

(2005) 09 KL CK 0012
In the High Court Of Kerala
Case No : W.A. No. 653 of 2005

Federal Bank Limited

APPELLANT

Vs

John Thomas and Another

RESPONDENT

Date of Decision : 18-09-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 15, 19, 19(1), 19(2), 19(3)

Citation : (2006) 1 KLJ 23

Hon'ble Judges : S. Siri Jagan, J;Rajeev Gupta, J

Bench : Division Bench

Advocate : Mohan Jacob George, P.V. Parvathi, Reena Thomas and K.N. Pramod Kumar Menon, for the Appellant; V.M. Kurian, A.V. Thomas, Mathew B. Kurian and K.T. Thomas, for the Respondent

Final Decision : Dismissed

Judgement

S. Siri Jagan, J.—An interesting question regarding payment of court fee on counter claims filed before the Debt Recovery Tribunal during the interregnum between 17-1-2000, which is the date of introduction of sub-section (8) in Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the Act"), allowing filing of counter claims by defendants, and 21-1-2003, which is the date of amendment of Rule 7 of the Debt Recovery Tribunal (Procedure) Rules, 1993 (for short "the Rules") prescribing court fee for application to counter claim, arises in this case. The facts necessary for the disposal of this appeal, which lie in a very narrow compass, are as follows. The appellant-Federal Bank filed O.A. No. 161/2002 before the Debt Recovery Tribunal, Ernakulam for recovery of certain amounts due from the 1st respondent herein. On 22-7-2002, the 1st respondent filed a counter claim raising money claims against the Bank in accordance with Section 19(8) of the Act. At that time, the Rules did not contain any specific provision for payment of court fee on counter claims. With effect from 21-1-2003, Rule 7 of the Rules was substituted

prescribing court fee for counter claims also. On 19-10-2004, the Debt Recovery Tribunal passed an order directing the 1st respondent herein to pay court fee on the counter claim. Challenging the said order, the 1st respondent filed W.P.(C) No. 34318/2004. A learned Single Judge of this Court allowed the writ petition and held that no court fee is payable in respect of counter claims filed before 21-1-2003, i.e. the date of amendment of Rule 7 of the Rules. This judgment is under challenge in this writ appeal at the instance of the Bank.

2. The appellant-Bank raises three contentions in this appeal :

(1) First is that the writ petition was not maintainable and the learned Single Judge ought not to have interfered in the writ petition but ought to have relegated him to the alternate remedy by way of an appeal to the Debt Recovery Tribunal u/s 20 of the Act.

(2) Second is that even without the amendment of the Rules with effect from 21-1-2003, the provisions in the Act and Rules as it stood when Section 19(8) was incorporated, itself impliedly warranted payment of court fee.

(3) The third is that the right to file counter claim not being a vested right but only a procedural right. Rule 7, amending the provisions for payment of court fee on counter claim is retrospective in nature and, therefore, for all counter claims filed subsequent to the introduction of Section 19(8) of the Act. Court fee as provided under the amended Rule 7 is payable.

3. While countering these contentions, counsel for the 1st respondent would take a preliminary objection regarding the maintainability of the appeal itself, since, according to him, court fee is a matter strictly between the 1st respondent and the State and, therefore, the appeal filed by the Bank in the matter of court fee is not maintainable. Both sides cited decisions in support of their arguments for and against the maintainability of the appeal. Although the argument of the 1st respondent merits consideration, since we propose to agree with the learned Single Judge on the question of law posed in this case, we are not inclined to go into the said contention regarding the maintainability of the appeal itself, especially in view of the substantial question of law of general importance involved.

4. We shall deal with the contentions in seriatim.

5. According to counsel for the appellant, since, u/s 20 of the Act, the 1st respondent has a right of appeal to the Debt Recovery Tribunal, the writ petition challenging the order directing payment of court fee is not maintainable. In this regard, we would note that existence of an alternate remedy is not always a bar for entertaining a petition under Article 226 of the Constitution of India in appropriate cases. Further, we note that the appellant had, in fact, filed a statement of objections dated 10-12-2004 in the writ petition, which does not contain such a contention. The impugned judgment also does not disclose that the appellant had raised such a contention before the learned Single Judge.

