Equivalent Citation:

IN THE HIGH COURT OF DELHI

Writ Petition (Civil) No. 3889/2011

Decided On: 01.06.2011

Appellants: **Resources of Aviation Redressal Association**
Vs.
Respondent: **Union of India (UOI) and Ors.**
[Alongwith Writ Petition (Civil) No. 3893/2011]

Hon'ble Judges/Coram:
Dipak Misra, CJ. and Sanjiv Khanna, J.

Counsels:
For Appellant/Petitioner/Plaintiff: Sandeep Sethi, Sr. Adv., Vinay Hegde, Rakesh Sinha and Pawan Kumar Bansal, Advs. for Writ Petition (Civil) No. 3889/2011 and Altaf Ahmad, Sr. Adv., Arunabh Chaudhary, Anurag Sharma and Prashant Kumar, Advs. for Writ Petition (Civil) No. 3893/2011

For Respondents/Defendant: Anjana Gosain, Adv. for R-1, Naresh Kaushik, Adv. for R-2, A.M. Singhvi and Jayant Bhushan, Sr. Advs., Atul Sharma and Milanka Chaudhary, Advs. for R-3 and Digvijay Rai, Adv. for AAI

Subject: Company

Subject: MRTP/ Competition Laws

Acts/Rules/Orders:
Airports Economic Regulatory Authority of India Act, 2008 - Section 12, Airports Economic Regulatory Authority of India Act, 2008 - Section 13, Airports Economic Regulatory Authority of India Act, 2008 - Section 13(1), Airports Economic Regulatory Authority of India Act, 2008 - Section 17, Airports Economic Regulatory Authority of India Act, 2008 - Section 18, Airports Economic Regulatory Authority of India Act, 2008 - Section 18(2), Airports Economic Regulatory Authority of India Act, 2008 - Section 20, Airports Economic Regulatory Authority of India Act, 2008 - Section 22; Airports Authority of India Act, 1994 - Section 22A, Airports Authority of India Act, 1994 - Section 28K; Monopolies and Restrictive Trade Practices Act, 1969 - Section 5; Consumer Protection Act, 1986 - Section 9; Competition Act, 2002 ; Delhi Rent Control Act, 1958 - Section 36, Delhi Rent Control Act, 1958 - Section 37, Delhi Rent Control Act, 1958 - Section 37(2), Delhi Rent Control Act, 1958 - Section 38(1); Companies Act, 1913 - Section 202; General Clauses Act, 1897 - Section 6; Foreign Exchange Management Act - Section 35; Code of Civil Procedure (CPC) - Section 9

Cases Referred:
The Central Bank of India Ltd. v. Gokal Chand MANU/SC/0053/1966 : AIR 1967 SC 799; Shankarlal Aggarwal v. Shankarlal Poddar; Raj Kumar Shivhare v. Assistant Director Directorate of Enforcement and Anr. MANU/SC/0249/2010 : (2010) 4 SCC 772

Citing Reference:

Case Note:
Civil - Maintainability - Airports Authority of India Act, 1994 - Division Bench of Court held that levy imposed by the Central Government under the Act, was not in nature of tax and it was tariff-arrangement, therefore, notices and consequent imposition were not ultra vires - Hence, this Petition - Whether, Appeal could lie to Appellate Tribunal - Held, Section 17 of the Act, dealt with Appellate Tribunal and provided that Central Government by notification in Official Gazette could established Appellate Tribunal to be known as Airports Economic Regulatory Authority Appellate Tribunal - Tribunal had conferred the jurisdiction to adjudicate any dispute under Section 18(a) and (b) of the Act - Moreover, Petitioners were stake holder under Section 20 of Airports Economic Regulatory Authority of India Act, 2008 - Therefore, they could raise dispute under Section 17 of the Act - Therefore, any order or direction issued by authority even if it was in ad-hoc nature could be challenged before Tribunal - The public notice issued by Central Government was ad-hoc order on cess or tax - Order was Appeal able under Section 18(2) of the Act to Tribunal - Writ Petitions dispose of.

