

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 16.08.2017

+ **W.P.(C) 5756/2016 & CM 23726/2016**

FEDERATION OF INDIAN AIRLINES & ORS

..... Petitioners

Versus

**DIRECTOR GENERAL OF CIVIL AVIATION
& ANR**

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Gaurav Sarin with Ms Poonam Verma and
Ms Nishtha Kumar.

For the Respondents : Ms Anjana Gosain.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Federation of Indian Airlines (petitioner no.1) along with its member airlines (hereafter 'the petitioner airlines') have filed the present petition assailing the Air Transport Circular no.02 of 2016, (hereafter 'the impugned circular') issued on 10.06.2016 by respondent no.1 (hereafter 'DGCA'). In terms of the impugned circular, the charges for check-in baggage weighing between 15 kg to 20 kg (that is, above the 15 kg free check-in baggage allowance) have been restricted to a maximum of ₹100 per kg.

2. The impugned circular came in force with effect from 15.06.2016 and superseded the earlier circular no.03 of 2015 dated 08.11.2015, which left it open for the concerned airlines to determine the charges for check-in baggage over and above the free baggage allowance of 15 kg.

3. The petitioners claim that the impugned circular has been issued in contravention of the provisions of the Aircraft Act, 1934 (hereafter 'the Act') and the Aircraft Rules, 1937 (hereafter 'the Aircraft Rules'). The impugned circular has also been challenged as being violative of Article 19(1)(g) read with Article 301 of the Constitution of India.

4. Before proceeding to address the aforesaid controversy, it is necessary to notice the relevant context in which the present controversy arises.

5. In order to provide option to the passengers to only pay for the services that are availed, it was decided to unbundle certain services; meaning thereby that the airlines could charge separately for such services. The same was communicated by the Ministry of Civil Aviation (respondent no.2) to DGCA by a letter dated 30.04.2013. The second paragraph of the said letter, which indicates the services to be unbundled, reads as under:-

"2. The issue of unbundling of services and fees by scheduled Airlines has been examined and it has been decided with the approval of competent authority that for the time being, the following services only may be included for unbundling:

- (i) Preferential Seating.
- (ii) Meal/snack/drink charges (Except drinking water)
- (iii) Charge for using Airline lounges.
- (iv) Check in baggage charges.
- (v) Sports equipment charges.
- (vi) Musical instrument carriage.

(vii) Fee for special declaration of valuable baggage - (allow for higher unit on carrier liability)."

6. The approval for unbundling of services was given subject to certain conditions as specified in the letter dated 30.04.2013, which included that all unbundled services would be provided on "opt-in basis" and not "opt-out basis"; and the charges for unbundled services / flight products would be fixed amounts and announced by the airlines well in advance. It was further specifically provided that DGCA would not fix the fees for unbundled services but would reserve the right to intervene and stop the airlines from charging for any specific flight product, if the regulatory principles were not followed.

7. Pursuant to the letter dated 30.04.2013, DGCA issued circulars providing for unbundling of services to be charged separately on opt-in basis. On 08.11.2015, DGCA issued circular no.03 of 2015, which *inter alia* provided for unbundling of the service of check-in baggage, above 15 kg of free check-in baggage allowance. The relevant extract of the circular dated 08.11.2015 is as under:-

“2.The airfares so established by the airlines also include charges for some of the services rendered by them. On the basis of various feedback received, it is felt that many a times these services provided by the airlines may not be required by the passengers while travelling. Considering the fact that unbundling of services and charges thereto has the potential to make basic fare more affordable and provides consumer an option of paying for the services which he/she wishes to avail, it has been decided by the Government to allow following services to be unbundled and charged separately on opt-in basis:

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(iv) Check-in baggage charges (above 15 kgs. of free check-in baggage allowance). However, airlines are allowed to offer "no check-in baggage/hand baggage only" fare scheme subject to the condition that the penalty to be imposed on a passenger, who avails such schemes but turns up with baggage for check-in at airline counter, cannot exceed the amount of incentive offered compared to lowest fare.

