
(1997) 05 DEL CK 0010
In the Delhi High Court
Case No : First Appeal No. 266 of 1995

Cofex Exports Ltd.

APPELLANT

Vs

Canara Bank

RESPONDENT

Date of Decision : 29-05-1997

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17

Citation : AIR 1997 Delhi 355 : (1997) 2 BC 438 : (1998) 92 CompCas 583 : (1997) 43 DRJ 754 : (1998) 1 RCR(Civil) 158

Hon'ble Judges : S.N. Kapoor, J; R.C. Lahoti, J

Bench : Division Bench

Advocate : A.S. Chandhiok, R. Vasudevan, H.C. Dhal, J.N. Aggarwal, I.S. Mathur, Sanjeev Kalra and Atul Kumar, for the Appellant;

Judgement

R.C. Lahoti, J.

(1) This order shall govern the disposal of FAO(OS) 266/95 and FAO(OS) 314 to 319 Of 1996. These appeals raise issues of frequent occurrence touching the entertainability of cross- suits, counter claims and claims of set-off before Debt Recovery Tribunal, and impact of their existence in written statement on the jurisdictional competence of the civil court qua the jurisdiction of Debt Recovery Tribunal over such cases which are associated with cross suits, cross claims and claims for set-off, filed or preferred reciprocally. Let us lay the factual matrix so as to seat the legal questions propping up for decision. Cofex Export vs. Canara Bank and Ors. arises out of civil suit No. 3193/92 filed by Canara Bank against the appellant and two others for recovery of Rs. 25,21,556.98. The Suit was filed on 24.8.92. The transactions entered into between the parties are banking and loan facilities, packaging credit facility and loan on pledge and hypothecation. In the written statement filed on 22.11.94, the defendants 1 and 2 have preferred counter-claim, wherein the pleas raised are that the plaintiff bank has charged excessive rate of interest in breach of agreement between the parties and has also adjusted more amounts then due in the discounting of foreign bills. It is

submitted that if the statements of account are correctly drawn up consistently with the agreements between the parties and the plaintiff gives due credit to all the amounts set out in the written statement then nothing would be found due and payable by the defendants; instead the plaintiff bank may be found liable to pay something to the defendants. 3.1 The reliefs prayed for are : (a) pass a decree of mandatory injunction in favor of the defendant and against the plaintiff directing the plaintiff to correct, draw and recast the entire account maintained by the defendant with the plaintiff since 12.11.1986 in accordance with the terms of agreement between the parties, inter alia, giving all due credits in respect of excess amount of interest charged and amounts/credits received from export credit guarantee Corporation and cheques received towards payment of foreign bills of the defendant for goods exported by them and deleting the charges/ amounts not provided for in the agreement; (b) Dismiss the suit of the plaintiff with costs. (c) Award costs to the defendants towards the counter claim. 3.2 The relief of mandatory injunction has been valued at Rs. 5,10,000.00 for the purpose of court fee and jurisdiction with court fee of Rs.7,322.00 paid thereon. FAO(OS) No. 314 to 319/96 respectively arise out of the following suits:- @3TAB = Suit No. filed on Names of Defendants Suit Amount In Rs.Ps @3TAB = Cs 2806/93 7.12.93. M/S Tayal Plywood (P) Ltd 3,84,89,483.41 @3TAB = Cs 2810/93 07.12.93 Tayal Sales Corp (P) Ltd & Ors 2,59,69,053.94 @3TAB = Cs 2811/93 14.12.93 Vijay Kumar Tayal And 3 Ors 2,44,17,286.34 @3TAB = Cs 2809/93 7.12.93. Kusum Gupta 95,56,800.92 @3TAB = Cs 2808/93 4.11.93 Geeta Ram Gupta 1,05,38,614.61 @3TAB = 2807/93 7.12.93. Sandeep PLYWOOD(P) Ltd 2,13,25,596.06 @3TAB =

(2) 1 All the six suits have been filed by State Bank of India. They seek recovery of debts secured by mortgages. In none of the cases written statement has been filed. In each of the cases the defendant/s have moved applications u/s 151 CPC seeking stay of the civil suit on the ground that the defendants are facing criminal prosecution on the same facts as set out in the plaint and filing of the written statement would prejudice them in their defense in the criminal trial on account of their defense being disclosed. On 23.5.94, in each of the suits, the learned trial Judge has directed filing of written statement to be deferred till disposal of the application seeking stay of the suit.

