AIRPORTS ECONOMIC REGULATORY AUTHORITY
APPELLATE TRIBUNAL : NEW DELHI

APPEAL NOS.04 AND 05 OF 2012

[Under Section 18(2) of the Airports Economic Regulatory Authority of India Act, 2008 against the order No.36/2011-12 dated 06.03.2012 passed by the Airports Economic Regulatory Authority of India]

CORAM

Hon'ble Mr. Justice V.S.Sirpurkar
Chairman

Hon'ble Mr. Rahul Sarin,
Member

Hon'ble Mrs. Pravin Tripathi
Member

In the matter of :

1. All Kerala Cargo Movers Association
   Airport Plaza Building,
   Kondotty KP VIII/154,
   Calicut Airport P.O., Malappuram District,
   Kerala – 673647.

2. Calicut Airport Area Pravasi Congress,
   PMR-Arcade, Calicut Airport,
   Malappuram District, Kerala-673647 ….Appellants

Versus

1. Airports Economic Regulatory
   Authority of India,
   Area Building, Administrative Complex,
   Safdarjung Airport, New Delhi-110003.

2. Kerala State Industrial Enterprises Ltd.,
   St. Joseph's Press Building,
   Cotton Hill, Vazhuthacaud
   Thiruvananthapuram,
   Kerala-695014. ….Respondents

O R D E R

PER JUSTICE V.S. SIRPURKAR, CHAIRMAN

This judgment shall dispose of two appeals, namely No.04/2012 and No.05/2012, filed by All Kerala Cargo Movers Association and Anr. While the appeal No.4/2012 pertains to Kozhikode Airport, the appeal No.5/2012 pertains to Thiruvananthapuram Airport.

2. The parties are common in both the appeals. The first appellant claims to be representative association for the cargo services providers, while the second appellant claims to represent Non-resident Indian (NRI) Passengers. In both the appeals, the Airports Economic Regulatory Authority has in exercise of its powers conferred by Section 13(1)(a) of the Act fixed the tariff for the cargo services provided by the second respondent, the Kerala State Industrial Enterprises (KSIEL) for the first tariff year 2011-12 with effect from 15.03.2012 for the first five year control period that is with effect from 01.04.2011. In appeal No.04/2012 (Kozhikode Airport), the concerned Authority fixed the tariff provided by the second respondent therein namely KSIEL at Thiruvananthapuram International Airport for the first tariff year that is 2011-12 with effect from 15.03.2012 of the first five year control period that is with effect from 01.04.2011. Since the common questions arise in both the appeals and since the parties are common, we propose to dispose of these appeals by

services at various airports and sea ports across the country. While the second appellant is an association of Non-resident Indian (NRI) Passengers availing cargo facilities in various airports. The common grievance in both the appeals is that said determination of the tariff was done by the respondent No.1 Authority without consulting and intimating either of the appellants. For this purpose, in both the appeals, reliance is placed on Section 13, which categorically lays down the exact procedure required to be followed by respondent No. 1 Authority while determining the tariff. The contentions raised by the learned counsel is that the respondent No.1 Authority has to take into consideration a number of factors while exercising its powers for determining the tariff and this exercise being mandatory cannot be given a go by.

4. The learned counsel also relied on the provisions 13(4) of the Act, which requires the authority to ensure transparency while exercising its power and discharge its functions. The learned counsel submits that holding of due consultation with all the stake holders and secondly, allowing all the stake holders to make their submissions to the Authority and thirdly, to make all the decisions of the respondent No.1 Authority fully documented are the three essential features. According to the learned counsel, both the appellants are stakeholders as defined under Section 2(O) of the Act, being a licensee of an airport and also being an organization which provides aeronautical services. The learned counsel

Section 2(a) of the Act which defines ‘aeronautical’ services which includes cargo facility also. According to the learned counsel, the first appellant provides cargo facility at various airports including the Kozhikode and Thiruvanthapuram Airports while the second appellant is an association of NRI passengers, the members of which avail cargo facility at various airports including the above mentioned two airports.

5. The learned counsel invited our attention that this being so, as per the guidelines on stakeholders consultation, more particularly, because of para 5.2, that all the associations engaged in cargo facility are duly identified in the guidelines and the Authority was bound to consult such agencies. Our attention was also invited at para-7 of the guidelines stating that as regards the cargo facility users like association of freight forwarders, air cargo agents, custom house agents etc. would be consulted so as to represent the interests of the cargo facility users and such associations should be treated as stakeholders and as such, the Authority would do well in consulting them.

