(2004) 02 CAL CK 0034

Calcutta High Court

Case No: Matter No. 3939 of 1994

Cosmosteels Pvt. Ltd. and Others		APPELLANT
	Vs	
Union of India (UOI) and Others		RESPONDENT

Date of Decision: Feb. 26, 2004

Acts Referred:

- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Section 2, 25

Citation: AIR 2005 Cal 53 : (2006) 1 BC 237 : (2005) 126 CompCas 210

Hon'ble Judges: Amitava Lala, J

Bench: Single Bench

Advocate: S.N. Mukherjee, Samrat Sen and R.L. Mitra, for the Appellant;M. Rajasekhar Mantha, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Amitava Lala, J.
In between the respective parties the following suits were instituted in the High Court at Calcutta.

(See Table below)

Suit No.	Filed on	Plaintiff	Defendants	Claim Rs.
a)1046	17-9-87	Cosmosteels (P) Ltd.	Punjab National Bank	6,36,6
b)547	7-7-88	Punjab National Bank	Cosmosteels (P) Ltd.& Others.	18,56,5
c)118	20-2-89	The Federal Bank Ltd.	Cosmosteels (P) Ltd. & Others.	80,61,

d)61 22-2-93 Cosmosteels (P) Ltd. The Federal Bank Ltd. 2,11,73
Punjab National Bank
& Others.

---

2. Excepting in one suit the respective written statements were filed in the other suits. According to the petitioners, those suits were awaiting for final disposal. Various interim orders were passed in connection with those suits by the High Court at Calcutta. By a notification dated 27th April, 1994 Debts Recovery Tribunal was established. Challenging the vires of the Act the present writ petition was moved along with the other prayers. Such vires was not only challenged in this High Court but for various High Courts as well as in the Supreme Court. Ultimately the Supreme Court held setting up the Debts Recovery Tribunal under the Recovery of Debts due to Banks and Financial Institutions Act, 1953 and Rules framed thereunder are intra vires. According to me, when such question has been declared as intra vires no other question can remain open for due consideration by this Court under Article 226 of the Constitution of India. Yet, Mr. S. N. Mukherjee, learned senior counsel appearing for the petitioners contended before this Court, while the matter was placed for hearing under the heading "old matters" or "old adjourned matters" or "for orders (old matters)", that mere declaration of the Act and Rules as ultra vires cannot give full answer of the Court in connection with the question of counter-claim made by the petitioners. Therefore, they are entitled to get such clarification within the four corners of the writ petition. Frankly speaking, I was reluctant in hearing the matter at the first instance but subsequently I became interested in hearing the point on that score. As to why I became interested those explanations are given hereunder.

3. Mr. Mukherjee contended before this court that the judgment and order of the Supreme Court is binding only on the point of vires alone. That does not necessarily mean if arguable points are yet open, the same cannot be agitated before the High Court in the pending writ petition. The points which are agitated before different High Courts and Supreme Court is that grossly the Recovery of Debts due to Bank and Financial Institutions Act, 1993 and Rules framed thereunder are bias piece of legislation but apart from that a specific point as canvassed here is that there is an apparent vacuum about consideration of counter claim by the Tribunal. Firstly he has drawn my attention to Section 2G of the Act and gave meaning of the ''debt'' therein:

"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.

4. It is to be remembered that even by way of amendment of the Act with effect from 17th January, 2000 it has indicated that ''debt'' means a claim from any person by a bank etc. Section 17 gives jurisdiction, powers and authority of the Tribunals as follows :-

(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.

5. There is no change or insertion by way of any amendment therein. Therefore, corroborative study of the amended Section 2G and Section 17 of the Act is that jurisdiction, power and authority of the Tribunal is made to entertain and decide applications from the bank etc. for recovery of debts due to such banks only. The Tribunal being the creature of the statute cannot go beyond such jurisdiction, power and authority. Surprisingly an amendment was caused on the selfsame date i.e., 17th January, 2000 in connection with Section 19 of the Act by inserting question of counter claim and/or set off. Sub-sections (6) to (11) of Section 19 are germane for due consideration and accordingly, set out hereunder :-

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

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

(8) A defendant in an application may, in addition to his right of pleading a set-off under Sub-section (6), set up, by way of counter-claim against the claim of the applicant, any right or claim in respect of a cause of action accruing to the defendant against the applicant either before or after the filing of the application but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such 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.

(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.

(11) Where the 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, the Tribunal may, on the hearing of such application make such order as it thinks fit.

6. In other Sections it has been described how the interim orders will be passed at any stage of the proceedings in relation to obstruction or delay or frustration of the execution of any order for the recovery of the debt as also attachment of the property etc. However, there is no such specification in respect of counter-claim or counter suit. The Sub-section (22) is playing a crucial role on that score which is as follows :-

The presiding Officer shall issue a certificate under his signature on the basis of the order of the Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate.

