(2009) 03 DEL CK 0013

In the Delhi High Court

Case No : Company Petition No. 117 of 2007

Lecoanet Hemant India Private Limited APPELLANT

Vs

Interglobe Aviation Limited RESPONDENT

Date of Decision : 23-03-2009

Acts Referred:

Citation : (2009) 152 CompCas 495 : (2010) 7 RCR(Civil) 1561

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Sanjay Jain, Peeyosh Kalra, Amol Dixit, Sahil Taneja and Gaurav Pratap Singh, for the Appellant; Sandeep Sethi Siddharth Chopra and Saurabh Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Vipin Sanghi, J.—This company petition under Sections 433(e), (f) and 434(1)(b) of the Companies Act 1956 (the Act) has been filed by the petitioner company to seek orders for winding up of the respondent company, namely, InterGlobe Aviation Limited.

2. The petitioner is a private limited company. The present petition has been filed on behalf of the petitioner through one Sh. C.D. Kingsly, appointed as the authorized representative of the petitioner company the board resolution dated 09.01.2007. It is stated that Mr. Hemant Sagar and Mr. Lecoanet, the promoters of the Petitioner company are world renowned for their innovative, exquisite and exclusive garment designs since the year 1984. They have been known to produce the ready to wear line of garments every season under the name "Lecoanet Hemant".

3. The respondent is a company incorporated under the Act having its registered office at Delhi. The authorized share capital of the respondent company is 155,00,00,000. The paid up capital of the respondent company as on 31.08.2006 as per the balance sheet filed with the Registrar of Companies on 31.03.2006,

was Rs. 99,00,00,000/-. The respondent is a company within the InterGlobe Enterprises Group, a travel corporation diversified in the field of aviation management, travel related services etc. The respondent company is engaged in the business of aviation and air transport services. It is responsible for, manages and control the airline IndiGo for servicing destination within the country.

4. The petitioner states that on account of the expertise and international acclaim of Mr. Sagar and Mr. Lecoanet in the aviation industry, the respondent approached and engaged the petitioner to design and deliver the uniforms for the airlines staff and personnel to be launched under the name "IndiGo". The petitioner states that after detailed discussions and numerous meetings, it was agreed some time in the beginning of July, 2006 that the petitioner would create original designs in order to produce and supply garments/uniforms for the respondent company in terms of their proforma invoice, duly approved by the respondent. The terms of the agreement are contained in the letter dated July 5, 2006 and also in an amendatory letter dated July 5, 2006. These have been placed on record as Annexures P-5 and P-6, respectively, along with the petition, and are not disputed by the respondent. The consideration to be paid by the respondent under the said agreement, according to the petitioner, was Rs. 76,38,186.40. Out of the aforesaid amount, 50% had to be paid in advance and the balance within 30 days after delivery. The petitioner states that the respondent, in partial discharge of its aforesaid obligation, made payment of first instalment of Rs. 18,13,062/- (after deducting TDS). The petitioner further states that the respondent made payment of the second instalment of Rs. 18,87,800/- after deducting TDS. The second cheque for Rs. 18,87,800/- was returned for rectification to the respondent, since the TDS had been deducted on an incorrect basis. The respondent company, however, did not return either the cheque for Rs. 18,87,800/- or issue a fresh cheque after deducting TDS at applicable rates. The petitioner submits that the tender of the cheque of Rs. 18,87,800/- by the respondent clearly tantamounts to an admission of an undisputed liability. The petitioner states that the principal liability of the respondent in respect of 5 invoices raised by it towards the manufacture of uniforms, of which the respondent did not accept delivery, stands at Rs. 30,58,224.80. The details of the various invoices claimed to have been raised by the petitioner, and the computation by the petitioner of the amount which according to it is due and payable by the respondent company are as follows:

A. PARTICULARS OF UNIFORMS DELIVERED: S.No. Invoice No. Delivery Date Total Units Amount (Rs) 1. 024/2006-07 dt. 20.07.2006 104 131,414.40 20.07.2006 2. 025/2006-07 dt. 03.08.2006 709 908,200.80 31.07.2006 & 03.08.2006 3. 028/2006-07 dt. 14.08.2006 705 919,880.00 14.08.2006 4. 029/2006-07 dt. 17.08.2006 214 208,384.80 17.08.2006 5. 034/2006-07 dt. 29.08.2006 200 212,628.00 29.08.2006 TOTAL 23,80,508.00 B. UNIFORMS PRODUCED BUT DELIVERY NOT ACCEPTED: 24,90,778.80 C. LESS PART ADVANCE PAYMENT RECEIVED**: 18,13,062.00 TOTAL PRINCIPAL OUTSTANDING 30,58,224.80

5. The petitioner states that the aforesaid tabulation reflects the contractual liability of the respondent. However, the claim of the petitioner is not confined to the aforesaid amount. So far as the present petition is concerned, the petitioner is confining its claim to the contractual liability, while reserving its right to sue the respondent for all its monitory claims by way of civil suits. The petitioner states that on 17.11.2006, to its amazement it received a letter of termination of the agreement aforesaid. The petitioner states that it issued a statutory notice to the respondent dated 25.01.2007 demanding from the respondent company, inter alia, payment in respect of delivered and undelivered uniforms along with interest @ 12% per annum. The said notice was issued in compliance of Section 434 of the Act. The respondent sent its reply through a lawyer dated 20.02.2007, wherein the respondent had sought to raise frivolous issues such as delay of delivery of uniforms, use of incorrect fabric and that the manufacture of the uniforms was not in accordance with the specifications and measurement. However, the Respondent has not denied the factum of issuance of the second cheque of Rs. 18,87,000/- in discharge of its contractual liability and the fact that the same was returned by the Petitioner for being reissued after correction of the rate at which TDS should have been deducted.

