

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V

Item No.-1

(IB)-264(PB)/2023

IA/3280/2023, IA/3277/2023, IA-2944/2023, IA/3254/2023, IA-3048/2023,

IA-2850/2023

IN THE MATTER OF:

Go Airlines (India) Limited

....Applicant

SECTION

U/s 10 of IBC, 2016

Order delivered on 26.07.2023

CORAM:

**SHRI MAHENDRA KHANDELWAL,
HON'BLE MEMBER (JUDICIAL)**

**SHRI RAHUL BHATNAGAR,
HON'BLE MEMBER (TECHNICAL)**

PRESENT:

For the Applicant :

For the Respondent :

ORDER

Order pronounced in open Court vide separate sheets.

Sd/-
(RAHUL BHATNAGAR)
MEMBER (T)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (J)

**THE NATIONAL COMPANY LAW TRIBUNAL
COURT V, NEW DELHI**

**I.A. No. 3280/2023, IA No. 3277/2023,
IA No. 2944/2023, IA No. 3254/2023
IA No. 3048/2023, IA No. 2850/2023**

IN

Company Petition No. (IB) – 264/(PB)/2023

*Under Section 60(5) of the Insolvency and Bankruptcy
Code, 2016 read with Rule 11 of NCLT Rules, 2016.*

IN THE MATTER OF:

GO AIRLINES (INDIA) LIMITED

CORPORATE APPLICANT

AND IN THE MATTER OF-

BLUESKY 31 LEASING COMPANY LIMITED

.... APPLICANT No. 1/I.A. No. 3280/2023

BLUESKY 19 LEASING COMPANY LIMITED

.... APPLICANT No. 2/ I.A. No. 3277/2023

JACKSON SQUARE AVIATION IRELAND LIMITED

.... APPLICANT No. 3/ I.A. No. 2944/2023

SMBC AERO ENGINE LEASE B.V.

.... APPLICANT No. 4/ I.A. No. 3254/2023

ENGINE LEASE FINANCE B.V.

.... APPLICANT No. 5/ I.A. No. 3048/2023

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BOC AVIATION (IRELAND) LIMITED

.... APPLICANT No. 6/ I.A. No. 2850/2023

VERSUS

MR. ABHILASH LAL,

INTERIM RESOLUTION PROFESSIONAL

OF GO AIRLINES (INDIA) LIMITED

.... RESPONDENT

Order Pronounced on: 26.07.2023

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Mr. Anandh Venkataramani, Mr. Saket Satapathy,
Mr. Anubhav Dutta, Mr. Priyal Shah, Mr. Sashank
Mehta in IA/3048/2023

Mr. Ameya Gokhale, Ms. Meghna, Mr. Vaijayant
Paliwal, Mr. Rishabh Jaisani, Mr. Harit Lakhani,
Ms. Megha Khandelwal, Advs. in IA/3277/2023 &
IA/3280/2023

Mr. Arun Kathpalia, Sr. Adv. with Ms. Meghna
Rajadhyaksha, Mr. Vaijayant Paliwal, Mr. Rishabh
Jaisani, Mr. Harit Lakhani, Ms. Megha
Khandelwal, Advs. in IA/2944/2023

Mr. Chinmoy Pradip Sharma, Mr. Ritesh Singh,
Mr. Ajay Kumar, Ms. Anchal Nanda, Mr. Hetram
Bishnoi, Mr. Navneet Singh, Mr. Irfan Haseib, Mr.

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Babul, Mr. Krishnajyoti Deka, Adv. in IA/2850/2023

Mr. Arvind Nayar, Sr. Adv. with Mr. Prayaya Goyal, Amit Tiwari 06.07.2023 Mr. Chiranjivi Sharma, Ms. Apoorva Kaushik, Ms. Neetika Gharna, Mr. Girish Shankar, Mr. Shubham Pandey, Mr. Akshay Joshi, Adv. in IA/3254/2023

For the RP : Mr. Ramji Srinivasan, Sr. Adv. with Mr. Vishnu Sriram, Adv

For the CoC: Mr. Varghese Thomas, Mr. Fatena Chawla, Ms. Aditi, Mr Dheeraj Nair, Ms. Ridhima Sharma, Mr. Akhil, Mr. Angad Baxi, Ms. Vishrutyi Sahai, Adv.

COMMON ORDER

PER: SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

1. These Interlocutory Applications have been filed by the Applicant(s) under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016, seeking certain interim directions from this Adjudicating Authority to the Respondent. During the course of hearing on these Interlocutory Applications, Learned Counsel on behalf of Applicants prays for the following reliefs to be granted urgently. By way of present order, we are dealing with only those reliefs on which urgent directions were sought by the Applicant(s). Details of the interim reliefs on which urgent directions were sought are reproduced below:

i. IA/3280/2023

1. *To direct the Corporate Debtor/ Respondent to refrain from operating or flying the Subject Aircraft (detailed in paragraph 3 above) owned by the Applicant for commercial use;*

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6. Pending the hearing and final disposal of the present Application, to direct the Respondent to protect and maintain the Subject Aircraft (detailed in paragraph 3 above); and ensure that the Subject Aircraft and their engines and other parts are duly protected from any unauthorized access/removal / replacement / operation / use by the personnel of the Corporate Debtor and/or any other person.

ii. IA/3277/2023

1. To direct the Corporate Debtor/ Respondent to refrain from operating or flying the Subject Aircraft (detailed in paragraph 3 above) owned by the Applicant for commercial use;
6. Pending the hearing and final disposal of the present Application, to direct the Respondent to protect and maintain the Subject Aircraft (detailed in paragraph 3 above); and ensure that the Subject Aircraft and their engines and other parts are duly protected from any unauthorized access / removal / replacement / operation / use by the personnel of the Corporate Debtor and/or any other person.

