

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 12032 OF 2022
WITH
INTERIM APPLICATION NO.30585 OF 2022
WITH
INTERIM APPLICATION NO. 18937 OF 2022
IN
WRIT PETITION NO. 12032 OF 2022

Tarulata Amritlal Bava
residing at Flat No. 502/503, "C" Wing
Divya Shrushti, Gaurav Garden,
Bundar Pakhadi Road, Kandivali (W)
Mumbai – 400 067.

... Petitioner/
Applicant

Versus

1. The State of Maharashtra, through
Secretary, Co-op. Dept., Mantralaya,
Mumbai – 400 032.
2. The Divisional Joint Registrar for
Cooperative Societies, Konkan Division,
CBD Belapur, Navi Mumbai.
3. The Dy. Registrar, Cooperative Societies
Thane City, 2nd floor, Vardhavat Mention
Shivaji Path Chendani Cross Road,
Thane (West).
4. The Recovery Officer attached to Thane
Bharat Sahakari Bank Ltd., Rimzim Apt.
Ground Floor, Baji Prabhu Deshpande
Marg, Vishnu Nagar, Naupada,
Thane(West) – 400 602.
5. The Thane Bharat Sahakari Bank Ltd.
having its registered office at

Shatataraka, B.P. Deshpande Marg,
Naupada, Thane – 400 602.

6. Amritlal Jayantilal Bava,
residing at Flat No. 502/503, “C” Wing
Divya Shrushti, Gaurav Garden,
Bundar Pakhadi Road, Kandivali (W)
Mumbai – 400 067.

7. Bhagwanji Laxmidas Mota,
having address at C/34, 301, Sector no. 10
Shanti Nagar, Mira Road (East)
Thane – 401 107.

... Respondents

Mr. Chetan Kapadia with Y. A. Rajgor and Ms. Rekha Shinde i/b.
Legal Chartered for the petitioner/applicant.

Mr. Ashish Kamat a/w Mr. Nikhil Rajani i/b. M/s. V. Desphande and
Co. for Respondent No. 5.

CORAM: G. S. KULKARNI, J.
DATED: 2 January 2023

ORAL JUDGMENT

1. This petition filed under Articles 226 and 227 of the Constitution inter alia assails a Recovery Certificate dated 25 September, 2018 issued by the Deputy Registrar, Cooperative Societies, Thane City-respondent no. 3 whereby an earlier Recovery Certificate dated 12 September, 2013 issued against the petitioner, who is the guarantor and who offered a collateral security, to the commercial borrowings by respondent no.6, has been confirmed.

2. The case of the petitioner is that, respondent no. 5-The Thane Bharat Sahakari Bank Ltd. (for short “**the bank**”) had sanctioned a term loan facility of Rs.1.90 crores in favour of one M/s. Shree Vaishnavi Enterprises, a sole proprietary concern of respondent no. 6-Amritlal Jayantilal Bava (for short “**Amritlal**”), who is stated to be the husband of the petitioner. Such term loan facility was availed for purchase of 10 trucks/trailers. On enquiry it was revealed to the bank that there were procedural violations as also misappropriation and fraudulent utilization of the amounts released under the said term loan facility as availed by Amritlal. It was also revealed that the officers of the bank were also involved in such irregularities.

3. In July, 2013, Amritlal filed a Dispute bearing no. 125 of 2013 before the Cooperative Court No. II under the provisions of Section 91 of the Maharashtra Cooperative Societies Act, 1960 (for short “**MCS Act**”) against the bank inter alia raising issues in relation to a fraud played by the Branch Manager of the bank namely one Mr. Mahendra Bhoir. It appears that in August, 2013 the bank also filed a First Information Report with the Mulund Police Station bearing No. 338 of 2013 against Amritlal, as also against the Branch Manager Mr. Mahendra Bhoir and one Mr. Tejas Lodaya in regard to the fraud as perpetrated by these accused against the bank. The FIR was subject matter of investigation by the Economic Offences Wing, which investigated the complaint in regard to the flow of funds and the manner in which the same was routed to the accounts of Mr. Tejas Lodaya & Ors. It however

appears that qua the bank the funds under the said loan were disbursed in favour of Amritlal.

