

**IN THE HIGH COURT OF TELANGANA AT HYDERABAD**

**W.P.No.5886 OF 2014**

**Between:**

GMR Hyderabad International Airport Limited

... **Petitioner**

**And**

Government of India,  
Ministry of Civil Aviation & others

... **Respondents**

**JUDGMENT PRONOUNCED ON: 03.06.2024**

**THE HON'BLE MRS JUSTICE SUREPALLI NANDA**

1. Whether Reporters of Local newspapers : Yes  
may be allowed to see the Judgment?
2. Whether the copies of judgment may be : Yes  
marked to Law Reporters/Journals?
3. Whether Their Lordships wish to : Yes  
see the fair copy of the Judgment?

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**MRS JUSTICE SUREPALLI NANDA**

**THE HON'BLE MRS. JUSTICE SUREPALLI NANDA****W.P.No.5886 OF 2014****% 03.06.2024****Between:**# GMR Hyderabad International Airport Limited ... **Petitioner****And**\$ Government of India,  
Ministry of Civil Aviation & others**... Respondents**

&lt; Gist:

&gt; Head Note:

**! Counsel for the Petitioner** : Mr. S. Niranjan Reddy**^ Counsel for Respondents** :Mr.Narsimha Sharma,  
Additional Solicitor General of  
India

? Cases Referred:

- (1) (2008) 2 SCC 672
- (2) (2009) 2 SCC 589
- (3) (2008) 13 SCC 213
- (4) (1991) 2 SCC 209

**THE HON'BLE MRS. JUSTICE SUREPALLI NANDA****W.P. No.5886 OF 2014****ORDER:**

Heard Sri S.Niranjan Reddy, learned Senior designate counsel appearing on behalf of the petitioner and Sri Narsimha Sharma, learned Additional Solicitor General of India appearing on behalf of respondents.

2. **The Petitioner approached the Court seeking prayer as under :**

"...to issue any appropriate writ, order or direction; more particularly, one in the nature of Writ of Mandamus declaring the impugned communication issued in Proceedings No. AV.13024/03/2011-AS (Pt.I) dated 18.02.2014 as illegal, arbitrary, unconstitutional and violative of the petitioner's Constitutional rights and set aside the same and pass such other order or orders..."

**PERUSED THE RECORD**

3. **The proceedings dated 09.05.2006 vide File No.AV 13024/047/2003-SS of the 3<sup>rd</sup> respondent, reads as under:**

“Consequent to allowing private companies, Joint Venture Companies to own and operate airports in the Country, manner and mode of collection of Passenger Service Fee (PSF) at airports have been engaging the attention of the Government for some time. The matter has been deliberated with Airports Authority of India and other airport operators and it has now been decided that: -

i) CISF will be deployed as per the assessment of BCAS at airports operated by JVCs or private operators also.

ii) Passenger Service Fee (PSF) at airports would be collected by the respective Airport Operator, which could be AAI, JVC, or a private operator.

iii) The amount of PSF to be collected will be fixed by the Ministry of Civil Aviation. The amount will continue to be Rs.200/- per passenger till further orders.

iv) The airport operator would retain Rs.70/- towards passenger facilitation.

v) An Escrow account would be opened whenever the airport operator is a JVC or private operator. This account will be operated by the airport operator (not by AAI). Rs.130/- of the PSF collected per passenger by such airport operator would be deposited in the Escrow account by the Airport Operator for payments to be made to CISF. The Escrow account would be subject to Government Audit of CAG.

vi) In case any amount remains, this will be transferred to AAI by the airport operator through a process of mutual consultation for payment to CISF deployed for security purposes at other airports. In case of a dispute, the matter may be referred to the Ministry of Civil Aviation whose decision will be treated as final and binding on both parties.

2. The new procedure will be effective from 01.04.2006.
3. This issues with the approval of the Minister of State for Civil Aviation (Independent Charges).

4. Order dated, 20.06.2007 vide file

No.AV.13024/047/2003-SS of the 3<sup>rd</sup> respondent, reads

as under:-

In this Ministry's Order of even no. dated 09.05.2006 on the subject noted above, the following modifications may be made-

(a) Clause (iii) is modified as under-

The amount of PSF to be collected will be fixed by the Ministry of Civil Aviation. **However, after Airports Economic Regulatory Authority (AERA) becomes functional, PSF will be fixed by AERA'.**

The amount will continue to be Rs.200/- per **embarking** passenger till further orders'.

(b) Clause (vi) is modified as under-

**'Security Component of PSF, in short PSF (SC) is not a regular revenue income of an airport-operator. PSF (SC) collected at an airport operated by a JVC or a private- operator will be utilized at the airport concerned only to meet the security related expenses of that airport. However, AAI will be considered as a single licensee in respect of its airports for this purpose with liberty to pool the PSF (SC) collections from such airports and use the same for meeting the security related expenses at any of its airport'.**

2. This issues with the approval of the Minister of State for Civil Aviation (Independent Charge)

5. The Interim Order of this Court, dated 13.07.2012 passed in WPMP.No.27346 of 2012 in W.P.No.21341 of 2012, read as under:-

"Prima facie, this Court finds that even according to the respondents, proceedings dated 16-04-2010 through which expenditure towards private security was disallowed, is prospective in nature. However, through the impugned proceedings, they are trying to recover the amount incurred towards that item prior to 16-04-2010.

