

(2014) 02 DEL CK 0221

In the Delhi High Court

Case No : Writ Petition (C) No. 5909 of 2013 and CM. No. 13039 of 2013 and 14134 of 2013 (both of the petitioner for interim relief)

Dr. Subramanian Swamy

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-02-2014

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2014) 125 SCL 133

Hon'ble Judges : Nuthalapati Venkata Ramana, C.J;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Ishkaran Singh Bhandari, Ms. Supriya Manan and Mr. Yatinder Chaudhary, for the Appellant; Mohan Parasaran, SG Alongwith Mr. Rajeeve Mehra, ASG, Ms. Anjana Gosain, Pradeep Desodhya, B.V. Niren and Mr. Kartikey Mahajan for R-1 to 4, Dr. Abhishek M. Singhvi and Ms. Ruby Singh Ahuja, Rustam Mulla, Jainveer Shergil, Ms. Naomi Chandra and Ms. Anisha Mitra for R-5, for the Respondent

Final Decision : Dismissed

Judgement

CM. No. 13039/2013 & 14134/2013 (both of the petitioner for interim relief)

1. This petition filed in public interest impugns the decision dated 3rd April, 2013 of the Government of India and the Foreign Investment Promotion Board (FIPB) allowing Foreign Direct Investment (FDI) proposal in favour of the respondent no. 5 Airasia (India) Private Limited. The petition also seeks-(i) setting aside/ revocation of all further approvals/permissions issued to the respondent no. 5 based upon or in furtherance of the impugned decision dated 3rd April, 2013; (ii) to prohibit the respondents from taking any action contrary to the applicable FDI policy as per Press Note No. 6 of 2012 read with Directorate General of Civil Aviation (DGCA) Guidelines dated 1st March, 2013 or from granting any approval for foreign investment by a foreign airline in a greenfield airline project; (iii) mandamus directing the respondents to define the terms "substantial ownership" and "effective control" and the meaning to be ascribed to them under the FDI

Policy as per Press Note 6 of 2012; (iv) a direction to the Central Bureau of Investigation to investigate into the role and functioning of Government of India and the FIPB leading to the impugned decision dated 3rd April, 2013. Notice of the petition was issued to the respondents no. 1 to 4 only i.e. not to the respondent no. 5 Airasia (India) Private Limited. The writ petition was accompanied with CM. No. 13039/2013 for ex parte ad interim relief of stay of the impugned decision dated 3rd April, 2013 and/or from restraining the respondents from granting any further approval/NOC to the respondent no. 5. Notice of the said application was also issued though no ex parte ad interim stay granted. The petitioner thereafter filed CM. No. 14134/2013 averring that in the absence of any interim order, the respondents were going ahead with the illegalities impugned in the petition and seeking immediate interim orders in terms of the earlier application. Notice of the said application was also issued. A counter affidavit and reply has been filed by the respondents no. 1 to 4 and to which rejoinder has been filed by the petitioner.

2. We have heard the petitioner appearing in person, the Solicitor General appearing for the respondents no. 1 to 4 as well as the senior counsel for the respondent no. 5 who appears though notice has not been issued to the said respondent.

3. The case of the petitioner is-

a) that as per the Consolidated FDI Policy effective from 10th April, 2012 announced by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, no foreign airline was allowed to participate directly or indirectly in the equity of an Air Transport Undertaking engaged in operating Scheduled and Non Scheduled Air Transport Services except Cargo airlines;

(b) that for review of the FDI Policy in Civil Aviation Sector, a meeting of the Cabinet Committee on Economic Affairs was called to consider the proposal, "to also permit foreign airlines to invest in the capital of Indian companies operating scheduled and non scheduled air transport services upto the limit of 49% of their paid up capital on the Government approved route";

(c) that the rationale for the said proposal, as per notice of the said meeting, was that "private airlines in the country are in dire need of funds for their operations and service up-gradation, to compete with other global carriers" and "denial of access to foreign capital could result in the collapse of many of our domestic airlines, creating a systemic risk for the financial institutions and a vital gap in the country's infrastructure";

(d) that as per the Press Note No. 6 (2012 series) issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, on the subject of "Review of the Policy on Foreign Direct Investment in the Civil Aviation Sector", "the Government of India has reviewed the position in this regard and decided to permit foreign airlines also to invest in the capital of

