

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

Pronounced on: April 10, 2017

+ W.P.(C) 11047/2016 & C.Ms. No.43138/2016 & 7168/2016

DELHI INTERNATIONAL AIRPORT PVT. LTD. Petitioner

Through: Mr.P.P.Rao, Mr.Parag P.Tripathi,
Sr.Advs. with Ms.Shally Bhasin, Mr.Karan Luthra,
Mr.Chaitanya Safaya, Mr.Swarnendu Chatterjee,
Mr.Shikar Khare, Advs.

Versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr.Sanjay Jain, ASG with Ms.Anjana
Gosain, Mr.Digvijay Rai, Ms.Rajul Jain,
Ms.Adrija Thakur, Mr.Kartik Rai, Mr.Vishu
Agarwal, Advs. for UOI & AAI

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

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

1. The petitioner/Delhi International Airport Private Ltd. (for short 'DIAL') is a Joint Venture Company led by GMR Group.
2. The Government of India, as part of its policy of liberalization entrusted the functions of management of airports in India to the Airports Authority of India (AAI) established under the Airports Authority of India Act, 1994 (for short 'AAI Act'). In furtherance of the said policy, AAI incorporated a Special Purpose Vehicle Company (hereinafter referred to as 'JVC') with AAI and the petitioner company. Accordingly, AAI and the petitioner entered into an agreement called Operation, Management and

Development Agreement (OMDA) dated 04.04.2006 thereby agreeing upon the terms and conditions upon which the petitioner shall operate, finance and manage, etc. Indira Gandhi International Airport (IGIA), Delhi. Pursuant to OMDA, AAI among other things has granted to the petitioner the right to operate, maintain, develop, design, construct, upgrade, modernize, finance and manage IGIA, Delhi. To effectuate OMDA, a lease has been granted by AAI in favour of the petitioner vide registered lease deed dated 25.04.2006 in respect of the land which is described, delineated and shown in the Schedule-I to the lease deed. Thus, the Petitioner company has been operating IGIA, Delhi.

3. The present petition has been filed by the petitioner aggrieved by the National Civil Aviation Policy, 2016 notified by the Union of India, Ministry of Civil Aviation (MoCA) which *inter alia* provides for development of airports by liberalizing the end-use restrictions of land allocated for commercial use of airport for existing (excluding PPP) and future airports of AAI as well as future airport projects under Public Private Partnership (PPP). The grievance of the petitioner is only to the extent of excluding the existing PPPs like the petitioner from the benefit of the liberalization with regard to the end-use restrictions of the land allocated for commercial use of airport.

4. The prayer in this petition reads as under:

“(A) Issue a Writ of Certiorari or any other Writ, Order or direction of a similar nature quashing and/or striking down the words “(excluding PPP)” in Clause 12(d) of the National Civil Aviation Policy as being *ultra vires* of Article 14 of the Constitution of India and Section 40 of the Airports Authority of

India Act, 1994 and in the alternative if any provision of the Airports Authority of India Act, 1994 permits the said Policy then the relevant provision of the AAI Act may be declared *ultra vires* Article 14 of the Constitution;

(B) In the alternative, declare that the impugned words “(excluding PPP)” in Clause 12(d) of the NCAP Policy do not apply to the Airport Projects operated by the Petitioner as it is an Airport in which AAI is a partner and consequently, issue a direction to the Respondents to act in accordance with the law declared by this Hon’ble Court in the present Writ Petition;

(C) Issue a Writ of Certiorari or any other Writ, Order or direction of similar nature quashing the letter dated 10.10.2016 issued by the Respondent No.1 to the Petitioner No.1 with all consequential reliefs;

(D) Pass any other or further Order(s) as this Hon’ble Court may deem fit in the facts and circumstances of the case.”

5. The facts in brief are as under:

- (i) The respondent No.2/AAI is an authority established under the Airports Authority of India Act, 1994 (for short 'AAI Act') which is responsible for the development, operation, management and maintenance of airports in India.
- (ii) In furtherance of the Liberalization Policy of the Government of India to entrust the functions of management of airports in India to AAI, competitive bidding process was initiated by AAI for selecting a lead partner for Public Private Partnership (PPP) Project for restructuring and modernization of IGI Airport, New Delhi.
- (iii) The petitioner/DIAL which is a Joint Venture Company led by GMR Group was the successful bidder and accordingly it was invited to become the major partner of the Special Purpose

Vehicle to be incorporated by AAI for operating, maintaining and etc. of the IGI Airport.

- (iv) Pursuant thereto, the petitioner/DIAL was incorporated as a Special Purpose Vehicle under which DIAL holds 74% equity whereas AAI holds the balance 26% equity.
- (v) An agreement dated 04.04.2006 called OMDA has been executed by and between AAI and DIAL under which some of the functions of AAI being the functions of operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing and managing the IGI Airport at Delhi have been granted to the petitioner.
- (vi) In terms of the said agreement, a State Support Agreement (SSA) dated 26.04.2006 has also been executed between MoCA, GOI and the petitioner/DIAL providing for support obligations of the Government towards DIAL with respect to functioning and operating of IGI Airport.
- (vii) A lease deed dated 25.04.2006 has been executed between AAI and DIAL under which the land as described and delineated in the Schedule-I to the lease deed has been leased out by AAI to DIAL for a period of 30 years with a clause for renewal for an additional period of 30 years in the event the lessee renews the term of OMDA in accordance with Article 18.1(b) therein.
- (viii) It is not in dispute that as per the decision of Empowered Group of Ministers (EGoM) constituted by the Union Cabinet, JVC has to undertake only those non-aeronautical activities which are related to passengers, air-traffic services and air-transport

services subject to the overall limit of 5% of the leased land in conformity with the Master Plan of Delhi Development Authority.

- (ix) While so, the respondent No.1/Union of India, Ministry of Civil Aviation (for short 'MoCA') issued Draft National Civil Aviation Policy, 2015 which *inter alia* is aimed at promoting the entire aviation sector chain. Paragraph 14(g) of the said Draft Policy states that MoCA will liberalize the end use restrictions for existing and future airports of AAI and future airport projects under PPP. However, existing airport projects under PPP have been specifically excluded from the proposed liberalized use of airport land.
- (x) The petitioner by letter dated 30.11.2015 submitted its objections to MoCA and requested that liberalization of land use may be made applicable to the existing PPP Airports also.
- (xi) Without taking into consideration the said objection/suggestion, the MoCA approved the Draft Policy and thus notified the National Civil Aviation Policy, 2016 (NCAP) on 15.06.2016 in which Paragraph 14(g) of the Draft Policy has been retained in the form of Paragraph 12(d).
- (xii) The petitioner thereafter submitted the representation dated 24.09.2016 stating that there is no justifiable reason to discriminate the existing PPPs and future PPPs on the aspect of liberalization of end use restriction of airport land for commercial purposes and accordingly requesting MoCA to reconsider the policy decision and to extend the benefit of the

liberalization of the end use restrictions to the existing PPPs on par with future PPPs.

(xiii) By letter dated 10.10.2016, the respondent No.1/MoCA rejected the representation of the petitioner primarily on two grounds, namely, (a) that the NCAP-2016 cannot be applied retrospectively to the existing PPP airports which are governed by OMDA executed prior to NCAP and (b) that usage of land being a vital clause of the bidding parameter during the selection process of PPP partners for IGI Airport, Delhi, the request of the petitioner if accepted would amount to a significant modification in the contract as well as alteration of the bid conditions which may result in extending post-bid benefit to JVC.

(xiv) Aggrieved by the same, the present petition has been filed.

