

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

IB NO. 349/(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:

Wilmington Trust SP Services (Dublin) Limited

Fourth Floor, 3 George's Dock,
IFSC, Dublin 1, Ireland

...Operational Creditor

Versus

SpiceJet Limited

Terminal 1D, Indira Gandhi International Airport,
New Delhi, 110037, India.

...Corporate Debtor

Order Delivered on: 29.01.2024

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

For the Applicant : Mr. Ritesh Singh, Mr. Ajay Kumar, Mr. Navneet K. Singh, Ms. Anchal Nanda, Mr. Hetram Bishnoi, Advs.

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

O R D E R

PER: RAHUL BHATNAGAR, 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 **Wilmington Trust SP Services (Dublin) Limited (*‘Operational Creditor’*)**, through its Power of Attorney, Mr. Naim Mohammad Khan, for initiation of Corporate Insolvency Resolution Process (***‘CIRP’***) against **SpiceJet Limited. (*‘Corporate Debtor’*)**.
2. **Wilmington Trust SP Services (Dublin) Limited** (Operational Creditor) has its registered office at Fourth Floor, 3 George’s Dock, IFSC, Dublin 1, Ireland. **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 26.05.2023 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 is claimed to be UD\$11,184,198. The ***date of default*** is not expressly mentioned in Part IV of the petition, However, it is mentioned in the present application, that the debt became due and payable on different dates in respect of several invoices raised by the Operational Creditor on different dates.
4. The present application was reserved on the issue of maintainability vide order dated 18.12.2023. Vide order dated 15.09.2023, both the parties were directed by this Adjudicating Authority to submit their written submissions. In the instant application, advance notice was served by the Operational Creditor in terms of NCLT Rules, 2016, and on this basis Ld. Counsel appeared on behalf of the Corporate Debtor, and made submissions with respect to maintainability of the petition and filed written synopsis as per this Adjudicating Authority’s order dated 15.09.2023.

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

- a)** The Operational Creditor and the Corporate Debtor entered into a Lease Agreement dated August 7, 2013 (amended and modified from time to time) (the "Lease Agreement"). The said Lease Agreement was for leasing of one (1) Boeing 737-800 Aircraft bearing manufacturer's serial number 41398 and Indian Registration Mark VT-SZK, fitted with two CFM56-7B engines bearing ESNs 658842 & 658847 (the "Aircraft") to the Corporate Debtor.
- b)** Under Clause 7.1 of the Lease Agreement, the Corporate Debtor (Lessee) is required to pay Basic Rent and other charges to Operational Creditor (Lessor). Accordingly, the Aircraft was leased by Operational Creditor and the Corporate Debtor paid the lease rentals to the Operational Creditor until February 5, 2021.
- c)** Further, in terms of Clause 8.1 of the said Lease Agreement, it was agreed between the Operational Creditor and Corporate Debtor that all payments including lease rentals and other charges should be made into the Rent Collection Account or to such other account as designated by the Operational Creditor from time to time. Thus, it is wrong on the part of the Corporate Debtor to state that the present Operational Creditor is not the Operational Creditor' in terms of Section 5(20) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'Code'), because the Aircraft, which is a good, was delivered to Corporate Debtor by the present Operational Creditor in terms of the said Lease Agreement and rent is due to the Operational Creditor in terms of the said Lease Agreement. Corporate Debtor cannot state that present Lessor (Operational Creditor) is not Operational Creditor because it does not own Aircraft and it is not beneficial Owner of Aircraft. The fact of the matter is that both the Corporate Debtor and Directorate General of Civil Aviation always recognized the fact that the present Operational Creditor is the 'Lessor' and 'Owner' of the Aircraft.
- d)** Conjoint reading of Section 5(20) and Section 5(21) of the Code clearly indicates that Lessor of the Aircraft can only be considered as an Operational Creditor because debt of the Corporate Debtor is in the nature of claim in respect of Aircraft leased to the

