

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORIGINAL JURISDICTION)

WEDNESDAY, THE 15TH DAY OF DECEMBER, 2021

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

COMP.PETN.NO.363 OF 2015

AND

COMP.A.NOS.887, 888 OF 2015 & 55 OF 2020

In the matter of the Companies Act,
1956

and

In the matter of SpiceJet Limited,
having its registered office at Kamaraj
Domestic Terminal, Chennai Airport,
Chennai,Tamil Nadu-600 027.

and

In the matter of Sections 433 and 434
of the Companies Act, 1956

Credit Suisse AG,
A stock corporation registered
under the laws of Switzerland,
Carrying on business at Uetlibergstrasse 231(C2),
8045 Zurich, Switzerland,
Rep.by its Power of Attorney
Mr.Robert Pavrey.

.. Petitioner in CP 363/2015 &
Applicant in COMP.A.Nos.887, 888/2015

-Vs-

SpiceJet Limited,
having its registered office
Kamaraj Domestic Terminal,
Chennai Airport,
Chennai – 600 027
Tamil Nadu.

.. Respondent in CP.No.363/2015
& COMP.A.Nos.887,888/2015

The Company Petition praying that this Hon'ble Court be pleased to

a) To wind up of the Respondent under the provisions of the Companies Act, 1956;

b) To appoint the Official Liquidator, High Court, Madras as the liquidator of the Respondent with all powers under section 448 of the Companies Act, 1956 to take charge of the assets, properties, stock in trade and books of accounts of the company; and

c) To order costs of this petition.

COMP.A.887/2015:

This Company Application praying this court to order of injunction restraining the respondent, its directors, officers, servants, agents, or anyone acting through or under them from in any manner alienating, encumbering, dealing with, disposing or creating any third party rights, interests or charge in or over the assets of the Respondent Company pending disposal of the Company Petition.

COMP.A.888/2015:

The company application praying this court to appoint the Official Liquidator, High Court, Madras, as Provisional Liquidator of the respondent company with all powers to take charge of the assets, properties, stock in trade and books of accounts of the respondent pending disposal of the company petition.

COMP.A.NO. 55 OF 2020:

Spiecejet Limited,
Having registered office at
Kamaraj Domestic Terminal,
Chennai Airport, Chennai 600 027
Tamil Nadu

..Applicant/Respondent

Credit Suisse AG,
 A stock corporation registered
 under the laws of Switzerland,
 Carrying on business at Paradeplatz,
 8001 Zurich, Switzerland,
 Rep.by its Power of Attorney
 Mr.Robert Pavrey.

...Respondent/Petitioner

This Company Application praying that this Hon'ble Court be pleased to direct the impounding, adjudication and payment of the appropriate stamp duty and penalty on the originals of the documents set out in the schedule to the Judges summons in accordance with the law.

Schedule
 (COMP.A.NO. 55 OF 2020)

<i>No</i>	<i>Date</i>	<i>Description of the document</i>
1	24.11.2011	Agreement for the performance of engine maintenance services on CFM 56-7B engines entered between Spicejet and SR Technics Switzerland Limited.
2	24.08.2012	Amendment No.2 Agreement entered between Spicejet and SR Technics Switzerland Limited
3	24.08.2013	Supplementary Agreement entered between SpiceJet and SR Technics Switzerland Limited
4	26.09.2012	Frame Agreement
5	26.09.2012	Transaction Agreement
6	31.07.2013	Bill of Exchange
7	09.08.2013	Bill of Exchange
8	23.08.2013	Bill of Exchange
9	21.10.2013	Bill of Exchange
10	25.10.2013	Bill of Exchange
11	04.12.2013	Bill of Exchange
12	04.12.2013	Bill of Exchange

This Company Petition along with the company applications having been heard on 06.12.2021 in the presence of of Mr.Rahul Balaji, Advocate for the petitioner in CP.No.363/2015 and for the Applicant in Company Application Nos.887,888/2015 and for the respondent in Comp.A.NO.55/2020 herein and Mr.V.Ramakrishnan Viraraghavan Senior Counsel assisted by for Varun K.Chopra, Abhinav Sharma for M/s. Ashok Menon, for respondent herein in CP.No.363/2015, Comp.A.Nos.887,888/2015 and for applicant in Comp.A.No. 55/2020 herein and order delivered on the same day and coming on this day for being mentioned in the presence of said advocates for the parties hereto and this Court while admitting the company petition herein, **It is ordered as follows:**

1).That the Official Liquidator, High Court, Madras, be and hereby is appointed as the Provisional Liquidator of the respondent company viz., M/s.SpiceJet Limited.

2). That the Provisional Liquidator appointed herein be and hereby is directed to take charge of the assets of the respondent company viz.,M/s.SpiceJet Limited..

3.). That the Ex-Directors of the respondent Company herein be and hereby are directed to file their statement of affairs to the Official Liquidator, High Court Madras within a period of 14 days.

4).That the notice of this company petition be served on the

Respondent company.

5).That the notice of this company petition be served on the Registrar of Companies, Chennai.

6).That the notice of this company petition be affixed on the Court notice board at the premises of the Registered office of the respondent.

7). That the petitioner herein be and hereby is directed to publish the Company Petition in one issue of Tamil Daily "Dinakaran" and in one issue of English Daily "Times of India" (All India Edition) and also in the TamilNadu Government Gazette, by fixing the date of hearing on ****20.01.2022.**

8) That the petitioner herein be and hereby is directed to publish the Company Petition giving atleast fourteen days clear advance notice.

9) That the petitioner Company, M/s.Credit Suisse AG, shall deposit a sum of Rs.25,000/- (Rupees Twenty five Thousand only) towards initial expenses to the Official Liquidator in this matter.

