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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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*Date of decision: 28.07.2023*

+ **W.P.(C) 7369/2023 & CM APPL. 38321/2023**

**SMBC AVIATION CAPITAL LIMITED**

**AND ORS**

..... Petitioners

Through: Mr. Rajiv Nayar, Sr. Adv. with  
Ms. Marylou Bilawala, Mr. Pranaya  
Goyal, Mr. Chiranjivi Sharma,  
Mr. Apoorva Kaushik, Ms. Neetika  
Sharma, Mr. Vasu Gupta and  
Ms. Manjira Das Gupta, Advs.

versus

**UNION OF INDIA AND ORS**

..... Respondents

Through: Ms. Anjana Gosain, SPC with Ms.  
Avshreya Pratap Rudy, Advocates for  
R-1&2.  
Mr. Abhishek Sharma and Ms. Ragini  
Sharma, Advocates for R-4 and R-8  
Mr. Ramji Srinivasan, Sr. Advocate  
with Mr. Vishnu S, Ms. Pratiksha  
Mishra, Mr. Shreyas Edupuganti, Ms.  
Namrata S and Mr. Kartik Pandey,  
Advocates for R-9

**CORAM:**

**HON'BLE MS. JUSTICE TARA VITASTA GANJU**

**[Physical Hearing/Hybrid Hearing (as per request)]**

**TARA VITASTA GANJU, J.: [ORAL]**

**CM APPL. 38321/2023 [Application for urgent directions to Respondent  
Nos. 2 & 9 to comply with the order dated 05.07.2023]**



1. This is an application filed by the Petitioners seeking urgent directions from the Court.

2. Mr. Rajiv Nayar, learned Senior Counsel who appears on behalf of the Petitioners has made the following submissions:

(i) In disregard of the order and directions passed by the Court, Respondent No.9/RP of Go Airlines has on 25.07.2023 and on 28.07.2023 flown 2 Aircraft owned by the Petitioners without the permission of this Court. It is contended that this Court by its judgment dated 05.07.2023 [hereinafter referred to as "05.07.2023 judgment"] had passed a detailed interim order granting reliefs to the Petitioners. Further, in paragraph 11 of the 05.07.2023 judgment, this Court has passed directions that once the process of the deregistration has begun, the Aircrafts cannot be flown as below:

*“11. The provisions of the Aircraft Act, 1934 and the Aircraft Rules inter-alia provide that no person shall use and operate an Aircraft unless it is in accordance with the Aircraft Rules.*

*11.1 Rule 5 of the Aircraft Rules provides for the registration etc. of an Aircraft and states that unless an Aircraft has been registered and it bears its nationality and registration marks on the Aircraft, it shall not be flown.*

*11.2 The registration and marking of an Aircraft is provided for in Rule 30 of the Aircraft Rules. The relevant extract reads as follows:*

*“30. Certificate of Registration –*

*(1) ...*

*(2). An aircraft may be registered in India in either of the following categories, namely:—*

*Category A—Where the aircraft is wholly owned either—*

*(i). ...*

*...*

*(iv). by a company or corporation registered elsewhere than in India:*

*Provided that such company or corporation has given the said aircraft on lease to any person mentioned in sub-clause (i), sub-clause (ii) or sub-clause (iii); and]...”*

*11.3 Rule 30(6)(iv) of the Aircraft Rules provides as follows:*



(6) The registration of an aircraft registered in India may be cancelled at any time by the Central Government, if it is satisfied that –

(i) ....

.....

(iv) the lease in respect of the aircraft, registered in pursuance of sub-clause (iv) of clause (a) of sub-rule (2) [has expired or has been terminated in accordance with terms of lease or];”

11.4 Thus, once an event of default has occurred and the Petitioners’ have terminated the Lease Agreement(s) and commenced the process of de-registration of the Aircraft, such Aircraft cannot be flown.”

