

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

IB NO. 352/(ND)/2023

An Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

Aircastle (Ireland) Limited
Through its Power of Attorney
Mr. Naim Mohammad Khan
20 Kildare Street, Dublin 2, Ireland,
D02 T3V7

...Operational Creditor

Versus

SpiceJet Limited
Terminal 1D, Indira Gandhi International Airport,
Delhi- 110037, India

...Corporate Debtor

Order Delivered on: 07.05.2024

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

For the Applicant : Adv. Ritesh Singh, Adv. Ajay Kumar, Adv. Navneet K. Singh, Adv. Anchal Nanda and Adv. Hetram Bishnoi, Advocates

For the Respondent: Mr. Krishnendu Datta, Sr. Adv., Mr. Sanjay Gupta, Ms. Sharmistha Ghosh, Mr. Rajat Sinha, Adv.

O R D E R

PER: DR. SANJEEV RANJAN, MEMBER (TECHNICAL)

1. This is an Application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**'the Code'**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by **Aircastle (Ireland) Limited ('Operational Creditor')** through its Power of Attorney-Holder Mr. Naim Mohammad Khan, duly authorized by its Board for initiation of Corporate Insolvency Resolution Process (**'CIRP'**) against **SpiceJet Limited. ('Corporate Debtor')**.
2. **Aircastle (Ireland) Limited** (Operational Creditor) has its registered office at 20 Kildare Street, Dublin 2, Ireland, D02 T3V7. **SpiceJet Limited** (Corporate Debtor) is a company registered under the Companies Act, 1956 [CIN-L51909DL1984PLC288239], having its registered office at Terminal 1D, Indira Gandhi International Airport, New Delhi, Delhi, 110037, India. The Corporate Debtor has Authorized Share Capital of Rs. 15,00,00,00,000/- and Paid-Up Share Capital of Rs. 6,01,84,56,650/-.
3. The present Application was filed on 07.06.2023 before this Adjudicating Authority by Mr. Naim Mohammad Khan, the Authorised Representative of the Operational Creditor, duly authorized to initiate Corporate Insolvency Resolution Process (**"CIRP"**) proceedings under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**"Code"**). The total amount due as on the date of filing of this petition is claimed to be USD 56,04,995. The **date of default** claimed is 17.05.2021.
4. The present application was reserved on the issue of maintainability/issue of notice vide order dated 04.03.2024. Vide order dated 14.12.2023, both the parties were directed by this Adjudicating Authority to submit their written submissions. In the instant application, advance notice was issued in terms of NCLT Rules, 2016, and on this basis Ld. Counsel appeared, and made submissions with

respect to issue of maintainability, and for not issuing notice and filed written synopsis as per this Adjudicating Authority's order dated 14.12.2023.

5. Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.

- a) The Operational Creditor and the Corporate Debtor entered into Aircraft Lease Shared Terms (ALST) on 11.04.2019 and subsequently, entered into a Lease Agreement on the same day for leasing one Boeing 737-800 aircraft with manufacturer's serial number-34799, fitted with two CFM56-7B engines bearing ESNs 894217 and 894219 (the "Aircraft") to the Corporate Debtor. Accordingly, the Aircraft was leased by the Operational Creditor to the Corporate Debtor in accordance with terms of the Lease Agreement.
- b) The Operational Creditor states that the Operational Creditor is the rightful lessor of the Aircraft. Additionally, in a letter sent to the Directorate General of Civil Aviation (DGCA) by the Corporate Debtor regarding filing of Irrevocable De-Registration and Export Request Authorization (IDERA), the Operational Creditor was named as owner of the Aircraft and the said IDERA was executed by the Corporate Debtor acknowledging Operational Creditor as Lessor and Owner.
- c) Further, the Aircraft was registered in the name of the Applicant and the Certificate of Registration dated 06.05.2021 issued by the DGCA recognizes the Operational Creditor as Lessor/Owner of the Aircraft.
- d) In terms of Clause 3 of the ALST, the Corporate Debtor was under the obligation to pay lease rentals towards the use of the Aircraft.
- e) The Operational Creditor being the rightful lessor of the Aircraft raised various invoices on the Corporate Debtor for the payment of the lease rent, supplemental lease rent, maintenance and other payments due from April, 2021. However, the Corporate Debtor defaulted in making the payment of lease rentals and supplemental lease rentals since May 2021 and did not also dispute the invoices so raised.

