

Arun Kumar Chamaria Vs Corporation Bank

Court: Calcutta High Court

Date of Decision: Feb. 12, 2001

Acts Referred: Recovery of Debts Due to Banks and Financial Institutions Act, 1993 " Section 17, 18, 19, 2, 31

Citation: (2001) 2 CALLT 63

Hon'ble Judges: Kalyan Jyoti Sengupta, J

Bench: Single Bench

Advocate: Arijit Banerjee, for the Appellant;Hirak Mitra and Somen Sen, for the Respondent

Final Decision: Dismissed

Judgement

Kalyan Jyoti Sengupta, J.

This is an application in substance for transfer of the aforesaid suit filed by the plaintiff on the ground that this

Court has no jurisdiction in view of amendment of the Recovery of Debts Due to Banks and Financial Institutions Act, (hereinafter described as the

said Act) whereby counter-claim of the debtor (plaintiff herein) is exclusively triable by the Tribunal formed under the aforesaid Act as by virtue of

Section 31 of the said Act, this counter-claim in guise of suit stands transferred.

2. Mr. Hirak Mitra, learned Senior Advocate appearing with Mr. Somen Sen, learned Advocate submits that in view of the aforesaid amendment

Act this Court has no jurisdiction to entertain and determine this suit. The subject matter of this suit is nothing but a counterclaim which is covered

by the said Act by reason of amendment, therefore, this suit which is pending in this Court stands transferred by virtue of Section 31 of the said

Act,

3. His further contention is that by the aforesaid Amendment Act the definition of "debt" has been amended exhaustively to cover all points which

might be raised by the debtor as and by way of defence in relation to debt recoverable by the Bank. Sections 17, 18 and 31 of the aforesaid Act if

read together, make it clear that this Court has no jurisdiction any longer to entertain this suit as it is a counter-claim in substance. The Bank has

already initiated proceedings before the Tribunal and the same are pending. The basis of the claim of this suit is inextricably connected with or

related to the claim and contention of the defendant Bank if the plaint filed herein and the application filed in the recovery proceedings are read

juxtaposition.

4. Mr. Mitra relies on a judgment of the Apex Court reported in United Bank of India, Calcutta Vs. Abhijit Tea Co. Pvt. Ltd. and Others,

rendered In United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd. & Ors. and submits that the Supreme Court transferred a pending suit filed

by the constituent, along with the suit filed by the Bank, treating the subject matter of the cross-suit to be a counter-claim by enforcing Section 31

of the aforesaid Act (as amended).

5. He contends that I should look into the purposive meaning as to object and intent of the Legislature while dealing with this matter. The purpose

of the said Act, according to Mr. Mitra, is to get all the disputes relating to "debts" as defined in the said Act, whether raised by the Bank or

debtor settled by the Tribunal to the exclusion of other Fora.

6. He further contends that the definition of "debt" has to be construed so as to include any dispute and/or defence which might be raised by the

constituent/debtor in connection with debt recoverable by the Bank or Financial Institution. Naturally in order to decide the plaintiff's right here this

Court will have to decide the rights and obligations of the Bank in relation to debts. This is what exactly Legislature debars the Civil Court from

doing so and that is why by this amendment counter-claim treating the same being cross-suit, has been made triable by the Tribunal. Consequently

this Court has no jurisdiction. In support of this portion of his submission he relies on a decision reported in State Bank of Bikaner and Jaipur Vs.

M/s Ballabh Das and Co. and Others, .

7. Mr. Arijit Banerjee, learned Advocate appearing for the plaintiff while opposing this application contends upon plain reading of Section 17 and

the definition of "debt" mentioned in Section 2(g) and Section 19 of the said Act it will appear filing of separate suit by the debtor/ constituent is not

barred at all. By the amendment the debtor/constituent has been given choice to put forward counter-claim before the Tribunal which was not

previously provided in the Act, instead of filing separate suit.

8. He contends that language of Section is clear to hold that jurisdiction power and authority have been given to the Tribunal to entertain and

decide the application from the Banks and Financial Institutions only, for recovery of debts due to such Banks and Financial Institutions. He

contends reading together Sections 17 and 18 of the aforesaid Act it is found this jurisdictional bar has been expressly created by the statute

against the Banks and Financial Institutions from approaching any other forum excepting the Tribunal, where claim exceeds Rs. 10 lakhs,

Therefore, Section 31 of the aforesaid Act has no manner of application. So, this application should be dismissed.

