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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 8092/2019, CM Nos. 33517-33519/2019

UDAY J DESAI & ORS. ..... Petitioners

Through: Mr. Pinaki Misra, Sr. Adv. with Ms. Neeha Nagpal and Mr. M. Bhatt and Ms. Aditi Pathak, Advs. for P1 to P3
Mr. Akhil Sibal, Sr. Adv. with Ms. Neeha Nagpal and Mr. M. Bhatt and Ms. Aditi Pathak, Advs. for P5
Mr. Rohan Jaitley, Adv. for P4

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Ravi Prakash, CGSC with Mr. Farman Ali, Adv. for R1
Mr. Arun Aggarwal, Adv. with Ms. Akansha Singh and Mr. Devesh Dubey, Advs. for R4 & R10
Mr. Ashok Kumar Jain and Mr. Pankaj Jain, Advs. for Allahabad Bank / R8
Mr. Karan Khanna, SC for R7 and R11 with Ms. Asmita Kumar, Adv.
Mr. Vivek Jain, Mr. Manish Sahay and Mr. Shikhar Yadav, Advs. for R3 / OBC
Mr. Santosh Kumar Rout, Adv. for R9.
Mr. Sarfaraz Khan, Adv. for R5 / UCO Bank
Mr. Sudesh Menon, Adv. for R6

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

O R D E R

% **26.07.2019**

CM Nos. 33518-33519/2019 (for exemption)

Exemption allowed, subject to all just exceptions.

Applications stand disposed of.

W.P.(C) 8092/2019 CM No. 33517/2019

1. The present petition has been filed by the petitioner with the following prayers:

> *"In the circumstances, it is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to:*
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> *A. Pass a writ of mandamus or any other writ, direction or order in the nature of a writ of mandamus directing the Respondents to provide copies to the Petitioners of the Haribhakti Report dated 05.01.2019 alongwith all its annexures [if any] and the addendum to the Haribhakti Report as submitted by Haribhakti & Co. LLP to the Respondents; and*
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> *B. Pass a writ of certiorari or any other writ, direction or order in the nature of a writ of certiorari for quashing and setting aside the decision taken by the Respondent Banks on 03.04.2018 to conduct a forensic audit; and*
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> *C. Pass a writ of certiorari or any other writ, direction or order in the nature of a writ of certiorari for quashing and setting aside the Haribhakti Report dated 05.01.2019 and the addendum to the Haribhakti Report which was never supplied to petitioner in spite of Petitioner's request dated 14.02.2019 to supply the same.*

D. Pass a writ of certiorari or any other writ, direction or order in the nature of a writ of certiorari for quashing and setting aside the decision taken by the Respondent Banks at the consortium meeting held on 07.01.2019 allowing the individual banks to decide on the course of action basis the forensic audit; and

E. Pass a writ of certiorari or any other writ, direction or order in the nature of a writ of certiorari for quashing and setting aside all further consequential actions taken by the Respondents against the Petitioners arising from and in relation to the Haribhakti Report dated 05.01.2019 and the addendum to the Haribhakti Report; and

F. Pass a writ of certiorari or any other writ, direction or order in the nature of a writ of certiorari for quashing and setting aside the declaration of the Petitioner No.5 as Fraud contained in IA filed by Respondent No. 6 before the Hon'ble Supreme Court in Writ Petition [Civil] No 1316 of 2018. on the basis of the Haribhakti Report dated 05.01.2019 and its addendum; and

G. Pass a writ of certiorari or any other writ, direction or order in the nature of a writ of certiorari for quashing and setting aside the Willful Defaulter Show Cause Notices dated 25.02.2019, 02.03.2019, 03.04.2019, 08.04.2019, 10.04.2019, 12.04.2019, 03.05.2019, 14.05.2019, 15.05.2019, 10.06.2019, 19.06.2019, issued by the Respondent Banks to the Petitioners, including, all such Willful Defaulter Show Cause Notices issued by the Respondent Banks on the basis of the Haribhakti Report dated 05.01.2019 and its addendum; and

