
(2014) 09 CAL CK 0035
In the Calcutta High Court
Case No : Writ Petition No. 942 of 2014

Kingfisher Airlines Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 26-09-2014

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2015) 1 CompLJ 190

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Sudipto Sarkar, Siddhartha Mitra, Hirak Kumar Mitra, Senior Advocates, Mousumi Bhattacharya, Rishab Medora, P. Garai and P. Basu Choudhury, Advocates for the Appellant

Judgement

Debangsu Basak, J.—The writ petition challenges a declaration of willful defaulter made by United Bank of India against the writ petitioners by an order of the Grievance Redressal Committee of United Bank of India dated 1 September, 2014 [GRC]. The writ petitioners also seek declaration that the Reserve Bank of India Masters Circular regarding wilful defaulters be declared invalid and ultra vires. Mr. Sudipto Sarkar, learned Senior Advocate for the writ petitioners, submits on instructions that the writ petitioners do not wish to proceed against the respondent No. 1 and seek deletion of respondent No. 1 as second party respondent. On such prayer the respondent No. 1 is deleted as a party respondent from the writ petition.

2. Mr. Sarkar refers to the judgment and order dated 10 July, 2014, passed in WP No. 19247(W) of 2014 Kingfisher Airlines Limited Vs. Union of India, and submits that the court on the earlier writ petition of the writ petitioners regarding declaration of the writ petitioners as willful defaulters gave few directions. According to him, one of the directions was that the date of hearing be fixed with 72 hours advanced notice. He submits that, the writ petitioners preferred an appeal which was disposed of by a judgment and order dated 28 August, 2014

judgment and order dated 10 July, 2014, passed in WP No. 19247(W) of 2014 [see Kingfisher Airlines Limited Vs. Union of India, . The appeal was confined to a point as to whether the writ petitioners will be entitled to be represented by an advocate at the hearing of the Grievance Redressal Committee (GRC) or not. Such question was answered in the negative and the appeal was dismissed. His clients moved the Hon''ble Supreme Court of India by way of a Special Leave Petition which, according to the writ petitioners, was made infructuous by the respondent authorities. Such special leave petition was found to be infructuous in view of the order passed by the GRC on 1 September, 2014. The Special Leave Petition was disposed of on 2 September, 2014.

3. Mr. Sarkar seeks interim protection pending adjudication of the writ petition. He submits that the bank acted in breach of the principles of natural justice. He submits that his clients were not afforded 72 hours notice in terms of the order dated 10 July, 2014 Kingfisher Airlines Limited Vs. Union of India, . He refers to the notice sent by electronic media dated 29 August, 2014. He submits that the electronic mail was sent at 11.01 am to an officer of the petitioner No. 1. The third electronic mail enclosed a notice dated 29 August, 2014, addressed to the petitioner No. 1, at Bangalore. The notice dated 28 August, 2014, required the writ petitioners to be present at Kolkata on 1 September, 2014, at 10.30 a.m. He submits that on the face of the notice dated 29 August, 2014, a time of 72 hours directed by the order dated 10 July, 2014, was not complied with.

4. He submits that, on the same date his clients applied for adjournment on the ground that the order of the division bench was not available with the writ petitioners and that the writ petitioners have filed a special leave petition before the Hon''ble Supreme Court of India. The request for adjournment was repeated on behalf of his clients by their advocates from Delhi in their request dated 30 September, 2014.

5. Mr. Sarkar refers to the electronic mail dated 1 September, 2014, received by his clients. He submits that electronic mail was issued on 11.34 a.m. The electronic mail enclosed a letter dated 1 September, 2014, which refers to a meeting of the GRC on 1 September, 2014, on 10.30 a.m. and that GRC has passed an order dated 1 September, 2014, declaring the writ petitioners as wilful defaulter.

6. Mr. Sarkar thereafter relies upon another electronic mail dated 1 September, 2014, issued at 4.40 p.m. enclosing the minutes of the meeting of the GRC. He refers to the fifth paragraph of the second page of such minutes and submits that, the Chairman of the GRC decided to proceed on the basis of the documents placed to the Committee to declare the writ petitioners as wilful defaulter. He submits that a third electronic mail dated 1 September, 2014 was issued by the respondent Authorities at 5.10 p.m. which enclosed the decision of the GRC. He points out that GRC considered the documents relied on by the bank. The GRC took on record such documents as annexures 1 to 30. He submits that, the documents being annexures 1 to 30, relied upon by the GRC, were not given to

his clients prior to the meeting of the GRC or even with the communication of the decision of the GRC.

7. He submits that the respondent authorities have acted in breach of principle of natural justice. His clients were denied reasonable opportunity of hearing before the GRC by the respondent authorities serving a notice not less than 72 hours, as directed by the court in the earlier writ petition¹. Secondly, he submits that, GRC considered documents which were not made available to the writ petitioners. The writ petitioners, consequently, were denied any opportunity of dealing with such document in their representation.