Hence there shall be interim stay of recovery of any amount paid or made over to the petitioner as expenditure incurred towards private security from out of Passengers Service Fee (Security Component), prior to 16-04-2012."

6. The proceedings dated 14.02.2014 vide file No.AV.13024/64/2011-AS of the 3<sup>rd</sup> respondent, read as under:-

"I am directed to refer to GHIAL's letter dated 14.11.2013 on the subject mentioned above and to say that the clarifications furnished i.r.o C&AG audit observations by the airport operator have been gone through. After careful examination, it has been observed that as per OMDA/SSA, airport operators are responsible for procuring and maintaining, at its own cost, of security systems and equipment (except arms and ammunition) as required by Government of India/Bureau of Civil Aviation Security (BCAS) or its designated nominee(s)/representative(s) from time to time. However, GHIAL is meeting out its Capital expenditure out of PSF (SC) funds which is improper. Keeping this in view, it has been decided that GHIAL shall accordingly reverse its entire capital expenditure (along with commercial Bank rate) incurred so far on procurement/maintenance of security systems/equipment and on fixed assets back to its PSF (SC) escrow account within a period of one month.

2. This issues with the approval of Hon'ble Minister of Civil Aviation. Compliance of above directions may be intimated to this office."

**7. The relevant portion of the impugned order, dated 18.02.2014 vide file No. AV.13024/03/2011-AS(Pt.I) of the 3<sup>rd</sup> respondent, reads as under:-**

As per the respective Operation, Management and Development Agreements (OMDAs) and State Support Agreements (SSAs), the private operators/JVCs are responsible for procuring and maintaining, at its own cost, security systems and equipment (except arms and ammunition) as required by Government of India/Bureau of Civil Aviation Security (BCAS) or its designated nominee(s)/representative(s) from time to time. The Comptroller and Auditor General of India on the basis of the annual audit of escrow accounts of various Private/JV airport operators pertaining to Passenger Service Fee (Security Component) funds, have inter-alia made similar observations. It has been observed by this Ministry that Private/JV airport operators are meeting their Capital expenditure out of PSF(SC) funds, which is improper, as these airport operators are not endowed with authority to do so as per the provisions of OMDAs/SSAs.

2. The aforesaid issue has been examined in this Ministry at length and it has now been decided that since PSF(SC) funds are meant only for meeting revenue expenditure on deployment of CISF and other security forces at the airports, the total capital expenditure incurred by the airport operators out of the PSF(SC) Escrow account opened and maintained by the respective airport operators in fiduciary capacity, together with the interest, has to be



reimbursed back to the respective Escrow accounts Accordingly, all the airport operators are hereby directed that they shall reverse/reimburse back to the respective PSF(SC) Escrow account, within a period of one month, the total amount spent (on account of capital costs/expenditure) so far towards procurement and maintenance of security systems/equipment and on creation of fixed assets out of the PSF(SC) Escrow Account, together with the interest that would have accrued in normal course had the said amount not been debited against the PSF(SC) Escrow account.

**8. The case of the Petitioner as per the averments made by the petitioner in the affidavit filed by the petitioner in support of the present Writ Petition, in brief, is as follows:**

a) The Petitioner is a registered company and has been granted the concession of designing, financing, constructing and operating and maintaining the GMR Hyderabad International Airport (GHIAL) i.e., Rajiv Gandhi International Airport ("RGIA") at Shamshabad, Hyderabad. The Petitioner has designed, financed, constructed and has commenced the operations of the

GHIAL from 23.03.2008 as a Green Field Airport commissioned under the Private Public Partnership Model ("PPP Model") under a Build Own Operate Transfer ("BOOT") Scheme.

b) As per the provisions of the concession agreement executed by the 1<sup>st</sup> respondent with the Petitioner herein, the 1<sup>st</sup> respondent is responsible with regard to specified reserved activities including security at the GHIAL which are to be provided by it at its cost and since then the capital expenditure with regard to the security equipment at the GHIAL has been incurred from PSF (SC) where the same has been capitalized in the books of PSF(SC) and not in the books of the petitioner and the said security equipment is being used by the central government designated security agency for the safety and security of the passengers.

c) Even prior to the operation of the RGIA, the MoCA issued an order dated 09.05.2006 prescribing the collection of Passenger Service Fee ("PSF") at Green Field/Private Airports and that the Central Industrial Security Force ("CISF") will be deployed at the airports operated by private operators also, for

providing security at the Airport. In partial modification of the said order dated 09.05.2006, the MoCA issued a further order on 20.06.2007 specifying that the PSF Security Component will be utilized only to meet the security related expenses of that Airport.

d) The accounting and audit procedure with respect to PSF (SC) was thereafter stipulated by the MoCA by an order dated 19.1.2009 in which an elaborate procedure was stipulated for operation of the PSF (SC) Escrow account. The Petitioner has been acting in compliance of the accounting procedure and had been furnishing the receipts and payment account in terms of the said instructions.

e) It is the specific case of the petitioner that, in the year 2010, committee was constituted to discuss issues pertaining to security related expenditure and on the basis of the recommendations of the committee; various directions were issued for compliance by the Airport Operators through a letter addressed by the 2<sup>nd</sup> respondent. The said directions specifically provide that the permissible expenditure is also allowed on the

security equipment required to be maintained as mandated by Bureau of Civil Aviation Security (BCAS). The security equipment has also been described as a part of the said proceeding.