6. The learned counsel then proceeds to argue that while passing the impugned orders, the respondents did not consult the appellant associations or for that matter any other connected body or persons who are engaged in cargo facility business or availing cargo facility at both Kozhikode and Thiruvananthapuram Airports. According to the learned

7. As regards the merits of the order, the complaint is that the same is illogical and irrational. Since the slab system of the tariff for the cargo facility has not been removed, according to the learned counsel, the said slab system is also illogical and irrational since the cargo facility services for 1Kg. and 50 Kg. have been treated as equal. The Authority has determined the tariff irrespective of the wide variations in weight and the similar structure was made applicable for cargo weighing 51 Kg. to 75 Kg.. According to the learned counsel, Thiruvananthapuram and Kozhikode Airports are similarly placed airports in the State of Kerala and cater to almost similar clientele.It is pointed out that the second respondent (KSIEL) is the service provider for both the airports. However, the tariff structure followed by the first respondent is not the same and is inconsistent with the rules and guidelines followed by the respondents. It is suggested that at Kozhikode Airport, the amount collected for cargo facilities is under the heads of warehousing charges, documentation charges, transportation charges, handling charges and the service tax whereas in Thiruvananthapuram Airport, the tariff includes warehousing charges, documentation charges, service tax and porterage. It is pointed out that in Cochin International Airport, which is a major airport in the State of Kerala, only charges are warehousing charges and an additional Rs.5/- as strapping charges for every baggage. Therefore, according to the learned counsel, there is a selective application of the Statute and the

business from one airport to another. This is apart from the fact that the practices are grossly discriminatory for the passengers traveling to and fro from different airports.

8. The learned counsel asks the rationale behind the hike ordered by the Authority on the ground that there were no improvements in the quality of services and facilities and that there was no investment or improvement made in the airport facilities whatsoever. According to the learned counsel, the respondents had not justified the present hike of tariff in the two airports. It has been pointed out that on account of the allegedly arbitrary acts of the respondents, there was a strike call given by the appellants from 23.03.2012 and a strike notice was also served on the second respondent and as a result the second respondent invited the appellants for discussions and offered some minor deductions in the proposed tariff hike. However, the learned counsel insisted that it was of no consequence since before deciding the tariff hike, there was no effective consultation or agreement.

9. Our attention was also invited to the impugned order and more particularly para-2 thereof, wherein it was admitted by KSIEL that they had not entered into any written agreement with the users. The learned counsel, therefore, suggests that if the said consultation had been done by the first respondent with all the stakeholders then the tariff could have been

was no justification for hike in tariff. The learned counsel, therefore, points out that in not affording the opportunity to the appellants and in not being consulted, the whole exercise by the Airports Economic Regulatory Authority is rendered null and void, as the consultation was mandatory. The further argument appears to be that hike of 25% to 30% in the cargo services as ordered by the Authority is wholly unjustified.

11. There will be no question of going into the merits of the order passed by the Airports Economic Regulatory Authority (hereinafter "Authority" for short) for the simple reason that the appellants admittedly absented themselves before the Authority in the sense that the appellants never appeared before the Authority either to oppose the proposed hike by the KSIEL and secondly, it has not given its proposal as regards the aforementioned hike.

12. As against the arguments raised by the appellants, the counsel appearing for the Authority firstly questions the *locus-standi* of the appellants. According to the learned counsel, the appellant No.1 was not even a registered association much less a stakeholder recognized under the Airports Economic Regulatory Authority Act, 2008 (in short "Act" or "AERA"). It is then pointed out that even if it is conceded that the appellants were interested as they claim, then they did not avail of the opportunity offered by the Authority. Shri Kaushik points out that the

therefore, the appeal at their instance, particularly on the merits of the order was not liable to be entertained by this Appellate Tribunal. Shri Kaushik took us through the history of the enactment of the AERA Act and also pointed out as to how the Authority under the Act was constituted. We were also taken through the CGF Guidelines. The learned counsel further pointed out the various steps taken by the Authority and the approach of the Authority. Our attention was invited towards the proposal for Multi Year Tariff for cargo services at Thiruananthapuram International Airport and the ultimate findings of the Authority in respect of the Multi Year Tariff Proposal. He also invited our attention to the Annual Tariff Proposal for cargo services at Thiruananthapuram International Airport and pointed out the whole procedure undertaken by the Authority, as also the approach of the Authority in application of principles and procedures laid down in the Act. The learned counsel insisted that full fledged consultation proposal was adopted by the Authority. The Authority also considered all the relevant factors under Section 13(1) of the Act while undertaking this exercise. Lastly, the learned counsel urged that the tariff structure finalized by the Authority was scientific, logical and rational. The learned counsel also insisted that since the appellants never ventured to come before the Authority, there is no question of entertaining the appeal and more particularly their contention that the tariff hike was incorrect. The contentions raised are more or less common in both the appeals.

