

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

% **Date of decision: 25th April, 2016**

+ **W.P.(C) 7652/2015 & CM No.14940/2015 (for stay)**

**SHRISTI INFRASTRUCTURE DEVELOPMENT
CORPORATION LIMITED & ORS**

..... Petitioners

Through: Mr. Chetan Sharma, Sr. Adv. with Ms.
Divya Chaturvedi & Ms. Saksham
Chauhan, Advs.

Versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Vishu Agarwal, Adv. for Ms.
Anjana Gosain, Adv. for R-1&3.
Mr. Sandeep Sethi, Sr. Adv. with Mr.
Digvijay Rai, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition, (i) impugns the order dated 24th June, 2015 of the respondent No.3 Appellate Committee, Ministry of Civil Aviation (Appellate Committee) and the order dated 29th July, 2015 of the respondent No.2 Airports Authority of India (AAI); (ii) impugns the 'No Objection Certificate' (NOC) dated 3rd July, 2014 issued by the respondent No.2 AAI to the construction of the proposed building of the petitioner No.1 at Plot No.AA-II/CBD/2, AAI-II, New Town, Under Auction Area-II, Kolkata to the extent that it limits the height of Tower-2 of the petitioners' complex

upto the height of 105.48 meters Above Mean Seal Level (AMSL); and, (iii) seeks a mandamus to the respondent No.2 AAI to grant NOC in terms of earlier NOC dated 26th July, 2006.

2. Though the petition came up first before this Court on 12th August, 2015 and the counsels for the respondent No.1 Union of India (UOI) and respondent No.2 AAI appeared on advance notice but was adjourned from time to time without issuance of notice thereof. Adjournment was sought on behalf of the senior counsel for the petitioners on 11th September, 2015 when also the matter was listed. On the opposition by the senior counsel for the respondent No.2 AAI as well as counsel for the respondent No.1 UOI and respondent No.3 Appellate Committee contending that the petitioners have increased the height of one of the towers on their hotel near the Airport at Kolkata and which was causing obstruction to the air traffic, the matter was adjourned to 14th September, 2015. On 14th September, 2015, the counsels were heard and order reserved. The counsel for the petitioners during the hearing handed over an additional affidavit along with documents and thereafter also on 18th September, 2015 and 30th September, 2015 handed over additional affidavits with advance copies to the counsels for the respondents. The said additional affidavits have also been considered by me.

3. The factual scenario is as under:

(a) that the petitioner No.2 M/s Shristi Housing Development Ltd. is the wholly owned subsidiary of the petitioner No.1 Shristi Infrastructure Development Corporation Limited and the petitioner No.3 M/s Shristi Hotel Pvt. Ltd. is an associate company of the petitioner No.1;

(b) that the petitioners, being possessed of land at Mouza Jatragachi, AA-II/CBD/2, Action Area-II, New Town, Rajarhat, Kolkata (West Bengal) situated at a distance of 7.06 Kms from Kolkata Airport and being desirous of constructing five star hotel, retail and commercial units and service apartments thereon, in or about the year 2006-2007 were in the process of obtaining various permissions / sanctions therefor;

(c) that Section 9A of the Aircraft Act, 1934 empowers the Central Government, if of the opinion that it is necessary or expedient so to do for the safety of aircraft operations, to by notification in the official gazette, direct that no building or structure shall be constructed or erected on any land within such radius, not exceeding twenty kilometers from the aerodrome reference point, as may be specified in

the notification and / or to direct that no building or structure higher than such height as may be specified in the notification shall be constructed or erected on such land;

(d) that the land aforesaid of the petitioners being within the prohibited distance from Kolkata Airport, the petitioners applied for NOC from the respondent No.2 AAI also;

(e) that the respondent No.2 AAI issued NOC dated 19th / 26th July, 2006 granting its no objection to construction by the petitioners upto height not exceeding 144.53 meters AMSL; it was a term of the said certificate that the same was valid for a period of three years from the date of issue and if the building / structure was not constructed and completed within the said period of three years, the petitioners would be required to obtain a fresh NOC from the respondent No.2 AAI;

