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

Judgement reserved on: 05.03.2015
% Judgement delivered on:19.03.2015

\+ **WP(C) 871/2015**

AWAS 39423 IRELAND LTD. & ORS. .....Petitioners

Versus

DIRECTORATE GENERAL OF CIVIL AVIATION & ANR. ..... Respondents

\+ **WP(C) 747/2015**

WILMINGTON TRUST SP SERVICES (DUBLIN) LIMITED .....Petitioners

Versus

DIRECTORATE GENERAL OF CIVIL AVIATION & ANR. ..... Respondents

Advocates appeared in this case:

For the petitioners: Mr Kevic Setalvad, Sr. Adv. with Ms Sneha Rao & Mr Amit A. Pai, Advs. for the petitioners in WP(C) 871/2015.
Mr Ramji Srinivasan, Sr. Adv. with Mr Ravi Nath, Mr Ajay Kumar, Mr Rohan Ghosh, Ms Neha Singh, Mr Karan Lahiri, Mr Rajeev Kumar, Ms Radhika Mathur, Ms Sara Sundaram & Mr Rishabh Kapur, Advs. for the petitioner in WP(C) 747/2015.

For the Respondents: Mr Sanjay Jain, ASG with Ms Anjana Gosain, Mr Pradeep Desodya, Mr Arnab Naskar, Ms Saroj Bidawat & Mr Vidur Mohan, Advs. with Mr S. Dutta, Director (Airworthiness) & Mr M. Debula, Asstt. Director, for R-1.
Mr Sandeep Sethi, Sr. Adv. with Mr Atul Sharma, Mr Anand Srivastava, Mr Milanka Choudhury & Mr Kshitiz Khera, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,J

WP(C) 871/2015
WP(C) 747/2015 & CM Nos. 2894/2015 & 2895/2015

1. The captioned petitions pertain to entities, which essentially seek de-registration of aircrafts (the details qua which I shall provide hereafter), upon termination of the lease agreements with respondent no.2. The other relief sought in both petitions are consequential in nature. Respondent no.2, in both petitions, is an airline, by the name of, Spicejet Limited. For the sake of convenience hereon, respondent no.2 will be referred to as Spicejet. Furthermore, hereon I will be making a reference to aircrafts as aircraft objects.

1.1 The other respondent in the two petitions is also common, which is respondent no.1. Respondent no.1 in both petitions is the Director General of Civil Aviation. Hereafter the Director General of Civil Aviation will be referred to as DGCA.

1.2 In order to adjudicate upon the petitions before me, the following facts are required to be noticed, which I would be setting out case-wise. The discussion though, concerning both facts and the law, would be common, as arguments have been advanced by counsels for parties on both sides, based on the premise that there are no substantial differences on facts in respect of the two matters.

FACTS IN WP(C) 871/2015

2. There are three petitioners in this matter. Each of these petitioners claim to be represented by their respective power of attorney holders. The

petitioners, apparently, entered into lease agreements, on various dates, with Spicejet. At that stage, Spicejet executed two crucial documents in favour of the petitioners. First, an Irrevocable De-Registration Power of Attorney (IDPOA). Second, an Irrevocable De-Registration and Export Request Authorization (IDERA). The details, with respect to the aircraft objects in respect of which the aforementioned documents have been executed, are as follows:

Petitioners	Aircraft Model	Manufacturer's Sl. No	Indian Registration Mark	Lease agreement date	IDPOA date	IDERA date	Certificate of registration
1	B 737-800	39423	VT-SGZ	30.4.12	30.4.12	30.4.12	14.05.12
2	B 737-800	39424	VT-SZA	22.5.12	24.5.12	24.5.12	04.06.12
3	B 737-800	39427	VT-SZB	17.10.12	23.10.12	18.10.12	29.10.12

2.1 As would be evident from the details given in the table above, that Certificate of Registration (COR) was issued by the DGCA in respect of each of the three aircraft objects. The COR, inter alia, certifies that the aircraft objects, described above, have been duly entered in the Indian Civil Aviation Register (in short ICAR), with effect from the date indicated therein, in accordance with the Convention on International Civil Aviation dated 07.12.1944 and the Aircraft Act, 1934 (in short the Aircraft Act), as also the Rules framed thereunder. In the three CORs issued vis-a-vis the aforementioned, it is sated that they are hypothecated by an entity by the name of Wells Fargo Bank, Northwest National Association.

2.2. Apparently, according to the petitioners, the defaults, in payment of lease rents, by Spicejet, prompted them to issue default-cum-termination and re-delivery notices. There were three separate notices of even date,

i.e., 18.12.2014, issued qua each of the aircraft objects. The said notices, inter alia, alluded to the failure on the part of the of Spicejet to pay basic and supplemental rent, in accordance with the terms of the lease, within three business days of the payments falling due; triggering an event of default under Section 17(a) of the Aircraft Lease Agreement (in short the Lease Agreement). The notices went on to state, that consequently, the lease, was terminated with immediate effect in accordance with the provisions of Section 18(a) (v) of the lease agreement. A demand was also made that Spicejet should, at the petitioners' expense, immediately return the aircraft objects, together with all documents at the location set out in the notices.

2.3 Spicejet, did not comply with the directive contained in the default notice, which propelled the petitioners to approach the DGCA. In this connection, petitioners wrote to the DGCA, on 19.12.2014. In the said communication, a request was made to the DGCA that, it should call upon Spicejet to ground the aforementioned aircraft objects and, take necessary steps, to return the same to them to the place already indicated.

2.4 Since, Spicejet continued to operate the aforementioned aircraft objects, even though the lease agreements vis-a-vis each one of them had been terminated, the petitioners, made a request to the DGCA, vide three separate communications of even date, i.e., 26.12.2014, to de-register the aircraft objects from the ICAR and, to issue an "Export Certificate of Airworthiness" – to enable them to ferry the aircraft objects out of the country, at their costs.

2.5 As there was no response by the DGCA to the petitioners' communications of 26.12.2014, by way of follow-up, once again, three

separate communications were sent, all of which were dated 29.12.2014, in respect of the aforementioned aircraft objects.

2.6 In the interregnum, DGCA had issued a communication dated 26.12.2014, which the petitioners claim, they received on 29.12.2014 as an attachment to an email of the same date, whereby they were directed to submit the following documents/ information:

(i) Certificate of registration in original.

(ii) Confirmation on de-activation of aircraft objects address for "Mode S transponder".

(iii) Application for issuance of Export Certificate of Airworthiness.

2.7 The petitioners, promptly, replied to this communication vide a letter dated 02.01.2015, whereby it informed DGCA that, in so far as COR was concerned, the same was available with Spicejet, as the operator of the Aircraft, and that, in any case, in terms of the relevant provisions of law, the original was to be retained by the operator. In so far as the photocopy of the same was concerned, the same had already been handed over to it.

2.8 As regards confirmation of de-activation address allotted to them for "Mode S" Transponder was concerned, it was indicated that the said exercise was normally carried out after the aircraft objects was de-registered. In any event, the petitioners undertook to furnish the necessary information; and, for that purpose, requested that they be provided the required format.

2.9 As regards issuance of Export Certificate of Airworthiness was concerned, the petitioners indicated that they would not be requiring the same vis-a-vis aircraft objects bearing manufacturer's serial no. 39423 and 39427. In so far as aircraft objects bearing manufacturer's serial no. 39424

was concerned, it was indicated that an application in the prescribed format would be submitted for the said purpose.

3. It is pertinent to point out that there were two separate letters of the same date, i.e., 02.01.2015, which were issued. The contents of both letters were common except the last part referred to above, that is, requirement of Export Certificate of Airworthiness. Pertinently though, the request for the de-registration, was reiterated in both letters.

3.1 However, by a subsequent letter dated 08.01.2015, it was clarified that even for the aircraft objects bearing manufacturer's serial no. 39424, the petitioners did not require the Export Certificate of Airworthiness. In other words, ultimately for none of the three aircraft objects, the said certificate was required. By this letter, while the petitioners' earlier request for de-registration remained intact, they indicated their revised preference for grounding the aircraft objects, as against what was indicated in their earlier communication.

3.2 In the earlier communication, the request made was that the aircraft objects be grounded at a place in Ireland, however, in this letter, it was indicated that the aircraft objects could either be grounded at the Hosur Airport, in Belagondapalli or, at the Indira Gandhi International Airport, in New Delhi.

