
(2005) 01 KL CK 0020

In the High Court Of Kerala

Case No : Writ Petition (C) No. 19073 of 2004

Dataware Design Labs (P) Ltd.

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 28-01-2005

Acts Referred:

Debts Recovery Tribunal (Procedure) Rules, 1993 — Rule 7

Parent Act — Section 19

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19,
19(1), 19(2), 19(8), 19(9)

Citation : (2005) 3 BC 177 : (2005) 127 CompCas 176 : (2005) 2 KLT 96

Hon'ble Judges : P.R. Raman, J

Bench : Single Bench

Advocate : N. Sukumaran, S. Shyam, N.K. Karnis, U.K. Balachandran, Latheesh Sebastian and Bobby Mathew, for the Appellant; R.S. Kalkura, for the Respondent

Final Decision : Allowed

Judgement

P.R. Raman, J.

1. Both these Writ Petitions raise common questions of fact and law and hence they are disposed of by this common judgment.

2. Petitioner in WP(C) 19073/2004 is a Private Ltd. Company who is a respondent in O.A. 335/2002 before the Debt Recovery Tribunal (hereinafter referred to as DRT), Ernakulam. The said O.A. was filed by the first respondent -- State Bank of India, for obtaining a certificate of recovery under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The said O.A. was filed by the Bank on 10.7.2002. On 11.11.2002, petitioner herein filed a written statement in which he also raised a counter claim. By Ext.P1 proceedings under date 21.10.2003, the Debt Recovery Tribunal directed the defendants to pay court fee on a counter claim. Thereupon, petitioner preferred I.A. 1047/2003 seeking review of the said order contending that in the absence of any statutory provision for levying court-fee on the counter claim on the date

on which it was filed, he was not liable to pay any court fee. This was objected to by the respondent Bank and by Ext.P4 order dated 22.4.2004 the review petition was dismissed by the Debt Recovery Tribunal. The Tribunal took the view that the provision for raising a counter claim was introduced by Sub-section (8) of Act 1 of 2000 with effect from 17.1.2000 amending Section 19 of the Parent Act. The Tribunal also accepted the fact that the rules were amended only in 2003 incorporating a specific provision for payment of court fee on the counter claim. But according to the Tribunal, a counter claim will have the same effect of a cross suit and hence it has to be treated as an O.A. and court fee being payable on an O.A. as per the unamended provision of Rule 7, it thought that the said provision will apply even to a counter claim for payment of court fee. It was on the above reasoning that the review application was rejected.

3. In W.P.(C) 34318/2004, petitioner is the first defendant in O.A.161/2002 pending before the Debt Recovery Tribunal, Ernakulam. The O.A. was filed on 11.1.2002 by the first respondent Bank. Petitioner herein filed his written statement before the Debt Recovery Tribunal on 22.7.2002. Among other things, the defendant also raised a counter claim against the Bank. Here also, by Ext.P1 order dated 19.10.2004 defendant was directed to pay court fee on the counter claim u/s 19(1) of the Act read with Rule 7 of the Rules as it stood on 22.7.2002 adopting the same reasoning. Thus, challenging the orders passed by the Tribunal directing payment of court fee on the counter claims, these Writ Petitions are preferred.

4. The short question that arises for consideration is as to whether any court fee is payable on the counter claim raised in the written statement filed by the defendants in the O.A. pending before the Tribunal filed by the respective Banks?

5. Admittedly, Rule 7 was amended incorporating a provision for payment of court fee on counter claim, only with effect from 21.1.2003 a date later than the date on which the counter claim was preferred by the respective petitioners in these cases, namely, in the case of the petitioner in W.P.(C) 34318/2004 on 22.7.2002 and in W.P.(C) 19073/2004 on 11.11.2002.

6. Learned counsel appearing on behalf of the petitioners contended that the provision permitting to raise a counter claim was introduced with effect from 17.1.2000 by Act 1/2000 amending the parent Act and by substituting Section 19(8) (in the present form). Though Rule 7 as it stood then, provides for payment of court fee on the O.A. filed by the Bank, Rule 7 was amended only later with effect from 21.1.2003. Hence in the absence of any provision for providing for payment of court fee on the counter claim during the interregnum period, it must be held that no court fee is payable on the counter claim filed prior to 21.1.2003. According to them, the view taken by the Tribunal that a counter claim stands in the same position of a counter suit and the same provision providing for payment of court fee on the O.A. filed by the Bank would equally apply to the counter claim, is contrary to law. It is also their contention that the Tribunal being a creature of the Statute, its jurisdiction, powers and

procedure including provision for payment of fee for adjudication of claims are to be governed strictly in accordance with the provisions of the Act and the Rules thereafter and the court fee being one payable as per a condition imposed by the Statute, in the absence of any express provision, there is no warrant for implied levy of court fee. The learned counsel appearing for the respective Banks, on the other hand, contended that since the Bank is obliged to pay court fee on the O.A. filed before the Tribunal, a counter claim raised by the defendant as permitted by law can only be treated as a counter suit and it should be treated in the same manner as an O.A. filed u/s 19(1) of the Act and hence even in the absence of any express provision (though separately made later by amending Rule 7), court fee is payable by the defendant on the counter claim. In other words, the provision for payment of court fee on the O.A. filed by the Bank will equally apply to the counter claim, even in the absence of any separate provision.

