

(2014) 08 CAL CK 0039

In the Calcutta High Court

Case No : AST No. 320 of 2014 and CAN No. 8329 of 2014

Kingfisher Airlines Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 28-08-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 1 CompLJ 151

Hon'ble Judges : Jayanta Kumar Biswas, J; Ishan Chandra Das, J

Bench : Division Bench

Advocate : Siddhartha Mitra, Moushumi Bhattacharya, Soumitra Datta and Arunava Deb, Advocates for the Appellant; Hira Mitra and Prantar Basu Chowdhury, Advocates for the Respondent

Judgement

Jayanta Kumar Biswas, J.—The appellant in the AST is questioning a decision of a single Judge dated 10 July, 2014 [Kingfisher Airlines Ltd. and others v. Union of India and others (2015) 1 Comp LJ 160 (Cal)], dismissing its WP No. 19247(W) of 2014 under Article 226 of the Constitution of India dated 4 July, 2014. Under a scheme framed by the Reserve Bank of India (in short RBI), with effect from 1 April, 1999, the banks, etc., incurred an obligation to submit to the RBI the details of the wilful defaulters and the banks, etc., were reporting all cases of wilful defaults that occurred or were detected after 31 March, 1999, on a quarterly basis. On 1 July, 2013, the RBI issued a Master Circular (in short MC) on Willful Defaulters for putting in place a system to disseminate credit information pertaining to wilful defaulters for cautioning the banks, etc. so as to ensure that further bank finance was not made available to them.

2. Paragraph 3 of the MC is quoted below:

"3. Grievances Redressal Mechanism Banks/FIs should take the following measures in identifying and reporting instances of wilful default:

(i) With a view to imparting more objectivity in identifying cases of wilful default,

decisions to classify the borrower as wilful defaulter should be entrusted to a Committee of higher functionaries headed by the Executive Director and consisting of two GMs/DGMs as decided by the Board of the concerned bank/FI.

(ii) The decision taken on classification of wilful defaulters should be well documented and supported by requisite evidence. The decision should clearly spell out the reasons for which the borrower has been declared as wilful defaulter vis-?-vis RBI guidelines.

(iii) The borrower should thereafter be suitably advised about the proposal to classify him as willful defaulter along with the reasons therefor. The concerned borrower should be provided reasonable time (say 15 days) for making representation against such decision. If he so desires, to a Grievance Redressal Committee headed by the Chairman and Managing Director and consisting of two other senior officials.

(iv) Further, the above Grievance Redressal Committee should also give a hearing to the borrower if he represents that he has been wrongly classified as wilful defaulter.

(v) A final declaration as "wilful defaulter" should be made after a view is taken by the Committee on the representation and the borrower should be suitably advised."

3. United Bank of India sanctioning the appellant a Rs. 398.22 crore credit limit wrote a letter dated 28 May, 2014, to the appellant that the committee of the bank on identification of wilful defaulters classified it as a wilful defaulter on the grounds that it was in default on the loan that it did not utilize for the specific purpose for which it had been made available, but diverted for other purposes.

4. Stating that it proposed to forward the appellant's name to the RBI as a wilful defaulter, the bank informed the appellant as follows:

"5. In case you desire to submit your representation in regard to the proposed identification as a willful defaulter by the aforesaid committee, you may submit your representation within 15 days (fifteen days) from the date of issuance of this letter for consideration by the Grievance Redressal Committee of the bank on identification of willful defaulter, failing which bank will proceed further in the matter. In case your representation is received by the bank within the above stipulated time, the same will be placed before the Grievance Redressal committee of the bank for consideration before taking a final decision in the matter."

5. In response the appellant wrote a letter dated 10 June, 2014. Disputing the case of the bank, the appellant requested the bank as follows:

"15. Given the legal and factual complexity as well as the dire consequences of our being declared a willful defaulter, natural justice demands that not only are we afforded an opportunity of a personal hearing, but are permitted to appoint

an advocate of our choice to appear on our behalf at the hearing before the said committee."

6. In view of the provisions of the MC, para. 3(iv), the Grievance Redressal Committee (in short GRC) of the bank incurred an obligation to give the appellant a hearing, because the appellant represented that it had been wrongly classified as a wilful defaulter. Its letter dated 10 June, 2014, was also to the effect that it was seeking permission to engage an advocate to appear on its behalf before the GRC.

7. By a letter dated 23 June, 2014, the bank responded to the appellant's letter dated 10 June, 2014. While reiterating its case that the appellant was a willful defaulter on the loan, it informed the appellant that its GRC would give it personal hearing on 28 June, 2014. It, however, did not say anything regarding the appellant's case that it should be permitted to engage advocate to appear before the GRC.

