

SL. No.4

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)

CORAM: SHRI. SANJAY PURI, - HON'BLE MEMBER (T)

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 08.05.2024 AT 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	Company Petition IB/210/2022
NAME OF THE COMPANY	Turbo Megha Airways Pvt Ltd
NAME OF THE PETITIONER(S)	Dae Leasing (Ireland) 30 limited
NAME OF THE RESPONDENT(S)	Turbo Megha Airways Pvt Ltd
UNDER SECTION	9 of IBC

ORDER

Orders pronounced, recorded vide separate sheets. In the result, the Petition is dismissed.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**4IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-II, HYDERABAD**

CP (IB) No. 210/9/HDB/2022

*(Under section 9 of the Insolvency and Bankruptcy Code, 2016 read with
Rule 6 of the Insolvency and Bankruptcy (AAA) Rules, 2016)*

Between:

DAE Leasing (Ireland) 8 Limited
70, Sir John Rogerson's Quay
Dublin 2, Ireland

...Applicant/Operational Creditor

Versus

Turbo Megha Airways Private
Limited
R/o at Ohris Tech Park,
Plot No 13,
Sy. No 64/2, (New) Software
Unit Layout,
Madhapur, Hyderabad-
500081

..... Respondent/Corporate Debtor

Date of order: 08.05.2024

Coram:

Hon'ble Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)

Hon'ble Sri Sanjay Puri, Hon'ble Member (Technical)

Counsels present:

For Applicant : Mr. Kevic Setalvad, Senior Counsel along with
Mr. Y. Suryanarayana, Advocate and
Mr. Sachin Sharma, Advocate

For Respondent : Mr. Sridhar, Advocate

Per : Sanjay Puri, Member (Technical)
ORDER

1. This Company Petition is filed by DAE Leasing (Ireland) 30 Limited herein after referred to as Operational Creditor (“**OC**”) seeking to initiate CIRP¹ under Section 9 of IBC² read with Rule 6 of the applicable Rules³ against Turbo Megha Airways Pvt Ltd herein after referred to as Corporate Debtor (“**CD**”), who is alleged to have committed default in payment of the operational debt of **USD 4,456,176.24**⁴

Brief averments in the application:

2. The OC is stated to have leased one ATR 72-600 aircraft with serial number **1385** to the CD against payment of rental and supplemental rental under an Aircraft Lease Agreement⁵ dated 08.11.2017. The Lease Agreement stipulated that if the CD failed to pay the Rental on time, it would incur Late Payment Charges on the overdue amount until the payment date.
3. The agreement also provided for the CD to make a deposit USD 486,400 as Security Deposit which the OC could use to fulfil Lessee Obligations. If the Security Deposit was utilized, the CD was required to replenish it within five business days on a written demand from the OC.
4. As per the lease, non-payment of rental or any other amounts by

¹ Corporate Insolvency Resolution Process

² Insolvency & Bankruptcy Code, 2016

³ Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

⁴ Original application stated this debt to be of **USD 4,479,338.47** which was later amended through IA No. 456/2023 that was allowed by this Authority vide order dated 30.06.2023

⁵ Aircraft Lease Agreement – Page 33 to 172 of the Application

CD would constitute repudiatory breach of lease and an event of default, the OC was entitled to terminate the lease. The payment of rentals under lease commenced from 29.12.2017.

5. It is submitted that CD defaulted in making payments towards invoices raised by CD from 21.11.2018 till 29.12.2020.
6. By a notice⁶ dated 01.07.2020, the OC demanded CD to make payment of overdue amounts and payable as at 15.03.2020, no later than 07.07.2020 failing which the OC expressed intention for issuance of formal grounding orders with respect to aircrafts and the deduction of overdue payments from Security Deposit without prejudice to other rights and remedies available to OC. Further in the event the Security Deposit being appropriated by the OC towards fulfilment of the CD's (Lessee) obligation, the CD was required to restore the Security Deposit to the level at which it stood prior to the appropriation.
7. The Operational Creditor, via a second notice⁷ dated 18.12.2020, demanded payment of overdue amounts by 22.12.2020. This deadline was extended to 07.01.2021 after discussions, but the CD failed to meet this extended deadline also.
8. Due to ongoing Events of Default, the Operational Creditor issued a Grounding Notice⁸ on 08.01.2021, instructing the Corporate Debtor to ground the Aircraft at Rajiv Gandhi International Airport, Hyderabad, and cease its operation on 09.01.2021.
9. Following discussions, the OC and the CD entered into a