[Emphasis supplied]

(ii) An Appeal against the 05.07.2023 judgment was filed by Respondent No.9/RP of Go Airlines before the Division Bench of this Court being LPA No.537/2023. The specific directions *qua* paragraph 11.4 of the 05.07.2023 judgment form part of the challenge in the Appeal(s). However, it is submitted that the Division Bench declined to interfere with these directions except for a minor modification to paragraph 20.1(ii) of the 05.07.2023 judgment. Reliance is placed on the followings paragraphs of the Division Bench order dated 12.07.2023 [hereinafter referred to as “DB order”] which is reproduced below:-

“14. The impugned interim directives primarily pertain to the inspection and maintenance of the aircrafts, which are designed to prevent cannibalisation and preserve their value and integrity. In our opinion, no severe prejudice would be inflicted upon GoAir in the event the matter is relegated to the learned Single Judge for final disposal of the writ petitions, especially in light of the fact that DGCA would require a minimum of fifteen days to decide on re-commencement of GoAir’s flights. We thus deem it appropriate in the interest of justice to refrain from entertaining the appeals at this juncture. The learned Single Judge is however requested to endeavour to decide the writ petitions as expeditiously as possible, preferably on the next scheduled date of hearing.

.....

16. In the meantime, direction (ii) contained in paragraph No. 20.1 of the impugned judgement is modified to the extent that GoAir, through RP, is



*permitted to carry out all maintenance tasks of the thirty subject aircrafts, their engines and other parts and components, which are parked at various airports, with due permissions mandated under extant rules/ law. The Lessors are also free to carry out periodic monthly inspections of the aforesaid aircrafts in accordance with law.*

[Emphasis supplied]

(iii) The Division Bench further permitted Respondent No.2/DGCA to process and decide Respondent No.9/RP of Go Airlines resumption application only and no permission was granted whatsoever to Respondent No.9/RP of Go Airlines to operate the Petitioners Aircrafts by the DB order. Reliance is placed on para 18 of the Division Bench order, which reads as follows:-

*“18. In view of the statement made by Ms. Gosain, without prejudice to the rights and contentions of the parties, the DGCA is permitted to process and decide Go Air’s resumption application.”*

(iv) Subsequently thereto, Respondent No.2/DGCA by letter dated 21.07.2023 addressed to Respondent No. 9/RP of Go Airlines by Respondent No.2/DGCA [hereinafter referred to as “Resumption Plan Letter”], *inter-alia*, communicated the acceptance of the Respondent No.9/RP of Go Airlines’ Resumption Plan. However, it was stated clearly in the Resumption Plan Letter, that the Resumption Plan would be subject to the outcome of the writ petition pending before this Court and that Respondent No.9/RP of Go Airlines may commence flights subject to conditions and outcome of the proceedings pending before this Court. Reliance is placed on paragraph 2 of the Resumption Plan Letter which reads as follows:

*“2. In this regard, it is to inform that the proposed resumption plan dated 28.06.2023, amended vide communication dated 15.07.2023, has been examined by this office and the same is accepted by the Competent*



*Authority subject to the outcome of the writ petitions/applications pending before the Hon'ble High Court of Delhi & Hon'ble NCLT, Delhi..."*

- (v) The Petitioners were therefore shocked to learn that Respondent No.9/RP of Go Airlines had operated one of the Petitioners Aircraft i.e. *Airbus A320-200 NEO, bearing MSN 7205* which was parked at Chhatrapati Shivaji Maharaj Airport at Mumbai, and had flown the Aircraft for at least 38 minutes on 25.07.2023. The Petitioners were alerted regarding such operation of the said Aircraft by aid of the Flight Radar 24 Application, which is used by the Petitioners to track their Aircrafts across the globe.
- (vi) Further it is submitted that, one of the other Aircrafts of the Petitioners was also operated and flown by the Respondent No.9/ RP of Go Airlines on 28.07.2023 for a period of more than one hour and that the Petitioners were also alerted regarding such operation by the aid of the Flight Radar 24 Application.
- (vii) Despite the termination of the lease agreements, pendency of the present proceedings before this Court, the Respondent No.9/RP of Go Airlines chose to operate the Aircrafts in contravention of the provisions of the Aircraft Act, 1934 and the Aircraft Rules, 1937, while the issue is *sub-judice* before this Court and without the permission of this Court. The Respondents are therefore, unjustly trying to create equities in their favour by operating and flying Aircraft without the requisite permission(s).
- (viii) The *malafide* intention of the Respondent No.9/RP of Go Airlines can also be seen from the public announcements and Media reports dated 26.07.2023, which declared that the “*test flights*” were successful and Respondent No.9/RP of Go Airlines would resume operations soon. This,



despite the pendency of the proceedings before this Court and National Company Law Tribunal [hereinafter referred to as “NCLT”].