iii. IA/2944/2023

- a) To direct the Corporate Debtor, Respondent to refrain from operating or flying the Aircraft for commercial use;

iv. IA/3254/2023

- c. Pending the hearing of the captioned Application, allow the Applicant's representatives to retain possession of the Engines and that the Respondent be directed to comply with its continuing obligations under the Lease Agreements (including, without limitation, to insure and to maintain the Engines as per the mandatory insurance and maintenance requirements under the Lease Agreements and applicable law);
- d. Pending the hearing of the captioned Application to restrain the Respondent/IRP from interfering with the Applicant's possession including attempting to remove the Engines bearing ESNs P771264

P772865, P772867 and P772868 from the SMBC Aviation Capital owned aircraft to another aircraft and/or remove the Engine bearing ESN P771194 from the workshop elsewhere;

v. IA/3048/2023

a. Direct Respondent No. I/Corporate Debtor to pass urgent interim directions and grant necessary permissions to allow the Applicant to depute an agency or an inspector to conduct inspection of the Four Engines.

vi. IA/2850/2023

III. Restrain the Insolvency Resolution Professional of the Corporate Debtor from taking any steps to cannibalise the Aircraft of any of its parts;

2. Briefly stated averments made in the **IA. No. 3280 of 2023**, which are just and necessary for adjudication, are as follows: -

- i. That, on 27th September, 2019, the Applicant and the Corporate Debtor entered into two Lease Agreements for (i) an Airbus A320-271 N aircraft with manufacturer's serial number 8785 ("Aircraft 1"), and (ii) an Airbus A320-271 N with manufacturer's serial number 9200 ("Aircraft 2"), whereby Aircraft 1 and Aircraft 2 were leased to the Corporate Debtor on the terms and conditions set forth in the Lease Agreements. Aircraft 1 and Aircraft 2 are collectively referred to as the "Subject Aircraft".
- ii. That the Corporate Debtor issued Irrevocable De-registration and Export Request Authorizations ("IDERA.") in relation to Aircraft 1 and Aircraft 2 in favor of the Applicant, in terms of Article XII of the Cape Town Convention, whereby it (the Corporate Debtor) recognized that the Applicant or its designee is the sole person entitled to, inter alia, procure the de-registration of the Subject Aircraft from DGCA and procure the export and physical transfer of the Subject Aircraft from India.
- iii. That on 3rd October, 2019 and 4th October, 2019, The Directorate-General of Civil Aviation (DGCA) subsequently issued Certificates of Registration and

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issued Indian Registration Marks in respect of the Subject Aircraft. That subsequently on 13th December, 2022, the Applicant sent a Default and Grounding Notice to the Corporate Debtor setting out the amounts in default under the Lease Agreements. The payment defaults in the First Grounding and Default Notice related to overdue amounts that were due from 15th April, 2022. The Corporate Debtor failed to cure the payment defaults under the Lease Agreements following the First Grounding and Default Notice.

- iv. That on 27th February, 2023 The Applicant issued another Default and Grounding Notice the "Second Grounding and Default Notice") mentioning the outstanding amounts, which are as below:

SR. No.	Aircraft	Amount stated to be in default under the notice
1.	Aircraft 1 /MSN 8785	USD 601,305.10 for Basic Rent USD 1,289,147.97 for Supplemental Rent; and USD 91,786.48 for late payment interest
2.	Aircraft 2 /MSN 9200	USD 343,235.70 for Basic Rent USD 1,953,435.58 for Supplemental Rent; and USD 120,541.02 for late payment interest.

- v. That on 4th May, 2023, the Applicant issued a Notice of Termination of Leasing (Termination Notice) and the Applicant terminated the leasing of the Subject Aircraft. Subsequently, on 5th May, 2023, the Applicant notified Airbus S.A.S. ("Airbus") via replacement entitled party notices for each of the Subject Aircraft that the Corporate Debtor was no longer entitled to the benefit of the airframe warranties and the Applicant was the new entitled party (the "Replacement entitled Party Notices"). Airbus countersigned the Replacement Entitled Party Notices by way of acknowledgement on 12th May, 2023.

- vi. That, the Applicant had meetings with the representatives of the Corporate Debtor, on 9th May, 2023 and 10th May, 2023, for the redelivery of the Subject Aircraft and the aircraft documentation and other aspects following an email dated 4th May, 2023.
- vii. That on 10th May, 2023, The Applicant through its counsel, filed an application under Rule 30(7) of the Aircraft Rules, 1937 before the DGCA for deregistration of the Subject Aircraft in terms of the IDERA. Further, on 11th May, 2023, the Applicant notified Pratt & Whitney ("Engine Warranty Termination Notices") that it had terminated the leasing of the Subject Aircraft and provided executed notices regarding the termination of the assignment of engine warranties that had been made to the Corporate Debtor (the "Engine Warranty Assignment Terminations"). Pratt & Whitney has confirmed receipt of the Engine Warranty Termination Notices. That on 12th May, 2023, the DGCA informed the Applicant that the Deregistration Application cannot be processed on account of the Admission Order.
- viii. That, in view of the defaults committed by the Corporate Debtor with respect to the Lease Agreement, the Corporate Debtor was aware that termination of the leasing by the Applicant was imminent. This is evident from the Default Notices. The present Application is bona fide and is made in the interest of justice.

