

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
COMMERCIAL DIVISION**

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS**

**FMA 1254 of 2022
IA No. CAN 1 of 2022**

**UCO Bank & Ors.
Vs.
Hemant Kanoria & Ors.**

With

**FMA 1255 of 2022
IA No. CAN 1 of 2022**

**KPMG Assurance and Consulting Services LLP
Vs.
Hemant Kanoria & Ors.**

Appearance:

For the Appellant (in FMA 1254 of 2022)	: Mr. Siddhartha Dutta, Sr. Adv. Mr. Siddhartha Mitra, Adv. Mr. Sakabda Roy, Adv. Mr. Deepanjan Dutta Roy, Adv. Mrs. Sanjana Jha, Adv.
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For the Appellant (in FMA 1255 of 2022)	: Mr. Rupak Ghosh, Adv. Mr. Rahul Auddy, Adv.
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For the Respondent no. 2 (in FMA 1254 of 2022)	: Mr. Ayan Dutta, Adv. Mr. Aditya Guptu, Adv.
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For the Respondent no. 1 (in both the appeals)	: Mr. Ratnanka Banerji, Adv. Mr. Jishnu Chowdhury, Adv.
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Mr. Rishav Banerjee, Adv.
Mr. Soumalya Ganguly, Adv.
Mr. Souradip Banerjee, Adv.

Judgment On : **27.7.2023**

Harish Tandon, J.:

The instant appeal arises from an Order no. 18 dated 18.7.2022 passed by the learned Judge, Commercial Court at Alipore in Title Suit no. 9 of 2022 by which an application for temporary injunction as well as an application for vacating the ex parte ad interim order were disposed of directing the Respondent no. 1 to provide the purported audit report before the Court in a sealed cover within a specified time and the respondents were directed to give an opportunity to the plaintiff-respondent before taking any final decision on the basis of the said audit report and after considering the representation and objections and the submissions to pass a reasoned order. The appellants were further directed not to act on the basis of the forensic audit report till the disposal of the suit before this Court. By the impugned order the Court has also clarified that the said order of injunction shall not affect any recovery of possession in any forum or from taking any step in accordance with law.

The aforesaid two appeals have been filed by the Defendant no. 1 and the other defendants challenging the self-same impugned order but restricted to the respective portions which operate against them. In an appeal filed by the KPMG, the challenge is restricted to a portion of the order by which the audit report was directed to be submitted before the Court in a sealed cover solely on the ground that the forensic audit report being a

secret report sought for by the consortium of banks cannot be made available to the plaintiff-respondent as it is an internal communication.

On the other hand, the consortium of banks have challenged the portion of the order by which they were directed to afford an opportunity to plaintiff-respondent to raise objection and an opportunity of hearing to be given before the appellant proceed to take any action on the basis of the said forensic audit report. The facts emanates from the record revealed that two companies namely SREI Infrastructure Finance Ltd. (SIFL) and SREI Equipment Finance Limited (SEFL) entered into a commercial transaction with the appellants of FMAT 320 of 2022. The plaintiff-respondent is a director of both the companies until 4th October, 2021 and subsequently an administrator was appointed upon supersession of the Board of the aforesaid companies due to intervention of RBI. The consortium of banks thereafter appointed the KPMG to make a forensic audit of the transactions relating to the aforesaid companies so that it may take further action thereupon in terms of the RBI Circular dated 1st July, 2016. The suit came to be filed primarily for the production and supply of the forensic audit report before the consortium of banks proceeds to take any action and further prayed for declaration that the said forensic audit report is null and void and should be delivered up and cancelled. An application for temporary injunction was taken out and by an order dated 20th May, 2022 an ex-parte ad interim order was granted.

Subsequently an application for vacating the interim order was taken out and both the applications have been dealt with simultaneously having

intricately related with each other and disposed of by passing an order as succinctly narrated hereinabove.

An argument was advanced before the Trial Court at the behest of the KPMG that the RBI guidelines or the draft AFIS guidelines do not provide for handing over the report i.e., the forensic audit report to the plaintiff-respondent and since the said draft forensic audit report was prepared and submitted to the consortium of banks, in presence of the respective representatives of the aforesaid companies, it would be deemed that an opportunity of hearing was given to them.

The entire argument was restricted on the issue whether the said forensic audit report is required to be served upon the plaintiff-respondent before any further action is taken thereupon or in other words whether the participation at the time of preparation of the forensic audit report is regarded as a meaningful participation satisfying the principles of natural justice. Further arguments were advanced on behalf of the parties and even the notes of arguments have been filed relying on the relevant guideline issued by RBI but the substratum of the argument is whether the forensic audit report is required to be served upon the plaintiff-respondent or an internal document of the auditor and the consortium of bank and, therefore, no opportunity of hearing should be given to the person affected thereby until a final decision is taken thereupon.

