

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

I.A. 615 OF 2021

Under Section 60(5) of the Insolvency &
Bankruptcy Code, 2016.

Ashish Chhawchharia,
Resolution Professional for Jet Airways
(India) Limited.

...Applicant

V/s

Klaatu Aircraft Leasing Ireland Limited &
Others

... Respondents

In the matter of

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

State Bank of India

...Financial Creditor

V/s.

Jet Airways (India) Limited.

... Corporate Debtor

Order delivered on: 04/12/2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances:

For the Applicant : Mr. Malhar Zatakia Advocate

For the Respondent : None present.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This IA 615/2021 is filed by Sh. Ashish Chhawchharia, the Resolution Professional (“Applicant”) of M/s Jet Airways (India) Limited (“Corporate Debtor”) in the Corporate Insolvency Resolution Process (“CIRP”) for directions to M/s Klaatu Aircraft Leasing Ireland Limited (“Respondent No. 1”) & M/s Spicejet Limited (“Respondent No. 2”) to return the Engine as well as the APU, to the Corporate Debtor, and also to pay variable as well as fixed rental for the period, it was in their use.
2. The Respondent No. 1 and the Corporate Debtor entered into separate Lease Agreements dated June 25, 2019 and dated December 22, 2016 for lease of Respondent No. 1's Aircrafts- Boeing (Model 737-800) bearing Serial Number MSN 34799 and Registration Mark: VT- JGR ("Aircraft 1"), and bearing Serial Number MSN 30410 Registration Mark VT-JGA ("Aircraft 2"). The Aircrafts 1 and 2 were fitted with engine bearing number ESN 803473 ("Engine"), and the APU E-5121 ("APU"). respectively, both of which belong to the Corporate Debtor.
3. Around June 2019, on account of the financial crisis faced by the Corporate Debtor, various aircraft leased and operated by Corporate Debtor including the Aircrafts, were grounded, and consequently were returned to the respective Lessors. When the Aircrafts were repossessed by the Respondent No. 1. the Engine and the API fitted thereto which belonged to Corporate Debtor, remained attached to the said Aircrafts and the Applicant's Engine (ESN 803473) and the APU (E-5121) was also taken by the Respondent No.1 along with the Aircrafts repossessed by the Respondent No.1, as these equipments remained installed on the Aircrafts. Thereafter, the insolvency proceedings commenced against the Corporate Debtor on 20.6.2019.

4. Applicant was first appointed by this Hon'ble Tribunal as an Interim Resolution Professional ("RP") for the Corporate Debtor, and was confirmed by the Committee of Creditors of the Corporate Debtor as a Resolution Professional of the Corporate Debtor.

5. It is the case of the applicant that Section 18 (1) (f) of the Insolvency and Bankruptcy Code, 2016 ("Code") requires the Applicant to take control and custody of any asset over which the Corporate Debtor has ownership rights. Upon making enquiries, the Applicant learnt about the Aircraft, the Engine and APU of the Corporate Debtor installed thereon and its repossession by the Respondent No. 1 on 24.4.2019. The Applicant further learnt that at the time of such repossession, the Engine and the API belonging to the Corporate Debtor continued to be attached to the these Aircrafts, and the Aircrafts (alongwith the Engine and the AP) were subsequently given on an operating lease to Respondent no.2 which is continuing till date.
 - 5.1. In discharge of its duties as an RP of the Corporate Debtor, particularly Section 18 (1) (f) of the Code, the Applicant by way of its letters called upon the Respondent Nos. 1 and 2 to return the Engine and the APU belonging to the Corporate Debtor, however the Respondent No. 1 and 2 have failed to return the Engine owned by the Corporate Debtor to the Applicant. Further, in view of the imminent danger that Respondent No. 1 would have exported the Engine and the APL out of India, and also since in spite repeated follow ups as no response was forthcoming from the Respondent Nos. 1 and 2, the Applicant also wrote letters to the Respondent No. 1 to 3. Ministry of Civil Aviation and GST Commissioner, in relation to return of the Engine and the API. However, all the above were of no avail, as the Engine and the APU is not yet returned to the Applicant.