H. Pass a writ of mandamus or any other writ, order or direction directing the Respondents not to take any coercive action against tine Petitioners pursuant to the Haribhakti Report dated 05.01.2019 and its addendum; and/or

I. Pass any other order this Hon'ble Court may deem fit and necessary, in the interest of justice and good faith."

2. At the outset, I may state here that Mr. Pinaki Mishra and Mr. Akhil Sibal, learned Sr. Counsels appearing for the petitioners have stated that present petition shall be maintained by them with regard to prayers (D) and (F) only. In other words, the petition with regard to the other prayers is not being pressed. I take on record their submissions. From the reading of prayers (D) and (F) it is seen that the challenge in the writ petition is primarily to the decisions of the respondent Banks at the Consortium meeting held on April 3, 2018, to mandate a forensic audit against the petitioner no.5 and to the decision dated January 7, 2019 whereby, it was decided that the individual banks shall decide the course of action with regard to the actions taken by the Respondent Banks on the basis of forensic report.

3. The only case of the petitioner as contended by Mr. Mishra and Mr. Sibal is that the process undertaken by the respondent Banks to declare the account of the Petitioner No. 5 as 'fraud' is governed by the RBI Master Directions on Frauds - Classification and Reporting by commercial banks and select FIs as updated as on July 03, 2017 is grossly arbitrary and in grave violation of the Petitioners' right to natural justice inasmuch as after reviewing two draft Reports on December 27, 2018, the Respondent Banks directed Haribhakti to consider all the material and explanations provided by the petitioners. Despite such clear directions, Haribhakti failed to consider the documents / explanations and provided the final report within 8 days on 05.01.2019 which was more or less identical to an earlier draft, and the Respondents Banks accepted the same to declare the petitioner nos. 5 account has “fraud”. As per the Master Circular, it is the Consortium of the

Respondent Banks to initiate forensic audit, the decision to declare the accounts as fraud has necessarily to be taken by the consortium and not by the individual banks as decided on January 7, 2019. That apart, it is contended by Mr. Mishra and Mr. Sibal that through out the entire process, the petitioners never received any adequate right to represent itself or to be heard in an effective manner. Despite the fact that the entire process had various civil and criminal consequences on the Petitioners, the Respondent Banks acted in an illegal manner and never provided the necessary information to the Petitioners to put forth its response / submissions. Thus, the entire process stands vitiated by way of arbitrariness and lack of process. That apart, it was contended by Mr. Sibal that the Haribhakti report is fallacious, arbitrary and prepared based on pre-conceived assumptions/ conclusions thereby, the non-application of mind is apparent. He also in his submissions tried to highlight the fact that an independent report prepared by Pricewaterhouse Coopers Pvt. Ltd. clearly demonstrates the bonafide nature of transactions entered into by Petitioner No 5 which negates the arbitrary findings Haribhakti Report, and in fact the legal advisor of the petitioners has made an comparative analysis Haribhakti report vis-à-vis the PWC report. The comparative report clearly brings out the fallacies and illegalities in Haribhakti report. In substance it is his plea that before the individual banks declare the accounts of petitioner no. 5 as fraud, the proper opportunity of giving the final report / addendum before taking the decision of fraud was denied. He would rely upon the following judgments in support of his contention that principle of natural justice needs to be followed before taking such a drastic action:

Abhey Kumar Jain vs. South Delhi Municipal Corporation, 2015(4)

R.A.J. 280(Del);

Yum Restaurants India Pvt. Ltd vs. Commissioner of Income-Tax, Delhi, 122 (2005) Delhi Law Times 370 (DB)

Manohar s/o Manikrao Anchule vs. State of Maharashtra and Another, (2012) 13 Supreme Court Cases 14

Sahara India (Firm), Lucknow v. Commissioner of Income Tax. Central-I And Anr. (2008) 14 SCC 151

Vishnu Security Services vs. Regional Provident Fund Commissioner, 2012 (129) DRJ 661 (DB)

4. On the other hand, learned counsel appearing for respondents Indian Overseas Bank and Canara Bank submitted that a notice of "wilful defaulter" has been issued to the petitioners, but no effective reply has come from them as they do not answer the allegations which have been made in the show-cause notice. In substance, it is his plea that there is no defence of the petitioners to challenge the findings of the Haribhakti Report.

