THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

W.P.Nos.8910, 8911, 9044, 9045, 9047, 9084, 1204, 1205 and 1206 of 2007

COMMON ORDER:

Heard Sri V.Venkata Ramana, learned Senior Counsel for petitioners in all these Writ Petitions, learned Government Pleader for Cooperation for 2nd respondent and Sri R.N. Hemendranath Reddy, learned counsel for 3rd respondent.

2. The 1st petitioner in W.P.Nos.8910 of 2007, 8911 of 2007, 9045 of 2007 and 9047 of 2007 is the Hyderabad Cooperative Urban Bank Limited (for short 'the Bank'). It was incorporated under the provisions of the provisions of the A.P. Cooperative Societies Act, 1962 (for short "the Act").

THE LOANS GIVEN TO BORROWER BY THE BANK

3. The said Bank granted a cash credit loans to Mohd. Abdullah Khan (hereinafter referred as principal borrower) of (i) of Rs.10 lakhs on 01-06-2000, (ii) Rs.15 Lakhs on 01-06-2000 and (iii) Rs.15 lakhs on 30-08-2000. The said three loans were given loan Account Nos.CC375, CC 374 and CC 419 respectively by 1st petitioner Bank. One Wahaz Mirza stood as surety for the said loans.

4. The borrower's father Baquer Khan had executed a regd. General Power of attorney being doc.No.7264/1982 dt.11-08-1982 in his favor authorizing him to hold, dispose of and even to sell his moveable and immoveable properties. A house bearing Municipal

No.5-8-606 and 5-8-607 of Cellar+ Ground+ 2 floors situated at Abids, Hyderabad belonged to Baquer Khan.

THE EXECUTION OF SIMPLE MORTGAGE DEEDS

5. In respect of all the above loans, as G.P.A Holder of his father Baquer Khan, the borrower executed a registered simple mortgage deed dt.01-06-2000 (doc.No.1626/2000) in respect of *2nd floor* of above house property of built up area of 263.33 sq. ft; registered mortgage deed dt.01-06-2000 (doc.No.1623/2000) for the *ground floor* portion of the same premises of area 263.33 sq. ft.; registered mortgage deed dt.01-06-2000 (doc.No.1624/2000) for the *cellar portion* of the said premises; registered mortgage deed dt.01-06-2000 (doc.No.1625/2000) for the *1st floor* of the above premises admeasuring 145 sq.ft.; and registered mortgage deed dt.01-06-2000 (doc.No.1627/2000) in respect of *ground floor* portion of the same premises of area 263.33 sq.ft.

6. Since these loans were not paid, following proceedings under Section 61(1) of the Act were initiated by the 1st petitioner against the borrower and surety as under:

(1) ARC No.432/2001/J/1 in respect of loan A/c.No.CC375,

(2) ARC No.431/2001/J/1 in respect of loan A/c.No.CC374 and

(3) ARC No.433/2001/J/1 in respect of loan A/c.No.CC419.

These proceedings were taken up by the Cooperative Sub-Registrar/Arbitrator, attached to the Office of the Divisional Cooperative Officer, Charminar Division.

THE DECISIONS IN THE ARCS DT.30.3.2002

7. Three (3) separate awards were passed on 30-03-2002 in the 3 ARCs by the Cooperative Sub-Registrar.

8. In A.R.C.No.432/2001/J/1 it was directed that the borrower shall pay to the Bank, Rs.9,04,358/- as on 30-09-20001 together with interest @ 24% p.a. plus 12% penal interest on the overdue amount and other incidental charges till the date of complete realization of cash credit loan amount within one month from the date of issue of the award and in the event of non-payment by the borrower, it was declared that the 1st petitioner Bank would be entitled to recover the entire dues jointly and severally from the surety or from the movable or immovable properties or both.

9. In A.R.C.No.431/2001/J/1, it was directed that the borrower shall pay to the Bank a sum of Rs.16,58,375/- as on 30-09-2001 together with interest @ 24% p.a. plus 12% penal interest on overdue amount and other incidental charges till the date of complete realization of cash credit loan amount within one month from the date of issue of the award and in the event of non-payment by the borrower, it was declared that the Bank would be entitled to recover the entire due jointly and severally from the surety or from the movable or immovable properties or both.

10. In A.R.C.No.433/2001/J/1, it was directed that the borrower shall pay to the Bank a sum of Rs.20,22,784/- as on

30-09-2001 together with interest @ 24% p.a. plus 12% penal interest on overdue amount and other incidental charges till the date of complete realization of cash credit loan amount within one month from the date of issue of the award and in the event of non-payment by the borrower, it was declared that the Bank would be entitled to recover the entire due jointly and severally from the surety or from the movable or immovable properties or both.

