

(1999) 04 AP CK 0039

In the Andhra Pradesh High Court

Case No : WA No. 964 of 1998 and WP No. 24809 of 1996

Flag Officer, Commanding-in-Chief, Eastern Naval Command
and others

APPELLANT

Vs

Vijay Visakha Co-op. Milk Dairy, Visakhapatnam and another

RESPONDENT

Date of Decision : 30-04-1999

Acts Referred:

Aircraft Act, 1934 — Section 9

Aircraft Rules, 1937 — Rule 3, 4(1), 4(2), 5, 6

Citation : AIR 2000 AP 459 : (1999) 4 ALD 241 : (1999) 4 ALT 711

Hon'ble Judges : Vaman Rao, J;B. Subhashan Reddy, J

Bench : Division Bench

Advocate : Mr. R.S. Murthy, Addl. SC for CG and Mr. P.B. Vijaya Kumar, for the Appellant;

Judgement

Vaman Rao, J

1. This appeal has been filed against the interim order originally passed by the learned single Judge at admission stage, which later was made absolute by the orders of the said Court dated 30-3-1998 passed in WV MP No. 1971 of 1997. Under the interim order dated 22-11-1996, orders of demolition issued by the Flag Officer Commanding-in-Chief, first respondent (in the writ petition), contained in his letter No. AO/0177/NOC/SDC, dated 16-8-1996, in respect of the building of the petitioner, was suspended. It was, however, directed that the petitioner shall not commence commercial production or effect any further constructions to the Milk Powder Plant.

2. It is this order which is challenged in Writ Appeal No.964 of 1998. When this writ appeal came up for hearing, it was pointed out that a Commissioner was appointed by the learned single Judge who filed his report. Considering this, the writ petition itself was directed to be posted for learning. In view of the fact that the writ petition is itself heard finally, there is no need to pass any orders in the writ appeal.

3. The facts leading to filing of the writ petition as stated in the affidavit of the petitioner may be briefly stated as follows : The petitioner is a Cooperative Milk Dairy, represented by its Chairman. The petitioner-Society is consisting of 460 Milk Producers Cooperative Societies in the four coastal districts. These Societies supply milk to the petitioner-Society. The petitioner-Society has been engaged in promoting the milk products by various modes.

4. The petitioner-Organisation proposed to construct a Milk Powder Plant in its premises at Visakhapatnam. It submitted an application on 11-2-1993 to the second respondent (Aerodrome Officer) for obtaining permission for the said construction (presumably the said site is in the vicinity of Visakhapatnam Aerodrome). In compliance of objections raised and by furnishing certain documents as pointed out by the Second respondent (Aerodrome Officer), the petitioner submitted an application on] 1-7-1994 requesting the first respondent (Flag Officer Commanding-in-Chief) to issue "No Objection Certificate" (NOC) for constructing the milk plant with a height of 27.48 metres, equivalent to 43.00 metres AMSL. The first respondent on the basis of documents furnished and in compliance of the objections by the petitioner, issued NOC on 24-10-1995, which is valid for a period of two years.

5. After receiving the NOC, the petitioner constructed the building and erected the machinery in question, by spending a sum of Rs.5.0 lakhs and when the building was nearing completion, respondents 2 and 3 asked the petitioner to stop the project. Later the petitioner, addressed a letter dated 27-7-1996 to the first respondent requesting him to consider the case and permit them to continue the work. The first respondent in his letter dated 16-8-1996 informed the petitioner that NOC issued by him on 24-10-1995 stands cancelled and further directed the petitioner to demolish the building at the earliest.

6. It is stated that the petitioner constructed the building and plant in accordance with NOC, which permits the construction upto a height of 42.2 Mts. AMSL. It is also stated that the distance of the building in question is more than three Kins, from Visakhapatnam Air Field. According to the averments in the petition, the petitioner constructed the building upto a height of 27.40 mts. It is well within the norms fixed by the first respondent. The contention of the Naval authorities that the building is within the approach funnel of Air field and that it constitutes hazardous of obstacle to airplanes operating from the Airfield according to the petitioner, is incorrect. It is also denied by the petitioner that the contour map of Visakhapatnam is incorrect. Thus it is pleaded that the letter of the first respondent dated 16-8-1996 issued to the petitioner informing about the cancellation of NOC and directing it to demolish the plant and building is capricious and is in violation of principles of natural justice. It is averred that no notice was given before cancelling the said NOC.

