

**IN THE HIGH COURT OF KARNATAKA, BENGALURU**

**DATED THIS THE 7<sup>TH</sup> DAY OF FEBRUARY 2017**

**BEFORE**

**THE HON'BLE Dr.JUSTICE VINEET KOTHARI**

**Co.P.No.57/2012**

**C/W**

**Co.P.No.121/2012, Co.P.No.122/2012,**

**Co.P.No.185/2012, Co.P.No.248/2012,**

**Co.P.No.51/2013, Co.P.No.99/2013,**

**Co.P.No.162/2013, Co.P.No.265/2013 &**

**Co.P.No.148/2016**

**Company Petition No.57/2012**

**Between:**

IAE International Aero Engines AG  
628 Hebron Avenue, Suite 400  
Glastonbury  
Connecticut 06033, USA  
Represented herein by its  
Attorney, Mr. Parminder Singh Dadhwal.

**... Petitioner**

**(By Mr. Shreyas Jayasimha, for AZB & Partners)**

**And:**

United Breweries (Holdings) Limited  
UB City, Level 12, UB Tower  
24 Vittal Mallya Road  
Bangalore – 560 001.

**... Respondent**

**(By Mr. Udaya Holla, Senior Counsel for  
M/s. Holla & Holla,**

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**Mr. C.K. Nandakumar, Advocate for Opposing Creditors  
Mr. Sajjan Poovayya, Senior Counsel for  
Mrs. Nalina Mayegowda & Mr. Praveen Kumar, for  
Poovayya & Co., for Objectors  
S.A. Partners, for Objectors  
M/s. Fox Mandal Assts., for Objector  
Mr. Ramanand Mundkur for M/s. Mundkur Law Partners,  
for Creditors)**

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This Company Petition is filed under Section 439(1)(b) r/w Sections 433(e), 433(f), 434 and 450 of the Companies Act, 1956, praying to order that the Respondent - Company be wound up under Section 433 of the Companies Act, 1956, pass such interim and other orders as deemed necessary to preserve and protect the assets of the Respondent - Company and that of the petitioner & etc.,

**Company Petition No.121/2012**

**Between:**

RRPF Engine Leasing Limited  
Having its registered office at  
65 Buckingham Gate, London  
SW1E 6AT, England  
Represented herein by its  
Authorised Signatory  
Mr. Jitendra Panda.

**... Petitioner**

**(By Mr. Pramod Nair, for Arista Chambers)**

**And**

United Breweries (Holdings) Limited  
Having its registered office at  
UB Tower, Level 12, UB City  
No.24, Vittal Mallya Road  
Bangalore – 560 001, Karnataka.

**... Respondent**

**(By Mr. Udaya Holla, Senior Counsel for  
M/s. Holla & Holla, Mr. C.K. Nandakumar, Advocate for  
Opposing Creditors,  
Mr. Sajjan Poovayya, Senior Counsel for  
Mrs. Nalina Mayegowda & Mr. Praveen Kumar for  
Poovayya & Co., for Objectors  
S.A. Partners, Advocate for Objectors  
Fox Mandal, Advocate for Objectors  
Mr. Ramanand Mundkur for  
M/s. Mundkur Law Partners  
Advocate for Creditors)**

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This Company Petition is filed under Section 433(e), 434 and 439 of the Companies Act, 1956, praying to pass an order winding up of the above named Respondent, United Breweries (Holdings) Limited, under the provisions of the Companies Act, 1956 on the ground of its inability to pay debts and pass such other or further order(s)/direction(s) as this Hon'ble Court may deem just and proper in the facts and circumstances of this case.

**Company Petition No.122/2012**

**Between:**

Rolls-Royce & Partners Finance Limited  
Having its registered office at  
65 Buckingham Gate, London SW1E 6AT  
England  
Represented herein by its Authorised Signatory  
Mr. Jitendra Panda.

**... Petitioner**

**(By Mr. Pramod Nair, for Arista Chambers)**

**And**

United Breweries (Holdings) Limited  
Having its registered office at  
UB Tower, Level 12, UB City  
No.24, Vittal Mallya Road  
Bangalore – 560 001, Karnataka.

**... Respondent**

**(By Mr. Udaya Holla, Senior Counsel for  
M/s. Holla & Holla,  
Mr. C.K. Nandakumar, Advocate for Opposing Creditors  
Mr. Sajjan Poovayya, Senior Counsel for  
Mrs. Nalina Mayegowda & Mr. Praveen Kumar for  
Poovayya & Co., for Objectors  
S.A. Partners, for Opposing Creditors  
Fox Mandal Assts., for Opposing Creditors  
Mr. Ramanand Mundkur for  
M/s. Mundkur Law Partners  
for Creditors)**

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This Company Petition is filed under Section 433(e),  
434 and 439 of the Companies Act, 1956, praying to pass an

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order of winding up of the above named Respondent, United Breweries (Holdings) Limited, under the provisions of the Companies Act, 1956 on the ground of its inability to pay debts and pass such other or further order(s)/direction(s) as this Hon'ble Court may deem just and proper in the facts and circumstances of this case.

**Company Petition No.185/2012**

**Between:**

Avions de Transport Regional GIE  
1 Allee Pierre Nadot, 31172 Blagnac  
France  
Represented herein by its Attorney  
Mr. Sudarshan Pradhan  
R/at. Mausleri House, 7 Kapashera Estate  
New Delhi – 110037.

**... Petitioner**

**(By Mr. C. Muralidhar, for Murali & Co.)**

**And:**

United Breweries (Holdings) Limited  
Having its Regd. Office at UB City  
Level 12, UB Tower  
24, Vittal Mallya Road  
Bangalore – 560 001.

**... Respondent**

**(By Mr. Udaya Holla, Senior Counsel for  
M/s. Holla & Holla)**

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This Company Petition is filed under Sections 433(e) and 433(f) r/w Section 434 and 439(1)(b) of the Indian Companies Act, 1956, praying to pass an order to wind up the Respondent Company. Pass such interim and other orders as may be necessary to preserve and protect the assets of the Respondent Company. Pass such other and further order(s) as this Hon'ble Court may deem just and appropriate in the facts and circumstances of the case.

**Company Petition No.248/2012**

**Between:**

BNP Paribas  
a company incorporated under the  
laws of the Republic of France  
having its registered office at  
16 Boulevard des Italiens, 75009  
Paris, France  
Represented herein by its Constituted Attorney  
Mr. Sabesan Ananthanarayanan &  
Mrs. Hyacinth Munshi  
working at 3<sup>rd</sup> Floor, Land Mark Building  
#21/15, M.G. Road, Bangalore – 560001.

**.... Petitioner**

**(By Mrs. Fereshte Sethna, Mr. Shanthanu Singh  
& Mr. Prashanth G, Advocates)**

**And:**

United Breweries (Holdings) Limited  
a public limited company incorporated  
under the Companies Act, 1956  
Having its registered office at

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12<sup>th</sup> Floor, UB Tower, UB City  
No.24, Vittal Mallya Road  
Bangalore – 560 001.

**... Respondent**

**(By Mr. Udaya Holla, Senior Counsel for  
M/s. Holla & Holla,  
AZB & Partners, Advocate for Supporting Creditors  
Mr. C.K. Nandakumar, Advocate for Opposing Creditors  
Mr. Sajjan Poovayya, Senior Counsel for  
Mrs. Nalina Mayegowda & Mr. Praveen Kumar for  
Poovayya & Co., for Objectors  
Mr. A. Murali & Co., for Objector  
Mr. D.L.N. Rao, Senior Counsel for  
Mrs. S.R. Anuradha, Advocate for Objector  
Mr. Ramanand Mundkur,  
M/s. Mundkur Law Partners, for Objector)**

This Company Petition is filed under Section 439(1)(b) r/w Sections 433(e), 433(f), 434 and 450 of the Companies Act, 1956, praying to order that the Respondent be wound up under the provisions of the Companies Act, 1956. Award costs of the proceedings to the Petitioner and pass such other and further orders as this Hon'ble Court deem just and appropriate in the facts and circumstance of the case.

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**Company Petition No.51/2013**

**Between:**

United Bank of India  
A Banking company constituted under the

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Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970 and having its Registered office at 11, Hemanta Basu Sarani Kolkata-700001 and having amongst others a Bangalore Branch office at 40 K.G. Road Bangalore-560 009.

**... Petitioner**

**(By Mr. M.V. Kini, Advocate)**

**And:**

United Breweries (Holdings) Ltd.,  
Having its Registered office at  
UB Tower, Level-12, UB City  
Bangalore-560 001.

**... Respondent**

**(By Mr. Udaya Holla, Senior Counsel for**  
**M/s. Holla & Holla**  
**Mr. C.K. Nandakumar, Advocate for opposing Creditors**  
**Mr. Sajjan Poovayya, Senior Counsel for**  
**Mrs. Nalina Mayegowda & Mr. Praveen Kumar for**  
**Poovayya & Co., for Objectors**  
**S.A. Partners, for Objectors**  
**FOX Mandal Assts., for Objectors in C.A.322/15)**  
**Mr. Ramanand Mundkur for**  
**M/s. Mundkur Law Partners, Advocate for Creditors)**

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This Company Petition is filed under Section 433(e) & 434(1)(a) & (c) of the Companies Act, 1956, praying that the said company United Breweries (Holdings) Ltd., be wound up under the direction and order of this Hon'ble Court as per the provisions under Companies Act, 1956 & etc.,



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**Company Petition No.99/2013**

**Between:**

Hindustan Petroleum Corporation Ltd.  
A Company incorporated under the  
Provisions of the Companies Act, 1956 and  
Having its Registered office at  
Petroleum House, 17, Jamshedji Tata  
Road, Mumbai-400 020.

**... Petitioner**

**(By Mr. V.S. Arabatti, for Mulla & Mulla & Craigie Blunt)**

**And:**

United Breweries (Holdings) Ltd.  
A Company incorporated under the  
Provisions of the Companies Act, 1956 &  
Having its Registered office at  
UB Tower, Level-12, UB City  
24 Vittal Mallya Road, Bangalore-560 001.

**... Respondent**

**(By Mr. Udaya Holla, Senior Counsel for  
M/s. Holla & Holla,  
Mr. C.K. Nandakumar, Advocate for Opposing Creditors  
Mr. Sajjan Poovayya, Senior Counsel for  
Mrs. Nalina Mayegowda & Mr. Praveen Kumar for  
Poovayya & Co., for Objectors  
S.A. Partners, for Objectors  
Fox Mandal Assts., for Objectors  
Mr. Ramanand Mundkur for M/s. Mundkur Law Partners  
for Creditors)**

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This Company Petition is filed under Sections 433(e) and (f) & 434 of the Companies Act, 1956, praying that the Respondent company United Breweries (Holdings) Ltd., be ordered to be wound up by and under the orders, directions and supervision of this Hon'ble High Court.

**Company Petition No.162/2013**

**Between:**

1. **State Bank of India**  
A banking corporation  
constituted under the  
State Bank of India Act, 1955  
(23 of 1955),  
having its Corporate Centre at  
State Bank Bhavan  
Madame Cama Road  
Nariman Point  
Mumbai-400021.  
And having its Industrial Finance  
branch at 61, Residency Plaza,  
Residency road, Bengaluru-580 025.
  
2. **Axis bank limited**  
A company incorporated under  
the Companies act, 1956 and  
a banking company within the  
meaning of Section 5(c) of  
the Banking Regulation Act  
1949 and having its  
registered office at Trishul  
Third floor, opp. Samartheswar temple  
Law Garden, Ellisbridge  
Ahmedabad-380006  
Gujarat, India  
And having its corporate  
office at Axis House, C-2

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Wadia International Centre  
Pandurang Budhkar Marg  
Worli, Mumbai-400025.

3. **Bank of Baroda**  
a body corporate under the  
Banking Companies (Acquisition  
and Transfer of Undertaking)  
Act, 1970 (5 of 1970)  
having its head office at  
Baroda House  
P.B.No. 506, Mandavi  
Vadodara-396006  
Acting through its branch  
office at P.O.Box 11745  
Samata Building  
General Bhosale Marg  
Nariman Point, Mumbai-400021.
4. **(Deleted as per order dated 25.01.2017)**
5. **(Deleted as per order dated 25.01.2017)**
6. **Corporation Bank**  
a body corporate under  
Banking Companies (Acquisition and Transfer  
Undertaking) Act, 1980  
(40 of 1980) having its  
Corporate Office at  
Mangaladevi Temple Road  
Pandeshwar, Mangalore-575001  
And having its Industrial  
Finance Branch at Rallaram  
Memorial bldg., 1<sup>st</sup> floor  
CSI Compound, Mission Road  
Bengaluru-560027.
7. **The Federal Bank Limited**  
a company within the meaning  
of the Companies Act, 1956

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having its registered office  
at Federal Towers  
Aluva-683101, Kerala  
and having its branch office  
at St. Marks road  
9, Halcyon complex  
St. Marks Road  
Bangalore-560001.

8. **IDBI Bank Limited**  
a company incorporated  
under the companies act, 1956  
and a banking company within  
the meaning of the Banking  
Regulation Act, 1949 having  
its head office at IDBI Tower  
WTC complex, Cuffe Parade  
Mumbai-400005  
Maharashtra, India  
And acting through its branch  
office at Corporate Banking  
Group-FAMG, 9<sup>th</sup> floor  
IDBI tower, WTC complex  
Cuffe Parade  
Mumbai-400005
9. **Indian overseas bank**  
a body corporate under the  
Banking Companies (Acquisition  
and Transfer of Undertaking)  
Act, 1970, having its central  
office at 763, Anna Salai  
Chennai-600002  
And its branch office at  
'Harikripa', 26-A, S. V.Road  
Santacruz (W), Mumbai-400054.
10. **Jammu & Kashmir Bank Limited**  
a banking company incorporated  
under the provisions of the

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Jammu & Kashmir Companies  
Act No. XI of 1977 (Samvat)  
having its registered office  
at Corporate Headquarter  
Maulana Azad Road  
Srinagar, Kashmir-190001  
And its branch office at  
Syed House, 124  
S. V. Savarkar Marg  
Mahim (West), Mumbai-400016.

11. **Punjab & Sind Bank**  
a body corporate under  
Banking Companies (Acquisition  
and Transfer of Undertaking)  
Act, 1980,  
having its Head office at 21,  
Rajendra place, New Delhi-110008  
And having amongst others  
a branch office at J.K. Somani  
Building, British Hotel Lane  
Fort, Mumbai-400023.
12. **Punjab National Bank**  
a body corporate under the  
Banking Companies  
(Acquisition and Transfer  
of Undertaking) Act, 1970  
(5 of 1970) having its head  
office at 7, Bhikaji Cama  
Place, New Delhi-110607  
Acting through its Large  
Corporate Branch at Centenary  
Building- 28, M.G.Road  
Bengaluru-560001.
13. **State Bank of Mysore**  
a body corporate constituted  
under The State Bank of India  
(Subsidiary Banks) Act, 1959

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having its head office at  
Kempe Gowda Road  
Bengaluru-560009  
And its Corporate Accounts  
Branch at No.18, Ramanashree Arcade,  
M.G. Road, Bangalore-560001.

14. **UCO Bank**

a body corporate constituted  
under the Banking Companies  
(Acquisition & Transfer of  
Undertakings) act, 1970 and  
having its head office at  
10, BTM Sarani, Kolkata-700001  
West Bengal, India  
And its branch office at  
1<sup>st</sup> floor, 13/22  
K.G.Road, Bengaluru-560009.