6. In the counter affidavit filed on behalf of the respondent No.1/MoCA, it is stated:

"3. That while exercising the powers conferred under Section 12A of the AAI Act (as amended in 2003), respondent No.2 leased out the Delhi and Mumbai airports to Joint Venture Companies (JVCs) namely, M/s Delhi International Airport Pvt. Ltd. (DIAL), herein petitioner and M/s Mumbai International Airport Pvt. Ltd. (MIAL) respectively for operation, management and development of the airports on long term lease basis. Operation, Management and Development Agreement (OMDA) was signed with both the JVCs separately in 2006. Provisions of OMDA regulate the rights and obligations of the JVC including utilization of land for various purposes.

4. That the terms and conditions as well as the modalities of modernization/restructuring of both the airports were finalized and approved by the Empowered Group of Ministers (EGoM),

constituted for the purpose by the Union Cabinet. The EGoM in the meeting held on 15th February, 2005, *inter alia*, approved the principles for the 'Request for Proposal' (RFP) and the 'Transaction Documents' (TD). Based on the decision of the EGoM, the draft of the Transaction documents were circulated on 09.03.2005 to Planning Commission, Department of Economic Affairs and Ministry of Law & Justice. That after approval of the EGoM, the RFP and draft TDs were issued to the Pre-Qualified Bidders (PQBs) on 01.04.2005. As per the time line suggested, PQBs were consulted on draft TDs through a pre-bid conference.

5. That in the initial Draft OMDA, certain commercial activities were proposed to be allowed to the successful bidder and accordingly, a separate Schedule 19 (subsequently revised as schedule 18) was incorporated in OMDA prescribing these activities which can be undertaken by the JVC. The activities listed in the proposed schedule 18 are as under:

"Schedule 18 - Commercial Activities"

- i. *Golf course,*
- ii. *Business parks,*
- iii. *High-tech parks,*
- iv. *Commercial office Buildings,*
- v. *Leisure Facilities,*
- vi. *Amusement arcade,*
- vii. *Sports complex,*
- viii. *Shopping Complex,*
- ix. *Convention Centre*

6. That subsequently, at the instance of erstwhile Planning Commission, the matter relating to land uses and limit on commercial uses of land at airport complex was broadly discussed by the EGoM in its meetings held on 14.06.2005 and 22.06.2005. On the directions of EGoM, opinion of the then Learned Attorney General (AG) was obtained on the point of land uses and limit on commercial uses and also mortgage of land and assets. The copy of the opinion of Ld. AG, Shri Milon Kumar Banerji in relation to the use of commercial activities is annexed as **Annexure: R/2**. However, for ready reference, the highlights are as follows:

"XXXX

XXXX

XXXX"

7. That the above legal opinion was considered by the EGoM in its meeting held on 22.06.2005. EGoM accepted the AG's opinion and inter-alia decided that in respect of Delhi, the total quantum of land required for complete aeronautical and non-aeronautical purposes at the airport would be identified upfront in consultation with Global Technical Advisor (GTA) and only the land so identified would be leased to the JVC. The balance land not required by the JVC, would be retained by the respondent No.2. Further, the JVC would be permitted to undertake aeronautical activities and such other permissible non-aeronautical activities, which are related to passenger, air traffic services and air transport services/facilities and would be further subject to the overall limit of 5% of the leased land in conformity with the DDA Master Plan. In line with the decision of EGoM, Schedule 19 was deleted and the development was conveyed to all the bidders before receiving the bids. It may be noted that the selection of joint venture partners for modernization of Delhi airport was done through an International competitive bidding process and all the qualified bidders, including GMR, were well acquainted with the changes that took place in the Transaction Documents and accordingly, all the bidders submitted their bids.

8. That presently, Clause 2.2.3 and 2.2.4 of OMDA read with Schedule 5 & 6 regulates various activities that can be undertaken by the petitioner airport i.e. DIAL. Clause 2.2.3 permits DIAL to undertake Non-Aeronautical Services at the Airport, provided however that the land area utilized for provision of Non-Transfer Assets shall not exceed five percent of the total land area constituting the Demised Premises. Schedule-6 of OMDA provides a list of the Non-aeronautical services that can be performed by the airport operator. Schedule 6 has two types of list.

(i) Transfer Assets: Part-I of Schedule 6 lists those services which are entirely to be located within the terminal complex or meant for catering the needs of passengers, air traffic services and air transport services. The asset created shall compulsorily come back to AAI after expiry of the tenure.

(ii) Non-Transfer Assets: Part-II of Schedule 6 inter-alia lists those non-aeronautical services/commercial activities which are not part of the terminal complex or meant for commercial activities.

Part-II also constitutes such activities (with * mark) including Business Centre and Conference Centre for which the footnote of Schedule - 6 is applicable. The footnote of Schedule-6 is reproduced as under:

"These activities / services can only be undertaken / provided, if the same are located within the terminal complex / cargo complex and are primarily meant for catering the needs of passengers, air traffic services and air transport services."

9. That it is stated that Clause 2.2.3 of OMDA permits JVC and the respondent No.2 to update the list of Non-Aeronautical Services to include other activities upon mutual agreement. Accordingly, on the request of the petitioner, the respondent No.2 had agreed to update the list of non-aeronautical services in 2009 with a stipulated condition that DIAL shall ensure commercial activities which are incidental and supplemental to the airport functioning and the same must be passenger related or related to airport transport services or air traffic services.

10. That the petitioner is governed by a separate and independent regime which is a complete code in itself. The OMDA is not an open-ended document so that the petitioner may migrate for the purpose of taking benefit from the subsequent policy decision which may be taken by the Central Government from time to time. The petitioner having already agreed upon OMDA and having taken benefits from the same over a long period of time, cannot be permitted to be sitting on the fence and watch subsequent policy decisions; and start crying foul the moment it sees that the subsequent policy decisions are differently structured and on that start claiming parity."

7. So far as AAI/respondent No.2 is concerned, a short affidavit has been filed adopting the counter affidavit filed by the respondent No.1 and pleading that NCAP has been initiated and issued by MoCA in the national interest keeping in mind domestic and international passenger traffic for overall growth of National Civil Aviation.

8. We have heard Shri P.P. Rao and Shri Parag P. Tripathi, the learned Senior Counsels appearing for the petitioner and Shri Sanjay Jain, the learned ASG appearing for the respondents.

9. It is contended by Shri P.P. Rao, the learned Senior Counsel that exclusion of existing PPPs from the purview of Paragraph 12(d) of NCAP, 2016 is *per se* discriminatory since there is no intelligible differentia or rational basis for such exclusion while liberalizing the commercial use of land for the existing and future airports by PPPs. While submitting that all airports - whether AAI Airports or PPP Airports - are entitled to equal opportunity to develop airport land for commercial use to maximize the revenue in public interest, it is contended that exclusion of existing PPPs denies equal opportunity and thus violative of Article 14 of the Constitution of India.

10. It is also contended that having regard to the fact that both under OMDA and State Support Agreement, JVCs are permitted to undertake commercial activities and the legislative policy is aimed at encouraging JVCs to invest in airports, the exclusion of existing PPPs from the liberalization of land use is ultra vires the AAI Act, more particularly, Sections 11, 12(3)(o) and (r) and Section 12A. The further contention is that creation of an artificial distinction amongst PPP Airports on the basis of 'Existing PPPs' and 'Future PPPs' destroys the very purpose and basis of NCAP.