Corporate Debtor. The Corporate Debtor since July 30, 2021. started defaulting in making the payment towards the lease rentals and supplemental rent and other charges under the Lease Agreement. The Operational Creditor raised various invoices to the Corporate Debtor for payment of lease rent, supplemental rent, maintenance and other payments due from July 30, 2021. However, the Corporate Debtor neither paid nor disputed the said invoices. Further, the Operational Creditor on December 31, 2021 sent Default and Grounding Notice (the "Default and Grounding Notice"). Even when the said Default and Grounding Notice was issued to Corporate Debtor, the Corporate Debtor never raised the plea that the Operational Creditor is not the Owner of the Aircraft and is not entitled to issue such notice. Rather, the Corporate Debtor did not even reply to the said Default and Grounding Notice.

- e) Further, the Operational Creditor contends that the reliance of the Corporate Debtor on Lease Amendment Agreement dated February 05, 2021 (the "Last Amendment Agreement") is completely misplaced because the said Last Amendment Agreement does not even form the part of the record of the present Insolvency Petition. Further, the Corporate Debtor has placed the wrong Last Amendment Agreement before this Adjudicating Authority whereby the parties to the said Last Amendment Agreement were different, particularly the Lessor was different. However, the Operational Creditor has attached the right Last Amendment Agreement hereto for the perusal and consideration of this Adjudicating Authority, under which the Operational Creditor was the Lessor and was executed between the Operational Creditor and Corporate Debtor. Furthermore, the Corporate Debtor has failed to point out that the said Last Amendment Agreement never came into existence or came into force. The said Last Amendment Agreement became void ab initio due to the breach committed by the Corporate Debtor.

Relevant paragraph is reproduced below:

"In the event that any of the terms and conditions of this deferral are not complied with the provisions of Agreement shall immediately cease to apply and shall be void ab initio, shall be deemed to have never been agreed to; and accordingly, all deferred

amounts shall be or shall continue to be immediately due and payable from and including the original due dates relating thereto.”

- f)** Further, even if the invoices admitted by Corporate Debtor are taken into consideration, the due amount goes well beyond the threshold limit of INR (1) one crore. In other words, Corporate Debtor is not even able to pay the acknowledged debt, as per its own admission before the Adjudicating Authority, which is above the threshold limit. Furthermore, despite the several reminders and requests of the Operational Creditor, the Corporate Debtor did not clear the acknowledged debt, which is US\$11,184,198. Thus, it became clear to the Operational Creditor that the Corporate Debtor is not solvent enough to clear the acknowledged debt and that is why on April 4, 2023, the Operational Creditor issued a demand notice (the "Demand Notice") to the Corporate Debtor in terms of Section 8 of the Code. In reply to the aforesaid Demand Notice, the Corporate Debtor sent reply on April 14, 2023 through its lawyer raising frivolous, spurious, illusory and hypothetical grounds of pre-existing dispute.
- g)** In accordance with the said Lease Agreement, particularly in terms of Clause 2.2, the Operational Creditor is a legal and valid trust duly incorporated under the laws of Ireland and has the corporate power to enter into and perform its obligations enshrined in the said Lease Agreement. Additionally, even in a letter sent to the Director General of Civil Aviation by the Corporate Debtor, regarding registration of Irrevocable De-Registration and Export Request Authorization (IDERA), the Operational Creditor was named as Owner of the Aircraft and the said IDERA has been executed by Corporate Debtor acknowledging Operational Creditor as Lessor and Owner. Consequently, the Aircraft was registered in the name of the Applicant and the Certificate of Registration dated May 26, 2014 issued by the Directorate General of Civil Aviation recognises the Operational Creditor as Lessor/ Owner of the Aircraft. Operational Creditor is the rightful Lessor of the Aircraft and is entitled to receive rent in any account which may be designated by the Operational Creditor. It is pertinent to mention that in the present case, the outstanding debt (from July 30, 2021 till the date of filing of this Application) falls within the scope and ambit of Operational Debt under Section 5(21) of the Code.