Moreover, in this case, a very substantial question of law of general importance involving the jurisdiction of the Tribunal to impose court fee on counter claim without any provision for the same in the Act or the Rules, is raised, which needs to be decided by this Court. As such, we are not impressed by this contention of the appellant, especially since the learned Single Judge has, in exercise of his discretion, entertained the writ petition.

6. The next contention of the counsel for the appellant is that even without any specific provision for payment of court fee on counter claim the provisions in the Act themselves make it abundantly clear that court fee is, in fact, payable on counter claim also as in the case of application u/s 19(1) of the Act. To substantiate this contention, counsel relies on sub-section (9) of Section 19. According to learned counsel. In view of the said sub-section, all the provisions applicable to an application u/s 19(1) by the Bank or financial institution would automatically become applicable to a counter claim also, which includes payment of court fee. He heavily relied on the decision of the Karnataka High Court in M/s. Capbeauti and another v. The Karnataka Bank Ltd. and others, AIR 2002 Kar 434 in support of his contention.

7. Counsel for the 1st respondent would vehemently oppose this contention stating that in so far as there is no express provision either in the Act or Rules, requiring payment of court fee on counter claim, it is not for the Court to supply the omissions in the statute and recover court fee. Both counsel have cited before us several decisions in support of their arguments, which we shall presently deal with.

8. We straight away choose to disagree with the reasoning of the Karnataka High Court in the judgment cited by the counsel for the appellant. We are not satisfied that the language employed in sub-sections (8) and (9) of Sec. 19 would lend support to an interpretation making all the provisions applicable to filing of applications under Section 19(1) to counter claims also. For convenience, we shall extract sub-sections (8) and (9):

(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 time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not.

(9) A counterclaim 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.

What sub-section (9) states is that a counter claim under sub-section (8) shall have the same effect as a cross suit so as to enable the Tribunal to pass final order on the same application both on the original claim and on the counter claim. The underlined words would necessarily imply that the legislature did not

contemplate application of the provisions of Section 19(1) in relation to filing of applications by the Bank of filing of counter claims also, but only wanted to restrict such effect only for the purpose of enabling the Tribunal to pass final orders in respect of both claims in the same application. If the intention of the legislature was as held out by the appellant, the legislature had a much simpler option of providing that the provisions of Section 19(1) shall mutandis mutantis apply to counter claims filed under sub-section (8) also, as is usually seen in legislations of like nature. In the absence of such a provision in the Act, we are unable to agree that sub-section (9) would indicate that all the provisions u/s 19(1) including payment of court fee shall ipso facto become applicable to counter claims also. Further, the provisions u/s 19(1) is not applicable to debts due to Banks or Financial Institutions the amount of which is less than ten lakh rupees whereas counter claims are entertainable for amounts less than rupees ten lakhs also. Moreover, Section 19(1) relates to "debt" as defined in Section 2(g), whereas Section 19(8) does not use the expression "debt" at all, but used the expression "claim". In this connection, it may be noted that the power to prescribe fee under the proviso to Section 19(3) is only having regard to the amount of debt to be recovered and "debt" is separately defined in Section 2(g). All these would indicate that it was not in the contemplation of the legislature to make Section 19(1) applicable to counter claims u/s 19(8).

9. In this connection, we may also note the unamended Rule 7 of the Rules which provided for court fee on applications filed by the Bank alone. Item 1 of the table appended to Rule 7 prescribing court fee on applications u/s 19(1), which remains the same even after amendment, reads as follows:

Sl

No.

Nature of application

Amount of fee payable

1.

Application for recovery of debts due - (a) Where amount of debt due is Rs. 10 lakhs

Rs. 12,000

(b) Where the amount of debt due is above Rs. 10 lakhs

Rs. 12,000 plus Rs. 1000 for every one lakh rupees of debt due or part thereof in excess of Rs. 10 lakhs subject to a maximum of Rs. 1,50,000

What is important here is that in respect of original application, no fee is prescribed for amounts less than Rs. 10 lakhs. If this provision is made applicable to counter claims also, it is difficult to understand how court fee can be levied in respect, of counter claims of the value of less than Rs. 10 lakhs.