6. Upon notice being issued in this petition, the respondent has filed its detailed reply. The respondent has raised two preliminary objections, to the maintainability of this petition.

7. Firstly, it is submitted that a civil dispute arises between the parties on account of contractual breaches by the petitioner of the aforesaid agreement. It is submitted that there is no admitted liability of the respondent towards the petitioner, and on that ground the petition is liable to be dismissed. It is submitted that the petitioner has already filed a civil suit to recover, inter alia, the amount which the petitioner claims to be admittedly due from the respondent, and which forms the basis for this petition. It is submitted that the present proceedings cannot be a substitute for recovery of money.

8. Secondly, the respondent submits that the petitioner has suppressed material facts. The correspondence leading to the agreement dated 05.07.2006, which has material bearing on the claim of the petitioner and other correspondence, which establishes the fact that the petitioner breached the agreement have been withheld by the petitioner from this Court. It is stated that though the agreement was executed only in July, 2006, the work on the designs for the uniform had started as early as in March, 2006 and the production process was initiated in April, 2006, thus giving the petitioner sufficient time to deliver the manufactured and well-fitted standard uniforms to the respondent within the contractual period. Moreover, the respondent had sent various email communications repeatedly highlighting the breaches in the contract by the Petitioner, which had not been denied by the petitioner. In fact, the petitioner had never disputed its breaches and even acknowledged the same.

9. Mr. Sanjay Jain, Senior Advocate has appeared for the petitioner while Mr.

Sandeep Sethi, Senior Advocate has represented the respondent. I have heard their detailed arguments and the learned senior counsel have taken me through the relevant record.

10. The agreement between the parties, as aforesaid, is contained in two communications dated 05.07.2006, issued by the petitioner to the respondent and accepted by the respondent. Some of the relevant clauses of the first communication dated 05.07.2006 are as follows:

Dear Sir,

1. We, Locoanet Hemant India Private Limited ("LH"), write with reference to our recent meetings with InterGlobe Aviation Private Limited ("IndiGo") in course whereof we discussed diverse matters in relation to the designing, creating and supply of uniforms by our company to your personnel. The purpose of this letter is to clarify and record certain important issues related to the business arrangement envisaged between us.

2. In terms of the understanding arrived at between us, we shall design, create, produce and deliver uniforms for your ground staff, technical staff and on board personnel in terms hereof and for the consideration agreed herein.

...

5. Without prejudice to the generality of the aforesaid, we have been given to understand by you that IndiGo is going to launch its operations by August and we acknowledge that with respect to IndiGo''s initial requirements, we shall be obligated to design, create, produce and deliver the quantities of Garments mentioned in the first purchase order placed on LH on or before July 21, 2006.

...

7.1 This Agreement shall be valid for a period of 5 years. You shall procure the Garments from us during the term of this Agreement and

(a) if the parties mutually agree or

(b) LH is unable to match a third party''s competitive price quote offered to IndiGo (written evidence whereof must be provided to LH) to design, create, produce and deliver the Garments, as envisaged herein, provided IndiGo has given LH 60 days to match such an offer;

IndiGo may terminate this agreement forthwith and procure uniforms for its personnel from the said third party which offered the competitive price quote.

...

8. In consideration of the designing, creating, production and supply of the Garments, you shall pay us in accordance with the terms of Annexure B to this letter and such payments shall be subject to withholding taxes as may be applicable and such other deductions as mentioned in this letter. We hereby

agree to bear the cost of the creation of the Designs and all labour and material used for the purpose of creating and supplying the Garments including all fabric.

9. Except for force majeure circumstances as envisaged in Clause 11 hereof, we acknowledge that if there is any delay in the delivery of the Garments from the date that has been agreed to by the parties or if the Garments that are delivered do not meet the specifications, delivery criteria or Design requirements as agreed to by the parties, then LH shall be liable to pay IndiGo reasonable costs and expenses to compensate for IndiGo''s losses.

...

15. In addition to any other rights and remedies at law, this Agreement may be terminated by giving written notice to the other party who has breached this Agreement or defaulted in the following circumstances:

15.1 where you have failed to make payments as required under this Agreement;

15.2 where either of us has committed a serious breach of our obligations under this Agreement, unless the one is breached rectifies the position, as far as reasonably possible, within sixty days;

11. The petitioner raised a proforma invoice bearing No. 0612 dated 22.07.2006 for an amount of Rs. 76,38,186.40 (inclusive of 4% VAT). The terms of payment stated in this invoice were "50% advance immediately, 50% balance 30 days after delivery 18 lakhs received 3rd July". This proforma invoice was, according to the petitioner, accepted and approved by the respondent.

12. It appears that the petitioner made deliveries of the manufactured uniforms and accessories to the respondent from time to time. However, these uniforms and accessories were admittedly found to be defective in various respects. My attention has been drawn to a series of exchanges, which took place between the parties. I may refer to a few of these exchanges. On 03.08.2006 the respondent sent the following e-mail to the petitioner:

As per our conversation on 02 August we had discusses several issues

1/ Dye issue

2/ Incorrect fabric

3/ Deadlines and timelines

4/ Initial Uniforms through August 21, and retraction/replaceable items

5/ Itemized Orders

6/ Contact person

I will address and summarize each point:

1. My understanding is that the dye used had been treated with a chemical. This

chemical that when heated, created a chemical reaction resulting in purple bleeding.