Ratio Decidendi:
"Suit shall be entertained by Tribunal if such power is conferred on it by Law."

JUDGMENT

Dipak Misra, C.J.

1. In these two writ petitions the controversy that emerges for consideration being similar, they were heard together and disposed of by a singular order.

2. We may not with profit that W.P.(C) No. 3889/2011 has been preferred by Resources of Aviation Redressal Association and W.P.(C) No. 3893/2011 is at the instance of Consumer Online Foundation. It is apt to note, both the associations have preferred the writ petitions as pro bono publico basically praying for issue of a writ of certiorari for quashment of the public notice dated 23rd April, 2010 issued by the Airports Economic Regulatory Authority of India (for short, 'the authority') under the Airports Economic Regulatory Authority of India Act, 2008 (for brevity, 'the 2008 Act') on the foundation that such a determination could not have been made by the said authority without following the procedure postulated under Section 13 of the Act and that apart the concept of ad-hoc determination is not contemplated under the purview of the provisions of the Act.

3. At this juncture, it is apposite to note that all the Respondents have entered appearance and canvassed their oral submissions as the controversy basically relates to issue of law. Before we proceed to deal with the contentions raised, it is seemly to refer to the previous history of this litigation. Certain public interest writ petition was filed before this Court forming subject matter of W.P.(C) No. 8918/2009 and other connected matters challenging the levy imposed by the Central Government under the Airports Authority of India Act, 1994 (for short, 'the Act'). The validity of the said notices were challenged on the ground that such imposition would tantamount to tax and without authority of law the tax could not be imposed. The Division Bench of this Court expressed the view that it is not in the nature of tax and, in fact, it is a tariff-arrangement and, therefore, notices and the consequent imposition were not ultra vires.

4. Being dissatisfied with the order passed by this Court, SLP (Civil) No. 23541/2009 was preferred, which after grant of leave formed the subject matter of Civil Appeal No. 3612/2011. The Apex Court after noting the submissions of the learned Counsel for the parties came to hold as follows:

> 14. The High Court was not correct in coming to the conclusion in the impugned judgment that the development fees to be levied and collected under Section 22A of

the 1994 Act is in the nature of tariff or charges collected by the Airports Authority for the facilities provided to the passengers and the airlines. It will be clear from a bare reading of Sections 22 and 22A that there is a distinction between the charges, fees and rent collected under Section 22 and the development fees levied and collected under Section 22A of the 1994 Act. The charges, fees and rent collected by the Airports Authority under Section 22 are for the services and facilities provided by the Airports Authority to the airlines, passengers, visitors and traders doing business at the airport. Therefore, when the Airports Authority makes a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) in favour of a lessee to carry out some of its functions under Section 12, the lessee, who has been assigned such functions, will have the powers of the Airports Authority under Section 22 of the Act to collect charges, fees or rent from the third parties for the different facilities and services provided to them in terms of the lease agreement. The legal basis of such charges, fees or rent enumerated in Section 22 of the 2008 Act is the contract between the Airports Authority or the lessee to whom the airport has been leased out and the third party, such as the airlines, passengers, visitors and traders doing business at the airport. But there can be no such contractual relationship between the passengers embarking at an airport and the Airports Authority with regard to the up-gradation, expansion or development of the airport which is to be funded or financed by development fees as provided in Clause (a) of Section 22A. Those passengers who embark at the airport after the airport is upgraded, expanded or developed will only avail the facilities and services of the upgraded, expanded and developed airport. Similarly, there can be no contractual relationship between the Airports Authority and passengers embarking at an airport for establishment of a new airport in lieu of the existing airport or establishment of a private airport in lieu of the existing airport as mentioned in Clauses (b) and (c) of Section 22A of the 1994 Act. In the absence of such contractual relationship, the liability of the embarking passengers to pay development fees has to be based on a statutory provision and for this reason Section 22A has been enacted empowering the Airports Authority to levy and collect from the embarking passengers the development fees for the purposes mentioned in Clauses (a), (b) and (c) of Section 22A of the Act. In other words, the object of Parliament in inserting Section 22A in the 2004 Act by the Amendment Act of 2003 is to authorize by law the levy and collection of development fees from every embarking passenger de hors the facilities that the embarking passengers get at the existing airports. The nature of the levy under Section 22A of the 2004 Act, in our considered opinion, is not charges or any other consideration for services for the facilities provided by the Airports Authority. This Court has held in Vijayalashmi Rice Mills and Ors. v. Commercial Tax Officers, Palakot and Ors. (supra) that a cess is a tax which generates revenue which is utilized for a specific purpose. The levy under Section 22A though described as fees is really in the nature of a cess or a tax for generating revenue for the specific purposes mentioned in Clauses (a), (b) and (c) of Section 22A.

