F.J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT :

THE HON'BLE JUSTICE SHAMPA SARKAR

W.P.A. NO. 10195 OF 2024

AMIT IRON PVT. LTD. & ANR.
-vs.-
STATE BANK OF INDIA

FOR THE PETITIONERS	:	Mr. Ratnanko Banerji, Mr. S. Manot, Mr. A. Kumar Awasthi
FOR THE BANK	:	Om Narayan Rai
HEARD ON	:	07.08.2024
JUDGMENT ON	:	07.08.2024

SHAMPA SARKAR, J. :

1. The writ petition has been filed challenging an order passed by the State Bank of India, declaring the petitioners' bank account as fraud. The ground for challenge is that personal hearing was not given to the petitioners. The second ground is that the forensic audit report that had been relied upon, was not supplied.

2. The petitioners place strong reliance on the issue of violation of the principles of natural justice. It is submitted that the jurisdiction of this

Court is being invoked as the principle of *audi alteram partem* which is an essential element of any decision making process, had not been followed.

3. It is submitted by Mr. Banerjee, learned Senior Advocate, representing the petitioners that the Hon'ble Apex Court and the Hon'ble High Court have repeatedly held that any document relied upon by the Bank, should be supplied to the borrower and the borrower must be given an opportunity to explain his defence against the proposed allegations of the lender/Bank.

4. Reliance has been placed on the decision of a Coordinate Bench in the matter of **Hemant Kanoria-vs.-Bank of India,** reported in **2024 SCC Online Cal 1012**.

5. Mr. Rai, learned Advocate appearing on behalf of the State Bank of India submits that personal hearing was not necessary. He relies on a decision of the Hon'ble Supreme Court passed in Misc. Application arising out of Civil Appeal No. 7300 of 2022 (State Bank of India & Ors.-vs.-Rajesh Agarwal & Ors.) The miscellaneous application was filed by the Union of India for a clarification of the observations made by the Hon'ble Apex Court in the decision of **State Bank of India & Ors. vs. Rajesh Agarwal & Ors.**, reported in **(2023) 6 SCC 1**.

6. To counter such argument, Mr. Rai submits that although the Master Circular of 2015 provides for grant of an opportunity of hearing to the borrower before the borrower is declared to be a wilful defaulter, such provision has not been included in the circular. A personal hearing is not essential. To substantiate such claim, Mr. Rai, submits that all that was necessary as per the direction of the Hon'ble Apex Court in *Rajesh*

Agarwal (supra) was that the ground on which the bank proposed to declare the account as a fraud, were to be informed to the borrower and the borrower was to be given sufficient opportunity to answer to the proposal of the bank. No further hearing was necessary as the adjudication was not like a court proceeding.

7. Relying on the order of the Hon'ble Apex Court in the Misc. Application, No. 810 of 2023, Mr. Rai submits that the Hon'ble Apex Court had clarified the directions in Rajesh *Agarwal & Ors. (supra)* and went on to hold that opportunity of being heard would not mean a personal oral hearing. Reliance has been placed on the first paragraph of the order which is quoted below:-

> *"The apprehension which has been expressed by the Solicitor General of India is that since the judgment of the Division Bench of the High Court of Telengana dated 10 December, 2022 was upheld in the judgment of this Court dated 27 March, 2023, the judgment of this Court may be interpreted in the future to mean that the grant of a personal hearing is mandatory though it has not been so directed in the conclusions set out in paragraph 81 of the judgment."*

8. Having heard Learned Advocates for the respective parties, this Court finds that admittedly a hearing was not given to the petitioners. Secondly, the order of the Bank indicates that the bank had relied on some decisions of the ICICI Bank and Axis Bank and also two forensic audit reports. The order of the Committee for Identification of the account as fraud and the proceedings of the meeting indicate that weightage was given to the decision of the ICICI Bank and the Axis Bank, which had both declared the

account of the petitioners as fraud. Reliance had been placed on the forensic audit reports of Suman Kumar Agarwal and associates dated November 2, 2020 and R. Dokania and Co. dated December 24, 2022. Those were not supplied to the petitioners. The show cause notice which has been issued to the petitioners and to which the petitioners have replied, does not contain any reference to the decisions of the ICICI Bank and the Axis bank. No reference has been made the two forensic audit reports.

9. On the other hand, when the decision has been taken, declaring the petitioners' account as fraud by the Committee for Identification, it appears that the earlier decisions of both the ICICI Bank and the Axis Bank, were relied upon. Two forensic audit reports of the Chartered Accountants were also relied upon. The rule of natural justice is an essential component of Article 14 of the Constitution of India. It has been well settled that if the authority places reliance on any report while arriving at a decision against any person, such report must to be supplied to the person before any final decision is taken. Reference is made to the decision of the Hon'ble Apex Court in the matter of **ECL-vs.-B. Karunakar**, reported in **(1993) 4 SCC 727**.

