

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 12.02.2013
Judgment delivered on: 14.03.2013

+ W.P.(C) 792/2012

CORPORATE AIRCRAFT FUNDING
COMPANY LLC

..... Petitioner

Versus

UNION OF INDIA & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Amit Sethi, Mr A. Aggarwal & Mr Aman Gandhi, Advs.

For the Respondents: Ms Anjana Gosain, Adv. for R-1.

Mr S.K. Dubey, Ms Zeenat Masoodi & Ms Bhagyashree Rati,
Advs. for R-3.

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. The petitioner before me, is the mortgagee of Bombardier Challenger Aircraft 300, bearing manufacturer's serial no. 20174 (hereinafter referred to as the `Aircraft'), assigned call sign VT-RAK, by the Indian authorities. The Aircraft, which is owned by respondent no. 2, i.e., Peel Aviation Ltd (in short PAL), was leased to an Indian company by the name of Golden Wings Pvt. Ltd. (in short GWPL).

1.1 Under a financing arrangement, a loan was extended by the petitioner to PAL which was secured by creating a mortgage on the said aircraft.

1.2 The instrument of mortgage, inter alia confers on the petitioner the right to seek de-registration of the Aircraft, from the jurisdiction of the concerned State Registry. The State Registry, is defined in the instrument

of mortgage, as the national jurisdiction; in which the aircraft is registered; which presently would be India.

2 The petitioner seeks to exercise, its right of de-registration, which is resisted by respondent no. 1, i.e., the Director General of Civil Aviation (in short DGCA) at the behest of the Directorate of Revenue Intelligence (in short DRI), i.e., respondent no. 3. An intimation in this behalf was issued by DRI to DGCA on 10.12.2010. The upshot of this communication is that, even though GWPL had imported the Aircraft in issue, into India under a Non-Scheduled Operator Permit (NSOP) no. 13/208 dated 08.05.2008 at “nil” rate of duty, since it was apparently not used for the said purpose, a case of duty evasion was being investigated by DRI. It is on account of this fact that DRI advised DGCA, not to de-register the Aircraft. Furthermore, in the very same communication DRI acknowledged the fact that, the Aircraft was located at London, and that the lessor of the Aircraft was PAL.

3 The petitioner is, essentially, aggrieved by the refusal of DGCA to de-register the Aircraft based on the aforementioned communication dated 10.12.2010 issued by DRI. DGCA by itself, as is emerged, during the course of arguments advanced before me, has no objection to the de-registration of the said Aircraft.

4. Briefly, the aforementioned grievance of the petitioner arises in the background of the following broad, but relevant facts:

4.1 On 20.03.2008, PAL which is the owner of the Aircraft, entered into a lease agreement with GWPL (in short the `March lease`). A fresh lease agreement was executed between the said entities on 07.05.2008 (in short the `May lease`), pursuant to which the March lease was terminated. Apparently, on 15.07.2008, the very same entities entered into yet another

lease agreement (in short the `July lease`), whereby it was agreed to terminate the `May lease`.

4.2 The petitioner, however, avers that it is unaware as to whether the July lease was filed with DGCA. Apparently, in the interregnum, on 16.04.2008, DGCA granted a No-Objection Certificate (in short NOC) to GWPL, to import the said Aircraft to India.

4.3 With the NOC in place, the said Aircraft was flown into India on 17.04.2008; whereupon, it is claimed by the petitioner, the Aircraft was received in India and custom duty amounting to Rs.28,880/- was paid by GWPL. Pertinently, as noticed above, the stand of DRI is that the Aircraft was imported into India at nil rate of duty.

4.4 Evidently, on 25.04.2008, DGCA issued a certificate of registration which carried an endorsement that the mortgagee of the Aircraft was the petitioner. To be noted, the certificate of registration, as indicated therein, is otherwise valid till 14.04.2015.

