

---

**(2002) 12 KL CK 0068**  
**In the High Court Of Kerala**  
**Case No : O.P. No. 25819 of 2002**

Abdul Rasheed

APPELLANT

Vs

The State Bank of Travancore

RESPONDENT

---

**Date of Decision :** 16-12-2002

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 19, 20, 22(2)

Debts Recovery Tribunal Rules — Rule 12(6)

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 22

**Citation :** (2003) 3 BC 270 : (2003) 2 ILR (Ker) 150 : (2003) 2 KLT 557

**Hon'ble Judges :** K. Padmanabhan Nair, J

**Bench :** Single Bench

**Advocate :** T.P. Kelu Nambiar, N.D. Premachandran and V.R. Hari Narayanan, for the Appellant; R.S. Kalkura, for the Respondent

---

## Judgement

K. Padmanabhan Nair, J.—The first defendant in O.A. No. 1768 of 1998 on the file of the Debts Recovery Tribunal is the petitioner in this Original Petition. The petitioner is challenging Ext.P-4 order passed by the Tribunal on 28th August 2002 by which the Tribunal stopped the cross-examination of A.W.1 who was in the box -while the same was going on and directing the first defendant to file a counter-affidavit if any on the proof affidavit filed on behalf of the applicant on further issues.

2. The short facts necessary for the disposal of the Original Petition are as follows: The first respondent-Bank filed Original Application No. 1768 of 1998 before the Debts Recovery Tribunal for realisation of the amount of more than Rs. 2,39,11,200. The petitioner filed a written statement denying his liability to pay the amount. The amount claimed in the O.A. is an amount, which according to the Bank it had to pay to a foreign buyer on account of a Judgment passed by a Court in France. The contention of the petitioner is that he is not liable to reimburse that amount to the first respondent. It is further contended that the loss occurred due to the laches and negligence on the part of the first respondent-Bank and the Bank itself had given necessary sanction to the Central

Bureau of Investigation to prosecute the then Chief Manager. It is also contended that due to recalcitrant and negligent conduct of the Bank, the petitioner sustained a loss of more than Rs. 1.25 crores due to the damages sustained to the cashew kernels kept in the godown under the control and custody of the first respondent-Bank. The Original Application was posted for evidence. Both the first respondent-Bank and the petitioner filed their proof affidavits. The Chief Manager of the first respondent-Bank appeared before the Tribunal for cross-examination. He was cross-examined on 31st July 2002 from 3.13 p.m. to 3.53 p.m. and on 8th August 2002 from 12.35 p.m. to 1.23 p.m. His further cross-examination was adjourned to 28th August 2002. According to the petitioner on 28th August 2002, the witness appeared and he was cross-examined from 12.11 noon to 1.00 p.m. and at that point of time the Tribunal directed the Counsel for the petitioner to complete the cross-examination within ten minutes. The further case of the petitioner is that his Advocate submitted that the Bank has produced 110 documents and because of the contentions raised by the petitioner, the witness has to be cross-examined with reference to all those documents and it was absolutely impossible to complete the cross-examination within ten minutes. It was also averred that many of the questions put to the witness were not recorded by the Tribunal and at 1.23 p.m. the Tribunal abruptly closed the cross-examination and closed the evidence of A.W.I and adjourned the case to 16th September 2002 and passed the following order:

"Both sides ready for evidence kept aside. The applicant is directed to produce the certified copy of Judgment in Tradi fee Decree. Produce in 2 weeks. A.W. 1 cross-examined for more than one and half hours today. The defendant will file counter-affidavit, if any on the P.A. filed on behalf of the applicant on further issues. For further evidence (Affidavit evidence) and Hg. 16th September 2002."

It is alleged that the procedure adopted by the second respondent-Tribunal caused irreparable loss and injury to the petitioner and will have serious consequences on the defence put forward by him. It is also averred that even according to the time recorded by the Tribunal in the deposition sheet on 28th August 2002 the witness was cross-examined only for 51 minutes. It is averred that the order passed by the Tribunal that the witness was cross-examined for more than one and a half hours on that day is not true as can be seen from the deposition sheet. It is averred that the action of the Tribunal is arbitrary, illegal and liable to be set aside.

