

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL  
NEW DELHI

Dated: 3<sup>rd</sup> February, 2021

MISC APPLICATION/323/2020

IN

AERA APPEAL/1/2019

Lufthansa German Airlines & Others ... Appellants

Versus

Bangalore International Airport Limited (BIAL) & Ors ..... Respondents

BEFORE:

**HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON**

**For Applicants/Appellants** : Ms. Neelam Rathore, Advocate

**For Respondent No.1** : Mr Ramji Srinivasan, Sr. Advocate  
Mr. Mannu Kulkarni, Advocate  
Mr. Saransh Jain, Advocate

**For Respondent No.2** : Mr. Gopal Jain, Sr. Advocate  
: Mr. Virender Mehta, Advocate

ORDER

**By S. K. Singh, Chairperson** - This Appeal was filed on 31.1.2019. It is directed against an order dated 5.4.2018 (Annexure A-I) passed by AERA. Ostensibly, AERA has capped the amount of Royalty / License Fee / Revenue Share at 30% of gross revenue, payable to the Airport Operators as a Pass-Through Capital Expenditure for the Independent Service Providers (ISPs) for determining the Tariff on ISPs providing Cargo Facility, Ground Handling and

Supply of the Fuel to the Aircrafts at major airports. The rates are to be effective from 1.1.2019.

2. Respondent No.1, BIAL is the Airport Operator at the Kempegowda International Airport, Bengaluru. Respondent No.2 is an ISP who has been awarded by Respondent No.1 the Ground Handling Concession at the Airport for a period of ten years from 1.8.2018. A Concession Fee percentage of 15% was made applicable by Respondent No.2 with effect from 1.8.2018 on the strength of authorization by Respondent No.1. The Appellants objected to such charge on the ground of lack of power in Respondent No.1 itself and also on the ground that it had no Regulatory approval.

3. The charge of Concession fee at the rate of 15% was allegedly made for the first time for the month of August, 2018 on the strength of a confidential agreement between Respondent No.1 and 2 and also on the strength of impugned order dated 5.4.2018 which has taken note of such Concession Fees being charged at different Airports at different rates. Since the impugned order permitted a cap of 30% effective from January, 2019, the present Appeal was preferred leading to an interim order on 4.2.2019 prohibiting any coercive steps against the Appellants for realization of Concession Fee in terms of the impugned

order of AERA dated 5.4.2019. The parties were again heard on the issue of interim order. On 30.4.2019, this Tribunal directed that the interim order shall continue till further orders. On the suggestion of Respondent Nos. 1 and 2 it was clarified that since the Appellants have not sought any relief against tariff order dated 28.5.2018, the interim order will not affect the provisions of the said tariff order.

4. On behalf of Appellants an application under section 20 of the TRAI Act,1997 bearing M.A. No.323 of 2020 was filed on 23.12.2020. The prayers in the M.A. are as follows:

- (a) restrain the respondent nos. 1 and 2 from demanding and / or realizing Royalty Charges / Concession Fee from the appellants and to continue to provide uninterrupted ground handling and other services to the appellants at the Kempegowda International Airport Limited, Bengaluru;
- (b) direct the respondent nos. 1 and 2 and its authorized representatives, officers, agents to ensure compliance and implementation of the orders dated 4<sup>th</sup> February, 2019 and 30<sup>th</sup> April, 2019 passed by this Hon'ble Tribunal in the subject appeal;

(c) punish the respondent nos. 1 and 2 for their willful non-compliance of the orders and directions passed by this Hon'ble Tribunal; and

(d) pass such other and further order(s) as this Hon'ble Tribunal may deem, fit and proper in the facts and circumstances of the case.

5. In the M.A. it is pleaded that Respondent No.2, in compliance of the interim orders raised separate invoices for aeronautical tariff and Royalty Charges / Concession Fees. The Appellants regularly paid the aeronautical tariff charges including that for the Ground Handling and Cargo facility. Respondent No.2 did not insist on payment of Royalty Charges / Concession Fees till May, 2020. But pursuant to the renewal / extension of the contract between the Appellants and Respondent No.2 (wrongly stated as contract between Respondent Nos. 1 and 2) with effect from June, 2020, the Respondent No.1 raised consolidated invoices for the aeronautical tariff as well as Royalty Charges / Concession Fees at 21.912% for the month of July, 2020. The Appellant paid the invoices under routine clearance but realized its mistake thereafter and demanded for separate invoices as was being done in the past and also requested for a credit note. The Respondent No.2 segregated the invoices for the month of October,2020 but still it demanded payment of the Royalty Charges / Concession Fees in alleged disregard and

violation of the interim orders of this Tribunal. Respondent No.2 justified the demand on the basis of its interpretation of order dated 30.4.2019 which clarified that the tariff order No.11 dated 28.5.2018 was not under challenge.

6. According to pleadings in the M.A., the parties had a conference call in October, 2020 and thereafter Respondent No.2 did not insist on its demand for some time. However, on 22.12.2020 through an email (Annexure A-8) it demanded for payment of Royalty Charges / Concession Fees along with interest on the ground that Respondent No.1 was claiming the charges from Respondent No.2 *de hors* orders of restraint orders and had threatened to cancel the contract with Respondent No.2. The email records that Respondent No.2 will not provide Ground Handling Service to the Appellant beyond 31.1.22021 unless Royalty payment is made.

7. On 4.1.2021 the M.A. was taken up by this Tribunal for consideration. Since the materials indicated that coercive steps in disregard of the interim order of this Tribunal was being threatened only by Respondent No.2, a short time was granted to Respondent No.2 for filing reply to the M.A. The reply and rejoinder were filed. The parties were heard and order was reserved on the M.A on 28.1.2021.