3.3 The aforesaid communication by the petitioners was followed by a communication dated 09.01.2015, addressed to the DGCA. In the said letter, a reference was made to the proposed amendment to be carried out in Rule 30 of the Aircrafts Rules, 1937 (in short the Aircraft Rules). While doing so, the petitioners sought to bring to the notice of DGCA the following:

(i) That the petitioners, i.e., the lessors, were the authorized parties under IDERA executed by Spicejet qua each of the aforementioned aircraft objects.

(ii) The lessors/ owners and mortgagees were the only "registered interest holders", in respect of the said aircraft objects, and that, there were no other registered interest holders in existence.

3.4 Accordingly, with this letter dated 09.01.2015, the petitioners appended the following for DGCA's reference:

(a) IDERAs.

(b) Priority interest search certificates in respect of airframes and related engines, as on the said date.

(c) Consent letters of respective owners and mortgagees dated 12.12.2014 and 18.12.2014 respectively, which had already been submitted to the Director of Airworthiness, DGCA.

3.5 As a result of the aforesaid communication, DGCA was propelled to act and, consequently, it issued an email on the same date, i.e., 09.01.2015, to Spicejet wherein, it adverted to the fact that, since, it had failed to abide by its commitment with regard to de-registration request of the petitioners/ lessors, it should surrender the COR, of the aircraft objects , and de-activate the "Mode S Transponder" Code allocated to the said aircraft objects. Reference in this regard was made to Spicejet's mail dated 07.01.2014. DGCA made it clear that the aforesaid was required to be done in order to process the lessors', i.e., the petitioners' request for de-registration of the aircraft objects from ICAR on account of termination of the lease agreement. Furthermore, Spicejet was called upon to treat the matter as "most urgent".

3.6 It appears that the petitioners received no response to their request for de-registration of the aircraft objects, and hence, sought an update from the DGCA vide letter dated 13.01.2015.

3.7 Despite, the aforesaid communications sent on the issue by the petitioners, there was no movement in the matter. Consequently, the petitioners were compelled to move this court by way of a petition under Article 226 of the Constitution.

4. The captioned petition was moved on 30.01.2015 when, both DGCA and Spicejet, were represented by counsels. Ms Gosain, who appeared on that date, on behalf of DGCA, submitted that her client was not able to process the case for de-registration, as Spicejet had not complied with its directive. Since, Ms Gosain, was not able to assist me, as to whether DGCA was invested with any coercive powers either under the Act, or the Rules and Regulations framed thereunder – the presence of the concerned officer, was sought, for that purpose on the next date of hearing. It is in this background, that arguments were heard on the returnable date, and the dates thereafter, whereupon the matter was reserved for judgement.

FACTS IN WP(C) 747/2015

5. In this case, there is only one petitioner. The petitioner executed three separate lease agreements of even date, i.e., 07.08.2013, with Spicejet, in respect of three aircrafts. In addition, the IDPOA and IDERA were also executed. The details of the lease agreements, the IDPOA and IDERA, and other information qua the aircraft are provided hereinafter in the tabular chart:

S. No.	Aircraft Model	Manufacturer's Sl. No	Indian Registration Mark	Lease agreement date	IDPOA date	IDERA date	Certificate of registration

1	B 737-800	37364	VT-SZI	7.8.13	3.10.13	03.10.13	14.10.13
2	B 737-800	41397	VT-SZJ	7.8.13	24.1.14	24.1.14	03.02.14
3	B 737-8GJ	41398	VT-SZK	7.8.13	21.5.14	21.5.14	26.5.14

5.1 As in the other case, Spicejet defaulted in payment of lease rent, which resulted in the petitioner issuing a common default notice dated 10.12.2014, as a termination event had occurred, as provided for in clause 23(a) of the subject lease agreements.

5.2 The petitioner thus, sought re-delivery of the aircraft objects, along with documentation on board, as early as possible, though no later than five days from the date of the notice. Spicejet was directed to deliver the aircraft objects at the specified place in Singapore.

5.3 The aforesaid communication was followed by three separate letters of even date, i.e., 19.12.2014, which were addressed to Spicejet. By virtue of these communications, lease qua each of the aircraft objects was terminated. As in the previous communications, the Spicejet was asked to re-deliver the aircraft objects at the specified site in Singapore.

5.4 On the same date, letters were also issued to the DGCA (i.e., letter dated 19.12.2014). By this communication, the DGCA was informed of the fact that, the petitioner had terminated the lease qua the aircraft objects. The said letters were accompanied by the following documents pertaining to each of the aircraft objects:

(i) The termination letter dated 19.12.2014.

(ii) Certificate of Registration.

(iii) Certificate of Airworthiness.

(iv) IDERA and IDPOA.

5.5 Furthermore, vide this very communication, the DGCA, was also informed, that there, was no litigation initiated either by the Airport Authority of India or, any private airport in India, in respect of the aforementioned aircraft objects. A request was made to the DGCA that it should permit the lessee (i.e., Spicejet), to transfer the custody of the records of the aircraft objects and, any parts removed therefrom, to their representative, at Spicejet office in Gurgaon, in India.

5.6 Spicejet was, similarly, requested by the petitioner to liaise with the DGCA for obtaining necessary permission for return of the aircraft objects. Separate letters were issued in respect of each of the aircraft objects.

5.7 Having failed to prevail upon Spicejet, to do the needful in the matter, on 30.12.2014, the petitioner, once again, by three separate communications, issued qua the aforementioned aircraft objects, made a request that they be de-registered from the ICAR, with immediate effect. It was indicated that the petitioner will be willing to ferry the aircrafts out of the country at their own costs, and that, they would deliver the COR to it, immediately, upon receipt of the same from the Spicejet.

5.8 This was followed by a letter dated 06.01.2015, wherein they reiterated the fact that they had, as far back as on 10.12.2014, requested Spicejet to allow the export of aircraft objects at their expense upon termination of the respective lease agreements. The petitioner, sought assistance of the DGCA, in de-registration of aircraft objects in consonance with their earlier request dated 30.12.2014. A passing reference was also made with regard to the fact that, they had a "bad experience", like other companies, in respect of another Indian airline

company, i.e., Kingfisher, and hence, were concerned about getting involved in a lengthy repossession process.

5.9 The aforesaid was followed by yet another communication by the petitioner, on the subject, dated 09.01.2015. In this communication, inter alia, a reference was made to a meeting which its representatives had attended on 08.01.2015, with the Jt. Secretary in the Ministry of Civil Aviation.

6. The DGCA was reminded that, at the meeting they were informed by its Deputy Director of Airworthiness that, under the IDERA route, it would de-register the aircraft objects within five working days, upon documents being furnished. It appears, in the said communication a reference was also made to the Draft Rule 30(7) of the Aircraft Rules.

6.1 Consequently, by another letter sent on the same date (i.e., 09.01.2015), by the petitioner, to DGCA, information was given to the effect that: (i) it was the only IDERA holder for the three aircraft objects; and (ii) that it was also the only registered interest holder in respect of the three aircraft objects.

6.2 As in the other case, the original IDERAs of the three aircraft objects, and priority search certificates, in respect of airframe and related engines, as obtaining on that date, were furnished.

6.3 Propelled by the aforesaid, DGCA on 09.01.2015, issued a missive to Spicejet to surrender the COR and de-activate the "Mode S" Transponder code allocated qua the aircraft objects leased out by the petitioner. Once again, reference was made to Spicejet's mail dated 07.01.2014.

6.4 Evidently, Spicejet continued to disregard the directive of DGCA,

which compelled the petitioner to dispatch an email dated 12.01.2015, on the subject. A copy of this communication was sent to Spicejet, as well. In this communication the petitioner indicated that they had re-submitted their request for de-registration of the aircraft objects, and that, they would like to complete the process of de-registration, as soon as possible, by a process which was as orderly as possible, under the given circumstances.

6.5 The petitioner, optimistically, reiterated this request to the DGCA vide its letter dated 16.01.2015. In this letter, reference was also made to the applicable Convention, i.e., the Convention on International Interest In Mobile Equipments (in short the Convention) and the Aircraft Protocol (in short the Protocol).

6.6 Being aggrieved by the fact that DGCA had not taken its directive dated 09.01.2015 any further, the petitioner, chose to approach this court, under Article 226 of the Constitution. This petition was moved on 28.01.2015.

6.7 On that date, DGCA was represented by Ms Gosain. On being queried, Ms Gosain informed that the matter pertaining to de-registration was under consideration, and that, she would revert with instructions on the next date. Since, Spicejet was not represented, notice was issued to the said entity in the matter. It was made clear, in case the respondents chose to resist the petition they would file their respective counter affidavits before the next date of hearing.

