

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 20.11.2018

+ **W.P.(C) 9509/2018 & C.M. No. 38741/2018**

KGA INVESTMENTS

..... Petitioner

versus

UNION OF INDIA AND ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Rajiv Nayar, Senior Advocate Adv. with Mr Kunal Vajani, Mr Kartik Nayar, Mr Paras Anand, Mr Mohit Mahla, Mr Prateek Rajodhanya & Mr Sarthak Sharma

For the Respondent: Ms Anjana Gosain, with Ms Shalini Nair & Ms Rabiya Thakur for R-1.
Mr. Dig Vijay Rai, with Mr. Kustubh Singh for R-2.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition impugning the Minutes of the Meeting (hereafter 'the impugned decision') of the Appellate Committee for height clearance, of Ministry of Civil Aviation, Government of India (hereafter 'the Appellate Committee') held on 31.07.2018. The said minutes are impugned to the extent that the Appellate Committee has rejected the petitioner's request for conducting an Aeronautical Study in respect of its building and further

directed initiation of action as per the Aircraft (Demolition of Obstruction Caused by Buildings and Trees etc.) Rules, 1994. The petitioner contends that the said decision is arbitrary and unreasonable.

2. The Appellate Committee has taken the impugned decision to reject the petitioner's request for conducting the Aeronautical Study on the ground that the height of the subject building constructed by the petitioner had exceeded the permissible height for which No Objection Certificate (NOC) had been issued by respondent no.2 (Airport Authority of India – hereafter 'AAI'). The petitioner contends that the Appellate Committee has completely ignored the fact that the petitioner had constructed the building strictly as per the NOC issued by the AAI. The height of the structure had exceeded the permissible height only on account of the change in the elevation of the site, resulting from a change in the method adopted for measurement of the site elevation. The petitioner further contends that the decision of the Appellate Authority is also contrary to the recommendations of the Municipal Corporation of Greater Mumbai (hereafter 'the Municipal Corporation') and the decision arrived at a joint meeting held between the AAI, the Municipal Corporation and the Airport Operator (Mumbai International Airport Ltd. – hereafter 'MIAL').

Factual Background

3. The petitioner is a partnership firm and is, *inter alia*, engaged in

the business of developing real estate. The petitioner is the owner of the Plot bearing No.106/A (Old No.C.T.S. No.106, 106/1 to 5), Village Tungve, Jogeshwari Vikhroli Link Road, L – Ward, Powai, Mumbai – 400076 (hereafter ‘the Plot’). In 2005, the petitioner decided to construct a building on the said Plot. Accordingly, the petitioner sent a letter dated 18.05.2007 to the Municipal Corporation seeking a Site Elevation Certificate to certify the altitude/elevation of the Plot Above Mean Sea Level (hereafter ‘AMSL’) and permissible height for the construction of the Building.

4. On 22.06.2007, the Municipal Corporation issued a certificate to the petitioner certifying the elevation of the Plot to be 24.85 mtr. RL. Thereafter, a letter was sent by the Architect of the petitioner to the AAI seeking a NOC for height clearance, for the construction of the Building.

5. By a letter dated 09/11.10.2007, AAI granted a NOC to the petitioner, for construction upto a height of 52.80 mtr. AMSL [27.95 mtr. AGL (height of the building) plus 24.85 mtr. RL (site elevation)].

6. On 19.03.2008, the Municipal Corporation issued an Intimation of Disapproval (IOD) after approving the building plans of the construction of the Building. This was followed by issuance of a Commencement Certificate dated 24.10.2008 upto Plinth/Stilt floor level.

7. Thereafter, the petitioner sent letters to the AAI seeking review of the aforesaid NOC and further requested AAI to grant a NOC with

the height of 71.40 mtr. AMSL [46.55 mtr. AGL (height) + 24.85 mtr. RL (site elevation)].

8. On 30.03.2010, a fresh NOC was issued by the AAI for the height of 62.27 mtr. AMSL [37.42 mtr. AGL (height) + 24.85 mtr. RL (site elevation)] as per the terms and conditions set out therein.

9. After the completion of the construction of the Building, the Municipal Corporation sent a letter dated 03.08.2017 to the Airport Operator (MIAL) requesting it to verify the top elevation of the Building. Accordingly, on 13.09.2017, a joint verification was carried out and the top elevation of the Building was calculated at 65.79 mtr. AMSL.

10. Thereafter, a certificate dated 13.10.2017 was issued by the Land Surveyor certifying the elevation of the Plot to be 28.241 mtr., which was 3.56 mtr. higher than the measurement of the site elevation as certified by the Municipal Corporation. Consequently, the height of the building also exceeded the maximum permissible top elevation by 3.52 mtrs.

