
(2018) 01 DEL CK 0002

In the Delhi High Court

Case No : Civil writ Petition No. 11829 Of 2016, Civil Miscellaneous No. 46645 Of 2016

M/S. DBS REALTY

APPELLANT

Vs

UNION OF INDIA & ANR.

RESPONDENT

Date of Decision : 30-01-2018

Acts Referred:

Constitution of India, 1950 — Article 14
Ministry Of Civil Aviation (Height Restrictions for Safeguarding Of Air Operations) Rules, 2015 — Rule 4, 5, 9, 11
Aircraft Act, 1934 — Section 5, 9A

Citation : (2018) 01 DEL CK 0002

Hon'ble Judges : Vibhu Bakhru

Bench : Single Bench

Advocate : Rajiv Nayar, Rishi Agarwala, Niyati Kohli, Karan Luthra, Digvijay Rai, Pulkit Tyagi

Final Decision : Disposed Of

Judgement

1. The petitioner is a company engaged in the business of developing real estate. On 14.02.2008, the Slum Rehabilitation Authority (hereafter "SRA") had issued a public notice inviting expression of interest from land owners/developers interested in undertaking a scheme as per the Development Control Regulation of Great Mumbai, 1991. This was, inter alia, to create additional housing stock for rehabilitation of slum developers that had encroached upon Sanjay Gandhi National Park and another project affected persons.

2. The petitioner had submitted a proposal pursuant to the aforesaid advertisement. The said proposal was accepted and, on 17.03.2009, a Letter of Intent was issued to the petitioner by the SRA for construction of 9927 number of tenements including Balwadi, Welfare Center and Society Offices. The said development was in five parts/plots - Plot I measuring approximately 11,600 sq. meters; Plot II measuring 10,000 sq. meters; Plot III measuring 23,405.65 sq. meters; Plot IV measuring 25,510.83 sq. meters; and Plot V measuring

29,916.52 sq. meters. An educational complex and a hospital were to be constructed on Plot I and Plot II respectively. The Slum Rehabilitation buildings were to be constructed on Plot IV and Plot V and Plot III was earmarked for construction of Sale building.

3. Since buildings were within the specified distance of the Inner Horizontal Surface (IHS) of the Santa Cruz Airport, Mumbai, the petitioner was required to take No Objection Certificate (NOC) for the height of the buildings from the AAI. Initially, the AAI issued separate NOCs for height clearance as indicated below:-
"a. Plot I (Educational Complex): 20.740 mts. Above Ground Level (hereafter "AGL") + 35.53 mts. Site Elevation = 56.27 mts. Above Mean Sea Level (hereafter "AMSL")

b. Plot II (Hospital): 19.540 mts. AGL + 36.73 mts. Site Elevation = 56.27 mts. AMSL

c. Plot III (Sale Buildings): 15.790 mts. AGL + 40.48 mts. Site Elevation = 56.27 mts. AMSL

d. Plot IV (9 G+23 Rehab Buildings): 13.910 mts. AGL + 42.36 mts. Site Elevation = 56.27 mts. AMSL

e. Plot V (5 G+23 Rehab Buildings): 18.770 mts. AGL + 37.50 mts. Site Elevation = 56.27 mts. AMSL"

4. Dissatisfied with the aforesaid NOCs, the petitioner filed appeals before the Appellate Committee constituted under the Chairmanship of Joint Secretary, Ministry of Civil Aviation (MOCA) for reviewing the NOCs and requested that height clearance of 112 meters AMSL (that is, 74.50 meters AGL + 37.50 meters site elevation) be granted to the petitioner.

5. On 18.05.2012, the AAI issued a revised Height Clearance NOC for Plot I permitting the petitioner to raise a building up to a height of 91.53 meters AMSL (that is, 56 meters AGL + 35.53 meters site elevation). A similar NOC was also granted in respect of Plot II permitting the petitioner to raise buildings on the said plot up to a height of 92.73 meters AMSL (56 meters AGL + 36.73 meters site elevation).

6. The petitioner is aggrieved by non-grant of height clearance as requested by it for buildings to be raised on remaining plots. It is also the case of the petitioner that the project is located at the foothill of a natural feature named "Lalbatti Hill". The petitioner claims that the apex of the said natural terrain is at 209.10 meters AMSL and, therefore, by applying the shielding criteria, the petitioner is entitled to construct buildings on Plot IV and Plot V up to a height of 188 meters AMSL.

