

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms. JUSTICE J.UMA DEVI

+ Writ Petition Nos.9213 and 10758 of 2018

% Date: 30-4-2018

Mohammed Mukhtar Ali Khan,
S/o Late Nawab Hoshdar Khan, Occ: Business,
Aged: 66 years, R/o H.No.1-2-597/19,
Lower Tank Bund, Domalguda, Hyderabad

... Petitioner

Vs.

\$ 1. The Union of India, Ministry of Finance,
Dept. of Revenue, Rep. by its Secretary, New Delhi

2. Sri R.Mallikarjuna, Presiding Officer,
DRT-I, Hyderabad, Former Manager, Andhra Bank,
Triveni Complex, Abids Road, Hyderabad

3. The DRT, Rep. by its Registrar,
Triveni Complex, Abids, Hyderabad

4. A.P. State Financial Corporation Ltd.,
Rep. by its Authorised Officer & AGM, Ground Floor,
M.No.5-9-194, Chirag Ali Lane, Hyderabad

5. Mehtab Constructions (P) Ltd.,
Office at 8-2-311/B, Mehtab Avenur,
Road No.10, Banjara Hills, Hyderabad,
Rep. by its M.D. Mohd. Asif Ali Khan
and Director Mrs. Asra Khatoon

... Respondents

! Counsel for Petitioner: Mr. Rakesh Sanghi

Counsel for Respondent No.1: Mr. K.Lakshman,
Asst. Solicitor General

Counsel for Respondent No.4: Mr. Y.N. Lohita,
Standing Counsel

< Gist:

> Head Note:

? Cases referred:

1. AIR 2004 SC 2371
2. (2010) 11 SCC 1
3. (2008) 1 SCC 125
4. (2009) 8 SCC 646

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms. JUSTICE J.UMA DEVI

Writ Petition Nos.9213 and 10758 of 2018

Common Order: (per V.Ramasubramanian, J.)

The petitioner has come up with the above writ petitions challenging the dismissal of certain interlocutory applications filed by him before the Debts Recovery Tribunal-I, Hyderabad, in two pending Securitisation Appeals.

2. Heard Mr. Rakesh Sanghi, learned counsel for the petitioner, Mr. K.Lakshman, learned Assistant Solicitor General of India appearing for the 1st respondent and Mr. Y.N. Lohita, learned Standing Counsel appearing for the 4th respondent/Corporation.

3. The averments with which the petitioner has come up with the above writ petitions are:-that the 5th respondent in these 2 writ petitions sought term loans of various amounts from the 4th respondent herein; that the 4th respondent is a State Financial Corporation; that on the basis of the project report and financial report submitted by the 5th respondent and on the basis of the certification by the officials of the 4th respondent about the creditworthiness of the 5th respondent, the petitioner was misled into executing a mortgage deed dated 04-11-2010 and an agreement of guarantee dated 04-11-2010 in favour of the 4th respondent, for securing the due repayment of the term loans given by the 4th respondent to the 5th respondent; that thereafter the 5th respondent executed a loan agreement, a deed of hypothecation etc; that under the agreements, the loan was to be repaid by the 5th

respondent in equated monthly instalments; that the entire loan amount was also disbursed by the 4th respondent to the 5th respondent; that to the utter shock and dismay of the petitioner, the 4th respondent issued a demand notice on 06-11-2012 under Section 13(2) of the Securitisation Act, 2002, putting the petitioner on notice for the first time about the default committed by the 5th respondent; that the petitioner issued a reply dated 10-11-2012 seeking the photo copies of all the documents, the project report and financial statements submitted by the 5th respondent to the 4th respondent, the inspection notes and inspections reports of the 4th respondent, which formed the basis for the grant of loan and the entire statement of accounts; that by a letter dated 16-11-2012, the 4th respondent issued copies of the unregistered memorandum of deposit of title deeds, unregistered hypothecation deed, loan agreement, agreements of guarantee, special terms and conditions and computer generated accounts; that the 4th respondent failed to furnish documentary evidence to substantiate the debit entries, in violation of the provisions of Section 34 of the Indian Evidence Act, 1872; that the accounts statement was also not prepared in a manner contemplated by the Constitution Bench judgment of the Supreme Court; that therefore the petitioner issued a legal notice dated 26-11-2012 pointing out that he had been subjected to a major hoax on account of a conspiracy between the officials of the 4th respondent and the 5th respondent; that the *modus operandi* was that the 5th respondent was merely a shell company without any plant, machinery, equipments, work in

