

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
(APPELLATE SIDE)**

**Present:
The Hon'ble Justice Rai Chattopadhyay**

C.R.R No. 478 of 2015

**Dipta Dutta & Anr.
Vs.
State of West Bengal & Anr.**

For the Petitioners : Mr. Ayan Bhattacharjee,
: Ms. Nafisa Yasmin.

For the State : Ms. Faria Hossain,
: Mr. Anand Keshari.

Hearing concluded on: 05/12/2022

Judgment on: 23/02/2023

Rai Chattopadhyay, J.

(1) The Petitioners are aggrieved that the criminal proceedings initiated against them is manifestly attended with malafide, maliciously instituted with an ulterior motive of wreaking vengeance and private and personal grudge, which would be deprecatory in accordance with law. Their prayer is for quashing of such a proceeding against them, which is now in motion.

(2) The proceeding petitioners are mentioning about is that in connection with Netaji Nagar Police Station Case No.24 of 2015 dated 22.01.2015 under

Section 448/506/114/34 IPC. The corresponding pending case in the Court of Ld. Additional Chief Judicial Magistrate, Alipore, is ACGR No. 430 of 2015.

(3) Said police case was started against the petitioners pursuant to the direction of the Magistrate dated 14.01.2015, under Section 156 (3) Cr.P.C, 1973, upon a complaint dated same, i.e, 14.01.2015, filed by the opposite party No.2, in this case (Complaint Case No.214/2015).

(4) Before dwelling upon the allegations made therein, one may first understand as to who the petitioners are. Record reveals that the petitioners are the employees of Housing Development Finance Corporation Limited (HDFC Ltd.), working for gain in the said company, as “Assistant Manager- Recoveries”. They are duly appointed “authorised officers” as defined in Rule 2 (a) of the Security Interest (Enforcement) Rules, 2002. Against these officers, allegations have been made of house trespass (Section 448 of IPC), criminal intimidation (Section 506 of IPC) and abetment to such offence, in furtherance of their common intention.

(5) Complaint dated 14.01.2015, may now be gone into, to find as to what are the allegations made.

(6) Complainant/opposite party No.2 has stated herself to be the tenant of the ground floor flat (No. G-3) at the premises No. 20A/4, Baishnab Ghata Bye-Lane, Kolkata-700047, against a monthly rent of Rs.2100/-. She mentions, Mr. Subir Biswas of 22, Ramesh Mitra Road, Kolkata-700025, to be her landlord. She alleges that the petitioners and their men and agents initiated process for her eviction and dislodgement from her said tenanted premises, by exercising intimidation, violence

and force. According to the complainant, the petitioners had no authority under law to dislodge her from the said premises and/or vacate the flat. Allegedly, in their said endeavour, the petitioners have trespassed into her tenanted premises and in furtherance of their common intention executed threat and intimidation. Complainant is apprehensive about being unlawfully and forcefully dislodged from her tenanted premises, which she has been lawfully occupying.

(7) Mr. Ayan Bhattacharjee, appearing on behalf of the petitioners, has stirred his arguments through various points, involving law and facts of the case. His first reference would be to a “loan agreement” dated 28.09.2004, annexed with the petition, to show that Mr. Subir Biswas, that is the landlord of the complainant is a borrower with the employer of the petitioners. He would further refer to the annexed “demand notice” under Section 13 (2) of the SARFAESI Act, 2002, dated 16.09.2014 of the HDFC Ltd., to submit that said Mr. Subir Biswas is a defaulter of loan. From the said letter dated 16.09.2014 it transpires that the flat, said to be in occupation of the complainant/opposite party No.2 under a tenancy has been categorised as the “secured asset” in respect of which the company has created security interest.

(8) Mr. Bhattacharjee has further referred to a letter of said Sri Subir Biswas dated 11.11.2014, which the writer has referred as his written ‘reply’ under Section 13 (3-A) of the SARFAESI Act, 2002, to company’s ‘demand notice’ dated 16.09.2014, as mentioned above.

(9) Mr. Bhattacharjee submits that notice of symbolic possession was published on 20.07.2012 in the well circulated English Newspaper 'Times of India', of which the borrower had knowledge. It is also submitted that the borrower had never applied before the Debt Recovery Tribunal, with his grievance as per mandate of law. According to Mr. Bhattacharjee, in fact, the remedy, if any, available to the borrower is that under the SARFAESI Act, 2002, against company's notice under Section 13 (2) of the said Act, i.e, to file an 'appeal' in the Debt Recovery Tribunal. He would further submit that petitioner has acted in a manner as the responsible and authorised officer of the company should do as per the statutory provisions. Their power is emanating from the statute itself, as regards the immovable secured asset collateral to the loan advanced, in this case of default committed by the borrower.

