

(2020) 07 BOM CK 0010
In the Bombay High Court
Case No : Writ Petition (L) No. 3646 Of 2019

Kalpataru Ltd

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 03-07-2020

Acts Referred:

Aircraft Act, 1934 — Section 5, 5A, 9A, 9A(1), 9A(2), 14, 14A
Ministry Of Civil Aviation (Height Restrictions For Safeguarding Of Aircraft Operations)
Rules, 2015 Rule 3, 5, 11, 11(2)
Constitution Of India, 1950 — Article 226

Citation : (2020) 07 BOM CK 0010

Hon'ble Judges : S.J.Kathawalla, J;B.P.Colabawalla, J

Bench : Division Bench

Advocate : irag Tulzapurkar, Saket Mone, Subit Chakraborti, Vishesh Karla, Sharan Jagtiani, uneet Tyagi, Aditi Chavan, Shweta Sangtiani, Vishal Dushing, Abhishek Salian, R.V.Govilkar, Dhanesh Shah, Anil Singh, Ajay Khair

Final Decision : Allowed

Judgement

S.J. Kathawalla, J

1. Rule. By consent of all parties Rule is made returnable forthwith and the Writ Petitions are taken up for final hearing.

2. These three Writ Petitions that were heard together arise from very similar facts and raise identical issues and are therefore being disposed of by a

common order and judgment. For convenience the facts in the first Writ Petition will be set out and the facts in the connected Writ Petitions will be

briefly referred to thereafter. The Petitioners in all the three Writ Petitions are person who are developing plots of land in the vicinity of the Mumbai

International Airport. The Respondents in all the three Writ Petitions are the Union of India (through the Ministry of Civil Aviation), the Airports

Authority and the Appellate Committee â" Airport Authority of India (hereinafter the âAppellate Committeeâ).

3. In Writ Petition (L) No. 3646 of 2019, the Petitioner, Kalpataru Ltd. is developing three plots all of which are at Village Kole Kalyan, Santacruz,

East. The first plot, in respect of which the Petitioner is also the owner, is CTS No. 4100 (âPlot No. 1â); the second plot is sub-divided Plot No. A

of CTS No. 4106 and 4108 (âPlot No. 2â); and the third plot is sub-divided Plot No. B of CTS No. 4106 and CTS No. 7632 (âPlot No. 3â).

4. Plot Nos. 1, 2 and 3 (hereinafter referred to as the âsaid Plotsâ) are at a distance of 2548 meters (Plot No.1), 2439.44 meters (Plot No. 2) and

2387.81 meters (Plot No. 3), respectively, from one of the existing Airport Surveillance Radar (âASRâ) that services the Mumbai International

Airport. This factual position is not disputed by the Respondents.

5. On 30th September 2015, Respondent No. 1 issued Notification No. GSR 751 (E) by which the Ministry of Civil Aviation (Height Restrictions for

Safeguarding of Aircraft Operations) Rules, 2015 (hereinafter the â2015 Rulesâ) were notified. The 2015 Rules lay down the parameters for

carrying out construction and development activities within the vicinity of airports throughout India. The issue that arises in these Writ Petitions mainly

concerns the rules pertaining to permissible height based on distance of the plots under development from ASRâs that service an airport. The

relevant Rules are set out below, but it is significant to note that it is the Petitioners contention that based on the 2015 Rules it is entitled to the

maximum permissible height because all of the said plots satisfy the requirement of being more than or beyond two kilometres away from any one of

the ASRâs that services Mumbai Airport.

6. On 12th April 2018, Respondent No. 1 published draft rules vide Notification No. GSR 365(E), inviting objections and suggestions in respect of the

draft rules as published (hereinafter the âDraft 2018 Rulesâ). By the Draft 2018 Rules certain amendments have been proposed to the 2015

Rules, including in respect of the manner in which the permissible height for development of a plot in the vicinity of an airport is determined. The

relevant draft Rules are set out below, but it would be significant to note that one of the proposed amendments is to make the maximum permissible

height available to a plot under development only if it is at a distance of more

than or beyond two kilometres from all the ASRâ??s that service an airport, where there are more than one ASRâ??s.