10.That the Spiecejet Limited, the respondent herein be and here by is directed to deposit the amount equivalent to five million dollars to the credit of C.P.No.363/2015 is extended till 29.12.2021.

11. That on such deposit within time as mentioned in Clause (10) supra, that of all further proceedings pursuant to this order shall stand stayed till 05.01.2022.

*** Clause 12 & 13 deleted**

14.) That except for the aforesaid modifications, the order dated 06.12.2021 shall remain unaltered in all other respects.

*WITNESS, THE HON'BLE MR. MUNISHWAR NATH BHANDARI,
ACTING CHIEF JUSTICE OF MADRAS HIGH COURT, AS
AFORESAID THIS THE 15th DAY OF DECEMBER 2021.*

Sd/-

JOINT REGISTRAR(O.S)(I/C).

//CERTIFIED TO BE A TRUE COPY//

DATED THIS THE DAY OF 2021

COURT OFFICER.

From 25th September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decree in this format.

**** The date of making publication is extended upto 20.01.2022,
the above said publication is modified as per order dt 23.12.2021
in C.P.No.363/2015**

*** clause 12 & 13 deleted as per order dated 23.12.2021
made in CP.No.363/2015**

Sd/-

JOINT REGISTRAR(O.S)(I/C).

//CERTIFIED TO BE A TRUE COPY//

DATED THIS THE DAY OF 2021

COURT OFFICER.

From 25th September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decree in this format.

R.s/17.12.2021

COMP.PETN.NO.363 OF 2015
AND
COMP.A.NOS.887, 888 OF 2015
& 55 OF 2020

DECREE

DATED: 15.12.2021

THE HON'BLE MR.JUSTICE
R.SUBRAMANIAN

FOR APPROVAL ON:17/12/2021

03.01.2022

APPROVED ON: 17/12/2021

03.01.2022

To

The Official Liquidator
High Court, Madras

+ Notification (2 Copies)

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORIGINAL JURISDICTION)

MONDAY, THE 06TH DAY OF DECEMBER, 2021

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

COMP.PETN.NO.363 OF 2015

AND

COMP.A.NOS.887 AND 888 OF 2015, 55 OF 2020

In the matter of the Companies Act,
1956

and

In the matter of SpiceJet Limited, having
its registered office at Kamaraj Domestic
Terminal, Chennai Airport, Chennai,
Tamil Nadu-600 027.

and

In the matter of Sections 433 and 434
of the Companies Act, 1956

Credit Suisse AG,
A stock corporation registered
under the laws of Switzerland,
Carrying on business at Uetlibergstrasse 231(C2),
8045 Zurich, Switzerland,
Rep.by its Power of Attorney
Mr.Robert Pavrey.

.. Petitioner/Applicant

-Vs-

SpiceJet Limited,
having its registered office
Kamaraj Domestic Terminal,
Chennai Airport,
Chennai – 600 027
Tamil Nadu.

.. Respondent/Respondent

This Company Petition praying that this Hon'ble Court be pleased to :

- a). To order for winding up of the Respondent under the provisions of the Companies Act, 1956;
- b). To appoint the Official Liquidator, High Court, Madras as the liquidator of the Respondent with all powers under section 448 of the Companies Act, 1956 to take charge of the assets, properties, stock in trade and books of accounts of the company; and
- c). To order costs of this petition.

COMP.A.887/2015:

This Company Application praying this court to order of injunction restraining the respondent, its directors, officers, servants, agents, or anyone acting through or under them from in any manner alienating, encumbering, dealing with, disposing or creating any third party rights, interests or charge in or over the assets of the Respondent Company pending disposal of the Company Petition.

COMP.A.888/2015:

The company application praying this court to appoint the Official Liquidator, High Court, Madras, as Provisional Liquidator of the respondent company with all powers to take charge of the assets, properties, stock in trade and books of accounts of the respondent pending disposal of the company petition.

COMP.A.NO. 55 OF 2020:

Spiecejet Limited,
Having registered office at
Kamaraj Domestic Terminal,
Chennai Airport, Chennai 600 027
Tamil Nadu

..Applicant/Respondent

-VS-

Credit Suisse AG,
 A stock corporation registered
 under the laws of Switzerland,
 Carrying on business at Paradeplatz,
 8001 Zurich, Switzerland,
 Rep.by its Power of Attorney
 Mr.Robert Pavrey.

...Respondent/Petitioner

This Company Application praying that this Hon'ble Court be pleased to direct the respondent in the present application (the petitioner in C.P.No.363/2015) to produce the originals of the documents set out in the schedule to the Judges summons.

COMP.A.NO. 55 OF 2020:

This Company Application praying that this Hon'ble Court be pleased to direct the impounding, adjudication and payment of the appropriate stamp duty and penalty on the originals of the documents set out in the schedule to the Judges summons in accordance with the law.

Schedule

(COMP.A.NO. 55 OF 2020)

<i>No</i>	<i>DATE</i>	<i>DESCRIPTION OF THE DOCUMENT</i>
1	24.11.2011	AGREEMENT FOR THE PERFORMANCE OF ENGINE MAINTENANCE SERVICES ON CFM 56-7B ENGINES ENTERED BETWEEN SPICEJET AND SR TECHNICS SWITZERLAND LIMITED.
2	24.08.2012	AMENDMENT NO.2 AGREEMENT ENTERED BETWEEN SPICEJET AND SR TECHNICS SWITZERLAND LIMITED
3	24.08.2013	SUPPLEMENTARY AGREEMENT ENTERED BETWEEN SPICEJET AND SR TECHNICS SWITZERLAND LIMITED
4	26.09.2012	FRAME AGREEMENT
5	26.09.2012	TRANSACTION AGREEMENT
6	31.07.2013	BILL OF EXCHANGE
7	09.08.2013	BILL OF EXCHANGE
8	23.08.2013	BILL OF EXCHANGE
9	21.10.2013	BILL OF EXCHANGE