11. In support of his submissions, Sh.P.P.Rao, the learned Senior Counsel relied upon ***Budhan Choudhary vs. State of Bihar; (1955) 1 SCR 1045, Rashbehari Panda vs. State of Orissa; (1969) 1 SCC 414, Erusian***

Equipment & Chemicals Ltd. vs. State of West Bengal; (1975) 1 SCC 70, Union of India vs. N.S.Ratnam; (2015) 10 SCC 681 and John Vallamattom & Anr. vs. Union of India; (2003) 6 SCC 611.

12. Placing reliance upon ***M/s Bennette Coleman vs. Union of India; (1972) 3 SCC 788***, the learned Senior Counsel contended that the clause in a policy which is arbitrary is liable to be struck down on the touchstone of Article 14 of the Constitution.

13. Shri Parag P.Tripathi, the learned Senior Counsel while supplementing the submissions of Shri P.P. Rao contended that any discrimination between two classes of persons can only be done by law alone and not by mere executive action. While submitting that NCAP, 2016 is neither law nor even delegated legislation under Section 40 of the AAI Act, 1994, it is contended by the learned Senior Counsel that the impugned classification between existing and future PPP airports drawn by virtue of NCAP which is nothing but an exercise of executive action is impermissible under law and unsustainable. In support of the said submission, the learned Senior Counsel relied upon ***N.K. Bajpai v. Union of India; (2012) 4 SCC 653 and Deokinandan Prasad v. State of Bihar; (1971) 2 SCC 330***. The further contention of the learned Senior Counsel is that NCAP, 2016 which amounts to taking away the petitioner's right over its property without authority of law is violative of Article 300-A of the Constitution of India. The said contention is sought to be substantiated on the basis of ***K.T. Plantation Pvt. Ltd. v. State of Karnataka; (2011) 9 SCC 1, Jilubhai Nanbhai Kachar v. State of Gujarat; (1995) Supp. 1 SCC 596; Basantibai Fakirchand Khetan v. State of Maharashtra; (1983) SCC Online Bom***

256 and *State of Maharashtra v. Basantibai Fakirchand Khetan*; **(1986) 2 SCC 516.**

14. Per contra, it is sought to be contended by Sh.Sanjay Jain, the learned ASG appearing for the respondents that the petitioner's status as PPP under OMDA is *sui generis* and therefore, it is prevented from claiming parity with other airports or PPPs. It is also contended that it has not legal right to be included in future policy decisions and therefore, the petitioner was rightly excluded from the benefit of liberalization under Clause 12(d) of NCAP, 2016.

15. It is further contended by the learned ASG that the petitioner having derived benefit under OMDA arrangement and having participated in global tender after removal of Schedule 19 of the tender conditions which resulted in restricting the entitlement of JVC to undertake aeronautical services subject to the overall limit of 5% of the leased land cannot now claim hostile discrimination nor can it claim any legitimate expectation to be included in the beneficial regime of future aviation policies in respect of their concluded agreements. To substantiate the said plea, the learned ASG relied upon *Joshi Technologies International Inc. vs. Union of India*; **(2015) 7 SCC 728.**

16. It is also contended that the decision to put 5% cap and placement of restrictions on the type of activities was preceded by a well-informed, non-arbitrary and rationale decision making process undertaken by the Empowered Group of Ministers (EGOM) which has a statutory force as held in *Reliance Natural Resources Ltd. vs. RIL*; **(2010) 7 SCC 1** and has never been challenged by the petitioner is binding and conclusive.

17. The further contention is that the restrictive conditions of OMDA which have been framed under the contemporaneous facts and circumstances cannot be re-opened at the onset of a new policy. It is sought to be explained by the learned ASG that the petitioner who is not prevented from participating in future PPPs and take benefit under the new policy cannot claim denial of equal opportunity or infringement of rights under Article 14, 19, and 300-A of the Constitution of India.

18. It is also contended that by virtue of Section 12 read with Section 12A of AAI Act, the existing PPP Airports are allowed to undertake only certain non-aeronautical services as specified in OMDA and, therefore, the benefit of commercial activities, i.e., the activities which are not passenger related provided under NCAP, 2016 cannot be extended to the existing PPP Airports.

19. It is also contended that the writ petition itself is premature since NCAP would have to be supported by an amendment to the Act without which it is not possible to allow non-passenger related commercial activities. It is also submitted that the petitioner being a Joint Venture Consortium in which AAI is only a shareholder cannot be termed as an AAI Airport. To substantiate the said submission, it is pointed out by the learned ASG that the management and funding of Delhi International Airport is completely different from those airports of AAI. It is also submitted that the services at Delhi International Airport are classified under OMDA whereas services at AAI Airports are classified in terms of Airports Economic Regulatory Authority of India Act, 2008 (AERA Act).

20. Rebutting the contention on behalf of the petitioners that the impugned action of the respondents in excluding the existing PPPs from the purview of paragraph 12(d) of NCAP, 2016 is *per se* discriminatory, it is contended by the learned ASG that the PPP Airports governed by OMDA are not equally placed with the AAI Airports and, therefore, Article 14 of the Constitution is not attracted at all.

21. Placing reliance upon ***CPIL vs. Union of India; (2016) 6 SCC 408***, it is vehemently contended that the interference in exercise of jurisdiction under Article 226 with a policy matter is impermissible under law.

22. We have given our thoughtful consideration to the rival submissions.

23. The Airports Authority of India Act, 1994 has been enacted to provide for the constitution of Airports Authority of India and for the transfer and vesting of the undertakings of the International Airports Authority of India and the National Airports Authority to and in the Airports Authority of India so constituted for the better administration and cohesive management of airports and civil enclaves, whereat air transport services are operated or are intended to be operated and of all aeronautical communication stations for the purpose of establishing or assisting in the establishment of airports and for matters connected therewith or incidental thereto.

24. Section 12 of AAI Act provides that it shall be the function of the AAI to manage the airports, the civil enclaves and the aeronautical communication stations efficiently and that it shall be the duty of AAI to provide air traffic service and air transport service at any airport and civil enclaves. Section 12(3) further provides that AAI *inter alia* may take all

such steps as may be necessary or convenient for or may be incidental to the exercise of any power or the discharge of any function conferred or imposed on it by the said Act. Section 12 may be reproduced hereunder for ready reference:-

"FUNCTIONS OF THE AUTHORITY

12. (1) Subject to the rules, if any, made by the Central Government in this behalf, it shall be the function of the Authority to manage the airports, the civil enclaves and the aeronautical communication stations efficiently.

(2) It shall be the duty of the Authority to provide air traffic service and air transport service at any airport and civil enclaves.

(3) Without prejudice to the generality of the provisions contained in sub-sections (1) and (2), the Authority may—

(a) plan, develop, construct and maintain runways, taxiways, aprons and terminals and ancillary buildings at the airports and civil enclaves;

(aa) establish airports, or assist in the establishment of private airports by rendering such technical, financial or other assistance which the Central Government may consider necessary for such purpose.