6.8 On the returnable date, i.e., 20.01.2015, it was found that while Spicejet had filed its counter affidavit, DGCA, had failed to do the needful. On account of urgency expressed in the matter, arguments were heard on that date and on several dates thereafter. The judgement, was finally

reserved, in this matter as well, on 05.03.2015.

SUBMISSIONS OF COUNSELS

7. In the background of the aforesaid facts, arguments in WP(C) 871/2015 were advanced by Mr Kevic Setalwad, Sr. Advocate on behalf of the petitioners, while in WP(C) 747/2015, submissions were made by Mr Ramji Srinivasan, Sr. Advocate. In so far as the DGCA was concerned, submissions were made by Mr Sanjay Jain, the learned ASG, assisted by Ms Anjana Gosain, while Spicejet was represented by Mr Sandeep Sethi, Sr. Advocate, assisted by Mr Atul Sharma.

8. On behalf of the petitioners (i.e., in WP(C) 871/2015) Mr Setalwad, broadly, argued as follows:

(i) That the lease qua the aircraft objects, having been terminated, followed by the lodgement of the IDERA with the DGCA, the provisions of Article IX of the Protocol had been triggered. The petitioners, being the only registered interest holders, with none having a ranking higher than theirs, they were entitled to the de-registration of the aircraft objects.

(ii) The remedy under Article IX of the Protocol was, in addition, to remedies provided under chapter III of the Convention.

(iii) The right to seek the de-registration of the aircraft objects, remained unaffected by any declaration deposited by India qua Non-Consensual Right or Interest (in short NCRI) under Article 39 of the Convention.

(iv) The declaration made in Form No. 1, under clause (a) and (b) by Republic of India, under Article 39 (1)(a) of the Convention, were required to be registered in terms of Article 40 of the Convention. For this purpose, reliance was placed on Form No. 6, clause (a) and (b), of the Declaration lodged by India.

(v) The failure to register the liens, which are delineated in Form No. 1, clause (a) & (b), would render them inefficacious. In so far as liens in favour of repairers of aircraft, as described in Form No. 1 clause (c) is concerned, that would be dependent on their position and limited by the extent of service or services performed on and value added to, the aircraft objects.

(iv)(a) In support of this submission, my attention was drawn to Article 1 (m), (bb) and (cc) of the Convention.

(vi) The DGCA, upon being informed that the lease in respect of the aircraft objects is not in force, is required to cancel its registration as reflected in the ICAR. The fact that this obligation is cast on DGCA is clearly provided in Rule 30 (6)(iv) of the Aircraft Rules.

(vii) Post, the amendment of Rule 30, by insertion of sub-rule (7), in the said Rule, any doubt, as to the mandatory nature of the duty, cast upon DGCA to de-register the aircraft after the lease is terminated, was removed.

(vii)(a) The amendment, which was brought about by gazette notification dated 09.02.2015, prescribes that registration of an aircraft, registered in India, to which the Convention or the Protocol applies, shall be cancelled by the Central Government, as provided in the Protocol, if an application is received from IDERA holder, prior to expiry of the lease, along with the following documents:

(a.1)The original or notarized copy of IDERA.

(a.2) A certificate that all registered interests, ranking in priority, have been discharged, or the holder's of such interests have consented to the de-registration and the export of the aircraft objects.

(vii)(b) The petitioners having lodged both these documents with their letter dated 09.01.2015; the DGCA was bound, in law, to de-register the aircraft objects.

(viii) A mandamus could issue to the DGCA to discharge its duties cast upon it, in law, once the conditions prescribed therein, stood fulfilled. The law required placement of documentary evidence of a fact that the lease qua the aircraft objects, on the date when request for de-registration was lodged was not in force. The factum of the lease having been terminated, is reflected by the termination notice, which in turn, is based, on the rights conferred on the petitioners under IDERA.

(viii)(a) The other requirement that, there was no other registered interest which ranked higher than the petitioners', having also been fulfilled upon lodgement of a priority interest search certificate, the DGCA, was bound to proceed to de-register the aircraft objects.

(ix) In support of his submissions, reliance was placed by Mr Setalwad, on the judgement of this court in ***Corporate Aircraft Funding Company LLC vs Union of India & Ors., (2013) 199 DLT 327***, and the Division Bench judgement in the same case, which is dated 10.05.2013, passed in LPA No. 226/2013, titled: ***Directorate of Revenue Intelligence vs Corporation Aircraft Funding Company LLC & Ors***. On the aspect of the power of the court to issue a writ of mandamus in certain circumstances, reliance was placed on the judgements of the Supreme Court in ***CAG vs K.S. Jagannathan, (1986) 2 SCC 679*** and in the case of ***State of Bombay vs Pandurang Vinayak, AIR 1953 SC 244***.

9. Mr Srinivasan, in full measure, supported the stand taken by Mr Setalwad, except qua one aspect which, I would advert to immediately

hereafter.

9.1 The learned counsel, in no uncertain terms, stated before me that, in so far as the petitioner, he was representing, was concerned, for the moment, was only interested in obtaining the de-registration of the aircraft objects.

9.2 Like Mr Setalwad, Mr Srinivasan took me through the provisions of the Convention and Protocol to buttress his point of view.

10. On the other hand, Mr. Sethi, appearing for Spicejet, made the following submissions :

(i). That the issue involved in the present writ petitions was similar to the one, which arises in LPA No.32/2015. The said appeal, is pending adjudication before a Division Bench of this court and, therefore, this court ought to hold its hand rendering a decision in the instant petition.

(i)(a). In respect of aforesaid submission, I may only note that I was informed that, though initially, the Division Bench, had reserved orders in the appeal, it had refrained from pronouncing an order as, an application had been moved, bringing on record the fact that an amendment had been brought about in Rule 30 of the Aircrafts Rules. Accordingly, the decision in the appeal, it appears, has been deferred.

(ii). The petitioners, cannot be granted reliefs as there are, disputed questions of fact involved in the matter.

(iii). The petitioners, qua the alleged disputes have initiated proceedings in the High Court of Justice, Queens Bench Division, Commercial Court in London against Spicejet. The claim lodged in those proceedings is based on an identical cause of action. There is a similarity both, in respect of facts as well as reliefs.

(iii)(a) It may only be noted that claims in the English Court, evidently, were lodged on 04.02.2015.

(iv). The petitioners are holding with them security deposits far in excess of their respective claims.

(iv)(a). Reference in this respect was made to the details of deposits held by the petitioners, as set out in paragraph 13 of the counter affidavit, filed in each of the two petitions.

(v). The issue, as to whether the petitioners are entitled to terminate the subject lease agreements, is an aspect, which requires determination by a competent court of law.

(vi). Spicejet has filed a scheme of reconstruction and revival for enabling take over of its ownership, management and control with the Government of India, Ministry of Civil Aviation, on 15.01.2015. The said scheme has received the approval of Government of India on 22.01.2015. The scheme of acquisition of interest by the new promoter has also received approval of the Competition Commission of India vide order dated 19.02.2015.

(vii). In case the petitioners are allowed to repossess the aircraft objects, great prejudice would be caused to Spicejet which, cannot be compensated in terms of money. The repossession of aircraft objects will engineer a collapse of the turn-around plan and, would, consequently, impact public interest as, it would impinge on the employment prospects of the personnel engaged with it. This apart, the interest of passengers, who have already booked their air passage with Spicejet, would get affected. For such passengers the cost of air travel, would become expensive.

(viii). The petitioners prayer for de-registration of the aircraft objects

cannot be allowed till such time the claims, as stipulated in the declaration are settled.

(viii)(a) For this purpose, reliance was placed on paragraph 18 of the counter affidavits filed in the present petition; to demonstrate that, Spicejet owed a sum of Rs.1,580 Crores to various creditors, which included, the Airport Authority of India (AAI), Private and International Airports; the Tax Authorities, Aircraft Lessor and other creditors.

(viii)(b) The submissions in this behalf were pivoted on the declarations filed by the Government of India under Article 39 of the Convention. The other provisions, which were relied upon were Article 40 of the Convention read with Article IX and XI of the Protocol.

(ix). This court, could not in any event issue a mandamus to DGCA for de-registration of the aircraft objects . The DGCA, is required to exercise its power of de-registration in line with the declarations made by the Government of India under Article 39 (1)(a) of the Convention.