5. Thus, it is manifest the Apex Court has expressed the view that once the development fee is received under Section 22A of the 1994 Act, which has the character of cess or tax, it cannot be levied by the executive fiat and accordingly came to hold as follows:

19. Section 22A of the 1994 Act before its amendment by the 2008 Act specifically provided that the development fees may be levied and collected at the rate as may be prescribed by the rules. Hence, the rate of development fees could not be determined by the Central Government in the two letters dated 09.02.2009 and 27.02.2009 communicated to DIAL and MIAL respectively. Under Section 22A of the 1994 Act, the Central Government has only the power to grant its previous approval to the levy and collection of the development fees but has no power to fix the rate at which the development fees is to be levied and collected from the embarking passengers. Hence, the levy and collection of development fees by DIAL and MIAL at the rates fixed by the Central Government in the two letters dated 09.02.2009 and 27.02.2009 are ultra vires the 1994 Act and the two letters being ultra vires

the 1994 Act are not saved by Section 6 of the General Clauses Act, 1897.

6. At this juncture, it is imperative to sit in a time machine and note that the notice dated 23rd April, 2010 that has been impugned before us was also brought to the notice of the Apex Court and in that context their Lordships in paragraph 20 have stated as follows:

> 20. After the amendment of Section 22A by the 2008 Act with effect from 01.01.2009, the rate of development fees to be levied and collected at the major airports such as Delhi and Mumbai is to be determined by the Regulatory Authority under Clause (b) of Sub-section (1) of Section 13 of the 2008 Act and not by the Central Government. The Regulatory Authority constituted under the 2008 Act has already issued a public notice dated 23.04.2010 permitting DIAL to continue to levy the development fees at the rate of Rs. 200/- per departing domestic passenger and at the rate of Rs. 1,300/- per departing international passenger with effect from 01.03.2009 on an ad hoc basis pending final determination under Section 13 of the 2008 Act. This public notice dated 23.04.2010 has been issued by the Regulatory Authority under the 2008 Act long after the impugned decision of the High Court upholding the levy and it has not been challenged by the Appellants. Hence, the question of examining the validity of the said public notice dated 23.04.2010 issued by the Regulatory Authority pertaining to levy and collection of development fees by DIAL does not arise. But no such public notice has been issued by the Regulatory Authority under the 2008 Act pertaining to levy and collection of development fees by MIAL. Hence, MIAL could not continue to levy and collect development fees at the major airport at Mumbai and cannot do so in future until the Regulatory Authority passes an appropriate order under Section 22A of the 1994 Act as amended by the 2008 Act.

7. It is urged by Mr. Altaf Ahmed and Mr. Sandeep Sethi, learned senior counsel for the Petitioner that the impugned notice is a public notice and by no stretch of imagination it can be construed as an order by the authority. Per contra, Dr. Singhvi appearing for DIAL has referred to paragraph 20 of the order passed by the Apex Court, which we have reproduced hereinabove, to highlight that it is an order. On a perusal of the order, penned by their Lordships there can be no scintilla of doubt that it has been treated as an imposition of tax in an ad-hoc manner. In this context, it is profitable to reproduce paragraph 6 of the conclusions, which is as follows:

> (vi) Nothing stated herein shall come in the way of any aggrieved person challenging the public notice dated 23.4.2010 issued by the Airports Economic Regulatory Authority in accordance with law.