3. The first respondent-Bank filed a counter-affidavit stating that the averments in the Original Petition are not true. The contention of the petitioner that the loss occasioned due to the negligence on the part of the officials of the Bank was denied. In answer to the averments contained, in paragraph 7 of the Original Petition regarding the cross-examination of A.W. 1 it is admitted that the cross-examination of that witness was conducted on 31st July 2002, 8th August 2002 and 28th August 2002. According to the respondent in spite of the lengthy cross-examination conducted by the Counsel for the petitioner, nothing material was

brought out and hence the Tribunal directed the petitioner to file a counter-affidavit, if any on the proof affidavit filed by the applicant and posted the case for further evidence and for hearing. It is contended that Section 22 of the Recovery of Debts and Financial Institutions Act, 1993 (Act for short) provides that Tribunal and Appellate Tribunal are not bound by the procedure laid down in the Code of Civil Procedure. It is contended that Rule 12(6) of the Debts Recovery Tribunal (Procedure) Rules, 1993 (Rules for short) provides that the Tribunal may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit or it may order the affidavit of any witness may be read at the hearing. It is contended that the order passed by the Debts Recovery Tribunal is under Rule 12(6) of the Rules and hence legal. It is further contended that the High Court as well as the Supreme Court are relying on the affidavits filed by parties while dealing with the Original Petitions filed under Articles 226 and 32 of the Constitution of India and hence the Tribunal is fully competent to dispose of a suit based on the affidavits. Hence it is prayed that the O.P. may be dismissed.

4. In view of the rival contentions raised by both sides, it is necessary to deal with the procedure to be followed by the Tribunal in recording the evidence. Sections 17 and 18 in Chap.III of the Act deal with jurisdiction, powers and authority of the Tribunals. Section 17 provides that a Tribunal shall exercise on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions. Section 18 of the Act provides that on and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority in relation to the matters specified in Section 17. Sections 19 to 24 in Chap.IV of the Act deal with the applications filed before the Tribunal. Sub-section 20 of Section 19 provides that the Tribunal may after giving the applicant and the defendant an opportunity of being heard, pass such interim or final order, including the order for payment of interest from the date on or before which payment of the amount is found due upto the date of realisation or actual payment, on the application as it thinks fit to meet the ends of justice. Section 20 provides for an appeal against the orders passed by the Debt Recovery Tribunal before the Debt Recovery Appellate Tribunal Section 21 deals with deposit of amount of debt due, on filing appeal Section 22 deals with the procedure and powers of the Tribunal and the Appellate Tribunal. It reads as follows:

"22. Procedure and powers of the Tribunal and the Appellate Tribunal.-(1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:-

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) reviewing its decisions;
- (f) dismissing an application for default or deciding it ex parte;
- (g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;
- (h) any other matter which may be prescribed.

(3) Any proceeding before the Tribunal or the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purposes of Section 196 of the Indian Penal Code (45 of 1860) and the Tribunal or the Appellate Tribunal shall be deemed to be a civil court for all the purposes of Section 195 and Chap. XX VI of the Code of Criminal Procedure, 1973 (2 of 1974)."

A reading of Sections 19, 20 and 22 makes it clear that the provisions contained in the CPC are not made applicable as such but certain provisions of the C.P.C. which are specified in Sub-section (2) of Section 22 are made applicable. Section 22(2)(a) of the Act confers power to examine a witness on oath and Sub-section (2)(c) confers power to receive evidence on affidavits.

5. The Central Government had made Debts Recovery Tribunal (Procedure) Rules, 1993. Rule 12(6) of the Rules reads as follows:-

"12. Filing of reply and other documents by the defendant.-

- (1).....
- (2).....
- (3).....
- (4) .....
- (5) .....

(6) The Tribunal may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit; or that the affidavit of any witness may

be read at the hearing, on such conditions as the Tribunal thinks reasonable:

Provided that where it appears to the Tribunal that either the applicant or the defendant desires the production of a witness for cross-examination, and that such witness can be produced an order shall not be made authorising the evidence of such witness to be given by affidavit."