(10) He says that no material in this case would suggest criminality of the action or intention of his clients. He says that, no cognizable case is at all made out against them. He submits that, contrarily the petitioners have been subjected to personal grudge and vengeance and the present case is only an unfortunate corollary of the same. He has prayed for quashing of the proceedings.

(11) Some judgments have been relied on by Mr. Bhattacharjee in support of his client's case, as follows:-

- (i) **Bajarang Shyamsunder Agarwal vs. Central Bank of India & Anr.** reported in (2019) 9 SCC 94,
- (ii) **Priyanka Srivastava & Anr. Vs. State of Uttar Pradesh & Ors.** reported in (2015) 6 SCC 287,

- (iii) **Inder Mohan Goswami & Anr. Vs. State of Uttaranchal & Ors.** reported in (2007) 12 SCC 1,
- (iv) **Charanjit Singh Chanda & Ors. Vs. Sudhir Mehra** reported in (2001) 7 SCC 417.

(12) The judgment of **Bajarang Shyamsunder Agarwal**, is on the proposition that Section 17 of the SARFEASI Act, 2002, is the provision for an invaluable right of appeal for any person including the borrower. Appeal is to be made to the DRT, which is even empowered to restore *status quo ante* (**Kanaiyalal Lalchand Sachdev & Ors. vs. State of Maharashtra & Ors.** reported in (2011) 2 SCC 782 has been relied on).

(13) Also that the secured creditor is empowered for enforcement of security interest according to the procedure prescribed under law, in terms of Sections 13 & 14 of the said Act. Mr. Bhattacharjee submits that the propositions here shall squarely apply in this case also.

(14) The 2015, very well known **Priyanka Srivastava & Anr** judgment would be on the proposition that the Magistrate would not consider passing orders under provision of Section 156 (3), in a routine manner. Application of mind of the Magistrate as to the culpability of the accused pleaded and the nature of allegations made are necessarily to be gone into and he is not to issue direction without proper application of judicial mind.

(15) Regarding the judgment of **Inder Mohan Goswami & Anr**, the proposition decided therein may be extracted from para 24 of the judgment as follows:-

“24. Inherent powers under Section 482 CrPC though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute.”

(16) The Court relied on a very well celebrated judgment of **Bhajanlal’s** case reported in **AIR 1992 SC 604**, to enumerate as to the myriad kind of cases, where a Court can exercise extraordinary power under Section 482 Cr.P.C, 1973. Mr. Bhattacharjee, urges that the present proceedings against his clients is manifestly malafide and an outcome of grudge. According to the settled law, to proceed against his clients, in that case would be a sheer abuse of the process of Court.

(17) The State is present and has controverted the petitioner’s prayer. It has been submitted on the basis of the case diary that there are sufficient materials available against the petitioners on the basis of which a cognizable offence can be said to have been made out against them. It has been submitted that the prosecution against the petitioners may not be interfered with in any manner and the present criminal revision case may be dismissed.

(18) Before entering into the merits of this particular case, it would be intriguing to look to some of the cardinal principles of the criminal jurisprudence. One leading doctrine of criminal law liability even in modern times is ***actus non facit reum nisi men sit rea***. It is a cardinal doctrine of the criminal law and has been accepted not only by the courts in England but also Indian courts. One may look at the judgment of the Hon’ble Supreme Court reported in **AIR 1965**

Supreme Court 722 [State of Maharashtra versus Mayar Hans George] in this regard. There are two necessary elements in a crime namely, first a physical element, and secondly, a mental element. Former is known technically as '*actus reus*' and the later as '*mens rea*'. The '*actus reus*' may be an act of omission or an act of commission [with reference to sections 32 and 33 Indian Penal Code] but in order that the '*actus reus*' may be punishable it must jointly be accompanied by a guilty mind. However in some cases punishment has been awarded although '*actus reus*' is not consummated. They are known to us as inchoate crimes for example, attempt, conspiracy or even some cases of preparation. Section 5(11) of the Indian Penal Code makes general attempts punishable while sections like 307 and 308 make attempt to commit murder and attempt to commit culpable homicide not amounting to murder, punishable. Section 120B(2) makes criminal conspiracy punishable. Similarly, abetments have been made punishable under sections 107 to 120. Further, in certain cases preparations to commit offences have been made punishable under the Indian Penal Code, for example section 399 makes preparation to commit the dacoity punishable.

