

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) No. 13678 of 2009

PARAMOUNT AIRWAYS PVT. LTD. Petitioner
Through: Mr. Neeraj Kishan Kaul, Senior
Advocate with Mr. Ashish Wad and Mr. Sameer
Abhyankar, Advocates.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. A.S. Chandihok, ASG with Ms.
Maneesha Dhir, Mr. B.V. Niren, Ms. Preeti Dalal
and Mr. K.P.S. Kohli, Advocates for R-1 to R-4.
Ms. Anuraddha Dutta with Ms. Divya Kesar,
Advocates for R-5 & R-6.

CORAM: JUSTICE S. MURALIDHAR

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| 1. | Whether Reporters of local papers may be allowed to see the order? | No |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the order should be reported in Digest? | Yes |

ORDER
15.03.2010

W.P.(C) No. 13678 of 2009 & CM Nos. 2792 of 2010 (for vacation of stay) & 15382 of 2009 (for stay)

1. The challenge in this petition is to an order dated 4th December 2009 passed by the Office of the Director General of Civil Aviation ('DGCA'), Government of India under Rule 30(6)(iv) of the Aircraft Rules, 1937 treating as cancelled the lease agreement between the lessors/owners i.e. M/s. GE Capital Aviation Services Ltd. ('GE') and M/s. Celestial Aviation Trading 71 Ltd. ('Celestial') (Respondents 5 and 6 respectively) and the Petitioner (as lessee) and consequently cancelling with effect from 4th

December 2009 the certificate of registration of three aircraft taken on lease by the Petitioner. By the impugned order, the Petitioner was asked to submit the original certificates of registration to the Director of Airworthiness, Office of the Civil Aviation Department at Chennai.

2. The Petitioner states that on 29th July 2005 it entered into three Aircraft Specific Lease Agreements ('ASLA') with Respondent No.6 Celestial whereby three aircraft were leased in favour of the Petitioner by Celestial. Simultaneous with the execution of the said ASLAs, the Petitioner entered into a Common Terms Agreement ('CTA') with GE under which the GE would play the role of a lease manager in respect of the aforementioned three aircraft.

3. Schedule 9 of the CTA sets out the "Events of Default". One such default in Clause (a) related to non-payment of the scheduled payments within two business days of the due date and in the event of non-payment of non-scheduled payment within five days of the due date. Under Clause 13 of the CTA, the lessor had the right, in the event of a default, to terminate lease and undertake legal action to enforce the obligations of the lessee to pay all sums due to the lessors under the leases and/or to claim damages for breach of the leases, to take possession of the aircraft, or to require the redelivery of the aircraft to the lessors. Further under Clause 15.8 of the CTA "the Courts of England are to have jurisdiction to settle any disputes arising out of or relating to the lease and further the lessee undertakes not to bring a claim against lessor other than in the English Courts and to comply with any interim orders of the English courts pending resolution of any dispute."

4. The Petitioner was handed over possession of the aircrafts sometime in 2006. It states that it had paid the entire lease rentals up to 2009. The Petitioner claims that it satisfied the conditions laid down in the ALSA in terms of which the security deposit to be maintained by the Petitioner with Celestial was to be reduced to 8 months and 6 months' rent after the completion of the second and the third year respectively. The Petitioner claims that Celestial owes it an amount of US\$ 1.27 million which it failed to refund to the Petitioner. On 25th May 2009, one of the aircraft had to be grounded for engine failure. Despite notice to Respondents 5 and 6 they failed to discharge their liabilities under the maintenance agreement and repair the engine of the grounded aircraft.

5. On 2nd September 2009, GE served a written default notice on the Petitioner stating that the Petitioner had defaulted in paying the scheduled rent. On 17th September 2009 another default notice was sent stating that the Petitioner had not maintained one of the aircrafts in a good operating condition and had removed various parts from it. According to GE, these were 'Events of Default' in terms of the CTA which would, inter alia, result in the termination of lease.

6. A further notice dated 25th September 2009 was issued by the GE. A notice of continuing events of default and warning was issued by GE and Celestial on 5th February 2009. Copies of the said notices were also marked to the Office of the DGCA (Respondent No.2 herein).

7. The Petitioner contested the notices denying default and claiming refund to the tune of US\$ 1.27 million as well as reimbursement of various maintenance activities to the tune of approximately 800,000 US dollars. On 14th October 2009, GE issued a notice of termination of the ASLA and CTA calling upon the Petitioner to stop using the aircraft and hand over their possession to the GE. It is stated that the GE invoked a letter of credit on 17th September 2009 and encashed on 14th October 2009 an amount of US\$ 1,590,800.

