NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
*** *** ***

TCP (IB) No. 5/9/AMR/2019
[CP (IB) No. 62/9/HDB/2019]
&
IA No. 529/2019 in
TCP (IB) No. 5/9/AMR/2019
[CP (IB) No. 62/9/HDB/2019]

In the matter of a Petition 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

and

IN THE MATTER OF M/s LEPL PROJECTS LIMITED

TCP(IB)No. 5/9/AMR/2019

Between

MTU Maintenance Berlin-Brandenburg GmbH
Having its registered office at
Dr. Ernst Zimmermann Strasse 2,
Ludwigsfelde, Germany – 14974. ... **Petitioner**

and

LEPL Projects Limited
Lingamaneni Corporate House,
59-14-10, Ramachandra Nagar,
Opposite Maris Stella College,
Vijayawada,
Andhra Pradesh – 520 008. ... **Respondent**

IA No. 529/2019

Between

LEPL Projects Limited
Lingamaneni Corporate House,
59-14-10, Ramachandra Nagar,
Opposite Maris Stella College,
Vijayawada,
Andhra Pradesh – 520 008. ... **Applicant**

14/11/19

and

MTU Maintenance Berlin-Brandenburg GmbH
Having its registered office at
Dr. Ernst Zimmermann Strasse 2,
Ludwigsfelde, Germany – 14974. ... **Respondent**

Date of Order: 14.11.2019

CORAM:

Hon'ble Janab Mohammed Ajmal, Member Judicial

Appearance:

For Operational Creditor : Ms. Shireen Sethna Baria, Ms. B. Saroj, Ms. Kajal Kumari, Advocates.

For Corporate Debtor : Mr. Tarun G. Reddy, Mr. Abhijeet Talwar and Ms. Richa Singh, Advocates

ORDER

The Company Petition filed under section 9 of Insolvency & Bankruptcy Code, 2016 (the Code) seeks to initiate Corporate Insolvency Resolution Process (CIRP) of the Respondent Company for default in payment of an operational debt.

2. The Company Petitioner headquartered at Ludwigsfelde, Germany is engaged *inter alia* in maintenance, refit and repair of combustion engines, particularly gas turbines and motors and gear boxes including their accessories for vehicles of all kinds, in particular aircrafts as well as their stationary use. The Respondent Corporate Debtor a public limited company incorporated on 29th March, 1996 is based in Vijayawada, Andhra Pradesh. The respondent (Air Costa) entered into an Aircraft Engine Lease General Terms Agreement (GTA) with MTU Maintenance Lease Services BV, Netherlands (MTU-Netherlands) on 6th November, 2014 to set out the general terms and conditions which would apply to the lease agreements, the

14/11/19

parties might enter into for leasing of civil aircraft engines. Each lease agreement when executed together with the GTA, so modified, shall be read as a single independent contract applicable to each engine. The GTA was agreed to be effective upon its execution and was to continue thereafter, until cancelled by either of the parties, but shall not expire before the expiration or termination of all lease agreements, executed in pursuance of the GTA. The respondent entered into a maintenance agreement with the present petitioner (MTU-Berlin) on the same day (6th November, 2014) for maintenance, repair and overhaul services concerning CF-34 type of aircraft engines on a 'not-to-exceed' and 'time and material' basis for a period of 10 years or earlier to be mutually agreed between the parties. The respondent on 8th November, 2014 entered into another agreement with MTU Maintenance Canada Limited, Richmond, Canada (MTU-Canada) relating to maintenance, repair and overhaul services for CF 34 Line Replaceable Units (LRU) based on a flat rate for aircraft flight hour and additional services provided on a 'time and material' basis for a period of 10 years or earlier to be mutually agreed between the parties effective from 1st December, 2014. Pursuant to the GTA, the respondent entered into one Aircraft Engine Lease Agreement with MTU-Netherlands on 11th May, 2015. Thereunder, MTU-Netherlands leased one CF 34-8E engine bearing sl.no.193-208 with effect from the same date on terms and conditions incorporated therein. Despite getting lease of the engine the respondent did not make the required payments. The lease agreement (11th May, 2015) was assigned to the petitioner on 1st September, 2015. The respondent also defaulted in payment under the maintenance agreements. Consequently, on 7th September 2016, the respondent entered into a settlement agreement with the petitioner and MTU-Canada for consolidation and settlement of the dues. The respondent agreed to a pay a total of US $ 1,990,914.34 in instalments by 30th December, 2016, beginning 20th September, 2016to be made into a Bank account of the petitioner, details of

