

(2017) 04 DEL CK 0020

In the Delhi High Court

Case No : Writ Petition (C) 2258 of 2017

Skylark Buildcon Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 12-04-2017

Acts Referred:

Aircraft Act, 1934 — Section 5, Section 9A
Constitution of India, 1950 — Article 14, Article 226

Citation : (2017) 4 ADDelhi 281

Hon'ble Judges : Ms. G. Rohini, CJ. and Sangita Dhingra Sehgal, J.

Bench : Division Bench

Advocate : Mr. Rajiv Nayar, Sr. Advocate with Mr. Kunal Vajani, Mr. Pranaya Goyal, Mr. Nitesh Ranawat and Mr. Chiranjivi Sharma, Advocates, for the Petitioners; Ms. Anjana Gosain, with Mr. Rahul Singhal, Advocates, for the Respondent No. 1/UOI; Mr. Digvijay Rai, Advocate with Mr. M.K. Das, Jt. G.M, for the Respondent No. 2/AAI

Final Decision : Disposed Off

Judgement

Ms. G. Rohini, C.J.—The petitioners in these petitions who proposed to construct buildings in the vicinity of Mumbai Airport filed the petitions with the following prayer:

"(a) Issue an appropriate Writ, order or direction under Article 226 of the Constitution of India thereby declaring the following as unconstitutional, void and inoperative:-

(i) Clause 5 of Schedule II of the Notification dated 30th September, 2015 issued by Respondent No.1 ("2015 Notification") as well as the Guidelines for Aeronautical Study dated 11th July, 2014 ("2014 Guidelines"); and

(ii) Clause 10.4 of Air Traffic Management Circular No.9 of 2016 dated 7th June, 2016 ("ATMC Circular") as well as the Guidelines on Allowable Penetration of OLS in Aeronautical Study Reports dated 26th March, 2015 issued by Respondent

No.1 ("Guidelines on Allowable Penetration of OLS");

(b) issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, order or direction under Article 226 of the Constitution of India referring the matter of the Petitioners to the ICAO for conducting an aeronautical study in accordance with law to determine whether additional height is permissible for construction of the Free Sale Buildings being constructed by the Petitioners.

(c) Issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, order or direction under Article 226 of the Constitution of India directing the Respondents that upon receipt of the report of the aeronautical study from ICAO, forthwith and in any event within a period of 4 (four) weeks from the receipt of the report, issue no objection to the Petitioners, for construction of the Free Sale Buildings being constructed by the Petitioners, of the height which is permissible as per the report of the aeronautical study of ICAO."

2. The Respondent No.1 before us is the Union of India, Ministry of Civil Aviation (MoCA) whereas the Respondent No.2 is the Airports Authority of India (AAI), a statutory body constituted under Section 3 of the Airports Authority of India Act, 1994 (for short "AAI Act").

3. It is pleaded that the petitioners in W.P.(C) No.2258/2017 and W.P.(C) No.2272/2017 have proposed to construct the buildings in Mumbai in implementation of Slum Rehabilitation Scheme (SRA Scheme) sanctioned by the Slum Rehabilitation Authority appointed by the Government of Maharashtra under Section 3-A of the Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971.

4. The petitioners in W.P.(C) No.2258/2017 pleaded that to ensure the viability of the project proposed by them under SRA Scheme they require the height of 500.00 mtrs. Above Ground Level (AGL) and 501.909 mtrs. Above Main Sea Level (AMSL) in order to consume the full Floor Space Index (FSI). Since the constructions are proposed to be made within 20 kms. from the Mumbai Airport, it is necessary to seek height clearance and therefore the petitioners applied for NOC. However, AAI granted NOC for Tower-A upto 253.84 mtrs. AMSL and for Tower-B upto 264.31 mtrs. AMSL as against the required height of 500.00 mtrs. AGL and 501.909 mtrs. AMSL.

