IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 16.01.2018

\+ **W.P.(C) 6569/2017 & CM No.27221/2017**

M/S. AIR CAR AIRLINES PVT LTD ..... Petitioner

versus

UNION OF INDIA & ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioner :Mr Piyush Sharma and Mr D. Bhattacharyya.
For the Respondents :Ms Anjana Gosain.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, impugning an order dated 08.12.2016 (hereafter 'the impugned order') passed by the Bureau of Civil Aviation Security (hereafter 'BCAS') rejecting the approval granted to the Security Programme issued to the petitioner and the order dated 24.07.2017 passed by respondent no.2 rejecting the petitioner's appeal against the impugned order.

2. The petitioner is engaged in the business of Air Charter Services and the effect of the impugned order is that the petitioner's Air Operator's Permit to provide Air Charter Services would be suspended/cancelled.

3. The impugned order has been passed on account of the failure on the part of the Pilot-in-Command operating a Chartered Flight on 22.11.2016 from Hisar to Dimapur, to report that a passenger was carrying ₹3.5 crores

of demonetised currency. According to the respondents, the same violated the approved Security Programme as well as certain mandatory circulars issued by BCAS. The petitioner contends that the same did not violate the Security Programme issued to the petitioner and further did not, in any manner, jeopardise security of India or the safety of aircraft operations.

4. The backdrop in which the present controversy arises is, briefly, narrated under:-

4.1 The petitioner is in the business of providing Air Charter Services and in November, 2016 one of its regular customers - M/s Silver Line Aviation Pvt. Ltd. - made bookings for a flight for the 'Delhi-Hisar-Dimapur-Delhi' sector for the travel dates 21.11.2016 - 22.11.2016.

4.2 On 22.11.2016, the petitioner operated the aircraft- Cessna 560 XL with the Call sign VT-CSP (hereafter 'the Aircraft') for a flight from Hisar to Dimapur. One of the passengers, Mr Amarjeet Singh, travelling on the flight, carried a sum of ₹3.5 crores in currency notes in denomination of ₹500/- and ₹1000/-, which had been demonetized earlier that month. The Haryana police at the Hisar Airport had cleared the said passenger after checking his luggage.

4.3 The currency being carried by the passenger on the said flight was seized at Dimapur Airport but subsequently released to the person claiming to be the legitimate owner of the aforesaid demonetized currency.

4.4 On 25.11.2016, BCAS issued a Show Cause Notice to the petitioner calling upon the petitioner to show cause as to why action should not be taken against the petitioner, as an adverse report had been received by the Central Security Agency regarding use of the Aircraft for the purposes of ferrying demonetized currency from Hisar (Haryana) airport to Dimapur (Nagaland). It was alleged that neither the Pilot-in-Command of the Aircraft nor the petitioner had alerted the relevant authorities about the suspicious passenger/baggage which was in violation of paragraph 4 of the BCAS Circular no. 26/2005. It was also alleged that the petitioner had violated paragraph (ix) of the AVSEC Circular Order 03/2010 dated 05.05.2010 as well as paragraph 3 of the letter dated 03.07.2014 issued by the BCAS.

4.5 The Chairman of the petitioner responded to the aforesaid Show Cause Notice by a letter dated 01.12.2016. He asserted that the passengers on the flight in question were not known to him or any of his staff. He also offered the phone records and e-mails and other communication records for scrutiny and verification of the said claim. He stated that the flight was booked through a broker, M/s Silver Line Aviation Pvt. Ltd. He stated that the petitioner relied upon the security personnel of Haryana Police at the Hisar Airport for frisking the passenger and screening their baggage. He also stated that neither the pilot nor the crew members noticed anything suspicious about the baggage or the passenger and thus, there was no legal obligation on the part of the pilot/crew members to alert the relevant authorities. He further stated that at the time of security check performed by the Pilot-in-Command (Capt. Dan Clifford), the currency in denominations of ₹500/- and ₹1000/- was discovered in the bag of the passenger, Mr Amarjeet Singh, and he was called upon to explain the same. Mr Amarjeet Singh had informed the Pilot-in-Command that the money belonged to one Mr Anato K. Zhimomi, son of Sh H. Khekiho Zhimomi, resident of 4th Mile, District Dimapur, Nagaland, who was an income tax payee and his PAN number was AAFPZ2014E (copy of which was collected by the Pilot-in-Command). Mr Amarjeet Singh also produced letter of authority issued by Mr Anato K Zhimomi authorizing the petitioner to carry his currency. Mr Amarjeet Singh also informed the Pilot-in-Command that Mr Zhimomi would be available at the Dimapur Airport and the information provided by him could be confirmed directly from Mr Zhimomi.