5. Mr. Arun Aggarwal, learned counsel appearing for respondent Vijaya Bank as merged with the Bank of Baroda so also the counsel appearing for Allahabad Bank have raised an issue of jurisdiction, inasmuch as the Registered Office of the petitioner no.5 is in Mumbai and the accounts of the petitioner no.5 are either at Kanpur or in Mumbai as such this court does not have jurisdiction to entertain this petition. Mr. Ashok Kumar Jain, learned counsel appearing for respondent Allahabad Bank has also relied upon the judgement of the Supreme Court in the case of ***Indian Charge Chrome and Ors. v. Union of India and Ors. 2003 (152) ELT 269 (Del.)*** in support of his contention.

6. Having heard the learned counsel for the parties, the only issue which arises for consideration is whether the principle of natural justice needs to be followed before declaring the account of the petitioner no.5 as fraud. To answer this, it is important to refer to three Paragraphs of the circular dated July 3, 2017 on which reliance was placed by Mr. Sibal. The same are reproduced as under:

> *"8.9.4 The initial decision to classify any standard or NPA account as RFA or Fraud will be at the individual bank level and it would be the responsibility of this bank to report the RFA or Fraud status of the account on the CRILC platform so that other banks are alerted. In case it is decided at the individual bank level to classify the account as fraud straightaway at this stage itself, the bank shall then report the fraud to RBI within 21 days of detection and also report the case to CBI/Police as is being done hitherto. Further within 15 days of RFA/Fraud classification, the bank which has red flagged the account or detected the fraud would ask the consortium leader or the largest lender under MBA to convene a meeting of the JLF to discuss the issue. The meeting of the JLF so requisitioned must be convened within 15 days of such a request being received. In case there is a broad agreement, the account should be classified as a fraud; else based on the majority rule of agreement amongst banks with at least 60% share in the total lending, the account should be red flagged by all the banks and subjected to a forensic audit commissioned or initiated by the consortium leader or the largest lender under MBA. All banks, as part of the consortium or multiple banking arrangement, shall share the costs and provide the necessary support for such an investigation.*
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> *8.9.5 The forensic audit must be completed within a maximum period of three months from the date of the JLF meeting authorizing the audit. Within 15 days of the completion of the forensic audit, the JLF shall reconvene and decide on the status of the account, either by consensus or the majority rule as*

specified above. In case the decision is to classify the account as a fraud the RFA status shall be changed to Fraud in all banks and reported to RBI and on the CRILC platform within a week of the said decision. Besides, within 30 days of the RBI reporting, the bank commissioning/ initiating the forensic audit should lodge a complaint with the CBI on behalf of all banks in the consortium/MBA. For this purpose, if the bank initiating the forensic audit is a private sector bank, the complaint shall be lodged with the CBI by the PSU bank with the largest exposure to the account in the consortium/MBA. If there is no PSU bank in the consortium / MBA or It is a solo bank lending by a private sector bank/foreign bank, the private bank/foreign bank shall report to the Police as per extant instructions. This would be in addition to the complaint already lodged by the first bank which had detected the fraud and informed the consortium/MBA.

8.9.6 It may be noted that the overall time allowed for the entire exercise to be completed is six months from the date when the first member bank reported the account as RFA or Fraud on the CRILC platform."

7. On perusal of the aforesaid paragraphs it is clear that they do not stipulate before declaring an account fraud, a show-cause notice need to be issued or a forensic report need to be shared with the entity concerned.