(f) that the petitioners could not complete the construction within the said period of three years and in fact claim to have commenced the work of construction only after November, 2008;

(g) that the petitioners on 27th August, 2010 applied to the respondent No.2 AAI for revalidation / renewal of the NOC;

(h) that the respondent No.2 AAI vide its communication dated 13th December, 2010 informed the petitioners that the case of the petitioners could be considered for NOC upto a maximum height of 88.64 meters AMSL on receipt of required revised sanction plan duly authenticated and asked the petitioners to submit revised undertaking and revised Sanction plan for a restricted height of 88.64 meters AMSL;

(i) the petitioners appealed to the respondent No.3 Appellate Committee;

(j) the said appeal remained pending and the respondent No.2 AAI vide its letter dated 5th July, 2012 informed the petitioners that the appeal of the petitioners will be considered by the Grievance Redressal Committee of the respondent No.1 Ministry of Civil Aviation, UOI and also asked the petitioners to apply online for NOC;

(k) that the respondent No.2 AAI vide its letter dated 13th June, 2014 to the Regional Executive Director, Eastern Region of AAI and with copy to the petitioners authorised the Regional Executive Director, Eastern Region of AAI to issue revised height clearance to the petitioners with respect to Tower-1 of 144.53 meters AMSL and

with respect to Tower-2 of 105.48 meters AMSL on compliance of certain other conditions by the petitioners;

(l) that the petitioners again appealed to the respondent No.3 Appellate Committee;

(m) that in the interregnum on 3rd July, 2014, the respondent No.2 AAI issued NOC to the petitioners permitting the height of Tower-1 upto 144.53 meters AMSL i.e. for the same height for which NOC was earlier issued on 26th July, 2006 but with respect to Tower-2 for a height of 105.48 meters AMSL as against the height of 144.53 meters AMSL for which NOC was issued on 26th July, 2006;

(n) that the respondent No.3 Appellate Committee heard the petitioners / their representatives on 21st January, 2015 and 24th June, 2015 and in its meeting held on 24th June, 2015 considered the appeal of the petitioners and found / observed / reasoned:

(i) that the site of the petitioners lies in Outer Conical Surface and is at a distance of 6307 meters from Kolkata Airport runway;

(ii) that the petitioners had initially requested a height of 144.53 meters AMSL and against which they were granted an

NOC dated 26th July, 2006 for a height of 144.53 meters AMSL with a three years validity;

(iii) that the petitioners on 27th August, 2010 i.e. after the expiry of the NOC asked for revalidation;

(iv) that as per the Rules, the provision of revalidation of NOC is applicable in those cases which were received for revalidation within the validity period;

(v) accordingly, the case of the petitioners was re-examined and NOC for the permissible height of 88.64 meters AMSL was issued;

(vi) that this change in height from the earlier NOC dated 26th July, 2006 was due to the revised norms which were notified in January, 2010;

(vii) that on representations / appeal of the petitioners, the matter was examined with respect to 'CNS' (Communication Navigation and Surveillance) criteria and it was observed that individually 'both the objects' (i.e. towers) are small but collectively become large object and should not be considered

for higher height than permissible from ASR (Air Surveillance Radar);

(viii) that in the respondent No.3 Appellate Committee meeting held on 7th March, 2014 it was decided that re-examination of the case from CNS criteria for Tower-2 for the requested height of 133.321 meters AMSL taking into consideration the new radar at Kolkata Airport be carried out by the respondent No.2 AAI and issue permission for the admissible height from new radar for Tower-2 and 144.53 meters AMSL for Tower-1;

(ix) that after re-examination, authorisation was given vide letter dated 13th June, 2014 for the permissible height of Tower-1 of 144.53 meters AMSL and of Tower-2 for 90.30 meters AMSL from existing radar and 105.48 meters AMSL after proposed ASR is commissioned;

(x) However the petitioners continued to represent, also citing relaxations due to second radar granted to number of structures in Mumbai;

