IN THE HIGH COURT AT CALCUTTA

Criminal Revisional Jurisdiction

<u>APPELLATE SIDE</u>

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 901 of 2023

Masrur Alam

Vs

The State of West Bengal & Ors.

For the Petitioner	:	Mr. Swarup Banerjee, Mr. Arindam Chatterjee, Mr. Subham Biswas.
For the Opposite Party No. 2/Bank	:	Mr. Manas Dasgupta, Mr. Gourav Das.
Hearing concluded on	:	12.11.2024
Judgment on	:	18.11.2024

Shampa Dutt (Paul), J.:

1. The present revisional application has been preferred against the order dated 31st January, 2023 passed in AC No. 345 of 2023 passed by the learned Additional Chief Judicial Magistrate, Alipore, South 24 Parganas.

2. By the said order the learned Magistrate has been pleased to hold as follows :-

> ***"AC 345 of 2023***
>
> ***Order dated 31.01.2023***
>
> *……Perused the documents annexed to this complaint. Also perused the order of Hon'ble High Court, Calcutta passed in MAT 1050/2022 with CAN 01/22 submitted along with the complaint petition.*
>
> *On consideration of the fact at this outset, I find that the Hon'ble Court opined that the complainant is at liberty to furnish a petition u/s.156(3) Cr.P.C. or u/s. 200 of Cr.P.C. for his cause of concern.*
>
> *On perusal of the instant petition, I find that he impleads innumerable banking officials and other persons as accused in this petition. But the entire document does not wholly substantiate his entire claim at this outset against all of them concerned.*
>
> *More so, it would be correct to say that the prima facie sanctity of the claim of the complainant cannot be rightly unearthed at this stage without placing this matter u/s.200 Cr.P.C. on a proper process of law.*
>
> *As such the application u/s. 156(3) Cr.P.C. for directly treating this petition as FIR is considered and rejected.*

But I am of the view that there is existence of allegation of section 420/406/120B r/w. section 34 of IPC.

Cognizance of offence is taken u/s. 420/406/120B r/w. section 34 of IPC and that matter be transferred to Ld. 5th J.M., Alipore u/s. 192 Cr.P.C.

Fix 01.04.23 appearance and S/A.

Sd/-

ACJM, (I/C), Alipore......"

3. Learned counsel appearing for the petitioner complainant submits that as all documents are not available with the complainant, a police investigation in this case is mandatory. Without a police investigation all the documents as required cannot be placed before the Court for proper adjudication.

4. Learned counsel for the petitioner relies upon the order of the Hon'ble Division Bench dated 9th November, 2022 passed in MAT 1050 of 2022 wherein it appears that the writ Court had been approached with the plea that the petitioner had obtained loan facility from the bank and in default of payment of the loan amount, the account was declared NPA on 13.12.2018 and OTs attempted was made but in default **the bank had initiated proceedings in SARFAESI Act, 2002.**

5. The petitioner herein stated before the writ Court that he had mortgaged property at 24/1A, Chandra Nath Roy Road, Kolkata-700 039 but the bank sold the different property at 24/1, Chandra Nath Roy Road.

6. It was further submitted that the sale certificate was issued and sale deed was executed in respect of the mortgaged property situated at 24/1A, Chandra Nath Roy Road and possession of the said property was taken illegally as alleged by the petitioner. On making a complaint with the police that the action of the bank was fraudulent, no action was taken. Thus, the writ petition was filed.

7. The learned Single Judge dismissed the writ petition on the finding that the issues agitated could not be decided either by the writ Court or the police authorities.

8. The Hon'ble Division Bench considering the extensive argument of the petitioner which appears to be similar to the submission made before this Court today, held as follows :-

> *".....The record reflects that the appellant has already filed SA 323 of 2019 before the DRT-3 at Calcutta and prayer C in that issue is to "set aside the impugned sale of premises NO. 24/1/A, Chandra Nath Roy Road, PS Tiljala, Kolkata 700 039." This is the same property for which the present dispute has been raised.* ***Since the appellant has already approached DRT with the prayer in this regard and the issue is pending in SA 323 of 2019, therefore the appellant should pursue his remedy before DRT. If there is any deficiency in the pleadings in SA 323 of 2019 then the appellant has remedy to file an application and amend the SA so that the challenge to the sale of the premises No. 24/1A, Chandra Nath Roy Road, PS Tiljala, Kolkata 700 039 is not defeated on any technical grand..."***

9. The Hon'ble Division Bench while deciding the scope of interference in SARFAESI matter by the High Court in writ jurisdiction relied upon the judgment of the Hon'ble Supreme Court in ***United Bank of India vs. Satyawati Tondon and Ors. reported in (2010) 8 SCC 110***.