11. In these proceedings, the borrower was served with summons and he attended the Court in person on 29-01-2002 and accepted the liability for the cash credit loans availed by him. He also engaged an Advocate by name Sri G.Hanumanth Reddy, who filed vakalat, but the borrower did not file any written statement even after being given adequate opportunity. The surety, who was 2nd respondent in all these ARCs, was called absent and was set *ex parte*.

12. Assailing these awards, C.T.A. Nos.86, 87 and 88 of 2002 were filed by the borrower.

13. On 30-06-2003, these three appeals were dismissed for default.

ISSUANCE OF SALE CERTIFICATES TO AUCTION PURCHASERS

14. E.P.Nos.8, 9 and 10 of 2003 were filed by the Bank before the competent authority for execution of the said awards.

15. On 26-07-2005, an auction was held against the mortgaged assets and the petitioners in W.P.Nos.12014, 12015 and

12016 of 2007 became the auction purchasers by bidding for a sum of Rs.2.26 crores. On 26-09-2006 sale certificate was also issued to them, but possession of the property was not delivered.

16. The borrower and the surety Wahaj Mirza both filed C.T.A.Nos.89, 90 and 91 of 2006 before the A.P. Cooperative Tribunal to set aside the sale certificates dt.26-09-2006.

17. In the meantime, the borrower filed applications for condonation of delay in seeking to set aside the order dt.30-06-2003 dismissing C.T.A.Nos.86, 87 and 88 of 2002 (which had been dismissed for default on 30-06-2003), to set aside the dismissal orders and restore them to the file of the said Tribunal. These applications were allowed on 19-10-2006 and C.T.A.Nos.86, 87 and 88 of 2002 were restored to the file of the said Tribunal.

THE IMPUGNED COMMON ORDERS DT.9.3.2007

18. Thereafter 3 separate orders were passed by the Tribunal on 09-03-2007 in C.T.A.No.87 of 2002 + C.T.A.No.91 of 2006, C.T.A.No.86 of 2002 + C.T.A.No.90 of 2002 and C.T.A.No.88 of 2002 + C.T.A.No.89 of 2006. In these orders, the Tribunal set aside the award dt.30-03-2002 as well as the sale certificates and remanded the matter back to the Arbitrator/Cooperative Sub-Registrar for fresh adjudication.

19. The Tribunal held:

(i) that the surety was not at all served the summons by the Dy. Registrar of Co-operative Societies before passing of the orders in A.R.Cs. adverse to him and therefore the Awards against him dt.30.03.2002 cannot be sustained and is void;

(ii) that contents of the mortgage deeds do not show that the property bearing Municipal No.5-8-606 and 5-8-607 belonged to Mohd. Baquer Khan and was mortgaged by the borrower in his capacity as G.P.A. of Mohd. Baquer Khan; that even Xerox copy of the title deed of Mohd. Baquer Khan was not found in the records relating to the loan accounts;

(iii) that along with a document titled 'equitable mortgage' dt.01.06.2000 only copy of the G.P.A. No.644 / 1982 dt.17.08.1982, which was the G.P.A. executed by Mohd. Baquer Khan in favour of the borrower was found and it appears that only the said document was deposited with the Bank; and therefore, it cannot be said that the property referred to above belonging to Mohd. Baquer Khan was mortgaged by the borrower in his capacity as G.P.A. of his father Mohd. Baquer Khan with the Bank;

(iv) that there was no pleading that the property in question was mortgaged by the borrower as G.P.A. holder at the instance of the principal though it is mentioned that the borrower offered the said property as collateral security; and it is also not mentioned that the registered mortgage deeds dt.01.06.2000 were executed by the borrower with the Bank.

(v) that the Bank erred in accepting documents executed by the borrower in his capacity as G.P.A. of Mohd. Baquer Khan though the G.P.A. was executed more than two decades back without verifying whether it was still subsisting or not;

(vi) that the initiation of arbitration proceedings without impleading Mohd. Baquer Khan was bad in law and without notice to him, no proceedings can be taken in law against the said property. It went to the extent of saying that had he been impleaded, he might have even taken a plea of denial of execution of the G.P.A. in favour of the borrower and that it is forged;

(vii) that the G.P.A. did not authorize the borrower to mortgage the property and the Bank's plea that power to sell includes the power to mortgage or encumber, cannot be accepted, and therefore the execution of the mortgage by the borrower in respect of the subject property is contrary to law;

(viii) that the G.P.A. is not coupled with any interest and was a revocable document, revocable at the pleasure of the principal;

(ix) that the arbitrator has not followed mandatory procedure contemplated under Rule 49(4) of the Rules framed under the

Act for conduct of arbitration proceedings since Mohd. Baquer Khan was not impleaded and the surety was also not served.

