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

% ***Date of Decision: 28th May, 2024***

\+ W.P.(C) 7825/2024, CM APPL. 32413/2024 & CM APPL. 32414/2024

APRESH GARG & ANR. ..... Petitioners

Through: Dr. Abhishek Manu Singhvi, Sr. Adv. with Mr. Sumit K. Batra, Mr. Naunidh S. Arora, Mr. Manish Khurana and Ms. Priyanka Jindal, Advs.
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versus

INDIAN BANK ..... Respondent

Through: Mr. Rajesh Kumar Gautam, Mr. Anani Achumi, Ms. Shivani Sagar, Mr. K. Yeptho, Ms. Likivi Jakhalu, Mr. Dinesh Sharma and Mr. Kushagrah, Advs.

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

MINI PUSHKARNA, J *(ORAL)*

CM APPL. 32414/2024 (For Exemption)

1. Exemption allowed, subject to just exceptions.

2. Application is disposed of.

W.P.(C) 7825/2024 & CM APPL. 32413/2024

3. The present petition has been filed seeking to set aside the Show

Cause Notice ("SCN") dated 18th May, 2024 issued by the respondent-Indian Bank, declaring the petitioners as 'Willful Defaulters', in respect of the loan account of M/s Agson Global Pvt. Ltd. ("the company"), on the ground that the same is contrary to law, as well as in terms of the facts of the present case.

4. Dr. Abhishek Manu Singhvi, learned Senior Counsel appearing for the petitioners, submits that the company is undergoing Corporate Insolvency Resolution Process ("CIRP") under the provisions of the Insolvency and Bankruptcy Code, 2016 ("IBC"). It is submitted that the impugned SCN has been issued by the respondent-bank, which is one of the members of the consortium banks, who have advanced loan to the company, which has a mere 2.47% stake in the consortium. The said action of the respondent-bank is merely to create deliberate hurdles, and scuttle the process of resolution/assignment in the loan account of the company.

5. It is submitted that the entire consortium of eleven banks, including the respondent-bank, had agreed for assignment of debt of the company to National Asset Reconstruction Company Limited ("NARCL"), which is an asset reconstruction company, owned and controlled by the Government of India. Further, the formalities, pertaining to assignment of debt to NARCL, are already in final stages.

6. Learned Senior Counsel for the petitioners draws the attention of this Court to the Minutes of the Meeting of the consortium held on 24th March, 2023, wherein, the following decision was taken:

> *"xxx xxx xxx*
>
> *IOB then summarised the major decisions in the meeting as under:*
>
> - ***Company's request for restructuring to the banks appears fair given its***

<u>business revival efforts and the fact that with the insurance claim proceeds the account can be upgraded within 12 months' time post implementation of restructuring package. Hence, it was decided that the banks to take up the restructuring in line with the applicable regulatory guidelines of RBI. Further, it was also decided that all the necessary steps in this direction to be taken up in a time bound manner.</u>

- *ICA shall be signed by the consortium banks.*
- *Company shall submit its detailed Restructuring proposal after completion of the Stock and Forensic Audit.*
- ***<u>Restructuring proposal of the company shall be assessed initially by the lead bank and subsequently other bank and moreover next consortium meeting to be arranged towards end of April-2023 to proceed further.</u>***
- *D&B shall be appointed to carry out the TEV study.*
- *Decision on the credit rating agencies shall be taken at appropriate time.*

xxx xxx xxx"

(Emphasis Supplied)

7. It is further submitted that the aforesaid Meeting dated 24th March, 2023, was attended by two representatives of the respondent-Indian Bank, wherein, decision was taken that the company's request to the banks for restructuring, appears fair.

8. Attention of this Court has also been drawn to the Joint Inspection Report dated 10th July, 2023, wherein, it was recorded as follows:

"xxx xxx xxx

The bank personnels during their visit enquired about the outcome of stock of almonds which was deteriorated because of non- movement due to Covid Lock down and Farmer agitation as informed to the consortium earlier. About this, As already explained due to various adverse external factors experienced in the past which were beyond the control of the company, the Almond Stock could not be sold within its shelf life and hence the majority of the Stock was rendered as inedible. The same was confirmed by various food safety accredited labs to whom sealed samples were sent by stock auditor appointed by the consortium in April 2023 for quality assessment. The factual outcome was that majority of stock was certified as non-edible, the same was also acknowledged/accounted by stock auditors in their report of May 2023 (Ram Vijay and co)"

Company was already doing a lot of R&D since last 1-2 years to minimize the loss and found that Linoleic Acid which can be used as input for CIS *production can be extracted from Almond oil and can effectively be utilized/value can be recovered in chemical division of the Company.*

