

GAHC010095432024



THE GAUhati HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2514/2024

TRISHILA CHETRY @ TRISHNA CHETRY
W/O- SRI HEMANTA KUMAR SHARMA, R/O- H/NO. 2, SAPTA SAHID PATH,
OIL PIPELINE, SARUMOTORIA, DISPUR, P.O. ASSAM SACHIVALAYA, P.S.
DISPUR, GHY-781006, ASSAM

VERSUS

THE STATE OF ASSAM AND 8 ORS
REP. BY ITS CHIEF SECRETARY TO THE GOVT. OF ASSAM, DISPUR, GHY-
781006.

2:THE DIRECTOR GENERAL OF POLICE
ASSAM
DR.B.K. KAKATI ROAD
GHY-781007.

3:THE COMMISSIONER OF POLICE
KAMRUP(M)
GHY
ASSAM
PIN- 781001.

4:THE OFFICER-IN-CHARGE
DISPUR POLICE STATION
DISPUR
GHY-781006
ASSAM

5:THE PUNJAB NATIONAL BANK
SASTRA CIRCLE
BHANGAGARH
GHY-781005.

6:THE ASSISTANT GENERAL MANAGER-CUM-HEAD

SASTRA CIRCLE
PNB
BHANGAGARH
GHY-781005.

7:THE BRANCH MANAGER
THE PUNJAB NATIONAL BANK
FANCY BRANCH
GHY-781001.

8:GOLOK HAZARIKA
S/O- LATE MANIK HAZARIKA
PRESENT RESIDENT OF H/NO. 2
SAPTA SAHID PATH
OIL PIPELINE
SARUMOTORIA
DISPUR
PO. ASSAM SACHIVALAYA
PS. DISPUR
GHY-781006.

9:ALAKA SAIKIA HAZARIKA
W/O- LATE GOLOK HAZARIKA
PRESENT RESIDENT OF H/NO. 2
SAPTA SAHID PATH
OIL PIPELINE
SARUMOTORIA
DISPUR
PO. ASSAM SACHIVALAYA
PS. DISPUR
GHY-781006

Advocate for the Petitioner : MS. B S GOYAL

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY**

JUDGMENT

Date : 15-05-2024

Heard Ms. B.S. Goyal, learned counsel for the petitioner; Ms. S. Baruah, learned Junior Government Advocate, Assam for the respondent nos. 1, 2, 3 &

4; and Mr. A. Ganguly, learned counsel for the respondent nos. 5, 6 & 7.

2. The facts projected in this writ petition can be narrated, in brief, as follows :-

2.1. In the year 2019, the respondent no. 8 and the respondent no. 9 approached the petitioner and her husband offering to sale the second floor of one RCC building which was under construction then on a plot of land belonging to them. After arriving at a mutual agreement, the petitioner agreed to purchase the second floor area measuring 1600 Sq. Ft. of the then under-construction RCC building which was being constructed at a plot of land, measuring 14 Lessas and covered by Dag no. 536 and K.P. Patta no. 618, situate at Village – Sorumotoria, Mouza – Beltola, Revenue Circle – Dispure, District – Kamrup [M], Assam [‘the subject-plot’, for short]. To that effect, the petitioner on one part and the respondent no. 8 and the respondent no. 9 on the other part executed a registered Agreement of Sale on 08.05.2019. It is the case of the petitioner that initially, the petitioner paid a sum of Rs. 14,00,000/- out of the total consideration amount agreed @ Rs. 27,00,000/-. The petitioner has claimed that subsequently, the balance amount of Rs. 13,00,000/- was also paid to the respondent no. 8 and the respondent no. 9. The petitioner has alleged that during the subsequent period, the respondent no. 8 and the respondent no. 9 created a disturbing situation for which the petitioner had to lodge a First Information Report [FIR] at Dispur Police Station on 17.12.2020. The petitioner has alleged that despite lodging of the FIR, the FIR was not registered by the Officer In-Charge, Dispur Police Station. As the petitioner has already paid the agreed consideration of Rs. 27,00,000/- and the respondent no. 8 and the respondent no. 9 were not providing No Objection Certificate for

registering the Sale Deed, the petitioner had to fork out a further sum of Rs. 8,00,000/-, as demanded by them prior to registration of the sale deed. Finally, a sale deed was executed and registered between the petitioner on one part and the respondent no. 8 and the respondent no. 9 on the other part on 24.10.2020. The petitioner has claimed that after execution of the registered sale deed, she became the owner of the second floor of the RCC building, construction of which had been completed in the meantime, by incurring a substantial amount. The petitioner has further stated that she had lodged another FIR at the Dispur Police Station on 22.01.2022.