15. JM Financial Asset Reconstruction  
Co.Pvt. Ltd.  
Having its registered office at  
7<sup>th</sup> floor, Cnergy  
Appasaheb Marathe Marg  
Prabhadevi, Mumbai-400 025.  
(Inserted as per order dated 25.01.2017)

... **Petitioners**

**(By Mr. S.S. Naganand, Senior Counsel for  
Mr. Shrikara P.K., for DUA Associates)**

**And:**

**United Breweries (Holdings) Limited.,**  
A public company incorporated under the  
Provisions of the Companies Act, 1956 &  
Having its Registered office at  
UB Tower, Level-12, UB City,  
24 Vittal Mallya Road,

Bangalore-560 001.

**... Respondent**

**(By Mr. Uday Holla, Senior Counsel for  
M/s. Holla & Holla,  
Mr. C.K. Nanda Kumar, Advocate for opposing Creditors  
Mr. Sajjan Poovayya, Senior Counsel for  
Mrs. Nalina Mayegowda & Mr. Praveen Kumar for  
Poovayya & co., for Objectors  
S.A. Partners, for Objectors  
FOX Mandal Assts., Advocate for Objectors in  
C.A.320/15)  
Mr. Ramanand Mundkur for M/s. Mundkur Law Partners  
for Creditors)**

This Company Petition is filed under Section 433(e) & (f) r/w Section 434 and 439 of the Companies Act, 1956, praying to order that the Respondent company be wound up under Section 433(e) & (f) of the Companies Act, 1956 & Etc.,

**Company Petition No.265/2013**

**Between:**

Oriental Bank of Commerce  
A body corporate, Constituted under the  
Banking, Companies (Acquisition and  
Transfer of undertakings) Act, 1980  
And having its corporate office at  
Plot No.5, institutional area, Sector 32  
Gurgaon, Haryana  
And a Branch known as large  
Corporate Branch, 'The Land Mark'  
#21/15, M.G. Road, Bangalore – 560001  
Represented by its  
Assistant General Manager

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Mr. T.S. Bhangu.

**... Petitioner**

**(By Mr. M. Mohamed Ibrahim, Advocate)**

**And:**

M/s. United Breweries (Holdings) Limited  
Registered Office  
UB Tower, Level-12, UB City  
#24 Vittal Malya Road  
Bangalore-560 001  
Represented by its  
Managing Director.

**... Respondent**

**(By Sri. Udaya Holla, Senior Counsel for  
M/s. Holla & Holla)**

This Company Petition is filed under Section 433(e) & (f) r/w 434(1)(a) & 439(1)(b) of the Companies Act, 1956, praying that the Respondent be wound up by this Hon'ble Court under the provisions of the Companies Act, 1956. That the official Liquidator of this Hon'ble Court or some other suitable person be appointed as Liquidator of the Respondent to conduct its affairs and distribute its assets in accordance with law and etc.,

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**Company Petition No.148/2016**

**Between:**

IDBI Bank Limited  
Infrastructure Corporate Group  
2<sup>nd</sup> Floor, Mafatlal Centre  
Nariman Point, Mumbai – 400 021.

Represented by



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Sri. S. Ajay Kumar Seshadri  
Assistant General Manager.

... **Petitioner**

**(By Mr. T.P. Muthanna, Advocate)**

**And:**

1. United Breweries (Holdings) Limited  
UB Tower, Level-12, UB City  
No.24, Vittal Malya Road  
Bengaluru-560 001.
2. UB Engineering Limited  
Sahyadri Sadan  
Tilak Road, Pune-411030.

... **Respondents**

**(By Sri. Udaya Holla, Senior Counsel for  
M/s. Holla & Holla, R1  
R2 - served & unrepresented)**

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This Company Petition is filed under Section 433(e) & (f) r/w 439, Companies Act, 1956, praying to pass an order for winding up of the Respondent No.1, i.e., M/s. United Breweries (Holding) Ltd., under the provisions of the Companies Act, 1956 to enable the petitioner to recover the huge debt which is public money. Pass orders that may be deemed fit under the facts and circumstances of the case in the interest of justice.

These Company Petitions having been heard and reserved for Orders on **11-01-2017**, coming on for Pronouncement of Orders, this day, **Dr Vineet Kothari, J**, made the following:

**ORDER**

1. These winding up petitions have been filed by host of creditors in this Court, seeking the winding up of the Respondent – Company, **United Breweries (Holdings) Limited ('UBHL'** for short) and in these ten winding up petitions, the secured creditors, consortium of Banks, 14 in number, led by State Bank of India (SBI) and various unsecured creditors like suppliers of Aero Engines, Lessors of Aircrafts and Service Providers who have invoked Corporate Guarantees furnished by the Respondent – Company, UBHL, to them to secure their loans, advances and supplies to King Fisher Airlines Limited (KFAL), have approached this Court, against the Respondent Company – UBHL, which was initially a Holding Company of the King Fisher Airlines Limited, but, later on diluting its shareholding in that, the said King Fisher Airlines Limited (KFAL) did not remain a Subsidiary Company, however, the existence and

validity of Corporate Guarantees given by the Respondent Company – UBHL continued.

**2. The King Fisher Airlines Limited (KFAL)** has already been ordered to be wound up recently by this Court in its judgment and order dated **18/11/2016** in **Company Petition No.214/2016 a/w. C.A.No.1183/2012 & C.A.No.1184/2012 (Aerotron Limited Vs. Kingfisher Airlines Limited)** and various other winding up petitions against KFAL.

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

Bureau of Investigation (CBI) are pursuing him for their respective recoveries.

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

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

of the assets of the said Company, KFAL and file a Status Report before this Court.

**6.** That soon thereafter, when the present set of winding up petitions against the Respondent - Company, UBHL were taken up for hearing, a serious contest was put up against these winding up petitions by Mr. Udaya Holla, Senior counsel for UBHL and other counsels appearing for the supporting creditors to oppose the winding up by Mr. Sajan Poovayya, Senior Advocate and Ms. S.R. Anuradha, learned counsels appearing for workmen of the Respondent - Company, UBHL and other allied companies.

**7.** The dues claimed from the Respondent - Company were relating to the KFAL and it is on the anvil of the Corporate Guarantees of UBHL and personal Guarantees given by Dr. Vijay Mallya to these petitioning creditors, which were invoked and on account of the failure to discharge the said Guarantee

obligations, these winding up petitions were filed by the different secured and unsecured creditors and the learned counsel appearing for the petitioning creditors also made emphatic arguments before this Court for seeking the winding up of the Respondent – Company, as they submitted that not only the Respondent – Company, UBHL has failed to pay its admitted liability and debts arising under these Corporate Guarantees but the defences put forth by them are flimsy and unsustainable and the Respondent – Company, UBHL cannot wriggle out of its Guarantee obligations and the net-worth of the Respondent - Company is also in negative and there is not even an iota of hope of the said Company, UBHL reviving its net worth in positive in such a manner to meet the financial obligations of the petitioners against it and it is not only a commercially insolvent Company, but otherwise also it is absolutely just and equitable to wind up the Respondent -

Company. The winding up is thus sought under Section 433(c),(e) and (f) of the Companies Act, 1956.

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

**9.** Though the new Companies Act, 2013 has been enforced in India and some jurisdictions under that new Law have been transferred from this Court to **National Company Law Tribunal**, but under the recently issued **Notification** dated **07/12/2016** by the Central



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Government, the winding up petitions in which Respondent - Company had already been served with the Court summons have been retained in High Courts and are to be disposed of by the High Courts only.

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

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

**Company Petition No.162/2013 - SBI and 13 other Banks Vs. UBHL:**

**12.** The consortium of 14 Banks led by SBI have filed this winding up petition claiming a sum of ₹6,203.35 crores from the Respondent-Company, UBHL as on **31/05/2013** by virtue of its obligations under the

Corporate Guarantee executed by Respondent – Company, UBHL in favour of the petitioners to secure the obligations of KFA Limited (KFAL).

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

**14.** The petitioners have stated before the Court that the petitioners, State Bank of India (SBI), Axis

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

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facilities provided to KFAL were treated as Single Working Capital facility and the financial documents and securities were created in pursuance of the said MDRA.

**15.** The State Bank of India was appointed as Lenders' Agent by other petitioners and the borrower, KFAL and other subsidiaries, that is, Respondent – Company, UBHL and Dr. Vijay Mallya executed the Corporate Guarantee in favour of the petitioners. The State Bank of India Cap Trustee Limited (SBICAP) was appointed as Security Trustee for the benefit of petitioners - Banks and the KFAL, the Respondent - UBHL and King Fisher Finvest (India) Limited (KFFIL) entered into a Pledge Agreement dated **21/12/2010** for the purpose of pledging certain shares owned by the pledgors in favour of SBI, kept for the benefit of petitioners – Banks. The Respondent – Company, UBHL executed a Corporate Guarantee Agreement on

**21/12/2010** with the petitioner No.1 – SBI and Dr. Vijay Mallya also executed a Personal Guarantee under the said MDRA and other financial documents, on **21/12/2010**.

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

**17.** The petitioners have also submitted that they have initiated action against the Respondent -

Company, UBHL, under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement Security Interest Act, 2002 ('SARFAESI' Act) and the representations and objections filed by the Respondent - UBHL, were rejected by the said Tribunal.

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

to some how create as many hurdles for recovery of outstanding dues to the petitioners as possible.

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

Section 529, 529-A and other relevant provisions of the Indian Companies Act, 1956.

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

**21.** Besides all serious arguments, on lighter side to a query as to what was the subject of Ph.D. of Dr. Vijay Mallya, the learned Senior Counsels appearing on defence side without being specific, only passed an intriguing smile.



**Company Petition No.57/2012 - IAE International  
Aero Engines AG Vs. UBHL**

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

**23.** The Respondent – Company, UBHL executed two Corporate Guarantees, **Guarantee No.1** under Repayment Agreement on **10/11/2010** for **USD 27,804,678** and **Guarantee No.2** under “**V2500 Rework Agreement**” on **01/08/2011** for **USD 18,500,000**. Both the Guarantees were unconditional and irrevocable as Principal Obliger and it took obligation to pay all monies whether actual or contingent, due owing or incurred by KFAL under these Agreements, upon failure of KFAL to pay its dues towards petitioner – Company. The petitioner – Company, on **15/02/2012**, invoked its two Guarantees and called upon the Respondent - UBHL to pay the entire outstanding amount of **USD 11,877,573.01** under “**V2500 Rework Agreement** and **USD 18,804,678** under “**Repayment Agreement**”. The statutory notice under **Sections 434 and 439 of the Companies Act, 1956** was served on **29/02/2012** which was not responded to by the Respondent -

Company. However, on **21/03/2012**, the Respondent – Company, UBHL only replied stating that they are trying to resolve the issue amicably. Thus, a total sum of **USD 30,682,251.01** (approximately **₹153 crores**) was due for which the petitioner -Company filed the present winding up petition in this Court on **26/03/2012**.

**Company Petition No.121/2012 & Company Petition No.122/2012 - RRPf Engine Leasing Limited & Rolls-Royce & Partners Finance Limited Vs. UBHL.**

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

**25.** The petitioner and its Holding Company, Rolls-Royce & Partners Finance Limited (RRPF) (petitioner –Company in Co.P.No.122/2012) entered into a Master Engine Lease Agreement on **30/09/2005** with

KFAL to provide a standing facility permitting the Lessee to lease Aircraft engines and Associated Equipments from the petitioner and RRPf from time to time.

**26. The Engine Lease Agreement No.1** was entered into between petitioner and KFAL on **30/09/2005** and according to that, the lessee agreed to make payment of loan to the petitioner in advance on each Rent Date and **the Engine Lease Agreement No.2** dated 30/09/2005 was in respect of the new Aircraft Engine being IAE V2527-A5 Engine with MSN V12416 (Engine 2) and the lessee and both the parties also entered into a Maintenance Reserves Letter dated **07/10/2005**. The Respondent – Company, UBHL executed a Corporate Guarantee on **25/01/2006** in favour of the petitioner and RRPf in respect of amounts due and payable by the KFAL, the lessee.

**27.** In 2007, on **28/03/2007**, the Engine Lease Agreement No.4 was also executed and Respondent

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UBHL again executed a Corporate Guarantee in favour of the petitioner, on **27/09/2007**. Since the Respondent – UBHL, lessee failed to pay its outstanding amount of **USD 11,580,055.72 (₹64,28,08,893/-)** despite its demand vide letter dated **08/02/2012**, the petitioners demanded the said amount from the Respondent, Guarantor, UBHL to pay the said outstanding amounts to the petitioner - Company. After terminating the lease on **29/03/2012**, a statutory notice was served on the Respondent - Company also under Section 434 of the Companies Act, claiming a sum of **USD 533, 268, 97 (₹2,96,01,760.52)**.

**28.** In **Company Petition No.122/2012**, petitioner – Company, **RRPF** made claim of **USD 10,437,866 (₹57,94,05,941.70)** vide paragraph 12 of its Company Petition from the Respondent, UBHL and *inter alia*, both the Companies contended that the Respondent, UBHL has failed to discharge its

Guarantee obligations and therefore deserves to be wound up by this Court.

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

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

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

**Company Petition No.248/2012 - BNP Paribas Vs. UBHL**

**31.** The said **BNP Paribas** also registered in France claims to be a Bank, having financed for the purchase of three ATR 72-212A Aircrafts or Engine bearing Number, "**MSN 699**", "**MSN 728**" and "**MSN 730**" under the Loan Agreements facilitated by "**campagnie Franqaise d' Assurance pour le Commerce Exterieur ("Coface")**" the Export Credit Agency of France. According to petitioner, all three parties to Agreement dated **05/06/2006** Kingfisher Airlines Limited, KF Aero, and the petitioner, BNP

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



be of the English Courts according to the petitioner – Company.

**32.** Learned counsel, Ms. Fereshte Sethna, appearing for BNP Paribas explained that an integral aspect to the financing arrangements was the execution and delivery by the Respondent, UBHL of three Guarantees, all dated **17/06/2006**, pursuant to which the Respondent, UBHL unconditionally and irrevocably agreed to guarantee and indemnify as Principal Obliger and not merely as Surety, on demand from KF Aero or its assignee, all monies due and payable by KFAL to KF Aero under or pursuant to the Lease Agreements, within 15 days of first written demand on the Respondent. The petitioner - Company has placed Security Assignments, Notices of Assignment, Lease acknowledgments and Guarantee acknowledgments, all dated **21/06/2006** as Annexure T to CC of the winding up petition and the petitioner, BNP Paribas is therefore claiming to be an

assignee and chargee to put in force and exercise all rights and powers in relation to the Guarantees. Since KFAL, in breach of Lease Agreements failed to make payments to KF Aero for these three Aircrafts, a sum total of **USD 724,246.29** and second demand of **USD 742,653.77**.

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

record as Annexures NN and PP respectively, the present winding up petition was filed on **05/11/2012**.

**Company Petition No.51/2013 - United Bank of India Vs. United Breweries (Holdings) Limited**

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

**35.** The Respondent – Company, UBHL had granted a Corporate Guarantee in favour of the petitioner - Bank and other Banks on 25/02/2003 which was invoked by the petitioner - Bank on **25/02/2013**. The petitioner Bank is not a part of the

SBI and 13 other banks in a consortium which have filed **Company Petition No.162/2013** in this Court, on its own head, claiming a sum of **₹386.62,31.757.07** along with interest by serving a legal notice on the Respondent Company, UBHL and KFAL on **08/11/2012** against various lease facilities extended to KFAL including cash credit facilities, Working Capital Term Loan (WCTL), Funded Interest Term Loan (FITL) Term Loan (PDP), with interest, the petitioner Bank claims a sum of **₹450,02,31,757.07** against the Respondent – UBHL and filed the present winding up petition in this Court on **21/06/2013**.