6. In addition to the Debts Recovery Tribunal (Procedure) Rules, 1993, the Debts Recovery Tribunal Regulations of Practice, 1997 was also promulgated. The Regulations applicable to Debt Recovery Tribunal, New Delhi are made applicable to Debts Recovery Tribunal in Kerala also. Chap.XI of the Debts Recovery Tribunal Regulations of Practice, 1993 (Regulations for short) deals with examination of witnesses and the issue of Commissions. Regulation 31 in Chap.XI reads as follows:-

"Examination of witnesses and the issue of Commissions.- Provisions of Section 22, Sub-clause (2) of the Act and provisions of Order XVI and XXVI of the CPC shall mutatis mutandis apply in the matter of summoning and enforcing attendance of any person as witness and for examining him on oath, and issuing commission for the examination of witness."

Regulation 34 in Chap.XI deals with form of recording of deposition. It reads as follows:-

"Form of recording of deposition. -

(a) The deposition whenever necessary of a witness shall be recorded in Form No. 18.

(b) Each page of the deposition shall be initialled by the Presiding Officer or the Court Commissioner as the case may be.

(c) Corrections, if any pointed out by the witness may, if the Presiding Officer/ Court Commissioner is satisfied, be carried out and duly initialled. If not satisfied, a note to that effect be made at the bottom of the deposition."

Form No. 18 prescribed under Regulation 34 provides that each page of the deposition sheet shall contain the signature of the witness and initials of the Presiding Officer and at the end of the deposition, the following endorsement by the Presiding Officer should be stated.

"Statement was read over to the witness who admitted it to be correct."

Regulation 36 deals with recording of evidence. Sub-sections (a) and (b) read as follows:

"36. Recording of evidences.- (a) A typewriter may be used by the Presiding Officer himself for the purpose of recording deposition and memoranda of evidence or the evidence may be typewritten to his dictation in open Court as the evidence proceeds. Each page of the deposition or memorandum of evidence when typewritten shall be attested by the Presiding Officer's signature and a

certificate to that effect that the deposition or memoranda of evidence is so typewritten to his dictation shall be added at the end.

(b) Affidavits Subject to provisions of Section 22, Sub-clause (ii)(c) of the Act, the P.O. may at any time for sufficient reasons order that any particular fact or facts, be provided by an affidavit. The provisions of Order XIX of Code of Civil Procedure, 1908, as amended from time to time would be/ are applicable with necessary and appropriate modifications."

So there is no meaning in saying that the Tribunal is not bound by any rules or procedure. Even if the provisions of the CPC are not applicable as such to the proceedings before the Debt Recovery Tribunal it has to follow the principles of natural justice. An officer of a Debt Recovery Tribunal cannot conduct proceedings according to his/her whims and fancies. The Tribunal has to follow the procedure prescribed under the Act, Rules and Regulations. The provisions contained in Rule 12(6) do not confer any power on the Tribunal to stop the recording of the evidence on the ground that the witness was in the box for any particular time.

7. Regarding the applicability of filing affidavit, the relevant provisions are contained in Order XVII, Rules 4(1) and (2) of the Code of Civil Procedure. It reads as follows:-

"Recording of evidence.- (1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court (other than the High Court) shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit:

Provided further that in a suit tried by the High Court, the evidence shall ordinarily be recorded by the Commissioner unless the Court directs otherwise."

A reading of Rule 4 makes it clear that the filing of proof affidavit under Order XVIII is confined to the matters regarding the examination-in-chief alone. Further it is not the law that any witness can file an affidavit under Rule 4. In Salem Advocate Bar Association v. Union of India 2002 (3) KLT 920 the Apex Court has considered the applicability of Rule 4(1) of Order XVIII of the Code of Civil Procedure. It reads as follows:-

