
(2012) 09 AHC CK 0287

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 43885 of 2012

Deepak Mitra

APPELLANT

Vs

United Bank of India and Others

RESPONDENT

Date of Decision : 13-09-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 14
Income Tax Act, 1922 — Section 30, 46
Limitation Act, 1963 — Section 3
Penal Code, 1860 (IPC) — Section 193, 195, 196, 228
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 18(1), 19, 19(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 18

Citation : (2013) 1 ALJ 648

Hon'ble Judges : Dilip Gupta, J

Bench : Single Bench

Advocate : Rahul Sahai, for the Appellant; K.M. Asthana, for the Respondent

Final Decision : Dismissed

Judgement

Dilip Gupta, J.—This petition, at the instance of a Director of M/s. Mitra Prakashan Ltd., a Company that was incorporated under the Indian Companies Act, 1956 with its Head Office at Allahabad, has filed this petition for quashing the orders dated 17th October, 2011 and 13th February, 2012 passed by the Debts Recovery Appellate Tribunal, Allahabad in the appeal filed by the petitioner u/s 20 of the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 (hereinafter referred to as the "Act"). The said appeal was filed by the petitioner to assail the order dated 24th July, 2009 passed by the Debts Recovery Tribunal, Allahabad in Original Application No. 109 of 2002 which had been filed by respondent No. 1 -United Bank of India (hereinafter referred to as the "Bank") u/s 19 of the Act for payment of the outstanding amount of Rs. 3,76,50,871.90/- with interest by the Company and the four Directors of the Company. The Debts

Recovery Tribunal had allowed the Original Application filed by the Bank by the order dated 24th July, 2009 and issued the recovery certificate for an amount of Rs. 3,76,50,871/- with pendente lite and future interest @ 19% per annum with quarterly rest from 30th January, 2011 till the realisation of the amount. The counter-claim filed by the petitioner who was impleaded as defendant No. 4 in the Original Application for claiming Rs. 35,66,17,673/- with interest was, however, dismissed by the Debts Recovery Tribunal by the said order dated 24th July, 2009.

2. Feeling aggrieved by the said order passed by the Debts Recovery Tribunal, the petitioner preferred an appeal before the Debts Recovery Appellate Tribunal, Allahabad (hereinafter referred to as the "Appellate Tribunal") u/s 20 of the Act and with the appeal an application was also filed by the petitioner u/s 21 of the Act for waiver of the amount required to be deposited as the said Section stipulates that such appeal shall not be entertained by the Appellate Tribunal unless the appellant has deposited 75% of the debt so due from him as determined by the Debts Recovery Tribunal u/s 19 of the Act.

3. The Appellate Tribunal passed the order dated 17th October, 2011 on this application filed by the petitioner u/s 21 of the Act and directed the appellant to deposit 60% of the amount due to the appellant as determined by the Debts Recovery Tribunal u/s 19 of the Act within a period of thirty days from the date of the order.

4. The petitioner-appellant submitted an application for recalling the order dated 17th October, 2011. The Appellate Tribunal considered this application and also examined whether the earlier order dated 17th October, 2011 passed by it for deposit of 60% of the amount due within thirty days had been complied with and by the order dated 13th February, 2012, dismissed the appeal filed by the petitioner as the order dated 17th October, 2011 had not been complied with and for other reasons mentioned hereinafter.

5. The Original Application had been filed by the Bank u/s 19 of the Act against the Company and the four Directors including the petitioner who was arrayed as defendant No. 4 in the application for payment of Rs. 3,76,50,871.90/- with interest with the allegation that the Bank had sanctioned credit facilities in favour of the Company against hypothecation of all the assets of the Company as well as the guarantees and the promissory notes executed-by the Directors of the Company and on accounting an amount of Rs. 3,76,50,981/- till 28th February, 2002 was found to be due from the defendants but despite demands it was not paid. Only defendant Nos. 1, 4 and 5 appeared through counsel, as is noticed in the order passed by the Debts Recovery Tribunal, but during the pendency of the Application, defendant Nos. 2 and 5 expired and though notice was issued on the substitution application, their heirs and legal representatives failed to appear. Defendant-Company was also wound up and an Official Liquidator was appointed by the High Court on 23rd May, 2005 in Company Petition No. 35 of 2000. The Official Liquidator was subsequently impleaded as defendant No. 6 in the Original

Application.

6. The petitioner, who was the Director and Guarantor, alone contested the claim by filing a written statement. In addition, the petitioner also filed a counter-claim in the Original Application u/s 19(8) of the Act for claiming an amount of Rs. 35,66,17,673.76/- from the Bank.

7. The following issues were framed in the Original Application filed by the Bank u/s 19 of the Act:--

- (1) Whether the proceeding is maintainable?
- (2) Whether the proceeding is barred by limitation?
- (3) Whether financial accommodation was made available to the company during 1998-1999 and defendant No. 4 was a guarantor to the advance.
- (4) Whether FDR/RIP worth Rs. 303.72 lacs was pledged by the company as security in 1994.
- (5) Whether FDRs/RIPs of the company and directors taken as security were adjusted validly in the loan account and when?
- (6) Whether other FDRs/RIPs of the company were validly adjusted in the loan account?
- (7) Whether any illegal and unauthorized debits were raised in the account?
- (8) Whether paper/raw materials amounting to Rs. 3,76,207/- kept under lock and key of the bank and the sale proceeds have been misappropriated by the Bank?
- (9) Whether there is any connivance of the Branch Manager with the Directors?
- (10) Whether statement of account filed by the bank is correct?
- (11) To what relief the applicant is entitled?