8. Thus, leave and liberty was granted to challenge the notice in accordance with law and no opinion was expressed on such imposition.

9. Questioning the legal propriety of the aforesaid notice, learned senior counsel appearing for the Petitioners in both the writ petitions have contended as follows:

> (i) The passing of an ad-hoc order is not within the purview of the Act, if the stipulations in Section 13 of the 2008 Act are studiedly scrutinized inasmuch as where certain guidelines have been incorporated for determination of the functions of the authority and the primary function is based on the development fee.
>
> (ii) Assuming for the sake of argument, the regulatory authority has the jurisdiction/power to impose such a cess or tax on ad-hoc basis, there has been no application of mind and, in fact, what has been placed reliance upon in the said notice, are two letters dated 9th February, 2009 and 1st March, 2009, which have been quashed by the Apex Court.
>
> (iii) Once the infrastructure collapses, the super structure, on which the edifice is

built, is bound to collapse and hence, the order passed by the regulatory authority has to pave the path of extinction.

(iv) Neither cess or tax cannot be imposed in an ad-hoc manner without prior determination as it is a levy on a citizen and has to be absolutely guided by the parameters of imposition of cess or tax.

(v) The public notice, which has the characteristic of an order in a way, has already expired, if the paragraph 2.3 of the said notice is appropriately understood.

10. Learned senior counsel appearing for the Respondent raised the following contentions:

(a) The Petitioner can prefer an appeal before the appellate authority constituted under Section 17 of the 2008 Act in view of the broad language used under Section 18 of the 2008 Act.

(b) Solely because liberty was granted by the Apex Court to challenge the order it cannot be construed that the leave was granted to file a writ petition seeking relief in the nature of certiorari or mandamus as their Lordships have not expressed such an opinion. It is obligatory on the part of the Petitioners to take recourse to the statutory remedy not visit this Court invoking the extraordinary and inherent jurisdiction of this Court.

(c) The regulatory authority when has been conferred the power for determination of cess or tax finally, it always can be as an interim measure on the principle that what can be finally done, can also be done at an interim stage on the basis of the material available today.

(d) As the Apex Court has already interpreted that by the letter there has been a permission to DIAL to collect the levy, the same should not be axed by issue of a writ of certiorari as there is no manifest infirmity.

(e). The submission that there has been no application of mind and the notice issued by the regulatory authority is laconic, is totally sans substance as the letter clearly reveals that there is application of mind.

11. First we shall address to the issue, whether an appeal would lie to the Appellate Tribunal. Section 17 of the Act, which occurs in chapter IV deals with Appellate Tribunal and provides that Central Government by notification in the Official Gazette can establish an appellate tribunal to be known as the Airports Economic Regulatory Authority Appellate Tribunal. The Tribunal has been conferred the jurisdiction to adjudicate any dispute under Sub-section (a) and (b) of Section 18 and dispose of an appeal pertaining to any direction, decision or order of the Authority under the Act.

12. We will be failing in our duty, if we do not take note of a submission of Dr. Singhvi that the Petitioners are stake holder under Section 20 of the 2008 Act and, therefore, they can raise dispute under Section 17 of the Act. Whether they can raise a dispute at this stage or not need not be adverted to by us. What is required to be determined is whether under Section 18(2), the Petitioners can prefer an appeal. Section 18(2) reads as follows:

18(2) The Central Government or a State Government or a local authority or any person aggrieved by any direction, decision or order made by the Authority may prefer an appeal to the Appellate Tribunal.

(emphasis supplied.)