3. Briefly stated averments made in the IA. No. 3277 of 2023, which are just and necessary for adjudication, are as follows: -

- (i) That the Applicant is a company incorporated and existing under the laws of Ireland and is an indirect subsidiary of Minsheng Financial Leasing Co., Ltd., a leading commercial aircraft leasing company with a fleet of 68 aircraft that are leased to more than 25 airlines around the world.
- (ii) That the Corporate Debtor entered into 3 Lease Agreements dated 27.07.2019 with the Prior Lessor (Bluesky 31 Leasing Company Limited) for an Airbus A320-271N aircraft with manufacturer's serial No. 9218 (Aircraft

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- 1), 9412 (Aircraft 2), and 9598 (Aircraft 3). The said Aircrafts 1,2 and 3 ("Subject Aircraft") were leased to the Corporate Debtor on the terms and conditions set forth in the Lease Agreements.
- (iii) That subsequently, the Prior Lessor, the Applicant and the Corporate Debtor entered into three Lease Novation and Amendment Agreements dated 18.06.2020 for 'Subject Aircraft' whereby the Corporate Debtor released the Prior Lessor from its obligations, duties and liabilities to the Lessee under the Lease Agreements and the Applicant assumed the rights, obligations, duties and liabilities of the Prior Lessor under the lease agreements.
 - (iv) The Corporate Debtor made default in the payment as per the terms of the Lease Agreements starting from February 2020, therefore, the Applicant issued two Default and Grounding Notices dated 13.12.2022 and 27.02.2023, respectively to the Corporate Debtor and the Corporate Debtor failed to respond to any of these notices.
 - (v) That a 'Termination Notice' dated 04.05.2023, terminating the lease of the 'Subject Aircraft' ("Termination of Leasing") was issued by the Applicant to the Corporate Debtor. Subsequently, on 05.05.2023, the Applicant also notified Airbus S.A.S. ("Airbus") via 'Replacement Entitled Party Notices' for each of the 'Subject Aircraft' that the Corporate Debtor is no longer entitled to the benefit of the airframe warranties and the Applicant is the new entitled party and the same was countersigned by the Airbus vide acknowledgement dated 12.05.2023.
 - (vi) That the Corporate Debtor had not raised any dispute/protest/objection to the abovementioned 'Termination of Leasing'. Therefore, the Corporate Debtor has no rights in respect of the 'Subject Aircraft' and hence, it is unlawful for the Corporate Debtor to be in possession of the 'Subject Aircraft' from that point of time.
 - (vii) That apart from Aircraft 1, the 'Subject Aircraft' are grounded, unserviceable and not generating any revenue for the Corporate Debtor and hence, not

operated by the Corporate Debtor. Aircraft 2 has not been operated since 28.02.2023 and is missing both engines. Aircraft 3 has not been operated since 15.08.2022, and has two unserviceable engines installed. Therefore, the Corporate Debtor has no intention to use the 'Subject Aircraft' as part of any recovery plan. There is no commercial rationale for the Corporate Debtor or IRP to seek to retain unserviceable aircraft as they would only serve to increase the costs (i.e., in maintenance, parking charges etc.) incurred by the Corporate Debtor during the CIRP process.

- (viii) That the Corporate Debtor on 02.05.2023, filed a Company Petition (IB) No. 264/2023 under Section 10 of the Code before this Adjudicating Authority for initiation of CIRP. On 10.05.2023, this Adjudicating Authority passed the Admission Order and thereby initiated the CIRP of the Corporate Debtor and declared a moratorium.
- (ix) That on 10.05.2023, the Applicant filed an application under Rule 30(7) of the Aircraft Rules, 1937 before the DGCA for de-registration of the 'Subject Aircraft' in terms of the Irrevocable Deregistration and Export Request Authorizations ("Deregistration Application"). The DGCA by its letter dated 12.05.2023, informed the Applicant that the Deregistration Application cannot be processed on account of the Admission Order.
- (x) The owner of an engine, viz. Jackson Square Aviation Limited, (which was installed in Aircraft 2) had addressed the said letter dated 12.05.2023 to the Applicant, inter alia, informing that they have terminated their Lease Agreement with the Corporate Debtor and called upon the Applicant to retain the engine and not to take any further action in relation to the engine and assist and cooperate in the return of the engine.
- (xi) That on 11.05.2023, the Applicant notified Pratt & Whitney about the termination of the leasing of the 'Subject Aircraft' and provided executed notices regarding the termination of the assignment of engine warranties that

had been made to the Corporate Debtor. Pratt & Whitney had confirmed the receipt of the said 'Engine Warranty Termination Notices'.

- (xii) That for the above stated facts, the Applicant has filed the present application seeking direction from this Adjudicating Authority to the Respondent to comply with its contractual obligations and forthwith redeliver to Applicant all of its Aircraft pursuant to termination of the leasing of the Aircraft, prior to the commencement of the CIRP.

4. Briefly stated averments made in the IA. No. 2944 of 2023, which are just and necessary for adjudication, are as follows: -

- i. That the present Application is being filed by the Applicant to seek directions to the Respondent to forthwith redeliver to the Applicant all of its Aircraft pursuant to a termination of the leasing of the Aircraft to the Corporate Debtor prior to the commencement of the corporate insolvency resolution process ("CIRP") vide the Order dated 10.05.2023.
- ii. That the Applicant is a company incorporated and existing under the laws of Ireland, with a fleet of 250 aircraft that are leased to 59 airlines around the world. The Corporate Debtor, being a commercial airline in India, approached the Applicant around 2010 to take aircraft on lease.
- iii. That the Applicant and the Corporate Debtor entered into eight Lease Agreements whereby eight Airbus A320NEO aircrafts with manufacturer's serial numbers 7172, 7507, 7563, 7571, 8613, 8621, 8643 and 8650 respectively ("Aircraft") were leased to the Corporate Debtor on the terms and conditions as set forth in the respective Lease Agreements. Subsequently, the DGCA issued certificates of registration and issued Indian Registration Marks in respect of the Aircraft.
- iv. That the Corporate Debtor being unable to make the payment, requested the Applicant to enter into a Payment Deferral Agreement and hence, both parties entered into a Rent Deferral Agreement dated 10.09.2021. The said Agreement was amended twice i.e., on 02.11.2021 (to amend the rent deferral

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terms) and 15.06.2022 (to grant extensions for the deferred payment of rent to be made by the Corporate Debtor).