<i>No</i>	<i>DATE</i>	<i>DESCRIPTION OF THE DOCUMENT</i>
10	25.10.2013	BILL OF EXCHANGE
11	04.12.2013	BILL OF EXCHANGE
12	04.12.2013	BILL OF EXCHANGE

This Company Petitions along with Company Applications Comp.A.Nos.887 and 888/2015 having been heard on 02.11.2021. in the presence of Mr.Rahul Balaji, Advocate for the petitioner in C.P.No.363/2015 and for the applicant in C.A.Nos. 887 and 888/2015, and of Mr.V.Ramakrishnan, Senior Counsel for Ashok Menon advocate for the respondent in C.P.No.363/2015 and for the respondents in C.A.Nos.887 and 888/2015 and upon reading the order dt.30.07.2021 made in C.P.No.363/2015 and C.A.Nos.54,55/2020 the court made the following order:-

The petitioner, as a stock corporation registered under the Laws of Switzerland, seeks winding up of the respondent for the alleged inability to pay the debts under Section 433 (e) and (f) read with Sections 434 and 439 of the Companies Act, 1956.

2. According to the petitioner, the respondent which is a private Sector Airline had availed of the services of a Company named SR Technics, Switzerland, for maintenance, repair and overhauling of Air Craft Engines, modules, components, assemblies and parts which are mandatory for its operations. An agreement for performance of such services for a period of 10 years was entered into between the respondent and S.R.Technics on 24.11.2011. The terms of payments were also agreed. On 24.08.2012 a supplemental agreement was entered into to

change certain terms of the agreement. The amendments included extension of time for payment of monies due under various invoices raised by SR Technics and also a deferred payment scheme. Since there was a general increase in the cost, the supplemental agreement dated 24.08.2012 included adjustment of flight hour rates and provisions for escalation were also made.

2.1. Upon provision of the services under the agreement, SR Technics had raised invoices and the respondent had issued seven bills of exchange for the monies due under the invoices. The respondent also acknowledge the debts from time to time by issuing certificate of acceptance in relation to the bills of exchange which would imply that the respondent had not disputed the correctness of the claim made in the invoices. The details of the seven invoices are as follows:

<i>S. No .</i>	<i>Date</i>	<i>Invoice Amount and reference no.</i>	<i>BOE issuance no. and date of payment</i>	<i>Certificate of Acceptance</i>
1	30.07.2013	USD 3,075,603.12 out of the invoice value of USD 4,134,733.75 bearing reference No.M90204840 (kindly note that USD 59'130.63 has been credited and USD 1 million that was received by Spice Jet on Jul 23, 2014 and adjusted to the said outstanding invoiced amount)	Issued in Zurich and payable at Yes Bank, New Delhi on January 26, 2014	Certificate of Acceptance executed between respondent and SRT in relation to invoice No.M90204840 dated 30.07.2013
2	09.08.2013	USD 4,414,567.04 bearing reference No.M90205479	Issued in Zurich payable at Yes Bank, New Delhi on February 5, 2014	Certificate of Acceptance executed between respondent and SRT in relation to invoice No.M90205479 dated 09.8.2013
3	22.08.2013	USD 1,783,372.69 bearing reference No.M90206294	Issued in Zurich payable at Yes Bank, New Delhi	Certificate of Acceptance executed between

S. No .	Date	Invoice Amount and reference no.	BOE issuance no. and date of payment	Certificate of Acceptance
			on 18 th February 2014	respondent and SRT in relation to invoice No.M90206294 dt. 22.08.2013
4.	18.10.2013	USD 874,149.79 bearing reference No.M90210188	Issued in Zurich payable at Yes Bank, New Delhi on 16, February 2014	Certificate of Acceptance executed between respondent and SRT in relation to invoice No.M90210188 dt. 21.10.2013
5	25.10.2013	USD 4,790,898.30 bearing reference No.M90210595	Issued in Zurich payable at Yes Bank, New Delhi on April 23, 2014	Certificate of Acceptance executed between respondent and SRT in relation to invoice No.M90210595 dt. 25.10.2013
6.	04.12.2013	USD 4,637,863.11 bearing reference No.M90213609	Issued in Zurich payable at Yes Bank, New Delhi on June 2, 2014	Certificate of Acceptance executed between respondent and SRT in relation to invoice No.M90213609 dt. 04.12.2013
7.	04.12.2013	USD 4,437,267.69 bearing reference No.M90213606.	Issued in Zurich payable at Yes Bank, New Delhi on May, 26, 2014	Certificate of Acceptance executed between respondent and SRT in relation to invoice No.M90213606 dt. 04.12.2013

The certificates of acceptance enables SR Technics to assign the debts due under then.

2.2. The petitioner namely Credit Suisse AG, entered into a financing agreement on 26.09.2012 with SR Technics and under a

transaction agreement dated 26.09.2012, SR Technics assigned all its present and future rights to receive payments under the agreement to the petitioner. The assignment included the Bills of exchange issued by the respondent pursuant to the agreement dated 24.11.2011 and the supplementary agreement dated 24.08.2012. In view of the assignments made by SR Technics, the petitioner is entitled to receive payments of the monies due under the seven Invoices from the respondent.

2.3. The petitioner has been making repeated requests to the respondent to make payments under the various invoices. Since the respondent did not honour its commitment under the agreements with the SR Technics and the petitioner reliably learnt that the respondent is not in a position to meet its financial obligations, the petitioner issued a statutory notice. It neither evoked any response nor did the respondent Company pay the monies due under the various invoices. Claiming that the failure on the part of the respondent to pay the monies due, despite issuance of a notice under Sections 433 and 434 of the Companies Act, 1956, would tantamount to inability to pay the debts making the respondent liable for winding up under Section 433 (e) of the Companies Act 1956, the petitioner has come up with this Company Petition.