(xi) that the petitioners during the hearing on 21st January, 2015 had revealed that they had constructed Tower-2 beyond

the permissible height of 105.48 meters AMSL, after expiry of their NOC—an enquiry was ordered into, how such construction was permitted after the expiry of the validity of the earlier NOC;

(xii) that the request of the petitioners for application of multi-radar criteria was considered but not found tenable as Kolkata has only one single ASR and that the benefits accruing from the present positioning of the existing radar had been applied in the CNS examination;

(xiii) accordingly, directions were issued for demolition of the excess height of Tower-2 as per the Aircraft Rules.

4. The petitioners contended:

(A) that the order for demolition of the excess height of Tower-2 is without application of mind and arbitrary;

(B) that the petitioners would suffer huge loss of revenue and reputation;

(C) that the petitioners have been kept on tenterhooks from more than three years from the year 2011 to 2015;

(D) that the inability of the petitioners to complete the construction within the validity period of NOC dated 26th July, 2006 was for reasons attributable to other agencies which delayed grant of permissions;

(E) that the respondents, in the case of M/s Wadhwa Residency Pvt. Ltd. had reviewed the decision of restricting the height upto 87.50 meters near CSI Airport, Mumbai to 109 meters AMSL on the basis of third party study—no such opportunity of presenting third party study was given to the petitioners;

(F) that similar review was done qua the building of M/s S.D. Corporation Pvt. Ltd. also near the CSI Airport, Mumbai;

(G) that from the factum the respondents having thus revised the height from that earlier indicated on 13th December, 2010 of 88.64 meters AMSL to 144.53 meters AMSL for Tower-1 and 105.48 meters AMSL for Tower-2 itself shows the arbitrariness of the decision making of the respondents;

(H) that the petitioners having already constructed Tower-2 upto the height of 133.50 meters AMSL, will suffer commercial loss on reduction of height thereof to 105.48 meters AMSL;

- (I) that there is no change in factual position of parameters for issuing the NOC since the year 2006 which would have necessitated change in permissible height for the petitioners' complex;
- (J) that the petitioners, because of NOC dated 26th July, 2006, had a legitimate expectation of renewal of NOC on the same terms;
- (K) that the petitioners with the said legitimate expectation had obtained foreign investment which was likely to be jeopardized;
- (L) that the respondents exercised the discretion vested in them in an unregulated manner;
- (M) that the Grievance Redressal Committee of the respondent No.2 AAI as per minutes of its meeting held on 1st July, 2012 had decided that all cases where delay in construction is due to procedural requirement, the renewal is to be granted as per the height approved earlier but the said principle has not been applied to the petitioners;
- (N) that had the petitioners completed the construction within the period of validity of NOC dated 26th July, 2006, the height of the two towers of the petitioners would have been for which NOC was issued and there is no reason for changing the height;

(O) that the decision of the respondent No.3 Appellate Committee is without any reasons whatsoever.

5. The senior counsel for the petitioners argued on the same lines and in addition, (i) drew attention to Annexure P-15 being copy of the letter dated 10th January, 2013 of the petitioners to the Regional Executive Director of AAI, Kolkata and contended that the petitioners thereby informed the respondent No.2 AAI of having already completed the construction of Tower-2 upto a height of 129 meters; (ii) that the respondent No.2 AAI in relation to a project at Mumbai and in relation to projects at Hyderabad also had decided on the basis of third party opinion and though the petitioners also requested therefor and also showed their willingness to bear the costs thereof but no such opportunity has been given to the petitioners; (iii) that Section 9A of the Aircraft Act does not prescribe any height and since there are no penal consequences thereof, it is merely directory; (iv) that the petitioners have created third party rights in the portions of Tower-2 above the height for which NOC has now not been issued; (v) that the norms which came into force in 2010 cannot be applied to the petitioners as NOC had already been issued to the petitioners prior thereto. Though the petitioners in

the writ petition have pleaded a number of judgments but the senior counsel for the petitioners during the hearing did not refer to any of them.