- v. That the Corporate Debtor failed to honour even the deferred payments, late interest and deferred interest towards the Aircraft. The Applicant therefore, sent notices of default dated 18.08.2022, 15.09.2022, 26.10.2022, 23.11.2022, 21.12.2022, 19.01.2023, 24.02.2023, 22.03.2023, 18.04.2023 and 03.05.2023 stating the outstanding amount in default under the Lease Agreements and the Rent Deferral Agreements. However, the Corporate Debtor failed to respond to any of the said notices.
- vi. That since August 2022, the Applicant had demanded that all off-wing engines are returned to the relevant titled Aircraft and repeatedly reminded the Corporate Debtor that under the terms of the Lease Agreements, no engine may be installed on any other aircraft while a Termination Event is continuing. The Applicant had specifically and repeatedly demanded that the Corporate Debtor reinstall Engines with serial numbers ESN P770388 and P770393 on Aircraft 5. However, the Corporate Debtor has failed to respond to (and has not challenged) any of these demands.
- vii. That the Applicant sent a Default Notice dated 03.05.2023 to the Corporate Debtor on account of failure of the Corporate Debtor to pay US \$ 81,172,053.78 that was due under the Lease Agreements and Rent Deferral Agreement. The Applicant further issued a Notice of Termination of Leasing ("Termination Notice") in respect of the Aircraft, on the basis of the payment defaults referenced above with the said Default Notice dated 03.05.2023 and other defaults listed in the Termination Notice ("Termination of Leasing").
- viii. That on 05.05.2023, the Applicant addressed notices terminating engine warranty assignment to Pratt & Whitney ("P&W") intimating P&W of the termination of leasing. Pursuant to these notices, P&W confirmed that it had

no objection to the termination of the engine warranty assignment and the engine warranties reverted to the Applicant.

- ix. That the Applicant on 12.05.2023 wrote an email to the IRP calling upon the Respondent to cease all operations of the Aircraft and take steps in accordance with the provisions of the Lease Agreements to protect the Aircraft.
- x. The Applicant and Airbus executed replacement entitled party notices whereby the Applicant was confirmed to be the new entitled party holding the airframe warranties under the Airframe Warranties Agreement dated 20.12.2018.
- xi. The Applicant addressed a letter to Stockholding requesting it to provide all identifiable Aircraft Documentation in its possession pertaining to the Aircraft to the Applicant.

5. Briefly stated averments made in the IA. No. 3254 of 2023, which are just and necessary for adjudication, are as follows: -

- i. The Applicant is a global aircraft engine leasing company with one of their principal activities being leasing spare aircraft engines to operators. The Applicant is the owner of 5 (five) PW1277G-JM aircraft engines ["Engines"]. The said Engines were leased by the Applicant to the Corporate Applicant/ Go Airlines (India) Ltd. ["Go Air"] under the General Terms Lease Agreement dated 29th July 2019 read with the specific aircraft engine agreements in respect of each of the 5 Engines.
- ii. That, the Applicant and Go Air entered into Lease Payment Deferral Agreement, in view of the corporate debtor defaulting in making timely payments. That from July 2022, Go Air committed further Event of Defaults under the lease agreements in particular with regard to non-payment of rent and supplemental rent. That on 17.03.2022, the Applicant issued to Go-Air Notices of Default and Demand in respect of each of the 5 engines.
- iii. Go Air filed the Company Petition (IB) No.264 of 2023 under Section 10 of the Code before the Hon'ble Adjudicating Authority seeking initiation of CIRP

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on 02.05.2023, and the Applicant issued Notices of Termination to Go Air in respect of each of the 5 (five) engines, terminating the leasing of the 5 (five) engines on 04.05.2023. The Company Petition was admitted by the Hon'ble Adjudicating Authority and moratorium was declared vis-a-vis Go Air in accordance with Section 14(1) of IBC on 10.05.2023. Furthermore, the IRP was directed to take charge of the CIRP of the Corporate Debtor and also to ensure to take all necessary steps to keep the Corporate Debtor as a going concern.

- iv. That, the Applicant is filing the present Application inter alia for appropriate directions / declaration that the Engines fall outside the purview of the moratorium declared vide the Order dated 10th May 2023 passed by the Hon'ble Adjudicating Authority admitting the captioned Petition ["Moratorium Order"] in view of the leasing of the Engines having been terminated on 4th May 2023 prior to the Moratorium Order.
- v. Furthermore, following the service of the Termination Notices, the Applicant resumed possession of the Engines and Go Air has no rights whatsoever in the Engines, including to retain, use or operate the Engines at the time when the Moratorium Order was passed. Further, Go Air/ the Respondent have not disputed the Termination Notices. Therefore, termination of the leasing of the Engines and resumption of the possession of the Engines by the Applicant pursuant the Lease Agreements is an admitted / indisputable position.
- vi. Further, it is submitted that Clause 19(12)(e) of the General Terms Lease Agreements stipulates that pursuant to termination, the Applicant inter alia may (i) cancel Lessee/ Go Air's rights of use and possession of the Engines under the Lease; (ii) immediately take possession of the aircraft; (iii) demand that Lessee / Go Air return the Engines promptly to the Applicant free of any claims or the rights of GoAir in the manner and condition required by and otherwise in accordance with the provisions of Section 18 and Schedule 2 of

the specific aircraft engine agreement if the Engines were being returned at the end of the Lease Term or; (ii) exercise any other rights and remedies provided to the Applicant under the Capetown Convention.

- vii. That, the Applicant accordingly, in accordance with the terms of the Lease Agreement terminated the leasing of the Engines and resumed possession of the Engines. Therefore, the Engines cannot be under the purview of the moratorium in view of the termination of the leasing of the Engines and resumption of possession of the Engines by the Applicant
- viii. It is submitted that this Hon'ble Adjudicating Authority pass appropriate directions to prevent the Respondent's unlawful attempt of creating / renewing rights which have ceased to exist, by misusing the Moratorium Order. Therefore, it is prayed that this Hon'ble Adjudicating Authority be pleased to pass an order clarifying that the Order dated 10th May 2023 does not apply to the Appellant's Engines, the leasing in respect of which have already been terminated on 4th May 2023.

