SUPREME COURT OF INDIA

Jt.Action Commit. of Airlines

Vs.

Director General of Civil

C.A.No.3844 of 2011

(P.Sathasivam and B.S.Chauhan,JJ.,)

03.05.2011

JUDGMENT

Dr.B.S.Chauhan, J.,

SLP(Civil)No.27814 of 2008

1. Leave granted.

2. This appeal has been preferred against the judgment and order dated 14.8.2008 passed by the High Court of Judicature at Bombay dismissing the Writ Petition No. 1687 of 2008, wherein the appellants had challenged the validity and propriety of a Circular issued by the Director General of Civil Aviation, (hereinafter called as `DGCA'), respondent No.1 dated 29.5.2008, to the effect that Civil Aviation Requirements (hereinafter called as the `CAR') dated 27.7.2007 had been kept in abeyance.

3. Facts and circumstances giving rise to this case are that the appellants are the Joint Action Committees of the Airlines Pilots Association representing several airlines operating in India. The dispute relates to the Flight Time (FT) and Flight Duty Time Limitation (FDTL), as there is some variance between the Aeronautical Information Circular (hereinafter called as `AIC') No.28/92 and the CAR 2007. Vide AIC 28/92, FT and FDTL had been defined and fixed depending upon the distance of destination and number of landings. The rest period for the pilots stood substantially changed by the CAR 2007 to the greater benefit of the pilots. However, a large number of representations had been made by the airlines to the DGCA and the Central Government, respondents herein, to the effect that it was practically not possible for them to ensure compliance of CAR 2007 and thus, the same was kept in abeyance. By a subsequent order dated 2.6.2008, the AIC 28/92 was revived.

4. Appellants challenged the Circular dated 29.5.2008 before the High Court on the grounds, inter-alia, that even if CAR 2007 is kept in abeyance, the AIC 28/92, which stood obliterated, could not be revived; the CAR 2007 had been kept in abeyance by the order of the Authority, which did not have the competence to interfere in the functioning of the DGCA, respondent

No. 1. The statutory authority i.e. DGCA alone is competent to pass the appropriate order in the matter. The Circular dated 29.5.2008 has seriously jeopardised the safety of passengers and the same was passed in flagrant violation of the principles of natural justice. However, the High Court did not accept the submissions of the appellants, rather rejected the same in an elaborate judgment. Hence, this appeal.

5. Shri K.K. Venugopal, learned senior counsel appearing for the appellants has agitated all the issues raised before the High Court. Once AIC 28/92 stood obliterated, the question of its revival/application/enforcement on putting the CAR 2007 in abeyance could not arise. More so, the orders by the DGCA make it abundantly clear that the same had been passed on instructions from the competent authority. The order stood vitiated as the same had not been passed by the DGCA on its own. Law does not permit the keeping of the subordinate legislation in abeyance without following the procedure, prescribed for its enactment. The Circular dated 29.5.2008 had been issued in violation of the guidelines stipulated for issuance of the CAR. The judgment and order impugned herein is liable to be set aside and the appeal deserves to be allowed.

6. On the contrary, Shri Parag P. Tripathi, learned ASG, Shri C.U. Singh and Shri L. Nageshwar Rao, learned senior counsel appearing for the respondents, have submitted that the writ petition filed by the appellants before the High Court was not maintainable as none of the necessary parties had been impleaded therein. However, the respondents, i.e. the airlines got themselves impleaded in the petition. The AIC and CAR fall within the category of executive instructions which simply provide the guidelines for persons working in the department. The said administrative instructions do not have any statutory force and thus can be kept in abeyance, altered or replaced by another executive instructions. Some of the appellants themselves challenged the CAR dated 27.7.2007 by filing Writ Petition No.2176 of 2007 on the grounds that the said CAR revealed shocking deviations and selective exclusions from international safety requirements in respect of FDT and FTL. It has further been submitted therein that the amendment to FDT and FTL in the said CAR was neither in conformity with the existing safety rules, nor with settled principles and procedures adopted by the similar international regulatory authorities. However, the said writ petition stood dismissed as withdrawn vide order dated 31.1.2008. Once the CAR dated 27.7.2007 has been put under suspension, the same is also under challenge by the appellants which also include some of the petitioners in Writ Petition No. 2176 of 2007. Their conduct is tantamount to approbate and reprobate which is not permissible in law. The DGCA had communicated vide letter dated 29.5.2008 its decision to keep the CAR 2007 in abeyance on the basis of advice/decision taken by the competent authority, i.e. the Central Government. The Hon'ble Minister was the competent authority under the Business Rules 1961. The DGCA himself had also participated in the process. The order dated 2.6.2008, providing that AIC 28/1992 would be effective once again, was not challenged by the appellants for the reasons best known to them. An order which is not under challenge, could not be quashed. Thus, no fault can be found with the impugned judgment and order. The appeal lacks merit and is liable to be dismissed.