(ix) Since the lease(s) with respect to the 10 Aircrafts owned by the Petitioners have been terminated by the Petitioners, grave prejudice and irreparable loss will be caused to the Petitioners if Respondent No.9/RP of Go Airlines is not restrained from flying the Aircrafts given that the Aircrafts are such valuable equipment.

3. The summary of the arguments of Mr. Ramji Srinivasan, learned Senior Counsel appearing on behalf of the Respondent No.9/RP of Go Airlines is below:

(i) Mr. Srinivasan submits that the prayers in the present Application are to strictly comply with the directions and observations in 05.07.2023 judgment and the same are being duly complied with by the Respondent No.9/RP of Go Airlines.

(ii) The fact that the Aircraft(s) have been flown by the Respondent No.9/RP of Go Airlines is not disputed. However, this was done to maintain the airworthiness of the Aircraft(s), the Aircraft(s) were required to be flown and that this forms a part of the routine maintenance activities and such flights are termed as “*handling flights*”.

(iii) Relying on the DB Order and connected matters, it is submitted that the DB Order permitted the deletion of the words “*and all maintenance tasks*” from paragraph 20.1(ii) of the 05.07.2023 judgment while permitting the Respondent No.9/RP of Go Airlines to carry out all maintenance tasks of the Aircrafts as follows:

“16. In the meantime, direction (ii) contained in paragraph No. 20.1 of



*the impugned judgement is modified to the extent that Go Air, through RP, is permitted to carry out all maintenance tasks of the thirty subject aircrafts, their engines and other parts and components, which are parked at various airports, with due permissions mandated under extant rules/law.”*

Thus, the DB order is being complied with by Respondent No.9/RP of Go Airlines by carrying out these maintenance flights.

(iv) There was urgency to enable the Aircrafts to be flight ready in terms of the Resumption Plan as approved by the Respondent No.2/DGCA on 21.07.2023 [hereinafter referred to as “Resumption Plan”] and Respondent No.2/DGCA also required the Respondent No.9/RP of Go Airlines to undertake satisfactorily, handling flights. Reliance is placed on paragraph 2(c) of the Resumption Plan Letter as follows:

“2. ....

*c) No aircraft shall be deployed for operations without undertaking a satisfactory handling flight.”*

(v) The Airbus Manual as revised on 01.05.2023 [hereinafter referred to as “the Airbus Manual”], requires Aircrafts to undertake “*non-revenue flights*” at the intervals of 3 months during the parking period to be in flight ready condition. Paragraph 3(A)(3) on page 10 of the Airbus Manual states:

“3.

.....

(3). *Parking period of 'Not more than 1 month' or 'more than 1 month in flight-ready condition.*

*Parking in flight-ready condition is applicable if :*

- *The aircraft will stay in flight-ready condition*
- *The aircraft will be out of operation for a short period to a period of some months.*
- *There is a risk that the aircraft must do a return to operation procedure*
- *You do a preservation procedure with small initial costs.*

***You must regularly maintain the aircraft with important periodic ground***



checks (frequent engine runs, etc.)

You must do a non-revenue flight at intervals of 3 months during a parking period in flight-ready condition...”

[Emphasis supplied]

(vi) Some Lessors of Aircrafts had approached NCLT for directions *inter-alia* to restrain the Respondent No.9/RP of Go Airlines from flying the Aircrafts owned by such Lessors for commercial use. The NCLT by its order dated 26.07.2023 [hereinafter referred to as “NCLT order”] has dismissed the applications filed by these Lessors. Reliance is placed on the following extract of the NCLT order:

“....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.....

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.”

[Emphasis supplied]

(vii) It is the duty of Resolution Professional to keep the Corporate Debtor as a going concern and to maintain the assets in its possession of the Corporate Debtor hence, it is necessary to fly these Aircrafts. Reliance is





placed on Section 18 of the Insolvency and Bankruptcy Code, 2016 in this regard, to state that since the possession of the Aircrafts is with Respondent No.9/RP of Go Airlines and that the “*handling flights*” are necessary to maintain these Aircrafts.