3. The respondent resisted the Company Petition contending that the alleged debts are not legally enforceable and as such there cannot be a winding up order under Section 433 of the Companies Act, 1956. It

was further contended that the petitioner is not a creditor of the respondent and in the absence of any contractual relationship of a debtor and creditor, a winding up proceeding will not lie. It was also contended that the agreements between the respondent and SR Technics do not authorise assignment to the present petitioner. The fact that SR Technics had also issued a notice, under Section 434 of the Companies Act, on 21.01.2015 and the fact that it did not pursue the winding up was also projected as a defence by the respondent. The liability to pay the very debt was denied.

3.1. It was also claimed that there is a *bona fide* dispute regarding the entitlement of SR Technics, the assignor under the invoices and therefore a Company Petition seeking winding up would not lie. A further claim was made to the effect that the documents that were relied upon by the petitioner particularly the assignment deeds, the bills of exchange and the acknowledgements/certificates of acceptance were not properly stamped in accordance with the requirements of the Indian Stamp Act, therefore they cannot be relied upon to establish a debt in an Indian Court. The respondent would also further contend that SR Technics did not have a valid license to carry out Air Craft maintenance services from the Director General of Civil Aviation (DGCA) as required under the Aircraft Act and therefore the enforcement of the claim would be against public policy.

3.2. In answer to the claim of the petitioner that SR Technics, the

assignor, has already been favoured with an award by the Arbitrators in the Arbitration that took place in the United Kingdom it is contended that the same cannot be a ground for accepting the claim of the petitioner before this Court where the Indian Laws would apply. In fine the contention of the respondent is that when there are *bona fide* disputes regarding the very debt itself, a petition under Section 433 of the Companies Act, for winding up on the ground of inability to pay the debts will not lie.

3.3. The only question that is to be determined is, as to whether the respondent could be directed to be wound up on the ground of inability to pay the debts, as provided under Section 433 (e) of the Companies Act.

4. I have heard Mr.Rahul Balaji, learned counsel appearing for the petitioner and Mr.V.Ramakrishnan, learned Senior Counsel appearing for Mr.Ashok Menon, for the respondent.

5. Mr.Rahul Balaji, learned counsel appearing for the petitioner would vehemently contend that Section 433 (e) of the Companies Act 1956, provides for winding up of a Company, if it is found that the Company is unable to pay its debts. Relying upon Section 434, the learned counsel would contend that once a notice under Section 434 (1)(a) of the Companies Act 1956, had been issued and the Company fails to pay the debt demanded under said notice within the three weeks period or to secure or compound for it to the reasonable satisfaction of the creditor, a company is deemed to be unable to pay its debts. In view of the presumption of inability to pay created under Section 434 of the

Companies Act, an order for winding up should automatically follow, unless the debtor Company is able to show that the debt itself is unenforceable or that there is a *bona fide* dispute.

5.1. The absence of a reply to the statutory notice, according to Mr. Rahul Balaji, would strengthen the presumption and the burden is on the debtor to show that the defences are *bona fide* or that the debt is unenforceable under Indian Law. The learned counsel would also point out that the debtor Company has not disputed the fact that it availed the services of SR. Technics, for maintenance and repairs of the aircraft engines under the agreement dated 24.11.2011 and the supplementary agreement dated 24.08.2012. Having accepted the invoices, having issued bills of exchange and having issued certificate of acceptance, the respondent Company cannot be heard to contend that the debt is not legally enforceable.

5.2. The learned counsel appearing for the petitioner would also point out that the enforceability or otherwise of the debt need not be gone into by the Court at the stage of issuing a notice of winding up or admission of a winding up petition. The enforceability or otherwise could be gone into by the Official Liquidator, after an order of winding up when the Official Liquidator examines the claims made by various creditors including the petitioner herein. Therefore, according to the learned counsel, the Court at the threshold, that is, while considering

whether a notice of winding up could be issued under Section 433 of the Companies Act 1956, or winding up petition could be admitted need not go into the question of validity of the debt or the enforceability of the debt. It is only the existence of the debt and the presumed inability of the debtor company to pay the debt.

5.3. In the absence of any dispute regarding the fact that the Debtor Company had availed the services of the SR. Technics, it is not open to the respondent to contend that the debts are unenforceable or that the enforcement of the debt would be against the public policy. He would also point out that despite knowledge of the fact that SR. Technics, had not obtained a license from the DGCA, the Debtor Company had availed of the engine maintenance services by SR. Technics. Therefore, according to the learned counsel, it is not open to the respondent to contend that the enforcement of the debt will be opposed to public policy.

5.4. The learned counsel appearing for the petitioner would also point out that the very same contentions have been rejected by the Arbitral Tribunal in the arbitration proceedings launched by SR. Technics. On the question of stamping of the instruments namely, the Agreements dated 24.11.2011 and 24.08.2012, the bills of exchange issued in support of the seven invoices and the certificates of acceptance,

the learned counsel would contend that the question of stamping will not arise at this juncture. According to him, the Company Court while deciding the question of winding up need not look into the requirement relating to stamping of the instruments. He would submit that even an unstamped instrument can be relied upon for collateral purposes namely, to establish the existence of the debt. According to the learned counsel, all that is required for admission of a Company petition is the existence of the debt and the inability of the respondent to pay the debt. Inasmuch as the petitioning creditor does not seek to enforce the debt in a petition under Section 433 read with 434 and 439 of the Companies Act, the question of stamping would not arise.