8. It was the contention of Mr. Sibal that the principles of natural justice have to be read in the said paragraphs. I am afraid such a plea cannot be accepted firstly there is no such stipulation, secondly in view of the stand of the petitioners themselves inasmuch as from time to time the petitioners including petitioner no.5 have been interacting with the auditors i.e., Haribhakti and they have been submitting documents to the Haribhakti for its consideration and that the two draft reports were discussed by the Haribhakti and Company with the petitioners before it came with the final

report. This I say so in view of the averments made by the petitioners in the writ petition which I reproduce as under:

> *1. (34.) At every step of the forensic audit process, the petitioners fully cooperated with Haribhakti & Co. and provided them with unrestricted access to the books and accounts of Petitioner No.5. By way of emails, letters and physical copies of documents delivered to their offices, the Petitioners provided numerous documents, information and data in response to queries raised by Haribhakti &Co. xxx xxx xxx*
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> *2. (40). A meeting of all the Respondent Banks with the petitioners was held on August 30, 2018 during which a draft report prepared by Haribhakti & Co. was discussed without providing a copy of the same to the petitioners. In any event, the Petitioners were able to rebut various observations of in the draft report. The respondent Banks therefore directed the petitioners to submit the necessary supporting documents to Haribhakti & Co. so the same could be factored into the final report.*
> *xxx xxx xxx*
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> *3. (42). As discussed at the meeting on August 30, 2018, the petitioners on September 15, 2019 provided detailed responses to the baseless, unsubstantiated and completely frivolous allegations and conclusions in the draft Haribhakti Report ['Management Responses']. The Petitioners provided detailed responses to each query / allegation that had been raised by Haribhakti &Co. and supported the same with documentary evidence running into approx. 900 pages*

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> *4. (43). Further between September 2018 and November 2018, the petitioners provided numerous documents, information and material to Haribhakti & Co. in response to queries raised from to time.*
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> *5. (46). On 27.11.2018, Haribhakti & Co. provided an updated draft forensic audit report to the Respondent Banks. However, the same failed to consider almost all of the documents, responses to*

allegations and clarifications provided by the Petitioners. Haribhakti & Co selectively considered responses submitted to them. This itself establishes the malafides of the Forensic Auditor. While the second draft Haribhakti Report referred to the Management Responses, the same were merely misrepresentative extracts taken out of context, provided by the Petitioners. It is pertinent to state here that Haribhakti & Co. had ignored vital documents as provided by the Petitioners inter alia to demonstrate the genuineness of transactions entered into by Petitioner No. 5 with third parties.

6. (47). Another glaring error in the second draft Haribhakti Report was the allegation that export of Indonesia Steam Coal and Bituminous Coal had not taken place. Pertinently, Haribhakti & Co. arrived at this completely baseless and erroneous conclusion without any supporting information or explanation as to how it had concluded the same. The petitioners therefore provided Haribhakti & Co. with independent third-party data from the International Chambers of Commerce (Commercial Crime Services) to rebut this baseless allegation. Upon a perusal of the above third-party data from ICC (CCS), Haribhakti &Co. and the respondent banks unequivocally agreed that this allegation was completely false. Further, Petitioner No.5 was not even concerned or in any manner connected to the above transaction as the same was effected by a group company i.e. Olympic Oil Industries Limited. It is pertinent to note that Haribhakti &Co. did not delete the above observation in its final report but simply replaced it with another frivolous allegation in against the Petitioners in respect of transactions with Fareast Distribution and Logistics Pte Ltd. without giving the Petitioners an opportunity to respond to the same, as detailed herein. The allegations regarding Fareast were suddenly added in the Final Report on January 5, 2019 The Petitioners learnt of these allegations only when they perused the Final Report in March 2019. The Petitioners submit that this further evidences the lackadaisical manner in which Haribhakti & Co. has carried out the forensic audit of Petitioner No.5 and has arrived at various conclusions without any application of mind.

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It is pertinent to note that this particular transaction did not even pertain to the Petitioner No. 5, but to its group company.

7. (48). On 04.12.2018, on account of the completely false and erroneous findings in the second Draft Haribhakti Report, the Respondent No. 6 sought inputs from the Petitioners seeking their responses to the allegations.

