

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Reserved on 28th of September, 2022

Pronounced on 13th December, 2022

CRM-M-20627-2022 (O&M)

IDFC First Bank Limited

....Petitioner

Versus

State of Haryana and others

...Respondents

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. R.S. Cheema, Senior Advocate assisted by
Mr. Arshdeep S. Cheema, Advocate
for the petitioner.

Mr. Rahul Mohan, Dy. Advocate General, Haryana.

Mr. R.S. Rai, Senior Advocate assisted by
Ms. Rubina Virmani, Advocate
for the complainant.

PANKAJ JAIN, J.

By way of present petition filed u/s 482 Cr.P.C. the petitioner seeks restrain against the respondents from inquiring/re-inquiring into a matter claiming that the same amounts to transgressing the jurisdiction at the hands of respondents. Asserting that after the controversy already stands adjudicated by various Foras up to highest Court of Land, respondents have no jurisdiction to entertain complaint against the petitioner.

2. Petitioner is a Bank as enumerated under Section 2(c) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SARFAESI Act'). It is claimed that credit was extended by the petitioner to one Kapsons Engineers Pvt. Ltd., A.K. Motors Pvt. Ltd., Nawab Auto Engineering Pvt. Ltd. and its sister concerns (hereinafter referred to as 'borrower'). As security to the said loan the borrowers mortgaged the following properties by depositing title deeds with the Bank :-

- (i) Property situated at Plot No.11, Block-E, Sector 11, Noida,UP for loan account no.3738474;
- (ii) Property situated at Plot No.554, Pace City-2, Sector 37, Gurgaon for loan account nos.4021886, 4557593 and 4561290.

3. Owing to the default on part of borrower, the account was declared Non-Performing Asset (NPA). Action was initiated by the petitioner to recover the debt under the provisions contained in SARFAESI Act. As per the petition, the borrowers approached DRT-II, New Delhi by way of SA No.11 of 2019 which was allowed. However, Bank was granted liberty to initiate action afresh. Proceeding afresh, the petitioner took physical possession of the

mortgaged property with the aid of District Magistrate vide order dated 12th of September, 2019. The same was again challenged by the borrowers by filing SA No.242 of 2019 before DRT-III, New Delhi. It is claimed that plea of undervaluation of properties was specifically raised while seeking interim relief before the Tribunal. Interim relief was declined vide order dated 9th of October, 2019. The said order was impugned before the Writ Court by way of WP(C) No.11752 of 2019. Delhi High Court dismissed the said writ petition vide order dated 6th of November, 2019. It is further claimed that after borrower delayed handing-over the physical possession of the property, the petitioner was constrained to approach this Court. During pendency of CWP No.1750 of 2020 physical possession of the property in question was delivered to the Bank thereby rendering the writ petition infructuous. The same was so recorded in the order dated 8th of February, 2021 passed by this Court, placed on record as Annexure P-7. Petitioner claims that borrowers again preferred IA Nos.107 and 108 of 2021 in SA No.242 of 2019 before DRT-III, Delhi raising the issue of undervaluation of the property and sought restrain against the petitioner from taking physical possession of the property. The said relief was declined vide order dated 21st of January, 2021. Petitioner further claims that on the basis of valuation reports dated 5th of

February, 2021 and 25th of January, 2021 reserve price of the mortgaged property was fixed and the same was put to auction. Multiple attempts made by the petitioner to auction the property failed as the property could not fetch buyers at the reserved price so fixed. Another attempt was made by the borrowers to raise the issue of undervaluation of the property by filing WP(C) No.11892 of 2021 before Delhi High Court. The same was ordered to be dismissed as withdrawn on the request made by counsel for the petitioner vide order dated 22nd of October, 2021 with liberty to approach this High Court. The writ petition filed before this Court i.e. CWP No.21624 of 2021 was also ordered to be dismissed as withdrawn with liberty sought by the petitioner to avail alternate remedy vide order dated 26th of October, 2021. It is claimed that the borrowers with an intent to armtwist the petitioner filed the complaint with the Police Authorities. The petitioner(s) were summoned to join inquiry vide notice dated 1st of December, 2021, Annexure P-17. Petitioner claims that employee of the petitioner-Bank joined the inquiry. The concerned Officer was apprised of the factual position and was supplied with the documents including various orders passed by Tribunals and Writ Courts. Still further the borrowers are stated to have approached Apex Court by way of SLP (C) No.19092 of 2021 which was dismissed as withdrawn

vide order dated 24th of November, 2021. Borrowers again approached Delhi High Court by way of WP (C) No.478 of 2022 which was also dismissed by passing the following order :-

“1. The present petition has been preferred by the petitioner to assail the order dated 13.12.2021 and all subsequent orders passed by the Presiding Officer, DRT Jaipur in the matter *“KAPSONS ENGINEERS PVT. LTD. & ORS. versus IDFC FIRST BANK & ORS.”* in TSA No. 53/2021, which is now listed on 11.01.2022. The petitioner/mortgagers aforesaid application under Section 17 of the SARFAESI Act is pending consideration before DRT Jaipur after transfer by this Court to the said DRT from DRT Delhi since there was no Presiding Officer at the relevant point of time managing the cases of DRT, Delhi.