2. We further understand that the fabric used was not the fabric IndiGo had ordered.

3. Thus, this caused a severe delay in the delivery of uniform items for the July 27 deadline and the 31 July deadline.

4. We discussed timelines: We have asked you to deliver new uniforms with the new material and dye, providing that Shan J. Iwanicki will be able to observe the dye process and release grant of approval from IndiGo.

5. Additionally, we discussed the items currently distributed, and items unavailable. The items currently distributed will be retracted upon completion of our original order. For now, the items that have been distributed will be supplied qty 1 per person.

13. On 03.08.2006 the petitioner replied to the aforesaid e-mail stating that:

While we apologize for the difficulties in the current deliveries and will do everything possible to maintain the dates and quantity standards it needs to be said that the order process needs to be streamlined in order for everybody to be "on the same page" and to avoid any last minute actions that do not allow us to respond to certain difficulties appropriately and effects our services (e.g. fittings!) profoundly.

14. On 05.08.2009, the respondent sent the following e-mail to the petitioner:

Hi Vikas

Following staff uniforms have not been received so far

PUNE

TRUPTI KAMBLE

RAVINDRA RAJPUT

BANGALORE

KISHORE KUMAR

PADMALATHA

MONESH

SAPNA NAIDU

VEENA

AMRITHA VADVAL

GEETALI NEOG

ANUSHA ANTONY

SAPTARISHI MUKHERJEE

SANDYA JOHN

BHARTHI...do not have measurement

G NAVEEN PAl

GUWAHATI

NIVEDITA SINGH

SHAHNAZ AHMED

RAJEEV MEDHI...do not have measurement

RATNADEEP DUTTA

ARINDHAM SHAW RONGPI...do not have measurement

SIDHARTH CHOUDHURI

HIMANSHU DEKA

IMPHAL

NINGAIHLIAN

RATIP KUMAR

SURCHAND SINGH

SOYAH RAMESH SINGH...do not have measurement for the rest delivery would be the very latest Monday evening.

Regarding the Del staff uniforms, I will get back to you.

Please advice the delivery dates for the above especially for GUA and IMF as these stations are already operational.

15. On 13.08.2006 the respondent sent the following e-mail to petitioner:

Dear Anu,

Please advice our uniforms department that the shirts for female collogues are losing color, thus causing stain marks on their sleeves.

We are yet to check our trousers for same.

We have still not received uniforms for Naveen Pal Kishor Kumar and Bharathi

Regards

16. On 14.08.2006 the respondent sent another e-mail to petitioner:

Hello

This is an update regarding various complaints that we have been receiving from various staff.

? Ladies shoes are very rough from the inside so that''s resulting in foot sores and torn stockings

? The colour of the blue cloth piping on the white shirts is bleeding so that means they don''t have a proper shirt to wear.

? The trousers are not made to proper measurements, either they are too tight or too loose.

Kindly send atleast 2 more shirts per staff as is the regular uniform issue as per our company''s policy

We hope that all these issues will be taken care of on an urgent basis

Regards

17. On 19.08.2006, the respondent sent the following e-mail to the petitioner:

Attention

Minutes from meeting concerning Uniform Issues on August 17, 2006

Discussion of concerns

1. Many uniform items are missing in all stations

2. Many uniform items are not properly fitting. Too small, Too tight.

3. Shoes for Cabin Attendants are sharp on both sides. They are too narrow for a standard fit

4. Items that were suppose to be altered, and that were stated to be altered were in fact not altered.

5. Shirts are too tight on the bustier girls

6. Shirts are bleeding on the sleeves where the dye is blue

7. Skirts and jackets do not match in dye color

8. The material is faded and crumpled in appearance

9. Sizes are wrongly sized

10. Cotton on the shirts is coming up from the fabric

Deadlines:

1. Arrival of new material 20 August 2006

2. Cabin Attendants Uniforms complete for Batch two by 24 August 2006, 56 pieces

3. Stations should have had complete uniforms by this date 28 August 2006. You have stated that you will not meet this Deadline. All other stations will be missing items until uniforms are produced.

18. On 21.08.2006, the respondent sent the following e-mail to the petitioner:

Hello Shan,

I would like to bring to your notice the issues regarding the Pilots uniforms:

1. As like Cabin Attendants, ALL the pilots uniforms are either too tight or too loose. E.g. a Pilot supposed to get a Medium size shirt gets XXL and vice versa. And if it fits fine from the above, the length of the shirt is too short that it comes out from the trousers.

2. As everyone facing this problem, along with the major fitting problems with their jackets and trousers, I had to request every pilot to visit the factory once and show it to the designer/master there which is again very difficult for the pilots.

3. We have not recd any shoes for pilots till date as the shoe made are not fitting acc to the sizes given.

4. Complete sets for July uniforms not recd till date.

5. Not recd any belts with a bigger size. Only one size for the belt (10 belts) was initially given.

Pilots are not at all happy with their uniforms fitting and esp getting incorrect sizes for shirts and jackets after taking the uniform measurements.