(viii) The NCLT order acknowledges the 05.07.2023 judgment, *inter-alia* stating as follows:

12. ... *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.***”

[Emphasis supplied]

(ix) The obligation of the Respondent No.9/RP of Go Airlines to maintain the Aircrafts exists post termination of the leases by the Petitioners. The Petitioners themselves in the Termination Letter dated 02.05.2023 acknowledge maintenance by Respondent No.9/RP of Go Airlines as follows:

“5. .... (iv) *Lessee's continuing obligations under the Lease Agreement, including, without limitation, its obligations to insure, repair and maintain the Aircraft, all of which remain in full force and effect.*”

(x) It was, therefore, imperative upon the Respondent No.9/RP of Go Airlines to undertake and continue these non-scheduled/handling flights.

4. Ms. Anjana Gosain, learned Counsel who appears on behalf of the



Respondent No.2/DGCA submits that the DB Order had directed that the Respondent No.9/RP of Go Airlines resumption application be processed by the Respondent No.2/DGCA and hence, Respondent No.2/DGCA processed and finalised the same by the Resumption Plan Letter.

4.1 However, Ms. Gosain submits that the Resumption Plan Letter [which is appended at Annexure C to the present Application] clearly states that the Resumption Plan is subject to the conditions as stated therein as well as outcome of the Writ Petitions and Applications pending before this Court and the NCLT.

5. Mr. Rajiv Nayar, learned Senior Counsel in Rejoinder, has made the following additional submissions:

- (i) The Respondent No.9/RP of Go Airlines has not been able to show any clear impending danger or urgent requirement to operate or fly the Aircrafts. The DB Order also recognized that this Court is still to finally decide the matter, hence even the Division Bench declined to interfere at this stage.
- (ii) The NCLT has not passed a blanket order for resuming flights *qua* all the Aircrafts in possession of Respondent No.9/RP of Go Airlines and as such its directions are only applicable to the Applicants before the NCLT which does not include the Petitioners before this Court.
- (iii) The Airbus Manual, relied on by the Respondent No.9/ RP of Go Airlines states at paragraph 3(A)(4) that if the Aircraft is grounded, a “*non-revenue*” or “*handing flight*” needs to, only be done every two years as below. Hence, there was no requirement for the Respondent No.9/RP of Go Airlines to undertake flying of the Aircraft(s) on 25.07.2023/28.07.2023.



“....(4) Storage period of "Not more than 1 year" or "More than 1 year".

*Aircraft storage is applicable if:*

*-You will remove primary parts (e.g. engines)*

*-The aircraft will be out of operation for a period of some months to a long period*

*-You do a preservation procedure with optimized total cost for a longer period*

*-You can do the maintenance of the aircraft with light periodic ground checks most of the time*

**You must do a non-revenue flight every 2 years during a storage period.....”**

[Emphasis supplied]

6. I have heard learned Senior Counsels appearing on behalf of the Petitioners as well as Respondent No.9/RP of Go Airlines and learned Counsel appearing on behalf of Respondent No.2/DGCA.

7. The Petitioners have been constrained to move this Application on account of the fact that the Respondent No.9/RP of Go Airlines has commenced flying the Aircrafts of the Petitioners despite the fact that the Lease Agreements with respect to such Aircrafts have been terminated by the Petitioners.

7.1 The Lease Agreements *qua* the following 10 Aircrafts have been terminated on the dates as set forth beside them in the table below:

S.No	Details of the Aircraft Leased	Lease Agreement Date(s)	Lease Agreement Termination Date(s)
1.	Airbus A320-214 MSN 5675 IRM VT-GON	24.07.13	02.05.23
2.	Airbus A320-271N MSN 7047 IRM VT-WGA	02.05.16	02.05.23
3.	Airbus A320-271N MSN 7074 IRM VT-WGB	02.05.16	02.05.23
4.	Airbus A320-271N	09.10.18	02.05.23



	MSN 8498 IRM VT-WGY		
5.	Airbus A320-214 MSN 5990 IRM VT-GOQ	30.10.18	02.05.23
6.	Airbus A320-271N MSN 8656 IRM VT-GOP	09.10.18	02.05.23
7.	Airbus A320-214 MSN 5809 IRM VT-WGA	30.09.12	02.05.23
8.	Airbus A320-271N MSN 7330 IRM VT-WGE	24.01.17	02.05.23
9.	Airbus A320-214 MSN 6072 IRM VT-GOR	01.05.14	02.05.23
10.	Airbus A320-271N MSN 7205 IRM VT -WGD	01.12.16	02.05.23