progress etc., but a project report was prepared and was approved by the officials of the 4th respondent by playing fraud; that the 5th respondent is not doing any business of any nature; that though the officials of the 4th respondent were fully aware of the true nature of the 5th respondent and the bogus nature of the project report and financial report submitted by them, the officials of the 4th respondent suppressed these facts and fraudulently induced and misled the petitioner into signing the mortgage deed and deed of guarantee, on account of which Sections 142 and 143 of the Indian Contract Act, 1872 got attracted; that even suppression of material facts constitutes fraud as defined in Section 17 of the Indian Contract Act and Section 415 IPC; that the officials of the 4th respondent were bound to protect the guarantors' interest as they were privy to the fraud committed by the 5th respondent; that right from the beginning the officials of the 4th respondent concealed and suppressed most vital evidence of the entire transaction; that a possession notice dated 17-12-2012 was issued under Section 13(4); that in view of the concealment of material particulars and suppression, the notices under Section 13(2) and 13(4) constituted a violation of the ratio laid down in **Mardia Chemicals Ltd. v. Union of India**¹, that the letters dated 16-11-2012 and 14-12-2012 issued by the 4th respondent would disclose that their officials were hiding specific documents and information in respect of the fraudulent and fictitious project report; that therefore the petitioner filed securitisation appeals in S.A.Nos.44 and 45 of 2013 on the file of the Debts Recovery Tribunal-I, Hyderabad, challenging the possession notice dated 17-12-2012

¹ AIR 2004 SC 2371

and auction notice dated 11-02-2014; that the petitioner also filed interlocutory applications in I.A.Nos.1724, 1725, 1732 and 1733 of 2013, in both the appeals, seeking to adduce evidence and also for production of certain crucial documents suppressed by the 4th respondent; that though the Tribunal is not deciding in an appeal under Section 17, the question whether the amount claimed by the Finance Corporation is a valid debt or not, they are obliged to consider the petitioner's *bona fide* and legitimate demand in terms of the provisions of Section 13(3A), which uses the expression "consider"; that the 2nd respondent herein who is now holding charge as the Presiding Officer of Debts Recovery Tribunal-I, was formerly a Manager of Andhra Bank; that he had been appointed to the Tribunal in terms of the provisions of the Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and other conditions of Service of Members) Rules, 2017 issued in GSR 514(E) and Gazette Notification dated 01-6-2017; that the petitioner has already filed two writ petitions in W.P.Nos.3444 and 4757 of 2018 on the file of this Court challenging the appointment of the 2nd respondent as the Presiding Officer of Debts Recovery Tribunal-I; that in those writ petitions, the petitioner has pleaded that the 2nd respondent is incapable of discharging judicial functions, as he lacks judicial knowledge and adequate training; that the 2nd respondent is possessed of a typical bureaucratic mindset and is sympathetic to the cause of the Banks and hostile to the cause of the borrowers/guarantors; that the 2nd respondent is virtually turning a deaf ear to and ignoring all the mistakes and frauds committed by the Banks;

that even in cases of this nature where fraud and irregularity committed by the Financial Institution are apparent on the face of the record, the 2nd respondent is victimising the litigant by frustrating a trial/dispassionate enquiry; that the 2nd respondent is incapable of understanding the pleadings and issues involved and his entire endeavour is to somehow or the other pass a cryptic, arbitrary and whimsical orders in favour of the Banks; that even during the pendency of the writ petitions W.P.Nos.3444 and 4757 of 2018 challenging his very appointment, the 2nd respondent vindictively dismissed all the interlocutory applications and that therefore the petitioner was compelled to come up with the above writ petitions challenging the dismissal of the interlocutory applications I.A.Nos.1724, 1725, 1732 and 1733 of 2013 in S.A.Nos.44 and 45 of 2013.

