

(2006) 09 CAL CK 0046

In the Calcutta High Court

Case No : A.P.O. No. 328 of 2003 and W.P. No. 438 of 2002

Delta Febrics Private Limited and Another	APPELLANT
Vs	
Industrial Development Bank of India and Others	RESPONDENT

Date of Decision : 07-09-2006

Acts Referred:

Citation : (2006) 4 CHN 594 : 111 CWN 1

Hon'ble Judges : Tapan Mukherjee, J;Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Ajit Kumar Panja, Pradip Kumar Tarafdar, Pannalal Bandopadhyay and Amrita Kumar, for the Appellant;A.K. Dhandhanian and A.K. Sur, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee, J.—The writ petitioner was a private limited company engaged in the business of manufacturing of fabrics. It applied for financial accommodation to Industrial Development Bank of India (hereinafter referred to as the "Bank"). The petitioner duly furnished necessary documents along with its application. The project was estimated at Rs. 1210.00 lacs. However, the bank sanctioned Rs. 650.00 lacs and asked the petitioner to deposit upfront fee @1.05% of the sanctioned amount being Rs. 6,82,500.00. The petitioner duly paid the said sum without any protest. The parties, thereafter, negotiated the terms of the agreement on which the sanction was to be implemented and actual financial accommodation to be extended. The petitioner, however, did not agree with the terms so prescribed by the bank. The bank ultimately cancelled the sanction. The petitioner accepted such cancellation, however, asked for refund of upfront fee which was refused by the bank. Hence the writ petition was filed.

2. Learned Single Judge dismissed the writ petition by judgment and order dated April 8, 2003. Hence the present appeal.

3. The learned Single Judge held as follows:

(i) Upfront fee so paid by the petitioner/appellant was nothing but processing fee required for process of the application by the bank and hence not refundable.

(ii) Bank processed the application and ultimately sanctioned the amount of Rs. 650.00 lac. Hence the process in grant of financial assistance was complete and the bank was entitled to the processing fee. The petitioner did not accept the terms and condition of such loan and as such the sanction was cancelled. Hence, the petitioner was not entitled to refund of the processing fee.

(iii) Before sanction of the loan the Bank was to examine various aspects including feasibility of the project to grant such sanction and for such process the bank was entitled to charge processing fee. Whether such fee was on the higher side or not was a question which was not possible to be examined by the Court.

(iv) The petitioner never objected to such processing fee being collected and paid such fee without any protest. Hence, question of refund did not arise.

4. In support of the appeal Mr. Ajit Kumar Panja, learned Senior Counsel appearing for the appellant, contended that until and unless the agreement was arrived at by and between the parties the issue was not concluded and no term of the unexecuted agreement could be enforced. According to Mr. Panja payment of upfront fee was a condition stipulated in the agreement which was to be entered into. The parties fell out before such agreement was entered into. Hence the bank was obliged to refund the upfront fee so collected from the petitioner.

5. Mr. Panja also contended that by the purported order of refusal dated October 28, 2000 the Bank observed that upfront fee was charged in lieu commitment made to the company towards availability of the fund during the implementation of the project whereas in the affidavit-in-opposition as well as before the learned Single Judge it was contended that such fee was collected as processing charge. Such contrary stand was not permissible and the learned Judge should not have allowed such deviated stand being taken on behalf of the Bank.

6. In support his contention, Mr. Panja relied on three decisions of the Apex Court:

(i) Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others,

(ii) 1994 (6) SCC Page 651 Tata Cellular v. Union of India

(iii) M/s. Shree Baidyanath Ayurved Bhawan Pvt. Ltd. Vs. State of Bihar and others,

(iv) M/s. Rickmers Verwaltung GMB H Vs. The Indian Oil Corporation Ltd.,

7. In the case of Mohinder Singh Gill (supra) the Apex Court observed:

when a statutory functionary makes an order based on certain grounds its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise.

8. In the case of Shree Baidynath Ayurved Bhawan Pvt. Ltd. (supra) considering the claim for refund from the excise authorities the Apex Court was of the view that although the claim was only for money considering the facts the High Court should have ordered for refund. Their Lordships quashed the order of refusal and directed refund together with interest in the said case.

9. In the case of Tata Cellular (supra) the Apex Court prescribed the test for judicial review to examine the decision making process. While doing so the Apex Court was of the view:

the duty of the Court is to confine itself to the question of legality. Its concern should be-

- (i) whether a decision making authority exceeded its powers?
- (ii) committed an error of law,
- (iii) committed a breach of rules of natural justice,
- (iv) reached a decision which no reasonable Tribunal would have reached, or
- (v) abused its powers.

10. In the case of Rickmers Verwalting GMBH (supra), the Apex Court was of the view:

It is the duty of the Court to construe the correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn.

11. Mr. A.K. Dhandhaniala learned Counsel on the other hand appearing for the bank contended that the Bank was entitled to upfront fee as a condition precedent of sanction of loan. Since the Bank sanctioned the loan they were not entitled to claim refund although the petitioner did not avail the said loan.

12. We have heard the parties at length. We have carefully examined the letter of refusal dated August 31, 2000. We have also considered the averments made in the affidavit-in-opposition. We have also examined the law on the subject so cited by Mr. Panja. On careful consideration of the issue we are of the view that the test is to find out whether the Bank was entitled to demand upfront fee at the stage when it was demanded and whether the same was paid by the writ petitioner without any protest. The writ petitioner applied for loan. The loan application was processed. The writ petitioner prayed for accommodation of Rs. 1210.00 lacs. The appellant Bank, however, granted them sanction of Rs. 650.00 lacs. At that juncture the Bank asked the writ petitioner to pay the upfront fee. There was no stipulation made by the petitioner for refund of the said fee. The petitioner also understood such demand as legally payable by them and as such

they paid the same. In this regard Mr. Panja drew our attention to Clause 1(iii) of the draft agreement by which it was stipulated that the company would be liable to pay upfront fee at the time of issue of letter of intent. Drawing our attention to such clause, Mr. Panja contended that such clause was to be incorporated in the agreement which was never entered into. Hence, such clause could not be enforced. Mr. Panja's argument in our view on this score could have been well-founded had it been made at the stage when such demand was raised. The petitioner understood the demand of the Bank as a precondition to get the sanction. Accordingly, they paid the amount. On the ground that the agreement was not entered into the petitioner was not entitled to claim for refund specially when the bank was ready and willing to grant the loan by making a promise through its letter of intent by sanctioning the loan.

13. The problem could be viewed from another angle. The dictionary meaning of the word "fee" is "charge in terms of money against the service rendered". From such meaning it is clear that unless it is paid in advance question of refund would not come. In the instant case the money was paid not along with the application made for sanction. It was paid at a later stage when the Bank came to a final decision that they would grant loan and accordingly sanctioned the same and issued the letter of intent to that extent. Hence, there could be no question of refund of such fee. It is true that by the letter of refusal the Bank contended that it was for commitment to grant the loan. Such demand was a result of a detailed investigation by the Bank which was elaborately explained in the affidavit-in-opposition. We do not find any deviation. Hence, the ratio decided in the case of Mohinder Singh Gill (*supra*) in our view cannot be applied herein. The learned Judge rightly dismissed the writ petition by coming to a conclusion that upfront fee so paid by the petitioner was not refundable. Such decision of His Lordship does not call for any interference.

14. The appeal fails and is hereby dismissed.

15. There would be no order as to costs.

16. Urgent xerox certified copy will be given to the parties, if applied for.

Tapan Mukherjee, J.

I agree.