19/11/19

which were noted therein. The respondent agreed to deliver the engine and to pay the costs of its redelivery under the Engine Lease Agreement. It also agreed to pay additional costs as would be invoiced by the petitioner, within the agreed payment period. The respondent by its email dated 20th September, 2016 and 28th September, 2016 intimated that an amount of US $ 250,000 had been transferred to the petitioner's account, but no such amount was received. It also failed to pay the future instalments, despite repeated entreaties and reminders. Due to the respondent's failure in adhering to the settlement agreement, the petitioner and MTU-Canada on 11th January, 2017 moved a debt collection claim before the Commercial Court in the Queen's Bench Division of the High Court of Justice, London. The London Court vide order dated 17th March, 2017 directed payment of US $ 2,460,868.69 and Euros 19,400.54 with interest respectively of US $ 95,635.25 and Euros 503.59. It also directed payment of costs to the tune of British Pounds 11,742 and 32,000respectively towards cost of the application and cost of the claim. The order was forwarded to the respondent by an email dated 6th April, 2017 by the Luxury Assets Law Firm representing the claimants before the Court. The petitioner followed it up with an Advocate's notice dated 11th July, 2017 demanding payment. The respondent in answer there to sent an interim reply on 27th July, 2017 and final reply on 9th August, 2017. The petitioner then issued a demand notice dated 16th July, 2018 in Form-3 under section 8 of the Code. The respondent in its reply dated 26th July, 2018 disputing the contents of the demand notice, averred that the notice was invalid as there has never been a contractual relationship with the petitioner under the GTA dated 6th November, 2014. Thus there was no debt due. The GTA was with MTU Netherlands. The foreign decree of the Queen's Bench, Commercial Court, London, which formed the basis of the action under the Code was an *ex parte* decree and the respondent reserved the right to contest the same. In addition it is stated that it had a substantial counter claim against the petitioner for

14/11/19

material breach of quality and delivery of services under the maintenance agreement. In order to overcome such shortcomings the petitioner has brought a false case. Since, the debt was not paid, the petitioner moved the present petition on 24th January, 2019 seeking CIRP of the respondent.

3. The respondent in answer to the notice issued by the Tribunal contested the claim by filing a counter. It is pleaded that the present petition is misconceived and not maintainable. The petitioner has approached the Tribunal, with unclean hands seeking payments not due. The respondent had entered into the GTA with MTU-Netherlands which set out the general terms and conditions of any future lease agreement, the parties might enter into,in furtherance of the GTA. The respondent entered into a maintenance agreement with the petitioner for maintenance, repair and overhaul service of CF-34 aircraft engines. Subsequently, the respondent entered into another maintenance agreement effective 1stDecember, 2014 with MTU-Canada for maintenance, repair and overhaul of CF-34 Line Replacement Units. In due course of business the respondent sought maintenance and overhaul of one of its engines namely CF-34 8E serial number 193-763 from the petitioner. The parties agreed that during the time the engine is being repaired MTU-Netherlands would lease another engine to the respondent so as to maintain uninterrupted air services. Under such circumstances, the respondent entered into the air craft engine lease agreement with MTU-Netherlands on 11th May, 2015, where under MTU-Netherlands leased one CF-34 8E engine bearing serial number 193-208. MTU-Netherlands however, failed to supply the 'leased engine' on the date agreed upon and unreasonably delayed the supply. MTU-Netherlands as the lessor, was thus liable to pay damages under the GTA for the delay in delivery of the engine. The violation of the terms of the GTA and lease agreement resulted in severe loss to the respondent owing to loss of bookings and grounding of aircraft. While the respondent was