f) On 16.04.2010, the 3<sup>rd</sup> respondent felt necessity of revisiting this issue and after noting that until then the entire costs of security equipment deployed at the Airports were to be met from PSF (SC). On 05.07.2010, the 3<sup>rd</sup> respondent on behalf of MOCA had again issued a clarification stating that the 16.04.2010 clarification would only have a prospective application. In view of the fact that RGIA commenced operations in March 2008, the petitioner Airport is governed under the earlier directions and not by the subsequent directives.

g) While so, in relation to the personnel engaged to provide private security on the city side of the airport, the 3<sup>rd</sup> respondent issued a communication dated 17.05.2012 stating that the deductions made by the Airport Operators from the PSF (SC) component, the expenses towards private security personnel needs to be reimbursed. Aggrieved by the said communication, the petitioner filed W.P. No. 21341 of 2012 before this court and

through interim orders dated 13.07.2012, this court was pleased to restrain the respondents from recovering any amount paid or made as expenditure incurred towards private security from out of Passenger Service Fee (Security Component), prior to 16.04.2010.

h) Despite the interim orders passed by this Court in relation to the personnel, lapsing into the same error, a letter dated 14.02.2014 was addressed by the 3<sup>rd</sup> respondent to the petitioner contending that as per OMDA/SSA Airport operators are responsible for procuring and maintaining at its own costs the security system and equipment, alleging that the petitioner was however, adjusting this amount out of the PSF (SC) amounts and the Petitioner was directed to reverse the entire capital expenditure along with commercial bank rate interest to the PSF (SC) account within a period of one month.

i) The above said communication, AV. 13024/64/2011-AS, was received by the petitioner on 20.02.2014. However, even before the Petitioner could respond to the same, the 3<sup>rd</sup> respondent passed an order vide Proceedings in File No. AV.

13024/03/2011-AS(Pt.I) dated 18.02.2014, directing the petitioner to comply with the said requirement of reversing the entire capital expenditure (incurred so far on the procurement/ maintenance of the security systems/ equipment and on fixed assets) within a period of one month together with interest. Aggrieved by the said order dated 18.02.2014, the present Writ Petition is filed.

**9. Learned Senior Counsel Mr. S.Niranjan Reddy, appearing on behalf of the petitioner/GMR Hyderabad International Airport Limited put forth the following submissions:-**

- i) The impugned proceeding issued by the 3<sup>rd</sup> respondent is clearly contrary to the series of directions issued hitherto in relation to the permissibility of utilizing the PSF (SC) amounts for meeting the security related equipment capital expenditure.
- ii) The various proceedings and the accounting guidelines issued by the respondents themselves clearly admit of this permissibility and the understanding of the 3<sup>rd</sup> respondent while issuing such impugned proceedings, is *ex facie* palpable and incorrect.

iii) The 3<sup>rd</sup> respondent appears to have issued this instruction in a wholly untenable manner for extraneous purposes of seeking to form a defense in relation to some scarce observations and the impugned proceedings therefore, suffer from the vice of consideration of non-material factors rendering the proceedings irrational and whimsical.

iv) The 3<sup>rd</sup> respondent ought to have seen that it was expressly stipulated that while in relation to all the existing Airports such deductions would be permissible, in relation to any new Airports, it was provided that the expenditure would be adjusted by making a provision in the project estimates.

v) The 3<sup>rd</sup> respondent failed to notice that the 3<sup>rd</sup> respondent's classification expressly stipulated only a prospective application to the direction for including it in project estimate and the 3<sup>rd</sup> respondent ought to have seen that the said prospective application is also borne out from the fact that though the petitioner has been acting in compliance with the account reporting stipulation, no objection was taken by the 1<sup>st</sup> respondent at any earlier point of time with regard to adjustment of security related capital expenditure from out of the PSF(SC) account.

vi) The impugned proceedings are also liable to be treated as being arbitrary and irrational as the responsibility of providing security is part of the State's duty and it is only as a concessionaire that the petitioner is discharging such functions of making provisions for security on behalf of the 1<sup>st</sup> respondent. These amounts cannot, therefore, be collected from the petitioner. The impugned proceedings are wholly unreasonable apart from being arbitrary and are hence, violative of provisions of Article 14 of the Constitution of India. The said proceedings also do not satisfy requirement of fairness, reasonableness and unarbitrariness required by the said action.

vii) It is respectfully submitted that the said proceedings are entirely untenable in law and would also infringe and violate the petitioner's constitutional rights under Article 300-A of the Constitution of India. The rights of the petitioner's promoters and members under Article 19 of the Constitution of India are also violated on account of such unlawful impugned proceedings.

viii) It is submitted that the order was issued by the 3<sup>rd</sup> Respondent purportedly based on the provisions of OMDA and SSA. The 3<sup>rd</sup> Respondent failed to notice that the said OMDA and SSA that are sought to be relied upon by the 3<sup>rd</sup> Respondent, are not applicable to the Petitioner. Hence, the impugned order is wholly illegal and liable to be set



aside. Further, the 3<sup>rd</sup> Respondent failed to notice that the Petitioner is governed by the concession agreement executed by it with the Petitioner and the state support agreement executed by the state government of Andhra Pradesh, not by the OMDA and SSA as alleged by the 3<sup>rd</sup> Respondent in its impugned order.