(x) that though the borrower appeared in person and accepted the liability for the cash credit loan availed by him, his statement alone is not sufficient to fasten liability on him since the borrower has denied making such statement in the CTAs and that there was no mention in the arbitrator's Award that the statement of the borrower admitting liability was read over to him and accepted by him; and the Bank ought to have examined an official of the Bank to prove its claim by marking the documents executed by the borrower.

It therefore set aside not only the Arbitration Awards but also the consequent proceedings issuing sale certificates to the auction purchasers though they deposited Rs.2.26 crores with the Bank. According to it, once the Arbitration proceedings are held illegal and void, the subsequent proceedings taken in the E.P. of such award also become null and void.

It rejected the contention of the Bank that no appeal lies under Section 71 of the Act against issuance of a sale certificate at the instance of the borrower and that C.T.A Nos.89, 90 and 91 of 2006 are not maintainable. The remanded the matter to the Arbitrator for fresh disposal and also permitted him to record evidence of the parties and pass a fresh reasoned award.

THE PRESENT WRIT PROCEEDINGS

20. Assailing the same, the Bank filed:

(i) W.P.No.8910 of 2007 challenging the order dt.09-03-2007 in C.T.A.No.91 of 2006,

(ii) W.P.No.8911 of 2007 challenging the order dt.09-03-2007 in C.T.A.No.90 of 2006,

(iii) W.P.No.9044 of 2007 challenging the order dt.09-03-2007 in C.T.A.No.89 of 2006,

(iv) W.P.No.9084 of 2007 challenging the order dt.09-03-2007 in C.T.A.No.86 of 2002,

(v) W.P.No.9045 of 2007 challenging the order dt.09-03-2007 in C.T.A.No.88 of 2002, and

(vi) W.P.No.9047 of 2007 challenging the order dt.09-03-2007 in C.T.A.No.87 of 2002.

21. The auction purchasers by name Ahmed Bin Abdullah, Syed Viquaruddin, Syed Imranuddin and Syed Infanuddin filed W.P.Nos.12014, 12015 and 12016 of 2007 challenging the orders dt.09-03-2007 in C.T.A.Nos.89, 90 and 91 of 2006 of the A.P. Cooperative Tribunal insofar as the sale certificates issued in their favour came to be set aside by the said Tribunal in the above orders.

22. No interim orders were granted in the Writ Petitions.

23. After filing of the Writ Petitions, the Commissioner for Co-operation and Registrar of Co-operative Societies passed order on 29.01.2009 cancelling the Banking licence issued to the Bank to carry on business under Section 22 of the Banking Regulation Act, 1949 invoking Section 69 of the A.P. Co-operative Societies Act, 1964 and directed the Bank to be converted into a Co-operative Credit Society.

Thereafter, the Hyderabad Co-operative Credit Society Limited was incorporated and the properties, assets, effects and actionable claims and liabilities of the Bank as on the date of the orders of conversion were directed to be devolved on the said Society w.e.f. 29.01.2009 and bye-laws of the said Society were registered on 06.06.2009 by the Dy. Registrar / Divisional Co-operative Officer, Charminar Division under Section 16(3) of the Act. Thereafter, the said Society filed applications to implead itself as the 2nd petitioner in W.P.Nos.8910 of 2007, 8911 of 2007, 9045 of 2007 and 9047 of 2007 and the said applications were ordered.

CONTENTIONS OF COUNSEL FOR THE PETITIONERS:

24. Sri V.Venkata Ramana, learned Senior Counsel appearing for the petitioners contended that the common orders passed by the Tribunal are contrary to law and the provisions of the Act and are unsustainable.

25. According to him, the Tribunal proceeded on an incorrect premise that there were no registered simple mortgage deeds and that there was only a mortgage by deposit of title deeds; that the contents of the simple mortgage deeds Nos.1623 to 1627 of 2000 show that different portions of the same property being H.No.5-8-606 and 5-8-607, Abids, Hyderabad were mortgaged to the Bank and the finding of the Tribunal that there is no document creating mortgage over this property is palpably incorrect and is a manifest misreading of evidence.

26. He pointed out that no doubt the recitals therein that Mohd. Baquer Khan is the borrower might be incorrect, but the borrower, who is the executant of the said documents as G.P.A. holder of his own father, cannot take advantage of the same and contend that the property in question was not given as security for the amounts taken by him or by contending that the terms of the G.P.A. executed in his favour by Mohd. Baquer Khan, his father, did not permit such a mortgage of the said property.

27. Even if the surety Wahaj Mirza cannot be made liable for the debts incurred by the borrower, once the borrower receives notice, engages a lawyer, and admits his liability in the arbitration proceedings, the borrower cannot wriggle out of the said liability and deny the said admission of liability itself before the Tribunal.