⁶ Page 173 – 176 of the Application- **Annexure E**

⁷ Page 177 – 178 of the Application- **Annexure F**

⁸ Page 179 – 182 of the Application- **Annexure G**

Forbearance Restructuring and Lease Amendment Agreement⁹ on 12.01.2021 (**Forbearance Agreement**). Under this agreement, the Operational Creditor agreed to defer payment of Rental Arrears, Supplemental Rental Arrears, and Late Payment Arrears. The CD thereafter defaulted on invoice raised by OC on 02.03.2021 for USD 81,452.19.

10. Due to non-payment of overdue Rental, Supplemental Rental amounts, and interest payments, the OC notified¹⁰ the CD on 17.06.2021, that the Security Deposit had been used for partial payment of the outstanding arrears. The CD was demanded to make immediate payments of overdue amounts and restore the Security Deposit within five business days from the date of the notice.
11. It is submitted that the CD persisted in defaulting on invoices, including one for USD 56,179.94 dated 04.05.2021, and all subsequent invoices raised by the OC until 01.05.2022, totalling USD 4,456,176.24¹¹ as of 06.05.2022.
12. As the CD failed to make payment on the outstanding invoices, on 13.05.2022, the OC issued a Demand Notice¹² under Section 8 of IBC, requiring the Corporate Debtor to pay USD 4,479,338.47, the total overdue amount as of 06.05.2022.
13. It is claimed that in an email dated 23.05.2022, one Mr. Yoga Narasimha, representing the CD acknowledged receipt of the Demand Notice. He mentioned his role as CFO and expressed interest in discussing an amicable settlement. The OC responded,

⁹ Page 183 – 194 of the amended Application- **Annexure H**

¹⁰ Page 197 to 202 of the amended Application- **Annexure J**

¹¹ Original application stated this amount to be USD 4,479,338.47 which was later amended through IA No. 456/2023 that was allowed by this Authority vide order dated 30.06.2023

¹² Page 260-270 of amended application- **Annexure L**

noting that a settlement proposal was previously communicated in early 2022. No further response was received from the CD.

Brief averments in Counter:

14. Respondent CD has contended that the present CP is not maintainable and deserved to be dismissed. It is argued that this petition has been filed by suppressing material facts and with an oblique motive to coerce the respondent CD to pay the amounts which it is not liable to pay.
15. The Respondent has asserted that the Aircraft Lease Agreement dated 8.11.2017, was terminated by the Petitioner via a Notice of Termination¹³ dated 08.07.2021. According to the Respondent, the Petitioner owed them USD 1,995,900. It is claimed that they have regularly paid supplemental rentals/maintenance reserves to the Petitioner, and upon termination of the Agreement, the Petitioner held an unutilized amount of USD 2,017,530 in such reserves, which should have been returned to the Respondent. However, the Petitioner has not adjusted or refunded this amount and is now making additional claims, which the Respondent deems impermissible.
16. The Respondent denied the validity of the maintenance invoices claimed by the Petitioner, asserting that the Agreement obligates the Respondent to perform maintenance at their own expense. The Petitioner was then supposed to reimburse the Respondent for these costs. There is no provision in the Agreement for the Petitioner to perform maintenance services. Therefore, the amounts claimed by the Petitioner for maintenance are not valid operational debts.