4. In the meantime, on 24 July 2013 a Recovery Application No. ABN/TBSB/101/31/13-14) was filed by the bank inter alia against Amritlal as also against the petitioner under the provisions of Section 101 of the MCS Act. A notice of the said proceedings was received by the petitioner on 30 July, 2013.

5. On 12 December, 2013 on such recovery proceedings, an order was passed, whereby a recovery certificate was issued by the Deputy Registrar Cooperative Societies, Thane City against the petitioner as also against Amritlal whereby ordering that a sum of Rs. 1.78 crores plus costs of Rs.12,266/- be paid by the said persons to the bank. It is the case of the petitioner that such order was ex parte to the petitioner and that, it be believed, that the petitioner for the first time came to know of availing of credit facilities by Amritlal and the issuance of the recovery certificate, sometime in June, 2014. The petitioner has contended that in these circumstances, the petitioner approached this Court by filing Writ Petition No. 10803 of 2014, which came to be disposed of by a coordinate Bench of this Court by an order dated 3 July, 2018, whereby the recovery certificate dated 12 December, 2013 issued by the Deputy Registrar qua the petitioner was set aside on a statement being made on behalf of the bank, when the bank stated that without the bank admitting allegations of the petitioner, the bank would have no objection for the said recovery certificate to be set aside qua the petitioner on the

ground that an opportunity of being heard be rendered to the petitioner by the Deputy Registrar. However, insofar the said certificate as issued against other persons was concerned, the same was not interfered. In short, insofar as the petitioner was concerned, the matter was remanded back to the Deputy Registrar for a fresh decision to be taken on all the contentions to be urged by the petitioner. The said order dated 3 July, 2018 passed by a co-ordinate Bench of this Court on the petitioner's writ petition reads thus:

"1. By this petition, filed under Article 227 of the Constitution of India, the petitioner has impugned the recovery certificate dated 12th December, 2013 and also the order dated 31st October, 2014 passed by the Divisional Joint Registrar refusing to entertain the revision application filed by the petitioner under section 154 of the Maharashtra Co-operative Societies Act, 1960 in view of the petitioner failing to deposit 50% of the certified amount under section 154 (2-A) of the Maharashtra Co-operative Societies Act, 1960.

2. The main grievances of the petitioner in this petition are two fold (i) the impugned order was passed when the petitioner could not remain present before the learned Deputy Registrar, Co-operative Societies at the time of hearing of the application, (ii) there were serious allegations of fraud against the officers of the respondent no.5 society insofar as various loans, including the loan in question is concerned. The petitioner was thus not required to deposit any amount under section 154 (2-A) of the Maharashtra Co-operative Societies Act, 1960 as a condition precedent for entertaining the revision application by the Divisional Joint Registrar.

3. Dr.Saraf, learned counsel appearing for the respondent no.5, on instructions, states that without admitting the allegations of the petitioner on the issues raised by the petitioner recorded aforesaid, the respondent no.5 has no objection if the impugned recovery certificate dated 12th December, 2013 is set aside insofar as the petitioner is concerned and an opportunity of being heard is rendered to the petitioner by the Divisional Joint Registrar. It is also submitted by the learned counsel that the said recovery certificate has been issued not only against the petitioner but also against several others. None of the other respondents to the said recovery certificate have impugned the said Recovery Certificate dated 12th December, 2013 and the said recovery certificate has attained finality insofar as those respondents to the said recovery proceedings are concerned. He disputes the allegations of fraud made by the petitioner against his client. The statement made by the

learned counsel for the respondent no.5 is accepted.