**Company Petition No.99/2013 - Hindustan Petroleum Corporation Limited Vs. UBHL**

**36.** The petitioner, a Government of India Enterprise and Supplier of Aviation Fuel to KFAL, has filed this winding up petition, claiming a sum of **₹66,72,44,516.73** as outstanding **delayed payment**

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

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

**37.** The petitioner - Bank has also filed this separate winding up petition, invoking its Guarantee for the dues of the KFAL and for recovery of a sum of

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**₹58,88,87,231.76** plus interest vide statutory Notice dated **07/02/2013, Annexure J**, against the Respondent - UBHL.

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

**38.** The petitioner - Bank claims to have granted financial assistances to M/s. U B Engineering Limited (UBEL), Respondent No.2 and Associate Company of Respondent No.1 ,UBHL by way of Working Capital Loan Agreement amounting to **₹190.00 crores** and under the unconditional and irrevocable Corporate Guarantee executed by Respondent No.1, UBHL in favour of petitioner on **03/08/2010**, to the extent of **₹15.00 crores** for Fund based limits. The petitioner - Bank has served a statutory Notice under Sections 433 and 434 of the Companies Act on Respondent – UBHL, claiming a sum of **₹46,89,15,617.87** vide its Notice

dated **03/03/2016** and thereafter has filed this winding up petition on **28/06/2016**.

**The contentions of the Petitioners**

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

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

**40.** For State Bank of India and other Banks Mr.S.S.Naganand, Senior Advocate made submissions on behalf of the State Bank of India, the lead Bank representing the consortium of various banks who had

made advances and extended loans to the Company – Kingfisher Air Lines Ltd., (**'KFAL'** for short) and the Respondent-company United Breweries (Holdings) Limited (**'UBHL'** for short) was earlier the Holding company *qua* its subsidiary KFAL and the claim of these petitioning creditors are based on the Corporate Guarantees given by the Respondent-company UBHL to secure the loans and advances by these petitioner-Banks to KFAL, which company has already been ordered to be wound up by this Court on **18.11.2016**.

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

That Respondent – UBHL was incorporated way back on **23.03.1915** about 100 years ago but the relevant facts for these winding up petitions have been dealt with in these petitions commenced from the year 2005 onwards, when these Banks had provided loan



facilities to the KFAL and since 2010, the said Company KFAL started making losses and its business operations stopped in the year 2011 and therefore, on **21.12.2010**, the Master Debt Recast Agreement (**MDRA**) was recast for restructuring of the various loans of KFAL and even further loans were advanced by these Banks to KFAL. The Security Trustee Agreement was also entered into and SBICAP Trustee Company Ltd.,(SBICTCL) was appointed as trustee of the petitioner –Bank to receive and recover the dues from the said borrower KFAL. The Corporate Guarantee Agreement was executed by the Respondent-UBHL in favour of the petitioner-Bank on 21.12.2010. Since 2011-12, the borrower company KFAL failed to service the loans and repay the principal and interest under MDRA Agreement. The various Banks classified the loan accounts as ‘NPA’ (Non Performing Assets) and the loans were recalled and recovery action was initiated against the said company KFAL.

**42.** Learned Senior counsel, Mr.S.S..Naganand submitted that dues of the petitioner-Bank for which, the action was also initiated under the provisions of 'SARFAESI' Act, 2002 before the Debt Recovery Tribunal ('DRT' for short), vide **O.A.No.766/13**, the total dues are to the extent of **₹6203.35 crores** as on **25.06.2013** which, with continuously accruing interest, coupled with other Banks outside this consortium and unsecured creditors now may be well over **₹10,000 crores** against UBHL.

**43.** Mr.S.S.Naganand, further submitted that the corporate guarantee given by the respondent-UBHL to secure the financial obligations of KFAL under various loan agreements, was co-extensive with that of the principal borrower KFAL and on account of failure to discharge its guarantee obligations under these Corporate Guarantee Agreements, the respondent-UBHL has also become commercially insolvent and is

unable to pay its huge liability and dues under the said Corporate Guarantees and therefore, the Respondent company UBHL also deserves to be wound up under the provisions of Section 433(e) r/w Section 433(f) of the Companies Act, 1956.

**44.** Mr.S.S.Naganand submitted that the petitioner-Banks being secured creditors, standing outside the winding up proceedings, insofar as secured interest are concerned, they have initiated action against the respondent-company before the DRT, Bangalore also, but that does preclude them from pursuing the present winding up petitions against the Respondent-company UBHL. He also drew the attention of the Court towards one settlement proposal dated **29.03.2016** filed on behalf of KFAL and Respondent-company UBHL and Kingfisher Finvest(India) Ltd., through its Chairman Dr.Vijay Mallya, but he submitted that the said proposal was an

eyewash and a ruse to wriggle out of the winding up proceedings initiated by the petitioners-Bank and several other creditors before this Court and such proposal was filed before the Hon'ble Supreme Court in **Special Leave Petition Nos.6828-6831/2016** was not accepted even by the Hon'ble Supreme Court and the counter filed by Dr. Vijay Mallya in the aforesaid SLP before the Hon'ble Supreme Court itself was clearly admitted that the assets of the Respondent company are presently worth only **₹4,986/-** crores, whereas, the liabilities of the respondent aggregated to about **₹11,452** crores and thus on the own showing of the Respondent company, it was clear that it was not commercially solvent and was not capable of discharging its admitted debts and was therefore, liable to be wound up under the provisions of the Companies Act.

**45.** Mr.S.S.Naganand, also drew the attention of the Court towards the audited Balance Sheets of the Respondent-company in public domain for the Financial Year 2012-13 to Financial Year 2015-16 and he submitted that the Respondent-company was consistently making huge losses and it's net worth has completely eroded and turned negative and it was impossible for the Respondent Company, UBHL to pay off all its creditors who are seeking winding up of the Respondent Company, UBHL and since it was a commercially insolvent Company and there was no chance of its revival and retrieval and the substratum of the company has been completely lost and it had already run into several litigations, petitions, suits and recovery proceedings and the operations of Airlines Company KFAL, for which, it stood guarantor had stopped operations long back in 2011 and that it has already been wound up by this Court in the recent past,

therefore, the present Respondent company UBHL also deserves to be wound up by this Court.

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

**46.** Mr.Shreyas Jayasimha, learned counsel on behalf of petitioner-**IAE International Aero Engines AG** in **Co.P.No.57/12** submitted that the petitioner is a Company incorporated under the laws of Switzerland and has its Registered office in Switzerland and it was engaged in the business of manufacturing, maintaining, selling and leasing etc., of Aircraft Engines and all related equipments. He submitted that the Respondent – UBHL had executed Deeds of Guarantee in favour of the Petitioner-company as security for amounts due to the petitioner from KFAL, to whom such engines and equipments were supplied during the contemporary period under various agreements. The amounts due to the petitioner- company as per the statutory notice

served upon the Respondent company is to the extent of **USD 3,06,82,251**, equivalent to **₹184,09,35,060/-** (an average conversion rate of ₹60/- for one (1) of USD for approximate value). The said amounts were due towards the supply of Aircraft Engines and expenses incurred by the petitioner towards maintaining the Aircrafts leased by the petitioner to KFAL. He submitted that the Corporate Guarantees executed by the Respondent-company in favour of the petitioner on **01.08.2011** and **10.11.2010** were unconditionally irrevocable and same contained covenant to pay to the petitioner-company within 5 business days of a written demand and the said Undertaking was given by the Respondent – UBHL in the capacity of Principal Obligor and not merely as a Surety.

**47.** Mr.Shreyas Jayasimha, submitted that series of Agreements were executed between the petitioner and KFAL including the Agreement called **V2500 Rework**

**Agreement** dated **27.10.2010** and FPA (Fleet Power Agreement) Termination Agreement and Agreement for mutual release and waiver of claims between the petitioner and KFAL, Deeds of lease for Aircraft Engines and for repayment of outstanding amounts which fell due between 2005-10 and all these series of Agreements were executed on 27.10.2010. The Corporate Guarantees were executed by UBHL in favour of the petitioner on 10.11.2010 and on 01.08.2011 and upon the default in payment by KFAL under Rework Agreement and Repayment Agreement, the petitioner-company invoked the Guarantees by issuing two Notices to the Respondent company UBHL on **15.02.2012** and served Statutory Notice under Sections 434 and 439 of the Companies Act, 1956 on **29.02.2012** followed by a Reminder Notice on **16.03.2012**. The Respondent company UBHL replied to the said Statutory Notice on **21.03.2012** denying its liability to pay the amount demanded by the petitioner-company and hence, the



present winding up petition No.57/12 was filed in this Court on **26.03.2012.**

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

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

**50.** He also submitted that while admitting the present winding up petition, the co-ordinate bench of this Court on **02.01.2015** held, although, prima-facie, that the defences raised by the respondent-company

were not valid defences and were merely moonshine and unsustainable and therefore, admitting the present winding up petition had directed publication of the same in terms of the Companies (Court) Rules, 1959 and accordingly, publication was carried out on **02.02.2015** in Newspapers, “the Hindu” and “Udayavani”.

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

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

**Date of order 07-02-2017**  
**Co.P.No.57/2012 & connected matters**  
**IAE International Aero Engines AG**  
**and others Vs. United Breweries**  
**(Holdings) Limited**

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Sl. No.	Case No.	Petitioner	Date of filing the Co.P.	Date of Statutory Notice U/S.433, 434 & 439 of Co.Act,1956.	Amount claimed in USD	Amount in Indian Rupee converted in approximate rate of ₹60/USD
1	Co.P.No.57 of 2012	IAE International Aero Engines AG (IAE)	26/03/2012	a) 29/02/2012 b) 16/03/2012	* 1,18,77,573 **1,88,04,678 <u>3,06,82,251</u>	184,09,35,060/-
2	Co.P.No.121 of 2012	RRPF Engine Leasing Limited (RRELL)	12/06/2012	28/03/2012	7,32,710	4,39,62,600/-
3	Co.P.No.122 of 2012	Rolls-Royce & Partners Finance Limited (RRPFL)	12/06/2012	28/03/2012	1,04,37,866	62,62,71,960/-
4	Co.P.No.185 of 2012	Avions de Transport Regional (GIE)	03/09/2012	03/08/2012	1,68,99,970	101,39,98,200/-
5	Co.P.No.248 of 2012	BNP Paribas	05/11/2012	05/07/2012	2,66,34,728	159,80,83,680/-
6	Co.P.No.51 of 2013	United Bank of India (UBI)	19/03/2013	25/02/2013		450,02,31,757/-
7	Co.P.No.99 of 2013	Hindustan Petroleum Corpn.Ltd.(HPCL)	27/05/2013	06/03/2013		66,72,44,516/-
8	Co.P.No.162 of 2013	SBI & 13 Banks	19/08/2013	02/04/2012 (Para.37 of ptn.)		***5823,75,41,697/-
9	Co.P.No.265 of 2013	Oriental Bank of Commerce (OBC)	16/11/2013	07/02/2013		58,88,87,231/-
10	Co.P.No.148 of 2012	IDBI Bank Ltd.	28/06/2016	03/03/2016		46,89,15,617/-
				<b>Total</b>	<b>8,53,87,525</b>	<b>6,958,60,72,318/-</b>

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

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

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

**53.** Mr.Ramanand Mundkur, the learned counsel has urged that USL is a creditor of the respondent-UBHL who owes ₹1776.77 crores as on **31.12.2016** to USL under the Loan Agreement dated 03.07.2013 (₹1337.42 crores by way of principal and ₹439.35 lakhs

by way of interest at the rate of 9.5% p.a. simple interest computed for the period 03.07.2013 to 31.12.2016) and therefore, submitted that the Loan Agreement dated **03.07.2013** was approved by the Board of Directors of both the companies. Mr.Ramanand also submitted that the effective date of this Loan Agreement was 04.07.2013 as defined in the Shareholders Agreement amongst Respondent-UBHL and Kingfisher Finvest India Limited dated **09.11.2012**, which become effective upon completion of the purchase of USL shares by Relay B.V. and Diageo plc, Relay B.V. being indirect wholly owned subsidiary of Diageo plc, pursuant to the Agreement entered into with the Respondent-UBHL on 09.11.2012, as contemplated under the Shareholders Agreement, the USL entered into Deed of Adherence and thereby become the party to that Shareholders Agreement on 04.07.2013.

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

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

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



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

Court which by its order dated **11.02.2014** directed status-quo with regard to transaction of sales of shares.

**58.** Learned counsel further submitted that thereafter the respondent company UBHL for the first time in its response to USL notice of arbitration vide its reply dated 13.08.2016, for the first time stated that since the Hon'ble Supreme Court did not stay the operation of the order of the Division Bench of this Court, the Loan Agreement had not become effective and as a consequence thereof, there was no loan outstanding or interest payable by UBHL to USL under the said Loan Agreement. This disclosure of the Respondent UBHL according to the learned counsel, Mr.Ramanand Mundkur, was clearly a moonshine and demonstrates its malafide intention to evade and avoid payment of its legitimate dues. He further submitted that in all its audited statements and Balance Sheets, after the order of the Hon'ble Supreme Court dated

**11.02.2014**, for the Financial Years ending on 31.03.2014, 31.03.2015 and 31.03.2016, the respondent company UBHL has clearly recognized and recorded the amount owed to USL under the Loan Agreement as a liability and therefore, its U-turn taken in the un-audited financial statements submitted to the Stock Exchanges on 10.11.2016 that there is no loan outstanding to USL is completely contrary to the admission of the liability made by the Respondent company in its audited statements and the correspondence issued by the respondent company to USL in the year 2015-16.

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

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

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

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

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

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

**62.** The first and foremost submission made by Mr. Udaya Holla, before the Court was that the petitioner –Banks led by SBI in **Co.P.No.162/2013**

have initiated multiple recovery proceedings against the Respondent – **UBHL** which is not permissible in law and the winding up petitions filed by these Banks cannot be converted into money recovery suits resulting in deadly consequences of winding up against the Respondent – Company, **UBHL** which is a serious most consequence, against the Respondent – Company. He submitted that the recovery suits have been filed by these Banks before Debt Recovery Tribunal and they have initiated proceedings for recovery under special enactment, **the Securitization and reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI' Act)** and have also filed the winding up petitions.

**63.** The second most emphatic argument made by Mr. Udaya Holla, Senior Counsel is that the Respondent – **UBHL** itself has filed **Civil Suit No.6406/2012** in Bangalore City Civil Court against

the supplier of Aero Engines to KFAL not only claiming declaratory relief of declaring Corporate Guarantees given by UBHL to IAE International Aero Engines and others as *void* and *non-est* but have also claimed compensation to a large extent against these suppliers for supplying defective Aero Engines to KFAL which have not only resulted in huge losses to the said erstwhile subsidiary Company of the Respondent – **UBHL**, but for whose financial obligations, it gave the Corporate Guarantees in question in the year 2010-2011 when the Master Debt Re-structuring Agreement was executed between the parties and thus on account of failure of these suppliers and other Companies, who are defendants in the said **Civil Suit No.6406/2012**, in which KFAL itself is a defendant in the Bangalore City Civil Court and on account of non-execution of their part of the contract by these suppliers, the said Company, KFAL suffered huge losses and its business operations completely stopped in the year 2011 and

unless and until the said Civil Suit is decided and decreed by the Court concerned in which the effort made by the defendants for dismissal of the suit at the threshold by filing Applications under Order 7 Rule 11, of the Civil Procedure Code was rejected by the Trial Court and the Suit is now pending for trial. He urged that unless and until the said Suit is decreed, it would be wholly unjust and improper to wind up the Respondent – Company, **UBHL**.

