

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

+ LPA 670/2014 & CM No.16370/2014 (*stay*) &
C.M.No.16372/2014(*addl. docs.*)

Pronounced on: 22.01.2015

DELHI INTERNATIONAL AIRPORT
PRIVATE LIMITED

..... Appellant

Through: Dr. Abhishek Manu Singhvi, Mr.
Rajiv Nayar, Mr. Gopal Jain, Sr. Advs. along with
Mr. Atul Sharma, Mr. Milanka Choudhary, Mr.
Abhishek Sharma and
Mr. Yash Srivastava, Advs.

Versus

UNION OF INDIA & ORS.

..... Respondents

Through: Ms. Anjana Gosain, Adv. for UOI.
Mr. Atul Nanda, Sr. Adv. with
Ms. Rameeza Hakeem, Mr. Priyadarshi Gopal and
Mr. Parinay T. Vasandani, Adv. for R-2.
Mr. Gaurav Sarin with Mr. Shantanu Singh, Adv.
for R-3.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

J U D G M E N T

: **MS.G.ROHINI, CHIEF JUSTICE**

1. The petitioner in W.P.(C) No.5746/2014 is the appellant in this appeal which is preferred against the order of the learned Single Judge dated 03.09.2014 which reads as under:-

“The petitioner has filed the present petition *inter alia* praying as under:-

“(i) The Appeal No. 10 of 2012 should be decided as expeditiously as possible in a time bound manner;

(ii) the existing status quo in respect of the Aeronautical Tariff for IGI Airport, New Delhi dated 20.04.2012 should continue till final disposal of the Appeal, in line with the extensions granted by the Respondent No.2 on 26.03.2014 and 02.05.2014.”

By an order dated 20.04.2012, the Tariff for the Control Period of five years ending on 31.03.2014 has been fixed. The said tariff was further extended upto 31.10.2014, by an order dated 21.04.2014.

It was pointed out that the Airports Economic Regulatory Authority Appellate Tribunal (AERAAT) is not functioning currently as the term of the erstwhile constituents had come to an end.

Although, it is expected that the said Appellate Tribunal (AERAAT) would be constituted shortly and a direction for the expeditious disposal of the appeal, obviously, cannot be granted.

With regard to the second prayer that the tariff as fixed on 20.04.2012 should continue till final disposal of the appeal. It is submitted that the respondent had extended the tariff fixed on 20.04.2012 till 31.10.2014, by an order dated 21.04.2014 which reads as under:-

“In continuation of this Authority’s Order No. 39/2013-14 dated 26th March 2014, the Authority further orders that:

(i) Aeronautical tariff(s) approved by the Authority vide Order No. 03/2012-13 dated 24.04.2012 shall continue upto 31st October, 2014 or until the final determination of the tariffs for the

second control period (i.e. 2014-2019), whichever is earlier.

(ii) The revenue so collected by the airport operator (DIAL) during such period shall be adjusted from the Aggregate Revenue Requirement for the Second control period starting w.e.f. 01.04.2014.”

In the given circumstances, it is expected that either the tariff fixed earlier would continue or a fresh arrangement would be made after 31.10.2014 for a further period after 31.10.2014. If no such arrangement is made or order is passed by any authority i.e. AERA or AERAAT, the order passed on 21.04.2014 shall continue till further orders are passed by any competent authority.

The petition and the application are disposed of with the aforesaid directions.”

2. The said order is assailed in this appeal primarily on the following grounds:-

- (i) Since the appeal preferred by the appellant under Section 18(2) of the Airports Economic Regulatory Authority of India Act, 2008 (AERA Act) against the tariff order for the first Control Period as well as the application for stay are pending before the Airports Economic Regulatory Authority Appellate Tribunal (AERAAT), the learned Single Judge ought to have directed that the same tariff shall be continued till the disposal of the said appeal.
- (ii) The order under appeal granting liberty to the Airports Economic Regulatory Authority (AERA) either to continue the tariff fixed earlier or to make a fresh arrangement for the period after 31.10.2014 is erroneous since the same virtually amounted to allowing AERA to determine the fresh tariff notwithstanding the pendency of the appeal against the tariff order for the First Control Period.