19. In the light of the aforesaid complaints, admittedly, a meeting was held between the parties at DLF Corporate Park on 21.08.2006, wherein certain decisions were taken by the parties. The minutes of this meeting were recorded by the respondent in its e-mail dated 22.08.2006, which reads as follows:

Hello,

Minutes from the meeting held at DLF Corporate Park August 21, 2006

1. Conducted a dye test with the new fabric in boiling water, and it did not bleed. Approval of new material as of August 21, 2008.

2. Do not use Surf Excel detergent while washing uniforms and the temperature should not be above 60 degrees.

3. Re-issue for all Cabin Attendants, Customer service agents, security and dispatchers will be re-issued new uniforms in the new blue material.

4. New Uniform deadline: All Stations and Cabin Attendants currently wardrobed in the old material will be re-issued the new uniforms by 21 Sep

5. Masterji will be traveling to the following stations for new measurements:

22 August DEL CCU 6E 302/Return CCU-DEL S2 316/22 August

23 August DEL BLR 6E 105

24 August BLR PNQ 6E 106

25 August PNQ DEL 6E 106

26 August DEL IMF 6E 201

27 August IMF GAU 6E 202

28 August GAU DEL 6E 202

I held a meeting with the following four uniform contacts on the following on August 21, 2006:

NIdhi Dhingra/Flight Operations - She has been instructed to seek Pilots to be re-measured based on the above schedule with Masterji. The Pilots have been furthered instructed to seek Hemant''s studio if they are here in Delhi for the re-measuring with the visual. In addition, the pilots will leave a footprint with Masterji to ensure proper fitting of the uniform shoe.

AK Bhatnagar/Engineering - He has been instructed to ask all Engineers whom have returned all uniform to be re-measured the visual. Stations Delhi or outstations according to Masterji''s schedule.

Satvinder Kaur/Customer Service - She has been instructed to send Masterji to the above stations to re-measure for all staff.

Ritu Saigal/In-Flight - We have had measurements taken from Masterji on August 20 for Batch 3. Batches 2 and 3 will be issued with the new uniform material.

Batch 2 will receive their uniforms by August 23, 2006.

Batch 3 will receive their uniforms TBA.

Batch one will receive new uniforms by September 21, 2006.

All stations will receive new uniforms by September 21, 2006

If your station or department has not received issued items with the old material, do not panic. There will be a month of no issue.

If you have employees currently not in uniform, black trousers, and the Indigo issued shirts is the temporary look. All grooming aspects still apply.

Any questions,

Please give me a call @ 9818624636

Shan J. Iwanicki

Director In-Flight

20. The undisputed position which emerges on a perusal of the aforesaid correspondence between the parties, which is not even denied by the petitioner is that the uniforms as originally manufactured and supplied by the petitioner were having various defects. The fabric being used for stitching the uniforms was not of standard quality and was leading to leaking of the dyes. In the meeting of 21.08.2006 the new fabric was approved by the respondent. It was further agreed that cabin attendants, customer service agents, security and dispatchers will be issued new uniform in the new blue material. The deadline set for delivery of new uniforms to all stations and cabin attendants, who were currently using the uniforms with the old fabric/material was fixed as September 21, 2006. The schedule for taking of measurements of the staff and personnel at various locations was also decided between the parties. Specific individuals were named, who were assigned the responsibility of making arrangements so that the production and supply of the new uniforms is achieved as per schedule. It was also agreed that Batch-2 will receive their uniforms by August 23, 2006. Batch-3 was to receive their uniforms on a date to be announced. Batch-1 was to receive its new uniform by September 21, 2006. It was also agreed that all stations will receive new uniforms by September 21, 2006.

21. Mr. Sanjay Jain, learned senior counsel for the petitioner candidly stated that there was nothing on record to show that the uniforms of Batch-2 were, in fact, delivered by August 23, 2006, as per the agreement between the parties arrived at on 21.08.2006. In the meantime, on 28.08.2006 the respondent tendered a cheque for Rs. 18,87,800/- after taking tax at source @ 5.61%. On the same day the petitioner returned the cheque to the respondent and sent an e-mail stating that the deduction of tax at source had been made under a wrong head. The petitioner stated that another cheque be issued in which the deductions of tax at source should be @ 2.24% an the cheque amount should be of Rs. 19,55,200/-.

22. The submission of Mr. Jain is that the respondent did not make payment in terms of the request dated 28.08.2006, for no rhyme or reason. He also submits that the tender of the aforesaid cheque by the respondent tantamounts to an admission of liability on the part of the respondent. He submits that even if one were to accept the fact that earlier there were complaints of delivery of inferior quality of product, delay in delivery of the uniforms and uniforms not being stitched according to specifications and measurements, the said issues were resolved in the meeting of 21.08.2006, wherein further time was granted to the petitioner upto 21.09.2006 to manufacture fresh uniforms with the new approved fabric. He further submits that the failure to deliver the uniforms for the second batch by 23.08.2006 stood condoned at the time of issuance of the cheque of Rs. 18,87,800/-, inasmuch as, the said cheque was issued after 5 days of the passing of the date of delivery i.e. 23.08.2006. Consequently, the failure to deliver the uniform and accessories either as per the original contract dated 05.07.2006 or even in accordance with the schedules fixed in the meeting of 21.08.2006 could not be a reason for the respondent to withhold the payment of Rs. 20 Lacs that the respondent had tendered on 28.08.2006 after deducting

TDS at a higher rate than what was applicable. The said payment had been made by the respondent towards discharge of its liability to make payment of 50% of the invoice amount of Rs. 76,38,186.40 in advance.