4. We have taken pains to cull out all the pleadings contained in paragraphs-1 to 21 of these writ petitions, as though we were dealing with a first appeal, under Section 96 CPC despite the fact that we are dealing with a writ petition. This is for a special reason that we shall advert to at the appropriate stage.

5. Before analysing the pleadings with which the petitioner has come up with the above writ petitions, some basic facts forming the background of the case need to be taken note of. These basic facts are as follows:

(i) In September, 2010, the 5th respondent applied to the 4th respondent/Corporation for a term loan and the term loan was sanctioned;

(ii) On 04-11-2010, the petitioner executed a deed of mortgage and a separate deed of guarantee;

(iii) The 5th respondent executed a loan agreement, a deed of hypothecation and an agreement of guarantee, all dated 06-11-2010;

(iv) A demand notice under Section 13(2) dated 06-11-2012 was issued;

(v) The petitioner issued a reply dated 10-11-2012 seeking copies of all the documents forming the basis for the sanction of loan and for the demand;

(vi) The Corporation issued a reply dated 16-11-2012 along with the copies of certain documents;

(vii) Thereafter, the petitioner issued a legal notice dated 26-11-2012 claiming that he has been subjected to a major hoax on account of a conspiracy between the officials of the 4th respondent and the 5th respondent;

(viii) The Financial Corporation thereafter issued a possession notice dated 17-12-2012 under Section 13(4) of the Securitisation Act;

(ix) Challenging the possession notice dated 17-12-2017, the petitioner filed S.A.Nos.44 and 45 of 2013;

(x) After the filing of S.A.Nos.44 and 45 of 2013 under Section 17, the Bank issued an auction notice dated 11-02-2014;

(xi) Therefore, the petitioner filed applications for amendment of the prayer column in his appeal. The amendment was ordered on

14-3-2014 and thus a prayer for setting aside the auction notice was added in the column relating to the reliefs sought;

(xii) In S.A.Nos.44 and 45 of 2013, the petitioner filed two sets of applications. They were – (a) I.A.Nos.1724 and 1732 of 2013 in S.A.No.44 of 2013 praying respectively for permission to adduce evidence in the main securitisation appeal to expose the entire fraud and for a direction to the 4th respondent/Corporation to produce certain documents, and (b) I.A.Nos.1725 and 1733 of 2013 in S.A.No.45 of 2013 praying respectively for permission to adduce evidence in the main appeal and for a direction to the 4th respondent/Corporation to produce certain documents;

(xiii) When these four interlocutory applications were taken up by the Debts Recovery Tribunal for hearing, as they were already more than four years old, the petitioner came up with two writ petitions in W.P.Nos.3444 and 4757 of 2018 challenging the qualifications prescribed under Entry No.8(b) in the Schedule under Rule 3 of the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other conditions of Service of Members) Rules, 2017, issued on 01-6-2017 in exercise of the delegated legislation under Section 184 of the Finance Act, 2017, as being violative of the prescription contained in Section 5 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 and also as being violative of the law laid down by the Constitution Bench of the Supreme Court in ***Union of India v. R.Gandhi***²;

(xiv) In those writ petitions W.P.Nos.3444 and 4757 of 2018, the petitioner prayed for a stay of all further proceedings in

² (2010) 11 SCC 1

S.A.Nos.44 and 45 of 2013. But this Court refused to grant interim stay, since there can be no presumption at the stage of interlocutory applications that a statutory rule is *ultra vires* the Act or the Constitution. The Court cannot presume that the appointment of a Presiding Officer is illegal especially on the basis that the rule in terms of which he was appointed, is *ultra vires* the Statute or the Constitution. Therefore, despite fervent appeals by the learned counsel for the petitioner that a usurper to office cannot adjudicate a lis, we did not grant stay of further proceedings pending those writ petitions;

