

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

WRIT PETITION NO. 2778 OF 2021

ICICI Bank Ltd.,
a Public Company incorporated under
the Companies Act, 1956 and Banking
Company within the meaning of the
Banking Regulation Act, 1949 having
its registered office at Landmark Race
Course Circle, Vadodara - 390007 and
its Corporate Office at ICICI Bank
Towers, Bandra-Kurla Complex,
Bandra, Mumbai – 400 051 through
its authorised representative
Mr. Kush Wadehra

... Petitioner No.1
(Original Accused No.1)

Zarin Daruwala, Adult,
Indian Inhabitant, residing at
B-1907, Ashok Towers, Dr. S.S.
Rao Road, Parel, Mumbai – 400 0412

... Petitioner No.2
(Original Accused No.2)

Girish Nayak, Adult,
Indian Inhabitant, residing at
A2301 Amey CHS, Plot 24,
Sector 4, Nerul, Navi Mumbai-400 706

... Petitioner No.3
(Original Accused No.3)

Arati Ramakrishnan, Adult,
Indian Inhabitant, residing at
D 602, Krishna, Vasant Sagar Complex,
Thakur Village, Kandivali East,
Mumbai – 400 101

... Petitioner No.4
(Original Accused No.4)

Vipul Parmar, Adult,
Indian Inhabitant, residing at
Plot 107, Flat 504, Road No.5,
Jawahar Nagar, Goregaon (W),
Mumbai – 400 104

... Petitioner No.5
(Original Accused No.5)

Kunjal Jadhav, Adult,
Indian Inhabitant, residing at
1101, Chhadva Residency,
Ghatla Road, Chembur,
Mumbai – 400 071

... Petitioner No.6
(Original Accused No.6)

Neha Badlani, Adult,
Indian Inhabitant, residing at
501, Fortune Heritage Building,
Road No. 30, Bandra (West),
Mumbai – 400 050

... Petitioner No.7
(Original Accused No.7)

v/s.

1. The State of Maharashtra
Through Senior Inspector of
Police, Banking – I, Unit – 9,
Economic Offences Wing,
3rd Floor, New Police Commissioner
Office Building, Crawford Market,
Mumbai – 400 001 in EOW CR.No.
71 of 2021
[Arising out of FIR No. 246 of 2021
registered by BKC Police Station,
Mumbai u/s. 420, 34 of the IPC]

... Respondent No.1

2. Vishal Harish Sharma, aged 48 years,
Occupation – Director, Hotel Horizon
Pvt. Ltd. having residential address at
1002, Florence, South Avenue, Khar (W),
Mumbai – 400 052 and having office
address at 37, Juhu Tara Road,
Mumbai – 400 049

... Respondent No.2
(Original Complainant)

***WITH
WRIT PETITION NO. 3018 OF 2021***

JM Financial Asset Reconstruction
Company Limited (erstwhile JM Financial
Asset Reconstruction Company Pvt. Ltd.
Through Sanil Panicker, a public company
incorporated under the laws of India having
its registered office at 7th floor, Energy,
Appasaheb Marathe Marg, Prabhadevi,
Mumbai – 400 025

... Petitioner

v/s.

1. The State of Maharashtra
at the instance of Economic Offences Wing,
Unit IX in the FIR bearing CR No.71 of 2021
registered with EOW, Unit IX (renumbered
from FIR bearing CR No. 246 of 2021
registered with BKC Police Station, Mumbai)
for offences under Section 420, 409, 465, 471
and Section 34 of the IPC
2. Vishal Sharma, son of Harish Sharma,
aged 48 years, Indian National, having
his residential address at 1002,
Florence, South Avenue, Khar (W),

Mumbai – 400 052 and 1401,
Silver Spring, Sherly Raja Road,
Bandra (West), Mumbai – 400 050
and registered office address at
37, Juhu Beach, Mumbai – 400 049 ... Respondents

Mr. Ashok Mundargi, Senior Advocate with Mr. Aabad Ponda, Senior Advocate, Mr. Zulfiquar Memon, Mr. Ravi Mishra, Mr. Chirag Naik, Ms. Vaijayanti Sharma, Mr. Noopur Mathrawala, Mr. Mahesh Ahire, Mr. Siddhant Dhavale i/b. MZM Legal for the Petitioners in WP 2778/21

Mr. Ravi Kadam, Senior Advocate with Mr. Karan Kadam, Mr. Amit Jajoo, Mr. Nirau Parmar and Mr. Darpan Bhatia i/b. Indus Law for the Petitioners in WP 3018/21

Mr. Ganesh Gole with Mr. Ritesh Ratnam, Mr. Ateet Shirodkar, Mr. Bhavin Jain, Mr. Viraj Shelatkar, Mr. Vivek Sharma for the Respondent No.2 in WP 2778/21

Mr. Aarif Ali Mali for Respondent No.2 in WP 3018/21

Mr. K.V. Saste, Asstt. Public Prosecutor for the Respondent - State

***CORAM : NITIN JAMDAR &
N.R. BORKAR, JJ.***

DATE : 01 AUGUST 2022

JUDGMENT (Per Nitin Jamdar, J.) :-

Rule. Rule is made returnable forthwith. The Respondents waive service. The Petitions have been argued together and are disposed of by the common judgment.

2. The Petitions are filed to quash the FIR EOW C.R.No. 71 of 2021 arising out of C.R. No. 246 of 2021 filed by Respondent No.2 and the summons issued by the EOW.

3. In Writ Petition No. 2778 of 2021, Petitioner No.1 - ICICI Bank Limited is a Public Company incorporated under the Companies Act, 1956 and Banking Company within the meaning of the Banking Regulation Act, 1949. Petitioner No.2 – Ms. Zarin Daruwala worked with Petitioner No.1 as President. Petitioner No.3 – Girish Nayak was working with Petitioner No.1 as General Manager and Head of Corporate Banking Group. Petitioner No.4 – Arati Ramakrishnan was employed with Petitioner No.1 as Deputy General Manager. Petitioner No.5 – Vipul Parmar was working with Petitioner No.1 as an Assistant Relationship Manager from June 2010 onwards. Petitioner No.6 – Kunjal Jadhav worked with Petitioner No.1 as Relationship Manager. Petitioner No.7 – Neha Badlani joined Petitioner No.1 in Strategic Solutions Group as a Relationship Manager.

4. In Writ Petition No. 3018 of 2021, the Petitioner – JM Financial Asset Reconstruction Company is a public limited company incorporated under the Companies Act, 1956 and registered as an Asset Reconstruction Company with the Reserve Bank of India under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security

Interest (SARFAESI) Act, 2002 on 19 September 2007. From 30 September 2016, the Petitioner has become a subsidiary of JM Financial Limited and a public limited company.