28. According to him, the G.P.A. holder was the borrower and he could have even sold the property to himself as G.P.A. holder of his father Mohd. Baquer Khan and once power to dispose of property is conferred under a G.P.A., it includes power to subject the property to mortgage also and recitals in the mortgage are not determinative and the right in the property created by the simple mortgage deed continues to bind the borrower.

29. He contends that when there is no denial of the principal Mohd. Baquer Khan at any time about the execution of the G.P.A. and he did not object to any acts of the borrower, the Bank can, on the

basis of the mortgage deeds recover its dues; even if Mohd. Baquer Khan is made a party, he cannot deny the loan transaction and at best he could have repudiated the action of his son and G.P.A. holder and tried to save his property; and so, non-impleadment of Mohd. Baquer Khan cannot be a ground to set aside the sale.

30. According to him, under Rule 52(14) of the Rules framed under the Act, if no application is made to set aside sale, within 30 days from the date of sale, the sale has to be confirmed; that there was no challenge to set aside sale before the Arbitrator and so no appeal can be maintained against issuance of sale certificate and the appeal if at all has to be confined to the question whether it is issued to the rightful person or not.

31. He contended that a Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances (**Rafeque Bibi (Dead) by LRs. Vs. Sayed Waliuddin (Dead) by LRs and others**[1]) and since the borrower has not questioned the sale, the sale certificate cannot be set aside. He stated that Mohd. Baquer Khan died on 07-09-2012 leaving the borrower, a wife and two daughters and none of them can object to the award or the sale of the subject property.

32. Learned counsel for petitioners in W.P.Nos.12014, 12015 and 12016 of 2007 supported and adopted the said contentions.

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[1] (2004) 1 SCC 287

CONTENTIONS OF THE BORROWER:

33. Sri R.N. Hemendranath Reddy, learned counsel for the borrower contended that the orders passed by the Tribunal are correct and do not suffer from any error apparent on the face of the record warranting interference by this Court under Article 226 of the Constitution of India.

34. He contended that any stage in the execution taken up under Rule 52 of the Rules r/w Section 70 of the Act, if an order is passed, it is appealable under sub-Section (1) of Section 76 of the Act and merely because a judgment-debtor/borrower failed to avail remedy provided under Rule 52(14) of the Rules, he cannot be debarred from filing appeal under Section 76(1) of the Act in relation to the sale certificate. He relied on an unreported judgment in **M.Krishna and another Vs. A.P. Co-operative Tribunal, Hyderabad and others**[2], which according to him was affirmed in **Shyam Trading Company Vs. M.Krishna and others**[3] arising out of the same case.

35. According to him, even if the borrower admitted liability, it does not absolve the arbitrator from following the procedure in Rule 49 and that such admission is not conclusive and is only a piece of evidence and it is open to the borrower to show that it is erroneous or

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[2] Order dt.18-09-2003 in W.P.No.13773 of 2003
[3] 2010(4) ALT 97 (D.B.)

untrue. He relied on **Nagubai Ammal and others Vs. B.Shama Rao and others**[4].

36. Even if the borrower was *ex parte*, the arbitrator had an obligation to verify the accounts and records of filing as to the amount due after giving credit to the repayments and decide legality of the interest claimed and the liability of the borrower or guarantor. He relied on **Prasanth Food Products, Secunderabad Vs. A.P. State Co-operative Bank Ltd., Hyderabad and others**[5].

37. He also raised a plea that the decree of the Arbitrator did not specify the immovable property to be sold and that Order 34 CPC was not followed.

38. He also took a plea that the terms of the G.P.A. do not permit mortgage and relied on **Malukchand Bin Gyanmal (original defendant) Vs. Shan Moghan Vardraj (Original plaintiff)**[6] and of the Supreme Court of Manila in **Philippine National Bank Vs. Tan Ong Sze**[7] to contend that no words can be added to the recitals in a G.P.A. and that it must be construed as it stands.

<u>REPLY CONTENTIONS OF PETITIONERS:</u>

39. In reply, Sri V.Venkata Ramana, learned Senior counsel contended that Order 34 C.P.C. applies only to suits and not to proceedings under Section 61 of the Act since it is not a suit; if no

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[4] AIR 1956 SC 593
[5] 2012(3) ALD 742
[6] ILR 14 Bombay 590 (1860)
[7] Case No.G.R.No.30831 dt.02-09-1929

objection is raised to sale within 30 days, under Rule 52(14)(vi) of the Rules, there is no remedy available at all and the sale certificate cannot be questioned; the borrower executed the mortgage deed in favour of the Bank and so he is estopped from setting up any defences which are available to his father Mohd.Baquer Khan on the principle of estoppel by execution and plead on behalf of the other L.Rs. of Mohd.Baquer Khan apart from himself to save the property; so the borrower cannot plead that the terms of the G.P.A. did not authorize him to mortgage the property which can only be raised by Mohd.Baquer Khan and which was not done by him during his lifetime.