6. Per contra, the senior counsel for the respondent No.2 AAI—(a) highlighted that Section 9A of the Aircraft Act empowered the Central Government to prohibit construction and / or construction above the prescribed height within a radius of twenty kilometers from the airport reference point; (b) handed over the Notification dated 14th January, 2010 issued in exercise of powers under Section 9A of the Act; (c) contended that the delay in disposal of the appeal preferred by the petitioners was owing to the petitioners having not submitted all the requisite documents and the delay on the part of the petitioners in submitting the same; (d) drew attention to the letter dated 25th March, 2014 of the Appellate Committee to the petitioners to demonstrate proper consideration of all parameters by the Appellate Committee; (e) contended that Kolkata Airport has a single radar, while the Airports at Mumbai and Delhi had multiple radars and argued that thus the parameters of Mumbai and Delhi Airports cannot be applied to Kolkata Airport; (f) contended that judicial review by this Court of such a decision can be on limited grounds only; (g) contended that from a perusal of the documents, it is evident that all the pleas of the petitioners have been

considered before taking the decision and due opportunity of hearing has been given to the petitioners; (h) stated that if at any time in future Kolkata Airport also has multiple radars, the height restriction can be increased; (i) that the petitioners are not entitled to any equitable relief having gone ahead of the construction of Tower-2, even in the absence of an NOC and in violation of Section 9A of the Aircraft Act; (j) invited attention to the undertaking given by the petitioners at the time of applying for NOC to not raise construction without the NOC and / or to not continue the construction after the expiry of the validity of NOC and contended petitioners to be in violation thereof also; (k) argued that the petitioners, by raising construction even without NOC are jeopardizing the lives of air traveler to and fro Kolkata; (l) qua “third party opinion” argued that the same were placed by the concerned parties before the respondent No.3 Appellate Committee and were thus considered; (m) relied on *The Secretary and Curator, Victoria Memorial Hall Vs. Howrah Ganatantrik Nagrik Samity* (2010) 3 SCC 732 where the order of the High Court rejecting the recommendations of the expert committee was set aside by the Supreme Court; (n) relied on *Akhil Bharat Goseva Sangh Vs. State of A.P.* (2006) 4 SCC 162 laying down that findings of expert bodies in technical and scientific matters are not to be

ordinarily interfered with by the Courts in exercise of power under Article 226 of the Constitution of India; (o) referred to *Sridhar Gupta Vs. N.D.M.C.* MANU/DE/0170/2010 where the person in violation of Building Bye-laws and guilty of unauthorised construction was held to be not entitled to any indulgence; (p) argued that the public interest is to prevail over the personal interest of the petitioners.

7. The counsel for the respondent No.1 UOI informed that the unauthorised construction beyond the permitted height near Mumbai Airport had also been demolished.

8. The senior counsel for the petitioners in rejoinder in response to specific query stated that the Notification dated 14th January, 2010 is to apply to the petitioners and not the earlier notifications.

9. The petitioners in the additional affidavits aforesaid filed—(i) have highlighted that in the case of M/s Wadhwa Residency Pvt. Ltd., Mumbai the Appellate Committee had suggested taking the opinion of a third party and which was agreed to by M/s Wadhwa Residency Pvt. Ltd.; (ii) that in the cases of Neepa Real Estates Pvt. Ltd., M/s Enarch Consultants (Pvt.) Ltd., M/s Gujarat International Financial Tech-City, M/s Aqua Space Developers Pvt. Ltd. and M/s S.D. Corporation Pvt. Ltd. also aeronautical study was got

conducted under the directions of the Appellate Committee and after receipt of report thereof, height was increased; (iii) however in the case of the petitioners only a desk calculation with respect to the evaluation of CNS criteria has been conducted and no actual aeronautical study has been carried out before passing the impugned order; (iv) that the application dated 27th August, 2010 of the petitioners ought to have been treated as an application for 'revalidation' and not as a 'fresh application'; (v) that in the case of M/s Consultants Combined, Mumbai, the Appellate Committee has clarified that as per the internal circular, the validity of NOC could be extended upto five years; (vi) that the petitioners, have since got an independent third party study conducted from one Mr. S.P. Jain, Consultant who has reported that there is no adverse impact on the safe aircraft operation at Kolkata Airport owing to the existing height of Tower-2 of the petitioners and that operationally and technically the two towers are so close to each other that there cannot be different impact due to Tower-2.