8. Celestial filed before the High Court of Justice, Queens Bench Division ('QBD') in London an action seeking a declaration that termination of the lease agreement was valid and for a direction that the Petitioner should hand over to Celestial the possession of the three aircraft. Celestial requested for a summary judgment.

9. The Petitioner entered appearance before the High Court of Justice, QBD in London and filed its defence. Simultaneously, the Petitioner filed a writ petition in the High Court of Judicature at Madras for a mandamus to the DGCA not to de-register the leased aircrafts without hearing the Petitioner. It is stated that the said writ petition was dismissed on the ground that the petition was premature. By an order dated 25th November 2009 the Division Bench of the Madras High Court dismissed the Petitioner's W.A. No. 1704 of 2009 in which it was noted that "it was open for the DGCA to take on necessary decision on the application filed by the GE and Celestial."

10. Meanwhile, on 19th November 2009, the Director of Airworthiness in the

Office of the DCGA, New Delhi informed the Petitioner that a letter dated 13th November 2009 has been sent by GE asking for the leased aircraft to be de-registered. The Petitioner's comments were sought on the said letter. The Petitioner while contending that the termination of the lease was invalid requested for further time to file a detailed reply. On 30th November 2009, Respondent No.3 wrote to the Petitioner giving it a last opportunity to offer its comments. The Petitioner replied stating that it had filed a detailed reply in the High Court of Madras and sought two more weeks' time. On 2nd December 2009, the Petitioner filed a reply reiterating that the matter was sub-judice and sought a personal hearing.

11. On 4th December 2009, the High Court of Justice, QBD, London passed an order directing the Defendant that the Petitioner was to pay to the claimant (Celestial) on or before 18th December 2009 a sum of US\$ 791,944.54. Judgment was entered on the above claim "and on the issue of liability for breach of the Lease Agreements." The application of Celestial was adjourned for the hearing of the issue of "whether relief from forfeiture should be granted." The Petitioner was permitted to remain in possession of the aircraft defined in the Schedule and use them for all purposes permitted under the lease agreements pending the hearing of the trial.

12. In para 13 of the order it was directed as under:

"Without prejudice to the Claimant's claim that the Lease Agreements were validly terminated by notice dated 14th October 2009, the Defendant is to pay to the Claimant the sums of money which would otherwise have been payable under the Lease Agreements, namely on or

before:

(a) 18 December, 2009 the sum of US\$ 1,586,547.84;

(b) The 15th day of each month, commencing on 15th December, 2009 the sum of US\$ 137,000.00 (being payments based on the estimated usage of the Aircraft);

(c) 24 December 2009, but thereafter on the 27th day of each month, the sum of US\$ 219, 670.65;

(d) The 4th day of each month commencing on 4 January 2010, the sum of US\$ 215,325.00; and

(e) 8th January 2010 but thereafter on the 9th day of each month, the sum of US\$ 217,768.30.”

13. The Petitioner states that the impugned order dated 4th December 2009 was passed by the DGCA de-registering all the 3 aircrafts on the ground that the lease agreement stood terminated. It is stated that despite the DGCA being aware that a competent court was seized with the determination of the question whether the lease was validly terminated, it went ahead and passed the impugned order.

14. This petition was filed on 7th December 2009 challenging the aforementioned impugned order dated 4th December 2009. The following order was passed by this Court on 7th December 2009:

“On oral prayer of the petitioner M/s. GE Capital Aviation Services Ltd. and M/s Celestial Aviation Trading 71 Limited are impleaded as respondent Nos.5 and 6. Amended memo of parties will be filed by

tomorrow.

Counsel for the petitioner has drawn my attention to the order dated 4th December, 2009, passed by Queen's Bench Division, Commercial Court. Paragraph 3 of the said order reads as under:-

“3. Save as aforesaid, the Claimant's application is adjourned to the hearing of the issue of whether relief from forfeiture should be granted. The Defendant is permitted to remain in possession of the Aircraft (as defined in the Schedule) and use them for all purposes permitted under the Lease Agreements pending the hearing of the trial ordered below or further order.”

Counsel for the petitioner states that they are bound and shall comply with said order.

Till the next date of hearing, there will be stay of the operation of the impugned order dated 4th December, 2009, passed by the respondent No.2. The petitioner will serve the newly added respondent Nos.5 and 6 by e-mail in addition to other modes. Notices for service of newly added respondent Nos.5 and 6 will be given dasti as well.