4.6 It was also explained that money had been brought to Hisar to purchase the agricultural land but since the deal could not be materialized, the money was required to be transported back to Dimapur for being deposited in the accounts of Mr Anato K. Zhimomi.

4.7 BCAS afforded the petitioner a personal hearing on 02.12.2016 during the course of which certain queries were raised. The petitioner responded to the said queries by a letter dated 05.12.2016.

4.8 On 08.12.2016, the Deputy Director, BCAS passed the impugned order rejecting the approval of the Security Programme issued to the petitioner by the letter dated 03.07.2014.

4.9 Respondent no.3, Directorate General of Civil Aviation (hereafter 'DGCA') issued a Show Cause Notice dated 13.12.2016 calling upon the petitioner to show cause as to why the Air Operator Permit issued to the petitioner not be suspended/cancelled. The said Show Cause notice was pursuant to the impugned order passed by BCAS.

4.10 On 15.11.2016, the petitioner appealed against the impugned order under Section 3B of the Aircraft Rules, 1937 before respondent no.2. On 21.12.2016, the petitioner also filed a writ petition being W.P. (C) 12092/2017, *inter alia*, praying that the impugned order be kept in abeyance during the pendency of the petitioner's appeal before respondent no.2. By an order dated 23.12.2016, this Court passed an *ad interim* order staying the impugned order till the next date of hearing. The aforesaid petition was disposed of by an order dated 11.05.2017, *inter alia*, permitting the Appellate Authority (respondent no.2) to proceed with the appeal filed by the petitioner and further directing that the interim protection granted to the petitioner by the order dated 23.12.2016 would continue to operate for a period of one week after disposal of the appeal by the Appellate Authority.

4.11 The petitioner's appeal was rejected by the order dated 24.07.2017 and this has led the petitioner to file the present petition.

Reasons and Conclusions

5. A plain reading of the Show Cause Notice dated 25.11.2016 indicates that action was proposed to be taken against the petitioner on the allegations that it had violated: (i) Paragraph 4 of the BCAS Circular no. 26/2005; (ii) Paragraph (ix) of the AVSEC Circular Order 03/2010 dated 05.05.2010; and (iii) Paragraph 3 of the letter dated 03.07.2014 issued by BCAS directing that all security measures as contained in the Security Programme must be implemented.

6. Paragraph 3 of the BCAS Circular No. 26/2005 (hereafter 'the Circular') indicates the objectives of issuing the said circular, which is set out below:-

> ''3. **Objectives:** There are two main security objectives:-
> 3.1 Protecting of passengers and aircraft from attack and;
>
> 3.2 Preventing aircraft from being used as a weapon of mass

destruction directed at sensitive targets on the ground.''

7. Paragraph 4 of the Circular provides for the 'security measures'. The relevant extracts of the Paragraph 4 are quoted below:-

"**4. Security measures**:

A key point to remember regarding General Aviation passenger is that the persons on board the flight are generally better known to aircraft operators than the typical passenger on a scheduled commercial airliner. Charter/sight-seeing passengers typically will meet the pilot or other flight department personnel well in advance of any flight. Suspicious activities such as use of cash for flights or probing or any inappropriate questions are more likely to be quickly noted and relevant authorities could be alerted. For corporate operations, typically all persons on board the aircraft are known to the pilots.

In order to adequately address real vulnerabilities and to mitigate varying threat levels, the following security procedures shall be applied by all concerned.

* * * * *

4.2.1 Operations using a sterile area of the airport in an aircraft of less than 5700 kg (12,500 pounds):

(a) **Applicability of this section:** This section applies to operations in an aircraft of maximum take-off weight of less than 5700 kg (12,500 pounds) in which passengers, crew or other individuals area emplaned from a sterile area of an operational airport/heliport i.e. the airport/heliport to/from scheduled commercial flights operate.

(b) **Procedure**: Any person conducting an operation identified in paragraph (a) of this section shall conduct a search of the aircraft before departure and shall screen passengers, crew members and other individuals, and their accessible property (carry-on-baggage) before boarding, in accordance with the security procedures prescribed by BCAS. In-accessible property (hold baggage) shall also be screened and matched with the occupants before taking it on board as per the procedures prescribed by BCAS.

(c) In case, there is no separate infrastructure at the airport for implementing the security procedures given in paragraph (b) above, the emplaning of passengers, crew members and other individuals shall be through security hold area of the airport after they along with their baggage (cabin baggage and hold baggage) have been subjected to prescribed pre-embarkation security checks by the airport security unit and aircraft operator.

4.2.2 * * * * *

4.2.3 Operations using a non-sterile area of the airport in an aircraft of less than 5700 kg. (12,500 pounds):

(a) **Applicability of this section**: This section applies to operations in an aircraft of maximum take-off weight of less than 5700 kg (12,500 pounds) in which passengers, crew members and other individuals are emplaned from a non-sterile area of an operational airport or from a non-operational airport/heliport, i.e. the airport/heliport to/from no scheduled commercial flight operates.