7. We have considered the rival submissions made by learned counsel for the parties and perused the record.

Relevant Statutory Provisions:

8. It may be necessary to make reference to relevant provisions of the Aircraft Act, 1934 (hereinafter referred to as `Act 1934'). Section 4A of the Act 1934 provides for safety oversight functions that the DGCA shall perform the safety oversight functions in respect of matters specified in this Act or the rules made thereunder. Section 5 empowers the Central Government to make rules. Sections 5(2) and 5-A of the Act 1934 read as under:

> "(2) Without prejudice to the generality of the foregoing power, such rules may provide for- .....
> (m) the measures to be taken and the equipment to be carried for the purpose of ensuring the safety of life. 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 (aa), (b), (c), (e), (f),(g), (ga), (gb), (gc), (h), (i), (m) and (qq) of sub-section (2) of section 5, to any person or persons using any aerodrome or engaged in the aircraft operations, 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 ofIndia 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.
> Section 14 provides that rules shall be made after publication.

9. The provisions of the Aircraft Rules, 1937 (hereinafter referred to as `Rules 1937') read as under:

> "3(22)- "Flight time"-
> (i) in respect of any aeroplane, means the total time from the moment of the aeroplane first moves for the purpose of taking off until the moment it finally comes to rest at the end of the flight; and .....
> .....
>
> 29C. Adoption of the Convention and Annexes.- The Director-General may lay down standards and procedures not inconsistent with the Aircraft Act 1934 (22 of 1934) and the rules made thereunder to carry out the Convention and any Annex thereto. 42A. Pilot not to fly for more than 125 hours during any period of 30 consecutive days.

133A. Direction by Director-General- (1) The Director-General may, through Notices to Airmen (NOTAMS), Aeronautical Information Publication, Aeronautical Information Circulars (AICs), Notice to Aircraft Owners and Maintenance Engineers and publication entitled Civil Aviation Requirements issue special directions not inconsistent with the Aircraft Act, 1934 (22 of 1934) or these rules, relating to the operation, use, possession, maintenance or navigation of aircraft flying in or over India or of aircraft registered in India.

(2) The Civil Aviation Requirements under sub-rule (1) shall be issued after placing the draft on the website of the Directorate General of Civil Aviation for a period of thirty days for inviting objections and suggestions from all persons likely to be affected thereby:

Provided that the Director General may, in the public interest and by order in writing, dispense with the requirement of inviting such objections and suggestions.

(3) Every direction issued under sub-rule (1) shall be complied with by the persons or persons to whom such direction is issued."

(Emphasis added)

10. The case requires to be considered in the light of the aforesaid submissions, the factual foundation laid by the parties and the relevant statutory provisions.

11. Admittedly, a Writ Petition No. 2176 of 2007 was filed by some of the present appellants seeking the following reliefs:

"(a) That this Hon'ble Court be pleased to hold and declare that the impugned amendment dated 27.7.2007 of Civil Aviation Requirements with the subject "Flight Duty Time and Flight Time Limitations- Flight Crew Members" is illegal, irrational and inconsistent with the settled principles of law and practice.

(b) That this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India, directing the respondent DGCA, not to proceed with the impugned amendment dated 27.7.2007 without conducting a thorough scientific study by an expert committee consisting of Aviation Medical Specialists under the guidance of an impartial medical authority such as DGCA-Air, IAF who has no commercial or vested interests.

(c) That pending the hearing and final disposal of this petition, this Hon'ble Court be pleased to direct the respondent to maintain status quo in respect of Flight Duty Time Limitations (FDTL) and Flight Time Limitations (FTL) as on June 2007."

12. The same was withdrawn vide order dated 31.1.2008 and the order runs as under:

> "The learned counsel for the petitioners submits that the grievance has already been redressed and he does not want to pursue the petition. Petition dismissed as not pressed."

The appellants/writ petitioners therein had also submitted that AIC 28/92 was a most scientific and properly formulated direction and CAR 2007 was based on a draft which revealed shocking deviations and selective exclusions from safety regulations in respect of FDT and FTL, adopted/accepted internationally.

13. In *R.N. Gosain v. Yashpal Dhir*[1], this Court observed as under:-

> "Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."