(3) 4.2 It appears that the defendants in suit No. 2806 to 2810/93, all belong to one family or one business house known as Tayal Group having floated companies and partnership firms consisting of the members of the group/family. The Tayal Group has filed following five suits against the State Bank of India :- (i) Suit No. 150/94 titled M/S Tayal Sales Corporation Pvt Ltd v. State bank of India, Delhi. The suit is for recovery of Rs. 10 lacs, for declaration with consequential relief and for injunction. The plaintiff in this suit is seeking adjustment of the claim in suit No. 2812/93 said to have been instituted by the State Bank of India against the plaintiff for Rs. 1,48,38,922.75 and has sought in addition a decree in the sum of Rs. 10 lacs as damages apart from the relief and declaration. (ii) Suit No. 493/94 titled Sh Geeta Ram Gupta v. State Bank of

India. This is a suit for recovery of Rs. 4 lacs, for declaration with consequential relief and for injunction. The plaintiff in this suit is seeking a sum of Rs. 4 lacs after adjustment of the defendant/banks claim in suit No. 2808/93., (iii) Suit No. 711/94 M/S M.T. Plywood Traders Pvt Ltd v. State Bank of India. (iv) Suit No. 837/94 M/S Sandeep Plywood Pvt Ltd v. State Bank of India. (v) Suit No. 2085/94 M/S. Tayal Plywood Industries Pvt Ltd v. State Bank of India. All the civil suits stated hereinabove, were filed on the Original Side of the High Court. With the coming into force of the Recovery of Debts Due to Banks and Financial Institutions Act 1893 (Act No. 51 of 1993) (hereinafter the Act, for short) the suits filed by the Banks were sought to be transferred and the records transmitted to the Debt Recovery Tribunal. The defendants have moved applications seeking the relief of the suits not being transferred to the Tribunal. The learned trial Judge has overruled the contentions of the defendants and directed the suits to be transferred to the Tribunal vide his order dated 22.8.95. The order of the learned Single Judge has been State Bank of India and etc. Vs. Vijay Kr. Tayal and Others, etc., . The aggrieved defendants have come up in appeals. It was submitted by Mr A.S. Chandihok, the learned counsel for the appellant in Fao (OS) 266/95 that it is the valuable right- also statutorily recognised - of a defendant to prefer a counter-claim and have it tried in the same suits filed by the plaintiff. The transfer of the suit would prejudice this valuable statutory right of the defendant, as the Tribunal would not have competence to try the counter-claim. Mr H.C. Dhal, the learned counsel appearing for the appellants in other appeals has submitted that the cross suits filed by the defendants are in the nature of cross-claims or counter-claims. Transfer of the suit filed by the Bank to the Tribunal would not be accompanied by corresponding transfer of the civil suits filed by Tayal Group to the Tribunal. The result would be that the bank's claim would be tried expeditiously by the Tribunal while the suits filed by Tayal Group would continue to remain pending in the civil court which would result in valuable right of the defendants being lost. Also the possibility of conflicting decrees coming into existence cannot be ruled out. This would occasion serious and unforeseen complications, also failure of justice. It was also submitted that to the extent of the claim in suit, a cross-claim or cross suit may tantamount to a plea in the nature of set-off, which plea being a plea essentially in nature of defense shall have to be heard and tried with the suit filed by the bank. Shri Ishwar Sahai, the learned Senior Advocate assisted by Shri Sanjeev Kalra and Shri Atul Kumar advocate appearing for the State Bank of India and Shri J.N. Aggarwal appearing for the Canara Bank have submitted that the Tribunal having been established by Parliament though a legislative enactment within its legislative competence, the law has to take its own course. Such claims as lie within the jurisdiction of the Tribunal have to be tried by it and cannot be withheld by the civil court so also the civil court cannot afford to transfer such claims to the Tribunal as are not entertainable by it nor the Tribunal is supposed to try, hear and decide such claims as do not lie within its jurisdiction. The questions arising for decision are :- Can a civil court refuse to transfer a civil suit to the Tribunal lying within latter's jurisdictional competence

merely because a cross suit or a counter-claim has been filed or preferred ?

(4) 2. If a civil suit instituted before a civil court is liable to be transferred to Tribunal on account of latter's exclusive jurisdictional competence to try it whether the civil court should transfer the cross suit or cross claim also to the tribunal along with the suit with which it is associated ?

(5) Whether a plea of set-off raised in a suit filed by a bank or financial institution would be triable by Tribunal or would enable the suit being retained by civil court before it ?

(6) A defendant has a right to defend himself by raising all possible pleas permitted by law. No court fee is livable on a written statement. The nature of the several pleas which can be taken by a defendant faced with a suit for recovery of a debt, in so far as relevant for the purpose of the present order may broadly be classified as payment, adjustment, set-off and counter- claim.

(7) A payment is the satisfaction or extinguishment of a debt prior to the filing of the written statement. 10. An adjustment contemplates existence of mutual demands between the same parties in the same capacity. The broad distinction between a payment and an adjustment is that in an act of payment one party deals with the other, while in an adjustment it is an act of the party himself prior to the filing of the written statement though the benefit of both is claimed by raising a plea in the written statement.