10. Need for issuing notice of this petition or for filing counter affidavit from the respondents was not felt, being of the opinion that the scope of judicial review in exercise of powers under Article 226 of the Constitution of India extends to the decision making process only and not to the decision

itself, particularly when the decision is of the nature as under consideration. Notwithstanding the same, after the order was reserved, the matter went on a back burner owing to remaining engrossed in other day to day matters. However, after hearing the counsels and after perusing the records and analyzing the same as hereinabove also, I remain of the opinion that this Court exercising jurisdiction under Article 226 of the Constitution of India cannot go into the merits / de-merits of the decision of the statutory authorities, particularly with respect to the height restrictions for construction in the vicinity of Airports.

11. This Court neither has the competence nor the wherewithal to sit in judgment over the decisions of the respondent No.2 AAI and respondent No.3 Appellate Committee as to what should be the maximum height of the construction admittedly near the airport of the petitioners and with respect whereto the law regulates construction.

12. The Aircraft Act has been enacted to make better provision for control of the manufacture, possession, use, operation, sale, import or export of aircrafts and vide Section 5 thereof empowers the Central Government to by notification make rules *inter alia* for use and operation and for securing the safety of aircraft operations and particularly to provide for the authorities by

which any of the powers conferred under the Act are to be exercised, the measures to safeguard civil aviation against acts of unlawful interference, the air routes by which and the conditions under which aircraft may fly over India and the places at which aircraft shall land, the supply, supervision and control of air route beacons, aerodrome lights, and lights at or in the neighbourhood of aerodromes or on or in the neighbourhood or air routes etc. Section 9A thereof has already been noticed hereinabove. Rule 3A of the Aircraft Rules, 1937 framed thereunder provides that any power or duty conferred by the Rules on the Central Government or on the Director General Civil Aviation may be exercised or discharged either by the Central Government or the Director General Civil Aviation or by any other person authorised by the Central Government.

13. The respondent No.2 AAI has been constituted and incorporated by the Airports Authority of India Act, 1994 for better administration and cohesive management of airports and for matters connected therewith. The same comprises of a Chairperson and not less than eight and not more than fourteen members to be appointed by the Central Government, with the Director General of Civil Aviation being an *ex officio* member thereof and with the functions *inter alia* of planning, development, construction and

maintenance of runways, taxiways, aprons and terminals and ancillary buildings at the airports and civil enclaves.

14. The Central Government, under the Aircraft Act has also framed the Aircraft (Demolition of Obstructions caused by Buildings and Trees, etc.) Rules, 1994 providing for the demolition of buildings and trees in violations of notification under Section 9A of the Act.

15. The purport of citing the aforesaid statutory provisions is only to show that the respondents by law have been empowered and constituted as the authorities to decide the height of buildings within the prohibited distance from the airports. The notification dated 14th January, 2010 supra also prohibits construction or erection of any building or structure on any land within the limits specified in annexures thereto without obtaining the NOC and constitutes the respondent No.2 AAI as the authority responsible for issuing NOC on behalf of the Central Government. The annexures to the said notification are found to specify varying limits depending *inter alia* upon the width of the runway strip available at the airport, the extent of the land adjacent to the runway, the parameters of the radio range available, glide path, air surveillance radar, air radius surveillance radar, secondary surveillance radar, micro link facilities etc. and the landing system available.

16. I may highlight (i) that the Notification dated 14th January, 2010 is not under challenge; (ii) that the counsel for the petitioners during the hearing admitted to the applicability of the said Notification qua the petitioners; and (iii) it is not the case of the petitioners that the height permitted for their construction is lessor than that to which they are entitled to as per the said Notification.

