Federal Bank Limited Vs Sri. John Thomas and Another

W.A. No. 653 of 2005 (A)

Court: High Court Of Kerala

Date of Decision: Nov. 18, 2005

Acts Referred:
Constitution of India, 1950 â€" Article 226#Debt Recovery Tribunal (Amendment) Rules, 2003 â€" Rule 7#Debts Recovery Tribunal (Procedure) Rules, 1993 â€" Rule 7#Recovery of Debts Due to Banks and Financial Institutions Act, 1993 â€" Section 15, 15, 19, 19(1), 19(2)

Citation: AIR 2006 Ker 86 : (2006) 2 BC 411 : (2006) 132 CompCas 855 : (2006) 3 RCR(Civil) 86

Hon'ble Judges: Rajeev Gupta, C.J; S. Siri Jagan, 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, for Respondent No. 1, A.V. Thomas, Mathew B. Kurian and K.T. Thomas, for the Respondent

Final Decision: Dismissed

Judgement

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.

2. 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.

3. 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 provision 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.

4. 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.

5. We shall deal with the contentions in seriatim.

6. According to counsel for the appellant since u/s 20 of the Act, the 1st respondent had 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.

7. 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 relies on the decision of the Karnataka High Court in Carbeauti and Another

Vs. The Karnataka Bank Limited and Others, in support of his contention.

8. 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.

9. We straightway 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 Section 19 would lend support to an interpretation making all the

provisions applicable to filing of applications u/s 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 defendant has delivered his defence or 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 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.

What Sub-section (9) states is that a counterclaim 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 to 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 mutatis mutandis 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 counterclaim also. Further the provision, 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 claim 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 uses 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).

10. 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. Nature of application Amount of fee

No. payable

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1. Application for reco-

very of debts due -

(a) Where amount of

debt due is Rs. 10

lakhs. Rs. 12,000

(b) Where the amount Rs. 12,000 plus

of debt due is above Rs. 1000 for ev-

Rs. 10 lakhs ery one lakh ru-

pees of debt due

or part thereof

in excess Rs. 10

lakhs subject

to a maximum

of Rs. 1,50,000.

XX XX XX

XX XX XX

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, 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

counterclaims 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.

11. Counsel for the appellant relies 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 fee. 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 Lalit Mohan Pandey Vs. Pooran Singh and Others, it was held that the

objective underlying the statute is required to be given effect to by applying the principles of purposive construction.

12. 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 n6t produce any unreasonable, unjust of 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-claim

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 counterclaims 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 fee 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 counterclaims 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 or 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 defeat or omission.

13. 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 (para 9) :

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 M PC I ""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. This

principle is too well settled and reference to a few decisions of this Court would suffice. (See : Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. Vs.

Custodian of Vested Forests, Palghat and another, , 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, .

14. In J.P. Bansal Vs. State of Rajasthan and Another, , in paragraphs 14 to 18, 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 separate 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) I All ER 529 .

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 Sriniwas Nayak and Another, . Indeed, the Court cannot re-frame

the legislation as it has no power to legislate. (See State of Kerala Vs. Mathai Verghese and Others, and Union of India v. Deoki Nandan

Aggarwal AIR 1992 SC 96

15. 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 Section 80HH is intended to encourage establishment of industrial

undertakings 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

extent 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 reasonable interpretation of the language employed by the Legislature.

16. 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 Jowai AIR 1988 SC 1930 are entirely different. The exercise of powers 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 Delhi Municipal Corporation''s case AIR 1983

SC 6174. 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.

17. In Union of India v. Deoki Nandan Aggarwal AIR 1992 SC 96 the Supreme Court held that the Court cannot correct or make up deficiency,

defect or omission in the legislation in the following words (para 14 of AIR) :

...It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is

plain and unambiguous. The Court cannot rewrite, recast or 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....

18. 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 the 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 538 ""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 ER 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 fraquentius 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 M PC 34.

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 semal aut bis existit proetereunt legislatores, the rule is that the

particular case thus left unprovided for, must be disposed of according to the law as it existed before such statute -- casus omissus et 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.

19. 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 Carbeauti and Another Vs. The Karnataka Bank Limited and Others, .

20. 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

counterclaims 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 counterclaim is only a convenience granted to the debtor to get their claim adjudicated

along with that of the Bank or 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 v. State Bank of Travancore

ILR (2004) 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.

21. 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 saves so expressly or by way of necessary intentment. For this he cites the decisions in State of Bombay v.

Supreme General Films Exchange Ltd. AIR 1980 SC 980 and Usha v. Food Corporation of India (1997) 1 K LT 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 Another Vs. Ram Kumar and Another, , 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, .

22. 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.

23. In the decision of Shyam Sunder and Another Vs. Ram Kumar and Another, , 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 (para 27 of AIR) :

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 (at p. 2641 of AIR para 25) :

(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 Shyam Sunder and Another Vs. Ram Kumar and Another, :

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.

24. 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 proceeding, 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.

25. 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.

26. We may reject the above contention straightway as totally untenable. We may quote here for convenience the said item 2 applicable to

counter-claims :

Sl. Nature of application Amount of fee

No. payable

XX XX

2. Application to counter

claim u/s 19(8)

of the Act.--

(a) Where the amount of

claim made is up to

Rs. 10 lakhs 12,000

(b) Where the amount of

claim made is above

Rs. 10 lakhs. Rs. 12,000 plus

Rs. 1000 for

every 1, lakhs

rupees or part

thereof in ex-

cess of Rs. 10

lakh subject to

a maximum

Rs. 1,50,000.

XX 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 counterclaim 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 (i) of Rule 9 is also indicative of

such prospective operation. The said Sub-rule 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 incorporated by the amendment providing for Court fee on counter-claim can also be only prospective

in nature.

26-27. Thus we do not find any merit in any of the contentions of the appellant and the same are liable to be rejected.

28. 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.