operating the leased engine (193-208), the petitioner delayed the re-delivery of the engine (193-763) till 25th January, 2016. Even after delivery it was found that there was oil leak beyond the permissible limit. The engine also developed technical snags. Such unforeseen problem compelled the respondent to continue using the leased engine (193-208) on rent. Meanwhile, another engine CF-34 8E 193-764 required scheduled maintenance. When informed, the petitioner surprisingly refused to inspect the same. The refusal of the petitioner had a cascading effect on the operation of the respondent leading to immeasurable loss. The respondent was in dire need of an appropriate engine. The petitioner taking advantage of the respondent's vulnerability arising therefrom, coerced it to enter into an unreasonable settlement agreement (7th September, 2016) comprising of exorbitant rates as damages towards non-payment of lease amounts of the earlier lease agreement. Under the agreement the respondent was to pay US $ 1,990,914.34 in five instalments between 20th September, 2016 and 30th December, 2016, each instalment amounting to not less than US $ 250,000. The action of the petitioner is illegal and arbitrary and the respondent is not bound by such settlement agreement. The settlement agreement executed under duress and coercion is null and void. The same could not be relied upon nor could be looked into in support of the demand of the petitioner.

4. It is further pleaded that the respondent had entered into an aircraft lease agreement with ECC Leasing Company Limited. The respondent had paid maintenance reserves, for schedule maintenance of engines, air frames and other parts, to the said lessor. The petitioner was required to receive US $ 787,408 from the lessor in addition to US $ 900,000 for engine no. 193-763 and US $ 932,900 for engine no. 193-764 paid by the respondent. The petitioner to that effect had agreed to enter into a tripartite agreement with the aircraft lessor and the respondent, where under the aircraft lessor was to pay

14/11/19

the appropriate maintenance reserves of US $ 787,408 and US $ 932,900 for the aforesaid engines respectively. Thus the petitioner was adequately covered for the maintenance cost and invoices.

5. The foreign decree of the Queen's Bench passed *ex parte* is not maintainable against the respondent in terms of the Code. The decree is not executable. Thus the amount in the decree could not be taken as a 'debt due' against the respondent. The same is also hit by section 13 of the Code of Civil Procedure. Consequently, the demand notices dated 11th July, 2017 and 16th July, 2018 under section 8 of the Code calling upon the respondent to comply with the said summary judgement would accordingly be invalid and *non est*in law. The respondent issued replies to the respective notices denying its liability mainly on the following grounds.

   i. There was no documentary proof to substantiate that MTU-Netherlands was an affiliate of MTU-Canada and the Petitioner/Operational Creditor.
   ii. The Demand Notices issued duly suppressed the correspondences and events that transpired between MTU-Netherlands and the Respondent/Corporate Debtor with respect to issues arising out of the leased aircraft.
   iii. MTU-Netherlands failed to adhere to the procedure contemplated for assignment of the Lease Agreement in favour of MTU-Canada and the Petitioner/Operational creditor herein, hence, the validity and maintainability of the Assignment Agreement has always been under challenge and dispute.
   iv. If the said Assignment was assumed to be valid, MTU-Netherlands, having assigned its rights in favour of MTU-Canada and the Petitioner/Operational Creditor would have ceased to have any rights to enforce the Lease GTA and the Lease Agreement and would thereby, have no authority to impose a penalty of US $ 600,000 on the Respondent/Corporate Debtor vide its email dated 29th September, 2016.
   v. The Settlement Agreement, if at all valid, ought to have stated the genesis of the authority of MTU Canada and the Petitioner/Operational Creditor herein to execute the Agreement. In any case, the Settlement Agreement nowhere talks about the

rights of MTU-Netherlands being assigned to MTU-Canada and the Petitioner/Operational Creditor, as alleged.

vi. Furthermore, although MTU-Netherlands was not a signatory to the Settlement Agreement, the entire correspondence for seeking the status of amount payable, arising out of the Settlement Agreement, was made by it.

vii. The Order of the Hon'ble High Court of Justice, Queen's Bench Division and commercial court is not binding on the Respondent/Corporate Debtor in as much as the same was passed *ex parte* and no opportunity of hearing was granted to the Respondent/Corporate Debtor herein."

6. It is further contended that as per the maintenance agreement, the petitioner was liable to pay damages for its failure to provide proper maintenance and services to and for the engines handed over to it. The so called assignment cannot be taken into account without any further documentation and consent from the respondent. All these events taken together would indicate that there exists a clear dispute between the parties and there could be no debt due. As such the petition is liable to be rejected.