Perhaps, an argument can be raised that, that would only mean that in respect of counter claims also no court fee is payable if the amount is less than 10 lakhs. But, court fee is provided for only in respect of Rs. 10 lakhs or more only because the jurisdiction of the Tribunal itself is only in respect of Rs. 10 lakhs and above. That being so, an interpretation to the effect that by virtue of Section 19(9), court fee is payable on counter claims also, but in respect of counter claims below Rs. 10 lakhs, no court fee is payable would do violence to the provision itself. In any event, admittedly, at the relevant time, the Act and Rules were totally silent about the court fee payable on counter claims. While incorporating sub-sections (8) and (9) in the Act by amendment, it was perfectly open to the legislature to incorporate appropriate provisions either in the Act or Rules making court fee payable on counter claims also. In so far as the legislature has not thought it fit to incorporate any such provision, it is not for this Court to supply the omissions of the legislature, if it was in fact, an omission, which itself we cannot assume.

10. Counsel for the appellant relied on the decisions reported in *Glenny, C.J. Vs. The Catholic Syrian Bank Ltd.*, *Shiv Shakti Coop. Housing Society, Nagpur Vs. Swaraj Developers and Others*, *Rattan Chand Hira Chand Vs. Askar Nawaz Jung (Dead) by Lrs and Others*, *Lalit Mohan Pandey Vs. Pooran Singh and Others*, and *Gujarat H.C. v. G.K.M. Panchayat*, AIR 2003 SC 1201 in support of his contention. In the Full Bench decision of this Court in *Glenny's* case (*supra*), it is stated thus:

It is settled law that if the statute creates fiction, then all those circumstances, which are necessary for giving the fiction a full meaning and content have to be assumed to exist.

We do not perceive creation of any fiction by the amendments to Section 19 and as such, we do not think that this decision has any application whatsoever to the case at hand. Further, in order to give Section 19(8) its full meaning, it is not necessary at all to assume a requirement of payment of court fee since applications for which court fee is not prescribed is not alien to the law of court fees. In *Shiv Shakti Coop. Housing Society, Nagpur Vs. Swaraj Developers and Others*, , the Supreme Court held that an intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available. The Supreme Court further observed that application of words literally would defeat the obvious intention of the legislation and produce a wholly unreasonable result and in such circumstances. Court must do violence to the words so as to achieve the obvious intention and produce a rational construction. In *Rattan Chand Hira Chand Vs. Askar Nawaz Jung (Dead) by Lrs and Others*, , the Supreme Court held that Court should interpret words in the context of changing social needs and values and fill the lacuna in the Legislation, if any, in consonance with social goal and public good. In AIR 2004 SC 2003, it was held that the objective underlying the statute is required to be given effect to by applying the principles of purposive construction.

11. We are not satisfied that these decisions have any application whatsoever to the facts of this case. Failure to make provision for payment of court fee on counter claim does not produce any unreasonable, unjust or anomalous result, requiring doing violence to the words of the section to assume an implied provision for payment of court fee. We also do not find any lacuna in the section which requires to be filled up. We are at a loss to understand what social goal and public good can be advanced by adopting a strained construction making court fee payable on counter claims also, and filling up an imaginary lacuna. There is nothing in the language employed in the Section warranting an inference that the objective underlying the statute, while making the amendment was to prescribe a court fee for counter claims also. As is in the case of several applications before courts, it is not always necessary to prescribe court fee for all applications. The legislature is free to choose applications to prescribe court fees or not to. In the present case, we can only infer that the legislature in its wisdom did not find it necessary to prescribe court fee on counter claims at least at the relevant time. We do not find any great unreasonable or unjust result in not prescribing court fee for counter claims so as to force the Court to bring in a construction to include court fee for counter claims also. Or perhaps the legislature thought it fit to leave it to the rule making authority to decide that question as in the case of applications u/s 19(1) and the rule making authority thought it fit to prescribe court fee for counter claims only with effect from 21-1-2003. On the other hand, the Supreme Court has time and again categorically held that intention of legislature has to be gathered from the language employed in the statute itself. It is not for the court to rewrite the section. The theory of implied intent of ancillary power is not applicable to interpretation of statutes. It is not the duty of the court to supply omissions especially when it affects the vested right of a party and court cannot correct or make up deficiency defect or omission.