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



Court, the winding up petitions deserve to wait and deserve to be stayed.

**65.** Another issue raised on behalf of the Respondent –Company, by Mr. Udaya Holla, Senior Counsel is that the law applicable as per the contracts between the Foreign Companies and KFAL clearly goes to say that they would be governed by the English law and in fact, the petitioner, IAE International Aero Engines obtained an *ex-parte* decree from English Court against the Respondent – **UBHL** also, but unless such English law is pleaded and proved as a fact as per the provisions of Section 57 of the Indian Evidence Act, the recovery of debt from the Respondent – **UBHL** on the basis of such *ex-parte* decree by English Court cannot be made and no such applicability of English law or English Court decree, as a fact has been pleaded or proved by the petitioners and creditors like IAE International Aero Engines and therefore, they cannot

seek the winding up from this Court of the Respondent

– **UBHL.**

**66.** Mr. Udaya Holla also submitted that Section 599 of the Companies Act, 1956 bars the Foreign Companies to take any legal proceedings including the winding up proceedings before this Court without complying with the mandatory provisions of Section 592 of the Companies Act, 1956, which requires a Foreign Company which has an establishment in India, to seek requisite approval and Registration from the Registrar of Companies and RBI and since the petitioner – M/s. IAE International Aero Engines, while it was actively engaged in the business of supply of Aero Engines to KFAL, had a business establishment in India and was admittedly neither registered with the Registrar of Companies in India nor had obtained any approval from RBI and other competent Authorities, the winding up petitions filed by such Foreign Company before this

Court was not maintainable and deserved to be dismissed.

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

**68.** Besides raising the aforesaid contentions, the learned Senior Counsel for the Respondent – Company, UBHL, Mr. Udaya Holla has also submitted the written arguments after the judgment was reserved on

**11/01/2017**, i.e. on **19/01/2017** and the summary of this written arguments is also reproduced below for ready reference.

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

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

business, *inter alia*, as a Holding Company and as a Trading and Manufacturing concern.

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

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

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

**CO.P.No.162/2013 – State Bank of India & Others v. United Breweries (Holdings) Limited**

**74.** On 19<sup>th</sup> August, 2013, State Bank of India (“SBI”) and other members of the Consortium of Banks (“Consortium”) that had advanced facilities to Kingfisher Airlines Ltd. (“KFA”) filed a winding up petition against UBHL, being **Company Petition No. 162 of 2013**. The Consortium’s claim arises out of a purported Corporate Guarantee dated **21<sup>st</sup> December, 2010** issued by UBHL in favour of the Consortium.

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

**75.** UBHL, along with Kingfisher Finvest India Limited (“KFIL”) and Dr. Vijay Mallya have filed a Suit in

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

**76.** Each of the members comprising the Consortium is a party defendant to the Bombay High Court Suit. The issues raised in the Bombay High Court, are still pending, and are *sub-judice*. The Respondent herein has also made a counter claim of **₹3200 crores** against the petitioners - Banks in the said

Suit. In fact, none of the members of the Consortium have filed their Written Statement in Suit No. 311 of 2013.

**77.** In these circumstances, it is submitted that in the absence of a valid, binding and subsisting Corporate Guarantee from UBHL, the question of UBHL being liable to make any payment or being wound up does not and cannot arise.

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

**79.** The Karnataka High Court has in ***Globe Detective Agency v. Subbaiah Machine Tools, reported in***



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

### **Breach of obligations by the Petitioner Consortium**

**80.** Despite the fundamental terms of the Master Debt Recast Agreement dated 21<sup>st</sup> December, 2010 (“MDRA”) entered into between KFA and the Consortium casting an obligation on the Consortium to provide for adequate working capital as agreed in the MDRA, and despite repeated requests to the Consortium to fulfill

their obligations under the MDRA and disburse the much needed working capital, the same was not provided to KFA. UBHL submitted that this is a breach of a fundamental term of the MDRA, releasing and discharging not only KFA, but also UBHL and Dr. Vijay Mallya from their respective obligations, if any, under the MDRA, the alleged Corporate Guarantee and the alleged Personal Guarantee.

**81.** The serious breaches of the Consortium's obligations under the "Lender's Liability" principles and especially the obligations of strict confidentiality with regard to which all the members of the Consortium have signed an undertaking binding themselves to maintain confidentiality of the information with regard to KFA, UBHL and Dr. Vijay Mallya, by the barrage of disparaging statements made in the media by or on behalf of the Consortium have hindered investment into KFA by external investors, resulting in UBHL and KFIL,

by themselves, and through their subsidiaries and associates, being compelled to fund KFA in an aggregate amount of ₹3199.68 crores just from 1<sup>st</sup> April, 2011 till the end of March, 2013. UBHL has claimed the said amount from the Petitioner Banks in Suit No. 311 of 2013 filed in the Hon'ble Bombay High Court.

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

**83.** The concerted action of the consortium in targeting KFA, UBHL and Dr. Vijay Mallya is a blatant example of a private enterprise being victimized and

being made an example to others in similar situations. In proceeding against KFAL, UBHL and Dr.Vijay Mallya in the manner as aforesaid, the Consortium has reinforced its decision to apply selective measures against KFAL, UBHL and Dr. Vijay Mallya to the detriment of KFAL, UBHL and Dr.Vijay Mallya. By reason of the Consortium's failure to ensure that its discretion is exercised in a fair and reasonable manner, the rights guaranteed to KFAL, UBHL and Dr.Vijay Mallya under the Constitution of India have been violated. For instance, as set out in a note dated 2<sup>nd</sup> February, 2013 handed over by KFA to the Consortium, there are a number of precedents of large borrowers where banks (including one or more of the Consortium) have shown considerable forbearance and/or facilitated multiple restructuring, viz. Suzlon (₹13,000 crores – 2<sup>nd</sup> restructuring under CDR), Jindal Stainless (₹7,900 crores – 2<sup>nd</sup> restructuring under CDR), Hindustan Construction (₹11,000 crores – restructuring approved

under CDR), Bharati Shipyard (₹11,000 crores – restructuring approved under CDR), Sterling Group (₹7,000 crores) and Ispat Group (₹7,800 crores). It is not without significance that each of the aforesaid restructuring cases, the total outstanding due to the banks was more than what which is demanded in Company Petition No. 162 of 2013.

**Proceedings Pending before the Debts Recovery Tribunal**

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

**85.** There is no final adjudication till date as against the Respondent herein in respect of the alleged

corporate guarantees and its liability there under. Therefore, the winding up petition does not survive. In fact, the Respondent has contested its liability before the Debts Recovery Tribunal and has also demonstrated the disparity in the interest charged as also the overcharging of interest.

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

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

**87.** The Supreme Court *in 1977 (1) SCC 1* and the Karnataka High Court in *AIR 2000 Kar. 393* have held that two parallel remedies cannot be pursued by a party in respect of the same matter at the same time. The

Bombay High Court in **Dalmia Cement v. Indian Seamless Steels and Alloys, reported in 2002 (112) Comp. Case. 314 and QSS Investors v. Allied Fibres, reported in 2001 (107) Comp. Case 587** and the Himachal Pradesh High Court in **Azeet International v. HPH Produce Marketing, reported in 2001 (107) Comp. Case. 587** have held that even in respect of winding up petitions, parallel remedies cannot be pursued.

**The petitioners have admitted that Respondent is solvent**

**88.** The State Bank of India (which is the lead bank in the consortium) has on the one hand declared UBHL as a Willful Defaulter stating that although UBHL has the means to pay, it has not paid the dues of the petitioners and therefore UBHL has been declared as a Willful Defaulter. A copy of the order has been produced by way of a memo. Further, the consortium of banks in their arguments before the DRT on 10<sup>th</sup> January,2017

have categorically made a statement that the Respondent has substantial assets to recover the whole of the claim before DRT in OA 766/2013 (approximately ₹6,280 crores), and if sold the realizable value of these assets will be sufficient for recovery of almost the entire dues of the Banks.

**Proposals for Settlement have not been considered by the Petitioners**

**89.** It is an admitted position that Banks make One Time Settlements with various defaulting customers, based upon their own Board approved policy, as directed by RBI to all the commercial banks in India. It is understood that the RBI has put in place a framework for Banks to consider such settlement offers. It is understood via RTI queries that each of the Public Sector Banks is required to consider an application through a process laid down by the Board of the respective bank. Two offers dated 29<sup>th</sup> March, 2016 and



6<sup>th</sup> April, 2016, made to the Banks for settlement were rejected patently without following due process and no offer was made by the Banks to engage with the Borrower / Guarantor in accordance with a settlement frame work approved by the respective Boards. The proposal of settlement which was rejected by the Consortium led by SBI bank was without justification/ reasoning and had no approval from the competent authority as envisaged in the policy.

**90.** The Consortium led by SBI has deliberately failed to give valid reasons for rejecting the proposal for settlement. Although, in absence of any counter offer the option of a negotiated settlement was not closed thereby. Whereas, in spite of being aware of their internal individual policies, the banks chose not to disclose the same, through which a reasonable settlement could have been arrived at. UBHL and KFA have not had an opportunity of a fit and proper

consideration of a settlement offer. It is to be noted that it is imperative for the banks to abide and adhere with their own Board Approved policies, which has to be non-discriminatory and non-prejudiced. It is submitted that based on representative information received from certain Banks the qualifying amount for settlement in KFA's case would in fact have been far lower than the offer made and referred to above. It will be seen that the settlement offer already made is largely from distribution of cash deposits and from the disposal of liquid assets with a transparent price determination on the Stock Exchange and therefore not subject to any conditionalities.

**CO.P.No. 57/2012 - International Aero Engines v.**  
**United Breweries (Holdings) Limited**

**Pending Proceedings against IAE before the City**  
**Civil Court**

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

Japanese Aero Engines Corporation and MTU Aero Engines GmbH.

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

Court to transfer Suit No. O.S.No.6406 of 2012 to the Company Court, which application is pending.

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

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

**94.** As on 31<sup>st</sup> March, 2010 the aggregate accumulated losses incurred by KFA totaled ₹4,321 crores - the root cause of these operational and financial woes of Kingfisher Airlines being principally attributable to the inherently defective and commercially unviable

IAE V2500 – A5 Engines. Thus, by this time KFA was exposed as a soft target of economic duress at the hands of IAE.

**95.** Since KFA encountered problems with the IAE V 2500 – A5 engines it had been constrained to operate on a significantly truncated fleet – primarily on account of the engine problems. This had a dramatic effect on KFA’s cash flow and revenue stream. The Indian business environment for civil aviation is very competitive, and thus the only way an airline can survive is by volumes of business. The operating margins are so small that any fall in volumes completely dislocates the cash flow. Fall in volumes are inevitable when aircraft remain grounded for want of and/or poor performance of engines, which was the result of the defective engines supplied by IAE to KFA.

**96.** In or around mid 2010, Kingfisher Airlines, which was already overburdened on account of the aforesaid huge accumulated losses totaling ₹4,321 crores, occasioned principally on account of the substandard, inherently defective and commercially unviable IAE V 2500 – A5 engines, was faced with no real choice. If it had to survive as an airline, it had to come to terms with IAE and get its fleet back in the air. It is in this background that KFA commenced negotiations with IAE sometime in mid 2010 to try and reach an amicable resolution of this issue. Oral representations were made, in the course of negotiations, by senior officials and officers of IAE to the representatives of KFA and the Respondent to the effect that steps taken by IAE by way of replacing the drums with fully silver coated nuts with new drums without fully silver coated nuts, and the proposed installation of Single Crystal Panels in the combustion chamber, were allegedly a “complete fix” for the HPC Stage 3 to 8 Drum

defect and the Hot Section Distress defect respectively. KFA and the Respondent were left with no alternative but to rely upon these representations. KFA and the Respondent accepted at face value the representations made by IAE regarding the complete fix of the problem of the engines. On the basis of such representations, KFA entered into the various Agreements and UBHL entered into the guarantee.

**97.** It has now come to the attention of KFA and the Respondent herein that the mandatory terminating action prescribed in the AD of the FAA of replacing the existing drums with new drums without fully silver plated nuts, is not a permanent fix to the HPC Stage 3 to 8 Drum defect. KFA and the Respondent were misled by IAE based on IAE's misrepresentations that there was a complete fix to the engine problems and were misled to execute the various Agreements including the corporate guarantee by the Respondent. Even as of



2011 and 2012, IAE has not been able to completely rectify the defect which is evident in the various directives that have been issued by IAE itself and which are part of the record. The representations made as to a solution being found by replacing the nuts was thus either false or at least made negligently. In any event, since the representation constitutes the fundamental basis of the aforesaid Agreements, as well as the guarantees given by the Respondent, the Agreements as well as the guarantees have been obtained on the basis of a misrepresentation, and thus, are void and/or in any event *voidable*. This necessitated the filing of the suit seeking a declaration that the guarantees obtained by misrepresentation are void and for recovery of an amount of ₹1500 crores from IAE.

**98.** Thus, it is evident that there are claims and counter claims between IAE and the Respondent. As held by courts when there are claims and counterclaims

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and having regard to the fact that the very guarantees have been challenged before the City Civil Court, Bangalore, the winding up proceedings are liable to be dismissed. In the light of the same, no amounts whatsoever are payable by the Respondent Company to the Petitioner Company.

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

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

**100.** The alleged guarantees are governed by English Law, which is a foreign law. The petitioner herein has in the petition neither pleaded the foreign

law in respect of the invocation of the guarantees nor proved the same.

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

**102.** The Bombay High Court in *Iridium India Telecom v. Motorola Inc., reported in MANU/MH/1125/2003 (BOM)* has held that the legal position is well settled that foreign law is a question of fact and must be pleaded by the parties who relies upon it.

**103.** The petitioner in the present winding up petition has neither pleaded nor proved English law which is the foreign law. This being the case, the

guarantees being governed by English law, the same cannot be regarded by this Hon'ble Court and consequently the very petition is not maintainable as the very enforcement of guarantees is not shown before this Hon'ble Court.

**Ex-Parte Decrees of Foreign Courts are not binding**

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

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

**106.** The Supreme Court in *International Woollen Mills v. Standard Wool, reported in 2001(5) SCC 265*, has held that an *ex-parte* decree generally is not a judgment on merits and that decree and judgment granted by a foreign court can be said to be on merits by looking into the evidence lead by the plaintiff and documents proved before it as per its rules. The Supreme Court has also held that a decree would not be on merits if the court has not gone through and considered the case of the plaintiff and taken evidence of witnesses of the plaintiff.

**107.** The Madras High Court in *K.M. Abdul Jabbar v. Indo Singapore Traders P. Ltd, reported in AIR 1981 MAD 118*, has held that a decree passed by a foreign court under summary proceedings after refusing leave to defend sought for by the defendant is not a judgment on merits and hence, the judgment cannot be

considered as conclusive as contemplated under Sec. 13(b) of the C.P.Code.

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

**Petitioner being a foreign Company has not complied with Section 592**

**109.** The petitioner is a foreign company which is incorporated under the Laws of England is carrying on business in India. It has dedicated persons who are in India servicing the customer airlines in India. Therefore, there is a place of business in India and the petitioner ought to have complied with the provisions of Section 592 of the Companies Act, 1956. The petitioner

not having complied with the provisions of Section 592 is in terms of Section 599 of the Companies Act, 1956 barred from prosecuting any legal proceedings in India.