5. In both petitions, Respondent No.1 – is State, the Economic Offences Wing.

6. Respondent No.2 – the Complainant is a director of Hotel Horizon Private Limited, engaged in the business of hoteliers and hospitality services. The Respondent no.2 has filed the impugned FIR bearing CR No.71 of 2021 registered with EOW (renumbered from FIR bearing CR No.246 of 2021 registered with BKC Police Station, Mumbai) for offences under Section 420, 409, 465, 468, 471 and Section 34 of the Indian Penal Code on 9 July 2021.

7. In this judgment, the Petitioner in Writ Petition No. 2778 of 2021, Petitioner No.1 - ICICI Bank Limited is referred to as the "Bank". Petitioners No.2 to 7 are referred to as the "officers of the Bank". In Writ Petition No. 3018 of 2021, the Petitioner JM Financial Asset Reconstruction Company Limited is referred to as "ARC". Respondent No.1 is the State of Maharashtra through Economic Offence Wing, referred to as "EOW". Respondent No.2 – the Complainant is a director of Hotel Horizon Private Limited is referred to as the "Complainant".

8. We have heard Mr. Ashok Mundargi, learned Senior Advocate with Mr. Aabad Ponda, learned Senior Advocate for the Petitioners in Writ Petition No. 2778 of 2021 (the Bank), Mr. Ravi Kadam, learned Senior Advocate for the Petitioners in Writ Petition No. 3018 of 2021 (the ARC), Mr. Ganesh Gole, learned Advocate for the Respondent Complainant (the Complainant) and Mr. K.V. Saste, APP for the Respondent No.1 – EOW in both the Petitions.

9. Before we detail the facts of the case, certain basic positions need to be referred. The Complainant had approached the Bank for a loan. The loan agreement was executed between the Bank and the Complainant in the year 2011. The Complainant's account was classified as Non-performing Asset (NPA) on 30 June 2016. The loan recall notice was issued to the Complainant on 8 July 2016. On 30 September 2016, the Complainant's facility was assigned to the ARC. On 7 December 2017, the ARC filed proceedings before the Debt Recovery Tribunal (DRT) against the Complainant. On 14 June 2021, the DRT issued summons to the Borrower and the Complainant and injuncted them from alienating and/or dealing with the properties. On 9 July 2021, the FIR was filed by the Complainant. The EOW issued summons to the ARC to produce and hand over the original documents pertaining to the loan transaction.

10. The broad heads of challenge by the Bank and the ARC are that the FIR is filed with malafides, seeking to convert a purely commercial dispute arising out of defaults in repayment of loan into criminal proceedings to harass and pressurize the Bank and its officers and ARC. They contend that the Complainant is using the police machinery to force the Bank to settle the matter and avoid repayment of the loan. The Bank and ARC contend that perusal of the FIR would show that there is no criminality but a civil transaction relating to loan recovery.

11. The Bank has pointed out in the rejoinder, which is not controverted, that the Complainant's account has been declared NPA with the Union Bank of India, HDFC Ltd., IDFC Phoenix ARC, ICICI - JMFARC. They state that the Complainant is a borrower whose account has been declared as a non-performing asset has initiated the criminal process six years after the account was classified as NPA and the loan recall notice was issued. They contend that FIR is filed making grievance of what transpired between 2011 - 2012 only after a summons is issued by the Debt Recovery Tribunal on the proceedings initiated by the ARC. The Bank and ARC have urged the Court to look into the FIR carefully, contending that if such practices are permitted, it would have severe implications for the banking business and recovery of bad loans.

12. The power of the Court to quash a First Information Report (FIR) in the exercise of powers under Section 482 of the Code of Criminal Procedure and Article 226 of the Constitution of India has fallen for consideration in various decisions. Broad parameters have been laid down in the case of *State of Haryana and Ors. v/s. Bhajan Lal and Ors.*¹ and the review of the legal position was taken in the decision of the Supreme Court in the case of *M/s. Neeharika Infrastructure Pvt. Ltd. v/s. State of Maharashtra and Ors.*². Quashing an FIR is not a normal rule but an exception. In the case of *Bhajan Lal*, the Supreme Court has illustrated some of the circumstances in which the High Court can exercise the extraordinary and inherent power to quash the FIR. The grounds invoked by the Bank and ARC are that the averments in the FIR even if they are taken at their face value and accepted in their entirety, do not prima-facie constitute any cognisable offence or make out a case against the accused. Second, the allegations made in the FIR are so absurd and inherently improbable based on which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. Third, the criminal proceedings are instituted with an ulterior motive to spite the Bank and ARC for a private and personal grudge.

13. The FIR has referred to various documentary transactions between the Complainant and the Bank and ARC.

¹ 1992 Supp (1) SCC 335

² AIR 2021 SC 1918

These documents are on record. There is no dispute about the documents executed. The Complainant also relied upon them during the arguments. In the case of *All Cargo Movers (India) Private Ltd. and Ors. v/s. Dhanesh Badarmal Jain*³, the Hon'ble Supreme Court observed that where a civil suit is already filed and an FIR/Complaint filed with a delay in respect of the same subject matter, then for the purpose of finding out whether the allegations in the FIR are *prima facie* correct, it is not impermissible to take into consideration the correspondence exchanged between the parties and other admitted documents.

14. In the present case original application was filed on 7 December 2017 in the Debt Recovery Tribunal; thereafter, the FIR was lodged on 9 July 2021, and all the documents placed on record are duly signed. The proceedings in the DRT are regarding the same loan transaction as in the FIR. The learned Counsel for the parties argued based on these documents. Therefore, keeping in mind the observations of the Supreme Court, we have looked at the documents on record to find out if any cognizable offence is made out.

15. The Complainant's statement annexed to the FIR runs into 13 pages. The Complainant's case in the FIR, reiterated and urged before us, is as follows.

3 (2007) 14 SCC 776

15.1. The Complainant and his brother are directors of Hotel Horizon Pvt. Ltd. In 2008, they decided to demolish their existing hotel and construct a new business hotel of 220 rooms. For that purpose, they had entered into an agreement with a hotel group and had taken a term loan of Rs.150.00 crores from HDFC Bank. They had mortgaged a plot at Juhu as security. In the year 2010, the State Government changed the rules regarding the Floor Space Index (FSI), and they decided to construct two hotels, a business hotel and a luxury hotel. The Complainant – Company needed financial assistance, and they contacted various banks.

15.2. In the year 2011, the officers of the Bank contacted the Complainant. The Complainant submitted the necessary documents on 6 May 2011. The Bank sanctioned a senior term loan facility of Rs.326 crores and a subordinate term loan facility of Rs.25 crores, total of Rs. 351 crores. IDBI was appointed as security trustee and facility agent. At the time of sanction of loan, FSI of two was permissible, and the Complainant had applied for additional 16000 sq. mtrs. FSI. The loan was not disbursed, but on 30 June 2011, the Bank showed in their audited results a profit of Rs.14.4 crores in terms of processing fees. This was shown to the general public and other agencies.