14. The doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily.

(Vide*: Babu Ram @ Durga Prasad v. Indra Pal Singh (D) by L.Rs.*[2]*, P.R. Deshpandey v. Maruti Balaram Haibatti*[3]*, and Mumbai International Airport Private Limited v. Golden Chariot Airport & Anr.*[4]*,*

15. In view of the above, it is clearly evident that some of the present appellants, had challenged the CAR 2007, wherein it had been submitted that AIC 28/92 was based on better scientific studies. The same remained in operation for more than 17 years and no one had ever raised any grievance in respect of its contents or application. However, it appears that during the pendency of the said writ petition, grievance of those petitioners stood redressed and, thus, they withdrew the writ petition. They did not even ask the court to reserve their right to file a fresh petition challenging the same, in case the need arose, as required in the principle enshrined in Order XXIII of the Code of Civil Procedure, 1908. Such a conduct of those appellants in blowing hot and cold in the same breath is not worth approval.

16. The appellants have raised the issue as to whether order dated 29.5.2008, keeping the CAR 2007 in abeyance could be passed without following the procedure prescribed in CAR dated 13.10.2006. CAR dated 13.10.2006 provides for a detailed procedure for the promulgation of CAR. Clause 3.3 provides that whenever a change is effected to a CAR, it

shall be termed as a revision and effective date of the revision of CAR shall be indicated therein. According to clause 4 thereof, if a new CAR or a revision to the existing CAR is proposed to be issued, the draft of the proposed CAR/revision shall be posted on DGCA's website or circulated to all the persons likely to be effected thereby inviting their objections/suggestions. Objections so received shall be analysed, considered and incorporated in case the same are found to be acceptable, before the promulgation of CAR.

17. In S*tate of A.P. & Ors. v. Civil Supplies Services Assn. & Ors.*[5], , the government had issued a notification that provided, inter-alia, that certain rules which had earlier been framed by the government would be kept in abeyance. The Administrative Tribunal quashed the same directing the government to frame the rules in a particular manner and to give partial effect to the rules kept in abeyance. However, on appeal, this Court set aside the order of the Tribunal and held that the Tribunal could neither have given directions to the Government to frame rules in any particular manner, nor to give partial effect to the rules kept in abeyance, as the order had exclusively been legislative in character. Thus, in exceptional circumstances, it may be permissible for the statutory authority to put subordinate legislation in abeyance. However, such an order being legislative in character, is not warranted to be interfered by the Court/Tribunal.

18. The CAR 2007 is neither a statute nor a subordinate legislation. Provisions contained in Sections 4A, 5 & 5A of the Act 1934 and Rules 42A & 133A of the Rules 1937, make it evident that the same are merely executive instructions which can be termed as "special directions". The executive instruction can supplement a statute or cover areas to which the statute does not extend, but it cannot run contrary to the statutory provisions or whittle down their effect. (Vide: *State of M.P. & Anr. v. M/s. G.S. Dall & Flour Mills*[6]

19. In *Khet Singh v. Union of India*[7], this Court considered the scope and binding force of the Executive instructions issued by the Narcotic Bureau, New Delhi and came to the conclusion that such instructions are binding and have to be followed by the investigating officer, coming within the purview of Narcotic Drugs and Psychotropic Substances Act, 1985, even though such instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by them during the investigation of the crime.

20. A Constitution Bench of this Court in *Sant Ram Sharma v. State of Rajasthan & Ors.*[8], held as under:

> "It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."
>
> (Emphasis added)

Thus, an executive order is to be issued keeping in view the rules and executive business, though the executive order may not have a force of law but it is issued to provide guidelines to all concerned, who are bound by it.

21. In *Union of India & Anr. v. Amrik Singh & Ors.*[8], this Court examined the scope of executive instructions issued by the Comptroller and Auditor General for making the appointments under the provisions of Indian Audit and Accounts Department (Administrative Officers, Accounts Officers and Audit Officers) Recruitment Rules, 1964, and came to the conclusion that the CAG of India had necessary competence to issue departmental instructions on matters of conditions of service of persons serving in Department, being the Head of the Department, in spite of the statutory rules existing in this regard. The Court came to the conclusion that an enabling provision is there and in view thereof, the CAG had exercised his powers and issued the instructions which are not inconsistent with the statutory rules, the same are binding for the reason that the provision in executive instructions has been made with the required competence by the CAG.