12. In *Grasim Industries Ltd. Vs. Collector of Customs, Bombay*, , on the question of interpretation of Statutes, in paragraph 10, the Supreme Court held as follows:

No words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation one should not concentrate too much on one word and pay too little attention to other words. No provision in the statute and no word in any section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used. It is said that every statute is an edict of the legislature. The elementary principle of interpreting any word while considering a statute is to gather the means or sententia legis of the legislature. Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to take upon itself the task of amending or alternating the statutory provisions. Wherever the language is clear the intention of the legislature is to be gathered from the language used. While doing so, what has been said in the statute as also what has not been said has to

be noted. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be avoided. As stated by the Privy Council in *Crawford v. Spooner* (1846) 6 Moore PC 1, "we cannot aid the legislature's defective phrasing of an Act. We cannot add or mend and by construction make up deficiencies which are left there." In case of an ordinary word, there should be no attempt to substitute or paraphrase of general application. Attention should be confined to what is necessary for deciding the particular case. The principle is too well settled and reference to a few decisions of this Court would suffice. (See: *Union of India and another Vs. Deoki Nandan Aggarwal*, *Institute of Chartered Accountants of India Vs. Price Waterhouse and Another*, and *Harbhajan Singh Vs. Press Council of India and Others*, .

13. In *J.P. Bansal Vs. State of Rajasthan and Another*, , it was held as follows:

14. Where, however, the words were clear, there is no obscurity, there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to innovate or take upon itself the task of amending or altering the statutory provisions. In that situation, the Judges should not proclaim that they are playing the role of a law-maker merely for an exhibition of judicial valour. They have to remember that there is a line: though thin, which separates adjudication from legislation. That line should not be crossed or erased. This can be vouchsafed by "an alert recognition of the necessity not to cross it and instinctive, as well as trained reluctance to do so." (See: Frankfurter: *Some Reflections on the Reading of Statutes* in "Essays on Jurisprudence." *Columbia Law Review*, P.51.)

15. It is true that this Court in interpreting the Constitution enjoys a freedom which is not available in interpreting a statute and, therefore, it will be useful at this stage to reproduce what Lord Diplock said in *Duport Steels Ltd. v. Sirs*. (1980) 1 All ER 529: (All ER at p.542 c-d)

It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if Judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to the public interest.

16. Where, therefore, the "language" is clear, the intention of the legislature is to be gathered from the language used. What is to be borne in mind is as to what has been said in the statute as also what has not been said. A construction which requires, for its support addition or substitution of words or which results in rejection of words, has to be avoided, unless it is covered by the rule of exception, including that of necessity, which is not the case here (See *Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. Vs. Custodian of Vested Forests, Palghat and another*,). *Smt. Shyam Kishori Devi Vs. Patna Municipal Corporation and Another*, and *A.R. Antulay Vs. Ramdas Srinivas Nayak and Another*, . Indeed, the

Court cannot reframe the legislation as it has no power to legislate. (See *State of Kerala v. Mathai Varghese*, (1986) 4 SCC 756 (SCC at p. 749) and *Union of India and another Vs. Deoki Nandan Aggarwal*, .

14. In *Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others*, , the Supreme Court considered the question as to whether it is permissible for the Court to rewrite the Section. In the same in paragraph 13, the Supreme Court held as follows:

13. It is submitted by the counsel for the respondent-assessee that since Sec. 80-HH is intended to encourage establishment of industrial undertaking in backward areas for the reason that such establishment leads to development of that area besides providing employment, we must adopt a liberal interpretation which advances the purpose and object underlying the provision. The said principle, however, cannot be carried to the extend of doing violence to the plain and simple language used in the enactment, it would not be reasonable or permissible for the Court to re-write the section or substitute words of its own for the actual words employed by the Legislature in the name of giving effect to the supposed underlying object. After all, the underlying object of any provision has to be gathered on a reasonable interpretation of the language employed by the Legislature.