7. It is averred by the petitioner that the respondents having been frequently coming to the Officials of the petitioner-Organisation and insisting demolition and they also threatened the petitioner's officials that if they fail to comply with the

directions given in the letter dated 16-8-1996, steps will be taken for demolition. Apprehending the demolition, this writ petition is filed.

8. Before referring to the counter filed on behalf of the respondents, it will be appropriate to refer to the impugned letter issued by the respondents dated 16-8-1996. The said letter is extracted below :

"(1) Refer to this Head Quarter's letter of even number dated 24-10-1995 regarding issuance of NOC.

(2) Scrutiny of a complaint made by National Air Ports Authority, New Delhi and Commanding Officer, INS DEGA has infer alia revealed that the construction of the Milk Powder Plant falls within the approach funnel of Visakhapatnam air field thus posing an aeronautical obstruction hazarding airplanes operating from this airfield.

(3) Further investigation has revealed that the certified color map provided by you is incorrect based on which the NOC had been issued.

(4) In view of the aforesaid, Your NOC hereby stands cancelled vide para 3 of the NOC and you are, therefore, requested to undertake the demolition of the above plant at the earliest.

Sd/- S. Gupta Command Aviation Officer for Flag Officer Commanding-in-Chief

9. The respondents contend (hat the complaints received from National Air Ports Authority, New Delhi and Commanding Officer, INS Dega, reveal that the construction of the Milk Powder Plant falls within the approach funnel of Visakhapatnam airfield, posing aeronautical obstructions and hazardous problems to the flights operating from that field. Secondly it is mentioned that the certified contour map provided by the petitioner on the basis of which NOC was issued was incorrect. In view of that, the petitioner was informed that NOC has been cancelled in terms of Para 3 of the said notice and it further "requested" the petitioner to undertake the demolition of the plant at the earliest.

10. In regard to the counter-affidavit filed on behalf of the respondents by the Commanding Officer, INS DEGA, instead of mentioning all the details of the counter, we deem it sufficient to point out salient features and pleas taken by the respondent. It is stated that by virtue of Circular No.3, the Headquarters Eastern Naval Command is authorised under the relevant Rules issued under India Aircraft Act, 1934, Indian Airports Authority Act, 1994, etc. to take action to remove the hazardous of obstacles to the flights operating from the Visakhapatnam Airport in Public interest. In this connection, it is mentioned that the Superintendence, Direction and Control over the Visakhapatnam Aerodrome with regard to Civilian and Defence Aircrafts were transferred to the Headquarters Eastern Naval Command by Central Government through Ministry of Transport Department of Civil Aviation through letter dated 15-1-1986, and Ministry of Defence fetter dated 10-7-1986. Thus the control of the Aerodrome with regard to Civilian and Defence Aircrafts vests with the first respondent and

the Aerodrome officer, Respondent No.2 herein. It is stated that the first respondent has been delegated the powers in terms of existing Rules, Notifications, Circulars under the provisions of Air Craft Act, 1934, International Airports Authority Act, 1971, National Airports Authority Act, 1985 and Airports Authority of India Act, 1994 for issuing NOC and also for taking action against the builders.

11. As to the facts, it is stated that the plan and elevation certificate from the Survey of India Department furnished by the petitioner along with their application for obtaining NOC indicated location of the Milk Powder Plant at bearing 251 degrees from dumbbell 05 runway. Thus it is stated that the location of the building as per plan was to fall outside the approach and take off funnel of the runway 05/23, as per the requirements of notification No.SO.988, dated 5-1-1988, Circular No.3, dated 10-10-1990, and Circular No.5, dated 4-12-1992. It is stated that the application for NOC was considered strictly with regard to stipulations provided in the said Notifications and Circulars with regard to the runway 05/23. Accordingly NOC was granted on 24-10-1995 as per the plan and elevation certificates annexed to the application dated 22-10-1994.

12. It is stated that contrary to the plan, the petitioner shifted location of the Milk Powder Plant and the building was erected at a distance, less than one nautical mile from the Runway 05 threshold which posed grave threat to the ingress and egress of Civil and Defence Aircraft since the structure in question was in the direct flight funnel, it is pointed out that the rules, circulars and regulations prohibited the structures, buildings beyond the air field upto a distance of 20 KMs. It is stated that the existence of such structures as an obstacle was brought to the notice of the Headquarters" Eastern Naval Command by Commander of Indian Airlines Flight Incharge 541/542, on 7-6-1996, who mentioned that the building stood as an obstacle to the take off path of runway at Visakhapatnam Aerodrome.

