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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on : 22.04.2013
Judgment Pronounced on: 10.05.2013

+ **LPA 226/2013**

DIRECTORATE OF REVENUE INTELLIGENCE Appellant

Through Mr.Sanjeev Kumar Dubey alongwith
Ms.Zeenat Masaudi and
Ms.Bhagyashree Pati, Advocates

Versus

CORPORATE AIR CRAFT FUNDING
COMPANY LLC & ORS.

..... Respondents
Through Mr.Neeraj Kishan Kaul, Senior
Advocate with the counsel for
respondents No.1 and 2
Ms.Pushpa and Mr.T.Mitra,
Advocates for Ms.Anjana Gosain,
Advocate for R-3

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present appeal arises out of a Writ Petition filed by respondent No.1 seeking a direction to respondent No.3 Director General Civil Aviation (hereinafter referred to as 'DGCA') to de-register its Aircraft being Bombardier Challenger Aircraft 300 bearing Manufacturer's Serial No. 20174. By the impugned order, the learned Single Judge allowed the Writ Petition and directed issuance of a Writ of Mandamus directing DGCA to

de-register the Aircraft in issue. The Aircraft Rules 1937 deal with registration and de-registration of an aircraft.

2. The brief facts of the case are that respondent No.2 herein Peel Aviation Limited (also known as PAL) is the owner of the Aircraft in question. The said respondent No.2 entered into a lease agreement with an Indian company Golden Wings Pvt. Limited (also known as GWPL) on 20.03.2008. On 16.04.2008 respondent No.3 DGCA granted to the said GWPL a 'No Objection Certificate' for import of the Aircraft into India. On 20.04.2008 the Aircraft was imported into India under the category of Non Scheduled (Passenger) Services and 'nil' Customs Duty was paid.

3. Under a financing arrangement a loan was extended by respondent No. 1 to PAL the owner i.e. respondent No.2. On 20.04.2008 GWPL executed an Irrevocable De-registration Power of Attorney in favour of respondent No.1. To secure the repayment of the loan, respondent No.2 executed Aircraft Security Agreement and Chattel Mortgage on 05.05.2008. The instrument of mortgage confers on respondent No. 1 the right to seek deregistration of the Aircraft in the jurisdiction of the concerned State Registry. On 07.05.2008, respondent No.1 entered into a loan agreement with the owner respondent No.2. Pursuant to the loan agreement credit facility in the sum of US \$ 15,885,916/-was agreed to be extended to respondent no.2-PAL. Thereafter it appears that various lease agreements were executed between respondent no.2 and the Lessee GWPL.

4. It is the averment of the appellant that in 2010 investigations were initiated and it was found that the Aircraft was being used for purposes other than for what it had been imported. The Aircraft was being used by Mr.Lalit K.Modi almost exclusively for his personal travel and hence investigations for violation of terms and conditions of import were initiated. During investigation it was revealed that there was hardly any payment made by Mr.Lalit K.Modi to the Indian Lessee, GWPL. It appears that the Aircraft was purchased mainly for the use of Mr. Lalit Modi and the entire process of procurement, financing and leasing of the Aircraft was carried out under the instructions of Mr.Modi. The said Aircraft was imported declaring 'nil' customs duty claiming exemption under the appropriate notification wherein Aircraft imported by Non-Scheduled Operators for Non-Scheduled Air Transport Services operations were exempt from duty on fulfilment of certain conditions. The Lessee GWPL had imported the Aircraft by filing an Undertaking that they shall use the subject Aircraft for NSOP (Passenger) services. They violated the said undertaking and no Non-Scheduled Passenger Service was ever provided by the said Aircraft inasmuch as the same was used exclusively by Mr.Lalit K.Modi.

5. It is further stated by the appellant that when investigations were initiated by various government agencies on the IPL scam, the Aircraft in question was flown out of India on 25.04.2010 and since then has remained outside India. The Aircraft arrived in United Kingdom in July, 2010 and has not flown since then.