23. Mr. Jain further submits that the petitioner repeatedly offered the supplies to the respondent in accordance with the mutual understanding arrived at between the parties on 21.08.2006, but on each occasion the respondent refused to accept the delivery. Reference in this regard is made to the e-mail sent by the petitioner to the respondent on September 9, 2006, which reads as follows:

dear sir,

pls note that the Captains/Co-Pilots was ready for delivery as requested on 04/09/06. however the concerned person was not available for receiving the same at the IndiGo office. since then sir we have been trying to have them delivered. pls advise when can i send the same.

Thanks

24. Another e-mail was sent by the petitioner to the respondent on September 12, 2006 which reads as follows:

dear ritu

we are still awaiting for your reply to the below. pls note that we would need a written mail from your side for confirmation of the delivery not only for the 3rd batch cabin crew but also of the indigo uniforms of Customer Service & Captains/ Co-pilots and batch 1 & 2 of Cabin Crew for all stations. after such a written confirmation shall we proceed to deliver the uniforms.

further more we would like to emphasize that inspite of our repeated phone calls, mails etc there is no response from indigo''s side regarding the captains uniforms and the t-shirts which have been ready for delivery for 10 days now.

thus we would request you to pls reply to the mails.

25. On September 12, 2006 another mail was sent by the petitioner, which reads as follows:

dear ritu

pls note that we would be able to deliver the below against batch 3 cabin crew on 16/09/06.

1. ladies 3/4 slv jacket ... 2pcs / person 2. ladies skirt ... 2pcs / person 3. ladies shirt ... 3pcs / person 4. ladies belt ... 1pc / person 5. ladies shoes ... 1pair / person 6. ladies hand bag ... 1pc / person 7. ladies tote-bag ... 1pc / person pls also note that i need to send 1 pair of ladies shoes in each size for the girls to try on. pls advise how soon i can send the person for the same.

also the ladies t-shirts for batch 3 & 4 are, as you are aware, ready. i hope that the confusion regarding printed and yarn dyed has been cleared. pls advise when i shall deliver the same.

thanks.

26. Mr. Jain submits that since time had been extended for effecting delivery of the uniforms fabricated with the new approved fabric upto 21.09.2006, the respondent was not justified in refusing to accept the deliveries when offered from 04.09.2006 onwards. The respondent became liable to make payment of the invoices raised by the petitioner, as above tabulated.

27. The submission of learned senior counsel for the respondent Mr. Sandeep Sethi on the other hand is that the petitioner not only failed to adhere to the terms and conditions of the original contract dated 05.07.2006, but also failed to fulfil its obligations in terms of the understanding arrived at between the parties on 21.08.2006. Mr. Sethi submits that the plight of the respondent can be appreciated from the fact that the respondent had launched a new airline and its personnel and officers did not have proper uniform to wear till even after the operations of its airline took off. He submits that it is of utmost importance that the airline staff is properly attired to cast a good first impression on the customers as there is severe competition in the airline industry. He submits that the respondent had engaged the petitioner to carry out the work of providing uniforms for all the staff members of the respondent, only on account of the fact that the petitioner claimed to have the expertise and capacity to deliver in a timely manner uniforms of a high standard. However, the experience of the respondent was very disappointing and there were complaints not only regarding the quality of the fabric being very poor and losing its colour, but also of the petitioner''s failure to deliver various uniforms on time. Even the uniforms which were delivered failed to meet the specifications and measurements. He submits that the staff and personnel of the respondent airline even had to incur personal expenses to get the uniforms altered, and on many occasions even that was not possible as the uniforms were tight and there were no margins even to have the same altered. Mr. Sethi further submits that there is no averment to be found either in the petition, or in the civil suit filed by the petitioner against the respondent to the effect that Batch-2 was delivered on 23.08.2006, as per the mutual understanding arrived at on 21.08.2006. He submits that the petitioner had not even procured new approved fabric in terms of the understanding arrived at on 21.08.2006. He has referred to the various invoices of the materials stated to have been procured by the petitioner for fabrication of the uniforms. These invoices have been filed by the petitioner along with its civil suit being CS(OS) No. 1163/2007. These invoices are all of the period April, 2006 to 19.08.2006 i.e. prior to 21.08.2006 when the new fabric was approved. He submits that the petitioner, in fact, did not procure the approved fabric after 21.08.2006 and consequently, there was no question of the petitioner offering the uniforms fabricated from the new fabric. He submits that uniforms stitched with new approved fabric were never offered to the respondent. He refers to the

specific averments of the respondent in its reply contained in para 13 and 14, which has not been denied by the petitioner in its rejoinder. In para 13 of its reply the respondent has stated:

13. ...It is denied that the uniforms produced by the Petitioner pursuant to the 21st August, 2006, meeting, were according to the mutually selected fabric. It is evident that no fabric was purchased by the Petitioner pursuant to the 21st August 2006 meeting and it is for this reason that the Petitioner declined to give samples for verification....

28. In para 14, the respondent stated as follows:

14. ...The petitioner failed to procure any fabric post 21 August 2006. Further, it had been agreed that new deliveries should be accepted subject to verification of the availability of fabric and merchandise. This was a condition precedent for accepting deliveries. It is however denied that the Petitioner made any attempt to affect deliveries on 4th September 2006 as alleged. The employees of the Respondent company were instructed to not accept any consignment without verification. However, the Petitioner company admittedly declined to give samples for verification, to the production unit of Respondent and thus exonerating the Respondent from any obligation to accept any delivery...