"Order 16, Rule 1 provides for list of witnesses being filed and summons being

issued to them for being present in court for recording their evidence. Rule 1A, on the other hand, refers to production of witnesses without summons where any party to the suit may bring any witness to give any evidence or to produce documents. Reading the provisions of Order 6 and Order 18 together, it appears to us that Order 18, Rule 4(1) will necessarily apply to a case contemplated by Order 16, Rule 1A, i.e. where any party to a suit, without applying for summoning under Rule 1 brings any witness to give evidence or produce any document. In such a case, examination-in-chief is not to be recorded in court but shall be in the form of an affidavit. In cases where the summons have to be issued under Order 16, Rule 1, the stringent provision of Order 18, Rule 4 may not apply. When summons are issued, the court can give an option to the witness summoned either to file an affidavit by way of examination-in-chief or to be present in court for his examination. In appropriate cases, the court can direct the summoned witness to file an affidavit by way of examination-in-chief. In other words, will regard to the summoned witnesses the principle incorporated in Order 18, Rule 4 can be waived. Whether a witness shall be directed to file affidavit or be required to be present in court for recording of his evidence is a matter to be decided by the court in its discretion having regard to the facts of each case."

The learned Counsel appearing for the respondent has relied on a decision reported in Union of India and Another Vs. Delhi High Court Bar Association and Others, and argued that the Debt Recovery Tribunal can frame its own procedure regarding the examination of witnesses. It was held as follows:-

"While the tribunal has, no doubt, been given the power of summoning and enforcing the attendance of any witness and examining him on oath, but the Act does not contain any provision which makes it mandatory for the witness to be examined, if such a witness could be produced. Rule 12(6) has to be read harmoniously with the other provisions of the Act and the Rules."

It was further held as follows:

"In other words, the Tribunal has the power to require any particular fact to be proved by affidavit, or it may order the affidavit of any witness may be read at the hearing. While passing such an order, it must record sufficient reasons for the same. The proviso to Rule 12(6) would certainly apply only where the Tribunal chooses to issue a direction, on its own, for any particular fact to be proved by affidavit or the affidavit of a witness being read at the hearing. The said proviso refers to the desire of an applicant or defendant for the production of a witness for cross-examination. In the setting in which the said proviso occurs, it would appear to us that once the parties have filed affidavits in support of their respective cases, it is only thereafter that the desire for a witness to be cross-examined can legitimately arise."

Even going by the decision reported in Delhi High Court Bar Association's case, it is clear that the proof affidavit is confined to the matters to be proved in chief

examination alone and when a witness files such an affidavit, the opposite party gets a right to cross-examine the person who had filed the proof affidavit.

8. The learned Counsel for the Bank relying on a decision in *Dr. J.J. Merchant and Others Vs. Shrinath Chaturvedi*, argued that the courts have got power to permit the party to file affidavits regarding points to be covered by cross-examination also. In *Dr. J. J. Merchant's* case (*supra*) the Apex Court found that the party who wants to cross-examine an expert witness like doctor before the Consumer Redressal Forum can be required to put the questions in writing and the witness can be asked to reply to those questions on affidavits. The Apex Court was considering the scope of examination of an expert witness before the Consumer Redressal Forum. The facts of the case are also to be considered. An application was filed by the father claiming that his son aged 21 years, who was undergoing treatment in Breach Candy Hospital, Mumbai died because of medical negligence. Before filing the complaint, the complainant filed a criminal complaint before the Metropolitan Magistrate alleging offences u/s 304-A/201 and 203 of the Indian Penal Code. An application was filed to stay the proceedings before the National Commission which was rejected. That matter was challenged before the Supreme Court. It was argued that recording of evidence of expert including doctors relied on by the complainant would consume much time and so the applicant must approach the Civil Court. The Supreme Court considered the power of the Commission to take evidence on affidavits. The Supreme Court took note of Order XVIII, Rule 4 and held as follows:

"Hence we do not think that there is any scope of delay in examination or cross-examination of the witnesses. The affidavits of the experts including the doctors can be taken as evidence. Thereafter, if cross-examination is sought for by the other side and the Commissioner finds it proper, it can easily evolve a procedure permitting the party who intends to cross-examine by putting certain questions in writing and those questions also could be replied by such experts including doctors on affidavits. In case where stakes are very high and still party intends to cross-examine such doctors or experts, there can be video conferences or asking questions by arranging telephone conference and at the initial stage this should be borne by the person who claims such video conference. Further, cross-examination can be taken by the Commissioner appointed by it at the working place of such experts at a fixed time."