4.5 On 07.05.2008, the petitioner apparently entered into a loan agreement with PAL. It is averred by the petitioner that, pursuant to the said loan agreement, credit facility in the sum of USD 15,885,915/- was agreed to be extended to PAL to enable it to: firstly, finance in-part, the acquisition of the Aircraft. Secondly, to refinance the existing credit facility availed by PAL, from Midland National Life Insurance Company.

4.6 In order to secure the repayment of loan, PAL executed an aircraft security agreement and mortgage with the petitioner on 05.05.2008 (collectively referred to as mortgage documents). In addition, a supplement mortgage was executed by PAL on the same date. By virtue of the said mortgage documents, a first priority mortgage was created by PAL in favour of the petitioner qua the Aircraft, which included the identified airframes

and engine etc. What is important to note, is that, by virtue of the mortgaged document, the petitioner acquired the right to seek de-registration of the aircraft from the jurisdiction of the State, in which, it was registered.

4.7 It is because the mortgage document required PAL to enter into a fresh lease agreement, that the `July lease` was executed, which resulted in termination of the `May lease`.

4.8 Pertinently, India had ratified the convention known as: The Cape Town Convention on International Interest in Mobile Equipment (in short the Cape Town Convention); a fact which is reflected in the `July lease`, as well. From the point of view of the petitioner, there were two important documents, which GWPL, i.e., the lessee, executed in favour of the petitioner. The first document being an irrevocable power of attorney (in short POA), which empowered the petitioner to seek deregistration of the aircraft. The second document being: an “irrevocable deregistration and export request authorization” (in short IDERA). This document was executed pursuant to the provisions of Article XIII of the Protocol to the Convention on International Interest in Mobile Equipment on Matters Specific to Aircraft Equipment (in short the Protocol). Importantly, both the POA and the IDERA were executed by PAL in favour of the petitioner on the same date, i.e., 23.04.2008.

4.9 Evidently, the Aircraft was flown out of India on 25.04.2010. Presently, the Aircraft appears to be parked at the Biggin Hill Airport, in Kent, United Kingdom (U.K.) , since 23.07.2010.

5. Apparently, the `May lease` agreement, executed between PAL and GWPL, was terminated on 30.09.2010; a notification with respect to which was issued to GWPL, on 15.10.2010. This fact was confirmed by GWPL

by its communication dated 21.12.2010. It is not in dispute that for some odd reason there has been no termination of the `July lease' by PAL.

5.1 In the interregnum, by a letter dated 04.11.2010 issued by PAL to DGCA, PAL while informing DGCA that its dry lease agreement with GWPL had been terminated on 30.09.2010, also sought, as indicated above, an export certificate of airworthiness, to be followed by deregistration of the Aircraft, in order to enable it to register the Aircraft in the U.K.. PAL also intimated DGCA by this very letter that they had appointed one, Jet Aviation; an entity based in U.K. for maintaining the Aircraft. DGCA vide its letter dated 14.12.2010, apparently, sought explanation from GWPL with regard to the aforesaid aspects as also the circumstances in which the Aircraft was grounded at a foreign station.

5.2 Evidently, on 10.12.2010, DRI, as indicated above, advised DGCA not to deregister the Aircraft.

5.3 On the part of GWPL, a response to DGCA's communication dated 14.12.2010, was issued vide letter dated 21.12.2010. GWPL informed DGCA that the Aircraft was flown out of India as GWPL was under scrutiny since August, 2010 by various statutory authorities including the Income Tax Department, DRI, Customs, Enforcement Directorate etc., as the Aircraft has been used by one Sh. Lalit K. Modi. This apart, GWPL also stated in this very communication that the lease had been terminated on 30.09.2010, as also the fact that PAL had applied for deregistration and issuance of an export certificate of airworthiness vide its letter dated 04.11.2010, to which it had no objection.

5.4 In response to the same, on 27.12.2010 DGCA informed GWPL that, its request for deregistration of the Aircraft could not be acceded to, without obtaining necessary clearance from DRI and the petitioner, i.e., the

mortgagee. A reference was also made to the fact that no explanation has been offered by GWPL as to the circumstances in which the Aircraft was grounded at a foreign station. A copy of the said communication was also sent inter alia to the petitioner, PAL and DRI.

