arises, because certain documents which are not referred to in the company petition are referred to in the affidavit, with the result the respondent is obliged to file a counter affidavit and the petitioner has to file a reply to that further affidavit.

18. The company petition has not yet been admitted. It is now at the stage of pending admission. The question that arises is whether the petitioner has made out a prima facie case for admission. The purpose of giving notice in

the company petition as to admission is to find out whether the debt is bonafide disputed or the petition has been presented with mala fide motive or there is any abuse of the process of the court and whether there is a substantial defence from the respondent. Therefore the question that has to be considered is whether the respondent has raised a bona fide dispute as regards the existence of the debt and the defence raised is substantial,

19. On 23-7-1996, NEPC Airlines has entered into a memorandum of agreement for aviation fuel supply with the petitioner for a period of five years. On 28-3-1997, NEPC Airlines has issued an irrevocable letter of undertaking to bring down the outstanding amount due to the petitioner to the expected level of Rs. 10 crores as of 31-3-1997. The letter of undertaking also provides for hypothecation of aircraft No. 10684 and the specification of the aircraft No. 10684 is given as annexure to the document. On 15-4-1997, another letter of undertaking was given hypothecating the aircraft No. 10687. On 1-5-1997, NEPC Micon Limited executed a deed of hypothecation admitting its liability on account of supply of aviation turbine fuel for a sum of Rs. 19 crores approximately as on 29-4-1997. In the said hypothecation deed, NEPC Micon Limited hypothecated its two aircrafts the specification of which is described in schedule A to the said document. The deed also provides for payment in instalments and the deed also contains the schedule of payment. The deed provides for the payment of interest. The deed was signed by the Director of NEPC Micon Limited.

20. On 6-5-1997, a tripartite agreement was entered into between Skyline NEPC Limited, NEPC Micon Limited and the petitioner company wherein Skyline NEPC Limited admitted that it is liable to pay a sum of Rs. 13 crores as on 30-4-1997. In the agreement it is stated that Skyline NEPC Limited was unable to offer any aircraft as security for the amount due by it and hence, Skyline NEPC Limited approached NEPC Micon Limited to offer its aircrafts as security to the petitioner. It is stated that NEPC Micon Limited also accepted the request of Skyline NEPC Limited. The deed provides for the hypothecation of two aircrafts belonging to NEPC Micon Limited in favour of the petitioner for the amount due and payable by Skyline NEPC Limited in addition to the security for the amount due and payable by NEPC Micon Limited. The deed provides for the

payment in instalments by both Skyline NEPC Limited and NEPC Micon Limited. Both the companies also agreed to pay the outstanding amount

due and payable by them to the petitioner as per the schedule of payment set out in Clause 2 of the agreement. The deed provides for payment of

interest and Clause 6 specifically provides that both NEPC Micon Limited and Skyline NEPC Limited are jointly and severally liable to pay to the

petitioner all the dues and outstanding towards the cost of the aircraft fuel uplifted by both of them as of 30-4-1997. It is relevant to notice here

that the tripartite agreement should be taken as a document executed prior to the hypothecation deed which was executed on the same date

wherein the joint and several liability of both the companies, viz., NEPC Micon Limited and Skyline NEPC Limited is admitted. In addition to that,

Skyline NEPC Limited also executed a deed of undertaking and indemnity in favour of the petitioner admitting its liability. In the deed it is stated

that Skyline NEPC Limited affirmed that there are no dues to be paid to any statutory authorities or to any other authorities. The deed confirms the

deed of hypothecation and the tripartite agreement between the parties. In other words, the tripartite agreement is in addition to the hypothecation

agreement executed by NEPC Micon Limited to secure the outstandings of Skyline NEPC Limited to the petitioner apart from securing the

outstandings of NEPC Micon Limited to the petitioner.

21. It is stated that NEPC Micon Limited and Skyline NEPC limited are sister concerns and they have agreed that they will be jointly and severally

liable to pay all the outstandings of both the companies and this shall not be disputed at any point of time at any forum, either judicial or otherwise.