10. Finally, the Hon'ble Division Bench held as follows:-

> *" ....Hon'ble Supreme Court in the matter of* ***Sakiri Vasu Vs. State of Uttar Pradesh and Others reported in (2008) 2 SCC 409*** *has settled that under Section 156(3) of the Cr.P.C., the Magistrate has very wide powers to direct registration of FIR and to ensure proper investigation. In this regard, it has been held that:*
>
> > *"**27.** As we have already observed above, the Magistrate has very wide powers to direct registration of an FIR and to ensure a proper investigation and for this purpose he can monitor the investigation to ensure that the investigation is done properly (though he cannot investigate himself). The High Court should discourage the practice of filing a writ petition or petition under Section 482 CrPC simply because a person has a grievance that his FIR has not been registered by the police, or after being registered, proper investigation has not been done by the police. For this grievance, the remedy lies under Sections 36 and 154(3) before the police officers concerned, and if that is of no avail, under Section156(3) CrPC before the Magistrate or by filing a criminal complaint under Section 200 CrPC and not by filing a writ petition or a petition under Section 482 CrPC."*
>
> *In view of the aforesaid, we are of the opinion that the petitioner should take recourse to the provisions under Cr.P.C. in case of inaction by the police authorities.*
>
> *It is relevant to mention here that the reliefs claimed in the writ petition by the appellant are mainly confined to the inaction of the police authorities for which the petitioner has appropriate remedy under the provisions of Cr.P.C.*
>
> *At this stage learned counsel for the appellant has submitted that the DRT should decide the pending application expeditiously. Hence, we direct that the DRT to decide the pending application expeditiously without granting any unnecessary adjournment.*
>
> *Accordingly, the appeal is disposed of."*

11. Taking the help of the said order the application was filed under Section 156(3) of the Cr.P.C. before the learned Magistrate.

12. The learned Magistrate rejected the application under Section 156(3) Cr.P.C. and directed that a complaint case be registered under Section 200 of the Cr.P.C. Prima facie the Court held that there existed allegations of offence punishable under Sections 420/406/120B read with Section 34 of the IPC and the matter was fixed for solemn S/A.

13. The learned counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court in ***XYZ vs. State of Madhya Pradesh & Ors., reported in 2022 LiveLaw (SC) 676.* Paragraph 18 and 24 reads as follows :-**

> *"**18.** Whether or not the offence complained of is made out is to be determined at the stage of investigation and / or trial. If, after conducting the investigation, the police find that no offence is made out, they may file a B Report under Section 173 CrPC. However, it is not open to them to decline to register an FIR. The law in this regard is clear - police officers cannot exercise any discretion when they receive a complaint which discloses the commission of a cognizable offence.*
>
> ***24.** Therefore, in such cases, where not only does the Magistrate find the commission of a cognizable offence alleged on a prima facie reading of the complaint but also such facts are brought to the Magistrate's notice which clearly indicate the need for police investigation, the discretion granted in Section 156(3) can only be read as it being the Magistrate's duty to order the police to investigate. In cases such as the present, wherein, there is alleged to be documentary or other evidence in the physical possession of the accused or other individuals which the police would be best placed to investigate and retrieve using its powers under the CrPC, the matter ought to be sent to the police for investigation."*

14. On going through the said judgment relied upon it appears that the facts and circumstances in the case relied upon and the facts in the present case are clearly different. The judgment relied upon was passed in a case dealing with the complaints of sexual harassment and sexual assault and the guidelines were laid down by the Hon'ble Supreme Court in such proceedings.

15. As seen from paragraph 24 of the revisional application this Court finds that in the present case the dispute between the parties involves the money of a nationalized bank before the Debt Recovery Tribunal.