(b) **Procedure :** Prior to boarding, the pilot-in-command of the aircraft shall conduct search of the aircraft, and also ensure that:-

(I) The identity of all occupants is verified;

(II) All occupants are aboard at the invitation of the owner/operator/person who has chartered the aircraft.

(III) All baggage and cargo is known to the occupants.

* * * * *|”

8. The security measures as indicated in paragraph 4 of the Circular

relates to verifying the identity of the occupants; ensuring that all occupants are boarded at the invitation of the owner/operator/person who has chartered the flight; ensuring that all baggage and cargo is known to the occupants; and other security procedures.

9. The security measures as indicated in the Circular have to be read in conjunction with the objectives of the Circular as noted above. Plainly, there is no allegation that there has been any breach of security measures, which had put any passenger or aircraft at the risk of attack. Further, there is also no allegation that the petitioner had failed to take any necessary measures to prevent the aircraft from being used as a weapon of mass destruction or directed at sensitive targets on the ground.

10. In view of the above, the allegation that there has been any violation of Circular is not sustainable.

11. Ms Anjana Gosain, the learned counsel appearing for the respondents was also unable to point any security measure as referred to in paragraph 4 of the Circular No. 26/2005, which could be stated to have been violated. Ms Gosain contended that the petitioner had essentially breached paragraph 3.6 of the BCAS approved Airline Security Programme.

12. A plain reading of the impugned order indicates that one of the principal grounds on which the impugned order has been passed is that the Pilot-in-Command had failed to alert the relevant authorities at Hisar or at Dimapur and this established that provisions of Paragraph 4 of the Circular was violated. Plainly, the impugned order cannot be sustained as this reasoning is *ex facie* flawed. The security measures as provided in the

Circular did not oblige the petitioner or the Pilot-in-Command to alert authorities regarding any currency being carried in the aircraft.

13. The opening sub-para of Paragraph 4 of the Circular obliged the petitioner/pilot to alert the relevant authorities if there were any "*suspicious activities such as use of cash for flights or probing or any inappropriate questions*". There is no allegation that cash had been used for booking the said flight in question. This would be relevant in case the identity of the passengers or the person chartering the flight was not known, which is not the case herein; there is no dispute as to the identity of the passengers. Further, there is no material to indicate that the payment for the booking of the flight had been made in cash, which would lead the petitioner to be suspicious about the passengers being ferried. More importantly, the reference to "Suspicious activities" in Paragraph 4 of the Circular must be understood in the context of the objectives. Thus, if any suspicious activities are noticed, which even remotely suggest that the passengers or the aircraft may be at risk from an attack or that the aircraft may be used as a weapon, the Pilot-in-Command would be obliged to take the necessary measures including alerting the relevant authorities. In view of the above, the finding of BCAS that there was any violation of the Circular is not sustainable.

14. The next issue to be examined relates to violation of AVSEC Circular Order No. 03/2010 (hereafter 'the AVSEC Order'). One of the principal allegation against the petitioner in the Show Cause Notice dated 25.11.2016 was that the petitioner had violated Paragraph (ix) of the AVSEC Order. However, there is no finding in the impugned order that the AVSEC Order was violated.

15. Para (ix) of the AVSEC Order is set out below:-

> **"**(ix) All air carriers/owners/pilot shall be responsible for ensuring that a person with proper antecedents boards their aircraft. Aircraft owner shall be personally responsible for the antecedents of such persons hiring the aircraft so that no misuse of aircraft occurs.**"**

16. As noticed above, there is no finding in the impugned order that there has been any misuse of the Aircraft. It is also relevant to note that the AVSEC Order has been issued by the Commissioner of Security (Civil Aviation), BCAS, in exercise of powers conferred under Section 5A of the Aircraft Act, 1934 (hereafter 'the Act'). Section 5A of the Act is set out below:-

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

17. A plain reading of Section 5A of the Act indicates that the directions as contemplated under Section 5A of the Act can be issued in cases where

the officer concerned is satisfied that it is necessary to issue such directions (i) "in the interest of the security of India" or (ii) "for securing the safety of aircraft operations". Plainly, the use of the Aircraft for transporting currency cannot be stated as misuse of the Aircraft, particularly, as there is nothing on record, which would indicate that transporting the currency was in any manner proscribed at the material time.

18. It is also not disputed that the authorities at Dimapur had released the currency to the person on whose authority the currency was being transported by the passenger. The powers under Section 5A of the Act to issue directions are qualified by the necessity to do so, since the directions under Section 5A of the Act can be issued only when it is necessary to do so for security of India and for securing the safety of aircraft operations. The expression "*misuse of aircraft*" as used in paragraph (ix) of the AVSEC Order must also be considered in the aforesaid context. Thus, ferrying a passenger carrying currency cannot be held to be misuse of the Aircraft.