On the same date, a similar undertaking was executed by the respondent-company admitting that both the companies are sister concerns and they

are jointly and severally liable to pay all the outstandings of both the companies to the petitioner. Another letter that is enclosed in the typed-set of

papers is dated 7-5-1997 issued by the petitioner wherein there is a reference to the hypothecation deed and the joint liability of NEPC Micon

Limited and Skyline NEPC Limited for a sum of Rs. 19 crores. The Director General of Civil Aviation has also sent a letter dated 8-5-1997 to the

petitioner rejecting the request of the petitioner that the two aircrafts should not be removed from the territory of India without prior written

permission from the petitioner. An indemnity was issued by Skyline NEPC Limited confirming the deed of hypothecation, by document dated 14-

5-1997. It is no doubt true that NEPC Airlines by letter dated 23-5-1997 offered securities to cover monthly upliftment as well as additional

security against the outstanding. It is also stated that the securities were given against the amount covered in the cheques, viz., Rs. 183.5 lakhs

which the respondent had to replace. On 23-5-1997 NEPC Airlines wrote another letter to the petitioner stating that the respondent gave

adequate security to cover the existing outstanding to the satisfaction of the petitioner and the respondent was making financial arrangements with

bankers "to clear the outstanding which are securitised". In that letter it is also stated that the respondent was willing to provide immovable

property as security for one month's upliftment and would also increase the existing security against outstanding.

22. The next document is the letter dated 23-5-1997 issued by the counsel for the petitioner to both NEPC Micon Limited and Skyline NEPC

Limited demanding a sum of Rs. 10 crores from both the companies. It is also stated that the failure of the same would result in the exercise of the

right of the petitioner under the hypothecation deed and the tripartite agreement. The NEPC Airlines, by letter dated 24-5-1997 handed over four

original documents in connection with the equitable mortgage. On 28-5-1997 the petitioner again wrote a letter to both NEPC Micon Limited and

Skyline NEPC Limited stating that several lakh rupees are due to the petitioner under aircraft fuel account. In that letter, there is a reference to the

seizure of two aircrafts already hypothecated in favour of the petitioner by the Commissioner of Customs for non-payment of inland air travel tax.

NEPC Micon Limited, by letter dated 31-5-1997, reiterated that the charge created in favour of the petitioner under the hypothecation agreement

is the first and paramount charge and the charge is prior in time to the order of seizure. Counsel for the respondent, by letter dated 3-6-1997,

requested the petitioner to give time to send a reply to the notice of the counsel for the petitioner dated 23-5-1997. Another letter was issued by

NEPC Airlines on 17-6-1997 making certain proposals. In that letter it was suggested that since the aircraft which was hypothecated to the

petitioner is under the detention of the Customs, properties belonging to the respondent may be taken as security for the current outstanding and

also for fortnightly upliftments. The respondent also gave the details of the properties.

23. On 17-6-1997, the petitioner issued the statutory notice to both NEPC Micon Limited and Skyline NEPC Limited calling upon them to

discharge the liability. The notice was served, but there was no reply by the respondent to the statutory notice. Subsequently, the petitioner filed an

application before the civil court for interim injunction in C.S. No. 425 of 1997 restraining the respondent from removing or otherwise dealing with

the aircraft having registration No. VT-NEJ F-27 Fokker stationed at the Coimbatore Airport. Subsequently, another agreement was entered into

on 20-9-1997. This agreement was entered into after an order of interim injunction was passed and in the agreement, both NEPC India Limited

and Skyline NEPC Limited on the one side and the petitioner on the other side were parties. The agreement was for the supply of aircraft fuel and

in the agreement, the respondent, on its behalf and on behalf of Skyline NEPC limited, agreed to pay a sum of Rs. 20 lakhs to the petitioner and

the respondent also agreed to pay the balance amount in four monthly instalments. In the agreement, the respondent has admitted the liability and

agreed to make satisfactory arrangements for liquidating the arrears due from the both, viz., NEPC India Limited and Skyline NEPC Limited. The