¹³ Copy of Termination Notice of 08.07.2021, Pg 68-70 of Counter affidavit

17. Additionally, since the Agreement had been terminated on 08.07.2021 and the aircraft repossessed by the Petitioner, there was no obligation to pay maintenance invoices. The reimbursement of maintenance expenses is evident from the Agreement's terms and documents filed with the Income Tax Department, indicating refundable amounts. According to the Respondent, an amount of USD 1,995,900 is due to be refunded to the Respondent for maintenance invoices/ supplemental rentals alone, as illustrated by the annexed forms¹⁴ indicating payments made by the Respondent.
18. It is alleged that the Petitioner has applied USD 2,500,000, held as supplemental rentals, towards alleged "technical costs" without providing any invoices. Even if the provided breakdown of costs is accepted, only USD 21,630 was utilized, with the rest being notional under various headings. The Petitioner failed to provide further details on these costs or demonstrate their actual incurrence, it is argued.
19. It is claimed that during oral discussions, the Petitioner had admitted that the supplemental rentals/maintenance reserves were not fully utilized. Therefore, it is contended that even if lease or deferred rentals were due until the Agreement's termination, the supplemental rentals/maintenance reserves would suffice to clear such dues, with the Respondent entitled to a refund as mentioned above.
20. The Respondent has also asserted that the Petitioner has claimed amounts against invoices which have already been paid. Invoice

¹⁴ Copy of some of forms Form 15CA and Form 15CB filed against the payments against refundable supplemental rentals/maintenance reserves at Pg. 44-67 of Counter

Nos. 352778, 352078, 353380, 354366, 354853, 355247, 355482, 356888, 357052, 357521 and 357785 are claimed by the Respondent as paid¹⁵ on 24.02.2021 and on 30.03.2021, in lieu of 'Refundable Supplemental Rental / Maintenance Reserves'.

21. These amounts, according to the Respondent, are now liable to be refunded as the Agreement has been terminated. This according to the Respondent, indicates that the Petitioner had been making arbitrary adjustments outside the Agreement's provisions, and the Petitioner's intent to coerce the Respondent is evident as some invoices claimed for supplemental rentals/maintenance have already been paid by the Respondent, entitling the Respondent to a refund.
22. Further, it is argued that the Demand Notice dated 13.05.2022, issued under Section 8 of IBC, is not supported by any of the invoices and it only makes a vague reference to another notice dated 17.06.2021. Even the notice of 17.06.2021 did not include any invoices and simply mentioned a total amount outstanding of USD 2,503,130.44 in respect of two aircraft with serial numbers 1364 and 1385. It's well-established that in transactions involving invoicing, the invoices must be included with the Demand Notice under Section 8 of IBC, with no discretion given to the Petitioner regarding such an attachment.
23. The Respondent CD points out that the only documents attached to the Demand Notice, being unacknowledged statement and the 17.06.2021 notice, fail to substantiate the Petitioner's claims. Therefore, it is contended that since the Demand Notice fails to meet the mandatory requirements of Section 8 of IBC, it renders the

¹⁵ Copy of Statements of payments – Pg 11 of the Counter

present petition filed under Section 9 invalid in law.

24. The Agreement, according to the Respondent, stipulated that the CD was to pay rentals during the Lease Period, which would end on the "Expiry Date". The Expiry Date as defined, included the Default Termination Date, specified by the Petitioner in the Default Notice under Clause 24.2 (a)(iii) of the Agreement, which in this case was the Notice of Termination dated 08.07.2021. Therefore, it is the position of the Respondent CD, that any of invoices raised from the date of 08.07.2021 onwards were legally void, as the Agreement terminated on that date, and no invoices could have been raised thereafter.
25. About the Petitioner's claim of USD 486,400 against the renewal of security deposit, it is argued that renewal of security deposit is not an operational debt and cannot be claimed by way of the present petition. Moreover, once the Agreement is terminated, the question of payment of a further security deposit would not arise.
26. Respondent has also disputed the claim of interest vide invoices no. 84348 and 84349 on amounts which had fallen due, and paid, during the period covered under section 10A of IBC.
27. Another argument of the Respondent CD is that the Petitioner's claim for lease rentals for a movable property i.e. the aircraft, did not constitute an operational debt since no services were provided. Citing the absence of service tax or GST on the invoices, it is submitted by the Respondent CD that it indicated lack of services rendered. Therefore, the present petition should be dismissed regarding the claim for rentals of a movable property, it is concluded.