h) The Operational Creditor sought overdue interest on delayed payment which was clearly stipulated in the invoice raised on February 22, 2023 (which was never disputed by the Corporate Debtor) therefore, interest on delayed payment falls within the "right to payment" (Section 3(6) of the Code) and will form part of "debt" (Section 3(11) Code). It is stated that there are still various pending invoices which are neither paid nor disputed, therefore, there is no evidence of any "pre-existing dispute" and the sum of the debt due and payable is higher than the stipulated threshold for initiation of CIRP. The plea of pre-existing dispute was not even raised by the Corporate Debtor before this Adjudicating Authority at that time. That the present Application has been filed within limitation as the present Petition was filed on May 27, 2023 and the Corporate Debtor vide its reply to the Demand Notice on April 14, 2023, confirmed the outstanding acknowledged debt, which is US\$11,184,198. Hence, the present Application.

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

- a)** The Corporate Debtor contends that the present petition has been filed on behalf of Wilmington Trust SP Services (Dublin) Ltd. ("Wilmington"), who is not an "Operational Creditor", thereby rendering the petition not maintainable against SpiceJet, as per law.
- b)** Wilmington also filed its written submissions dated 15.10.2023, placing reliance upon and attaching the copy of the Lease Amendment Agreement dated 05.02.2021 executed between Klaatu Aircraft Leasing (Ireland) Limited and SpiceJet Limited ("Last Amendment Agreement"). However, during arguments on 12.12.2023, it was submitted on behalf of Wilmington that the said written submissions were subsequently withdrawn by them.
- c)** Subsequently, on 17.10.2023, Wilmington sought and was granted some time to place on record an alleged "correct" agreement. I.A. No. 6018 of 2023 was filed on 31.10.2023 ("I.A."), on behalf of Wilmington, seeking to bring on record a purported copy of Lease Amendment Agreement dated 05.02.2021 entered between Wilmington Trust SP Services (Dublin) Ltd. and SpiceJet Limited ("Wilmington's Amendment Agreement"). The said agreement was taken on record vide this Adjudicating

Authority's order dated 04.12.2023 and SpiceJet was granted liberty to put its response on the same when the matter is taken up on the maintainability issue. The issue has been argued at length on behalf of SpiceJet and thus, the present written submissions are being filed to place the said submissions on record, as per the direction of this Adjudicating Authority on 12.12.2023, on the limited issue of maintainability of the present company petition read with Wilmington's Amendment Agreement.

- d)** Wilmington has filed the CP claiming to be an "Operational Creditor" in relation to aircraft bearing manufacturer serial number ("MSN") 41398, placing reliance on the aircraft lease agreement dated 07.08.2013 ("Lease") wherein, BOC Aviation ("BOCA") is stated to be a "Participant" to the Lease and the same has been executed on its letter head. Wilmington claims to be the "Lessor" on the basis of the Lease, completely ignoring and disregarding the fact that the Lease categorically records that Wilmington is "not acting in its individual capacity but solely as a trustee". A conjoint reading of the contents of the Lease would show that Wilmington throughout was not acting in its individual capacity, but as a trustee.
- e)** Also, as per the documents filed by Wilmington, the Lease was amended vide the lease amendment agreement (No. 2) dated 29.11.2016 ("Amendment No. 2"), whereby it is categorically stated that "...original beneficial owner under the Trust Agreement, that is, BOC Aviation (Ireland) Limited, has sold its beneficial interest in the Aircraft and transferred its interest in the Trust Agreement to Klaatu Aircraft Leasing (Ireland) Limited." Thereby, making it clear that Wilmington is not vested with the beneficial interest qua the aircraft bearing manufacturer serial number ("MSN") 41398 and the same has been transferred from BOCA to Klaatu Aircraft Leasing (Ireland) Limited ("Klaatu"), now Aircastle (Ireland) Ltd. ("Aircastle"), due to change in corporate name.
- f)** In addition to the aforementioned, the fact that Wilmington is not an "Operational Creditor" is further fortified by the fact that the Lease was again amended vide the Last Amendment Agreement, wherein, only Klaatu (now 'Aircastle') and SpiceJet are parties. Therefore, confirming without a doubt that Wilmington has no locus to maintain the CP. It is pertinent to point out herein that for the purposes of

illustrating the existence of an alleged “operational debt”, Wilmington has placed reliance on certain purported invoices. That a cursory perusal of the said invoices would show that the same are premised on the Last Amendment Agreement. A cursory perusal of the purported invoices would show as to how the Last Amendment Agreement is a crucial document which was required to be brought on record by Wilmington.