(x). The amendment to Rule 30, carried out by way of insertion of Sub-Rule (7) did not materially change the existing position, which is that, the DGCA on receiving the request for de-registration, would have to consider, whether or not to issue a direction as sought, having regard to the subsisting lien(s) qua wages of employees, taxes, and the dues owed by the Airline i.e., Spicejet to various statutory authorities. In this case, since, admittedly, payments were outstanding towards employees and statutory authorities, the DGCA, cannot direct de-registration.

10.1 In support of his submissions, Mr Sethi placed reliance on the following judgments: judgment dated 10.05.2013, passed in LPA 226/2013, titled: ***Directorate of Revenue Intelligence Vs. Corporate Air***

Craft Funding Company LLC and Ors.; and the judgements of the Supreme Court in ***U.P. State Road Transport Corporation and Anr. Vs. Mohd. Ismail and Ors., (1991) 3 SCC 239*** and ***Union of India and Anr. Vs. Bilash Chand Jain and Anr., (2009) 16 SCC 601***.

11. Mr. Jain, the learned ASG, while, substantially, supporting the submissions made on behalf of Spicejet, stressed upon the following, in so far as the declarations lodged by the Government of India are concerned :-

(i). The power to de-register an aircraft conferred on DGCA under Rule 30 of the Aircrafts Rules is an enabling power, and that, in exercising this power, it would have to take into account the various liens that may obtain vis-a-vis the aircraft objects.

(i)(a). It is pertinent to note here that the learned ASG on being queried as to whether the declarations lodged by the Government of India could travel beyond the Municipal Law – agreed that the declarations could not enlarge the scope of the Municipal Law. On being further queried, as to what were those Municipal Laws, under which liens were sought to be enforced, the learned ASG, candidly, stated that this aspect of the matter had not been examined by the DGCA.

(ii) Therefore, in the context of the above, the learned ASG submitted that as long, as this court, were not to order export of the aircraft objects, the other aspect of de-registration, could be dealt with in the present petitions.

REASONS

12. I have heard the learned counsel for parties and perused the record. What has emerged from the record is as follows:-

(i). The petitioners have taken recourse to the IDERA route, as

prescribed in Article IX of the Protocol.

(ii). The IDERA along with IDPOA have been voluntarily executed by Spicejet. The IDERA, has been lodged with the DGCA.

(iii). The events of default have occurred qua the lease agreements in issue; the details of which are provided hereinabove.

(iv) Consequent to the defaults occurring which, essentially, pertain to non-payment of lease rents, the petitioners have terminated the lease agreements.

(v). The DGCA, has been informed about the factum of termination of the lease agreements.

(vi). The DGCA, has received the original IDERAs from the petitioners qua each of the aircraft objects , as also, photocopies of Priority Search Certificates, evidencing that the lessors, owners and mortgagees are the only registered interest holders.

(vii). The DGCA, recognizing the request for de-registration and export of the aircraft objects, outside the country, has called upon Spicejet to surrender the original CORs and, to de-activate the "Mode S" transponder code allocated to each of the aircraft objects. This aspect is evidenced by the e-mails dated 09.01.2015, issued by the DGCA to Spicejet.

(viii) The provisions of Rule 30 have been amended to the extent that a new sub-rule (7) has been inserted in the said Rule.

13. In the light of the aforesaid facts, what is required to be considered is: whether the petitioners are entitled to seek de-registration of the aircraft objects and, if so, what consequential reliefs, if any, ought to be granted to them?

14. In order to consider the various submissions made before me, one

would have to examine the provisions of the Convention, the Protocol and the Aircraft Rules, which were relied upon by the counsels for the parties represented before me.

15. In this context, a broad frame-work of the Convention has to be borne in mind. The preamble of the Convention would suggest that it seeks to facilitate the acquisition and use of mobile equipment of "high value" and economic significance. In other words, it encourages and facilitates asset-based financing. While doing so, it seeks to recognize the interest in such equipment and protects the same universally. The Convention thus, in effect, provides a legal architecture for international interest created in such equipment(s). For this purpose, the Convention has put in place an international registration system.

15.1 The idea being to provide, uniformity, certainty and predictability in commercial transactions involving high financial stakes. The Convention while protecting the interest of the creditors seeks to give due deference to the National Legal Regime, i.e., the Municipal Law of the Contracting State. Therefore, logically and, quite clearly, the Convention does not affect National Legal Regimes which concern and are relatable to criminal conduct and tortious liability. The Convention, also, does not appear to impinge upon public law issues.

15.2 The thrust of the Convention is to make available private finance for mobile equipments, to persons, situate in Contracting States.

15.3 The Convention, as currently positioned, deals with airframes and aircraft engines; helicopters; railway rolling stock; and space assets. It is the Protocol, which is, industry specific, which, provides the necessary frame-work vis-a-vis the concerned industry. Therefore, the Aircraft

Protocol, which is referred to, for sake of brevity, as the Protocol, both ***supplements*** and, wherever necessary, ***modifies*** the Convention (which is more generic in nature), to the extent necessary, for the purposes of the Aircraft Industry.

16. With this preface, let me deal with the submissions raised before me with regard to the declarations lodged by the Government of India under the Convention and their effect.

16.1 The Government of India, it appears, has lodged six (6) declarations under the Convention and five (5) declarations under the Protocol, under various Forms.

16.2 I will, however, for the sake of brevity, quote and discuss only those declarations, which are necessary for the purposes of the present case, albeit at the appropriate stage.

16.3 Suffice it to say, that Article 11(1) of the Convention, provides that parties may agree in writing as to what would constitute an event of default or otherwise give rise to rights and remedies, under Articles 8 to 10 and 13 of the very same convention. In each of the lease agreements, it is inter alia provided that lessee's failure to make payment of the lease rent, would constitute a "***termination event or an event of default***".

16.4 It is not disputed before me by Spicejet that, a termination event or an event of default has been triggered. In these circumstances, the remedies available to a lessor are those, which are provided in Article 10 of the Convention.

16.5 Article 10 provides that if, the event of default has occurred under a leasing agreement as envisaged under Article 11 of the Convention then, subject to any declaration that a Contracting State may have made under

Article 54, the lessor would have the right to either terminate the agreement and take possession or, control of any object to which the agreement relates or, could apply for a court order authorising or directing either of these acts.

16.6 Article 54(1) of the Convention, provides that a Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that while the charged object is situated within, or controlled from its territory, the chargee shall not grant a lease of the object in that territory. Clause (2) of Article 54 specifically provides that, the Contracting State shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare whether or not any remedy available to the creditor under any provision of the Convention which is not "***there expressed***" to require application to the court may be exercised only with the leave of the court.

16.7 I may only note that under Article 54(2) of the Convention, the Government of India has filed in Form No.13, with the following mandatory declaration: "...Any and all remedies available to the creditor under the Convention which are not expressed under the relevant provision thereof to require application to the court may be exercised ***without*** court action and without leave of the court." (emphasis is mine)

16.8 This would mean that in its declaration filed under the Convention, the Government of India has made it categorically clear that unless the remedy available to the creditor under the Convention, requires application to the court, the same can be exercised "***without court action and without the leave of the court***". This is important in the context of Article IX of the Protocol, as would be evident from the discussion, set forth hereafter.

16.9 In these circumstances, the petitioners are entitled to approach a court and, seek advance relief pending final determination under Article 13 of the Convention. The relief that the petitioners can seek under the said Article, ordinarily would be of the following nature: (a) preservation of the object and its value; (b). possession, control or custody of the object; (c). immobilisation of the object; and (d). lease or, except where covered by sub-paragraphs (a) to (c), management of the object and the income therefrom.

17. Clause (2) of Article 13 of the convention empowers the court to inter alia impose such conditions as it may deem necessary to protect, interested persons, in the event the creditor i.e., the petitioners herein, would either fail to perform any obligation qua the debtor under the Convention or Protocol while implementing such order of the court granting relief or, fails to establish its claim wholly or in part on the final determination of the claim. Under clause (3) of Article 13, it is indicated that the court may require notice of the request made to it, to be given to any of the interested persons before proceeding to grant relief pending final determination.

17.1 Article IX of the Protocol though, introduces modifications to the default remedies in as much as it confers an additional right on the creditor to procure: de-registration of the aircraft objects ; and, the export and physical transfer of the aircraft object from the territory in which it is situated. For these rights to operate, one would have to examine the other clauses of Article IX, which I intend to extract, in the judgment, to the extent necessary.