List again on 21st December, 2009.

Dasti to the counsel for the petitioner under signature of the Court Master.”

15. On 21st December 2009, the Respondents 5 and 6 informed this Court that the Petitioner had not made payment in terms of the order dated 4th December 2009 passed by the High Court of Justice, QBD, London. This was disputed by learned counsel for the Petitioner. This Court then directed that the DGCA would take further action “only after receiving orders from

the Queen's Bench Division, Commercial Court.” It was directed that the interim order passed on 7th December 2009 as modified would continue till the next date of hearing.

16. On 11th January 2010 when this Court was informed that the decision of the QBD, Commercial Court was still awaited. The interim order was continued and the case was directed to be listed on 9th April 2010.

17. On 5th March 2010, Respondents 5 and 6 filed CM No. 2792 of 2010 for vacation of the stay granted by this Court. In it, Respondents 5 and 6 pointed out that by the judgment dated 11th February 2010, handed down on 12th February 2010, the High Court of Justice, QBD Commercial Court in London declined any equitable relief to the Petitioner both on jurisdictional and discretional grounds. The Court held that Celestial was entitled to insist on redelivery of the aircraft without compliance with Schedule 6 of the CTA; that Celestial had a money judgment for US\$ 3,618,531.83 pursuant to the order dated 11th February 2010 and that Celestial was entitled to insist that the three aircraft be grounded and that it would not be appropriate to impose terms involving their continued use. A copy of the said judgment dated 11th February 2010 and the consequential order dated 23rd February 2010 passed by the QBD, Division Commercial Court was enclosed with the application.

18. When the above application CM No. 2792 of 2010 was listed on 5th March 2010, before this Court, learned Senior counsel appearing for the Petitioner informed the Court that an appeal had been filed against the

judgment of the QBD Commercial Court, before the Court of Appeal. On 5th March 2010 the Court of Appeal passed an interim order subject to certain conditions being fulfilled by the Petitioner.

19. Today this Court has been shown a copy of the said order passed by the Court of Appeal on 5th March 2010. The operative portion of the said order reads as under:

“On reading the Appellant’s Notice sealed on the 1st March 2010 filed on behalf of the Applicant applying for permission to appeal, a stay of execution and an expedited hearing from the order of Mr. Justice Hamblen dated 11th February 2010.

And on hearing Mr. Stephen Cogley counsel for the Applicant, and Mr. Tim Saloman QC and Mr. Nicholas Craig counsel for the Claimant.

It is ordered that

1) The application for permission to appeal is adjourned to be heard in the week commencing the 22nd March 2010 with the appeal to be heard immediately thereafter if permission to appeal is granted. The hearing is to be listed with a time estimate of 1.5 to 2 days.

2) Any stay of execution ordered by Mr. Justice Hamblen on 23rd February 2010 (both paragraphs 3 and 4) is to be continued until the hearing of the application for permission to appeal and (if permission is granted) the hearing of the appeal.

3) Unless the Applicant pays the sums of USD\$5,474,240.32 and the sum of GB210,000 (the latter being in respect of orders made on account of the

Claimant's costs) in to account number 0961807458300162 with BNP Paribas London (Swift code BNPA GB22), sort code 23-46-35, for credit to GE Commercial Aviation Funding by 16:30 hours (London Time) on 10th March 2010:

(a) the application for permission to appeal be refused;

(b) any stay of execution ordered by Mr. Justice Hamblen dated 23rd February 2010 is to be lifted;

(c) the Applicant is to pay the Claimant's costs of and occasioned by its application for permission to appeal on the indemnity basis (pursuant to the terms of the contracts).

4) The Claimant is to serve any necessary Respondent's Notice by no later than 4.30pm on Friday the 12th March 2010.

5) The costs of the hearing are (subject to paragraph 3 herein) in the appeal. And it is further directed that, subject to variation by the Presiding Lord Justice, the application be heard by three Lord Justices, one of whom should have commercial expertise."

20. It is not in dispute that the Petitioner has not been able to comply with the above order. In other words, no amount as directed by the Court of Appeal has been paid by the Petitioner to Celestial by 1630 hours on 10th March 2010.

21. However, learned Senior counsel appearing for the Petitioner informs the

Court that an application has been filed in the Court of Appeal on 12th March 2010 for variation of the terms on the ground that they were extremely harsh and not capable of being complied with. The said application has not yet been decided by the Court of Appeal. Meanwhile the Petitioner appears to have again approached the Madras High Court but this time by way of a civil suit. Notice is stated to have been issued in the civil suit by a learned Single Judge of the Madras High Court although no interim order is stated to have been passed.