7. On 23rd April 2019, Respondent No. 3 (â??the Appellate Committeeâ?) in its meeting at which it was considering various appeals fled by diferent parties, also took a decision to adopt, at Agenda 19, the parameters contained in the Draft 2018 Rules as the criterion for clearing projects for maximum permissible height. The specifc draft Rule is the proposed amendment to Rule 2.5.2.2 of Schedule II, that prescribes the requirement of a plot being more than two kilometres away from all the ASRâ??s to be entitled to the benef of the maximum permissible height. There is no dispute that at that time the 2015 Rules were in force and the criterion adopted by the Appellate Committee was based on the Draft 2018 Rules. This decision is impugned in all the three Writ Petitions.

8. On 22nd May 2019, the Petitioner fled three applications â??â? for grant of highest permissible top elevation along with requisite undertaking and site elevation and site coordinates certifcatesâ?, as stated in the Petition at paragraph 17 (hereinafter referred to as â??the Applicationsâ?). The Applications were based on the provisions of the 2015 Rules that were and are in force.

9. On 29th August 2019, Respondent No. 2 issued the impugned NOCâ??s granting a reduced permissible top elevation of 44.68 meters (Plot No. 1), 43.10 meters (Plot No. 2) and 43.55 meters (Plot No. 3), respectively. According to the Petitioner the permissible top elevations of maximum height that it would be entitled to in respect of the said Plots is 57.65 meters (Plot No. 1), 56.03 meters (Plot No. 2) and 55.25 meters (Plot No. 3), respectively, Above Mean Sea Level (â??AMSLâ?). The aforesaid NOCâ??s are impugned in Writ Petition (L) No. 3646 of 2019. Similar NOCâ??s of diferent dates are the subject matter of challenge in the connected Writ Petitions.

10. On 5th September 2019, the Petitioner made representations to Respondent No. 2 for reconsideration of permissible top elevation or maximum permissible height. These representations or requests were rejected by Respondent No. 2 vide communications dated 4th October 2019 but issued on 16th October 2019. The Petitioner then addressed three separate letters to the Chairman of the Appellate Committee on 15th October 2019, again

seeking a reconsideration of the height or top elevation as granted by the impugned NOCs. There does not appear to have been any response to these representations.

11. Writ Petition (L) No. 3646 of 2019 was filed on 13th December 2019. The Petition has impugned the decision at Agenda 19 of the Appellate

Committee dated 23rd April 2019 and the NOCs dated 29th August 2019, inter alia, on the ground that Appellate Committee has no jurisdiction to

take an executive or administrative decision to apply the Draft 2018 Rules for determining maximum permissible height when the 2015 Rules continue

to remain in force and binding upon the Respondent Nos. 2 and 3. The Petition states that the 2015 Rules are subordinate legislation and cannot be

overridden by the executive decision of 23rd April 2019 of the Appellate Committee. Under the Aircrafts Act, 1934, there is a process to be followed

for Draft Rules to be notified as the final rules, which process has not been completed in respect of the Draft 2018 Rules. Therefore, any decision of

the Appellate Committee seeking to implement the Draft 2018 Rules and the NOCs based on that decision and the Draft 2018 Rules are in

contravention of the 2015 Rules and would be illegal and arbitrary.

12. Accordingly, prayers (a) and (b) of Writ Petition (L) No. 3646 of 2019 read as under :

â“(a) This Court be pleased to issue a Writ of Certiorari or any other appropriate writ order or direction in the nature of Certiorari under

Article 226 of the Constitution thereby calling for the record and proceedings culminating in the Minutes of Meeting dated 23rd April 2019

of Appellate Committee of Respondent No. 2 (Exhibit C), and after examining the legality and propriety thereof, be pleased to quash and set

aside the same to the extent it implements the proposed amendment to multi-radar criteria (Agenda No. 19 of Minutes of Meeting dated 23rd

April, 2019).

(b) This Court be pleased to issue writ of Mandamus or any other Writ, Order or direction in the nature of mandamus under Article 226 of

the Constitution of India, 1950, thereby directing the Respondent No. 2 to issue revised NOC in accordance with norms laid down in 2015

Rules for a permissible top elevation of 57.65m AMSL for Plot No. 1, 56.03m AMSL for Plot No. 2, 55.25 meter AMSL for plot no. 3, within

a time bound manner.â??