13. It is stated that the matter was reviewed under the provisions of Air Craft (Demolition of obstacle caused by Buildings and Trees) Rules, 1994 (for short "The Aircraft Rules") and the certificate granted on 24-10-1995 was cancelled in public interest and in the interest of safety of flights. It is also stated that Visakhapatnam was proposed to be up-dated as an International Airport which necessitated giving effect to the standards and recommended practices laid down by the International Civil Aviation Organisation since India was a Signatory and ratified the Chicago Convention of 1944 and also stipulated under the relevant Air Port Authority Acts.

14. Thus the cancellation of the NOC and the direction for demolition of the building are justified on these grounds. It is further elaborated that as per the plan submitted by the petitioner, the building was to be constructed to the bearing of 251 degrees and at a distance of 3.5 KMs from the threshold runway dumbbell 05 which is outside the direct flight funnel. It was on this basis that NOC was issued on 24-10-1995 for construction of building with a height of 43

meters above AMSL. Thus it is alleged that the petitioner willfully suppressed the correct location of the plant in the site plan and elevation certificate, and erected the building on 226 degrees at a distance of less than one nautical mile as against at the distance of 3.5 Kms. mentioned in the NOC. As the building came close to the runway 05/23 of Visakhapatnam Airport, and has become obstacle in the take off path endangering the safety of aircraft, NOC granted on 24-10-1995 was cancelled on 16-8-1996 under the provisions of Notification No.SO.988, dated 5-1-1988 issued u/s 9-A of the Air Craft Act, 1934 read with Rule 3 of the Aircraft Rules and the petitioner was directed to remove the said obstacle. This direction, according to the respondents, is just, proper, valid and in accordance with law.

15. It is denied that the petitioner was not served with a copy of Notification as contemplated u/s 9-A(3) of the Aircraft Act, 1934. It is thus stated that the direction for demolition issued under the letter dated 16-8-1996 is pursuant to the Notification No.SO. 988, dated 5-1-1988, issued u/s 9-A of the Aircraft Act, 1934 and also under Circular No.3, dated 10-10-1990, Circular No.5, dated 4-12-1992 and as such, is valid. It is averred that after cancellation of NOC issued on 21-10-1995, directions were issued for demolition through communication dated 16-8-1996 and no notice to the petitioner was required to be given, in as much as the construction was illegal.

16. It may be mentioned here that the learned single Judge, before whom the writ petition came up for consideration, though it fit to appoint a technical person as a Commissioner, namely, Officer Commandant, Air Force Academy, Hyderabad, by his order dated 20-1-1997 directing the Commissioner to obtain an independent view as to whether the building constructed by the petitioner was in any way danger to flights landing or taking off from the Visakhapatnam Airport, and the Commissioner has filed his report, to which objections have been filed by the petitioner and reply affidavit has been filed on behalf of the respondents to the objections filed by the petitioner

17. For the purpose of disposal of the present matter, it is not necessary to go into the merits and the stand taken by the rival parties on the report of the Commissioner, inasmuch as the writ petition has to be disposed of on a different question to be stated presently.

18. Though a reading of the impugned order dated 15-8-1996 passed by the first respondent would show that it is not couched in the form of a final determinative order and it merely purported to inform the petitioner that NOC was cancelled and accordingly requested the petitioner to undertake demolition of the building in question, it is apparent from the counter filed on behalf of the respondents that this is treated by them as final order in respect of cancellation of NOC dated 24-10-1996 granted by the first respondent and for directing the petitioner to demolish the building. The question is whether this order satisfied the statutory requirements.

19. It is apparent that the question of demolition of the building purporting to cause obstruction and endanger the flights while landing or taking off from the Visakhapatnam Airport is governed by the provisions of the Air Craft Act, 1934. Section 9-A of the Aircraft Act empowers the Central Government to prohibit or regulate construction of buildings, planting of trees etc. in the vicinity of the Airport, Section 9A is extracted below :

"9A. Power of Central Government to prohibit or Regulate Construction of Buildings, Planting of Trees etc. : (1) If the Central Government is of opinion that it is necessary or expedient so to do for the safety of aircraft operations it may by notification in the Official Gazette :

(i) direct that no building or structure shall be constructed or erected or no tree shall be planted on any land within such radius not exceeding 200 Kms. from the aerodrome reference point as may be specified in the notification and where there is any building, structure or tree on such land, also direct the owner or the person having control of such building, structure or tree to demolish such building or structure or, as the case may be, to cut such tree within such period as may be specified in the notification ;

(ii) direct that no building or structure higher than such height as may be specified in the notification shall be constructed or erected or no tree, which is likely to grow or ordinarily grows higher than such height as may be specified in the notification shall be planted, on any land within such radius, not exceeding 20 Kms. from the aerodrome reference point, as may be specified in the notification and where the height of any building or structure or tree on such land is higher than the specified height, also direct the owner or the person having control of such building, structure or tree to reduce the height thereof so as not to exceed the specified height, within such period as may be specified in the notification.