5.5 In response to the aforementioned communication GWPL, vide communication dated 04.03.2011, offered the following explanation:

- (i) the Aircraft had flown out of India on 25.04.2010 and was flying in UK air space till 23.07.2010;
- (ii) the Aircraft was parked at foreign station as per the instruction of the lessor, PAL;
- (iii) the lease was terminated on 30.09.2010, preceded by the termination of the maintenance agreement with an Indian entity on 28.09.2010;
- (iv) PAL had approached the DGCA for deregistration of the Aircraft, which was refused vide letter dated 12.12.2010;
- (v) the management of the Aircraft had been assigned to a company based in U.K., resultantly it had no control over the aircraft; and
- (vi) lastly, that it was desirous of surrendering the NSOP permit, which was due for renewal as no aircraft is endorsed on the said permit.

5.6 DGCA, once again, by a letter dated 08.11.2011 informed GWPL that, its request for deregistration could not be acceded to for two reasons. Firstly, DRI was investigating the issue of evasion of custom duty and no clearance had been received for deregistration from the said agency. Secondly, a NOC /consent of the petitioner for deregistration had not been received. A copy of this letter was sent inter alia to the petitioner, PAL and DRI.

5.7 In view of the above, the petitioner vide letter dated 20.04.2011, furnished their NOC for deregistration of the Aircraft. This communication

was apparently sent by the solicitors of PAL alongwith their communication dated 25.04.2011.

5.8 Since no response was received from DGCA, the petitioner through its solicitors reiterated its request vide communication dated 18.05.2011. It appears since PAL had defaulted under the loan agreement, by a communication dated 08.07.2011, the petitioner terminated the loan agreement and also simultaneously called upon a company by the name of London Executive Aviation Limited, which was, managing and maintaining the Aircraft, to transfer the possession of the said Aircraft to the petitioner. Pursuant to the aforesaid communication, the petitioner, in its capacity as a mortgagee, took possession of the Aircraft. The above was followed by a communication dated 21.07.2011 addressed to DGCA which, sought to convey to DGCA, in no uncertain terms that, since the lease agreement had been terminated it was desirous of deregistering the Aircraft from the Indian Aircraft register in consonance with its power and capacity, conferred upon it, under as the POA of GWPL, as also in its capacity as the mortgagee of the Aircraft.

5.9 Apparently, meetings in this behalf were held between the officials of DGCA as well as the solicitors of the petitioner on 02.09.2011, which is reflected in the email of its solicitor dated 14.09.2011. The aforesaid meeting was followed up by a communication dated 07.10.2011, issued by the solicitor of the petitioner, seeking deregistration of the aircraft.

6 DGCA on its part, by letter dated 08.11.2011 informed the petitioner's solicitor that since DRI was investigating the issue of evasion of custom duty, it could not deregister the Aircraft till completion of investigation, as conveyed by DRI vide its letter dated 10.12.2010. In sum

and substance, DGCA conveyed that till it receives the necessary clearance, it could not deregister the Aircraft.

7 Aggrieved by the above, the petitioner filed the present writ petition under Article 226 of the Constitution of India, whereupon notice was issued in the petition on 08.02.2012. On the said date, a direction was issued to the petitioner, to implead DRI, since the DGCA's resistance to deregistration of the Aircraft was based on the communication issued by DRI in that behalf.

7.1 Upon issuance of notice, returns have been filed by both DGCA and the DRI. Based on the aforesaid, the following submissions have been made on behalf of the parties before me.

SUBMISSIONS OF COUNSELS

8 The petitioner was represented by Mr Amit Sethi, Advocate, while DGCA was represented by Ms Anjana Gosain, Advocate. The submissions on behalf of DRI was represented by Mr S.K. Dubey, Advocate.