(xv) In the meantime, the Presiding Officer of the Tribunal took up the two sets of interlocutory applications filed in both the securitisation appeals and dismissed the same by separate orders;

(xvi) Therefore, challenging the common order passed on 28-02-2018 in I.A.Nos.1724 and 1732 of 2013 in S.A.No.44 of 2013, the petitioner has come up with one of the above writ petitions viz., W.P.No.10758 of 2018. Similarly, the petitioner has come up with the other writ petition W.P.No.9213 of 2018 challenging the common order dated 28-02-2018 passed in I.A.Nos.1725 and 1733 of 2013 in S.A.No.45 of 2013;

(xvii) In the meantime, the first two writ petitions W.P.Nos. 3444 and 4757 of 2018 came up for orders as to admission. At that time, the learned Assistant Solicitor General produced a copy of the amendment made to the Recovery of Debts due to Banks and Financial Institutions Act, 1993. Under the Finance Act, 2017, Section 6A has been inserted in the 1993 Act. Section 6A contains a

non-obstante clause. Though Section 5 of the 1993 Act stipulates that a person shall not be qualified for appointment as the Presiding Officer of a Tribunal, unless he is or has been or is qualified to be a District Judge, Section 6A inserted by way of amendment through the Finance Act, 2017, makes it clear that notwithstanding anything contained in the Act, the qualifications and other terms and conditions of service of the Presiding Officers appointed after the commencement of Part-14 of Chapter-VI of the Finance Act, 2017, shall be governed by the provisions of Section 184 of that Act. Entry No.8(b) in the Schedule forms part of the Rules issued on 01-6-2017, in exercise of the powers conferred under Section 184 of the Finance Act, 2017;

(xviii) After being enlightened about the fact that Entry No.8(b) in the Schedule under Rule 3 of the 2017 Rules is not *ultra vires* the Act in view of the insertion of Section 6A with a non-obstante clause, the petitioner came up with applications for amendment of his prayers in W.P.Nos.3444 and 4757 of 2018, so as to include a challenge to the Constitutional validity of Section 6A of the 1993 Act;

(xix) Though we permitted the petitioner to amend the prayers in W.P.Nos.3444 and 4757 of 2018 so as to include a challenge to Section 6A of the 1993 Act, we refused to stay further proceedings, in view of the fact that there is a presumption in favour of the Constitutional validity of a statutory prescription. The Court cannot presume a provision in a Parliamentary Enactment to be unconstitutional and grant a stay on that basis. Therefore, we simply admitted W.P.Nos.3444 and 4757 of 2018 and posted the

writ petitions to the month of June, 2018, for a counter affidavit to be filed by the Government of India. The reason as to why we directed the Union of India to file a counter is that the question whether Section 6A of the 1993 Act would stand the test of scrutiny in the light of the Constitution Bench judgment of the Supreme Court in *R.Gandhi*, still requires consideration;

(xx) Since we did not grant stay of further proceedings in the first two writ petitions, the learned counsel for the petitioner submitted written arguments in these two writ petitions viz., W.P.Nos.9213 and 10758 of 2018 and requested us to pass orders. Therefore, we have taken up these two writ petitions, since there is no challenge in these writ petitions to any statutory prescription. The challenge in these two writ petitions is only to the orders passed by the Tribunal in two sets of interlocutory applications in two pending securitisation appeals.

6. As we have recorded earlier, the learned counsel for the petitioner filed written arguments purportedly under Order XVIII, Rule 2(3A) of the Code of Civil Procedure. Without standing on formalities as to the application of the said provision to the proceedings under Article 226, we shall take the written arguments into consideration.