6. It was in this background that the appellant DRI issued a letter dated

10.12.2010 to DGCA/respondent no.3 requesting it not to de-register the Aircraft till the investigations are complete. On 15.10.2010 respondent no. 2 wrote to respondent No. 3 of the fact of termination of lease related to the Aircraft. Thereafter on 14.12.2010, DGCA wrote a letter to GWPL/the lessee pointing out that as an operator no information has been given to DGCA about termination of the lease agreement nor any request for issuance of Export C of A and deregistration of the Aircraft. It was also pointed out that in the circumstances in which this Aircraft is grounded at foreign Airport is also not known to DGCA. Hence, comments were sought from the said Lessee GWPL.

7. In response to the above, GWPL wrote back on 21.12.2010 to respondent No.3 pointing out that the Aircraft had flown out of India on 25.04.2010. It is also accepted that GWPL was under the scanner since August, 2010 by competent authorities including Income Tax Department, DRI and Enforcement Directorate. GWPL stated that they have no objection to the de-registration of the Aircraft.

8. The respondent No.3 on 27.12.2010 replied to GWPL making following observations:-

“(i) As stated in your letter referred above, the aircraft has flown out of India on 25th April 2010 and is presently positioned at Biggin Hill Airport, UK since 23rd July, 2010. However, you have not clarified about the circumstances under which this aircraft was grounded at foreign station and what is the status of the maintenance of the aircraft since then.

(ii) The Mortgagee, M/s. Corporate Aircraft Funding Company, LLC, Chicago, Illinois, is also required to submit the No

Objection certificate for the De-registration of the above mentioned aircraft.

(iii) It may also be noted that Directorate of Revenue Intelligence, Mumbai Zonal Unit, is investigating the issue of evasion of custom duty of the above aircraft. They have requested the office not to de-register the aircraft till the investigation is completed by them.”

9. Further correspondence has taken place between the parties. It appears that respondent No. 2 defaulted under the loan agreement. Hence on 08.07.2011, respondent No. 1 as per the loan terms terminated the commitment under the Loan Agreement and also asked PAL to re-deliver the collateral including the Aircraft to respondent No. 1. On 07.10.2011 counsel for respondent no.1 wrote a letter to respondent no.3 requesting for deregistration of the Aircraft at the earliest. On 08.10.2011 respondent no.3-DGCA wrote to the counsel for respondent no.1 pointing out that DRI is investigating the issue of evasion of Customs Duty on import of the above Aircraft and that DRI vide a letter dated 10.12.2010 requested DGCA not to de-register the said Aircraft till completion of the investigation. The communication dated 08.10.2011 by DGCA states as follows:-

“Your application has been examined by this office and it is noted that the Directorate of Revenue Intelligence (DRI), Mumbai is investigating the issue of evasion of custom duty on import of above aircraft. Directorate of Revenue Intelligence (DRI), Mumbai vide their letter No.DRI/MZU/E/Int-12/2010/11345 dated 10th December 2010 has requested this office not to de-register the subject aircraft till the completion of the investigation. This office has not received any clearance from the investigating agency till date.

In view of above your request for deregistration of subject aircraft cannot be acceded to without prior clearance from the

investigating agency.”

10. In view of the above, respondent no. 1 filed the present writ petition seeking aforementioned Writ of Mandamus. The said writ petition was allowed vide impugned order dated 14.03.2013.

11. In the light of the above facts it is the contention of the appellant that the impugned order is erroneous and ignores the powers of the appellant to ask respondent No.3 not to de-register the Air Craft. Mr.Dubey, learned counsel appearing for the appellant contends that Respondents no.1 and 2 have deliberately in order to deprive statutory authorities the right to exercise their powers under Section 110 or 111 of the Customs Act, flown the Aircraft out of the country in anticipation of the confiscation Orders. It is contended that the violation of terms and conditions of the exemption of Customs Duty has led to a evasion of Customs Duty of approximately Rs.19 crores. It is further claimed that it is within the powers of respondent No.3/DGCA to withhold de-registering of the Aircraft on the ground of pendency of investigation and proceedings under the Customs Act to safeguard the Government revenue. It is further stated that merely because the Aircraft has flown out of India would not be a ground for the appellant not being able to exercise its powers. Learned counsel for the appellant further contends that though Union of India is a signatory to the Cape Town Convention under Form No. 4 of the instrument of accession lodged by India under the Cape Town Convention, the said lodgement empowers detention or arrest of an aircraft with the object of recovering amounts owed to the Government or any internal-governmental organisation or private provider

of public services.

