

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I**

IA No. 342/MB/C-I/2021

In

C.P (IB) No.2205/MB/C-I/2019

An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016

Filed by

**Mr. Ashish Chhawchharia
Resolution Professional of
Jet Airways (India) Limited**

...Applicant

Versus

TWC Aviation Capital Limited and Ors.

...Respondents

In the matter of

State Bank of India

...Financial Creditor

Versus

Jet Airways (India) Ltd

... Corporate Debtor

Order Pronounced on: 24.06.2024

Coram:

Hon'ble Member (Judicial)	:	Justice V.G. Bisht (Retd.)
Hon'ble Member (Technical)	:	Mr. Prabhat Kumar

Appearances:

For the Applicant	:	Mr. Malhar Zatakia, Advocate
For the Respondent	:	Though the Ld. Counsel for the Respondent is present and argued the matter; he has not marked the attendance sheet.

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ORDER

Per: Prabhat Kumar, Member (Technical)

1. The Applicant Resolution Professional of Jet Airways (India) Limited (hereinafter referred to the Corporate Debtor has filed the present Application. The Respondents herein are TWC Aviation Capital Limited (Respondent No.1), Spice Jet Limited (Respondent No.2), Director General of Civil Aviation (Respondent No.3) and Commissioner of Customs (Respondent No.4). The reliefs sought by the Applicant as are follows:

- a. Direct Respondent No.1 and 2 to forthwith return the engine to the Corporate Debtor.*
- b. Direct Respondent No.1 and 2 to forthwith pay a sum of Rs.13,31,46,453/- to the Corporate Debtor towards fixed lease rental for use of Engine during the period of 24th April 2019 to 21st January 2021 plus USD 220 per hour and USD 180 per cycle for which the engine was used during the aforementioned period.*
- c. Direct Respondent No.1 and 2 to pay a sum of Rs.2,08,693/- per day, towards fixed lease rentals plus USD 220 per hour and USD 180 per cycle for the engine to the Corporate Debtor towards the lease rental for the use of the engine, pending hearing and disposal of this Application.*
- d. Grant ad interim reliefs in terms of prayer clause (c) and (d) above.*
- e. Pass such further and other orders as this Tribunal may deem fit and proper in the facts and circumstances of the case.*

2. The dispute before us in a nutshell pertains to title and possession of Engine No. 890506 of an aircraft originally belonging to the Corporate Debtor. The issue emanates out of a Lease Agreement dated 1st December 2017, ("Lease Agreement") entered into between Respondent No. 1 and Jet Lite (India) Limited ("Jet Lite") for lease of an aircraft fitted with 2 engines, bearing numbers 895134 ("Engine 1") and 894147 ("Engine 2"), belonging to Respondent No. 1. The Corporate Debtor herein guaranteed the dues of Jet Lite to the Respondent No.1 under the Lease Agreement vide Deed of guarantee dated 22nd December 2017.
3. The Applicant/Resolution Professional has sought the return of the aforesaid engine 890506 and certain sums as lease rentals have been claimed from Respondent No.1 and 2 which are more particularly detailed in the prayer clause reproduced hereinabove. Per contra, the Respondent No.1 has vehemently opposed the present Application on the broad ground that the said Engine No. 890506 was replaced in the aircraft in lieu of engine No. 894147 belonging to the Respondent No.1. The replacement took place as engine no. 894147 was sent for repairs to ST Aerospace Engines Private Limited. It is argued by the Respondent No.1 that under the lease agreement the lessee i.e Jet Lite was under an obligation to service, repair, overhaul and maintain the aircraft. Further, until the original engine no. 894147 is attached back into the aircraft, the said replacement engine would be deemed to be a part of the aircraft. It is contended that the said original engine was to be attached to the aircraft within 120 days. The Respondent No.1 submits that failure to

maintain and repair the engine constitutes an Event of Default under the Lease Agreement.

4. The Respondent No.1 relies on Article 8.7 of the Lease Agreement:

“8.7 Title to Parts and Engines:

All Parts and Engines which are at any time during the Term removed from the Aircraft shall remain the property of Lessor, no matter where located, until such time as: (i) such Parts shall be replaced by Replacement Parts which have been incorporated or reinstalled in or attached to the Aircraft, free and clear of all Liens, and which meet the requirements specified in Article 8.6; and (ii) title hereto shall have passed to Lessor according to the lex situs free and clear of all Liens, immediately upon any Replacement Part is incorporated or installed in or attached in or to the Aircraft, and without further act (a) title to the removed Part shall vest in Lessee, free and clear of all rights of Lessor, and (b) such Replacement Part shall be subject to this Agreement and shall be deemed a Part of the Aircraft for all purposes hereof to the same extent as any Part originally incorporated and installed in or attached to the Aircraft.”