29. To the aforesaid averments of the respondent, the petitioner in para 13 of the rejoinder has stated:

13. ...

It is denied that no fabric was purchased by the Petitioner pursuant to the aforesaid meeting for which the Petitioner declined to give samples for verification. It is asserted that the Petitioner was under no obligation to give samples of uniforms to the Respondent as per the agreed course of action....

30. Similarly, in para 14 of the rejoinder the petitioner stated as follows:

14. ...It is submitted that the Petitioner was under no obligation to provide any samples of the uniforms to the Respondent for verification. Therefore, it is denied that in the absence of such samples being provided, the respondent is exonerated from its obligation to accept delivery. At any rate, the Petitioner did not receive any request for samples on or around September 4, 2006 or September 12, 2006....

31. Mr. Sethi submits that the petitioner has, therefore, failed to specifically state as to when, according to it, the new fabric was procured in terms of the meeting dated 21.08.2006. He submits that the approach of the petitioner, despite being in default, was very high handed. Reference is made to the mail dated 06.10.2006 issued by the petitioner, which reads as follows:

Dear Mr. Bhandari,

your request for prototypes is noted. You can send your team with prior appointment to check the material and fitting.

Since we have reason to believe that indigo has procured the uniforms developed by Lecoanet Hemant from another manufacturer during the last weeks we will not send any merchandise until the following steps are taken care of:

Outstanding payment of 5,67,445.60 (See account statement in letter of 26/09) 100% advance against (re)delivery 1,27,628.80 (rejected delivery from 4th Sept.) 100% advance against delivery TBC (delivery scheduled for 21st Sept.)We would then deliver the above mentioned and could discuss further steps

I suggest that you come with your quality control team to see what we are talking about and then decide how you want to proceed.

We are looking forward to find an amicable solution.

Best regards

32. He submits that, pertinently, the issue of payment of the amount covered by the returned cheque of 28.08.2006 was not contemporaneously raised by the petitioner, as it was mutual understanding of the parties that payment would be made to the petitioner only upon delivery of uniforms of acceptable quality, specifications and measurement.

33. Mr. Sethi submits that the respondent has raised a bonafide dispute and defence and there are disputed questions of fact which arise in the present case, which cannot be determined in the present petition. He submits that the petitioner had already initiated a civil suit against the respondent being CS(OS) No. 1663/2007 which covers even the amount that, according to the petitioner, is contractually duly to it. He submits that the petitioner having raised the same issues in the suit, thereby inviting a trial on those issues, cannot be permitted to pursue the present petition. Mr. Sethi submits that since the termination of the contract had taken place in November, 2006, it cannot be said that the civil suit aforesaid was filed by the petitioner merely for saving limitation. The suit had been preferred some time in August, 2007, whereas the limitation available to the petitioner is uptill November, 2009. In these circumstances the petitioner should be left to pursue the civil suit and the present petition is not maintainable. He relies on Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, , Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, , State Trading Corporation of India Ltd. Vs. Punjab Tanneries Ltd., in support of his submission that winding up proceedings is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the Company, and that the fact that a civil suit had already been instituted to go into consideration while deciding the petition.

34. In his rejoinder Mr. Sanjay Jain states that the petitioner had made a demand for payment of Rs. 20 Lacs, the cheque in respect whereof had been returned to the respondent in good faith. He refers to the notice dated 26.09.2006 stated to have been issued to the respondent making the said

demand. He has tried to explain the averment made in para 13 of the rejoinder, as quoted hereinabove, by submitting that the same was made in response to the specific averment of the respondent that no fabric had been procured by the petitioner pursuant to the meeting dated 21.08.2006. He submits that the sample of the uniforms was sought by the respondent only on October 5, 2006, whereas the petitioner had offered fresh uniforms fabricated with the new approved fabric in September, 2006. He refers to para 34 of the plaint in the aforesaid civil suit which discloses the dates on which the cause of action for filing the suit arise.

35. He submits that as per the published accounts of the respondent company, the net loss suffered by the respondent company is Rs. 201 Crores. The respondent company has no fixed assets. All its aircrafts are leased. He submits that the petitioner would be satisfied so far as the present petition is concerned, if the amount covered by the returned cheque of Rs. 20 Lacs is paid by the respondent. He further submits that the admissions made by the respondent are evident from the following circumstances:

(i) That it placed orders for production of uniforms on the Petitioner;

(ii) That it was liable to pay an advance amount to the Petitioner, equivalent to 50% of Rs. 76,38,186.40/- i.e. the amount mentioned in aforesaid proforma invoice, even before the commencement of production of uniforms;

(iii) That under instructions of the Respondent Company, the Petitioner created original ''designs'' in order to produce the uniforms;

(iv) That the finished uniforms produced in accordance with measurements/ specifications received from the Respondent Company were indeed delivered;

(v) That the aforesaid uniforms were produced and dispatched for delivery well within the stipulated deadline kept for delivery.

(vi) That the Petitioner produced uniforms in accordance with the instructions given by the Respondent Company at the meeting held on August 21, 2006, as per the approved fabric and desired measurements/specifications;

(vii) That the finished uniforms produced subsequent to the aforesaid meeting of August 21, 2006, in accordance with measurements taken by the Petitioner, were not accepted by the Respondent Company, without providing any reasons therefore .