13. The brief facts of Writ Petition (L) No. 3743 of 2019, fled by United Industrial House Premises Co-operative Society Ltd. are as follows :

The Petitioner is the owner of a single plot bearing CTS No. 4102D and 4102D1/1 to 6 located at Village Kole Kalyan, Shantinagar, Vakola,

Santracruz (East). The Petition states in paragraph 11 that this plot is at a distance of 2505.06 meters from one of the existing ASRâ??s that service

Mumbai International Airport. This fact is not disputed by the Respondents. The Petitioner, being a cooperative society, took a decision to redevelop

the dilapidated building that is located on the aforesaid plot. On 22nd May 2019, the Petitioner fled an application â??â?| for grant of highest

permissible top elevation along with requisite undertaking and site elevation and site coordinates certificatesâ? as mentioned in paragraph 18 of that

Writ Petition. This application was made on the basis of the 2015 Rules. On 29th August 2019, Respondent No. 2 issued a NOC granting a reduced

permissible top elevation of 44.34 meters AMSL, whereas the Petitioner claimed a top elevation or height of 57.01 meters AMSL being the maximum

permissible height under the 2015 Rules. The Petitioner addressed a representation to Respondent No. 2 for reconsideration of the NOC, highlighting

the dilapidated condition of the building. This request was rejected by Respondent No. 2 on 4th October 2019 and 18th October 2019. Further letters

or representations were addressed on 15th October 2019 to Respondent No. 2 being the Appellate Committee. There was no response to this

letter/representation. This Writ Petition also challenges the decision of 23rd April 2019 of the Appellate Committee and the NOC of 29th August 2019.

14. The brief facts of Writ Petition (L) No.3744 of 2019, fled by Klassik Homes Pvt. Ltd. are as follows :

The Petitioner is the owner of plot bearing CTS No. 250B/ 8 at village Bandra-1, Sub Plot No. 50/2 of Plot No. 50 at Santacruz. There is a building

that is standing on that plot. The Petition at paragraph 11 states that the plot is at a distance of 2916.38 meters from one of the existing ASRâ??s that

services Mumbai International Airport. This fact is not disputed by the Respondents. On 4th June 2019, the Petitioner fled an application in respect of

this plot â??â?| for grant of highest permissible top elevation along with requisite undertaking and site elevation and site coordinates certificatesâ? as

mentioned in paragraph 16 of that Writ Petition. This application was made on the basis of the 2015 Rules. On 15th October 2019, the Petitioner

addressed a letter to the Chairman of the Appellate Committee requesting them to grant permission for building height as per the 2015 Rules and not

on the basis of the decision of Respondent No. 3 dated 23rd April 2019. As of this date, the Petitioner still had not received any NOC in respect of its

application for top elevation or maximum height. On 7th November 2019, Respondent No. 2 issued a NOC to the Petitioner granting a reduced top

elevation of 49.39 meters for its plot as against a claimed top elevation of 63.17 meters AMSL. On 2nd December 2019, the Petitioner addressed a

letter to Respondent No. 2 for reconsideration of permissible top elevation. There has been no response to this letter. This Writ Petition also

challenged the decision of the Appellate Committee dated 23rd April 2019 and the NOC issued to the Petitioner dated 7th November 2019.

15. Before setting out the rival submissions of the parties, it would be necessary to reproduce the relevant provisions of the Aircrafts Act, 1934; the

2015 Rules; the Draft 2018 Rules; and the relevant extract of the impugned resolution at Agenda 19 of the Appellate Committee dated 23rd April

2019.

16. The Aircraft Act, 1934 (â??the Actâ?), confers upon the Central Government the rule making power under Section 5 of the Act, the relevant part

of which reads as under.

â??5. Power of Central Government to make rules â?" (1) Subject to the provisions of Section 14, the Central Government may, by

notification in the Official Gazette, make rules regulating the manufacture, possession, use, operation, sale, import or export of any aircraft

or class of aircraft and for securing the safety of aircraft operations.]

5 (2) â?" Without prejudice to the generality of the foregoing power, such rules may provide for -

â?|â?|â?|â?|â?|..

(gc) the measures to safeguard civil aviation against acts of unlawful interference; and

â?|â?|â?|â?|â?|.

(r) any matter subsidiary or incidental to the matters referred to in this sub-section.

17. Section 5A of the Act confers powers upon the Director General of Civil Aviation or any other officers empowered by the Central Government to

issue directions not inconsistent with the provisions of the Act or the rules framed thereunder. Section 5A of the Act reads as follows :

â??Section 5A. Power to issue directions â?" (1) The Director-General of Civil Aviation or any other officer specifically empowered in this

behalf by the Central Government may, from time to time, by order, issue directions, consistent with the provisions of this Act and the rules

made thereunder, with respect to any of the matters specified in [clauses (aa), (b), (c), (e), (f), (g), (ga), (gb), (gc), (h), (i), (m) and (qq) of

sub-section (2) of Section 5, to any person or persons using any aerodrome or engaged in the aircraft operations, air traffic control,

maintenance and operation of aerodrome, communication, navigation, surveillance and air traffic management facilities and safeguarding

civil aviation against acts of unlawful interference], in any case where the Director-General of Civil Aviation or such other officer is satisfied

that in the interests of the security of India or for securing the safety of aircraft operations it is necessary so to do.â??