7. The petitioner has filed the present petition, inter alia, impugning the decision of the Appellate Committee taken at its meeting held on 30.07.2015 to direct the "Airport Operator" - in this case the Mumbai International Airport Limited

(hereafter "MIAL") - to initiate action under Aircraft (Demolition of Obstructions caused by buildings & trees, etc.) Rules, 1994. The petitioner also impugns the consequent direction issued by the AAI to MIAL to take suitable action pursuant to the above decision of the Appellate Committee.

8. In the present petition, the petitioner has also prayed that directions be issued to the respondents to "grant of Height Approval NOCs of 73.95 AGL on Plot IV and Plot V in accordance with the provisions of shielding benefit contained in GSR 751 (E)".

9. Although, several prayers have been made in the petition, Mr Nayar, the learned Senior Counsel appearing for the petitioner had limited the relief in the present petition to only seeking that directions to be issued to AAI for conducting aeronautical studies. Mr Nayar submitted that although the Appellate Committee in its meeting held on 16.01.2015 had taken a decision that aeronautical studies be undertaken for the purposes of considering the petitioner's request for granting increased height clearance for the plots in question, no such aeronautical study had been undertaken.

10. This Court had taken up the matter on 02.11.2017 and the following order was passed:- "1. Mr Nayar, learned Senior Counsel appearing for the petitioner has restricted the present petition to the solitary relief, that a direction be issued to Airport Authority of India (hereafter "AAI") for conducting aeronautical studies. He referred to the minutes of the meeting of the Appellate Committee held on 16.01.2015, wherein a decision to conduct the aeronautical study was taken. He submits that despite the said decision no such exercise was conducted. Initially, the said contention was disputed by Mr Rai, the learned counsel appearing for AAI. However, it was pointed out that the order dated 30.07.2015 plainly indicates that a physical verification was done and that was not a substitute for aeronautical studies.

2. Learned counsel further submitted that aeronautical studies cannot be done where the height of the buildings has exceeded under the maximum height provided in the NOC. He also referred to the decision of the Bombay High Court in the case of Havemore Realty Private Ltd. & Anr. v. Union of India: W.P. (LODGING) No. 550/2016 order dated 20.04.2016, whereby the Bombay High Court had directed the petitioner therein to demolish the floors above the height provided under the NOC for the aeronautical studies to be carried out. He further submits that it would not be physically/technically possible to carry out the said studies, if the height of the building is above the level indicated in the NOC.

3. In view of the above submission, the scope of the controversy has is considerably narrowed down to the question whether aeronautical studies can be conducted despite the building existing above the level specified in the NOC level or whether it is physically necessary to demolish part of the buildings to bring it within the NOC height restriction for such aeronautical studies to be carried out; the respondents submits that it is physically/technically not possible to carry out

such studies without such demolition and this is disputed by the petitioner. The learned counsel for AAI seeks time to take appropriate instructions in this regard and file a short affidavit.

4. Mr Rai also submitted that the buildings of the petitioner fall within the Inner Horizontal Surface (hereafter "IHS") as they are located at a distance of 3028 meters from runway 27 of Santacruz Airport. He states that as per the directions issued by the Bombay High Court, no NOC above a height of 56.9 meters can be granted for buildings located within IHS. This is not a matter of controversy which is required to be entertained at this stage. The same would be considered by an appropriate forum at a subsequent stage, if necessary.

5. Let the affidavit be filed on behalf of AAI before the next date of hearing.

6. List on 14.11.2017 for further proceedings."

11. It is apparent from the above order that the only issue that falls for consideration of this Court in this petition is whether there is any impediment in implementing the Appellate Committee's decision for conducting the aeronautical studies in respect of the buildings in question.

12. In compliance with the order passed on 02.11.2017, an affidavit was filed on behalf of the AAI. The said affidavit did not support the contention that was advanced on behalf of the AAI, by Mr Rai on 02.11.2017. It was now conceded that there is no physical or technical difficulty in carrying out the aeronautical studies as was decided by the Appellate Committee. Mr Rai, opposed the petitioner's plea for directing that aeronautical studies to be conducted, on three fronts. First, he submitted that the petition itself was not maintainable and this Court has no jurisdiction to entertain the same. Thus, the question of granting any relief to the petitioner in this petition did not arise. He submitted that the buildings in question were being constructed in Mumbai and only the Courts at Mumbai would have the jurisdiction in regard to the subject matter of the present petition.