11. It is stated that on 22.06.2007, the Municipal Corporation had issued the measurement for plot/site elevation indicating that the same was 24.85 mtrs. AMSL. At the material time, the site elevation was measured without using GPS as the said technology was not readily available with the AAI/the Municipal Corporation. Indisputably, the difference in the height of the building, as subsequently measured by GPS method (65.77 mtrs. AMSL), and the height permitted by the

AAI (62.27 mtrs. AMSL) is not on the account of excess construction but on the account of a difference in the height of the site elevation.

12. The height of the building above ground level (AGL) does not exceed 37.42 mtrs. as permitted by the AAI. However, the height of the ground level (site elevation) as determined by GPS technology was found to be 28.241 mtrs., which is 3.54 mtrs. higher than the height of the site as measured by the Municipal Corporation at the initial stage (that is, on or about 22.06.2007).

13. Apparently, the Municipal Corporation had also issued certificates with regard to the height of the site elevation in respect of various sites, which were now found to be inaccurate. This issue was discussed at a joint meeting held between the representatives of the AAI, the Municipal Corporation and MIAL on 10.10.2017. At the said meeting, it was decided that the list of such buildings would be prepared by the Municipal Corporation and that list would be provided to the AAI. AAI in turn would send the list to the concerned authority with a request to conduct Aerodrome Study without issuing orders for demolition of the excess height.

14. The relevant extract of the said minutes is set out below:-

“6. Site Elevation issued by MCGM:

It is observed that there are few building cases which are constructed on the basis of site elevation provided by MCGM. However, due to the difference in the actual site elevation at the location and the site elevation provided by MCGM, the top elevation of building after its construction has exceeded the

permissible top elevation of AAI NOC. In addition to the above, there are buildings which were constructed as per the DCR rules of MCGM and still those buildings appear in the obstacle list of CSI Airport.

It was decided that list of such buildings to be prepared by MCGM and provided to AAI-WR. AAI-WR will send the list to AAI CHQ with a request to conduct an aeronautical study without issuing orders for demolition of the excess height.”

15. Thereafter, on 01.01.2018, the Municipal Corporation sent a letter to the AAI requesting the AAI to carryout the Aeronautical Study.

16. On 10.01.2018, the petitioner filed an application before the Appellate Committee requesting that a study to be conducted to determine whether the building on the plot can be constructed to the proposed enhanced height of 83.90 mtrs. AMSL, without demolition of the excess height of the top elevation to the extent of 3.52 mtrs. AMSL.

17. The Appellate Committee rejected the aforesaid request on 31.07.2018 and further directed the Airport Operator (MIAL) to initiate action as per Aircraft (Demolition of Obstruction Caused by Buildings and Trees etc.) Rules, 1994.

Submissions

18. Mr Nayar, learned senior counsel appearing for the petitioner contended that the impugned decision is without any reasons and

without application of mind. He submitted that the petitioner had not exceeded the height of the building as permitted by the AAI inasmuch as the height of the building above ground level is within the permissible limit of 37.42 mtrs. AGL. He submitted that the Appellate Committee, thus, erroneously rejected the petitioner's request for Aeronautical Study on an assumption that the petitioner had raised construction in excess of the permissible height. He further contended that the Appellate Committee has also completely ignored the decision taken at the joint meeting held on 10.10.2017.

19. Mr Rai, learned counsel appearing for the AAI countered the aforesaid submissions. He submitted that this Court had no jurisdiction to entertain the present petition as the building in question was located in Mumbai. He submitted that no part of the cause of action had arisen within the jurisdiction of this Court.

20. Without prejudice to the aforesaid contentions, he submitted that applying principles of *forum non conveniens*, the petitioner should be relegated to avail its remedies before the Courts in Mumbai.

21. Next, he submitted that the petitioner's request for Aeronautical Study could not be acceded to without the petitioner first demolishing the construction beyond the permissible height. He relied upon the order of the Bombay High Court in ***Havemore Realty Pvt. Ltd. & Anr. v. Union of India: W.P.(C) 550/2016, decided on 20.04.2016.*** He contended that the action of the petitioner to prefer a petition in this regard was essentially to avoid the view of the Bombay High

Court. He also submitted that no reliance could be placed on the earlier decision of this Court in ***DBS Realty v. Union of India & Anr.: W.P.(C) 11829/2016, decided on 30.01.2018***, as an appeal against the said order was pending before the Division Bench of this Court. He further submitted that the Division Bench had not granted interim relief in the said appeal. However, the Supreme Court had stayed that decision.