7. Section 25 of the Act is far more specific in respect of modes of recovery of debts which is as follows :-

The Recovery Officer shall, on receipt of the copy of the certificate under Sub-section (7) of Section 19, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely,-

(a) attachment and sale of the movable or immovable property of the defendant;

(b) arrest of the defendant and his detention in prison;

(c) appointing a receiver for the management of the movable or immovable properties of the defendant.

8. Section 23 elaborately prescribed about other modes of recovery leaving aside the scope and ambit of Section 19(7) and Section 25 of the Act. However, both the modes of recovery are based on a certificate to be issued by the Recovery Officer on the basis of the decision of the Tribunal obviously in respect of the claim and counterclaim. In any event Section 35 of the Act prescribes power to remove difficulties.

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for removing the difficulty :

Provided that no such order shall be made "after the expiry of the period of three years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

9. In Union of India and Another Vs. Delhi High Court Bar Association and Others, . I find a Three Judges Bench of the Supreme Court held that power of Parliament to enact a law, which is not covered by an entry in List II and List III of the Constitution of India is absolute. It was also held therein that this Tribunal is not meant to be the Tribunal under Articles 323A and 323B of the Constitution of India. Such judgment lays down the general principles of law applicable under such Act in respect of the mode of recovery only available portion in such judgment that by virtue of the amendment of the provisions of the Act by the amending Act of 2000 lacunae and infirmities, if any, had been removed. Mr. Mukherjee has drawn my attention to a part of paragraph 9 of a judgment whereunder the Court accepted the previous analysis of the Supreme Court in respect of construction of the Act. There I find the Supreme Court held that the cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude. However, the Supreme Court ultimately held that the Recovery of Debts due to Banks and Financial Institutions Act, 1993 is a valid piece of legislation. Mr. Mukherjee further contended that in spite of the same there is no specific answer is available in respect of the question as agitated by him in this Court. Therefore, following the ratio of Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, he contended that when the issue is not settled judgment is not binding. He further cited in Allahabad Bank Vs. Canara Bank and Another, to show that in such case the Supreme Court virtually held in respect of hearing the dispute by the Tribunal vis-a-vis company Court in respect of a claim as against the company. Again it has been said that the Supreme Court has not considered even in such judgment in respect of the point which has been agitated by them. In United Bank of India, Calcutta Vs. Abhijit Tea Co. Pvt. Ltd. and Others, I find that the Supreme Court held specifically in respect of counterclaim as available in Section 19(8) to (11) of the Act as also Section 19(6) and (7) regarding set off however factually therein the Supreme Court held that the nature of the claim of the respondent company was in the nature of counter-claim. Plea of deduction of damages is in the nature of set off which can be equated under Sections 19(6) and (7) of the Act. Both are equated as cross suits u/s 19 of the Act. Therefore, there is no difficulty in the cross-suit as one by way of a counter claim and as proceeding which ought to be dealt with simultaneously with the main suit by the bank. In the context, the word "counter -claim" in Sections 19(8) to (11) which is equated to a cross-suit, includes a claim even if it is made in an independent suit filed earlier. A plea of

deducting damages though raised in the suit is indeed broadly a plea of set off "following under Sub-sections (6) and (7) of Section 19." However, the important feature in paragraph 41 of the judgment is as follows :

10. ''Indeed, Section 19(11) says that if any particular counter-claim raised in suit No. 272 of 1985 cannot be decided by the Tribunal while deciding the petitioner''s suit, the defendant may apply to the Tribunal for exclusion of such a counter-claim but such a question does not arise in this case''. By citing the judgment reported in D.K. Basu Vs. State of West Bengal, he reminded once again that there is no wrong without any remedy. Similarly by citing Dhannalal Vs. Kalawatibai and Others, he reminded the same principle and contended that wrong must be left in unredeemed and right not left unenforced. Forum ought to be revealed when it does not clearly exist or when it is doubted where it exists. When the law - procedural or substantive - does not debar any two seekers of justice from joining hands and moving together, they must have a common path. Multiplicity of proceedings should be avoided and same cause of action available to two at a time must not be forced to split and tried in two different fora as far as practicable and permissible. However it has been further held thereunder that procedural law cannot betray the substantive law by submitting to subordination of complexity. Courts equipped with power to interpret law are often posed with queries which may be ultimate. The judicial steps of the Judge then do stir to solve novel problems by neat innovations. When the statute does not provide the path and precedents abstain to lead, then sound logic, rational reasoning, common sense and urge for public good play as guides those who decide.