Accordingly, out of the total damaged Almond stock of Rs. 1500Cr. App. which was certified not edible and not fit for human consumption was mostly recovered in the form of CIS-3 WIP approximately Rs. 1300 Cr. and hence the loss was minimized. The same is also computed in the DP calculation sheet of stock audit report of May 2023.

xxx xxx xxx"

9. Learned Senior Counsel has also relied upon the Techno Economic Viability Study Report dated 24th August, 2023, pertaining to the Restructuring Proposal of the company, relevant portion of which, reads as under:

"xxx xxx xxx

Economic Viability

Thus Techno-economic viability of the project will majorly depend on,

− Company's ability to store the CIS-WIP in suitable form so that it can be used in the future.

− Acceptability of the new products by the customers and AGPL's ability to scale up the production in a time bound manner and hence the achievability of higher EBDITA margins.

− Realization of insurance claims to the tune of INR 300 Cr in early FY25 and subsequent restoration of Kundli plant by end of FY25

− Infusion of promoter contribution as per proposed tranches by FY24.

− Successful and timely implementation of proposed restructuring proposal

<u>As per D&B India's assessment, the average DSCR of 1.43 and average adjusted DSCR of the project is 1.37 during FY24 to FY36 which indicates that debt serviceability can be met to repay the debt as proposed in the scheme and the IRR is above post tax cost of capital, hence the Project is financially viable.</u>

*Subject to the above assessment & Critical Success Factors, various scenarios mentioned in sensitivity analysis, SWOT analysis and Risk analysis, **D&B India is of the opinion that as per proposed restructuring scheme the project is technically feasible and economically viable."***

xxx xxx xxx"

(Emphasis Supplied)

10. It is further submitted that the lead bank, in the consortium of banks, is the Indian Overseas Bank, which has, along with other member banks, agreed for restructuring. Attention of this Court has been drawn to the Minutes of the Consortium Meeting held on 29th January, 2024, wherein, the stand of the various banks, with regard to restructuring, has been noted as follows:

"xxx xxx xxx

#	Bank	Total O/s. debt as on 31• 03-23. (Proposed Cut-off date as per the Resolution Plan) (Rs Cr)	%Share	Assent/ Dissent for Restructuring proposal consideration	Status on TEV Report
1	IOB	710.00	39.04%	**Agreed for re-structuring**	Under consideration
2	PNB	331.30	18.21%	**Agreed for re-structuring in line with the Lead Bank**	Under consideration
3	Union Bank	169.11	9.30%	Confirmation awaited	Under consideration
4	Bank of India	150.28	8.26%	**Agreed for re-structuring in line with the Lead**	Under consideration

				Bank	
5	*UCO Bank*	*122.79*	*6.75%*	***Agreed for re-structuring in line with the Lead Bank***	*Under consideration*
6	*Canara Bank*	*95.79*	*5.27%*	*Restructuring proposal will be considered subsequent to acceptance/ closure of forensic audit*	*Under consideration*
7	*SBI*	*56.30*	*3.10%*	*Not Agreeable*	*Not Applicable (member bank has expressed unwillingness for restructuring)*
8	*Central Bank*	*47.35*	*2.60%*	***Agreed for re-structuring in line with the Lead Bank***	*Under consideration*
9	*BOB*	*78.61*	*4.32%*	***Agreed for re-structuring in line with the Lead Bank***	*Under consideration*
10	*Indian Bank*	*44.95*	*2.47%*	*Not Agreeable*	*Not Applicable (member bank has expressed unwillingness for restructuring)*

11	*IDBI Bank*	*12.36*	*0.68%*	*Not Agreeable*	*Not Applicable (member bank has expressed unwillingness for restructuring)*
	Total	*1,818.85*	*100.00%*		

xxx xxx xxx"

11. Learned Senior Counsel also relies upon the Forensic Audit Report with respect to account of the company, wherein, it has been held as follows:

> *"xxx xxx xxx*
>
> ***Hence, no case of diversion or siphoning of bank funds has been observed. THEREFORE, THE INSTANT CASE IS NOT A CASE OF FRAUD.***
>
> *xxx xxx xxx"*

12. Learned Senior Counsel also relies upon the Joint Lenders Meeting ("JLM") held on 29th January, 2024, wherein, all the banks, who are members of the Consortium, unanimously gave their mandate to the lead bank for in-principle transferring the account to NARCL for purpose of assigning the debt of the company, to NARCL. Relevant portion, as pointed out to this Court, reads as under:

> *"xxx xxx xxx*
>
> ***All the Banks then one by one conveyed their stand on transferring the account to NARCL****. The details of which is as annexed below:*

Bank	***Views on In-principle Transfer of Account to NARCL***
IOB	▪ ***Agreeable***
PNB	▪ ***Agreeable***
Union Bank of India	▪ ***Agreeable to go with the majority*** ▪ *There should be Swiss Challenge*

BOI	▪ ***Agreeable to go with the lead bank***
UCO Bank	▪ ***Agreeable*** *and recommended to HO, awaiting final approval*
Canara Bank	▪ ***Agreeable***
SBI	▪ ***Agreeable***
Central Bank of India	▪ ***Agreeable***
BOB	▪ ***Agreeable to go with the majority***
Indian Bank	▪ ***Agreeable*** ▪ *Alternate recovery process by the bank shall proceed*
IDBI Bank	▪ ***Agreeable***

> ***All the member banks unanimously give their mandate to lead bank for in principle transferring the account to NARCL***
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

13. Attention of this Court has also been drawn to the order dated 30th January, 2024 passed by the National Company Law Tribunal ("NCLT"), New Delhi, wherein, it has been recorded as under:

> *"xxx xxx xxx*
> *17.* ***It is made clear if there is any positive development regarding transfer of loan account to NARCL, by the consortium, it would be open to the parties to take steps in accordance with law.***
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

14. Attention of this Court has also been drawn to the order dated 05th March, 2024 passed by the National Company Law Appellate Tribunal ("NCLAT"), Principle Bench, New Delhi, wherein, NCLAT has recorded that the Consortium of Lenders, has expressed their agreement for restructuring of the debt of the company, having more than 93% shares in the lending. Paragraphs 7 and 8 of the said order, reads as under:

"xxx xxx xxx

7. ***<u>From the facts, as noticed above, it is apparent that the consortium of lenders led by Indian Overseas Bank has expressed their agreement for restructuring of the debt which having more than 93% shares in the lending. It is the Indian Bank or one or other two banks who have not given their consent and they have been opposing restructuring. The Corporate Debtor is a going concern.</u>***

xxx xxx xxx

8. Both the Learned Counsel for the parties have made respective submissions in support of their claim. ***<u>From the facts which have been brought on record, it does appear that the majority of lenders having more than 90% share in the lending have expressed their agreement on for restructuring of the debt</u>*** *which could not be accomplished due to credit rating of the Corporate Debtor which is R5. We also notice that the High Court of Delhi on 16.01.2024 has already passed an order to the credit rating agency to have a relook at CRA Rating of RPF in view of inputs given by the lead bank which process is still on way. The minutes of meeting dated 29.01.2024 of joint lenders clearly minutes following decision:-*

> ***<u>"all the member banks unanimously give their mandate to lead bank for in-principle transferring the account to NARCL."</u>***

xxx xxx xxx"

(Emphasis Supplied)

15. Learned Senior Counsel for the petitioners also relies upon the E-mail dated 17th May, 2024, issued by NARCL to the lead bank, which reads as under:

"xxx xxx xxx

We refer to the trail mail and presume that your Due Diligence on the captioned account must be completed by now. As Lead Bank, we need to inform the Consortium Member Banks on the expected timelines on receiving an offer from NARCL.

We request to advise us on the above.

xxx xxx xxx"

16. Thus, it is submitted that the process for assigning of debt of the company to NARCL was initiated after all the Consortium members had agreed in unanimity to resolve the issues of the company, by assigning its debt to NARCL. However, despite the aforesaid, the respondent-bank has issued the impugned SCN on 18th May, 2024 in their attempt to scuttle the process. The respondent has completely disregarded the Reserve Bank of India ("RBI") Circular on 'Willful Defaulters', and is making an attempt to declare the petitioners as 'Willful Defaulters', under any circumstances.

17. Learned Senior Counsel submits that the SCN has been issued with *mala fide* intention, and there is no material to issue such a notice. The action of issuance of impugned notice by the respondent-bank, is not a bona-fide action, and is an abuse of process, as respondent has no jurisdiction to issue such a SCN. Learned Senior Counsel has relied upon the judgment in the case of ***Whirlpool Corporation Versus Registrar of Trademarks, Mumbai, (1998) 8 SCC 1***.

18. Per contra, learned counsel appearing for the respondent-bank submits that the present petition is a premature petition. The bank is entitled to take action as per law. The respondent has rightly issued a SCN, as the petitioners are guilty of diversion of funds, and have defaulted in making payments, despite having the capacity to pay.

