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IN THE HIGH COURT AT CALCUTTA
(ORDINARY ORIGINAL CIVIL JURISDICTION)
ORIGINAL SIDE

G.A. No. 1 of 2024

In

C.S. No. 190 of 2024

HEMANT KANORIA & ANR.

-VS-

SAXENA & SAXENA & ORS.

BEFORE:

The Hon'ble JUSTICE KRISHNA RAO

Hearing Concluded On : 07.10.2024

Order On : 06.11.2024

Appearance:

Mr. Ratnanko Banerji, Sr. Adv.
Mr. Jishnu Chowdhury, Adv.
Mr. Deepan Kumar Sarkar, Adv.
Mr. Soumalya Ganguli, Adv.
Mr. Samriddha Sen, Adv.
Mr. Biswaroop Mukherjee, Adv.
... for the plaintiffs.

Mr. Dhruv Dewan, Adv.
Mr. Anoop Rawat, Adv.
Mr. Saurav Panda, Adv.
Mr. Deepanjan Dutta Roy, Adv.
Ms. Arushi Chandra, Adv.
Ms. Sanjana Jha, Adv.
Ms. Rashmi Sharma, Adv.
...for the defendant nos. 2 to 23.

ORDER

1. The plaintiffs have filed the present application praying for grant of interim order. The plaintiffs have filed the suit praying for declaration that the audit report is illegal, null and void and other prayers.
2. The plaintiffs were the shareholders of SREI Infrastructure Finance Limited (SIFL). SREI Infrastructure Finance Limited is the holding company of and owns 100% shareholding in SREI Equipment Finance Limited (SEFL), the plaintiffs were the directors of a SEFL and SIFL.
3. On 4th October, 2021, the Reserve Bank of India under the provisions of Section 45(IE) of the Reserve Bank of India Act, 1934, issued a Notification regarding the appointment of Mr. Rajneesh Sharma as the Administrator with respect to the management and affairs of the above two companies. The Board of Directors of the said two companies were superseded and the Administrator took over the affairs and management of the said two companies.
4. The Reserve Bank of India in exercise of powers conferred under Section 227 read with Section 239(2)(zk) of the Insolvency and Bankruptcy Code, 2016 and initiated Corporate Insolvency Resolution Process (CIRP) in respect of the SREI Entities. The Adjudicating Authority in respect of the said two companies for CIRP on 8th October, 2021.

5. By an email dated 6th December, 2021, the defendant No. 2 has appointed the defendant no.1 for the purpose of carrying out a forensic audit in respect of the affairs of SEFL. The forensic audit to be conducted by the defendant no.1 with respect to the affairs of SEFL relating to the period from 1st April, 2016 to 30th September, 2020 and are restricted to transaction relating to the IL & FS group of companies which are as follows:

“a. Gujarat Integrated Maritime Complex Private Limited;

b. Sealand Ports Private Limited;

c. IL&FS Transportation Networks Limited;

d. IL&FS Energy Development Company Limited;

e. Chennai Nashri Tunnelway Limited; and

f. Fagne Sonagadh Expressway Limited.”

6. The defendant no.1 on completion of forensic audit has published report on 7th February, 2022.
7. Mr. Ratnanko Banerji, Learned Senior Advocate representing the plaintiffs submits that the plaintiffs came to know about the publication of forensic report only on 25th June, 2024. He submits that in respect of the transactions of the SREI Entities (other than IL & FS), KPMG Limited had been appointed as auditor for the purpose of conducting forensic audit and KPMG has published multiple reports.

8. Mr. Banerji submits that the defendant no.1 has been required by the defendant no.2 to carry out a forensic audit in respect of SEFL in or around 6th December, 2021. On the said date, SEFL had already been admitted for CIRP and all the records of SEFL were under the control of the Administrator/ Resolution Professional. He submits that without specific concurrence of the Administrator, no step could have been taken and the report reveals that without any permission, the defendant no.1 carried out the forensic audit upon consulting records obtained from the Administrator.
9. Mr. Banerji submits that the report is not conclusive and no responsibility has been taken by the defendant no.1. He submits that the report is not reliable, incapable of being acted upon and is not an audit report in law. He submits that the report contains disclaimers and is contrary to the norms of ICAI. He submits that the report is partial in nature, selective and without context inasmuch as the present management of the SREI Entities, who alone had been consulted by the defendant no.1 while preparing the report and did not provide email communications between erstwhile management and SREI Credit Sanctioning Committee personnel and Ledgers of IFIN (IL&FS group entity) in the books of group entities of SEFL/SIFL.
10. Mr. Banerji submits that as per applicable auditing norms, the defendant no.1 was required to enquire with the plaintiffs as to whether they had any real or actual contemporaneous knowledge of any alleged fraud concerning the SREI Entities. He submits that the audit report

had been undertaken well after the supersession of the Board of the SREI Entities on 4th October, 2021, the plaintiffs had not been either consulted or approached by the defendant no.1 while preparing the audit report.