(8) 11. A plea of adjustment is to be distinguished from a plea of set-off or counter-claim Adjustment like payment is relatable to a period anterior to the date of such plea being set out before the court. A Division Bench of High Court of Madhya Pradesh had an occasion to deal with the plea in State of Madhya Pradesh Vs. Raja Balbhadra Singh, . It was held :- " Where two persons have certain accounts and monies are payable by each to the other, they are both entitled to mutual adjustments of the monies provided they are really due and recoverable. The distinction between payment and adjustment is that payment is made to the creditor while the adjustment is made by the debtor himself. Although it is not called `payment" in common parlance yet it undoubtedly partakes the character of payment. At all events, it cannot be called a claim for set off,nor can it be said to be a counter-claim, as the defendant does not seek enforcement of his claim, and, Therefore, court-fee is not due." "On a general principles a person is entitled to pay to himself that amount which is due to him from another if he has in his hand monies belonging to that other, provided that his dues are legally recoverable. Although that question will be adjudged by the Court of law when it arises, he is not obliged to sue for the recovery of the money which he is already in possession of."

(9) To the same effect is a Division Bench decision of Orissa High Court rendered in The Tata Iron and Steel Co. Ltd. Vs. R.N. Gupta, . Halsbury's Laws of England (4th Edn, Vol 42 vide para 401, at page 239), categories three types of claims which a defendant may raise by way of cross-complaint against the plaintiff. (1)

"B's right where his cross complaint consists of a money claim, to deduct from the amount paid to A a sum representing his cross-complaint. (2) B's right to raise legitimately and successfully such a cross-complaint in a claim brought by A, so as to reduce or extinguish A's claim and to establish any right of B to an excess over A's claim; and (3) B's right to raise a non-pecuniary cross-complaint in a claim brought by A. Whilst much of the jurisprudence applicable to this title appears to bear a procedural hallmark, the substantial advantage which B derives from the relevant doctrines is that he may defer meeting A's claim, wholly or in part, until a court has adjudicated on his own cross-complaint.

(10) Typically, the doctrine of set-off, counterclaim and abatement are concerned with deductions made by B. If these are permissible and B has a triable cross-complaint, then B is entitled to withhold payment, wholly or protanto, until his cross-complaint has been resolved by the court. If the deductions are impermissible, B may at best have to meet A's claim at once, the trial of his cross-complaint being deferred to a later hearing."

(11) Vide para 410 (at page 214 supra) Halsbury has drawn distinction between set-off and payment as under :- "4

(12) Distinction between set-off and payment. Set-off is entirely distinct from payment. Payment is satisfaction of a claim made by or on behalf of a person against whom the claim is brought. The person paying performs the obligation in respect of which the claim arises, which thereby becomes extinguished. Set-off exempts a person entitled to it from making any satisfaction of a claim brought against him, or of so much of the claim as equals the amount which he is entitled to set off and thus to the extent of his set-off he is discharged from performance of the obligation in respect of which the claim arises. Where there has been payment, the party against whom the claim is brought pleads payment or accord and satisfaction, which in effect alleges that the claim no longer exists. On the other hand, a plea of set-off in effect admits the existence of the claim, and sets up a cross claim as being ground on which the person against whom the claim is brought is excused from payment and entitled to judgment on the plaintiff's claim. Until judgment in favor of the defendant on the ground of set off has been given the plaintiff's claim is not extinguished.

(13) Vide para 432 (at page 251 supra) it is stated: "432. When set off is available. A set-off is available to a defendant only when the rules of procedure of the court in which the plaintiff brings his action allow a set-off to be pleaded and the mode in which a plea of set-off is to be raised is also determined by those rules. A defendant cannot be compelled to plead a set-off, he can, if he wishes, enforce his claim by independent action."

(14) Vide para 477 (at page 265, supra) it is stated : 477. When a Counter claim is available. A counter claim is available to a defendant only when the rules of procedure of the Court in which the plaintiff brings his action allow a counter-claim to be set up and the way in which a counter claim may be brought is

determined by those rules.

(15) The effect of preferring a counter claim is that to its extent the defendant becomes a plaintiff and the plaintiff becomes a defendant.(Halsbury, supra, para 482, p.267)

(16) A counter-claim is for most purposes of procedure except execution, treated as a separate action to be tried together with the original action. (Halsbury, supra, para 491, p.270

(17))IN Corpus Jurisdiction Vol 57 (Edn 1932) the subject as to set-off and counter-claim has been dealt with. We may extract and reproduce the relevant statements there from as under :

"A set-off is a counter demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of plaintiff's cause of action. It is in the nature of a cross action. (pp. 359-360) "Statutory set-off - The right or remedy of set off in actions at law is purely statutory; it was unknown at common law according to which mutual debts were distinct and inextinguishable, except by actual payment, release, or agreement, and a defendant who had a demand against a plaintiff was compelled to resort either to his cross action or a bill in chancery, except in the few instances in which the limited right of recoupment was available. This condition of the law led to the enactment by statute of the remedy of set-off, which was designed by allowing set-offs in actions at law to supersede, or obviate the necessity of a resort to, bills in equity for that purpose"

(Pg 360) Equitable set-off- A court of equity or a court possessing equitable jurisdiction has inherent power as a part of its general jurisdiction to allow or compel a set off. This power is independent of statutes allowing a set off. (pg 361)

"Adequacy of Remedy at Law. Equity will not aid a defendant in an action at law as to matters of set-off when his legal remedies are complete and adequate, but it may allow a set-off where, from the nature of the claim or situation of the parties, justice cannot be done at law.(pg. 362)