Rejoinder

28. In the rejoinder, the CD's contentions in the counter have been refuted, and the averments made in the application are reiterated.

The Decision

29. We have heard the learned counsels for the Petitioners and Respondents, and also perused the records. Our first observation is about the claimed outstanding amount of USD 4,479,338.47 that was communicated by the OC to the CD on 13.05.2022 through a Demand Notice¹⁶ under section 8 of IBC. The only documents attached to this notice to 'prove the existence of operational debt' was a table of invoices of two pages showing the "Total overdue" of USD 4,479,338.47 and copy of a letter dated 17.06.2021 sent by the OC to the CD giving details of 'Overdue Invoices' of USD 2,503,130.44 and a statement of 'Security Deposit Application' of USD 486,450 and USD 486,400 concerning "TWO (2) ATR 72-600 AIRCRAFT BEARING MANUFACTURER'S SERIAL NUMBERS 1364 AND 1385". None of invoices representing outstanding debt claim of USD 4,479,338.47 were enclosed to this notice sent to the CD. To that extent therefore, the Demand notice under section 8, and consequently the present application under section 9, is deficient in its presentation.

30. The amount of USD 4,479,338.47 was also incorrect as admitted by the Petitioner OC later in their application IA No. 456/2023 where the amount claimed to be in default was changed to USD 4,456,176.24. The original application also reflected the incorrect amount and was later corrected through the amended petition.

31. The proforma of Form-3, in which the present application has been

¹⁶ Page 260-270 of the amended Application-**Annexure L**

made, requires mentioning of the amount of debt; details of transactions on account of which debt fell due; and the date from which such debt fell due. In column 7 of the said proforma, the phrase, “List of documents attached to this application in order to prove the existence of operational debt and the amount in default” is mentioned. The import of this phrase is explained by Hon’ble NCLAT in the case of **Neeraj Jain vs Cloudwalker**¹⁷, by holding that

“if the operational debt is of nature where the invoice is generated as part of the transaction, then in such cases the invoice becomes an essential document to prove the existence of the debt, and thus it has to be submitted.”

and that

“...Section 8(1) does not provide the Operational Creditor, with the discretion to send the demand notice in Form 3 or Form 4 as per its convenience. Rather, it depends directly on the nature of the operational debt and applicability of Form 3 or Form 4 as per the nature of the transaction”

32. The absence of the invoices in section 8 notice to prove existence of operational debt renders this application to be a non-starter. Nevertheless, it would still be useful to look into the invoices, copies of which have been included in the present application¹⁸.
33. One of the invoices is for an amount of USD 1,756,071.66. This invoice¹⁹ is numbered 76526 and the due date for payment is mentioned as 01.05.2022. The description regarding the amount on the invoice is stated to be:

¹⁷ Neeraj Jain v. Cloudwalker Streaming Technologies Private Limited, 2020 SCC OnLine NCLAT 445

¹⁸ List of Invoices amounting to USD 4,321,526.57 at Page 275 & 276 of the Application- **Annexure N-1**

¹⁹ Page 332 & 333 of the amended Application

“Operational rental as per original lease chargeable from 1-Aug-2020 to 31-May 2022 disgrading deferral as Trujet is in default – Clause 5b of the Forbearance, Restructuring and Lease agreement”