11. *Per contra*, Mr. Dhruv Dewan, Learned Advocate representing the defendant nos. 2 to 23 submits that in the present application, no interim order can be granted. He submits that the plaintiff has also challenged the report submitted by KPMG in C.S. No. 242 of 2023 but no interim order is passed. He submits that forensic report is not a final report and it is only a show cause.
12. Mr. Dewan submits that in the case of ***Hemant Kanoria Vs. Bank of India (WPA No. 28329 of 2023)*** dated 2nd February, 2024, the Coordinate Bench of this Court in the writ proceeding has explained the procedure with regard to the Forensic Audit Report. He submits that Forensic Report is only a preliminary opinion in order to issue show cause notices. The probative value and evidentiary strength of the Forensic Audit Report can only be ascertained at the stage of final decision to declare the plaintiffs fraud.
13. Mr. Dewan submits that the plaintiffs has filed writ petition being WPA No. 15471 of 2024 challenging show cause notice dated 16th May, 2024 in connection with Forensic Audit Report dated 7th February, 2022 and in the said proceeding also, the plaintiffs could not able to get any order of stay.

14. Mr. Dewan submitted that SA 240 is only for financial statement and the Forensic Audit Report is not a financial statement. He submits that SA 240 is not applicable in the present suit. He submits that for preparation of Forensic Audit Report comments from management is not required. He submits that they will get an opportunity to give reply to the show cause notice in connection with the Forensic Audit Report.
15. Mr. Dewan in support of his submissions relied upon the judgment in the case of ***State Bank of India Vs. Rajesh Agarwal and Others*** reported in ***(2023) 6 SCC 1*** and submitted that the Reserve Bank of India has the right to take all such measures as are necessary to protect the health of the banking system. He submits that the Master Directions on Frauds lay down the procedure for banks, who in case of a breach of loan agreements by the borrowers, can seek appropriate remedies by approaching law-enforcement agencies and debarring borrowers from accessing further institutional finance.
16. Heard the Learned Counsel for the respective parties, perused the materials on record and the judgment relied by the defendants. The plaintiffs have prayed for an order of injunction restraining the defendants from giving any effect or further effect to the Forensic Audit Report submitted by the defendant no.1 dated 7th February, 2022.
17. By an order dated 1st October, 2021, the Reserve Bank of India has superseded the Board of Directors of SIFL for the following reasons:
 - i. *As per data submitted by financial institutions, the total borrowings of SIFL stood*

at Rs. 11,746 crore, on June 30, 2021. SIFL has defaulted with 12 lenders aggregating Rs.3,566 crore.

- ii. *The Board of Directors of SIFL and Srei Equipment Finance Limited (SEFL) had on July 04, 2019 approved transfer of assets and liabilities (including liabilities towards issued and outstanding NCDs) of SIFL by way of slump exchange to SEFL with effect from October 01, 2019. Despite non-receipt of No-objection Certificate (NOC) from majority of the lending institutions, SIFL and SEFL had given effect to the slump exchange.*
- iii. *Several supervisory concerns (e.g. violation of IRACP norms, evergreening of NPA accounts, connected lending, weak corporate governance standards, inadequate systems and control, poor compliance standards, etc.) observed during past inspections by the Reserve Bank have been communicated through supervisory letters, DO letters and also reiterated in the meetings held by the Reserve Bank with the management of the company.*
- iv. *Inspection of SIFL with reference to financial position as on March 31, 2020 revealed that the company is not meeting minimum regulatory CRAR (15%) and NOF (Rs.300 crore). Further, infrastructure loans as a percentage of total assets was assessed at 3.33% as against the regulatory requirement of 75%.*
- v. *Special Audit conducted by the Reserve Bank in December 2020-January 2021 observed that funds disbursed to certain borrowers were received back from such borrowers/ their group companies on the same date/dates close to the date of disbursement, which indicated evergreening.*
- vi. *SIFL has remained non-compliant with RBI regulations and supervisory instructions. Despite continuous engagement and follow up by the Reserve Bank, SIFL has failed to take corrective action on governance, systems and controls, compliance, etc.”*

