

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 23rd November, 2021

MA No.82 of 2021
IN
AERA Appeal No.2 of 2021

Mumbai International Airport Ltd.

....Appellant

Versus

Airport Economic Regulatory Authority of India & Anr.

....Respondents

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. SUBODH KUMAR GUPTA, MEMBER

For Appellant

: Mr. Abhishek Manu Singhvi, Sr. Advocate
Ms. Amrita Narayan, Advocate
Mr. Ashwin Rakesh, Advocate

Respondent No.1(AERA)

: Mr. Reena Khair, Advocate
Mr. Raheel Kohli, Advocate

Mr. Nishant Menon, Advocate

Respondent No.2(FIA)

: Mr.Buddy Ranganathan, Sr. Advocate
Mr. Prantar Basu Chaudhury, Advocate
Ms. Nishtha Kumar, Advocate
Mr. Akash Lamba, Advocate

ORDER

By S.K. Singh, Chairperson – This appeal has been preferred by the appellant/applicant against Order No.64/2020-21 dated 27.02.2021 passed by Airport Economic Regulatory Authority of India(AERA) in respect of Mumbai International Airport Ltd. (MIAL) operating Chhatrapati Shivaji Maharaj Airport, Mumbai. It is a tariff order for the Third Control Period which covers the period between 01.04.2019 to 31.03.2024. The appeal was filed on 30.03.2021. Along with the appeal, MA No.82/2021 was also pressed on 13.07.2021. The prayer in the MA is for an interim relief in favour of the appellant by way of stay of the effect and operation of the impugned order dated 27.02.2021 till the final adjudication of the appeal by this Tribunal. The appeal was admitted for hearing and time was granted to AERA for filing a reply/short reply at least in respect of issues involved in the interim relief. A reply to the MA as well as a rejoinder to such reply is already on record. On behalf of Federation of Indian Airlines(FIA) impleadment was sought and the same was allowed on 29.09.2021. FIA was

added as respondent No.3. Further time was granted for filing reply and rejoinder. Reply of respondent No.3 was filed on 27.10.2021 to which a rejoinder was filed on 15.11.2021. Parties have been heard in detail in respect of MA No.82/2021.

2. Learned Senior Counsel for the appellant/applicant has highlighted the fact that on account of impugned order coming into effect from 01.04.2021, the aeronautical tariff has been reduced by 38.37% as compared to the aeronautical tariff fixed last for the financial year 2019 which was the last year of the Second Control Period. It is the case of the appellant/applicant that AERA has shown no regard to the prevailing market conditions and implementation of the impugned order will add to the financial distress of the applicant by affecting its financial viability. It has also been submitted by Learned Senior Counsel that impugned order will adversely affect applicant's ability to arrange funds for further investments for the purpose of revenue generation. The difficulty in arranging loan was attributed to market conditions due to which allegedly the credit grading of the applicant went down even from 'B' to 'C'.

3. In particular, a grievance was raised that AERA is not justified in first deciding to recover the surplus of Rs.1462.58 crores generated during the last control periods and in reducing the Target Revenue to that extent. Further

grievance is that AERA has acted arbitrarily in not accepting appellants demand for imposing higher rates of Development Fee on the passengers and in ignoring various capital expenditures planned to be incurred, on the pretext of providing for the same when the capital expenditure is actually incurred. According to the appellant this would cause further revenue loss and shall impede the functioning and viability of the airport.

4. Certain decisions/determination by AERA such as not including cost of runway re-carpeting in capital expense as an asset have been highlighted in support of the plea that appellant/applicant has a good *prima facie* case for seeking stay of order under appeal.

5. It has also been submitted that reduction of aeronautical tariff by 38.37% will have an impact of more than Rs.2844 crores and will cause an irreparable injury by way of forced reduction in maintenance standards of the airport.

6. The financial model pleaded by the appellant for the period of COVID according to the applicant ought to have been accepted fully but several suggestions have been ignored. Lastly, it has been submitted that balance of convenience also lies in favour of the appellant because if extra revenue is

generated as surplus it can always be subjected to truing-up while fixing aeronautical tariff for the next control period. Such a procedure, as per submission, will not cause prejudice to anyone.