7. Basing on the rival pleadings, the following issues arise for determination.

i) Whether the respondent owed an operational debt to the petitioner?

ii) Whether the respondent had brought to the notice of the petitioner, the existence of a dispute?

iii) Whether the petition merits admission?

8. The respondent while making the aforesaid objections to the petition filed IANo.529/2019 under section 8 of the Arbitration and Conciliation Act, 1996 on the self-same grounds, praying to refer the parties to Arbitration under clause 16.2 and 17.2 of the maintenance agreements dated 6th November, 2014 and 8th November, 2014 effective 1st December, 2014 (wrongly mentioned as 1st December, 2016). The averments made in the

14/11/19

application are identical to the averments made in the counter. They need not be repeated.

9. The petitioner filed a common rejoinder to the counter to be treated as counter to the Interim Application. It is contended that the application is based on the respondent's failure to honour the settlement agreement dated 7th September, 2016. The settlement agreement did not have an arbitration clause and it superseded all other agreements between the parties. The plea that the judgment of the English Court was without any notice to the respondent is misconceived as the Acknowledgment of Service would indicate. The service of notice of the proceeding before the English Court has been held to be sufficient and the case has been decided on merits. The petition under section 9 of the Code is not in the nature of an execution of the order of the English Court. This authority need not go into the legality and enforceability of the foreign decree. Therefore, the challenge to the jurisdiction of this Authority is misconceived. Even otherwise the obligation of the respondent to pay the dues under the settlement agreement is indisputable. The settlement agreement was executed as late as 7th September, 2016. The respondent raised questions of its legality, validity and unreasonableness on the grounds of duress, coercion and exorbitant rates only in the counter. It did not take such a plea in the reply to the demand notice under section 8.The plea of lack of privity of contract is negated by the settlement agreement itself. The settlement agreement spoke of the assignment and the respondent never objected to the same. The contention that the respondent sustained loss due to the alleged deficiency in service is a dishonest afterthought as the correspondence referred to by it precede the settlement agreement. The settlement agreement was executed between the parties to settle all issues between the parties and the respondent was obliged to comply with the terms thereof. Further, the petitioner decries the proposed

14/11/19

tripartite agreement as false and baseless. The petitioner has never agreed for any such agreement. Therefore, it cannot be said that the respondent had raised a tenable defence of 'dispute'. There is no impediment in admitting the petition. It is accordingly submitted that the application for referring the parties to arbitration cannot also be allowed.

10. The petition for CIRP and counter against it involved same questions and facts, as that of the application seeking reference to arbitration. Therefore, the company petition as well as interim application were heard together and shall abide by this common order.

Issue No. I:

11. The petitioner relies on the settlement agreement dated 7th September, 2016 in support of its claim of operational debt payable by the respondent. The foreign decree dated 17th March, 2017 is also based on the settlement agreement. The relationship between the respondent and the petitioner can be traced to the earliest agreement dated 6th November, 2014 (GTA) with MTU-Netherlands. The agreement set out the general terms and conditions which would govern any other lease agreement the parties might enter into in respect of leasing of civil aircraft engines. The GTA was coextensive with the subsequent lease agreements, if any, executed in pursuance thereof. The MTU-Netherlands and the respondent executed an Aircraft Engine Lease Agreement on 11th May, 2015. This agreement, it is claimed by the petitioner, was assigned to it. The terms of the GTA *inter alia* provides as follows:

> *1.1 Agreement. This GTA governs the leasing of civil aircraft engines (hereinafter referred to as the 'Engine' or the 'Engines, as the context shall dictate) describes in lease agreements, which will specifically incorporate the terms of this GTA (each such lease agreement shall be substantially in the form as set out in Schedule 1 and shall be referred to as Lease Agreement). Each Lease Agreement when executed, together with this GTA, as so modified,*

19/11/19

shall be read as a single independent contract applicable to each Engine.