2. The Court while transferring the petitioner's Securitization Applications for hearing, had specifically observed that any further proceedings taken by the respondent is subject to the outcome of the pending applications. In this case the possession of the secured asset was taken on 09.10.2019. After two failed attempts to auction the property, the same was finally auctioned on 06.11.2021. The possession of the property was delivered to the auction purchaser and after the matter was transferred to DRT Jaipur, the sale certificate has also been issued. The primary grievance of the petitioner is that the sale certificate has been issued despite pendency of the Securitization Application. We do not find any merit in this grievance of the petitioner since the Court has clearly stated that whatever steps are taken by the respondent bank shall be subject to orders of the DRT in the pending application. There was no order granting any stay against issuance of sale certificate. Therefore, the petitioner can possibly have no grievance against the issuance of the sale certificate which is, of course, subject to outcome of the pending

Securitization Application.

3. The matter is now coming up before DRT Jaipur on 11.01.2022. We are hopeful that the DRT Jaipur shall conclude the proceedings at the earliest and pronounce orders on the applications being dealt with by it expeditiously.

4. The petition along with all pending applications, if any, stands dismissed in the aforesaid terms.”

4. In compliance of the aforesaid order passed by the Delhi High Court, DRT Jaipur vide order dated 13th of January, 2022 decided the application filed by the borrowers seeking interim restrain *qua* the property. A bare perusal thereof shall reveal that the issue w.r.t. valuation of the property was raised before the Tribunal and was dealt as under :-

“During the course of arguments, the issue of declaration of account as NPA, and value of the property was raised.

I have again perused the Order dt. 09.10.2019 thoroughly, passed by my Ld. Predecessor and found that in the Year 2019, the Applicant took plea that the valuation of the mortgaged property is nearly Rs. 60.00 Crore, and also took plea that two employees namely – Shubham Goyal, Account Department and Ramesh Kumar (Runner) in collusion with Rajiv Gupta (CFO) on the basis of forged, manipulated face documents misappropriated more than Rs. 15.00 Crore from the accounts of the borrowers and accordingly, they lodged FIR in November, 2015.

It is mentioned in para 9 of the Order dt. 09.10.2019 that the objection with regard to disposal of their representation to the demand notice also stands decided. The ground of valuation of

the subject property was also dealt with in detail in the Order at page no. 3 and finally, my Ld. Predecessor concluded that -

“Resultantly, where the liability and equitably mortgage of the property has been admitted and the necessary compliances under the Act has been made out by the bank, in such like circumstances no prima facie case stand made out in favour of the applicant and no balance of conveyance lies. The applicant is also not going to suffer irreparable loss, rather, the respondent bank would suffer irreparable loss because of the reason that huge amount of Rs.28.00 Crore (approx.) has to be recovered from the applicants.

Therefore, finding no prima facie case is made out for granting interim injunction, accordingly, the same stand declined.”

In my considered opinion, the above said Order dt. 09.10.2019 and later on Order dt.21.01.2021 with regard to valuation of subject mortgaged properties also stands decided and the Order dt. 09.10.2019 as well as the Order dt. 21.01.2021 passed by my Ld. Predecessor have attained finality as these have not been reversed by any of the higher Court having jurisdiction.

During the course of arguments again and again, Ld. Counsel for SA Appliant raised the issue of valuation of the property but merely on the ground that the Applicant claimed that the valuation of the mortgaged movable and immovable properties is more than Rs. 70.00 Crore, is not liable to be accepted. In fact, the Applicant is now approaching to the Tribunal based on the grounds/arguments, which have already been decided and as of now the grounds taken by the Applicant are devoid of any merit, if they were ready in order to save their subject property, they could have offered the amount and they could have save their property. Further, the SA Applicant failed to point out any illegality in the auction proceedings held on 25.11.2021 and Sale

Certificate, which was issued on 10.12.2021.

Accordingly, I am of the view that IA Nos. 1724/2021, 1725/2021 and 1726/2021 filed by the SA Applicant are devoid of any merit and they are not liable to be allowed at all, accordingly the IAs are dismissed.”