17. The grounds pleaded in the writ petition and urged during the hearing are general and the petitioners have not technically or legally found fault with the impugned decisions of the respondents vis.-a-vis. the Notification dated 14th January, 2010.

18. In my opinion, no arbitrariness can be attributed from the respondents, in the year 2006 giving NOC for the height of 144.53 meters AMSL for both towers of the construction of the petitioners, in the year 2010 communicating to the petitioners that the maximum height for which NOC can be issued to them was of 88.64 meters AMSL and in the year 2014 issuing NOC to the petitioners for the same height for which NOC was issued in the year 2006 for Tower-1 but issuing NOC for the reduced height of 105.48 meters AMSL for Tower-2. The NOC admittedly was not for ever and as recorded above, the validity thereof was contained therein itself and it was further stipulated

that after the expiry of validity, a fresh NOC would have to be obtained. Issuing NOC for a limited validity is quite understandable and again was/has not been challenged. Though the location of the airport may over the years remain static and constant but the same cannot be said with respect to the operations from the airport. Not only is the volume of air traffic rising day by day (and which also has impact on air operations) but with the changes / improvements in the aircrafts and the air surveillance system on which operation of aircrafts is dependant, are also changing day by day. Such changes are bound to affect the maximum height of buildings within the prohibited distance of the airports and the height thereof cannot remain static. Section 9A supra not only prohibits new constructions beyond the prescribed height or height for which NOC is issued but also empowers issuance of a direction for demolition or reduction in height of existing buildings within the prohibited distance if found to be affecting air operations. In fact, the documents filed by the petitioners themselves before this Court demonstrate that the case of the petitioners has been fairly and elaborately considered and even though as per the situation applicable in the year 2006 the petitioners were issued NOC with the maximum height of 144.53 meters AMSL for both the towers but on further studies what height

could be permitted has been permitted to the constructions of the petitioners. Merely because the respondents have considered the representations of the petitioners and as per further study granted the benefit available to the petitioners, cannot constitute a ground to contend that the same shows the arbitrariness of the decision making process. If such reasoning were to be adopted by the Courts it would sound the death knell for the exercise of power of review by the authorities concerned, even if on review finding an error in the earlier decision or finding the applicant to more relief than what was earlier granted to them and the authorities would hesitate to grant the same for the fear of their decision being challenged as arbitrary. Also, it does not follow that because the petitioners on earlier reconsideration were granted additional relief, the respondents should again be directed to reconsider. The process after all cannot be made an endless one, particularly when the petitioners by illegally raising construction and enjoying the benefit thereof are interested in making such process of reconsideration an indefinite one. In fact, I tend to agree with the contention of the senior counsel for the respondent No.2 AAI of the petitioners, having illegally gone ahead with the construction, being not entitled to any relief. The jurisdiction of this Court under Article 226 of the Constitution of India

is an equitable jurisdiction and it is again a settled principle of law that one who comes in equity must have come with clean hands and a clean conscience. The equitable jurisdiction of this Court cannot be permitted to be abused by those indulging in illegal and unauthorised construction in contravention of the rules. The petitioners herein had no reason to, notwithstanding their NOC having lapsed, go ahead with the construction and that too construction beyond the height of 88.64 meters AMSL which had been communicated to them on 13th December, 2010. The petitioners by their such conduct alone are disentitled from any relief from this Court.

19. The argument of the counsel for the petitioners, of no opportunity of obtaining third party opinion having been given to the petitioners, also does not find any favour with me. The impugned order dated 24th June, 2015 of the respondent No.3 Appellate Committee and which has been succinctly set out hereinabove, in my opinion is unambiguous and lucid and a well considered one and does not show any need for any third party opinion. Merely because the respondents have in some other cases allowed third party opinion upon feeling the need therefor, would not bind the respondents in every case to give an opportunity to applicant to seek third party opinion.

20. No case for entertaining the petition is thus made out.

21. Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

APRIL 25, 2016

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