1.2 *<u>Term.</u> This GTA shall be effective upon its execution and continue thereafter until cancelled by either Lessor or Lessee, but shall not expire before the expiration or termination of all Lease Agreements subject hereto.*

12. In view of the terms of the Agreement, the GTA dated 6th November, 2014 and the Aircraft Engine Lease Agreement dated 11th May, 2015 have to be read as a single independent contract applicable to the engine so leased. Basing on the Aircraft Engine Lease Agreement MTU-Netherlands supplied one CF34-8E bearing sl.no.193-208. There was however some delay in supply of the engine as could be found from the emails exchanged between MTU-Netherlands and the respondent. On 14th May, 2015 one Mr. Ralf Koenig enclosed the quote for the engine CF34-8 to be supplied from Winnipeg, Canada and delivered at Hyderabad. One Mr. Vivek Choudhary from LEPL replied seeking the airway bill details. Later, the same day Mr. Ralf informed that the engine was picked up at .1300 hours local time at Winnipeg on its way to Toronto Airport. Because of the delay, Mr. Ralf again informed on 15th May, 2015 that there has been a delay in the delivery of the consignment. Mr. Vivek of LEPL followed it up with two emails to the following effect.

i) On Sat, May 16, 2015 at 2.13 PM
From Vivek Choudhary <vivek@lepl.in>

Dear Ralf
As you are aware our Aircraft is AOG and this kind of delay is just not acceptable. You had committed to deliver the engine on the Friday slot so as to reach Hyderabad on Tuesday. Now you give us a new timeline which has a lot of negative impact on our airline.

We signed the Engine support Agreement with MTU with a lot of hope and trust on the professionalism and your ability to support us. Sadly this delay in shipment is a wrong first step.

I have tried to call you and Daniel a couple of times each earlier today but no response. I urge you all to kindly push for a AOG shipment with the freight forwarded so as to reach Hyderabad at the earliest possible. I shall await your reply immediately in this matter.

Regards
Vivek Choudhary

ii) Sat, May 16, 2015 at 2,30 PM
From Dhiraj <dhiraj@lepl.in>

Dear Daniel and Michel,

MTU had confirmed Air Costa to deliver the engine on Tuesday (May 18, 2015) but as per the latest email of Ralf now it would be delivered on May 27, 2015.

Please notice that a delay in delivery of Engine beyond the Delivery Date makes MTU liable to pay damages to Air Costa under the GTA and well will make the official demand for that.

With kind regards.

Email correspondence made between 25th January 2016 and 22nd February, 2016 LEPL and MTU-Berlin relate to defect on account of oil leak and oil consumption of engine sl.no.193-763. The execution of the settlement agreement dated 7th September, 2016 between the respondent on one side and MTU-Berlin and MTU-Canada on the other is not in dispute. The agreement in the first few lines itself indicates that MTU-Netherlands had assigned the Aircraft Engine Lease Agreement dated 11th May, 2015 to MTU-Berlin on 1st September, 2015. The recitals of the lease agreement *inter alia* may be quoted below.

"A. Whereas, LEPL and MTU Maintenance Lease Services B.V. entered into the Aircraft Engine Lease General Terms Agreement dated November 06, 2014 (the "GTA");

B. Whereas, LEPL and MTU Maintenance Lease Services B.V. entered into an aircraft Engine Lease Agreement dated May 11, 2015 (the "Engine Lease Agreement") on the lease to LEPL of one General

Electric aircraft engine Model CF34-8E, Serial No 193-208 (the "Engine") as assigned by MTU Maintenance Lease Services B.V. to MTU on September 01, 2015;

C. *Whereas, LEPL and MTU entered into the Maintenance, Repair and Overhaul Services Agreement dated December 01, 2014 (the "MRO Agreement");* ***(Factually incorrect. Agreement was entered on 6th November, 2014).***

D. *Whereas, LEPL and MTU-C entered into the Maintenance, Repair and Overhaul Services Agreement dated November 06, 2014 (the "MRO LRU");* ***(Factually incorrect. Agreement executed on 8th November, 2014, effective 1st December, 2014)***

E. *Whereas LEPL has failed to make a number of payments under the Engine Lease Agreement, the MRO Agreement and the MRO LRU with open accounts to be settled by this Settlement Agreement (the "Subject Matter");*

F. *Whereas, the Engine is in the process of being redelivered to MTU;*

G. *Whereas, LEPL being in Default under the Engine Lease Agreement; and*

H. *Whereas, LEPL, MTU and MTU-C desire to resolve this matter amicably upon the terms and conditions set forth in this Settlement Agreement."*

Thereunder, the respondent (LEPL) agreed to deposit a total amount of US $ 1,990,994.34 into an open the account of the petitioner. Details of which are noted at Page No.3 of the agreement. The parties *inter alia* further agreed as follows:

"5. This Settlement Agreement is and shall be binding upon the parties and each of them and upon the Parties' respective successors and permitted assigns.