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8. (49). On 07.12.2018, the Petitioners replied to the above letter received from Respondent No. 6 and explained how each allegation in the second Draft Haribhakti Report were completely baseless and erroneous. The Petitioners once again provided detailed responses to demonstrate how each allegation was without any merit. Further, the Petitioners also provided voluminous documents [almost 900 pages] to Haribhakti & Co. and also the Respondent Banks in support of their responses.

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9. (50). The Petitioners reiterate that while the forensic audit was being conducted i.e. from May 2018 to December 2018, they provided Haribhakti &Co. with numerous documents, information and data evidencing that Petitioner No. 5's account had been operated in accordance with law and all the transactions entered into by them were genuine.

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10. (51). A meeting of all the Respondent Banks with the Petitioners was held on December 27, 2018 wherein the Petitioners informed the Respondent Banks that Haribhakti & Co. had completely failed and neglected to consider the documents, information and material that had been supplied by the Petitioners. Accordingly, the Respondent Banks categorically advised that Haribhakti &Co. to verify all the documents submitted by the Petitioners and submit an addendum to the forensic audit report. It is relevant to note that the Petitioners were provided with a copy of the Minutes of Meeting for the meeting on December 27, 2018 sometime in the end of January 2019.

11. (53). On 28.12.2018, the Petitioners met with Haribhakti & Co. at their offices and informed them about the multiple fallacies in the *report and the data not considered by them for the purpose of the forensic audit. The Petitioners also informed Haribhakti & Co. that even the Respondent Banks had taken cognizance of the fact that the report was not to their satisfaction. It was in such a scenario that the Petitioners had scheduled a meeting the very next day, post the Consortium Meeting of December 27, 2018.*

12. (54). In the meeting held on 28.12.2018, Haribhakti & Co. requested the Petitioner to provide additional / further documents as they realized the important aspects missed out by them. The Petitioners in order to keep track of the documents provided, gave them to Haribhakti & Co. vide emails dated (i) December 29, 2018; (ii) December 29, 2018; (iii) January 1, 2019; (iv) January 2, 2019; (v) January 2, 2019; and (vi) January 3, 2019 various documents, information and data which was not included in the second Draft Haribhakti Report. Furthermore, the Petitioner also addressed the queries and allegations as raised by Haribhakti & Co. in the second Draft Haribhakti Report.

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9. So it follows sufficient opportunity was given to the petitioners before Haribhakti arrived at its final conclusion, the principles of natural justice have been followed.

10. On the plea that, after reviewing two draft reports on December 27, 2019, Haribhakti failed to consider the documents / explanations and provided the final report within eight days on January 5, 2019 is concerned, it may be stated here that the mandate of circular dated July 3, 2019 is that within 15 days of the forensic audit the status of account shall be decided. In this case the forensic audit report having been submitted on January o5, 2019, a meeting was convened on January 08, 2019 by the Consortium to take a decision on the report, which is based on the material / responses and the stand of the petitioners before the Haribhakti and Co.

11. The arguments of Mr. Mishra and Mr. Sibal is that the Haribhakti and Company could not have come to a conclusion, as it has done in the final report in view of the report submitted by the PWC is concerned, such an argument is an afterthought and cannot be raised as the petitioners having accepted the appointment of Haribhakti and Company without demur, had also participated in the deliberations with Haribhakti and Co. It is because the report is against them, they are challenging the same on the ground that the report is arbitrary and full of conjectures and surmises and the conclusion could not have been arrived at. The same is impermissible.

12. In so far as the judgments relied upon by Mr. Sibal are concerned, the same have no applicability in the peculiar fats as noted above. It must be held that even though there is no requirement to issue show-cause notice before declaring an account fraud, in the facts of this case, sufficient opportunity has been given to the petitioners, which resulted in the final report / addendum based on which there is a declaration of account as fraud by some of the banks as of today.

13. In so far as the plea of Mr. Sibal that it is the Consortium which can declare an account as fraud is concerned, no prejudice is caused to the petitioners as effect / consequence thereof shall remain the same.

In view of my above conclusion, the petition is dismissed.

V. KAMESWAR RAO, J

JULY 26, 2019/*jg*