Indian Companies operating scheduled and non scheduled air transport services, upto the limit of 49% of their paid up capital"; (e) that as per the Guidelines for Foreign Direct Investment in Civil Aviation Sector issued by the DGCA also on 1st March, 2013, the decision of the Government of India was to permit foreign airlines also to invest in the capital of Indian Companies "operating scheduled and non scheduled air transport services" upto the limit of 49% of their paid up capital;

f) that thus, as per the decision of the Cabinet Committee on Economic Affairs, FDI upto 49% was permitted only in Indian Companies already operating scheduled and non scheduled air transport services;

g) however the Government of India and the FIPB had on 3rd April, 2013 granted approval to M/s. Airasia Investment Limited, Malaysia to incorporate a new Joint Venture Company with a foreign equity of 49% and with the balance 51% equity to be held by M/s. Tata Sons Limited and M/s. Telestra Trade Private Limited for carrying on scheduled and non scheduled air transport services in the country;

h) that the grant of approval of FDI in a company yet to be incorporated and which till now is not engaged in operating scheduled and non scheduled air transport services, is contrary to the FDI policy permitting FDI only in existing airlines.

4. The petitioner relied on Noida Entrepreneurs Association Vs. NOIDA and Others, wherein it was observed that it is a settled proposition of law that whatever is prohibited by law to be done, cannot legally be affected by an indirect and circuitous contrivance on the principle of *quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud*, which means, "whenever a thing is prohibited, it is prohibited whether done directly or indirectly" and on Jagir Singh Vs. Ranbir Singh and Another, , laying down that an authority cannot be permitted to evade a law by "shift or contrivance".

5. Per contra, the Solicitor General has contended that the petitioner is misconstruing the FDI Policy as permitting FDI to the extent of 49% only in domestic companies already engaged in the business of providing scheduled and non scheduled air transport services, when there is no such restriction in the policy. He has during the hearing handed over the Consolidated FDI policy effective from 5th April, 2013 and wherefrom it is shown that where ever the decision was to treat greenfield and existing projects separately, they are separately mentioned. It is contended that in relation to the air transport services, no distinction is made between greenfield and existing projects. It is argued that the entire case of the petitioner is based on a distinction between greenfield and existing airlines and which distinction does not exist in the FDI Policy for air transport services.

6. It is also argued, that the DGCA has vide public notice dated 13th January, 2014 in compliance of the requirements of Schedule XI of Aircraft Rules 1937 invited objections and suggestions from the members of the public on the

proposal of M/s. Airasia (India) Pvt. Ltd. for grant of Air Operators Permit (Scheduled) for the purpose of providing Scheduled Air Transport Services in India. It is contended that the objection if any of the petitioner to the grant of approval by FIPB to the respondent no. 5 should also be raised with the DGCA and which as per Rule 134 is competent to adjudicate the same.

7. Reliance is placed on Manohar Lal Sharma Vs. Union of India and Another, to contend that the grant of approval to the respondent No. 5 is in public interest as the same will increase competition and bring down the air fares.

8. The petitioner has intervened to contend that the Consolidated FDI Policy relied upon by the Solicitor General is effective from 5th April, 2013 when the decision of the FIPB impugned in this petition is of prior thereto that of 3rd April, 2013.

9. The learned Solicitor General has clarified that though the policy as per the endorsement on the cover of the booklet is shown as effective from 5th April, 2013, but as per its contents, is from the date of issuance of the Press Note on 14th September, 2012.

10. We have during the hearing also inquired from the petitioner as to what is the public interest in the petitioner filing this petition with the relief having effect of preventing respondent no. 5 from providing air transport services in the country.

11. The petitioner has contended that the grant of licence to the respondent no. 5 would be to the prejudice of Air India being the national carrier and which is already suffering losses.

12. The senior counsel for the respondent no. 5 has also argued that there is no public interest and any obstacle in allowing the respondent no. 5 to commence air transport operations in the country would be to the detriment of the consumers. Reliance is placed on Ashok Kumar Pandey Vs. The State of West Bengal and Others, laying down the scope of Public Interest Litigation. It is argued, that the petitioner has no case lest a prima facie case; that if FDI were to be permitted only in existing airlines there was no need for a policy; that there is no law which bars the Government of India from revising the policy; that from the language of the Note for the meeting of the Cabinet Committee on Economic Affairs or the Press Note issued in pursuance thereto, it cannot be said that FDI has been permitted in the existing airlines only; that the FDI Policy is not capable of any other interpretation; that any interference by the Court at this stage will scare away the investors and will lead to a policy paralysis.