14/11/19

6. This Settlement Agreement constitutes the entire agreement between the Parties relating to the Subject Matter hereof and supersedes anyother agreements, written or oral, between the Parties concerning

such Subject Matter. Neither Party has relied upon any representation, express or implied, not contained within this Settlement Agreement. No modification of the terms of this Settlement Agreement shall be valid unless evidenced by an agreement in writing, signed by the Parties. For the avoidance of doubt, nothing within this Settlement Agreement shall affect MTU's or MTU-C's rights to take all such action as may be necessary and/or desirable in order to enforce and/or protects its rights under this Settlement Agreement or the GTA, MRO Agreement or the MRO LRU in the event that LEPL shall fail to comply with the terms of this Settlement Agreement.

xxx xxx xxx

10. This Settlement Agreement and any non-contractual claims arising out of or in connection with it will be construed, interpreted and applied in accordance with the Laws of England and Wales, excluding its conflict of law provisions. The Parties hereby agree that any disputes or claims of any kind arising out of or in connection with this Settlement Agreement (including, without limitation, any claim for breach of this Settlement Agreement or relating to its validity or interpretation) shall be resolved by the English Courts in London.

11. The Parties waive any objection to the English courts on grounds of forum non convenience or otherwise as regards proceedings in connection with this Settlement Agreement and agree that a judgment or order of the English Court in connection with this Settlement Agreement is (subject to rights of appeal before the English courts) conclusive and binding on them and may be enforced in the courts of any other jurisdiction."

xxx xxx xxx

The settlement agreement does not contain an arbitration clause. The respondent submitted to the jurisdiction of the English Courts, London for resolution of any dispute arising out of the settlement agreement. Upon execution of the agreement the respondent became aware that the Aircraft Engine Lease Agreement had been assigned to the petitioner. For the limited purpose of this case, it can therefore be safely accepted that the respondent acquiesced to the validity of such assignment notwithstanding the fact that it had not executed any other document in terms of Para 17.1 of the GTA. The wide and sweeping language and terms of the settlement agreement would

19/11/19

indicate that the respondent on execution of the agreement had agreed to forgo its rights and liabilities under the earlier agreements with the petitioner and MTU-Canada as well as MTU-Netherlands. Under the agreement it did not rake up the issue of deficiency in service with regard to Engine sl.no.193-763and the delay in delivery of Engine sl.no.193-208. Whatever, reservations it may have had, merged with the terms and conditions of the settlement agreement and obliterated thereby. It expressively agreed to pay the dues quantified therein. Email exchanged between the respondent and the petitioner between 20th September, 2016 and 27th September, 2016 indicate that the respondent had remitted certain payments of US $ 250,000, but the same had not materialised. These payment in fact is stated to have been initiated close on the heels of the settlement agreement. This indicates that the respondent had taken necessary steps, though futile, in furtherance of its commitment to pay the dues quantified under the settlement agreement. Admittedly no further payment was made after the so called remittance of US $ 250,000. The respondent having subjected itself to the jurisdiction of the English Courts, the petitioner and MTU-Canada on 11th January, 2017 moved the Commercial Court of the Queen's Bench Division in the High Court of Justice, London. The propriety of the judgment need not be looked into nor commented upon by this forum. Whether *ex parte* or otherwise, the judgement stands even today. No material has been placed to indicate that the orders made therein have either been varied, modified or set aside. On the face of the settlement agreement and the admission of the respondent of the dues indicated therein, the judgement of the foreign court may be looked into for collateral purposes. It may not form the sole basis of the claim before the present forum. Therefore, its validity, applicability and executability need not be gone into in this summary proceeding nor is it required. Further, the validity or otherwise of the settlement agreement cannot be weighed by this Authority. The respondent *ex facie* having failed to pay the dues agreed under

19/11/19

the settlement agreement, its validity notwithstanding, did owe a debt to the petitioner. Even otherwise the respondent had failed to pay the dues arising out of the agreements dated 6th November, 2014 and 8th November, 2014 entered respectively with the petitioner and MTU-Canada. The debt arising out of the provision of goods and services is thus an operational debt under section 5(21) of the Code. Issue No. I is answered the affirmative.