9. Having heard the respective contentions of the learned Advocates the point fallen for consideration in this application is whether the instant suit

treating to be a counter-claim can be held stands transferred by virtue of Section 31 of the aforesaid Act (as amended) or in other words whether

this Court ceases to have any jurisdiction to entertain and determine this suit (which is essentially a counter-claim) in view of amendment of the

aforesaid Act with effect from 17th January, 2000.

10. Before I discuss or decide this matter on merit I am to examine the scope of the amendment which has been lately incorporated by the

amending Act so far as it relates to jurisdiction of Tribunal vis-a-vis counter-claim. The definition of "debt" has been re-defined under the aforesaid

amending Act and it is reproduced hereunder.

2(g)--"debt" means any liability (inclusive of interest) which is claimed as due from any person by a Bank or a Financial Institution or by a

consortium of Banks or Financial Institutions during the course of any business activity undertaken by the Bank or the Financial Institution or the

consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a

decree or order of any Civil Court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the

date of the application.

11. It is clear from the above definition that "debt" relates to any liability of any person to be due to Bank or Financial Institution. In other words it

is the right of the Bank or Financial Institution, not the right of other persons. So definition of "debt" relates to or concerns with the Bank or other

Financial Institution. So I am unable to accept contention of Mr. Mitra the definition "debt" includes alt liability including the Bank.

12. It is appropriate to reproduce the scope of Sections 17 and 18 of the aforesaid Act under which conferment of jurisdiction upon the Tribunal

and ouster of corresponding jurisdiction from other forum, viz., Civil Court have been provided.

17. Jurisdiction, powers and authority of Tribunals.--(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and

authority to entertain and decide applications from the Banks and Financial Institutions for recovery of debts due to such Banks and Financial

Institutions.

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any

order made, or deemed to have been made by a Tribunal under this Act.

18. Bar of jurisdiction.--On and from the appointed day, no Court or other authority shall have, or be entitled to exercise, any jurisdiction, powers

or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the

matters specified in Section 17.

13. It is also necessary to examine the scope of Section 19 of the aforesaid Act by which a proceeding can be initiated for adjudication thereof.

The subject matter of the proceedings has been expressly contemplated in Section 19. Before amendment undisputedly the Tribunal had only

authority to entertain the application from the Banks and the Financial Institutions and there was no power and provision initially to entertain any

counter-claim or set-off which might be taken by the constituent/debtor. However, this difficulty has been removed by this amendment. By

insertion of Sub-sections (8), (9), (10) and (11) of Section 19 of the aforesaid Act the Tribunal has been enabled to entertain and/or adjudicate

this counter-claim. We are concerned with the counter-claim in this case here. So I quote the relevant provision of Section 19 of the aforesaid Act

inserted by way of amendment.

19. (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

19. (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.

19. (10). The applicant shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be

fixed by the Tribunal.

19. (11). Where a defendant sets up a counter-claim and the applicant contends that the claim thereby raised ought not to be disposed of by way

of counterclaim 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.

14. It will appear from the plain reading of Section 19(8) that it is an enabling provision because of word ""may"" being employed therein by which

constituent/debtor can raise his or its counter-claim in the proceedings itself initiated in the Tribunal. If it is done so then the Tribunal now can

adjudicate the same treating it to be a cross-suit. This new power of Tribunal; in my view, is additional and/or supplemental not the substitutional.

This position is clear from intention of Legislature reflected in Sub-section 11 of Section 19 of the said Act that says as follows :

Where a defendant sets up a counter-claim and the applicant contends that the claim thereby raised ought not to be disposed of by way of

counter-claim but in an independent action, the applicant may, at any time before issues are settled in relation to the counter-claim, apply to the

Tribunal for an order that such counter-claim may be excluded and the Tribunal may, on hearing of such application, make such order it thinks fit.

This further power to exclude counter-claim for being tried at the subsequent stage do not support the theory of exclusive jurisdiction being

conferred upon Tribunal.

15. I do not find anywhere in the said Act unlike CPC (Order VIII, Rule 60) any provision empowering the Tribunal to decide and determine

counter-claim even though the proceeding of Bank or Financial Institution is stayed, discontinued or dismissed.