- g)** Wilmington deliberately concealed the Last Amendment Agreement, the perusal of which clearly illustrates that the Lease was amended and Klaatu (now ‘Aircastle’, because of a change in its corporate name) is the Lessor, in favour of whom the purported invoices have been raised and payments were to be made. Therefore, leading to dismissal of the CP. Since Wilmington failed to bring on record the Last Amendment Agreement *inter alia*, the same was produced before this Adjudicating Authority by SpiceJet, on 15.09.2023 and taken on record, during the course of arguments.
- h)** It is pertinent to note that on one hand Wilmington failed to produce the Last Amendment Agreement, as part of the documents to the CP, and on the other hand, it placed reliance on and filed the same along with its written submissions dated 15.10.2023 (filed in pursuance to directions of this Adjudicating Authority vide order dated 15.09.2023). It was stated by Wilmington in its written submissions that “...reliance of the Corporate Debtor on Lease Amendment Agreement dated February 05, 2021 (the “Last Amendment Agreement”) is completely misplaced because the said Last Amendment Agreement does not even form part of the record of the present Insolvency Petition. Further, the Corporate Debtor has failed to point out that the said Last Amendment Agreement never came into existence or came into force. The said Last Amendment Agreement became void *ab initio* due to the breach committed by the Corporate Debtor. ...”.
- i)** Therefore, it is explicit that as on date of filing the written submissions i.e., on 15.10.2023, the Last Amendment Agreement was the correct document albeit not for Wilmington as a purported Operational Creditor. However, on 17.10.2023, the said agreement all of a sudden and purportedly became the “wrong agreement”, necessitating filing the I.A. to bring on record Wilmington’s Amendment Agreement. It

is pertinent to point out herein that during arguments on 12.12.2023, it was submitted on behalf of Wilmington that the written submissions dated 15.10.2023 were subsequently withdrawn by them.

- j)** Subsequently, Wilmington filed another written submission dated 01.12.2023, this time annexing Wilmington's Amendment Agreement and stating that "F. ...the Operation Creditor has attached the right Last Amendment Agreement hereto for the kind perusal and consideration of this Adjudicating Authority, under which, the Operational Creditor was the Lessor and was executed between the Operational Creditor and Corporate Debtor. Furthermore, the Corporate Debtor has failed to point out that the said Last Amendment Agreement never came into existence or came into force. The said Last Amendment Agreement became void ab initio due to the breach committed by the Corporate Debtor. ...". As per the Last Amendment Agreement inter alia, it is evident that Wilmington is not the Operational Creditor and does not have any locus to file the present CP.
- k)** It is pertinent to note that as per Wilmington, both the Last Amendment Agreement and Wilmington's Last Amendment Agreement never came into force and are void ab initio. However, as mentioned above at 6(f), the invoices filed on record along with CP are premised on the lease amendment agreement dated 05.02.2021. Therefore, if the agreements are void, reliance cannot be placed on the invoices, for the purpose of ascertaining an alleged operational debt.
- l)** Additionally, it is also an established fact that payments as per the said invoices were to be made to Aircastle. Therefore, in either situation, i.e., (1) when as per the invoices, the payments were to be made to Aircastle, or (2) when as per the submissions of Wilmington, due to the agreement being void, the invoices also become non est, Wilmington is not an Operational Creditor, and no amount is due and payable to it by SpiceJet, thereby, making the present CP non-maintainable.
- m)** The I.A. filed by Wilmington contained neither any explanation / averment / submission as to the existence / veracity of the document and / or its sudden surfacing, nor any plausible reasoning as to the alleged "correctness" of Wilmington's Amendment Agreement vis-à-vis the Last Amendment Agreement. Wilmington does not dispute the execution of and / or signatures on the Last Amendment Agreement

and the I.A. also does not clarify as to what according to Wilmington is “wrong” about the Last Amendment Agreement, rendering the purported need to file the “correct” version.