8.1 Mr Sethi submitted that the decision of the DGCA, not to deregister the Aircraft at the behest of DRI was illegal for the following reasons:

(i) The DGCA was a statutory authority under the Aircraft Act, 1934 (in short the Aircraft Act) which was required to take decisions on its own in consonance with provisions of the said Act read with the Aircraft Rules, 1937 (in short the Aircraft Rules), framed thereunder. In this regard, reference was made, in particular to Rule 30(6)(iv) and para 9 of the Civil Aviation Requirements (in short CAR) framed under Rule 133A.

(ii) The petitioner having exercised its power under the irrevocable POA and the IDERA, DGCA could not have refused deregistration of the Aircraft.

(iii) The refusal of DGCA to effect deregistration is violative of the provisions of the Cape Town Convention and the Protocol. It was submitted

that under Article XIII of the Cape Town Convention, it was the bounden duty of the DGCA to assist the petitioner, which was authorized to exercise remedies available under Article IX of the said convention, which included the right to seek deregistration of the Aircraft.

(iv) It is because there was a default by the lessee, i.e., GWPL, which led to the termination of the lease and the consequent step taken towards exercise of power under the POA and the IDERA by the petitioner for seeking deregistration of the Aircraft.

(v) It is not the duty or function of DGCA as envisaged under the Aircraft Act and the Rules framed thereunder, to recover the purported dues seemingly owed by the importer to the customs. In this behalf, it was submitted that DGCA is required to act independently and cannot abdicate its statutory functions and powers in favour of another authority which had nothing to do with the administration of the Aircraft Act and the Rules framed thereunder.

(vi) The DRI, similarly, has no power or authority conferred upon it under the Customs Act, 1966 (in short the Customs Act) to direct the DGCA to act in a particular manner and in this particular case to refuse deregistration so as to achieve indirectly what it cannot achieve directly.

(vii) The provisions of Section 110 and 111(o) of the Customs Act have no applicability as the Aircraft is grounded at a place which is outside the territory of India.

(viii) The petitioner being a financial institution, with a secured interest in the Aircraft, it cannot be prevented from exercising that right by an entity such as the DRI which has failed to show that, it has either a better right or a statutory charge over the Aircraft.

(ix) The investigation of DRI against the Indian importer, i.e., GWPL cannot impinge upon the rights which inhere in the petitioner under the POA, IDERA, the Customs Act, Rules framed thereunder and the Cape Town convention. In support of his contentions the learned counsel for the petitioner relied upon the following judgments: *Joint Action Committee of Air Line Pilots' Association of India (ALPAI) & Ors. vs Director General of Civil Aviation & Ors. (2011) 5 SCC 435; GPA Finance Ltd. vs Union of India, Through Ministry of Civil Aviation in C.W. No. 2368/1997 dated 02.07.1997* and *Golden Dragon Traders vs Union of India 2009 (244) E.L.T. 43(Guj)*.

9. On the other hand Mr Dubey and Ms Gosain submitted that the writ petition ought to be dismissed on the ground that there was a prima facie case of evasion of customs duty in the import of the Aircraft in question; investigation in respect of which was ensuing. Both counsels submitted that DGCA was well within its powers, both under the provisions of clause (vii) of Sub-rule 6 of Rule 30 of the Aircraft Rules to act in the manner in which it did, i.e., refuse deregistration of the aircraft.

9.1 It was submitted by the counsels that the petitioner could not exercise the power under the irrevocable POA or the IDERA in view of the fact that the lease already stood terminated.

9.2 It was the submissions of the counsels that the charge of evasion of customs duty was being investigated for the reason that at the point in time when the Aircraft was imported, exemption was sought from payment of duty on the specific undertaking that it would be used to provide NSOP services, whereas it is now found that, since the date of import, the Aircraft was being used exclusively by one Sh. Lalit K. Modi, for his exclusive personal travel.

9.3 It was further submitted, investigations had revealed that GWPL, i.e., the lessee had not paid any lease rental to the lessor, i.e., PAL. The counsels submitted that, since the Aircraft had been imported at nil rate of duty under an exemption notification, whereby, it was required to be used in a particular manner, as indicated above – the breach of the exemption conditions had triggered a right to recover duties which were exempted only if the aircraft was used for the purpose indicated in the notification. In this behalf reliance was placed on condition no. 104 of notification no. 21/2002-Cus-s.no. 347B.