4. *I therefore, pass the following order:-*

a) The impugned recovery certificate dated 12th December, 2013 passed by the Deputy Registrar, Co-operative Societies under Recovery Certificate No. ABN/TBSB/101/ 31/13-14 is set aside, insofar as the same is against the petitioner. The petitioner would be at liberty to appear before the Deputy Registrar, Co-operative Societies and shall file an affidavit in reply. Such affidavit in reply shall be filed within two weeks from today and a copy thereof shall be served upon the respondent no.5 simultaneously.

b) The Deputy Registrar shall decide the matter afresh insofar as the petitioner is concerned in accordance with law and after complying with the principles of natural justice and without being influenced by the observations, if any, made against the petitioner in the impugned order.

c) The petitioner and the respondent no.5 bank are directed to appear before the learned Deputy Registrar, Co-operative Societies on 23rd July, 2018 at 11:00 a.m., without fail. None of the parties shall seek any unnecessary adjournment before the learned Deputy Registrar, Co-operative Societies.

d) It is made clear that insofar as the recovery certificate dated 12th December, 2013 is concerned, since the other respondents to the said recovery certificate have not impugned the said recovery certificate, the said recovery certificate has attained finality against those respondents, including the borrowers. Learned Deputy Registrar, Co-operative Societies shall not re-open the said recovery certificate against those respondents.

e) In view of the aforesaid order passed by this Court, this Court need not go into the issue whether the petitioner was required to deposit 50% of the certified amount under section 154 (2-A) of the Maharashtra Co-operative Societies Act, 1960 or not.

f) It is made clear that this Court has not expressed any views on the merit of the matter. All the contentions of both the parties are kept open.

g). Learned Deputy Registrar, Co-operative Societies is directed to dispose of the said application insofar as the petitioner is concerned within two months from the date of the first hearing.

5. *In view of the aforesaid order, Dr.Saraf, learned counsel appearing for the respondent no.5, on instructions, states that his client will not proceed with the auction of the property to the extent of the petitioner's share in*

those properties at this stage. Statement is accepted.

6. The writ petition is disposed of in aforesaid terms. There shall be no order as to costs.

7. In view of disposal of the writ petition, the Civil Application No.1287 of 2018 does not survive and is accordingly disposed of. There shall be no order as to costs.

9. All the parties, including the Authorities to act on the authenticated copy of this order.”

6. In pursuance of the above orders passed by this Court, the Deputy Registrar undertook a fresh enquiry on the contentions of the petitioner and passed a fresh order being order dated 25 September, 2018, of issuance of a recovery certificate against the petitioner, ordering recovery of an amount of Rs.3,21,54,981.44 plus interest @13.50% on principal amount of Rs.1,35,73,910.44 from 1 July, 2022 till final payment. Thus, the recovery certificate which was initially granted against the petitioner on 12 December 2013 came to be confirmed by the impugned order passed by the Deputy Registrar under section 101 of MCS Act.

7. Consequent to such order dated 25 September, 2018 passed by the Deputy Registrar issuing a fresh recovery certificate against the petitioner, proceedings were adopted by the bank to execute the recovery certificate. Accordingly, on 8 August, 2022, the office of the Recovery Officer issued an order attaching the mortgaged property being the collateral security furnished by the petitioner, in the capacity of the guarantor. These are three properties. Two of such properties of the petitioner are situated in Mumbai, namely, Flat no. 502 and 503. Divya Shruti Cooperative Housing Society Ltd., C Wing, Gaurav Garden, Kandivali

(West), Borivili, Mumbai, and another property, being a bungalow is situated at Bhuj, Kutch. It appears to be not in dispute that in respect of these mortgaged properties, symbolic possession has already been taken by the bank and now the bank has initiated steps to take physical possession of the said two flats of the petitioner.

8. When the present proceedings came to be moved before the learned Vacation Judge on 30 December, 2022, the learned Vacation Judge had posted the matter for today, however, as the Court takes up proceedings on the Original Side under the Labour and Industrial Laws, this petition was not listed. Accordingly, on urgent mentioning on behalf of the petitioner, the proceedings are taken on board.