6. Briefly stated averments made in the IA. No. 3048 of 2023, which are just and necessary for adjudication, are as follows: -

- i. That the present Application was filed by the Applicant being aggrieved by the Admission Order dated 10.05.2023 passed by this Tribunal.
- ii. That on 31.08.2012, the Applicant and the Corporate Debtor entered into an Aircraft Engine General Terms Agreement (GTA), which is the master agreement for leasing of aircraft engines.
- iii. That between 28.04.2014 to 19.03.2019, the Applicant and Corporate Debtor entered into six difference aircraft engine lease agreements in respect of six aircraft engines. Under the said lease agreements, the Corporate Debtor was inter alia required to make payments towards Rent, Hourly Supplemental Rent and LLP Supplemental Rent.

- iv. That between 2019 to 2023, the parties entered into several deferred payment plans on account of payment of outstanding dues by the Corporate Debtor.
- v. That the Report dated 18.03.2023, of the Inspector appointed by the Applicant was filed to assess and verify the conditions of the Aircraft Engines, which categorically stated that the engines were poorly maintained, and many parts were either broken or missing.
- vi. That on account of the Corporate Debtor's continuing defaults under the GTA and Lease Agreements, the Applicant issued a Termination Notice dated 03.05.2023, thereby terminating the GTA and the Lease Agreements.
- vii. That on 04.05.2023, the Applicant issued a Notice to Cease Removal of engines to the Corporate Debtor.
- viii. That the order initiating CIRP of the Corporate Debtor was passed by this Tribunal vide Admission Order dated 10.05.2023.
- ix. That the Applicant approached the NCLAT by filing the Company Appeal (AT) (Insolvency) No. 615 of 2023 ("NCLAT Appeal") under Section 61 of the code against the Impugned Order. The Hon'ble NCLAT by way of order dated 22.05.2023, inter alia, held that questions in relation to the termination of the lease agreements by the Corporate Debtor's lessors and the consequences of such termination had not been considered by the Adjudicating Authority and granted liberty to file an application under Section 60(5) of the IBC before this Tribunal to address the abovementioned question.

7. Briefly stated averments made in the IA. No. 2850 of 2023, which are just and necessary for adjudication, are as follows: -

- i. That the present Application is being filed by the Applicant to seek modification and/or clarification to the Moratorium Order dated 10.05.2023 passed by this Tribunal in the aforesaid Company Petition IB No. 264 of 2022.

- ii. That the Applicant is the owner of one Airbus A320NEO Aircraft with manufacturer's serial number 9332 ("Aircraft"). The Applicant and the Corporate Debtor entered into an aircraft lease agreement dated 21.12.2019 ("Lease Agreement"), pursuant to which the Aircraft was leased to the Corporate Debtor. In accordance with the terms of the Lease Agreement, the Corporate Debtor was required to pay monthly lease rentals towards the use of the Aircraft along with certain other payments, and comply with its other obligations under the terms of the Lease Agreement.
- iii. That as early as May 2020 which is not even 6. months past the delivery date of 21.12.2019, the Corporate Debtor started defaulting in its obligations under the Lease Agreement. On 28.12.2020, on the request of the Corporate Debtor, Applicant agreed to enter into certain payment deferral agreements ("Payment Deferral Agreement") and deferred certain lease rentals commencing from July 2020 to February 2021 and even after the said Payment Deferral Agreement, the Corporate Debtor continued to default under its obligations under the Lease Agreement.
- iv. That a payment demand and notice of default was sent by the Applicant on 31.08.2022, due to various defaults committed by the Corporate Debtor in terms of the Lease Agreement and Payment Deferral Agreement.
- v. The said Aircraft has not been operated by the Corporate Debtor since March 2023. The Aircraft has been parked in Kannur, Kerela since March 6, 2023 under a long-term storage program. The Aircraft has not undertaken any commercial flights since then. Furthermore, the Applicant found out that the Corporate Debtor has removed certain parts from the Aircraft while it is so parked. The Applicant vide notice dated 05.04.2023 required those parts to be re-installed on the Aircraft.
- vi. That vide Lease Termination Notice dated 02.05.2023 ("Termination Notice"), the Applicant terminated the leasing of the Aircraft under the Lease Agreement with immediate effect. With the termination of

the leasing the legal and lawful possession of the Aircraft passed into the care and control of the Applicant.

- vii. That on 03.05.2023, the Applicant through its counsel filed an IDERA application under Rule 30(7) of the Aircraft Rules, 1937 before the Directorate General of Civil Aviation ("DGCA") for deregistration of the Aircraft in terms of the Irrevocable De-Registration and Export Request Authorisation dated 24.12.2019 ("IDERA") and the same was published by the DGCA on its website on 04.05.2023.
- viii. That the Cape Town Convention on international interests in mobile equipment ("Cape Town Convention") and the Protocol to the Convention on International Interests in Mobile Equipment on matters specific to aircraft equipment ("Aircraft Protocol"), read with Rule 30(7) of the Aircraft Rules 1937 and AIC 12 of 2018 dated 16.11.2018 (SOP) requires the DGCA to deregister the Aircraft within 5 working days of receipt of an application from the IDERA holder. Thus, DGCA ought to have deregistered the Aircraft within the stipulated timeline.
- ix. That the Applicant, hence, prays for modification and clarification of the Moratorium Order dated 10.05.2023.

