

(2011) 06 BOM CK 0150

In the Bombay High Court

Case No : Writ Petition (Lodging) No. 1105 of 2011

Narangs International Hotels Private Limited and Mr. Ramesh Narang Joint Managing Director of Petitioner 1 **APPELLANT**

Vs

Union of India (UOI), Bureau of Civil Aviation Security (BCAS) **RESPONDENT**
Ministry of Civil Aviations Government of India, Mr. Rama Narang Chairman and Managing Director Narangs International Hotels Private Limited and Mr. Rajesh Narang Whole Time Director Narangs International Hotels Private Limited

Date of Decision : 17-06-2011

Acts Referred:

Aircraft Act, 1934 — Section 5(2), 5A, 5A(1)
Aircraft Rules, 1937 — Rule 90, 90(1), 90(2), 90(3)

Citation : (2011) 113 BOMLR 2335

Hon'ble Judges : Ranjit More, J;Ranjana Desai, J

Bench : Division Bench

Advocate : Janak Dwarkadas and D.D. Madan, s, Salim Inamdar and Ranbir Singh, instructed by P. Parsurampuriah, for the Appellant; D.J. Khambatta, A.S.G., Arif Doctor, Afroz Shah, Rajendra Kumar and D.P. Singh for Respondents 1 and 2, N.H. Seervai, instructed by S.S. Israni, for Respondent 3, for the Respondent

Judgement

Ranjana Desai, J.—Petitioner 1-company is operating the "Ambassador" chain of hotels in Mumbai, Chennai and Aurangabad since 1960. It provides flight catering services at Mumbai and Delhi Airports under the brand name "Sky Chef". Petitioner 2 is the Managing Director of Petitioner 1 and is also a shareholder therein. Respondent 1 is Union of India. Respondent 2 is the Bureau of Civil Aviation Security in the Ministry of Civil Aviation, Government of India. Respondent 3 is the Chairman and Managing Director of Petitioner 1 (for short, "CMD") and Respondent 4 is the Whole Time Director of the Petitioner-company.

2. The Petitioners are aggrieved by order dated 3/6/2011 passed by Respondent 2 rejecting the Petitioners' application dated 27/1/2011 for security clearance.

3. It is the case of the Petitioners that the Petitioners flight catering division is operating at the Mumbai Airport since 1960 and at the Delhi Airport since 1982 in accordance with the rules and regulations. u/s 5A(1) of the Aircraft Act, 1934, the Director-General of Civil Aviation or any other officer specially empowered in this behalf by the Central Government may, from time to time, by order, issue directions, consistent with the provisions of the said Act and the rules made there under, with respect to any of the matters specified in Clauses (aa), (b), (c), (e), (f), (g), (ga), (gb), (gc), (h), (i), (m) and (qq) of Sub-clause (2) of Section 5 to any person or persons using any aerodrome or engaged in the aircraft operations, air traffic control, maintenance and operation of aerodrome, communication, navigation, surveillance and air traffic management facilities and safeguarding civil aviation against acts of unlawful interference, in any case where the Director-General of Civil Aviation or such other officer is satisfied that in the interests of the security of India or for securing the safety of aircraft operations it is necessary to do so. Sub-section (2) thereof states that every direction issued under Sub-section (1) shall be complied with by the person or persons to whom such direction is issued. We deem it appropriate to quote provisions of Sub-Section 5(2), (b), (gc) and (m) to which our attention is drawn by Mr. Khambatta, learned Additional Solicitor General. They read as under:

5. Power of Central Government to make rules. -(1) ...

(2) Without prejudice to the generality of the foregoing power, such rules may provide for

(a) xxx xxx xxx

(b) the licensing, inspection and regulation of aerodromes, the conditions under which aerodromes may be maintained and the prohibition or regulation of the use of unlicensed aerodromes;

(c) xxx xxx xxx

(d) xxx xxx xxx

(e) xxx xxx xxx

(f) xxx xxx xxx

(ga) xxx xxx xxx

(gb) xxx xxx xxx

(gc) the measures to safeguard civil aviation against acts of unlawful interference;

(h) xxx xxx xxx

(i) xxx xxx xxx

(j) xxx xxx xxx

(k) xxx xxx xxx

(l) xxx xxx xxx

(m) the measures to be taken and the equipment to be carried for the purpose of ensuring the safety of life.