9. Before the rival contentions of the parties are noted, it would be appropriate to extract the prayers as made by the petitioner, as the prayers have a bearing on the issues which fall for consideration of the Court:

“(a) that this Hon’ble Court be pleased to call for the records and proceedings in Recovery Application No. ABN/TBSB/101/31/13-14 and upon perusing the record, this Hon’ble Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other Writ, Order or direction and be pleased to quash and set aside the Recovery Certificate dated 25th September, 2018 issued by Respondent no. 3 confining the earlier Recovery Certificate dated 12th December, 2013;

(b) that this Hon’ble Court be pleased to call for the records and proceedings from Respondent no. 2 in respect of Revision Application No. 123 of 2022 and upon perusing the records and proceedings, this Hon’ble Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other Writ, Order or direction and be pleased to quash and set aside the order dated 29th September, 2022 and also be pleased to

set aside the Attachment Order dated 8th August, 2022 and the Rejection Order dated 9th September, 2022;

(c) that in the alternative to prayer clause (a) above this Hon'ble Court be pleased to issue a Writ of mandamus or any other Writ, order or direction in the nature of Mandamus or any other writ, order or direction ordering and directing the Respondent no. 2 to hear the Revision Application No. 117 of 2018 of the petitioner on merit without insisting for any deposit from the petitioner and within a time bound schedule as may be deemed fit by this Hon'ble Court;

(d) that pending the hearing and final disposal of this petition, Respondent no. 4 be restrained by an Order of this Hon'ble Court in any manner taking any steps pursuant to the Recovery Certificate dated 25th September, 2018;

(e) that pending the hearing and final disposal of this petition, this Hon'ble Court be pleased to restrain the Respondent no. 4 from in any manner taking any steps pursuant to the Attachment Order dated 8th August, 2022 and also from taking possession of property being Bungalow No. B/620, (Vrundavan), Shreeji Society RTO (2), Relocation Site, near Sonali Park, Bhuj, District Kutch, Gujarat – 370 001 on 7th October, 2022 or any day during the pendency of this Writ Petition;

(f) that such further and other reliefs be granted as the nature and circumstances of the case may require;

(g) that interim and ad-interim reliefs in terms of prayer clauses (d) and (e) above be granted.”

10. As seen from the prayers, the challenge of the petitioner is to the recovery certificate dated 25 September, 2018 issued by the Deputy Registrar, confirming the earlier recovery certificate dated 12 December, 2013. By prayer clause (b) the petitioner seeks setting aside the order dated 29 September, 2022 which is an order passed by the Divisional Joint Registrar in execution of the Recovery Certificates as also there is a prayer for quashing of the attachment dated 8 August, 2022 and the order of rejecting the removal of attachment dated 9 September 2022.

Prayer clause (c) is an alternate prayer for a writ of mandamus that the Revision Application No. 117 of 2018 filed by the petitioner before the Divisional Joint Registrar under section 154 (2A) of the MCS Act filed on 23 September 2022 be heard on merits without insisting for a mandatory pre-deposit.

11. Having noted the complexion of the dispute and the prayers as made in the present proceedings, the contentions as urged on behalf of the parties are required to be adverted.

12. Mr. Kamat, learned counsel for the bank, at the outset, has raised a preliminary objection to the maintainability of the present petition. Mr. Kamat would submit that as the petitioner has already availed of an alternate statutory remedy of filing a Revision Application under section 154(2A) of the MCS Act, the present petition ought not to be entertained. Mr. Kamat submits that the petitioner to evade compliance of the provisions of a mandatory pre-deposit of 50% of the total recoverable dues so as to maintain the Revision Application, has filed the present petition. It is his submission that in these circumstances, the present proceeding is an abuse of the process of law when a recourse to an alternate statutory remedy has already been taken by the petitioner. Mr. Kamat submits that as the prayers made by the petitioner in the present proceedings are a substantive challenge to the recovery certificate, which is the very challenge as raised by the petitioner in the Revision as filed by the petitioner under section 154(2A) of MCS Act, the present petition which also assails orders passed in the execution of

the recovery certificate, the writ petition certainly ought not to be entertained for such reliefs.