**10. Learned Additional Solicitor General of India appearing on behalf of the respondents put forth the following submissions:-**

1. That the collection of Passenger Service Fee (PSF) is mandated under Rule 88 of Aircraft Rules 1937 by the licensee from the passengers at such rate as the Central Government may specify and is also liable to pay security component to any security agency designated by the central government for providing security services.

2. The generic guidelines issued by the Ministry of Civil Aviation on 29.01.2004 also deal with the security and PSF issues at the Airports including Green Field Airports. According to these the airport operator will provide and maintain the security equipment as required by Civil Aviation Authorities. The creation and setting up of security infrastructure was the sole responsibility of the airport operator.

3. It is submitted that as per the Green Field Airport policy dated 31.08.2004 the screening equipments expenditure and CISF related expenditure are to be met by Airport Authority of India (AAI) out of PSF(SC) and the remaining security infrastructure has to be provided by the airport operator out of its project cost as per the said policy.

4. As per the concession agreement entered into by the petitioner with the Ministry of Civil Aviation dated 20.12.2004, HIAL shall be responsible for procuring, installing, maintaining and replacing all such security equipments as required as per the norms and standards prescribed by the authorities from time to time. Hence, as per the said concession agreement the petitioner has the responsibility to provide for security requirements except the core aviation security to be provided directly by the government through deployment of security forces.

5. The said Passenger Service Fee is levied @200 per embarking passenger and it applies to all types of airports and passengers and it has two components, one the security component of Rs.130/- that was given to the Airport Authority of India for providing security services at the airport and the other service component of Rs.70/- that goes to the airport operator for providing facilitation services at the airport to the passengers.

6. As per the request made by the Airport operators, the Ministry vide letter dated 09.05.2006 has allowed the PSF funds to be handled by airport operators in fiduciary capacity on behalf of the Government of India which is subject to audit by C&AG through escrow account which is to be operated as per the SOP issued by Ministry dated 19.01.2009

7. It is the specific case of the respondents that the C&AG while auditing the escrow accounts of airport operators including the petitioner for the financial years 2007-2008 to 2009-10 has raised objections on some of the ineligible expenses incurred by the airport operators from the PSF(SC) funds. Considering the said audit objections, the Ministry has accordingly directed to reverse such amounts to the escrow accounts.

Hence, it is submitted that the letters issued by the Ministry which are impugned in the Writ Petition are therefore, legal, valid and reliance is made on Rule 88 of Aircraft Rules, generic guidelines issued by the Ministry Airport Policy and also specifically the binding nature of the terms of the concession agreement executed by the Petitioner with the Ministry and also in view of C&AG audit objections for the ineligible expenditure diverted by the petitioners for the above mentioned period as tabulated, the petitioner is not entitled for any relief sought in the WP

and it is humbly prayed that this Court dismiss the WP. The petitioner has given undertaking before the Court in the year 2014 that in the event of dismissal of WP it will pay the differential amounts covered by the impugned letters to the escrow accounts as directed by the authorities.

**11. The counter affidavit filed on behalf of the Respondents and in particular para Nos. 14, 17, 40 & 41 read as under:-**

**14. I state that BCAS frames the rules and regulations for civil aviation security in India, the Ministry of Civil Aviation makes provision for meeting the expenses on CISF/State police and also makes provision for necessary security infrastructure and gadgets for implementing security measures at the airports out of the passenger Security Fee- Security Component (PSF-SC) collected for this purpose.**

PSF spent on ASG at airport level is subjected to three level audit by; internal auditor, the Finance controller and the C&AG. I state that the Passenger Service Fee (PSF) is levied by the Government @ Rs. 200/- per embarking passenger and applies to all type of airports and embarking passengers. There

are two components in Passenger Service Fee; one the security component (herein after referred to as PSF-SC) Rs 130/-that was given to the Airports Authority of India for providing security services at the airport and the other is service component (Rs. 70/-) that goes to airport operator for providing facilitation services at airports to the embarking passengers. The collection of PSF is mandated under Rule 88 of the Aircraft Rules, 1937, which is reproduced below: -

**PASSENGER SERVICE FEE (PSF):** The licensee is entitled to collect fees to be called as Passenger Service Fee from the embarking passengers at such rate as the Central Government may specify and is also **liable to pay for security component to any security agency designated by the Central Government for providing the security service.**

The issues of collections and expenditures of PSF arose only after upcoming of Greenfield airports at Hyderabad & Bangalore airports and restructuring of Delhi and Mumbai airports. In respect of the Greenfield airports and the Restructured airports, Passenger Service Fee is a "Defined Term" in Concession Agreement" signed by HIAL. As mentioned in the detail at para 3 above all the

components of policy guidelines of security are based on the Draft Concession Agreement of HIAL duly approved by the Ministry of Finance. These policy guidelines with regard to ATS/Security were approved as generic guidelines for all the Greenfield Airports including HIAL. **As per the above GOI Policy, the airport operator will provide and maintain security equipment as required by BCAS excepting DFMD, HHMD, X-ray machines, walkie-talkie for use by CISF, which will be provided by the AAI out of PSF (SC).** The latter shall be supplied and maintained by AAI from PSF (SC) funds, as these equipments are connected with CISF functioning. Besides, this will achieve uniformity of standards and maintenance and PSF generated at the Greenfield airports will be apportioned i.e. Security Fee Component of PSF as prevalent from time to time collected by Greenfield operator will be passed on to AAI and service fee component will be retained by the operator. The PSF (SC) would be used by the AAI for meeting out the expenditure relating to security agency and the DFMD, HHMD, X-ray machines, walkie-talkie. **The creation and setting up of remaining security infrastructure was the sole responsibility of the airport operator.** All these provisions are

incorporated in the Concession Agreement read with SSA.