(b) plan, procure, install and maintain navigational aids, communication equipment, beacons and ground aids at the airports and at such locations as may be considered necessary for safe navigation and operation of aircrafts;

(c) provide air safety services and search and rescue, facilities in co-ordination with other agencies;

(d) establish schools or institutions or centers for the training of its officers and employees in regard to any matter connected with the purposes of this Act;

(e) construct residential buildings for its employees;

(f) establish and maintain hotels, restaurants and restrooms at or near the airports;

(g) establish warehouses and cargo complexes at the airports for the storage or processing of goods;

- (h) arrange for postal, money exchange, insurance and telephone facilities for the use of passengers and other persons at the airports and civil enclaves;
 - (i) make appropriate arrangements for watch and ward at the airports and civil enclaves;
 - (j) regulate and control the plying of vehicles, and the entry and exit of passengers and visitors, in the airports and civil enclaves with due regard to the security and protocol functions of the Government of India;
 - (k) develop and provide consultancy, construction or management services, and undertake operations in India and abroad in relation to airports, air-navigation services, ground aids and safety services or any facilities thereat;
 - (l) establish and manage heliports and airstrips;
 - (m) provide such transport facility as are, in the opinion of the Authority, necessary to the passengers traveling by air;
 - (n) form one or more companies under the Companies Act, 1956 or under any other law relating to companies to further the efficient discharge of the functions imposed on it by this Act;
 - (o) take all such steps as may be necessary or convenient for, or may be incidental to, the exercise of any power or the discharge of any function conferred or imposed on its by this Act;***
 - (p) perform any other function considered necessary or desirable by the Central Government for ensuring the safe and efficient operation of aircraft to, from and across the air space of India;
 - (q) establish training institutes and workshops;
 - (r) any other activity at the airports and the civil enclaves in the best commercial interests of the Authority including cargo handling, setting up of joint ventures for the discharge of any function assigned to the Authority.
- (4) In the discharge of its functions under this section, the Authority shall have due regard to the development of air transport service and to the efficiency, economy and safety of such service.
- (5) Nothing contained in this section shall be construed as-
- (a) authorizing the disregard by the Authority of any law for the time being in force; or

(b) authorizing any person to institute any proceeding in respect of duty or liability to which the Authority or its officers or other employees would not otherwise be subject."

(emphasis supplied)

25. It is relevant to note that Section 12(3) starts with the words "without prejudice to the generality of the provisions contained in sub-sections (1) and (2)". The list of functions of the AAI enumerated therein are therefore not exhaustive but illustrative in nature.

26. Pointing out the express language of Section 12(3), it is contended by the learned Senior Counsels appearing for the petitioner that EGoM committed a grave error in proceeding on the assumption that the functions of AAI are limited to "passenger related" only. It is submitted that on proper appreciation of the statutory provisions, the decision of EGoM ought to have been that AAI is entitled to act on business and commercial lines and execute a lease with the overriding purpose of earning income since the same would enable AAI to enhance the passenger facilities and development of world class airports in public interest. It is also contended by the learned Senior Counsel appearing for the petitioner that the interpretation sought to be given by the respondents on the basis of (*) mark attached to some of the activities in Part II of Schedule 6 that all the non-aeronautical activities of the petitioner under Schedule 6 of OMDA are limited only to "passenger related" is erroneous.

27. Before proceeding further, we may have a look at the other relevant provisions of the AAI Act. Section 13 of the AAI Act provides that the undertakings of the International Airports Authority and the National Airports Authority including all assets, movable and immovable, lands and

buildings stood transferred and vested in the AAI with effect from the appointed day, i.e., 01.04.1995. Further, Section 40 empowers the Central Government to issue directions on questions of policy which shall be binding on the AAI in the discharge of its functions and duties under the AAI Act.

28. The AAI Act, 1994 was amended by Act No.43 of 2003 w.e.f. 01.07.2004 appreciating the need to improve the standard of services and facilities at the airports to bring them at par with international standards. It has been clearly stated in the Statement of Objects and Reasons:-

"There is need to improve the standard of services and facilities at the airports to bring them at par with international standards. To facilitate the process for such improvement, there is need, both for infusion of private sector investments as also for restructuring of airports. This will speed up airport infrastructure development, improve managerial efficiency, increase local responsiveness and improve service levels. It will, in turn, generally stimulate the economy by boosting tourism and trade. It has been decided to undertake the task of restructuring the airports under the Airports Authority of India as well as to encourage private participation for the Greenfield airports in the country. Since the Airports Authority of India Act, 1994 is applicable to all airports whereat air transport services are operated or are intended to be operated, significant private sector investments in such project require an effective legal framework within which the investors would feel safe and secure about their operational and managerial independence. To achieve these purposes, the Bill proposes to amend the various provisions of the said Act."

29. The amendments under Act 43 of 2003 included insertion of definition of 'Private Airports' vide Section 2(nn) which reads as under:-

" "private airport" means an airport owned, developed or managed by-

- (i) any person or agency other than the Authority or any State Government; or
- (ii) any person or agency jointly with the Authority or any State Government or both where the share of such person or agency, as the case may be, in the assets of the private airport is more than fifty per cent.;"

30. It is also necessary to notice Section 12A which was inserted by Amendment Act 43 of 2003:-

"12A. Lease by the authority. - (1) Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better management of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under Section 12 as the Authority may deem fit:

Provided that such lease shall not affect the functions of the Authority under section 12 which relates to air traffic service or watch and ward at airports and civil enclaves.

(2) No lease under sub-section (1) shall be made without the previous approval of the Central Government.

(3) Any money, payable by the lessee in terms of the lease made under sub-section (1), shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for all purposes of section 24.

(4) The lessee, who has been assigned any function of the Authority under sub-section (1), shall have all the powers of the Authority necessary for the performance of such function in terms of the lease."

31. As could be seen, by virtue of Section 12A, AAI is entitled to lease the premises of an airport in the public interest or in the interest of better management of airports to carry out some of its functions under Section 12 with the previous approval of the Central Government.

32. On a combined reading of Sections 2(n), 12A and 13, it is clear that apart from vesting the entire land of all airports in the AAI, it has also been conferred full powers to develop the land of the airports in the public interest or in the interest of better management of airports by any person or agency jointly with AAI.

33. It may also be mentioned that the Airport Infrastructure Policy, 1997 which was existing as on the date of Amendment Act 43 of 2003 expressly provided for private sector participation to bridge the gap in resources as also to bring in greater efficiency in management of airports.

34. Coming to NCAP, 2016, the rationale of the said policy has been explained in Clause 1.2 thereof as under:

"1.2 The Government has proposed to promote the growth of Indian aviation sector in a significant manner as the development of this sector has a multiplier effect on the economy. As per an International Civil Aviation Organization (ICAO) study, the output multiplier and employment multiplier are 3.25 and 6.10 respectively. The aim of the Government is to provide an eco-system for the harmonized growth of various aviation sub-sectors, i.e. Airlines, Airports, Cargo, Maintenance Repairs and Overhaul services (MRO), General Aviation, Aerospace Manufacturing, Skill Development, etc."

35. Clause 12 of the policy further provides for development of airports by private sector or in PPP mode as under:

"12. Airports developed by State Governments, Private sector or in PPP mode

MoCA will continue to encourage development of airports by the State Governments or the private sector or in PPP mode. MoCA will also encourage the State Governments to develop new airports in their State by forming SPV with Airport Authority of India or with other interested Public Sector Undertakings/ Industry in order

to create stake and ownership. Wherever so required, MoCA will endeavour to provide regulatory certainty with the following framework:

- a) XXXX XXXX XXXX
- b) XXXX XXXX XXXX
- c) XXXX XXXX XXXX
- d) **There are restrictions on the use of land allocated for commercial use of airport. MoCA will explore ways to unlock the potential of the same by liberalizing the end-use restrictions for existing (excluding PPP) and future greenfield and brownfield airports of AAI and future greenfield and brownfield projects under PPP.**

- e) XXXX XXXX XXXX
 - f) XXXX XXXX XXXX"
- (emphasis supplied)

36. Apparently, Clause 12(d) creates a classification amongst PPP Airports. The respondents seek to justify the said classification contending that the existing PPP airports which are governed by OMDA executed much prior to NCAP, 2016 form a separate class and are not equally placed either with the "airports of AAI" or "future PPP airports".