- n)** It is pertinent to state that SpiceJet has not been able to come across any relevant communication with Wilmington, pertaining to Wilmington’s Amendment Agreement and its execution, despite due diligence. Both the Last Amendment Agreement and Wilmington’s Amendment Agreement have certain distinguishing factors, for which no clarification has been accorded by Wilmington. The date in Wilmington’s Amendment Agreement is written by hand, while it is typed in the Last Amendment Agreement. The purported signatures of the parties to Wilmington’s Amendment Agreement are on different pages (yet both numbered as internal page no. 4), while both the party signatures in the Last Amendment Agreement are on the same page.
- o)** The conduct of Wilmington is apparent and the same ought not be permitted by this Adjudicating Authority. Not being an Operational Creditor, Wilmington has filed the present CP, in an attempt to arm-twist SpiceJet into making payments which are not due and payable to it. It is also an established principle of law that IBC is not intended to be a substitute to a recovery forum. It has been laid down by the Hon’ble Supreme Court that whenever there is existence of real dispute, the IBC provisions cannot be invoked. The IBC cannot be used whenever there is existence of real dispute and, also whenever the intention is to use the Code as a means for chasing payment or building pressure for releasing the payments.
- p)** In the absence of any tangible pleadings or documentation, Wilmington has failed to substantiate and establish itself in the shoes of a “Operational Creditor” to whom any “Operational Debt” is owed to, by SpiceJet. Therefore, Wilmington has no locus to either maintain the present CP and the same is liable to be dismissed.

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 Adjudicating Authority is having territorial jurisdiction as the Adjudicating Authority with respect to maintainability of Company Petition bearing C.P IB/349/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, we have to see whether the Applicant in the instant case, is operational creditor within the meaning of IBC, 2016. The term 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 in the present case, i.e. Wilmington Trust SP Services (Dublin) Ltd. claims to be an Operational Creditor in the instant application. The claims of the Applicant is based upon the Lease Agreement entered between the Applicant as a Trustee and the Corporate Debtor, for leasing of one (1) Boeing 737-800 Aircraft bearing manufacturer's serial number 41398 and Indian Registration Mark VT-SZK, fitted with two CFM56-7B engines bearing ESNs 658842 & 658847 (the "Aircraft") to the Corporate Debtor.

10. In the instant case, the Applicant i.e. Wilmington claims to be the Lessor on the basis of the Lease Agreement entered between the Applicant and the Corporate Debtor. However, the Lease Agreement records that Wilmington is “not acting in its individual

capacity but solely as a trustee". The description of Parties at Page no. 49 of the Application, Clause 25 of the Lease Agreement ("Delivery of Notices"), and Execution Page at Page no. 169 of the Application, the conjoint reading of all these clause shows that Wilmington throughout was not acting in its individual capacity, but as a trustee.

- 11.** The definition clause of the Lease Agreement defines "Trust Agreement". It means "the trust agreement entered into between Wilmington (as trustee) and Participant (as trustor) establishing Lessor. Therefore, being a Trustee, Wilmington, even in its individual capacity, does not qualify to be an "Operational Creditor". Moreover, in the instant case, as per the documents filed by Wilmington, the Lease was amended vide the lease amendment agreement (No. 2) dated 29.11.2016 ("Amendment No. 2"), whereby it is categorically stated that "...original beneficial owner under the Trust Agreement, that is, BOC Aviation (Ireland) Limited, has sold its beneficial interest in the Aircraft and transferred its interest in the Trust Agreement to Klaatu Aircraft Leasing (Ireland) Limited." Therefore, it is clear that Wilmington is not vested with the beneficial interest qua the aircraft bearing manufacturer serial number ("MSN") 41398 and the same has been transferred from BOCA to Klaatu Aircraft Leasing (Ireland) Limited ("Klaatu"), now Aircastle (Ireland) Ltd. ("Aircastle").
- 12.** 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 Klaatu (Aircastle) and not Wilmington. The Payment details as mention in one of the invoice (Pg. 179- Volume- II) is mentioned below:

Sort Code: 990051
SWIFT Code: CITIIE2X
Account Name: Klaatu Aircraft Leasing Ireland Limited
Account No.: 0017246003
IBAN: IE59CITI99005117246003
Reference: SG 41398 August 2021

- 13.** Further, amendment to the definition of "Rent Collection Account", whereby, the bank account name and address of Klaatu (now Aircastle) is mentioned as the beneficial owner for receiving lease rentals. The definition of the "Rent Collection Account" as mentioned in the Agreement is as follows:

"Rent Collection Account" means Bank Account Number: 304642207, Beneficiary Bank: Citibank Europe PLC. Dublin, IBAN No: IE59CITI99005117246003, SWIFT Code: CITIE2X, Account Name: Klaatu Aircraft Leasing (Ireland) Limited, Reference: MSN 41398, or such other account at such bank as Lessor may specify in writing from time to time to Lessee,

- 14.** Therefore, from the payment details mentioned in the Agreement and invoices, it is evident that the debt is owed to Klaatu (now Aircastle) and not to the instant Applicant. Further, the instant Applicant has not placed any document on record in terms of Section 5(20) of the IBC to suggest that debt, if any, was assigned in its favour.
- 15.** Additionally, under definitions in 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”. However, in the instant case, neither the operational debt is owed to the instant applicant, nor it has been legally assigned or transferred to the instant applicant. Therefore, it is undisputedly concluded that the Applicant is not a ‘Operational Creditor’ in the instant case.
- 16.** Further, the Lease was again amended vide lease amendment agreement dated 05.02.2021 ("Last Amendment Agreement"), which was produced by the Corporate Debtor during the course of argument. wherein, only Klaatu (now Aircastle) and SpiceJet are parties. However, the Operational Creditor claims that the Agreement produced by the Corporate Debtor during the course of argument is not the correct document and is a wrong agreement. Therefore, the Operational Creditor placed on record the lease amendment agreement dated 05.02.2021 which was filed through IA 6018 of 2023, wherein the Applicant and the Corporate Debtor are the parties. However, the Operational Creditor contends that the Agreements became void ab initio on account of the breach committed by the Corporate Debtor. On perusal of Clause 4 of the said agreement, it can be seen that Clause 4 of the agreement is read as:

“In the event that any of the terms and conditions of this deferral are not complied with, the provisions of this agreement shall immediately cease to apply and shall be void ab initio; and shall be deemed to have never been agreed to; “

- 17.** Therefore, as per the Applicant, the Last Amendment Agreement never came into force and are void ab initio. However, on perusal of the invoices placed on record, it can be evidenced that invoices issued are premised on the lease amendment agreement dated 05.02.2021 (Page 189 of the Petition). Therefore, if the agreements entered between the parties are void ab initio, this Adjudicating Authority is of the view that the reliance cannot be placed on the invoices, for the purpose of ascertaining an alleged operational debt.
- 18.** Further, it was submitted by the Operational Creditor that DGCA also in its Certificate of Registration dated 26.05.2014 recognized the Applicant as the Lessor/Owner. However, it is understood that DGCA would recognize parties as Lessor and Lessee on the basis of document of Lease Agreement filed with them. It is also clear that on the date of issue of Certificate of Registration (26.05.2014) as well as IDERA Certificate (21.05.2014), the only Lease Agreement was the one dated 07.08.2013 in which it is mentioned that Wilmington Trust SP Services (Dublin) Limited, is a trustee and not acting in its individual capacity in the said Lease Agreement. Therefore, it appears that for the sake of convenience in dealing with day to day business operations with various authorities in India, on behalf of BOC Aviation, the DGCA has mentioned them as Lessor/Owner without clarifying that they are trustees. However, for the purposes of IBC, a clear distinction is required between the Owner, Lessor, Assignee, Trustee, with respect to being recognized as Operational Creditor in terms of provision of IBC.
- 19.** At page 4 of the Application, the Applicant has stated, "The operational Creditor is a trust acting for the beneficiary who is an aircraft leasing company in Ireland. The Corporate Debtor approached the Operational Creditor to take an aircraft on lease. Thus, it is clear admission on the part of the Applicant that the Applicant is a trust/trustee and acting for the beneficiary.