7. Before Considering the rival contentions raised by the parties, it will be useful to refer to the relevant provisions contained in the Act and Rules. Section 19 of the Act to the extent it is relevant is as follows:

19. Application to the Tribunal:--

(1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction.

(a): The defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business or personally works for gain; or,

(b): any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business or personally works for gain; or

(c): the cause of action, wholly or in part, arises.

(2) Where a bank or a financial institution, which has to recover its debt from any person, has filed an application to the Tribunal under Sub-section (1) and against the same person another bank or financial institution also has a claim to recover its debt, then, the latter bank or financial institution may join the applicant bank or financial institution at any stage of the proceedings, before the final order is passed, by making an application to that Tribunal.

(3) Every application under Sub-section (1) or Sub-section (2) shall be in such form and be accompanied by such documents or other evidence and by such fee for filing the application as may be prescribed.

Provided that the fee may be prescribed having regard to the amount of debt to be recovered: Provided further that nothing contained in this sub-section relating to fee shall apply to cases transferred to the tribunal under Sub-section (1) of Section 31.

(4) On receipt of the application under Sub-section (1) of Sub-section (2), the Tribunal shall issue summons requiring the defendant to show cause within thirty days of the service of summons as to why the relief prayed for should not be granted.

(5) The defendant shall, at or before the first hearing or within such time as Tribunal may permit, present a written statement of his defence.

(6) Where the defendant claims to set-off against the applicant's demand any ascertained sum of money legally recoverable by him from such applicant, the defendant may, at the first hearing of the application, but not afterwards unless permitted by the Tribunal, present a written statement containing the particulars of the debts sought to be set-off.

(7) The written statement shall have the same effect as a plaint in a cross suit so as to enable the Tribunal to pass a final order in respect both of the original claim and of the set-off.

(8) A defendant in an application may, in addition to his right of pleading a set-off under Sub-section (6), set up, by way of counter claim against the claim of the applicant, any right or claim in respect of a cause of action accruing to the defendant against the applicant either before or after the filing of the application but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not.

(9) A counter-claim under Sub-section (8) shall have the same effect as a cross-suit so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter-claim.

(10) The applicant shall be at liberty to file a written statement in answer to the counterclaim of the defendant within such period as may be fixed by the Tribunal.

(11) Where a defendant sets up a counter-claim and the applicant contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent action, the applicant may, at any time, before issues are settled in relation to the counter-claim, apply to the Tribunal for an order that such counter claim may be excluded, and the Tribunal may, on the hearing of such application, make such order as it thinks fit.

(12) The Tribunal may make an interim order (whether by way of injunction or stay or attachment) against the defendant to debar him from transferring, alienating or otherwise dealing with, or disposing of, any property and assets belonging to him without the prior permissions of the Tribunal.

8. Sub-section (8) as aforesaid in the present form is brought out as a result of an amendment by Act 1/2000 which came into force on 17.1.2000. Till then, there was no express provision to entertain a counter claim by the Debt Recovery Tribunal. It was after the amendment enabling a defendant to raise counter claim

that the counter claims were preferred in both the cases on the respective dates. On a plain reading of Section 19(2) of the Act along with its proviso would make it clear that it is on the application filed under Sub-section (1) that the proviso provides for payment of fee as prescribed having due regard to the amount of debt to be recovered. Section 19(1) of the Act applies only for O.A. to be filed by Banks or Financial Institutions for recovering any debts from any person, as the case may be. It did not speak of any counter claim. It was for the first time that by Act 1/2000 that Section 19(8) in the present form was introduced whereby a defendant in an application is permitted to set up a plea by way of set off or counter claim against the claim of the applicant and by virtue of Section 19(9) a counter claim under Sub-section (8) shall have the same effect as a cross suit only to the limited extend of enabling the Tribunal to pass a final order on the same application, both on the original claim and on the counter claim. Therefore, the purpose of treating the counter claim as a cross suit by the express provision contained in Section 19(9) is only for the purpose of enabling the Tribunal to pass a final order. It, however, is silent as to whether the fee prescribed for payment of fee in O.A. would apply to a counter claim as well. Further, Act 1/2000 did not make any amendment to Section 19(1) or (2) as the case may be. Therefore, a counter claim by itself is liable to be adjudicated and power is conferred in the Tribunal by virtue of Section 19(8) read with Section 19(9) of the said Act without any reference to Section 19(1) or (2), as the case may be. Rule 7 underwent an amendment with effect from 21.1.2003. Rule 7 as it stood prior to the amendment reads as follows:

7. Application fee--

(1) Every application u/s 19, interlocutory application or application for review of a decision of the tribunal shall be accompanied with a fee provided in Sub-rule (2) and such fee may be remitted either in the form of crossed demand draft drawn on a nationalised bank in favour of the Registrar and payable at the station where Registrar's Office is situated or remitted through a crossed Indian Postal Order drawn in favour of the Registrar and payable in Central Post Office of the Station located at any place within local limits of the jurisdiction of a Tribunal.

(2) The amount of fee payable shall be as follows:

Sl.No.	Nature of application	Amount of fee payable
		_____XXK XXK XXK XXK XXX XXX."

After the amendment,, the Rules reads as hereunder:

7. Application fee--

(1) Every application u/s 19(1), or Section 19(2), or Section 19(8), or Section 30(1) of the Act, or interlocutory application or application for review of decision of the Tribunal shall be accompanied by a fee provided in the Sub-rule (2) and

such fee may be remitted through a crossed Bank Demand Draft drawn on a Bank or Indian Postal Order in favour of the Registrar of the Tribunal and payable at the place where the Tribunal is situated.

(2) The amount of fee payable shall be as follows:

Sl.No.	Nature of application	Amount of fee payable	XXX	XXX	XXX	XXX	XXX
	XXX." (compared)						

9. The amendment introduced to the rule came into force with effect from 21.1.2003. Here also, the Legislature in its wisdom did not think it fit to give retrospective operation to the rule either expressly or impliedly. On the other hand, this rule was brought into force only with effect from 21.1.2003. Hence it was the intention of the rule making authority to give effect to this rule only from the date 21.1.2003 and not prior to that. According to the respondent Bank, even without the aforesaid amendment of the rule, court fee becomes payable on the counter claim by virtue of the provisions contained in Section 19(2) of the Act. In other words, if this contention is accepted the amendment to Rule 7 becomes redundant and normally any such interpretation is to be avoided. Legislature while making an amendment expressly giving prospective effect cannot be understood interpreting such rule as redundant. On the other hand, when a rule is made and enforced with effect from a particular date, the amendment cannot be given retrospective effect contrary to the intention of the rule making authority.

10. In this connection, it has to be noticed that until the amendment to Section 19 by Amendment Act 1/2000 there was no provision enabling the defendant to raise a counter claim and the Tribunal therefore, had no jurisdiction to entertain any such counter claim. In this connection, a Division Bench of the Delhi High Court in Cofex Exports Ltd. Vs. Canara Bank, , brought a distinction between "payment" and "adjustment" and held that the broad distinction between a payment and the adjustment is that in an act of "payment" one party deals with the other, while in the case of "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. But a plea of adjustment is to be distinguished from the plea of set off or counter claim since the adjustment like payment is relatable to a period anterior to the date of such plea being set out before the Court. A counter claim or a plea of set off is a claim made by the defendant. It does not extinguish the plaintiff's claim; it exonerates the defendant from honouring plaintiff's claim though upheld and such plea if raised will be gone into by the Court if permitted by law and would have the effect of decree in favour of the defendant taking away plaintiff's right to realise such amount as has been upheld in favour of the defendant. Further every cause action including one constituting a plea of set off or plea of counter claim must be placed before the Court as an independent action. In the same decision, it