8. The reply on behalf of Resolution Professional of the Corporate Debtor with respect to the above-mentioned Interlocutory Applications are as follows:

- i. That, the Corporate Debtor has possession of the aircrafts on an operating lease basis and in this regard has entered into lease agreements with various aircraft lessors, six of them being the present Applicants. Further, from the start of the year 2020 onwards, the engines supplied by Pratt & Whitney ("**Pratt**") which were at the time fitted in all 43 aircraft of the Corporate Debtor began failing gradually due to an inherent defect in the engines. The engines began malfunctioning and failed to complete on an average, even 5,000 hours of flying

- time before being rendered unserviceable; significantly lower than other engines of similar category of other manufacturers in the market (at least 10,000 hours);
- ii. That, as a result of such failure of engines supplied by Pratt, since March 2020, aircraft of the Corporate Debtor began grounding gradually since Pratt did not (a) supply serviceable spare engines on an operating lease basis nor (b) induct unserviceable engines from the Corporate Debtor for repair at Pratt's facility and return the same as serviceable to the Corporate Debtor, in each case, in a timely manner (despite Pratt's obligation to do so pursuant to Corporate Debtor's agreement with Pratt) to ensure that the aircraft can continue to remain operational. Admittedly, the Corporate Debtor began defaulting in payment of lease rentals and other dues as per the Lease Agreements since early 2020. In or around 2021-2022, the Corporate Debtor and the Applicants negotiated and entered into rent deferral agreements for deferring the payments due under the Lease Agreements.
 - iii. Furthermore, engines of Pratt that were fitted in the Corporate Debtor's operational fleet, also began failing, leading for more aircraft on ground ("**AOG**") and consequently a steady decline in the number of operational aircraft being available to the Corporate Debtor for its commercial operations. Singularly owing to the failure of engines supplied by Pratt and Pratt's refusal to resolve the issue by adhering to its contractual obligations, the stress on the cash flows of the Corporate Debtor continued to increase resulting in the Corporate Debtor being unable to make payments to the Applicant under the Rent Deferrals; and
 - iv. Further, even though the Corporate Debtor committed default in payment of lease rentals and other dues to the Applicant since early of 2020 on various dates, the Applicants had never sought to terminate the Lease Agreements on account of payment defaults until the filing of the Section 10 Application. That, by March 2023, owing singularly to the failure of engines supplied by Pratt, the operational fleet of the Corporate Debtor was reduced by over 50% from 54 aircraft to 26 aircraft. Left with no other option, on 13.03.2023, the Corporate

Debtor filed an emergency arbitration against Pratt before the Singapore International Arbitration Centre ("SIAC"), wherein the Emergency Arbitrator passed emergency awards dated 30.03.2023 and 15.04.2023 directing Pratt to immediately (a) supply to the Corporate Debtor 10 serviceable spare leased engines within 28 days by 30.04.2023; (b) supply further 10 spare leased engines to the Corporate Debtor per month till December 2023; (c) induct for repair 20 GTF Engines and spare leased engines (each of the Corporate Debtor) currently in Pratt's facility; and (d) pick-up and induct 44 unserviceable GTF and spare leased engines (each of the Corporate Debtor) in Pratt's facility ("Emergency Awards"). Pratt did not comply with the directions in the Emergency Awards and did not supply spare engines within the stipulated timeline of 27.04.2023. Consequently, the Corporate Debtor initiated proceedings for recognition of the Emergency Awards in a court in Delaware, USA so that the said awards may be enforced against Pratt's assets, particularly engines, available in various jurisdictions in the USA. Subsequently, Pratt filed an application before the SIAC Arbitral Tribunal for vacation/ setting aside the Emergency Awards, which has been heard and reserved for orders by the Arbitral Tribunal.

- v. That the engine failures and Pratt's defiance of the Emergency Awards were the singular reasons that pushed the Corporate Debtor and its shareholders to take the decision to file the Section 10 Application. Accordingly, on 02.05.2023, at around 08:27 a.m., the Corporate Debtor e-filed the Section 10 Application.
- vi. Upon becoming aware of the filing of the Section 10 Application, various lessors of aircraft and engines of the aircraft issued fresh demand notices and notices of termination. Thereafter, this Hon'ble Tribunal heard the Section 10 Application on 04.05.2023 and reserved orders thereon. The termination of lease was clearly a counterblast to the filing and hearing of the Section 10 Application by the Hon'ble Tribunal and the Notice of Termination was issued by the Applicant knowing fully well that the leased aircraft are critical and

essential to the going concern status and survival of the Corporate Debtor and with a view of avoiding the implications of Section 14 of the IBC in the event the Section 10 Application is admitted by this Hon'ble Tribunal.

- vii. In the Admission Order, this Hon'ble Tribunal has cast a duty upon the Respondent to ensure that all necessary steps are taken for the execution of the emergency awards and that "retrenchment of employees" is not resorted to as a matter of course. Further, since the insolvency commencement date, every endeavor is being made to ensure that the Corporate Debtor is managed as a going concern.
- viii. Admittedly, the Corporate Debtor had filed the Section 10 Application at 8:27 A.M. 1ST on 02.05.2023. Immediately thereafter, the filing of the Section 10 Application was reported widely across various national and international news platforms. It was only subsequent thereto that the Applicant issued the Notice of Termination after the filing of Section 10 Application.
- ix. From the above it is evident that the Applicants were aware of the filing of the Section 10 Application by the Corporate Debtor before this Tribunal and have in fact specifically listed the filing of the Section 10 Application under the section of "Events of Default". It is amply clear that the ulterior objective behind issuance of the Termination Notice, termination of the Lease Agreements and filing of the present Applications is to evade the clutches of moratorium as envisaged under Section 14 of the IBC. It is a settled position of law that no party ought to be allowed to act in a manner that defeats the provisions of a statute.
- x. It is a settled position of law that the Hon'ble NCLT has jurisdiction, under Section 60(5) of the IBC, to invalidate the termination of contracts which is evidently and admittedly motivated by insolvency proceedings of the Corporate Debtor and pertain to critical contract(s), the termination of which would prevent the corporate debtor from being run as a going concern. In fact, it is the duty of the Resolution Professional to not only protect and preserve the

assets of the Corporate Debtor but also to ensure the continued business operations of the Corporate Debtor.