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- 5.2. The Applicant is making the present application under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 inter alia seeking a direction against the Respondents to return to the Applicant, the Engine and the APU belonging to the Corporate Debtor attached to Respondent No. 1's Aircraft which is presently being operated by Respondent No. 2.
- 5.3. As detailed in the Application, although it is undisputed that the Engine and the APU are the assets belonging to the Corporate Debtor. Respondent No. 1 is illegally and unlawfully not returning the Engine and the APU to the Corporate Debtor. Further. Respondent Nos. 1 and 2 have failed and neglected to pay Corporate Debtor lease rentals for use of the Engine and the APU
6. The Respondent No. 1 has filed the reply stating that Engine Bearing number ESN 803473 and an Auxiliary Power Unit bearing number APU E-5121 are properties of Respondent No. 1 and were fitted in the leased aircrafts. It is their case that the Corporate Debtor has till date not returned the original Engine ("Aircraft Engine") which was removed and replaced by the Corporate Debtor from Aircraft 1, and also Auxiliary Power Unit No. P7440 which was removed from Aircraft 2 and in its place, APU was installed in the Aircraft 2. It is further emphasised that the re-possession of both the Aircrafts fitted with such replaced parts took place prior to commencement of CIRP/moratorium in the case of Corporate Debtor.
- 6.1. It is further stated that the Applicant could not have filed any application after the approval of the Resolution Plan in the case of Corporate Debtor by this Tribunal, and also this Tribunal has no role to play in respect of any dispute concerning the agreement of the Corporate debtor with any third party. For these propositions, the Respondent No. 1 has relied upon decision of Hon'ble Delhi High Court in case of Venu Recruiters Private Limited versus Union of India and Ors. {276 (2021) DLT 530}.
- 6.2. Accordingly, the Respondent No. 1 has contended that the APU and Engines are in the ownership and possession of the Respondent No. 1,

the Resolution Professional cannot place reliance on section 18(1)(f) of the Code to claim delivery of assets which are not owned by the Corporate Debtor.

7. We have heard learned Counsel and perused the material available on record.
 - 7.1. It is not in dispute that Engine and APU claimed in this Application are owned by the Corporate Debtor but these parts were fitted in the leased aircraft by the Corporate Debtor in replacement of already installed Engine and APU. The Respondent No. 1 asserts that the Engine and APU installed in the repossessed Aircraft are in lieu of already installed Engine and APU.
 - 7.2. We may note that the Applicant sent a letter dated 1.10.2019 to the Respondent Nos. 1 and 2 referring to the earlier correspondence for request for return of the Engine, inter alia, stating that the Engine is an asset of the Corporate Debtor and is in the custody of Respondent No. 2. With regards to the proposal of the Respondent No. 1 for swapping of the Engine, the letter further recorded that there was a significant difference in the value of the Engines that Respondent No. 1 had propose to swap (i.e. the value of the Corporate Debtor's Engine exceeds the value of the engine with ESN 896341 that the Respondent No. 1 has offered for the title swap), and proposed that the title swap is neutral for all the parties. It further stated that if the difference in value between the 2 engines could not be neutralised in the swap then the parties may need to be proceeded with the original request for return of the Engine to the Corporate Debtor.
 - 7.3. Section 18(1)(f) of the Code casts an obligation on the Resolution Professional to take control and custody of any asset over which the Corporate debtor has ownership rights as recorded in the balance sheet of the Corporate Debtor, including those assets that may or may not be in possession of the Corporate Debtor. Explanation appended to Section 18 excludes assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment.

