

**2017 Y L R 2442**

**[Sindh]**

**Before Mohammad Shafi Siddiqui, J**

**SHAHEEN AIR INTERNATIONAL LIMITED (SAIL) and another---  
Plaintiffs**

**Versus**

**CIVIL AVIATION AUTHORITY (CAA) through Director-General and  
another---Defendants**

Suit No.1691 of 2016, decided on 25th November, 2016.

**Civil Procedure Code (V of 1908)---**

---O.XXXIX, Rr.1 & 2---General Clauses Act (X of 1897), S. 24-A---  
Constitution of Pakistan, Arts. 18 & 25---Suit for declaration and injunction---  
Interim injunction, grant of---License, renewal of---Right to trade and business---  
Discrimination---Plaintiffs were licensed by Civil Aviation Authority to operate  
commercial airline for passengers and cargo---Grievance of plaintiffs was that  
authorities declined to renew the license on the plea that some of the Directors  
and Shareholders of plaintiff company required security clearance---Validity---  
Denial of security clearance was not as required under the law---Such was not  
only devoid of serious reasoning of security/ intelligence agencies but also hit by  
S.24-A of General Clauses Act, 1897---In absence of detailed reasoning as to the  
adverse observation, it would not be possible for plaintiffs to comply with such  
anonymous terms---Change of directorship or Chief Executive Officer, was not  
the solution as it would amount to denying a right as guaranteed to each citizen of  
Pakistan in terms of Arts. 18 & 25 of the Constitution---Letter of government  
advising plaintiff company through Civil Aviation Authority that they could either  
get security clearance from the Directorate of Inter Service Intelligence or  
concerned Director/Chief Executive Officer should be considered to be changed  
was of no consequence at all---Denial to renew a license to plaintiff company on  
account of dual nationality of Directors amounted to curtailing a right guaranteed  
under Arts. 18 & 25 of the Constitution unless valid reasons were provided---  
High Court directed plaintiffs to respond to queries and provide all information  
and documents as and when required by the concerned authority/security  
agencies---High Court suspended the orders passed by the authorities---Interim  
injunction was granted in circumstances.

Muneer A. Malik and Ch. Atif Rafiq for Plaintiffs.

Khurram Rashid for Defendant No.1.

None for Defendant No.2.

Dates of hearing: 16th and 18th November, 2016.

**ORDER**

**MOHAMMAD SHAFI SIDDIQUI, J.**---Plaintiffs have filed this suit for  
declaration, permanent and mandatory injunction against the defendants  
challenging Clause D17 of Licensing/ Certification of Flying Training,  
Commercial and Private Air Operations' Air Navigation Order dated 15.09.2015  
to be ultra vires, on the basis of which the license of petitioner No.1 was declined  
to be renewed.

Learned counsel contended that plaintiffs were licensed by defendant No.1  
to operate commercial airline for passengers and cargo under Civil Aviation  
Authority Ordinance, 1982. Such license has been renewed regularly and in  
pursuance thereof they were allowed to operate passenger flights to domestic and

international airports. The last license in this regard was renewed till December, 2015. Plaintiffs however applied with defendant No.1 for renewal of RPT License for the year 2016. It is claimed that though the defendants were satisfied as per procedure in all respects however it is informed that the plaintiff No.2 and his brother Kashif M. Sehbai who are shareholder and director of plaintiff No.1 require security clearance certificate from security agencies being of dual national despite being Pakistanis.

It is contended by the learned counsel that such condition was imposed despite the fact that father of these directors/shareholders was an officer in Pakistan Air Force. It is claimed that the security clearance of directors and chief executives, who are of dual nationals, were introduced in September, 2015 whereby new Air Navigation Order (ANO) was implemented for licensing, certification of flying training, commercial and private air operations. Such condition, as envisaged in subject ANO, were not imposed under Civil Aviation Rules, 1994 for grant of RPT license nor was it part of the previous ANO. It is claimed that plaintiff No.1 being operated by its directors since more than a decade despite being dual nationals.