12. Mr. Neeraj Kishan Kaul, learned senior counsel for respondent no.1 submits that there are no grounds to interfere in the impugned order. He submits that the decision taken by DGCA, respondent No. 3 that without clearance from the investigating agencies the appellant cannot agree for deregistration of the Aircraft is untenable in law. He relies upon the provisions of the Cape Town Convention and the Aircraft Protocol to the Convention to argue that a signatory State is required to de-register an Aircraft on a request being made by the mortgagee and/or owner of the Aircraft and that India has acceded to the convention and protocol. He also relies upon Rule 30(6) (iv), of the Aircraft Rules to argue that DGCA under the said Rules was obliged to de-register the Aircraft on the request of respondent No.1. He further submits that at the best it is the case of the appellant that certain excise dues are payable by the lessor GWPL. There is no allegation about any infringement of Customs Law or violation by respondent No.1. The appellant is by all means free to take appropriate action for recovery of its dues against the lessee GWPL but under the said guise cannot start taking action against the assets of respondent no.1. He states that as the Aircraft has already flown out of India the relevant department cannot exercise powers under Section 110 or 111 of the Customs Act and in any case, the DGCA is not concerned with Section 110 or 111 of the Customs Act. He further contends that the appellant has no powers to write a communication to DGCA stopping it from de-registering the Aircraft.

13. Learned senior counsel also argued that though the appellant has written a communication to DGCA about pending investigation on 10.12.2010 regarding the alleged evasion of Customs Duty by GWPL the Indian lessee, however, despite a lapse of more than two years, there appears to have been no progress whatsoever in the investigation being carried out by the appellant. It is contended that the appellant has not brought on record any material regarding the alleged evasion of Customs Duty except its letter dated 10.12.2010 written to DGCA.

14. The short issue here is as to whether the act of respondent No. 3- DGCA in not de-registering the Aircraft in the given facts is correct.

15. On the issue of the right of respondent No.1 to seek de-registration. DGCA has in its various communications and in its counter affidavit filed before this Court has not argued that respondent no.1 is not authorised to seek deregistration of the Aircraft. The only contention of the counsel for DGCA was that it has not accorded deregistration to the Aircraft due to the communication received by them from the appellant regarding the ongoing investigation. This stand is also borne out from the letter dated 08.10.2011 sent by DGCA. Hence there is no dispute that respondent No. 1 is entitled to request DGCA to de-register the Aircraft.

16. It is common ground that the powers of the DGCA to carry out deregistration are contained in Rule 30(6) of the Aircraft Rules, 1937. The said Rule 30 (6) reads as under: -

“The registration of an aircraft registered in India may be cancelled at any time by the Central Government, if it is satisfied that –

- (i) such registration is not in conformity with the provisions of sub-rule (2); 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 lease in respect of the aircraft, registered in pursuance of sub-clause (iv) of clause (a) of sub-rule (2) is not in force; or
- (v) the certificate of airworthiness in respect of the aircraft has expired for a period of five years or more;
- (vi) the aircraft has been destroyed or permanently withdrawn from use; or
- (vii) it is inexpedient in the public interest that the aircraft should remain registered in India.”

Rule 30 (6) enables DGCA to exercise its power to de-register the Aircraft.

17. Now the issue is whether DGCA was bound to follow the request/direction of the appellant and refuse to permit de-registration till approval of the appellant. The impugned order comes to a conclusion that the appellant has no powers under the Customs Act to prevail upon DGCA to desist from de-registering the Aircraft. Accordingly, the impugned order issues a Writ of Mandamus directing DGCA to deregister the Aircraft in issue.

18. In our view the learned counsel for the appellant has not been able to

bring to our attention any provisions of law by which it could be said that DGCA is bound to comply with the request of the appellant. A reading of sections 110 and 111 of the Customs Act on which reliance was placed by learned counsel for the appellant, would show that there is nothing contained therein which would oblige DGCA to comply with any instructions issued by the appellant while dealing with a request for de-registration. We are, however, not impressed by the argument of learned senior counsel for respondent no.1 that the powers under Sections 110 and 111 of the Customs Act cannot be exercised as the Aircraft has flown out of India. None of the parties have argued as to under what circumstances, the Aircraft has flown out of India and has been parked abroad in UK since 2010.