8. The provisions of the Aircraft Act, 1934 and the Aircraft Rules, 1937 provide that no person shall use and operate an Aircraft unless it is in accordance with the Aircraft Rules, 1937. Rule 30(6)(iv) of the Aircraft Rules, 1937 provides that the registration of an Aircraft registered in India may be cancelled where the lease in respect of the Aircraft has expired or been terminated. Rule 30(6)(iv) states:

“30.

.....

(6) *The registration of an aircraft registered in India may be cancelled at any time by the Central Government, if it is satisfied that –*

(i) ....

.....

(iv) *the lease in respect of the aircraft, registered in pursuance of sub-clause (iv) of clause (a) of sub-rule (2) [has expired or has been terminated in accordance with terms of lease or];*”

[Emphasis supplied]



8.1 Non-payment of lease rentals by the Respondent No.9/RP of Go Airlines constituted an event of default under the Lease Agreement(s) executed between the Petitioners and Respondent No.9/RP of Go Airlines. Hence, the Lease Agreement(s) were terminated by the Petitioners on the dates as set forth in the table hereinabove.

9. It is not disputed by the parties that Lease Agreements *qua* the Aircrafts in paragraph 7.1 above have been terminated and the process of deregistration of the Aircrafts has commenced. Once an event of default has occurred and the Petitioners have terminated the Lease Agreement(s) and commenced the process of deregistration of the Aircraft, flying such Aircraft will be contrary to the provisions of the Aircraft Act, 1934 and the Rules framed thereunder.

10. It has been contended that the termination of the Lease Agreements has been challenged by the Respondent No.9/RP of Go Airlines. However, no order of any Court /Tribunal of competent jurisdiction has been placed before the Court, where this termination has been held to be invalid.

11. In any event, the lease termination and deregistration of the Aircraft pursuant to such termination, form the subject matter of the present Writ Petition which is pending adjudication before this Court.

12. The document termed as the '*Airbus Manual*' (which appears to only be an extract of the complete Airbus Manual) has been relied upon to submit that during the parking period such flights require to be undertaken at intervals of 3 months. This document also does not help the case of the Respondent No.9/RP, as Paragraph 3 of this document itself contains multiple options *qua* storage and maintenance. Paragraph 3(A)(4) also states



that a maintenance/handling flight is requisite every two years, during a storage period, so that the Aircraft is preserved. It cannot be disputed by the either party that these Aircrafts have not been grounded for two years. Therefore, reliance placed on the Airbus Manual extract, as has been done by the Respondent No.9 /RP of Go Airlines, cannot be accepted either.

13. Thus, the contention of the Respondent No.9/RP of Go Airlines, that the reason, 2 of the 10 Aircrafts have been flown by Go Airlines is that these were handling flights forming part of the scheduled maintenance activity for the Aircraft, is misconceived.

14. The Respondent No.9/RP of Go Airlines has also not been able to show any urgency or any grave imminent threat to these Aircrafts to suddenly and without any prior notice, compel the Respondent No.9/RP of Go Airlines to fly these Aircrafts. *Prima facie*, the term “*scheduled maintenance*” cannot be understood to include flying the Aircrafts even if it is a non-commercial flight. Thus, Respondent No.9/RP of Go Airlines cannot be permitted at this stage, to continue with these handling/maintenance flights.

15. In view of the foregoing discussion, let *status quo* be maintained in respect of handling/non-revenue flights of the Petitioners Aircrafts [as reproduced in paragraph 7.1 hereinabove] till the next date of hearing.

16. Ms. Pratiksha Mishra, learned counsel on behalf of the Respondent/RP of Go Airlines seeks and is granted time to file a reply, if any, in two days.

17. Rejoinder be filed before the next date of hearing.

18. List this Application for further hearing/disposal on 03.08.2023 at



3:00 PM.

19. Parties will act based on the digitally signed copy of the order.

**TARA VITASTA GANJU, J**

**JULY 28, 2023/yg/r**