15.3. On 1 July 2011, the loan agreement was executed between the Bank and the Complainant and the representative of

IDBI. It was agreed that the first disbursement would be of Rs.40 crores before the release of additional 16000 sq. mtrs. FSI. The second utilisation after the grant of FSI of Rs.72 crores. The loan was to be taken in ten disbursements. Thereafter, the Complainant sought modification in the agreement regarding the reduction of interest and process fee and utilisation and disbursement of Rs.65 crores instead of Rs.40 crores. Thereafter, in September 2011 when the Complainant asked the Bank about the outcome of their representation of 18 July 2011, the Bank asked for security documents, which the Complainant did not give. A meeting was held between the officers of the Bank and it was suggested that the first disbursement would be of Rs.25 crores and the processing fee would be Rs.15.5 crores. This was not agreeable to the Complainant. On 28 September 2011, another meeting took place wherein the Bank asked the Complainant to take Rs.15 crores disbursement. The Complainant did not accept the same. The Complainant proceeded on the basis that the loan was cancelled, as they had stated so in their e-mail dated 30 September 2011.

15.4. In November – December 2011, the Bank again contacted the Complainant stating that the FSI is now three and + .05 TDR is available. Upon this, the Complainant requested the Bank that the first disbursement of Rs.40 crores and thereafter, the restriction of the second disbursement after additional FSI be removed. The Bank informed the Complainant that the proposal

would be re-validated. In January 2011, a meeting took place between the Bank Officers and the Complainant wherein it was stated that the Bank informed the Complainant that the process for removal of disbursement is going on and the first disbursement will be taken before 28 February 2012. After that, an e-mail was received from the Bank to submit mortgage documents; otherwise, the loan facility will lapse if the first disbursement is not taken before 29 February 2012. The Complainant did not submit documents as they were not agreeable. Again a meeting took place on 7 March 2012, wherein it was stated that if Rs.25 crores are not taken minus Rs.15.5 crores processing fee, the loan facility will lapse. The Complainant did not agree with this. This correspondence went on. A further visit was done by an Officer of the Bank on 24 March 2012.

15.5. Thereafter, again, promises were given regarding the removal of restrictions on 26 April 2012. Then the Officers of the Bank – Petitioners promised that all restrictions would be removed, the property of mortgage and the disbursal of Rs.25 crores be taken. Based on this promise and the receipt of input from the technical team that the hotel can be constructed within FSI of 3 and the certificate from the engineer, the Complainant submitted a mortgage deed in respect of the property of the Complainant – Company worth Rs.1200 Crores, personal guarantee of the Complainant and the brother was given and also Power of Attorney was given. A revised agreement was executed on 31 March 2012. It was stated that

the approval of FSI should be brought before 15 October 2012 and also the environmental clearance. The Complainant signed this revised agreement. Thereafter, on 31 March 2012, the Bank disbursed in the Escrow account an amount different from Rs.25 crores and in the current account on 3 April 2012, Rs.9 crores. On 10 April 2012, Rs.49.00 lakhs totalling to Rs.9.49 crores were released instead of Rs.25 crores as asked for by the Complainant, Rs.9.49 crores were given. On 24 April 2012, the Complainant wrote to remove the restrictions on loan disbursement. On the aspect of removal of loan restrictions meeting took place. From April to December 2015, the Bank unauthorizedly showed Rs.14.53 crores in an Escrow account which the Bank cannot operate, yet it deposited and withdrew the amount.

15.6. On 27 May 2016, a meeting took place between the Officer of the Bank – Petitioners wherein the Complainant submitted an OTS proposal and stated that the liability should be Rs.8.25 crores and the account be closed. The proposal was given without prejudice. Further correspondence took place on 28 June 2016. The Officers of the Bank called for a meeting wherein the procedure was explained and it was stated that the Complainant should deposit Rs.47 crores in one account and from other accounts Rs.24 crores will be returned as settlement should not be shown to the statutory authorities and the Reserve Bank of India.

15.7. On 30 September 2016, the Bank assigned the loan account in favour of ARC of Rs. 25 crores. As per the agreement between the Bank and ARC, 80% would be returned to the Bank. The Bank was getting Rs.120 crores from ARC while giving only Rs.9.5 crores. The Complainant brought to the notice that the assignment is not proper, yet in a conspiracy with the Bank, and the ARC is proceeding against the Complainant. Because of the promise given by the Bank, the Complainant has suffered a serious loss; therefore, both the Bank and the ARC have committed an offence. These are broadly the contents of the FIR.

16. The perusal of the FIR shows that it is nothing but a narration of documentary transactions between the Bank and the Complainant. The FIR reads more like a written statement filed in the DRT. Therefore, it was put to the learned Counsel for the Complainant to indicate the heads of criminality in these transactions.

17. The Complainant from the reply affidavit and documents, tried to show the criminality on the part of the Bank and ARC as follows.

17.1. The Bank has induced and pressured the Complainant to avail of the loan facility. The processing fee of Rs.14.5 crores was illegally shown in the audit result, and the same has been projected

to the public. The Bank has manipulated books of records and has misrepresented them to statutory authority.

17.2. The Bank has forged the books of the Bank showing the profit of Rs.14.05 crores towards processing fees. The Bank has fabricated and made false entries in the loan account. The Bank has manipulated the Bank's books of account and misrepresented the quarterly results.

17.3. The Management Committee of the Bank has misled the Credit Committee and submitted the wrong information. The decision of the Credit Committee that Rs.25 crores and the remaining loan would be released only after permission under the Environmental (Protection) Act, 1986, was not informed to the Complainant. A certificate of the independent engineer was secured so that the Complainant would be convinced to take the loan, misleading and forcing the Complainant to take the loan by mortgaging a valuable property.

17.4. In the period from April 2013 to April 2015, illegally interest at the rate of 14.53% was shown, and this was kept as a charge on the property. The proposal of the Company was misrepresented by the Management Committee to the Credit Committee that the Complainant was ready to pay Rs.47 crores. As regard Section 420 and 464 of the Indian Penal Code, it is

contended that the request made by the Complainant on 18 July 2011 to increase the first disbursement from Rs.40 crores to Rs.65 crores and not to deduct the processing fee was never placed before the Credit Committee by the Managing Committee and therefore, there was an intention to cheat the Complainant right from the beginning.

17.5. The Managing Committee impressed upon the Credit Committee that the Complainant has sought Rs.25 crores only towards the first disbursement for construction purposes only. The Credit Committee approved this misleading proposal of the Managing Committee. The Managing Committee did not bring to the notice of the Complainant the embargo imposed by the Credit Committee and kept assuring the Complainant that the limit would be removed, thus, inducing the Complainant to sign the mortgage deed. On 30 March 2012, the Bank was aware that no amount after Rs.25 crores was disbursed unless the Complainant had all approvals, including Environmental Clearance, and the Bank induced the Complainant to sign the amended agreement with an assurance that the restrictions on disbursement would be removed.