5.5. Mr. Rahul Balaji, learned counsel appearing for the petitioner would also contend that the bills of exchange being the documents that are payable on demand they do not require stamping. Even otherwise, According to Mr. Rahul Balaji, the certificates of acceptance, the execution of which have been admitted by the respondent, would establish the debt beyond doubt and therefore, the issue relating to stamping may not be very germane to decide whether the Company Petition should be admitted and winding up should be ordered. The learned counsel would distinguish a proceeding to enforce a debt and a proceeding seeking winding up contending that while a creditor who

seeks to wind up the company is not attempting to enforce the debt. Enforcement of the debt would arise only after admission of the winding up petition and the same will have to be before the Official Liquidator.

5.6. Mr. Rahul Balaji, learned counsel would also rely upon the judgment of the Division Bench of this Court in *Michael Hart v. M/s. Ninestars Information Technologies Ltd.*, reported in (2013) 3 LW 879 and the judgment of the Bombay High Court in *M/s. Classic Diamonds (India) Limited v. ICICI Bank Limited*, reported in 2016 SCC Bom 15573, in support of his submissions. The learned counsel would also invoke the same analogy to counter the contention of the respondent that the enforcement of the debt would be opposed to public policy, inasmuch as the debt is not sought to be enforced. He would also submit that it is open to the respondent to raise all the issues at the time of enquiry into claims that will be made by the Official Liquidator, after admission of the Company Petition.

5.7. The submissions of the learned counsel for the petitioner can be summed up as follows:

1. There must be a debt existing; and
2. It should be proved that the respondent is unable to pay the debt.

Once the above two requirements are satisfied, the other considerations namely, whether the debt is enforceable or whether the defence raised by

the respondent is *bona fide* or not, need not be gone into at this stage.

6. Contending contra, Mr.V.Ramakrishnan, learned Senior Counsel appearing for the respondent would submit that a mere existence of a debt and its non payment would not attract an order of winding up under Section 433 of the Companies Act. He would submit that it is open to the respondent resisting a winding up petition to show that there is a bona fide dispute regarding the debt, enforcement of such debt would be against the public policy in India, the documents relied upon in support of the debt or the documents relied upon to prove the debt are not properly stamped in accordance with the law relating to stamping in India and if the Court finds that the debt is not legally enforceable or the enforcement of the debt would be against the law in India, the Company Court shall reject an application seeking winding up.

6.1. Elaborating on his submissions, Mr.V.Ramakrishnan, would contend that the agreements dated 24.11.2011 and 24.08.2012 are not stamped in accordance with the Indian Stamped Act. Drawing my attention to the bills of exchange which have been relied upon as a proof of debt, the senior counsel would submit that those bills are not bills payable on demand and therefore they require stamping. Relying upon the language of the bills, the learned Senior Counsel would submit that the bills are not ones payable on demand. He would also draw my

attention to Section 3 of the Indian Stamp Act, to contend that under Section 3(b) of the Act, a bill of exchange payable otherwise than on demand is chargeable with duty. Relying upon the definition of a bill of exchange payable on demand under Section 2 (3) (b) of the Indian Stamp Act, the learned Senior Counsel would submit that a bill of exchange payable on demand should contain an order for the payment of any sum of money weekly, monthly, or at any other stated period.

6.2. Drawing my attention to the bills of exchange, Mr.V.Ramakrishnan, learned Senior Counsel would submit that all the bills of exchange are made payable on a date fixed which date is about six months from the date of the issue of the bills of exchange. Therefore, according to the learned Senior Counsel, none of the bills of exchange that are relied upon by the petitioner or payable on demand and therefore, all of them require stamping and admittedly none of them are stamped. Attention is also drawn to Section 18 of the Stamp Act, which provides for stamping of instruments executed outside India. Therefore, those bills of exchange cannot be taken as valid evidence of an existing debt or they cannot be enforced in an Indian Court. Once the debt is not proved, question of inability to pay the debt will not arise and therefore, there cannot be an order of winding up under Section 433 of the Companies Act 1956.

6.3. Mr.V.Ramakrishnan, learned Senior Counsel, would also submit that the agreements between SR Technics and the respondent are also not stamped in accordance with the law relating to stamping in India namely, the Indian Stamp Act and therefore, they cannot be enforced. It is also the claim of the learned Senior Counsel for the respondent that the bills of exchange have not been endorsed by SR Technics. The learned Senior Counsel would submit that the transaction agreement dated 26.09.2012 entered into between SR Technics and the petitioner herein requires the endorsement of the bill of exchange to be in a particular form. According to him, if the endorsement is not in the form as suggested in the agreement between the parties then the same is not valid. The form of bill of exchange that is shown as Annex II to the transaction agreement is as follows:

“Annex II

Form of Bill of Exchange

Bill of Exchange

.....(*place and date of issue*) (*Currency and amount in figures*)

On (*date*) *fixed*

for value received, pay against this bill of exchange

to the order of(*name of Supplier*)

the sum of

effective payment to be made in US Dollars (type of currency) only,

without deduction for and free of any tax, impost, levy or duty present or future of any nature.

This bill of exchange is payable at Yes Bank Ltd, 48, Nyana Marg, Chanakyapuri, New Delhi – 110 021, India (domicile of drawee's bank)

Drawn on: (name and address of drawee)

..... (signature of drawer – SR Technics (Switzerland) AG)

Accepted

*.....
(stamp and signature of drawee – Spice Jet Ltd.)*

The signatures of Mr(s)..... and Mr(s) is/are legally binding⁴ for Spice Jet Ltd. And correct

*.....(Stamp and signature of confirming
bank)*

Yes Bank Ltd, 48, Nyana Marg, Chanakyapuri, New Delhi 110 021, India

(Endorsement on the back side of the Bill of Exchange)

Please pay to the order of Credit Suisse AG

*.....
(Stamp and signature drawer – SR Technics (Switzerland AG))”*

6.4. Pointing out that the endorsements made on the reverse of each of the seven bills of exchange that were subject matter of this Company Petition, Mr.V.Ramakrishnan, would submit that none of the endorsements are in the form required or suggested and therefore, the very endorsement of the bills of exchange is invalid. He would also point out that in the agreements, the seal of SR Technics has been affixed, whereas such seal is evidently absent in the endorsements made. Therefore, according to the learned Senior Counsel, the endorsements are invalid and as such, there is no legally enforceable debt.

