

(2017) 08 DEL CK 0043

In the Delhi High Court

Case No : 2638 of 2017 & CM Nos 11455 of 2017 & 15230 of 2017

CHOWRINGHEE RESIDENCY PVT LTD

APPELLANT

Vs

UNION OF INDIA AND ANR

RESPONDENT

Date of Decision : 17-08-2017

Acts Referred:

Constitution of India, Article 226(2) -
Ministry of Civil Aviation (Height Restrictions for Safeguarding of Aircraft Operations)
Rules, 2015, Rule 16

Citation : (2017) 08 DEL CK 0043

Hon'ble Judges : Sanjeev Sachdeva

Bench : SINGLE BENCH

Advocate : P. Chidambaram, ?Rajiv Nayar, ?Kunal Vajani, Nikhil Rohatgi,
Pranaya Goyal, Aman Gandhi, Chiranjivi Sharma, Shashank Khurana, Suresh
Chandra Sati, Pradeep C. Sati, Digvijay Rai, Vivek Kumar Pandey, Nikita Salwan

Judgement

1. The petitioner by the present petition seeks quashing of letter dated 08.03.2017 issued by Airport Authority of India (hereinafter referred to as the AAI) whereby a revised height clearance with lower permissible top elevation of 198.89 meters Above Mean Sea Level (hereinafter referred to as "AMSL") has been issued.

2. The petitioner also impugns the "No Objection Certificate" (hereafter referred to as NOC) for revised height clearance dated 14.03.2017 issued through General Manager (Aero), Eastern Region of the AAI. The petitioner further seeks a mandamus to the respondents to issue a revalidated NOC for height clearance as originally granted by NOC dated 02.02.2011.

3. The petitioner claims to be the owner of land situated at No. 42- B, Chowringhee Road, Kolkata. The petitioner sought to construct a building on the said land. Since the said land is situated within a radius of 20 kms. from the "Aerodrome Reference Point" i.e. 14.20 kms. from Netaji Subhash Chandra Bose International Airport, Kolkata, the petitioner applied for a NOC for height

clearance from AAI.

4. At the time when the initial project was proposed, the building was proposed to be used for commercial purposes. Accordingly, the petitioner sought a height clearance of 293.4 meters. Permission was granted by AAI for construction of a building upto 142.5 meters in height.

5. On 22.06.2010, the petitioner decided to change the user of the building from commercial to residential and accordingly made a fresh application for height clearance upto 260 meters (AMSL).

6. On 06.08.2010, AAI directed the Regional Executive Director (ER) to issue a NOC for height clearance upto 170.02 meters Above

Ground Level (hereinafter referred to as "AGL")/180.02 meters (AMSL).

7. Being aggrieved by the said clearance granted, the petitioner filed an appeal before the Appellate Committee of Ministry of Civil Aviation on 30.08.2010. The Appellate Committee of Ministry of Civil Aviation by its letter dated 22.11.2010 granted height clearance of 250 meters (AGL)/260 meters (AMSL). Consequently, Respondent No. 2 granted the NOC on 02.02.2011 with a height clearance of 250 meters (AGL)/260 meters (AMSL).

8. The NOC granted on 02.02.2011 was valid for a period of five years. Consequent to the NOC, the petitioner applied to the municipal authority for sanction of the building plans. The petitioner commenced construction on 08.08.2012. A revised building permit dated 14.12.2012 was issued for a period of 5 years, pursuant to which the petitioner issued a fresh notice for commencement of construction on 31.12.2012.

9. As the original NOC was valid for a period of five years from 02.02.2011, the date of its issuance, till 01.02.2016, the petitioner vide its letter dated 25.06.2016 applied for revalidation of the same in terms of Clause 13 of the ATM Circular read with Rule 16 of the 2015 Rules.

10. By the time, the application seeking revalidation was filed, it is contended that, the petitioner had already completed the construction upto elevation of 189.6 meters (AGL)/199.6 meters (AMSL).

11. Consequent to the application, the Regional Executive Director was required to conduct a physical verification. The petitioner was required to provide site elevation and site coordinates to the respondents. By letter dated 05.10.2016, the petitioner submitted a declaration of construction height and declared that construction work of the building was in progress and construction height achieved as on 04.10.2016 was 212.10 meters (AGL). The physical verification of the height was carried out.