7. In reply, learned counsel for AERA has strongly opposed the prayer for interim relief. According to her, the appellant should have clearly disclosed in the MA that collections during the earlier period has resulted in an excess collection of Rs.1462 crores approximately and it has rightly not been pleaded that such excess should not be adjusted. According to her some stray issues raised for the purpose of interim stay of the impugned tariff order do not reflect the full implication of the order and its impact on the airlines passengers who actually have to pay the excess amount but are deprived of its return due to absence of any mechanism for refund to the actual payer. She has highlighted that there is no illegality or error on the part of AERA in deciding to recover the surplus collection through the accepted norms and mechanism of truing-up. For this purpose, the projected Target Revenue for the Third Control Period has been reduced only by the excess amount so as to facilitate recovery over the Third Control Period. She has referred to various parts of the impugned tariff order to highlight that large number of suggestions or demands of the appellant on account of COVID have been accepted for the balance term of the Third Control Period when in fact the COVID effect

had reduced and the numbers of passengers in the major airports is rising significantly. According to submissions, in case the excess amount was not to be recovered, the aeronautical tariff would not have appeared lower by 38.70% rather it would have been higher when compared to earlier aeronautical tariff rate. The improvement in the COVID situation will also, according to AERA, work to great advantage of the appellant. According to the submissions, the appellant does not have a good *prima facie* case nor balance of convenience to require stay of the impugned tariff which is already delayed by about two years.

8. Learned counsel for the FIA has also strongly opposed interim stay of the impugned tariff order. According to him such stay would revive the earlier tariff which has already resulted in huge surplus to the appellant. He has submitted that on no specific count the appellant has made out a case for granting him higher tariffs. He has also submitted that interim relief sought by the appellant actually amounts to asking for mandatory injunction for the earlier order to continue although it has spent its force long back. He has relied upon judgment of the Hon'ble Supreme Court in the case of **Dorab Cawasji Warden Vs. Coomi Sorab Warden & Ors. – (1990) 2 SCC 117** to submit that the guidelines noticed in Para 16 for grant of mandatory injunction require that the plaintiff must not show only a *prima facie* case but a strong case for trial; it should become necessary for

preventing irreparable or serious injury which normally cannot be compensated in terms of money and the balance of convenience is in favour of one seeking such relief. It is noted that learned counsel for the appellant has referred to paras 12 and 15 to explain this judgment. According to him consequences of a stay order will follow but that will not render “the stay” a mandatory injunction. According to him such technical pleas can not stand in the way of passing a just interim order.

9. Learned counsel for FIA has shared on screen and also filed hard copies of ratings by CRISIL. The document is not disputed and shows that rating on 08.09.2021 show Mumbai International Airport Ltd. – “CRISIL A+/Stable” assigned to Bank Debt and non-convertible debentures. This rating has of course come during the pendency of the petition but it shows that as on date the appellant enjoys good rating and hence it is not, on that account, disabled in arranging loans.

10. In rejoinder, Learned Senior Counsel for the appellant has reiterated the earlier submission and has further added that since appeal is continuation of original proceeding, stay of the impugned order will not amount to a mandatory injunction; rather it will be continuance of the *status quo* existing before passing of the impugned order. It is the case of the appellant that in view of mechanism of

truing-up available in such matters, no prejudice will be caused to either of the parties.

11. Having considered the rival submissions it is found that the tariff order for Third Control Period has already been delayed and no good case is made out for delaying its implementation any further. It will not serve any useful purpose to ensure as to who has caused the delay but recovery of surplus generated during the earlier period is required to be trued up/adjusted in the interest of justice. This can be done not by continuing with the earlier tariffs but by the new tariffs under challenge in this appeal.

12. The Regulator, AERA has considered and accepted many of the suggestions of the appellant made in the light of COVID situation. Some criticism with regard to one or two particular items may or may not be found acceptable at the time of final hearing, but in any event they do not make out a *prima facie* case requiring stay of the current tariff order.

13. Being too generous to the airport operator at the cost of the paying public will not promote interests of justice and the purpose of Aeronautical Tariff regulation. Truing-up may work either way and does not require AERA to ensure that the airport operator must always have a surplus. In case it is required to

arrange finances on loan etc., the cost of loan/interest will be fairly considered at the time of truing-up for control on funds for Capex. The Regulator has to look to the relevant facts and apply its mind in a fair manner. Hence, at this stage no case is made out for stay of the impugned tariff order. Appellant does not have balance of convenience in its favour or even strong case of irreparable injury which is necessary for the interim relief prayed which is in essence a prayer for mandatory injunction. The example of pendency of suit even during appeal is not apt in the present case in view of statutory requirement that there should be a tariff order for each control period. The nature of order does not warrant its stay. The mechanism of truing-up does not favour the appellant in showing balance of convenience or irreparable injury.

14. For all the aforesaid reasons, the prayer for interim relief made in MA No.82/2021 is declined. The MA is disposed of accordingly.



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(S.K. Singh)
Chairperson

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(Subodh Kumar Gupta)
Member