18. Section 9A of the Act confers powers upon the Central Government to issue directions to regulate or prohibit, inter alia, the construction of

buildings within a prescribed radius of the aerodrome reference point, if it is of the opinion that it is necessary or expedient to do so for the safety of

aircraft operations. Section 9A(2) of the Act sets out the factors that have to be taken into account for determining the radius to which the prohibition

or regulation in Section 9A(1) of the Act is to be applicable. Any direction made under these provisions is required to be notified in the Official Gazette.

Section 9A(1) and (2) read as under :

â??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 twenty kilometres 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 twenty kilometres 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 persons 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 aircraftâ??.

19. Section 14 of the Act provide that every rule made under the Act is subject to the condition of the rule being previously published. This condition

can be dispensed with by the Central Government only in writing. Section 14A of the Act requires that the rules made under the Act are placed

before each House of Parliament for their approval. These provisions read as under :

â??14. Rules to be made after publication. - Any power to make rules conferred by this Act is subject to the condition of the rules being

made after previous publication :

Provided that the Central Government may, in the public interest, by order in writing dispense with the condition of previous publication in

any case.)â??

14A. Laying of rules before Parliament. - Every rule made under this Act shall be

laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule, or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that ruleâ??.

20. The Ministry of Civil Aviation (Height Restrictions for safeguarding of Aircraft Operations) 2015 Rules have been made by the Central

Government under Section 5 read with Section 9A of the Act. Rules 5, 7 and 11 are relevant and are set out below :

Rule-5

â??5. Issuance of No Objection Certificate. - (1) The No Objection Certificate in respect of civil aerodromes shall be issued by the

designated officer on behalf of the Central Government in respect of civil aerodromes.

(2) The No Objection Certificate in respect of defence aerodromes shall be issued by the authorised officer in accordance with Schedule I and

Schedule II, subject to such other conditions as the said authorized officer may deem fit.

(3) In case of State owned and private aerodromes, licensed by the Directorate General of Civil Aviation, the No Objection Certificate for

the protection of obstacle limitation surfaces (OLS) at such airports shall be issued by the designated officer and the procedure in cases of

State owned and private aerodromes, not licensed by the Directorate General of Civil Aviation, shall be regulated in the manner as specified

in rule 13.

(4) The application for issuance of No Objection Certificate in respect of civil aerodromes, shall be made by the applicant to the designated

officer through the No Objection Certificate Application System (NOCAS), accessible on the website of the Airports Authority at

www.aai.aero.â??

Rule-7

7. Approval for construction of buildings, structures, etc. -

(1) After considering, the No Objection Certificate issued by the designated officer or the authorised officer, the concerned Local, Municipal

or Town Planning and Development Authorities shall approve the construction of buildings or structures not exceeding the Permissible Top

Elevation. Local, Municipal or Town Planning and Development Authorities shall also consider the existing building regulations or bye-

laws or any other law for the time being in force before approving the construction of buildings or structures.

(2) In cases of aerodromes where the Colour Coded Zoning Maps has been issued, the Local, Municipal or Town Planning and

Development authorities shall, in accordance with the height specifications provided in such Colour Coded Zoning Maps, approve the

construction of the structures, as per the existing building regulations or bye laws or any other law for the time being in force :

Provided that no such approval shall be given by the Local, Municipal or Town Planning and Development authorities for sites which lies in

approach, take off and transitional areas of an airport or in any other area, marked in the Colour Coded Zoning Map for the compulsory

obtaining of No Objection Certificate from the designated officer or authorized officer.

(3) The Local, Municipal or Town Planning and Development authorities shall certify on the sanction plan that the Floor Space Index or

Floor Area Ratio and the related height of the building or structure is within the permissible elevation as indicated in the Colour Coded

Zoning Map for the given site.

(4) The Local, Municipal or Town Planning and Development Authorities shall submit the details of structures approved under sub-rule (1)

and sub-rule (2) to the concerned designated officer or the authorised officer within a period of three days from the date of such approval.