8. The Debts Recovery Tribunal considered the aforesaid issues from paragraphs 55 to 64 of the judgment.

9. Issue Nos. 1 and 2 were decided in favour of the Bank. Issue No. 3 was decided in favour of the Bank and against the defendant and it was held that the financial accommodation was made available to the Company and the Company utilized the same for its business and defendant No. 4 had jointly, with the other Directors, guaranteed the advance. Issue No. 4 was decided against defendant No. 4 and it was held that defendant No. 4 could not prove the allegations and the documents relied upon by him did not suggest creation of security over the FDRs. The Debts Recovery Tribunal, therefore, held that the alleged FDRS were never the subject-matter of security and the Bank had no responsibility to refund the proceeds. Issue No. 5 was also decided against defendant No. 4 and in favour of the Bank and it was held that the claim of defendant No. 4 that FDRs of

Rs. 30 lacs and Rs. 163 lacs had not been accounted for was not correct as the said security had been validly adjusted prior to the filing of the Application. Issue No. 6 was decided in favour of the Bank and against defendant No. 4 and it was held that the Bank had validly adjusted the amount before the filing of the Application. Issue Nos. 7 and 9 were decided together against defendant No. 4 and it was found that the bald statement made by defendant No. 4 could not be proved by him. Issue No. 8 was also decided against defendant No. 4 and the claim was disallowed as it was found that the said defendant was unable to discharge the burden of proof. Issue No. 10 was also decided in favour of the Bank as it was found that the statement of account given by the Bank was the correct reflection of the account of the defendant-Company. Issue No. 11 was, accordingly, decided and it was held that the applicant Bank was entitled to recover Rs. 3,76,50,871.90/- from the Company jointly and severally with the other defendants with interest of 19% per annum with quarterly rest from 30th January, 2011 till the date of realisation.

10. With respect to the counter-claim filed by defendant No. 4, the following issues were framed by the Debts Recovery Tribunal:--

- (1). Whether the counter-claim is maintainable?
- (2). Whether the counter-claim is barred by limitation?
- (3). Whether the defendants had pledged fix deposits worth Rs. 303.72 lacs as security with the bank?
- (4). Whether other FDRs (Fixed Deposit Receipts) RIPs of the defendant No. 1 company and directors taken as security or otherwise by the bank was validly adjusted in the loan accounts and when?
- (5). Whether there is any connivance of the Branch Manager with a group of Directors?
- (6). Whether defendant No. 4 in the capacity of a guarantor is entitled to a counter-claim in the recovery proceeding?
- (7). Whether the defendant No. 4 is entitled to a counter-claim of Rs. 35,66,673.76?
- (8). To what relief?

11. While taking up the Issues framed in the counter-claim, the Debts Recovery Tribunal made the following observations in paragraph 65 of the judgment:--

65. Counter-Claim -- Now the counterclaim preferred by the defendant No. 4 is taken up. It is not necessary to repeat the details of the counter-claim and the defence taken by the Bank on the same has been fully discussed hereinabove. However, it is stated that the defence in the WS and a major part of the counter-claim are almost the same. The issues decided in the application from paras 55 to 64 shall mutatis mutandis be applicable to the counter-claim. However, at the

cost of repetition the issues in the counter-claim are settled as under and shall be read only with paras 55 to 64.

12. Issue Nos. 3, 4, and 5 of the counterclaim were, accordingly, decided against defendant No. 4 in view of the findings given by the Debts Recovery Tribunal while deciding Issue Nos. 4, 5 and 9 respectively of the Original Application filed by Bank. Issue No. 7 of the counter-claim was decided against the defendant No. 4 in view of the findings recorded by the Debts Recovery Tribunal while deciding Issue Nos. 4, 5, 6, 7 and 8 of the Original Application.

13. The counter-claim filed by the petitioner-Company was, therefore, dismissed on contest by the commons judgment dated 24th July, 2009.

14. It is against the common judgment passed by the Debts Recovery Tribunal on 24th July, 2009 that the petitioner filed an appeal u/s 20 of the Act.

15. Section 21 of the Act provides that such appeal u/s 20 of the Act shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal 75% of the amount deposited so due from him as determined by the Debts Recovery Tribunal u/s 19 of the Act. The proviso, however, stipulates that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this Section.

16. The petitioner had filed an application for waiver of the amount to be deposited in terms of Section 21 of the Act. It had been contended on behalf of the Bank that once the Official Liquidator had been appointed, the appeal could only be filed by the Official Liquidator and not by any of the Directors, But this contention was not accepted by the Appellate Tribunal for the reason that the appellant may have been a Director of the Company but he was also a guarantor. The Appellate Tribunal by the order dated 17th October, 2011 directed for deposit of 60% of the amount awarded by the Debts Recovery Tribunal within 30 days and the operative part of the said order passed by the Appellate Tribunal on the waiver application filed by the petitioner-appellant is as follows:--

In the waiver application, it is submitted that the appellant is a senior citizen and there was some malpractice adopted by the other Directors. The Company has already been directed to be liquidated. The present appeal is filed by one of the guarantors, who was also a Director of the Company. The Company has gone under liquidation. Merely because there is no fund to repay the amount due, that does not mean, the appellant shall not deposit any amount and the case is made out for complete waiver in terms to Section 21 of the RDDBFI Act, 1993.

No appeal has been filed by the Company. The liability of the guarantor is co-terminus with the principal borrower. The Company was the borrower.

Under these facts and circumstances as aforesaid, I direct the appellant to deposit 60% of the amount due within a period of thirty days from today with the respondent-Bank.

The case is listed for compliance on 7.12.2011.

17. An application dated 15th November, 2011 was then filed by the petitioner on 16th November, 2011 before the Appellate Tribunal for recalling the order dated 17th October, 2011 with the assertion that the appellant had not been heard. A further prayer was made for hearing the waiver application on merits.