13. The petitioner in rejoinder has invited attention to Minutes of the subject Meeting of the FIPB, where the stand of the Ministry of Civil Aviation was that the FDI permitted in the air transport services as per Press Note aforesaid was not in a joint venture yet to be incorporated and was aimed at infusing capital into the existing cash-starved aviation companies; however the FIPB brushed aside the

said objection of the Ministry of Civil Aviation.

14. The Solicitor General has invited attention to the version of the Department of Industrial Policy and Promotion (DIPP) in the meeting of the FIPB to the effect that the Press Note supra did not refer to the existing airlines only and as such no clarification was required.

15. We have considered the aforesaid contentions for the limited purpose of interim relief.

16. As would be borne out from the aforesaid, the entire challenge to the FIPB approval for FDI in respondent no. 5 which is not an existing airline and is yet to commence air transport operations, is based on the plea that from the use of the words "operating scheduled and non scheduled air transport services" in the FDI policy announced in the year 2012, FDI is permitted only in companies "already operating" scheduled air transport services in the country and not in companies which are not "already engaged" in the business of providing scheduled and non scheduled air transport services.

17. We are reluctant to, at this interim stage, hold that from a mere use of the words "operating scheduled and non scheduled air transport services", it can be held that the policy of the Government of India announced vide Press Note No. 6 of 2012 supra is to allow FDI in "existing airlines" only and not in "proposed/new airlines". The learned Solicitor General is correct in his contention that if that had been the intent of the Government, nothing prevented the Government from expressly stating so.

18. Undoubtedly, in the deliberations leading to the FDI Policy announced vide Press Note No. 6 of 2012 supra, one of the considerations was the dire need of the existing airlines for infusion of foreign funds. However that again cannot necessarily lead to the conclusion, in the absence of anything else, that the decision was to allow FDI only in existing airlines and not in new/proposed airlines.

19. Yet again, though the Ministry of Civil Aviation in the FIPB meeting of 6th March, 2013 took a stand that as per the Policy, FDI was permitted only in existing airlines but the version of DIPP was otherwise and which version was accepted by the FIPB. FIPB is a high level body comprising of Secretaries of the Departments of i) Economic Affairs, Ministry of Finance; ii) Industrial Policy and Promotion, Ministry of Commerce and Industry; iii) Commerce, Ministry of Commerce and Industry; iv) Economic Relations, Ministry of External Affairs; and v) Ministry of Overseas Indian Affairs, with power to co-opt other secretaries to the Central Government and top officials of financial institutions, banks and professional experts of Industry and Commerce and we are of the view that at least at this interim stage, once the FIPB inspite of the objections of the Ministry of Civil Aviation as to the interpretation of the policy, approved FDI into respondent no. 5, it is not for this Court to interfere. A Division Bench of this Court in Mrs. Geeta Kapoor, Lt. Col. M.G. Kapoor and Consumer Education and

Research Society Suraksha Sankool Vs. Union of India (UOI) and Others, held that where the appropriate authorities (in that case, RBI and SEBI) and the Government of India have taken a decision and have examined the case, it would not be wise for this Court to sit as an Appellate Court, in a Public Interest Litigation.

20. It cannot be lost sight of that though as per the Ministry of Civil Aviation which had also participated in the meeting of the Cabinet Committee on Economic Affairs, the decision was to permit FDI only in existing airlines and which means the said aspect must have been deliberated in the said meeting, but in the policy ultimately announced vide Press Note supra, no such distinction was made and from the mere use of the word "operating scheduled and non scheduled air transport services" we are unable to find any such decision, to allow FDI only in existing airlines.

21. We are also not unmindful of the fact that we are called upon to interpret a policy of the Government of India which is essentially an executive function, and not a statute.

22. The Government of India, upon this challenge being made by the petitioner, has taken a categorical stand as to what it meant by the policy aforesaid.

23. The stand of the Government of India before this Court is really the understanding of the Government of India of its own policy and in our opinion, at least at this interim stage, it is not for the petitioner to contend as to what the Government should understand from its own policy and these matters, specially being in the domain of economic policy are not subject to challenge.