A counter-claim is purely a statutory remedy of modern origin; it was not known to the common law, or before the adoption of the codes and in some states which have not adopted codes there is no statute providing for a counterclaim in an action at law. It is substantially a cross action by defendant against plaintiff and secures to defendant the full relief which a separate action at law, a bill in chancery or a cross bill would have secured him on the same state of facts. (pg.366)

(18) With this background we proceed to take note of the law governing set-off and counter claims by reference to the provisions of the CPC. 20.1 Rules 6 and 6A of Order 8 CPC provide as under : 6. Particulars of set-off to be given in written statement.(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money

legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the court present a written statement containing the particulars of the debt sought to be set-off. Effect of set-off-(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the court to pronounce a final judgment in respect both of the original claim and of the set-off: but this shall not affect the lien, upon the amount decreed of any pleader in respect of the costs payable to him under the decree. (3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off. 6A. Counter-claim by defendant. (1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up by way of counter-claim against the claim of the plaintiff, and right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defense or before the time limited for delivering his defense has expired, whether such counter-claim is in the nature of a claim for damages or not : Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court. (2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. (3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court. (4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. 20.2 Rule 6C provides for counter-claim being excluded on a plea being raised in that regard by the plaintiff and the court being satisfied that the counter claim ought not be disposed of in the suit but in an independent suit. Rule 6F provides where in any suit a set-off or counter claim is established against the plaintiff's claim and any balance is found due to the plaintiff or the defendant, as the case may be, the court may give judgment to the party entitled to such balance. 20.3 Rule 19 of Order 20 provides for a decree when set off or counter claim is allowed. Where the defendant has been allowed a set-off or counter claim against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to that party. 20.4 The provisions relating to counter-claim have been added in Order 8 of the CPC by CPC (Amendment) Act No. 104 of 1976, coming into force on 1.2.77. The same amendment has extended applicability of Rule 19 of Order 20 to counter claim which prior to amendment applied only to set-off 20.5 Sch.I Art 1 of Court fee Act 1870 provides for a written statement pleading a set-off or counter-claim to be levied with court fee .

(19) A written statement pleading a set-off or counter claim is to be treated as a plaint in a cross suit. The defendant occupies the position of a plaintiff so far as set off or counter claim is concerned though a separate suit number is not

required to be given to it. Dismissal in default of the suit or withdrawal of the suit may entail a decree ex parte or bi-parte being passed in favor of the defendant against the plaintiff.

(20) Having read the law laid down in *Bow Mclachiland & Co., Ltd. v The Ship "Camosun"* 1909 Ac 597, *Williams Brothers Vs. Agius Ltd.* 1914 Ac 510 and *Amon Vs. Bobbett* (1889) 22 Qbd 543 the Division Bench of Patna High Court in *Pramada Prasad Mukherjee Vs. Sagarmal Agarwalla and Others*, noted the English Courts having laid it down that a counter claim must be of such a nature that the court would have jurisdiction to entertain it as a separate action and then held:- "The essence of a set-off is that the defendant should have a cause of action against the plaintiff apart from the suit and not merely as a defense to the plaintiff's claim. To put it differently, the set-off is in the nature of a cross-action which would be separately entertained."

(21) In *Laxmidas Dahyabhai Kabarwala Vs. Nanabhai Chunilal Kabarwala and Others*, , their Lordship had an occasion to deal with the question of maintainability of a counter-claim. It is a pre 1976 amendment case. Their Lordships held that a right to make a counter claim has to be conferred by statute though a counter-claim preferred without statutory sanction does not preclude a court from treating a counter claim as a claim in cross-suit. The law laid down by their Lordships is an authority to develop a proposition that whether it be a counter claim or a set-off, the court must have sanction in law to entertain and try the same; else the court could not have tried it. For want of statutory provision the court could have precluded the plea and could have with justification adopted the procedure of treating the plea as a claim in cross-suit.

(22) Thus, a plea in the nature of payment, adjustment and the like can be raised in defense as of right. The plea if upheld, has the effect of mitigating or wiping out the plaintiff's claim on the date of the suit itself. The plea is not a claim made by the defendant. A counter-claim or a plea of set-off is a claim made by defendant. It does not extinguish the plaintiff's claim; it exonerates the defendant from honouring plaintiff's claim through upheld. Such plea if raised shall be gone into by the court, if permitted by law applicable to the court and would have the effect of a decree in favor of the defendant taking away plaintiff's right to realise such amount as has been upheld in favor of the defendant.

(23) 25. One of the riders on the jurisdiction of the court before which a plea in the nature of set off or counter claim is advanced is that only such court can entertain the plea as would have been empowered to take its cognizance had it been made the subject matter of a separate suit (see *Lassoo and Sons Vs. Krishna Bahadur Nepali*, , *Pramada Prasad Mukherjee Vs. Sagarmal Agarwalla and Others*, , *Beni Bandho v. Gaya Prasad* 1893 15 All 404.