18. The Appellate Tribunal considered this application filed by the petitioner and also examined whether the earlier order dated 17th October, 2011 had been complied with and by its order dated 13th February, 2012 dismissed the appeal for the reason that the order dated 17th October, 2011 for deposit of 60% of the amount due within 30 days had not been complied with and for the reason that in the absence of a separate appeal to assail the order rejecting the counter-claim, the order passed in the counter-claim will operate as res-judicata. The relevant portion of the said order passed by the Appellate Tribunal is quoted below:--

...This Tribunal by order dated 17.10.2011 has directed to the appellant who is guarantor to deposit 60% of the amount due within a period of 30 days from 17.10.2011. The appellant has not even deposited any amount up till now. The order for depositing the 60% of the due amount was made as per section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) which provides pre deposit for maintaining a valid appeal preferred u/s 20 of the RDDBFI Act, 1993. As per order passed by The Apex Court in case of M/s. Prestige Lights Ltd. v. State Bank of India. 2007 AIR SCW 5350. the present appeal, in the absence of any pre-deposit is not entitled to be heard on merits, and the appeal as such, is to be dismissed for not depositing any amount.

The Official Liquidator has been impleaded only as respondent Nos. 2 and 8 and not as an appellant. An application is moved on behalf of the appellant that before the Hon"ble Company Judge the proceedings are pending for verification of the record with reference to the amount due and recoverable by the respondent Bank and on this ground it is prayed that the deposit as directed by this Tribunal by order dated 17.10.2011 be postponed.

The present appeal is preferred by the guarantor and not by the Company. The guarantor is severally and jointly liable with the company. The Recovery Certificate against the present appellant who is guarantor is joint and several. Thus, the liability of the present appellant is an individual one. The counter-claim was preferred by the guarantor which has been rejected. No separate appeal is filed by the guarantor. Under these circumstances, the effect of non-filing of the appeal by the guarantor against the rejection of the counter-claim would be governed by Premier Tyres Limited Vs. Kerala State Road Transport Corporation, wherein the Apex Court has held that once the counter-claim is rejected and no separate appeal is preferred against the rejection of the counter-claim then the finding as such would be res judicata.

In view of the aforesaid, since no separate appeal has been filed, therefore, the

claim made by the appellant in counter-claim will not be relevant for the purposes of maintaining the appeal valid u/s 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) so that it can be said that the compliance of the deposit directed u/s 21 of the RDBFI Act, 1993 is not required.

In the light of the sections 20 and 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993), and also in the light of the judgment of the Apex Court passed in Prestige Lights case (supra), the appeal has to be dismissed.

In view of my aforesaid discussions, no further time is required to be granted to the appellant to enable him to comply with the order passed by this Tribunal on 17.10.2011 because enough time has already been granted to the appellant for the same. Under these circumstances, the present appeal stands dismissed in terms of the order passed by the Apex Court in case of Prestige Lights Ltd. Vs. State Bank of India, and, accordingly, the appeal stands dismissed for noncompliance of the order dated 17.10.2011 passed by this Tribunal u/S. 21 of the Recovery of Debts Due to Banks and Financial Institutions Act. 1993 (51 of 1993).

(Emphasis supplied)

19. This petition has been filed for quashing the orders dated 17th October, 2011 and 13th February, 2012 passed by the Appellate Tribunal as also the order dated 24th July, 2009 passed by the Debts Recovery Tribunal.

20. Learned counsel for the petitioner submitted that the petitioner had pleaded in the waiver application filed u/s 21 of the Act that the petitioner did not have any source of income and nor did he have any assets and, therefore, the direction by the Appellate Tribunal to deposit 60% of the amount due to the appellant was not justified and that in such circumstances the condition requiring the Appellant to deposit 60% of the amount due is an onerous condition and the Appellate Tribunal should have granted complete waiver of the amount required to be deposited. Learned counsel also submitted that the Appellate Tribunal committed an illegality in rejecting the appeal filed by the petitioner for this reason and for the reason that only one appeal had been filed as the Original Application filed by the Bank and the counter-claim filed by the petitioner had been decided by the common judgment dated 24th July, 2009 and both the orders had been assailed in the Appeal. In this connection he further submitted that at least the appeal filed by the petitioner insofar as it challenged the rejection of the counter-claim should have been considered on merits by the Appellate Tribunal because the Appeal against the said order did not require deposit of any amount. Learned counsel for the petitioner also assailed the order dated 24th July, 2009 passed by the Appellate Tribunal on various grounds.

21. Sri. K.M. Asthana, for the respondent-Bank submitted that the Appellate Tribunal was justified, in the facts and circumstances of the case, to direct the

Appellant to deposit 60 % of the amount due instead of 75% and as this amount was not deposited by the Appellant within the period of 30 days, the Appellate Tribunal committed no illegality in dismissing the appeal. He also submitted that even otherwise, the petitioner was required to file separate appeals against the order allowing the Original Application and the order dismissing the counter-claim but as only one appeal had been filed, the Appellate Tribunal was justified in dismissing the appeal in view of the decision of the Supreme Court in Premier Tyres Limited Vs. Kerala State Road Transport Corporation, . He also submitted that if the appeal filed by the petitioner is treated as an appeal against the dismissal of the counter-claim, then too the decision in the Original Application will operate as res judicata as in that case the appellant would not have filed any appeal to challenge the order passed in the Original Application.

22. I have considered the submissions advanced by learned counsel for the parties.

23. It is seen that the Bank had filed the application u/s 19(1) of the Act for recovery of Rs. 3,76,50,871.90/- from the Company and the four Directors of the Company. The petitioner, who was a Director and also a Guarantor was arrayed as defendant No. 4 in the Original Application. The petitioner filed a written statement as also a counterclaim u/s 19(8) of the Act.