24. The present petition entails interpretation of the policy by the Government which created the policy. It cannot be lost sight of that even if the Government was earlier of the view that FDI is to be permitted in existing airlines only, nothing prevented the Government from subsequently allowing FDI in a new/proposed airline also and which is neither the subject matter of challenge nor can be the subject matter of judicial review. The policy was formulated by the Government and the Government cannot be precluded from clarifying or amending its policy which is executive in nature. The matter is strictly within the domain of the internal functioning of the Government. The question, how a particular policy is to be interpreted has to be necessarily, at least at this stage, answered in favour of the Government and the petitioner cannot be heard to object. It was so held by a single Judge of this Court in Federation of Associations of Maharashtra and Others Vs. Union of India (UOI) and Others, and at this interim stage we have no reason to take a different view. Another Division Bench of this Court in Ojas Industries P. Ltd. Vs. Union of India (UOI) and Others, held that in interpreting economic regulatory measures, the Court should be cautious that in the garb of interpretation, the whole scheme is not disturbed as the Courts are not experts in the economic field and should defer to the opinion of the experts, rather than apply their own notions as to what is proper

and what is improper. It was further held that economic regulatory measures often have implications and ramifications over the whole economy and it is not proper for Courts to tinker with the same.

25. The Supreme Court also recently in *Rohitash Kumar and Others Vs. Om Prakash Sharma and Others*, observed that administrative interpretation may often provide the guidelines for interpreting a particular Rule or executive instruction and the same may be accepted, unless of course it is found to be in violation of the Rule itself. Similarly, we are prima facie unable to find the Government in its stand before this Court to be wrongly interpreting its FDI policy. The Supreme Court earlier also in *P.H. Paul Manoj Pandian Vs. Mr. P. Veldurai*, laid down that one of the accepted principles of interpretation is as to how those, who are conversant with the government order and are expected to deal with the same, construe and understand the order and that the opinion expressed by the government officials who are expected to have sufficient knowledge and experience as to how a government order should be operated and/or implemented may be relied upon.

26. The Supreme Court in *BALCO Employees Union (Regd.) Vs. Union of India and Others*, has held that the Courts while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or "play in the joints" to the executive and that it is the prerogative of each elected Government to follow its own policy and a matter of policy cannot per se be interfered with by the Court and wisdom and advisability of economic policies are ordinarily not amenable to judicial review. It was also held that if a considered policy decision has been taken which is not in conflict with any law or is not mala fide, it would not be in public interest for the Court to go into and investigate those areas which are the function of the executive. The Supreme Court in the said judgment also cautioned the Courts from allowing their process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective and noticed the recent feeling of public interest litigation tending to become publicity interest litigation or private interest litigation. It was also laid down that no relief by way of stay, especially with respect to public projects and schemes or economic policy or schemes should be granted without putting the petitioner to appropriate terms such as providing an indemnity or an adequate undertaking to make good the loss or damage in the event the PIL is dismissed. Considering the nature of interim relief claimed by the petitioner in the present case, we fail to see, how the petitioner can be directed to make good the loss which will be caused from the interim stay sought if the petition is ultimately dismissed.

27. The Constitution Bench in *In Re: Special Reference No. 1 of 2012*, after considering a plethora of case-law has reiterated that the Courts will not compare which policy is fairer than the others and strike down a policy only if it is found to be patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution. We are at this interim stage unable

to return any such finding with respect to the impugned decision.

28. Coming back to the interpretation of the Press Note No. 6 of 2012 supra, we may notice that the FDI policy as existing prior thereto and as filed by the petitioner at page 130 of the paper-book, also was "no foreign airlines would be allowed to participate directly or indirectly in the equity of an Air Transport Undertaking engaged in operating Scheduled and Non-Scheduled Air Transport Services except Cargo airlines ". It is not the case of the petitioner that the aforesaid prohibited foreign airlines only from participating in the equity of "existing" airlines and not from participating in the equity of new airlines. Rather the admitted position is that no FDI was then permitted neither in existing nor in new/proposed airlines. The Government of India in the Press Note No. 6 of 2012 supra while permitting FDI to the extent of 49% used the same language/phraseology. When earlier, on the same language/phraseology there was no distinction between existing and new/proposed airlines, there is no reason to carve out any such distinction now. We are thus of the view that no case for grant of interim relief sought is made out. The applications are dismissed. Needless to state, none of the observations contained herein would affect the final adjudication.

WP(C) 5909/2013

List of hearing on 5th March, 2014.