17.2 I may only indicate that Article X of the Protocol, similarly,

introduces certain modifications, regarding reliefs pending final determination that a creditor may seek from the court. Since, there was much discussion with regard to the provisions of clause (6) of Article X, I would be adverting, in particular, to the same, in the course of my discussion.

17.3 Article XI of the Protocol pertains to remedies available on insolvency of the debtor. It provides for two alternatives i.e., Alternative A and Alternative B. This article, one need not discuss any further, as the debtor, admittedly, is not insolvent, as yet.

17.4 Article XIII of the Protocol speaks, inter alia, of what would be the consequences of the debtor issuing an IDERA and, who could exercise the remedies specified in Article IX (1).

17.5 Notably, clause (4) of Article XIII says that the "registry authority" and other administrative authorities in the contracting State, "***shall***" expeditiously, co-operate with and assist the authorised party in exercise of the remedies provided under Article IX. Therefore, if a Contracting state has made a declaration pursuant to Article XXX (1) of the Act, and if, an IDERA is issued by the debtor, in this case, Spicejet, which is substantially in the 'Form' annexed to the Protocol (which is recorded with the "registry authority"), then, on the authorised person or its certified designee triggering the remedy under Article IX (1) (having regard to the applicable aviation safety laws and regulations), the same will have to be honoured by the registry authority and other administrative authorities of the Contracting States.

17.6 In the present case, a declaration has been filed by the Government of India in Form No. 27 under Article XXX (1), as required under Article

XIII of the Protocol. The debtor i.e., Spicejet, has admittedly issued an IDERA, which stands lodged with DGCA. Consequently, the remedies under Article IX (1) of the Protocol, stand triggered.

17.7 Pertinently, none of the provisions of Article IX refer to court intervention. In other words, remedy under Article IX can be availed of by a creditor (i.e., lessor in this case), without having to approach the court or having to seek its intervention.

17.8 The counsels for Spicejet and DGCA seek to contend that the remedies sought under Article IX of the Protocol are not available to the petitioners as there are in existence "registered interests", which rank higher than that of, the creditor i.e., the lessors/ petitioners herein.

17.9 It is in this context that the counsels for the respondents have argued that before the DGCA could act upon, the requests made for de-registration and / or export and physical transfer of the aircraft objects from India – it will have to take into account the NCRIs, which under the Municipal Law, would have priority over an interest in the aircraft object equivalent to that of the holder of a registered international interest.

17.10 This submission has been advanced by the counsels for the respondents based, inter alia, on various clauses of Article IX of the Protocol and Article 39 and 40 of the Convention. In this context, a reference is also made to the definition of words and/or expression used in the aforementioned provisions of the Convention and Protocol. I will advert to the same and endeavour to explain the applicability of the provisions of the convention and Protocol in juxtaposition to the facts obtaining in the instant case as I go along with the discussion. But let me first extract the relevant provisions.

"**Article IX – Modification of default remedies provisions**

1. ***In addition*** to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter :

(a). Procure the de-registration of the aircraft; and

(b). Procure the export and physical transfer of the aircraft object from the territory in which it is situated.

2. The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

3. Article 8(3) of the Convention shall not apply to aircraft objects. Any remedy given by the Convention in relation to an aircraft object shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.

4. A chargee giving ten or more working days' prior written notice of a proposed sale or lease to interested persons shall be deemed to satisfy the requirement of providing "reasonable prior notice" specified in Article 8(4) of the Convention. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.

5. The registry authority in a Contracting State shall, subject to any applicable safety laws and regulations, honour a request for de-registration and export if:

(a) the request is properly submitted by the authorised party under a recorded irrevocable deregistration and export request authorisation; and

(b) the authorised party certifies to the registry authority, if required by that authority, that all registered interests ranking in priority to that of the creditor in whose favour the authorisation has been issued have been discharged or that the holders of such interests have consented to the de-registration and export.

6. A chargee proposing to procure the de-registration and export of an aircraft under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed deregistration and export to:

(a) interested persons specified in Article 1(m)(i) and (ii) of the Convention; and

(b) interested persons specified in Article 1(m)(iii) of the Convention who have given notice of their rights to the chargee within a reasonable time prior to the de-registration and export.."

"**Article 39 – Rights having priority without registration**

1. A Contracting State may at any time, in a declaration deposited with the Depositary of the Protocol declare, generally or specifically :

(a). Those categories of non-consensual right or interest (other than a right or interest to which Article 40 applies) which under that State's law have priority over an interest in an object equivalent to that of the holder of a registered international interest and which shall have priority over a registered international interest, whether in or outside insolvency proceedings; and

(b). That nothing in this Convention shall affect the right of a State or State entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of that State for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object.

2. A declaration made under the preceding paragraph may be expressed to cover categories that are created after the deposit of that declaration.

3. A non-consensual right or interest has priority over an international interest if and only if the former is of a category covered by a declaration deposited prior to the registration of the international interest.

> 4. Notwithstanding the preceding paragraph, a Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that a right or interest of a category covered by a declaration made under sub-paragraph (a) of paragraph 1 shall have priority over an international interest registered prior to the date of such ratification, acceptance, approval or accession."
>
> "**Article 40 – Registrable non-consensual rights or interests**
> A Contracting State may at any time in a declaration deposited with the Depositary of the Protocol list the categories of non-consensual right or interest which shall be registrable under this Convention as regards any category of object as if the right or interest were an international interest and shall be regulated accordingly. Such a declaration may be modified from time to time.."

18. Having regard to the aforementioned extracts from the Protocol and Convention, let me begin with the effect that of provisions of clause (5) of Article IX of the Protocol on the issue under consideration. Article IX(5) of the Protocol casts an obligation on the registry authority in the Contracting State to honour a request for de-registration and export, if the following two conditions, are fulfilled. First, the request made, is properly submitted by an authorised party, under a recorded IDERA. Second, the authorised party certifies to the registry authority that all registered interests ranking in priority to that of the creditor in whose favour the authorisation has been issued have been discharged, or that, the holders of such interests have consented to the de-registration and export.

18.1 Admittedly, in this case both these conditions have been fulfilled.

18.2 The respondents, however, contend that since the definition of the expression, "registered interests" means a registrable NCRI, the DGCA cannot proceed to de-register the aircraft objects. In this context, the

definition of the following words and expressions needs to be kept in mind. Let me therefore, cull out the definition of: NCRI, registered, registered interests, unregistered interests, and registrable NCRI.

> "non-consensual right or interest" means a right or interest conferred under the law of a Contracting State which has made a declaration under Article 39 to secure the performance of an obligation, including an obligation to a State, State entity or an intergovernmental or private organisation..." [Article 1(8), the Convention]
>
> "registered" means registered in the International Registry pursuant to Chapter V..." [Article 1(bb), the Convention]
>
> "registered interest" means an international interest, a registrable non-consensual right or interest or a national interest specified in a notice of a national interest registered pursuant to Chapter V..." [Article 1(cc), the Convention]
>
> "unregistered interest" means a consensual interest or non-consensual right or interest (other than an interest to which Article 39 applies) which has not been registered, whether or not it is registrable under this Convention..." [Article 1(mm), the Convention]
>
> "registrable non-consensual right or interest" means a non-consensual right or interest registrable pursuant to a declaration deposited under Article 40.. [Article 1(dd), the Convention]"

18.3 A bare perusal provisions of the Article 39(1)(a) of the Convention would show that the Contracting State is required to indicate (by filing relevant declaration), the types of NCRIs (other than a NCRI to which Article 40 applies) which, under the Municipal Law, have priority, over an interest in the aircraft object equivalent to that of the holder of registered international interest and, which shall have priority over a registered

international interest, without they themselves being registered as international rights or interests.

18.4 In other words, a NCRI is a status, which is, conferred by the Municipal Law of the Contracting State. It is not a right or interest created by any agreement obtaining between the parties. The equivalent interest alluded to in Article 39 would be that of a person, who has an interest created under a charge or one, held by a conditional seller reserving title under an agreement or, even a lessor under a lease agreement. The petitioners, in the captioned petitions fall under the last category, that is, they are lessors under a lease agreement.

18.5 Thus, quite clearly, these rights and interests, referred to in the declaration filed under Article 39(1)(a) are created under the Municipal Law of the Contracting State and, are not, conferred by the Convention.

18.6 Therefore NCRIs covered by the declarations lodged by the Contracting State would have a priority over registered international interest, even though, they are not registered themselves.