5. The position canvassed by the Respondent No.1 under aforesaid Article 8.7 is that the replacement engine would be deemed to be a part of the aircraft and Respondent No. 1 would be entitled to take possession of the same. To bolster this stance reliance is placed on Article 10 of Cape Town Convention. India is a signatory to the said convention. Article 10 is reproduced herein below for the sake of convenience:

“Article 10 - Remedies of conditional seller or lessor

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In the event of default under a title reservation agreement or under a leasing agreement as provided in Article 11, the conditional seller or the lessor, as the case may be, may: (a) subject to any declaration that may be made by a Contracting State under Article 54, terminate the agreement and take possession or control of any object to which the agreement relates; or

(b) apply for a court order authorising or directing either of these acts. ”

6. It is stated that the lessee failed in retrieving the engine no. 894147 back from ST Aerospace Engines Private Limited. It is stated that the second engine bearing no. 895134 was also sent to ST Aerospace Engines Private Limited for overhaul. It is submitted that Respondent No.1 has incurred an expenditure of USD 15,951,520.05 to retrieve the two engines and exercises lien over the Engine 890506 until dues are paid.
7. To buttress the argument advanced by the Respondent No.1, the Applicant submits that the Corporate Debtor's title to the engine is inter alia evidenced by the extract of the software used by the Corporate Debtor. Further, when Respondent No. 1 repossessed its aircrafts from Jet Lite, the Corporate Debtor's Engine remained attached to it. Subsequently, Respondent No.1 leased the aircraft to Respondent No.2 with Corporate Debtor's engine attached to it.
8. The Applicant submits that the Respondent No.1 terminated the lease agreement and took repossession of the Aircraft. It also took possession of the Engine No. 894147 from ST Aerospace Engines PTE Limited. Thus, it is the Applicant's case that both the Engines bearing no. 894147 (owned by the

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Respondent No.1) and Engine No. 890506 (owned by the Corporate Debtor) are in the custody of the Respondent No.1.

9. The Applicant states that it is bound under Section 18 (1)(f) of the Code to take control of the assets of the Corporate Debtor. In furtherance of this, the Applicant wrote to Respondent No.1 and 2 vide letter dated 21st August 2019 requesting the return of the aforesaid Engine to the Corporate Debtor. Since, the engine was being utilized by Respondent No.2, the Applicant sent an Invoice detailing the outstanding amounts more particularly therein.
10. The Respondent No.1 replied to the Applicant vide letter dated 2nd September 2019 informing that they were under no obligation to return the engine as it had been installed in the aircraft under swap mechanism and as per provisions of the Lease Agreement the same formed part of the aircraft.
11. It is the Applicant's case that Respondent No. 1, ceding to the jurisdiction of this Tribunal filed its proof of claim, in Form B, claiming a sum of USD 23,771,905.71 in July 2019. The Applicant verified the said claim in accordance with the Code and admitted a sum of USD 4,529,889 (being INR 315,119,447) which is included in the approved resolution plan of the Corporate Debtor. The said claim has not been challenged by the Respondent No.1.
12. Further, the aircraft leased to Respondent No. 2, has been monetized since May 2019, and is being used by Respondent Nos. 1 and 2 even today. It is urged that at the time of filing Form B, while claiming costs for inter alia the repossession of the Engine, Respondent No. 1 suppressed the fact that it (i) was monetizing the Corporate Debtor's engine since May 2019 and

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Respondent No. 1 was earning substantial profits pursuant to its use and (ii) had obtained Respondent No. 1's original engine, i.e., Engine 2 from ST Aerospace by June - August 2019.

13. The Applicant submits that Respondent No. 1 has further exercised its remedy against the Corporate Debtor by filing Form B and is now estopped from claiming any lien or bailment against the Corporate Debtor's assets.