13. Secondly, Mr Rai contended that as a matter of policy and uniform practice, the AAI does not conduct aeronautical studies of the structures, which had been raised in violation of the height restrictions. He stated that the petitioner had raised its buildings beyond the NOC granted by the AAI and, therefore, the benefit of conducting aeronautical studies was not available to the petitioner.

14. He further submitted that the Bombay High Court had also held that aeronautical studies could not be conducted unless the unauthorized construction had been demolished. He relied on the order passed by the Bombay High Court in Havemore Realty Pvt Ltd & Anr v. Union of India (supra) in support of his contention that the Bombay High Court had taken a view that aeronautical studies could not be conducted in respect of the structures that had been raised beyond the height clearance granted by the AAI and unless the height of the structures was brought within the permissible NOC, it was not permissible to

conduct any aeronautical studies.

15. Lastly, Mr Rai contended that the Bombay High Court was already in seisin of the subject matter of the present petition in Public Interest Litigation - Public Interest Litigation No. 86/2014 captioned "Yeshwant Shenoy v. Union of India and Five Others". He referred to an order dated 27.04.2017 passed in the said proceedings to indicate that there were 317 cases of unauthorized structures, which had been referred by MIAL to DGCA and the Bombay High Court had also admonished Director General of Civil Aviation for not showing the urgency as was necessary in such cases. Mr Rai relied upon a Newspaper Report - which Mr Rai states was published on April 13, 2017 - in support of his contention.

16. Mr Nayar, countered the submissions made on behalf of the AAI. He referred to the decision of the Division Bench of this Court in Skylark Buildcon Pvt. Ltd. and Anr. v. Union of India and Anr.: 2017 SCC OnLine Del 7819 and on the strength of the said decision contended that this Court would have the jurisdiction as the respondents were located within the territorial jurisdiction of this Court. He also referred to clause 5 of Schedule II to the Ministry of Civil Aviation (Height Restrictions for Safeguarding of Aircraft Operations) Rules, 2015 in support of his contention that an aeronautical study could also be conducted in case of existing structures.

17. Mr Nayar also pointed out that the petitioner's case was not included in the 317 cases mentioned by the Bombay High Court in the order dated 27.04.2017 passed in PIL No. 86 of 2014.

18. I have heard the learned counsel for the parties.

19. The contention that this Court does not have any jurisdiction to entertain the present petition is unmerited. The principal offices of the respondents are located in Delhi. The Appellate Committee also holds its meetings in Delhi. The said contention was also rejected by the Division Bench of this Court in Skylark Buildcon Pvt. Ltd. and Anr. (supra), wherein this Court held as under:- "15. On behalf of the respondent No.2/AAI, a detailed counter affidavit has been filed in which a preliminary objection has been raised as to the maintainability of the writ petitions in this Court on the ground of lack of territorial jurisdiction.

16. We do not find any substance in the said preliminary objection. It may be true that some other petitions are pending before the High Court of Bombay in which similar issues are stated to have been raised with regard to height clearance. However, we make it clear that the consideration by us is limited only to the issue as to whether the inaction on the part of the respondents in considering the request of the petitioners for referring their matters to ICAO for aeronautical study is arbitrary, illegal and violative of Article 14 of the Constitution of India. The said issue deserves consideration by this Court since the situs of both the respondents 1 and 2 is situated in Delhi within the territorial jurisdiction of this Court."

20. In view of the above, the contention that this Court has no jurisdiction to entertain the petition is rejected.

21. There is no dispute that the Appellate Committee, in its meeting held on 16.01.2015, decided that aeronautical studies be carried out at the site in question for determining whether the requested height of 112 meters AMSL is permissible. The minutes of the said meeting indicate that the Appellate Committee had referred to various letters sent by the petitioner requesting that clearance for a height of 112 meters of AMSL be granted for the project in question.

22. The Appellate Committee had also noted in the minutes of the meeting held on 16.01.2015 that the petitioner had agreed that aeronautical studies be carried out. It is also apparent from the minutes that the considered aeronautical study was necessary for considering the petitioner's request for grant of the Height Clearance.