18. After supersession of the Board of Directors of SIFL, the Reserve Bank of India appointed Shri Rajneesh Sharma, Ex-Chief General Manager, Bank of Baroda as the Administrator of the SIFL and SEFL. The defendant no. 2 has appointed the defendant no.1 for the purpose of forensic audit with respect to the affairs of the SEFL. The defendant no.1 has conducted forensic audit in respect of the affairs of SEFL for the period from 1st April 2016 to 30th September, 2016 and restricted to transactions relating to the IL & FS group namely:

- “a. Gujarat Integrated Maritime Complex Private Limited;*
- b. Sealand Ports Private Limited;*
- c. IL&FS Transportation Networks Limited;*
- d. IL&FS Energy Development Company Limited;*
- e. Chennai Nashri Tunnelway Limited; and*
- f. Fagne Sonagadh Expressway Limited.”*

19. The conclusion of the forensic report is as follows:

“Conclusion

It can be concluded from the above table that out of total loan amount of Rs. 1179.78 Crores disbursed by the SEFL/SIFL to IL&FS group entities, loan of Rs. 1079.78# Crores were not disbursed in the normal course of business. Further, out of Rs. 1079.78 Crores except for the amount of 212.97^ Crores, all the loans disbursed were round tripped back to the Company. Further, with respect to Rs. 212.97 Crores, since no trail of receiving back of money by SIFL/SEFL is found, there might be possibility that these funds may have been diverted elsewhere. These round tripping of funds has resulted in evergreening of the books of SEFL/SIFL, inflated profits, suppressed

provisioning, non- disclosure of potential NPAs and wrongful reporting to various stakeholders.”

20. As per the contention of the plaintiffs, the report is not reliable, incapable of being acted upon and is not an audit report in law. It is the further contention that the report contains disclaimers and the report is contrary to the norms of ICAI. The further contention of the plaintiffs that the report is partial in nature, selective and without context as the present management of the SREI entities did not provide email communications between erstwhile management and SREI Credit Sanctioning Committee personnel and Ledgers of IFIN (IL&FS group entity) in the books of group entities of SEFL/SIFL.
21. Sub-Sections 1 to 4 of Section 45-IE of the Reserve Bank of India Act, 1934, reads as follows:

“45IE. Supersession of Board of directors of non-banking financial company (other than Government Company).

(1) Where the Bank is satisfied that in the public interest or to prevent the affairs of a non-banking financial company being conducted in a manner detrimental to the interest of the depositors or creditors, or of the non-banking financial company (other than Government Company), or for securing the proper management of such company or for financial stability, it is necessary so to do, the Bank may, for reasons to be recorded in writing, by order, supersede the Board of Directors of such company for a period not exceeding five years as may be specified in the order, which may be extended from time to time, so, however, that the total period shall not exceed five years.

(2) The Bank may, on super session of the Board of Directors of the non-banking financial company under sub-section (1), appoint a suitable person as the Administrator for such period as it may determine.

(3) The Bank may issue such directions to the Administrator as it may deem appropriate and the Administrator shall be bound to follow such directions.

(4) Upon making the order of super session of the Board of Directors of a non- banking financial company,--

(a) the chairman, managing director and other directors shall from the date of super session of the Board of Directors vacate their offices;

(b) all the powers, functions and duties, which may, by or under the provisions of this Act or any other law for the time being in force, be exercised and discharged by or on behalf of the Board of Directors of such non-banking financial company or by a resolution passed in general meeting of such non-banking financial company, shall, until the Board of Directors of such company is reconstituted, be exercised and discharged by the Administrator referred to in sub-section (2)."

22. In the case of ***Hemant Kanoria Vs. Bank of India*** reported in **2024 SCC Online Cal 1012**, the Coordinate Bench of this Court in the writ proceeding wherein a Show Cause Notice with respect to the Audit Report was served upon the petitioner and the petitioner has challenged the said Show Cause Notice held that:

"42. *The FAR, it is to be noted, is merely a trigger for the formation of a preliminary opinion by the respondent-Banks in order to issue a show-cause notice under the Master Directions. Thus, at the stage of issuance of*

show-cause notices, it is not required to enter into the probative value of the FAR. Such probative value and evidentiary strength of the FAR can only be ascertained at the stage of final decision to declare the petitioner as a fraud.