15. In *Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others*, , while holding that the theory of implied intent or of ancillary power is not applicable to interpretation of statute, the Supreme Court observed thus:

6. After giving our anxious consideration to the contentions raised by Mr. Goswami, it appears to us that in a fiscal matter. It will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that the delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power. The facts and circumstances in the case of *District Council of the Jowai Autonomous Distt., Jowai and Others Vs. Dwet Singh Rymbai etc.*, are entirely different. The exercise of power by the Autonomous Jantia Hills Districts are controlled by the constitutional provisions and in the special facts of the case, this Court has indicated that the realisation of just fee for a specific purpose by the autonomous District was justified and such power was implied. The said decision cannot be made applicable to the facts of this case or the same should not be held to have laid down any legal proposition that in matters of imposition of tax or fees, the question of necessary intendment may be looked into when there is no express provision for imposition of fee or tax. The other decision in *Khargram Panchayat Samiti and Another Vs. State of West Bengal and Others*, also deals with the

exercise of incidental and consequential power in the field of administrative law and the same does not deal with the power of imposing tax and fee.

7. The High Court has referred to the decisions of this Court in *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, and *Mahant Sri Jagannath Ramanuj Das and Another Vs. The State of Orissa and Another*, and *Municipal Corporation of Delhi and Others Vs. Mohd. Yasin*, , It has been consistently held by this Court that whenever there is compulsory exaction of any money, there should be specific provision for the same and there is no room for intendment. Nothing is to be read and nothing is to be implied and one should look fairly to the language used. We are, therefore, unable to accept the contention of Mr. Goswami. Accordingly, there is no occasion to interfere with the impugned decision of the High Court. The appeal, therefore, fails and is dismissed with no order as to costs.

16. In *Union of India and another Vs. Deoki Nandan Aggarwal*, , the Supreme Court held that the Court cannot correct or make up deficiency, defect or omission in the legislation in the following words:

It is not the duty of the Court either to enlarge the scope of the legislation or the intention is plain and unambiguous. The Court cannot rewrite, recast or re-frame the legislation for the very good reason that it has no power to legislate. The power to legislate 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. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities

17. In *Shiv Shakti Coop. Housing Society, Nagpur Vs. Swaraj Developers and Others*, , the Supreme Court dealing with the principles of construction relating to *casus omissus* held thus in paragraphs 23 and 24;

23. Two principles of construction -one relating to *casus omissus* and the other in regard to reading the statute as a whole--appear to be well settled. Under the first principle, a *casus omissus* cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a *casus omissus* should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of these whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which would not have been intended by the legislature. "An intention to produce an unreasonable result" said Danckwerts,

L.J. in *Artemiou v. Procopiou* (1965) 3 All ER 539 (All ER 0.544) "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result". We must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. Per Lord Reid in *Luke v. IRC.* (1963) 1 All ER 655 where at AC p. 577 (All FR p. 6641) he also observed: "This is not a new problem, though our standard of drafting is such that it rarely emerges."

24. It is then true that,

when the words of law extend not to an inconvenience rarely happening, but do to those which often happen, it is good reason not to strain the words further than they reach, by saying it is *casus omissus*, and that the law intended *quae frequentius accident*.

"But", on the other hand,

it is no reason, when the words of a law do enough extend to an inconvenience seldom happening that they should not extend to it as well as if it happened more frequently, because it happens but seldom" (see *Fenton v. Hampton*, (1858) 11 Mog PCC 347)

A *casus omissus* ought not to be created by interpretation, save in some case of strong necessity. Where, however, a *casus omissus* does really occur, either through the inadvertence of the legislature, or on the principle *quod semel aut bis existit proetereunt leges*, the rule is that the particular case, thus left unprovided for, must be disposed of according to the law as *oblivioni datus dispositioni juris communis relinquitur*, "a *casus omissus*", observed Buller. J. in *Jones v. Smart* 99 ER 963. "can in no case be supplied by a court of law, for that would be to make laws".

18. Applying the principles enunciated by the Apex Court in the above decisions, we have absolutely no hesitation to hold that the language employed in sub-sections (8) and (9) of Section 19 did not admit of any interpretation whatsoever which implies payment of court fees to counter claims as in the case of applications by the Bank u/s 19(1). The language used in this Section is clear and unambiguous. We were unable to perceive any omissions therein or any compelling need to supply any omission by a purposive construction. No injustice or anomalous results would follow if a need for payment of court fee on counter claims is not read into the Section. We do not perceive the necessity for any kind of interpretation to the clear words in the Section and if we do that, the same would do violence to the Section itself without any reason of any kind to do so. Therefore, there is absolutely no merit in the contention of the appellant in that regard. For the same reasons, with great respect, we disagree with the decision of the Karnataka High Court in AIR 2002 Kar 434 *supra*.