A reading of the principles laid down by the Supreme Court shows that the court was considering the cross-examination of expert witnesses including doctors alone. The court was examining the methods to avoid the delay in examining such witnesses. The Apex Court only suggested that permission can be given to a party who intends to cross-examine an expert by putting certain questions in writing and the witness can be asked to reply those questions on affidavits. It further held that if stakes are very high and still the party intends to cross-examine, there can be video conference for asking questions by arranging telephone conferences. The court also found that if necessary a commission can



be appointed and the Commissioner can examine the expert witness at the working place. The Apex Court has not held that the cross-examination of a party to the proceedings or his witnesses can also be made by affidavits. So the principle laid down in Dr. J. J. Merchant's case (*supra*) is no authority for the proposition that the cross-examination of a witness can be allowed to be done only for a limited time. In fact, a reading of the order passed by the second respondent on 28th August 2002 shows that the Tribunal abruptly stopped the cross-examination of the witness on the ground that he was cross-examined for more than one and half hours on that day. The timing recorded by the Tribunal in the deposition sheet itself shows that the witness was cross-examined only for 51 minutes. The witness was discharged. No permission was given to the petitioner to elicit the matters which he wanted to elicit from the witness during cross-examination by asking questions. So it is clear that the Tribunal closed the evidence of the witness on the ground that his evidence was recorded for more than a particular time. That is a procedure unheard of. No Tribunal or a court can take such an attitude that the cross-examination of a witness shall be finished within a particular time-limit. The time that is required for cross-examining a witness depends upon various factors. If the Tribunal insists that it will not record evidence of a witness for more than a particular time-limit, the parties will be put to irreparable injury and hardship. So the order passed by the Tribunal is illegal and without jurisdiction and not in accordance with the procedure prescribed under the Act, Rules or Regulations. It is against the principles of natural justice also.

9. The photo copies of the deposition produced along with the Original Petition show that there is violation of the provisions contained in Regulations 34 and 36. Regulation 34 of the Regulations provides that each page of the deposition shall be initialled by the Presiding Officer. The last page shall contain the endorsement by the Tribunal. The certified photo copy of the deposition produced and marked as Exts.P-3, P-3(a) and P-5 shows that at the bottom of every page, the witness had affixed his signature. The deposition sheets do not contain the initials of the Presiding Officer as provided under Regulation 34(b) of the Regulations. Even though the evidence is typewritten the same is not attested by the Tribunal and does not contain the certificate contemplated under Regulation 36. A perusal of the deposition sheet shows that after recording the evidence by the steno it was not seen or signed by the Presiding Officer at all. Form 18 prescribed under Regulation 34(a) shows that on the last page of the deposition the Tribunal shall make an endorsement to the effect that the statement was read over to the witness who admits it to be correct. It shall be signed by the Presiding Officer. Exts.P-3, P-3(a) and P-5 show that it is signed by the Registrar of the Tribunal. It contains the following endorsement:

"Certified that the above notes of evidence has been prepared on dictation to the steno by the Hon"ble Presiding Officer in the open court simultaneous to the version of the witness, on this the 29th day of August, 2002. Read over to the witness, who admitted it to be correct."

The Registrar of the Debt Recovery Tribunal has no authority or jurisdiction to make such an endorsement and is illegal. It is to be noted that Regulation 34(c) provides that if the witness points out any correction and the Presiding Officer is satisfied that the correction pointed out is genuine, it shall be carried out and initialled by the Presiding Officer. If the Presiding Officer is not satisfied, a note to that effect shall be made at the bottom of the deposition. The procedure followed by the Presiding Officer, Debts Recovery Tribunal in recording the evidence is not in accordance with Regulations 34 and 36 of the Regulations. What is the legal effect of the violation of the Regulations need not be considered in this proceedings and that matter is left open to be decided in appropriate proceedings.

10. The order passed by the Debt Recovery Tribunal in stopping the recording of the evidence of A.W.I on the ground that the cross-examination of that witness was going on for more than one and half hour is illegal and without jurisdiction. It is liable to be quashed.

In the result, the order passed by the Debt Recovery Tribunal on 28th August 2002 closing the evidence of A.W.I in O.A. No. 1768 of 1998 is hereby quashed. The Tribunal is directed to dispose of the O.A. in accordance with law.