13. In support of his submissions, Mr. Kamat has placed reliance on the decision of a co-ordinate Bench of this Court in *Greater Bombay Cooperative Bank Ltd., Mumbai & Anr. vs. Dhillon P. Shah & Ors.*¹. It is submitted that in the said decision, the Court has held that the provisions of sub-section (2A) of Section 154 of the MCS Act would be the only remedy which can be espoused by the person who is aggrieved by a Recovery Certificate. The Court also has held that it would be preposterous to accept a stand that a person against whom a recovery certificate is issued, need not challenge the recovery certificate as such, and/or for that matter, even if he has failed in the challenge to the recovery certificate, yet he would be entitled to interdict the process of recovery of the amount specified under the recovery certificate, by ostensibly challenging only the derivative action by way of Revision Application under section 154 of the MCS Act, without complying the mandatory requirement under sub-section (2A) thereof of 50% payment of the total amount of the recoverable dues. Thus, Mr. Kamat's submission is that on such preliminary ground, the petition needs to be dismissed.

14. Mr. Kapadia, learned counsel for the petitioner responding to the preliminary objection as urged by Mr. Kamat would submit, that there can be no quarrel on the proposition, that in the normal circumstances,

1 2004 (1) Mh. L.J. 996

the litigant who intends to assail the recovery certificate would be required to take recourse to the provisions of sub-section (2A) of Section 154 of MCS Act. However, according to Mr. Kapadia, this is a case in which there is clearly a fraud, wherein the officers of the bank were also involved. It is his submission that the petitioner is only a guarantor and if the entire borrowing is hit and/or is vitiated by fraud, then the normal remedy of pursuing proceedings under sub-section (2A) of Section 154 of MCS Act cannot be insisted and/or would be required to complied, so as to make the petitioner suffer the rigours of sub-section (2A) of Section 154 of MCS Act, namely, to compel the petitioner to undertake a mandatory deposit of 50% of the recoverable dues. Mr. Kapadia has submitted that in these circumstances to relegate the petitioner to pursue a Revision would be too harsh and a serious prejudice to the rights of the petitioner. In support of such submission, Mr. Kapadia has placed reliance on the decisions in *Manisha Bijal Shah vs. Shankar Laxman Sutar & Ors.*² and the decision of the Division Bench of this Court in *Top Ten, a Partnership Firm & Anr. vs. State of Maharashtra & Ors.*³. Mr. Kapadia would thus submit that it needs to be held that the petitioner is appropriately pursuing the present proceedings as not only an issue of fraud is involved in the present case and is the subject matter of recovery against the petitioner, but also on the ground that the Deputy Registrar, who has issued recovery certificate, has no territorial jurisdiction to proceed to issue the impugned recovery certificate inasmuch as the property in question is situated at Borivali, Mumbai and the Recovery Officer is situated at Thane.

2 2018(2) Mh. L.J. 935

3 (2012) 1 Mah L.J. 347

15. Mr. Kapadia would next submit that the plea of a fraud was a plea advanced by the petitioner right from the inception. In supporting this submission, Mr. Kapadia has drawn the Court's attention to the order dated 3 July, 2018 passed by the learned Single Judge of this Court on the petitioner's earlier Writ Petition No. 10803 of 2014 (supra), wherein in paragraph 2 of the said order the learned Single Judge has referred to two grievances of the petitioner, firstly in regard to the Deputy Registrar issuing recovery certificate dated 12 December, 2013 without hearing the petitioner; and secondly that there were serious allegations of fraud against the officers of the bank, insofar as various loans including the loan in question was concerned. Mr. Kapadia would submit that on remand the plea of fraud was accordingly raised by the petitioner before the Deputy Registrar, which has not been appropriately dealt by the Deputy Registrar, while passing the impugned order dated 25 September, 2018, in issuing a recovery certificate against the petitioner. Mr. Kapadia would thus submit that the present petition be entertained and the reliefs as prayed for be granted to the petitioner.