5. So far as petitioner in W.P.(C) No.2272/2017 is concerned, it was proposed to raise the buildings under SRA Scheme for which purpose it required the clearance for the height of 217.00 mtrs. AGL and 221.172 mtrs. AMSL. However, by proceedings dated 21.12.2010, AAI granted NOC for height clearance upto 66.498 mtrs. AGL and 70.67 mtrs. AMSL only.

6. The petitioner in W.P.(C) No.2274/2017 proposed to develop inter alia residential, commercial and public parking consisting of several buildings under

the provisions of Regulation 58 of the Development Control Regulations for Greater Mumbai, 1991. For the said purpose, the Petitioner needs to develop five buildings with the heights ranging between 176.101 mtrs. and 436.211 mtrs. AGL (180.89 mtrs. and 441 mtrs. AMSL respectively). However, AAI granted height clearance upto 176.101 mtrs. AGL (180.89 mtrs. AMSL) only. It is pleaded in the said writ petition that the land over which the buildings are proposed to be constructed is located at a distance of 10.7 kms. away from the Santa Cruz Airport and Juhu Airport and for several buildings in the said locality, permissions were granted for higher heights than that was granted to the petitioner. It is also the specific case of the petitioner that the proposed building is not in the flight path, given the fact that it is located at a significant distance from the Aerodrome Reference Point. The petitioner therefore made a request to refer its case to ICAO for aeronautical study.

7. It is the case of the petitioners in W.P.(C) Nos.2258/2017 and 2272/2017 that for the purpose of implementation of SRA Scheme and to ensure its viability, it is necessary to conduct an aeronautical study. It is also pleaded that SRA Scheme is at an advanced stage and therefore they requested the respondents to refer their cases for aeronautical study by ICAO for conducting an aeronautical study to determine whether additional height is permissible for the buildings proposed to be constructed by them.

8. Aggrieved by the inaction on the part of the respondents in considering their requests to refer the matter for aeronautical study by ICAO, the present petitions have been filed.

9. In all the writ petitions it has been specifically pleaded that in identical circumstances the respondents had referred/agreed to refer various matters to ICAO for conducting aeronautical studies to determine the permissible height of the buildings. Some of the instances mentioned in the writ petitions are as under:-

(i) The Appellate Committee MoCA in its meeting dated 22.01.2015 directed that an aeronautical study be conducted by ICAO with respect to granting permissible height of the buildings to Gujarat International Financial Tech-City (Gift) Project, ZFC Gift City, Gandhinagar,

(ii) AAI vide its order dated 28.08.2015 inter alia ordered that aeronautical survey be conducted through ICAO in respect of the following projects:-

a) Project at Bandra Kurla Complex where the proposal is made by MMRDA for the development of the same, and

b) Project at Wadala Notified area.

10. It is also the specific case of the petitioners that the aeronautical study as requested by them would only assist the respondents in reviewing the cases of the petitioners for height clearance for the buildings proposed to be constructed by them and no prejudice whatsoever would be caused to anyone if such a study

is permitted.

11. It is also pleaded by the petitioners that in fact having appreciated the need for conducting aeronautical study by ICAO to meet the need for affordable housing in Mumbai, the Mumbai Metropolitan Region Development Authority (MMRDA) vide letter dated 26.02.2016 addressed to MoCA, recommended for conducting aeronautical study by ICAO to ensure completion of the constructions proposed by the petitioners in W.P.(C) Nos.2258/2017 and 2272/2017. The Chief Minister of Maharashtra also addressed letter dated 14.03.2016 to MoCA stressing the need for aeronautical study by ICAO to determine the maximum permissible height for the said construction.

12. The contention of the petitioners is that as per the statutory rules governing the height restrictions for safeguarding the aircraft operations, the respondents are bound to consider the request of the applicants to refer the matter to ICAO for conducting aeronautical study to determine whether the height clearance as required by the applicants can be permitted. It is alleged that the inaction on the part of the respondents in considering the requests of the petitioners for referring their matters to ICAO for aeronautical study not only amounts to dereliction of the statutory duty but also violative of Articles 14 and 19(g) of the Constitution of India since the respondents had earlier referred the matters of some of the similarly situated applicants to ICAO for conducting the aeronautical study.