- (iii) Having found that the AERA itself granted extension upto 31.10.2014, the learned Single Judge ought to have held that the balance of convenience is in favour of the appellant and should have directed to maintain status quo till the disposal of the appeal before the AERRAT.
- (iv) As the tariff order for the First Control Period itself is under challenge on various grounds relating to regulatory principles applied by AERA which go to the root of the matter, the learned Single Judge ought to have held that determination of tariff for the Second Control Period pending the appeal would be a futile exercise apart from resulting in multiplicity of proceedings.
- (v) Having regard to the fact that the AERA, while granting extension of the existing tariff upto 31.10.2014, has protected the rights of all the stakeholders by assuring adjustment of the revenue collected from the Aggregate Revenue Requirement for the Second Control Period, the learned Single Judge ought to have held that by continuing the existing tariff till the disposal of the appeal before the AERRAT would protect the interest of all the stakeholders and no prejudice would be caused to any of the parties.

3. On the other hand, the contention on behalf of the respondents is that the determination of tariff is independent for each Control Period and, therefore, the AERA cannot be restrained from proceeding with the determination of the tariff for the Second Control Period merely on the ground that the appeal against the tariff order for the First Control Period is pending before the AERRAT. It is also contended that since no substantial questions of law have been raised in the appeal pending before the AERRAT and, moreover, the appellant is entitled to financial adjustments,

if any, after the determination of tariff for the Second Control Period, no irreparable loss or damage would be caused to the appellant by allowing the AERA to proceed with the determination of the tariff for the Second Control Period. The further contention is that determination of tariff being a statutory function of the AERA, it cannot be restrained from passing a tariff order for the Second Control Period. It is also contended that any delay in determination of tariff would be against public interest since it would ultimately lead to reduction of recovery period which, in turn, would be detrimental to the interest of the end users, i.e., passengers. The further contention is that the extension orders passed by the AERA are not on account of the pendency of the appeal before the AERRAT, but it is only because the process of tariff determination is likely to take some more time.

4. For proper appreciation of the rival contentions, we may refer to the facts of the case in brief.

5. The appellant/writ petitioner is a Special Purpose Vehicle, which was incorporated on 01.03.2006 with Airports Authority of India (AAI). In terms of the Operation, Management and Development Agreement dated 04.04.2006 entered with AAI, the appellant took over the operations of the Indira Gandhi International Airport, New Delhi.

6. The respondent No.2 – Airports Economic Regulatory Authority (hereinafter referred to as ‘AERA’) is the Authority established under Section 3(1) of the AERA Act to exercise the powers conferred on and the functions assigned to it under the said Act. The functions assigned to AERA under Section 13 of AERA Act included determination of tariff for the aeronautical services in respect of major airports. In terms thereof, the AERA determined the tariff for aeronautical services for Indira Gandhi International Airport at Delhi for the First Control Period (from 01.04.2009

to 31.03.2014) on 20.04.2012. Aggrieved by the said Tariff Order dated 20.04.2012, the appellant/writ petitioner preferred an appeal, being Appeal No.10/2012, before the AERAAT under Section 18(2) of the AERA Act. The appeal along with the application for stay of determination of tariff for Second Control Period was listed before the AERAAT on various occasions during 05.12.2013 to 01.08.2014 without being adjudicated upon. In the meanwhile, the AERA initiated proceedings for determination of the tariff for the Second Control Period i.e. 01.04.2014 to 31.03.2019. The AERA on its own extended the tariff determined for the First Control Period for a further period upto 31.05.2014 by order dated 26.03.2014. Since the appeal against the tariff order for the First Control Period is still pending, the appellant herein made a request to AERA to extend the tariff for a further period. Pursuant thereto, the AERA by order dated 02.05.2014 extended the tariff for a further period upto 31.10.2014. While so, the term of office of the Chairperson and one of the Members of AERAAT expired on 20.08.2014. Therefore, the appellant by letter dated 20.08.2014 once again requested the AERA for a further extension beyond 31.10.2014.