5. As per the averments made in the petition, petitioner received notice dated 13th of January, 2022 (Annexure P-23) from Station House Officer, Police Station Sector 10-A, Gurugram. It is claimed that the officials of the petitioner-Bank joined inquiry proceedings and submitted a detailed reply on 17th of January, 2022 (Annexure P-24). Thereafter, another notice was received on 16th of April, 2022 (Annexure P-25) issued by one Sub Inspector posted with Economic Offence Wing-I, Gurugram. As per the petitioner, they again joined inquiry. Another notice was received on 6th of May, 2022 whereby Amritpal Singh Gill, an employee of the petitioner-Bank was summoned to join inquiry. It is claimed that on the said date, summoned officer could not join inquiry owing to his medical condition. In these circumstances, representation was submitted to respondent No.2 claiming that the Police Authorities have transgressed their jurisdiction and cannot be allowed to inquire into the issues which already stand adjudicated by various Courts.

6. Ld. Senior Counsel representing the petitioner submits that in the aforesaid facts, the present petition raises a serious question w.r.t. legality and propriety of the actions of the Police Authorities. He submits that SARFAESI Act is a complete Code in itself, the rights and remedies of the parties to the *lis* are governed exclusively by the Special enactment and, thus, the Police Authorities have no jurisdiction to deal with the complaint made by the borrowers. Strong reliance is being placed upon **K. Virupaksha and another vs. State of Haryana and another, 2020(4) SCC 440**. He strongly asserts that in cases involving similar facts, the Supreme Court has come heavily even on the Courts wherein directions were being issued for investigation resorting to Section 156(3) Cr.P.C. He relies upon the judgment rendered in **Mrs. Priyanka Srivastava and another vs. State of U.P. and others, 2015(6) SCC 287**. Main thrust of the argument raised by Ld. Senior Counsel is that once the issue of undervaluation of the property has been repeatedly raised before multiple fora unsuccessfully by the Borrowers, the present complaint filed before the Police Authorities raising the said issue is an abuse of process of law. He claims that the Police Authorities cannot be allowed to act as a fiefdom of the Borrower(s). He asserts that the boggy of inquiry raised by the Police Authorities in their reply cannot

be looked into as the Code does not contemplate any inquiry by the Police Authorities. He extensively relies upon Section 2(g) and Section 2(h) of Cr.P.C. to submit that the inquiry as adumbrated under the Code is related to a Magistrate or Court and is not relatable to the Police Authorities. He further asserts that under the garb of inquiry, Police Authorities are conducting a full-fledged investigation exercising powers contemplated under Section 2(h) in an illegal manner without complying with the provisions of the Code especially those contained in Section 91 and Section 160 Cr.P.C. He submits that even at the inquiry stage provisions of Section 91 and Section 160 Cr.P.C. have to be read in order to effectuate checks and balances on the powers of the police as provided under the law.

7. Ld. State Counsel appearing for the respondents has argued on the lines of reply filed by the State claiming that after complaint was received, Police Authorities initiated inquiry. It is during inquiry that the notices were issued to the petitioner-Bank to supply certain information and to join the inquiry. It is claimed that merely for initiating inquiry, the authorities cannot be accused of having transgressed their jurisdiction. It is further claimed that notices u/s 160 or 91 Cr.P.C. are not required to be served as the investigation has not yet started. The inquiry is still at nascent stage and is yet to conclude.

Relevant portion of the short reply filed by way of affidavit of Assistant Commissioner of Police reads as under :-

“2. That the brief facts of the case are that a complaint was submitted by Anuj Kapoor to the Commissioner of Police, Gurugram, alleging therein that in the year 2015, he had obtained a loan of Rs. 25 crores from the petitioner bank in favour of his companies namely Kapsons Engineers Pvt. Ltd. and A.K. Motors Pvt. Ltd., by mortgaging his showroom and service centre of Honda Cars. He was regularly paying the loan installments, but later on, they were not able to pay the installments as their business was affected. The complainant offered the petitioner bank to pay the rent of Rs. 13 Lakhs per month for half of the premises mortgaged with the bank. However, the same was rejected by the bank. Amrit Pal Singh, officer at IDFC Bank, told him that he has instructions from higher officers to get the mortgaged property sold for Rs. 20 crores. The above said offer was again made for Rs. 18.5 Lakhs per month and thereafter for Rs. 32 Lakhs per month but the same was again rejected by the bank. During this time, the value of the mortgaged property rose to Rs. 66.5 Crores. They raised the said issue with the bank but they did not pay any heed. The bank issued notices for e-auction in the newspapers by undervaluing the property and by mentioning the reserve price to be Rs. 23.54 Crores and subsequently created third party interest in the said property. They also obtained the order of possession of mortgaged property u/s 14 of SARFAESI Act. The complainant further stated that the officers of the petitioner bank, in connivance with each other have illegally and deliberately undervalued the property of the complainant with malafide intentions.