(2) In specifying the radius under Clause (i) or Clause (ii) of sub-section (1) and in specifying the height of any building, structure or tree under the said Clause (ii), the Central Government shall have regard to :

(a) the nature of the aircraft operated or intended to be operated in the aerodrome; and

(b) the international standards and recommended practices governing the operation of aircraft.

(3) Where any notification has been issued under sub-section (1) directing the owner or the person having control of any building, structure or tree to demolish such building or structure or to cut such tree or to reduce the height of any building, structure or tree, a copy of the notification containing such direction shall be served on the owner or the person having the control of the building, structure or tree as the case may be :

(i) by delivering or tendering it to such owner or person; or

(ii) if it cannot be so delivered or tendered by delivering or tendering it to any officer of such owner or person or any adult member of the family of such owner or person or by affixing a copy thereof on the outer door or on some conspicuous part of the premises in which such owner or person is known to have last resided or carried on business or personally worked for gain, or failing service these means :

(iii) by post.

(4) Every person shall be bound to comply with any direction contained in any notification issued under subsection (1)."

A perusal of the said section would show that the Central Government may issue a notification u/s 9-A(1) prescribing the restrictions and regulations in respect of construction of buildings or planting of trees.

20. It is seen that Notification has been issued u/s 9-A(1) prescribing regulations regarding permissible heights and other parameters in respect of the buildings in the vicinity of the Aerodrome by way of DARA Circular No.5 of 1992, F. No.NAS/20012/3/92-ARI by the National Air Ports Authority, Directorate of Air Routes and Aerodromes (Operations) which also contains the procedure for submission and examination of application for obtaining permissible elevations for construction of buildings and other structures in the vicinity of Aerodromes.

21. It is seen that the Central Government promulgated the Aircraft Rules. These Rules provide statutory procedure for taking steps for ordering demolition of any building and other structures which are likely to endanger the flights.

22. Rule 3 which is relevant for the said purpose is extracted below :

"3. Notification to be served - Where any notification has been issued by the Central Government under subsection (1) of Section 9A of the Act and the Director General of Civil Aviation has reason to believe that any building or tree existing in violation of the provisions of the aforesaid notification, he shall serve, through the officer-in-charge of the concerned aerodrome, a copy of the notification on the owner of the building or tree, as the case may be, in accordance with the procedure laid down in subsection (3) of Section 9A of the Act.

This Rule mandates that the Director-General of Civil Aviation shall cause a copy of the notification referred to above to be served through the Officer-in-Charge of the Aerodrome on any owner or occupier of the building which is sought to be demolished on the ground that it endangers to the safety of the flights.

23. Rule 4(1) of the Air Craft Rules mandates that while serving a copy of the notification on the persons concerned it shall be accompanied by an order of the Director-General of Civil Aviation, directing the owner to furnish to the Officer-in-Charge of the aerodrome within the specified period, a plan showing the location of the building or tree, as the case may be, and also its dimensions or any other

details specified in the order.

24. Rule 4(2) renders it obligatory on the part of the owner to furnish the details asked for in the order passed under sub-rule (1).

25. Rule 5 prescribes that the details furnished by the owner of the building or tree, as the case may be, shall be forwarded by the Officer-in-Charge of the aerodrome to the Director-General of Civil Aviation with his comments.

26. Rule 5(2) requires the Officer-in-Charge of the aerodrome to satisfy himself about the correctness of the details and for that purpose he shall be authorised to enter into the premises in question and carry out physical verification of the dimensions of the building or tree, as the case may be, with the prior notice to the owner who shall be duty bound to co-operate with such verification. However, where the owner does not co-operate the Officer-in-Charge of the aerodrome, shall be at liberty to forward his own findings and comments to the Director-General.