22. Learned Senior counsel for the Petitioner submits that as far as the present writ petition is concerned, the grievance is that the DGCA could not have on 4th December 2009 passed any order de-registering the three aircraft since such an order was in the teeth of the procedures issued by the Office of DGCA on 10th September 1998. In particular, he refers to Clause 9 of the procedures which deals with cancellation of registration of aircraft. He submits that where a dispute was pending regarding the termination of lease in a competent court, the DGCA could take action only after the decision of a court of law and not earlier. Since on that day i.e. on 4th December 2009 a stay had been granted by the QBD on Celestial taking possession of the aircraft, the DCGA could not have passed the impugned order. On the other hand, it is pointed out by learned counsel for the Respondents that by the interim order granted by this Court on 7th December 2009, the impugned order dated 4th December 2009 of the DGCA was stayed. The stay has continued notwithstanding the fact that in the meanwhile the QBD has given a judgment in favour of Celestial and the Court of Appeal has also granted only a conditional order of stay on 5th March 2010. With the conditions not

being satisfied by the Petitioner, the leave to appeal stood automatically refused. Thus the order dated 23rd February 2010 passed by the High Court of Justice, QBD had attained finality. Since the competent court has given a judgment, the DGCA's impugned order dated 4th December 2009 did not call for interference.

23. In order to appreciate the above contentions, this Court would first like to refer to Clause 9 of the "Procedures relating to registration or de-registration of aircraft" (hereinafter "proceedings") issued by the DGCA on 10th September 1998, which reads as under:

"9. Cancellation of Registration of Aircraft

9.1 The registration of an aircraft registered in India may be cancelled at any time by the DGCA, if it is satisfied that:-

- i. such registration is not in conformity with para 3.1 of this CAR; or
- ii. the registration has been obtained by furnishing false information; or
- iii. the aircraft could more suitably be registered in some other country; or
- iv. the aircraft has been destroyed or permanently withdrawn from use; or
- v. it is inexpedient in the public interest that the aircraft should remain registered in India; or
- vi. the lease in respect of the aircraft registered pursuant

to paragraph 3.1 (iv) has-

a) expired, or

b) has been terminated by mutual agreement between the lessor and the lessee, or

c) has been otherwise terminated lawfully.

Note:- In case of dispute regarding termination of the lease agreement the DGCA will take action in pursuance of decision of a Court of Law.”

24. The note appended to Clause 9.1 states that: DGCA will take action “in pursuance of decision of a court of law in case of a dispute regarding termination of the lease agreement.” The date on which the DGCA passed the impugned order i.e. 4th December 2009, it obviously did not have before it the copy of the order passed by the QBD of that date itself. If a copy of such order had been produced before the DGCA, then it is possible to contend that the DGCA could not have in the teeth of such order, passed the impugned order cancelling the registration. However, it is obvious that by the time the DGCA passed the impugned stay order, it could not and in fact did not have a copy of the order dated 4th December 2009 passed by the High Court of Justice QBD in London.

25. In any event, the Petitioner was not at that stage prejudiced since this Court by passing an interim order on 7th December 2009 gave effect to the conditional order of stay granted by the High Court of Justice QBD in London. However what is clear was that the order dated 4th December 2009 of the QBD was itself a conditional one. The Petitioner was required to make payment of a certain sum to Celestial within a time period as per that order. As the subsequent detailed order dated 11th February 2010 passed by

the High Court of Justice QBD in London shows, the Petitioner did not comply with the conditional stay order dated 4th December 2009. The High Court of Justice, QBD in the said order decided the following two issues:

“(1) Whether the Court has jurisdiction to grant relief from forfeiture in relation to an aircraft operating lease of the type and on the terms of those before the Court; and
(2) If so, whether it is appropriate for the Court, in the exercise of its discretion, to grant such relief.”

26. The High Court of Justice, QBD held:

“I am not satisfied that this is one of those “appropriate” and “limited” cases in which the Court should hold that there is a jurisdiction to grant relief against forfeiture.”

27. The conclusion of the QBD on the issue of ‘discretion’ was as under:

“Conclusion on discretion

121. I have reached the clear conclusion that, notwithstanding the serious consequences which Paramount may suffer if the Aircraft are redelivered to Celestial, this is not an appropriate case for relief. In particular, the operative defaults were knowingly committed and there is no excuse or even explanation for them. They were committed against a background of persistent defaults evidencing a cavalier disregard by Paramount for its contractual obligations and despite clear warnings of the consequences of continuing default. The defaults have still not been cured and Paramount has been in further default as well as in breach of a Court Order. There is real prejudice to Celestial if relief is given and they are compelled to carry on with the ASLAs.