was also held that while transferring a suit filed by the bank by the Civil Court to the Debt Recovery Tribunal, plea of set off, counter claim or cross claim shall not be transferred to the Tribunal as the Debt Recovery Tribunal cannot entertain a claim of set off or counter claim. In that context, it was also held that 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 Institution 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. (Emphasis given) It may be noticed that the above decision was rendered prior to the substitution of Section 19 in the present form enabling a counter claim to be raised. The principle laid down in the said decision is to the effect that the Act contemplates only an application to be filed by the Bank or Financial Institution and not any other person. Therefore, it admits of no doubt that but for the introduction of the new provision by substituting Section 19(8) in the present form Section 19(1) or (2) as the case may be is wholly inapplicable in the matter of a counter claim as it only refers to an application to be made by the Bank or Financial Institution, as the case may be. It is in respect of such an application that Section 19(2) provides for payment of court fee as prescribed. Section 19(9) of the Act only clarifies that a counter claim shall be treated as a counter suit and the purpose is also mentioned therein so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter claim. In other words, while adjudicating the claim made by the Bank, the Tribunal is enabled to adjudicate on the counter claim. Except for this limited purpose the entire provisions contained in Section 19(1) and 19(2) has not been made applicable so as to treat the counter claim as an application filed u/s 19(1) and to levy court fee thereon. If the Legislature has intended to give effect to Section 19(2) to any counter claim as well, in the matter of payment of fee there was no reason to restrict the effect of the counter claim as merely enabling the tribunal to pass orders on the same application and to treat the counter claim for that purpose only as a counter suit. Further, even the rule making authority, by the subordinate legislation by amending Rule 7 and providing for a different rate of court fee on the counter claim was brought to force with effect from 21.1.2003 and did not choose to give any retrospective operation to the rule at least from the date on which Act 1/2000 came into force. In such circumstances, to treat a counter claim as though it was an application made u/s 19(1) and to hold that the fee prescribed for an application would equally apply to a counter claim as well will be contrary to the intention of the Legislature. It is settled law that when the Code is complete in itself, there is no room for any import and has to be given effect to the express provision contained therein. Fee is a matter provided for under the Act and the Rules. But until Rule 7 was amended it provided payment of fee only to claims to be made by the Bank or other financial institutions u/s 19(1) of the Act. Neither Section 19(1) or (2) was amended by Act 1/2000 but only introduced a new

provision by substitution in the section by introducing Section 19(8) in the present form. Prescription of the fee being a condition imposed for entertaining an application for adjudication, it is always open to the Legislature either to prescribe a fee or no fee as the case may be. When fee was prescribed for an application filed by the Bank or other financial institutions and such rules were amended subsequently only with effect from 21.1.2003, neither can it be said that such rule is redundant nor could such rule be given retrospective effect contrary to the express provisions making it enforceable from 21.1.2003 only. Admittedly, Rule 7 was amended only later and counter claims in the two cases were filed long prior thereto and hence fee if any, payable should be governed by the provisions as it stood then and in the absence of any provision for payment of any court fee on the counter claim, it must be held that no court fee is payable by the petitioners. In *Union of India v. Deoki Nandan Aggarwal* AIR 1992 SC 96 the Apex Court held as follows:

It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the Legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to Legislature has not been conferred on the Courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the Legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be".

11. When Rule 7 was amended and brought into force by express provision with effect from 21.1.2003, it is impermissible to give retrospective operation to the rule nor is it permissible to hold that the rule is redundant. It must be presumed that the Legislature knows the law and when express provisions are made prescribing fee as regards the counter claim the intention of the Legislature should be given full effect and brought into force only with effect from the date on which it was enforced. It is not possible to ignore the intention of the Legislature in introducing the rule from a prospective date and by interpreting the rule as redundant the result will be to give retrospectivity to the said rule. An interpretation having the effect of the rule redundant should be avoided and if only the rule is given full effect to, it can be seen that provision for payment of court fee on counter claim was made prospectively.

12. In *State of Bombay Vs. Supreme General Films Exchange Ltd.*, , while considering the court fee payable as per the Court Fees (Bombay Amendment) Act 12 of 1954, the Apex Court held that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only; it impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment. It was also held that court fee is payable according to the law in force on the date of filing of the suit and not according to the law in force

at the date of filing of the memorandum of appeal.

13. In *Usha v. Food Corporation of India* 1997 (1) KLT 264 a Division Bench of this Court, while interpreting the Court Fees and Suit Valuation Act; held that higher court fee could not be insisted for proceedings instituted before amendment and court fee is payable only on the unamended provision as far as the proceedings instituted prior to the amendment is concerned. In *Koongaran Mukundan Vs. Thamaravalappil Nalini*, , this Court held that while interpreting the fiscal statute namely in interpreting Court fee legislation, levy of fee can be directed only if the Act applies on strict construction and the benefit of any serious doubt must go against the levy.

14. Though the learned counsel appearing for the defendant placed reliance on the decision of the Karnataka High Court in *Capbeauti v. Karnataka Bank Ltd.* AIR 2002 Kar 434 with great respect, I am unable to agree with the view expressed therein. I have already considered the scope of Section 19(9) of the Act which merely treats a counter claim as a counter suit for the limited purpose of enabling the Tribunal to pass orders on the same application by following the procedure as required for disposal of the Banks' application. Fee payable on an application is a substantive provision. The Legislature has by express words given effect to a counter claim as a counter suit only for a limited purpose as provided for in Section 19(9); but did not make any reference to Section 19(2) of the Act nor is there anything expressly or impliedly to hold that the provision for payment of fee to O.A. would equally apply to a case of counter claim. No fee is payable on a counter claim raised after 17.1.2002 by which date the Act was amended till 21.1.2003 when the rules were amended providing for payment of court fee.

Hence the order passed by the Tribunal is set aside. The Writ Petitions are allowed.