- f) The Operational Creditor sent Default and Grounding Notice dated 31.12.2021 and 27.09.2022 to the Corporate Debtor. Further, on the occasion of continuance of defaults, the Operational Creditor sent a notice dated 22.02.2023 for the termination of the leasing of the Aircraft.
- g) Despite several reminders, the Corporate Debtor failed to clear the acknowledged debt of USD 56,04,995. Therefore, the Operational Creditor issued a Demand Notice dated 04.04.2023 to the Corporate Debtor in terms of Section 8 of the Code. The Corporate Debtor filed its reply dated 14.04.2023 to the Demand Notice.
- h) The Demand Notice dated 04.04.2023 was issued by the Operational Creditor to the Corporate Debtor through its Director and such was not disputed by the Corporate Debtor in its reply dated 14.04.2023.
- i) The Operational Creditor has also filed another Insolvency Petition bearing CP IB No. 266 of 2023 against the Corporate Debtor for an amount of USD 60,94,878 with respect to the occupation and use of Boeing 737-800 Aircraft with manufacturer's serial number 33597 under the Lease Agreement dated 07.04.2017.
- j) The present application is filed by Mr. Naim Mohammad Khan through Power of Attorney which is backed by the Board Resolution issued by the Operational Creditor.

6. Submission by the Learned Counsel appearing on behalf of the Corporate Debtor

- a) It is submitted on behalf of the Corporate Debtor that the Petition is not maintainable in law and no notice deserves to be issued on such defective Petition. Aircastle (Ireland) Limited prior to the filing of present Petition had earlier filed a similar petition under Section 9 of the IBC on different default comprising of different invoices which is sub judice before this Adjudicating Authority.

- b) Rule 5 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("2016 Rules") prescribes that as per Form 3 and Form 4, a demand notice shall be addressed to the Corporate Debtor. However, in the instant case, the Demand Notice is addressed to the Directors of the Corporate Debtor and not to the Corporate Debtor itself.
- c) The Default and Grounding Notice dated 27.09.2022 and 31.12.2021, alongside the Lease Termination Notice dated 22.02.2023 were all appropriately addressed to the "Corporate Debtor". However, only the demand notice was not addressed to the Corporate Debtor.
- d) The Corporate Debtor states that the present Section 9 petition is filed by the Power of Attorney Holder on behalf of the Operational Creditor which is not permissible as per the law. Hence, the present petition is defective and not maintainable.

Analysis & Findings

- 7. We have heard the Learned Counsels for the Operational Creditor and the Corporate Debtor, and further perused the averments made in the written submissions presented by both the parties. Since the registered office of the respondent Corporate Debtor is in Delhi, this Tribunal is having territorial jurisdiction as the Adjudicating Authority with respect to maintainability/issue of notice of Company Petition bearing C.P IB/352/ND/2023. Further, the present petition is filed within the period of limitation.
- 8. In order to analyze that whether the present petition is maintainable as to the issue of petition filed by the Power of Attorney-Holder, we have to see whether the Applicant in the instant case, is operational creditor within the meaning of IBC, 2016. The terms 'Operational Creditor' and 'Operational Debt' are defined under Section 5(20) and Section 5(21) of the Code which are as under:

- a) Section 5(20): *operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;*
- b) Section 5(21): *operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;*