13. The petitioners, therefore, sought a declaration that the impugned provisions under the statutory rules vide notification dated 30.09.2015 as well as the Guidelines dated 11.07.2014 issued by MoCA and the Air Traffic Management Circular dated 07.07.2016 issued by AAI are liable to be struck down contending that the unguided discretionary power vested under the said provisions is arbitrary, illegal and violative of Article 14 of the Constitution of India.

14. On behalf of the Union of India, a short affidavit dated 27.03.2017 has been filed stating that the respondent No.2/AAI has been authorised to issue NOC on behalf of the Central Government in respect of civil aerodromes. It is further stated that:

"The Secretary, Ministry of Civil Aviation had requested the Chief Secretary, Government of Maharashtra to communicate the willingness of the State Government to undertake the ICAO survey for the entire Mumbai city after the completion of the ongoing study of BKC and Wadala areas vide letter D.O. No.AV-29013/420/2015-AAI-MOCA dated 12th November, 2016. It was further requested to indicate the coordinates of the specific areas in Mumbai for which comprehensive aeronautical study had to be conducted by ICAO because ICAO does not undertake city-wide aeronautical surveys. It is submitted that the response in regard to the letter is still awaited from the State Government. It is submitted that the aeronautical report from ICAO for BKC and Wadala Notified areas is also awaited."

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.

17. On merits of the case, it is contended by AAI that there was no possibility of granting higher height in the case of the petitioners in W.P.(C) No.2258/2017 through aeronautical study as the Communication Navigation Surveillance (CNS) criteria was restricting height more than that granted by way of NOC and therefore the aeronautical study as requested by the petitioners was not done. In W.P.(C) No.2274/2017 and W.P.(C) No.2272/2017, it is contended that the aeronautical study was already done and, therefore, there is no occasion for conducting an aeronautical study by ICAO as requested by the petitioners. The further contention is that the Aeronautical Study Report of neither ICAO nor AAI is binding on Appellate Committee and the Appellate Committee would take a decision on the report after due deliberation. It is also contended that this Court has no competence nor wherewithal to sit in judgment over the decision of the respondents as to what should be the maximum height of the construction near the airport.

18. We have given our thoughtful consideration to the rival submissions.

19. Section 9A of the Aircraft Act, 1934 empowers the Central Government to issue directions by notification in the Official Gazette prohibiting or regulating construction of buildings, planting of trees etc. for the safety of aircraft operations. In exercise of the powers so conferred, MoCA issued Notification being S.O.No.84E dated 14.01.2010 directing that no building or structure shall be constructed within the limits specified in Annexures-1 and 2 from civil and defense aerodromes without obtaining No Objection Certificates. It was also stated that AAI shall be responsible for issuing NOC on behalf of the Central Government in respect of all civil aerodromes. The procedure for grant of such NOC was also prescribed therein.

20. It is relevant to note that under Section 5 of the Aircraft Act, 1934, the Central Government is also empowered to make Rules for securing the safety of aircraft operations. In exercise of the said rule making power read with Section 9A of the Aircraft Act, 1934, MoCA in supersession of the Notification dated

14.01.2010 made Rules vide Notification dated 30.09.2015 called the Ministry of Civil Aviation (Height Restrictions for Safeguarding of Aircraft Operations) Rules, 2015. Rule 4 of the said Rules which provides for height restrictions and Rule 5 which provides for issuance of No Objection Certificate read as under:

"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."

21. Clause (5) of Schedule II to the Rules which provides for conduct of aeronautical study may also be noticed hereunder:

"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."

22. A reading of the above Rules makes it clear that aeronautical study shall be carried out by AAI, ICAO or any other agency approved for the purpose of Ministry of Civil Aviation and based on the aeronautical study report a revised height clearance, if necessary, can be communicated to the applicant by AAI.

