IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.06.2023

PRONOUNCED ON : 31.07.2023

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

C.S.No.350 of 1996

NEPC Airlines
(A division of NEPC Micon Ltd.)
G.R.Complex,
407 & 408, Anna Salai,
Nandanam,
Madras - 600 035. ... Plaintiff

versus

1.United Airlines Inc.
P.B.No.66100,
O'hare International,
Chicago, Illinois,
United States of America.

2.Air Wisconsin Inc.
1200, East Algonquin Road,
Elk Grove Township,
Illinois 60007
United States of America. ... Defendants

PRAYER: Civil Suit filed under Order IV Rule 1 of Original Side Rules read with Order VII Rule 1 of Code of Civil Procedure, praying for a judgment and decree against the defendants :-

(a) to direct the defendants 1 and 2 jointly and severally to pay to the plaintiff the said sum of Rs.3,64,32,846/- together with interest at 36% per annum on Rs.3,09,53,988/- from the date of plaint till date of realization;

(b) to direct the defendants to pay the cost of the suit.

For Plaintiff : Mr.V.Anil Kumar
for Mr.P.Elango

For Defendants : Set *Ex parte* on 20.04.2022

JUDGMENT

This Civil Suit has been filed for recovery of the suit amount with interest.

2. Heard the learned counsel for the plaintiff and perused the materials available on record.

The case of the plaintiff in brief:-

3. The plaintiff is a division of NEPC Micon Limited, a pioneer in manufacturing Wind Turbine Generator in India; the plaintiff / NEPC Airlines is the Scheduled Private Airlines Operator connecting various feeder routes all over India; the defendants are U.S. based companies selling the Fokker F-27 Aircraft to their customers; the second defendant is the sister concern and subsidiary company of the first defendant; the officers and employees of the first defendant are also the officers and employees of the second defendant.

3.1. The plaintiff, in the course of their business transactions entered into 4 conditional sale agreements dated 01.01.1994 for the purchase of 4 Fokker F-27 model aircrafts and paid an initial deposit of 11,55,000 U.S. dollars for each aircraft under 4 different conditional sale agreements; as per the terms of the conditional sale agreements, the total sale consideration agreed between the plaintiff and the defendants for the purchase of 1 Fokker F-27 model aircraft is 27,54,000 U.S. dollars plus interest on unpaid balance; apart from these 4 aircrafts purchased under the aforesaid conditional sale agreements, the plaintiff took another aircraft under the lease agreement dated 01.07.1994 in respect of which the plaintiff paid a sum of 14,80,000 U.S. dollars are given as under:-

Aircraft Manufacturer's Sl.No.	***Date of Agreement***	***Purchase price in USD***	***Payment made in USD***
10671	1.1.1994	27,54,000	16,23,504
10690	1.1.1994	27,54,000	17,01,588
10691	1.1.1994	27,54,000	16,75,560
10692	1.1.1994	27,54,000	17,27,616
		1,10,16,000	**67,28,268**
10678	1.7.1994	27,54,000	14,80,000

3.2. As per Section 7 of the conditional sale agreements and the lease agreement, the plaintiff, who is in possession of the aircrafts, should pay to the defendants the maintenance reserves at an amount equal to 90 U.S. dollars for each hour of operation of the airframe and 60 U.S. dollars for each hour of operation of each engine namely 'Airframe Maintenance Reserves' and 'Engine Maintenance Reserves' respectively; these maintenance reserves should be paid to the maintenance accounts; it was further agreed that so long as there is no default or even if there is any default, the amounts deposited in the maintenance accounts shall be disbursed by the vendor for the purposes mentioned in the sale agreements; whenever repair and maintenance charges are incurred by the plaintiff, the plaintiff is entitled for the refund of the exact amount incurred for the repair and maintenance charges from the defendants by furnishing invoices to the defendants.

3.3. The plaintiff submitted the invoices and statement for repair and maintenance for a total sum of 8,59,833/- U.S. dollars; inspite of repeated fax messages dated 20.09.1995, 10.10.1995, 06.11.1995, 01.12.1995, 12.12.1995, 22.12.1995, being sent to the first defendant, the defendants failed and neglected to reimburse the amount and it accumulated to the amount of 8,59,833/- U.S. dollars; the plaintiff sent fax message dated 08.04.1996 to the defendants by stating that to adjust the maintenance reserve either towards the remaining lease rentals or to pay the balance reserve; for which, the defendants sent a reply fax message on 08.04.1996 by stating that the maintenance reserve will be paid only when everything is made current; at no point of time, the defendants denied the entitlement of the plaintiff but it is just their failure to pay the deficit reserve and hence there is no ground to treat it this as a dispute and refer it to the Arbitrator; the second defendant falsely claimed default against the plaintiff and got an *ex parte* order of arrest of the Aircraft viz. VT-NED, FOKKER F-27-500 model aircraft bearing Manufacturer's Serial No.10692, in C.P.No.150 of 1996 on the file of the High Court of New Zealand, Auckland Registry.