It is however, without prejudice to the lawfulness of such ANO, claimed that it is the responsibility of defendant No.1 to obtain such requisites and not the plaintiff and defendant No.1 was informed accordingly in terms of letter dated 10.10.2015. It is contended that the objections raised on the renewal of plaintiff No.1's license is not related to the worthiness of aircraft or with insufficiency of regulatory procedures or commercial feasibility but the objection is only in relation to security clearance of its Chief Executive/directors. It is claimed that this denial of security clearance is only to curb the plaintiffs' operation which is discriminatory and confiscatory in nature.

Plaintiffs claim to have denied the rights in terms of Articles 18 and 25 of the Constitution of Pakistan. It is claimed that despite issuance of letters by defendant No.1 as to the assessment of security clearance of Plaintiff No.2 and his bother no reply came from Inter Service Intelligence (ISI). It is contended that ISI is not a law enforcement agency and as such they have no public interaction and without prejudice to the contention as to their responsibility it is submitted that it is impossible for plaintiffs to approach such authority. Plaintiffs approached defendants on 11.07.2016 for the confirmation of RPT License but all in vain. On 18.07.2016 again request was made to process its renewal in terms of the deeming clause D17.3 of the ANO which means that in case of no objection within the prescribed time it is deemed to be granted. However, instead of complying therewith, on 21.07.2016 reply was addressed based on letter dated 22.09.2014 that there were objections regarding security clearance despite the license being extended up to April, 2015. It is further contended that despite this issue of security clearance it was extended twice by defendant No.1.

Learned counsel for defendant No.1 on the other hand submitted that the plaintiffs are well aware of the security clearance even before Aviation Policy of 2015. Their cases were sent to the relevant department of government and the NOC was declined hence it is not in pursuance of Policy of 2015 and the recent ANO that the security clearance was declined. Since it has been rejected by the concerned agencies it cannot be taken up by defendant No.1. It is further contended that since the plaintiffs themselves have challenged the vires of present ANO they cannot take shelter upon this policy which amounts to blowing hot and cold in the same breath.

Learned counsel further relied upon the language of ANO itself and submitted that the defendant No.1 is not at all responsible or liable to process the application of the plaintiffs for security clearance in relation to a matter of dual nationality of the directors of plaintiff No.1.

Without prejudice to the above, learned counsel further relied upon the letters issued by the Government of Pakistan, Cabinet Secretariat, Aviation Division to ISI and IB with request that necessary security clearance of the above

persons may please be made. In response to this letter of 01.07.2014, the Directorate General of Inter-Services Intelligence had declined the security clearance on account of the appointment of Mr. Kashif M. Sehbai as CE and Ehsan Khalid Sehbai as director. The letter is available at page 127 Annexure B to the counter-affidavit to the listed application. He further submitted that insofar as the clearance of Pakistan International Airline is concerned, since Mr. Bernd Hildenbrand (German national) being CEO of PIA, the Cabinet Secretariat forwarded the letter of Ministry of Interior for having no objection as to the appointment of Mr. Bernd Hildenbrand as CEO hence they are operating in view of such clearance.

I have heard the learned counsel and perused the material available on record.

Admittedly the plaintiff No.1 is operating an airline since last two decades. It is only on account of the appointment of the two dual nationals, one of whom is acting as CEO, that the present controversy arose. Despite the fact that the relevant clauses of the subject ANO are under challenge the present controversy seems to revolve around clause D17 of ANO, which relates to security clearance and related issues, as long as it is not held to be ultra vires by the Court.

D17.1 relates to issuance of licenses and that Civil Aviation Authority i.e. defendant No.1 was required to directly correspond with the authorized security/intelligence agencies for obtaining security clearance of the company/ operator/ individual (CE/ Directors). D17.2 relates to the renewal of the license on account of any change, notified by the licensee regarding company's hierarchy, top management, directors, address, major shareholding, or category of operations etc. In relation to this issue as well Civil Aviation Authority is required to directly correspond with the authorized security/intelligence agency for obtaining security clearance of the concerned operators/individuals or credentials thereof. D17.3 talks about an event in case such clearance of security is delayed for more than 40 days when such deeming clause would come to rescue for the operating company. Clause D17.4 appears to have a role as far as present controversy is concerned. It relates to an issue of dual nationality and the security clearance was made mandatory, meaning thereby that by way of deeming clause of 17.3 it will not operate as an automatic grant or renewal of license.