16. Mr. Kamat in responding to the above contentions as urged by Mr. Kapadia, would submit that none of the contentions deserve acceptance. The first contention of Mr. Kamat is that the plea of fraud purportedly raised by the petitioner, even in the present proceedings, is totally an eye wash. His submission is that Amritlal had already filed a dispute before the Cooperative Court against the bank in the year 2013, in which he had specifically asserted a plea of fraud, and for a period of almost 9 years, Amritlal has not been in a position to obtain any order on such

plea of any fraud so as to overcome and / or halt the liability faced by Amritlal to repay the borrowings. To make good such contention, Mr. Kamat has drawn the Court's attention to an order dated 10 January, 2018 passed by the co-ordinate Bench of this Court in Amritlal's case (*Amritlal Bava vs. Divisional Joint Registrar for Cooperative Societies & Ors.*⁴). Mr. Kamat's submission is that with a similar plea Amritlal had approached this Court in a Writ Petition. Mr. Kamat would contend that in paragraph 2 of the said order passed by this Court, the Court has specifically recorded Amritlal's contention of a fraud namely Amritlal's case that the recovery certificate was fraudulently issued by respondent no. 2-Deputy Registrar, hence, Amritlal was entitled to challenge the said recovery certificate in the parallel proceedings of a Writ Petition. It is Mr. Kamat's submission that the objection as to the maintainability of the Writ Petition as raised on behalf of the bank was accepted by this Court to the effect that the recovery certificate could not be challenged by Amritlal before this Court in a Writ Petition and could be only challenged under section 154 of the MCS Act, as also that Amritlal could not have challenged the other orders which were passed in the execution of the recovery certificate, in such writ petition. Mr. Kamat would thus submit the petitioner is not differently positioned from how Amritlal was positioned before this Court in the said proceedings of his writ petition, who came to be relegated to the alternative remedy under section 154 of MCS Act, with all its rigours. It is submitted by Mr. Kamat that the proceedings filed by Amritlal under section 154 are also pending before the Divisional Joint Registrar and no orders on such plea of fraud could

4 2018 SCC Online Bom 5049

be obtained by Amritlal. Mr.Kamat would thus submit that the writ petitions be dismissed.

17. Having heard the learned counsel for the parties and having perused the record, in my opinion, the preliminary objection as urged by Mr. Kamat to the maintainability of this petition would be required to be accepted. Sub-section (2A) of Section 154 clearly provides for remedy of a Revision against an order passed by the Deputy Registrar issuing the recovery certificate. The said provision is required to be noted, which reads thus:

“154. Revisionary powers of State Government and Registrar.-

(2) Under this section, the revision shall lie to the State Government if the decision or order is passed by the Registrar, the Additional Registrar or a Joint Registrar, and to the Registrar if passed by any other officer.

(2A) No application for revision shall be entertained against the recovery certificate issued by the Registrar under section 101 unless the applicant deposits with the concerned society, fifty percent amount of the total amount of recoverable dues.”

18. The petitioner admittedly has availed the said remedy having already preferred a Revision Application before the Divisional Joint Registrar, however, it appears that as the petitioner did never intended and/or wanted to evade complying the provisions of mandatory deposit of 50% of the total amount of recoverable against the petitioner, and for such reason has filed the present petition.

19. The petitioner, hence, having failed to effectively espouse the revisional remedy, and in the meantime, only when the execution proceedings adopted by the respondent-bank ultimately reached the doorstep of the petitioner, for taking over physical possession of the mortgaged property, the petitioner moved this Court, by the present proceedings. In my opinion, certainly in these circumstances it was not permissible for the petitioner to invoke the jurisdiction of this Court under Article 226 read with Article 227 of the Constitution of India praying for a relief which the petitioner had already prayed/espoused by filing a Revision Application under sub-section (2A) of Section 154 by approaching the Divisional Joint Registrar.

20. Mr. Kapadia's contention that the remedy of revision although espoused by the petitioner was not an effective remedy for the reason that the petitioner has alleged fraud and the said plea of fraud was not considered by the Deputy Registrar, while issuing recovery certificate, also cannot be accepted, for more than one reason. It is quite clear that the plea of fraud to avoid liability towards the bank was also simultaneously canvassed from the year 2013 by Amritlal/ petitioner's husband, including in proceedings under Section 91 of the MCS Act, being a dispute before the Cooperative Court against the bank and other parties. The petitioner is also asserting the same plea although in the capacity as a guarantor. In my opinion, once the borrower/Amritlal himself was not in a position to successfully canvass any such plea and obtain any order in the substantive proceedings, it cannot be heard from the petitioner, that as such plea was not appropriately considered by the

Deputy Registrar in the proceedings of Section 101 of the MCS Act, this petition be held to be maintainable. It needs to be stated that the jurisdiction of the Deputy Registrar under section 101 of the MCS Act was certainly a limited jurisdiction. It is not the jurisdiction in the nature of proceedings under section 91 of the MCS Act, which would take within its ambit an adjudication on the merits of any such contention on any allegation of an unestablished fraud, which was being canvassed by Amritlal.