7. It is seen from the written arguments that paragraphs-1 to 21 of the Affidavits in support of the writ petitions have been converted into paragraphs-1 to 21 of the written arguments. The only difference appears to be that in the Affidavit in support of the writ petition, some of the paragraphs begin with the words "I submit". But in the written arguments, these words have been substituted by the

words "It is submitted". Similarly, the petitioner has raised 12 grounds as the grounds of attack to the impugned order. The very same 12 grounds are repeated in the written arguments. It is precisely for this reason that much against our wish, despite the fact that we are dealing with writ petitions, we reproduced the contents of the Affidavit (though in simple terms), in paragraph-3 above.

8. Before we proceed to consider the grounds of attack, we should also point out that ***the contents of the writ petition and the written arguments can be categorised into two parts, the first part attacking the officials of the State Financial Corporation and the second part attacking the Presiding Officer of the Debts Recovery Tribunal.*** (May be our turn will come next). We shall first take up the attack on the officials of the State Financial Corporation.

Attack on the officials of the Finance corporation

9. The grievance of the petitioner as against the 4th respondent/Financial Corporation is that it is only based upon the assurances of the officials of the 4th respondent regarding the creditworthiness of the 5th respondent/borrower that the petitioner was misled into creating a mortgage of his property and execute an agreement of guarantee. In simple sentences, the averments in paragraphs-2 to 4 of the Affidavits in support of the above writ petitions (equivalent to paragraphs-2 to 4 of the written submissions) can be stated as follows:

(i) That the 5th respondent approached the 4th respondent for a term loan in September, 2010 and presented a project report and

financial report, disclosing respectively their business activities and creditworthiness;

(ii) That it was recorded by the 4th respondent that the 5th respondent was engaged in construction activities in Banjara Hills, Hyderabad, that they possessed a net effective capital of a particular status and that the 5th respondent was also possessing substantial plant, machinery and equipment for carrying out civil contract works;

(iii) That the 4th respondent represented to the petitioner that its officials specifically entrusted with the task of checking, verifying and corroborating the creditworthiness and genuineness of the 5th respondent were fully satisfied and convinced about the 5th respondent's genuineness and the possession of the assets by the 5th respondent; and

(iv) That the aforesaid assurances of the officials of the 4th respondent regarding the creditworthiness of the 5th respondent, made the petitioner gullible and foolish enough to be fraudulently misled into executing a registered mortgage deed and an agreement of guarantee.

10. At the outset, it should be pointed out that the above averments contained in paragraphs-2 to 4 of the affidavit in support of the writ petition are liable to be rejected outright for the following reasons:

(i) It is not the case of the petitioner that he never knew the persons in Management of the borrower company (5th respondent herein). On the contrary, there are indications to suspect that the

petitioner is the brother of the Managing Director of the 5th respondent ;

(ii) It is not the case of the petitioner that the 5th respondent was a total stranger to him and that it was the officials of the 4th respondent who introduced him to the 5th respondent;

(iii) The petitioner has not been able to name a single officer of the 4th respondent/Finance Corporation, who allegedly made the assurances about the genuineness and creditworthiness of the 5th respondent. Even in the securitisation appeals filed way back in the year 2013, the petitioner has not named a single official of the Finance Corporation who induced or enticed him to be a guarantor for the loan taken by the 5th respondent and also to offer his property as security for the loan. Despite a lapse of five years from the date of filing of the securitisation appeal,, the petitioner has not been able to name even today, a single officer of the Finance Corporation who enticed him to be a guarantor and to offer his property as security;

(iv) The law does not require a lender to certify the creditworthiness of a borrower, especially to the guarantor. While the lender may satisfy himself about the creditworthiness of the borrower for the purposes of grant of loan, no lender is obliged to certify to the guarantor the genuineness or the creditworthiness of a borrower. A guarantor/surety is obliged to check up the genuineness and creditworthiness of a person for whom he agrees to stand as surety, unless he became a surety for a consideration or was foolish enough to stand guarantee. The pleading of the petitioner in paragraph-4 of the Affidavit is to the effect that he belonged to the

second category (viz., that he was foolish enough). But the petitioner cannot become over-smart in 2018 to compensate for his foolishness in the year 2010, just to defeat the lawful dues to the Finance Corporation.