gives the list of the functions to be performed by the Authority. The functions include :-

a) to determine the tariff for the aeronautical services;

b) to determine the amount of the development fees, in respect of major Airports;

c) to determine the amount of the passengers service fee levied under Rule 88 of the Aircraft Rules, 1937;

d) to monitor the set performance standards relating to quality, continuity and reliability of the service;

e) to call for such information as would be necessary to determine the tariff; and

f) to perform such other functions, as may be entrusted to it by the Central Government, or as may be necessary to carry out the provisions of the Act.

14. Sub-Section (2) mandates that the Authority shall determine the tariff once in five years and if it is considered appropriate and in public interest, amend, from time to time during the said period of five years, the tariff so determined. Sub-Section (4) specifies that the Authority in order to ensure transparency, hold due consultations with all stakeholders. It shall also allow all the stakeholders to make their submissions to the Authority and lastly, it is expected to make all the decisions fully documented and explained. For this purpose, the Authority has the powers to call for

15. The term “stake-holder” is defined in Section 2(o) of the Act. The definition is as follows :-

> “(o) “stake-holder” includes a licensee of an airport, airlines operating threat, a person who provides aeronautical services, and any association of individuals, which in the opinion of the Authority, represents the passenger or cargo facility users.”

Considering the language of the definition of the terms “stake-holder”, there should ordinarily be no difficulty in at least *prima-facie* assumption that both the appellants are the “stake-holders” subject to the opinion of the Authority.

16. The first appellant claims to be the association of cargo facility provider and it is suggested that it represents the interests of all the cargo movers in the State of Kerala. The appellant argued that by the term “cargo movers” they mean an organization which provides door-to-door cargo movement services using primarily air transport, both internationally and domestically. Appellant No.2 also claims to be a representative body of the passengers. Very strangely in both the appeals, nothing is stated in respect of the local status of both the appellants. In fact both the appeals are totally silent about the role played by or the status of the second appellant except that it represents the passengers. It is specifically suggested in its counter affidavit by second respondent KSIEL that the appellants are not stakeholders. It is revealed from the counter affidavit in

manner. It is revealed by the contentions raised by the respondent that the appellant No.1 is not even a registered association, nor is it a “stakeholder” recognized under the Act. The reply is silent about the appellant No.2, which claims to be the representative of the passengers. Therefore, when a pertinent question was asked to the learned counsel, as to whether these two associations were registered with either to respondent No.1 or respondent No.2, the learned counsel did not assert that they were so registered. It only means that both these associations did not bother to register themselves either with first respondent or with second respondent with whom they claim to be essentially connected. Even before us, no material was offered by the appellants regarding their registration with or approach to either of the respondents. Even the legal status of these so called associations has not been stated.Under such circumstances, it is difficult to believe that these two associations legitimately have the status of “stakeholders” as they have not claimed that status before any of the respondents.

17. However, the things do not stop here. Apart from the fact of their non-registration, even if it is presumed on the basis of the claims made by them to be the representatives of association of the cargo service providers or as the case may be, passenger, the further question still remains unanswered as to why the said two associations kept themselves aloof from the enquiry undertaken by the Authority, which enquiry was initiated at

notes of arguments, it is reiterated that after the advent of AERA Act and establishment of the Airports Economic Regulatory Authority, a Consultation Paper was issued vide Consultation Paper No.3/2009-10 dated 26.02.2010 to finalize its regulatory philosophy and approach in the matter of tariff determination for cargo facility, ground handling and supply of fuel to the aircrafts. It is suggested that the Authority even issued directions under Section 15 of the Act vide Direction No.4 dated 10.01.2011 and came out with the guidelines meant for cargo facility at major airports, ground handling relating to the aircrafts passengers and cargo facility at the major airports and supplying of fuel to the aircrafts to the major airports. The arguments go on to suggest that the authority decided to follow three stage procedure for determining its approach to the regulation, whereby at stage one, the Authority was to first assess 'materiality', at stage two, the Authority was to assess 'competition' and at stage three, the Authority was to assess reasonableness of the existing user agreements. After that the Authority was to determine tariff. For the 'not material' category determination was to be based on the light touch approach for the duration of the control period. In case of the 'material but competitive' category also the Authority was to fix the tariff based on light touch approach for the duration of the control Period. As for the category of "material and not competitive" but where the Authority was assured of reasonableness of the user agreements, the Authority was to determine the tariff for service based