40. According to him, Section 61 only permits dispute resolution between borrower and Bank and not third parties to the loan such as Mohd.Baquer Khan and so he was not a necessary party to the arbitration proceedings. He therefore prayed that the Writ Petitions be allowed and the sale certificates in favour of the petitioners in W.P.Nos.12014, 12015 and 12016 of 2007 be confirmed.

POINT FOR CONSIDERATION:

41. Having regard to the above contentions, the following point arises for consideration :

"Whether the three orders passed by the Tribunal setting aside the awards of the Arbitrator and canceling the sale certificate

issued to the auction purchasers are liable to be interfered with in these Writ Petitions ?"

CONSIDERATION BY THE COURT:

42. There is no dispute that the borrower availed cash credit loan of Rs.10 lakhs, Rs.15 lakhs and another Rs.15 lakhs on 01.06.2000 from the Bank under loan account Nos.CC375, 374 and 419.ARC.No.432/2001/J/1, ARC.No.431/2001/J/1 and ARC.No. 433/2001/J/1 are the three proceedings initiated by the Bank against the borrower and the surety Wahej Mirza for recovery of Rs.9,04,358, Rs.16,58,375 and Rs.20,22,784/- as on 30.09.2001 with interest at 24% per annum plus penal interest and other incidental charges till realization of the full loan amount.

43. The borrower attended the Court of the Arbitrator in person on 29.01.2002 accepting his liability for the cash credit availed by him without filing any counter disputing his liability, though he engaged an Advocate G. Hanumanth Reddy in the said proceedings.

44. It is not the case of the borrower in the CTA.No.86, 87 and 88 of 2002 filed under Section 76 of the Act before the Tribunal that he did not make any such admission of liability before the Arbitrator. The grounds of appeal in CTA.No.88 of 2002 filed by the borrower before the Tribunal against the order dt.30.03.2002 in ARC.No.431/2001/J/1 do not contain any such ground raised by him.

45. Ground no.(ii) therein states that adequate opportunity was not given to file written statement and ground (iii) states that ex parte award could not be passed without given any opportunity to him.

46. Both grounds raised by the borrower are not tenable.

47. As regards ground (ii), the arbitration awards themselves show that hearings took place before the Arbitrator on 13.12.2001, 10.01.2002, 21.01.2002, 29.01.2002, 12.02.2002, 28.02.2002, 05.03.2002, 11.03.2002, 19.03.2002 and 27.03.2002 and Award was passed on 30.03.2002. What prevented the borrower from filing a written statement on any of these dates of hearing is not mentioned anywhere by the borrower.

48. As regards ground (iii), having received summons, engaged counsel G.Hanumanth Reddy and having appeared in person and admitted liability before the Arbitrator in the three cases, the borrower cannot contend that the Awards are ex parte awards as far as he is concerned.

49. It is settled law that an admission is the best evidence that an opposing party can rely on, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. (see **Narayan Bhagwantrao Vs. Gopal Vinayak**[8]**).** In the present case, there is no nothing on record to show that the finding about admission

[8] AIR 1960 S.C. 100

of liability by the arbitrator was erroneous or that he withdrew the same before the arbitrator.

50. Only the surety Wahaj Mirza was entitled to raise both above pleas since he did not receive summons admittedly.

51. The decision in **Nagubai Ammal and others** (4 supra) that an admission is not conclusive and can be shown to be erroneous or untrue would apply in a situation where admission is contained in a different document and is sought to be relied upon in a litigation by a party adverse to the party who made the admission. The said decision cannot be relied upon by the borrower because the Bank is not relying on his admission of liability in some other document before the arbitrator to mulct him with liability. He himself admitted liability before the arbitrator with open eyes and later before the Tribunal and this Court tried/is trying to wriggle out of its consequences, which cannot be permitted.

52. The view of the Tribunal that such a statement of the borrower is not sufficient to fasten liability on the borrower, cannot be sustained. It’s further view that admission of liability by the borrower on 29-01-2002 before the Tribunal is contradicted by contents of note file, also cannot be sustained. Also when there is no contention raised in the grounds of appeal in the CTA.Nos.86, 87 and 88 of 2002 that he did not make any such admission of liability on 29.01.2002, it ought not to have permitted the borrower to raise such a plea in oral

submissions. It also ought not to have held that the contents of the statement made by the borrower voluntarily on 29.01.2002 should have been read over to him and must be noted as admitted by him to be true and correct. When there is a clear and unambiguous admission of liability by a borrower before it, the Tribunal ought not to have said that the Bank must still prove its claim by examining its officials and marking documents executed by the borrower.