23. It may also be added that AAI issued Guidelines dated 11.07.2014 for aeronautical study for the purpose of evaluating the existing or the proposed structures, penetrating the obstacle limitation surfaces in terms of the MoCA's

Notification dated 14.01.2010.

24. After the statutory Rules were made by MoCA vide Notification dated 30.09.2015, the Respondent No.2/AAI issued Air Traffic Management Circular (ATMC) No.9 of 2016 dated 07.06.2016 to standardize the process of issuance of NOC for height clearance using online application system. Clause 10 of the said Circular also provides for carrying out aeronautical study on the direction of Appellate Committee which 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"

25. It is pertinent to note that even under the Notification dated 14.01.2010 which stood superseded by the statutory Rules vide Notification dated 30.09.2015, there was a provision for calculation of permissible elevations based upon instrument approach procedures of ICAO.

26. It is brought to our notice that ICAO is a UN Specialised agency to manage the administration and governance of the Convention on International Civil Aviation (Chicago Convention) and it works with the 191 member States of the Convention and Industry Groups to reach consensus on International Civil Aviation Standards and Recommended Practices and Policies in support of a safe, efficient, secure, academically sustainable and environmentally responsible civil aviation sector. As could be seen from the decision of the Supreme Court in Japan Airlines Company Ltd. v. CIT (2015) 10 SCC 591, India is also a contracting State to ICAO.

27. On a perusal of the statutory Rules made by MoCA dated 30.09.2015 and Air Traffic Management Circular dated 07.06.2016 issued by AAI, it is clear that the aeronautical study by ICAO has been recognised to be one of the procedures for determination of permissible heights for the buildings without interfering with the safety of aircraft operations.

28. The specific plea of the petitioners that the respondents had earlier referred to ICAO for conducting aeronautical study to determine the permissible heights of various other constructions has not been controverted by the respondents.

29. The material placed on record included the proceedings of the Appellate

Committee, MoCA in its meeting dated 22.01.2015 wherein aeronautical study was directed through ICAO to determine the permissible height of the buildings proposed to be constructed by M/s Gujarat International Financial Tech-City (GIFT) ZFC-Gift City, Gandhinagar.

30. In the meeting dated 28.08.2015 of AAI while taking a similar decision for conducting aeronautical study through ICAO in respect of Bandra Kurla Complex (BKC) and Wadala Notified Area (WNA) in Mumbai, the need for such decision was incorporated in para-5 of the minutes of AAI as under:-

"5. The Commissioner, MCGM stressed that there is a critical need for covering the affordable housing shortage in Mumbai. Mumbai being an Island City, land is a critical constraint taking into consideration the given circumstances, high-rise buildings in Mumbai would need to be facilitated. Recognizing this, AAI should commission a study to not only simplify and bring reliability in the existing height structure process, but also use cutting edge technology and other instruments available in the World that would permit higher heights in Mumbai City, both closer to the airport and also in the funnel. A study should inter-alia include, relocation, new technology up gradation and its seamless integration with other elements like aircraft to facilitate higher heights in the City."

31. In the above noticed facts and circumstances, we are of the view that the respondents are not justified in ignoring the request of the petitioners for referring their cases to ICAO for aeronautical study. It is relevant to note that all the petitioners have expressed their willingness to bear the cost of aeronautical study by ICAO for their projects.

32. Having regard to the fact that ICAO is specialised agency established in pursuance of the Convention on International Civil Aviation and that India is also a contracting State to ICAO and, more particularly, the statutory Rules vide Notification dated 30.09.2015 as well as the Circular dated 07.06.2016 issued by AAI have recognised such aeronautical study through ICAO, it appears to us that by allowing such aeronautical study of the cases of the petitioners by ICAO no prejudice whatsoever would be caused to anyone. On the other hand, such study may assist the respondents in reviewing the cases of the petitioners.