24. It will, therefore, be useful to reproduce the relevant provisions of Section 19 of the Act and the same are:--

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)....

(3) Every application under sub-section (1) or sub-section (2) shall be in such form and accompanied by such documents or other evidence and by such fee 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 subsection (1) of section 31--

(4) On receipt of the application under sub-section (1) or 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 the Tribunal may permit, present a written statement of his defence.

(6) Where the defendant claims to set-off against the applicant's demand and 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 debt 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 setoff.

(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 counterclaim 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 counterclaim 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)....

25. It is seen from the aforesaid provisions of Section 19 of the Act that on receipt of the application u/s 19(1) of the Act, the Tribunal shall issue summons requiring the defendant to show cause why the relief prayed for should not be granted and the defendant shall, at or before the first hearing or within such time as the Tribunal may permit, present a written statement of his defence. Under subsection (8) of Section 19 of the Act it is provided that a defendant in the Original 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. It is further provided in sub-section (9) of Section 19 of the Act that the 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. Under sub-section (10) of Section 19 of the Act the applicant of the Original Application has also been given liberty to file a written statement to the counter-claim of the defendant.

26. The Central Government has framed The Debts Recovery Tribunal (Procedure) Rules, 1993 (hereinafter referred to as the "Debts Recovery Tribunal Rules") and Rule 7 deals with Application Fee and is as follows:--

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:--

27. It is seen that the fee is separately prescribed for filing an application u/s 19(1) of the Act by the Bank and the counterclaim by the defendant u/s 19(8) of the Act.

28. The Debts Recovery Tribunal by the common judgment dated 24th July, 2009 allowed the claim made by the Bank in the Original Application for issuance of recovery certificate of Rs. 3,76,50,871,90/- with interest and costs and dismissed the counter-claim filed by defendant No. 4 in the said Original Application.

29. Section 20 of the Act provides for an appeal before the Appellate Tribunal. Section 21 deals with deposit of amount of debt due on filing appeal and Section 22 of the Act deals with procedure and powers of the Tribunal and the Appellate Tribunal and the same are as follows:--

20. Appeal to the Appellate Tribunal.-- (1) Save as provided in sub-section (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter.

(2) No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made, or deemed to have been made, by the Tribunal is received by him and it shall be in such form and be

accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Tribunal.

(6) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

21. Deposit of amount of debt due, on filing appeal.-- Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five per cent, of the amount of debt so due from him as determined by the Tribunal u/s 19:

Provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

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 Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)."

30. The Central Government has framed The Debts Recovery Appellate Tribunal (Procedure) Rules, 1994 (hereinafter referred to as the "Appellate Tribunal Rules") and Rules 5, 6, 8, 9, 10 and 12, which are relevant, are as follows:--

5. Procedure for filing appeals.-- (1) A memorandum of appeal shall be presented in the Form annexed to these rules by the Appellant either in person to the Registrar of the Appellate Tribunal within whose jurisdiction his case falls or shall be sent by registered post addressed to such Registrar.

(2) Where the appellant is a bank or a financial institution, a memorandum of appeal may be preferred.--

(a) by one or more legal practitioners authorised by such bank or financial institution or,

(b) by any of the officers of such bank or financial institution to act as Presenting Officers; and every person so authorised may present the appeal before the Appellate Tribunal.

(3) Where the appellant is other than a bank or a financial institution, he may prefer an appeal in person or by his agent or by a duly authorised legal practitioner.

(4) An appeal sent by post under sub-rule (1) shall be deemed to have been presented to the Registrar on the day on which it is received in the office of the Registrar.

(5) The appeal under sub-rule (1) shall be presented in four sets in a paper-book along with an empty file size envelope bearing full address of the respondent and where the number of respondents are more than one, then sufficient number of extra paper-books together with empty file size envelopes bearing full addresses of each respondent shall be furnished by the appellant.

6. Presentation and security of memorandum of appeal.-- (1) The Registrar shall endorse on every appeal the date on which it is presented under Rule 5 or

deemed to have been presented under that rule and shall sign endorsement.

(2) If, on scrutiny, the appeal is found to be in order, it shall be duly registered and given a serial number.

(3) If an appeal on scrutiny is found to be defective and the defect noticed is formal in nature, the Registrar may allow the appellant to rectify the same in his presence and if the said defect is not formal in nature, the Registrar, may allow the appellant such time to rectify the defect as he may deem fit.

(4) If the concerned appellant fails to rectify the defect within the time allowed in sub-rule (3), the Registrar may by order and for reasons to be recorded in writing, decline to register such memorandum of appeal.

(5) An appeal against the order of the Registrar under sub-rule (4) shall be made within fifteen days of making of such order to the Presiding Officer concerned in his chamber, whose decision thereon shall be final.

8. Fee.-- (1) Every memorandum of appeal u/s 20 of the Act 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 the 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 where the Appellate Tribunal is located.

(2) The amount of fee payable in respect of appeal u/s 20 shall be as follows:--

9. Deposit of amount of debt due.-- Where an appeal is preferred by a person referred to in section 21 of the Act, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five per cent. of the amount of debt so due from him as determined by the Tribunal u/s 19 of the Act, provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited u/s 21 of the Act.

10. Contents of memorandum of appeal.-- (1) Every memorandum of appeal filed under Rule 5 shall set forth concisely under distinct heads, the grounds of such appeal without any argument or narrative, and such grounds shall be numbered consecutively and shall be typed in double line space on one side of the paper.

(2) It shall not be necessary to present separate memorandum of appeal to seek interim order or direction if in the memorandum of appeal, the same is prayed for.

12. Plural remedies.-- A memorandum of appeal shall not seek relief or reliefs based on more than a single cause of action in one single memorandum of appeal unless the reliefs prayed for are consequential to one another.