23. The relevant extract of the minutes of the hearing held on 16.01.2015 were communicated to the petitioner on 30.01.2015. It is also apparent from the said communication that the Appellate Committee had not placed any condition for conducting the aeronautical studies; on the contrary, the petitioner was called upon to pay the fees as well as provide the necessary coordinates and elevation of the specific building for which aeronautical studies was to be conducted. The relevant extract is quoted as under:- "Accordingly, you are requested to deposit to this office the Aeronautical Study fee of Rs. 20 lakhs + Service tax, i.e. Rs.22,47,200/- in the form of a Demand Draft in favour of "Airport Authority of India" payable at Delhi and also sign an Agreement (is e-mailed) for conducting Aeronautical Study of your site.

(please submit the building section plan, coordinates of all the corners and its elevation of specific building for which Aeronautical Study is to be conducted)."

24. It is not disputed that the petitioner had paid the requisite fee as demanded.

25. Plainly, if the AAI had sought a review of the decision, it was necessary for the same to be communicated to the petitioner and also afford the petitioner an opportunity to be heard. However, there is nothing on record to indicate that any steps were initiated for review of the decision of the Appellate Committee.

26. Mr Rai earnestly contended that aeronautical studies cannot be conducted in relation to any construction, which has exceeded the permissible height for which an NOC had been given; however, he was unable to refer to any circular, rule or any policy statement, which embodies this Rule/policy.

27. The Central Government has in exercise of the powers conferred under Section 5 read with Section 9A of the Aircraft Act, 1934, framed the Ministry of Civil Aviation (Height Restrictions for Safeguarding of Air Operations) Rules, 2015 (hereafter "the said Rules"). Rule 4 of the said Rules proscribes construction and erection of any structure or for growing any tree, except as specified, within a

radius of twenty kilometers of an aerodrome without obtaining a No Objection Certificate for height clearance. Rule 5 of the said Rules provides for issuance of the No Objection Certificate for height clearance by the Designated Officer. Rule 9 of the said Rules provides for processing of the No Objection Certificate and Rule 11 of the said Rules provides for an Appellate Committee for considering appeals from decisions of the Designated Officer. Rule 4, 5 and 11 of the said Rules are set below: "4. Restrictions on constructions, erections, trees, etc.-

(1) No structure shall be constructed or erected, or any tree planted or grown on any land within a radius not exceeding twenty kilometers from the Aerodrome Reference Point of the civil and defence aerodromes, as specified in Schedule III to Schedule VII, without obtaining a No Objection Certificate for the height clearance, except in cases specified in sub-rule (2) of rule 7.

(2) No structure shall be constructed or erected, or any tree planted or grown on any land within the areas specified in Schedule I of the civil and defence aerodromes, as listed in Schedule III to Schedule VII, except for essential navigational aids and other installations required for aeronautical purposes.

(3) No structure higher than the height specified in Schedule II, shall be constructed or erected and no tree, which is likely to grow or ordinarily grows higher than the height specified in the said Schedule shall be planted on any land within a radius of twenty kilometers from the Aerodrome Reference Point.

(4) The level roads and level railway lines within one kilometer of the airport boundary wall shall also be subject to issuance of the No Objection Certificate.

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 authorised 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.

XXXX XXXX XXXX XXXX

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 - 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."

28. Clause 5 of Schedule II to the said Rules provides for conduct of Aeronautical Studies. The said clause is set out below:- "5. Conduct of Aeronautical Study and CNS Simulation Study

5.1 The Aeronautical Study, as referred to in the Civil Aviation Requirements Section-4, Series "B", Part I on Aerodrome Design and Operations and ICAO Annex 14, may be conducted to determine that the existing object or the proposed new object would not adversely affect the safety or significantly affect the regularity of operations of aeroplanes in pursuance of the ICAO provisions as given below:

Note 1: New objects or extensions of existing objects should not be permitted above the conical surface and the inner horizontal surface except when, in the opinion of the appropriate authority, after aeronautical study it is determined that the object would not adversely affect the safety or significantly affect the regularity of operations of aeroplanes.

Note 2: Existing objects above an approach surface, a transitional surface, the conical surface and inner horizontal surface should as far as practicable be removed except when, in the opinion of the appropriate authority, after aeronautical study it is determined that the object would not adversely affect the safety or significantly affect the regularity of operations of aeroplanes.

5.1.1 The request for aeronautical study shall be considered by the Member (Air Navigation Services), Airports Authority of India, on case to case basis.