10. Closer to the subject matter involved, the decision of the Hon'ble Apex Court in **Rajesh Agarwal & Ors. (supra)** is discussed**.** Paragraphs 80 and 81 of the judgment are quoted below for convenience:-

> "*80. Audi alteram partem has several facets, including the service of a notice to any person against whom a prejudicial order may be passed and providing an opportunity to explain the*

evidence collected. In Tulsiram Patel, this Court explained the wide amplitude of audi alteram partem: (SCC p. 476, para 96)

"96. The rule of natural justice with which we are concerned in these appeals and writ petitions, namely, the audi alteram partem rule, in its fullest amplitude means that a person against whom an order to his prejudice may be passed should be informed of the allegations and charges against him, be given an opportunity of submitting his explanation thereto, have the right to know the evidence, both oral or documentary, by which the matter is proposed to be decided against him, and to inspect the documents which are relied upon for the purpose of being used against him, to have the witnesses who are to give evidence against him examined in his presence and have the right to cross-examine them, and to lead his own evidence, both oral and documentary, in his defence. The process of a fair hearing need not, however, conform to the judicial process in a court of law, because judicial adjudication of causes involves a number of technical rules of procedure and evidence which are unnecessary and not required for the purpose of a fair hearing within the meaning of audi alteram partem rule in a quasi-judicial or administrative inquiry." (emphasis supplied)

81. Audi alteram partem, therefore, entails that an entity against whom evidence is collected must: (i) be provided an opportunity to explain the evidence against it; (ii) be informed of the proposed action, and (iii) be allowed to represent why the proposed action should not be taken. Hence, the mere participation of the borrower during the course of the preparation of a forensic audit report would not fulfil the requirements of natural justice. The decision to classify an account as fraud involves due application of mind to the facts and law by the lender banks. The lender banks, either individually or through a JLF, have to decide whether a borrower has breached the terms and conditions of a loan agreement, and based upon such determination the lender banks can seek appropriate remedies. Therefore, principles of natural justice demand that the borrowers must be served a notice, given an opportunity to explain the findings in the forensic audit report, and to represent before the account is classified as fraud under the Master Directions on Frauds."

11. The Hon'ble Apex Court held that principles of natural justice demands that the borrowers must be served a notice, given an opportunity to explain the findings in the forensic audit report and to represent their case, before the account is classified as fraud under the Master Directions on Frauds.

12. In the interpretation of this Court, specific directions had been passed with regard to service of notice, opportunity to explain the contents of the notice and to represent. The expression 'represent' implies that the person who had filed the answer to the notice, should be allowed to represent his case by explaining to the authority why the account should not be declared as fraud. Representation and filing of an explanation are two distinct and separate steps prescribed by the Hon'ble Apex Court. However, the Hon'ble Apex Court also clarified such position on the request of the learned Attorney General of India which is a part of the order passed in Miscellaneous Application.

13. Mr. Rai's submission that the Supreme Court had held in the miscellaneous application that personal hearing was not essential, is not correct. Section 'E' of the judgment is the conclusion arrived at by the Hon'ble Apex Court after discussing the issues involved. Relevant portions of Section 'E' are quoted below:-

> *"E. 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, <u>it is reasonably practicable for the lender banks to provide an opportunity of a hearing to the borrowers before classifying their account as fraud.</u>*
>
> *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."*

14. Paragraphs 98.5 and 98.6 of the judgment deals with the concluding directions. Hon'ble Apex Court directed that it would be reasonably practicable for the lender bank to provide an opportunity of hearing to the borrowers before classifying their accounts as fraud. Paragraph 98.6 indicates that the Hon'ble Apex Court held that the principles of natural justice demanded that the borrowers must be served a notice, given an opportunity to explain the conclusion of the forensic audit report and be allowed to represent before the bank declares the account as fraud.

15. The Hon'ble Apex Court was of the view that not only should a person be allowed to answer to the show cause notice, but the forensic audit report which was also not supplied in the case before the Hon'ble Apex Court, should be supplied to the borrower, even if the borrower was present during such audit. The borrower was allowed to represent his case before the authority concerned.

16. Upon a comprehensive reading of the decision in **Rajesh Agarwal and another (supra)** and the order in the miscellaneous application, this Court is of the view that before declaring an account as fraud, the documents relied upon by the Identification Committee should be mentioned in the show cause notice and supplied to the borrower. The borrower should be allowed to represent his case by filing an answer to the

show cause notice and also by dealing with the documents which the committee proposed to rely upon. The borrower should be allowed to represent his case before the authority, by way of a personal hearing and thereafter, the order shall be passed with reasons.

17. Under such circumstances, the order of the Identification Committee of the State Bank of India, is set aside. The decisions of the ICICI Bank and the Axis Bank which are available in the records of the State Bank of India as also the two forensic audit reports, shall be supplied to the petitioners within two weeks from date. The petitioners will be allowed an opportunity to file an additional reply, by dealing with those documents, within two weeks thereafter. The committee will then proceed with the matter in accordance with law and pass a reasoned order. An opportunity of hearing shall be given to the petitioners' representatives.

18. The Reserve Bank shall not take any steps on the basis of the communication received from the bank.

19. Accordingly, the writ petition is disposed of.

20. However, there will be no order as to costs.

21. Parties are directed to act on the basis of the server copy of this order.

(SHAMPA SARKAR, J.)