22. Thus, it is evident from the above that executive instructions which are issued for guidance and to implement the scheme of the Act and do not have the force of law, can be issued by the competent authority and altered, replaced and substituted at any time. The law merely prohibits the issuance of a direction, which is not in consonance with the Act or the statutory rules applicable therein.

23. This Court in State of U.P. & Ors. v. Hirendra Pal Singh etc., JT (2010) 13 SC 610, considered a large number of judgments particularly in Firm A.T.B. Mehtab Majid & Co. v. State of Madras & Anr., AIR 1963 SC 928; B.N. Tewari v. Union of India & Ors., AIR 1965 SC 1430; Indian Express Newspapers (Bombay) Private Ltd. & Ors. v. Union of India & Ors., AIR 1986 SC 515; West U.P. Sugar Mills Association & Ors. v. State of U.P. & Ors., AIR 2002 SC 948; Zile Singh v. State of Haryana & Ors., (2004) 8 SCC 1; and State of Kerala & Anr. v. Peoples Union for Civil Liberties, Kerala State Unit & Ors., (2009) 8 SCC 46, and came to the conclusion that once the old rule has been substituted by the new rule, it stands obliterated, thus ceases to exist and under no circumstance, can it be revived in case the new rule is held to be invalid and struck down by the Court, though position would be different in case a statutory amendment by the Legislature, is held to be bad for want of legislative competence. In that situation, the repealed statutory provisions would revive automatically.

24. It is not a case of automatic revival of AIC 28/92, but there is a specific order by the competent authority in exercise of statutory powers whereby the AIC 28/92 has been revived. Since the instructions which have been issued under the letter dated 2.6.2008 are merely in the form of interim measures, the question of the applicability of the principles of natural justice does not arise. The suspension of CAR 2007 had created a vacuum, and it was, therefore, necessary for the DGCA to take an appropriate decision during the finalisation of the CAR, pursuant to the report to be submitted by a Committee constituted by the Government. The appellants did not challenge the subsequent order dated 2.6.2008, by virtue

of which AIC 28/92 dated 10.12.1992 came into force which had also been nothing but special directions and remained in force from 1992 to 2007.

25. In the High Court it was sought to be contended on behalf of the appellants that as the order dated 2.6.2008 was in continuation of the Circular dated 29.5.2008, it was not necessary for the appellants to challenge the said order separately. The High Court held:

> "We are afraid the contention is not well-founded. While the Circular dated 29.5.2008 relates to the subject of suspension of CAR of 2007, the letter dated 2.6.2008 refers to instructions to the effect that AIC 28/92 would be effective till CAR is approved by following the procedure laid down in CAR of 13.10.2006. The subject matter of two documents being different, merely because the second document is in continuation of the first document, it cannot be said that the challenge to the first document would ipso facto include challenge to the second document. The letter dated 2.6.2008 is not the effect of the Circular dated 29.5.2008, but the same has been issued in exercise of powers under Rule 133A of the Rules 1937 to meet the circumstances which have resulted on account of CAR 2007, being suspended. The cause for issuance of the letter dated 2.6.2008 is not directly flowing from the Circular dated 29.5.2008, but it was issued for the consequences which followed the issuance of the Circular dated 29.5.2008. Being so, in case the appellants wanted to challenge the communication dated 2.6.2008, they ought to have challenged the same by raising specific ground in that regard by laying proper factual foundation in support of such ground and only then, they could have invited the order in that regard from the court."

In absence of the challenge to the same, it is immaterial to determine as to whether the same had been issued by the competent authority or not, as it is not the case of statutory rules i.e. subordinate legislation. The question of following any procedure for replacement is not warranted.

26. The contention was raised before the High Court that the Circular dated 29.5.2008 has been issued by the authority having no competence, thus cannot be enforced. It is a settled legal proposition that the authority which has been conferred with the competence under the statute alone can pass the order. No other person, even a superior authority, can interfere with the functioning of the Statutory Authority. In a democratic set up like ours, persons occupying key positions are not supposed to mortgage their discretion, volition and decision making authority and be prepared to give way to carry out commands having no sanctity in law. Thus, if any decision is taken by a statutory authority at the behest or on suggestion of a person who has no statutory role to play, the same would be patently illegal. (Vide: The Purtabpur Co., Ltd. v. Cane Commissioner of Bihar & Ors., AIR 1970 SC 1896; Chandrika Jha v. State of Bihar & Ors., AIR 1984 SC 322; Tarlochan Dev Sharma v. State of Punjab & Ors., AIR 2001 SC 2524; and Manohar Lal (D) by L.Rs. v. Ugrasen (D) by L.Rs. & Ors., AIR 2010 SC 2210).