6.5. Mr.V.Ramakrishnan, learned Senior Counsel would further contend that since there is a breach of the agreement by SR Technics, the respondent company is absolved of the liability. Relying upon Clause 14.3 of the agreement dated 24.11.2011 which provides for termination of the agreement by the respondent on the happening of any of the events referred to therein, the learned Senior Counsel would contend that in view of the fact that SR Technics was not authorised to carry out engine maintenance service between 01.01.2009 and 18.05.2015 by the Director General of Civil Aviation in India, is not entitled to claim any amount towards such maintenance carried out by it. Clause 14.3 reads as follows:

14.3.: If any of the following events occur, SpiceJet may

terminate this Agreement with immediate effect by giving SR Technics written notice;

(a) If any certification of SR Technics necessary for rendering the services pursuant to this agreement is suspended or revoked by the authority providing such certification for more than 30 days.

(b) In an event as described in clause A-6.2 (repetitive failure to meet TAT)

Therefore, the fundamental contentions of the respondent are that there is no legally enforceable debt. The enforcement of the debt would be against the public policy in India. Therefore, an order for winding up cannot be granted under Section 433 of the Companies Act.

7. I have considered the rival submissions.

8. Before venturing to consider the elaborate submissions made by the counsel on either side, I wish to dwell in to the scope of a Company Petition filed under Section 433 of the Companies Act. Section 433 of the Companies Act, reads as follows:

“433. Circumstances in which company may be wound up by Tribunal:- A company may be wound up by the Tribunal, -

(a) if the company has, by special resolution, resolved that

the company be wound up by the Tribunal ;

(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting ;

(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year ;

(d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two;

(e) if the company is unable to pay its debts ;

(f) if the Tribunal is of opinion that it is just and equitable that the company should be wound up;

(g) if the company has made a default in filing with the Registrar its balance sheet and profit and loss account or annual return for any five consecutive financial years ;

(h) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality ;

(i) if the Tribunal is of the opinion that the company should be wound up under the circumstances specified in

section 424G :

Provided that the Tribunal shall make an order for winding up of a company under clause (h) on application made by the Central Government or a State Government.”

Class (e) of Section 433 of the Companies Act provides for winding up a Company, if the Company is unable to pay its debts. Section 434 of the Companies Act, states as to when a Company can be deemed to be unable to pay its debts. The requirements of Section 434 are very fundamental, all that Section 434 requires is

- (i) There should be an outstanding of more than Rs.500/-;
- (ii) A notice in writing to be delivered at the registered office of the respondent Company and a neglect on the part of the respondent Company either to pay the money demanded within a period of three weeks or to secure or compound for it to the reasonable satisfaction of the creditor.

Therefore, if a debtor against whom a demand has been made in the form of a notice in writing under Section 434(1)(a) does not either satisfy the debt or secure the debt to the satisfaction of the creditor within a period of three weeks is deemed to be unable to pay its debts. Therefore, the Company Court while deciding the question of issuance of notice of

winding up or admission of winding up under Section 433 of the Companies Act, will have to decide as to whether the Company could be said to be unable to pay its debts.

9. Once a notice is issued under Section 434 of the Companies Act, a deeming fiction is created regarding the inability to pay the debt, therefore it becomes the obligation on the part of the respondent/debtor Company to show that the debt itself is illegal or that there is no debt at all, if it has to escape the consequence of issuance of a winding up notice. While deciding on the scope of an application under Section 434, the Hon'ble Supreme Court has in ***Mathusudan Gordhandas & Co. v. Madhu Woollen Industries (P) Ltd.***, reported in (1971) 3 SCC 632, held as follows:

“20. 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 Horfold Hotel Co. Ltd.

21. Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt, See Re. A Company. 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 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.”

10. A reading of the above principles laid down by the Hon’ble Supreme Court would show that the Court while examining the question, as to whether, a winding up proceeding is to be admitted or not must, upon the existence of a debt being proved, consider whether

- i. The defence of the Company is in good faith and one of substance;
- ii. The defence is likely to succeed on point of law; and
- iii. The company adduces *prima facie* proof of the facts on which the defence depends.

Therefore, even after the Court comes to the conclusion that there is a debt existing, the Company Court sitting in winding up proceedings need not automatically issue an order for winding up. It is well open to the Company Court to see or to examine by applying the three pronged test suggested by the Hon’ble Supreme Court, as to whether, the defence of the Company is in good faith and is one of substance, the defence is likely to succeed on a point of law and the company adduces *prima facie* proof of the facts on which the defence depends.

11. On the facts available in the case on hand one could see that the deeming fiction created by Section 434 of the Companies Act, has occurred, therefore, the existence of the debt has been proved. Therefore, it becomes incumbent upon the Court to consider the defences

that are projected by the respondent Company as an answer to the claim for winding up. The defences that are projected are

1. The agreements dated 24.11.2011 and 24.08.2012 are not stamped in accordance with law relating to stamping in India;
2. The Bills of exchange which are executed by the respondent requires stamping as per the law applicable in India;
3. An unstamped document cannot be enforced in India;
4. The endorsements made or the assignments of the debt in favour of the petitioner by SR Technics, is not in the form required and therefore, the same cannot invest a valuable right of recovery on the petitioner;
5. The service provider namely SR Technics did not have a valid approval for providing Air Craft engine maintenance services between 01.01.2009 and 18.05.2015 and therefore, they are not entitled to recover the charges for such services provided when they have no authority that is required under

the provisions of Sections 4A, 5(1), 2(g), 5(A)(1), 10(2) and 11A of the Aircraft Act and the Rules there under.