- xi. The Corporate Debtor intends to resume operations as soon as possible, and significant steps forward have been and are being taken in this regard. As stated above, at the 2nd CoC Meeting, the CoC has in-principle approved the Resumption Plan for the resumption of commercial operations of the Corporate Debtor. In addition, the CoC has also in-principle approved the raising of interim finance to the tune of INR 450 crores inter alia for the purpose of implementing the Resumption Plan and meeting other critical going concern expenses.
- xii. Further, termination of such leases in relation to Aircraft, if permitted, would make it impossible to run the Corporate Debtor as a going concern and defeat very object of the CIRP. In this context, it is well-settled that contractual rights cannot be permitted to be exercised in such a manner to have the effect of defeating the provisions of a statute, much less a statute that is meant for revival of the debt-stricken corporate debtor as a whole for the benefit of all its stakeholders. It is therefore, submitted that the termination of the Lease Agreements by the Applicant must be invalidated in the present case by this Tribunal in order to ensure that the Corporate Debtor is maintained as a going concern and for its value maximization. The lease of the Aircraft is a service that is critical to protecting and preserving the value of the corporate debtor and to manage its operations as a going concern and cannot be terminated, suspended or interrupted in view of Section 14 (2A) of the IBC.

Analysis & Findings

- 9. We have gone through documents on record filed by the Applicants and the respondent, and arguments advanced by counsel for the Applicants and the Respondent.

10. In the present case, the Applicants are seeking interim reliefs to direct the Respondent to protect and maintain the Subject Aircraft and ensure that the Subject Aircraft and their engines and other parts are duly protected from any unauthorized access/removal / replacement / operation / use by the personnel of the Corporate Debtor and/or any other person. The Applicants are also seeking to pass urgent interim directions and grant necessary permissions to allow the Applicant to depute an agency or an inspector to conduct inspection of the engines. Furthermore, the Applicants seeks to direct the Corporate Debtor/Respondent to refrain from operating or flying the Subject Aircraft.

11. The following are significant and noteworthy in the overall context of the present matter.

- (i) By the order dated 10.05.2023 passed by this Adjudicating Authority, the CIRP proceedings were initiated against the Corporate Applicant. The Interim Resolution Professional (IRP) was appointed to carry out the duties as mentioned under Section 18 of the IB Code, 2016. Thereafter, the Committee of Creditors (CoC) approved the appointment of the Resolution Professional (RP) who was tasked with the duty to ensure the Corporate Debtor to be a going-concern. Further, the RP was also directed to perform all such actions which are required in order to keep the Corporate Debtor as a going-concern.
- (ii) The definition of 'property' and relevant provision of moratorium is given under Section 3(27) and Section 14(1)(d) respectively of the IB Code, 2016 which are reproduced below:

Section 3 (27) - "property" includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property;

Section 14 (1) - Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

From the above definitions, it is evident that these aircrafts which were provided by the Lessor on Lease to the Corporate Debtor, come within the definition of the 'property' as per the IB Code, 2016, and as per Section 14 (1) (d), the moratorium has been imposed upon the property. It has been held by the Hon'ble Supreme Court in **Rajendra K. Bhuta V. Maharashtra Housing and Area Development Authority (AIR 2020 SC 3274)** and another that the term 'occupied by' would mean actual physical possession. The physical possession of the aircrafts/engines is indisputably with the Corporate Debtor. Therefore, in terms of Section 14(1) (d) the Applicants would not be within their rights to claim possession of these aircrafts/engines.

(iii) The moratorium prohibits the recovery of the Aircraft/Engines by the Lessors (Applicants) from the Corporate Debtor. Section 14(1)(d) contains the mandatory provision about the imposition of the moratorium which triggers after the commencement of CIRP whereas, Section 18 only specifies the duties of the Interim Resolution Professional.

(iv) There can be little doubt that the Applicants were aware of the filing of the Section 10 Application by the Corporate Debtor before this Tribunal, since it was widely reported in the media. It is strongly indicative of the fact that the objective behind issuance of the Termination Notice, termination of the Lease Agreements and filing of the present Application was to evade the rigors of moratorium as envisaged under Section 14 of the IBC. It being a settled

position of law that no party ought to be allowed to act in a manner that defeats the provisions of a statute.

- (v) In the aviation industry, the prevailing practice is that most Airlines lease the aircrafts for their operation rather than own them. In other words, the aircrafts are not as such the property of the airlines. Therefore, the application of the provision of the IBC and the process of insolvency would have no meaning in respect of Airlines as Corporate Debtors, if the sole essence of the Corporate Debtor's business is taken away. It would result in corporate death of the Corporate Debtor, leaving no scope for resolution of the Corporate Debtor.
- (vi) As per the provisions of the IBC, the moratorium starts after the commencement of CIRP. In that respect, several judgments of the Higher Courts have time and again reiterated that where there exists a debt and default, then the application to initiate CIRP shall be admitted. Such being the common and well understood provisions of the Code, it would not be an exaggeration to say that once the Application under Section 10 was filed, and being aware of the debt and default status of the Corporate Debtor, the present Applicants were inclined to believe that the Section 10 Application of the Corporate Debtor would be admitted and moratorium would be imposed.
- (vii) There is a significance to the period of one year before commencement of CIRP under the IBC in the cases of Preferential Transactions, Under Valued Transactions, Fraudulent Transactions and Extortionate Credit Transactions committed by the Corporate Debtor as stated in Sections 43 to Section 51 of the IBC, 2016. The said provisions are not applicable in the present case since they apply to the transactions done by the Corporate Debtor, while in the instant case, it is done by the lessors. It, however, manifests the legislative intent that any such dubious actions or events which occurred within a year

prior to the commencement of CIRP and which appear to be detrimental to the interest of the other creditors, need to be scrutinized.