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6. Although scheduled airlines are free to fix the charges/fee for the unbundled services, yet DGCA reserves the right to intervene and stop the scheduled airlines from charging for any specific unbundled service if principles such as opt-in, transparency, non-discrimination are found to be violated by the airlines.”

8. DGCA claims that it received several complaints from the public indicating that the airlines were charging exorbitant rates (between ₹200/- to ₹350/- per kg) for check-in baggage above 15 kg. Moreover, the rates for excess baggage were not uniform across different airlines.

9. On 27.05.2016, DGCA held a meeting to review the Civil Aviation Requirements (CAR) on various matters including the circular dated 08.11.2015. During the meeting, the airlines were asked to justify the issue of overcharging of baggage between 15 kg to 20 kg. The petitioners claim that it was brought to the notice of DGCA that excess check-in baggage rates were fixed by the airlines keeping in mind the limited baggage hold space in the aircrafts and to minimize additional fuel burn costs along with the overall impact of carriage of excess check-in baggage on the operations of the airlines. It was also pointed out that the rates charged by the petitioner airlines were comparatively less than their international counterparts.

10. Pursuant to the meeting held on 27.05.2016, DGCA sent an e-mail to the petitioner airlines seeking comments on the proposal of fixing a

nominal charge (on per kg basis) for check-in baggage between 15 kg to 20 kg and beyond 20 kg. In response to the same, the petitioner airlines sent e-mails dated 30.05.2016, 31.05.2016 and 01.06.2016. It was *inter alia* explained that (i) for customers who exceed the stipulated check-in baggage allowance of 15 kg, the stipulated hand baggage allowance of 7 kg and check-in baggage allowance of 15 kg are combined and if the overall weight is under 22 kg, fee for check-in baggage above 15 kg is not charged; (ii) the excess check-in baggage rate is determined after considering the additional fuel burn, ground handling charges, blocking of aircraft space, security cost, etc.; (iii) the petitioner airlines offer discounts for excess check-in baggage on pre-purchase basis; and (iv) any additional excess allowance at subsidized rates will have cascading cost implications.

11. Thereafter, on 10.06.2016, DGCA issued the impugned circular, *inter alia*, restricting the charge for check-in baggage between 15 kg to 20 kg, up to ₹100 per kg. All other terms and conditions, as provided in the circular dated 08.11.2015, continued to be applicable. The relevant portion of the impugned circular is reproduced below:-

“2. The airfares so established by the airlines also include charges for some of the services rendered by them. On the basis of various feedback received, it is felt that many a times these services provided by the airlines may not be required by the passengers while travelling. Considering the fact that unbundling of services and charges thereto has the potential to make basic fare more affordable and provides consumer an option of paying for the services which he/she wishes to avail, it has been decided by the Government to allow following services to be unbundled and charged separately on opt-in basis:

(i) Preferential seating

- (ii) Meal/snack/drink charges (except drinking water)
- (iii) Charges for using airline lounges
- (iv) Check-in baggage charges (above 15 kgs. of free check-in baggage allowance. Between 15-20 kgs of checked-in baggage, the charge per kg shall not be more than INR 100). However, airlines are allowed to offer “no check-in baggage/ hand baggage only” fare scheme subject to the condition that the penalty to be imposed on a passenger, who avails such schemes but turns up with baggage for check-in at airline counter, cannot exceed the amount of incentive offered compared to lowest fare.
- (v) Sports equipment charges
- (vi) Musical instrument carriage
- (vii) Fee for special declaration of valuable baggage (allow for higher unit on carrier liability).”

12. Meanwhile, the respondents state that DGCA received an oral request from Jet Airways and Indigo Airlines seeking the postponement of the operation of the impugned circular to include the updated check-in baggage charges in their software system. In view thereof, DGCA sent an e-mail dated 14.06.2016 to the airlines informing that the impugned circular would be effective from 01.07.2016.