53. All such findings of the Tribunal are clearly perverse and unsustainable.

AS REGARDS THE BORROWER, RULE 49(4) NOT VIOLATED

54. As regards the finding of the Tribunal that there is a violation of Rule 49(4) of the Rules, the said Rule only requires the arbitrator to briefly note the evidence of the parties and the witnesses, consider the documentary evidence and pass a decision in accordance with justice, equity and good conscience. Insofar as the surety is concerned, it may be correct to say that Rule 49 (4) is violated, but, as regards the borrower, its finding is incorrect. In my considered opinion, as regards the borrower, in the light of his admission of liability, it cannot be said that there is any violation of Rule 49(4) at all.

THE GPA AUTHORISED THE EXECUTION OF MORTGAGE DEEDS BY BORROWER

55. The further contention of the borrower that the borrower's farther Mohd. Baquer Khan did not authorize execution of

mortgage in the GPA executed by him in favor of the borrower and so the regd. simple mortgage deeds cannot create any security of the subject property in favor of the Bank, is also without any merit.

56. Clause (1) and (2) of the registered General Power of Attorney executed by Mohd. Baquer Khan in fvour of his son Mohd. Abdullah Khan (the borrower), states:

> "(1) To acquire, hold, lease out and *dispose of* my property, both movable and immovable including securities, fixed deposits etc. for me and on my behalf.
>
> (2) To manage, lease out and sell any property, belonging to me or which may belong to me henceforth..."

57. Since the power to lease and sell any property belonging to Mohd. Baquer Khan is specifically conferred by clause (2) on the borrower, the word "dispose of" used in clause (1) may not include power of lease or sale of the property. So what do the words "*dispose of*" property mean?

58. In **Northumberland Vs. A.G.**[9]**,** Lord Macnaghten held:

> *"The terms '**disposition**' and 'devolution' cover every mode by which property can pass, whether by act of parties or by act of the law."*

59. The Supreme Court in **Madras Refineries Limited Vs. Board of Revenue, Madras**[10]**,** approved the definition of the term '**disposition**' in Stroud's Judicial Dictionary wherein the said author defined it as "*a devise intended to comprehend a mode by which*

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[9] 1905 A.C. 406
[10] AIR 1977 S.C. 500

property can pass, whether by act of parties or by an act of law and includes a transfer and charge of property."

60. Therefore in my considered opinion, the term '*dispose of*' used in clause (1) of the registered General Power of Attorney executed by Mohd. Baquer Khan in favour of the borrower would cover all modes by which property can pass and will definitely cover a "mortgage" also.

61. I therefore do not agree with the view expressed by the Mumbai High Court in **Malukchand (6 supra)** and **Tan Ong Sze (7 supra)** cited by the counsel for the borrower that the term 'dispose of' used in a power of attorney does not confer on the agent, the power to pledge or mortgage property.

MOHD.BAQUER KHAN'S FAILURE TO QUESTION MORTGAGE DEEDS AMOUNTS AT ACQUIESCENCE BY HIM OF SAID TRANSACTIONS

62. These simple mortgage deeds are registered transactions under the Registration Act, 1908. Under Section 3 of the Transfer of Property Act, 1882, registration is public notice of a transaction affecting a property and Mohd. Baquer Khan is deemed to be aware of it. (see **Suraj Lamps & Industries (P) Limited Vs. State of Haryana**[11]). Even otherwise, the borrower being none other than his son, the normal course of human conduct would lead to the presumption that with the knowledge of Mohd. Baquer Khan only, the simple mortgage deeds were executed by the borrower pursuant to the

[11] (2009) 7 S.C.C. 363

power conferred on him under the registered General Power of Attorney.

63. Admittedly Mohd. Baquer Khan died on 07-09-2012. During his lifetime he never questioned the mortgage transactions covered by the simple mortgage deeds under which his property was given as security to the loans given to his son, the borrower. Therefore he is deemed to have acquiesced in the said transactions.

64. Had he intended to question the said simple mortgage deeds executed in favour of the Bank by his son, the borrower, he should have filed suits for cancellation of the same within period of limitation or got impleaded in the arbitration proceedings. As held in **Rafique Bibi** (1 supra), unless the right remedy is sought by the right person in the right proceedings, a Court cannot invalidate an order or transaction.

NO NEED TO IMPLEAD MOHD.BAQUER KHAN

65. Even the borrower did not raise any plea before the arbitrator that his father Mohd. Baquer Khan ought to be impleaded.

66. So the borrower cannot contend *and* the Tribunal ought not to have held that Mohd. Baquer Khan should have been impleaded as a party in the arbitration proceedings by the Bank.