37. The settled principle of law that a classification is sustainable in law only if it is based on intelligible differentia and the differentia has a nexus with the objective sought to be achieved has been explained in ***Budhan Choudhary Vs. State of Bihar (supra)*** as under:-

"5. The provisions of article 14 of the Constitution have come up for discussion before this Court in a number of cases, namely, Chiranjit Lal Chowdhuri v. The Union of India, The State of Bombay v. F. N. Balsara, The State of West Bengal v. Anwar Ali Sarkar, Kathi Raning Rawat v. The State of Saurashtra, Lachmandas Kewalram Ahuja v. State of Bombay and Qasim Razvi v. State of Hyderabad and Habeeb Mohamad v. State of Hyderabad. It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning,

scope and effect of the article in question. It is now well-established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that article 14 condemns discrimination not only by a substantive law but also by a law of procedure. The contention now put forward as to the invalidity of the trial of the appellants has, therefore to be tested in the light of the principles so laid down in the decisions of this Court."

38. In a latest decision of the Supreme Court in ***Union of India vs. N S Ratnam***; **(2015) 10 SCC 681**, while reiterating the principles of law it was further clarified:

"12. The judgment of this Court in *Kasinka Trading case* [(1995) 1 SCC 274] , no doubt, lays down the principle that there is wide discretion available to the Government in the matter of granting, curtailing, withholding, modifying or repealing the exemptions granted by earlier notifications. It is also correct that the Government is not bound to grant exemption to anyone to which it so desires. When the duty is payable under the provisions of the Act, grant of exemption from payment of the said duty to particular class of persons or products, etc. is entirely within the discretion of the Government. This discretion rests on various factors which are to be considered by the Government as these are policy decisions. In the present case, however, the issue is not of granting or not granting the exemption. When the exemption is granted to a particular class of persons, then the benefit thereof is to be extended to all similarly situated persons.

The notification has to apply to the entire class and the Government cannot create sub-classification thereby excluding one sub-category, even when both the sub-categories are of same genus. If that is done, it would be considered as violating the equality clause enshrined in Article 14 of the Constitution. Therefore, judicial review of such notifications is permissible in order to undertake the scrutiny as to whether the notification results in invidious discrimination between two persons though they belong to the same class. In *Aashirwad Films v. Union of India* [(2007) 6 SCC 624] , this aspect has been articulated in the following manner: (SCC pp. 628-29, paras 9-12)

“9. The State undoubtedly enjoys greater latitude in the matter of a taxing statute. It may impose a tax on a class of people, whereas it may not do so in respect of the other class.

10. A taxing statute, however, as is well known, is not beyond the pale of challenge under Article 14 of the Constitution of India.

11. In *Chhotabhai Jethabhai Patel & Co. v. Union of India* [AIR 1962 SC 1006] , it was stated: (AIR p. 1021, para 37)

‘37. But it does not follow that every other article of Part III is inapplicable to tax laws. Leaving aside Article 31(2) that the provisions of a tax law within legislative competence could be impugned as offending Article 14 is exemplified by such decisions of this Court as *Suraj Mall Mohta & Co. v. A.V. Visvanatha Sastri* [AIR 1954 SC 545 : (1955) 1 SCR 448] and *Shree Meenakshi Mills Ltd. v. A.V. Visvanatha Sastri* [AIR 1955 SC 13 : (1955) 1 SCR 787] . In *K.T. Moopil Nair v. State of Kerala* [AIR 1961 SC 552] the Kerala Land Tax Act was struck down as unconstitutional as violating the freedom guaranteed by Article 14. It also goes without saying that if the imposition of the tax was discriminatory as contrary to Article 15, the levy would be invalid.’

12. A taxing statute, however, enjoys a greater latitude. An inference in regard to contravention of Article 14 would, however,

ordinarily be drawn if it seeks to impose on the same class of persons or occupations similarly situated or an instance of taxation which leads to inequality. The taxing event under the Andhra Pradesh State Entertainment Tax Act is on the entertainment of a person. Rate of entertainment tax is determined on the basis of the amount collected from the visitor of a cinema theatre in terms of the entry fee charged from a viewer by the owner thereof.”

13. It is, thus, beyond any pale of doubt that the justiciability of particular notification can be tested on the touchstone of Article 14 of the Constitution. Article 14, which is treated as basic feature of the Constitution, ensures equality before the law or equal protection of laws. Equal protection means the right to equal treatment in similar circumstances, both in the privileges conferred and in the liabilities imposed. Therefore, if the two persons or two sets of persons are similarly situated/placed, they have to be treated equally. At the same time, the principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position. It would mean that the State has the power to classify persons for legitimate purposes. The legislature is competent to exercise its discretion and make classification. Thus, every classification is in some degree likely to produce some inequality but mere production of inequality is not enough. Article 14 would be treated as violated only when equal protection is denied even when the two persons belong to same class/category. Therefore, the person challenging the act of the State as violative of Article 14 has to show that there is no reasonable basis for the differentiation between the two classes created by the State. Article 14 prohibits class legislation and not reasonable classification.

14. What follows from the above is that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that, that differential must have a

rational relation to the object sought to be achieved by the statute in question. If the Government fails to support its action of classification on the touchstone of the principle whether the classification is reasonable having an intelligible differentia and a rational basis germane to the purpose, the classification has to be held as arbitrary and discriminatory. In *Sube Singh v. State of Haryana*[(2001) 7 SCC 545] , this aspect is highlighted by the Court in the following manner: (SCC p. 548, para 10)

“10. In the counter and the note of submission filed on behalf of the appellants it is averred, inter alia, that the Land Acquisition Collector on considering the objections filed by the appellants had recommended to the State Government for exclusion of the properties of Appellants 1 and 3 to 6 and the State Government had not accepted such recommendations only on the ground that the constructions made by the appellants were of ‘B’ or ‘C’ class and could not be easily amalgamated into the developed colony which was proposed to be built. There is no averment in the pleadings of the respondents stating the basis of classification of structures as ‘A’, ‘B’ and ‘C’ class, nor is it stated how the amalgamation of all ‘A’ class structures was feasible and possible while those of ‘B’ and ‘C’ class structures was not possible. It is not the case of the State Government and also not argued before us that there is no policy decision of the Government for excluding the lands having structures thereon from acquisition under the Act. Indeed, as noted earlier, in these cases the State Government has accepted the request of some landowners for exclusion of their properties on this very ground. It remains to be seen whether the purported classification of existing structures into ‘A’, ‘B’ and ‘C’ class is a reasonable classification having an intelligible differentia and a rational basis germane to the purpose. If the State Government fails to support its action on the touchstone of the above principle, then this decision has to be held as arbitrary and discriminatory. It is relevant to note here that the acquisition of the lands is for the purpose of planned development of the area which includes both residential and commercial

purposes. That being the purpose of acquisition, it is difficult to accept the case of the State Government that certain types of structures which according to its own classification are of 'A' class can be allowed to remain while other structures situated in close vicinity and being used for same purposes (residential or commercial) should be demolished. At the cost of repetition, it may be stated here that no material was placed before us to show the basis of classification of the existing structures on the lands proposed to be acquired. This assumes importance in view of the specific contention raised on behalf of the appellants that they have pucca structures with RC roofing, mosaic flooring, etc. No attempt was also made from the side of the State Government to place any architectural plan of different types of structures proposed to be constructed on the land notified for acquisition in support of its contention that the structures which exist on the lands of the appellants could not be amalgamated into the plan."