13. The said provision has to be read in juxtaposition with Sub-section (a) of Sub-Section 17(i) and (ii). They read as under:

17(a) adjudicate any dispute-

(i) between two or more service providers;

(ii) between a service provider and a group of consumer:

> Provided that the Appellate Tribunal may, if considers appropriate, obtain the opinion of the Authority on any matter relating to such dispute:
>
> > Provided further that nothing in this clause shall apply in respect of matters-
> >
> > (i) relating to the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under Sub-section (1) of Section 5 of the Monopolies and Restrictive Trade Practices Act, 1969;
> >
> > (ii) relating to the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under Section 9 of the Consumer Protection Act,1986;
> >
> > (iii) which are within the purview of the Competition Act, 2002;
> >
> > (iv) relating to an order of eviction which is appeal able under Section 28K of the Airports Authority of India Act, 1994.

14. The language employed under Section 18(2) is quite broadly worded. It includes "any person" "any direction" "decision or order". The legislature, as we are disposed to think has deliberately made the provision of appeal quite wide. It worth noting, sometimes the legislature uses the terms "every order". The said terms though may not relate to any procedural order, but if an order affects a party, he has a right to prefer an appeal. In this context, we may usefully refer to the decision in The Central Bank of India Ltd., v. Gokal Chand MANU/SC/0053/1966 : AIR 1967 SC 799. In the said case, a three Judges Bench of the Apex Court was considering the words "every order" used in Section 38(1) of Delhi Rent Control Act, 1958. In that context their Lordships have held thus:

> 3. The object of Section 38(1) is to give a right of appeal to a party aggrieved by some order which affects his right or liability. In the context of Section 38(1), the words "every order of the Controller made under this Act", though very wide, do not include interlocutory orders, which are merely procedural and do not affect the rights or liabilities of the parties. In a pending proceeding, the Controller may pass many interlocutory orders under Sections 36 and 37, such as orders regarding the summoning of witnesses, discovery, production and inspection of documents, issue of a commission for examination of witnesses, inspection of premises, fixing a date of hearing and the admissibility of a document or the relevancy of a question. All these interlocutory orders are steps taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding; they regulate the procedure only and do not affect any right or liability of the parties. The legislature could not have intended that the parties would be harassed with endless expenses and delay by appeals from such procedural orders. It is open to any party to set forth the error, defect or irregularity, if any, in such an order as a

ground of objection in his appeal from the final order in the main proceeding. Subject to the aforesaid limitation, an appeal lies to the Rent Control Tribunal from every order passed by the Controller under the Act. Even an interlocutory order passed under Section 37(2) is an order passed under the Act and is subject to appeal under Section 38(1) provided it affects some right or liability of any party. Thus, an order of the Rent Controller refusing to set aside an ex parte order is subject to appeal to the Rent Control Tribunal.

4. Similar considerations have induced the courts to give a limited construction on the apparently wide words of other statutes conferring rights of appeal. Section 202 of the Indian Companies Act, 1913 confers a right of appeal "from any order or decision made or given in the matter of the winding up of a company by the court." In Shankarlal Aggarwal v. Shankarlal Poddar this Court decided that these words, though wide, would exclude merely procedural orders or those which did not affect the rights or liabilities of parties.

15. In this context we may profitably refer to the decision in the case of Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement and Anr MANU/SC/0249/2010 : (2010) 4 SCC772 while interpreting Section 35 of the FEMA, the Apex Court has opined thus:

18. The argument that under Section 35 only appeals from final order can be filed has been advanced on a misconception of the clear provision of the Section itself. The Section clearly says that from "any decision or order" of the Appellate Tribunal, appeal can be filed to the High Court on a question of law.