3.4. The defendants without adopting the due procedure had invoked civil jurisdiction of the High Court of New Zealand just to harass the plaintiff; the money payable to the plaintiff in Indian Rupees would be equal to Rs.3,09,53,988/-, the defendants are jointly and severally liable to pay the same along with interest @ 36% per annum from December 1995 to till the date of the suit and thereafter at the same rate from the date of the plaint till the date of realisation.

4. The defendants had filed two individual applications in A.Nos.2926 and 2927 of 2008 for rejecting the plaint. These applications have been dismissed on 24.08.2009 and thereafter the defendants neither make their appearance nor filed their written statement and hence, the defendants set *ex parte* on 20.04.2022.

5. On perusal of the pleadings and documents and on hearing the learned counsel for the plaintiff, the following issue was originally framed and taken up for consideration:-

"Whether the defendants 1 and 2 are jointly or severally liable to pay the suit claim as raised by the plaintiff ?"

6. However the arguments of the learned counsel for the plaintiff is that the defendants never denied the entitlement of the plaintiff to get back the amount accumulated in the maintenance reserves. But it is the failure on the part of the plaintiff which necessitated him to file the suit for recovery of money. So the plaintiff has to prove his limited liability that he is entitled to get the decree. Hence the issue is modified as under:-

"Whether the plaintiff is entitled to get the decree for recovery of the suit amount with interest as prayed for ?"

7. During the course of trial, on the side of the plaintiff, one witness has been examined as P.W.1 and Ex.P.1 to Ex.P.15 were marked and the defendants remain *ex parte.*

8. The plaintiff has entered into 4 conditional sale agreements on 01.01.1994 for the purchase of 4 Fokker F-27 model aircrafts with the defendants. Earlier, the applications to reject the plaint was filed by stating that the first defendant is not a party to the agreements and hence the plaint should be rejected. It is the contention of the plaintiff that the defendants are U.S. based companies selling Fokker F-27 model aircrafts to their customers and the second defendant is the sister concern and subsidiary company of the first defendant. He has further submitted that all the officers and employees of the first defendant company are the officers and employees of the second defendant's company as well.

9. In fact, the plaintiff has filed Ex.P.15 reply sent by the first defendant UAL Services. Had the first defendant was not a necessary party and the contract signed by the second defendant does not bind the first defendant, he would not have sent a reply [Ex.P.15] to the fax message sent by the plaintiff for demanding the maintenance reserves. Even prior to the said fax message, the plaintiff had sent fax message with regard to the same subject and it has been been marked as Ex.P.14. In order to substantiate the claim, the plaintiff has filed the conditional sale agreements entered into between the plaintiff and the defendants which were marked as Ex.P.2 to Ex.P.5. The sublease agreement was marked as Ex.P.6.

10. As per Section 3(d) of the terms of the Sublease Agreement is as under:-

> *"Section 3(d)........... "the plaintiff has agreed to pay the sum equal to 90 U.S. dollars for each hour of operation of the airframe (the Airframe Maintenance Reserves) and 60 U.S. dollars for each hour of operation of each engine (the "Engine Maintenance Reserves", the airframe maintenance reserves and the Engine Maintenance Reserves shall be referred to herein collectively as the 'maintenance reserves'). On or prior to the fifth business day preceding each sublease period date, sublessee shall provide a written report containing the following information relating to the aircraft, the airframe, engines and parts with respect to the preceding calendar month: a) the total flight hours and cycles accumulated on the aircraft, each engine installed on the aircraft, plus each engine*

delivered with the aircraft; b) all engine and landing gear removed from the aircraft with specified cause for removal; (the part numbers, serial numbers, modification status and service bulletin incorporation status of all replacement assemblies shall also be provided); c) damage and repair data, and modification and alterations; d) alert service bulletin accomplishment and airworthiness directive compliance; e) location of any and all items removed from the aircraft; and f) aircraft maintenance check scheduled dates. Concurrently with submitting each report, Sublessee shall pay sublessor (i) the airframe maintenance reserves to the airframe maintenance account and (ii) the engine maintenance reserves to the engine maintenance account (the airframe maintenance account and engine maintenance account shall be referred to herein collectively as the "maintenance accounts") in each case by 2.00p.m. Chicago time, on the relevant sublease period date. All interest generated by funds held in the maintenance accounts shall be held in such maintenance accounts and shall thereafter be considered maintenance reserves for all purposes of this agreement.