4. Rule 90 of the Aircraft Rules, 1937 relates to "Entry into public aerodromes". Sub-rule (1) thereof states that no person shall enter or be in the terminal building of any Government aerodrome or public aerodrome or part of such building or any other area in such aerodrome notified in this behalf by the Central Government unless he holds an admission ticket issued by the aerodrome operator or an entry pass issued by the Commissioner of Security (Civil Aviation) or any other officer authorized by him in this behalf. Sub-rule (2) (a) states that no person without permission in writing, by general or special order of the Central Government or any officer authorized by that Government in this behalf shall enter or remain in the Movement area. Sub-rule (3) states that sub-rules (1) and (2) shall not apply to any person who is engaged on regular duty at an aerodrome and hold a Photo Identity Card issued by the Commissioner of Security (Civil Aviation) or any other officer by the Central Government in this behalf.

5. The Commissioner of Security, Bureau of Civil Aviation Security has in exercise of powers conferred by Section 5A of the Aircraft Act, 1934 issued certain circulars, copies of which have been annexed to the additional affidavit of the Petitioners and to the petition. By circular dated 31/12/2004, directions are issued with regard to security of catering consignment. Clause 1 thereof states that no airline operator shall accept any catering items for loading in the aircraft unless these items have been subjected to the following security controls viz. (a) the supplies of the catering items have been received from a caterer with whom the air operator has signed a written contract for the purpose and (b) the caterer has obtained security clearance from the Commissioner.

6. Circular dated 28/1/2011 inter alia states that no catering company shall enter into an agreement with any aircraft operator for providing catering stores and supplies unless security clearance is granted by the Commissioner and the security programme is approved by the concerned RDCOS, BCAS. Thus, the Aircraft Act and the Aircraft Rules and the circulars issued there under stress the importance of the security clearance. No person shall enter a public aerodrome or private aerodrome unless he is given a security clearance.

7. According to the Petitioners, from time to time security clearance was granted to them. Last security clearance was accorded to them for five years from 31/7/2005 onwards vide communication dated 31/7/2005. As required by the Regional Deputy Commissioner of Security (CA), Petitioner 1 submitted an application for security clearance dated 27/1/2011. On 31/1/2011, Petitioner 1 was granted provisional approval of catering security programme by Respondent 2. About four months thereafter, Petitioner 1 received impugned order dated

3/6/2011 rejecting the Petitioners' application dated 27/1/2011 seeking security clearance on the ground that there is adverse report against the CMD of Petitioner 1 i.e. Respondent 3 herein.

8. Mr. Dwarkadas, learned senior counsel appearing for the Petitioners has taken us through the affidavit of Petitioner 2 - Ramesh Narang. He has assailed the impugned order on several counts. Counsel submitted that the rejection of the Petitioners' application is arbitrary and unjustified. Counsel pointed out that Petitioner 1 is operating flight kitchen since, 1961. Provisional clearance was granted to the Petitioners on 31/1/2011. From the year 1961 till the Petitioners' application was rejected on 3/6/2011, the Respondents have never indicated that the Petitioners were a threat to the security of India. If there was any such apprehension, the provisional clearance would never have been granted. Counsel submitted that the provisional clearance was granted on 31/1/2011 and the Intelligence Bureau report is stated to be dated 25/4/2011 and the application of the Petitioners was rejected on 3/6/2011. Counsel submitted that there has to be a close nexus between the CMD's alleged adverse conduct and the order of rejection. Only the current activities can be taken into consideration for rejection of security clearance of which, as far as the Petitioners know, there is no record. There is no proximity between the two. Counsel then submitted that the Petitioners have not been furnished with any material on the basis of which the rejection order was passed. Counsel submitted that it is well settled that even in case of administrative action if it affects the civil rights of a person, principles of natural justice will have to be followed, which is not done in this case. The impugned order is bad on that count also. Counsel submitted that the alleged report of the Intelligence Bureau is irrelevant. The report is against the CMD. It is not relevant for the purpose of granting security clearance to individual employees. Respondent 1 is dealing with Petitioner 1 which is a corporate entity. Petitioner 1 is not the alter ego of the CMD. The CMD is never physically present in the field of operation. Each employee requires individual clearance. Thus, irrelevant facts have been taken into consideration. Counsel further submitted that the impugned decision is arbitrary. The ban is imposed for all times to come without giving opportunity of hearing. It does not answer Wednesbury test of reasonableness. Counsel submitted that there has to be a real and imminent danger emanating from the alleged report. No such case is made out considering the fact that provisional clearance was given on 31/1/2011 and after the alleged report dated 25/4/2011, the application was rejected on 3/6/2011. Drawing our attention to the additional affidavit filed on behalf of the Petitioners, counsel submitted that catering division of the Petitioners is under the management of a reputed professional. Referring to the charts annexed thereto, counsel submitted that every stage of operation of the Petitioner-company is subject to the supervision and control of independent agencies. The Petitioners are operating flight kitchen and supplying food to airlines. The argument that the CMD, who is out of India and whose shareholding is merely 36.5%, can be a security risk to the country is farfetched. Counsel submitted that judgments of this Court in