19. In any view of the matter since the impugned order does not mention violation of Paragraph (ix) of the AVSEC Order (as alleged in the Show Cause Notice), it is not necessary to dilate on the said issue any further.

20. The only question that remains to be considered is whether the petitioner had violated the provisions of the Security Programme approved by BCAS. Ms Anjana Gosain has earnestly contended that Paragraph 3.6 of the BCAS approved Security Programme had been violated since the petitioner had failed to coordinate with the Government Agencies. This is also one of the principal grounds on which the impugned order had been passed.

21. Paragraph 3.6 of the Security Programme (which is alleged to have been violated by the petitioner) reads as under:-

> ‘‘3.6 Airline’s Compliance with the Requirements of NACP:-
>
> The airline will comply with all the BCAS requirements in India to achieve the aforementioned compliance:-
>
> (a) The airline will use its internal abilities to ensure stringent security controls;
>
> (b) The airline will work closely with the government agencies where it would operate to ensure that there is proper coordination between the airline and the local security agencies.”

22. This Court finds it difficult to accept that there has been any violation of the Security Programme.

23. First of all, the requirement that the airline will work closely with the government agencies and ensure that there is proper coordination between the airline and the local security agencies must be interpreted in the context of the Aircraft Operator Security Programme. In terms of Rule 24 of the Aircraft (Security) Rules, 2011 (hereafter “the 2011 Rules”), every aircraft is required to make and comply with Aircraft Operation Security Programme in accordance with the National Civil Aviation Security Program.

24. Rule 2(1) (za) of the 2011 Rules defines “security programme” as under:

> “(za) “security programme’ means written measures specified by the Commissioner to be adopted by an entity

> to safeguard civil aviation against acts of unlawful interference"

25. Rule 2(1)(e) of the 2011 Rules defines the expression "acts of unlawful interference" is as under:

> (e) "acts of unlawful interference" means acts or attempted acts to jeopardize the safety of civil aviation and air transport, including-
>
> (i) unlawful seizure of aircraft in flight;
>
> (ii) unlawful seizure of aircraft on the ground;
>
> (iii) hostage-taking on board aircraft or on aerodromes;
>
> (iv) forcible intrusion on board an aircraft, at an aerodrome or on the premises on an aeronautical facility;
>
> (v) introduction on board an aircraft or at an aerodrome of a weapon or hazardous device or material intended for criminal purposes;
>
> (vi) communication of false information with a view to jeopardize the safety of an aircraft in flight or on the ground, of passengers, crew, ground personnel or the general public, at an aerodrome or on the premises of a civil aviation facility."

26. It is clear from the above that the main object and purpose of the Security Programme is to safeguard against "acts of unlawful interference" as explained above. The requirement to work closely with the government agencies and ensure proper coordination with the local security agencies as indicated in paragraph 3.6 of the Security Programme has to be read in the context of safeguarding against "acts of unlawful interference". It is at once clear that carrying currency is not within the scope of such acts and respondents have read paragraph 3.6 of the Security Programme out of

context.

27. Secondly, the question of working closely or co-ordinating with security agencies would arise where the security agencies seek such cooperation or where the airlines become aware of any security threat or an offence.

28. Although, currency notes in the denomination of ₹500/- and ₹1000/- were not legal tender after 08.11.2016, the same could be deposited in the bank accounts and there was no prohibition in transporting the same. At the material time, there was also no statutory order or advisory prohibiting transportation of such currency. The petitioner has pointed out that an addendum to BCAS Circular No. 26/2005 requiring an aircraft operator to prevent transportation of suspicious money which was issued on 23.12.2016. This clearly indicates that the transportation of currency at the material time was not proscribed and, therefore, the petitioner cannot be penalised for not coordinating with the security agencies regarding such ferrying of a passenger carrying such currency.

29. In response to the Show Cause Notice issued by the respondents, the petitioner had explained that the Pilot-in-Command had duly verified the identity of the passenger and also obtained the photocopy of the PAN Card of the person stated to be the owner of the currency. In absence of any statutory order or any circular requiring the petitioner to report to the transportation of currency to the relevant authorities, the petitioner cannot be faulted for having failed to do so.

30. It is also relevant to mention that the petitioner has produced images of notices displayed at various airports, which expressly directs the security

staff to "*not look for cash, jewellery or other valuables that passengers may carry*". This also indicates that ferrying a passenger carrying currency was not a relevant security concern.

31. In view of the above, the petition is allowed and the impugned orders are set aside. The pending application is also disposed of.

VIBHU BAKHRU, J

JANUARY 16, 2018
pkv