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- 7.4. Section 25 of the Code further mandates that the Resolution Professional shall preserve and protect the assets of the Corporate Debtor, and take immediate custody and control of all the assets of the Corporate Debtor.
- 7.5. The Hon'ble Supreme Court in the case of ***Victory Iron Works Ltd. Vs. Jitendra Lohia & Anr (2023) ibclaw.in 29 SC*** held that “*the word “asset” is not defined, either in IBC or in any of the seven enactments referred to in Section 3(37) of the Code. But the word “asset” is defined in Section 102(2) of the Income Tax Act, 1961 to include “property or right of any kind”. Though Section 102 applies as such to Chapter X-A of the Income Tax Act, the definition throws light on the fact that property or right of any kind is considered to be an asset*”.
- 7.6. It is undisputed fact that the Engine and APU, fitted in the repossessed Aircrafts were owned by the Corporate Debtor and the re-possession took place prior to commencement of CIRP. The Engine and APU came to be fitted into the repossessed Aircrafts in replacement of existing Engine and APU. It is the case of the Resolution Professional that original Engine is lesser in value than the Engine owned by the Corporate Debtor and fitted in the repossessed Aircraft prior to its repossession and the Original Engine has been retrieved by Aircastle from Honeywell, whom such original engine was given for repair. Accordingly, the Original Engine belonging to the Respondent No. 1 has travelled back to the Respondent No. 1.
- 7.7. Accordingly, the Respondent No. 1 is duty bound to return the Engine no. ESN 803473 ("Engine"), if the Original Engine has been retrieved by them from M/s Honeywell, however, the Respondent No. 1 shall be entitled to make claim for the job work charges paid by them to M/s Honeywell while retrieving the Original Engine from them. To this extent, we find force in the contention of the Applicant and direct accordingly to the Respondent No. 1 to return the Engine No. 803473 forthwith to the Resolution Professional. Since, the said Engine was fitted in replacement of Original Engine and the Respondent No. 1 got

it later on, we do not find any merit in the claim for usage charges for such engine.

- 7.8. As regards return of APU E-5121 ("APU"), we do not find any submission from the Resolution Professional in relation to status of Original APU, except that the said APU is to be returned by JetLite, their sister concern. However, we find that Lease Agreement in relation to Aircrafts was entered into between the Corporate Debtor and Respondent No. 1, hence, the Resolution Professional can not shift the onus to recover the said APU from JetLite, as there exists no privity of contract between JetLite and the Respondent No. 1. Since, the said APU was in replacement of original APU, we do not find any force in the contention of the Resolution Professional for usage charges of said APU as well as return of said APU. Further, the repossession took place prior to CIRP, the right of set off is available to the Respondent No. 1 in relation to exchange of APU. However, the parties shall be entitled to make claim for the differential in price, if it is ascertainable.
- 7.9. The reliance of the Respondent No. 1 on the Hon'ble Delhi High Court Single Member Bench decision in case of Venus Recruiters Pvt Ltd. (Supra) is misplaced, as the said decision went into appeal before Division Bench of Hon'ble High Court titled as ***Tata Steel BSL Ltd. Vs. Venus Recruiter Pvt. Ltd. & Ors. (2023) ibclaw.in 09 HC*** and was reversed. The Hon'ble Division Bench held that that in the judgment of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. vs. Amit Gupta (2021) ibclaw.in 44 SC the Hon'ble Supreme Court has, in a comprehensive manner, interpreted and laid down the scope and import of the phrase "arising out of" and "in relation to" in the specific context of Section 60(5)(c) of the IBC. It becomes evident that the phrase "arising out of" and "in relation to" is to be given wide import. It further held that It follows that the RP will not be functus officio with respect to adjudication of avoidance applications in a situation, as described hereinabove. There being a clear demarcation between the scope and nature of the CIRP and avoidance

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application within the scheme of the IBC, the RP can continue to pursue such applications.

8. In view of the foregoing, IA 615/2021 is disposed of as partly allowed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

V.G. Bisht
Member (Judicial)