Akbar Travels of India (Pvt.) Ltd. v. Union of India and Ors. in Writ Petition (L) No. 420 of 2009 decided on 12/3/2009 (for short, "Akbar Travels-I") and Akbar Travels of India (Pvt.) Ltd. v. Union of India and Ors. in Writ Petition (L) No. 656 of 2009 decided on 10/6/2009 (for short, "Akbar Travels-II") are not applicable to this case because Akbar Travels was involved in several business activities and Akbar Travels' activities beyond tarmac were not affected because of refusal of security clearance. The Petitioners are only providing catering service and the ban imposed will bring the Petitioners' business to a grinding halt rendering several employees jobless. Counsel submitted that there is no allegation that the Petitioners are connected with any terrorist organization like LTTE and, therefore, judgment of the Madras High Court dated 3/2/2010 in Dani Aviation Services Pvt. Ltd. v. Union of India and Anr. in W.A. No. 1 of 2010 is not applicable to their case. Counsel submitted that in any case, this is a fit case where the Petitioners should be granted post decisional hearing and till then the impugned order be stayed.

9. Mr. Seervai, learned senior counsel for Respondent 3 submitted that there are serious allegations levelled against his client, the CMD. Though there are certain family disputes in the Narang family, on their attack on the impugned order, the family is together. However, so far as the personal allegations against the CMD are concerned, they may go undefended and, hence, he has instructions to appear and deny them. Counsel submitted that it was necessary for Respondent 1 to follow the principles of natural justice because its action has affected the civil rights of the Petitioners and Respondents 2 and 3. Counsel submitted that there are several judgments of the Supreme Court which substantiate this submission. Counsel submitted that the impugned order is arbitrary, unreasonable and passed in violation of principles of natural justice and deserves to be set aside. Counsel submitted that the impugned order does not attract any of the clauses enumerated in Sub-Section 5(2) (b) of the Aircraft Act. Counsel submitted that the judgment in Akbar Travels-I and II, will have to be distinguished from the facts of this case. Counsel submitted that in the absence of any material supplied by the Respondents, the CMD does not know what is being taken against him. Counsel, however, tendered a copy of the Delhi High Court judgment which shows that the CMD was acquitted in the criminal case. Counsel submitted that the preventive detention order issued against the CMD was also set aside. Therefore, the rejection of the application on the ground of alleged adverse report against the CMD is totally unjustified. Counsel heavily relied on Delhi High Court judgment in A.K. Sharma Vs. Director General of Civil Aviation and Union of India (UOI), . Counsel submitted that in case this Court directs that post-decisional hearing be given, for it to be meaningful, the CMD must be conveyed the grounds which are held against him with sufficient particularity. Counsel submitted that the source of information may be excluded but the particulars of the allegations must be conveyed to him. Counsel submitted that in case this Court grants post-decisional hearing, his client may be directed to be separately heard because the allegations are directed against

him.