31. The Appellate Tribunal emphasised that only one appeal was filed by the petitioner against the judgment dated 24th July, 2009 even though by the said

judgment, the Original Application filed by the Bank was allowed and the counter-claim filed by the petitioner-defendant No. 4 was dismissed.

32. It has, therefore, to be considered, in the light of the provisions of the Act and the Rules referred to above, whether one appeal was required to be filed u/s 20 of the Act or two appeals were required to be filed by the petitioner to assail the orders by which the Original Application was allowed and the counter-claim was dismissed on contest.

33. A counter-claim can be filed by a defendant in the Original Application under subsection (8) of Section 19 of the Act. This subsection provides that a defendant may, in the Original Application, set up, by way of counterclaim against the claim of the applicant, any right or claim in respect of a cause of action accruing to the defendant against the applicant. Sub-section (9) of Section 19 of the Act provides that a counter-claim has 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.

34. The Supreme Court in *Jag Mohan Chawla and another Vs. Dera Radha Swami Satsang and others*, has described what a counter-claim is and the observations are:--

The counter-claim expressly is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite Court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protraction, the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross-suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit.

(Emphasis supplied)

35. The Delhi High Court in *Cofex Exports Ltd. Vs. Canara Bank*, also pointed out what a counter-claim is and what things are common in set-off and counterclaim and observed:--

24. Thus, a plea in the nature of payment, adjustment and the like can be raised in defence 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 counterclaim 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 if 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 favour of the defendant taking away plaintiff's

right to realise such amount as has been upheld in favour of the defendant.

34. 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. I, 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.

(Emphasis supplied)

36. Halsbury's Law of England (4th Edition) on counter-claim states:--

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.

17. The effect of preferring a counter-claim is that to its extent the defendant becomes a plaintiff and the plaintiff becomes a defendant.

18. A counter-claim is for most purposes of procedure except execution, treated as separate action to be tried together with the original action.

(Emphasis supplied)

37. Thus, a counter-claim is a claim made by a defendant in a suit against a plaintiff. It is a cause of action in favour of the defendant against the plaintiff and the defendant in his counter-claim, may ask for the relief to which he is entitled. A defendant can claim any right by way of counter-claim in respect of any cause of action that accrues to him even though it is independent of the cause of action of the applicant and get the same cause of action adjudicated without relegating the defendant to file separate suit. The effect of preferring a counter-claim is that the defendant becomes the plaintiff and the plaintiff becomes the defendant.

38. It is for this reason that the Debts Recovery Tribunal Rules provide for

separate fees to be paid for the Original Application and the counter-claim filed in the Original Application.

39. Section 20 of the Act provides for an appeal before the Appellate Tribunal from an order passed by the Debts Recovery Tribunal. Section 22 of the Act provides that the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall be guided by principles of natural justice, subject to the other provisions of the Act and of the Rules.

40. While interpreting Section 22 of the Act, the Supreme Court in *The Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industries Ltd. and Others*, pointed out:--

11. We, however, do not agree with the reasoning adopted by the High Court. When Section 22 of the Act says that the Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, it does not mean that it will not have jurisdiction to exercise powers of a Court as contained in the Code of Civil Procedure. Rather, the Tribunal can travel beyond the CPC and the only fetter that is put on its powers is to observe the principles of natural justice.

41. Rule 5 of the Appellate Tribunal Rules deals with the procedure for filing an appeal. It provides that a memorandum of appeal shall be presented in the Form annexed to the Rules. Rule 8 deals with fee and it provides that every memorandum of appeal u/s 20 of the Act shall be accompanied with a fee provided in sub-rule (2). Rule 12 provides that a memorandum of appeal shall not seek relief or reliefs based on more than a single cause of action in one single memorandum of appeal unless the reliefs prayed for are consequential to one another.

42. Thus, when in the Original Application the defendant can set up by way of a 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; when Rule 7 of the Debts Recovery Tribunal Rules provides for separate fees to be filed for Original Application and the counter-claim; when Rule 12 of the Appellate Tribunal Rules provides that a memorandum of appeal shall not seek relief or reliefs based on more than a single cause of action; when the Appellate Tribunal Rules do not prescribe separate fees for filing an appeal against the order passed on the counter-claim of the defendant and when Rule 8 provides for fees on every memorandum of appeal, it is more than apparent that a separate appeal will be required to be filed against the order dismissing the counter-claim.

43. It, therefore, follows that if defendant No. 4 desired the quashing of the order passed in the Original Application filed by the Bank u/s 19(1) of the Act and the quashing of the order by which the counter-claim filed by the said defendant u/s 19(8) of the Act was dismissed, then two appeals were required to be filed but defendant No. 4 filed only one appeal in which he sought the quashing of both the aforesaid orders. Even if it is assumed that both the reliefs could have been claimed in one memorandum of appeal, then too the appellant

was required to file two sets of fees but the appellant filed only one set of fee.

44. The Appellate Tribunal, therefore, committed no illegality in holding that two separate appeals were required to be filed against the orders passed in the Original Application filed u/s 19(1) of the Act and the counter-claim filed u/s 19(8) of the Act.

45. Learned counsel for the petitioner contended that even if two appeals were required to be filed, then the appeal filed by the appellant could have been treated to be either an appeal filed against the order passed in the Original Application or an appeal filed against the order passed in the counter-claim.

46. If the appeal is treated to be an appeal filed against the order passed in the Original Application, then the provisions of Section 21 of the Act get attracted. The said Section provides that where an appeal is preferred by any person from whom the amount of debt is due to a bank, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal 75% of the amount of debt so due from him as determined by the Tribunal u/s 19 of the Act but the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited.