33. We make it clear that this Court is not expressing any opinion as to the entitlement of the petitioners for grant of NOC for the height of the constructions proposed by them since it is for the respondents to take the ultimate decision on the said issue. In these petitions, we are only concerned with the grievance of the petitioners with regard to non-consideration of their request for aeronautical study by ICAO.

34. It may be added that the petitioners in W.P.(C)No.2258/2017 and W.P.(C) No.2272/2017 have taken up the projects under SRA Scheme in respect of which it was observed by the Chief Minister of Maharashtra in its letter dated 14.03.2016 as under:-

"A road has been proposed in the Development Plan of Municipal Corporation of Greater Mumbai (MCGM) along the Drainage Channel Road over. The alignment of the Sewri-Worli elevated corridor follows the DP road in the area. Presently, there are slum dwellers/hutments along the Drainage Channel Road at Kamgar Nagar-I & Kamgar Nagar - II along this DP road which will be rehabilitated in the nearby ongoing SRA Scheme at Worli. Presently, there are no tenements available with MMRDA to accommodate the PAPs of Sewri Worli Connector project in the vicinity.

MMRDA will be able to take up the work of Sewri Worli connector only after shifting and rehabilitation of Project affected Persons (PAPs) falling in the project alignment in the said area. It is understood that MCGM has carried out the survey of the Project Affected Persons (PAPs) and submitted the Annexure-II of to Slum Rehabilitation Authority (SRA). The SRA has planned the SRA Project in the area which is being implemented by M/s Skuylark Buildcon Pvt. Ltd.

It is understood that this area needs to be surveyed by International Civil Aviation Organization (ICAO) to determine maximum permissible height so as to complete the SRA Project. This will enable MMRDA to take up the work construction of Sewri Worli connector as PAPs falling in this road would be rehabilitated completely. In similar cases at Wadala and BKC the work of Aeronautical Survey has been carried out earlier. The charges towards Aeronautical Survey by ICAO may be borne by the concerned Developer.

Considering this Sewri elevated being an ambitious Government project the need of expeditious resettlement and rehabilitation of PAPs for the implementation of this corridor, has become a vital issue. So it is requested that suitable instructions may be given to carry out aeronautical study by ICAO about the proposal of M/s Skylark Buildcon Pvt. Ltd. immediately."

35. As is evident from the above letter of the Chief Minister, there is an imminent need for rehabilitation of slum dwellers/hutments for which purpose the SRA Scheme was taken up by the Government. Hence, the petitioners are justified in requesting to refer their matters for aeronautical study by ICAO since the same would enable the authorities to resolve expeditiously the controversy with regard to the additional height clearance sought by the petitioners.

36. With regard to the submission on behalf of the MoCA in its short affidavit dated 27.03.2017 that it is proposed by MoCA to undertake the ICAO survey for the entire Mumbai City and the said proposal is still under process, we are of the view that the pendency of the said proposal cannot be a bar to refer the matters of the petitioners for aeronautical study by ICAO.

37. Having regard to the admitted fact that such directions were already issued by the respondents in respect of various other projects and keeping in view that the projects undertaken by the petitioners are time bound and their requests for aeronautical study by ICAO have been pending for a considerable time, and more particularly, aeronautical study by ICAO being a recognised method under the

statutory rules to determine that the proposed construction would not adversely affect the safety of operations of the aircrafts, we consider it appropriate to dispose of the writ petitions with the following directions:-

(i) The respondents shall, within two weeks from today, refer the matters of the petitioners herein to ICAO for conducting an aeronautical study in accordance with law to determine whether the additional height is permissible for the buildings being constructed by them.

(ii) The cost/expenses and charges in relation to such study including the equipment/instruments, if any, shall be borne by the petitioners.

(iii) Upon receipt of the report of the aeronautical study from ICAO, the appropriate decision with regard to permissibility of the additional heights as sought by the petitioners for construction of the Free Sale Buildings shall be taken by the respondents within four weeks thereafter.

38. All writ petitions are accordingly disposed of.