Notwithstanding the foregoing, if sublessee is prevented by applicable law from making any payment of maintenance reserves in Dollars, sublessee shall make such payment in Indian Rupees in such amount as shall equal the required *payment in Dollars when converted at the then current relevant exchange rate. If any maintenance account shall hold Indian Rupees as a result of the previous sentence, each payment of maintenance reserves made on any subsequent basic rent installment payment date shall include (in addition to the amounts required pursuant to the first paragraph of this Section 7(d) and the immediately preceding sentence) an additional sum of Indian Rupees in such amount as is necessary such that the amount of Indian Rupees held in such Account as of such Basis Rent Installment Payment Date, when converted to Dollars at the then current relevant exchange rate, is equal to the amount of dollars that would have been held in such account if sublessee had made all required payments of maintenance reserves in dollars. For purposes of the foregoing, the "relevant exchange rate" shall be the exchange rate for converting Indian Rupees into Dollars as announced two (2) business days prior to the relevant basic rent installment payment date by an international financial institution chose by sublessor.*

So long as no default or event of default then exists, the amounts deposited in the aircraft maintenance account shall be disbursed by sublessor as provided below for purposes of "C" checks, "D" checks and landing gear shop visits, and the amounts deposited in the engine maintenance account shall be *disbursed by sublessor for purposes of engine shop visits and propeller shop visits, in each case performed by qualified maintenance performers on the aircraft or any part thereof in accordance with the maintenance program and as approved by sublessor; provided that any costs resulting from accidental or intentional damage or operational mishandling or foreign object damage or QEC kits shall be solely for sublessee's account and no maintenance reserves shall be disbursed with respect to such costs.*

Sublessee shall give sublessor thirty (30) days (or such shorter period as is reasonably practicable in the case of unplanned and non-deferrable maintenance) prior written notice of any proposed "C" check, "D" check, propeller shop visit, landing gear shop visit and engine shop visit. Such notice shall disclose the scope of the proposed work, the name of the maintenance provider and the proposed cost of the maintenance work. All maintenance work shall be subject to sublessor's approval and sublessor may disapprove of the proposed maintenance work based on its scope, cost or the reputation of the provider. Actual disbursements shall be made by sublessor directly to the maintenance provider upon at least five (5) business days prior written notice to sublessor, which notice shall include an invoice from the maintenance provider indicating the cost of the work completed, the scope *of the work completed and a statement that the work has been completed. Sublessor shall be entitled, at its expense, to have an employee or agent on site at the maintenance provider's facility to monitor the work to be performed. If the amount in the applicable maintenance account is insufficient to complete maintenance required pursuant to the terms hereof, sublessee shall nevertheless complete such maintenance and shall be solely responsible for such deficiency and shall pay all amounts sufficient to complete such required maintenance. All amounts required to be paid to and/or maintained in each maintenance account shall be subject to adjustment over time to account for changes to the assumptions on which the calculations of the proper level of such maintenance reserves were based, including, but not limited to, adjustments resulting from actual increases or decreases in maintenance costs, changes in the utilization, operation, operating environment and/or the hour to cycle ratio of operation of the aircraft or the engines, manufacturers' recommendations, industry as a result of any adjustment it is determined that there has been under-accruals or over-accruals in respect of any prior period for either maintenance reserves, then the applicable future maintenance reserve payments shall be increased or decreased, as the case may be, to correct such deficiency or surplus, as the case may be. If sublessor determines any such adjustment upward is necessary, sublessor shall provide* *sublessee with written notification of the amount of the proposed adjustment and the rationale underlying such adjustment and such adjustment shall take effect on the fifth business day after sublessee's receipt of such notification. Any such adjustment downward must be pre-approved, in writing, by sublessor.*

It is the intent of the parties hereto that all maintenance reserves and the amounts deposited in the maintenance accounts shall be and remain the sole and exclusive property of sublessor until disbursed in accordance herewith (such maintenance reserves being a usage rental charge) and can be used or adjusted by the sublessor at is own discretion for any sums due sublessor or any other person under the operative documents. The decision of the sublessor in this regard shall be final and binding and will be accepted by the sublessee without any protest. Maintenance reserves remaining at the end of the term shall be the property of sublessor."