(24) In *Bow, McLachlan and Co Ltd.v. The Ship "Camosun" and Union Steamship Co of British Columbia,Ltd* 1909 Ac 597, a claim was brought before the

Exchequer Court of Canada also having jurisdiction in Admiralty to enforce payment of the balance due on the mortgage of a ship. The defendant pleaded by way of equitable defense that they were entitled to set-off a sum of money expended by them which was sufficient to prevent their being in default under the mortgage at the date of the action. It was held:- "What good reason exists or can be suggested for refusing permission to set out the facts as a defense to an action on a mortgage given to secure the stipulated price ? The most important reason in the present case does not appear to have been fully presented to the learned judges in Canada. The change of practice , as stated in *Mondel v. Steel*, was based upon convenience in order to avoid circuitry of action, and the Courts were dealing with actions in which they had jurisdiction in the action for the price, and also jurisdiction in an action which might be brought to enforce the cross-claim in which both the damages which might be treated as an abatement and special or consequential damages could be recovered, and it was not unreasonable to permit the former to be proved to reduce the price without putting the defendant to the expense of a cross-action. But totally different position arises when the Court in which the action to recover the debt is brought has no jurisdiction to entertain a cross-action by the defendant to recover from the plaintiff damages for breach of the contract. In such a case the matter cannot be treated as one of mere convenience." page 613. (underlined by us) Their Lordships held that as the Exchequer Court had no jurisdiction to try the plea raised in the defense, it should be left to be settled by a cross-action in a court having jurisdiction to entertain it.

(25) In *Sri Vasudevandra Saraswathiswami Vs. Sridhara Sivarama Moorthy*, it was held that a counter claim may be entertained if the court has jurisdiction to entertain the same as a separate suit. To quote :

"A counter-claim may be set up only in respect of claims as to which the party could bring an independent action in the Court in which the counter-claim is brought . Because the plaintiff has brought an action which he was entitled to do, it does not mean that the defendant's right to put forward a counter-claim became limitless, e.g. to put forward a claim which nobody else could put forward as a plaintiff, and for which there is no justification in the Letters Patent or in the Civil Procedure Code."

(26) In *Ratna Ram v. Union of India*, 1983 Raj Lw 623, in a motor accident claim petition the defendant-owner of truck causing accident- sought to raise a counter-claim as regards the damages caused to the truck. The High Court held : "So far as the provisions of Order 8 rule 6A CPC are concerned I am unable to hold that they are based upon any equitable principles as may be applicable to the claim petitions. The claim petition can be filed by a person who has sustained injury or has sustained the loss of property at a motor accident by way of a speedier remedy in place of the normal and usual remedy of a civil suit and no principle of equity, justice or good conscience is involved for allowing his adversary to file a counter-claim, although there is no express provision permitting the filing of such

a counter-claim either in Section 110A of the Motor Vehicles Act or Rule 20. Nor any such provision is contained in rule 7 which allows the owner of the vehicle, which has caused the accident, and the insurer an opportunity to file a written statement. Thus, in my considered view, the provisions of Order 8 Rule 6A CPC cannot be pressed into service for filing a counter-claim in claim proceedings u/s 110-A of the Act."

(27) Every cause of action including one Constituting plea of set-off or counter-claim must be placed before the court as an independent action. Its entertainability by way of a plea raised in written statement is founded on convenience; such convenience having been given statutory recognition by procedural codes. If statutory permissibility be lacking, mere convenience would not entitle a defendant to raise such plea nor would oblige a court or tribunal to entertain the same by way of being placed before the court in a written statement.

(28) Set off may be legal or equitable. The right to set off dealt with by Order 8 R 6 CPC is a legal set-off. Its characteristics are that the sum of money is ascertained and both the parties fill the same character as they fill in the suit. Independently of the provisions in the CPC the courts of equity in England allowed a plea of equitable set-off being entertained though the amount was unascertained and there were mutual debits and credits amounting to cross-demands arising out of the same transaction or so connected in their nature and circumstances as to make it unequitable so that the plaintiff should recover and the defendant driven to a cross suit.

(29) The Code of Civil Procedure, as we have already noticed, provides for legal set-off and counter-claim being entertained by civil courts. A plea in the nature of equitable set-off though not contemplated by the CPC is yet entertainable under the common law. However, the plea cannot be raised as a matter of right. (See Gulla v. Premsukhdas 954 Raj Lw 749 It stands on a lower pedestal than the plea of legal set-off. If raised the court on being satisfied that trial of the plea may result in protracting or delaying the trial, may refuse to entertain it, leaving it open to the defendant to raise the same in an independent action. Munshi Ram and Others Vs. Radha Kishan (decd.) and Others, , Sankara Pillai Vs. Parameswaran Pillai, . The Muslim Bank vs Hassan Shiraza, Air 1951 Hyd 57. AIR 1940 177 (Nagpur) , Bhagwati Prasad V. Hukamchand Mills Ltd 1961 Mplj 272. In Bhagwati Prasad's case the High Court of Madhya Pradesh has held : "In case of an equitable set-off the principle contained in Order 8 rule 6 applies not strictly but only by analogy. Therefore, the Court's discretion in this regard is wider than in a case falling within the terms of that rule. That does not mean that the Court can do what it likes. It should consider the question of convenience. If for example, the claim of the defendant in equitable set-off relates to transactions that can be suitably investigated in the suit itself, then even if it is a claim for unliquidated sum it should be taken up. If on the other hand, the defendant's version would involve an elaborate and complicated enquiry unconnected with

and over a period different from the version of the plaintiff, the matter should be left to a fresh suit by the defendant. The question is not one of the party's right or court's jurisdiction. It is ultimately one regarding the convenience and of the mechanics of the litigation."