13. Aggrieved by the change in policy, the petitioner no.1 also sent a letter dated 26.06.2016 to DGCA - which DGCA claims to have received in the evening of 27.06.2016 - requesting for withdrawal of the impugned circular on the ground that fixing of excess check-in baggage charges falls within the discretion of the airlines and the Aircraft Rules do not empower DGCA to issue directions in matters of economic regulations and/or to

determine tariff. It was also stated that reducing the charge for excess baggage will have an adverse impact on the operating viability of the airlines. Thereafter, the present petition was filed on 28.06.2016.

Submissions

14. Mr Gaurav Sarin, learned counsel for the petitioners advanced contentions on three fronts.

15. First, he stated that DGCA does not possess the power to issue directions with respect to economic regulations as Section 5A of the Act, which confers powers on the DGCA to issue directions on several matters, does not refer to matters covered under Section 5(2)(ab) of the Act, which pertain to tariffs charged and economic regulation. Therefore, the fixation of tariff is without jurisdiction and thus the impugned circular is liable to be set aside. He referred to the decision of the Kerala High Court in ***IATA Agents Association of India & Anr. v. Union of India & Ors.: 2013 (1) KLJ 55*** in support of his contention.

16. Second, he contended that Rule 135(4) of the Aircraft Rules confers power on DGCA to issue directions to an air transport undertaking only if it is satisfied that that particular airline has established tariff, which is excessive or predatory. However, the petitioners have not been confronted with any material in the nature of any complaint received from the public to establish so. He relied on the decision of the Supreme Court in ***Indian Nut Products & Ors. v. Union of India & Ors.: (1994) 4 SCC 269*** in support of his contention that if an authority is satisfied that conditions exist for exercise of any power, such satisfaction has to be based on grounds mentioned in the statute, made out on the basis of relevant material.

17. Third, he argued that the letter dated 30.04.2013 did not confer power on DGCA to regulate tariff as paragraph 4(vii) of the said letter specifically stated that DGCA cannot fix charges for the unbundled services as the same are governed by market forces. He contended that DGCA cannot act beyond the power delegated to it under the parent statute, that is, the Act and the Aircraft Rules. He relied upon the decisions of the Supreme Court rendered in *Sidhartha Sarawgi v. Board of Trustees for the Port of Kolkata and Ors.* (2014) 16 SCC 248, *Director General of Foreign Trade & Anr. v. Kanak Exports & Anr.*: (2016) 2 SCC 226, *B K Srinivasan & Ors. v. State of Karnataka and Ors.*: (1987) 1 SCC 658 and *M Chandru v. Member Secretary, Chennai Metropolitan Development Authority & Anr.*: (2009) 4 SCC 72 to support his case.

18. Ms Anjana Gosain, learned counsel appearing on behalf of the respondents countered the aforesaid submissions. She stated that Section 5 of the Act gives authority to the Central Government to issue directions pertaining to matters of economic regulation including approval, disapproval and revision of tariff charged by the operators of air transport services. In terms of the aforesaid power, the Ministry of Civil Aviation had issued the letter dated 30.04.2013 for unbundling of certain services and also empowered DGCA to intervene in case of violation of any terms of the said letter subject to which approval for unbundling was granted.

19. Next, she submitted that the airlines were charging exorbitant, varied and arbitrary amounts for check-in baggage above 15 kg and many complaints from the general public had been received in this regard. She contended that on the basis of the complaints received, the impugned circular was issued in exercise of powers granted under Section 5(2)(ab) of

the Act and Rule 135(4) of the Aircraft Rules. Ms Gosain also referred to the decision in *IATA Agents Association* (*supra*) in support of her contention.

20. Lastly, she argued that the impugned circular was not issued in *suo motu* exercise of the powers by DGCA as several meetings were held and comments were sought from the scheduled airlines on the issue of excess check-in baggage charges, before the circular dated 08.11.2015 was withdrawn to be replaced by the impugned circular.