14. We have heard the learned counsel for both sides and perused the records.

15. At the outset, it is discernible that the Engine 890506 belonging to the Corporate Debtor was fitted in the aircraft in lieu of Engine No. 894147. The said Engine of Respondent No.1 was sent for repairs. Respondent No.1 argues that Jet Lite failed to meet its obligations under the Lease Agreement by neglecting to get the original engine No. 894147 back within the time stipulated under the Lease Agreement. The said fact along with other breaches by Jet Lite i.e. the lessee resulted in default under the lease agreement thereby leading to termination of the lease agreement. The Respondent No.1 submits that the said default resulted in the replacement engine being part of the aircraft and therefore, the possession of engine ought to vest in Respondent No.1. Reliance is placed on Article 8.7 of the Lease Agreement and Article 10 of the Cape Town Convention. Respondent No.1 states that it has incurred cost to the tune of USD 15,851,520.05 to retrieve Engines 894147 and 895134 and accordingly it exercises lien over the engine.

16. Clause 8.7 of the Lease Agreement clearly stipulates that title to the removed Part shall vest in Lessee. Accordingly, it can be inferred that the engine bearing no. 894147 would vest with Jet Lite i.e. the lessee. However, in the

present case the Respondent No.1 has in its possession both the original engines as well as replacement engine of the Corporate Debtor. We are of the view that the Respondent No.1 cannot have in its possession all the three engines. Accordingly, the Respondent No.1 ought to return the engine of the Corporate Debtor.

17. The submission of the Respondent No.1 that the engine ought to vest in Respondent No.1 due to the cost incurred by them is not tenable. As the Respondent No.1 has retrieved the engines bearing nos. 894147 and 895134, whilst they continued to monetize the engine of the Corporate Debtor, this fact clearly demonstrates that the Respondent No.1 has unjustly enriched itself and have been holding one engine in trust of the Corporate Debtor. It is crucial to note that Respondent No.1 has filed its claim form on 4th July 2019 in the Corporate Insolvency Resolution Process of the Corporate Debtor. The claim is bifurcated into three parts i) lease rentals, ii) Repossession costs and iii) other claims. The said fact clarifies that that the Respondent No.1 may have claimed the charges for retrieval of two engines from ST Aerospace Engines Private Limited. Nonetheless, the Respondent No.1 had a claim against Jet Lite for the repair charges of these two engines. Even if the Corporate Debtor had stood as surety for the performance of obligation of Jet Lite and such repair charges were claimable from Jet Lite, which makes the Corporate Debtor in turn responsible for payment of such charges, Respondent No.1 ought to have made claim in the Resolution Process of the Corporate Debtor.
18. In the backdrop of the aforesaid facts, it is clear that the engine No. 890506 owned by the Corporate Debtor ought to be returned by the Respondent No.1

and 2. The contention of the Respondent No.1 that it exercises a lien over the engine is not a relevant consideration at this stage after the filing of claim by the Respondent No.1 in the particular class and admission thereof by the Resolution Professional in that class. It is trite law that the assets of the Corporate Debtor held by third party has to be released in favor of the Resolution Professional for the resolution of Corporate Debtor even by the charge holders, who may file their claim in appropriate class if they believe holding any charge over the assets of the Corporate Debtor. It is not in dispute that the repair charges claimed by Respondent No.1 were incurred in relation to the originally fitted engine, and the usage charges claimed by the Application are in relation to the Corporate Debtor's engine for the period beginning from the retrieval of originally fitted engine by the Respondent No.1. Accordingly, the lien in terms of Cape Town Convention ceases after retrieval of originally fitted engine. Needless to say, the Respondent No.1 has already filed a claim form in the Corporate Insolvency Resolution Process of the Corporate Debtor, the process has been completed and the same has attained finality owing to approval of the Resolution Plan.

19. Moreover, the Respondent No.1 has been using the said engine 890506 of the Corporate Debtor from 24.04.2019 till 21.01.2021. The Applicant has claimed usage charges to the tune of USD 12,403,520 (as on the date of hearing). The Respondent No.1 has to pay the aforesaid usage charges as the Engine bearing No. 890506 has been utilized and monetized by the Respondent No.1 for the relevant period. Further, the Respondent No.1 is directed to return Engine No.

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890506 or an engine with equivalent specifications to the Corporate Debtor
within a period of 60 days from the date of this Order.

20. IA No. 342 of 2021 is **allowed** and disposed of.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)

24.06.2024

Priyal

Sd/-

JUSTICE V.G. BISHT
MEMBER (JUDICIAL)