(30) For payment of court fee there is no distinction between legal and equitable set off. Both attract applicability of Sch 1 Art 1 of the Court Fees Act. (See. Dr Jessie George v. Mrs Shakuntala Haridas, Air 1950 Ep 225. W. Wilrow Vs. Mahadeo Govind Mehendale, . The Muslim Bank (supra) Girdhari Lal (supra).

(31) It is settled law that cross claim and cross suit enjoy practically the same status in law.

(32) Therefore, in appropriate cases a cross suit can be tried as a cross claim while a cross claim can be made to stand trial separately as a cross suit.

(33) The following things are in common in set off and counter claim : 1) None should exceed the pecuniary limits of the jurisdiction of the court: 2) Both are pleaded in the written statement, if the law governing the court permits such plea being raised by the defendant in the written statement; 3) The plaintiff is expected to file a written statement in answer to a claim for set-off or to a counter claim; 4) Even if permitted to be raised, the court may in appropriate cases direct a set-off or counter claim being tried separately ; 5) A defendant cannot be compelled to plead a set off nor a counter claim; he may as well maintain an independent action for enforcing the claim forming subject matter of set-off or counter claim. 6) Both are liable to payment of court fee under Sch 1 Art.1 of Court Fees Act 1870. 7) Dismissal of suit or its withdrawal would not debar a set-off or counter claim being tried, may be followed by a decree against the plaintiff.

(34) We may now notice the relevant provisions of the DRT Act and briefly examine the scheme of the enactment. The Preamble to the Act speaks of an act to provide for the establishment of the Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters conducted therewith or incidental thereto. The Act came into force on 24.6.93. Its applicability is attracted when the amount of debt due to any bank or financial institution or to a consortium of banks or financial institution is Rs. 10 lakhs or above. The term debt has been assigned a wide meaning vide clause (g) of the interpretation clause. Debt means any liability (inclusive of interest) which is alleged as due from any person by a bank or financial institution or by a consortium of banks and financial institutions during the course of any business activity undertaken by the bank etc. under any law for the time being in force, in cash or otherwise, whether secured or unsecured, whether payable under a decree or order of any civil court or otherwise and subsisting on, and legally recoverable on the date of the application. 35.1 Section 3 speaks of establishment of Tribunal by notification by the Central Govt. Section 17 confers jurisdiction, power and authority to entertain and decide applications from the

banks and financial institutions for recovery of debts due to them. On and from the appointed date Section 18 takes away jurisdiction, power or authority of courts or other authorities in relation to matters lying within the jurisdiction, power and authority of Tribunals. 35.2 Chapter IV provides for procedure of Tribunal. The bank or financial institution seeking to recover any debt from any person may make an application to the appropriate Tribunal whereupon summons shall be issued to the defendant and after giving him an opportunity of being heard the application shall be disposed of by passing such orders as the Tribunal thinks fit to meet the ends of justice. The Tribunal may make interim orders. A certificate issued under the signature of the presiding officer of the Tribunal empowers the recovery officer for recovery of the amount of debt specified in the certificate. The Tribunal is expected to dispose of the application finally within six months from the date of receipt thereof. 35.3 Section 22 releases the Tribunal from the bonds of procedure laid down by the Code of Civil Procedure, 1908 and obliges it to be guided only by the principles of natural justice. It has also power to regulate its own procedure. Sub section (2) vests the Tribunal with powers of civil court in respect of a few matters specified therein. Not only legal practitioners but even the officers of the parties may be authorised to act as presenting officers before the Tribunal. 35.4 Section 31 of the Act provides for transfer of pending cases. Every suit or other proceedings pending before the Court immediately before the date of establishment of a Tribunal which lies within the jurisdictional competence of the Tribunal must be transferred from the civil court to the Tribunal. On receipt of the records the Tribunal may proceed to deal with such suits or other proceedings in the same manner as if it were an application made to it u/s 19. Unlike the court which assumes jurisdiction on inquiry into a claim on presentation of plaint or written statement (as the case may be) pleading the claim, the Tribunal assumes jurisdiction on presentation of application setting out the claim, which application can be filed only by a bank or financial institution or Consortium thereof. 35.5 Section 34 of the Act gives its provisions an overriding effect on any other law or instrument for the time being in force if it be inconsistent with the provisions of the Act.