122. Even if the exercise of discretion was finally balanced, which it is not, it is well established that consideration of commercial certainty are relevant to the exercise of the Court's discretion and those considerations would lead me to the conclusion that relief should not be granted."

28. It further concluded:

"123. I refuse the equitable relief sought by Paramount on both jurisdictional and discretionary grounds. I shall hear the parties as to the terms of the relief to which Celestial is entitled in the light of that conclusion."

29. Thereafter the High Court of Justice gave its "approved ruling" on 23rd February 2010 where a hearing took place for the purposes of establishing the precise terms of the order which should be made following the judgment dated 11th February 2010. The following three issues were addressed in the order dated:

"(1) the terms in which the order for delivery up of the Aircraft should be made;
(2) whether there should be any restriction on the right of Celestial to seek to enforce the money judgment in circumstances where they are in possession of the deposits for each Aircraft; and
(3) whether the Aircraft should remain grounded at Chennai whilst the stay of execution ordered by the Court operates."

30. The conclusions on the above points were as under:

(1) Celestial was entitled to insist on redelivery without

compliance of Schedule 6 CTA.

(2) Celestial was entitled to hold onto the deposit (or what remains of it) until satisfied that all such outstanding amounts have been paid to it. The money judgment would not be subjected to any stay of enforcement pending Paramount's appeal on other matters.

(3) The effect of the judgment was that "Celestial is entitled to the return of its aircraft immediately" and that the "leases were appropriately terminated on 14th October 2009." It was held that "Celestial should be entitled to insist that the aircrafts be grounded." It was opined that "it would not be appropriate to impose terms involving their continued use."

31. The operative portion of the order dated 5th March 2010 of the Court of Appeal in the appeal filed by Paramount against the aforementioned judgment dated 11th February 2010 has already been extracted hereinbefore. When Paramount was not able to comply with the said conditional order, leave to appeal stood automatically refused. Consequently, as on date, the judgment dated 11th February 2010 of the QBD followed by the directions contained in its order dated 23rd February of the High Court of Justice, QBD in London have attained finality.

32. At this stage, reference may also be made to Rule 30 (6)(iv) of the Aircraft Rules, 1937 which states that the registration of an aircraft may be cancelled if the Central Government is satisfied that the lease in respect of an aircraft, the lessor/owner of which is a foreign company, "is not in

force.”Consequently, if there is no valid lease subsisting in respect of the three aircraft, there is no question of the DGCA being issued a mandamus not to cancel the certificates of registration. In other words, until and unless there is a decision of a competent Court keeping in abeyance the termination of the lease, that has been brought out in the manner indicated hereinbefore, the DGCA cannot be faulted for passing the impugned order cancelling the registration of the aircraft in question. There can be no manner of doubt that the DGCA has in the circumstances not committed any error or illegality in passing the impugned order dated 4th December 2009 cancelling the registration of the aircraft in question.

33. It was stated by learned Senior counsel for the Petitioner that the Petitioner has now filed a fresh suit in the High Court of Madras in which notice has been issued. It was urged that the impugned order of the DGCA should be stayed for a longer time either till an interim order is passed by the High Court of Madras in the suit or till such time the application filed by the Petitioner before the Court of Appeal is decided.

34. This Court is unable to accept the above submission. The scope of the present proceedings is concerned with the validity of the impugned order of the DGCA. In the above facts and circumstances, when this Court has found no ground having been made out to hold the said order to be illegal, there is no justification for staying the operation of the said order any longer.

35. It is then submitted that if the interim orders passed earlier by the Court would not be continued, the Petitioner would be subjected to severe hardship

as bookings have been made by passengers in the flights scheduled in the next few days. This Court does not find any case having been made out by the Petitioner for grant of any equitable relief. While the passengers can be adjusted on flights of other carriers, there can be no interference with the primary role of the DGCA which is to ensure that there is no aircraft, whether a passenger or a cargo aircraft, that is operational without being covered by a valid lease. There cannot be issued a mandamus to keep the registration alive of an aircraft that is not covered by a subsisting lease.

36. For all the aforementioned reasons, the writ petition is without merits and it is dismissed. The applications are disposed of.

37. A copy of this order be given dasti to learned counsel for the parties under signature of the Court Master.

S. MURALIDHAR, J.

MARCH 15, 2010
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