17.6. As regards Section 409 of the Indian Penal Code, it is stated that the Bank had sanctioned two loan facilities. Senior Term Loan Facility of Rs.6.3 crores and Subordinate Term Loan facility of Rs.2.5 crores processing fee was charged on a total loan of Rs. 3.15

crores. Admittedly, there was no disbursement of any amount as per the Subordinate Term Loan Facility. The Bank classified the Subordinate Term Loan Facility without disbursing any amount executed the mortgage deed. As per the amended agreement, there had to be a specific authorisation of the facility agent IDBI trust to deduct any fees and costs; no authorisation was given to the Bank to deduct processing fees.

17.7. As regards Section 465 and 468 of the Indian Penal Code, it is stated that the Bank showed a profit of Rs.14.54 crores towards processing fees of the subject matter of the loan facility. No loan agreement existed on that date, and thus audited profit reports were shown before the authorities. The ledger account maintained in the Complainant's name showed Rs.2.5 crores as of 31 March 2012. The escrow account was created only on 31 March 2012, and there is no entry towards the debt of neither processing fees nor the first disbursement of Rs.9.5 crores. The statement of account maintained by the Bank shows that they are manipulated by the Bank. The decision of the Credit Committee was that there was an express bar on the disbursement account. There was a prohibition for the first disbursement, and the Bank could not have made disbursement into an Escrow account.

17.8. As regards Section 471 of the Indian Penal Code, the case is that the ARC stated to have carried out due diligence and,

despite being aware that the subordinate loan account has no disbursal, could not have been classified the account as a non-performing asset.

17.9. The disbursal of interest during the construction beyond Rs.25 crores sanction was illegal and there was a forged utilisation request for the interest during the construction period between April 2013 and December 2015.

17.10. Unilaterally keeping the Complainant in the dark, the account was transferred to ARC. There is a collusion between the Bank and the ARC, and there has to be an investigation over the selection of this particular JM Financial as an Asset Reconstruction Company. As per the guidelines issued by the Reserve Bank of India on 5 August 2014, ample time is given to carry out due diligence by the ARC, and the ARC was aware, having carried out due diligence, that there was no loan disbursed from subordinate loan account and it could not have been made a non-performing asset. Due diligence would have shown the manipulations of accounts and cheating by the Bank, and that instead of Rs.25 crores, only Rs.9.95 crores were credited in the account. The ARC had full knowledge of the creation of additional liability of Rs.18.48 crores, with interest being illegal. The ARC must have ensured that the Bank has disbursed the loan under proper authorisation and the Complainant also informed the ARC of the illegalities; therefore, there is apparent collusion.

18. Broadly, the allegations are in respect of process fee being shown as profit to deceive the Complainant, public and statutory authorities; false promises inducing the Complainant to take a loan; seeking to recover an amount which is not due; misleading the Credit Committee of the Bank by the Management Committee of the Bank; manipulation and forgery of its accounts by the Bank. In the FIR, the reply and the oral arguments on behalf of the Complainant has repeatedly sought to interweave these themes in every submission.

19. The learned APP contended that investigation is necessary.

20. First, we will deal with the argument of the Bank and ARC that the FIR does not disclose any offence but only civil transactions and then the argument that the Complainant is abusing the process of law. Also, the case against Bank is taken first and then against the ARC.

21. In the present FIR the basic premise is that the Bank pressured the Complainant into signing the documents. This allegation is far too simplistic, looking at the nature of the transaction and status of the parties. In a loan transactions involving large sums of money such as Rs.250 crores, in a normal course of business, both the borrower and the financial institute would have

detailed and elaborate discussions involving legal expertise. Nothing was shown that this was not so in the present case. The Complainant – Company was already running a hotel. According to the Complainant, it has property worth Rs.1200 crores. It has entered into transactions with the other banks and was engaged in correspondence with the State Government. Such a Complainant is not a rustic villager that it would be naive enough to sign the documents on verbal assurances. The FIR itself states that the Complainant refused to accept various proposals put forth by the Bank. The FIR shows that the Complainant was fully aware of what the proposals were and also gave reasons for not accepting the proposals on various occasions. The Complainant has signed all the documents, and it cannot be accepted, nor is it alleged that they were signed without application of mind or that the Complainant was under any incapacity. The allegations made in the FIR on this aspect are contrary to common sense.

22. Now, we turn to the heads of criminality alleged by the Complainant.

23. The first is regarding the processing fee. It is urged by the Complainant that the processing fee of Rs.15.05 crores is wrongly shown in the quarterly audit result of 30 June 2011 as profit even before the facility agreement of 1 July 2011 was executed. No processing fee was actually paid by the borrower, and this was to

mislead the public and the statutory authorities. On this aspect, the Bank argued that this allegation has no criminality. It is stated that the documents referred to in the FIR itself show that the Complainant has accepted the charging of the processing fees. Secondly, it is a regular banking practice and the policy of the Bank to show the processing fees as approved in the quarterly audited reports, and as per the policy, the same has been reversed.

24. The credit arrangement letter/sanction letter issued to the Complainant is part of the record compilation. There is no dispute that it was signed by the Complainant on 18 May 2011. The credit arrangement letter, which is approved and accepted under the signature of the Complainant, states that as per the terms of the letter the credit facility is approved. The Complainant has accepted and signed the letter dated 31 March 2012 stating that the processing fees are to be deducted from the first disbursement. The condition precedent to the agreement signed by the Complainant – Bank refers to the fee letter regarding the processing fee at Clause 10.1. The agreement expressly provides that the Complainant shall pay the processing fees prior to the first utilisation date in the amount agreed in the fee letter. Clause 2 of part 2 of the agreement declares that all fees, costs and expenses due for the Complainant have been paid and gives authority to the Bank to deduct such fees, costs and expenses from the proceeds of the utilisation. Further, the Bank has asserted

that the 4% processing fees on the entire loan amount is in compliance with the policy note of the Bank dated 28 April 2007, which stipulates maximum processing fees to be levied at 5%. The action of the Bank is based on its established policy. There is no denial of the existence of the policy note. The policy note dated April 2011 regarding accounting of fees and commission income under Indian GAAP is part of the record. It permits the processing fee to be shown as approved. The guidelines therein state that all loan processing fees should be accounted for upfront as a significant cost is incurred in processing the loan. The policy also states that when uncertainty relating to collectability arises subsequent to the accrual of fee, the fees shall be reversed provided for written off the amount to reflect the uncertainty of collection. Non-receipt of accrued fees within 90 days from the due date will be considered evidence of non-collectibility and will require reversal. Since there was a failure on the part of the Complainant to create the first charge as per clause 16.1 of the facility agreement, the processing fee had to be reversed. Accordingly, the Bank reversed the processing fees on 30 September 2011 within 90 days at the end of the subsequent quarter. The Complainant issued its end-user certificate on 8 May 2012, reflecting the processing fee. According to Clause 10 of the facility agreement of 1 July 2011, the fee letter was issued on 31 March 2012, showing the processing fee. Therefore, the assertion of the Complainant in the FIR that the records were forged and public

money was mis-utilized, giving rise to an offence, is without any basis whatsoever. All this is part of the admitted documents on record. The complainant may have a dispute about the quantum of the utilisation, quantum of process fee, the timing thereof and the stage at which it was deducted, but the allegation of criminality in charging the processing fees is absurd.