(35) A few features of significance may be noted. The Debt Recovery Tribunal is a tribunal and not a Court. The proceedings before it are initiated on an application and hence are not suits. Only bank or a financial institution has the locus to invoke the jurisdiction of the Tribunal. The Tribunal does not pass a decree. It issues a certificate to the recovery officer for recovery of the amount of debt specified therein. Its procedure is not prescribed nor detailed; the principles of natural justice alone have to be followed. The procedure is summary. Ordinarily the Tribunal shall spend a term of six months merely between the date of the application and decision thereon. The definition of debt shows that the jurisdiction of the Tribunal is attracted on the allegation of debt being due made in the application and is not dependent on its being so found.

(36) The Act was preceded by an ordinance promulgated on 26.4.93 which has

been repealed by Drt Act. Why the Act was enacted, is set out in the Statement of Object and Reasons. In *State Bank of India Vs. Samneel Engineering Company and Others*, one of us (R.C. Lahoti, J) had an occasion to deal with the Drt Act in the context of answering the question whether a mortgage debt was triable before the Tribunal. Having noticed the Preamble and the Statement of Objects and Reasons leading to the enactment of the Act it was observed (vide para 16-17) :- "The Statement of Objects and Reasons in the Act reveals the experience of the Parliament to considerable difficulties being faced by the banks and financial institutions in recovering loans and enforcement of securities. In spite of the banks and financial institutions trying to play as safe as possible the outstandings recoverable to them had mounted to more than Rs. 5622 crores in the field of public sector banks alone. This was virtually causing an economic crises preventing economic development of the country by blocking the funds. The Act was enacted with the object of ameliorating banks and financial institutions from such crises. It is also a judicially noticeable fact that process for recovery initiated by banks and financial institutions before the civil courts is a time consuming process. Unscrupulous borrowers resort to false and technical pleas in their defense resulting in protracting of trial caught in the procedural odds before the civil courts and providing another argument in the mouth of critics speaking of legendary delay in disposal of court cases. The establishment of the Tribunal and vesting it with summary jurisdiction and providing for procedure consistent with the principles of natural justice only is sure to accelerate the recovery of debts. Provisions of the Act must, Therefore receive an object oriented interpretation." 37.1 Vide para 18 it was observed that having regard to the historical background of the enactment, the Statement of Objects and Reasons, the Preamble spelling out the mischief which is sought to be cured and prevented by the Act, the object with which the Act has been enacted, the Act has to be so interpreted as "to give the laws its claws." 37.2 Vide para 21.2 it was observed that the special provisions of the Act spell out the avowed object of securing recovery of money to the banks and financial institutions at the earliest avoiding cumbersome procedures. 37.3 In the context of the questions posed before us we find ourselves in agreement with the observations made in *Samneel Engineering Company's* case (supra).

(37) For reasons more than one, we are of the opinion that a set-off or a counter claim cannot be entertained by a Debt Recovery Tribunal. A Debt Recovery Tribunal is a tribunal and not a court. It is a creature of statute vested with a special jurisdiction to try only applications by bank or financial institutions to recover any debt from any person. It does not exercise any 'common law jurisdiction'. It is only a bank or a financial institution or a consortium of the two which can enter the Tribunal for enforcement of its claim for recovery. Any one other than those cannot be entertained invoking jurisdiction of the Tribunal for enforcement of its claim as a claimant. What cannot be done directly can also not be allowed to be done indirectly. If claim by a person other than bank or financial institution is not entertainable before Tribunal it does not become entertainable

merely because it is set out in the written statement or preferred by way of set-off or counter claim. An obligation to comply with the principles of natural justice obliges the Tribunal to entertain such pleas (e.g. denial, payment, adjustment) as would have the effect of abating, mitigating or extinguishing the claim itself, denying the Tribunal an opportunity of issuing a certificate while disposing of the application. The Tribunal is not a civil court; it has been vested with the powers of the civil court in respect of limited matters only such as summoning and enforcing attendance of witnesses, requiring discovery and production of documents, proceeding ex parte and setting aside ex parte orders etc. (see clauses (a) to (h) to sub section (2) of S. 22 of the Act). It has not been conferred with jurisdiction to entertain counter-claim or plea of set-off by reference to the provisions of Order 8 of the CPC. Entertaining a counter-claim or a cross suit or a plea of set-off would not only be without jurisdiction but also an exercise in futility inasmuch as the Tribunal would not adjudicate thereupon nor pass a decree in favor of the defendant against the plaintiff. The law creating Tribunal and conferring jurisdiction on it has not provided for set-off or counter claim being entertained by it just as the CPC does it for civil courts. If a counter claim was to be tried by Tribunal it may have to go into disputes arising between the parties though not "filling the same character". There may be disputes which by no stretch of imagination can be tried by Tribunal. Claims preferred by bank or financial institutions are capable of being disposed of by summary enquiry while claims preferred by other persons would not be capable of being so disposed of. The principle of convenience and the mechanics of litigation before Tribunal (as set out in the Act) - both exclude set-off or counter claim being placed before the Tribunal. If set-off, counter claims and cross suits were allowed to be raised before the Tribunal the very object behind its creation will be lost.