5.1.2 Aeronautical Study shall not be carried out in Approach and Transition surfaces.

5.1.3 Aeronautical Study, as per the established guidelines, shall be carried out by AAI, ICAO or any other agency, approved for the purpose by Ministry of Civil Aviation.

5.1.4 Based on the Aeronautical Study report, including a revised height clearance if necessary, shall be communicated to the applicant by AAI.

5.1.5 Guidelines are available at NOCAS at www.aai.aero.

5.2 Communication Navigation Surveillance (CNS) Simulation study: In case any structure is required to be made within aerodrome premises (airside and city side) by the Aerodrome Operator which creates obstruction from CNS point of view, a simulation study could be carried out to study the impact of this structure on the performance of the relevant facility and in case the study confirms that the impact would not hamper the operability of the facility, such structure could be permitted within the aerodrome premises."

29. It is also relevant to mention that the AAI had also issued a Circular - Air Traffic Management Circular No. 9 of 2016 dated 07.06.2016 - for standardizing the process of issuance of NOC for Height Clearance. Clause 10 of the said Circular also provides that Aeronautical Studies would be conducted by the AAI on directions of the Appellate Committee. Clause 10 of the aforementioned Circular reads as under:- "10. Aeronautical Study 10.1 On the direction of Appellate Committee, AAI shall carry out the Aeronautical Study as per the existing Aeronautical Study Guidelines available on AAI website. 10.2. Applicant shall pay the Aeronautical Study fee of Rs.20 lakh plus the applicable taxes to the Airports Authority of India for conduct of Aeronautical Study. Agreement for the same shall also be executed by the applicant. Fees shall be paid online at AAI website through the payment gateway in case online Appeal. For Offline/manual appeal, fees shall be paid by DD in favor of Airports Authority of India payable at New Delhi. 10.3 On completion of the aeronautical study, a report shall be submitted to the Appellate Committee and based on its directives, if necessary, a revised NOC letter may be issued after the submission of undertaking by the applicant in form IE (annexure-IE)

xxx xxx xxx"

30. In terms of the aforesaid Circular, it was incumbent upon the AAI to carry out the aeronautical studies as directed by the Appellate Committee on 16.01.2016 and it is not permissible for the AAI to ignore the same.

31. Sub-clause 5.1 of Clause 5 of Schedule II to the said Rules also indicates that aeronautical studies could be carried out in respect of existing objects or structures. Mr Rai contended that the expression "existing objects" under sub clause 5.1 should be read to mean only those objects which are existing when the construction of a new airport is contemplated in the area. However, this Court finds no reason to read existing objects in a restrictive manner. In the present case, the Appellate Committee had taken a decision for conduct of

aeronautical studies and it is not open for the AAI not to implement the said decision.

32. The order of the Bombay High Court in Havemore Realty Pvt. Ltd. & Anr v. Union of India (supra) referred to by Mr Rai also is not an authority for the proposition that aeronautical studies are not permissible in cases where the height of the building was exceeded the height clearance under the NOC issued by the AAI.

33. The contention that the Bombay High Court is in seisin of the subject matter of the present petition is also unpersuasive. A plain reading of the order dated 27.04.2017 passed by the Bombay High Court in Yeshwant Shenoy (supra) indicates that MIAL had informed DGCA regarding 317 cases of unauthorized structures and the Bombay High Court was considering those cases. However, it is not disputed that the case of the petitioner is not one of the 317 (or 319) cases referred to by MIAL to DGCA. The petitioner has produced a letter dated 06.06.2017 addressed by MIAL to the petitioner, inter alia, stating as under:- "4. The list of 317 structures referred to in the order dated 27th April 2017 is the list of structures that fall within the approach surfaces/funnel areas of the runways at the Mumbai Airport and which have been identified as obstacles on the approach path of the aircraft. The buildings of DBS Realty were not included in the list as these are obstacles in the IHS and not in the approach surfaces/funnel areas."

34. In view of the above, this Court directs the AAI to conduct the Aeronautical Studies as decided by the Appellate Committee at its meeting held on 16.01.2015. It is clarified that nothing stated in this order should be construed as an expression of opinion that the request for Aeronautical Studies must be acceded to in all cases where such request is made.

35. The petition and the pending application are disposed of with the aforesaid directions. The parties are left to bear their own costs.