2.2. It was on 16.03.2024, the petitioner came to know that the respondent no. 8 and the respondent no. 9 had taken a housing loan from the respondent Punjab National Bank in the year 2016 mortgaging the landed property including the subject-plot, with the respondent Punjab National Bank when a few bank officials from Bhangagarh Branch of the respondent Bank paid a visit to the subject-plot and informed the petitioner that due to the default on the part of the respondent no. 8 and the respondent no. 9 in repayment of the loan, the respondent Bank had taken over symbolic possession of the subject-land and the building standing therein. The respondent Bank authorities had already initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [‘the SARFAESI Act, 2002’, for short]. In that connection, an auction process had been initiated by publication of an E-Auction Notice by ascertaining the valuation of the landed property including the subject-plot, in order to recover its outstanding dues amounting to Rs. 45,51,781.19 and further interests and other charges thereon. It is the case of the petitioner that in view of the initiation of the auction

process, the petitioner's legitimately purchased property, that is, the second floor of the RCC building standing on the subject-land and the proportionate share in the subject-plot were likely to be sold in the auction process. Therefore, the husband of the petitioner had to participate in the said auction process held on 12.04.2024. In the said auction process, the husband of the petitioner became the successful bidder @ Rs. 85,50,000/- against a reserve price of Rs. 85,00,000/- and on deposit of the said amount, the respondent Bank authorities has already issued a sale confirmation letter on 19.04.2024.

2.3. It is the further case of the petitioner that prior to and after purchase of the second floor by the registered sale deed dated 24.10.2020, the petitioner and her husband had made investment of a substantial amount to complete construction of the second floor of the RCC building and, as such, the petitioner is also an owner of a part of landed property, which had been auctioned. As the respondent Bank authorities are required under the provisions of sub-section [7] of Section 13 of the SARFAESI Act, 2002 to disburse the residue of the money received in the auction process after meeting all the other expenses mentioned therein, to the person entitled thereto in accordance with his rights and interest, the petitioner is under a serious apprehension that the entire residual amount would be disbursed by the respondent Bank authorities to the respondent no. 8 and the respondent no. 9 as they are the borrowers/owners of the landed property which had been auctioned, at the time of extending the loan in the books of the respondent Bank authorities. In the process, the petitioner's chances of recovering her share out the residue of the amount, Rs. 85,50,000/- would be jeopardized. Stating that the petitioner has no other remedy to stop the respondent Bank authorities from disbursing the residue amount to the

respondent no. 8 and the respondent no. 9, the instant writ petition is preferred seeking the following reliefs :-

- [I] The respondents, more particularly the respondent nos. 5, 6 and 7 to apportion the sale proceeds arising out of the E-Auction dated 12.04.2024 and pay the share of sale proceeds to the petitioner with respect to her share of property;*
- [ii] The respondents, more particularly the respondents no. 5, 6 and 7 be directed to apportion an amount of the money to cover the costs of money invested in developing her share of property and only after satisfaction of dues and entitlement of the petitioner to pay any excess residue of the sale proceeds to the Respondents No. 8 and 9;*
- [iii] The respondents, more particularly the respondents no. 1 to 4 to register all the 3 FIR's and investigate the same and take steps in accordance with Law;*
- [iv] and/or pass such further or other order or orders as this Hon'ble Court may deem fit and proper.*

3. The first relief that has been sought for is with regard to the sale proceeds received by the respondent Bank authorities in the auction process. The petitioner's claim is on the residual amount. According to the petitioner, the residual amount is required to be disbursed to the owners of the auctioned property commensurate with their respective shares in the auctioned property. The petitioner has also sought for a direction to the State respondent authorities to register the three FIRs which the petitioners stated to have lodged at the Dispur Police Station on 17.12.2020, 22.01.2022 & 17.03.2024 respectively.