9. Thus, Operational Creditor is a person (i) to whom an operational debt is owed, (ii) to whom an operational debt is legally assigned or transferred. In order to examine, whether the instant Applicant is an Operational Creditor, we would refer to the pleading filed by the Applicant. On perusal of Part-I in Form-5 of the pleadings, it can be seen that the Applicant herein, i.e., Mr. Naim Mohammad Khan is acting in the capacity of Power of Attorney of the Operational Creditor i.e. Aircastle (Ireland) Limited. The claim of the Applicant is based upon the Lease Agreement and Aircraft Lease Shared Terms Agreement each dated 11.04.2019. On perusal of the Lease Agreement placed on record in Annexure-C of the petition, it is evident that the Agreement is independently executed between the Aircastle (Ireland) Limited [Formerly known as Klaatu Aircraft Leasing (Ireland) Limited] (Lessor) and the SpiceJet Limited (Lessee). Further, in order to corroborate the same, this Adjudicating Authority deems fit to analyze the clauses of the Lease Agreement placed on record, as to who are the Parties in the Lease Agreement and to whom the payment is owed under such Agreements. Reliance is placed on the various clauses of the Lease Agreement dated 11.04.2019. The relevant extract of same is as follows: -

“Clause 3.2: Lessee will pay promptly to Lessor, or to whosoever will be entitled thereto, any and all Rent-supplemental when and as the same will become due and owing.

Clause 3.3.1: All payments of rent will be made directly be Lessee in Dollars by wire transfer of immediately available funds on the required date of payment, for receipt on such date and with value

on such date, (1) **if due to Lessor, to the account for Lessor specified in Schedule 5 of the Aircraft Lease Agreement or to such other account as Lessor will otherwise direct** by not less than five (5) days prior written notice to Lessee and (2) **if to any other person to the account of Lessor.....**

Clause 4.1: Lessee will pay Lessor a security deposit in an amount equal to the Security Deposit Amount (the “security Deposit”) as provided in the Aircraft Lease Agreement.

On perusal of Clause 3.2 of the lease Agreement, it is observed that the payment is owed by the Lessee (i.e., SpiceJet Limited) either to the **Lessor** [i.e., Airastle (Ireland) Limited in the instant case] or to **whoever entitled to.**

10. To analyze whether the Power of Attorney Holder in the instant case is legally entitled to receive the Operational Debt on behalf of the Operational Creditor, reference is taken from the power of Attorney of the Applicant which was executed by the Director of the Operational Creditor on 20.03.2023. The Power of Attorney lucidly specifies the functions to be performed by the Applicant. The relevant extract of the Power of Attorney executed in favor of Mr. Naim Mohammad khan is reproduced hereunder as:

“.....

1. To represent the Grantor in instituting or defending any court proceedings, including without limitation, proceedings before the National Company Law Tribunal (NCLT), New Delhi Bench or where the registered office of SpiceJet Limited ("SpiceJet") is located or otherwise, National Company Law Appellant Tribunal, any High Courts of India and/or Supreme Court, in India, against inter alia, SpiceJet, Resolution Professional of SpiceJet (if any), Directorate General of Civil Aviation of India ("DGCA"), tax authorities or any other government body or authority and to sign, verify and execute, including without limitation the winding up petitions, writs, suits, petitions, applications, affidavits, vakalathnama, appeals, reply, written statements, review, applications and all other necessary pleadings and documents as may be necessary to protect the interest of the Grantor:
2. To sign, file and deliver all affidavits, letters, documents, notices, evidence, forms and applications to protect the interest of the Grantor

and to attend to the office of DGCA, Airports Authority of India Central Board of Indirect Taxes and Customs, Goods and service tax authorities, Collector of Stamps Mumbai/ Delhi, or elsewhere in India and such other authorities/courts/tribunals as may be necessary in connection with the foregoing: and

3. *To do all such other or further acts or deeds as the Attorney may deem necessary in connection with the foregoing.*
.....”

On the perusal of the Power of Attorney executed in favor of the Applicant, it is observed that the Applicant is entitled to represent the Operational Creditor in any suit or proceedings filed by or against the Operational Creditor. However, such Power of Attorney nowhere entitle the Applicant to receive the Operational Debt on behalf of the Operational Creditor. Further, the Applicant has failed to annex any such document which justifies the entitlement of the Operational Debt in the favor of the Applicant. Further, the Applicant has also failed to prove that the Operational Debt is legally assigned or transferred to the Applicant.