10 Mr Dubey, in particular, submitted that, in view of the fact the conditions of the exemption notification had been violated by GWPL, the aircraft was liable to be seized/confiscated under the provisions of Section 110/111(o) of the Customs Act.

10.1 Mr Dubey relied upon his counter affidavit to contend that no sooner was an investigation ordered against Sh. Lalit K. Modi in the IPL scam, the Aircraft was flown out of the country, and, therefore, in order to seek recovery of the duty evaded, the communication dated 10.12.2010, was issued by DRI to DGCA advising it, not to deregister the Aircraft. According to Mr Dubey, the duty evaded in respect of Aircraft in issue, was to the tune of Rs. 19 crores (approximately), which was, exclusive of interest and other charges applicable under the Customs Act.

10.2 Mr Dubey further submitted that, the respondents' action were in consonance with provisions of Form No. 4, lodged by the Government of India (GOI) under the Cape Town Convention at the time of deposit of its instrument of accession which, empowered GOI to arrest or distrain an aircraft for payment of amounts owed to it.

10.3 Mr Dubey, when asked, as to the source of DRI's power to make the kind of request which it did vide its communication of 10.12.2010, addressed to DGCA, relied upon the proviso to Section 110 of the Customs Act.

REASONS

11 Having perused the record and heard the counsels for the parties, following facts emerge in respect of which there is no perceptible dispute.

(i) The petitioner had executed three (3) successive lease agreements with PAL, i.e., the owner of the Aircraft, in March, May and July of 2002. These lease agreements have been referred to as the 'March lease', the 'May lease' and the 'July lease'.

(ii) The petitioner also executed mortgage documents with PAL, on 05.05.2008. The said mortgage documents, create a first priority mortgage in favour of the petitioner with regard to identified airframes and engines.

(iii) The petitioner has, in its favour, an irrevocable POA and IDERA. Both documents empower the petitioner to seek deregistration of the Aircraft.

(iv) The DGCA, made an endorsement on the certificate of registration dated 25.04.2008, recognizing the petitioner as the mortgagee of the Aircraft.

(v) The Aircraft was imported into the country on 16.04.2008, after a NOC was issued by DGCA.

(vi) At the time of import, recourse was taken to the exemption notification, which, according to DGCA and DRI required the use of the Aircraft only for NSOP services and not charter services, which were purportedly availed of by one Sh. Lalit K. Modi. This aspect is also borne out, on a perusal of the NOC dated 16.04.2008 issued by the DGCA. The

petitioner claims that, at the time of import of the Aircraft a sum of Rs. 28,882/- was paid as duty by PAL, while DRI says that no duty was paid. Since the sum is insignificant, nothing much turns on it. Though the perusal of the bill of entry would show that the rate of basic custom duty is shown as nil and the total amount of duty in the bill of entry is shown as Rs.28,882/-.

(vii) The import of aircraft was subject to the compliance of applicable provisions of CAR and all other mandatory requirements laid down in that behalf by DGCA. This was specifically indicated to GWPL, by DGCA, vide its communication dated 16.04.2008.

(viii) The Aircraft was flown out of the country on 25.04.2010 and, apparently, it is parked at Biggin Hill Airport in Kent, U.K., since 23.07.2010.

(ix) On 30.09.2010, the May lease agreement was terminated; a fact which PAL conveyed to DGCA, vide communication dated 15.10.2010.

(x) The DRI, vide its communication dated 10.12.2010, advised DGCA not to permit deregistration of the Aircraft.

(xi) Initially, DGCA had two substantial objections to the deregistration of the Aircraft. These were: that there was no NOC issued by the petitioner for deregistration; and secondly, the factum of pendency of investigation by DRI. This aspect comes to fore in the DGCA's letters of 27.12.2010 and 31.03.2011, issued to GWPL.