Reasoning and Conclusion

21. The first and foremost question to be addressed is whether DGCA has the power to fix the amounts chargeable by scheduled airlines for excess baggage. Concededly, such charges form a part of airline tariff and any circular or direction by DGCA in this regard would amount to regulation of tariffs. Indisputably, the Central Government has the power to make rules including rules for tariffs. Section 5 of the Act empowers the Central Government to make rules for regulating the manufacture, possession, use, operation, sale, import or export of any aircraft or class of aircraft and for securing the safety of aircraft operations. Section 5(2) of the Act specifically lists out certain subjects in regard to which such rules can be made. In terms of Section 5(2)(ab) of the Act, such rules may provide for economic regulation of civil aviation. The relevant extract of Section 5 is set out below:-

"Section 5. Power of Central Government to make rules-

(1) Subject to the provisions of section 14, the Central Government may, by notification in the Official Gazette, make rules regulating the manufacture, possession, use,

operation, sale, import or export of any aircraft or class of aircraft and for securing the safety of aircraft operation.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for-

(a) the authorities by which any of the powers conferred by or under this Act are to be exercised;

(aa) the regulation of air transport services, and the prohibition of the use of aircraft in such services except under the authority of and in accordance with a licence authorizing the establishment of the service;

(ab) the economic regulation of civil aviation and air transport services, including the approval, disapproval or revision of tariff of operations of air transport services; the officers or authorities who may exercise powers in this behalf; the procedure to be followed, and the factors to be taken into account by such officers or authorities; appeals to the Central Government against orders of such officers or authorities and all other matters connected with such tariff.

Explanation. - For the purposes of this clause, "tariff" includes fares, rates, valuation charges and other charges for air transport of passengers or goods, the rules, regulations, practices or services affecting such fares, rates, valuation charges and other charges and rates, terms and conditions of commission payable to passenger or cargo sales agents;"

22. As is apparent from the above, any rule made by the Central Government is required to be notified in the Official Gazette and is further subject to the provisions of Section 14 of the Act, which requires the rules to be made after prior publication. Further, Section 14A of the Act requires that any rules made by the Central Government be laid before each House of Parliament. Sections 14 and 14A of the Act are set out below:-

"Section 14. Rules to be made after publication-

Any power to make rules conferred by this Act is subject to the condition of the rules being made after previous publication:

Provided that the Central Government may, in the public interest, by order in writing dispense with the condition of previous publication in any case.

Section 14A. Laying of rules before Parliament-

Every rule made under this Act shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid both Houses agree in making any modification in the rule, or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however, that any such modification or annulment shall be without prejudice to the validity or anything previously done under that rule."

23. The explanation to Section 5(2)(ab) makes it amply clear that the expression "tariff" would include charges for air transport of passengers or goods and thus, charges for excess check-in baggage would plainly fall within the scope of tariff as referred to in Section 5(2)(ab) of the Act. Therefore, indisputably, the Central Government would have the power to make rules in regard to charges for excess baggage. However, such rules would require to be notified in the gazette and would be subject to provisions of Sections 14 and 14A of the Act.

24. The contention that the impugned circular restricting the charges for excess check-in baggage between 15 kg to 20 kg is in terms of Section 5(2)(ab) of the Act, is unmerited as the circular issued by DGCA does not qualify to be a rule as contemplated under Section 5 of the Act.

25. The powers of the Central Government under Section 5 are in the nature of delegated legislation and thus, must be exercised in accordance with the provisions of the Act.

26. Having stated the above, it is also relevant to note that DGCA also has been conferred powers to issue directions in terms of Section 5A of the Act, which is set out below:-

"Section 5A Power to issue directions-

(1) The Director-General of Civil Aviation or any other officer specifically empowered in this behalf by the Central Government may, from time to time, by order, issue directions, consistent with the provisions of this Act and the rules made thereunder, with respect to any of the matters specified in clauses (aa), (b), (c), (e), (f), (g), (ga), (gb), (gc), (h), (i), (m) and (qq) of sub-section (2) of section 5, to any person or persons using any aerodrome or engaged in the aircraft operations, air traffic control, maintenance and operation of aerodrome, communication, navigation, surveillance and air traffic management facilities and safeguarding civil aviation against acts of unlawful interference, in any case where the Director-General of Civil Aviation or such other officer is satisfied that in the interests of the security of India or for securing the safety of aircraft operations it is necessary so to do.

(2) Every direction issued under sub-section (1) shall be complied with by the person or persons to whom such direction is issued."