8. By a letter dated 24 June, 2014, the appellant requested the bank to fix the hearing for 26 July, 2014, or 2 August, 2014. It mentioned in the letter that its advocate would address the GRC. In response the bank wrote a letter dated 25 June, 2014, notifying the hearing date 9 July, 2014, and saying as follows:

"As regards engaging advocate for addressing the Grievance Redressal Committee, you are requested to be guided by the aforesaid Master Circular of RBI. In this regard, you will appreciate that the said Master Circular of RBI does not contain any provision for being represented by an advocate at the time of hearing before the Grievance Redressal Committee."

9. The appellant wrote a reply letter dated 30 June, 2014. Saying that in a similar case Corporation Bank, another partner in the appellant's lenders' consortium, had permitted it to engage advocate to appear before its GRC, it again requested the bank to permit it and its directors concerned to engage their respective advocates to appear on their behalf before the GRC.

10. The appellant wrote that advocates should be permitted for the following reasons:

"In this regard, it is submitted and you are well aware that being declared a wilful defaulter entails serious consequences, including penal consequences. Hence, depriving KFA, Dr. Vijay Mallya and the erstwhile directors of an opportunity to be represented by trained legal professionals is a miscarriage and failure of justice and a denial of a real and reasonable opportunity of defending themselves. It is submitted that the refusal of legal representation is in essence a violation of the principles of natural justice and the rights guaranteed under the Constitution of India."

11. By a letter dated 30 June, 2014, the bank referring to its decision stated in its earlier letter dated 25 June, 2014, to the appellant informed the appellant that the RBI MC did not contain any provision for engaging advocate before its

GRC by a borrower for the hearing purpose. Feeling aggrieved, the appellant moved the WP.

12. The respondents contesting the WP chose not to file any affidavit in opposition thereto.

13. The Single Judge has mentioned the issue involved in the WP in his judgment, para 10, which is quoted below:

"10. No argument has been advanced in support of the claim for setting aside the notices dated 28 May, 2014, and 23 June, 2014. Regard being had to the arguments advanced the only point that emerges for a decision on this writ petition is, whether the petitioning company is entitled to legal representation before the Committee."

14. Referring to the principles stated by the Supreme Court in J.K. Aggarwal Vs. Haryana Seeds Development Corporation Ltd. and others, , the Single Judge has said that the question of legal representation is to be decided on the facts of the case concerned.

15. As to the WP case, the judge has said as follow:

"It has not been shown that the officers of the bank comprising the Committee are legally trained persons for which there could be a reasonable likelihood of a failure of justice, if the petitioning company were refused the permission to be represented by an advocate..... in the hearing to be conducted by the Committee, reasonably simple questions of fact as to by whom and how the finances of the petitioning company were handled and utilized, and where the funds have gone resulting in accumulation of dues, would fall for consideration,..... "

16. Mr. Siddhartha Mitra, Senior Advocate, has appeared for the appellant and Mr. Hirak Mitra, Senior Advocate, has appeared for the bank; and they have cited the following decisions: Pett v. Greyhound Racing Association Ltd. (1968) 2 All ER 545; Enderby Town Football Club Ltd. v. The Football Association Ltd. (1971) 1 All ER 215; Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, ;]. J.K. Aggarwal Vs. Haryana Seeds Development Corporation Ltd. and others, and D.G. Railway Protection Force and Others Vs. K. Raghuram Babu, .

17. For the appellant, Mr. Mitra has submitted as follows: No provision of law prohibited against a borrower's advocate appearing before the GRC for the hearing purpose. The appellant has a right to participate in the hearing through an agent that includes an advocate. Even if the bank had a power to decide whether advocate would be permitted, having regard to the complex nature of the case, need for interpretation of provisions of the MC, a legal document, the serious penal consequences likely to visit the appellant, and no case of prejudice to the bank, the bank ought to have permitted the appellant to engage advocate. The bank refusing permission simply citing absence of a provision in the MC did

not exercise its discretion judiciously. In court it has sought to justify its decision stating other reasons. It cannot do that. On the facts, the Single Judge erred in law in dismissing the WP.

18. For the bank, Mr. Mitra has submitted as follows: The appellant's several reply letters to the letters written by the bank will reveal that the appellant has not said that on 28 May, 2014, when the bank wrote the first letter dated 28 May, 2014, it was not in default on the loan. The only question before the GRC is whether the appellant is a wilful defaulter. In letter dated 28 May, 2014, the bank specifically stated the reasons why its committee proposed to classify the appellant as a wilful defaulter. There is no reason to say that the appellant's refuting process is likely to be a very complex one. The appellant did not have any legal right to engage advocate to appear before the GRC for the hearing purpose, and there was no reason to treat the appellant's case as one fit for a permission to engage advocate.

19. Before us the appellant's junior counsel has raised one issue that a committee such as the GRC of the bank that is likely to be biased in favour of the bank cannot be permitted to hear the borrower whom the bank, on the basis of its own records scrutinised by its own officials, has already proposed to classify as a wilful defaulter. She has also argued that, on the facts of the case, the appellant does not come within the definition of wilful defaulter given in the MC.