**110.** The Chancery Division in **Re: Tovarishstvo Manufacur Liudvig Rabenek, reported in 1944 (2) All E R 556**, if the representatives of foreign company were often coming and staying in hotel in England for purchase of machinery etc, the foreign company is deemed to have a place of business in England. The judgement of the Chancery Division has been affirmed in the judgement of the Delhi High Court in *Dabur (Nepal) P. Ltd. v. Woodworth Trade Links P. Ltd.*, reported in 2012 (175) Comp. Cas. 338.

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**111.** The Respondent had agreed to guarantee the amounts due to M/s KF Aero. In this regard an

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



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prejudice, the petition would be maintainable only by KF Aero and not BNP Paribas.

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

**112.** In this respect, on 17.06.2006, three corporate guarantees (Annexures Q (pg. 530), R (pg.549) and S (pg.568) to the Petition) came to be given to KF Aero. On 21.06.2006, there was a notice of assignment. However, this notice of assignment itself was qualified in that it expressly stated (notwithstanding the assignment) that the Respondent *“shall owe your obligations under the guarantee exclusively in favour of the Assignor unless the Assignee notifies you in writing otherwise, from which time your obligations under the Guarantee falling due for performance after such notice shall be owed to the Assignee ... ”*.( Annexures AA (pg. 634), BB (pg. 636) and CC (pg. 638) to the Petition).UBHL put its signature on 21.06.2006 itself on

this very document. However, admittedly, no notice was given to the UBHL on or after 21.06.2006.

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

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

**114.** As stated earlier, at the time of issuance of the three corporate guarantees, Kingfisher Airlines had

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

**115.** It is submitted that unless prior permission was duly obtained from the RBI, the purported assignment of the three corporate guarantees in favour of BNP Paribas would be void and/or unenforceable in

law for such permission would have to precede and not follow the assignment. That BNP Paribas was aware of this position in law is evident from the legal opinion(s) given by M/s Rajinder Narain & Co. (Annexures R-2 (Pg 34), R-3 (Pg. 46) and R-4 (Pg. 58) of the Additional Objections of the Respondent dated 28.02.2014) to, inter alia, BNP Paribas who had duly examined the RBI Permission dated 12<sup>th</sup> June, 2006 and, inter alia, opined as follows:-

*“The RBI has given approval for issuing the Guarantee in favour of the Lessor. Any change in its terms would require RBI’s approval.”* (emphasis supplied)

**116.** This position also emerges from the plain language of Regulation 3 of the Foreign Exchange Management (Guarantees) Regulations, 2000 as well as in light of the judgment of the Supreme Court in ***Mannalal Khetan v. KedarNath Khetan (1997) 2 SCC***

**424.** Regulation 3 of the Foreign Exchange Management (Guarantees) Regulations 2000 (“FEMA Guarantee Regulations”) expressly provides as follows:-

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

**117.** In *MannalalKhetan v. KedarNathKhetan* (1997) 2 SCC 424, the Supreme Court held that:

*“The contract is void if prohibited by statute under a penalty, even without explicit declaration that the contract is void because such a penalty implies a prohibition. If contact is made to do is prohibited act, that contract will be unenforceable. This contract is expressly or impliedly prohibited by*

*statute, one has see not what acts the statute prohibits but what contracts is prohibits. One is not concerned with the intent of the parties.”*

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

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

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

*“Article VIII: General Obligations of Members*

Section 2. Avoidance of restrictions on current payments

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

**121.** The International Monetary Fund has clarified that the meaning and effect of this provision is that Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained or imposed consistently with the Fund Agreement will not receive the assistance of the judicial



or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example by decreeing performance of the contracts or by awarding damages for their non performance. India joined the IMF on December 27, 1945, as one of the IMF's original members and adopted the Articles of Agreement. Furthermore, India expressly accepted the obligations of Article VIII of the IMF Articles of Agreement on current account convertibility on August 20, 1994.

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

**122.** The three aircraft in question were covered by Asset Value Guarantees provided by Avions De

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

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Kingfisher Airlines. KF Aero and its assignee – BNP Paribas were duty bound to invoke the Asset Value Guarantees against ATR. If KF Aero and/or BNP Paribas have or had so invoked the Asset Value Guarantees, ATR is contractually bound to pay to KF Aero and/or BNP Paribas the Guaranteed Amount, i.e. the entire alleged debt or at least the entire alleged outstanding principal amount claimed in the present Petition.

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

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

**124.** The guarantees are governed by English Law. The petitioner in the petition has neither pleaded nor proved English Law. Under the circumstances, the

very petition is not maintainable and no order of winding up can be passed against this Respondent.

**CO.P.No.121/2012 – RRP Engine Leasing Limited v. United Breweries (Holdings) Limited**

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

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

**125.** From (i) the websites of Rolls-Royce and IAE, (ii) the Annual Report of Rolls-Royce Holdings plc, and (iii) the Directors Report and Financial Statements for 2011 for Rolls-Royce plc – the details of which are set out in the statement of objections, it is clear that the petitioners are a constituent of the Rolls-Royce Group of companies which includes Rolls-Royce plc – which admittedly was at all material times a constituent joint venture partner in IAE and a key participant in the

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manufacture and supply of the IAE V 2500 – A 5 Engines. In fact, the registered office of the petitioners is located at the same address as the registered of Rolls-Royce plc.

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

**Petitioners being Foreign Companies have failed to comply with Section 592**

**127.** Petitioners are companies organized and existing under the laws of England having their

registered office and principal place of business in England. Petitions therefore are “foreign companies” as defined in the Companies, 1956 (“Companies Act”). From the aforesaid facts objections it is evident that Rolls-Royce being a ‘foreign company’, is carrying on business in India, but has failed to comply with the provisions of Section 592 to 594 of the Companies Act. It is therefore expressly prohibited under Section 599 of the Companies Act from instituting any legal proceedings in India, including the present Company Petition.

**128.** Under the provisions of the Foreign Exchange Management Act, 1999 (‘FEMA’) and the Foreign Exchange Management (Establishment in India of a Branch Office or other Place of Business) Regulations, 2000 (‘the Regulations’), prior approval of the Reserve Bank of India is required for establishment of a branch or liaison office or office or any other place

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of business in India by any entity resident outside India other than a banking company. Petitioners are admittedly not banking companies and have established a place of business in India as is evident from what is stated in the aforesaid objections. Petitioners have not obtain the requisite prior permission from the Reserve Bank of India prior to establishing such places of business in India and hence, are illegally carrying on business in India.

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

**CO.P.No.185/2012 - ATR v. United Breweries (Holdings) Limited**

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

**129.** The Respondent Company submits that erstwhile Kingfisher Airlines Limited (“erstwhile

Kingfisher”), which *inter alia*, operated Scheduled Air Transport Services within India and was a part of the UB Group of Companies, had entered into Agreements with the Petitioner for purchase of ATR 72-500 aircraft as well as General Maintenance Agreements (“GMA”) for maintenance of these aircraft. Erstwhile Kingfisher had entered into a Purchase Agreement dated 13<sup>th</sup> December, 2005 (“the erstwhile Kingfisher PA”), and GMA dated 21<sup>st</sup> June, 2006 with the Petitioner (“the erstwhile Kingfisher GMA”). Similarly, Deccan Aviation Limited (now known as KFA) had also entered into a Purchase Agreement dated 11<sup>th</sup> February, 2005 (“the Deccan PA”), and GMA dated 11<sup>th</sup> June, 2003 with the Petitioner (“the Deccan GMA”). Both erstwhile Kingfisher and Deccan Aviation Limited prior to the de-merger, made payments titled “Pre Delivery Payments” to the Petitioner in respect of the aircraft booked under these purchase Agreements as also payments under the GMA for maintenance services and supply of parts by the



Petitioner. Thereafter, subsequent to the de-merger mentioned above, the Deccan PA and the Deccan GMA were terminated and, inter alia, the enlarged fleet was consolidated into the erstwhile Kingfisher GMA.

**130.** Further in terms of the Deccan GMA, the Repairer (petitioner) was to provide or cause to provide technical and operational support to Operator (KFA), including assistance and advise on engine performance and conditions follow up, airworthiness and OEM publications follow-up, life limited parts follow up, technical events follow up and engines removal forecast and staggering plan. This service was to be provided by the Repairer by assigning at Operator's main base of one (1) Engine specialist to assist and advise Operator's personnel on engines monitoring and follow up activities at Operator's main base. The Operator was to provide, at no cost to Repairer, suitable facilities with office, telephone, fax, Internet access line in order to enable

the specialist to fulfill its task properly. (Under the Deccan GMA entered into prior to the de-merger mentioned above, Deccan Aviation Limited (the Respondent Company herein) is the Operator and the Petitioner is the Repairer).

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

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

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

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

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

**CO.P.No.99/2013 – HPCL v. United Breweries**  
**(Holdings) Limited**

**Petitioners' claim is for interest**

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

amounts allegedly due from KFA on account of the interest.

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

**138.** The Allahabad High Court in ***Ultimate Advertising v. GB Marketing, reported in 1989 (66) Comp Cases 232*** has held that where there is a bona fide dispute regarding the interest, the petition for winding up cannot be maintained.

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

**140.** The Supreme Court in *Union of India v. Raman Iron Foundry, reported in AIR 1974 SC 1265* and the Karnataka High Court in *Green hills Exports Private Limited v. Coffee Board, reported in [2001] 106 Comp. Cas. 391* have held that a claim for damages is not a debt and becomes a debt only when the same is quantified by a competent court on enquiry. Thus, a winding up petition on a claim for damages would not lie.

**Supporting Creditors, who are opposing Winding up of UBHL**

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

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

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

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

**145.** He submitted that even the secured creditors like **HDFC Bank** who have their financial exposure in the Respondent – **UBHL**, want to oppose these winding up petitions. He urged that of course, with the sale of some of the share holding of the **UBHL**, by the said HDFC Bank, their exposure is much less



when compared to the debts claimed by the petitioning creditors, but they are also opposing these winding up petitions, because they are hopeful of the recoveries from the 'Going concern' of the Respondent – Company, **UBHL**.

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

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

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

**149.** He also drew the attention of the Court towards another Suit, in **O.S.No.6406/2012** filed by

the Respondent –**UBHL** in Bangalore City Civil Court, similarly raising a question on the validity of the Corporate Guarantee Agreements of the Respondent - **UBHL** with the Banks and other unsecured creditors on the ground that the Engines supplied by the creditor, IAE International were defective and various other grounds and even that suit is pending trial at Bengaluru and the application filed by the defendants under Order 7 Rule 11 of the Civil Procedure Code, 1908 seeking dismissal of the suit at the threshold has already been rejected by the learned Trial Court on 30/04/2016 and even though the Revision Petitions have been filed by the defendants before this Court, however, there is no stay order granted by this Court in such Revision Petitions and they are pending consideration before this Court.

**150.** Finally, Mr. Poovaiah also submitted that the winding up petitions cannot be converted into

Money Recovery Suits and as per the well settled legal position, if the liability to pay is seriously and *bona fide* disputed by the Respondent – **UBHL**, the present objecting creditors also have the right to save the Respondent – **UBHL** from winding up, in which, nobody's interest would be served and the economic and production activity of the Respondent – **UBHL** will come to a standstill causing loss of employment, devaluation of the worth of the assets of the Company and various other negative fallouts and therefore, the present winding up petitions deserve to be dismissed by this Court.

**The contentions on behalf of the Workmen of**

**UBHL:**

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

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

**153.** They have stated in paragraphs 11 and 12 of their Written submissions that the subsidiary of Respondent, UBHL namely SEPL has been engaged in the manufacture and sale of ready to wear Apparels for the last ten years, which has employed a workforce of 1813 employees, comprising of 1587 workers and 220 staff and all of them are permanent employees of the said Company, SEPL and the winding up of the Respondent – Company, UBHL will perversely affect the

business of their employer Company, SEPL. They have also stated that the UBITL (M/s. UB International Trading Limited) is engaged in the footwear manufacturing business since 2002, exporting leather footwear to Europe, USA and UK and employs about 450 workers directly and 500 workers indirectly and therefore for their survival, they have submitted before the Court that the Respondent – Company does not deserve to be wound up.

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

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

(i) In **Hegde & Golay Ltd., vs. State Bank of India (ILR 1987 KAR 2673)**, the Division Bench of this

Court held that the secured creditor like Bank does not have to give up its security in order to pursue the winding up petition against the Respondent company and filing of the suit by the Creditor-Bank for recovery of the dues against the respondent company does not bar the filing up of the winding up petition as well. The relevant portions of the judgment are quoted below for ready reference:-

*“These observations, in our opinion, do not advance the contention of Sri.Shetty any further. Section 529(1) of the ‘Act’ attracts the rules of insolvency to winding up in relation to “the respective rights of secured and unsecured creditors” and confines these Rules so attracted to matters that arise between these two classes of creditors. Sections 528 and 529 of the ‘Act’ are in the chapter “Proof and Ranking of Claims” and deal with the question of proof of debts and the rights of secured and unsecured creditors. Section 529(2) itself, in so far it expressly envisages, and provides for, the contingency that if a secured creditor proceeds to realize his security he should*



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*pay the expenses incurred by the Liquidator, by implication, rules out the construction contended for by Sri.Shetty. The words “in winding up of insolvent company” in Section 529(1) of the ‘Act’ has obvious reference to a post winding up stage.*

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

*“49. It is no doubt true that the Bank had, subsequent to filing of winding up petition, instituted **three suits**. Sri.Shekar Shetty stated that the claim in the first suit was ₹14 lakhs and that the Company would, if so directed, deposit this amount under protest, subject to the result of the suit. So far as the other two suits are concerned, Sri.Shekhar Shetty’s contention is that the claims in the subsequent suits and the entire rest of the Bank’s claim were hit at by Order 11*

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*Rule 2 of the Code of Civil Procedure. In our opinion, the sanctions of limits from time to time were distinct transactions giving rise to distinct causes of action. In some cases the sanctioned limits were operated, wholly or partially, in one account. In other cases, the sanctioned limits were operated upon in one current account. That would not make the limits, sanctioned from time to time, one transaction.*

***The pendency of a suit is no bar to the maintainability of a winding up petition. If the Company fails to show that the debt is bonafide disputed it would not render the claim any the more dispute or any the less just, merely because the Creditor is driven to file suits for its recovery. Though a winding up petition is a mode for recovery of a Just debt, the proceedings in winding up do not partake of the nature of a suit. Therefore, incidents of Order II Rule 2 CPC are not attracted.***

(ii) The Delhi High Court Division Bench in the case of ***Bank of Nova Scotia vs. RPG Transmission Limited [ILR (2004) II Delhi 583]***, held that the Companies Act 1956 and Recovery of Debts due to the

Banks and Financial Institutions Act of 1993 (RDB Act) operate in two different and distinct fields and mutually exclusive jurisdiction and while the purpose of initiating proceedings under RDB Act is to recover the amount due and payable to the Bank/Financial Institutions, the purpose of invoking the winding up jurisdiction is to wind up the company on the ground that it has become commercially insolvent. Paragraph-30 is quoted below for ready reference.

*“30. Therefore, it cannot be said that RDB Act covers the field for winding up an insolvent company and, therefore, the contentions of Mr.Tripathi are misconceived and are accordingly rejected. The contention that the petitioner could chose one of the remedies available in case where two or more than two remedies are available is applicable when the remedy provided for is one and the same but when two different remedies are provided for two different reliefs, in that event the plea of election of remedies is not applicable. We, therefore, hold that the winding up court is concerned with the issue as to whether or not a company could be declared as commercially*

*insolvent and, therefore, comes within the ambit of provisions of Section 433 of the Companies Act. **The Debt Recovery Tribunal does not have any jurisdiction to entertain any such application for winding up of a company** whether the same is by any bank and/or other financial institution. We also hold that both the remedies are jurisdictions are mutually exclusive of each other and, therefore, there cannot be any inconsistency between the two different remedies provided for in two different legislations”.*

(iii) The Division Bench of this Court in the case of **Kingfisher Airlines Limited** itself, when the said company challenged the action of the Respondent-State Bank of India to stand outside the liquidation and realize its security with respect to ‘Kingfisher House’ held in the case of **Kingfisher Airlines Ltd., vs. State Bank of India and others (ILR 2014 KAR 1739)** that the proceedings initiated by the Respondent-Bank under SARFAESI Act are not alternate to winding up

petition. Paragraph-24 of the judgment is quoted below for ready reference.