25. The next head of criminality alleged in the FIR is that Managing Committee misrepresented to the Credit Committee and did not convey the decisions of the Credit Committee and manipulated the records in respect of the Complainant's proposal. The ledger and escrow accounts were manipulated and forged.

26. The internal functioning of the Bank is on record and is borne out by the documents. The Bank has relationship managers and Credit Committees. It has its procedure and mechanism for processing and issuance of loans. The officers of the Bank negotiate with the borrowers. Then they move to the Credit Committee of the Bank for approval and sanction. This is an internal procedure. The borrower is not a party to this procedure. The borrower deals with the Bank as an entity. The Bank's Credit Committee sets the contours of transactions in the interest of the Bank within which discussions take place. The documents such as facility agreement, credit arrangement letters, and amendatory agreement are signed by the signatory of the bank and borrower. The Borrower has no direct

dealing with the Credit Committee. The Complainant dealt only with authorised signatories. The allegation that some employees of the Bank misrepresented the Credit Committee and that the Credit Committee decisions were never informed to the Complainant, is thus based on an entirely misconceived premise. The interaction between the Managing Committee and Credit Committee are internal working of the Bank. This is not the case where the Bank has filed an FIR stating that one section of its officers misrepresented to the other. The Bank itself is the Petitioner. The Bank is arrayed as accused as an institution. This allegation of the Complainant is thus only desperate attempt to somehow create a semblance of criminality.

27. The Complainant's allegation of cheating by the bank under Section 420 of the Code of Criminal Procedure is that the first disbursal was of Rs.40 crores, but the Bank reduced it to Rs.25 crores, and the Bank has cheated the Complainant in his loan transaction. The Bank had represented that the hotel's construction was permissible within the FSI available and deliberately misled the Complainant. The requirement of the Ministry of Environment and Forest was not put forth, leading the Complainant to enter into a loan agreement.

28. It has to be reiterated that we are not deciding the civil dispute between the Complainant, Bank and the ARC. The dispute

will be decided in the DRT, where the proceedings are pending. The question is of the existence of criminality and whether these proceedings are being used as a tool of harassment or abuse of process of law to stall the recovery proceedings.

29. The Bank has pointed out from the admitted documents that the first *pari passu* charge on the subject property was an essential condition as per clause 16.1 of the facility agreement. This was to be credited prior to the first utilisation date as per clause 16.1(c) that the first charge was not created is seen from the document itself; therefore, according to the Bank, the Complainant was in default as per clause 21.2(a) of the facility agreement. There could be a dispute about whether the obligation was made or otherwise, however, there is no denial of the existence of clauses 16.1(c) and 21.2(a) of the facility agreement is signed by the Complainant. Therefore, this is a matter of civil dispute as to whether the conditions of the clauses of the agreement between the parties were fulfilled or otherwise. The Credit Committee also had stated in its meeting dated 8 September 2011 that any disbursement after the proposed disbursement of Rs.25 crores would be only after the creation of the security structure as per the facility agreement. This position is independent of whether the Managing Committee communicated the Credit Committee's decisions to the Complainant.

30. The records show correspondence on the issue of FSI and the requirement of environmental clearance. An e-mail was issued by the Bank on 26 March 2012. According to the Complainant, the Bank misrepresented to the Complainant about this requirement. This e-mail which is part of the record, shows that the Bank had stated that the Complainant was eligible for the FSI, but according to the Bank, this was with a view that approval is needed from the competent authority. A Complainant's perception of this e-mail is made the basis of the FIR that it has misled the Complainant. This is a matter of interpretation of the document to be read along with other documents. The Bank had stated that the Complainant was eligible but needed approval from the competent authority. How this communication has to be read would be a matter of civil dispute between the parties. Merely using the phrase 'cheating' in the FIR, Complainant cannot convert this dispute over the interpretation of the documents into an offence.

31. The reference is also made to an e-mail from a technical consultant of the Bank that the Complainant could have completed the project at the proposed 3 FSI but did not have approvals from the competent authority. The Complainant did not have FSI at 3 at that time, as the FIR states, and the Complainant had applied for an additional FSI of 16,000 sq. mtrs. The facility agreement at Clause 4.6(b) and the amendatory facility agreement Clause 3.5 stated that unless this requirement was met, the limitation could not have been

removed. From the FIR itself, it is clear that the Complainant was aware that he did not have the FSI as required, and the Complainant was fully aware of the terms of the agreement if signed.

32. The Bank has also pointed out that the Municipal Corporation by concession report dated 17 December 2013 clarified the position and stated that the Complainant's proposal requires a complete revisit and the Complainant's eligibility for the additional FSI was in doubt. Again, these are the matters of a dispute over the interpretation of documents signed, records of the Bank and correspondence from the Corporation.

33. According to the Complainant, the condition of environment clearance, as a pre-condition for further disbursement, was kept away from the Complainant. Again this is only an attempt to create criminality in the actions of the Bank. That the Complainant was fully aware that environmental clearance is necessary is seen from Clause 17.23 of the facility agreement, which specifically deals with environmental clearance. It records the representation of the Complainant that the Complainant has obtained all authorisation under applicable environmental laws and as of the effective date, no further environmental clearance other than authorisation already obtained was necessary. The Bank sent three e-mails on 19 August 2011, 27 September 2011 and 14 March 2012 calling for the certified copies of all the necessary approvals,

permits and authorities to start the project. In those environmental clearance is referred as a condition precedent. Again on 8 September 2011, an e-mail communication was sent by the Bank that the position of condition precedent of FSI and environment clearance is not being clarified and may result in cancellation. Nowhere in the FIR or during the argument has it been stated that the Complainant was unaware of this stipulation. Specific e-mails are sent and are part of admitted documents; therefore there was no cheating or misrepresentation. Whether environment clearance was necessary, whether it was granted or otherwise, are matters of civil dispute. Furthermore, Clause 4.6(b) of the draft amendatory agreement provided for the stipulation for which the Complainant even suggested modifications. On 26 March 2013, the Bank informed the Complainant that modification, as suggested regarding requisite sanctions and clearance as a condition precedent to remove the utilisation limit, was not possible. Thus even the issue of environment clearance, the FIR and the admitted signed documents do not show any element of cheating or forgery.