19. The second contention raised by the appellant is that in so far as payment of

court fee is only a matter of procedure, the same is essentially retrospective in nature, and, therefore, Rule 7 as amended by Debt Recovery Tribunal (Amendment) Rules, 2003 w.e.f. 21-1-2003 applies to all counter claims filed subsequent to the introduction of sub section (8) in Section 19 of the Act. Counsel would argue that prior to the introduction of sub-section (8), in order to realise any amounts due from the Bank, the debtor had to approach the civil court and could not approach the Debt Recovery Tribunal. Therefore, the provision for filing a counter claim is only a convenience granted to the debtor to get their claim adjudicated along with that of the Bank of the financial institution and that does not create a vested right in him. As counter claim is basically a matter of convenience, it is only a procedural provision and therefore, court fee payable to counter claim is also procedural which would apply retrospectively. In support of his said contention, the counsel for the appellant relies on the decision in Pankajakshy and others v. State Bank of Travancore and others, ILR 2004(3) Ker 306, which is to the effect that no person has a vested right to file a revision and court fee is to be paid as per Rules existing on the date of admission of revision. He would argue that since the right to file counter claim is not a vested right and much less a substantive right, the provision for payment of court fee on counter claim is retrospective in nature.

20. In answer to these contentions, counsel for the writ petitioner would argue that payment of court fee for which provision was not originally there, is imposition of an onerous condition and, therefore, is not a matter of procedure. It impairs a substantive right. An enactment which does that, is not retrospective unless it save so expressly or by way of necessary intentment. For this, he cites the decisions in State of Bombay Vs. Supreme General Films Exchange Ltd., and Usha v. Food Corporation of India 1997 (1) KLT 264. Citing the decision in Koongaran Mukundan Vs. Thamaravalappil Nalini, , counsel argues that levy of court fee can be directed only if the provision on a strict construction provides for the same, and if there is any serious doubt regarding that, the benefit should go against the levy. Citing the decision in Shyam Sunder and others v. Ram Kumar and another (2001) SCC 24, counsel argued that amendment cannot affect substantive or vested right unless it is made expressly or by necessary implication retrospective. On this aspect, he also cites the decision in Shiv Shakti Coop. Housing Society, Nagpur Vs. Swaraj Developers and Others, .

21. We are of opinion that right to file a counter claim, like the right to file a suit for recovery of the said amount, is an inherent and substantial right and the condition imposing court fee on counter claim would certainly be an onerous condition on the right to file a counter claim and therefore, is a fetter on a substantive right. Such an onerous condition affecting substantive right cannot be retrospective in operation. In paragraph 12 of the decision reported in State of Bombay Vs. Supreme General Films Exchange Ltd., the Supreme Court held as follows :

12. It is thus clear that in a long line of decisions approved by this Court and at

least in one given by this Court, it has been 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.

22. In the decision of Shyam Sunder's case (supra), quoting from the decision in Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, , the Supreme Court summarised the law relating to the ambit and scope of amending Act and its retrospective operation as follows :

26. In Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, , this Court laid down the ambit and scope of an amending Act and its retrospective operation as follows : (SCC p. 633 para 26).

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction, is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly-defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

In paragraph 28 of the said decision, the Supreme Court further held as follows:

28. From the aforesaid decisions, the legal position that emerges is that when a repeal of an enactment is followed by a fresh legislation, such legislation does not affect the substantive rights of the parties on the date of the suit or adjudication of the suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of the suit. However, the position in law would be different in the matters which relate to procedural law but so far as substantive rights of parties are concerned they remain unaffected by the amendment in the enactment. We are, therefore, of the

view that where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act, such legislation is prospective in operation and does not affect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment. We are further of the view that there is a presumption against the retrospective operation of a statute and further a statute is not to be construed to have a greater retrospective operation than its language renders necessary, but an amending Act which affects the procedure is presumed to be retrospective, unless the amending Act provides otherwise. We have carefully looked into the new substituted Section 15 brought in the parent Act by the Amendment Act, 1995 but do not find it either expressly or by necessary implication retrospective in operation which may affect the rights of the parties on the date of adjudication of the suit and the same is required to be taken into consideration by the appellate court.