47. The petitioner did not deposit 75% of the amount due to him as determined by the Debts Recovery Tribunal but filed an application u/s 21 of the Act with a prayer to allow complete waiver of pre-deposit and hear the appeal on merits. After taking into consideration the facts stated in the waiver application, the Appellate Tribunal directed the appellant to deposit 60% of the amount due within a period of thirty days with the respondent-Bank and the case was also directed to be listed on 7th December, 2011 to examine whether the order had been complied with. The appellant filed an application on 16th November, 2011 for recalling the order dated 17th October, 2011 and for hearing the waiver application on merits. The Appellate Tribunal heard the appellant. The appeal was dismissed for the reason that the amount had not been deposited and there was no necessity of granting further time to the appellant to comply with the order dated 17th October, 2011 because enough time had already been granted. The Appellate Tribunal also held that since a separate appeal had not been filed against the order dismissing the counter-claim, the findings given by the Debts Recovery Tribunal in the counter-claim would operate as res judicata in view of the decision of the Supreme Court in Premier Tyres Limited Vs. Kerala State Road Transport Corporation, .

48. The Supreme Court has time and again pointed out that an appeal is a creature of a Statute and it is for the Legislature to decide whether the right of appeal should be unconditionally given to an aggrieved party or it should be given conditionally and when law authorises filing of an appeal, it can also impose conditions.

49. In this connection the decision of the Supreme Court in The Anant Mills Co. Ltd. Vs. State of Gujarat and Others, needs to be referred to. The Supreme Court

examined the provisions of the Bombay Provincial Municipal Corporation Act as amended by Gujarat Act regarding the condition contained in Section 406(2)(e) of the Act which stipulated that no appeal shall be entertained unless the amount claimed from the appellant has been deposited by him with the Commissioner but such deposit or part thereof could be dispensed with in the discretion of the Appellate Authority. The observations of the Supreme Court are:--

...The right of appeal is the creature of a Statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the Statute book in Section 30 of the Indian income tax Act, 1922. The proviso to that section provided that "...no appeal shall lie against an order under sub-section (1) of Section 46 unless the tax had been paid". Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the Legislature to impose an accompanying liability upon a party upon whom legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of that liability or the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Article 14 in it. A disability or disadvantage arising out of a party's own default or omission cannot be taken to be tantamount to the creation of two classes offensive to Article 14 of the Constitution, especially when that disability or disadvantage operates upon all persons who make the default or omission.

(Emphasis supplied)

50. This decision was followed by the Supreme Court in *The Gujarat Agro Industries Co. Ltd. Vs. The Municipal Corporation of the City of Ahmedabad and Others Etc. Etc.,* .

51. In *Competition Commission of India Vs. Steel Authority of India Ltd. and Another*, the Supreme Court made the same observation:--

50. The principle of "appeal being a statutory right and no party having a right to file appeal except in accordance with the prescribed procedure" is now well settled. The right of appeal may be lost to a party in face of relevant provisions of law in appropriate cases. It being a creation of a Statute, legislature has to

decide whether the right to appeal should be unconditional or conditional. Such law does not violate Article 14 of the Constitution. An appeal to be maintainable must have its genesis in the authority of law. Reference may be made to *M. Ramnarain Private Limited and Another Vs. State Trading Corporation of India Limited*, and *The Gujarat Agro Industries Co. Ltd. Vs. The Municipal Corporation of the City of Ahmedabad and Others* Etc. Etc., .

52. The decision of the Supreme Court in *Narayana Chandra Ghosh Vs. UCO Bank and Others*, also needs to be noticed. The Supreme Court examined the provisions of Section 18 of The Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 which provides for an appeal to the Appellate Tribunal against the order passed by the Debts Recovery Tribunal with a rider that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal 50% of the amount of debt due from him as determined by the Debts Recovery Tribunal but the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than 25% of debts. After examining the provisions, the Supreme Court made the following observations:--

7. Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the Debts Recovery Tribunal u/s 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred u/s 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. However, under the third proviso to the sub-section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five per cent. of the debt, referred to in the second proviso. Thus, there is an absolute bar to the entertainment of an appeal u/s 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre-deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity.

8. It is well-settled that when a statute confers a right of appeal, while granting the right. the legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. Thus, we hold that the requirement of pre-deposit under sub-section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no Court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the Statute. We have no

hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement.

(Emphasis supplied)

53. It was thus open to the Legislature to impose a condition u/s 21 of the Act for filing an appeal before the Appellate Tribunal.

54. Learned counsel for the petitioner submitted that it was a fit case where the Appellate Tribunal should have waived the deposit of the entire amount and the Appellate Tribunal committed an illegality in requiring the petitioner to deposit 60% of the amount due as determined by the Debts Recovery Tribunal. In this connection learned counsel for the petitioner submitted that the appellant was not in a position to deposit any amount because of the extremely weak financial condition of the petitioner and so a complete waiver was sought. The Appellate Tribunal, after examining the contents of the waiver application and the reply submitted by the Bank, passed an order for deposit of 60% of the amount due.

55. A learned Judge of this Court in Bankey Lal Gupta and Another Vs. Bank of Baroda and Another, examined the conditions under which the amount could be waived or reduced by the Appellate Tribunal u/s 21 of the Act and observed:--

5. Be that as it may, the only ground taken by petitioner is his financial hardship. Section 21 of 1993 Act contemplates that an appeal can be preferred along with payment of 75 % of the amount of debt so due as determined by the Tribunal u/s 9. This is normal procedure of filing the appeal. However a discretion has been granted to Appellate Tribunal to waive or reduce the amount to be deposited u/s 21 but the Appellate Tribunal has to record reasons in writing therefor. The deposit is normal rule and lesser or no deposit is an exception. In order to attract the exception, an appropriate ground has to be shown by the appellant. The mere financial hardship cannot be a ground for asking the Tribunal to exercise waiver for the reason here is a Statute which entitles the Bank to file suit against the loanee or creditor who has not repaid the amount taken from the Bank and the reason for default may include financial hardship. Therefore, the very reason for the Bank to approach the Tribunal under 1993 Act may be the default on the part of creditor/loanee which may be on account of financial hardship. When a suit is decreed, it would make no difference whether there was any financial hardship to the creditor or not. Once the decree has been passed, for the purpose of appeal, unless it is shown that the amount decreed is excessive or in law is not recoverable or is otherwise illegal, mere financial hardship, in my view, would not be a relevant consideration for exercising power of waiver under proviso to Section 21. No authority taking a different view has been cited before this Court.