3. That after the receipt of the above mentioned complaint, the same was marked to Economic Offence Wing – 1, Gurugram

for conducting the enquiry, to examine the allegations and to unearth the truth. The enquiry of the complaint was initiated by SI Harbir Singh, EOW-1, Gurugram. During the course of enquiry, on 04.04.2022, the intimation letter was given to Perfect Valuer and P&A Valuetech Pvt. Ltd., who had conducted the valuation of the property in question in the year 2021. On 16.04.2022, the intimation letter was given to Mr. Vaidyanathan (MD and CEO), Mr. Suraj Kumar (Authorised Officer), Mr. Amrit Pal Singh Gill (Regional Manager Collections) and other officers of IDFC First Bank and they were asked to give their reply along with documents on 19.04.2022. On 20.04.2022, the employees of IDFC First Bank appeared without any authorization letter. They were sent back. On 26.04.2022, Amrit Pal Singh Gill joined the enquiry and he told that he does not have much knowledge regarding the present matter. The bank also gave a reply in response to the intimation letter dated 16.04.2022.

XXXXX

11. That in view of the above averments, it is submitted that only the intimation letter was issued by the EOW-1, Gurugram to the petitioner bank, for providing the relevant record and for submitting their version upon the complaint filed by the complainant. The enquiry was initiated by the EOW-1, Gurugram upon the complaint filed by the complainant before the Commissioner of Police, Gurugram and as such, no jurisdiction has been transgressed by the Gurugram Police in the present case, as alleged by the petitioner.

12. That the plea taken by the petitioner in the present petition that instead of giving notice u/s 160 or 91 Cr.P.C. intimation letter was given, is not sustainable as the present proceedings are the enquiry proceedings and not the investigation proceedings.”

8. Borrower has also filed application i.e. CRM No.32604 of 2022 seeking impleadment as respondent No.4 and has filed para-wise reply to the petition as well.

9. Ld. Sr. Counsel representing the petitioner/non-applicant objected to the prayer made by the borrower for impleadment. However, he submitted that he does not object to their participation in the proceedings. In view of the concession given by the Senior Counsel though limited, no formal order is required to be passed on application moved by the borrower/complainant. They are allowed to participate in proceedings and reply filed is taken on record.

10. Mr. Rai appearing for the borrower has raised a preliminary objection w.r.t. the maintainability of the present petition. He submits that the present petition is bad on two counts :

- (a) He asserts that in the absence of complaint, present petition filed u/s 482 Cr.P.C. cannot be maintained as in order to adjudicate the present *lis*, the complaint was the most essential document which has been deliberately withheld by the petitioner.
- (b) He further claims that as per settled law laid down by

the Apex Court in **M/s. Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra and others, 2021 AIR (SC) 1918**, the Courts are not required to interfere even at the stage of investigation and the petitioner herein is persuading this Court to forestall even a preliminary inquiry. He claims that at such a nascent stage, the present petition filed u/s 482 Cr.P.C. cannot be maintained.

On merits, Mr. Rai submits that as per settled law no word can be added or subtracted to the enactment and, thus, the prayer made by the Counsel for the petitioner to read Section 91 and 160 even at the stage of inquiry is misplaced. It has been further contended that even though SARFAESI Act is a complete Code in itself *qua* the contractual obligations of the parties but the same cannot have an effect of closing the doors on a victim who alleges fraud at the hands of secured creditor. He agrees that without doubt the Police Authorities are required to be extra careful in such cases and reads the notices issued by Police Authorities to claim that the Police Authorities were conscious of the said fact while issuing those notices. He claims that no coercive action was initiated by the Police Authorities and refers to

language of the notices to hammer his submissions.

11. I have heard Ld. Counsel for the parties and have carefully gone through the records of the case.

12. In the considered opinion of this Court the following issues arise for the consideration :

(i) Whether the present petition filed under Section 482 Cr.P.C. seeking directions restraining the official respondents from enquiring/re-enquiring into the matter will be maintainable without there being complainant on record ?

(ii) Whether in the facts and circumstances of the present case, enquiry as contemplated by Apex Court in Lalita Kumar vs. Government of U.P. and others' ought to have been undertaken?

(iii) Whether Section 160 and Section 91 can be read as part of the procedure required to be followed for such enquiry?

(iv) What is the effect of provisions contained in under SARFAESI Act on the police complaint filed by the borrower alleging fraud at the hands of officers of the Lender Bank?