(19) To understand as to what is an "offence", one may resort to section 40 of the Indian Penal Code, where it has been provided that the word "offence" denotes a thing made punishable by the Code itself. Also a thing punishable under any other special or local law would be an "offence" within the meaning of the Code. In most of the cases, an offence shall be prosecutable and punishable upon simultaneous satisfaction of the two components thereof, that is the physical action and the mental action as well, except in some of the cases where even if there is no physical

action, a person would be punishable as per the law, on proof of his intention to commit an offence. Thus '*mens rea*' is an important element of crime meaning, guilty mind. '*Mens rea*' is the state of mind which indicates culpability, which is required by a statute as an element of crime. As a general rule every crime requires a mental element that is some blameworthy mental condition. Expressions, connoting the requirement of blameworthy mental element include: "with intent, knowingly, recklessly, unlawfully, maliciously, knowing or believing, fraudulently, dishonestly, corruptly allowing and permitting." Each of these expression is capable of bearing a meaning which differs from that ascribed to any other. Though the word '*mens rea*' as such is nowhere found in the Indian Penal Code, its essence is reflected in almost all the provisions of the Code. The existence of the mental element or guilty mind or '*mens rea*' at the time of commission of the '*actus reus*' will make the act of the actor an offence.

(20) If one refers to Salmond on '*Jurisprudence*', he can find that an 'intention' has been expressed to be the fore-knowledge of the act coupled with the desire of it, such fore-knowledge and desire being the cause of the act, in as much as they are fulfilled to themselves through the operation of the will. An act is "intentional" if, and insofar as it exists in idea before it exists in fact, the idea realising itself in the fact because of the desire by which it is accompanied. "Intention" is a state of mind consisting of a desire that consequences shall follow from the act or illegal omission.

(21) The reason which prompted this court to discuss as aforesaid, is for better understanding as to what should constitute an offence, punishable under

law. A conscious physical action, as well as *compos mentis* with the definite intention, aim, objective and the determination to cause and causing injury or harm to the person or property – would complete the circle, upon which a person can be said to have committed an offence. “Injury”, that is, any harm illegally caused to any person, his “wrongful loss” due to the actions of the perpetrator and “wrongful gain” of the perpetrator, that is, gain by unlawful means of property which he is not legally entitled to gain, would be the determinants, as to whether an offence has been committed by the perpetrator or not.

(22) These are the broad principles which will guide this Court in this case to determine if any cognizable case has at all been made against the present petitioners in the written complaint.

(23) Fact remains that the petitioners being the bank employees and being authorised by the appropriate office and under a specific statute, have acted in terms of the said statute to execute the provisions mentioned therein. It is undisputed in this case that the landlord of the defacto complainant is the borrower, who eventually is a defaulter. His relationship with the concerned bank is controlled and guided under the provisions of an agreement and that of the SARFAESI Act, 2002. It has been pointed out duly, to this Court, that after he defaulted paying back the loan, the bank has taken all requisite steps in accordance with law for realisation of the same by taking over the secured asset/mortgaged property. Notices have been duly issued. The bank has proceeded in terms of the statutory provision to take possession of the property in question, when even after the default notice, the defaulter has failed to comply with the same.

Being the employees of the bank, the petitioners were entrusted to execute the job of taking possession of the secured asset. In doing so it is but natural that they shall have to enter the premises of the secured asset and take all necessary steps in pursuance thereof. It is a fact in this case that at the said point of time the complainant was possessing over the secured asset as a tenant and she might not have granted express permission to the petitioners to enter the premises of the same for taking possession thereof in exercise of the statutory provisions. It would not however come within the purview of the description of “house trespass” as provided under section 442 of the Indian Penal Code.

(24) Let us first see the provisions in section 442 of the Indian Penal Code, which is as follows:

“442. House trespass – Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit “house trespass”.

Explanation – The introduction of any part of the criminal trespasser’s body in entering sufficient to constitute house trespass.”

The petitioners have also been alleged of an offence of criminal intimidation.