agreement also provides that the agreement dated 19-9-1997 stands cancelled in view of the new agreement dated 20-9-1997. In the annexure to

the agreement the amounts due from both NEPC India Limited and Skyline NEPC Limited are separately mentioned, and in the agreement, the

total amount was agreed to be paid jointly by NEPC India Limited and Skyline NEPC Limited. The agreement provides that NEPC Airlines made

arrangements to sell the aircrafts, viz., VT-NEK, VT-NEJ and VT-ECP and to pay a sum of Rs. 18 crores to the petitioner from and out of the

funds generated by this mechanism within three months from the start of fuel supply on cash and carry basis. In the agreement NEPC Airlines also

undertook to ensure that there shall be an agreement to ensure that a sum of Rs. 18 crores is paid to the petitioner within the specified period. On

28-4-1998, counsel for the respondent has given a reply for which a rejoinder has also been issued.

24. A fair reading of the various documents clearly shows that though NEPC Airlines and Skyline Airlines are two separate concerns, the

respondent has undertaken to discharge the liability of both the companies jointly and severally. I have gone through the documents and I am quite satisfied that the agreements are supported by consideration. Though Mr. C.A. Sundaram, learned senior counsel submitted that the agreements are one-sided agreements, I am unable to accept the same, as the respondent with open eyes has entered into the agreements. The respondent is a commercial organisation and it is very difficult to believe that the respondent has signed the agreements on the dotted lines as dictated by the petitioner, without verifying the same. The agreements were followed by enforceable documents and the documents clearly show that the respondent has admitted its liability and also undertaken to discharge the liability. I am therefore prima facie of the view that the debt is established.

25. Once it is a joint and several liability, it is open to the petitioner to appropriate the payments made by the respondent against the liability of anyone of the two airlines corporations as it is not the case of the respondent that it was not an open payment, but the payment was made with specific instructions that it should be adjusted against the liability of a particular airlines corporation. I therefore hold that there was a joint and several liability of both the companies. The documents produced by the petitioner clearly show that there was an admission and acknowledgement of liability of both the corporations by the respondent.

26. The next submission was that there was novation of terms in the subsequent agreement. The tripartite agreement is dated 6-5-1997 and another agreement was entered into subsequently on 20-9-1997 which specifically provides that it cancels the agreement dated 19-9-1997. The terms of the agreement dated 20-9-1997 clearly show that there was no novation. The subsequent agreement was entered into for specific purpose of the supply of fuel on cash and carry basis and from the subsequent agreement, it cannot be stated that the earlier tripartite agreement wherein the respondent has admitted its liability and also hypothecated its aircrafts for the dues of NEPC India Limited and Skyline NEPC Limited was substituted or a new agreement came into force.

27. As far as the agreement dated 6-5-1997 is concerned, an argument was advanced that it was not supported by consideration but the argument has no force. There is a forbearance on the part of the petitioner from taking any

legal proceedings so long as instalments are paid regularly in accordance with the payment schedule and therefore it cannot be stated that the agreement dated 6-5-1997 is not supported by consideration.

28. Another argument that was addressed was that the suit, C.S. No. 998 of 1999 is barred under Order II, Rule 2 C.P.C., in view of the earlier

suit filed in C.S. No. 425 of 1997 and the suit, C.S. No. 11 of 2000 is barred under Order II, Rule 2 C.P.C., in the light of the earlier suits in C.S.

Nos. 425 of 1997 and 998 of 1999 and O.S. 3327 of 1998. I am not inclined to go into the question as it is for the civil court to decide that

question. As far as the company petition is concerned, it was filed on 16-7-1998 and on that date there was only one suit, C.S. No. 425 of 1997

filed on the file of this Court for mandatory injunction directing the airport authorities to detain the aircraft belonging to the respondent and

hypothecated to the petitioner. The question that the company court has to consider is whether there was a debt on the date of filing of the petition,

and I am satisfied that the petitioner has prima facie established that there is a debt.