13. In order to answer Issue No.1 it is necessary to reproduce the prayer made in the petition :

It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to :-

i) Issue direction restraining respondent nos. 1 & 3 from transgressing his jurisdiction from enquiring /re-

enquiring into a matter which has already been adjudicated by various courts right upto the Hon'ble Supreme Court.

ii) Issue a direction to respondent no.3 not to call the employee, agents, representatives of the petitioner-bank without following due process of law i.e. without issuing summons as mandated by section 160 Cr.PC;

14. The petitioner has thus not approached this Court for seeking quashing of the complaint. His grievance primarily relates to the repeated inquiries being conducted by the Police Authorities on the complaint made by the borrower. Counsel for the petitioner asserts that at no point of time he was supplied with the copy of the complaint.

15. Ld. Senior Counsel appearing for the petitioner has strongly relied upon the law laid down by Apex Court in **K. Virupaksha's** case (supra) and that laid down in **Priyanka Srivastava's** case (supra). In the case of **K. Virupaksha**, Apex Court was seized of a petition filed against the order passed by High Court in dismissing the petition filed under Section 482 Cr.P.C. against the order passed by JMFC referring the matter for investigation and consequential registration of FIR against bank officials for offences punishable under Sections 511, 109, 34, 120B, 406, 409, 420, 405, 417

and 426 of the IPC. Apex Court while framing the issue and answering the same held as under :-

“15. The issue however is, as to whether such proceedings by the police in the present facts and circumstances could be permitted.

At the outset the sanction of loan, creation of mortgage and the manner in which the sanctioned loan was to be released are all contractual matters between the parties. The Complainant is an industrialist who had obtained the loan in the name of his company and the loan account was maintained by the Canara Bank in that regard. The loan admittedly was sanctioned on 16.03.2009. When at that stage the amount was released and if any amount was withheld, the Complainant was required to take appropriate action at that point in time and avail his remedy. On the other hand, the Complainant had proceeded with the transaction, maintained the loan account until the account was classified as NPA on 15.01.2013. Initially the issue raised was only with regard to the under valuation of the property when it was brought to sale. On that aspect, as taken note the writ proceedings were filed and the learned Single Judge having examined, though did not find merit had reserved liberty to raise it before the DRT, which option is also availed. It is only thereafter the impugned complaint was filed on 20.05.2016.

16. The SARFAESI Act is a complete code in itself which provides the procedure to be followed by the secured creditor and also the remedy to the aggrieved parties including the borrower. In such circumstance as already taken note by the High Court in writ proceedings if there is any discrepancy in the manner of classifying the account of the appellants as NPA or in the manner in which the property was valued or was auctioned, the DRT is vested with the power to set aside such auction at the stage after the secured creditor invokes the power under Section 13 of SARFAESI Act. This view is fortified by the decision of

this Court in the case of Authorised Officer, Indian Overseas Bank & Anr. v. Ashok Saw Mill (2009) 8 SCC 366 wherein it is held as hereunder:

"34. The provisions of Section 13 enable the secured creditors, such as banks and financial institutions, not only to take possession of the secured assets of the borrower, but also to take over the management of the business of the borrower, including the right to transfer by way of lease, assignment or sale for realising secured assets, subject to the conditions indicated in the two provisos to clause (b) of sub-section (4) of Section 13.

35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub-section (3) thereof.

36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.

37. The consequences of the authority vested in the DRT under sub-section (3) of Section 17 necessarily implies that the DRT is entitled to question the action taken by

the secured creditor and the transactions entered into by virtue of Section 13(4) of the Act. The legislature by including sub-section (3) in Section 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Resultantly, the submissions advanced by Mr Gopalan and Mr Altaf Ahmed that the DRT has no jurisdiction to deal with a post-Section 13(4) situation, cannot be accepted."

(emphasis supplied)

17. We reiterate, the action taken by the Banks under the SARFAESI Act is neither unquestionable nor treated as sacrosanct under all circumstances but if there is discrepancy in the manner the Bank has proceeded it will always be open to assail it in the forum provided. Though in the instant case the application filed by the Complainant before the DRT has been dismissed and the Appeal No.523/2015 filed before the DRAT is also stated to be dismissed the appellants ought to have availed the remedy diligently. In that direction the further remedy by approaching the High Court to assail the order of DRT and DRAT is also available in appropriate cases. Instead the petitioner after dismissal of the application before the DRT filed the impugned complaint which appears to be an intimidatory tactic and an afterthought which is an abuse of the process of law. In the matter of present nature if the grievance as put forth is taken note and if the same is allowed to be agitated through a complaint filed at this point in time and if the investigation is allowed to continue it would amount to permitting the jurisdictional police to redo the process which would be in the nature of reviewing the order passed by the learned Single Judge and the Division Bench in the writ proceedings by the High Court and the orders passed by the competent Court under the SARFAESI Act which is

neither desirable nor permissible and the banking system cannot be allowed to be held to ransom by such intimidation. Therefore, the present case is a fit case wherein the extraordinary power is necessary to be invoked and exercised.”