11. Moreover, on perusal of the invoices it can be seen that the payment details mentioned in the invoices, evidences that the payment were owed to the Lessor i.e. Aircastle (Ireland) Limited [Formerly known as Klaatu Aircraft Leasing (Ireland) Limited], who had issued the invoices. The Payment details as mentioned in one of the invoices (Pg. 163- Volume- 2) is mentioned below:

Beneficiary Bank: Citi International plc, Dublin, Ireland
Sort Code: 990051
SWIFT Code: CITIIE2X
Account Name: Klaatu Aircraft Leasing Ireland Limited
Account No.: 0017246003
IBAN No.: IE59CITI99005117246003
Reference: SN: SG 34799 June 2021

12. Further, on perusal of the invoices in the instant application, it is observed that the invoices were issued by the Lessor to SpiceJet Limited, and not by Mr. Naim Mohammad Khan (Applicant) to SpiceJet Limited (Corporate Debtor). The Learned Counsel for the Applicant has stressed during the oral arguments, that the name of the instant Applicant is backed by the Power of Attorney issued by the

Operational Creditor through Board Resolution. On the contrary, during the course of arguments, the Learned Senior Counsel, Shri Krishnendu Datta appearing on behalf of the Corporate Debtor laid emphasis on the established tenet of the law that to file an application under Section 9 of the Code, the Operational Debt must be legally owed or assigned or transferred to the Applicant. However, in the instant case, the debt is owed to the Lessor and not to the instant Applicant.

13. On the perusal of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, it is observed that the Form 5 of the Rules contain proforma as to filing of the Section 9 application. Form 5 specifies that an application can be filed either by the Operational Creditor or by the person authorized to act on behalf of the Operational Creditor. It is observed that such Form 5 contains no provision as to filing of the application by the Power of Attorney-Holder.
14. At this juncture, it is pertinent to refer to the decision of the Hon'ble National Company Law Appellate Tribunal (NCLAT) in the case of **Palogix Infrastructure Private Limited Vs ICICI Bank Limited [Company Appeal (AT) (Insol.) No. 30 of 2017]**, wherein, the Hon'ble NCLAT has held as under:

“32. The 'I&B Code' is a complete Code by itself. The provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder.

33. Therefore, we hold that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'.

35. In a case where it is noticed that the Insolvency Resolution proceeding has been initiated by a person fraudulently or with malicious intention for personal act on the part of an individual, can a Power of Attorney Holder be punished? This is one of the reasons we

have noticed to hold that a 'Power of Attorney holder' cannot file any application under Section 7 or Section 9 or Section 10 of 'I&B Code'."

However, the Hon'ble NCLAT has also observed as under:

*36. In so far as, the present case is concerned, the 'Financial Creditor'-Bank has pleaded that by Board's Resolutions dated 30th May, 2002 and 30th October, 2009, the Bank authorised its officers to do needful in the legal proceedings by and against the Bank. **If general authorisation is made by any 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant' in favour of its officers to do needful in legal proceedings by and against the 'Financial Creditor'/Operational Creditor/Corporate Applicant', mere use of word 'Power of Attorney' while delegating such power will not take away the authority of such officer and 'for all purposes it is to be treated as an 'authorization' by the 'Financial Creditor'/Operational Creditor/Corporate Applicant' in favour of its officer, which can be delegated even by designation. In such case, officer delegated with power can claim to be the 'Authorized Representative' for the purpose of filing any application under section 7 or Section 9 or Section 10 of 'I&B Code'.***

On the bare perusal of the judgment of the Hon'ble NCLAT in the **Palogix Infrastructure (supra)**, the Hon'ble NCLAT in the paras 32,33 and 35 has held that a Power of Attorney is not competent to file an application under Section 7, 9 and 10 of the Code. Whereas, on the other hand, in para 36, the Hon'ble NCLAT has observed that officer delegated with power can claim to be the 'Authorized Representative' for the purpose of filing any application under section 7 or Section 9 or Section 10 of 'I&B Code'.