29. Mr. C.A. Sundaram, learned senior counsel referred to C.S. No. 998 of 1999, particularly, the averments made in the plaint and submitted

that the petitioner has filed the suit for recovery of a sum of Rs. 5,28,23,501.90 against the respondent-company and others. He also referred to

the C.S. No. 11 of 2000 wherein the petitioner has filed the suit against Skyline NEPC Limited and others for recovery of a sum of Rs.

13,12,76,421.25. He therefore submitted that by filing two suits, the petitioner himself has recognised that the liabilities are separate and distinct

and hence, the company petition filed as if the debt is due from the respondent-company with reference to the liabilities of both the companies is

not maintainable. I am unable to accept the submission of the learned senior counsel. I have already held that there is a joint and several liability

undertaken by both the companies and I am prima facie of the view that if it is open to the petitioner company to institute a suit separately against

the respondent-company for its liability alone as the liability undertaken is joint and several liability, equally, it is open to the petitioner to maintain a

suit separately against Skyline NEPC Limited for recovery of the amount due by Skyline NEPC Limited. Further, the scope and ambit of a

company petition is different from a civil suit. While a civil suit is filed to vindicate the private rights, the company petition is filed in recognition of the law of insolvency to establish that the company which is sought to be wound up is not in a sound financial status so that the interests of the general body of creditors are protected. To maintain a company petition what has to be seen is whether there is a debt on the date of filing of the petition. Therefore, I am quite satisfied on the basis of the documents that there exists an admitted liability due and payable by the respondent herein to the petitioner and the liability of the respondent-company is a joint and several one undertaken to discharge not only its liability, but also the liability of its sister concern, Skyline NEPC Limited and the agreements were entered into for consideration.

30. The next submission was that the entire amount was appropriated and adjusted against the liability of Skyline NEPC Limited without any authority. I am unable to accept the submission of Mr. C.A. Sundaram, learned senior counsel as the agreement dated 6-5-1997 clearly shows that there was a joint and several liability of both NEPC India Limited and Skyline NEPC Limited and hence, it is open to the petitioner to appropriate the sum paid by the respondent against the debt of the other company, Skyline NEPC Limited. Further, there is absolutely no evidence to show that the amount paid by the respondent has been adjusted against the liability of Skyline NEPC Limited. Though the respondent has produced statement of account, the statement was not even signed by any officer of the respondent-company. Moreover, there are no supporting documents to corroborate the entries in the statement of account filed by the respondent. Hence, no reliance can be placed on the statement of account filed by the respondent. Accordingly, issue No. 8 raised on behalf of the respondent is answered against the respondent.

31. The issue No. 9 proceeds on the basis that the respondent discharged its entire liability and the amount has been paid in excess by the respondent. As already held, it is open to the petitioner to appropriate the amount paid by the respondent against the dues of either of the companies as there was a joint and several liability of NEPC India Limited and Skyline NEPC Limited.

32. As far as the issue No. 10 is concerned, the issue proceeds on the basis that the petitioner has wasted the security and hence, the petition is

not maintainable. The petitioner has referred to the securities furnished by the respondent in the petition. It is the case of the respondent that the petitioner has not given the details of the securities or the value of the same. In order to answer this issue, I have gone through the copies of documents produced by the petitioner and I am not expressing any opinion as to the value of the securities offered by the respondent and also on the question whether the securities offered are valuable securities. The documents produced by the petitioner prima facie establish that the securities offered would not be sufficient to cover the liability. Therefore I hold that the petition is maintainable. Accordingly the issue Nos. 10 and 12 are answered against the respondent.