Rule-11

11. Appellate Committee.- (1) There shall be an Appellate Committee consisting of the following, namely :-

(a) Joint Secretary (Airports), Ministry of Civil Aviation, Government of India as Chairperson ;

(b) Joint Director General of Civil Aviation (Aerodrome), Directorate General of Civil Aviation " Member ;

(c) Member (Air Navigation Services), Airports Authority of India " Member ;
and

(d) One technical expert having knowledge in the field of communication or air traffic management " Member.

(2) If any person or Local, Municipal or Town Planning and Development authorities or any airport operator is aggrieved with the decision

of the Designated officer, such person or entity may appeal to the Appellate Committee for redressal of his / their grievances with respect to

the height permissible under these rules.

(3) The cases for reference to the Appellate Committee specified in sub-rule (2) shall be received and processed by the corporate office at the

headquarters of the Airports Authority in New Delhi."

21. Schedule II of the 2015 Rules is concerned with the manner of calculating the height or permissible elevation based on certain international

standards. This schedule defines, inter alia, the procedure to be followed while applying and processing the NOC for height clearance. The relevant

provisions of this Schedule are as under :

"SCHEDULE II :

Purpose :

The height or permissible elevation for the structure, requiring, grant of NOC, shall be calculated based upon the International Civil

Aviation Organization (ICAO) Annex 14 Obstacle Restriction and Removal, Annex 10 the Radio Communication, Navigation and

Surveillance (CNS) aids and Doc 8168 Vol II defining the operational requirements for minimum altitudes of various segments of published

or proposed instrument approach procedures.

This annexure-II defines various OLS surfaces, requirements w.r.t. CNS and PAN-OPS, procedure to be followed while applying and

processing the NOC for height clearance".

2.5.2 Wherever airport is served or proposed to be served by Multiple Radars (more than one ASR), operational and integrated,

following criteria shall be applicable :

2.5.2.1 In case only one ASR is installed and the proposed ASRs are yet to be operationalized and integrated, the existing ASR will be

considered for height calculations as per the provisions of 2.5.1.

2.5.2.2. After multi radar system is operationalized and integrated, the maximum height permissible in the integrated system will be

considered for calculation of height to the applicant. However, from the radar performance requirement point of view, the structures are to

be examined, as follows, to ensure that there is no degradation of radar performance.

I. Within one kilometer of any ASR in the system, structures shall be examined from the respective radar as per para 2.5.1.

II. Between one and two kilometer, the metallic and large structures shall be examined from respective ASR as per para 2.5.1.

III. Structures which are Non-metallic and are not termed as large objects may be permitted to higher height as per IV below, subject to

condition that other structure(s) in vicinity do not form cluster with the structure under examination.

IV. Objects beyond two kilometer from any one of the ASRs, highest permissible height among integrated & operational ASR sites shall be

permitted as per para 2.5.1.??

22. The Draft 2018 Rules propose an amendment to clause 2.5.2.2 of Schedule II of the 2015 Rules. The relevant clause of the Draft 2018 Rules

reads as under :

?(xii) for clauses 2.5.2.2 the following shall be substituted, namely :-

?2.5.2.2. : After multi radar system is operationalized and integrated, the maximum height permissible in the integrated system shall be

considered for grant of height to the applicant. However, from the Radar performance requirement point of view, the structures are to be

examined, as follows, to ensure that there is no degradation of Radar performance.

a) Within one kilometer from any of the Rader (ASR/MSRR), structures shall be examined from the respective radar (ASR/MSSR) as per para

2.5.1

b) The metallic structures beyond one kilometer from all the Radars (ASR/MSSR), but between one to two Kilometer from any of the Radars

(ASR/MSSR), shall be examined from respective Radar (ASR/MSSR) as per Para 2.5.1

c) The non-metallic structures beyond one kilometer from all the Radars (ASR/MSSR), but between one to two Kilometer from any of the

Radars (ASR/MSSR), shall be permitted highest permissible height, as per IV below.

d) Objects beyond two kilometer from all the Radars (ASR/MSSR), highest permissible height among integrated & operational ASR sites

shall be permitted as per para 2.5.1. Note.I : Reinforced Cement Concrete (RCC) structures shall also be treated as Metallic structures.

Note.II : Above criterion will not be applicable for wind farms and EHT/HT lines.