27. As is clear from the above, Section 5A does not empower the DGCA to issue any directions in respect of matters specified under Section 5(2)(ab) of the Act. It is, thus, apparent that the legislature has consciously not conferred any powers on DGCA to issue directions in relation to economic regulations of civil aviation (which includes tariff).

28. The Central Government in exercise of its powers under Section 5 of the Act has framed the Aircraft Rules which include rules in relation to tariff. The relevant extract of Rule 135 of the Aircraft Rules is set out below:-

"Rule 135. Tariff-

(1) Every air transport undertaking operating in accordance with sub-rule (1) and (2) of rule 134, shall establish tariff having regard to all relevant factors, including the cost of operation, characteristics of service, reasonable profit and the generally prevailing tariff.

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(4) Where the Director-General is satisfied that any air transport undertaking has established excessive or predatory tariff under sub-rule (1) or has indulged in oligopolistic practice, he may, by order, issue directions to such air transport undertaking."

29. In terms of Rule 135(4), DGCA has been delegated the powers to issue directions. However, issue of such directions is contingent upon satisfaction of any of the three conditions, namely, (i) DGCA is satisfied that any air transport undertaking is charging excessive tariff; (ii) DGCA is satisfied that the air transport undertaking has established predatory tariff; and/or (iii) DGCA is satisfied that the air transport undertaking has indulged in oligopolistic practice. Thus, unless any of the three conditions are satisfied, DGCA cannot issue any directions under Rule 135 of the Aircraft Rules.

30. It is not disputed that none of the three conditions are satisfied in the present case. It is trite law that where certain conditions are specified for exercising any powers, the same can only be exercised if those conditions are met.

31. It is apparent that none of the three conditions as set out in Rule 135(4) of the Aircraft Rules are satisfied and, therefore, the impugned circular insofar as it restricts the charges for excess check-in baggage, is unsustainable under Rule 135(4).

32. The impugned circular insofar as it restricts excess check-in baggage charges, is also not saved by virtue of Section 5 of the Act, since the power to issue directions in relation to the subject matter of Section 5(2)(ab) of the Act, has not been conferred on DGCA. It is well settled that subordinate legislation must be confined within the limits of the authority conferred by the enabling legislation. In the present case, the Act only confers limited powers on DGCA and, therefore, any directions issued by DGCA have to be within the confines of the authority conferred under the Act. The impugned circular, thus, insofar as it issues directions regarding charges for excess check-in baggage, is plainly beyond the powers conferred on DGCA by virtue of Section 5A of the Act.

33. It was also suggested that DGCA also derives its powers in terms of the letter dated 30.04.2013 issued by the Ministry of Civil Aviation (in particular, in terms of paragraph 4(vii) of the said letter). A plain reading of paragraph 4(vii) indicates to the contrary. Sub-paragraph (vii) of paragraph 4 of the letter dated 30.04.2013 reads as under:-

"vii. While DGCA may not fix fee for unbundled service (as air fare is determined by market forces), they shall reserve the right to intervene and stop charging for any specific night product, if, regulatory principles such as opt-in, non-discrimination and transparency are sought to be violated in the offering of the airlines."

34. It has been expressly provided that DGCA would not fix the fee for unbundled services as airfare is determined by market forces. However,

DGCA has been empowered to intervene and stop the airlines from charging for any specific flight product, if the regulatory principles are sought to be violated. Thus, the power of DGCA is limited to interdict the separate charging of a product, if the regulatory principles such as opt-in, non-discrimination and transparency are violated. This is so because the letter dated 30.04.2013 must be read in the context of unbundling of services. The Central Government had permitted unbundling of certain services - meaning thereby that airlines could charge separately for specified flight product - on certain conditions specified in the letter dated 30.04.2013. If those conditions were violated then clearly one of the consequences contemplated is that the permission to unbundle the specific flight product would be revoked. However, that does not mean that DGCA could determine the tariff for that specified flight product.

35. In view of the above, the impugned circular insofar as it puts a limit on the charges for excess check-in baggage, is set aside.

36. The petition along with the pending application is disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

AUGUST 16, 2017
RK