Reasons and Conclusion

22. The contention that this Court does not have jurisdiction to entertain the present petition is, plainly, unmerited. The petitioner has impugned the decision of the Appellate Committee, which was admittedly taken at a meeting held in the office of the Appellate Committee in New Delhi. In ***Skylark Buildcon Pvt. Ltd. and Anr. v. Union of India and Anr.: 2017 SCC OnLine Del 7819***, the Division Bench of this Court rejected the AAI's contention and held as under:

“16. We do not find any substance in the said preliminary objection. It may be true that some other petitions are pending before the High Court of Bombay in which similar issues are stated to have been raised with regard to height clearance. However, we make it clear that the consideration by us is limited only to the issue as to whether the inaction on the part of the respondents in considering the request of the petitioners for referring their matters to ICAO for aeronautical study is arbitrary, illegal and violative of Article 14 of the Constitution of India. The said issue deserves consideration by this Court since the

situs of both the respondents 1 and 2 is situated in Delhi within the territorial jurisdiction of this Court.”

23. The petitioner’s request for an Aeronautical Study was considered by the Appellate Committee in New Delhi and, therefore, the contention that no part of cause of action had arisen within the territorial jurisdiction of this Court is unmerited.

24. The petitioner had made an application to the Appellate Committee in Delhi and submitted all material in support of its application. Thus, this Court is also unable to accept that principle of *forum non conveniens* is applicable in the present case.

25. The next question to be examined is whether the decision of the Appellate Committee warrants any interference by this Court in these proceedings. A plain reading of the minutes of the meeting of the Appellate Committee dated 31.07.2018 indicate that the Appellate Committee had rejected the petitioner’s request for Aeronautical Study for the following reasons:-

“After due deliberations and in the interest of Aviation Safety and to maintain the system integrity, the Committee decided that request of the applicant for conducting Aeronautical Study cannot be accepted as the existing structure is in excess of permissible top elevation granted by AAI.”

26. It is apparent from the above that the petitioner’s request for Aeronautical Study was rejected solely on the ground that the existing

structure was in excess of the permissible top elevation granted by the AAI.

27. The contention that the petitioner has constructed the building strictly as per NOC issued by the AAI, is erroneous. The petitioner is correct that it had constructed the building within the permissible limit AGL (Above Ground Level); however, admittedly, the overall height of the building now exceeds the maximum permissible height as per the NOC issued by the AAI. It is not disputed that the increase in the height is on account of an incorrect measurement of the site elevation as recorded in the certificate dated 22.06.2007, issued by the Municipal Corporation; however, the AAI is not responsible for the same. The NOC dated 30.03.2010 issued by the AAI expressly indicates that the NOC was issued on the basis of the measurement of the site elevation as provided. The English translation for the relevant extract of the NOC reads as under:

“..this no objection certificate is being issued with a clear understanding that the required AMSL (Above Mean Sea Level) i.e. 24.85 meters of the required site of the proposed building/construction and the distance and directional angles have been correctly given from the ARP/ends of the runway. If it is found in any situation after the inspection that it is different from the statistics submitted by the above-mentioned applicants, then the part of the construction for which no objection certificate is being issued, it shall be demolished and the cost of the applicant as per the orders of the Chairman Airports Authority of India. Therefore, the applicants are advised in their own interests that the proposed elevation and other

statistics of the site should be verified before the start of the proposed construction at the site.”

28. Paragraph 8.3 of the “guidelines for the applicants for NOC Application in NOCAS” issued by the AAI also indicates that if any stage it is established that the actual data is different from the one provided by the applicant, the NOC issued will be null and void.

Paragraph 8.3 of the said guidelines is set out below:-

“8.3 All NOC calculations shall be done purely on the basis of WGS 84 Coordinates and site elevation provided by the applicant. If however, at any stage it is established that the actual data is different from the one provided by the applicant, the NOC, so issued, will be null and void.”

29. In view of the above, the principal question to be addressed is whether the Appellate Committee could refuse the request for Aeronautical Study on the sole ground that the building constructed had exceeded the permissible height.

30. The Central Government has framed the Ministry of Civil Aviation (Height Restriction for Safeguarding of Aircraft Operations) Rules, 2015 (hereafter ‘the said Rules’) in exercise of powers conferred under Section 5 read with Section 9A of the Aircraft Act, 1934. Rule 5 of the said Rules provides for issuance of No Objection Certificate for height clearance by a designated officer. In terms of sub rule (4) of Rule 5, an application for issuance of No Objection Certificate in respect of civil aerodromes is required to be made to the designated officer through “No Objection Certificate Application

System (NOCAS)”.

31. Clause 5 of the Schedule II to the said Rules provides for conduct of Aeronautical Study. The said clause is set out below:-

“5. Conduct of Aeronautical Study and CNS Simulation Study

5.1 The Aeronautical Study, as referred to in the Civil Aviation Requirements Section-4, Series ‘B’, Part I on Aerodrome Design and Operations and ICAO Annex 14, may be conducted to determine that the existing object or the proposed new object would not adversely affect the safety or significantly affect the regularity of operations of aeroplanes in pursuance of the ICAO provisions as given below:

Note 1: New objects or extensions of existing objects should not be permitted above the conical surface and the inner horizontal surface except when, in the opinion of the appropriate authority, after aeronautical study it is determined that the object would not adversely affect the safety or significantly affect the regularity of operations of aeroplanes.