21. There is yet another significant aspect which has a vital bearing on the recovery proceedings adopted by the bank against the petitioner namely that the documents in regard to the guarantee as furnished by the petitioner in creating the collateral security to guarantee the borrowings availed by Amritlal have remained to be valid and legal, *inter se* between the petitioner and the bank. The said documents were enforceable as there was no embargo on the bank not to enforce the security. Once such documents of guarantee interse between the bank and petitioner are not declared to be illegal in a manner known to law, as to how a plea of fraud could be canvassed by the petitioner, before the competent authority under section 101 of the MCS Act cannot be understood. Admittedly, the petitioner has also not taken recourse to any proceedings in law, wherein the petitioner could assert that such security as offered by the petitioner and/or any such documents executed by the bank creating such security be declared to be illegal, null and void and obtain orders in that regard. Thus, as rightly pointed out by Mr. Kamat,

the plea of fraud being taken by the petitioner only as a defence, is quite untenable, moreso, it appears to be a plea in desperation.

22. Insofar as other contentions of Mr. Kapadia are concerned, I am not persuaded to accept the same. Firstly it appears that there is no material placed on record to indicate that the Deputy Registrar in issuing the impugned recovery certificate had no territorial jurisdiction. As pointed out by Mr. Kamat that one of the party to the recovery certificate is situated at Thane and therefore, certainly the Deputy Registrar had jurisdiction. Such plea also appears to be without substance in absence of any clear plea by pointing out any notification on the jurisdiction of the Deputy Registrar, for the Court to reach a conclusion that the Deputy Registrar issuing the Recovery Certificate had no territorial jurisdiction.

23. Now coming to the decisions cited on behalf of the parties. In the decision in *Greater Bombay Co-operative Bank Ltd., Mumbai & Anr. vs. Dhillon P. Shah & Ors.* (supra) as relied by Mr. Kamat, the Court has held that it would not be open to a person against whom a recovery certificate is issued, to not challenge the recovery certificate, and yet would be entitled to interdict the process of recovery of the amount specified under the recovery certificate, by ostensibly challenging only the derivative action by way of Revisional Application under Section 154 of the Act without complying the mandatory requirement under Sub-section (2A) thereof of 50% payment of the total amount of the recoverable dues. This decision would be relevant in the present context so as to observe that, as the present petition which makes omnibus

prayers, when substantive Revision Application as filed by the petitioner, without compliance of the mandatory requirement of 50% deposit of the total amount of the recoverable dues, this petition certainly ought not to be entertained. It is not permissible for a person like the petitioner who is facing recovery under the recovery certificate issued under Section 101 of the MCS Act to defeat the statutory path as prescribed under sub-section (2A) of Section 154 of the MCS Act by invoking extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution.

24. The decision of the learned Single Judge of this Court in *Manisha Bijal Shah* (supra) would not assist the petitioner. In the said case, respondent No. 1 had obtained loan from respondent No.4 therein. Respondent No.1 as a security had also mortgaged a property and construction thereon in favour of respondent No.4. There was a default by respondent No. 1 in making repayment of the loan. Respondent No.4 hence applied for a recovery certificate under Section 101 of the MCS Act, which was issued in favour of respondent No.4. The recovery certificate was not challenged by respondent No.1. Accordingly, a demand notice was issued by respondent No.4 to respondent No.1. Further, the mortgaged properties belonging to respondent No.1 were attached and the District Deputy Registrar proceeded to sell the properties. A proclamation of auction was published and an auction of the immovable property was also conducted. The petitioner was the highest bidder in the auction to purchase the properties of respondent No.1. The petitioner made payments of the purchase price including