18.7 I may only note here that an interest is construed as an international interest under the Convention, if it fulfils the requirements of Article 7 of the Convention. In the context of the lessor, it would suffice if, the agreement creating or providing for such an interest is: in writing; relates to an object qua which the lessor has the necessary power of disposal; and it enables the object to be identified in conformity with the Protocol. (Also see, Article 2 of the Convention).

18.8 The arguments advanced by Mr. Setalvad, based on Article 40 of the Convention that, NCRIs would not be enforceable unless they are registered, overlooks the fact that under the Convention, there are two

distinct types of NCRIs. The first kind of NCRIs are those, which find mention in Article 39 of the Convention. These NCRIs operate and have priority by virtue of the declaration lodged by the Contracting State. Their priority is not dependent on registration. There are other kinds of NCRIs, which are registrable, and accordingly, provision for them is made in Article 40 of the Convention. The use of the word, "registrable" as against "registered" in Article 40 of the Convention makes that amply clear.

18.9 The declarations made in Form No. 1, filed under Article 39(1)(a) and in Form No. 6 under Article 40 of the Convention, bring to fore this distinction, as well. The declarations filed by the Government of India under Article 39(1)(a), Article 39(1)(b) and Article 40 are set out below for the sake of convenience :-

> "..(i). Form No.1 [Specific opt-in declarations under Article 39(1)(a)]
> The following categories of non-consensual right or interest have priority under its laws over an interest in an aircraft object equivalent to that of the holder of a registered international interest and shall have priority over a registered international interest, whether in or outside insolvency proceedings, namely :-
>
> (a). liens in favour of airline employees for unpaid wages arising since the time of a declared default by that airline under a contract to finance or lease an aircraft object;
>
> (b). liens or other rights of an authority of India relating to taxes or other unpaid charges arising from or related to the use of that aircraft object and owed by the owner or operator of that aircraft object, and arising since the time of a default by that owner or operator under a contract to finance or lease that aircraft object; and
>
> (c). liens in favour of repairers of an aircraft object in their

possession to the extent of service or services performed on and value added to that aircraft object.

(ii). Form No.4 [General opt-in declaration under Article 39(1)(b)]

Nothing in the Convention shall affect its right or that of any entity thereof, or any intergovernmental organization in which India is a member, or other private provider of public services in India, to arrest or detain an aircraft object under its laws for payment of amounts owed to the Government of India, any such entity, organization or provider directly relating to the service or services provided by it in respect of that object or another aircraft object.

(iii). Form No.6 (opt-in declarations under Article 40)

The following categories of non-consensual right or interest shall be registrable under the Convention as regards any category of aircraft object as if the right or interest were an international interest and shall be regulated accordingly, namely :-

(a) liens in favour of airline employees for unpaid wages arising prior to the time of a declared default by that airline under a contract to finance or lease an aircraft object;

(b) liens or other rights of an authority of India relating to taxes or other unpaid charges arising from or related to the use of an aircraft object and owed by the owner or operator of that aircraft object, and arising prior to the time of a declared default by that owner or operator under a contract to finance or lease that aircraft object; and

(c) rights of a person obtaining a court order permitting attachment of an aircraft object in partial or full satisfaction of a legal judgment..”

19. A bare reading of the declarations would show that via Form No. 1, clause (a) and (b), liens have been created in favour of Airline employees

for unpaid wages arising since the time of the declared default by that Airline. This apart, lien has also been created qua authorities in India in respect of taxes or other unpaid charges, arising from or related to the use of the aircraft objects and, owed by the owner or the operator of the aircraft object. The lien adverted to is, one, which arises since the time of the declared default by the concerned airline under the lease agreement. The repairers of the aircraft objects have also been declared, as having lien, over an aircraft objects in their possession to the extent of service or services performed on and value added to the aircraft objects.

19.1 Under Article 39(1)(b) of the Convention, the declaration filed, makes it clear that nothing in the Convention will affect the right of the Government of India or any of the authorities or any inter-governmental organisation, in which India is a member or that of a private provider of public services in India to arrest or detain an aircraft object under its laws for payment of amounts owed to any of the above, which, directly relates to the service or services provided in respect of that object or another aircraft object.

19.2 The declaration under Article 40 of the Convention makes a distinction and, in that sense, is different to the one lodged under Article 39(1)(a) of the Convention, in as much as, though it adverts to the very same liens pertaining to employees with respect to their unpaid wages, taxes and unpaid charges of authorities in the Contracting State – it alludes to a period arising "***prior to the time of the declared default***". [See Form No. 6, clause (a)&(b)]. Therefore, unless such liens are registered, they may not be efficacious.

19.3 Identical situation arises vis-a-vis rights of a person obtaining a

court order permitting attachment of an aircraft objects in partial or full satisfaction of a legal judgment. The attachment will be recognized only if, it is registered.

20. The above discussion would show that the existence of lien under Article 39(1)(a) of the Convention has nothing to do with the remedy which the petitioners seek to avail of under Article IX of the Protocol. De-registration of the aircraft is not, in my opinion, hampered by the existence of liens, if any, under the Municipal Law of the Contracting State. The liens, as indicated above, under Article 39(1) (a) shall obtain if so provided under the Municipal Law. The extent of the lien shall also be governed by the Municipal Law and not by the Convention.

20.1 The learned ASG during the course of his submission was not able to inform me, as to the Municipal Law under which DGCA has liens, and whether, the appropriate stage had been reached for triggering any of the liens, referred to in the declarations lodged by the Government of India.

21. This brings to the issue as to the statutory obligation cast on the DGCA. The provisions of Rule 30 of the Aircraft Rules, are relevant for this purpose. Once again for the sake of convenience, the relevant provisions are extracted below :-

> "...30. Certificate of Registration – (1). The authority empowered to register aircraft and to grant certificate of registration in India shall be the Central Government. The certificate of registration shall include the following particulars, namely :-
>
> Type of aircraft, constructor's number, year of manufacture, nationality and registration marks referred to under these rules, full name, nationality and address of the owner, usual station of aircraft and the date of registration and the period of validity of

such registration.

Provided that in the case of leased aircraft, the certificate of registration shall also include the validity of the lease and the names, nationalities and addresses of the lessor and the lessee:
(1A). x x x
(2). x x x
(3). x x x
(4). x x x
(5). x x x

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

(i). Such registration is not in conformity with the provisions of sub-rule (2); or

(ii). The registration has been obtained by furnishing false information; or

(iii). The aircraft could more suitably be registered in some other country; or

(iv). The lease in respect of the aircraft, registered in pursuance of sub-clause (iv) of clause (a) of sub-rule (2), is not in force; or

(v). The certificate of airworthiness in respect of the aircraft has expired for a period of five years or more; or

(vi). The aircraft has been destroyed or permanently withdrawn from use; or

(vii). It is inexpedient in the public interest that the aircraft should remain registered in India..”

(emphasis is mine)

21.1 As would be evident upon a careful reading of the proviso to sub-

rule (1) that, in case of a leased aircraft, the COR should include inter alia the factum of the validity of the lease. In the cases under discussion, the lease is no longer valid; the lease agreements having been terminated.

21.2 The Central Government, which in this case, would be the DGCA, upon termination of the lease is required to cancel the registration of an aircraft, inter alia, under clause (iv) of sub-rule (6) of Rule 30 if, the lease is not in force.

21.3 The argument advanced on behalf of the petitioners, proceeds as follows, which is, that, a perusal of clauses contained in sub-rule (6) of Rule 30 would show, once the conditions stipulated therein are fulfilled, there is no discretion left with the DGCA, to defer the de-registration of the aircraft.

21.4 This argument was sought to be supported by drawing my attention to various situations, which were contemplated, inter alia, under clause (ii), (v) and (vi) of sub-rule (6) of Rule 30. These are cases where de-registration could be ordered if, the registrant has supplied false information, or that, the certificate of airworthiness stood expired for a period of five years or more, or if a situation arose whereby, the aircraft was destroyed or permanently withdrawn from use. In other words, the submission was, the word, "may" should be read as "shall".

21.5 As against this, the respondents have vehemently argued that it is only an enabling power, and therefore, the decision in this regard will have to be taken by the DGCA, and that, there can be no directive by the court to act in a particular manner. It is, in this context, that the counsel for the respondents had relied upon the Division Bench judgment of this court in the case of: ***DRI Vs. Corporate Aircraft Funding Company LLC***.

21.6 The argument that, this court cannot issue a writ of mandamus to DGCA is sought to be supported by placing reliance on two Supreme Court judgments, referred to in the Division Bench judgment in the case of ***DRI Vs. Corporate Aircraft Funding Company LLC***. These being: ***U.P. SRTC & Anr. Vs. Mohd. Ismail*** & ***Ors***. and ***UOI & Anr. Vs. Bilash Chand Jain & Anr***.