Note 2: Existing objects above an approach surface, a transitional surface, the conical surface and inner horizontal surface should as far as practicable be removed except when, in the opinion of the appropriate authority, after aeronautical study it is determined that the object would not adversely affect the safety or significantly affect the regularity of operations of aeroplanes.

5.1.1 The request for aeronautical study shall be considered by the Member (Air Navigation Services), Airports Authority of India, on case to case basis.

5.1.2 Aeronautical Study shall not be carried out in Approach and Transition surfaces.

5.1.3 Aeronautical Study, as per the established guidelines, shall be carried out by AAI, ICAO or any other agency, approved for the purpose by Ministry of Civil Aviation.

5.1.4 Based on the Aeronautical Study report, including a revised height clearance if necessary, shall be communicated to the applicant by AAI.

5.1.5 Guidelines are available at NOCAS at www.aai.aero.

5.2 Communication Navigation Surveillance (CNS) Simulation study: In case any structure is required to be made within aerodrome premises (airside and city side) by the Aerodrome Operator which creates obstruction from CNS point of view, a simulation study could be carried out to study the impact of this structure on the performance of the relevant facility and in case the study confirms that the impact would not hamper the operability of the facility, such structure could be permitted within the aerodrome premises.”

32. It is clear from the sub-clause 5.1.1 of the said Rules that the request for Aeronautical Study is required to be considered on a case to case basis.

33. AAI had also issued a circular for standardising the process of

issuance of NOC for height clearance – the Air Traffic Management Circular No.9 of 2016 dated 07.06.2016. Paragraph 10 of the said Circular provides for Aeronautical Studies would be conducted by the AAI on directions of the Appellate Committee. Clause 10 of the said Circular is set out below:-

“10. Aeronautical Study

10.1 On the direction of Appellate Committee, AAI shall carry out the Aeronautical Study as per the existing Aeronautical Study Guidelines available on AAI website.

10.2. Applicant shall pay the Aeronautical Study fee of Rs.20 lakh plus the applicable taxes to the Airports Authority of India for conduct of Aeronautical Study. Agreement for the same shall also be executed by the applicant. Fees shall be paid online at AAI website through the payment gateway in case online Appeal. For Offline/manual appeal, fees shall be paid by DD in favor of Airports Authority of India payable at New Delhi.

10.3 On completion of the aeronautical study, a report shall be submitted to the Appellate Committee and based on its directives, if necessary, a revised NOC letter may be issued after the submission of undertaking by the applicant in form IE (annexure-IE)

xxx

xxx

xxx”

34. Mr Rai had contended that the Aeronautical Studies cannot be conducted if the height of the building has been raised in excess of the height permissible under the NOC. However, he is unable to produce any guidelines or any other Rules that expressly indicate the same.

35. In view of the above, this Court finds it difficult to accept the aforesaid contention. Further, as noticed above, sub-clause 5.1.1 of Schedule II to the said Rules expressly provides that the request for Aeronautical Study is required to be considered on a case to case basis.

36. It cannot be disputed that if the Appellate Committee is of the view that the building constructed in excess of the permissible limits presents a risk to aviation safety, no interference with the said decision would be warranted. However, it would be incumbent upon the Appellate Committee to examine this issue on a case to case basis. In the present case, the building in question is located at a distance of 4 kms. from the aerodrome. The site is also not located above the conical surface or the inner horizontal surface (IHS). These would be the factors for the Appellate Committee to consider while deciding whether it was to demolish the building in excess of the height, as permitted, before considering the request for Aeronautical Studies.

37. The contention, that Aeronautical Study cannot be undertaken unless the excess height is demolished, is not supported by any rule or even the stated policy. Sub-clause 5.1 of Schedule II to the said Rules also clearly indicate Aeronautical Studies may be conducted to determine whether the existing body or proposed new body would adversely affect the safety or significantly affect the regularity of operations of aeroplanes. Thus, the contention that the Aeronautical Studies cannot be conducted in any case unless the building, which is already constructed, is removed is unpersuasive.

38. In view of the above, this Court considers it apposite to remand the matter to the Appellate Committee to consider afresh after examining all relevant facts of the petitioner's case including the location of the building; the height by which the building has exceeded the maximum permissible limit; as well as any other factor that the Appellate Committee considers relevant for the said decision. The Appellate Committee would also briefly indicate the reasons for its decision in this regard.

39. The petition is disposed of in the above terms. The pending application also stands disposed of.

NOVEMBER 20, 2018
MK

VIBHU BAKHRU, J