67. In my opinion, the Bank had no obligation in law to implead the surety in the arbitration proceedings since the simple mortgage deeds were not impugned by Mohd. Baquer Khan. So

recovery of loans taken by the borrower from it cannot be stalled by the borrower on the said plea.

CONTENTIONS WHICH COULD HAVE BEEN RAISED BY MOHD.BAQUER KHAN CAN'T BE RAISED BY BORROWER

68. Even otherwise, such a defence i.e. that Mohd. Baquer Khan did not authorize execution of 'mortgage' in the GPA executed by him in favor of the borrower and so the regd. simple mortgage deeds cannot create any security of the subject property in favor of the Bank, is at best available to Mohd. Baquer Khan only but not to the borrower.

69. This is because firstly the registered simple mortgage deeds had been executed by the borrower himself in his capacity as agent of his father Mohd. Baquer Khan under the General Power of Attorney executed by the latter. Also because on the death of Mohd. Baquer Khan, as his heir, the borrower is precluded from raising such a plea at all on the basis of doctrine 'feeding the grant by estoppel'.

70. In fact in **G.Raju and others Vs. Government of Andhra Pradesh**[12]**,** it has been held by this Court that when the mortgager, who is the exclusive owner of the property, did not object to the sale of the property, which was mortgaged to the Bank, it is not for the borrower, who defaulted in repayment of the loans, to question the sale on the ground that procedure under Rule 52 was not followed.

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[12] 2011 (1) ALD 310

71. The further contention of the borrower that the recitals in the simple mortgage deeds seem to suggest that Mohd. Baquer Khan was himself a borrower and not his son Mohd. Abdullah Khan (who is in fact the borrower), and so they cannot be relied upon by the Bank, is equally without merit. This contention also was open to Mohd. Baquer Khan only to urge and not to the borrower for the same reasons mentioned in para-69 supra.

72. The tribunal's view that the Bank erred in accepting documents executed by the borrower in his capacity as G.P.A. of Mohd. Baquer Khan though the G.P.A. was executed more than two decades back without verifying whether it was still subsisting or not is unsustainable. It is for the borrower or his father Mohd.Baquer Khan to show that it was not subsisting and had been revoked, but no such evidence was adduced by either of them anywhere. It's view that if Mohd. Baquer Khan had been impleaded, he might have even taken a plea of denial of execution of the G.P.A. in favour of the borrower and that it is forged, is hypothetical and perverse.

<u>BORROWER CAN'T TAKE ADVANTAGE OF HIS OWN WRONG</u>

73. Also the borrower himself signed the simple mortgage deeds as General Power of Attorney Holder of his father Mohd. Baquer Khan. It cannot be accepted that he did not read the said documents before signing it before the Sub Registrar. So it has to be held that he is responsible for incorporation of recitals that Mohd. Baquer Khan is the borrower (and not Mohd. Abdullah Khan i.e.

himself). He therefore cannot be allowed to take advantage of his own wrong and plead that the property cannot be sold for the said reason.

74. A three Judge Bench of the Supreme Court declared this in **Union of India v. Maj. Gen. Madan Lal Yadav**[13] in the following terms:

> *"Even if narrow interpretation is plausible, on the facts in this case, we have no hesitation to conclude that the trial began on 25-2-1987 on which date the court martial assembled, considered the charge and the prosecution undertook to produce the respondent who was found escaped from the open detention, before the Court. It is an admitted position that GCM assembled on 25-2-1987. On consideration of the charge, the proceedings were adjourned from day to day till the respondent appeared on 2-3-1987. It is obvious that the respondent had avoided trial to see that the trial would not get commenced. Under the scheme of the Act and the Rules, presence of the accused is a precondition for commencement of trial. In his absence and until his presence was secured, it became difficult, nay impossible, to proceed with the trial of the respondent-accused. In this behalf, the maxim nullus commodum capere potest de injuria sua propria — meaning no man can take advantage of his own wrong — squarely stands in the way of avoidance by the respondent and he is estopped to plead bar of limitation contained in Section 123(2). In Broom's Legal Maxim (10th Edn.) at p. 191 it is stated:*
>
> > *"… it is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits*

[13] (1996) 4 SCC 127

of illustration from every branch of legal procedure."

The reasonableness of the rule being manifest, we proceed at once to show its application by reference to decided cases. It was noted therein that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law. In support thereof, the author has placed reliance on another maxim frustra legis auxilium invocat quaerit qui in legem committit. He relies on Perry v. Fitzhowe[3]. At p. 192, it is stated that if a man be bound to appear on a certain day, and before that day the obligee puts him in prison, the bond is void. At p. 193, it is stated that "it is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned". At p. 195, it is further stated that "a wrong doer ought not to be permitted to make a profit out of his own wrong". At p. 199 it is observed that "the rule applies to the extent of undoing the advantage gained where that can be done and not to the extent of taking away a right previously possessed".