21.7 I may only note that the Division Bench in the case of ***DRI Vs. Corporate Aircraft Funding Company LLC***, concluded that the instructions issued by DRI with regard to its dues, was not binding upon the DGCA. The Division Bench, however, came to the conclusion that it would be a factor which the DGCA will keep in mind while examining the request of respondent no.1/lessor in that case, seeking de-registration of the aircraft object under Rule 30 of the Aircraft Rules. The Division Bench also, agreed that a writ of mandamus, directing the DGCA to de-register the aircraft objects, could not have been issued. The court in its operative directions, though, issued a writ of mandamus directing DGCA to exercise its enabling power to take a decision on the request made by respondent no.1/lessor for de-registration. [See Paragraphs 19, 22 and 24 of the Division Bench judgment].

21.8 One cannot quibble with the proposition that a court cannot issue a writ of mandamus where, an authority, is not required to act in a particular manner by express provisions of law. This dicta finds reflection even in Paragraph 12 of that judgement rendered in the case of ***UP SRTC & Anr. Vs. Mohd. Ismail & Anr***. The obligation, cast on DGCA under clause (iv), sub-rule (6) of Rule 30 of the Aircraft Rules requires it to de-register an aircraft if, the lease agreement qua the aircraft object is not in force.

Notably, like under clause (iv), each of the circumstances set out in sub-rule (6) are independent of each other. It may be, in a given situation that, more than one circumstance is attracted.

21.9 It is, therefore, quite possible that a statutory authority, which is vested with the power to act, under the law, chooses not to act by citing factors, with which the court finds fault: Would the court, in such a situation, be obliged to refer the matter to concerned authority for a fresh decision? I think not. The court, in my opinion, is not required to refer the matter, once again, to the statutory authority for revisiting the issue if, the necessary ingredients for exercise of that power are found to be in place, and the reasons cited, not to act, by the statutory authority, are found, by a competent court, to be legally untenable. In such a situation, the statutory authority has no other option but to act, as that is the duty cast on it, under the law. The court can thus issue a writ of mandamus. That, courts have issued writ of mandamus in such like, situations is, evident on perusal of the dicta and directions set out in the following cases: ***(i) Union of India and Ors. Vs. Indo Afghan Agencies Ltd., (1968) 2 SCR 366; (ii) Judgment dated 02.02.2012, passed in: WP(C) 423/2010, titled: Centre for Public Interest Litigation and Ors. Vs. Union of India and Ors. (2G case where the court ordered an auction to be carried out);*** and ***(iii) The CAG and Anr. Vs. K.S. Jagannathan, AIR 1987 SCC 537.***

22. In this context, I may only quote the following observations contained in paragraph 20 of the judgment in the case of the ***CAG and Anr. Vs. K.S. Jagannathan*** which are both instructive and illustrative of the situations in which a court can issue a writ of mandamus:-

> "..There is thus no doubt that the High Courts in India

> exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion malafide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case, a High Court can in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion..” (emphasis is mine)

22.1 In my opinion, a bare perusal of the unamended clauses of sub-rule (6) of Rule 30 would show that all that the DGCA is required to do is to ascertain whether circumstances exist, once it is found circumstances exist as contemplated in the relevant clause, and the DGCA is found wanting, a writ of mandamus could issue to compel performance. The fulfilment of ministerial act and, therefore, vesting of a minor discretion in that behalf, if it can be called one ought not to deter a court from not issuing a writ of mandamus. The observations of the Supreme Court in this behalf in the case of ***Sharif Ahmad & Ors. Vs Regional Transport Authority, Meerut & Ors,. (1978) 1 SCC 1*** being apposite, are extracted hereinafter:

> "…. It may describe any duty, the discharge of which involves no element of discretion or independent judgment. Since an order of mandamus will issue to compel the performance of a ministerial act and since, moreover, wrongful refusal to carry out a ministerial duty may give rise to liability in tort, it is often of practical importance to determine whether discretion is present in the performance of a statutory function. The cases on mandamus show, however, that the presence of a minor discretionary element is not enough to deter the courts from characterising a function as ministerial.
>
> We think that the Regional Transport Authority, pursuant to the order of the Appellate Tribunal, had merely to perform a ministerial duty and the minor discretionary element given to it for finding out whether the terms of the Appellate Order had been complied with or not is not enough to deter the Courts from characterising the function as ministerial. On the facts and in the circumstances of this case by a writ of mandamus the said authority must be directed to perform its function...."

22.2 The Division Bench Judgment of this court in ***DRI Vs. Corporate Aircraft Funding Company LLC***, has however, construed the power of the DGCA under Rule 30 of the Aircraft Rules, as an enabling power. Being a judgment of the Division Bench, concerning the issue at hand, it would have to be followed both as a matter of propriety and in law, having regard to the principle of judicial hierarchy.

22.3 This aspect of the matter, however, need not detain me any further as, Rule 30 stands amended with the insertion of sub-rule (7) in Rule 30 of the Aircraft Rules. The relevant amendments brought about in Rule 30, vide notification no. GSR 78(E) dated 09.02.2015, issued by Ministry of Civil Aviation read as follows :-

> "...3. In Rule 30 the said rules, -
> (a). In sub-rule (6), in clause (iv), for the words "is not in force; or", the words "has expired or has been terminated in

accordance with terms of lease or" shall be substituted;

(b). After sub-rule (6), the following sub-rule shall be inserted, namely :-

"7. The registration of an aircraft registered in India, to which the provisions of the Cape Town Convention or Cape Town Protocol apply, ***shall*** be cancelled by the Central Government, as provided in the Cape Town Protocol, if an application is received from IDERA Holder prior to expiry of the lease along with :-

(i). The original or notarized copy of the IDERA; and

(ii). A certificate that all registered interests ranking in priority have been discharged or the holders of such interest have consented to the deregistration and export :

Provided that the deregistration of an aircraft by the Central Government under sub-rule (6) or sub-rule (7) shall not affect the right of any entity thereof, or any inter-governmental organisation, or other private provider of public services in India to arrest or detain or attach or sell an aircraft object under its laws for payment of amounts, owed to the Government of India, any such entity, organisation or provider directly relating to the services provided by it in respect of that object.."

22.4 A bare reading of the aforesaid would show that with the insertion of sub-rule (7) in Rule 30, the doubt, if any, as to whether the DGCA had any discretion in the matter has got removed. Upon the creditor fulfilling the conditions prescribed in clause (i) and (ii), of sub-rule (7), of Rule 30, the DGCA is mandatorily required to cancel the registration.

22.4 Therefore, keeping in mind the aforesaid, in my view, a mandamus shall issue to the DGCA to act in a particular manner, as the conditions prescribed for acting in that manner, as required by law, stand fulfilled.

Any other direction would only frustrate the object and purpose with which the amendment has been brought about in Rule 30. I am, thus, persuaded to direct the DGCA to de-register the aircraft objects, which are subject matter of the captioned writ petitions.

23. Before I conclude, let me also deal with other tertiary submissions made by counsels.

23.1 As indicated above, one of the aspects qua which much argument was advanced, pertained to, whether or not the remedies provided in Article IX of the Protocol had to be given effect within five working days, after the creditor notifies to the concerned authorities its intention to seek relief in terms of the said Article.

23.2 This argument, advanced by Mr Srinivasan, stems from Article X(6) of the Protocol. A careful perusal of Article X of Protocol would show that it deals with modification of provisions regarding relief pending final determination. The clauses (1) to (5) of Article X, give a clear indication that they refer to the court route for seeking relief as provided in Article 13 of the Convention, as against IDERA route, as provided in Article IX of the Protocol.

23.3 Therefore, once a creditor, takes recourse to the provisions of Article 13 of the Convention for seeking relief pending final determination by the court, and such relief, is granted by the court, then the registry authority and other administrative authorities (as applicable), in a contracting State, are required to make available the specified reliefs as sought and granted by the court, within five working days.

23.4 A confusion has arisen on account of the fact that both, in the heading concerning clause (6) of Article X of the Protocol, as well as in

the body of the provision, there is a reference to Article IX(1) of the Protocol. This appears to be incongruous, as Article X, relates to a remedy which is sought by a creditor via court route. This conclusion, finds support in the comments made in the Official Commentary, distributed under the approval of UNIDROIT Governing Council, pursuant to resolution no. 5, adopted by the Cape Town Diplomatic Conference[1]

23.5 Therefore, the argument of Mr Srinivasan, based on the provisions of Article X(6) of the protocol, are not sustainable. However, this will not have any impact on the aspect of de-registration by the DGCA, in view of my discussion hereinabove.