(xii) Since, the NOC issued by the petitioner, was submitted to DGCA by the solicitor of PAL, alongwith communication dated 25.04.2011, this objection does not survive. The fact that only, the objection qua the pendency of investigation by DRI survives, is quite evident upon a perusal of letter dated 25.05.2011 issued by DGCA to the solicitor of PAL and the letter dated 08.11.2011 issued to the solicitors of the petitioner.

12 In this background the first question which arises for consideration is: whether the irrevocable POA issued in favour of the petitioner could be used by the petitioner to seek deregistration of the Aircraft after the termination of the lease. The answer to this question is found in the POA itself, which clearly empowers the petitioner to determine at its sole discretion, the point in time when, it ought to exercise the power of deregistration, and if, such power is exercised, no authority including a governmental authority, will inquire “*as to whether an event of default has occurred under the lease or whether the lease has been terminated*”. The lessee-GWP, in fact, in this behalf has waived its claims against any party which relies on the instructions of the attorney, in this case, the petitioner. POA clearly stipulates that, this power is conferred on the petitioner by the lessee-GWPL for performance by the lessee of its obligation under the lease and the loan documents. Since the POA is coupled with interest, it is declared to be irrevocable.

12.1 Therefore, the argument advanced on behalf of the DGCA and DRI that the powers of the petitioner under the POA have dissolved pursuant to the termination of the lease agreement, is untenable and hence rejected.

12.2 Furthermore, it may be relevant to note that the IDERA issued in consonance with Article XIII of the Protocol confers a similar power of deregistration in favour of the petitioner and, on such a power being exercised, the State Registry Authority of the contracting State, which is, DGCA in this case, is required to assist the authorized party, i.e., the petitioner in the instant case, in the exercise of remedies provided in Article IX of the Protocol, which includes the procurement of deregistration of the aircraft. The relevant provisions of Article IX and XIII of The protocol reads as follows:

“Article IX: Default Remedies, Priorities and Assignments”

1. In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter:

- a. procure the de-registration of the aircraft; and
- b. procure the export and physical transfer of the aircraft object from the territory in which it is situated.

2. The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

3. Article 8(3) of the Convention shall not apply to aircraft objects. Any remedy given by the Convention in relation to an aircraft object shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.”

Article XIII: De-registration and export request authorisation

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXX (I).

2. Where the debtor has issued an irrevocable de-registration and export request authorisation substantially in the form annexed to this Protocol and has submitted such authorisation for recordation to the registry authority, that authorisation shall be so recorded.

3. The person in whose favour the authorisation has been issued (the “authorized party”) or its certified designee shall be the sole person entitled to exercise the remedies specified in Article IX(1) and may do so only in accordance with the authorisation and applicable aviation safety laws and regulations. Such authorisation may not

be revoked by the debtor without the consent in writing of the authorised party. The registry authority shall remove an authorisation from the registry at the request of the authorised party.

The registry authority and other administrative authorities in Contracting States shall expeditiously cooperate with and assist the authorised party in exercise of the remedies specified in Article IX. (emphasis supplied)

12.3 In view of the provisions of Article IX and XIII, DGCA would, of necessity, be obliged to render assistance to the petitioner in obtaining deregistration. The only caveat to the aforesaid obligation appears to be that which is contained in Form No. 4 of the instrument of accession lodged by India under the Cape Town Convention. The said lodgement empowers detention or arrest of an aircraft with the object of recovering amounts owed to the GOI or any inter-governmental organization or private provider of public services in India under the extant laws in respect of services provided to the aircraft. For the sake of convenience the relevant part of Form no. 4 is extracted hereinbelow:

“...Form No. 4 (general opt-in declarations under Article 39(1)

(b)

“Nothing in the convention shall affect its right or that of any entity thereof, or any intergovernmental organization in which India is a member, or other private provider of public services in India, to arrest or detain an aircraft object under its law for payment of amounts owed to the Government of India, any such entity, organization or provider directly relating to the service or services provided by it in respect of that object or another aircraft object.”