*“24. In the present case, the proceedings under the provisions of SARFAESI Act were initiated much before filing of winding up petition. Winding up petition was filed on 19-08-2013. While after completing other formalities contemplated under Section 13(1)(3A), notice under Section 13(4) of the SARFAESI Act, was issued on 13-7-2013 and symbolic possession of the Kingfisher House was also taken on 10-08-2013. When the winding up petition was filed, the respondents-Banks being certain that even if all secured assets are sold they would not realize all of their outstanding dues, **which admittedly as of today are more than 6000 crores.** In this backdrop they were constrained to file company petition. They clarified it in the petition, making their position unequivocally clear at the time of filing of company petition. In paragraph 4 of the memorandum of company petition, the respondents-Banks, specifically stated that they are “standing outside winding up” insofar as their secured interest, including Kingfisher House and the same is being filed without relinquishing their rights and interest as secured creditors.*

*They also made it clear in the petition that they were pursuing other remedies available to them for realization of securities created in their favour without seeking assistance of this Court for sale/realization of secured assets. In the petition, they have also made a categorical statement that even if all secured assets are sold and their value realized, they would still not realize substantial/large portion of the outstanding dues. Learned Counsel for the parties are ad idem that the worth of Kingfisher House in nay case may not be more than ₹ 300 Crores as against total outstanding of ₹ 6200 Crores. The proceedings under the Act are not recovery proceedings and need to be filed for winding up of the company which is unable to pay its debts. The proceedings initiated by the respondent-Banks under SARFAESI are not alternate to the winding up petition”.*

(iv) In the case of **Official Liquidator, Uttar Pradesh vs. Allahabad Bank & Others (2013) 14 SCC 381**, the Hon’ble Supreme Court has held that RDB Act is a complete code in itself and DRT has exclusive jurisdiction for sale of properties for

realization of dues of Banks and Financial Institutions. However, being protector of interests of workmen and creditors of the company in winding up petition, the Official liquidator shall mandatorily be associated at the time of auction and sale by Recovery Officer under RDB Act and if the Official Liquidator is not satisfied with the manner in which auction was conducted he can challenge the said auction by filing the appeal before the Debt Recovery Appellate Tribunal as a person aggrieved under Section 30 of the RDB Act. However, the official liquidator cannot approach the Company Court to set aside the auction/confirmation of sale under RDB Act, 1993.

(v) In ***Bank of New York Mellon vs. Cranes Software International Ltd., (2016) 195 Comp Case 17 (Karn)***, the Division Bench of this Court held that Section 9 of the Companies Act provides that the provisions of the Act shall have effect, notwithstanding

anything to the contrary contained in any agreement which may be executed, and therefore the Agreement which provided for applicability of the English law under clause 20.2 of the Trust Deed, it does not impose the blanket ban on the jurisdiction of Indian Courts to try the winding up here in the State where the registered office of the Respondent's company was situated. The relevant portion of the judgment is quoted below for ready reference.

*“Section 9 of the Companies Act provides that the provisions of the Act shall have effect, notwithstanding anything to the contrary contained in any agreement which may be executed, meaning thereby that the Companies Act would override the provisions of the agreement or the trust deed. Section 10 of the Act provides that the court having jurisdiction under the Act would be the High Court having territorial jurisdiction in relation to the place at which the registered office of the company is situate. In the present case, it is not disputed that the registered office of the company is at Bangalore, which is within the territorial jurisdiction of the Karnataka*



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*High Court at Bangalore. Sub-section (11) of section 2 defines “court” to mean the court having jurisdiction under the Act, “with respect to that mater relating to that company, as provided in section 10”. Sub-section(2) of section 439 provides that any trustee/s having been appointed in respect of the debentures, and the trustee for holders of debentures, shall have a right to file a petition for winding up of the company. Clause (e) of section 433 provides that the company can be would up if it is unable to pay it debts. Section 434 gives the details as to when the company would be deemed to be unable to pay its debts.*

*While passing the impugned order dismissing the company petition for lack of jurisdiction, the learned company judge has relied on the decision of **Swastik Gases P. Ltd. Vs. Indian Oil Corporation Ltd.,[2013] 9 SCC 32**, wherein the issue was with regard to invoking of jurisdiction in Jaipur court, where a part of the contract had been performed by the parties in Jaipur and also in Kolkata, but the agreement provided that the Kolkata court would have jurisdiction to entertain all cases arising out of the dispute with regard to the agreement. In such facts, it was held that Kolkata court would have*

*the jurisdiction and not Jaipur court. Relying on the said decision, the learned company judge has considered and interpreted clause 20 of the agreement and held that the English courts alone would have jurisdiction to try any case regarding a dispute with regard to the trust deed.*

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

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*of the bonds and to enforce the provisions of the trust deed or the conditions.*

*In the case of Swastik Gases P. Ltd. Vs. Indian Oil Corporation Ltd.,[2013] 9 SCC 32, part of the contract was performed both at Kolkata and Jaipur and parties had agreed to the jurisdiction of Kolkata court to entertain all cases arising out of any dispute. Such is not the position in the present case. As such, in our view, the ratio of the said case will not apply to the facts of the present case”.*

(vi) The learned single Judge of Mumbai High Court while admitting the winding up petition against the Respondent's company in the case of ***Intesa Sanpaolo S.P.A. vs. Videocon Industries Limited (2014) 183 Comp Case 395 (Bom)***, dealt with the objections raised by the Respondent's company that since the creditor held an ex-parte decree from a Foreign court and had filed execution proceedings in Indian Court, such creditor could not maintain a winding up petition before the High Court. The learned

single Judge held that such an objection was unsustainable. The following relevant extract of paragraphs **46, 47, 48 & 67** are quoted below for ready reference:-

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

*flow of capital and international commerce. Thus there is no warrant to read such an exclusion of the statutory right by way of interpretation.*

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

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

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

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

(vii) In ***P.J.Johnson & Sons Vs. Astrofiel Armadorn S.A. of Panama, Panama City & Others (AIR 1989 Kerala 53)***, the Full bench of the Kerala High Court dealt with the question of residence of a foreign company in India with regard to its right to maintain the legal proceedings in India and had

concluded that mere presence of a representative of Foreign Corporation in India is not sufficient if his only authority is to elicit orders from customers but not to make contracts on behalf of the corporation. The Court held that unless the corporation has a fixed place of business in India for sufficiently and reasonably long period of time, it cannot be said to hold as being present in India. Paragraph-20 of the judgment is quoted below for ready reference.

*“20. To sum up: The decisions discussed above evidence what is now generally accepted as a rule of Private International Law See Dicey & Morris, on cit; and Cheshire & North, e.g. cit; and what may be regarded as part of Indian Law, namely, **that a foreign corporation is resident in India only if it carries on business in India.** A foreign corporation carrying on business in India is amenable to the jurisdiction of the local courts and is for all practical purposes present in India. This test is satisfied only if its business is carried on at a fixed and definite place which is, to a reasonable extent a permanent place within India. **The***

*mere presence of a representative of the foreign corporation is not sufficient if his only authority is to elicit orders from customers, but not to make contracts on behalf of the corporation.* The question really is, as stated by Lord Loraborn, does the corporation really keep house and does business in India? Its real business is carried on where the “central management and control actually abides”. **De Beers Consolidated Mines Ltd. V. Howe, (1906) AC 455, 458 (see above).** While a company is domiciled where it is incorporated, it is resident where its controlling power and authority is vested. Although dual residence is conceivable where there is division of management and control, it is nevertheless imperative that in some degree, in some measure, to some extent it can be said that the foreign corporation is centrally managed and controlled in India. This test can by no means be satisfied unless the corporation has a fixed place of business in India for sufficiently and reasonably long period of time. Although in **Dunlop Pneumatic Tyre Co. Ltd. V. Actien-Gesellschaft Fur Motor Und Motor-fahrzeunbau Vorm. Cudell & Co., (1902) 1 KB 342**, a very short period of residence at a



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

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

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

*The proposition that the decree was on merits as all documents and particulars had been*

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

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

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

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

(ix) The leading case on the maintainability of the winding up petition when there is a bonafide dispute about the debt was rendered by the Hon'ble Supreme Court in the case of **Madhusudan Gordhandas & Co., vs. Madhu Woollen Industries Pvt. Ltd., [1972]2 S.C.R. 201**, the Hon'ble Supreme Court has laid down the principles in the following terms:-

*“Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable (See **London and Paris Banking Corporation**). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed.(See **Re. Brighton Club and Norfolk Hotel Co. Ltd.**)*

*Where the debt is undisputed the court will not act upon a defence that the company has the*

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*ability to pay the debt but the company chooses not to pay that particular debt (See Re. A Company 94 S.J. 369). Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely (See Re. Tweeds Garages Ltd.) The principles on which the court acts are **first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.***

*Another rule which the court follows is that if there is opposition to the making of the winding up order by the creditors the court will consider their wishes and may decline to make the winding up order. Under Section 557 of the Company Act 1956 in all matters relating to the winding up of the company **the court may ascertain the wishes of the creditors.** The wishes of the shareholders are also considered though perhaps **the court may attach greater weight to the views of the creditors.** The law*

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on this point is stated in **Palmer's Company Law, 21<sup>st</sup> Edition page 742** as follows: "This right to a winding up order is, however, qualified by another rule, viz., that the court will regard the wishes of the **majority in value of the creditors, and if, for some good reason, they object to a winding up order, the court in its discretion may refuse the order**". The wishes of the creditors will however be tested by the court on the grounds as to **whether the case of the persons opposing the winding up is reasonable**, secondly, whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well settled that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case (**See Re. P. & J Macrae Ltd.**)".

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

**156.** In *IBA Health (India) Private Limited Vs. Info-Driver Systems SDN. BHD. [(2010) 10 SCC p.553]*, **decided on 23/09/2010**, the Hon'ble Supreme Court held that where the Company has a bona fide dispute, the petitioner cannot be regarded as a creditor of the Company for the purpose of winding up. In fact, the dispute implies the existence of a substantial ground for the dispute raised. The Court should dismiss the winding up petition and leave the creditor first to establish his claim in an action, lest, there is danger of abuse of winding up procedure. A dispute would be substantial and genuine if it is *bona fide* and not spurious, speculative, illusory or misconceived. The Company Court in a winding up proceedings is not expected to hold a full trial of the matter. If the debt is *bona fide* disputed, there cannot be **"neglect to pay"** within the meaning of Section 433(1)(a) of the

Companies Act, 1956. The relevant portion of the judgment is quoted below for ready reference.

*“ A party to the dispute should not be allowed to use the threat of winding-up petition as a means of enforcing the company to pay a bona fide disputed debt. A Company Court cannot be reduced to a debt collecting agency or as a means of bringing improper pressure on the company to pay a bona fide disputed debt and should not permit a party to unreasonably set the law in motion, especially when the aggrieved party has a remedy elsewhere. Of late, there are several instances where the jurisdiction of the Company Court is being abused by filing winding-up petitions to pressurize the companies to pay the debts which are substantially disputed and the courts are very casual in issuing notices and ordering publication in the newspapers which may attract adverse publicity. A creditor’s winding-up petition implies insolvency and*

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*is likely to damage the company's creditworthiness or its financial standing with its creditors or customers and even among the public and which may also have other economic and social ramifications. Competitors will be all the more happy and the sale of its products may go down in the market and it may also trigger a series of cross-defaults, and may further push the company into a state of acute insolvency much more than what it was when the petition was filed. The Company Court, at times, has not only to look into the interest of the creditors, but also the interests of the public at large. The Company Courts are to be more vigilant so that its medium would not be misused. A Company Court, therefore, should act with circumspection, care and caution and examine as to **whether an attempt is made to pressurize the company to pay a debt which is substantially disputed.***



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*If there is no dispute as to the company's liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under Section 434(1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. **If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand.** The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1)(a) that the company is unable to pay its debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption."*

**157.** The Karnataka High Court in ***Ramakrishna Setty K.S. Vs. Clarian Fisheries Pvt. Ltd. And Others, decided on 10/09/1984, [1985 (1) Kar.Law Journal 155]***, a learned Single Judge of this Court held that the

Company Court, while exercising its jurisdiction under Section 433 of the Act, cannot convert itself into a Court of Original Jurisdiction settling civil dispute including drawing up of a decree in favour of one or the other parties in proceedings under Section 433 of the Act and then convert itself into a kind of Executing Court by passing a winding up order and such an exercise of jurisdiction should be avoided. In paragraph 4 of the judgment, the Court has held as under:

*“4. The Company Court under the provisions of the Act cannot convert itself into a Court of original jurisdiction setting civil disputes including drawing up of a decree in favour of one or the other of the parties in proceedings under Sec.433 of the Act. It is true, the Company Court does have original jurisdiction to settle claims of all kinds when it exercises its power under Sec.446 of the Act. But the nature of jurisdiction and the nature of power exercised under the two*

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sections are widely different. Under the latter section jurisdiction is acquired only if an order is made under Sec.433 of the Act and not otherwise. If there is no order under Sec.433 of the Act, including the appointment of a provisional liquidator then there is no jurisdiction acquired by the Court under Sec.446 of the Act. If this is borne in mind then **Sec. 433 of the Act which is normally a discretionary jurisdiction should necessarily be so understood only when the Court is fully satisfied that it is called upon to examine the merit of the need of a winding-up order** and not settling the disputes of civil nature that may arise out of a contract or obligations arising under an Agreement. In fact, I will go to the extent of stating that even if a company is sought to be wound up on the basis of a promissory note, **if the Company disputes either receipt of consideration or the execution thereof**, then this Court would be compelled to refer such a **petitioner to the civil Court** for obtaining the necessary decree before he can move the Company

*Court for a winding up order. In other words, the test would be whether this Court should first grant a decree for an alleged debt and then convert itself into a kind of executing Court by passing the winding up order. That should be avoided.”*

**158.** Mr. Udaya Holla also relied upon the Supreme Court decision in the case of **Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, decided on 08/01/1965, [1965 vol.35 Company Cases pg.456]** at page.463, where the Hon’ble Supreme Court held that a winding up petition is not a legitimate means of seeking to enforce payment of debt which is in fact disputed by the Company. The petition presented ostensibly for a winding up order, but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the Court.

**159.** Similarly, in ***Madhusudan Gordhandas and Co. Vs. Madhu Woollen Industries (P) Ltd.,[A.I.R. 2 (1971) 3 SCC 632]***, the Hon'ble Supreme Court held, that the principles on which the Court acts are first, that the defence of the Company is good faith and one of substance, secondly, **the defence is likely to succeed in a point of law** and thirdly, the Company adduces *prima facie* proof of the facts on which the defence depends.

**160.** Another case relied upon by Mr. Holla was also rendered by the same learned Single Judge of this Court, (Hon'ble Justice M.P. Chandrakantaraj Urs.) in the case of **Globe Detective Agency Vs. Subbiah Machine Tools P.Ltd. and others, decided on 09/03/1984, [1984(2)K.L.J.P.207]**, wherein the winding up petition was filed by the petitioner – M/s. Globe Detective Agency had provided security guards to the Respondent - Company and some of the security

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

**161.** The argument of Mr. Holla based on this case was, that when the Respondent - **UBHL** also has

raised claims against the petitioning creditors in Civil Suits filed by it and has disowned its Corporate Guarantees and there are claims and counter claims between the parties, the winding up petitions deserve to be dismissed.