7. As there was no response, the appellant herein filed W.P.(C) No.5746/2014 seeking a direction that Appeal No.10/2012 be decided as expeditiously as possible in a time bound manner and pending the said appeal, the existing *status quo* in respect of the Aeronautical Tariff for Indira Gandhi International Airport dated 20.04.2012 should continue in line with the extensions granted by AERA on 26.03.2014 and 02.05.2014. It may be mentioned that the Tariff Order dated 20.04.2012 has also been challenged by some of the other stakeholders viz., Federation of India Airlines, Lufthansa German Airlines and International Air Transport Association contending that the tariff determined by the AERA is high and excessive. The said appeals filed by the other stakeholders being Appeal

Nos.6/2012, 11/2012 & 12/2012 are also pending before the AERAAT. There was a specific direction by the AERAAT to list the appellants' Appeal (10/2012) along with the above said appeals preferred by the other stakeholders and thus, all the matters are coming up together for hearing.

8. However, the term of the Chairperson of the AERAAT expired on 20.08.2014. The term of one of the Members also expired and thus the AERAAT has not been functioning from 20.08.2014. Under these circumstances, the appellant approached this Court by filing the writ petition pleading that since the AERAAT is not functioning and its statutory appeal pending before the AERAAT involves various issues relating to determination of tariff by the AERA the adjudication of which will have a direct bearing on the determination of tariff for the Second Control Period, it is necessary in the interest of justice to continue the *status quo* in respect of the existing tariff dated 20.04.2012 till the disposal of the appeal. It was also pleaded that the same would be in line with the extension granted by AERA by orders dated 26.03.2014 and 02.05.2014.

9. Though no such relief was granted by the learned Single Judge, the writ petition was disposed of at the threshold with certain directions to the effect that the existing tariff i.e. the tariff fixed for the First Control Period would be continued till further orders are passed by AERA or AERAAT.

10. The grievance of the appellant before us is that by virtue of the order under appeal, the AERA is granted liberty to fix the fresh tariff for the Second Control Period without having regard to the pendency of the appellants' statutory appeal against the tariff order for the First Control Period. It is contended that determination of fresh tariff by the AERA pending the appellants' statutory appeal against the existing tariff would cause serious prejudice to it since the issues involved in the said appeal have

a direct bearing on the determination of fresh tariff. It is also contended that the process of determination of fresh tariff would be a futile exercise since various issues relating to determination of tariff are the subject matter of the statutory appeal pending before the AERAAT against the existing tariff order.

11. While entertaining the present appeal, an interim order came to be passed by this Court on 29.09.2014 as under:

“We have heard Mr. Rajiv Nayar, Senior Advocate and Mr. Gopal Jain, Senior Advocate appearing on behalf of the appellant as well as Mr. Sanjay Jain, learned ASG appearing for the respondent no.1 and Mr. Atul Nanda, learned Sr. Advocate appearing for the respondent no.2.

It is observed that no notice is served on respondent no.3 Federation of Indian Airlines (FIA) even in the writ petition.

Issue notice to respondent no.3 FIA by all modes including dasti, returnable on 11th November, 2014.

The tariff determined by the respondent no.2 for the First Control Period shall be continued until further orders.

However, this shall not preclude the respondent no.2 to determine the tariff for the Second Control Period following due process of law. The statement of the learned senior counsel for the appellant that the information as sought by the respondent no.2 for determination of the tariff for the Second Control Period will be made available within three weeks from today is placed on record.”

12. In terms of the above order, the tariff determined for the First Control Period is being continued as of today. It may also be mentioned that the tariff for the Second Control Period has not yet been determined by the AERA. On instructions, it was stated by Sh. Atul Nanda, the learned Senior Counsel appearing for AERA during the course of the hearing on 09.12.2014 that the process of consultation with the various stakeholders which is under progress is likely to take four more weeks and thereafter

about three months' time is needed for determination of the tariff for the Second Control Period. So far as the Chairperson of the Appellate Tribunal (AERAAT) is concerned, the learned Standing Counsel for the Union of India, Ms.Anjana Gosain on instructions submitted that the appointment of the Chairperson which has to be made in consultation with the Chief Justice of India or his nominee in terms of Section 19 of the AERA Act has not yet been finalized. On a perusal of the record produced by the learned Standing Counsel for the Union of India, we found that the steps for appointment of the Chairperson are still in progress and the learned Standing Counsel was unable to even indicate any timeframe as to when the AERAAT is likely to be made functional.