11. As per the above terms in the agreement, the plaintiff has been paying towards the maintenance reserves and for the maintenance on repair work undertaken by the plaintiff, they were in the habit of submitting the invoices for getting the reimbursement as decided by the sublessor in terms of the agreement. The plaintiff has submitted the accounts detailing the amounts spent by him towards maintenance from 10.03.1996. The total amounts spent towards maintenance is shown as 14,17,670 U.S. Dollars and the amount reimbursement was 5,57,837 U.S. Dollars. So the claim of the plaintiff towards the balance sum of 8,59,833 U.S. dollars.

12. Even though the plaintiff had been repeatedly demanding the defendants to reimburse the said maintenance amount from the maintenance reserves, the defendants did not sanction the same. It is not the case of the defendants that the maintenance reserves as on date is excess of the claim made by the plaintiff and hence the excess should be treated as the property of the defendants.

13. The one and only reply given by the defendants on 08.04.1996 states that the defendants are going to terminate the agreement and for which the agreement is being drafted and that has to be signed by the plaintiff. It is claimed that there was some payment dues. But even in that communication, the defendants have agreed to release the maintenance reserves after the aircrafts returned to flight status and "D" checks are completed. It is also subject to the verification of the conditions and engine etc. In fact, the agreement itself states that the maintenance reserves shall not be used for any other operation and in case of shortage in the maintenance reserves the plaintiff has to correct the deficiency or the surplus or the case may be.

14. Having admitted the entitlement of the plaintiff on the reimbursement of the maintenance expenses, the defendants are obliged to pay the same. Even in Ex.P.7 the defendants have stated about the time during which the plaintiff can get the reimbursement more specifically after the aircrafts have been returned to flight status and "D" checks are completed. The defendants have not come out with any statement of accounts of their own to show that the statement of accounts submitted by the plaintiff in Ex.P.7 is not correct and that the reimbursement claimed by the plaintiff is not correct. So the claim made the plaintiff and the supporting documents filed by him remains unchallenged. The plaintiff has proved his entitlement and hence the issue is answered in his favour. However only with the reasonable interest.

15. In the result, the suit in C.S.No.350 of 1996 is **decreed** and the defendants 1 and 2 are jointly and severally liable to pay to the plaintiff a sum of Rs.3,64,32,846/- [Three Crores Sixty Four Lakhs Thirty Two Thousand Eight Hundred and Forty Six only] with cost along with interest at the rate of 12% per annum from the date of the plaint till the date of realisation. Time for payment one month.

31.07.2023

Speaking order / Non Speaking Order
Index : Yes / No
Neutral Citation : Yes / No

sri

Witnesses examined on the side of plaintiff:-

P.W.1	Rajkumar

List of documents marked on the side of plaintiff:-

Ex.P1	Original Authorization letter dated 14.11.2022
Ex.P2	True copy of the sale agreement dated 01.01.1994
Ex.P3	True copy of the sale agreement dated 01.01.1994
Ex.P4	True copy of the sale agreement dated 01.01.1994
Ex.P5	True copy of the sale agreement dated 01.01.1994
Ex.P6	Photocopy of the sublease agreement dated 01.07.1994
Ex.P7	Photocopy of the statement of accounts dated 10.03.1996
Ex.P8	True copy of the letter dated 20.09.1995
Ex.P9	True copy of the letter dated 10.10.1995
Ex.P10	True copy of the letter dated 06.11.1995
Ex.P11	True copy of the letter dated 01.12.1995
Ex.P.12	True copy of the letter dated 12.12.1995
Ex.P13	True copy of the letter dated 22.12.1995
Ex.P14	True copy of the fax messages dated 08.04.1996
Ex.P15	True copy of the letter dated 08.04.1996

31.07.2023

Copy to :
1.The Sub Assistant Registrar,
Original Side, High Court of Madras.

2.The Record Keeper,
Original Side Records Section,
High Court of Madras.

R.N.MANJULA, J.

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Pre-Delivery Judgment made in
C.S.No.350 of 1996

31.07.2023