(Emphasis supplied)

56. It, therefore, follows that it was imperative on the Appellant to show that the amount mentioned in the recovery certificate was excessive or not recoverable or illegal and financial hardship could not be the sole consideration. The judgment rendered by the Debts Recovery Tribunal has, therefore, to be examined.

57. As seen from the judgment of the Debts Recovery Tribunal, the main defence of the petitioner-defendant No. 4 taken in the written statement filed in response to the Original Application was the claim set up by the petitioner in the counter-claim. The Debts Recovery Tribunal had exhaustively dealt with the issues framed in the Original Application and decided the issues against the petitioner. The issues which were framed in the counter-claim were decided against the petitioner for the reason that the issues had been decided in the Original Application against the petitioner.

58. As the Court is considering the Appeal filed by the petitioner as an appeal against the order passed in the Original Application, the consequences of filing an appeal against the order passed in the Original Application and not filing the appeal against the dismissal of the counter-claim need to be examined.

59. The Supreme Court in *Sheodan Singh Vs. Smt. Daryao Kunwar*, observed that where two suits having common issues are decided on merit and if two appeals are filed but one of them is dismissed on the ground of limitation or on some other preliminary ground, the said decision will operate as *res-judicata* for the other appeal and the observations are:--

20. A consideration of the cases cited on behalf of the appellant therefore shows that most of them are not exactly in point so far as the facts of the present case are concerned. Our conclusion on the question of *res judicata* raised in the present appeals is this. Where the trial Court has decided two suits having common issues on the merit and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial Court's decision stands confirmed, the decision of the appeal Court will be *res judicata* and the appeal Court must be deemed to have heard and finally decided the matter. In such a case result of the decision of the appeal Court is to confirm the decision of the trial Court given on merits, and if that is so, the decision of the appeal Court will be *res judicata* whatever may be the reason for the dismissal. It would be a different matter, however, where the decision of the appeal Court does not result in the confirmation of the decision of the trial Court given on the merit, as for example, where the appeal Court holds that the trial Court had no jurisdiction and dismisses the appeal even though the trial Court might have dismissed the suit on the merits. In this view of the matter, the appeals must fail, for the trial Court had in the present case decided all the four suits on the merits including the decision on the common issues as to title. The result of the dismissal on a preliminary ground of the two appeals arising out of suit Nos. 77 and 91 was that the decision of the trial Court was confirmed with respect to the common issues as to title by the High Court. In consequence the decision on those issues

became res judicata so far as appeal Nos. 365 and 366 are concerned and S. 11 of the CPC would bar the hearing of those common issues over again. It is not in dispute that if the decision on the common issues in suit Nos. 77 and 91 has become res judicata, appeal Nos. 365 and 366 must fail.

(Emphasis supplied)

60. Sheodan Singh (supra) was a case where two appeals were filed against the decisions rendered in two suits having common issues. In Premier Tyres Limited Vs. Kerala State Road Transport Corporation, the Supreme Court examined the consequences when two suits are connected and decided by a common order but only one appeal is filed. It was held that if only one appeal is filed, the finality of the finding recorded in the suit against which no appeal is filed will preclude the Court from proceeding with the appeal and the appeal has to be dismissed. In reaching such a conclusion, the Supreme Court placed reliance on the earlier decision rendered in Sheodan Singh (supra). The observations are:--

3. The validity of this finding has been assailed by Shri Raja Ram Aggarwal, the learned senior advocate appearing on behalf of the appellant. It is urged that Section 11 of the CPC does not apply as such. According to him since both the suits were connected and decided by a common order the issue in neither suit can be said to have been decided in a former suit. Therefore the basic ingredient of Section 11 of the CPC was not satisfied. The submission derives some support from observations in Narhari and Others Vs. Shankar and Others, that, "even when there are two suits it has been held that decision given simultaneously cannot be a decision in the former suit". But this decision was distinguished in Sheodan Singh Vs. Smt. Daryao Kunwar, , as it related to only one suit, therefore, the observations extracted above were not relevant in a case where more than one suit were decided by a common order. The Court further held that where more than one suits were filed together and main issues were common and appeals were filed against the judgment and decree in all the suits and one appeal was dismissed either as barred by time or abated then the order operated as res judicata in other appeals,

In the present case there were different suits from which different appeals had to be filed. The High Court's decision in the two appeals arising from suit Nos. 77 and 91 was undoubtedly earlier and therefore the condition that there should have been a decision in a former suit to give rise to res judicata in a subsequent suit was satisfied in the present case. The contention that there was no former suit in the present case must therefore fail.

In Ramagya Prasad Gupta and Others Vs. Murli Prasad and Others, an effort was made to get the decision in Sheodan Singh Vs. Smt. Daryao Kunwar, reconsidered. But the Court did not consider it necessary to examine the matter as the subject-matter of two suits being different one of the necessary ingredients for applicability of Section 11 of the CPC were found missing.

4. Although none of these decisions were concerned with a situation where no

appeal was filed against the decision in connected suit but it appears that where an appeal arising out of connected suit is dismissed on merits the other cannot be heard, and has to be dismissed. The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non-filing of appeal against a judgment or decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequences follows when a judgment or decree in a connected suit is not appealed from.