19. I have learned counsels for the parties and have perused the record.

20. At the outset, this Court notes that along with the impugned SCN dated 18th May, 2024, no documents have been supplied to the petitioners.

21. It is no longer *res integra* that fair procedure and Principles of Natural Justice, demand that all the underlying documents, which form the basis of

the SCN, ought to be provided to the concerned party, so that an effective reply can be filed. If the requisite documents are not provided, then, it cannot be said that an effective opportunity has been provided to the noticee. This would be in direct contravention to the Principles of Natural Justice. Therefore, it is imperative that all the underlying documents, which form the basis of a SCN, are supplied to the noticee. Thus, Supreme Court in the case of ***State Bank of India and Ors. versus Rajesh Agarwal and Ors., (2023) 6 SCC 1***, has held as follows:

> *"xxx xxx xxx*
>
> ***36. We need to bear in mind that the principles of natural justice are not mere legal formalities. They constitute substantive obligations that need to be followed by decision-making and adjudicating authorities. The principles of natural justice act as a guarantee against arbitrary action, both in terms of procedure and substance, by judicial, quasi-judicial, and administrative authorities.*** *Two fundamental principles of natural justice are entrenched in Indian jurisprudence : (i) nemo judex in causa sua, which means that no person should be a Judge in their own cause; and (ii) audi alteram partem, which means that a person affected by administrative, judicial or quasi-judicial action must be heard before a decision is taken. The courts generally favour interpretation of a statutory provision consistent with the principles of natural justice because it is presumed that the statutory authorities do not intend to contravene fundamental rights. Application of the said principles depends on the facts and circumstances of the case, express language and basic scheme of the statute under which the administrative power is exercised, the nature and purpose for which the power is conferred, and the final effect of the exercise of that power. [Union of India v. J.N. Sinha, (1970) 2 SCC 458]*
>
> *xxx xxx xxx*
>
> ***54. In Jah Developers [SBI v. Jah Developers (P) Ltd., (2019) 6 SCC 787 : (2019) 3 SCC (Civ) 412] , this Court construed the Master Circular on Wilful Defaulters by harmonising it with the principles of natural justice. Particularly, it was directed that : (i) the First Committee must give its order to the borrower as soon as possible; (ii) the borrower, thereafter, can file a written representation against the order of First Committee to the Review Committee; and (iii) the***

Review Committee must pass a reasoned order which must be provided to the borrower.

xxx xxx xxx

79. *In Swadeshi Cotton Mills [Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664],* ***this Court held that a company is entitled to an opportunity to explain the evidence collected against it and represent why the proposed action should not be taken*** *: (SCC p. 707, para 85)*

> *"85. The contention does not appear to be well founded. Firstly, this documentary evidence, at best, shows that the Company was in debt and the assets of some of its "units" had been hypothecated or mortgaged as security for those debts. Given an opportunity the Company might have explained that as a result of this indebtedness there was no likelihood of fall in production, which is one of the essential conditions in regard to which the Government must be satisfied before taking action under Section 18-AA(1)(a).* ***Secondly, what the rule of natural justice required in the circumstances of this case, was not only that the Company should have been given an opportunity to explain the evidence against it, but also an opportunity to be informed of the proposed action of take over and to represent why it be not taken.****"*

xxx xxx xxx

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 [Union of India v. Tulsiram Patel, (1985) 3 SCC 398 : 1985 SCC (L&S) 672] , 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."*

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.*

xxx xxx xxx"

(Emphasis Supplied)

22. At this stage, learned counsel appearing for the respondents, submits that the respondent-bank shall provide all the underlying documents to the petitioners, which form the basis of issuance of SCN dated 18th May, 2024.

23. Since the present case is still at the stage of a SCN, it is directed as follows:

(i) The respondent-bank shall provide all the underlying documents, which form the basis of the SCN dated 18th May, 2024, to the petitioners, within a period of two weeks from today.

(ii) Upon receipt of the documents, the petitioners shall file reply to the SCN, within a period of four weeks, thereafter.

(iii) The petitioners are at liberty to make a request for personal hearing, which shall be considered by the respondent-bank.

(iv) If the decision of the Committee of 'Willful Defaulters', is against the petitioners, the petitioners shall be at liberty to file representation against the same, to the Review Committee of the 'Willful Defaulters'.

(v) If the decision of the Review Committee of the 'Willful Defaulters' is against the petitioners, the said decision shall not be given effect to, for a period of two weeks, in order to enable the petitioners, to seek their legal remedies.

24. Accordingly, the present petition is disposed of, along with the pending applications, with the aforesaid directions.

MINI PUSHKARNA, J

MAY 28, 2024/kr