39. Coming to the case on hand, we have already taken note of the fact that the objective of NCAP, 2016 is to have a uniform and proper development of all airports across India. The fact that the policy areas that are covered by NCAP, 2016 included "airports developed by State Government, private sector or in PPP mode" vide Clause 3(i) of the Policy itself shows that NCAP is aimed at promoting the entire civil aviation sector including existing airports being operated under the PPP mode. It appears to us that these are all the modes for development of aviation sector in India and there is no justifiable reason to treat the "existing PPP airports" as a separate class for the purpose of extending the benefit of the liberalization of the land use under NCAP, 2016.

40. It is also relevant to note that the amendment Act 43 of 2003 by virtue of which Section 12A has been inserted into AAI Act, 1994 has enabled private participation to ensure that the airports in India are developed so as

to match international standards. In tune with the same, OMDA dated 04.04.2006 contains a specific provision, i.e. Clause 2.2.3 which reads as under:

"2.2.3 Aeronautical Services, Non-Aeronautical Services and Essential Services

Subject to the foregoing and to Applicable Law, JVC shall undertake/ provide Aeronautical Services and Essential Services at the Airport Site. JVC may seek to undertake/provide Non-Aeronautical Services at the Airport Site by including them in the proposed (draft) Master Plan, provided however, if the same form a part of the (final) Master Plan then the same shall be undertaken as provided in this Agreement. JVC and AAI shall upon mutual agreement between the Parties update the list of Non-Aeronautical Services to include such other activities, as requested by AAI or JVC.

Notwithstanding anything contained in this Agreement, the JVC shall not undertake any activities at the Airport Site other than Aeronautical Services, Non-Aeronautical Services and Essential Services."

41. As is evident from the above Clause, the list of non-aeronautical services can be expanded upon mutual agreement between JVC and AAI. It is relevant to note that the expression "non-aeronautical services" has been defined under Clause 1.1 of OMDA as under:

"Non-aeronautical services shall mean such services as are listed in Part I and Part II of Schedule 6 hereof."

42. It is necessary to extract Schedule 6 also in this context:

"Non-Aeronautical Services" shall mean the following facilities and services (including Part I and Part II):

Part I

1. Aircraft cleaning services.
2. Airline Lounges
3. Cargo handling

4. Cargo terminals
5. General aviation services (other than those used for commercial air transport services ferrying passengers or cargo or a combination of both)
6. Ground handling services
7. Hangars
8. Heavy maintenance services for aircrafts
9. Observation terrace

Part II

10. Banks / ATM*
11. Bureaux de Change*
12. Business Centre*
13. Conference Centre*
14. Duty free sales
15. Flight catering services
16. Freight consolidators/forwarders or agents
17. General retail shops*
18. Hotels and Motels
19. Hotel reservation services
20. Line maintenance services
21. Locker rental
22. Logistic Centers*
23. Messenger services
24. Porter service
25. Restaurants, bars and other refreshment facilities
26. Special Assistance Services
27. Tourist information services
28. Travel agency
29. Vehicle fuelling services
30. Vehicle rental
31. Vehicle parking
32. Vending machines
33. Warehouses*
34. Welcoming services
35. Other activities related to passengers services at the Airport, if the same is a Non-Aeronautical Asset.

*These activities/services can only be undertaken/provided, if the same are located within the terminal complex/cargo complex and are

primarily meant for catering the needs of passengers, air traffic services and air transport services."

43. It is also relevant to note that in terms of Clause 2.2.3 of OMDA, vide letter dated 02.02.2009, AAI conveyed its no objection for the utilization of the land at IGI Airport, Delhi for creation of non-transfer assets as proposed in the petitioner's letter dated 20.11.2008 subject to the conditions specified therein. The expression "non-transfer assets" has also been defined under Clause 1.1 of OMDA as under:

"Non-transfer assets shall mean all assets required or necessary for the performance of non-aeronautical services as listed in Part II of Schedule 6 hereof as located at the airport site (irrespective of whether they are owned by the JVC or any third entity) provided the same are not non-aeronautical assets."

44. Further, Section 12A of the AAI Act which empowers AAI to make a lease of premises of an airport in the public interest or in the interest of better management of airports read with the lease deed dated 25.04.2006 between the petitioner and AAI which is an outcome of Section 12A makes it clear that the lease does not in any manner curtail the functions which can be carried out by the lessee/writ petitioner herein.

45. It may be added that AAI Act applies to all airports belonging to AAI as well as the airports that are leased by AAI for being operated by private participation. There is no provision under the said Act which either expressly or by necessary implication provides for regulating the development and operation of airports by private participation. This itself shows that the AAI Act never intended to make a distinction between "AAI airports" and "PPP airports" in its application. Therefore, we find force in

the submission of the learned Senior Counsel for the Petitioner that Clause 12(d) of NCAP, 2016 seeks to create an artificial distinction between "AAI airports" and "PPP airports". We also find force in the submission that the distinction so drawn has no rational nexus with the object sought to be achieved by the AAI Act as amended by Act 43 of 2003. In fact, it appears to us that it runs contrary even to the object and rationale of NCAP, 2016.

46. We are also of the view that OMDA cannot be interpreted to be a static document. It is clear from Clause 2.2.3 itself that OMDA does not in any manner limits the activities to be undertaken by the parties in future. Therefore, Clause 12(d) of NCAP, 2016 must be read in line with Clause 2.2.3 of OMDA as well as Section 12A(4) of AAI Act which expressly provides that the lessee who has been assigned any function of AAI under sub-section (1) of Section 12(A) shall have all the powers of AAI necessary for the performance of such function in terms of the lease. For the same reasons, we are of the view that the contention of the Respondents that granting the benefit of clause 12(d) to the "existing PPP airports" would amount to a post-bid benefit and altering the clauses of OMDA is untenable and cannot be accepted. In fact, we found that there is no such embargo under OMDA. As already noticed, the Respondent No.1 in fact had conveyed it's no objection vide letter dated 02.02.2009 for utilization of the land for the purposes sought by the petitioner and accordingly the scope of non-aeronautical services was modified to that effect.

47. The decision of the Supreme Court in ***M.P. Oil Extraction & Ors vs. State of M.P. and Ors.***; **(1997) 7 SCC 592** relied upon by the learned ASG, in which the object of the impugned policy was to benefit those units which

were invited and set up within tribal areas, in our considered opinion is clearly distinguishable on facts. As noticed above, in the present case, NCAP, 2016 is with reference to the entire aviation sector in India. Therefore, the existing PPP airports cannot be treated differently from future PPP airports.

48. We are also of the view that such classification is destructive of the object sought to be achieved by NCAP, 2016. The exclusion of existing PPP airports from availing the benefit of Clause 12(d), which would enable to develop the existing airports and to increase revenue to the public exchequer, would be completely arbitrary and discriminatory. The exclusion of existing PPP airports is also against the interest of the public at large since while the liberalized use of airport land by the AAI airports and future PPP airports will promote wider economy in the vicinity and benefit the passengers and the public at large in terms of overall development, the economic activity in the vicinity of the existing PPP airports would remain stagnant and deprive the passengers the same benefits.

49. In this context, it would be appropriate to refer to the following observations made by the Supreme Court in ***John Vallamattom & Anr. vs. Union of India; (2003) 6 SCC 611***:

"62. Article 14 of the Constitution states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The first part of Article 14 of the Constitution of India is a declaration of equality of civil rights for all purposes within the territory of India and basic principles of republicanism and there will be no discrimination. The guarantee of equal protection embraces the entire realm of "State action". It would extend not only when an individual is discriminated against in the

matter of exercise of his right or in the matter of imposing liabilities upon him, but also in the matter of granting privileges etc. In all these cases, the principle is the same, namely, that there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the same. In my view, all persons in similar circumstances shall be treated alike both in privileges and liabilities imposed. The classification should not be arbitrary; it should be reasonable and it must be based on qualities and characteristics and not any other who are left out, and those qualities or characteristics must have reasonable relations to the object of the legislation."