17. I further submit that however observing that the private airport operators were misusing the PSF (SC) funds and were meeting out various ineligible expenditure out of the PSF(SC) account much beyond the scope as per the security, certain clarifications were issued through the circular issued by the Ministry on 8<sup>th</sup> January, 2010 and on 16<sup>th</sup> April, 2010. Both the aforesaid orders dated 08- 01- 2010 and 16-04-2010 were issued by the MoCA to clarify all the previous instructions issued by the Ministry on PSF (SC) with a view to remove any iota of doubt/confusion. The PSF (SC) being a statutory levy as per Rule 88 of the Aircraft Rules, 1937 and has to be spent for the security agency deployed at the airports as per the policy of GOI and MOCA. Rule 88 of Aircraft Rules itself states that **"the licensee is entitled to collect fees to be called as Passenger Service Fee from the embarking passengers at such rate as the Central Government may specify and is also liable to pay for security component to any security agency designated by the Central Government for providing the security service"**.

Further, the decisions of MOCA are binding on the petitioner **(as per orders issued by the Ministry from time to time)** and, therefore, approaching the court for directions is improper and untenable. I state that the issue of meeting out the expenditure of security equipment out of PSF (SC) funds was reviewed in this Ministry. While reviewing it was found that the Cost of Deployment of CISF (which includes salaries and other revenue expenditures) are not being paid by several airport operators regularly citing shortage of PSF(SC) funds, which is causing great inconvenience. The reason observed behind this lapse was that that the most of collections of PSF (SC) funds are used by the several Airport Operators to finance cost of fixed items/capital items which resulted in a severe shortfall in the PSF Accounts and as a result, many airport operators are not in a position to pay Cost of Deployment (CoD) of the CISF/ASG at the airport regularly. I state that the review was also done in the light of observations made by C&AG wherein several irregularities on the part of some of the airport operators were highlighted by the audit. It may also be noted that CISF is a 'Zero Budget Force' which depends on the amount collected in the PSF



(SC) escrow account. If the contentions of the petitioner are admitted it would result inordinate delay in making the payments to the security personnel.

40. In reply to Para 20 (xii) to (xv), it is once again submitted that the directions issued by MoCA through order dated 18.02.2014 is not mere an executive decision. It may be clearly understood that the provisions of Concession Agreement signed by the petitioner with the Government have legal sanctity and are binding on both the parties. Further, Ministry vide its order has only reiterated the provisions mentioned under this agreement.

41. In reply to Para 21 to 23 of the affidavit, I state that the contention of GHIAL that reversal of capital expenditure would result in additional burden on passengers is flawed due to the fact that at the time of take over GHIAL was well aware with the relevant provision of concession Agreement that the cost of security equipment had to be borne by the airport operator out of its project cost. If arguments of GHIAL are allowed to win over the arguments put forth by Ministry of Civil Aviation it would certainly lead to the defeat of the spirit of the Concession

Agreement which means the all the provisions of the said agreement would not have any legal sanctity in the eyes of law. In addition, it is submitted that the collections of PSF (SC) funds from all the airports in the Country are barely sufficient to meet the revenue cost of security services of the CISF which would further be disturbed in case security equipment are considered allowable to be met out of PSF (SC) funds. CISF is a 'Zero Budget Force' and the deployment of CISF for security related duties at Airports solely depends on the collections of PSF.

**The learned counsel appearing on behalf of the respondents placing reliance on the averments made in the counter affidavit filed by the respondents contended that the Writ Petition needs to be dismissed in limini.**

**DISCUSSION AND CONCLUSION:**

12. On perusal of the record it is evident that the Airport Authority of India is not a party to the concession agreement, which is entered into between respondent No.1 i.e., Ministry of Civil Aviation and petitioner. The impugned order, dated 18.02.2014 had been issued under Operation, Maintenance and

Development Agreement (OMDAs) and the provisions of Operation, Maintenance and Development Agreement are entirely different from the provisions of the concession agreement.

**13. Clause 8.5.1 of concession agreement reads as under:-**

8.5.1 Gol (Government of India) confirms that unless otherwise agreed under this Agreement it shall, on the same terms as it provides such security at all other Major Airports, provide all aviation security at the Airport. Provided that Gol and HIAL may, following mutual discussions, if it is considered appropriate, enter into arrangements to jointly provide aviation security services at the Airport. The Parties recognise that as at the date of this Agreement the fee levied for security is Rs.130 per departing passenger as such fee may be revised uniformly for all Major Airports.

14. A bare perusal of Clause 8.5.1 of the concession agreement (referred to and extracted above) clearly indicates that the Ministry of Civil Aviation undertook to provide the security at the airport.