4. As regards the lodging of the three FIRs are concerned, the petitioner is silent as regards any subsequent action taken by her after the act of alleged non-registration of the two FIRs, stated to have been lodged on 17.12.2020 and

on 22.01.2022 respectively. The law is well settled about the remedy available for a person when a First Information Report lodged by him/her is not registered by the Officer In-Charge of the concerned Police Station. If a person has a grievance that the Police Station is not registering his/her FIR under Section 154[1], CrPC, then he/she can approach the Superintendent of Police under Section 154[3], CrPC by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156[3], CrPC before the jurisdictional Magistrate concerned. If such an application under Section 156[3], CrPC is filed before the jurisdictional Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made.

5. The law has been settled by the Hon'ble Supreme Court of India in *Sakiri Vasu vs. State of Uttar Pradesh and others*, reported in [2008] 2 SCC 409, by observing as under :-

11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 CrPC, then he can approach the Superintendent of Police under Section 154[3] CrPC by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156 [3] CrPC before the Learned Magistrate concerned. If such an application under Section 156 [3] is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a

case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.

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17. In our opinion Section 156[3] CrPC is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156[3] CrPC, though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

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24. In view of the abovementioned legal position, we are of the view that although Section 156[3] is very briefly worded, there is an implied power in the Magistrate under Section 156[3] CrPC to order registration of a criminal offence and /or to direct the officer in charge of the concerned police station to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same. Even though these powers have not been expressly mentioned in Section 156[3] CrPC, we are of the opinion that they are implied in the above provision.

25. We have elaborated on the above matter because we often find that when someone has a grievance that his FIR has not been registered at the police station and/or a proper investigation is not being done by the police, he rushes to the High Court to file a writ petition or a petition under Section 482 CrPC. We are of the opinion that the High Court should not encourage this practice and should ordinarily refuse to interfere in such matters, and relegate the petitioner to his alternating remedy, firstly under Section 154[3] and Section 36 CrPC before the concerned police officers, and if that is of no avail, by approaching the concerned Magistrate under Section 156[3].

26. If a person has a grievance that his FIR has not been registered by the police station his first remedy is to approach the Superintendent of Police under Section 154[3] CrPC or other police officer referred to in Section 36 CrPC. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section 156[3] CrPC instead of rushing to the High Court by way of a writ petition or a petition under Section 482 CrPC. Moreover he has a further remedy of filing a criminal complaint under Section 200 CrPC. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?

27. As we have already observed above, the Magistrate has very wide powers to direct registration of an FIR and to ensure a proper investigation, and for this purpose he can monitor the investigation to ensure that the investigation is done properly [though he cannot investigate himself]. The High Court should discourage the practice of filing a writ petition or petition under Section 482 CrPC simply because a person has a grievance that his FIR has not been registered by the police, or after being registered, proper investigation has not been done by the police. For this grievance, the remedy lies under Sections 36 and 154[3] before the concerned police officers, and if that is of no avail, under Section 156[3] CrPC before the Magistrate or by filing a criminal complaint under Section 200 CrPC and not by filing a writ petition or a petition under Section 482 CrPC.

6. In the same line, the Hon'ble Supreme Court of India in *Sudhir Bhaskarrao Tambe vs. Hemant Yashwant Dhage and others*, reported in [2016] 6 SCC 277:-

2. This Court has held in *Sakiri Vasu vs. State of U.P.*, that if a person has a grievance that his FIR has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go to the High Court under Article 226 of the Constitution of India, but to approach the Magistrate concerned under Section 156[3] CrPC. If such an application under Section 156[3] CrPC is made and the

Magistrate is, prima facie, satisfied, he can direct the FIR to be registered, or if it has already been registered, he can direct proper investigation to be done which includes in his discretion, if he deems it necessary, recommending change of investigating officer, so that a proper investigation is done in the matter. We have said this in Sakiri Vasu case because what we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.

7. Thus, so far as the second relief sought for by the petitioner is concerned, this Court has found that the petitioner has not yet approached the authority either under Section 154[3], CrPC or under Section 156[3], CrPC. In such obtaining situation, this Court is of the view that the present writ petition with regard to the said prayer is not to be entertained. However, liberty stands reserved to the petitioner to approach the authority as per the procedure laid down in Section 154[3], CrPC and Section 156[3], CrPC.