11. We are unable to believe that the petitioner was subjected to a major hoax on account of a conspiracy between the officials of the 4th respondent and the 5th respondent, as pleaded by the petitioner in paragraph-10 of the Affidavit. In our considered view, in the absence of any pleading to the effect (i) that the petitioner never knew the 5th respondent and (ii) that he was introduced to the 5th respondent by certain named officials of the 4th respondent, the case now set up by the petitioner is the real hoax (and not the other way about). Therefore, we reject outright, the attack made by the petitioner on unnamed and unknown officials of the 4th respondent.

Attack on the Presiding Officer of the DRT (Part-I)

12. Coming to the second part of the pleadings and the written arguments, where the attack is on the Presiding Officer of the Debts Recovery Tribunal, we feel less said the better. The Presiding Officer of DRT-I has been impleaded by the petitioner, by name, as the second respondent in both the writ petitions. In fact, the attack on the 2nd respondent consists of two parts. The first part relates to his qualifications for being appointed as a Presiding Officer. The petitioner does not claim that the 2nd respondent was not qualified to be appointed in terms of the 2017 Rules. But the petitioner's case is that the qualifications prescribed in Entry No.8(b) of the Schedule under Rule 3 of the 2017 Rules are *ultra vires* Section 5 of the 1993

Act and the judgment of the Constitution Bench in *R.Gandhi*. But after the learned Assistant Solicitor General brought to our notice the amendment made under the Finance Act, 2017 to the 1993 Act, by which Section 6A was inserted with a non-obstante clause, the question of the rule being *ultra vires* the Act does not arise. But still the challenge to Section 6A may survive in view of the Constitution Bench judgment and hence we have admitted the first two writ petitions of the petitioner where a challenge is made to Section 6A and consequently to the appointment of the 2nd respondent. ***Today, the 2nd respondent is holding office by virtue of a statutory prescription, which is yet to be declared unconstitutional in the light of the Constitution Bench decision in R.Gandhi.*** Therefore, the first part of the attack of the petitioner on the second respondent, is liable to be rejected.

Attack on the Presiding Officer of the DRT (Part-II)

13. The second part of the attack of the writ petitioner on the 2nd respondent, borders on absurdity and obnoxiousness. Ground Nos.1 and 2 under paragraph-21 of the Affidavits in support of the writ petitions, if extracted, would show that we have been more generous than required, in dealing with such contentions. Ground Nos.1 and 2 under paragraph-21 of the Affidavits in support of the writ petitions read as follows:

“1. The impugned order under challenge has definitely not been written or, authored by the 2nd respondent herein as the same constitutes a “Ghost Written Order” as the 2nd respondent being a retired bureaucrat (Bank Officer) is virtually not possessing the legal knowledge and acumen, clarity of thought process, vocabulary, diction, capability of formation of sentences and the very language employed in the impugned order.

2. The foregoing portends a very dangerous trend insofar as unscrupulous and inefficient bureaucrats such as the 2nd respondent herein are being illegally appointed and posted to high Judicial Offices and they in turn are employing a cabal of lawyers working as “Ghost Writers” for writing judgments for the P.O in the Debts Recovery Tribunal.”

14. The grounds of attack made by the petitioner, which are extracted above would show that they are not based upon concrete facts, but preposterous presumptions. What the petitioner seems to indicate in Ground Nos.1 and 2 under paragraph-21 of the Affidavits in support of the writ petitions is that a bureaucrat is incapable of writing such judicial orders and that therefore he must have employed a battery of lawyers as ghost writers. Such allegations, without any basis and without any details of facts, are atrocious in nature. ***But unfortunately, there is a pattern that seems to be emerging across the country, viz., to attack the case on merits, failing which, to attack the opponent and thereafter to attack the institution.*** The case of the petitioner falls within this pattern. Therefore, the allegations made by the petitioner in Ground Nos.1 and 2 under paragraph-21 of the Affidavits in support of the writ petitions, are liable to be rejected without blinking an eye.