12. On 11.01.2017, the petitioner received an e-mail to the effect that the petitioner was not to raise any height without valid NOC and the NOC case for height clearance was under examination.

13. The petitioner by e-mail dated 16.01.2017 pointed out that the construction of the building has reached upto 244.355 meters (AGL)/254.355 meters (AMSL).

14. By impugned communication dated 08.03.2017, the petitioner was informed that the permissible top elevation of the building was revised to 198.89 meters (AMSL). Consequent to communication dated 08.03.2017 impugned NOC dated 14.03.2017 was issued restricting the permissible top elevation of the building upto 198.89 meters (AMSL).

15. The petitioner impugns the communication dated 08.03.2017 and 14.03.2017.

16. The respondents have raised a preliminary objection as to the maintainability of the petition. It is contended by learned counsel for the respondents that this court lacks the territorial jurisdiction to entertain the petition on the ground that the impugned letter dated 08.03.2017 has been issued by the Executive Director, who is based at Kolkata and the impugned NOC dated 14.03.2017 has also been issued by the designated officer based at Kolkata.

17. The respondents have also objected to the maintainability of the petition on the ground of availability of an alternative remedy to the petition. It is contended that the order, directing the issuance of NOC for revised height clearance having been passed by the competent authority, is appealable to the Appellate Committee of the Ministry of Civil Aviation.

18. Without going into the merits of the contention raised by the petitioner and the proposed defence of the respondents, I have heard the arguments on the preliminary objections raised by the respondents.

OBJECTION WITH REGARD TO TERRITORIAL JURISDICTION

19. The impugned letter dated 08.03.2017 has been issued by the Deputy General Manager (ATM-NOC) for the Executive Director (ER). The impugned letter dated 08.03.2017 has been issued from the Kolkata office of the AAI. The NOC for revised height clearance dated 14.03.2017 has been issued by the designated officer i.e. General Manager (Aero) (ER) of AAI through offices stated to be situated at Netaji Subhash Chandra Bose International Airport, Kolkata.

20. No doubt the impugned communication dated 08.03.2017 as well as the NOC for revised height clearance dated 14.03.2017 have been issued from the Kolkata office, however to ascertain whether any part of the cause of action has arisen within the territorial jurisdiction of this court, a reference to the contents of the impugned communication dated 08.03.2017 and the NOC dated 14.03.2017 would be necessary.

21. The communication dated 08.03.2017 is a letter written by Deputy General Manager (ATM-NOC) for Executive Director (ASM) addressed to Regional Executive Director (ER). Letter, inter-alia stipulates as under:-

"The following additional terms & conditions shall be included in the NOC.

The earlier NOC mentioned above as Reference (2) has expired on 01.02.2016, hence case has been examined in detail at CHQ from CNS, AGA & PANS-OPS criteria & height is restricted due CNS criteria. Based on re- examination the unauthorized Permitted Top Elevation for the building is 198.89m AMSL. Please intimate the revised height clearance to the Local Bodies /Authority and Aerodrome Operator for information and necessary compliance as per GSR-750(E). While issuing the NOC, CHQ reference letter may also be quoted.

The applicant be advised to maintain the building height accordingly. THIS IS NOT AN NOC" (underlining supplied)

22. Perusal of the above conditions mentioned in letter dated 08.03.2017, written by Deputy General Manager (ATM-NOC) for Executive Director (ASM) addressed to Regional Executive Director (ER), shows that the case of the petitioner has been examined in detail at CHQ i.e. Corporate Head Quarters of AAI. The impugned letter specifically states that while issuing the NOC, CHQ (Corporate Head Quarters) reference letter may also be quoted.

23. The consequent impugned NOC dated 14.03.2017, issued to the petitioner, specifically refers to CHQ letter dated 06.03.2017. The NOC also states that the case has been examined in detail at CHQ and based on the re-examination the NOC has been issued.

24. The Corporate Head Quarters of AAI is situated at New Delhi. The case of the petitioner has been considered in detail at the Corporate Headquarters at New Delhi consequent to which the impugned communication dated 08.03.2017 and the NOC dated

14.03.2017 have been issued. Part of the cause of action has clearly arisen within the territorial jurisdiction of this court.

25. In view of the fact that part of the cause of action has arisen within the territorial jurisdiction of this court, the requirement of Article 226 (2) of the Constitution of India are satisfied.