34. The allegations made in the FIR that the Complainant – Company owned the property stated to be Rs.1,200 crores and was mislead into signing documents resulting in a crime committed by the Bank is absurd as the FIR itself narrates detailed negotiations and exchange of voluminous correspondence and, as stated earlier, the Complainant is not a rustic villager to get easily misled.

35. Next is the issue of disbursal of interest during the construction beyond the amount of Rs.25 crores sanctioned. According to the Complainant, this was illegal as there was a forged utilisation request for the interest during the construction for the period between April 2013 and December 2015.

36. On this allegation of charging interest also, the admitted document shows that it would be a civil dispute. The Bank has pointed out that disbursal of interest during construction is as per the Reserve Bank of India guidelines as a part of project finance as the projects under construction do not generate income in the construction stage to service interest. According to the Bank, this had to be done; otherwise, the account would have turned NPA. The Reserve Bank of India Master Circular dated 14 August 2014 and also Prudential Norms on Income Recognition, Asset Classifications and Provisions Pertains to advances, dated 1 July 2015, are on record. The Bank has pointed out that the Credit Committee, in its meeting dated 8 September 2011, had approved such interest. Furthermore, the Senior Loan Facility Agreement provided for this contingency under Clause 8.4 states that if interest is due and/or unpaid, the interest or disbursal facilities are continued to be payable by the Complainant. The Bank has pointed out to the e-mail of the Complainant dated 15 December 2015 for an extension of the date of commencement for commercial operations, which had connection

with the disbursement of the interest during construction for three years beyond 31 December 2015 as per the Amendatory Senior Facility Loan Agreement. The Bank has also placed on record that the Complainant in its annual report for the Financial Year 2014-2015 had showed interest during construction. Again, all these documents are not disputed. The documents are signed by parties or the documents issued by the Reserve Bank of India and Authorities. Whether, as per the practice, the interest during construction was approved or at what rate it should have been charged are matters of civil dispute between the parties therein.

37. As regards the difference in accounting entries in ledger and escrow statements, according to the Bank, the accounting entries are in consonance with the Banking Code on Accounting Standards. Nothing has been stated in the FIR or pointed out before us that there is no such Banking Code. The Complainant is fully aware of both the statements and making only sweeping general statements to somehow create a case to lodge the FIR.

38. The FIR was initially registered under Section 420 of the Indian Penal Code. The case for invoking Section 409 of the Indian Penal Code is on the allegation that on the false promise of loan, the Complainant was made to part the property of Rs.351 crores. This is the only elaboration. The property is only mortgaged with the bank. Also, as per the case of the Complainant, in the FIR itself that the

property has been mortgaged with several financial institutions on *pari passu* charge. Thus there is no offence made out under this Section.

39. Sections 465, 468 and 471 relate to forgery for making false documents. The documents stated to be forged are Bank's own accounts. The allegations in the FIR are even taken as it is; the only allegation of forgery of documents is the forgery of the books of account and loan account statements. The Complainant itself relies on these loan account statements. As stated earlier, there can be a civil dispute on the contents and correctness of the accounts, but it is absurd to suggest that the Bank has forged its own accounts.

40. Now, we turn the precedents cited by the Complainant, the learned Counsel for the Complainant, relied upon the decision of the Supreme Court in the case of *Neeharika Infrastructure* to emphasise that the quashing of FIR should be in exceptional circumstances and the FIR should be read as it is. The learned Counsel also relied upon the decision of the Supreme Court in the case of *Salimbhai Hamidbhai Memon v/s. Niteshkumar Maganbhai Patel & Anr.*⁴. The learned Counsel contended that in this decision, the decision of *Neeharika Infrastructure* and *Kaptan Singh v/s. The State of Uttarpradesh and Ors.*⁵ has been followed.

4 AIR 2021 SC 4404

5 LL 2021 SC 379

41. In the case of *Kaptan Singh*, the Supreme Court considered the case which arose from an order passed by the Magistrate under Section 156(3) of the Code of Criminal Procedure Code and a First Information Report lodged consequent thereto. In this case, the complainant was a power of attorney holder of an owner of the land. He was entrusted with the task of taking care of a plot of land. The owner had entered into a registered agreement of sale, and the purchaser had given five cheques which were dishonoured. When the owner contacted the purchaser, she sought time. Thereafter, the purchaser did not pay the money and showed no interest in the registration of the sale deed. When the complainant went to the plot, he found other persons were present there. The complainant confronted the purchaser, upon that the complainant was assaulted with a knife and forced to sign certain papers. A civil suit was filed by the owner. The FIR was sought to be quashed by the accused – the purchaser, and one of the grounds was that the dispute is of civil nature. The High Court quashed the proceedings on the ground that a power of attorney was an outsider, the dispute is of civil nature, and the civil suits are pending. The Supreme Court observed that the notarised affidavit relied upon by the High Court, was itself seriously disputed. There was no reference in the registered agreement to sell to the payments though it was mentioned in the joint affidavit. Thus the Hon'ble Supreme Court found that the document based on which it was inferred that there

was a civil dispute, was questionable and the documents were stated to be executed was also in serious dispute and thus matter had to be investigated.

42. In the case of *Salimbhai Memon*, there were series of transactions between various parties. The complainant and the accused had entered into a deed of partnership, and certain shares were stated to have been agreed upon. Thereafter, a document was alleged to be signed by the appellant consenting to execute a sale deed in favour of a third party. The document was notarised. The allegation was that the first respondent therein forged the pages of the documents. The allegations were that the forged deed of dissolution of partnership also contained a reference to another forged deed, and upon such allegations of forgery and fraudulent transaction, a preliminary enquiry was conducted. Thereafter, the parties settled the matter. A fresh MOU was executed. Therefore, the cheques were issued. The appellant alleged that fresh cheques were returned unpaid, the sale deed executed in respect of the land whose title was not marketable. The first respondent therein registered an FIR alleging forgery, which was disposed of by 'B' summary. Thereafter, the FIR, from which the case arose was filed, contending that the first respondent forged the relinquishment of the deed. The deed of dissolution has been fabricated. The first respondent therein moved for quashing of the FIR. The application was allowed by the High Court, and the matter was considered by the Supreme Court,

where the order of the High Court was set aside. It was on the backdrop of series of documents and the forgery therein, the Supreme Court did not accept the argument that dispute was of civil nature.