(viii) The Emergency Arbitrator at the Singapore International Arbitration Centre has already passed emergency awards directing Pratt & Whitney, the engine suppliers to supply serviceable spare leased engines to the Corporate Debtor in relation to its operations.

12. It is noted that the interim order of the Hon'ble High Court dated 05.07.2023 in Writ Petitions W.P.(C) 6569/2023 and CM Nos. 25806-25807/2023, W.P.(C) 6626/2023 and CM Nos. 26011-26012/2023, W.P.(C) 7214/2023 and CM Nos. 28114-28115/2023 & 30784/2023, W.P.(C) 7369/2023 and CM Nos. 28705-28706/2023, W.P.(C) 7663/2023 & CM APPL. 29679-29680/2023, W.P.(C) 7773/2023 & CM APPL. 29997-29998/2023, W.P.(C) 7774/2023 & CM APPL. 30005-30006/2023, 32445/2023 and W.P.(C) 8088/2023 & CM APPL. 31155-31156/2023 was submitted by the Applicants and the same was taken on record. The Hon'ble High Court has passed orders and directions in respect of 8 Aircraft lessors and their 30 aircrafts. It is pertinent to mention that the Applicants who have appeared before this Adjudicating Authority in I.A. No. 3280/2023, IA No. 3277/2023, IA No. 2944/2023, IA No. 3254/2023, IA No. 3048/2023 and IA No. 2850/2023 were not among the 8 petitioners (Aircraft Lessors) before the Hon'ble High Court in which order dated 05.07.2023 was passed. The order dated 05.07.2023 passed by the Hon'ble High Court, is an interim order passed in its writ jurisdiction and no law has been laid down by the Hon'ble High Court by the said order. Moreover, the present applications are filed in the CIRP proceedings under the IBC and hence, need to be considered in the light of the provisions contained in the IBC, 2016.

13. With respect to the interim prayers by the Applicant(s) i.e Corporate Debtor/ Respondent to refrain from operating or flying the Subject Aircraft owned by the

Applicant for commercial use, it is pertinent to mention that the DGCA has not deregistered the aircraft, which means that they are available to the Corporate Debtor for use to resume operations. Therefore, as long as the aircrafts/engines are registered, they can be used for operating or flying to keep the Corporate Debtor as a going concern, however, within the safeguards/safety norms prescribed by the Regulators. Additionally, it has already been ordered by this Tribunal vide its Admission Order dated 10.05.2023, that it is the duty of the IRP to keep the Corporate Debtor as a going concern. In order to keep the Corporate Debtor as a going concern, the Aircrafts have to be flown and hence, the Aircrafts shall be with the Corporate Debtor and shall be operated by the Corporate Debtor. Therefore, we see no reason to allow this interim relief claimed by the Applicant(s).

14. Further with respect to the interim relief to allow the Applicant to conduct inspection, the respondent has strongly opposed and argued that it is the duty of the Respondent i.e. the Resolution Professional, under Section 25 to maintain assets at highest level of efficiency/safety. It has also been argued by the Resolution Professional that there is no need for inspection, as he is under obligation to maintain and protect the assets as per the duty assigned to him under the Code. Further, it is also evident that 'Inspection' is not an end in itself and is always done with a purpose and therefore must consequentially be followed by curative or remedial action or directions. Under these circumstances, in the instant case, allowing inspection would only act as an impediment to the effective discharge of the duties of the Resolution professional which, inter alia, includes the protection and maintenance of the engines at the prescribed levels of efficiency/safety, which would be necessary to keep the Corporate Debtor as a going-concern. Furthermore, the purpose of inspection is to see whether these Aircrafts/Engines are properly cared and protected or not. Since by our order dated 15.06.2023, we have already asked the RP to maintain the Aircrafts, therefore, no fruitful purpose would be served by allowing this prayer. Hence, we are not inclined to allow this prayer.

15. It is necessary to mention that in our order dated 15.06.2023, we have clearly stated the duties of Resolution Profession with respect to preserving and protecting the assets in his possession and to comply with the provisions of Section 25 of the Code. The relevant extract of this order is reproduced here below:

“The RP should comply with the relevant provisions of the IBC and perform the duties assigned to him under the Code, in particular those related to Section 25(1) of the Code regarding protection of the assets with respect to which he has the responsibility assigned to him in the current proceedings under the Code”.

This Adjudicating Authority strongly reiterates the responsibility of the Resolution Professional to maintain the property/Aircraft/engines at the highest levels of efficiency/safety. During the course of arguments, the Learned Counsel for Resolution Professional has also stated that a substantial amount has been set aside by the Committee of Creditors for restoring the functioning of the business of the Corporate Debtor as well as for the payment of due Lease Rent to the Lessor. Moreover, the lease of the Aircraft is a service that is critical to protecting and preserving the value of the corporate debtor and to manage its operations as a going concern.

16. Therefore, in light of above observations, we do not find sufficient cause to rely on the affirmations made by the Applicants. The claim of the Applicants does not stand substantiated. However, interim relief only to the extent of protection and maintenance of subject aircraft/engines by the Respondent is granted. In the facts and circumstances of the matter as observed above none of the other interim relief sought in the subject applications is granted. Further, it is made clear that in respect of the other reliefs claimed in the Interlocutory Applications, the matter shall be proceeded further with.

17. The I.A. No. 3280/2023, IA No. 3277/2023, IA No. 2944/2023, IA No. 3254/2023, IA No. 3048/2023 and I.A. No. 2850/2023 to the extent of interim relief are accordingly disposed off.

Let copy of the order be served to the parties.

Sd/-
(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)

**I.A. 3280 of 2023, IA No. 3277/2023, IA No. 2944/2023,
IA No. 3254/2023, IA No. 3048/2023, IA No. 2850/2023**

IN
CP(IB) No. 264/ND/2023
Order Delivered On: 26.07.2023