2023 INSC 1046

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Miscellaneous Application No.1721/2023 in C.A. No.8378/2018

DELHI INTERNATIONAL AIRPORT LTD. … Appellant

Versus

AIRPORTS ECONOMIC REGULATORY AUTHORITY & ORS. …Respondents

With:
Miscellaneous Application No.1710/2023 in C.A. No.5401/2019

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. We thought that our judgment in ***Delhi International Airport Limited v. Airport Economic Regulatory Authority of India***[1] would have resolved all the issues. It appears not.

[1] 2022 SCC Online SC 850.

2. Applications have been filed by both Delhi International Airport Limited (DIAL) and Mumbai International Airport Limited (MIAL) predicated on the discovery of what is stated to be a 'new and important piece of evidence', which was not within the knowledge of the applicants even after exercising due diligence. The applicants have referred to a letter dated 24.05.2011, which is an internal correspondence between the Ministry of Civil Aviation (for short 'MoCA') and the Airport Economic Regulatory Authority (for short 'AERA') *inter alia* stating that "Accordingly, in this case the proposed approach is to back solve the initial aeronautical Asset Base given the aeronautical charges. In the State Support Agreement, in Schedule-I the method for calculating Asset Base for the first regulatory period has been defined."

3. The aforesaid is stated to have given rise to an error apparent on the face of the record in paras 50 and 63 of the judgment.

4. If we turn to our judgment under the heading "Calculation of Hypothetical Regulatory Asset Base (HRAB)", we have proceeded on the basis that the two airports in question were not set up *de novo* but instead, existing airports were taken over. Consequently, assets as reflected in the books of accounts would record depreciation. This had created difficulty in arriving at a value of the Regulatory Base for the first year of the first control period. Apart from this, there was a common book of assets for several airports across India. Thus, the State Support Agreement (for short 'SSA') provided for HRAB to be derived by working backwards, which would have a cascading effect for

successive years and was thus crucial. In the formula in question this would imply that the term 'RB' as defined, thus, base calculation for RB_0 would have an impact on the calculation of RB_1 and for further years. HRAB was to determine RB_0.

5. In para 50 of the judgment, the controversy in relation to HRAB was set out. This Court gave its imprimatur in para 63 to the view adopted by AERA and TDSAT.

6. The submission on behalf of the applicants is that MoCA's letter dated 24.5.2011 relates back to the core issue of calculation of HRAB by the method of back solving. We have already recognized the cascading effect as stated aforesaid. The question was whether in terms of the SSA dated 24.06.2006, the HRAB has been correctly calculated.

7. In effect, it has been submitted that this Court confined its finding to the expression "pertaining to aeronautical services" but the aspect of 'single till' had not been dealt with and that HRAB should be computed on the basis of 'single till' mechanism. It is conceded that this aspect was not dealt with by the TDSAT either. Suffice to say that this Court proceeded on the basis of the opinion of the TDSAT and did not expand beyond the ambit of what the TDSAT had opined on.

8. In substance, the contention on behalf of the applicants is that the 'single till' mechanism was prevalent in the year 2008-09 where there was no

distinction between aeronautical and non-aeronautical revenue and the entire revenue, i.e., aeronautical and non-aeronautical were considered as composite revenue and tariff was fixed on a cost-plus basis. Thus, for determining the opening of HRAB for FY 2009-10, the entire revenue of the previous year, i.e., 2008-09 ought to have been considered.

9. A reference has also been made to a letter dated 18.06.2018 of the Airports Authority of India, which stated that "the airport charges were fixed on cost recovery principle….but allowing for all aeronautical revenue plus contribution from non-aeronautical revenues accruing from the operations of the airports to its operations." This has to be read in the context of the provisions of Schedule 1 of the SSA, and the submission is that the "hypothetical regulatory base will be computed on the entire revenue for the period between 01.04.2008 and 31.03.2009, i.e., aeronautical and non-aeronautical income to calculate the value of the regulatory base."

10. There are also some grounds raised qua categorization of fuel throughput charge (FTC) as an aeronautical service.

11. The prayer made is in the alternatives, i.e., either to modify the judgment or to remit the matter before the TDSAT for the limited issue of considering afresh the computation of HRAB.

12. In the reply, it has been stated that the issue relating to FTC is no more *res integra* in view of the judgment of this Court in paras 41 to 45. Insofar as

the issue of HRAB is concerned, the letter purported to be “new evidence” is only a clarificatory communication. The MoCA has subsequently clarified this issue to the effect that it has no role in providing any mechanism and has merely quoted that which has been provided in SSA and the ABN AMRO report.

13. The rest of the reply deals with the details and interpretation of the clauses of the agreements.

14. On having heard learned counsel for the parties, we are of the view that the nature of jurisdiction exercised by this Court is predicated on two specialist authorities/tribunals having applied their mind to it. It would be difficult to have a re-appreciation of evidence and facts, especially when the admitted position is that the TDSAT has not opined on it. It would thus not be appropriate to venture into this aspect. However, this letter being in the nature of an internal communication privy to the non-applicants, we believe it should have been placed before the concerned authorities. Whether it has any impact or not, it would be difficult for us to say at this stage until the opinion of the TDSAT is available.

15. We are, thus, inclined to adopt the alternative prayer of the applicants by directing that the effect of this document ought to be examined by the TDSAT. We leave it to the TDSAT to take a view on the same, uninfluenced by the fact that the earlier opinion of the TDSAT has received our imprimatur. Thus, the

TDSAT may for the limited issue *qua* computation of HRAB examine the effect of the letter now produced before us, i.e., the letter dated 24.05.2011 by the MoCA to the AERA, and take its own independent view on the impact of the same in computing HRAB and whether 'single till' mechanism should be the basis of the computation. Needless to say, that in either situation the effected parties would have a remedy before this Court.

16. We dispose of the applications in the aforesaid terms.

....……J.
[Sanjay Kishan Kaul]

....……J.
[M. M. Sundresh]

New Delhi.
December 04, 2023.