20. We have already noted that before the Single Judge the appellant argued only one issue--permission to engage advocate to appear before the GRC of the bank. It is of no consequence that in its WP the appellant might have stated a case that was sufficient to give rise also to the issues raised before us. The appellant not raising them before the Single Judge cannot be permitted to raise them before us. Hence, we are to examine the only issue whether the bank was justified in refusing permission to engage advocate for the hearing purpose.

21. The four decisions cited to us in relation to permission to engage advocate for the hearing purpose lead to the following principles--If any provision applicable to the proceeding deals with the question, the request for permission to engage advocate is to be decided according to the provision. If there is no provision, it is the discretion of the person initiating the proceeding and obliged to give the hearing. The discretion is to be exercised on the facts of the case concerned. The nature of the proceeding, accusation, forum, decision making process, likely consequences of an unfavourable decision and the position of the person to be heard--are relevant for deciding the question.

22. The proceeding has been initiated by the bank that had granted the appellant loan and it has been initiated under provisions of the MC that created an obligation of the bank to initiate the proceeding and give the appellant a hearing opportunity under para 3(iv) thereof. The appellant's right to hearing by the GRC of the bank has been created by the provisions of para 3(iv) of the MC.

23. The accusations of the bank are that the appellant is a wilful defaulter,

because it is not only in default on the loan, but has also diverted the loan amount for purposes other than the purpose for which it had been sanctioned.

24. The GRC of the bank is to hear the appellant before taking a view on the appellant's representation that the bank has wrongly classified it as a wilful defaulter. The committee does not possess any power to take down evidence. Hence, there is no scope for examining and cross-examining any witness. The consequences the appellant is likely to suffer are those specified in the MC. The appellant is a company taking a Rs. 398.22 credit limit from the bank.

25. In its letters dated 10 June, 2014, and 30 June, 2014, the appellant stated the reasons why it intended to engage an advocate to appear before the GRC for the hearing purpose. It is true that the bank refused permission to engage advocate on the grounds that nothing in the MC provisions entitled it qua a borrower to engage an advocate to appear on its behalf before the GRC for the hearing purpose. But, on the facts, we do not think it is a case for remand.

26. The Single Judge did not think it necessary to remit the matter to the bank for a fresh decision, evidently because this was not the line of the appellant's argument. The bank did not file any opposition. Hence, it is wrong to say that, by supplying additional reasons, it sought to supplement the rejection reason mentioned in its letters dated 25 June, 2014, and 30 June, 2014.

27. In our opinion, the principal test for deciding whether permission to engage advocate for the hearing purpose before the GRC should given is whether the refusal will defeat the purpose of the hearing. No prohibition against MC silence and no case of prejudice--these all are wrong tests; for absence of a prohibition or silence or no likely prejudice does not create a right to do a thing.

28. As noted hereinbefore, here the proceeding has been initiated by the bank whose GRC is under an obligation created by the MC, para 3(iv), to give the appellant a hearing, because the appellant has represented against the proposal of the bank to classify it as a wilful defaulter.

29. Here the proceeding is between a lender and a borrower, and a committee of the lender is to hear the borrower. The committee is not to decide any lis between the parties; nor is it to adjudicate any dispute; nor to inquire into any charge and record its findings. It is only to take a view on the appellant's representation against proposal of the bank, based on its records related to the appellant's loan account, to classify the appellant as a wilful defaulter.

30. The lender is under an obligation to detect its borrowers who are in default on loan it has sanctioned. Whether a borrower is a wilful defaulter is to be ascertained first by the bank internally through its high officials who are to scrutinise the related records for classifying the borrower concerned. A borrower when declared a wilful defaulter is bound to face the penal consequences mentioned in the MC itself.

31. The evident purpose of the hearing of the borrower is to ensure that the

lender does not commit a mistake in identifying and classifying a borrower as a wilful defaulter. The appellant's representation is that the bank has wrongly classified it as a wilful defaulter. The GRC of the bank supposed to examine the appellant's case closely in the presence of the appellant that will be free to present its case over the course of hearing, is not, however, empowered to take down any evidence.

32. Hence, in ordinary cases, absence of an advocate for the hearing purpose is not likely to defeat the purpose of the hearing. In this case, we do not find any reason to say that the grounds stated by the appellant for permission to engage advocate to appear before the GRC for the hearing purpose have constituted a case that absence of the service of an advocate for the hearing purpose is likely to defeat the purpose of the hearing.

33. We are, therefore, of the opinion that by refusing permission to engage advocate the bank did not commit any wrong, and that the Single Judge has rightly dismissed the WP, though he has recorded a finding that the appellant is a defaulter on the loan, - not an issue in the WP, and made an assumption about the appellant's representation ability, - an impermissible personal perception.

34. For these reasons, we dismiss the AST. The CAN (for additional evidence) shall be treated as disposed of. No costs. For the appellant, Mr. Mitra has prayed for stay. We have dismissed the AST. We are unable to see what to stay. Mr. Mitra is actually seeking an interim order restraining the bank from proceeding with the matter. We find no reason to pass interim order after dismissing the AST.