6. There is a violation of Civil Aviation Rules which require an engine maintenance contractor to have a approval or Authority from DGCA for providing such engine maintenance services.
7. The petitioner being an assignee from SR Technics, the defences available against SR Technics can be raised against the petitioner also.

12. It is the *bona fides* or the validity of the aforesaid defences that will have to be tested before admitting the winding up proceedings. The counsel for the parties had addressed arguments on the requirement of stamping of the agreements and the bills of exchange, the nature of the bills of exchange whether they are bills payable on demand or payable otherwise than on demand.

13. As I had already pointed out the scope of examination of the defences is very limited. The three pronged test suggested by the Hon'ble Supreme Court which I have already extracted would show that the Company Court need not render a conclusive finding on the enforceability of the debt, while examining the issuance of notice of winding up or while examining the admission of a winding up petition. The question whether the documents require stamping or the question

whether the bills of exchange are payable on demand or otherwise than on demand or questions which, as rightly pointed out by Mr. Rahul Balaji, learned counsel appearing for the petitioner, will have to be examined at the time when the actual enforcement or examination of the claim of the petitioner by the Official Liquidator takes place.

14. I therefore do not propose to go into the requirements as to stamping. I must point out, even ignoring the agreements and the bills of exchange, the certificates of acceptance that had been issued by the respondent would show that there is a categorical admission of liability. Each of the bills of exchange is supported by a certificate of acceptance. The respondent has not denied the execution of the certificates of acceptance. A Division Bench of this Court in ***Michael Hart v. M/s. Ninestars Information Technologies Ltd.***, reported in (2013) 3 LW 879, has examined the scope of Section 433 of the Companies Act and held that the Company Court while examining the issuance of notice or admission of a Company Petition need not pronounce upon the validity or enforceability of the debt. While doing so, the Division Bench after referring to various judgments on the issue had held as follows:

“ 36. In view of the submissions made by the learned counsels appearing on behalf of the parties concerned, and in view of the records available, and on considering the decisions cited supra, it is noted that the learned single Judge, in his impugned order, dated 29.6.2012, made in C.P. No. 2 of 2009, had held that the promissory note produced by the appellant is only a copy of the said document and that it had been insufficiently stamped. The learned single

Judge had lost sight of the fact that the said promissory note had been filed in the company petition, in which a direction had been prayed for, by the appellant herein, for winding up the respondent company, for non payment of the admitted debts. The requirement of filing the original promissory note, with the appropriate value of stamps having been affixed, would arise only in the suit filed before the trial court, for the recovery of money, based on the said promissory note.”

15. The Bombay High Court in ***Classic Diamonds (India) Ltd., v. ICICI Bank Limited***, reported in **2016 SCC Online Bom 15573**, has expressed a similar view, while doing so, a Division Bench of the Bombay High Court has observed as follows:

“7. The second contention that was raised before the learned Single Judge was that the document of corporate guarantee was inadequately stamped. Therefore, it cannot be acted upon in the Company Petition. The corporate guarantee in question, admittedly, was executed in the State of Gujarat and it was on a stamp of duty of Rs. 100/- in accordance with the residuary Clause i.e. Clause (j) Article no. 5 of Schedule-I to the Bombay Stamp Act as applicable in Gujarat.

8. *In the State of Gujarat where the document of corporate guarantee was executed, it was based on adequate stamp duty payable on the instrument so far as that State. According to the appellant, when this document comes to the State of Maharashtra in the light of sections 18 and 19 of Bombay Stamp Act which are applicable in the State of Maharashtra, there is deficit of stamp duty required to be paid on the documents, in accordance with the laws applicable in the State within the stipulated period. If that stamp duty is not paid, according to the appellant, the document cannot be admitted in evidence, and cannot be acted upon. We fail to understand this stand of the appellant in the present Appeal, since we are not concerned with the insufficiency of stamp duty payable on documents of corporate guarantee, but we are concerned with the issue whether the appellant Company deserves to be wound up or not. The Company Court definitely is not required to act upon any particular document while considering whether or not to wind up a Company. It necessarily considers whether the Company is unable to pay its debts. Section 434 is a deeming provision wherein it says that*

if a creditor to whom the Company is indebted in a sum exceeding the statutory limit, has served upon the Company a demand requiring it to pay the sum so due, and the Company has thereafter neglected to pay the sum or secure the same to the reasonable satisfaction of the creditor, the deeming provision comes into play and the Company is deemed to be unable to pay its debts.

(emphasis supplied)

It is also seen that the Special Leave Petition filed against the judgment of the Bombay High Court in ***Classic Diamonds (India) Ltd., v. ICICI Bank Limited***, *supra*, was dismissed by the Hon'ble Supreme Court on 30.01.2017.

16. In the light of the above pronouncements of a Division Bench of this Court and that of the Bombay High Court with which I respectfully concur, I am of the considered opinion that the question relating to stamping or sufficiency of stamping is really foreign to the scope of the proceedings before me. No doubt, Mr.V.Ramakrishnan, learned Senior Counsel appearing for the respondent would vehemently contend that in order to see whether there is a legally enforceable debt, the Court has to look into the question of stamping of the instrument. When a Division Bench of this Court had categorically laid down that

even production of the document is unnecessary as the execution of the document is not denied, I do not think it will be proper for me to dwell into the aspect of stamping or the character of the document whether it is a bill of exchange payable on demand or it is a bill of exchange payable otherwise on demand etc. in these proceedings.