27. Rule 6 is vitally important to this writ petition which is reproduced below :

"Final order: (1) If the Director General of Civil Aviation, on an examination of the details forwarded to him by the Officer-in-Charge of the aerodrome, is satisfied, after giving the owner an opportunity of being heard, that the building or tree in question does violate the provisions of the notification issued by the Central Government under sub-section (1) of Section 9A of the Act, he shall pass a final order in the matter directing the owner to demolish the building, or to cut the tree, or to reduce the height of the building, or the tree, as the case may be required for compliance with the provisions of the notification, within a specific period. In case of reduction in the height of the building, or tree, as the case may be, the permissible height shall also be specified in the order:

Provided that in a case where the owner has failed to furnish details in response to the order under Rule 4, the Director-General of Civil Aviation shall be empowered to pass a final order based on information made available to him by the officer-in-Charge of the aerodrome or any other reliable source."

It is apparent that before the Director-General of Civil Aviation passes an order on the basis of the material information forwarded to him by the Officer-in-Charge of the aerodrome, he is required to give the owner an opportunity of being heard that the building or tree in question does not violate the provisions of the notification issued by the Central Government under subsection (1) of Section 9A of the Air Craft Act. After affording such opportunity and after hearing the owner of the building or tree, the Director-General is required to satisfy himself that the building or tree in question violated the provisions of Notification referred to above. It is only after following this procedure, the order of demolition of building or to cut the tree or reduce the height of the building or the tree as the case may be required for compliance with the provisions of the notification shall be passed.

28. In this case, it is nobody's case that any notice was served on the petitioner giving him an opportunity to present his case before the impugned order dated 16-8-1996 was passed. It may be mentioned here that as the Airport at Visakhapatnam was transferred under the control of Indian Navy, it is the first respondent who is vested with the powers of Director-General of Civil Aviation. Further there is no material to show that the Notification No.SO.988, dated 5-1-1988 prescribing the limits and regulations in respect of the building in the vicinity of the aerodrome has been served on the petitioner along with an order of concerned authority as contemplated under Rule 3 and 4(1) of the Air Craft Rules. Thus the impugned order dated 16-8-1996 appears to have been passed without complying with the statutory requirements under the said rules. No opportunity has been furnished to the petitioner to present his case as to how the building in question does not contravene the requirements of notification issued u/s 9-A(1), referred to above. The impugned order is, therefore, bad inasmuch as it has been passed in violation of principles of natural justice and statutory rules.

29. The same applies to the other part of the said order in regard to cancellation of NOC. It may be mentioned here that the said requirement under DARA Circular No.5 of 1992 also prescribes the mode of giving an application and procedure for disposal of the application for NOC. Though there is no specific mention about the procedure for cancellation of NOC already issued, the fact remains that unilateral cancellation of NOC already issued cannot be countenanced and upheld. It cannot be denied that if as contended by the respondents herein, no objection certificate was obtained by misrepresentation or suppression of the material facts, the respondents obviously have the power to cancel the NOC. The petitioner cannot rely on NOC once it is proved that it has been obtained by suppression of facts or that the construction of building is of a height, place and distance other than what has been mentioned in the application for obtaining the NOC. There is a serious dispute about facts in this case. It is the contention of the Counsel on behalf of the respondents that in the application for NOC it was represented that the building will be constructed at 25! degrees and at a distance of 3-5 Kms. from the Aerodrome reference point, but that infact the building has been constructed within less than one nautical mile from the threshold of runway and on 226 degrees. Before cancellation NOC on this ground, it was incumbent upon the concerned authority to give reasonable opportunity to the petitioner to present his case that there was no misrepresentation of facts for obtaining NOC and the plans and maps annexed there to were correct. They might to have been given an opportunity to show that the building was not constructed contrary to the factual basis on which NOC was issued namely, that the building would be constructed at a distance more than 3.5 Kms. away from the Aerodrome reference point and that it was not constructed within one nautical mile as averred by the respondents.

30. In the result, the impugned order is set aside. The Competent Authority under the Aircraft Act applicable to the Visakhapatnam Aerodrome shall follow

the procedure prescribed while passing the orders for demolition of any building as required under the relevant Rules and after affording an adequate opportunity to the petitioner for making his representation as required under the said Rules. It shall be open to the Competent Authority, at Visakhapatnam Airport to take steps to cancel the NOC after giving an opportunity of being heard to the petitioner.

31. The writ petition is allowed accordingly in the above terms. However, in the circumstances, the parties are directed to bear their own costs. It goes without saying that no demolition of building shall be undertaken by the respondents without following the procedure prescribed under the Rules as mentioned above.

32. In view of the disposal of the writ petition itself, there is no need to pass any orders in the writ appeal. Hence closed. No costs.