26. The objection raised by the respondents as to maintainability of the petition on the ground that lack of territorial jurisdiction is clearly not sustainable.

OBJECTION AS TO AVAILABILITY OF ALTERNATIVE REMEDY OF APPEAL

27. The other objection raised by the respondents is with regard to availability of an alternative remedy of an appeal to the Appellate Authority of the Ministry of Civil Aviation as prescribed by Notification dated 30.09.2015 issued by the Ministry of Civil Aviation whereby the Ministry of Civil Aviation (Height Restrictions for Safeguarding of Aircraft Operations) Rules, 2015 (hereinafter referred to as the 2015 Rules).

28. Reliance has been placed by learned counsel for the respondents on the

decision of a coordinate bench in *UBC FARCHI VS. CIPLA LTD.* 167 (10) DLT 459 to contend that a High Court would normally decline to exercise jurisdiction under Article 226 of the Constitution of India where there is efficacious alternative statutory remedy available to the aggrieved person. Reliance is also

placed on the decision of the Supreme Court in *NIVEDITA SHARMA VS. CELLULAR OPERATORS ASSOCIATION OF INDIA & ORS.* (2011) 14 SCC 337 and *KARNATAKA CHEMICALS INDUSTRIES VS. UOI* 2000 (10) SCC 13.

29. Per contra, learned senior counsel for the petitioner has contended that mere existence of an alternative remedy is no bar to entertaining a writ petition filed for enforcement of any fundamental right or where there has been a violation of principles of natural justice or where the order under challenge is wholly without jurisdiction.

30. Rule 16 of the 2015 Rules reads as under:-

"16. Savings:-- Nothing in these rules shall affect the height clearances assessed and duly issued under the notifications issued by the Government of India in the Ministry of Civil Aviation vide notification numbers S.O. 84(E.) dated the 14 January, 2010, and S.O 1589(E) dated the 30th June, 2008, during their assessment validity period of eight years for the buildings and twelve years for the structures such as masts, chimney and towers etc., within which the applicants have to complete the structures and obtain the completion certificate from the concerned authorities:

Provided that in cases where the construction work has not started during the initial validity period of five years for the buildings or within seven years for the structures such as mast, chimney, etc., revalidation shall not be considered and the height of such buildings or structures shall be reassessed In accordance with the provisions of these rules."

31. Perusal of Rule 16 of the 2015 Rules shows that these rules are not to affect height clearances assessed or issued under the Notifications dated 14.01.2010 and 30.06.2008 during their assessment validity period of eight years for the buildings and twelve years for the structures such as masts, chimney and towers etc., within which the applicants have to complete the structures and obtain the completion certificates from the concerned authorities.

32. The Proviso, however, provides that where construction work has not started during initial validity period of five years for the buildings or within seven years of structure revalidation shall not be considered and height of such buildings or structures shall be re- assessed in accordance with the provisions of these rules.

33. The remedy of an appeal provided by the 2015 Rules, would be available only where the case is assessed for the first time or re- assessed in accordance with the 2015 Rules. Where the case is for revalidation, it would be saved from the applicability of the 2015 Rules, in terms of Rules 16 thereof. Since the 2015 Rules do not apply, the alternative remedy of an appeal as provided there under

would not be available to the petitioner.

34. In terms of Rule 16, the rules notified by Notification dated 30.09.2015 are excluded in their application to height clearances assessed in terms of Notifications dated 14.01.2010 and 30.06.2008, provided the construction work has commenced during the initial validity period of five years.

35. Admittedly, in the case of the petitioner the construction work had commenced within the period of five years of 02.02.2011. Thus, prima facie, I am of the view that the 2015 Rules would not be applicable.

36. Since 2015 Rules are not applicable and there is no alternative remedy available, the judgments relied upon by learned counsel for the Respondent are not applicable in the facts of the case.

37. Accordingly, the objection raised by the respondents as to maintainability of the petition, both on the ground of lack of territorial jurisdiction and availability of an alternative remedy, is not sustainable and is accordingly rejected.

38. List the writ petition for consideration on merits, before the roster bench on 13th September 2017.

39. In the meantime, the respondents shall file counter affidavit and reply to the pending application seeking interim relief within three weeks. Rejoinder, if any, be filed by the petitioner, before the next date of hearing.