(38) There is a remedy for every wrong. Every legal claim or right must be enforced. However, nobody has a right to have his claim being tried by a particular forum. There is nothing wrong if the claims and cross claims whether by way of set-off or by way of counter claim allegedly existing between a person and a bank or financial institution are left to be enforced before two different forums - before Debt Recovery Tribunal by bank or financial institution and before civil court by any person other than the two. The person at whose instance the cross suit was filed or the cross claim, counter-claim or plea of set-off was preferred cannot complain of prejudice inasmuch as he can always approach the civil court for decree in respect of the claims forming subject matter of set-off or counter claims. The law has provided separate forums for the adjudication of claims by banks and financial institutions and by persons other than these. Each has a right to invoke the jurisdiction of the forum meant for it and each forum shall try the claim within its jurisdictional competence. Finality shall attach to the findings arrived at and reached by each of the two within its respective jurisdictional competence. Issues heard and decided by the Tribunal shall operate as res judicata and shall bind the parties in the suit before the civil court by virtue of Explanation VIII to S. 11 CPC. However, the civil court shall be free to decide

such issues as lie within its jurisdictional competence. If the civil court must decide an issue seized by it and within its competence and if there be an unavoidable conflict between the findings recorded by the civil court and by the Tribunal, the finding of Civil Court would obviously override and supersede the findings recorded by the Tribunal for a court is a court and tribunal is a tribunal; the former adjudicates on trial, the later holds only a summary inquiry guided by principles of natural justice as the Act provides.

(39) A civil Court while transferring a suit to the Tribunal for the purpose of being heard as an application u/s 31 of the Drt Act shall transfer the suit but shall not transfer a counter claim cross-claim or a cross-suit not even a plea of set off. Before transferring a suit filed by a bank or a financial institution to the Tribunal, the Civil Court shall direct the defendant to take steps for separating the plea of set off and counter-claim from the written statement. On that being done the plea shall be registered as a suit filed by the defendant, designating the defendant as plaintiff and the bank or financial institution as the defendant. A cross suit presents no difficulty; in spite of the suit having been transferred to the Tribunal a cross suit would remain pending before the civil court for the very obvious reason that law does not contemplate a cross suit being transferred to Tribunal.

(40) The learned counsel for the appellants have relied on the law laid down by the Supreme Court in Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others, in support of the submission that filing of a counter claim was a right of the defendant of which he cannot be deprived. The relevant part of the judgment reads as under: "There is no substantial difference between a counter claim and a suit, but nevertheless a defendant cannot be prevented from filing a counter claim under the Code of Civil Procedure." It hardly needs to be stated that their Lordships were dealing with counter claim by reference to the provisions of Order Viii of the CPC which is not applicable to the Tribunal. The observation of their Lordships that there is no substantial difference between a counter claim and a suit, goes against the appellants inasmuch as the counter claim being a suit would not be entertainable by the Tribunal and hence cannot be transferred to it.

(41) To sum up our answers to the questions referred to in para 7 above are:- 1. A suit the subject matter whereof lies within the jurisdictional competence of the Tribunal cannot be refused to be transferred by a civil court to the Tribunal merely because a cross suit or a counter claim has been filed or preferred before the civil court. 2. A cross suit or cross claim or a plea in the nature of set-off cannot be transferred to the Tribunal along with the suit with which it is associated and which is liable to be transferred to the Tribunal. 3. A plea of set-off raised in a suit filed by a bank or financial institution cannot be tried by Tribunal nor would it enable the suit being retained by civil court before it if the subject matter of suit lies within the jurisdictional competence of tribunal otherwise.

(42) In the light of the above said discussion we may now proceed to dispose of the appeals before us. 44. So far as the appeals preferred by Tayal Group and registered as Fao (OS) 314 to 319/96 are concerned they present no difficulty.

(43) The suits filed by the bank must be transferred to the Tribunal to honour the mandate of Section 31 read with Section 17 and 18 of the Drt Act. The cross suits shall continue to be tried on the Original Side of the High Court.

(44) Fao (OS) 266/95 has a disturbing feature. The counter-claim preferred by defendants No.1 and 2 in the written statement is a misnomer for a counter claim,. Really speaking there is no counter-claim at all. All that the defendants say is that on a proper account being taken of the transactions between the parties consistently with the terms of the agreements between the parties the defendants would not be found liable to pay the amount claimed by the plaintiff. The plea is pure and simple a plea in defense. Taking of accounts and finding out what is due and payable by the defendants to the plaintiff bank would be an exercise necessarily to be performed even by the Tribunal to satisfy the demand of the principles of natural justice before finding out the amount of debt for which the Tribunal may issue a certificate u/s 19(7) of the Act. There was no occasion for the defendants to have asked for issuance of a "mandatory injunction for accounts". Indeed it was an ingenious device invented by the defendants in an effort at excluding the summary jurisdiction of the Tribunal and stalling the transfer of the suit from the court to the Tribunal.

(45) 46. All the appeals are dismissed. The order of the learned single Judge is maintained. No order as to the costs

(46) The records of the suits shall be transmitted to the Tribunal. The parties through their respective counsel are directed to appear before the Tribunal on 14.7.1997.