10. Mr. Khambatta, learned Additional Solicitor General produced the original file. We have carefully perused it, more particularly the report of Intelligence Bureau. Mr. Khambatta submitted that the present case is completely covered by the decisions of this Court in Akbar Travels-I and II and the judgment of the Madras High Court in Dani Aviation Services Pvt. Ltd. Our attention was also drawn to the judgment of the Supreme Court in State Bank of Patiala and others Vs. S.K. Sharma, . Counsel submitted that it is well settled that principles of natural justice are not embodied in a straight jacket formula and in certain exceptional cases, they will recede in the background. Counsel submitted that national security or security of Airports is of prime importance. The report of expert agency like the Intelligence Bureau requires to be accepted by this Court. Such report cannot be trifled with as the court does not have the necessary expertise to opine on the matter of security of the nation. Counsel submitted that ordinarily, the Intelligence Bureau may not even tender its report in the court but to check whether it is an extreme case of a totally arbitrary nature where there may not even be a report or whether there is a malafide exercise of powers, the courts do call for the report and peruse it. In this case, in deference to the wishes expressed by this Court, Respondent 1 has tendered in the court the report of the Intelligence Bureau which the court has perused. Counsel submitted that this Court may give due weight age to the said report and may not interfere with the decision taken by Respondent 1 based on the said report. Counsel submitted that this Court cannot sit in appeal over the said report. Counsel submitted that the attempt to draw distinction between Akbar Travels-I and Akbar Travels-II and the present case must be repelled by this Court. Counsel submitted that the ratio of both these cases is squarely attracted to this case. The only factual difference is that there the Petitioners were carrying on business of ground handling and other activities whereas in this case, the Petitioners are concerned with catering to the passengers and crew members of the airlines. Counsel pointed out that in that case, the impugned order stated that as the security verification has been found adverse, the firm cannot be granted security clearance. In Akbar Travels-I, while directing the Respondents to grant post-decisional hearing to the Petitioners therein, this Court made it clear that it cannot direct Respondent 1 to furnish the material shown to the court, to the Petitioners. However, this Court stated that it would be open to Respondent 1 to give the gist or the conclusions of the report. In Akbar Travels-II, the Division Bench clarified that it cannot read into the judgment delivered in Akbar Travels-I a direction to furnish source of information or to disclose the report to the Petitioners and the liberty to furnish gist or conclusions of the report to the Petitioners can by no stretch of imagination be construed as a direction to the Respondents to disclose such information to the Petitioners. It was clarified that it was a liberty granted to the parties and it cannot be construed as a mandate by any means. Counsel pointed out that in this case also, the order refers to adverse report against the CMD. Hence, no further material is required to be

supplied to the Petitioners. Counsel drew our attention to paragraph 33 of the judgment in *State Bank of Patiala*, where the Supreme Court has stated that there may be situation where the public /State interest may call for a curtailing of the rule of *audi alter am partem*. In such a situation, the court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision. Counsel submitted that this is also a case where rule of *audi alter am partem* can be curtailed. Relying on the Madras High Court judgment in *Dani Aviation Services Private Limited*, counsel submitted that the facts of that case are almost identical to the facts of the present case. He submitted that in that case, post-decisional hearing was granted. However, the Madras High Court rejected the prayer for stay of the order refusing security clearance. Counsel submitted that there is no challenge to the power of Respondent 1 to issue directions. The directions issued are clearly covered by Sub-Section 5(2) (b), (gc) and (m) of the Aircraft Act. Counsel submitted that, in case, this Court directs, Respondent 1 is prepared to give a post-decisional hearing to the Petitioners. However, the impugned order may not be stayed.

11. Having considered the rival contentions, we are of the opinion that this is a case where this Court cannot interfere with the impugned order which rejects the security clearance on the basis of the report of the Intelligence Bureau. We have perused the report of the Intelligence Bureau. We have no reason to disbelieve it. We cannot sit in appeal over the said report. This case involves the security of India and more particularly the security of the Airports. Intelligence Bureau is an expert body. The Petitioners have not alleged any malafides. It is impossible to say that any extraneous reasons have persuaded the Intelligence Bureau to submit the report or that Respondent 1's action is malafide.

12. We must note that in this petition, the power to issue directions vested in the Director-General of Civil Aviation or any other officer specially empowered in this behalf by the Central Government u/s 5A of the Aircraft Act, has not been challenged. It is also not seriously disputed across the bar. We have already referred to the relevant provisions of the law. We have also referred to the circulars issued by the Ministry of Civil Aviation u/s 5A of the Aircraft Act. The impugned order, in our opinion, is in accord with legal provisions. We find substance in Mr. Khambatta's submission that Clauses (b), (gc) or (m) of Sub-Section 5(2) of the Aircraft Act are attracted to this case.

13. In our opinion the present case is covered by *Akbar Travels-I* and *II*. We may quote the relevant portion of the judgment of this Court in *Akbar Travels-II* from which support can be drawn by Respondent 1.

31. We cannot transgress the limits of writ jurisdiction by sitting in judgment over the actions of Intelligence Agencies. These agencies manned by experts, who are in the best position to judge the security interests. Ultimately, sensitive and vital installations have to be safeguarded and protected from entry of persons who are considered to be undesirable and a security risk. Precisely, such are the inputs in the reports which have been received and if the Bureau

has acted upon the same, then, we cannot sit in judgment over their decision. The writ Court does not possess any expertise in such cases. The Court cannot indulge in guess work and hold that the inputs do not endanger the security of the Airport nor public interest demand that the ground handling operations of the Petitioner be prohibited. These are matters which are better left to the authorities in charge of security of the vital installations as they are in-charge of laying down standards and norms for protecting and safeguarding them. They act in public interest and when no malafides are alleged, their actions ought not be interfered.