(25) Therefore in this case, the very factum of “criminality” should be present in the actions of the petitioners, in order to construe that the allegations against them have made out a cognizable offence. As discussed earlier, the trait ‘criminality’ would entail both *actus reus* and *mens rea*. The petitioners should have possessed the intention and knowledge of their trespassing any property of others and intimidating the occupiers therein, and also intimidating them with the same intention and knowledge. As in this case it has been amply made clear that the

property in question was the secured asset with the bank, and thus it cannot be termed as a premises where the petitioners have made an unlawful entry, more so, when from the records it has been strongly suggested that the bank has already exhausted legal formalities for taking possession of the secured asset that is the said property.

(26) The 3 Judges Bench judgment of **Bajrang Shyamsundar Agarwal** (supra), as relied on by the petitioners in this case may be profitably relied on and quoted here, as bellow:

“12. Section 13 of the SARFAESI Act provides for the enforcement of security interest. This is a self-executory mechanism for the banks. Once the process of realising the secured interest takes place, the secured creditor acts as trustee having de jure/symbolic possession of the property and is required by law to realise it strictly in accordance with the provisions of Sections 13, 14 and 15 of the SARFAESI Act. Crucially, sub-section (2) of Section 13 of the SARFAESI Act envisages a notice, which acts as the trigger point for initiation of the recovery process under the SARFAESI Act. In the aforesaid notice, the secured creditor is required to disclose information on the amount payable by the borrower and the secured interest intended to be enforced by the secured creditor in the event of non-payment of the secured debt. If the borrower fails to discharge the liability, the secured creditor has four options including taking possession of the secured assets of the borrower [Section 13(4) of the SARFAESI Act]. Critically for this case, once a notice is served on the borrower, he cannot further enter into any contract to create any encumbrance on the property [Section 13(13) of the SARFAESI Act]. This extinguishes the right of the mortgagor to lease the property under Section 65-A of the Transfer of Property Act (hereinafter referred to as “the TP Act”).”

In paragraph 15 of the said judgment the court has held as follows:

“15. Section 17 provides for an invaluable right of appeal to any person including the borrower to approach the Debts Recovery Tribunal (hereinafter referred to as “DRT”). In Harshad Govardhan case [Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd., (2014) 6 SCC 1 : (2014) 3 SCC (Civ) 1] this Court held that the right of appeal is available to the tenant claiming under a borrower, however, the right of re-possession does not exist with the tenant. However, in Kanaiyalal Lalchand Sachdev v. State of

Maharashtra [Kanaiyalal Lalchand Sachdev v. State of Maharashtra, (2011) 2 SCC 782 : (2011) 1 SCC (Civ) 570] , this Court held that DRT can, not only set aside the action of the secured creditor, but even restore the status quo ante. We do not intend to express any view on this issue since it is not relevant for the disposal of this appeal. We also note that Parliament has stepped in and amended Section 17 by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (44 of 2016). Under the amendment, possession can be restored to the “borrower or such other aggrieved person”.

(27) We may also be educated regarding the scope and ambit of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, from a judgment of a coordinate bench of this Court, reported in ***AIR 2015 Cal 306 [Sri Jawahar Singh versus the United Bank of India and others]***, in which the court has held :

“49. Right from the decision of the Supreme Court in Mardia Chemicals (supra) where the constitutionality of various provisions of the SARFAESI Act were under challenge till the decision in V. Nobel Kumar (supra), the law has clearly been laid down that the enactment in question envisages enforcement of security interest created in favour of a secured creditor without the intervention of courts and tribunals and an adjudicatory process qua the points raised by the borrower against the secured creditor taking possession of the secured asset could comments only after possession were taken by the later. Section 14 essentially being a method for taking possession, no ads adjudication of a rival claims would be invoked at that stage. The parties have not disputed in this position.”

It has further held that,

“61. The marginal note of section 14 shows what section 14 is all about. It provides an avenue for the secured creditor, when faced with the resistance by the borrower or anyone else, or when the borrower simply refuses to surrender possession, to seek administrative assistance of the CMM/DM to facilitate taking of possession of a secured asset and/or documents in relation thereto to ultimately enable the secured creditor to put up the secured asset for sale and to recover its dues.”