(viii) That a cheque for an amount of Rs. 18,87,800/- was issued by the Respondent Company in favour of the Petitioner, as part advance payment for its admitted liability, and was returned by the Petitioner only due to incorrect computation of tax deducted at source. Thereafter, the Respondent Company failed to hand over the revised cheque to the Petitioner.

(ix) That post August 21, 2006, the Respondent Company had not expressed any concern whatsoever vis-?-vis the uniforms produced exclusively for the

Respondent Company, in accordance with the terms agreed upon the parties.

36. Having heard learned senior counsels for the parties, I am of the view that the present petition is not maintainable and the same is liable to be dismissed since the same raises highly disputed questions of fact, which cannot be adjudicated upon in the present petition. I also find that the respondent has raised a bonafide defence, which cannot be said to frivolous or moonshine. The defence raised by the respondent certainly requires a trial and adjudication. It cannot be said to be a defence raised merely to avoid payment of an otherwise admitted liability.

37. Admittedly, there was default on the part of the petitioner in not supplying the uniforms of acceptable quality by 21.07.2006. The fact that the uniforms were defective stands substantially admitted by the petitioner. Even after the meeting dated 21.08.2006 it appears that there was non compliance of its obligations by the petitioner. The petitioner is not able to point out whether Batch-2 was delivered on 23.08.2006 or not, as per the mutual understanding of 21.08.2006. According to the respondent despite the meeting dated 21.08.2006, the petitioner had failed to procure the newly approved fabric. The respondent states that it had asked for verification of the new uniforms offered by the petitioner, but such verification was denied. Though the petitioner disputes and denies that any such issue was raised by the respondent, it is pertinent to note that the petitioner in its own alleged communication dated 26.09.2006 (The receipt of this communication is denied by the respondent. However, since the petitioner claims to have sent this communication the petitioner would, in any event, continue to be bound by what is recorded therein) stated the reason for the respondent''s refusal to accept the uniforms offered by the petitioner from 04.09.2006 onwards in the following words:

3. Accordingly, we have put in all our effort and mobilized resources to meet your specifications and requirements within the agree time lines. Unfortunately and to our utmost surprise, on September 4, 2006, your office refused to accept the delivery of T-Shirts and Captain''s uniforms without providing us with any explanations for the refusal. It was only after repeated follow up from our side, were we informed (and that too verbally) by your staff that the T-Shirts were rejected since they were not produced using the approved fabric. However, till date, no reason has been given for refusal of the Captain''s uniforms. The allegation of use of unapproved material is incorrect as is evident from the order authorized by Mr. Hamilton-Manns of your company. Our request for confirmation of the delivery on September 21, 2006 were ignored and there has been no response to any of our attempts to communicate with you and your office.

38. Therefore, it has come from the petitioner''s mouth that the uniforms were being rejected by the respondent on the ground that they have not been produced using the approved fabric. The issue before me is not whether the petitioner, in fact, used the newly approved fabric or not while tendering the uniforms from 04.09.2006 onwards. For my purpose, what is relevant is the fact

that, even according to the petitioner, the aforesaid was a ground taken for rejecting the uniforms by the respondent contemporaneously. This shows that the respondent had contemporaneously raised a dispute of fact, which cannot be said to be without substance in view of the respondents averment that the petitioner had failed to procure the newly approved fabric after 21.08.2006, since no document to establish the purchase of the new fabric has been placed on record. The normal course of human conduct is: once bitten twice shy. Therefore the stand of the respondent that it wanted the petitioner to first satisfy the respondent regarding the use of the newly approved fabric before accepting the uniforms offered by the petitioner or paying for the same appears to be plausible. I may also refer to the e-mail communication sent by the respondent to the petitioner on 04.09.2006. This e-mail not only talks about the terms on which the respondent was willing to make payment to the petitioner, but also about the verification of the uniforms. The relevant extract of the said e-mail reads as follows:

...

I am actually more surprised that you find the change in our relationship "inexplicable"! The explanation is quite simple really - we have not received any of the products that we paid for! The fabric is not what we asked for. The uniforms don''t fit. We have been operating the airline for a month now and we still do not have the uniforms that you said you will produce for us.

You committed this afternoon to me that we will have all the replacement uniforms by the 21st of September and we agreed that once IndiGo has had a chance to verify that the uniforms are of the same quality and specifications as we asked for, the payments will be made to you. Is there any change since then?

I don''t want to sound rude but I think that for this relationship to continue and for us not to terminate this agreement for breach on your part, we need to receive the products as we ordered. I think the remedy period for rectifying a breach according to our agreement is 60 days...... which is fast running out!

39. The petitioner responded to this e-mail on 05.09.2006. The said is extracted, in its entirety is reproduced hereinbelow:

Dear Aditya,

Thank you for your very simplified reply.