19. Hence, we agree with the findings recorded in the impugned order by the learned Single Judge that the instructions issued by the appellant are not mandatory and binding upon DGCA. However, in our view the communication sent by the appellant to DGCA is a request and would be a factor which DGCA can certainly keep in mind while exercising its powers as stipulated in Rule 30 of the Aircraft Rules. We are not ready to accept the contention that irrespective of the conduct or actions of the concerned party seeking de-registration qua other Government agencies or bodies or violation of Statutory provisions, DGCA has to ignore the same while exercising powers of de-registration. Hence the request of the appellant, though not binding, would be one of the factors DGCA could take into account while dealing with the request for de-registration.

20. We now come to the action of DGCA on the request for de-registration by respondent No. 1. The stand of respondent No.3 DGCA is contained in its communications dated 27.12.2010 and 08.10.2011 and shows that DGCA has taken a view that the request of respondent No.1 for de-registration of the Aircraft cannot be acceded to without prior clearance from the investigating agency. To that extent, the DGCA has gone by the dictates of the appellant as communicated to it in its letter dated 10.12.2010, to not allow the request of respondent no.1 and has failed to exercise its discretion.

21. Rule 30(6) of the Aircraft Rules empowers DGCA to allow de-registration of an Aircraft in accordance with the relevant provisions. The said rule for public reasons confers an enabling power. The enabling power of this kind conferred would be coupled with a duty on DGCA to exercise its powers, when circumstances so demand. It is a duty which cannot be shirked or shelved. The communications of DGCA dated 27.12.2010 and 08.10.2011 clearly indicate that DGCA has simply refused to exercise its powers without giving any cogent or justifiable reasons. It has simply acted at the behest of the appellant completely ignoring all other facts. DGCA has a duty to exercise its powers in the circumstances of the case. The act of DGCA in not exercising the said powers is arbitrary and illegal.

22. Now, we come to the relief. In our view the impugned order erroneously issues a Writ of Mandamus directing DGCA to de-register the Aircraft. Normally a Court would not direct a statutory authority to exercise

its discretion in a particular manner not expressly required by law. Reference in this context may be had to the judgment of the Hon'ble Supreme Court in the case of ***U.P.State Road Transport Corporation and another –vs- Mohd. Ismail and others***, (1991) 3 SCC 239 where in paragraph 12 the Hon'ble Court held as follows:-

“The court cannot direct the statutory authority to exercise the discretion in a particular manner not expressly required by law. The court could only command the statutory authority by writ of mandamus to perform its duty by exercising the discretion according to law. Whether alternative job is to be offered or not is a matter left to the discretion of the competent authority of the Corporation and the Corporation has to exercise the discretion in individual cases. The court cannot command the Corporation to exercise discretion in a particular manner and in favour of a particular person. That would be beyond the jurisdiction of the court.”

23. Further, in this context reference may also be had to the case of ***Union of India and another –vs- Bilash Chand Jain and another***, (2009) 16 SCC 601, where the Hon'ble Supreme Court held that the High Court would itself not perform the functions of the statutory authority and that the Court can command the statutory authority to perform its duty by exercising its duty in accordance with law.

24. In view of the above, we modify the impugned Order of the learned Single Judge, as set out below. We issue a Writ of Mandamus directing respondent no.3 DGCA to exercise its enabling power and take a decision on the request of respondent No.1 for de-registration of the Aircraft, in accordance with law. Keeping in view the observations made above, the

DGCA would take its decision and pass a reasoned order. Respondents no. 1 and 2 are permitted to make written submissions to DGCA within four weeks from today in support of their application for de-registration. Based on the said submissions and other material on record, DGCA- respondent No. 3 shall take a reasoned decision within four weeks thereafter on the request for de-registration filed by the respondents No. 1 and 2.

25. We may also clarify that irrespective of whatever decision is taken by DGCA, the appellant-DRI is free to take appropriate steps if so advised, on the allegations of evasion of custom duty as elaborated before this Court, in accordance with law.

JAYANT NATH, J.

CHIEF JUSTICE

MAY 10 , 2013

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