8. The averments in the M.A. and the materials on record clearly point to the fact that there has been a sudden change in the stand of the Respondent No.2 at the behest of Respondent No.1 or otherwise. It reversed the practice of indicating the Royalty / Concession Fees separately and started coercing the Appellant to pay such charges, otherwise the Ground Handling Services will be disrupted even if it continues to pay tariff charges separately. On behalf of Respondent No.2, learned senior counsel has referred to paragraph 14 and 15 of the Counter-affidavit / reply to point out that timely payment should be ensured by the Appellant because of the COVID Pandemic. However, the Pandemic had adverse affect on ventures and business of all the stakeholders. In any event, it can have no effect on the interim orders of this Tribunal already under operation. The main plank on which Respondent No.2 has rested its defense is an agreement between the Appellant and Respondent No.2 dated 1.6.2020. According to the Respondents, the parties agreed upon new pricing at Rs.2,05,000/- as comprehensive Ground Handling charges exclusive of Airport Concession Fee that was to be applicable on gross up charges. The agreement also provides for additional services at agreed prices inclusive of Concession Fee. The invoices showing the aggregate charges were allegedly raised in terms of the new agreement.

9. The other defense of the respondents is that on 30.4.2019 this Tribunal clarified that tariff order dated 28.5.2018 was not under challenge. It has been pleaded that this order of 2018 was superseded by new tariff order dated 17.1.2020 which has approved a ceiling rate of comprehensive package at Rs.2,80,979/- per flight handling for category flight with 1-400 flight per annum. The submission appears to be that since the approved ceiling rates are inclusive of Concession Fee, the interim orders passed by the Tribunal are no longer effective. This stand is totally erroneous and unacceptable.

10. The tariff order dated 17.1.2020 (Annexure C-1) claims to be Annual Tariff Proposal (ATP) for Financial Year 2019-20 and 2020-21 for the second control period in respect of Respondent No.2. This order by AERA notices and refers to the tariff order of 28.5.2018 which is for the whole duration of second control period. It also refers to the impugned order of 5.4.2018 providing a cap on the Royalty to the maximum of 30% of the annual gross revenue. The light touch approach has been continued and the tariff card for the residual period of the second control period has been prescribed. The order clarifies that the tariff as determined will be maximum tariff to be charged and no other charge is to be levied over and above the approved tariff. The respondent is taking shelter behind this provision to submit that it can levy Concession Fee Charges on the

authority of this order, over and above the tariff charge provided the ceiling is not violated. This will have to be tested in the light of issues raised in the appeal but no coercive steps can be taken in view of interim protection granted.

11. The new agreement between the Appellant and Respondent No.2 is Annexure C-2 dated 1.6.2020. It has been highlighted by the Respondent No.2 that the internal page 19 of this document contains a Note-1 showing that the additional charges and services such as special assistance for wheel chair etc are inclusive of the Airport Concession Fee and hence, the Appellant having signed the agreement cannot raise the plea that Concession Fee be shown separately and be not realized by coercive methods.

12. Learned counsel for the Appellant / Applicant has rightly submitted that the order of AERA dated 17.1.2020 (Annexure C-1) does not have and in law it cannot have any effect upon the interim orders passed by this Tribunal. It is simply a revision of the rates. This contention clearly has merits.

13. So far as the agreement (Annexure C-2) is concerned, learned counsel for the Appellant has shown from internal page 16 of the document that the second table prescribes all inclusive turn-around Handling Charge followed by a note that the above charges are exclusive of the Airport Concession Fee which shall be

applicable on the gross-up charges. It was pointed out that the note at internal page 19 that the above charges are inclusive of the Airport Concession Fee is not in relation of the Ground Handling Charges as such but only in relation to some additional charges and services like that of a wheel chair. Learned counsel has further submitted that the agreement has been signed under the understanding that it is a standard format, without conceding any of the issues raised in the present Appeal in which interim orders are already operative.

14. The M.A. under consideration is found to have merits. The Appellant has not given up its case or claims and has not conceded any of the issues raised in the Appeal. The interim orders of this Tribunal are not affected by the subsequent yearly tariff orders of AERA or the new agreement between the Appellant and Respondent No.2. At this stage, it cannot be held that the Appellant has admitted the stand of the respondent in the present Appeal. Such admission is difficult to be inferred in the present factual scenario.

15. In case the respondents seriously believed that the interim orders of this Tribunal are no longer binding on the parties or are not available to the Appellants, they should have sought clarification before forcing the Appellants to file the present M.A. by threatening coercive action.

16. The payments made by the Appellants towards Royalty Charges / Concession Fee on or from June, 2020 shall abide by the final result of this Appeal. However, in the meantime, the Respondent Nos. 1 and 2 are directed to meticulously follow the interim order already passed by this Tribunal and should not do anything directly or indirectly to pressurize the Appellants to pay the Royalty Charges / Concession Fee. These charges should be shown in accounts separately so that if the Appeal fails, the same may be directed to be paid by the Appellant with such conditions etc. as may be determined by the final judgment and order in this Appeal. Considering the entire facts, prayer no. (b) of the M.A. is allowed. However, prayer No.(a) and also No. (c) seeking punishment / penalty for willful non-compliance is not granted because impugned actions though found improper, do not deserve to be treated as willful non-compliance. This view is also justified by the fact that actually the services to the Appellants were never disturbed although a threat was given. It is expected that respondent no.1 and 2 shall be more careful in future.

17. With the aforesaid directions and orders the M.A. is disposed off.

.....  
( S. K. Singh )  
Chairperson

/pkb/