50. For the aforesaid reason, we are of the view that the classification that has been drawn between the "existing PPP Airports" and "future PPP Airports" is in clear violation of Article 14 of the Constitution of India. While passing the order dated 10.10.2016, it appears to us that the Respondent No.1 failed to take into consideration the effect of clause 2.2.3 of OMDA and more particularly the fact that the power under Section 12(A)(1) of AAI Act has to be exercised in the interest of better management of airports and in the public interest. Liberalizing the end use of the airport land and unlocking the potential of the same is undoubtedly to advance the public interest and for better management of the airport. The Respondent No.1 had apparently failed to notice that denial of the benefit of liberalization of the restrictions on the use of land allocated for commercial use of airports to the "existing PPP airports" would manifestly be against public interest. Such exclusion of "existing PPP airports" from the benefit of liberalization of land use therefore apparently suffers from the vice of arbitrariness.

51. It is no doubt true that the Courts are normally slow in interfering with a policy decision. However, the law is well settled that even a policy has to be struck down if it is found to be violative of the principles of equality enshrined in the Constitution of India. In ***Rashbehari Panda vs. State of Orissa***; **(1969) 1 SCC 414**, it was explained:

"17. Validity of the schemes adopted by the Government of Orissa for sale of Kendu leaves must be adjudged in the light of Article 19(1)(g) and Article 14. Instead of inviting tenders the Government offered to certain old contractors the option to purchase Kendu leaves for the year 1968 on terms mentioned therein. The reason suggested by the Government that these offers were made because the purchasers had carried out their obligations in the previous year to the satisfaction of the Government is not of any significance. From the affidavit filed by the State Government it appears that the price fetched at public auctions before and after January 1968, were much higher than the prices at which Kendu leaves were offered to the old contractors. The Government realised that the scheme of offering to enter into contracts with the old licensees and to renew their terms was open to grave objection, since it sought arbitrarily to exclude many persons interested in the trade. The Government then decided to invite offers for advance purchases of Kendu leaves but restricted the invitation to those individuals who had carried out the contracts in the previous year without default and to the satisfaction of the Government. By the new scheme instead of the Government making an offer, the existing contractors were given the exclusive right to make offers to purchase Kendu leaves. But insofar as the right to make tenders for the purchase of Kendu leaves was restricted to those persons who had obtained contracts in the previous year the scheme was open to the same objection. The right to make offers being open to a limited class of persons it effectively shut out all other persons carrying on trade in Kendu leaves and also new entrants into that business. It was ex facie discriminatory, and imposed unreasonable restrictions upon the right of persons other than existing contractors to carry on business. In

our view, both the schemes evolved by the Government were violative of the fundamental right of the petitioners under Article 19(1)(g) and Article 14 because the schemes gave rise to a monopoly in the trade in Kendu leaves to certain traders, and singled out other traders for discriminatory treatment.

18. The classification based on the circumstance that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved i.e. effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees is ex facie arbitrary, it had no direct relation to the object of preventing exploitation of pluckers and growers of *Kendu* leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade to the State."

52. In *Bennette and Coleman v. Union of India*; (1972) 2 SCC 788, a Constitution Bench of the Supreme Court struck down some clauses of the import policy of the newsprint for the year 1972-73 *inter alia* on the ground of violation of Article 14 of the Constitution of India observing as under:

"65. The Government has sought to justify the reduction in the page level to 10 not only on the ground of shortage of newsprint but also on the grounds that these big dailies devote high percentage of space to advertisements and therefore the cut in pages will not be felt by them if they adjusted their advertisement space. In our judgment the policy of the Government to limit all papers at 10 pages is arbitrary. It tends to treat unequals as equals and discriminates against those who by virtue of their efficiency, standard and service and because of their All-India statute acquired a higher page level in 1957. The main source of income for the newspapers is from advertisements. The loss of revenue because of the cut in page level is said to be over several lakhs of rupees. Even if there is a saving in raw material by cut in page level there would be a revenue gap of a large sum of money. This

gap could have been partly recouped by increasing the page level. The newspaper has a built-in mechanism. Advertisements are not only the sources of revenue but also one of the factors for circulation. Once circulation is lost it will be very difficult to regain the old level. The advertisement rate has undergone slight increase since 1972. As a result of the cut in page level the area for advertisements is also reduced.

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69. The justification pleaded by the Government is that big dailies chose to increase pages rather than circulation in the past. In the past the newsprint allocation was based on the page level of 1957 and the circulation figures of 1961-62. The Government says that newspapers which started after 1961-62 were unable to increase their pages. Therefore, the present policy is intended to remove that position. In our judgment it will depend on each paper as to how it will grow. Those who are growing should not be restricted if they can grow within their quota. In the past dailies having less than 10 pages were given increases and were allowed to come up to 10 pages from 4 pages in 1961-62 and 6 pages in 1962-63. Most of them could not even fully utilize the page increase allowed. The present impeached policy seeks to remove inequities created by previous policies. It depends upon facts as to how much more newsprint a group of newspapers started after 1961-62 will require and secondly whether they are in a position to increase the page number. It also appears that 19 language dailies reduced their page numbers on the basis of which the quota was calculated in order to increase their circulation. Therefore, there appears to be no justification for giving them additional quota for increasing page numbers by reducing the quota of the big dailies by imposing upon them the 10 page ceiling. The 10 page ceiling imposed affecting 22 big newspapers operating above 10 page level with approximate circulation of over 23 lakhs i.e. more than 25 per cent of the total circulation is arbitrary and treats them equally with others who are unequal irrespective of the needs and requirements of the big dailies and thus violates Article 14 of the Constitution.

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88. For the foregoing reasons the newsprint policy for 1972-73 violates Articles 19(1)(a) and 14 of the Constitution. The restrictions by fixing 10 page limit in Remarks V. and VIII of the policy infringe Articles 19(1)(a) and 14 of the Constitution and are, therefore, declared unconstitutional and struck down. The policy of basic entitlement to quota in Remark V. is violative of Articles 19(1)(a) and 14 of the Constitution and is therefore struck down. The measure in Remark VII(a) is violative of Articles 14 and 19(1)(a) of the Constitution and is struck-down."

53. In *Kumari Shrilekha Vidyarthi & Ors. vs. State of U.P. & Ors.*; **(1991) 1 SCC 212**, it was reiterated that Article 14 applies also to matter of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of arbitrariness, it would be unconstitutional. It was held as under:

"29. It can no longer be doubted at this point of time that Article 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. (See *Ramana Dayaram Shetty v. International Airport Authority of India* [(1979) 3 SCC 489 : (1979) 3 SCR 1014] and *Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir* [(1980) 4 SCC 1 : (1980) 3 SCR 1338]). In *Col. A.S. Sangwan v. Union of India* [1980 Supp SCC 559 : 1981 SCC (L&S) 378] while the discretion to change the policy in exercise of the executive power, when not trammelled by the statute or rule, was held to be wide, it was emphasised as imperative and implicit in Article 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose."

54. In *Cellular Operators Association of India & Ors. vs. Telecom Regulatory Authority of India & Ors.*; (2015) 4 SCC 309, it is held:

"21. The question whether the non-discrimination clause is applicable to the class of subscribers making call to another private network from a private network as compared to the class making call from a private network to BSNL/MTNL network was raised by both the parties. The appellants' contention was that they were two different classes since the routing of the call was different and BSNL was charging higher amount for the latter category of calls. In reply to the same, it has been rightly contended on behalf of the respondents that the same subscriber or two subscribers from the same house making calls from the same network to another private network or to BSNL network located at the same destination form the same class. The interpretation of the respondents being more logical was also accepted by the Tribunal. For the said reason the Tribunal rightly held that the action of the appellants amounts to discrimination between the same class of subscribers which is against the basic definition laid down in Para 2(k) of the Tariff Order.