(emphasis supplied)

16. In **Priyanka Srivastava's** case (supra), Apex Court noticed the following facts :-

“2. The facts which need to be stated are that the respondent No.3, namely, Prakash Kumar Bajaj, son of Pradeep Kumar Bajaj, had availed a housing loan from the financial institution, namely, Punjab National Bank Housing Finance Limited (PNBHFL) on 21st January, 2001, vide housing loan account No.IHL-583. The loan was taken in the name of the respondent No.3 and his wife, namely, Jyotsana Bajaj. As there was default in consecutive payment of the installments, the loan account was treated as a Non-Performing Asset (NPA) in accordance with the guidelines framed by the Reserve Bank of India. The authorities of the financial institution issued notice to the borrowers under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (for short, 'the SARFAESI Act') and in pursuance of the proceedings undertaken in the said Act, the PNBHFL, on 5th June, 2007, submitted an application before the District Magistrate, Varanasi, U.P. for taking appropriate action under section 13(4) of the SRFAESI Act.

3. At this juncture, the respondent No.3 preferred W.P. No.44482 of 2007, which was dismissed by the High Court on 14th September, 2007, with the observation that it was open to the petitioner therein to file requisite objection and, thereafter, to take appropriate action as envisaged under section 17 of the

SRFAESI Act. After the dismissal of the writ petition with the aforesaid observation, the respondent No.3, possibly nurturing the idea of self-centric Solomon's wisdom, filed a Criminal Complaint Case No.1058 of 2008, under Section 200 Cr.P.C. against V.N. Sahay, Sandesh Tiwari and V.K. Khanna, the then Vice-President, Assistant President and the Managing Director respectively for offences punishable under Sections 163, 193 and 506 of the Indian Penal Code (IPC). It was alleged in the application that the said accused persons had intentionally taken steps to cause injury to him. The learned Magistrate vide order dated 4th October, 2008, dismissed the criminal complaint and declined to take cognizance after recording the statement of the complainant under Section 200 Cr.P.C. and examining the witnesses under Section 202 Cr.P.C.”

17. While deciding the *lis* Apex Court was primarily seized of the powers as contemplated under Section 156(3) Cr.P.C. and the manner in which such powers have to be exercised. While referring to SARFAESI, Apex Court observed that :

“29. At this juncture, we may fruitfully refer to section 32 of the SRFAESI Act, which reads as follows : "32. Protection of action taken in good faith.- No suit, prosecution or other legal proceedings shall lie against any secured creditor or any of his officers or manager exercising any of the rights of the secured creditor or borrower for anything done or omitted to be done in good faith under this Act."

30. In the present case, we are obligated to say that learned Magistrate should have kept himself alive to the aforesaid provision before venturing into directing registration of the FIR under Section 156(3) Cr.P.C. It is because the Parliament in its

wisdom has made such a provision to protect the secured creditors or any of its officers, and needles to emphasize, the legislative mandate, has to be kept in mind.”

18. The question : “*can Section 32 of the SARFAESI Act be held to be a bar against the criminal proceedings against bank officials while dealing with the matters related to secured debt wherein fraud is being alleged*” has also been answered by Apex Court in **K. Virupaksha's** case (supra).

19. Section 32 provides for the act done/omission in good faith. Thus, in other words while enacting the statute the legislature was conscious of certain situations wherein suit/prosecution or legal proceedings may be initiated against secured creditor or its officers for their acts/omissions under the Act. The legislature provides statutory immunity for such actions/omissions only in case where they are qualified by 'good faith'. The issue w.r.t. statutory immunities and the expression 'good faith' came up for consideration before the Apex Court in **Bijendra Singh vs. State of U.P., AIR 1981 Supreme Court 636**. Apex Court while dealing with the expression as adumbrated in Section 32 held that :

“17. The expression 'good faith' has not been defined in the Ceiling Act The expression has several shades of meanings. In the popular sense, the phrase 'in good faith' simply means

"honestly, without fraud, collusion, or deceit; really, actually, without pretence and without intent to assist or act in furtherance of a fraudulent or otherwise unlawful scheme". (See Words and Phrases, Permanent Edition, Vol. 18A, page 91). Although the meaning of "good faith" may vary in the context of different statutes, subjects and situations, honest intent free from taint of fraud or fraudulent design, is a constant element of its connotation. Even so, the quality and quantity of the honesty requisite for constituting 'good faith' is conditioned by the context and object of the statute in which this term is employed. It is a cardinal canon of construction that an expression which has no uniform, precisely fixed meaning, takes its colour, light and content from the context."