34. Apparently, this invoice represents the amounts defaulted by the CD prior to the signing of the Forbearance, Restructuring and Lease Amendment Agreement²⁰ (**Forbearance Agreement**) of 12.01.2021. This agreement *inter-alia* provided for the revised schedule of the overdue payment by the CD to the OC. Clause 5b of this Agreement provided that Forbearance will be terminated and Restructuring shall have no effect in case of default of the payments under this Agreement. Invoice No.76526 appears to have been raised pursuant to the default by the CD under Clause 5b of Forbearance Agreement. The Forbearance Agreement in its Annexure-1 listed²¹ invoices in default as on 12.01.2021 and the outstanding amount stood at USD 1,725,231.99 on that date.
35. It is seen that following invoices²² which were included in Annexure-1 of the Forbearance Agreement, and thus form part of the invoice number 76525, are also listed in the working for computation of default of USD 4,456,176.24 claimed in the present application.

Invoice No.	Due on@	Outstanding Amount in USD
351565	15-01-2020	149860.25
352777	29-03-2020	159432.08
352778*	29-03-2020	86128.67
353078*	15-04-2020	42165.08
353380*	15-05-2020	18860.46
354366*	15-07-2020	68631.74
354853*	15-08-2020	34071.18

²⁰ Page 183 to 194 of the amended Application- **Annexure H**

²¹ Page 193 of the amended Application

²² Page 286 to 310 of the amended Application- **Annexure N-1**

355247*	19-08-2020	27006.49
355482	15-09-2020	18860.46
356888	19-10-2020	18860.46
357052	15-11-2020	52567.38
357521	15-12-2020	27348.16
357785	15-01-2020	87942.75

@ due date as mentioned on the invoice

36. Including these amounts in the list of defaulted invoices (totalling USD 4,456,176.24) results in a double claim on these invoices, leading to ambiguity regarding the actual default amount. Besides, the invoice nos. 352778, 353078, 353380, 354366, 354853, 355247, 355482, 356888, 357052, 357521, 357785 and 354853 (part) out of the above are also claimed to have been paid by the CD, as evidenced by the remittance details²³ submitted.
37. Following other invoices²⁴ claimed as part of the defaulted amount were raised after 08.07.2021, the date on which the Lease Agreement was terminated²⁵ by the OC and leased Aircraft was directed to be returned to a specified location.

Invoice No.	Due on	Outstanding Amount in USD
129760	08-09-2021	25000.00
361172	15-09-2021	19426.28
361659	15-10-2021	19426.28
130487	17-10-2021	25000.00
130425	01-11-2021	120000.00
130796	01-12-2021	120000.00
131570	01-01-2022	120000.00
132239	01-02-2022	120000.00
133364	01-03-2022	120000.00
134046	01-04-2022	120000.00
134611	01-05-2022	108000.00
76530	01-05-2022	69494.47
76528	01-05-2022	43762.38

²³ Page 28 -30 of the Counter

²⁴ Page 317 to 331 and 334 to 336 of the amended Application

²⁵ Page 74 to 76 of the Counter

38. All these invoices were raised after the termination of lease by the OC on 08.07.2021, and also pertain to the period thereafter. Additionally, the invoices explicitly state no usage of the leased Aircraft by the CD. The inclusion of these invoices in the defaulted amount also raises doubts about the OC's claim.
39. Then, there are following two invoices²⁶ which clearly reflect computation of interest on the delayed payments with regard to the invoices raised during the COVID period i.e. w.e.f. 25.03.2020 to 25.03.2021.

Invoice No.	Due on	Amount in USD
84348	15.06.2021	19,894.82
84349	15.06.2021	26,773.14

These amounts having accrued during the period covered under Section 10A cannot be considered for the proceedings to be initiated under Section 9 of IBC.