43. Thus, the decisions of the Hon'ble Supreme Court *Kaptan Singh* and *Salimbhai Memon* arose from different set of facts than the present case. In the case at hand the documents are duly signed and are even relied upon and asserted by the Complainant. The present dispute is not between the partners, purchasers or individuals. The Complainant, a borrower whose account has been declared as NPA, is alleging that the Bank and ARC have committed offences in the loan transactions. The FIR is lodged only after the ARC has moved the DRT. In this case there would be a dispute regarding calculations, regarding the entitlement of the bank, regarding the liability of the Complainant – Borrower. There could arise a dispute as to whether the ARC can enforce its charge for a particular amount over the property or whether the asset is worth more than the liability sought to be enforced but these are disputes to be resolved in civil forum. Mere lengthy narration of execution of documents and correspondence embellished with phrases such as “fraud”, “misrepresentation”, and “cheating”, would not convert this civil dispute over the loan transactions into a criminal action.

44. There is no case in respect of individual officers of the bank either. In the Petition, their service details are asserted which are not in dispute. Petitioner No.2, Ms. Zarin Daruwala was the President of the Bank from August 2010 to December 2015. The President of the Bank would not have a direct connection with the borrower where the bank has numerous loan accounts. Petitioner No.3 – Girish Nayak was a General Manager and Head of Corporate Banking Group (West-1) from April 2009 to April 2011 and Senior General Manager and Head of Corporate Banking Group (West-1) from April 2011 to April 2013 and was managing client relationships for the Bank with corporates in the Western Region. Petitioner No.4 – Arati Ramakrishnan was working with the Bank as Deputy General Manager from April 2010 till April 2013 and Joint General Manager from April 2013 till May 2018. Petitioner No.5 – Vipul Parmar worked the Bank from 2008 and worked as an Assistant Relationship Manager from June 2010 onwards. Petitioner No.6 – Kunjal Jadhav was employed with the Bank as Relationship Manager from August 2005 to March 2015. Petitioner No.7 – Neha Badlani joined the Bank in Strategic Solutions Group on 30 March 2016 as a Relationship Manager. The Bank itself is Petitioner No.1. It is not even alleged that officers did not have the authority of the Bank to negotiate or to execute the documents. The Bank has fully supported its officers. The Bank is itself made an accused. It is clear to us that the Complainant has roped in all the officers, right from the

President of the Bank and they were called to the Police Station only to pressurize the Bank in a clear abuse of process of law.

45. In the case of *Punjab National Bank v/s. Surendra Pratap Sinha*⁶ the Supreme Court considered the case of a private complaint filed by an advocate of the Punjab National Bank. The Supreme Court found that the complaint did not make any case, much less prima facie, to set the criminal law in motion, and the high court had committed error in declining to quash the complaint. While allowing the appeal, the Supreme Court observed that the judicial process should not be an instrument of oppression or needless harassment. The complaint therein had impleaded chairman, managing director of the bank and named host of other officers. The Supreme Court observed that vindication of justice and maintenance of law and order are the prime object of criminal justice, but they cannot be used for personal vengeance and found that the Respondent therein had abused the process of law. As our discussion shows, this dicta is fully applicable to the case at hand as the FIR filed by the Complainant is for the sole personal agenda of blocking loan recovery.

46. Turning now to the allegations of the Complainant against the Petitioner in Writ Petition No. 3018 of 2021- JM Financial Asset Reconstruction Company.

⁶ 1993 Suppli(1) SCC 499

47. In the FIR, as regards the ARC, the position is even worse. The FIR is almost entirely in respect of transactions with the Bank. Only four lines have been stated towards the end that in September 2016, the Bank sold the account of the Complainant for Rs.35.65 crores and that it has agreed to give 80% to the Bank, and despite informing the ARC about the illegalities it has not done anything and therefore, it is colluding with the Bank.

48. The argument of the Complainant against ARC is referred to earlier, for sake of convenience it is stated again as follows. There is a collusion between the Bank and the ARC, and there has to be an investigation over the selection of this particular JM Financial as an asset reconstruction company. As per the guidelines issued by the Reserve Bank of India on 5 August 2014, ample time is given to carry out due diligence by the asset reconstruction company. The ARC was aware, having carried out due diligence, that there was no loan disbursed from subordinate loan account and it could not have been made a non-performing asset. The due diligence would have shown the manipulation of accounts and cheating by the Bank, and instead of Rs.25 crores, only Rs.9.95 crores were credited in the account. The ARC had full knowledge of the creation of additional liability of Rs.18.48 crores, with interest being illegal. The ARC must have ensured that the Bank has disbursed the loan under proper authorisation and the Complainant also informed the ARC of the illegalities; therefore, there is clear collusion.

49. Before the allegations made by the Complainant against the ARC are considered, the legal position as regarding the asset reconstruction companies and the legislative intent behind recognizing them as institutions to recover bad loans, needs to be referred.

50. The SARFESI Act was brought about because the existing legal framework had created a slow base for recovery of defaulting loans and led to accumulations of liabilities of the banks and financial institutions. The government established two committees to examine the banking sector reforms. Pursuant to their recommendations, various legislative changes were brought in one of them being the recognition of the asset reconstruction companies. The asset reconstruction companies have to take the certificate of registration from the Reserve Bank of India. The Reserve Bank of India, after satisfying the conditions laid down to grant a certificate of registration to carry out the business of securitisation to the asset reconstruction companies. The Reserve Bank of India can cancel the registration of a asset reconstruction company inter-alia on the grounds that it has failed to comply with the directions or maintain accounts as per the requirement of law or has breached the conditions of registration. Section 5(1) permits the the asset reconstruction company to acquire financial assets of the financial institutes. Upon acquisition, the asset reconstruction company is deemed to be the lender and all rights vest in the company regarding

the financial asset. The right, title and interest of the bank – financial institutions to secure payment of any unpaid portion of purchase price vest in the asset reconstruction company. Upon acquisition of a financial asset, the asset reconstruction company can apply to the DRT or any other Court in respect of the enforcement of his right. Thus, the mechanism of ARC is introduced in the larger economic interest.

51. The Petitioner - ARC is an entity registered under the provisions of the SARFAESI Act and is a duly authorised and recognized financial body to recover the non-performing assets. The ARC has pointed out from the offer documents issued by the Bank, which are on record, that it was not only the account of the Complainant that was put up in the bidding by the Bank, but list of 11 non-performing accounts was put up for assignment by the Bank, including portfolio of the Hotel Horizon Pvt. Ltd. The Bank offered its non-performing assets for sale collectively on a portfolio basis. The offers were called only on a portfolio basis, and the parties interested were asked to bid on portfolio basis. It is not disputed that the examination of the account is an online process. The eleven assignment agreements are on record, which show that eleven NPA accounts were based out of different States in India, and NPA accounts pertaining to a State were clubbed in a single assignment agreement. Four different NPA accounts, including the account of the Complainant, were assigned in a single assignment agreement.