23. Of course, counsel for the appellant would try to refute this contention on the ground that all these decisions relate to right of appeal and not original proceedings. According to him, since counter claim is an original proceedings, there is no inherent or substantive right and, therefore, these decisions are not applicable to the case in question. We do not agree. In *Shyam Sunder and Another Vs. Ram Kumar and Another*, the Supreme Court categorically held that law relating to forum and limitation is procedural in nature whereas law relating to right of action and right of appeal, even though remedial is substantive in nature. Therefore, there is no merit in that contention of the appellant. Applying the ratio of these decisions, the only reasonable conclusion possible is that a condition imposing court fee on a right to file counter claim is essentially a fetter on a substantive right and the same cannot therefore be retrospective in operation.

24. Lastly, as a second limb to his third contention, counsel for the appellant would argue that the language used in Rule 7 would show that the same is retrospective in nature. According to him, the expression "made" used in item 2 of sub-rule (2) of amended Rule 7 would show that the same is applicable to counter claims already made also.

25. We may reject the above contention straightaway as totally untenable. We may quote here for convenience the said item 2 applicable to counter claims :

Sl. No.

Nature of Application

Amount of fee payable

2.

XXX

Application to counter claim u/s 19(8) of the Act :-

(a) where the amount of claim made is up to Rs. 10 lakhs

XXX

12,000

(b) where the amount of claim made is above Rs. 10 lakhs.

XX

Rs. 12,000 plus Rs. 1000 for every 1 lakh rupees or part thereof in excess of Rs. 10 lakh subject to a maximum of Rs. 1,50,000.

XX XX

Court fee payable as above is on application to counter claim and if the amount of claim made is up to Rs. 10 lakhs, the court fee payable on the application to counter claim is Rs. 12,000/- and where the amount of claim made is above Rs. 10 lakhs, then a different rate of court fee is prescribed. The word "made" qualifies the words "amount of claim" and not the words "application to counter claim". As such the words used in the said provision do not admit of any interpretation making the said provision retrospective in nature by implication. On the other hand, there are indications at two places at least in the rules themselves which would show that the provision can only be prospective in nature. First of all, the Rule making authority has consciously prescribed the date of commencement of the Rules as the date of their publication in the official Gazette which is 21-2-2003. In sub-rule (1) of Rule 7 itself, there is sufficient indication that the substituted rule was intended to be prospective in operation. The said sub-rule is extracted below :

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.

The same mentions that the applications mentioned therein, which includes an application u/s 19(8) also, shall be accompanied by a fee as provided in sub-rule (2). It does not require any racking of the brains to understand that an application which has already been filed cannot be accompanied by a fee. Only the applications filed subsequent to the amendment can be accompanied by a fee. Further sub-rule (1) of Rule 9 is also indicative of such prospective operation. The said subrule is extracted below :

9. Documents to accompany the application u/s 19 or section 31-A of the Act.-
(1) An application u/s 19 or section 31-A shall be accompanied by a paper book containing :-

(i) a statement showing details of the debt due from a defendant and circumstances under which such debt has become due :and shall also disclose details of the case and decision in that case which is sought to be reviewed:

(ii) all documents relied upon by the applicant and those mentioned in the application:

(iii) details of the crossed demand draft or crossed Indian Postal Order representing the application fee :

(iv) Index of Documents.

It says that an application u/s 19 (which should include an application u/s 19(8) also) shall be accompanied by a paper book containing details of the crossed demand draft or crossed Indian Postal Order representing the application fee. Here also, the words "shall be accompanied" necessarily connotes a prospective operation and not a retrospective operation. As such, the Rules themselves give sufficient indication that the Rules can only be prospective and therefore the provision incorporation by the amendment providing for court fee on counter claim can also be only prospective in nature.

26. Thus, we do not find any merit in any of the contentions of the appellant and the same are liable to be rejected. In the above circumstances, we respectfully agree with the view of the learned Single Judge in the impugned judgment that in respect of counter claims filed between the date of introduction of Section 19(8) namely 17-1-2000 and the date of substitution of Rule 7, namely 21-1-2003 no court fee is payable.

In the above view, we find no merit in this writ appeal and the same is accordingly dismissed. But we do not make any order as to costs.