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

does not take judicial notice of Foreign law, it should be pleaded like any other fact, if a party wants to rely on the same.

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

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

**165.** He also relied upon to the same effect the judgment of the Bombay High Court in the case of



**Chloro Controls (India) P. Ltd. Vs. Severn Trent Water Purification Inc. and another, decided on 20<sup>th</sup>/21<sup>st</sup> February 2006, [(2006) 131 Comp.Case 501(Bombay)],** in which the Division Bench of the Bombay High Court in the said judgment authored by Hon'ble Mr. Justice R.M. Lodha (as his lordship then was ) held as under:

*“ The legal position is well settled that foreign law is a question of fact and must be pleaded by the party who relies upon it. The petitioner has not pleaded about the relevant laws of merger. The documents that have been placed on record only show that certain documents were filed by the petitioner in the office of the secretary of the State of Delaware. Nothing is pleaded about its legal effect. These documents only show that the certificate of ownership and merger merging Capital Controls (Delaware) Inc. (Delaware Corporation) into Severn Trent Water Purification Inc. were filed before the same authority. In the absence of pleading of the*

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*relevant laws of merger prevalent in the State of Delaware or under the law of the commonwealth of Pennsylvania under which merger is said to have taken place, it is very difficult to examine the aspect as to whether by virtue of the said merger, there is a blending of the two entities and the status of the two companies thereafter.”*

**166.** In support of his contention that where the Civil Suit had been filed by the petitioning creditor for recovery of the money in question, the same creditor cannot pursue the winding up proceedings against the Respondent – Company like the petitioning Banks, SBI and others are pleading before this Court, Mr. Udaya Holla relied upon the judgment of the Bombay High Court in the case of ***Dalmia Cement (Bharat)Ltd. Vs. Indian Seamless Steels and Alloys Limited, decided on 31<sup>st</sup> August, 2001 [2002(112) Comp.Case 314(Bom)]*** in which the learned Single Judge of the Bombay High Court held that the winding up petition is not a

legitimate means to seek to enforce payment of a debt which is *bona fide* disputed by the Company and merely because one creditor claiming a large amount of debt seeks the winding up of a Company, the Court will not admit such petitions and advertise the same to cause further damage and injury to the Company. The Court further held that the petitioner - Company had already resorted to its legitimate civil remedy by way of filing a Civil Suit which would examine the correctness of the contention of both the parties and thus having resorted to alternative remedy, it was not proper and legitimate for the petitioner - Company to seek winding up of the Respondent - **UBHL** on the basis of the same debt.

**167.** To the same effect, he relied upon the Himachal Pradesh High Court judgment in the case of ***Azeet International Pvt.Ltd. Vs. Himachal Pradesh Horticultural Produce Marketing and Processing Corporation Ltd., decided on 10<sup>th</sup> December 1997, [1998***

**(92) Com.P. Case 356 (HP) ],** the relevant portion of the said judgment is also quoted below for ready reference.

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

**168. In QSS Investors Private Limited Vs. Allied Fibres Limited, decided on 08/09/2001, [(2001) 107**

**Company Case 587 (Bom)]**, the learned Single Judge of Bombay High Court held on facts that although according to the petitioners, the sum advanced was a loan, the Respondent - Company had treated it as share application money in its Balance Sheet and there was no written Agreement to pay the interest at the rate of 24% as claimed by the petitioners on the alleged loan, the Court held, that the liability was *bona fide* disputed by the Respondent Company and the winding up petition was liable to be dismissed. Moreover, the petitioners had resorted to the civil remedy and therefore the petition could not be entertained.

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

**170.** On the issue of compliance of Sections 592 and 599 of the Companies Act, 1956, Mr. Udaya Holla also relied upon a Foreign judgment, in the case of ***Re TOVARISHESTVO MANUFACTUR LIUDVIG RABENEK, decided on 12/06/1944,[1944(2) All E. Reporter 556]***, in which the Court there found that where it was the practice of the Director on such visits to stay at a Manchester Hotel which was used as regular place of business for the Company and to which, the correspondence was addressed and the Company kept Banking Accounts in London, but it was contended by the Respondent - Company that the Company could not be wound up under Section 338 of the Indian Companies Act, 1929, since it never had an established place of business under the jurisdiction of the Courts within the meaning of the Companies Act, 1929. Section 343, which refers to “companies incorporated outside Great Britain which....establish a place of

business within Great Britain” it was held, that it was sufficient for the purposes of the Companies Act, 1929. Section 338 for the Company to have a place, not an “established” place of business in England and thus there was jurisdiction of the Court to wind up the Company, since it had, through its Directors carried on business in England for a substantial period and at a fixed place.

**171.** In *M/s. Greenhills Exports (P) Ltd., and others Vs. Coffee Board, decided on 16/03/2001,(ILR 2001 Kar.2950)*, a Division bench of this Court held that the petition for winding up on the ground that the Company is unable to pay its debts under Section 433 (e) of the Companies Act cannot be filed for claiming damages as the term ‘debts’ in that provision does not refer to the claims for damages. Since the Court held that a ‘debt’ is a sum of money which is now payable or will become payable in future by reason of a present

obligation. The 'damages' is money claimed by, or ordered to be paid to a person as compensation for loss or injury, and it merely remains as a claim till adjudication by a Court and becomes a 'debt' only after a Court awards it.

**COURT'S REASONS & FINDINGS:**

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

**173.** Indisputably, the Respondent – Company, UBHL extended its Corporate Guarantees for the dues and financial obligations of the Company, KFAL which



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

extended arm of the Guarantor and its Holding Company, Respondent, UBHL.

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

*17. **There has been no opposition as such to the present winding up petition and such of other winding up petitions against the respondent-company.** The alleged defences of pendency of civil suit filed by holding company against the manufacturers but not against petitioner-Aerotron Ltd., locus standi of petitioner company to file this winding up petition, there being chance of revival of the business etc., are all, moonshine and sham defences raised without any material basis for them. **The respondent-company is commercially insolvent and is unable to pay its huge debts** and there appears to be no useful purpose to keep this company out of the process of winding up or to keep these*

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*winding up petitions pending **unnecessarily waiting for some magic to happen for a turnaround of this company, which has been left to fend for itself even by its own holding company, even though UBHL facing similar winding up petitions against itself** filed allegedly for not discharging its own guarantee obligations for discharging the debts of its own subsidiary- the Respondent company, and UBHL is hotly contesting winding up petitions filed against itself. **This is nothing but self serving suicidal contradiction of these two companies.***

18. *The failure of the respondent-company even to make any alternative arrangement to argue and oppose the present case and other such petitions on behalf of the respondent-company against the petitioning creditors also shows that the **Company is not interested in seriously opposing these winding up petitions against it. The objections** raised in the statement of objection though not pressed*

*again **were considered but are found to be unsustainable and flimsy.** There is **no bona fide dispute** against the admitted liability of the respondent-company and **no substantial defence** has been put-forth by it to show that it is not commercially insolvent.*

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

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

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

**177.** Taking up the arguments of Mr. Udaya Holla, learned senior counsel for Respondent – Company, UBHL, that UBHL has instituted Civil Suits in Bombay High Court and Bengaluru City Civil Court, challenging the validity of the Corporate Guarantees

itself as having been given under duress or coercion or that on account of defective supply of Aero Engines, the said company, KFAL suffered huge losses and went out of business operations and therefore the Respondent Company has claimed huge damages against the suppliers and also to declare the Corporate Guarantees itself as *non-est* and *void*, this Court does not find any substantial ground in law upon which the Respondent – UBHL hopes to succeed in such proceedings.

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

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

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

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

**181.** The learned Member of the Debt Recovery Tribunal, Bengaluru, has made the following



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

***“The above contention of coercion raised by second and third defendants are so unworthy of any consideration for the simple reason that there was none. Not only the applicant banks are dealing with the public money, but it was also the defendants 1 to 3, who knowingly availed public money as loans from the Banks with a promise to repay the same. It is the bounden legal duty of the banks and the borrowers to ensure that such loans are properly secured by mortgage over immovable properties, hypothecation over movables and guarantees of directors and all other types of guarantees including even that of third parties wherever offered or possible. The second and third***

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defendants cannot expect the banks to give away public money as loans to them without even guarantee from them for the repayment in addition to other securities and loan documents. In fact, the second and third defendants would have done well to have volunteered execution of such guarantees, being the holding company and the Chairman and as Rajya Sabha member. **It is unfortunate that the defendants are challenging these guarantees without any basis or material to support their contention of coercion.** If insistence on guarantees by the banks for realizing the loans are to be considered as **coercion, then no loan can be properly secured** by any bank. In fact, the banks will be failing in their legal and public duty in discharging of their functions if such guarantees are not obtained. Further, the defendant 2 being the parent company of first defendant and third defendant being the Group Chairman and man of sufficient net worth and as Member of Rajya Sabha, **were bound to execute guarantee documents for the repayment**

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**of loan availed by first defendant.** *The third defendant who was also a Member of Parliament cannot be heard to say without any basis or material that he was coerced by Nationalized banks into execution of personal guarantee at the time of availing thousands of crores as loans from the banks. At best, this claim of defendants 2 and 3 can add a bit of humour value in this otherwise serious claim for recovery of thousands of crores of public money. In fact the 3<sup>rd</sup> defendant by alleging coercion has hardly set a role model in himself as Rajya Sabha member.*

*One of the contentions raised by the Learned Counsel appearing for Defendants 2 and 3 is that the Bank being in a dominant position have given undue pressure to Defendants 2 and 3 to sign their guarantees by withholding the credit facilities and also by charging very high rate of interest when the defendants were in dire need of funds. This contention is also unacceptable. In fact one of the judgment cited by the learned*

*counsel for Defendants 2 and 3 is directly on the point (AIR 1924 PC 60). That was the case where alleged unconscionable interest charged was challenged as coercion since lender was considered to be in a dominating position. The argument was that the lender took advantage of the position of the borrower as the borrower was in urgent need of money. The learned counsel for the appellant therein argued that the mortgagees were thereby placed in position to dominate the will of the mortgagor. In the said decision, their Lordship have clearly held that urgent need of money on the part of the borrower will of itself not place the parties in that position. In para 13 of the said judgment, it is observed as follows:-*

*“Their lordship think it right to observe that the judgment now pronounced is not in accord with the principles laid down by the Appellate Civil Court of Calcutta in Abdul Majeed v. Khirode Chandra Pal I.L.R. 42 C.690, that “where there is ample security, the exaction of excessive and usurious*

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*interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate". Their Lordships think that decision to be wrong. There is no such presumption until the question has first been settled as to the lender being in a position to dominate the borrower's will"*

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

***Therefore, it is clear from the above that the question of coercion on the basis of banks being in an advantageous/dominant position to take guarantee, charge interest etc. raised by the defendants 2 to 3 are baseless. In fact, in my view, it was the defendants 1 to 3 herein who were in dominant position of demanding restructuring of the loan by not repaying the huge loans already***

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**availed by them from the banks.** In my opinion, therefore, it was the bank which, just for the sake of arguments, can be heard to say that they were coerced into entering into MDRA so as to recover its huge outstandings and not the other way around. However, in view of the above, I am therefore of the considered view that the **defendants have not experienced any coercion at any stage** and they have entered into the guarantee agreements MDRA and all other documents voluntarily.

XX XX XX XX

**ORDER**

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

(a) Defendants No.1 to 4 jointly and severally shall pay a sum of **₹6203,35,03,879=42 (Rupees Six Thousand Two Hundred and three Crores Thirty Five Lakhs Three Thousand Eight Hundred and Seventy Nine and Paise Forty Two only)** with further interest at

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***the rate of 11.50% p.a. with yearly rests  
from the date of the application till the  
date of complete realization.***

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

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

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

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

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

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

**182.** That besides the aforesaid judgment and decree of the Debt Recovery Tribunal now existing against the Respondent UBHL, during the contemporary period also there was not much a serious contest to the liability of the Respondent, UBHL as a



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Guarantor towards the petitioning creditors and learned counsels for the petitioners brought to the notice of the Court, the letter written by the Chairman of the Respondent – Company, Dr. Vijay Mallya himself to one Mr. Ian of petitioner – IAE International Aero Engines, AG, the supplier of the Aero Engines on **30<sup>th</sup> December 2011** in which the said Chairman, Dr. Vijay Mallya not only acknowledged all the debts towards the said Company and expressed his difficulties faced by the Company in meeting its obligations towards the company KFAL but sought for the co-operation of the said creditor supplier, IAE International Aero Engines AG, in the following manner and to complete this contextual background, the entire letter is quoted in-extenso below:

***“From:*** Vijay Mallya <vjm@ubmail.com>  
***To:*** Aitken, Ian (IAE)  
***Cc:*** sanjay.aggarwal@flykingfisher.com  
<sanjay.aggarwal@flykingfisher.com>  
***Sent:*** **Fri Dec 30 17:08:11 2011**  
***Subject:*** Kingfisher

*Dear Ian*

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

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

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

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

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

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

*The depreciation of our Indian currency has added a straight 20% increase in our USD denominated costs including lease rentals and maintenance reserves. As a result every Airlines in India is losing money currently.*

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

*Some important policy change announcements are expected in the next*

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*couple of weeks pertaining to direct import of jet fuel and to allow investment by Foreign Airlines to invest in Indian carries. This will have a direct financial impact.*

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

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

*On the contrary, when this escrow mechanism was agreed, SBI decided to “retain” all our cash pending their own*

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*interpretation of Law which is the most frustrating aspect for me.*

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

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

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

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

***You have the ability both legally and morally to ground and repossess your***

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***planes and you are entitled to take such action.***

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

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

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

*Specifically, we will secure:*

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

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

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

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

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

*With my best regards and wishes for the new year.*

*Vijay Mallya*

*3/24/2012*

*Member of Parliament-India  
Chairman, The UB Group.”*

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

**184.** By way of strange coincidence, this Court also felt that the Front Logo of each year's Annual Report of UBHL with a Logo printed on the front page to



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be giving some indications of the things reflected in the financial affairs of the Company as recorded in the duly audited Balance Sheets of the Respondent – Company.

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

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

For Annual Report **2012-13**, the title of Annual Report is again **“Moving Forward”** with **Beautiful Flower Petals making a rotation.**

The next Annual Report of **2013-14** has the title of **“Standing Tall”** with a **Big Tree curiously grown between the crevices of Dry Hills**, as if the Respondent Company is standing tall and still growing

although there are no apparent water resources thereon.

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

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

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

**187.** These winding up petitions have to be dealt with on harder facts and figures and financial results as reflected in these Balance Sheets and commented upon

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by the Auditors including independent Auditors. Therefore, a glance through their comments and financial figures follows herein:

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

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

**“ Note: 4. Attention is invited to the following:**

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

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

(iii) Note no 40 regarding **significant financial exposure to KFA in the form of investments in equity, loans and advances and guarantees. KFA has considerably scaled down its operations and it is under severe financial stress.**

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**No provision has been made in the accounts for the probable loss** that may arise due to non recovery of loans and advances and other receivables, decline in the value of investments and invocation of guarantees.