33. The other point raised was that the notice was not served at the Registered Office of the respondent and therefore the petition is not maintainable. As far as the service of notice at the Registered Office of the respondent is concerned, the case of the petitioner is that the Registered Office of the respondent was situate at No. 36, Wallajah Road, Chennai and the notice was sent to the said address and the notice was served on the respondent. Though the respondent has produced the certified copies of Form 23 and Form 18 stating that the Registered Office has been shifted from No. 36, Wallajah Road, Chennai to "NEPC House, 1678, Trichy Road, Ramanathapuram, Coimbatore - 641 045" and the name of the respondent has been changed from NEPC Micon Limited to NEPC India Limited, the petitioner has produced several letters which clearly show that even after the Registered Office was shifted, the letters received from the respondent show that the address of the Registered Office was "36, Wallajah Road, Chennai". Further, Form 18 was sent to the Registrar of Companies only on 31-5-1997, but it is not clear from the Form 18 when it was registered by the Registrar of Companies as the endorsement made on it shows that even though fee was paid on 4-6-1997, it was registered on 15-2-1999. It is also stated that on the basis of verification of records only the statutory notice was issued. Though it is essential that notice must be addressed and sent to the Registered Office, on the facts of the case, the fact remains that the notice was received by the respondent. The Department of Post, India has also issued a Certificate to the effect that the registered notice was delivered to the addressee on

22-7-1997. I am of the view that the petitioner has acted in good faith and it is also seen that the company petition was also served on the respondent. I therefore hold that the petitioner has acted bona fide, because the respondent had issued more than one letter to the petitioner and in all letters the address of the Registered Office of the respondent was shown as No. 36, Wallajah Road, Chennai. Further, prior to the issue of the statutory notice, viz., 16-7-1997, the petitioner had received the letter of the respondent dated 17-6-1997 showing the address of its Registered Office as No. 36, Wallajah Road, Chennai. Even assuming that the respondent has already changed its Registered Office to the new address with effect from 1-5-1997, when the petitioner has acted on the basis of the letter issued by the respondent immediately before the dispatch of the statutory notice, I hold that it is not open to the respondent to contend that the statutory notice was addressed to the old address and hence, the statutory notice is not valid. The address of the Registered Office is mentioned as 36, Wallajah Road, Chennai not only in the letters issued prior to the statutory notice, but also in the letters subsequently issued by the respondent from August 1997 to January 1998. Moreover, subsequent to the statutory notice, the respondent has admitted its liability in the agreement dated 20-9-1997. The purpose of issuing notice is to give an opportunity to the respondent to discharge the liability and when subsequent to the notice the respondent admitted the liability and agreed to pay the amount, the wrong reference as to the address of the Registered Office of the respondent in the statutory notice would not vitiate the notice. Further, this Court in *Rajearajeswari Packaging Products v. Dev Fasteners Ltd.* [2002] 37 SCL 248 has taken the view that in the case of petition filed u/s 433(e) read with Section 434 of the Companies Act, notice served on the administrative office is a valid notice. Here also, it is a case filed u/s 433(e) read with Section 434 of the Companies Act and the decision of this Court in *Rajearajeswari Packaging Products*" case (supra) would squarely apply to the facts of the case.

34. As far as the issue No. 12 is concerned, it is stated that the suit, C.S. No. 425 of 1997 has already been filed by the petitioner for a money decree. As already observed, the respondent has not established that the security offered by the respondent would be sufficient to cover the

liability, but, on the other hand, the case of the petitioner is that the security offered is insufficient. Though the petitioner has not given particulars as to the value of the security in the petition, that would not preclude the petitioner from maintaining the company petition when the petitioner has established that there is a bona fide debt and has shown that the value of the security is insufficient.

35. As far as the aircrafts are concerned, it is the case of the petitioner that the engines were already removed and after the removal of the engines, the aircrafts are worthless. Though the respondent claimed that it was not responsible for the removal of the engines, to which question I am not inclined to interfere, but is it not a case of the respondent that the engines were not removed from the aircrafts and the aircrafts remained intact. In the absence of aircraft engines, it cannot be stated that the petitioner is in possession of valuable security offered by the respondent.

36. One another contention was also raised by Mr. C.A. Sundaram, learned senior counsel that the petitioner was responsible for not bringing the aircrafts for sale in spite of the offer made by the respondent. Learned senior counsel for the petitioner has satisfactorily explained before this Court that the offer of the respondent came during the course of the winding up proceedings and if the aircrafts are sold, the sale proceeds would not be available exclusively to the petitioner, but to the general body of creditors. I therefore hold that the petitioner was perfectly justified in not acceding to the request of the respondent to bring the aircraft for sale.