**15. Clause 8.5.3 of the concession agreement entered between respondent No.1/Ministry of Civil Aviation and the petitioner reads as under:-**

8.5.3 HIAL shall be responsible for procuring, installing, maintaining and replacing all such security equipment as required as per the norms and standards laid down by MCA/BCAS or any other Relevant Authority from time to time. In so far as the equipment relating to anti-hijacking and anti-sabotage functions (door frame metal detector (DFMD), hand held metal detector (HHMD), X-ray scan machines for screening carry on passenger baggage and walky-talkies) shall be operated by the agency designated by MCA/BCAS.

16. A bare perusal of Clause 8.5.3 of the Concession Agreement (referred to and extracted above) entered into between Respondent No.1 and the petitioner clearly indicates that the petitioner is solely responsible for procuring installing, maintaining and replacing all such security equipment as required however, the Concession Agreement does not specify the party responsible for bearing the associated expenditures.

17. A bare perusal of the material document (Annexure-A filed by the petitioner in support of the present writ petition Page No.27 of the material document's) clearly indicates that the security related revenue expenditure can be incurred from the Passenger Service Fee (Security Component). **The Escrow Account operating procedure, which is explained at Clause 3 of Standard Operating Procedure for account/audit of Passenger Service Fee (Security Component) by JVC/Private Airport, and the said relevant clauses read as under:**

2.1 Aviation security is an activity reserved for the Government of India. Force deployment at the airports, security requirements including the requirement of capital items and specifications thereof are laid down by the Government/Bureau of Civil Aviation Security (BCAS). As stated above, PSF is levied under Rule 88 of the Aircraft Rules 1937 and covers security component as well as facilitation. While the fee is collected by the licensee of the airports, i.e., the airport operator, through the airlines, the security component thereof, which constitutes 65% of the total amount, can be used only in terms of directions issued by the Government/ BCAS, from time to time. The amount collected by the airport operator, which is kept separately in an escrow account, is thus held, which is in fiduciary capacity.

3.1 For PSF (SC) a separate Escrow Account shall be opened and operated by JVC/Private Operator, with a Scheduled Nationalized Bank.

3.2 An Escrow Account agreement will be entered with the Escrow Banker by the JVC/Private Operator.

**3.5 Escrow Account shall be maintained, controlled and operated by Escrow Bank under the Escrow Agreement as under:**

i) **PSF (SC) Account:** JVC/Private Operator shall deposit immediately all PSF (SC) collections into the "PSF (SC) Account."

ii) **Withdrawal from PSF (SC) Account:** The Escrow Bank shall allow withdrawal by JVC/Private Operators of amounts deposited into the PSF (SC) account only towards the following purposes, in the order of priority by descending order:

c. To pay other security related expenses in terms of MoCA Order dated 20.6.2007 or any other decision of MOCA/BCAS or any other government agency, from time to time.

iii) **Deployment of Surplus:** Any surplus standing at the credit of the Escrow Account should be deployed by the Escrow Bank in its own Deposit Account. On maturity or otherwise, the proceeds, shall be credited in Escrow Account.

**4.12 JVC/Private Operator shall furnish Receipts and Payments account, on quarterly basis, to MOCA as per Annexe-A. The quarterly accounts should be submitted within 30 days of the end of the respective quarter.**

**4.15 The capital assets, if any, procured out of PSF(SC) by the JVC/Private Operator will be duly accounted for in the books. Further, a separate Asset Register will be maintained for Fixed Assets.**

6.1 Pledging/offering of any assets (Bank A/c, Equipment etc.) as guarantee to any bank etc. may not be permitted.

**6.6 JVC/Private Operator shall account for PSF (SC) in its books JVC shall account also for fixed assets, investments and current assets etc. created out of the books. It is clarified that such fixed assets, investments and current assets etc. are held by JVC/Private operator in fiduciary capacity only.**

**6.7 All fixed assets acquired through (PSFISCS shall be adequately insured by JVC/Private Operator and insurance charges shall be paid from PSFISCS.**

18. A bare perusal of the above referred clauses clearly indicates that the Passenger Service Fee (Security Component) is paid by the passengers and the same is being utilized for the safety and security of the passengers at the Airport and there is no transfer of any Passenger Service Fee (Security Component) amount from the petitioner to the AAI and in fact, there is a separate Escrow account in favour of respondent No.1, which is operated by the petitioner whereby the Passenger Service Fee

(Security Component) at Hyderabad Airport is being handled onsite.

**19. This Court duly taking into consideration the fact as borne on record that the Passenger Service Fee (Security Component) is paid by the passengers and the same is being utilized for the Safety and Security of the Passengers at the Airport opines that if the cost of the Security equipment is included in the project cost the passenger would be further burdened.**

**20. The order dated 19.01.2009 vide file No.AV 13024/047/2003-SS/AD of the 3<sup>rd</sup> respondent, reads as under:-**

The undersigned is directed to say that the consequent to allowing of private companies/ Joint Venture Companies into the airports sector, the manner and mode of collection of Passenger Service Fee (Security Component) at airports and its accounting and audit procedure has been considered by the Government on the basis of recommendations of a Committee comprising of the representative of Airports Authority of India and nominated



airport operators. The Committee, after taking into consideration all relevant factors and possible emerging situations, has formulated necessary 'Standard Operating Procedure for Account/Audit of Passenger Service Fee (Security Component) by JVC/ Private airports'. A copy of the same is enclosed for strict compliance.