A question which is contested by both the learned counsel is as to whose responsibility is it to obtain security clearance in relation to a dual nationality issue. The scheme of this part of ANO which relates to security clearance has two frames; one frame is in domain of clauses D17.1 and D17.2; the other frame is encompassed in clause D17.4. Cumulatively these clauses do not specifically show as to who the security/ intelligence agencies are from whom clearance is required. Though the deeming clause of D17.3 will operate only for D17.1 and D17.2 however insofar as procedural requirement for applying to obtain security clearance is concerned, it is one and the same. It seems that even prior to the operation of the present ANO it is the defendant No.1 who has been making correspondence on behalf of the plaintiff. The correspondence such as Annexure J, K, L etc. to plaint are relevant in this regard.

The request of the Cabinet Secretariat, Government of Pakistan dated 01.07.2014 was declined by the Director General Inter-Services Intelligence in the following manner:--

"NOC for appointment of Mr. Kashif M. Sehbai, CEO and Mr. Ehsan Khalid Sehbai as Director is not supported due to security reasons, please."

I have no hesitation in observing that it is the responsibility of defendant No.1 to directly correspond with the authorized security/intelligence agencies for obtaining security clearance of the company. The second part of clause D17.4 of ANO is very crucial in this regard which is reproduced as under:--

".....If such CE/Director(s) are not security cleared or there are serious or adverse observations by the Security/Intelligence Agencies at any stage, the operator/company/ individuals concerned shall have to comply with the instructions of the Federal Government/DG Civil Aviation Authority....."

Firstly the denial of the security clearance as observed in the letter dated 22.09.2014 at page 127 to the counter-affidavit is not as required under the law. This is not only devoid of serious reasoning of the security/intelligence agencies but also hit by Article 24-A of General Clauses Act. In the absence of detailed reasoning as to the adverse observation, it would not be possible for the plaintiffs to comply with such anonymous terms. The change of directorship or CEO is not the solution as it would amount to denying a right as guaranteed to each citizens of Pakistan in terms of Articles 18 and 25 of the Constitution of Pakistan. The letter of the Cabinet Secretariat, Government of Pakistan, advising the plaintiffs company through Civil Aviation Authority that they may either get the security clearance from the directorate of ISI or the concerned director/CEO may be considered to be changed is of no consequence at all. The denial to renew a license to plaintiff No.1 on account of dual nationality of directors amounts to curtailing a right guaranteed under Articles 18 and 25 of the Constitution unless valid reasons are provided. Admittedly, one of the airline was being operated despite it being headed by one German national namely Mr. Bernd Hildenbrand.

In view of the above, I would dispose of the injunction application in the following terms:--

1. That the denial order/decision as to non-issuance of NOC in view of appointment of Mr. Kashif M. Sahbai as CEO and Ehsan Khalid Sehbai/plaintiff No.2, prima facie does not appear to be in accordance with law hence cannot be acted upon and shall remain suspended till final disposal of the suit;
2. The defendants in pursuance of clause relating to security clearance in terms of 17D of ANO shall directly apply and correspond with the concerned authority/security intelligence agencies for obtaining NOC/security clearance on account of dual nationality of CEO/ directors of plaintiff No.1 for renewal of its license;
3. The concerned security/intelligence agency shall issue notice, if require, hear the plaintiffs and/or any other person from any concerned department and decide the question as to security clearance of plaintiff No.1 and its all directors and CEO etc. by giving reasons for such decision. Such exercise shall be completed within four weeks from the date of last hearing before the concerned authority/security agency;
4. The plaintiffs and all directors and CEO however shall respond to the queries and provide all information and documents as and when required by the concerned authority/ security agencies;
5. Till such time the question of security clearance is decided, in terms of the above, the interim order dated 01.11.2016 passed in this suit shall continue to operate.

The application fixed at Sr. No.1 for orders in view of the above order appears to have served its purpose and the same is accordingly dismissed as having become infructuous.

MH/S-4/Sindh  
accordingly.

Order