16. Mr. Mitra wants me to accept the proposition that the counter-claim encompasses the cross-suit subject matter of which could be counter-

claim against the Banks. Since by way of amendment this counter-claim has been required to be adjudicated by the Tribunal it is no longer open to

the regular Civil Court to decide the same dispute involved in counter-claim in a separate cross-suit.

17. The aforesaid argument of Mr. Mitra is not acceptable to me. The authority and power of the Tribunal emanates from Section 17 of the

aforesaid Act. Upon plain reading of the same it will appear the Tribunal has jurisdiction and/or authority to entertain and decide applications from

the Banks and Financial Institutions. It has no power to entertain any application of debtor independent of counter-claim and that too until

Bank/Financial Institution files claim in relation to the alleged debt of the Bank or Financial Institution. By the amendment it has only been made

convenient for the debtor/constituent to bring its claim and contention in the Tribunal also if it wishes so by counter-claim. Bar of jurisdiction as

referred to in Section 18 should be read in the context of and in relation to Section 17 of the aforesaid Act. In my view the Banks and Financial

Institutions are statutorily debarred from approaching any forum excepting the forum contemplated in the said Act a fortiori it cannot be bar to the

debtor/constituent to file a separate suit against the Banks or Financial Institutions.

18. Mr. Mitra wants me to decide that construing the intent of Legislature and giving purposive meaning of the Amendment Act I should hold that

any claim and contention in relation to the Bank's debt should be entertained and tried by Tribunal to the exclusion of other forum be it in a

separate suit or in counter-claim. I cannot accept this catastrophic idea. It is settled law that the statute has to be interpreted harmoniously. The

definition of "counterclaim" has not been mentioned in the Act itself. The very concept and idea of counter-claim pre-supposes existence of a claim

to be placed before Tribunal by the adversary party. Until and unless a claim is filed by the Bank and Financial Institution question of raising

counterclaim does not and cannot arise.

19. I am unable to accept further contention of Mr. Mitra that the separate suit subject matter of which might be directly related to and/or

concerned with the banking transaction and/or in relation to debt of the Bank, can be treated to be a counter-claim. Such theory is wholly absurd.

It is the constituent suitor who will choose its own course of action either by way of separate suit or by way of counter-claim against the same

party. If the suitor files a separate suit before the Court having jurisdiction cannot be compelled to ask to file a counter-claim before another forum

which is also otherwise competent to entertain.

20. Moreover, the ouster of jurisdiction of any forum or for that matter Civil Court cannot be inferred from the statute, it must be explicit and

express, is the settled position of law. The provisions of Sections 31 and 18 of the aforesaid Act have to be read in relation to Section 17. Section

31 will apply only in case whereon the appointed day if any suit or proceeding is pending before any Court the claim of which exceeds Rs. 10

lakhs then it stands transferred. In view of the present amendment I am of the view that this automatic transfer by operation of the statute will also

apply in case of counter-claim if it has already been made by way of defence in a pending proceeding even if in a case where such counter-claim

has been filed before this amendment took effect.

21. Therefore, I am of the view by the amending Act the jurisdiction of the Civil Court to entertain a suit of the debtor the subject matter of which

may be a counter-claim, is not ousted. But in the event the constituent/debtor filed a counter-claim as against the Bank's application before any

Tribunal then it would be open for the Tribunal to decide this.

22. The decision cited by Mr. Mitra in Abhijit Tea case the Supreme Court has not decided the aforesaid issue at all. The Supreme Court had no

occasion to deal with the question of jurisdiction of the Civil Court in the matter of entertaining separate suit. Though factually in the Supreme Court

case it appears that the counter suit filed by the constituent/ debtor was directed to be tried by the Tribunal treating the same to be counter-claim

for convenient sake without deciding the question of jurisdiction. On this point this judgment of Supreme Court is precedent sub silentio. It is

settled law that the decision of the Supreme Court cannot be a binding precedent on any particular issue of law which was neither raised nor

decided regardless of the conclusion arrived at by the Supreme Court. In support of this proposition the following decisions are very helpful.

(i) State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, .

(ii) B. Shama Rao v. Union Territory of Pondichery, AIR 1967 SC 1430.

Therefore, what Supreme Court could do by transfer of the suit cannot be done by this Court unless provision of law permits so. Since I have held

in this case Section 31 has no manner of application, I do not find any law to transfer this suit to Tribunal.

Therefore, I uphold the submission and contention of Mr. Banerjee and I dismiss this application without any order as to costs.

Let the suit be heard in accordance with law.