We need not have to dilate much on the above aspect as we find that the argument advanced before us has been taken note of by the Supreme Court in a recent judgment rendered in case of ***State Bank of India &***

Ors. vs. Rajesh Agarwal & Ors. reported in (2023) 6 SCC 1. Though the above given case arises from a challenge to the Reserve Bank of India (Frauds, classification and reporting by Commercial Banks and selected FIs) Direction, 2016 issued by the RBI on the ground that no opportunity of hearing is envisaged to the borrowers before classifying their accounts as fraudulent, the Apex Court was principally deciding whether principle of natural justice must be read and treated to be engrained within the said Master Directions on Frauds issued by the RBI. Identical arguments were advanced but ultimately the Apex Court held that the fairness in action requires that the procedures adopted by the statutory authorities does not impinge upon the fundamental rights, even if so must withstand on a just, fair and reasonable principles as the principles of natural justice have an universal application as recognised under Article 14 of the Constitution in the following:

“85. Fairness in action requires that procedures which permit impairment of fundamental rights ought to be just, fair and reasonable. The principles of natural justice have a universal application and constitute an important facet of procedural propriety envisaged under Article 14. The rule of audi alteram partem is recognised as being a part of the guarantee contained in Article 14. A Constitution Bench of this Court in Tulsiram Patel has categorically held that violation of the principles of natural justice is a violation of Article 14. The Court held that

any State action in breach of natural justice implicates a violation of Article 14: (SCC p. 476, para 95)

“95. The principles of natural justice have thus come to be recognised as being a part of the guarantee contained in Article 14 because of the new and dynamic interpretation given by this Court to the concept of equality which is the subject-matter of that article. Shortly put, the syllogism runs thus: violation of a rule of natural justice results in arbitrariness which is the same as discrimination; where discrimination is the result of State action, it is a violation of Article 14: therefore, a violation of a principle of natural justice by a State action is a violation of Article 14. Article 14, however, is not the sole repository of the principles of natural justice. What it does is to guarantee that any law or State action violating them will be struck down. The principles of natural justice, however, apply not only to legislation and State action but also where any tribunal, authority or body of men, not coming within the definition of “State” in Article 12, is charged with the duty of deciding a matter. In such a case, the principles of natural justice require that it must decide such matter fairly and impartially.”
(emphasis supplied)

87. Administrative proceedings which entail significant civil consequences must be read with the principles of natural justice to meet the requirement of Article 14. Where possible, the rule of audi alteram partem ought to be read into a statutory rule to render it compliant with the principles of equality and non-arbitrariness envisaged under Article 14. The Master Directions on Frauds do not expressly provide the borrowers an opportunity of being heard before classifying the borrower's account as fraud. Audi alteram partem must then be read into the provisions of the Master Directions of Frauds."

The similar argument was advanced that a reasonable opportunity was given to the borrower at the time of preparation of the forensic audit report which is negative by the Supreme Court holding that would not have construed as a reasonable opportunity of hearing given to the borrower in the following:

"77. RBI and lender banks have further submitted that the requirement of natural justice is already fulfilled under the Master Directions of Frauds as the borrower is allowed to participate during the preparation of the forensic audit report. On the other hand, the borrowers have submitted that the Master Directions do not expressly provide for participation of the borrowers during forensic audit report. It is also submitted that merely seeking inputs of borrowers during the preparation of the forensic audit report does not satisfy

the requirements of the principles of natural justice as the borrowers should also be heard before classifying them as fraud.”

The Apex Court repelling the contention of the bank and the secrecy to be maintained in relation to the forensic audit report and ultimately held:

“97. We are unable to accept this argument of the borrowers in light of the fact that the borrowers and the third parties stand on a different footing because: (i) the borrowers are the main perpetrators of fraud, while the third parties are merely facilitators; and (ii) it is the borrowers who face the significant civil consequences stipulated under Clauses 8.12.1 and 8.12.2, while the third-party service providers are merely referred to the Indian Banks’ Association which maintains a cautious list of such service providers. However, this view does not affect our conclusions in view of the discussion in the preceding paragraphs.

E. Conclusion

98. The conclusions are summarised below:

98.1. No opportunity of being heard is required before an FIR is lodged and registered.

98.2. Classification of an account as fraud not only results in reporting the crime to the investigating agencies, but also has other penal and civil consequences against the borrowers.

98.3. Debarring the borrowers from accessing institutional finance under Clause 8.12.1 of the Master Directions on Frauds results in serious civil consequences for the borrower.

98.4. Such a debarment under Clause 8.12.1 of the Master Directions on Frauds is akin to blacklisting the borrowers for being untrustworthy and unworthy of credit by banks. This Court has consistently held that an opportunity of hearing ought to be provided before a person is blacklisted.

98.5. The application of audi alteram partem cannot be impliedly excluded under the Master Directions on Frauds. In view of the time-frame contemplated under the Master Directions on Frauds as well as the nature of the procedure adopted, it is reasonably practicable for the lender banks to provide an opportunity of a hearing to the borrowers before classifying their account as fraud.

98.6. The principles of natural justice demand that the borrowers must be served a notice, given an opportunity to explain the conclusions of the forensic audit report, and be allowed to represent by the banks/JLF before their account is classified as fraud under the Master Directions on Frauds. In addition, the decision classifying the borrower's account as fraudulent must be made by a reasoned order.

98.7. Since the Master Directions on Frauds do not expressly provide an opportunity of hearing to the borrowers before

classifying their account as fraud, audi alteram partem has to be read into the provisions of the directions to save them from the vice of arbitrariness.”

In view of the law enunciated in the above judgment we do not have any infirmity and/or illegality in the order of the Trial Court. Both the appeals are dismissed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)