2. It may be observed that each airport operator would be required to deposit the PSF (Security Component) amount in an Escrow Account. The details/proforma of agreement, for this purpose, would be made available to the Airport Operators shortly.

**21. A bare perusal of the order, dated 19.01.2009 (referred to and extracted above), and a bare perusal of the Standard Operating Procedure for Account/Audit of Passenger Service Fee (Security Component) by JVC/Private Airports indicates that the petitioner is permitted to incur the expenditure for security equipment from the Passenger Service Fee (Security Component), since the equipment belongs to respondent No.1.**

**22. Clause 7 of the proceedings, dated 16.04.2010 of the Ministry of Civil Aviation which deals with the expenditure**

**to be met out of the Passenger Service Fee (Security Component), Clause I to VII reads as under:-**

I. In the circular issued by the Ministry on 8th January, 2010, a distinction had been made between anti-hijacking and anti-sabotage functions with the intention to support expenditure only on anti-hijacking functions from PSF(SC). It was felt that this distinction is somewhat unreal as modern day threats to aeroplanes, passenger and airport infrastructure form part of a composite danger and hence it is decided that expenditure toward anti- hijacking as well as anti-sabotage functions is considered as allowable expenditure from PSF(SC)

II. Considering the above, the entire cost of security equipments deployed at the airports as per the BCAS mandate is allowed to be met from PSF(SC). However, this is subject to the condition mentioned at para VII below. The following items are specifically listed as eligible:- Perimeter Intrusion Detection System (PIDS) Installed over the perimeter wall, patrolling tracks, road rambler, boom barriers, bollards, tyre killers, Under Vehicle Scanning System (UVSS), CCTVs, Licence Plate Reader(LPR). However, cost of Access Control equipment installed in private commercial areas let out

to airlines/concessioners etc. shall not be met out from PSF.

III. The cost of Aviation Security Force i.e CISF shall be met out of PSF(SC). This would include salaries, perquisites and allowances of CISF as per MHA guidelines, accommodation expenses, arms and ammunition etc. Terms of eligibility of personnel will be as per norms of MHA/BCAS. Vehicles for use of the force shall be purchased as per DGS&D rate contract as prescribed in the circular No. AV. 13028/001/2009-AS dated 08.01.2010 of MOCA. The cost of accommodation as per eligible norms including leased accommodation wherever necessary, will be borne out of PSF(SC). No expenditure on account of private security or manpower deployed by the airport operator for regulation of traffic and other purposes can be met out of PSF. Similarly, there shall be no expenditure from PSF to support private security apparatus, if any, put in place by the airport operator.

IV. The cost of the security screening equipment shall be met out of PSF. As far as Inline Baggage Screening System is concerned, only the portion of expenditure relating to baggage screening equipment can only be met from PSF and not the entire Baggage Handling

System. Further, the operator shall not charge the airlines for the security screening of the Baggage.

V. The procedure for procurement of equipment and execution of projects out of PSF shall be according to Govt. Procedures, in the sense, that open tenders shall be resorted to in case of expenditure over Rs. 20 lakhs and competitive open tender in the case of expenditure below. Rs. 20 lakhs.

VI. It is also decided to permit the mortgaging of security capital assets set up, for financing purposes with prior approval of MoCA. A separate amendment to the SOP will be issued in this regard by MoCA.

VII. It is clarified that in case of new airport projects, whether Brown field or green field, the entire expenditure on security Infrastructure shall form part of the project cost. However, the operating expenditure relating to such eligible security equipment installed as per BCAS mandate shall be met out of the PSF

VIII. Procedure to be followed for creating accommodation for ASF/CISF: the expenditure on creating accommodation for CISF shall be incurred after seeking the MCA/competent authority's prior approval, subject to the compliance to the Ministry of Urban

Development's guidelines on eligibility of the accommodation.

This has the approval of Hon'ble Minister of Civil Aviation (I/C).

23. A bare perusal of Clause 7 (referred to and extracted above) clearly indicates and clarifies that in case of new airport project, the cost of security infrastructure shall be considered part of the overall project cost however, this Court opines that the petitioner/airport is not a new project, having been completed in the year 2008 and commenced operations in March, 2008 itself. Hence, the plea of the respondents that the cost of security equipment is deemed to be a part of the project cost for the petitioner's airport is untenable and hence rejected.

24. This Court opines that the Greenfield Airport Policy, 2004 referred to by the respondents is not applicable to the petitioner since the Concession Agreement executed by respondent No.1 post dates the policy and there is no mention in any manner of the said policy within the agreement.

25. A bare perusal of material documents on record in particular Annexure P1 to P7 clearly indicates that subsequent to Greenfield Airport Policy, 2004 the Respondent No.1 Ministry had issued several orders during the years 2006-2007, 2009 and 2010 and as per these orders it is evident that the petitioner is entitled to procure the security equipment from PSF (SC) Escrow Fund.