23. As noted above, all these Writ Petitions challenge the decision taken at Agenda 19 of the Appellate Committee Minutes of Meeting dated 23rd

April 2019. The Minutes of Meeting, as noted in the first paragraph, basically deals with decisions taken on various appeal grievances from decisions

of the subordinate Designated Officers. However, at Agenda 19, the Appellate Committee noted as follows :

19. Multi radar criteria

On the basis of representation from RIIQ , WR (Mumbai), GM (ATM-NOC) and the representative of MIAL raised the issue of the

implementation of multi radar criteria only for the sites which are at least 2000m away from each of the radars in multi radar system at

Delhi and Mumbai airports. Appellate Committee deliberated on the issue and it was decided that the project site shall be at least 2000m

away from each of the Airport Surveillance Radars (ASRs) in the multi radar system so as to maintain the integrity of radar signal

propagation for uninterrupted aircraft data acquisition.

24. In view of the above facts and statutory provisions, Mr. Virag Tulzapurkar, learned Senior Counsel for the Petitioner in Writ Petition (L) No. 3646

of 2019 contended that the Appellate Committee decision of 23rd April 2019 is entirely without any legal authority or jurisdiction. He submitted that

whilst the 2015 Rules are in force, any application for permissible height or top elevation clearance can only be considered on the basis of the 2015

Rules. The 2015 Rules are very clear and unambiguous in that it allows for

maximum permissible height clearly under Schedule II, Clause 2.5.2.2 (IV)

if the plot in question is more than two kilometres from any one of the ASR's in a case where an airport is serviced by more than one ASR. This

being the situation as far as the Mumbai International Airport is concerned, the application ought to have been considered on this basis. Under the Act,

Rules proposed to be made under Section 5 read with Section 9A of the Act have to be previously published in the Official Gazette under Section 14 of

the Act. They have also to be laid before both Houses of Parliament under Section 14A of the Act. The Appellate Committee could never have by

executive fiat made the Draft 2018 Rules applicable to applications for height and top elevation when the 2015 Rules were in force. Moreover, the

Appellate Committee is itself a creature of the 2015 Rules and its limited jurisdiction is circumscribed by Rule 11(2) to that of a quasi-judicial appellate

forum to hear grievances from certain decisions of the Designated officers under the Act and Rules.

25. Mr. Tulzapurkar, also made a further submission that after the Draft 2018 Rules were published for inviting objections and suggestions there were

certain other applicants who have received height and top elevation clearance to an extent greater than the Petitioner. This, it is submitted, is

discriminatory treatment of Petitioner by the Respondent No. 2.

26. Mr. Tulzapurkar, in support of his submission that rules in draft form that have not been notified cannot be relied upon, cited the following authorities

:

i. B.K. Srinivasan & Ors. v/s State of Karnataka & Ors.¹ ; and

ii. I.T.C. Bhadachalam Paperboards & Anr. v/s Mandal Revenue Officer, A.P. & Ors.².

27. Mr. Sharan Jagtiani, learned Counsel for the Petitioner in Writ Petition (L) No. 3743 of 2019 adopted the submissions of Mr. Tulzapurkar. He again

emphasized that under the Act the rule making authority is only with the Central Government. Even the power to issue directions conferred upon the

DGCA under Section 5A of the Act has to be consistent with the provisions of the Act and the Rules framed thereunder. Further, it is only the Central

Government that is conferred the power to issue directions for regulating or prohibiting buildings within a certain radius of an aerodrome. This too

requires publication. Hence, he submitted that keeping these provisions in mind the Appellate Committee decision is completely illegal and without any

authority or jurisdiction. Mr. Jagtiani relied upon a decision of a Single Judge of the Delhi High Court in the case of Federation of Indian Airlines &

Ors. v/s Director General of Civil Aviation³.

28. Mr. Saket Mone, appearing for the Petitioner in Writ Petition No. 3744 of 2019, also adopted the submissions of Mr. Tulzapurkar and Mr. Jagtiani.

29. On behalf of the Respondents, Mr. Anil Singh, the learned Additional Solicitor General of India, opposed the Petitions and essentially relied upon

the Replies to Writ Petition (L) No. 3646 of 2019 (which is to be treated as a reply to all the Petitions). He contended that the Writ Petitions are not

maintainable as the Petitioners have an alternative remedy available to challenge the impugned NOCs granting a height or top elevation lesser

than what they had claimed by preferring an appeal to Respondent No. 3, the Appellate Committee. He then relied upon the facts set out in paragraph

3 of the Reply that deals with the high degree of air traffic congestion and density faced by the Mumbai International Airport as a reason to ensure that

higher standards of safety are maintained. This, he submits, is the reason for the Appellate Committee decision of 23rd April 2019 to adopt and

implement the Draft 2018 Rules. For these reasons he submitted that the Writ Petitions ought to be dismissed.