13. Thus, the fact remains that the Appellate Tribunal/AERAAT on the file of which the appellant's statutory appeal is pending, is not functional as of today. Similarly, the tariff for the Second Control Period is yet to be determined and even according to the AERA the process of determination is likely to take about three months more.

14. It may also be mentioned in this context that during the pendency of the appeal before us, the AERA passed a fresh order extending the operation of the tariff order dated 20.04.2012 upto 31.01.2015 or until the final determination of the tariff for the Second Control Period whichever is earlier.

15. In the light of the above-noticed facts borne out of the record, the only question that requires consideration is whether the appellant is entitled to the grant of relief of continuation of the tariff determined for the First Control Period till the disposal of its statutory appeal pending before AERAAT. In other words whether it is open to the AERA to determine and enforce the tariff for the Second Control Period notwithstanding the

pendency of the statutory appeal preferred against the tariff order for the First Control Period.

16. As could be seen from the scheme of the AERA Act, determination of the tariff for the aeronautical services in respect of major airports is one of the statutory functions of the AERA. Sub-section (2) of Section 13 of AERA Act provides that the AERA shall determine the tariff once in five years. As per sub-section (4) of Section 13, while determining the tariff, it is mandatory for the AERA inter alia (i) to hold due consultations with all stake-holders with the airport; (ii) to allow all stake-holders to make their submissions to the authority; and (iii) to make all decisions of the authority fully documented and explained. Thus, it is clear that the process of determination of tariff is consultative and highly technical.

17. It is relevant to note that any order passed by the AERA is appealable under Section 18(2) of the AERA Act. As per sub-section (6) of Section 18, such appeal shall be dealt with by the AERAAT as expeditiously as possible. The proviso to Section 18(6) makes it clear that in case the appeal could not be disposed of within the period of ninety days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within that period.

18. The Statement of Objects and Reasons of AERA Act, 2008 reflects that the said Act is enacted to provide for establishment of a Regulatory Authority to regulate tariff and other charges for aeronautical services and also to establish an Appellate Tribunal to adjudicate disputes and dispose of appeals and for matters connected therewith or incidental thereto. It may also be mentioned that AERAAT is the first adjudicatory body under the scheme of the Act which is headed by a Judge of the Supreme Court or the Chief Justice of the High Court. An appeal against

the order of the AERAAT lies only to the Supreme Court under Section 31 of the AERA Act.

19. Referring to the scheme of the AERA Act, particularly the fact that the appeals under Section 18(2) are required to be decided in a time bound manner, it is contended by the learned Senior Advocates appearing on behalf of the appellant that the regulatory functions by AERA are subject to adjudication by the AERAAT and, therefore, during the pendency of the appeal in which the correctness of the Tariff Order for the First Control Period made by AERA is under challenge, the AERA cannot be allowed to determine the tariff for the Second Control Period.

20. However, it is vehemently contended by Shri Atul Nanda, Senior Advocate appearing for AERA that determination of tariff is independent for each Control Period and that it would be a fresh determination in terms of Section 13(1) of the AERA Act. Thus, it is contended that the mere pendency of the appeal against the tariff order for the First Control Period is no bar for determination of the tariff for the Second Control Period. On the basis of the factual instructions dated 08.12.2014 issued by AERA, it is also represented by the learned Senior Counsel that in the light of the documents filed by the appellant with AERA it would appear that the tariff for the Second Control Period is likely to be lesser than the existing tariff. It is further contended by the learned Senior Counsel that it is not mandatory under Section 18(6) of AERA Act to dispose of an appeal within 90 days but the only requirement under the proviso to Section 18(6) is to record reasons in writing where the appeal could not be disposed of within the period of 90 days. Thus, according to the learned Senior Counsel the legislature was fully conscious that in a given case an appeal may not be disposed of within 90 days and may take a fairly long period and in such

cases, the only requirement of the law is to record reasons in writing by the Tribunal for not disposing of the appeal within 90 days.