Attack on the Presiding Officer of the DRT (Supplemental Part)

15. The next ground of attack is that the impugned orders have been passed vindictively because the petitioner challenged the appointment of the 2nd respondent. Such an allegation is also baseless. As we have pointed out earlier, the petitioner came up with two writ petitions in W.P.Nos.3444 and 4757 of 2018, challenging the prescription contained in the 2017 Rules and the

appointment of the 2nd respondent. We did not order notice in those writ petitions, but requested the learned Assistant Solicitor General to find out whether the petitioner was right in contending that the rule was *ultra vires* Section 5 of the 1993 Act. The learned Assistant Solicitor General then brought to our notice the amendment under the Finance Act, 2017 by which Section 6A was inserted. Thereafter, the petitioner took time and filed applications for amendment in the first two writ petitions, so as to include a challenge to Section 6A. It is only thereafter that those writ petitions were admitted.

16. But in the meantime, the interlocutory applications were disposed of by the 2nd respondent. The 2nd respondent was not expected to wait for the outcome of the writ petitions. Probably the only thing that he could have done to avoid the allegation of vindictiveness, is to grant all the prayers that the petitioner sought. A Judicial Officer is supposed to continue to discharge his duties, unless there are fetters on his powers to decide a lis. Since we did not grant a stay of further proceedings in the securitisation appeal, the 2nd respondent was obliged to decide the interlocutory applications. It must be pointed out that the Financial Corporation has not been able to bring this property to sale for the past four years, after issuing a notice of auction way back in February, 2014. The securitisation appeal is pending from 2013. Even the interlocutory applications, which are disposed of by the orders impugned in these writ petitions, are pending for five years. Therefore, the Presiding Officer was obliged to dispose of these interlocutory applications one way or the other. Merely because the

petitioner had challenged the statutory prescription which enabled the appointment of the 2nd respondent to an office, there cannot be a presumption of vindictiveness.

17. As a matter of fact, we offered in the course of hearing of the writ petitions that if the petitioner wanted, we would transfer the pending proceedings to any other Bench of the Debts Recovery Tribunal, in order to avoid any likelihood of bias. It should be remembered that – (i) likelihood of bias, (ii) actual bias and (iii) vindictiveness, all fall under different categories. The petitioner made wild allegations of vindictiveness and not bias. Yet we were prepared to give a concession to the petitioner by transferring the proceedings to another officer so that the likelihood of bias, even if there was any, could be removed. But the learned counsel for the petitioner stated categorically that he is not invoking the mercy jurisdiction of this Court and that this Court may pass orders on the basis of the written arguments made by him. Therefore, we are compelled to address the issue of vindictiveness.

18. As we have pointed out earlier, a mere allegation that the orders impugned in the writ petitions were vindictively passed because of a challenge to the appointment of the 2nd respondent, is not sufficient to hold that they were in fact vindictive in nature. Hence, we reject the allegation of vindictiveness.

On merits

19. Coming to the merits of the claim made by the petitioner in the interlocutory applications, it is seen that the petitioner wanted permission to adduce evidence, purportedly to expose the fraud of

which he became a victim and he also wanted a direction to the Finance Corporation to produce certain documents. Both these applications were rejected by the Tribunal on the grounds – (i) that the petitioner has already filed his Evidence Affidavit along with documents on 24-5-2013 itself, (ii) that the petitioner has not mentioned the details of any specific document that he is seeking, (iii) that in view of the decision of the Supreme Court in ***Transcore v. Union of India***³, the scope of the enquiry in these proceedings are limited, (iv) that even if the observations of the Supreme Court in paragraph-51 of its decision in *Mardia Chemicals Ltd.*, is taken into account, the forum for the conduct of an enquiry into the question of fraud is different, (v) that in view of the decision of the Supreme Court in ***Nahar Industrial Enterprises Ltd. v. HSBC***⁴, the provisions of the Civil Procedure Code and the Evidence Act have no application to the proceedings before the Tribunal and (vi) that therefore the Tribunal cannot travel beyond the scope of Section 17(2).