24. The other submission advanced on behalf of Spicejet, which is that the petitioners having initiated action in the English Court, in which, amongst others reliefs sought, includes the relief of de-registration, and therefore, the instant petition is not maintainable, in my view, is also untenable. The jurisdiction of this court, if rightly invoked, cannot be

[1] 3.32 Article X(6) provides the trigger for action by the authorities where the creditor follows the court route. A creditor invoking Article X(6) must have obtained an order for advance relief under Article 13(1) from a court in a Contracting State which is the State of registry or an equivalent order from a foreign court, which need not itself be a court of a Contracting State. In effect the order must be one which gives possession or control to the creditor or otherwise removes control from the debtor. In the case of an order by a foreign court the relief must be "recognized" by a court of the State of registry. "Recognised" denotes recognition of the foreign court's jurisdiction to make the order granting the relief, whether under the Convention or under other rules of recognition of the law of the State of registry. The basic idea is that any order should be either made or recognized by a court in a Contracting State which is the State of registry. The relevance of Article 13 is not apparent from Article X(6) because of a drafting slip. The second reference to Article IX(1) makes no sense because nowhere in the Convention or Protocol is there any reference to the grant by a court of relief under Article IX(1). The reference should be to an order granting relief under Article 13(1) of the Convention, as is clear from (a) an earlier draft presented by the Aviation Working Group in which the precursor of Article X(6) referred back to the relief specified in what became Article 13 and (b) the fact that, as indicated by its heading, the whole of Article X is concerned with the modification of provisions regarding relief pending final determination. To trigger Article X(6) the creditor must notify the relevant authority (a) that relief has been granted under Article 13(1) and (b) that the creditor is entitled to procure the remedies of de-registration and export. The purpose of this requirement is to dispense with the need for the authority to investigate external facts and to require it to rely solely on the creditor's notification. In short, the process is perceived as purely documentary...."

ousted merely on the ground that the petitioner has instituted an action in the English Court. Spicejet has not filed any proceedings in this court, in the nature of an anti-suit injunction. The fact that the aircraft objects are registered with the DGCA, and have their particulars mentioned in the ICAR, is not in dispute. Therefore, in my opinion, this court would have jurisdiction to deal with the captioned petitions.

25. This brings me to one yet another argument advanced on behalf of the respondents. The argument is that, money, in the form of cash security is available with the petitioners – which is, far in excess of what is claimed by them, and therefore, reliefs of the nature, including the relief of de-registration, sought for in the petition, ought not to be granted.

25.1 This is an argument, which is, pivoted, if at all, on equity. For the record, the petitioners have disputed that the amount available with them is sufficient to tied-over the arrears payable to them, and the recurring rentals, which would add up on use of aircraft objects. The petitioners' commercial sense, at least at this juncture, is that, continued engagement with Spicejet is not a viable proposition. The fact that an event of default has occurred, is not in dispute. The petitioners' right to seek remedies, both under the Convention and Protocol, have got triggered. The court, therefore, cannot impose its own view on the creditors, contrary to their commercial judgement, when there is no justification for the same either under the lease agreement or, the Convention or, the Protocol, or even the Municipal Law of the land. The argument centred on equity, even if considered, is tenuous in view of the apprehensions of the petitioners. Equity, as is often said, can only follow law, and not precede it.

25.2 Furthermore, India is a signatory to the Convention and has ratified

the same. Article 5(1)[2] of the Convention clearly sets forth, inter alia, an obligation on the contracting States, to promote uniformity and predictability in the application of the Convention. Article 51(c) of our Constitution obliges the State to "***foster respect for international law and treaty obligations in dealings of organized people with one another***". The provisions of Article 51(c) of the Constitution when read with Article 26[3], 27[4] and 31[5] of the Vienna Convention clearly cast an obligation on the contracting State to not only remain bound by the terms of a treaty entered into by it but also obliges the State not to cite internal law (read municipal

[2] Article 5. Interpretation and applicable law

1. In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.

[3] **Article 26**. PACTA SUNT SERVANDA: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[4] **Article 27**. INTERNAL LAW AND OBSERVANCE OF TREATIES: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

[5] **Article 31**. GENERAL RULE OF INTERPRETATION:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

law), as a justification for failure to perform its obligation under a treaty. An international Convention, i.e., a treaty, is required to be interpreted in good faith, in accordance with the ordinary meaning given to the terms of the treaty, in their context, and in the light of its stated object and purpose.

25.3 With the insertion of sub-rule (7) in Rule 30 of the Aircraft Rules, in my opinion, the position with regard to the manner in which the DGCA has to proceed, once a creditor seeks recourse to the remedy under Article IX of the Protocol, has only acquired greater clarity. The court, therefore, cannot interdict the process of de-registration on the nebulous ground of equity as it would be contrary to the provisions of the Convention and Protocol, to which, India is a party.

25.4 There is another aspect, which has to be kept in mind, while dealing with such like matters; which is that, a court ought not to proceed in a manner which retards funnelling of much needed private finance for business transactions in India. This is not to say where legitimate legal rights surface under the Municipal Law, the court would ignore them. Sans such legitimate legal rights, the courts must prod the concerned statutory authorities to act in consonance with the provisions of international conventions, to which the contracting State is a party. [see ***Vishaka & Ors. vs State of Rajasthan & Ors., (1997) 6 SCC 241*** and ***Jolly George Varghese & Anr. vs The Bank of Cochin (1980) 2 SCC 360***]

26. In passing, a reference was also made to the fact that the issue with regard to the petitioners' entitlement to terminate the lease agreements, would require determination by a competent court of law, and therefore, no relief could be given in the present petitions. This argument, in my view,

is misconceived, because it ignores the provisions of Convention and the Protocol, which proceed on documentary evidence vis-a-vis the remedy sought under Article IX of the Protocol. Upon fulfilment of the ingredients set out in Article IX of the Protocol, the petitioners become entitled to the reliefs encapsulated therein. Entitlement to termination of the subject lease agreements is not an ingredient of Article IX of the Protocol. All that the petitioners have to demonstrate qua this aspect, is that, they have exercised their right under IDERA, and thus, proceeded to terminate the subject lease agreements. There is no dispute that this aspect has been taken care of by the petitioners. The submission is, accordingly, rejected.

27. I am also not impressed by the submissions advanced on behalf of the Spicejet that de-registration and/or re-possession of the aircraft objects would impinge upon public interest. As indicated above, there is as much if not more public interest in ensuring that treaty obligations are honoured, and that, the parties adhere to their respective contractual obligations. The very fact that India has ratified the Convention and Protocol, gives rise to the presumption that it has been done in, the larger public interest, as against a narrow interest of one particular airline. The argument that passages have been booked with Spicejet, does not improve the case put forth by the respondents as this is a risk that every unsecured creditor will take vis-a-vis its transactions with the airline. This interest cannot come in the way of a larger public interest, which is the obligation undertaken by the contracting State to honour its commitments under the Convention and the Protocol.

28. Which brings me to other reliefs, prayed for in the petitions,

including the direction sought for the export of aircraft objects along with documentation on board. Grant of these reliefs, may require a prior decision of the DGCA qua NCRI liens. As noted above, the learned ASG was not able to inform me as to whether or not, there are liens obtaining vis-a-vis the aircraft objects under the Municipal law; as contemplated under Article 39(1) of the Convention. The difficulty has been compounded by the fact that the DGCA, has not filed its return in the matter. Therefore, the DGCA will, take a decision in the matter qua liens, if any, obtaining. The decision in the matter will be taken by the DGCA within two (2) weeks from today.

28.1 The decision will, inter alia, indicate the existence lien(s), if any, with reference to the relevant Municipal Law as required by the declarations filed by the Government of India. DGCA's decision will also indicate as to whether, the liens, as contemplated in the declarations filed, in consonance with the Convention, are operable at present.

28.2 The DGCA will, thus specifically, deal with the prayer made by the petitioners for export of the aircraft objects along with the documentation on board, out of the country.

28.3 Furthermore, as indicated above, DGCA will, forthwith, de-register the aircraft objects.

29. The writ petitions and the pending applications are, accordingly, disposed of.

RAJIV SHAKDHER, J

MARCH 19, 2015
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