16. The accused persons in the present case are admittedly officers of CANARA Bank and should have been implicated along with the bank. But the Bank has not been made an accused in this case.

17. On the other hand, the learned counsel for the opposite parties has relied upon a judgment of this Court passed in CRR 2787 of 2019 passed on 10.05.2024 in ***Bank of Baroda & Ors. vs. M/s Jainex Metalliks Ltd.***, wherein the Court held as follows :-

> *"…**10.** The petitioners have relied upon the judgment in **K. Virupaksha & Anr. Vs The State of Karnataka & Anr.,** reported in **2020 (4) SCC 440.***
>
> > ***"14.** 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 Canara Bank in that regard. The loan admittedly was sanctioned on 16-3-2009. 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 15-1-2013. Initially, the issue raised was only with regard to the undervaluation 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 DRT, which option is also availed. It is only, thereafter, the impugned complaint was filed on 20-5-2016.

***15.** 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 of 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, 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 the SARFAESI Act. This view is fortified by the decision of this Court in Indian Overseas Bank v. Ashok Saw Mill [Indian Overseas Bank v. Ashok Saw Mill, (2009) 8 SCC 366 : (2009) 3 SCC (Civ) 403] wherein it is held as hereunder :*

***"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)"

11. *The petitioners further state that in the instant case the opposite party as borrower has defaulted in payment of monies due to the Bank. In other words, public money due by the opposite party to the Bank has not been repaid and the account of the opposite party has been classified as a 'non-performing asset'.* ***The petitioner bank has initiated proceedings under the SAFAESI Act to recover its dues. By filing the instant petition of complaint the opposite party is attempting to stall the SARFAESI proceeding which is not permissible inasmuch as the petitioner bank which is a nationalized bank is the custodian of public money taking steps to recover its dues by e-auction.***

12. ***In this connection Section 32 of the SARFAESI Act is referred to. It is the absolute domain of the Learned Debts Recovery Tribunal to look into the matters relating to the said SARFAESI action and other Courts have very little role to play in this matter. If the borrower had any grievance with regard to the measures taken by the secured creditor invoking the provisions of Section 13 of the SARFAESI Act the remedy is to take recourse to Section 17 of the***

SARFAESI Act. In the instant case, the opposite party has already taken such recourse under Section 17 of the SARFAESI Act and was unsuccessful therein.

13. *The intention of the legislature is very 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 Learned DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to pass remedial orders. The SARFAESI application of the opposite party has been dismissed by the Learned Debts Recovery Tribunal. Therefore, the initiation of the present petition of complaint before the Criminal Court is an intimidatory tactic and an afterthought which is an abuse of the process of law.*

20. *In* ***M. N. Ojha & Ors. vs Alok Kumar Srivastav & Anr., Criminal Appeal No. 1582 of 2009 (arising out of SLP (crl.) No. 1875 of 2008), on 21 August, 2009,*** *the Supreme Court held:-*

> *"**14.** In our considered opinion, the learned SDJM set the criminal law in motion against the appellants without even examining the allegations and averments made in the complaint filed by the respondent-complainant. The learned SDJM took cognizance of the case without considering the allegations on merits. Had the learned SDJM perused the complaint properly he would have realized that the complainant himself had made a mention about the lodging of the FIR for criminal breach of trust and other offences against the respondent-complainant and others. Had he looked into the complaint properly, he would have certainly asked the complainant to furnish the copy of the said FIR. A copy of the legal notice issued on behalf of the respondent- complainant to the appellants was filed along with the complaint and a mention is made about it in the order passed by the learned SDJM. Had the learned SDJM perused the said legal notice, he would have realized that the complainant himself admitted about his execution of agreement of guarantee and other documents unconditionally agreeing to discharge the loan amount in case of failure of the principal borrower to pay the said amount to the bank. Had the learned SDJM*

applied his mind to the facts and circumstances and sequence of events and as well as the documents filed by the complainant himself along with the complaint, surely he would have dismissed the complaint. He would have realized that the complaint was only a counter blast to the FIR lodged by the Bank against the complainant and others with regard to same transaction. This Court in Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors. [(1998)5 SCC 749 held:

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

The case on hand is a classic illustration of non-application of mind by the learned Magistrate. The learned Magistrate did not scrutinize even the contents of the complaint, leave aside the material documents available on record. The learned Magistrate truly was a silent spectator at the time of recording of preliminary evidence before summoning the appellants.