30. We have considered the facts, statutory provisions, submissions of the parties and the case law relied upon by the Advocates for the Petitioners.

We are of the opinion that there is no merit in the preliminary objection of alternative remedy alleged to be available to the Petitioners. The first

challenge in all of the Writ Petitions is to the Appellate Committee decision of 23rd April 2019 on the ground that it is entirely without authority or

jurisdiction and ultra vires the Act and the 2015 Rules. The alleged alternative remedy, as contended by the Respondents, is to the very same

Appellate Committee and can therefore never be a recourse to consider a challenge to the impugned decision of the Appellate Committee itself. It is

also clear that the impugned NOCs have been processed and issued on the basis of the impugned decision of the Appellate Committee and if that

decision stands there would be no purpose served by filing an appeal under Rule 11 of the 2015 Rules from the impugned NOCs to the Appellate

Committee. This submission is also without merit because it is well settled by the Supreme Court including by its judgment in the case of Whirlpool

Corporation v/s Registrar of Trade Marks, Mumbai and Ors. reported in (1998) 8 SCC 1 that the bar of alternative remedy to the maintainability of a

writ petition invoking the Courts jurisdiction under Article 226 of the Constitution of India will not be applicable when an order or decision is challenged

as being entirely without jurisdiction. Hence, for all of these reasons there is no merit in this submission of the Respondents.

31. As regards the merits of the challenge in these Writ Petitions, the main issue is as to whether the decision of the Appellate Committee to

implement and adopt the Draft 2018 Rules in relation to determining the permissible height or top elevation is illegal and without jurisdiction as

contended by the Petitioners.

32. We are of the view that said decision is entirely without authority of law and in excess of the jurisdiction and power of the Appellate Committee. It

is clear that in taking such a decision the Appellate Committee was not acting as an appellate forum or authority exercising any quasi- judicial

functions, for which purpose alone it was constituted, under Rule 11 of the 2015 Rules. In fact, it is not even the case in the Reply of the Respondents

that the impugned decision of the Appellate Committee was in exercise of its powers under Rule 11(2) of the 2015 Rules.

33. The Appellate Committee does not have any rule making or general administrative powers under the 2015 Rules or the Act. As is seen from the

provisions of Section 5 of the Act set out above, the power to make rules is only with the Central Government. Further, the power to issue directions

to regulate and prohibit the height of buildings within a defined radius of the aerodrome, under Section 9A of the Act, is also with the Central

Government. The other general power to issue directions under Section 5A on specified matters, consistent with the Act and rules made, is with the

Director General Civil Aviation.

34. At the time when the Appellate Committee took its decision on 23rd April 2019 and also when the Petitioners made their applications for grant of

NOC under Rule 5 of the 2015 Rules, admittedly it was only the 2015 Rules that were in force. The 2015 Rules continue to remain in force to date.

All applications would therefore have to be considered only in accordance with the 2015 Rules. The Appellate Committee could not have by its

decision given effect to or implemented the Draft 2018 Rules and in particular its

proposed amendments to the provisions of Clause 2.5.2.2 of the Second Schedule in contravention of the prevailing and corresponding provisions of the 2015 Rules. There is a clear statutory process that has to be followed for the Draft 2018 Rules becoming final and binding. Under Section 14 of the Act all rules are required to be previously published and the power to make rules is itself subject to this condition. The Central Government may, in the public interest and by order in writing, dispense with the condition of previous publication in any case. Section 14A of the Act then requires rules to be laid before both Houses of Parliament for their approval or modification.

35. Our aforesaid view is fortified by the Hon^{ble} Supreme Court in the case of B.K. Srinivasan & Ors., supra, at paragraph 15, which reads as follows :

“15. There can be no doubt about the proposition that where a law, whether Parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliably of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the 'conscientious good man' seeking to abide by the law or from the standpoint of Justice Holmes's 'Unconscientious bad man' seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known. We know that delegated or subordinate legislation is all pervasive and that there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important if not more important, than governance by Parliamentary legislation. But unlike Parliamentary Legislation which is publicly made, delegated or subordinate legislation is often made, unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes

the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the

mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is

published through the customarily recognised official channel, namely, the Official Gazette or some other reasonable mode of publication.