(emphasis supplied)

20. While discussing the aforesaid observations made in **Bijendra Singh's** case (supra), Apex Court in the case of **General Officer Commanding vs. CBI and another, 2012(6) SCC 228** held that :

“46. Performance of duty acting in good faith either done or purported to be done in the exercise of the powers conferred under the relevant provisions can be protected under the immunity clause or not, is the issue raised. The first point that has to be kept in mind is that such a issue raised would be dependent on the facts of each case and cannot be a subject matter of any hypothesis, the reason being, such cases relate to initiation of criminal prosecution against a public official who has done or has purported to do something in exercise of the powers conferred under a statutory provision. The facts of each case are, therefore, necessary to constitute the ingredients of an official act. The act has to be official and not private as it has to

be distinguished from the manner in which it has been administered or performed.

47. Then comes the issue of such a duty being performed in good faith. 'Good faith' means that which is founded on genuine belief and commands a loyal performance. The act which proceeds on reliable authority and accepted as truthful is said to be in good faith. It is the opposite of the intention to deceive. A duty performed in good faith is to fulfil a trust reposed in an official and which bears an allegiance to the superior authority. Such a duty should be honest in intention, and sincere in professional execution. It is on the basis of such an assessment that an act can be presumed to be in good faith for which while judging a case the entire material on record has to be assessed.

48. The allegations which are generally made are, that the act was not traceable to any lawful discharge of duty. That by itself would not be sufficient to conclude that the duty was performed in bad faith. It is for this reason that the immunity clause is contained in statutory provisions conferring powers on law enforcing authorities. This is to protect them on the presumption that acts performed in good faith are free from malice or illwill. The immunity is a kind of freedom conferred on the authority in the form of an exemption while performing or discharging official duties and responsibilities. The act or the duty so performed are such for which an official stands excused by reason of his office or post.

49. It is for this reason that the assessment of a complaint or the facts necessary to grant sanction against immunity that the chain of events has to be looked into to find out as to whether the act is dutiful and in good faith and not maliciously motivated. It is the intention to act which is important.

50.xxxxx

51. There has to be material to attribute or impute an unreasonable motive behind an act to take away the immunity clause. It is for this reason that when the authority empowered to grant sanction is proceeding to exercise its discretion, it has to take into account the material facts of the incident complained of before passing an order of granting sanction or else official duty would always be in peril even if performed bonafidely and genuinely.”

(emphasis supplied)

21. The aforesaid principle has been recognized by Apex Court in **K. Virupaksha's** case (supra). Thus, it can be safely concluded that Section 32 itself does not bar criminal proceedings against the secured creditor or its officials.

22. Coming on to the plea raised by Ld. Senior Counsel for the petitioner that the Code does not contemplate inquiry by the Police Authorities and, thus, the respondents have transgressed their jurisdiction, it needs to be noticed that without doubt the statutory provisions as contained in Code of Criminal Procedure put inquiry and investigation in different compartments. Inquiry is only relatable to a judicial act and the Police Authorities have nothing to do with the inquiry as contemplated under the Code. However, at the same time we cannot lose sight of the fact that Constitutional Bench in **Lalita Kumari vs. Government of Uttar Pradesh and others, (2014) 2 SCC**

1 held that there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of the crime with the passage of time. While referring to the issue raised therein Apex Court observed that :

“The important issue which arises for consideration in the referred matter is whether "a police officer is bound to register a First Information Report (FIR) upon receiving any information relating to commission of a cognizable offence under Section 154 of the Code of Criminal Procedure, 1973 (in short 'the Code') or the police officer has the power to conduct a "preliminary inquiry" in order to test the veracity of such information before registering the same?"

23. While answering the said question Apex Court noticed substantial changes made in the 1973 Code that came into existence repealing Code of 1898 and observed that :

“38.The precursor to the present Code of 1973 is the Code of 1898 wherein substantial changes were made in the powers and procedure of the police to investigate. The starting point of the powers of police was changed from the power of the officer in-charge of a police station to investigate into a cognizable offence without the order of a Magistrate, to the reduction of the first information regarding commission of a cognizable offence, whether received orally or in writing, into writing and into the book separately prescribed by the Provincial Government for recording such first information. As such, a significant change that took place by way of the 1898 Code was with respect to the placement of Section 154, i.e., the provision imposing

requirement of recording the first information regarding commission of a cognizable offence in the special book prior to Section 156, i.e., the provision empowering the police officer to investigate a cognizable offence. As such, the objective of such placement of provisions was clear which was to ensure that the recording of the first information should be the starting point of any investigation by the police. In the interest of expediency of investigation since there was no safeguard of obtaining permission from the Magistrate to commence an investigation, the said procedure of recording first information in their books along with the signature/seal of the informant, would act as an "extremely valuable safeguard" against the excessive, mala fide and illegal exercise of investigative powers by the police."