17. I therefore refrain from expressing any opinion on the contentions relating to stamping, as I find that the same would have a bearing on the claim of the petitioner when the debt is sought to be proved. Similarly I do not find any merit in the contention of the learned Senior Counsel appearing for the respondent that the endorsements made are not in the form required and therefore, the debt cannot be enforced. Here again I find that the defence taken is not bona fide. In fact in the supplemental agreement dated 24.08.2012, there is a clause which enables SR Technics to endorse the bills of exchange to the petitioner herein, therefore the respondent was aware of the fact that the bills of exchange could be endorsed in favour of the petitioner namely, Credit Suisse AG, even on 24.08.2012 when it entered into the supplemental agreement. The said supplemental agreement also makes it obligatory on the part of the respondent to execute a certificate of acceptance and it is not in dispute that such certificates of acceptance have been executed by the respondent company in support of each and every one of the bills of

exchange and the invoices.

18. A reading of the supplemental agreement dated 24.08.2012 would show that the execution of the bills of exchange in support of the invoices and the execution of the certificates of acceptance have been done by the respondent Company in order to avail the benefit of a six months deferred payment scheme. Therefore, it is clear that the respondent Company had obtained an advantage of a deferred payment by execution of these documents and the denial there of, in my considered opinion, cannot be said to be *bona fide*. Having obtained an advantage under the supplementary agreement and having executed the documents as required, the respondent cannot now seek to evade liability raising technical objections relating to stamping of the instruments.

19. This leaves us with the last contention of Mr.V.Ramakrishnan, that the debt is against the public policy in India. It is an admitted fact that SR Technics did not have a valid authorisation from DGCA to carry out engine maintenance contracts between 01.01.2009 and 18.05.2015. All the invoices which are now in dispute or during that period only. A finding has been recorded in the award that was passed in favour of SR Technics by the panel of arbitrators on 20.11.2017 that the respondent Company was aware of the fact that SR Technics did not possess the approval of DGCA.

20. The Clause 14.3 enables SpiceJet Limited/respondent Company to terminate the agreement by a written notice if any certification of SR Technics is necessary for rendering services pursuant to this agreement is suspended or revoked by the Authority providing such Certification for more than 30 days. It is not in dispute that the respondent Company had not invoked Clause 14.3 and terminated the

agreement. It chooses to avail of the services of SR Technics despite being aware of the fact that SR Technics did not possess a valid authorisation by DGCA. It is here the contract between the parties becomes relevant.

21. Clause 14.4 of the agreement dated 24.11.2011 reads as follows:

“14.4. Even if any such termination happens, each party shall fulfill all obligations which accrued under this Agreement prior to the time that termination becomes effective and no such termination will prevent either party from claiming against the other for breach of any obligations under this Agreement including recovery of excess payments made by SpiceJet to SR Technics, if any.”

A reading of the said Clause would show that the parties to the contract are bound to fulfill all obligations which occurred prior to the termination and such termination will not prevent either party from claiming against each other for breach of any obligations under the agreement including recovery of excess payments made by SpiceJet

Limited to SR Technics. The above clause would make it very clear that while it was open to SpiceJet Limited to terminate the contract for the reason that SR Technics did not have a valid authorisation the termination by itself would not relive SpiceJet Limited of the obligations that arose under the contract prior to such termination becoming effective.

22. Admittedly, the respondent Company had not chosen to terminate the contract. It had continued to avail the services. Therefore in my opinion, it cannot now turn around and say, there is a violation of the provisions of the Aircraft Act or the C.A.R. Rules made there under and therefore the liability ceased. I thus find that the respondent Company has miserably failed to satisfy the three pronged test suggested by the Hon'ble Supreme Court in *Mathusudan Gordhandas & Co. v. Madhu Woollen Industries (P) Ltd., supra*, and hence had rendered itself liable to be wound up for its inability to pay its debts under Section 433 (e) of the Companies Act 1956.

***Admit.**

(i) Notice on the Court Notice Board.

(ii) Notice to the respondent.

(iii) Notice to the Registrar of Companies,

Chennai.

(iv) Affixure of notice at the premises of the Registered Office of the respondent company.

(v) The petitioner is directed to publish the company petition in one issue of Tamil daily “Dinakaran” and in one issue of English Daily “Times of India” (All India Edition), and in the Tamily Nadu Government Gazette fixing the date of hearing on **20.01.2022.

(vi) The petitioner is directed to publish the company petition giving at least 14 days clear advance notice.

(vii) The Official Liquidator, High Court, Madras is appointed as Provisional Liquidator and is directed to take charge of the assets of the respondent company. The Ex-Directors of the respondent company are directed to file their statement of affairs before the Official Liquidator within a period of 14 days. The company shall deposit a sum of Rs.25,000/- towards

initial expenses before the Official Liquidator in this matter.

WITNESS, THE HON'BLE MR. MUNISHWAR NATH BHANDARI, ACTING CHIEF JUSTICE OF MADRAS HIGH COURT, AS AFORESAID THIS THE 06TH DAY OF DECEMBER 2021.

*** Para 23 of the order dated 06.12.2021 is deleted as per order dated 23.12.2021 in CP.No.363/2015 and the aforesaid paragraphs are incorporated as per order dated 15.12.2021 in CP.No.363/2015**

**** The date for making publication is extended upto 20.01.2022, the above said publication is modified as per order dt 23.12.2021 in C.P.No.363/2015**

Sd/-

JOINT REGISTRAR(O.S)(I/C).

//CERTIFIED TO BE A TRUE COPY//

DATED THIS THE DAY OF 2021

COURT OFFICER.

From 25th September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decree in this format.

R.s/06.12.2021

COMP.PETN.NO.363 OF 2015
AND
COMP.A.NOS.887 AND 888 OF
2015, 55 OF 2020

ORDER DATED:06.12.2021

THE HON'BLE MR.JUSTICE
R.SUBRAMANIAN

FOR APPROVAL ON:06/12/2021

03.01.2022

APPROVED ON: 06/12/2021

03.01.2022