14. In the impugned order, there is a categorical statement that consequent upon the adverse report against the CMD, the security clearance was rejected. The order issued in Akbar Travels-I and II was somewhat similarly worded. It stated that as security verification has been found adverse, the said firm cannot be granted security clearance. Though in Akbar Travel-I, this Court stated that it was open to the Respondents to give gist of the conclusions of the report, no fault was found in Akbar Travel-II with the Respondents because gist was not conveyed to the Petitioners. It was observed that merely a liberty was granted to the parties and there was no mandate to supply the gist. In view of this, in the facts of this case, in our opinion, no direction need to be issued to Respondent 1 to give any gist of the report to the Petitioners.

15. We are not impressed by Mr. Dwarkadas's submission that there was no proximity between the CMD's alleged activities and the impugned order or that adverse remark against the CMD has no relevance to the security clearance and that there is no imminent and real danger emanating from the report because provisional clearance was granted on 31/1/2011. Report is dated 25/4/2011 and the order is dated 3/6/2011. The examination of security threat is an ongoing process. Therefore, though provisional clearance was granted, upon an overall scrutiny of the material, Respondent 1 on the basis of the Intelligence Bureau report can come to the conclusion that circumstances are such that security clearance cannot be granted. It is not possible to hold that because the CMD is allegedly not in actual control of the business, remarks against him are irrelevant as what is required is independent security clearance of each employee. In what manner the CMD would have hold over the Petitioners is for the Intelligence Bureau and Respondent 1 to decide. Similarly, whether there is any real, apparent and imminent danger emanating from the report can be decided by the Intelligence Bureau. Threat perception falls in the domain of Intelligence Bureau. We are unable to draw any conclusions in that behalf. It was contended that Petitioner 1 is a corporate entity whose fundamental right to carry on business cannot be curtailed because some adverse remarks are made against the CMD. We are not impressed by this submission either. We do not find that the impugned order is unreasonable or suffers from the vice of arbitrariness because the ban is of permanent nature and onerous directions are issued thereby. We have no doubt that in terms of Section 5A of the Aircraft Act, the impugned order is issued in the interest of the security of India or for securing the safety of

aircraft operations. These considerations override all other considerations.

16. Mr. Khambatta is also right in drawing our attention to the judgment of the Madras High Court in Dani Aviation Services Private Limited, where in a similar fact situation, though post-decisional hearing was granted, the stay of the impugned order was not granted. It is pertinent to note that the Madras High Court has relied on the judgment of this Court in Akbar Travels-II. We respectfully concur with Akbar Travels-I and II and are not inclined to follow the view of the Delhi High Court in A.K. Sharma, which even otherwise is distinguishable on facts. We, however, feel that in the circumstances of the case, post-decisional hearing should be granted to the Petitioners. The impugned order, however, cannot be stayed during the hearing. It is not possible to accede to the request of Mr. Seervai that separate post-decisional hearing be given to the CMD. The order is against Petitioner 1, who is a corporate entity. Petitioner 1 may if it so desire authorize someone who can represent all directors and, hence, that request of Mr. Seervai is rejected. Hence, the following order.

17. The petition is dismissed. Interim stay is vacated. Respondent 1 is directed to give post-decisional hearing to the Petitioners. We must record the statement made by Mr. Khambatta, learned Additional Solicitor General that if the Petitioners hand over copy of the judgment of the Delhi High Court whereby the CMD was acquitted and any judgment whereby the preventive detention order issued against the CMD was set aside, those judgments would be forwarded to the Intelligence Bureau without prejudice to the rights and contentions of Respondent 1 and 2.

18. At this stage, Mr. Dwarkadas, learned senior counsel for the Petitioners states that the petitions are desirous of challenging this order in the Supreme Court. He states that hence, the present order be stayed. Learned Counsel for Respondents 1 and 2 strenuously opposes the said prayer. In the circumstances of the case, in the interest of justice and in order to enable the Petitioners to approach the Supreme Court, the operation of the present order is stayed till 22/6/2011 i.e. inclusive of 22/6/2011. We record that the file of Respondents 1 including the report of Intelligence Bureau has been handed over to learned Counsel for Respondents 1 and 2, in the court today who has, in turn, handed it over to the concerned officer.