Issue No. II:

13. The respondent replied to the legal and statutory notices of the petitioner under its reply dated 20th July, 2017; 9th August, 2017 and 26th July, 2018 respectively. The replies *inter alia* reiterate the deficiency of service in maintenance of the engine and its right to contest the order passed by the foreign court. The relevant portions of the replies may profitably be quoted.

Reply dated 9th August, 2017 page 74 para 9 -

"It appears that your clients in order to overcome their shortcomings arising out of the Maintenance-Agreement have made a false claim against our Client and therefore issued the Demand Notice under reply. It is reiterated that it was due to your clients action/inactions in not returning the engine within the prescribed time and several defects in providing services to the engine, out-Client incurred huge financial losses. Out Client reserves its right to file a claim against your clients for monetary losses and loss of reputation suffered due to above said actions/inactions of your clients."

Reply dated 26.07.2019 to the notice under section 8.

"*6. The Company has a substantial counter-claim against your Client MTU Berlin for material breach of quality and delivery of services under Maintenance agreements for maintenance and overhaul of engine given by the Company to MTU Berlin inter-alia including (a) not returning the engine within the turnaround time as agreed in the maintenance agreements; and (b) returning the engine with several defects, due to which the Company suffered monetarily. It appears that your client MTU-Berlin, in order to overcome their shortcomings arising out of maintenance agreements has made a false claim against the Company and therefore issued this Demand Notice.*

7. This reply of ours should be read in totality with our letters dated July 20, 2017 and August 09, 2017."

The validity or otherwise of the settlement agreement challenged on the grounds of coercion and duress cannot be gone into by this forum. It is in the domain of a competent court of law. What this authority is required to see is that whether the respondent had raised a dispute that pre-existed the notice sent under section 8 of the Code, in this case the notice dated 16th July, 2018. The Hon'ble Apex Court in **Mobilox v. Kirusa Software: (2018) 1 SCC 353** with regard to the 'dispute' held as follows.

> "51. *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".*

The dispute with regard to settlement agreement is that it was arbitrary, oppressive and vitiated by undue influence, coercion and duress. The other dispute raised is with regard to the deficiency in service by the petitioner and delay in delivery of Engine sl.no.193-208 by MTU-Netherlands (assignor of the petitioner). On a cursory glance it would *prima facie* appear that the settlement agreement is loaded in favour of the petitioner and MTU-Canada. In a settlement agreement, ideally, the genuine concerns of both the parties need to be addressed. No apparent concession *prima facie* is seen to have been given to the respondent. Similarly, the email exchanged between the

14/11/19

parties would indicate that there has been some deficiency in service of the maintenance of the engine sl.no.193-263 and delay in delivery of the other aircraft engine. But the respondent having entered into the settlement agreement, all its grievances of deficiency in service and delay in delivery of the engine got erased and coalesced into the terms of the said agreement. To use the phrase "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" of the Hon'ble Court, in this case, the contentions presently raised by the respondent would not satisfy the requirements laid down by the Hon'ble Court. Considering the findings in Issue No. I, it can be stated that the respondent by entering into the settlement agreement dated 7th September, 2016 essentially agreed to forgo the contentions raised earlier in its emails regarding the deficiency in service by the petitioner and delay in delivery of the leased engine by the MTU-Netherlands. The terms and conditions of the earlier agreements got merged with the terms and conditions of the settlement agreement. The settlement agreement in clear terms indicated that it shall be binding on the parties and constituted the entire agreement between them relating to the subject matter (its failure in making number of payments under the Aircraft Engine Lease Agreement, the Maintenance Agreements with the Petitioner and MTU-Canada) and superseded any other agreements between the parties. Respondent's readiness and willingness to enter into the settlement agreement has not been questioned in any appropriate forum till it received the legal notice in July 2017. It also did not take any step even subsequent thereto, though the statutory notice was given one year later. It did not approach the appropriate forum to avoid the settlement agreement despite there being a gap of one year between the legal notice and the statutory notice. It also did not take any steps to nullify the effect of the decree of the foreign court which held that the service against it had been sufficient. The

14/11/19

copy of the order was duly sent to the respondent by email as early as 20th March, 2017. As already indicated, this authority cannot go into the legality and propriety of the foreign judgement and the settlement agreement. Challenge to the settlement agreement only in the reply to the statutory notice is a mere bluster and can be considered to be a feeble legal argument. The same would not qualify to be dispute in terms of section 8 of the Code and the principle laid down by the Hon'ble Apex Court indicated above. Therefore, in my considered opinion the respondent had failed to bring to the notice of the petitioner the existence of a dispute subsequent to the execution of the settlement agreement. Issue No. II answered in the negative.