6. Thus the finality of finding recorded in the connected suit, due to non-filing of appeal, precluded the Court from proceeding with appeal in other suit. In any view of the matter the order of the High Court is not liable to interference.

(Emphasis supplied)

61. The Supreme Court in *Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others*, approved the view taken earlier by the Supreme Court in *Sheodan Singh* (supra):--

8. The first question to be considered is whether an appeal accompanied by an application for condoning the delay in filing the appeal is an appeal in the eye of law, when the application for condoning the delay in filing the appeal is dismissed and consequently the appeal is dismissed as being time barred by limitation, in view of Section 3 of the Limitation Act. There was conflict of views on this question before the High Courts. But the Privy Council in *Nagendra Nath Dey v. Suresh Chandra Dey* (59 Indian Appeals 283): (AIR 1932 PC 165) held,

There is no definition of appeal in the Civil Procedure Code, but Their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less than appeal because it is irregular or incompetent.

Learned counsel placed reliance on the decision in *Ratansingh Vs. Vijaysingh and Others*, rendered by two learned Judges of this Court and pointed out that it was held therein that dismissal of an application for condonation of delay would not amount to a decree and, therefore, dismissal of an appeal as time-barred was also not a decree. That decision was rendered in the context of Article 136 of the Limitation Act, 1963 and in the light of the departure made from the previous position obtaining under Article 182 of the Limitation Act, 1908. But we must point out with respect that the decisions of this Court in *Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab*, and *Sheodan Singh Vs. Smt. Daryao Kunwar*, were not brought to the notice of their Lordships. The principle laid down by a three Judges Bench of this Court in *Mela Ram and Sons* and that stated in *Sheodan Singh* was, thus, not noticed and the view expressed by the two Judges Bench, cannot be accepted as laying down the correct law on the question. Of course, their Lordships have stated that they were aware that some decisions of the High Courts have taken the view that even rejecting an appeal on the ground that it was presented out of time is a decree within the definition of a decree

obtaining in the Code. Thereafter noticing the decision of the Calcutta High Court above referred to, their Lordships in conclusion apparently agree with the decision of the Calcutta High Court. Though the decision of the Privy Council in AIR 1932 165 (Privy Council) was referred to, it was not applied on the ground that it was based on Article 182 of the Limitation Act, 1908, and there was a departure in the legal position in view of Article 136 of the Limitation Act, 1963. But with respect, we must point out that the decision really conflicts with the ratio of the decision in Mela Ram and Sons and Sheodan Singh and another decision of this Court rendered by two learned Judges in Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury, . In M/s. Essar Constructions Vs. N.P. Rama Krishna Reddy, , brought to our notice, two other learned Judges of this Court left open the question. Hence, reliance placed on that decision is of no avail to the appellant.

62. The petitioner, as noticed hereinabove, who was a defendant No. 4 in the Original Application filed by the Bank filed a written statement as also a counter-claim. The Debts Recovery Tribunal framed separate issues in the Original Application and the counter-claim. It is seen that apart from Issue Nos. 1 and 2 of the Original Application and Issue Nos. 1 and 2 of the counter-claim which deal with the maintainability and the limitation bar of the Original Application and the counter-claim, the other issues which deal with the merit of the respective claims are common. In this connection it is noticed that issue Nos. 4 to 10 of the Original Application were also framed as different issues in the counter-claim and the issues framed in the counter-claim were decided against defendant No. 4 in view of the findings given by the Debts Recovery Tribunal while deciding the corresponding issues in the Original Application. The petitioner had file only one appeal. If the appeal is treated as an appeal against the order passed in the Original Application then in view of the decision of the Supreme Court in Premier Tyres Limited Vs. Kerala State Road Transport Corporation, and Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others, the Appellate Tribunal could not have proceeded to hear the appeal and had to dismiss it as the decision of the Debts Recovery Tribunal in the counter-claim will operate as res-judicata.

63. In such circumstances, it is not possible to hold that the petitioner had any prima facie case much less any case on merits. The financial difficulties of the petitioner alone could not have been taken into consideration to examine whether any waiver as contemplated under the proviso to Section 21 of the Act could have been granted to the petitioner. The contention of learned counsel for the petitioner that complete waiver of the amount required to be deposited u/s 21 of the Act should have been granted, therefore, cannot be accepted.

64. The Appellate Tribunal, however, had directed for deposit of 60% of the amount due to the appellant as determined by the Debts Recovery Tribunal but even this amount was not deposited by the appellant within the time granted by the Tribunal.

65. In the circumstances mentioned above, the Appellate Tribunal committed no

illegality in dismissing the appeal filed by the petitioner for non-deposit of the amount and for the reason that only one appeal had been filed.

66. The second option of treating the Appeal as an appeal filed against the dismissal of the counter-claim has now to be examined.

67. Learned counsel for the petitioner submitted that if the appeal that was filed by the petitioner could be treated as an appeal against the dismissal of the counter-claim filed by the petitioner, then it could have been heard since the amount as contemplated u/s 21 of the Act was not required to be deposited in filing such an appeal.

68. It is also not possible to accept this contention of learned counsel for the petitioner. As observed above, if the appeal is treated to be an appeal against the dismissal of the counter-claim, then, as the petitioner did not file any appeal against the order passed in the Original Application, the principle of res judicata will be applicable and the appeal filed against the counter-claim would have to be dismissed.

69. In such circumstances, the prayer made for quashing the order passed by the Debts Recovery Tribunal cannot also be accepted.

70. Thus, for all the reasons stated above, there is no force in the submissions advanced by learned counsel for the petitioner and the writ petition is liable to be dismissed. The writ petition is, accordingly, dismissed.