19. The word "any" in this context would mean "all". We are of this opinion in view of the fact that this Section confers a right of appeal on any person aggrieved. A right of appeal, it is well settled, is a creature of statute. It is never an inherent right, like that of filing a suit. A right of filing a suit, unless it is barred by statute, as it is barred here under Section 34 of FEMA, is an inherent right (See Section 9 of the Code of Civil Procedure Code) but a right of appeal is always conferred by statute. While conferring such right Statute may impose restrictions, like limitation or pre-deposit of penalty or it may limit the area of appeal to questions of law or sometime to substantial questions of law. Whenever such limitations are imposed, they are to be strictly followed. But in a case where there is no limitation on the nature of order or decision to be appealed against, as in this case, the right of appeal cannot be further curtailed by this Court on the basis of an interpretative exercise.

20. Under Section 35 of FEMA, the legislature has conferred a right of appeal to a person aggrieved from "any" "order" or "decision" of the Appellate Tribunal. Of course such appeal will have to be on a question of law. In this context the word "any' would mean "all".

16. We have no ounce of doubt that an order or direction issued by the authority even if it is in the ad-hoc nature, can be challenged before the tribunal.

17. As an appeal would lie, as advised at present, we are not inclined to deal with the submissions which have been canvassed by the learned Counsel for the parties and grant liberty to the Petitioners to file an appeal before the appellate tribunal.

18. At this stage, learned Counsel for the Petitioners submitted that if the Court has thought of relegating the Petitioners to prefer an appeal for the purpose of efficacious adjudication regard being had to the lis in question, there should be an interim direction for not giving effect to the order dated 23rd April, 2010. Dr. Singhvi, learned senior counsel submitted that the balance of convenience and irreparable injury are in favour of the third Respondent inasmuch as the amount that is collected from the passengers does not go to its coffer, but goes to the Airports Authority of India, which is spent for development and, hence, it will be advisable and desirable

in law not to pass any kind of interdiction while asking the Petitioners to agitate their grievance before the Appellant forum. It is also contended by him that it is obligatory on the part of DIAL to collect the same as the Supreme Court has also not interdicted in such collection. Learned senior counsel has also invited our attention to paragraph 23(v), which pertains to the future collection to highlight that there is no justification to pass an interim order.

19. Resisting the aforesaid submissions with regard to injunction during the interregnum period, Mr. Ahmed and Mr. Sethi, learned senior counsel appearing for the Petitioners submitted that there has been illegal collection on the basis of the two letters dated 9th February, 2009 and 27th February, 2009, as the same have quashed by the Apex Court and there could not have been refunds to the passengers. The directions have been given to deposit the same before the Airports Authority. It is urged by them that the passengers have suffered for almost a span of two years with the levy and, therefore, balance of convenience as well as irreparable injury would tilt in their favour. Further, the learned senior counsel would canvass that the ad-hoc determination is bereft of reasons, which is the heart and soul of any kind of determination and, therefore, the same should not be given effect to as this will lead to price rise which will be borne by the consumers.

20. Having heard learned Counsel for the parties, we dispose of the writ petitions by recording the following conclusions and directions:

(a) The public notice dated 23rd April, 2010 is an ad-hoc order/direction on cess or tax in view of what has been stated in paragraph 20 of the Apex Court's decision in Civil Appeal No. 3612/2011

(b) The aforesaid order is appeal able under Section 18(2) to the Airports Economic Regulatory Authority Appellate Tribunal.

(c) The Petitioners may prefer an appeal within a period of two weeks from today before the Tribunal which shall hear the appeal on merits and not throw the same overboard on the ground of limitation. Along with memorandum of appeal, if an application for stay is filed, the same shall be decided by the Tribunal within a span of two weeks from the date of its presentation. Till the application for stay is dealt with by the Tribunal, the public notice 23rd April, 2010 shall not be given effect to.

(d) The present order shall not be construed as this Court has interdicted in the proceedings of the regulatory authority for final determination of the cess or tax as per law.

(e) The Tribunal shall decide the appeal within a span of 45 days.

21. Before we part with the case, we may hasten to clarify that we have not expressed opinion on any of the contentions canvassed by the learned Counsel for the parties and the Tribunal shall independently deal with the matter.