8. As regards the first prayer is concerned, it is found that the husband of the petitioner had emerged as the successful bidder in the auction process initiated by the respondent Bank authorities for realizing its dues under the provisions of the SARFAESI Act, 2002 and in view of the deposit of the entire auction amount, the respondent Bank authorities has already issued a sale confirmation letter to the husband of the petitioner. As on date, the respondent no. 8 and the respondent no. 9 have no subsisting interest in the auctioned property including the subject-plot, as the said property including the subject-plot, has been duly auctioned by the respondent Bank authorities in favour of the husband of the petitioner. The learned counsel for the petitioner has placed a copy of the Sale Certificate dated 14.05.2024, issued by the respondent Bank under Rule 9[6] of

the Security Interest [Enforcement] Rules, 2002. The description of the property in the Sale Certificate in favour of the husband of the petitioner is as under :-

DESCRIPTION OF THE IMMOVABLE PROPERTY

[IBAPI E-BKRAY PROPERTY ID – PUNB018900202401]

ALL that part and parcel of Land measuring 14 [fourteen] Lechas along with RCC building, structures and other construction thereon covered by Dag No. 250[Old]/536[New], K.P. Patta no. 30[Old]/618[New] situated at Revenue Village – Sorumotoria, Mouza Beltola, under Revenue Circle-Dispur, District – Kamrup [M], Assam, standing jointly in the name of Sri Golok Hazarika, son of Late Manik Hazarika and [2] Smti. Alaka Saikia Hazarika, wife of Sri Golok Hazarika as per Regd. Gift deed bearing serial no. 19504; deed no. 13212 dated 30.10.2007 executed before the Senior Sub-Registrar, Guwahati and bounded by :-

North – Land of Mukunda Sarma; South – Land of Kanteswar Choudhury; East – Bye Lane; West – Land of Miss Pathak.

List of encumbrances

1. NIL [Free from any known encumbrances as on date of this sale certificate]

9. As per sub-section [7] of Section 13 of the SARFAESI Act, 2002, where any action has been taken against a borrower which includes an auction process, all costs, charges and expenses which, in the opinion of the secured creditor, that is, the Punjab National Bank in the instant case, have been properly incurred by it or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and *the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.* It transpires that in the E-Auction Notice, the

respondent Bank authorities had valued the landed property proposed to be auctioned to realize an outstanding amount of Rs. 45,51,781.19 on 30.09.2023 plus further interests and other charges thereon and it had fixed the reserved price the property @ Rs. 85,00,000/-.

10. It is the case of the petitioner that after realizing the outstanding amount and other charges from the amount collected through the auction process, that is, Rs. 85,50,000/-, as per sub-section [7] of Section 13 of the SARFAESI Act, 2002, the residual amount would be substantial and the petitioner is a person who is entitled to receive a part of the said residual amount as the petitioner has already become the owner of a part of the said landed property, which had been auctioned. The petitioner has further contended that the respondent Bank authorities should be directed to disburse that part of the residual amount, which is legitimately due to the petitioner. Though such submission advanced on behalf of the petitioner seems attractive, it has no basis in law. The provisions contained in sub-section [7] of Section 13 of the SARFAESI Act, 2002 has made it clear that the residue of the money is to be paid to the person entitled to in accordance with his rights and interests. Thus, to receive any part of the residual amount, a person has to establish his rights and interest. The writ proceedings under Article 226 of the Constitution of India is not a proper proceedings to establish the petitioner's right and interests in so far as the residual amount is concerned as the petitioner has to establish such rights and interest qua the respondent no. 8 and the respondent no. 9, who were the original owners of the landed property which had been auctioned and in the Sale Certificate, the respondent no. 8 and the respondent no. 9 are recognized as the owners of the auctioned property. In the process for establishing such

rights and interests, a number of disputed questions of fact would fall for determination. Thus, such rights and interests can be established only in a proceedings where the contesting parties can lead evidence. In such view of the matter, this Court is of the considered view that the reliefs sought for in the form of a direction as regards apportionment of the residual amount and a direction to the respondent Bank authorities to stop from disbursing the residual amount in accordance with the provisions of the SARFAESI Act, 2002 are found to be issues, which cannot be decided in a writ petition in absence of any accrued right and interest established in favour of the petitioner under the law.

11. In view of the discussion made above, the writ petition seeking to invoke the extra-ordinary and discretionary jurisdiction under Article 226 of the Constitution of India is found to be bereft of any merit as no public element is found involved. Resultantly, the same is not entertained. It is, however, made clear that non-entertainment of the writ petition shall not preclude the petitioner to avail any other appropriate remedy, as permissible under the law.

JUDGE

Comparing Assistant