Issue No. III:

14. In view of the findings in the foregoing issues the Company Petition succeeds and needs to be admitted. Issue No. III is answered in the affirmative.

15. As indicated earlier, the settlement agreement which according to the parties covers the entire gamut of the relationship between them concerning the subject matter and supersedes all previous agreements. The settlement agreement does not contain an arbitration clause. The respondent by executing the settlement agreement forsook its claim to invoke the arbitration clause(s) contemplated in the agreement, dated 6th November, 2014 with MTU-Berlin and 8th November, 2014 with MTU-Canada. The absence of the arbitration clause in the settlement agreement indicated that the parties agreed to adhere to the terms and conditions of the settlement agreement and did not wish outside interference to settle their differences notwithstanding the fact that the settlement agreement *prima facie* might have been lopsided and skewed. More so when the same has been allowed to subsist till date. Section 8 of the Arbitration and Conciliation Act, 1996 is as follows:

> *Section 8 - Power to refer parties to arbitration where there is an arbitration agreement -*

14/11/19

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute then notwithstanding an judgment, decree o order of the Supreme Court or any court, refer the parties to the arbitration unless it finds that prima facie no valid arbitration exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that court.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

16. The action before this forum thus cannot be said to be a subject matter of an arbitration agreement. Therefore, the parties cannot be referred to arbitration as contemplated under the quoted provision. The prayer in IA No. 529/2019 accordingly cannot be allowed. Hence ordered.

ORDER

The Company Petition be and the same is admitted on contest. The IA No. 529/2019 is rejected on contest.

i. The Corporate Insolvency Resolution Process of the respondent Company namely LEPL Projects Limited shall commence from this date and shall be completed within 180 days hence.

ii. Ms. Medarametla Srinivasa Mano Ranjani (Registration No. IBBI/IPA-001/IP-P00736/2017-2018/11235), having office at Flat

14/11/19

122, VasaviIndraprastha, Street 1, Czech Colony, Sanathnagar, West Maredpally, Telangana – 500 018; e-mail ID: mano3ranjani@gmail.com; Mobile No. 98484 59322is appointed as the Interim Resolution Professional (IRP). No disciplinary proceeding is pending/proposed against her as per the IBBI website. She is requested to furnish her consent in Form No.2 forthwith.

iii. She is directed to take charge of the Respondent/Corporate Debtor's management forthwith and take necessary steps in furtherance of the CIRP in terms of Sections 13(2), 15, 17, 18 and 20 of Code and Rules made thereunder.

iv. Moratorium in respect of the respondent is hereby declared under Section 14 of the Code.

v. The Directors, Promoters or any other person(s) associated with the management of Corporate Debtor shall extend all assistance and cooperation as stipulated under section 19 of the Code to the IRP and for effectively discharging her functions under the Code.

vi. The Registry is directed to communicate the order to the Petitioner/Operational Creditor and the Respondent/Corporate Debtor forthwith.

vii. The petitioner/OC and the Registry are also directed to send the copy of this order to IRP for necessary compliance.

viii. There would however be no order as to costs.

14/11/19

(MOHAMMED AJMAL)
MEMBER JUDICIAL

Dy. Regr./Asst. Regr/Court Officer/
National Company Law Tribunal, Hyderabad Bench

प्रमाणित प्रति
CERTIFIED TRUE COPY
केस संख्या
CASE NUMBER... TCP(IB)No.5/9/AMR/2019 (CP(IB)No.62/9/HDB/2019)
निर्णय का दिनांक
DATE OF JUDGEMENT... 14/11/19...
प्रति तैयार किया गया
COPY MADE READY ON... 15/11/19

IA No. 529/2019 in