8. Mr. Sarkar relies upon an unreported decision dated 3 October, 2013 rendered in WP 865 of 2013 (2015) 1 Comp LJ 120 (Cal)]. He submits that the decision of the bank to classify the writ petitioners as wilful defaulter must be supported by requisite evidence and that the material on which basis the bank considers the writ petitioners as wilful defaulter should have been made over to the writ petitioners along with the notice to show cause.

9. He refers to a decision of Delhi High Court passed in a writ petition filed by the writ petitioner No. 1 being WP (C) 5532 of 2014 Kingfisher Airlines Limited Vs. Union of India, and submits that the Delhi High Court has held that the materials that are relied upon by any authority in arriving at a decision must be made available to the affected party and that the same is an integral part of the principle of natural justice that are enshrined in Article 14 of the Constitution of India.

10. Mr. Hirak Mitra, learned senior advocate for the United Bank of India and its functionaries, submits that no principle of natural justice was breached in the facts and circumstances of the instant case. He submits that a show cause notice was issued to the writ petitioners on 23 June, 2014, where the grounds on which the writ petitioners were sought to be declared as wilful defaulter were specified. The writ petitioners responded thereto by a reply dated 24 June, 2014. The points raised in the show cause notice dated 23 June, 2014, were not dealt with at all.

11. He refers to the Reserve Bank of India circular under challenge. In particular, he refers to clauses 2.1, 2.2 and 2.4. On clause 3 which deals with Grievance Redressal Mechanism, he submits that the decision to classify a person as wilful defaulter in terms of clause 3(ii) can be taken internally by the bank without the involvement of the persons who were sought to be declared as such. On clause 3(iii) of the guidelines he submits that the guidelines require a borrower to be suitably advised about the proposal to classify it as wilful defaulter along with reasons thereof. The clause does not require, according to him, documents which formed the basis of the decision of the bank to proceed against the borrower to classify him as a wilful defaulter under clause 3(ii).

12. He submits that, in the facts of the instant case, the writ petitioners received adequate notice of the decision of the bank to classify them as wilful defaulter.

They were afforded reasonable opportunity of making representation. They did not address the issues raised in the show cause notice dated 23 June, 2014. They chose not to appear before the GRC in spite of notice. They cannot complain of the breach of the principles of natural justice.

13. He submits that the writ petitioners were not present on 1 September, 2014, when the GRC considered the 30 documents. Had the writ petitioners or any of them been present on 1 September, 2014, they would have been given such documents. He submits that there is no obligation on the part of the bank to supply such document prior to the date of hearing and that supply of such document prior to the date of hearing should not be read into clause 3 (iii) of the Reserve Bank of India guidelines.

14. He points out that the writ petitioner No. 3 is a resident of Kolkata. Even the writ petitioner No. 3, despite being a resident of Kolkata, did not attend the GRC meeting. He refers to the past conduct of the writ petitioners. He submits that the writ petitioners have been moving diverse forum for the purpose of stalling the declaration of the writ petitioners as wilful defaulters. That the account of the writ petitioner No. 1 has become a non-performing asset (NPA) cannot be disputed. The bank is justified in invoking the provisions of the Reserve Bank of India Guidelines for declaration of borrower as wilful defaulter as the facts scenario obtaining in the instant case warranted such declaration. He submits that the Reserve Bank of India guideline under challenge is a piece of economic legislation and that it is in public interest. He relies upon M/s. Rose Valley Real Estate and Construction Ltd. and Another Vs. Union of India and Others, on this aspect. He submits that the order impugned herein is of 1 September, 2014, and that there is unexplained delay of about 25 days. Considering such delay no ad interim order should be passed.

15. According to him, the writ petitioners have not made out a prima facie case and that the balance of convenience is not in favour of the writ petitioners in granting any ad interim relief. His clients will use an affidavit dealing with the allegations made in the writ petition. He refers to paragraph 34 of the previous writ petition filed by the writ petitioners and submits that the points of ultra vires with regard to the Reserve Bank of India Guidelines in question was not taken in the earlier writ petition and, therefore, the points raised today by the writ petitioners cannot be raised in the subsequent writ petition in view of the principles of constructive res judicata. He relies upon Smt. Molina Ghosh v. State of West Bengal and others (1988) 2 Cal LJ 20, at page 44, in support of such proposition.

16. I have considered the rival contentions of the parties and the materials made available on record. The writ petitioners before me contend that the declaration of wilful defaulter made by the GRC on 1 September, 2014, is in breach of the principles of natural justice.