27. Similar view has been re-iterated by this Court in Commissioner of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16; Bahadursinh Lakhubhai Gohil v. Jagdishbhai M.

Kamalia & Ors., AIR 2004 SC 1159; and Pancham Chand & Ors. v. State of Himachal Pradesh & Ors., AIR 2008 SC 1888, observing that an authority vested with the power to act under the statute alone should exercise its discretion following the procedure prescribed therein and interference on the part of any authority upon whom the statute does not confer any jurisdiction, is wholly unwarranted in law. It violates the Constitutional scheme.

28. In view of the above, the legal position emerges that the authority who has been vested with the power to exercise its discretion alone can pass the order. Even senior official cannot provide for any guideline or direction to the authority under the statute to act in a particular manner. It cannot be said that the Circular dated 29.5.2008 was either issued illegally or without any authority. Admittedly, the DGCA is competent to issue special directions and the same had been issued by him, though may be with the consultation of some other authorities. However, it cannot be denied that the DGCA was involved in the process. The authority which had been in consultation with the DGCA had been provided for under the business rules and it cannot be held by any stretch of imagination that the Ministry of Civil Aviation is not an authority concerned with the safety measures involved herein. The authorities are competent to issue the said regulations. Exercise of the power is always referable to the source of power and must be considered in conjunction with it. In view of the fact that the source of power exists, there is no occasion for the Court to link the exercise of power to another source which may invalidate the exercise of power.

29. The High Court has observed that in the instant case, the reviving of AIC 28/92 is in question, even the keeping in abeyance of the CAR, whether by the DGCA or other competent authority, is in issue. However, it is merely an interregnum arrangement till the new CAR comes into picture. After keeping the CAR 2007 in abeyance, an Expert Committee was constituted which held a large number of meetings with various stakeholders. The final report has been submitted by the Expert Committee to the Government in September 2010 for consideration. The Government has accepted FDTL Committee report and advised the DGCA to issue draft CAR for consultation and the same has been put on the DGCA website inviting comments or objections within a period of 30 days. It is a question of challenging the public policy and it is well settled that public authorities must be given a very long rope, full freedom and full liberty in framing policies, though the discretion of the authorities cannot be absolute and unqualified, unfettered or uncanalised. The same can be the subject matter of judicial scrutiny only in exceptional circumstances where it can be shown to be arbitrary, unreasonable or violative of the statutory provisions. More so, the courts are not well equipped to deal with technical matters, particularly, where the decisions are based on purely hyper-technical issues. The court may not be able to consider competing claims and conflicting interests and conclude on which way the balance tilts. More so, the whole exercise has been done to bring a new CAR into existence for which the process has already been initiated and a draft CAR was put on the DGCA website giving opportunity to all concerned to submit their objections/suggestions within a period of 30 days and a new CAR is likely to come into existence very soon.

30. The High Court held that DGCA is directly under the control of Civil Aviation Ministry and considering the rules of business, the Government being the appropriate authority to formulate necessary policy in relation to the subject matter in issue, and the Government in its wisdom having decided after taking into consideration all the representations made from various sections, has appointed a Committee to formulate CAR in relation to the matters enumerated under order dated 29.5.2008, and on that count, the DGCA in exercise of its power under Rule 133A r/w Rule 29C of the Rules 1937 issued the Circular dated 29.5.2008, and therefore, no fault can be found with the same. Being so, we are in agreement with the finding recorded by the High Court that even assuming that there is a challenge to the communication dated 2.6.2008 in the petition, the same is to be considered as devoid of substance as undisputedly, the DGCA has ample power to issue such instructions or directions in exercise of its power under the Rule 133A r/w Rule 29C of the Rules 1937. Since, the appellants have not been able to point out any provision even for issuance of instructions for such interregnum period, the provisions of CAR of 13.10.2006 would be attracted in the matter.

31. In view of the above, we do not find any force in the appeal, it is accordingly dismissed. No order as to costs. Before parting with the case, we would like to point out that in the facts and circumstances of the case, as the process to bring new CAR in existence is going on, the same should be concluded expeditiously in accordance with law.

[1]*AIR 1993 SC 0352*
[2]*(1998) 6 SCC 0358*
[3]*(1998) 6 SCC 0507*
[4]*(2010) 10 SCC 0422*
[5]*(2000) 9 SCC 0299*
[6]*(1992) supp. 1 SCC 0150*
[7]*AIR 2002 SC 1450*
[8]*AIR 1994 SC 2316*