20. Both the sides have filed separate Amendment Agreements. OC as well as CD has submitted that Amendment Agreement filed/submitted by them are genuine and amendment agreement filed/submitted by other side is not the correct version. We may state that proceedings under the IBC are summary in nature. In this regard, we may refer the judgment of Hon'ble NCLAT (cited by the Sr Counsel of the CD) in the matter of **Gokul Exim Pvt. Ltd. v. Grid India Power Cable Pvt. Ltd.; MANU/NL/1259/2022**, dated 12th December 2022, wherein the Hon'ble NCLAT while dismissing the Appeal filed against the Order of Adjudicating Authority has quoted the following observations of the Adjudicating Authority:

*"9. The Respondent has alleged that invoices have been forged by the Applicant to extort money from the Respondent and the Respondent has placed on record certain document which shows that vehicles that used to carry the goods does not have the capacity to carry such quantity of goods which was denied by the applicant and stated that the Corporate Debtor has its own transportation carrier. The amount of debt due, if any, cannot be ascertained as long as the authenticity of invoices is proved. The dispute with respect to forgery of invoices cannot be decided by this Adjudicating Authority. It is settled law that proceedings before NCLT are summary in nature and adversarial evidence cannot be led and appraised by this Tribunal. **This Adjudicating Authority is not expected to ascertain the veracity of invoices raised in a summary proceeding, if the Tribunal starts adjudicating these types of issues, then the purpose of enacting the statute for speedy disposal by the mechanism will be defeated, therefore, the Applicant may explore other legal remedies.**"*

21. The Hon'ble Supreme Court has already amplified the role of the Adjudicating Authority on the question of consideration of dispute in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd, AIR 2017 SC 4532** at para 40:

40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by

*the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. **Therefore, 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.*

- 22.** Therefore, since the proceedings under the IBC are summary in nature, this Adjudicating Authority is not inclined to adjudicate upon the genuineness of the document. However, it is evident that the Amendment Agreement produced by the Operational Creditor is not signed by both the parties and the Amendment Agreement produced by the Corporate Debtor during the course of argument is signed by both the parties.
- 23.** In the present case, Section 9 Petition has been filed on the basis of alleged default of payment due as per Aircraft Lease Agreement signed by the Willington Trust SP Services (Dublin Limited) as a Trustee and not in its individual capacity. It is a settled law that ownership of the Trust property is vested in the beneficiary and not in the trust or trustees. Since we are considering application under Section 9 of the IBC which can be filed by the 'Operation Creditor' and the said term is defined in Section 5(20). Only a person to whom operation debt is owed or such person to whom such debt is legally assigned or transferred. Since the applicant is a trustee and neither the beneficiary of the transaction, no pleading or documents have been filed to substantiate that the applicant is an assignee or transferee, and in view of dispute

about veracity/genuineness of amendment agreement, the present application is not maintainable.

24. In light of the above observation, this Adjudicating Authority is of the view that the present application filed by **Wilmington Trust SP Services (Dublin) Limited** (Operational Creditor), under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **SpiceJet Limited** ('Corporate Debtor'), lacks merit, is not maintainable and therefore stands dismissed without costs. We have only examined the issue of maintainability of present application under Section 9 and we have not expressed any opinion in respect of the bonafide/interest of the claim referred to and necessary recourse regarding such claim may be taken in appropriate court/forum in accordance with law.

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

Sd/-
(RAHUL BHATNAGAR)
Member (Technical)

Sd/-
(MAHENDRA KHANDELWAL)
Member (Judicial)