12.4 A bare perusal of the said provision would show that the power conferred therein is with regard to arrest and detention of the aircraft and not to prevent its deregistration. Admittedly, the Aircraft is no longer available

in India, having flown out of India on 25.04.2010. Therefore, the DGCA cannot now, in my opinion, do indirectly what it cannot achieve directly. The argument advanced on behalf of the DRI that, since there is reason to believe that the aircraft,(being “goods”, within the meaning of Customs Act), is liable to be confiscated on account of the fact that the conditions of exemption notification were violated cannot be accepted as the Aircraft, i.e., the goods in issue, are no longer available within the territorial jurisdiction of India. The power under Section 110 of the Customs Act cannot extend beyond the territorial jurisdiction of India.

12.5 The submission of Mr Dubey that since the goods in issue, i.e., the Aircraft was not available in India, power could be exercised under the proviso to Section 110 is completely misconceived. A bare reading of Sub-Section (1) of Section 110, would show that power contained thereunder is exercisable where it is not practicable to seize goods in respect of which the proper officer has reason to believe that the goods in issue, are liable for confiscation. In such circumstances, the proper officer is empowered to serve on the owner of the goods in issue, an order that he shall not remove, part with or otherwise deal with the goods in issue except with his prior permission. This power is conferred in respect of goods which are otherwise available within the territorial jurisdiction of India and cannot be seized, either because of their perishable nature, or their size or such other circumstances which make it impractical to secure physical custody of the goods. The word practicable in the proviso cannot be given a meaning which would extend jurisdiction of the proper officer beyond the territory of India.

13 A Single Judge of this court in the case of *GPA Finance Ltd.* (supra) had an occasion to deal with this issue. In that case, the 1st petitioner before

this court was owner of two aircrafts, while the 2nd petitioner was the lessee of the aircrafts in issue. The 2nd petitioner had sub-leased the aircrafts to a carrier by the name of East-West Airlines. Upon defaults being committed, the lease with East-West airline, was terminated. In a suit filed in the Bombay High Court by 2nd petitioner against East-West airline, repossession of the aircrafts was granted to it subject to certain conditions. Consequently, the aircrafts were flown out of the country and were thus no longer available in India. A second round of litigation commenced in this court when, the petitioners proposed to let out the aircrafts on hire to third parties outside India. At that stage, deregistration was refused on the ground that the carrier, i.e., East-West airline had not cleared dues towards in-land travel tax.

13.1 It is in this context that the court considered: as to whether the power to arrest and distrain the aircraft could be exercised, when the aircrafts were no longer available in the country. The relevant observations of this court, made in that behalf, are as follows:

“..... The petitioner No. 1 who is the owner or petitioner no. 2 who is the first lessee and had sub-leased the aircraft to East West Airlines is neither the ‘carrier’ within the meaning of clause (c) of Section 41 of the Act nor ‘other person’ under Sub-Sections (2), (3) and (4) of Section 46A of the Finance Act, 1989. It is the ‘carrier’ alone who has realised the tax, from the passengers is liable to pay the tax and the carrier as defined under Section 41(c) of the Finance Act 1989 means the person or authority undertaking the carriage of a passenger on an inland journey and includes any agent, representative or other person acting on behalf of such person or authority. Petitioners are not such persons.

Thus in this case East West Airlines as ‘the carrier; is the person who is liable to pay the tax realized by them alongwith interest and penalty for non payment of the tax to the

Government. And under the Finance Act, 1989 this liability cannot be fastened on the petitioners.

However, these dues can be realised by distrain or arrest and sale of any aircraft or any other property belonging to or under the control of the carrier. East West Airlines are not the owners of the two aircrafts nor are the two aircrafts under the control of the carrier. Admittedly, the lease of the East West Airlines was terminated on 7.2.1995 and the possession of both the aircrafts was handed over to petitioner no. 2 in pursuance of the Bombay High Court order dated 1.8.1996. It is also admitted that both the aircrafts have flown out of the territory of India, one sometime before 1.8.1996 and the other on or about 27.2.1997 after due permission and clearance. The words “distrain” and “arrest” as per Webster’s Dictionary mean as under:

Distrain: to seize a person’s goods so as to compel him to pay a debt; to seize and sell (a person’s goods) in lieu of receiving payment of a debt; to seize the goods of (someone) in this way.