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

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

extent of ₹1,577.425 millions for the Financial Year  
**2012-13.**

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

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

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some of **which necessitated underlying support from the Company.**

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

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

**192.** It is significant that no reference was made by the Respondent - Company in this Report given on **13/08/2014** to the Original Suit, **O.S.No.6406/2012**, instituted by the Respondent - Company in the Bangalore City Civil Court, on **05/09/2012** even while referring to the Suit filed by it in the Bombay High Court. The Auditor in the Report dated **13/08/2014**, by the same Chartered Accountant, Mr. Vishnu Murthy, in this very year, clearly noted that “**accumulated losses of the Company are more than 50% of its net worth**”. The relevant extract from Auditor’s Report is quoted below for ready reference.

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



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

**193.** For the year **2014-15** Annual Report, the Auditor, Mr. S. Vishnu Murthy, Chartered Accountant in his Report dated **29/05/2015** in which Balance Sheet also, the Respondent – Company, UBHL had registered a profit of **₹433.974 crores** taking into account the exceptional gain of **₹965 crores** for the said year on account of sale of **‘Pledged Shares’** with certain lenders, namely Banks of the Company to recover their dues and which was challenged and is the subject matter of litigation even now before the Hon’ble

Supreme Court of India as to whether the sale of such '**Pledged Shares**' by UBHL was valid or not.

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

*“Winding up petitions filed against the Company have been admitted by the Honourable High Court of Karnataka and are being heard (Ref. note no.45); the Honourable **High Court of Karnataka has restrained the Company from disposing of any of its assets** [Ref. note no.52(e)]; the Company is a defendant in recovery suits instituted by certain creditors/lenders **for recovery of their dues of ₹62,033 million** [Ref. note no.45]; some of the lenders have recovered*

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*their dues **by disposing of the securities pledged by the company** [Ref. note no.37]. Yet, the company has prepared its financial statements on going concern basis for the reasons stated in note no.52. The appropriateness of preparation of financial statements on going concern basis in subject to the Company being able to successfully defend itself in the petitions/suits filed against it and obtaining substantial reliefs in the suits filed by it as mentioned in note no.45.*

***The Company has not recognized in its financial statements, disputed liabilities amounting to ₹77,309 million arising out of invocation of its corporate guarantees** [Ref. note no.31] and claims of ₹1,463 million made against it under agreements entered into with a banker [Ref. note no.31]. Had the company recognized the above, current liabilities in the Balance Sheet would have been higher by that amounts and guarantees under contingent liabilities and claims not acknowledged as debt would have been*

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*lower by ₹77,309 million and ₹1,463 million, respectively.*

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

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

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

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

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

*(e) Due to restraint orders passed by the High Court of Karnataka, rentable commercial office space could not be leased out resulting in continued loss of significant rental revenue. The Company has filed an Application vide CA No.1428 of 2014 in COP 185/2012 with a prayer to permit the*

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*Company to lease/rent out the vacant premises at UB City and grant such other further orders as are just. Also, high value residential units in Kingfisher Towers, could not be sold which has impacted the cash flow. The said application is pending.*

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

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

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Auditor reported the following qualifications in his Report dated **31/08/2016**.

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

Xx xx xx xx xx xx xx

*The company has shown ₹ 358 million as due from a banker who has unilaterally encashed company's deposits lying with it and appropriated the amount towards its claims against a group company. The*

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



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*consequently quantify the amount of provisions required in the above cases.”*

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

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

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The Chairperson  
State Bank of India  
Mumbai.

29<sup>th</sup> March 2016

Madam,

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

*The Consortium of Banks through SBICAP Trustees Limited had issued a Notice dated 3<sup>rd</sup> May, 2013 under Section 13(2) of the Securitisation and Reconstruction of financial Assets and Enforcement of Security interest Act, 2002 (“SARFAESI Act”) to the Offerors, in which it was alleged that the aggregate outstanding principal amount (both fund based and non-fund based outstanding) was ₹ 5,440 crores plus unapplied interest of ₹1,131 crores. In addition thereto, 4 Banks (PNB, OBC, UBI and Corporation Bank) have filed Original Application No.158 of 2014 before the Debt Recovery Tribunal, Bangalore (“DRT”), inter alia, against the Offerors in*

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*respect of Pre-Delivery Payment Loans raising an aggregate claim of ₹192 crores plus interest thereon. PNB has also filed O.A.No.1844 of 2014 in the DRT, inter alia, against the Offerors in respect of Pre-Delivery Payment Loans raising an aggregate claim of ₹18 crores plus interest thereon.*

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

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

*The total liabilities of UBHL aggregate to approximately ₹12,012 crores as set out in Annexure “1” hereto.*

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

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

*In the light of the aforesaid facts, and without prejudice to the respective rights and contentions of the Consortium of Banks and the Offerors in various pending proceedings,*

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*and subject to the Hon'ble Supreme Court/Company Court granting the requisite permission under Section 536 of the Companies Act, 1956 to KFA and UBHL, the Offerors with a view to amicably settle all disputes and differences with the Consortium of Banks/Asset Re-construction Company shall, in full and final Settlement of all the dues and claims made or raised by the Consortium of Banks/Asset Re-construction Company against the Offerors in various pending proceedings, make payment to the Consortium of Bank/Asset Re-construction company an aggregate amount of ₹4,000 crores in the manner following:*

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

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- (ii) *Upon acceptance in writing of this Offer by the Consortium of Banks/Asset Reconstruction Company, an aggregate amount of ₹1,603 crores shall forthwith in the first instance be paid/secured in the manner following:*
- (a) *₹ 700 crores, consisting of a sum of ₹651 crores together with accrued interest thereon, are lying deposited in the Hon'ble Karnataka High Court to the credit of O.S.No.25877 of 2013 filed by the Consortium of Banks before the Hon'ble City Court, Bangalore pursuant to the order dated 20<sup>th</sup> June, 2014 passed in Writ Petition No.28577 of 2014. The Offerors will cause KFA, UBHL and KFIL to consent to the aforesaid sum of RS.700 crores being paid over to the Consortium of Banks in full and final settlement of their claims in O.S.No.25877 of 2013;*

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- (b) *The residual value of 4,116,306 equity shares of United Spirits Ltd held by UBHL shall be pledged in favour of the Consortium of Banks (Petitioners), the current residual value of which (net of MAT and dues payable to pledgees) being approximately ₹660 crores. These shares shall be liquidated so as to maximize the total amount recovered, subject to the Offerors receiving a minimum credit of ₹660 crores (net of MAT and dues payable to pledgees); and*
- (c) *The residual value of 1,208,180 equity shares of United Spirits Ltd held by KFIL shall be caused to be pledged in favour of the Consortium of Banks, the current residual value of which (net of MAT and dues payable to pledgees) being approximately ₹243 crores. These shares shall be liquidated so as to maximize*

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*the total amount recovered, subject to the Offerors receiving a minimum credit of ₹243 crores (net of MAT and dues payable to pledgees).*

*(iii) The balance ₹1,853 crores shall be paid by the Offerors on or before 30<sup>th</sup> September, 2016 in the manner following:*

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



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*Hon'ble Supreme Court, Airbus Industries S.A. be directed to pay the aggregate amount of US\$ 101,000,000 (equivalent to approximately ₹688 crores) to the Consortium of Banks.*

- (b) ₹ 1,165 cores by the Offerors to the Consortium of Banks, failing which the Offerors shall cause the residual value of 17,773,404 equity shares held by companies controlled by the Mallya family and/or UBHL in United Breweries Ltd to be pledged in favour of the Consortium of Banks, the current residual value of which (net of MAT and dues payable to pledgees) being approximately ₹1,165 crores.*

*In addition to payment of the aforesaid aggregate amount of ₹4,000 crores, the Offerors shall cause UBHL to assign all and any amount that UBHL may recover against*

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*the claim of USD 210,400,000 plus ₹162,10,00,000 (aggregating to approximately ₹2,000 crores) made against the Defendants (International Aero Engines Inc. & Ors.) in O.S.No.6406 of 2012 filed in the City Civil Court at Bangalore.*

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

- (i) all legal proceedings filed by the Consortium of Banks against the Offerors shall be stayed and shall not be proceeded with further.*
  
- (ii) IDBI Bank shall forthwith release 3,459,090 equity shares of United Spirits Ltd in favour of USL Benefit Trust which are the subject matter of Writ Petition No.49864-49865 of 2013 pending in the Hon'ble Karnataka High Court.*
  
- (iii) all orders passed by any of the Banks against any of the Offerors declaring*

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*them willful defaulters shall be kept in abeyance and not acted upon. The Consortium of Banks shall inform the Reserve Bank of India and CIBIL accordingly.*

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

- (i) all legal proceedings filed by the Consortium of Banks against the Offerors shall stand dismissed as withdrawn, and all ad-interim and interim orders passed therein shall stand vacated.*
- (ii) all security/security interests other than those created hereinabove, shall stand released in favour of the party which created the security/security interest in favour of the Consortium of Banks.*

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

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

*It is clarified that non of the ad-interim or interim orders passed by any court(s) against the Offerors will prevent the Offerors from fulfilling this Offer if accepted in writing by the Consortium of Banks.*

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

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*officers maintain strict confidentiality of the contents hereof.*

*Yours sincerely,*

*(Dr. Vijay Mallya)*

*Encls: As above.*

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

***“I.A.Nos.5-8 of 2016 – applications for impleadment on behalf of Oriental Bank of Commerce are allowed.***

*Mr. Shyam Divan and Mr.S.S. Naganand, learned senior counsel appearing for the petitioners have submitted that the offer made by Respondent Nos.1 to 4, which is referred to in our order dated 30.03.2016, **has been considered and the consortium is of the view that the offer is not acceptable. However, the consortium is***

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***not against a negotiated settlement,  
provided the respondents show their  
bonafide for a meaningful negotiation.***

*As a pre-condition to such steps on bonafides,  
it is submitted that the third respondent  
should first of all disclose, on oath, the details  
of all the properties-movable, immovable,  
tangible, intangible, share holdings and any  
right, title or interest including beneficial  
interest and those held in fiduciary capacity,  
in private trusts, public trusts, companies,  
partnerships, limited liability partnerships,  
and/or any other entity/ies both in India and  
abroad etc. in any form and there should be  
a substantial deposit made before this Court.*

*Mr.C.S. Vaidyanathan and Mr. Para P.  
Tripathi, learned senior counsel appearing for  
Respondent Nos.1 to 4 have submitted that  
on receipt of the response from the  
Consortium, they have made another  
proposal.*

*Mr. Shyam Divan, learned senior  
counsel, has submitted, on instruction, that*

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

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

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

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*indicated above, in the name also of his wife and children, as on 31.03.2016.*

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

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

*Post the matters on 26.04.2016 as first item.”*

**200.** That as far as other technical objections or defences raised by the learned Senior Counsel for the



Respondent Company, UBHL, Mr. Udaya Holla is concerned, they are also found to be devoid of any merit. They are dealt with below.

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

**202.** The petitioners are not seeking execution of any decree passed by English Courts or other Foreign jurisdiction against the Respondent – Company. They have invoked the winding up of Respondent- Company before this Court under Section 433 read with Sections 434 and 439 of the Companies Act, 1956 and have been able to satisfy this Court with the relevant and cogent material that the specified amounts of debts are due to

be recovered by them from the Respondent – Company and the Respondent - UBHL under its contractual Guarantee obligations incurred by it for the financial obligations of the KFAL, which it has failed to discharge, despite due notice without any cogent reasons. It is neither a question of treating these winding up petitions as civil Suits for recovery of monies but it is a matter of forming a reasonable and fair opinion that whether from the facts and figures, contentions and defences, this Court can form a reasonable opinion about the commercial insolvency and erosion of its net worth and inability of the Respondent Company, UBHL, to pay-off its admitted dues or not. This Court does hold this opinion against the Respondent - Company, UBHL. Therefore, the contention that the applicability of the English law was required to be pleaded and proved as a fact, as if in the realm of trial of a Civil Suit, does not merit acceptance of such a contention by this Court.

The same is therefore liable to be rejected and is accordingly rejected.

**203.** Another contention about the petitioning Companies other than the secured creditors like SBI and consortium of Banks and others that such Foreign Companies ought to have obtained due permissions from Registrar of Companies (ROC) or Reserve Bank of India (RBI) in terms of Sections 592 and 599 of the companies Act, 1956, also is equally devoid of merit. If the Respondent – Company wanted to challenge the *locus standi* of the petitioners, it was for them to establish before the Court that such Companies had a ‘permanent establishment’ of business in India so as to fall within the definition of a Foreign Company, requiring registration and permissions in terms of Sections 592 and 599 of the Act. No such material has been placed by them before this Court to question the *locus standi* of the petitioning creditors. Mere presence

of some sales representatives while undertaking business of supply of Aero Engines and Allied Equipments does not establish in any manner that such Companies had their permanent establishment in India so as to attract rigor of Sections 592 and 599 of the Companies Act. The said contention also is therefore liable to be rejected and is accordingly hereby rejected.

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

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

**206.** The winding up order of course results in divesting the existing Management of the Respondent - Company of their control, possession and effective management of day-to-day affairs of the Company

ordered to be wound up but it does not partake the character of a money decree against the Respondent - Company. Therefore the institution of Civil Suits, recovery proceedings in Debt Recovery Tribunal proceedings does not and cannot prohibit the institution and pursuing of the winding up petitions by the secured creditors like SBI and others and unsecured creditors like IAE International Aero Engines AG and BNP Paribas, etc. On the other hand, the interest of the creditors, workmen and other stakeholders in the Respondent - Company can be better safeguarded, if the Government Authority, like Official Liquidator undertakes the control of the affairs of the Respondent - Company and winds up the Respondent - Company, UBHL in accordance with the provisions of the Companies Act, 1956. Therefore, these defences are also without any merit and the same are hereby rejected.

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

of the Respondent Company, because such a proposal is hedged with the conditions, practically impossible of compliance and therefore, this Court finds no serious and sincere efforts made by the Respondent - Company to save itself from the winding up of the Company in accordance with law.

**208.** This Court also finds that if one of the Group Companies itself, viz. the United Spirits Limited (USL), on account of its financial help extended to UBHL and KFAL and now later on upon change of its management by the purchase of shares by Foreign Companies like Diageo Plc and Relay B.V., had to change its stand from initial opposing winding up petitions but now supporting the winding up petitions, it appears that something seriously wrong has taken place in the Respondent - Company's Management and affairs, where it has been unable to perform its contractual obligations even towards its own group



Company, what to talk of all other creditors, who are petitioners herein. This Court finds such a change of stand very serious turn of events and has no reason to disbelieve the genuineness of the strong reasons for the said Company, USL to change its stand for which the detailed Affidavits were filed before this Court explaining such reasons.

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

**210.** The deposits of **₹1280.00 crores** made in the Court under Interim Orders of the Court will of course be utilized for distribution, if the Respondent – Company, UBHL is to be wound up. The argument that such deposit being in excess of claims of unsecured creditors or suppliers and therefore the Respondent –

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

**211.** Therefore, on a totality of the facts and circumstances, this Court is of the firm and clear opinion that the Respondent Company, UBHL also

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

**212.** This winding up order be published in ‘The Hindu’ and ‘Udayavani’ having circulation in Karnataka in terms of Rule 114 of Companies (Court) Rules, 1959, read with relevant provisions and notice of this order

may also be sent to Official Liquidator, Regional Director and the Registrar of Companies, Karnataka, the Respondent - Company itself and the petitioners.

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

**214.** The Official Liquidator may file a status report within a period of four weeks from today about taking over the control and possession of the assets of the Respondent-Company, UBHL and also about the pending litigation or cases against the Respondent, UBHL at various other Forums/Courts or Tribunals or before this Court, within a period of four weeks.

**Sd/-**  
**(DR.VINEET KOTHARI)**  
**JUDGE**

Sr1/BMV\*