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23. We have noticed that the appellants took advantage of the aforesaid provision. But they did not apply before BSNL/MTNL to apply new Ps of I and treating the tariff as inter-service charges differently from same sets of consumers. The access providers have option to continue with the existing inter-connected routing of the class of service areas but that cannot be a ground to discriminate, in any manner, between the subscribers of the same class. The Tribunal rightly held that the appellants - service providers, discriminated between subscribers of the same class; one on the ground that the call ends with the private parties and another on the ground that the call ends with BSNL/MTNL. The classification of the subscribers into two categories on the basis of calls made by them from one private network to another private network and from private network to BSNL/MTNL network is arbitrary as it fails to satisfy the twin test for reasonable classification laid down by this Court in *State of W.B. v. Anwar Ali Sarkar* [AIR 1952 SC 75:1952 CriLJ 510] . Therefore, the Tribunal rightly dismissed the appeal."

55. In the present case, we found that clause 12(d) of NCAP, 2016 to the extent of excluding the "existing PPP airports" from the benefit of the liberalized use of airport land is arbitrary and in violation of Article 14 of the Constitution of India. In the light of the settled legal position noticed above, we are of the view that the contention of the Respondents that the judicial review of the impugned policy is impermissible under law cannot be accepted.

56. It may also be added that in *Delhi International Airport Private Ltd. vs. Union of India & Ors.*; (2011) 12 SCC 449, while interpreting the provisions of AAI Act, 1994 and the clauses of OMDA dated 04.04.2006 in the light of the Contract Labour (Regulation and Abolition) Act, 1970, and holding that the Central Government is the appropriate Government for DIAL under the Contract Labour (Regulation and Abolition) Act, 1970 and the Industrial Disputes Act, 1947, the Supreme Court observed:

"72. The contention that DIAL would not also be bound by the obligations of AAI establishment would once again lead to absurd consequences. In the impugned judgment, the Division Bench correctly observed that "every time a fresh agreement is entered into, the entire process of getting a notification issued by the appropriate Government in relation to the same work of trolley retrieval and with the same establishment vis-à-vis such private player" must be repeated. This interpretation would defeat the rights of the workers, which are meant to be protected by CLRAA. The Division Bench has correctly observed that the obligation flowing from the notification under Section 10(1) of CLRAA shall continue to bind every private player that steps into the shoes of AAI.

73. We have carefully heard the learned counsel for the parties and perused the written submissions filed by them. In our considered view,

the Central Government is the appropriate Government for DIAL for the following reasons:

- (i) DIAL could not have entered into a contract with AAI without approval of the Central Government according to the mandate of Section 12-A of the AAI Act. In this view of the matter, it is abundantly clear that DIAL functions “under the authority” of the Central Government;
- (ii) AAI clearly acts under the authority of the Central Government and DIAL acts under the authority of AAI because of its contract with DIAL. Then it can be logically stated that DIAL works under the authority of the Central Government;
- (iii) The Central Government has given AAI responsibility for overseeing the airports. To fulfil its obligations, AAI contracted with DIAL. However, it is clear that DIAL's work “concerns” AAI, if DIAL does not perform its work properly or adequately, then AAI will be breaching its statutory obligation and would be responsible for the consequences.
- (iv) AAI is under an obligation to follow the directions of the Central Government and if DIAL has admittedly assumed those obligations through OMDA, then DIAL is presumably also obligated to follow such directions. Again, a contrary interpretation would allow AAI to circumvent the Central Government's exercise of authority over its work merely by contracting it out to third party (DIAL).
- (v) Clause 5.1 of OMDA specifically notes that the “rights and obligations associated with the operation and management of the Airport would stand transferred” to DIAL. If AAI was admittedly obligated to follow 26-7-2004 Notification and DIAL has assumed all of AAI's obligations, then DIAL must also be obligated to follow the notification. In other words, the notification issued by the Central Government is equally binding on DIAL.
- (vi) Holding 26-7-2004 Notification inapplicable to DIAL would mean that the Government would have to issue separate notification every time AAI contracts with a third party. This would clearly violate the basic objects and reasons of CLRAA.

(vii) The security of contract labour working for AAI envisaged, a law cannot be made to depend on the private sector. If the legislature had found it fit to specifically include AAI as an enumerated industry under the ID Act, it is extremely unlikely that it would have intended for AAI to be able to circumvent the Central Government orders by contracting with private parties.

(viii) The privatisation of the airports does not mean that the “appropriate Government” cannot be the Central Government. According to the Constitution Bench judgment of this Court in SAIL [SAIL v. National Union Water Front Workers, (2001) 7 SCC 1 : 2001 SCC (L&S) 1121] , the definition of “establishment” in CLRAA takes in its fold purely private undertakings...”. Concerns about privatisation are, therefore, unfounded.

(ix) Under Section 12(2) of the AAI Act, AAI is obliged to provide air traffic service and air transport service at the airport. DIAL admits that AAI has transferred all of its responsibilities at the airports with the exception of certain reserved functions. Since industries concerning air transport service function under the authority of the Central Government, and since AAI has transferred its “air transport service” responsibilities to DIAL, the Central Government must be held to be the appropriate Government for DIAL.

(x) OMDA makes it clear that AAI maintains ultimate responsibility for the airports. The fact that DIAL was transferred only a portion of AAI's work which DIAL only has incomplete control over as well as the fact that DIAL meets the definition of a contractor under CLRAA further suggests that DIAL is nothing more than a contractor for AAI establishment. That being the case, Notification dated 26-7-2004 directed at AAI establishment must also apply to DIAL.

(xi) The contention of DIAL that it would not be bound by the obligation of AAI establishment would lead to absurd consequences. The Division Bench in the impugned judgment has rightly pointed out that every time a fresh agreement is entered into, the entire process of getting a notification issued by the appropriate Government in relation to the same work of trolley

retrieval and with the same establishment via-à-vis such private player must be repeated. But this interpretation would defeat the rights of the workmen which are meant to be protected by CLRAA.

(xii) In the impugned judgment, the Division Bench of the High Court has correctly held that the obligation flowing from the said notification under Section 10(1) CLRAA should continue to bind every private player that steps into the shoes of AAI."

(emphasis supplied)

57. In the light of the above decision, there can be no dispute that the Petitioner is operating IGI Airport on behalf of AAI and it is not open to the Respondents to contend that IGI Airport is different from "AAI Airport". That being so, the expression 'AAI airport' in Clause 12(d) of NCAP, 2016 automatically includes the "existing PPP Airport" operated by the Petitioner.

58. For the aforesaid reasons, we hold that Clause 12(d) of NCAP, 2016 to the extent of excluding "existing PPP airports" is *ultra vires* Article 14 of the Constitution of India.

59. Accordingly, the letter dated 10.10.2016 of the Respondent No.1 is hereby set aside and there shall be a direction to the Respondents to take the necessary further steps in terms of the findings recorded by us in this order and to extend the benefit of liberalized use of airport land under clause 12(d) of NCAP, 2016 to the Petitioner in respect of IGI Airport on par with the existing and future airports of AAI as well as future projects under PPP.

60. Writ Petition is accordingly disposed of.

CHIEF JUSTICE

APRIL 10, 2017/kks

SANGITA DHINGRA SEHGAL, J