The court has endorsed the view, that the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under

section 13(4) of the act, by providing for an appeal before the DRT. In the said judgment, the Court has relied on and endorsed the following view expressed by the Hon'ble Supreme Court in the case of *V. Nobel Kumar [Standard Chartered Bank vs V. Nobel Kumar]* reported in (2013) 9 SCC 620]:

“27. The appeal under section 17 is available to the borrower against any measure taken under section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under section 13(4). Alienating the asset either by these or sell, et cetera. And appointing a person to manage the secured asset are some of those possible measures. On the other hand, section 14 authorises the Mag only to take possession of the property and forward the asset along with the connected documents to the borrower(sic the secured creditor). Therefore, the borrower is always entitled to prefer an appeal under section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a position is to be obtained directly by the secured creditor or by resorting to the procedure under section 14. We are of the opinion that by whatever manner the secured creditor Upton possession either through the process contemplated under section 14 or without resorting to such a process of obtaining of the possession of a secured asset is always a measure against which a remedy under section 17 is available”.

(28) Thus what the petitioners have argued in this case that, it is not a criminal proceeding against the petitioners but an appeal under the provisions of the SERFAESI Act, 2002, would be the only remedy available to the borrower, under whom the complainant claims herself to be the tenant to occupy the secured asset, appears to be rightly been pointed out. It is the settled position of law, as determined by the courts from time to time, as discussed above.

(29) Having discussed as above this Court may now discuss about the scope and ambit of its powers under section 482 CrPC and for this, reference may be

made to the judgment relied on by the petitioners, that is of ***Inder Mohan Goswami and another (supra)***. The relevant portion may be quoted below:

“Scope and ambit of courts' powers under Section 482 CrPC

23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 CrPC can be exercised:

- (i) to give effect to an order under the Code;***
- (ii) to prevent abuse of the process of court, and***
- (iii) to otherwise secure the ends of justice.***

24. Inherent powers under Section 482 CrPC though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute.

Discussion of decided cases

25. Reference to the following cases would reveal that the courts have consistently taken the view that they must use this extraordinary power to prevent injustice and secure the ends of justice. The English courts have also used inherent power to achieve the same objective. It is generally agreed that the Crown Court has inherent power to protect its process from abuse. In Connolly v. DPP [1964 AC 1254 : (1964) 2 WLR 1145 : (1964) 2 All ER 401 (HL)] Lord Devlin stated that where particular criminal proceedings constitute an abuse of process, the court is empowered to refuse to allow the indictment to proceed to trial. Lord Salmon in DPP v. Humphrys [1977 AC 1 : (1976) 2 WLR 857 : (1976) 2 All ER 497 [HL (E)]] stressed the importance of the inherent power when he observed that it is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. He further mentioned that the court's power to prevent such abuse is of great constitutional importance and should be jealously preserved.”

In this judgment the Hon'ble Supreme Court has also relied on the decision of ***Bhajanlal's***, reported in 1992 Supp(1) SCC 335.

(30) From the entire discussion as above, it appears that the petitioners who in discharge of their bona fide duty, being the employees of the bank, which is admittedly a secured creditor, has entered the premises of the secured asset /property in exercise of the power vested on them by law, cannot be entangled with the liability of criminality in absence of any *actus reus* or *mens rea* on their part, in discharging that function, as alleged against them in this case. It is also settled that a defaulter borrower holds the secured asset, in this case the residence of the defacto-complainant, only in trust or symbolic possession, and even if the petitioners have entered into the said property cannot be marked out as trespassers in 'other's' property. It is also well settled now, that an 'appeal' under the provisions of the SERFAESI Act, and not any criminal proceeding against the recovering creditor, would be the proper and only available course of action available to the borrower, in a case of like nature.

(31) Thus it is found that the ingredients of offence as alleged against the petitioners are not available in this case and the complainant has neither made out any case or any cognizable offence against the present petitioners- in her written complaint. On the other hand the possibility of the same to be the result of malice and personal vendetta of the defacto-complainant, who is to be dispossessed from the concerned property, unless protected by any order of the Tribunal, cannot be ruled out altogether. Under such circumstances it would only be a gross abuse of the process of court to further continue with the prosecution against the present petitioners, which is deprecated in law.

(32) Accordingly, the revision succeeds.

(33) Proceedings in the Court of Additional Chief Judicial Magistrate at Alipore, in ACGR 430 of 2015 , in connection with Netaji Nagar Police Station case No.24 dated 22.01.2015 is quashed and set aside.

(34) Connected applications, if any are also disposed of. Case Diary be returned.

(35) Urgent certified copy of this judgment, if applied for, be given to the parties upon compliance of all legal formalities.

(Rai Chattopadhyay, J.)