**26. Section 1(3)(aa) of the AAI Act, reads as under:-**

**1. Short title, commencement and application.—(1)**

This Act may be called the Airports Authority of India Act, 1994

(3) It applies to—

(a) all airports whereat air transport services are operated or are intended to be operated, other than airports and airfields belonging to, or subject to the control of, any armed force of the Union;

(aa) all private airports insofar as it relates to providing air traffic service, to issue directions under section 37 to them and for the purposes of Chapter VA;]

**27. A bare perusal of the same clearly indicates that the AAI Act has no application to the petitioner as per Section 1(3)(aa) of the AAI Act (referred to and extracted above).**

28. A bare perusal of the Standard Operating Procedure /for account/audit of the Passenger Service Fee (Security Component) by JVC/private airports clearly indicates that the expenditure procurement of security equipment was incurred from Passenger Service Fee (Security Component). Therefore, this Court opines that the impugned order is not applicable to the petitioner

**29. The judgment of the Apex Court in DDA v. Joint Action Committee, Allottee of SFS Flats, reported in (2008) 2 SCC 672 and in particular at para 76, it is observed as under:**

**76. An executive officer, in absence of any provision of a statute, cannot apply his own decision with retrospective effect.**

**30. The judgment of the Apex Court in Panchi Devi v. State of Rajasthan, reported in (2009) 2 SCC 589 and in particular at para 9 reads as under:**

"9. A delegated legislation, as is well known, is ordinarily prospective in nature. **A right or a liability which was created for the first time, cannot be given a retrospective effect.**"

**31. The judgment of the Apex Court in Kusumam Hotels (P) Ltd. v. Kerala SEB, reported in (2008) 13 SCC 213, reads as under:**

"Ex facie, the said policy decision could not be given a retrospective effect or retroactive operation. The State was not exercising the power under any statute to grant or withdraw the concession.... The 1948 Act does not authorise the State to issue a direction with retrospective effect. The Board, therefore, could only give prospective effect to such directions in absence of any clear indication contained therein. **By reason of withdrawal of concession with retrospective effect, the accrued right of the appellants had been affected.**

**This Court opines that the instructions contained in the impugned communication dated 18.2.2014 do not have statutory force and have not been issued in exercise of any statutory power. The instructions, therefore, do not have any force of law. It is a settled position of law that mere executive instructions would not be valid if they entail adverse civil consequences for private persons.**



**32. In the judgment of the Apex Court in Shankar Pandurang Jadhav v. Vice-Admiral, reported in (1991) 2 SCC 209, it is observed as under:**

"If their transfer outside the Time Keeping Department becomes possible by the merger of their cadre with the clerical cadre but the same entails civil consequences in the form of loss of overtime wages and bonus, justice demands that they must be given an option to choose which course is beneficial to them and if they decide or opt in favour of the status quo they must be allowed to continue as Time Keepers and not be transferred outside that department without their consent, because to do so would render the scheme vulnerable unless the department agrees to make good the economic loss suffered on transfer"

33. This Court opines the Passenger Service Fee (Security Component) is paid by the passenger and the same is utilized for the safety and security for the passengers by the Airport and if the cost of the security equipment is included in the project cost, the petitioner shall be further burdened, since the responsibility of providing security is part of the states duty and the petitioner is discharging functions of making provisions for security on behalf of the 1<sup>st</sup> respondent. A bare perusal of the provisions of Concession Agreement clearly indicate that respondent No.1 agreed with the petitioner that it shall be responsible for the

provisions of the security at airport at its cost and the petitioner shall be responsible only for the procurement of the security equipment. This Court takes note of the fact that the petitioner is governed by the concession agreement executed by the 1<sup>st</sup> respondent with the petitioner and the State support Agreement executed by the State Government and not by the OMDA and SSA as put forth and projected by the 1<sup>st</sup> respondent in its impugned order. This Court is of the firm opinion that even according to the respondents, proceedings dated 16.04.2010 through which expenditure towards private security was disallowed is prospective in nature. However through the impugned proceedings, they are trying to recover the amount incurred towards that item prior to 16.04.2010. Hence, this Court opines that the action of respondent No.1 to recover from the petitioner the amounts paid or made over to the petitioner as expenditure incurred towards private security from out of passenger's service fee (Security Component) prior to 16.04.2010 is totally contrary to the provisions of the Concession Agreement and the guidelines issued from time to

time and as such, the impugned order dated 18.02.2014 is liable to be set aside.

**This Court opines that the judgments relied upon by the learned counsel appearing on behalf of respondents have no application to the facts of the present case.**

**34. Taking into consideration:**

(a) The aforesaid facts and circumstances of the case and,

(b) The observations of the Apex Court in the judgments (referred to and extracted above),

(c) The interim orders of this Court dated 13.07.2012, passed in W.P.M.P.No.27346 of 2012 in W.P.No.21341 of 2012, which are in force as on date (referred to and extracted above) and,

(d) The guidelines issued from time to time on the subject issue,

(e) The provisions of the concession agreement entered into between respondent No.1 and the petitioner,

(f) The averments made in the counter affidavit filed on behalf of the respondents,

**The Writ Petition is allowed as prayed for. However there shall be no order as to costs.**

Miscellaneous petitions, if any pending, in this writ petition shall stand closed.

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**MRS JUSTICE SUREPALLI NANDA**

Date: 03.06.2024

**Note :** L.R. Copy to be marked.

B/o.ktm