24. The specific plea being raised by Mr. Cheema before this Court was also raised before the Apex Court in the following term :-

"87. The term inquiry as per Section 2(g) of the Code reads as under :

'2(g) - "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court."

Hence, it is clear that inquiry under the Code is relatable to a judicial act and not to the steps taken by the Police which are either investigation after the stage of Section 154 of the Code or termed as 'Preliminary Inquiry' and which are prior to the registration of FIR, even though, no entry in the General Diary/Station Diary/ Daily Diary has been made."

25. Apex Court held that :

"120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable

offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under :

- a) Matrimonial disputes/family disputes
- b) Commercial offences
- c) Medical negligence cases
- d) Corruption cases
- e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7 While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.”

26. It needs to be reiterated here that the list of the category of cases as provided under Section 120.6 is illustrative and not exhaustive. Thus, it cannot be held that the issues relatable to SARFAESI having not been enlisted, preliminary inquiry in such issues was held to be barred. Consequently, the argument raised by Mr. Cheema w.r.t. bar of inquiry under the Code by the Police Authorities is rejected in terms of law laid down by Apex Court in **Lalita Kumari's** case (supra). Having said that I may hastenly add

here that even as per aforesaid law laid down by Apex Court, the inquiry has to be time bound. Likewise the scope of inquiry is only limited to the issue whether the information given *ex facie* discloses the commission of a cognizable offence. Scope of inquiry cannot be enlarged to inquire into the genuineness/credibility of the information so given. The issue has been specifically dealt with the Apex Court in Para 119 of the **Lalita Kumari's** case (supra) to hold as under :

“119. Therefore, in view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given *ex facie* discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR.”

27. Thus, the scope of inquiry initiated by the Police Authorities cannot be beyond what has been laid down in Para 119 of Lalita Kumari's case *ibid*.

28. In view of the aforesaid observations, it is thus clear that if the Investigating Agency at the time of considering the allegations levelled in the information received decides to hold a preliminary inquiry, it has to be strictly in terms of law laid down in **Lalita Kumari's** case (*supra*).

29. Coming on to the third question regarding reading of Section 91 and Section 160 as a procedure to be followed during preliminary inquiry, Mr. Cheema submits that the same being safeguards provided under the Code must be read implidely while holding enquiry. Section 91 and Section 160 Cr.P.C. read as under :

“91. Summons to produce document or other thing.—

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have

complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed—

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.

160. Police officer's power to require attendance of witnesses.—(1) Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required: Provided that no male person [under the age of fifteen years or above the age of sixty-five years or a woman or a mentally or physically disabled person] shall be required to attend at any place other than the place in which such male person or woman resides.

(2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under subsection (1) at any place other than his residence.”

30. A bare perusal reveals that the aforesaid provisions are applicable while investigation is under process. The same cannot be read into law laid down by Apex Court in **Lalita Kumari's case**

(supra) to expand the scope of preliminary enquiry as contemplated therein. On the other principle of interpretation of statute also it is trite law that a *casus omissus* cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself. In the words of Lord Parker, *it would be disastrous if courts did not eschew the temptation to pass judgment on an issue of policy. Judicial self-preservation may alone dictate restraint.*”

31. Coming on to the facts of the present case, it needs to be noticed here that admittedly, the petitioner(s) have been served with the written notice to supply the documents as well as to join inquiry. As per the settled law the procedure has to be right just and fair and not arbitrary, fanciful or oppressive. The fact that the petitioner(s) were served with the written notice, the nomenclature thereof would not make difference and the absence of mentioning of Sections 160 and 91 cannot be a ground to invoke jurisdiction of this Court to read the aforesaid provisions in the process of inquiry even though the Code does not contemplate the same.

32. While holding preliminary inquiry though the Police Authorities can ask for the documents, they have no reason to enforce presence of the officials of the petitioner-Bank.

33. Likewise there was no reason for the Police Authorities to prolong the inquiry. This Court is conscious of the stage of the inquiry and the statutory powers vested in the Police Authorities. This Court can't interfere at this nascent stage. The Court can neither venture into the merits of the allegations nor into the question whether the allegations constitute cognizable offence or not? The same is left to the realm of the Police Authorities. Thus, without going into the merits of the allegations levelled by the complainant, liberty is granted to the Police Authorities to act in accordance with law purely in terms of **Lalita Kumari's** case (supra). Keeping in view the peculiar circumstances of the case, Commissioner of Police, Gurugram is directed to supervise the inquiry proceedings and to conclude the same in accordance with law within 7 days from the date of receipt of certified copy of this order.

34. Petition stands disposed off accordingly.

December 13, 2022

Dpr

(PANKAJ JAIN)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No