17. I find from the materials on record that the writ petitioners had filed a

previous writ petition with regard to the process for declaration of wilful defaulter initiated at the instance of the bank. Such writ petition being WP No. 19247(W) of 2014 was disposed of by a judgment and order dated 10 July, 2014 Kingfisher Airlines Limited Vs. Union of India, . One of the directions contained in such judgment and order is the requirement of the bank to issue 72 hours advance notice to the writ petitioners prior to the date of hearing of GRC.

18. An appeal was carried at the instance of the writ petitioners, which was disposed of by a judgment and order dated 28 August, 2014 Kingfisher Airlines Limited Vs. Union of India, . The directions contained in the judgment and order dated 10 July, 2014, as to notice was not interfered with. The bank also accepted the position that prior 72 hours notice is required to be given. The acceptance of such position on behalf of the bank will appear from the minutes of the meeting dated 1 September, 2014. The bank issued a notice dated 29 August, 2014, at 11:01 a.m., requiring the writ petitioners to be present before the GRC meeting scheduled to be held on 1 September, 2014, at 10:30 a.m., Mr. Sarkar submits that 29 August 2014, was a Friday. The following Monday being 1 September, 2014, was the date fixed for the GRC meeting. Even taking the date and time of the notice as well as the time fixed for GRC meeting, Mr. Sarkar submits that 72 hours in terms of the direction contained in the judgment and order dated 10 July, 2014 Kingfisher Airlines Limited Vs. Union of India, , was not complied with.

19. Mr. Mitra for the bank submits the court should not be concerned with trivialities. A notice was given for the GRC meeting was admittedly given. At best, half an hour less than 72 hours notice was given. That should not prevail upon the court to declare the entire proceedings bad. The question, according to him, is whether the writ petitioners were given adequate opportunity of hearing or not?

20. I find that the writ petitioners were issued a notice on 29 August, 2014, at 11:01 a.m., when the date of the GRC was fixed on 1 September, 2014 at 10:30 a.m. at Kolkata. Prima facie, I am of the view that the bank complied with the direction contained in the order dated 10 July, 2014 Kingfisher Airlines Limited Vs. Union of India, .

21. The next ground for the breach of principles of the natural justice is the absence of document being annexures 1 to 30 referred to in the decision of the GRC dated 1 September, 2014. Admittedly, these documents were not made over to the writ petitioners at the time when the show cause notice was issued. The documents were also not made over to the writ petitioners when the bank responded to the reply of the show cause given by the writ petitioners as well as when the bank fixed the date for hearing of the GRC by the notice dated 29 August, 2014.

22. The Delhi High Court, in a writ petition, filed at the instance of the writ petitioner, against another banker, took the following view [see Kingfisher Airlines Limited Vs. Union of India, :

"It is also trite law that the material that is relied upon by any authority in arriving at a decision must be made available to the affected party. This is an integral part of the principles of natural justice that are enshrined in Article 14 of the Constitution of India."

23. At the interim stage it would be prudent to accept the view of the Delhi High court as it was in a proceeding initiated for declaration of the writ petitioners as wilful defaulters.

24. Prima facie, I am of the view that the bank acted in breach of the principles of natural justice in not making over the documents which they considered to form the opinion that the writ petitioners are to be proceeded against under the Reserve Bank of India Guidelines for wilful defaulter. Again, prima facie, I am of the view that the bank ought to have made over the documents along with show cause notice or at a stage, at least prior to the date of hearing before the GRC meeting to allow the writ petitioners to make an effective representation with regard to the allegations levelled against it. Whether or not clause 3(iii) of the Reserve Bank of India Guidelines allows a bank to make over the documents it considered under clause 3(ii) at the hearing of the GRC only and not prior thereto requires further consideration. These points as well as the other points and the judgments cited by the respective parties will be considered at the final hearing of the writ petition. The writ petitioners have, therefore, made out a prima facie case to go to trial.

25. The writ petitioners have already been declared as wilful defaulter. I am yet to hear and dispose of the main writ petition. I have found that the writ petitioner made out a prima facie case to go to trial. The balance of convenience and inconvenience is in favour of the writ petitioners in granting interim stay of the decision of the GRC to classify the writ petitioners as wilful defaulters.

26. In such circumstances, I direct that the decision of the GRC dated 1 September, 2014, to declare the writ petitioners as wilful defaulter will remain stayed till 24 November, 2014 or until further orders whichever is earlier.

27. The bank has sought time to file affidavit-in-opposition. As prayed for, the respondent will file affidavit-in-opposition within one week after the long vacation; reply, if any, within one week thereafter.

28. W.P. No. 942 of 2014 will appear under the heading "for hearing" on 10 November, 2014. The Advocate-on-record of the writ petitioners will carry out the amendments in the writ petition of deletion of respondent No. 1 within 29 September, 2014.

1 See judgment and order dated 10 July, 2014, passed in WP No. 19247(W) of 2014 Kingfisher Airlines Limited Vs. Union of India, .