21. The respondent No.3-Federation of Indian Airlines also contested the writ petition reiterating the contention that the grant of relief to appellant would tantamount to preventing the statutory authority from performing its statutory functions under Section 13(1) of the AERA Act. While submitting that the learned Single Judge in fact granted protection to the appellant but made it subject to any fresh arrangement made by the AERA, it is contended by Shri Gaurav Sarin, the learned counsel appearing for respondent No.3 that the appellant failed to point out any error of law or of fact in the impugned order. The further contention is that the non-disposal of the appeal filed before AERAAT does not grant the appellant any right to seek a mandamus for disposal of such appeal by invoking the jurisdiction under Article 226 of the Constitution of India. Placing reliance upon *Municipal Corporation of City of Thane vs. Vidyut Metalics Ltd. and Anr.* (2007) 8 SCC 688; *Maharashtra State Power Generation Co. Ltd. vs. Maharashtra Electricity Regulatory Commission* 2011 ELR (APTEL) 569; *Maharashtra State Power Generation Co. Ltd. vs. Maharashtra Electricity Regulatory Commission* 2011 ELR (APTEL) 871; *Maharashtra State Power Generation Co. Ltd. vs. Maharashtra Electricity Regulatory Commission* 2011 ELR (APTEL) 1404; *In Re: Tariff Revision* 2011 ELR (APTEL) 1742; *Tamil Nadu Electricity Consumers Association vs. Tamil Nadu Electricity Board and Anr.* 2011 ELR (APTEL) 1293, it is also contended that tariff determination ought to be time bound exercise and must be carried out regularly.

22. It is no doubt true that the rigour of time limit prescribed for disposal of an appeal under Section 18(6) of the AERA Act within 90 days is diluted

by virtue of the proviso which enables continuation of the appeal beyond 90 days subject to recording reasons in writing for not disposing of the appeal within the period of 90 days. There can also be no dispute about the legal principle that mere pendency of an appeal in the absence of any order of stay is not a bar for discharging the statutory functions. However, in the case on hand, what is under challenge before the Appellate Tribunal is the tariff determined by the AERA for the First Control Period taking into consideration the factors prescribed in Section 13(1)(a). Admittedly, the appellant preferred an appeal against the said determination and the same is pending on the file of the AERAAT since 25.05.2012. The record placed before this Court shows that the appeal underwent adjournments from time to time without any adjudication in spite of the fact that the Tribunal was very much functioning till 20.08.2014. Though the time limit of 90 days expired long back, no reasons were recorded at any point of time as required under the proviso to Section 18(6). It may also be mentioned that on 10.09.2013, AERA initiated proceedings for determination of the tariff for Second Control Period and therefore, on 29.11.2013, the appellant filed an application being I.A. No.35/2013 seeking stay of determination of tariff for the Second Control Period. However, the said application for stay is also kept pending along with the appeal.

23. The specific case of the appellant is that the appeal pending before AERAAT involves substantial questions of law including the issues pertaining to correctness of the regulatory principles applied by AERA while determining the tariff for the First Control Period. It may be true that the tariff order that may be passed by AERA for the Second Control Period would be a fresh determination, however the fact remains that such determination shall also be on the basis of the factors prescribed in Section 13(1)(a) of the AERA Act. That being so, we find force in the submission

of the learned counsel for the appellant that the adjudication on the issues raised in the appeal pending before the AERAAT would have a direct bearing on the determination of the tariff for the Second Control Period. In the peculiar facts and circumstance of the case on hand, therefore, we are unable to agree with the contention on behalf of AERA that no relief can be granted to the appellant in exercise of jurisdiction under Article 226 of the Constitution of India on the ground of pendency of appeal before the AERA.