75. This principle was again reiterated recently in **Devendra Kumar v. State of Uttaranchal**[14] in the following terms:

"25. …..A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent court. In such a case the legal maxim nullus commodum capere potest de injuria sua propria applies. The persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. (Vide ***Union of India v. Major General Madan Lal Yadav and Lily Thomas v. Union of India***[15]*) . Nor can a person claim any right arising out of his own wrongdoing (jus ex injuria non oritur)."*

[14] (2013) 9 SCC 363
[15] (2000) 6 SCC 224

ORDER 34 CPC INAPPLICABLE

76. The contention of the borrower that Order 34 CPC is not followed by the arbitrator is without any merit because the proceeding before the arbitrator is not a suit in a Civil Court and the procedure under Rule 52 framed under the Act is a comprehensive procedure and is a complete code by itself.

APPEALS BY BORROWER CHALLENGING SALE CERTIFICATES MAINTAINABLE

77. As regards the question raised by the petitioners as to whether an appeal to be maintained under Section 76 of the Act before the Tribunal against issuance of sale certificate by the competent authority, I am of the view that having regard to the language contained in sub Section (1) of Section 76, such an appeal would be maintainable notwithstanding the fact that objection to the sale was not raised within the 30 days' time period prescribed in Rule 52 (14) (1), because the said Section prevails over the said Rule.

TRIBUNAL'S VIEW LEADS TO GROSS INJUSTICE

78. In **Ritesh Tewari and another v. State of Uttar Pradesh and others**[16], the Supreme Court held that a Court of equity must act so as to prevent perpetration of a legal fraud and promote good faith and equity and the Court must advance the cause of justice and not to thwart it.

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[16] (2010) 10 SCC 677

79. This was reiterated in **V. Chandrasekaran v. Administrative Officer**[17], where the Court held:

> " *44….Whenever a person approaches a court of equity, in the exercise of its extraordinary jurisdiction, it is expected that he will approach the said court not only with clean hands but also with a clean mind, a clean heart and clean objectives. Thus, he who seeks equity must do equity. The legal maxim* ***jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem****, means that it is a law of nature that one should not be enriched by causing loss or injury to another. (Vide* ***Ramjas Foundation v. Union of India***[18]***, Noorduddin v. K.L. Anand***[19] ***and Ramniklal N. Bhutta v. State of Maharashtra***[20]***.****)*
>
> ***45.*** *The judicial process cannot become an instrument of oppression or abuse, or a means in the process of the court to subvert justice, for the reason that the court exercises its jurisdiction, only in furtherance of justice. The interests of justice and public interest coalesce, and therefore, they are very often one and the same. A petition or an affidavit containing a misleading and/or an inaccurate statement, only to achieve an ulterior purpose, amounts to an abuse of process of the court.*
>
> ***46.*** *In* ***Dalip Singh v. State of U.P.***[21] *this Court noticed an altogether new creed of litigants, that is, dishonest litigants and went on to strongly deprecate their conduct by observing that the truth constitutes an integral part of the justice delivery system. The quest for personal gain has become so intense that those involved in litigation do not hesitate to seek shelter of falsehood, misrepresentation and suppression of facts in the course of court proceedings. A litigant who attempts to pollute the stream of justice, or who*

[17] (2012) 12 SCC 133
[18] (1993) Supp 2 SCC 20
[19] (1995) 1 SCC 242
[20] (1997) 1 SCC 134
[21] (2010) 10 SCC 114

touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."(emphasis supplied)

80. Applying the above principles, if the borrower is allowed to raise the above referred technical pleas and seek to escape liability to pay money to the Bank which he admitted before the arbitrator, it would be a travesty of justice and it cannot be permitted. The Tribunal lost sight of this basis principle of justice and granted relief to the borrower by allowing his appeals accepting the hyper technical pleas raised by him, which have no merit.

81. For the aforesaid reasons, all the Writ Petitions are allowed; orders dt.09-03-2007 in C.T.A.Nos.86, 87, 88 of 2002 as well as C.T.A.Nos.89, 90 and 91 of 2006 are set aside; the sale confirmation orders dt.26-09-2006 in E.P.Nos.8, 9 and 10 of 2005 of the Dy. Registrar/Divisional Cooperative Officer, Charminar Division in favour of the petitioners in W.P.No.12014, 12015 and 12016 of 2007 are declared as valid and enforceable; the sale certificates issued to the said petitioners pursuant to the said orders are held valid; and they are entitled to delivery of possession of the property mentioned therein from the borrower or other persons in possession thereof. No costs.

82. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 22-09-2017
Vsv/Kvr