15. Subsequently, the Hon'ble Supreme Court in the case of **Rajendra Narottamdas Sheth & Anr. Vs. Chandra Prakash Jain & Anr. (2022) 5 SCC 600** approves the abovementioned observations made by the Hon'ble NCLAT in **Palogix Infrastructure (supra)**, wherein, the Hon'ble Supreme Court has held as under:

“11. The NCLAT in its judgment in *Palogix Infrastructure (supra)* held that a ‘power of attorney holder’ is not competent to file an application under Section 7 on behalf of the financial creditor. However, the NCLAT made certain further observations, as reproduced below:

“41.**mere use of word 'Power of Attorney' while delegating such power will not take away the authority of such officer and for all purposes it is to be treated as an 'authorization' by the 'Financial Creditor' / 'Operational Creditor' / 'Corporate Applicant' in favour of its officer, which can be delegated even by designation. In such case, officer delegated with power can claim to be the 'Authorized Representative' for the purpose of filing any application under section 7 or Section 9 or Section 10 of 'I &B Code'.**”

The NCLAT was of the opinion that general authorisation given to an officer of the financial creditor by means of a power of attorney, would not disentitle such officer to act as the authorised representative of the financial creditor while filing an application under Section 7 of the Code, merely because the authorisation was granted through a power of attorney. Moreover, the NCLAT in *Palogix Infrastructure (supra)* has held that if the officer was authorised to sanction loans and had done so, the application filed under Section 7 of the Code cannot be rejected on the ground that no separate specific authorisation letter has been issued by the financial creditor in favour of such officer. In such cases, the corporate debtor cannot take the plea that while the officer has power to sanction the loan, such officer has no power to recover the loan amount or to initiate corporate insolvency resolution process, in spite of default in repayment. **We approve the view taken by the NCLAT in *Palogix Infrastructure (supra)*.**

16. Subsequent to the decision of the Hon’ble Supreme Court in the case of **Rajendra Narottamdas Sheth (supra)**, the Hon’ble NCLAT has subsequently analyzed the same issue in the case of **Sameer Bansal, Director (Suspended) of NSP**

Associates (India) Pvt. Ltd. Vs Canara Bank & Anr. [Company Appeal (AT) (Insol.) No. 1188 of 2022] and has held as under:

*16. The above judgment of the Hon'ble Supreme Court clearly holds that **an Application under Section 7 even if it is on the basis of Power of Attorney which is referable to the Resolution of the Board is fully maintainable.***

17. Further, subsequent to the decision of the Hon'ble NCLAT in **Sameer Bansal (supra)**, the Hon'ble NCLAT has recently in the case of **Tulip Hotels Private Limited Vs JC Flowers Asset Reconstruction Private Limited and Anr., Company Appeal (AT) (Insol.) No. 1146 of 2023** allowed an application filed by the Power of Attorney Holder under Section 7 of the Code on general authorization being granted vide Board Resolution to file necessary applications for commencement of legal proceedings.

18. In view of the above cited judicial decisions, it emerges that the Hon'ble Supreme Court and the Hon'ble NCLAT has, subject to the facts of the respective cases, permitted an application to be filed by the Power of Attorney-Holder, treating them as filed by the authorized representatives. However, it was permitted in view of the specific facts of the case. Although, the view of the Hon'ble NCLAT in Palogix Infrastructure Private Limited (supra) as mentioned in para 35 of the said observations has not been overruled. Therefore, in our considered view, in order to examine this issue that whether the application filed by the Power of Attorney Holder can be considered as a valid authorized person, it would be appropriate to consider and examine all the pleadings filed by the parties including the facts/documents in detail. As of now, the Corporate Director has not filed its reply to the Section 9 petition. Therefore, the Corporate Debtor is directed to file its reply to the present Section 9 application. However, it is made clear that we have not adjudicated upon the issue of maintainability at this stage. Further, the Corporate Debtor is at liberty to raise these preliminary issues in its

reply/arguments. Let the Corporate Debtor file its reply within 15 days of the pronouncement of this order. List the matter on 28.05.2024.

19. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Sd/-
(DR. SANJEEV RANJAN)
MEMBER (TECHNICAL)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)