24. The further contention advanced by the learned Senior Counsel for AERA that the appellant has no legal right to seek a mandamus for continuation of the tariff determined for the First Control Period for an indefinite period which in effect would restrain the AERA from discharging its statutory function, is equally without substance.

25. It is to be noticed that the right of appeal available to the appellant against the tariff order is a statutory right. It is no doubt true that AERA is a regulatory authority and its functions include determination and regulation of tariff and other charges for the aeronautical services rendered at airports. However, Section 18(7) empowers the Appellate Tribunal to examine the legality or propriety or correctness of any such order passed by AERA and make such orders as it thinks fit. Admittedly, the appellant has availed the said statutory remedy of appeal and sought adjudication on the correctness of the tariff order passed by AERA. It is nobody's case that the pendency of the said appeal which was preferred in May, 2012 is for the reasons attributable to the appellant. In such circumstances, it is always open to this Court, in exercise of the extraordinary jurisdiction under Article 226 of the Constitution of India, to direct expeditious disposal of the appeal and also to

pass appropriate orders to protect the interest of the appellant pending the statutory appeal.

26. It may be made clear that this Court never restrained AERA from discharging its statutory functions of determination of tariff for the Second Control Period. In fact, in the interim order dated 29.09.2014 itself it was made clear that the AERA is not precluded to determine the tariff for the Second Control Period following due process of law. Therefore, the question of restraining the AERA from discharging its statutory function does not arise at all.

27. Though the learned Senior Counsel appearing for AERA sought to make his submissions on merits of the matter and filed detailed written submissions on various issues relating to determination of tariff, we decline to enter into the said controversy and express any opinion since the statutory appeal is yet to be decided by the AERAAT. At this stage, we are only concerned with the question whether the AERA can be allowed to enforce the tariff that may be determined for the Second Control Period notwithstanding the pendency of the appellants' appeal against the tariff order for the First Control Period.

28. We had on 9th December, 2014, while reserving order also directed the counsel for the respondent No.1 Union of India to produce the record to enable us to ascertain the steps taken for making AERAAT functional. In response thereto, the counsel for the respondent No.1 produced the record before us which disclosed that the process of consultation under Section 19 of the Act stood completed. Having regard to the fact that the appellant's appeal is pending from May, 2012 and moreover, similar appeals preferred against the Tariff Orders for the First Control Period in respect of several other major airports in the country are also pending before AERAAT and

that all the appeals involve various important technical issues as well as legal issues, we deem it appropriate to direct the Union of India, Ministry of Civil Aviation to finalize the selection and appointment of the Chairperson and members of AERAAT at the earliest, within four weeks of today. We further direct AERAAT to decide the said appeals within eight weeks therefrom i.e. latest within twelve weeks herefrom.

29. For the reasons stated supra and for the reason that we have now issued directions for making AERAAT functional within four weeks and yet further for the reason that the respondent No.2 AERA itself has till now not determined the tariff for the Second Control Period and has extended the tariff for the First Control Period until such determination which we were informed on 9th December, 2014 was likely to take three months and yet further for the reason that we have also directed the appeals against the tariff determined for the First Control Period to be decided within twelve weeks herefrom, we see no harm to anyone in ordering that the tariff determined for the First Control Period shall continue till the decision of the appeal by AERAAT.

30. Accordingly, the order under appeal is set aside and the appeal shall stand disposed of with the following directions:

- (i) The Union of India, Ministry of Civil Aviation shall take the necessary steps to finalize the selection and appointment of the Chairperson and members of AERAAT and to make it functional at the earliest, within four weeks herefrom.
- (ii) We further direct AERAAT to decide the appeals aforesaid within eight weeks therefrom i.e. latest within twelve weeks herefrom.

- (iii) The tariff determined by AERA for the First Control Period vide Tariff Order No.03/2012-13 dated 20.04.2012 shall continue till the disposal of the appeals pending against the said Tariff Order, by the AERAAT.

CHIEF JUSTICE

RAJIV SAHAI ENDLAW, J.

JANUARY 22, 2015
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