The ARC has duly bidden on portfolio basis and has acquired the complainants account, along with others in an open bidding process. This is the usual procedure followed by the asset reconstruction companies in taking over the assets. There is no allegation of any forged documents by the ARC in this case. There is no merit in the argument of giving 80% of proceeds to the Bank. What will be the percentage of share of the Bank and of the ARC in these transactions is part of commercial discussion of the parties depending on various factors. Further more, the transaction between the Bank and ARC was not of Complainant alone but combined with other borrowers as well and thus the transaction is in totality.

52. All the acts alleged by the Complainant in the FIR are prior to the ARC taking over the debt of the Complainant in its usual course of business. Except using the word 'collusion'; nothing is elaborated any further as to how there is a collusion. The due diligence argument of the Complainant is misconceived. The ARC was not supposed to report due diligence to the Bank, but due diligence was for its own purpose. Even in the reply and in oral arguments, later on in the FIR, there is no link whatsoever shown between the Bank and the ARC. No offence under Section 409 of the IPC is made out even by reading the FIR as against the ARC. Taking over the non-performing assets and initiating recovery is its business. The Complainant can urge all the contentions against the ARC in the DRT where the proceedings are pending.

53. One more crucial aspect is the timeline and the stage at which the FIR has been lodged. The thirteen pages of narration by the Complainant in the FIR start with the year 2011. The narration is of the events of the meetings and documentation from pages 1 to 10 between the period 2011 to 2013. Then the event in 2016 is when one-time proposal has been narrated. Then there is a reference on the last page of the statement of assignment to the ARC. Even in the concluding paragraph of the statement in the FIR, the periods are given as 2011-2013 and 2013-2015. The FIR was lodged on 9 July 2021.

54. After the ARC had moved the DRT and the summons was issued to the Complainant and interim order was passed on 14 June 2021, immediately within twenty days thereof, the FIR came to be filed narrating the history of fraud and cheating by the Bank of seven years ago. There is no explanation or justification for this delay as every documentation was in full knowledge of the Complainant. The Bank and ARC are fully justified in their grievance that this is a gross abuse of the criminal process.

55. The EOW did not initially entertain the complaint made by the Complainant, and it was referred to the Banking Ombudsman of the Reserve Bank of India on 23 October 2019. The Banking Ombudsman carried out an enquiry in the matter wherein the Bank

gave detailed submissions. In June 2020, the complaint was closed by the Banking Ombudsman. Thereafter, the present process is initiated.

56. In the case of *Kishan Singh through the Legal Representative v/s. Gurpal Singh & Ors.*⁷, the Hon'ble Supreme Court observed that early reporting of the events gives an assurance of the veracity of the statements. It is not the position of law that no explanation can be given for the delay, but the reason must be credible. In this case at hand, the FIR narrates events of almost ten years ago and it is filed six years after the loan was recalled and declared NPA. The misrepresentation and cheating as alleged had occurred a decade before the filing of the FIR. There is no credible explanation coming forth from the Complainant for this delay.

57. The ARC has also questioned the timing and action of summons issued by the Respondent – EOW on 21 September 2019, calling upon the officials of the ARC to attend to the EOW office on 27 November 2019, when the Original Application No. 68 of 2021 filed by the ARC was filed on 7 December 2017 and pending in the DRT. Again, the officers of ARC had to remain present again on 14 December 2020. The EOW had issued these notices based on the application of the Complainant. ARC submitted the copies of the documents received from the Bank to EOW on 5 March 2020. On 7

7 2008 SCC 775

August 2021, the EOW asked the ARC to produce the original documents. By that time, on 14 June 2021, the DRT had issued the summons to the Complainant and also had issued an injunction, and the proceedings under DRT were underway. The ARC has rightly made a grievance that handing over original documents to EOW at this stage would seriously jeopardise its recovery proceedings in DRT filed against the Complainant.

58. In these facts, two decisions of the Hon'ble Supreme Court cited by the Bank and ARC are apposite. In the case of *Priyanka Srivastava V/s. State of Uttar Pradesh*⁸, the Supreme Court has sounded a note of caution while dealing with the cases of borrowers invoking criminal process against financial institutes. Though the discussion is in the context of magistrate using the power under section 156(3) of the code of criminal procedure, it also provides guidance to the High Court to exercise its inherent and extraordinary power. The Supreme Court observed when a borrower of the financial institution covered under the SARFAESI Act invokes criminal process inspite of there being a special procedure under the Act, more care, caution and circumspection has to be adhered to. Care should be taken to ensure that unscrupulous and unprincipled litigants are not be permitted to use criminal process to reduce the financial institutions to state of helplessness. The borrower should not be permitted to take recourse to the criminal process with the

8 2015(6) SCC 287

sole intent of avoiding the payment of a loan. The Hon'ble Supreme Court, inter alia observed that in cases pertaining to the financial sphere and commercial offences, the Court should be aware of the delay in lodging the FIR. The Supreme court referred to Section 32 of the SARFAESI Act, which protects the action taken in good faith by the secured creditor or any of his officers exercising any of the secured creditor's rights. The Supreme Court noted that this intent of the Parliament to protect the secured creditors or any of its officers also has to be kept in mind. In the case of *G. Sagar Suri v/s. State of Uttar Pradesh*⁹ the Hon'ble Supreme Court has observed, that in such cases court needs to ensure that an essentially civil matter is not given a cloak of a criminal offence.

59. It is true that there is no absolute proposition that there can never be any criminality on the part of a financial institution or asset reconstruction company in their dealings, but as our discussion shows, in this case no cognisable offence is made out. With the manner in which the FIR has been lodged, the repeated summons issued by the Investigating Officer and the insistence on handing over the original documents, we are convinced that this FIR is an abuse of the process of law. It is filed in respect of the events that occurred a decade ago only with an intention to block the recovery of the loan in a brazen attempt to do so. If this criminal process is permitted to go on, with all the senior officers of the Bank and the

9 2000(2) SCC 636

ARC being subjected to it, it would be a gross failure of justice. Also, if such pressure tactics are permitted, it would encourage recalcitrant borrowers to use the criminal process to stall the recovery of their loans and enforcement of personal guarantees, defeating the legislative intent of setting up a special mechanism for recovery of bad loans.

60. The Complainant signed the credit facility agreement. The loan has been recalled, recovery proceedings are underway, and thus the Complainant would have an opportunity to put forth all its contentions regarding the *inter-se* dispute in the proceedings pending in the DRT.

61. Resultantly, case is made out for exercise of inherent and extraordinary jurisdiction of this Court in both the Petitions.

62. Writ Petition No. 2778 of 2021 is allowed in terms of prayer clause (a).

63. Writ Petition No. 3018 of 2021 is allowed in terms of prayer clauses (b) and (c).

64. Rule is made absolute in both the Petitions in the above terms.

N.R. BORKAR, J.

NITIN JAMDAR, J.