20. In fact, the Tribunal has recorded a finding in paragraph-30 of its order (impugned in these writ petitions) that it was on the request of the petitioner that the 4th respondent/Corporation sanctioned credit facilities to the 5th respondent. This finding was on the basis of a letter dated 07-10-2010 written by the petitioner to the Corporation. Interestingly, it is found from the said letter that the petitioner is none else than the brother of one Mr. Asif Ali Khan. The 5th respondent/ Company in W.P.No.10758 of 2018, even as per the

³ (2008) 1 SCC 125

⁴ (2009) 8 SCC 646

cause title in the writ petition, is represented by its Managing Director Md. Asif Ali Khan.

21. The petitioner has questioned in these writ petitions, the admissibility in evidence of the said letter dated 7-10-2010 and the propriety of the DRT in looking into the Xerox copy of the said letter. ***But interestingly, he has questioned it not on the ground that such a letter was never written by him, but on the ground that the original of the letter contained an endorsement on its reverse, by the General Manager of the Finance Corporation to the effect that the property cannot be accepted as security.*** In fact the petitioner has not come up with a pleading that he never wrote such a letter dated 7-10-2010. Therefore, even assuming that the original contains such an endorsement, even then what follows is that the petitioner was the one who was instrumental in introducing his brother to the Corporation for the grant of the loan. This falsifies the theory of fraud and conspiracy pleaded by the petitioner. In fact the petitioner is guilty of *suppressio vari suggestio falsi*. He has completely suppressed his relationship with the persons who were managing the affairs of the borrower companies.

22. Therefore, in the light of the categorical findings of facts recorded by the Tribunal, we see no scope for any interference. As rightly pointed out by the Tribunal, the scope of an enquiry under Section 17(2) of the Securitisation Act is very limited. Sub-section (3) of Section 17, as amended by Act No.44/2016 makes it clear that the Tribunal is entitled to see whether any of the measures taken under Section 13(4) are not in accordance with the provisions of the

Act and the Rules. As a consequence, sub-section (4) of Section 17 enables the secured creditor to take recourse once again to the measures specified in Section 13(4).

23. But what the petitioner has sought in his securitisation appeal is to establish a diabolical conspiracy between his brother and unnamed officials of the 4th respondent/Corporation. Therefore, the Tribunal did what the Tribunal had to do in terms of the Statute. The facts pleaded by the petitioner both in his securitisation appeals and in the present writ petitions are nowhere near the type of factual basis that is required to form the foundation for an allegation of fraud and conspiracy. Therefore, any amount of interlocutory applications for production of evidence and for summoning the records cannot improve the case of the petitioner. It is a fundamental rule of evidence that no one can be permitted to lead evidence about facts not specifically pleaded. Order VI, Rule 4 of the Code of Civil Procedure gives an indication of the type of pleadings required to establish fraud. Therefore, when there was no factual basis, the question of seeking permission to produce evidence and seeking to summon the documents did not arise.

24. In view of the above, the Tribunal did not commit any error of law or jurisdiction in passing the impugned orders. The writ petitions are completely devoid of merits and are liable to be dismissed with costs, in view of the scandalous allegations made by the petitioner without any evidence that the impugned orders were ghost written. Accordingly they are dismissed with costs, which we quantify at Rs.20,000/- (Rupees twenty thousand only), to be paid to

the 4th respondent/Corporation. The interlocutory applications, if any, pending in this writ petition shall stand closed.

V.RAMASUBRAMANIAN, J.

J.UMA DEVI, J.

30th April, 2018.
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HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms. JUSTICE J.UMA DEVI

Writ Petition Nos.9213 and 10758 of 2018
[Common Order -- per VRS, J.]



30th April, 2018.
(Ak)