***15.** The High Court committed a manifest error in disposing of the petition filed by the appellants under Section 482 of the Code without even* *adverting to the basic facts which were placed before it for its consideration. It is true that the court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure cannot go into the truth or otherwise of the allegations and appreciate the evidence if any available on record. Normally, the High Court would not intervene in the criminal proceedings at the preliminary stage/when the investigation/enquiry is pending. Interference by the High Court in exercise of its jurisdiction under Section 482 of Code of Criminal Procedure can only be where a clear case for such interference is made out. Frequent and uncalled for interference even at the preliminary stage by the High Court may result in causing obstruction in progress of the inquiry in a criminal case which may not be in the public interest. But at the same time the High Court cannot refuse to exercise its jurisdiction if the interest of justice so required where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding. In such cases refusal to exercise the jurisdiction may equally result in injustice more particularly in cases where the Complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint. It is well settled and needs no restatement that the saving of inherent power of the High Court in criminal matters is intended to achieve a salutary public purpose "which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. If such power is not conceded, it may even lead to injustice". [See: State of Karnataka Vs. L. Muniswamy (1977) 2 SCC 699). We are conscious that inherent powers do not confer an arbitrary jurisdiction on the High Court to "act according to whim or caprice. That statutory power has to be exercised sparingly, with circumspection and in the rarest of rare cases". [See: Kurukshetra University Vs. State of Haryana (1977) 4 SCC 451].*

16. This is one case where the averments and allegations made in the complaint do

not disclose the commission of any offence by the appellants or any one of them. They were merely discharging their duties to realize and recover the amounts due to the bank from the borrower as well as the guarantors. The complaint obviously has been filed as counter blast to the proceedings already initiated by the bank including the first information report lodged by the first appellant against the complainant and the borrower for the offences of cheating and misappropriation. Sequence of events undoubtedly suggests that the criminal proceedings have been maliciously instituted with an ulterior motive of wreaking vengeance on the appellants and with a view to spite them due to personal grudge. It was clearly intended to prevent the public servants from discharging their duties. The criminal law has been set in motion by the learned SDJM by mere asking to do so by the complainant. The High Court almost abdicated its duty in refusing to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure though the case on hand required its interference in order to prevent abuse of the process by a court subordinate to it. A clear case is made out requiring our interference to secure the ends of justice."

22. The present case *has been filed against a Bank and its officers, when they proceeded under the SARFAESI Act and proceedings before the DRT had been initiated by the opposite party/complainant herein, prior to filing of the present complaint……"*

18. In the present case, the Division Bench of the High Court had directed the petitioner to approach the proper forum **under Cr.P.C.**

19. The learned Magistrate in his wisdom has rightly refused a police investigation as concerning the nature of the allegation against a nationalized bank and its officers who were prima facie carrying out their official duty and as such at this stage it does not require any police investigation.

20. **The learned Magistrate has permitted proceedings under Section 200 of the Cr.P.C. to continue** and, as such, no prejudice has been caused to the petitioner herein who for reasons best known to them are hell-bent on a police investigation, against the officers of a nationalized bank, who prima facie discharged their official duties.

21. **The complaint as made by the complainant is before the Magistrate in a proceeding initiated under Section 200 of the Cr.P.C. and, as such, this Court finds no reason to interfere with the order of the learned Magistrate challenged in the revision and any indulgence shown to the petitioner at this stage shall be sheer of the abuse of the process of law and against the interest of justice.**

22. **The present revisional application being CRR 901 of 2023 is thus dismissed.**

23. The order dated 31st January, 2023 passed in AC No. 345 of 2023 passed by the learned Additional Chief Judicial Magistrate, Alipore, South 24 Parganas is hereby affirmed.

24. The learned Magistrate shall proceed in AC No. 345 of 2023, expeditiously in accordance with law.

25. All connected applications, if any, stand disposed of.

26. Interim order, if any, stands vacated.

27. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

28. Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties expeditiously after due compliance.

(Shampa Dutt (Paul), J.)