payment towards the stamp duty. The sale of the immovable property was confirmed in favour of the petitioner on a sale certificate being issued by the District Deputy Registrar, Co-operative Societies. After about a month, from the date of sale being confirmed, and the sale certificate being issued, respondent No.1 filed a revision application before the Divisional Joint Registrar challenging the sale certificate and seeking settlement of loan under 'One Time Settlement' scheme. However, in filing such revision, respondent No.1 did not deposit 50% of the recoverable amount as per the requirement of sub-section (2A) of Section 154. The Revisional Authority, accordingly, dismissed the revision application on the ground of non-compliance of the provisions of sub-section 2A of Section 154. Respondent No.1 again, after about 8 months from the dismissal of this revision application filed a second revision application for the same relief, which came to be allowed by the revisional authority. It was such order passed by the revisional authority which was challenged by the petitioner who was the purchaser of the mortgaged property of respondent no. 1 in the auction undertaken in the recovery proceedings. Respondent No.1 in the second revision application had alleged that there was fraud and collusion between the petitioner and respondent No.4-bank, and hence, the sale of the property had stood vitiated by fraud. It is in such context the Court considering such contention of respondent no. 1 on fraud observed that in the facts of the said case the Court was not inclined to accept the submission as urged on behalf of the petitioner that respondent no. 1 having not challenged the recovery certificate, could not have challenged the validity of auction sale or sale certificates issued by the authority. The Court

observed that even if the recovery certificate was not challenged by a party, if there was fraud committed in effecting the sale certificate of the property and if the sale is in violation of the provisions of the MCS Act read with MCS Rules, the remedy of a party to challenge such auction sale as well as sale and confirmation certificate by filing revision application under section 154 of the MCS was not taken away. In the present case, the petitioner has already availed of a remedy of revision and the petitioner can certainly canvass such contentions in a manner known to law, however, such contentions of fraud to be enquired and examined by this Court which are proceedings under Article 226 and 227 of the Constitution would be an untenable proposition, when already recourse to remedy of revision has been availed by the petitioner.

25. It is quite glaring that despite having availed of a remedy of revision, the petitioner has made the same prayers as before the Revisional Authority in the present proceedings. Hence, such prayers to assail the recovery certificate in the present proceedings is not a permissible course of action to be adopted by the petitioner.

26. The Division Bench of this Court in *Suresh Bhagwandas Rajpal Vs. Union Bank of India, Mumbai*⁵, although in the context of the provisions of Section 17 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, observed that in the said case the petitioner had made no attempt to avail of the remedy and after considerable delay opted to file a writ petition before the High Court.

The Court dismissing the petition observed that the writ petition under Article 226 of the Constitution, by not taking recourse to the alternate remedy which provides for despoit of 75% of the ascertained amount, would not be maintainable.

27. Mr. Kapadia's reliance on the decision of the Division Bench in *Top Ten, A Partnership Firm and Anr.* (supra) would also not assist the petitioner as it was the case where the validity of the provisions of Rule 86-E of the Maharashtra Co-operative Societies Rules, 1961, which did not permit cross examination in inquiry proceedings under Section 101 of the MCS Act, was challenged as being arbitrary and in breach of principles of natural justice. It is in such context the Court held that when a provision of any statute or rule was questioned on the ground of it being violative of Article 14 of the Constitution of India, and its constitutionality is otherwise assailed, such authority functioning under the Act cannot examine that challenge, and hence the objection to the maintainability of the petition on the ground that an alternate remedy under the provisions of Section 154 of the MCS Act being available, could be accepted.

28. In the light of the above discussion, in my opinion, no case has been made out by the petitioner for interference in the present proceedings. The petition is summarily rejected.

29. It is however made clear that the petitioner is free to assert all contentions in the pending revision application which be decided on its

own merits. It is also clarified that the observations made above are made in the context of the present proceedings and all pending disputes between the parties be decided on its own merits without being influenced by these observations.

30. In view of dismissal of Writ Petition, Interim Applications do not survive and the same are accordingly disposed of.

31. No costs.

G. S. KULKARNI, J