Arrest: to seize and hold by legal authority or superior force, to bring to a stop, check, (measures to arrest inflation), to attract and hold (one’s sight or attention).

Obviously, the aircraft could be distrained or arrested if it is available within the territory of India. The Authority who is competent to distrain or arrest the aircraft under the Act and the Rules is the Assistant Collector of Customs. He would have no authority to distrain or arrest an aircraft beyond the territory of India. As such in the present case as at present, recovery cannot be made by distrain or arrest of the aircrafts.....

...In any case, remedy if any, was by way of distrain or arrest of the aircraft which remedy is lost after the aircrafts have left the Indian territory....

...Here the aircraft has not been arrested nor is available in India. The question of arrest of the aircraft does not arise. This thus does not help the respondent.

The objections raised and the contentions advanced by the learned Standing Counsel for the Government have no force. Refusal to deregister the two aircrafts in the

circumstances is unreasonable, unwarranted and not justified. The petitioners are being put to great loss due to non use of their aircrafts. Writ petition is accordingly allowed with costs. The respondent is hereby directed to deregister the above two aircrafts from the register and issue necessary certificates in this behalf within two days from today filing which the respondent shall be liable to pay damages to the petitioner no. 1 @ Rs. 1 lakh per day till such certificates are issued....”

14. That apart, there is no averment made in the counter affidavit of the DRI that any such order was served on the owner of the goods in issue (i.e., the aircraft) which in this case is PAL. There is another difficulty which is that the investigation by DRI in the case has commenced, if not earlier, since 10.12.2010 when, it wrote to DGCA requesting it not to release the Aircraft. The customs authorities, who are required under Sub-Section (2) of Section 110 to return the goods in issue, if notice, as prescribed under Section 124 clause (a) of the customs Act, is not issued within six (6) months of the seizure of goods. The period of six months, under the proviso, can be extended, on a sufficient cause being shown by the Commissioner of Customs, for a period, not exceeding six (6) months. Admittedly, no notice has been issued under Section 124(a) of the Customs Act, therefore, even if one were to assume that a seizure was effected within the meaning of the proviso to sub-section (1) of Section 110, the non-fulfilment of the mandatory condition of sub-section (2), would then result in the seizure dissolving. See *J.K. Bardolia Mills vs M.L. Khunger, Dy. Collector & Ors. 1994 (5) SCC 332 and Jatin Ahuja vs UOI & Ors. 193(2012) DLT 156* This situation would of course occur only if it is assumed for the sake of argument that a seizure can be effected qua the goods in issue which, are located outside the territory of India. For the sake of convenience the

relevant provisions of Section 110(1) alongwith the proviso and sub-section (2) of 110 including the proviso is extracted hereinbelow:

“110. Seizure of goods, documents and things. – (1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

.....

.....

(2) Where any goods are seized under sub-Section (1) and no notice in respect thereof is given under clause (9) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding six months...”

15. Having regard to the aforesaid, the only conclusion that one can come to is that there is no power under the Customs Act by which it can prevail upon DGCA to desist from deregistering the aircraft. Accordingly, as prayed, a writ of mandamus is issued directing the DGCA to deregister the aircraft in issue, being Bombardier Challenger Aircraft 300, bearing manufacturer’s serial no. 20174, and registration no. VT-RAK.

16. It is, however, made clear that the aforesaid is not an expression of opinion as to the mode and manner by which the customs dues may be recovered if found payable, upon the completion of the investigation and the adjudication of the alleged charge of evasion of custom duty.

17. The writ petition is disposed of in the aforementioned terms, leaving parties to bear their own costs.

RAJIV SHAKDHER, J

MARCH 14, 2013

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