There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication

or promulgation by other means may be sufficient.⁴

36. To similar effect is the judgment of the Hon^{ble} Supreme Court in the case of *I.T.C. Bhadrachalam Paperboards*, *supra*, which after following

B.K. Srinivasan, *supra*, states at paragraph 15 that, “The above decisions of this Court make it clear that where the parent statute prescribes the

mode of publication or promulgation that mode has to be followed and that such requirement is imperative and cannot be dispensed with.” (Emphasis

Original)

37. It is therefore clear that there is an elaborate process to be followed for the Draft 2018 Rules to become final and binding. The same or any part of

it cannot be given effect by the impugned decision of the Appellate Committee in variance with the existing provisions of the 2015 Rules. As already

noted above the Appellate Committee has done this by adopting the standard for maximum height clearance as stipulated in the Draft 2018 Rules

namely that the site must be at least 2000 meters away from each of the radars system at Delhi and Mumbai airports. This is in variance with the

corresponding provision of the existing 2015 Rules at Clause 2.5.2.2 (IV), which provides for highest permissible height for objects beyond two

kilometres from any one of the ASRs.

38. This decision of the Appellate Committee is not traceable to any provision or power of the Act or 2015 Rules. The power of any authority

established under the Act or rules made thereunder, must be exercised strictly in accordance with the Act. This well established principle has been

applied by the Delhi High Court in the case of *Federation of Indian Airlines & Ors.*, *supra*, which dealt with a challenge to a circular issued by the

DGCA under the Act. In this regard the Court upheld a challenge to a circular issued by the DGCA purporting to restrict levy of excess baggage

charges. At paragraph 32 the Court stated as follows :

“The impugned circular insofar as it restricts excess check-in baggage charges, is also not saved by virtue of Section 5 of the Act, since

the power to issue directions in relation to the subject matter of Section 5(2)(ab) of the Act, has not been conferred on DGCA. It is well

settled that subordinate legislation must be confined within the limits of the authority conferred by the enabling legislation. In the present

case, the Act only confers limited powers on DGCA and, therefore, any directions issued by DGCA have to be within the confines of the

authority conferred under the Act. The impugned circular, thus, insofar as it issues directions regarding charges for excess check-in

baggage, is plainly beyond the powers conferred on DGCA by virtue of Section 5A of the Act.”

39. None of the submissions canvassed by the Respondents are an answer to lack of authority, power and jurisdiction of the Appellate Committees

impugned decision of 23rd April 2019 or to any of the observations expressed above. There is no doubt that it is for the Respondents to take all

aspects of safety into account when regulating activities within the vicinity of any airport, but in doing so the Respondents must act in accordance with

the provisions of the Act and rules made thereunder. If there are safety related concerns that require to be addressed, the Respondents may do so by

making appropriate rules and issuing appropriate directions in the manner prescribed by the Act and the rules made thereunder. No part of our

observations as expressed above comes in the way of the Respondents doing so. However, the same must be done in accordance with the statutory

framework and not in the manner in which it is sought to be done by the impugned decision of the Appellate Committee.

40. For all of these reasons, the impugned decision of the Appellate Committee at Item 19 of the Minutes of Meeting dated 23rd April 2019 is quashed

and set aside and the Writ Petitions are allowed in terms of prayer Clause (a) thereof.

41. As already mentioned above, the impugned NOCs were also based on the decision of the Appellate Committee and not granted in

accordance with the provisions of the 2015 Rules. For the reason stated above, we are of the view that the impugned NOCs have not been

issued in accordance with the provisions of the 2015 Rules and are therefore also liable to be quashed and set aside and the Writ Petitions are allowed

in terms of prayer (b) but only to the extent of the first part thereof, which seeks quashing of the impugned NOCs. It is made clear that by this

order we are not issuing any direction to the Respondents to issue a revised NOC of any particular height as prayed for in the latter part of prayer (b).

Respondent No. 2 will consider the applications for grant of NOC afresh in accordance with the provisions of the 2015 Rules and issue its NOC

strictly in accordance with law within a period of four weeks from the date of pronouncement of this Judgment. This is of course, if in the meanwhile,

the draft 2018 Rules or any other form of legislation has not been brought into force. If it has, then the grant of NOC will be governed by the new

legislation.

42. In light of the view taken above, we do not find it necessary to deal with any other submission made by the Petitioners in respect of alleged

discrimination or favourable treatment of other developers or plot owners in the matter of grant of permissible height. We express no view on the

same.

43. The Writ Petitions are allowed in the aforesaid terms. There will, however, be no order as to costs.