37. As far as other immovable properties are concerned, the petitioner has produced documents to show the value of the immovable properties.

As far as the lands assigned in favour of the respondent by the Government of Tamil Nadu is concerned, the assignment was subject to certain conditions and in view of the conditions, it cannot be stated that the petitioner is fully protected as a secured creditor against the liability of the respondent.

38. Learned senior counsel for the respondent submitted that because of the running account being maintained for the supply of fuel, the company petition is not maintainable. This submission is not acceptable, because the respondent has admitted the liability that arose from the supply of aircraft fuel not only to the respondent-company, but also to Skyline NEPC

Limited. Hence, it is not a case where the claim is made on the basis of running account, but the petition has been filed on the basis of the admission of liability by the respondent. I hold that the respondent has acknowledged the liability to the petitioner and therefore, the question of filing of statement of account does not arise.

39. The question of liability as guarantor does also not arise as the liability undertaken is a joint and several liability. It is stated that the amount due from the respondent is Rs. 6 crores and the amount due from Skyline NEPC Limited is Rs. 13 crores. The petitioner has proved that there was admission of liability by the respondent and hence, the question of liability as guarantor does not arise. Further, the petition has been filed on the basis that there are dues by the respondent in its individual account, and there is absolutely no material from the respondent that the respondent has discharged its independent liability or the Skyline NEPC Limited has discharged its liability. Nor is there any material to show that the payments made by the respondent were adjusted against the dues of Skyline NEPC Limited.

40. As far as the decisions relied upon by the learned senior counsel for the respondent, viz., (1) G. Loganayaki Vs. Moolangudi Chit Funds

Private Ltd., , (2) K.S. Trivedi & Co. v. Ashok Leyland Ltd. [1989] 3 CLJ 351, (3) Vysya Bank Ltd. Vs. Randhir Steel and Alloys (P.) Ltd., ,

(4) Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, , (5) Rishi Pal Gupta Vs. S.J.

Knitting and Finishing Mills Ltd., , (6) Manganese Ore (India) Ltd. v. Sandur Manganese & Iron Ores Ltd. [1999] 22 SCL 128 (Kar.), and (7)

Neg Micon v. NEPC India Ltd. [2001] 34 SCL 210 (Mad.) are concerned, the principles are clear that a debt shall not only be disputed bona

fide, but defence shall also be substantial. This Court in Neg Micon's case (supra), has held that bona fide dispute of liability has to be determined

having regard to the conduct of the parties, character of plea and circumstances peculiar to each case. This Court held that the petitioner seeking

winding up should establish at the threshold that it is an unpaid creditor.

41. I hold that the petitioner is a creditor and the liability of the respondent to the petitioner is admitted and hence, there is a debt within the

meaning of Section 433(c) of the Act. I also hold that the petitioner has established that it is an unpaid creditor and the admission of liability by the

respondent clearly shows that there is a debt due by the respondent to the petitioner. The defences raised by the respondent are not bona fide as

the respondent has accepted the liability to pay not only its own debt, but also the debt of its sister concern, viz., Skyline NEPC Limited. I hold

that the petitioner has made out a prima facie case for admission and hence, the petition filed by the petitioner is maintainable. I also hold that the

requirements of notice u/s 434 are complied with and the respondent has neglected to pay the debt, in spite of its own admission. Hence, the

petition is liable to be admitted and accordingly, it is admitted. Since I find that there is no chance for any settlement between the parties, the

petitioner is directed to advertise the petition for winding up in one issue of the English daily, ""The Hindu"" and in one issue of the Tamil daily, ""Dina

Malar"" and also in one issue of the Tamil Nadu Government Gazette giving 21 clear days notice for the date of hearing 9-12-2002.

42. It is made clear that the above view has been arrived at only for the purpose of admitting the company petition.