40. Yet, another Invoice No.69870 for USD 486,400 has been included in the list of defaulted invoices. This was the amount, which under the lease agreement was to be provided as Security Deposit by the CD. Apparently, the initial Security Deposit of USD 4,86,400 was adjusted towards some of the invoices raised by the OC on the CD, and replenishment of the same was asked through this Invoice No.69870. Such demand for renewal of Security Deposit cannot be considered as an operational debt and therefore, cannot be a form part of the claimed amount.
41. It is also noticed from the Forbearance Agreement²⁷ that, a sum of USD One Million was paid by the CD to the OC prior to the

²⁶ Page 281 to 284 of the amended Application

²⁷ Para 4 of Forbearance Agreement at Page 185 & and Annex. 2 on Page 194 of the Application

execution of that Agreement. This one million included a 'Deposit Invoice' Number 65866 of USD 486,400. There are no details of about the accounting of this deposit of USD 486,400. Therefore, raising this amount through another invoice was perhaps not warranted.

42. That the dispute about the amounts payable by the CD under the Lease Agreement was in existence, is apparent. The fact that it led to signing of Forbearance Agreement on 12.01.2021, makes it even more obvious. The letter of 17.06.2021 from the OC to CD is also reflective of contentious nature of the relationship between the two with regard to the payments under the Lease Agreement. Therefore, the amount in default claimed by the OC in the present application is far from the admitted debt. Moreover, as discussed in the preceding paras 30 out of 36 invoices listed to support the claim of defaulted debt are under the cloud of uncertainty. For an application to be admitted under Section 9 of IBC, the operational debt should be certain and undisputed. In the present case, it is neither.

43. At this juncture we find it relevant to rely on the judgement of Hon'ble NCLAT in the case of **Rakesh Kumar**²⁸ wherein it was held that

“disputes surrounding claims and counter-claims cannot be adjudicated or determined by the Adjudicating Authority given their summary jurisdiction”.

We would also like to refer to the decision in the case of **Mobilox**²⁹ wherein, the Hon'ble Supreme Court has held in relation to Section 9 proceedings that;

²⁸ Rakesh Kumar vs Flourish Paper & Chemicals Ltd and Another (2023 SCC Online NCLAT 668)

²⁹ Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd. [2017] ibclaw.in 01 SC

*“all that the adjudicating authority is to see at this stage is whether there is **a plausible contention which requires further investigation** and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”*

44. There are plausible contentions requiring detailed examination with regard to the terms of the Lease Agreement, especially the Supplemental Rental and Repair & Maintenance expenses of the leased Aircraft. These contentions constitute a dispute which can be examined by the Competent Forum/Court and the correct amount of outstanding debt can be determined, if any. We cannot adjudicate on the claims and counterclaims of the parties, given our summary jurisdiction.
45. Moreover, the present application is unabashedly an attempt to pursue recovery of an uncertain debt. It has not been filed for the resolution of insolvency of the CD, but to make use of IBC as a recovery forum, which cannot be permitted. As held by Hon’ble Supreme Court in the case of **S.S. Engineers**³⁰ that

“The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed

³⁰ S.S. Engineers v. HPCL, 2022 SCC OnLine SC 1385

dues claimed by an operational creditor.”

46. In summary, several critical issues come in the way of accepting the present application. Firstly, the notice sent to the CD under section 8 was incomplete, as it did not contain the invoices based which the unpaid operational debt was claimed. The debt claim mentioned in the said notice was also accurate. Secondly, the claimed defaulted debt itself is uncertain, as some amounts appear to have been claimed more than once, some having been claimed for the period after termination of the lease agreement, and some are not even due. Thirdly, the debt claim is based on disputed interpretations of the Aircraft lease agreement, particularly relating to the supplemental rental and maintenance expenditure. Lastly, the objective of this application is solely to pursue the recovery of contested debt, not to resolve the insolvency of the CD. For these reasons, we find no merit in the present application and it is liable to be dismissed.

Application CP(IB) No. 208/9/HDB/2022 is therefore dismissed.

Sd/-
(SANJAY PURI)
MEMBER (TECHNICAL)

Sd/-
(RAJEEV BHARDWAJ)
MEMBER (JUDICIAL)