64. *First, a show-cause notice is to be issued, enumerating the exact offences alleged against the borrower/Director. If any FAR or other document forms the basis of the show-cause, the same is to be served along with the show-cause notice. (Both the said criteria have, in fact, have been satisfied in the present case in respect of BOI, BOB and UBI.)*

65. *A fortnight thereafter would be ample time to give reply to the show- cause notice. In its reply, the noticee shall, apart from addressing the allegations and controverting those specifically, specify the documents which are required to be provided to the noticee by the Banks/financial institutions. If necessary, in the reply, the borrower/Director or promoter can reserve its rights to give a further additional reply upon receiving such documents.*

66. *Within a week from receiving such replies, the Banks can give an inspection of the documents, if extremely voluminous, and/or furnish copies of the particular documents which are sought by the borrower.*

67. *Within a further fortnight, if necessary, the noticee/ borrower can be given an opportunity to file additional reply, in the light of the documents which have by now been inspected / served on them. Thereafter, a hearing shall be fixed by the bank on the basis of the reply.*

68. *Upon such hearing being concluded, a decision shall be taken whether or not to declare the borrower-company or its Director/promoter as "fraud" or "perpetrator of fraud". The aforesaid procedure would take, at the most, 8 weeks in total to be concluded, which would be sufficient compliance of the*

Master Directions of the RBI. Thereafter, if declared as fraud/perpetrator of fraud, the same can be intimated by the Bank to the RBI.

69. *The very first step has been complied with in the present cases by issuance of show-cause notices enumerating the exact allegations and serving a copy of the FAR which forms the basis of the show-cause notices. Thus, there is no scope or reason to set aside the show-cause notices as such.*

70. *However, the subsequent steps are required to be undergone to give an effective opportunity to the petitioner to rebut the allegations made against him and the borrower-companies.”*

23. In the present case, the Reserve Bank of India by invoking the provisions of Section 45-IE of the Reserve Bank of India Act, 1934 has superseded the Board of Directors of SIFL and appointed an Administrator. Subsequently, the defendant no.2 has appointed defendant no.1 for conducting Forensic Audit and submitted Forensic Audit Report. Now, the plaintiffs have challenged the said Forensic Report in the present Suit. Simultaneously, the plaintiffs have filed a Writ Application being WPA No. 15471 of 2024 against the South Indian Bank Limited challenging the Forensic Audit Report but the Writ Court has not passed any interim order in favour of the plaintiffs.

24. In the case of **Rajesh Agarwal (Supra)**, the Hon'ble Supreme Court held that:

“83. *RBI has the right to take all such measures as are necessary to protect the health of the banking system. Hence, the*

Master Directions on Frauds lay down the procedure for banks, who in case of a breach of loan agreements by the borrowers, can seek appropriate remedies by appropriate law-enforcement agencies and debarring borrowers from accessing further institutional finance. However, any policy decision which contemplates serious civil consequences for any person will be open to challenge for being arbitrary if the principles of natural justice are not applied during the process.”

25. The plaintiffs have relied upon the order passed by the Learned Judge, Commercial Court at Alipore in Title Suit No. 09 of 2022 filed by the plaintiffs challenging the Forensic Audit Report of KPMG and the Learned Court has granted interim order and the same was challenged before the Appellate Court being FMA No. 1254 of 2022 and the Hon’ble Appellate Court also confirm the order passed by the Learned Judge, Commercial Court. The Bank has challenged the said order before the Hon’ble Supreme Court in Civil Appeal No. 7823 of 2023 and the plaintiffs have withdrawn the Title Suit No. 09 of 2022 in view of the objection raised by the bank regarding maintainability of the Commercial Suit. As the suit is withdrawn and thus the order passed by the Learned Judge, Commercial Court and the Hon’ble Appellate Court cannot be taken into consideration as after the withdrawal of the suit, the orders passed in the suit does not exists.
26. The plaintiffs have challenged the Forensic Audit Report. Forensic Audit Report is only a preliminary opinion. If the bank intent to rely upon the said report, the bank has to issue show cause notice to the plaintiff by informing about the alleged offences against the plaintiffs. The plaintiffs

would be at liberty to submit reply to the show cause notice. If any, decision is taken by the bank against the plaintiff after receipt of the reply of the plaintiffs, the plaintiffs can take appropriate steps against the decision of the bank.

27. Considering the above, this Court did not find any prima facie case and balance of convenience in favour of the plaintiffs for grant of interim order. Accordingly, prayer for grant of interim order is refused.
28. The defendants are directed to file affidavit-in-opposition within three weeks, reply, if any, be filed within two weeks thereafter. List the matter on 11th December, 2024 under the heading Adjourn Motion.

(KRISHNA RAO, J)

p.d/-