The shift of communication I refer to is from Rahul Bhatia to you, he who insisted on mastering each and every detail of our collaboration so far. I also noted the total abstraction of our development of the product free of charge for IndiGo and the chronically late placing or orders on your behalf, which is the main delay you omitted to mention in your mail. It has also come to our knowing that you are having a counter product of our uniform developed in the meantime and contrarily to what you had mentioned earlier it appears it is in a material which is much more expensive than the one you asked us to develope for you. Please do include us in this briefing if possible, I had repeatedly stressed while making the uniforms for you, that we could make something far superior in a more expensive material. The delivery of uniforms on September 21 is not something I confirmed yesterday although that may be new to you, it was decided in the last meeting with Rahul Bhatia and is in the minutes I could forward to you if needed. You also mention that the uniforms are ill-fitting. This is due to (again) late orders from IndiGo and non-communication of proper measurements of employees, as uniforms have to be made one by one to fit each individual. This has been tackled in the meantime as our pattern master has visited all your stations. The minutes referred to earlier also mention the need of a person in charge of uniform logistics at IndiGo, as this task was theoretically given to us to be done entirely by Mr. Bhatia. The point I am trying to make is that we really need someone to be controlling your side of the collaboration .I would also like to mention your T-shirt order, that was placed in a very orderly manner after having test worn a pre-series confirmed by you and which we tried to deliver yesterday. This delivery was refused by IndiGo because you had the impression of having ordered a different product. The product you asked for at one point was not possible to be made in India, the IndiGo graphics we developed for you and which you wanted woven into the material, were too intricate, we had confirmed this a couple of months ago and the question had never been raised again. So as you see there are far more parameters in our collaboration than mentioned in the contract and your mail, I am sending this mail only to you because of the T-shirt solution you promised to tackle personally.

Best, Hemant

40. From the aforesaid response, it is seen that the petitioner tried to give its own explanation for the delays and defaults in the performance of the contract. However, what is pertinent to note is that there was nothing said to contradict the respondent''s stand with regard to the verification of the quality of the offered uniforms, or with regard to the payment being made.

41. The respondent has categorically denied having received the invoices of the amount of Rs. 24,90,778.80/-. The respondent admits the receipt of only one invoice of Rs. 9,08,200.80/- and submits that the other four invoices mentioned in paragraph 15 of the petition have not been served on the respondent. From the tabulation of invoices stated to have been sent by the petitioner, it is seen that the first four invoices pertain to deliveries stated to have been made up on 7.08.2006, that is prior to the meeting of 21.08.2006. Since these supplies evidently were defective for one or the other reason, the liability of the respondent to make payment on these invoices in their entirety is seriously disputed. So far as the fifth invoice dated 29.08.2006 is concerned the receipt of this invoice is also denied by the respondent. Along with the rejoinder the petitioner has placed on record the gate passes to show the dispatch of the uniforms in respect of which the invoices dated 29.08.2006 is stated to have been issued. The respondent disputes having received the said uniforms or even

these gate passes, by submitting that these are merely the gate passes which show alleged movement of goods from out of the factory gate of the petitioner, but these gate passes do not show the receipt of the goods by the respondent. Admittedly, on these gate passes there is no endorsement to be found showing the receipt of the goods covered thereby at the respondent''s end. Therefore, in my view, it cannot be said with any amount of certainty at this stage that the goods stated to be covered by the said gate passes (to which the invoice dated 29.08.2008 pertains) were, in fact, delivered to the respondent.

42. In my view the tender of cheque of Rs. 18,87,800/- after deduction of tax at source on 28.08.2006 by the respondent cannot be considered to be payment tendered by the respondent against the supply of any specific goods. From the proforma invoice dated 22.07.2006, it is evident that 50% of the amount was to be paid as advance and the remaining 50% within 30 days of the supply being made. Strictly speaking, this part of the agreement was not adhered to by the parties. It is also seen that the petitioner itself did not consider the failure of the respondent to make payment of 50% advance as a breaking point in the relationship between the parties. The petitioner continued to manufacture and supply the uniforms, though substandard and not meeting the specifications and measurements, from time to time. It appears that the respondent tendered the aforesaid cheque as ''on account'' payment, but after the same was returned by the petitioner, the respondent did not tender the payment as it appears to have realized the continued failure of the petitioner to meet its contractual obligations including those undertaken on 22.08.2006. The tender of the cheque for Rs. 18,87,800/- therefore, in my view, cannot be considered to be an admission of liability to that extent by the respondent towards the petitioner.

43. Though Mr. Sandeep Sethi, learned Senior Counsel for the respondent has sought to urge that the petition is not maintainable as the claim in the statutory notice is for a larger amount than what is claimed to be admittedly due to the petitioner in this petition. He has placed reliance on the decision in Om Packages Vs. Agro Dutch Foods Ltd., . I do not agree with the submission of Mr. Sethi in view of the decision of the Supreme Court in Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., . The Supreme Court has held:

....where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely (See Re. Tweeds Garages Ltd. [1962] Ch. 406.

44. I also do not agree with the submission of Mr. Sethi that the petition is liable to be dismissed on account of concealment of any fact. The petitioner has made sufficient disclosures in the petition. Merely because the communication dated 17.11.2006 terminating the contract, though referred to, has not been filed and a few e-mail exchanged between the parties have not been filed, it cannot be said that the petition is liable to be dismissed on that ground.

45. However, I find support in my view that the present petition should be dismissed on the ground that it raises disputed questions of fact; that the respondent has raised a plausible and bona fide defence, and; that the petitioner has already instituted a Civil Suit for recovery of the disputed debt and that the machinery for winding up should not be allowed to be used merely as a means for realizing a disputed debt from the company from the decisions relied upon by the respondent.

46. For the reasons aforesaid, the present petition is dismissed with costs quantified at Rs. 20,000/-. However, the findings recorded by me shall not prejudice either party in any other legal proceedings including the civil suit filed by the petitioner.