Tariff proposal at Kozhikode International Airport is concerned, before the issue of the order No.12 for finalizing its philosophy and approach, a detailed consideration to the submission made by all the stakeholders was done on the basis of the submissions made by all the stakeholders. The same considerations were also done while deciding the cargo services rendered at Kozhikode International Airport while considering the Multi Year Tariff Proposal submitted by KSIEL. It was then pointed out that as to how the Annual Tariff Proposal for the first tariff year in November 2011 was considered i.e. only after the Consultation Paper No.34/2011-12 dated 24.01.2012 was issued. It is then pointed out that for deciding the Annual Tariff Proposal all the necessary consultations were made. In the present case also, it is pointed out that the Authority in order to ensure transparency in the process had laid down its philosophy and approach for economic regulation of the services provided for cargo facility, ground handling and supply of fuel to the aircraft at the major airports vide CFG Order No.5/2010 dated 02.08.2010. It is then argued that it was impossible that user of a facility/ service at an airport would not be aware of the Consultation Paper issued vide Order No.3/2011-12 and 4/2011-12 in respect of the MYTP. It was asserted that the Consultation Paper Nos.35/2011-12 and 34/2011-12 both dated 24.01.2012 putting forth the annual tariff proposal submitted by KSIEL in respect of the cargo services provided by them at Calicut and Trivandrum airports were put on the

stakeholders, should have responded/ commented on the proposals at the consultation stage. However, they did not chose to do the same. It was, therefore, urged that it was futile on the parts of the appellants to find faults with the consultation process on the ground of non-consultation with them. A reference was made to Order No.4/11-12 dated 26.07.2011 whereby Authority had decided to adopt Light Touch Approach, it was therefore, argued that consequential order thereto could not now be challenged by way of present appeals by the appellants. It is pointed out that after the receipt of the tariff proposal from KSIEL, the same was examined by the Authority and all the tentative views/ decisions of the Authority were placed before the stakeholders vide CP No.34/2011-12 dated 24.01.2012. It was argued that CP was uploaded on the Authority's website for public information and the impugned order dated 14.03.2012 was issued only after due application of the aforementioned philosophy and approach and after the due observance of the procedure mentioned in the Guidelines dated 10.01.2011 and due stakeholder consultation as mandated under Section 13(4) of the Act. It was on this basis that it was reiterated that the appellants have no merits. The learned counsel was at pains to point out that the Authority had already issued a Policy Guidelines on the Stakeholder Consultation on 14.12.2009where a standing list of stakeholders was available, who were required to be consulted on various issues. The said list also included the organizations/ persons to be

India (APAI) were also included in the said list to represent the interest of the cargo facility users and passengers. It is pointed out that this list and consultation was also put on the official website of AERA in order to seek comments/ views/ feedbacks from the organizations/ persons other than those listed. However, appellants did not come forth before the Authority. It was asserted that in this list, the appellants are nowhere to be found. On this basis, the learned counsel argues that there was apathy on the part of the appellants and it is now after the order is finalized by the Authority, that the appellants have chosen to wake up.

18. In our opinion all these arguments are extremely weighty and substantial in nature. It is clear that the Authority had scrupulously followed the principles enshrined in Section 13(4) of the Act and had finalized its order regarding the tariffs on cargo services.

19. The learned counsel for the appellants had no answer to any of these issues except repeating that they were the stakeholders. We are prepared to even hold that not being included in the list prepared under the Guidelines by itself could not deny the right to take part in the proceedings. However, the learned counsel could not explain as to why they did not chose to go before the Authority at the relevant time? Under such circumstances it is clear that the appellants have no case and they must suffer on account of their own apathy.

appellants are not correct. It was asserted that the hike in the tariff is 25% to 30%, while it is pointed out by the respondents that the hike is only 16.8%. This in our opinion is sufficient to reject the claim of the appellants. In our opinion, they have no *locus-standi* to file this appeal. On that ground, we find that both the appeals have no merits and they are dismissed.

Pronounced in open Court on 12th day of October, 2012.

(V.S. Sirpurkar)
Chairman

(Rahul Sarin)
Member

(Pravin Tripathi)
Member