11. Incidentally it has brought to the notice of the Court by the learned Senior Counsel that in the matter of UCO Bank v. Haraparbati Cold Storage Pvt. Ltd. reported in 1999 WBLR (Cal) 365 this Court was pleased to consider various points which are required to be considered here. I am sorry to say that I cannot consider the same in view of the fact that M. Jagannadha Rao and M. B. Shah, JJ of the Supreme Court in Hara Parbati Cold Storage Pvt. Ltd. and Another Vs. UCO Bank and Others, held that the reasoning of this Court is unjustified on a judgment reported in Allahabad Bank Vs. Canara Bank and Another, posterior to the judgment of this Court. It is correct to say that when a Superior Court delivers a judgment contrary to the stand taken by this Court, it will definitely lose its force. But with utter surprise it appears as if I am committed an error by not following a posterior judgment dated 10th April, 2000 of the Superior Court at an anterior date of judgment on 24th June, 1999. I am not as brilliant as one is to follow the ratio of a posterior judgment to apply it at an anterior date.

12. Mr. Rajasekhar Mantha, the learned counsel appearing for the respondent bank contended before this Court that factually there is no counter-claim. The counterclaim, if any, is pending in this High Court in the form of a suit. Nobody applied for transfer of the same as yet. No application of stay about the suit in the

High Court is pending. Therefore, all the questions, as taken herein are premature in nature and purely academic. He cited a judgment of this Court reported in State Bank of India Vs. Madhumita Construction (Pvt.) Ltd. and Others, to argue that counter-claim may not be "debt" but damages and for the same it has not been incorporated in the definition of "debt". He said, even in paragraph 31 of the judgment in Union of India and Another Vs. Delhi High Court Bar Association and Others, it was held that the Act is a valid piece of legislation and as a result thereof, the writ petitions and appeals filed by various parties challenging the validity of the said Act OF some of the provisions thereof, were dismissed. He further said that in view of Article 141 of the Constitution of India the law declared by the Supreme Court shall be binding on all Courts within the territory of India. Although it is true that Supreme Court can review the matter, but the position is almost settled. How, the writ Court will be called upon to alter the settled position, is unknown to him. He cited : [1980]3SCR1159 (Ambika Prasad Mishra v. State of U.P. whereunder I find a Five Judge Bench of the Supreme Court held that every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent.

13. In D.K. Yadav Vs. J.M.A. Industries Ltd., it was held by the Three Judge Bench of the Supreme Court that once an authoritative law is! laid after considering all the relevant provisions and the previous precedents, it is no longer open to be recanvassed the same of new grounds or reasons that may be put forth in its support unless the Court deemed appropriate to refer to a larger Bench in the larger public interest to advance the cause of justice. In State of Gujarat and another Vs. Kasturchand Chhotalal Shah, it was held that as per Article 141 of the Constitution of India when the Supreme Court declared provision of a State law is ultra vires it will have binding effect upon the State. It cannot be ignored merely because of some procedure or irregularity. In Shenoy and Co., Represented by its Partner, Bele Srinivasa Rao Street, Bangalore and Others Vs. Commercial Tax Officer, Circle II, Bangalore and Others, that the declaration of the law is binding on everyone and it is, therefore, futile to contend that the mandamus would survive in favour of those parties against whom appeals were not filed. He also cited St. Johns Teachers Training Institute Vs. Regional Director, National Council for Teacher Education and Another, , National Council for Teacher Education) wherein I find the three Judge Bench of the Supreme Court held that in considering the vires of subordinate legislation one should start with the presumption that it is intra vires and if it is open to two constructions, one of which would make it valid and the other invalid, the Courts must adopt the construction which makes it valid and the legislation can also be read down to avoid it being declared ultravires. He said that modes of recovery of debts are given u/s 25 of the Act. Section 19(8) is also giving an impression about the claim of damages. He also said that as per Section 33 of the Code of Civil Procedure, the Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow. In Order 21 Rules 18 and 19

of the Code of Civil Procedure, the method of execution in the case: of cross decrees are available. Proviso to Section 28(2) of the Act said nothing shall apply in the subjection to any part of the amount exempt from attachment in execution of a decree of the Civil Court u/s 60 of the Code of Civil Procedure, 1908, Section 22 of the Act gives certain power to regulate the procedure not being bound by the Code of Civil Procedure, 1908. "But I find in effect the principles of CPC applied in regulating the Courts" business as available from the Act itself.

14. By citing a judgment reported in Babua Ram and Others Vs. State of U.P. and Another, he contended that when two interpretations are possible, the task of the Court would be to find which one or the other interpretation would promote the object of the statute, serve its purpose, preserve its smooth working and prefer the one which subserves or promotes the object to the other which introduces inconvenience or uncertainty in the working of its system. The construction or interpretation, must therefore, be construed with reference to its intended purpose and the scope of meaning of the statute must be determined by the language used therein. Necessary implications may be read into the statute. True implications sense and spirit are as much a part of the language which makes up the statute as the meanings of the various words as a part of it. The statute, must, therefore, be analysed and expressed meaning ascertained. Whether liberal or strict construction will be given depends largely upon a finding whether the given a determinate was intended from the alternative part of statute the type and its nature. Often in some statute if the same parts are subjected to different types of construction, whether liberal, or strict construction is a means by which the scope of the statute is expounded or restricted in order to convey the legislative meaning. According to Crawford if that be the proper position to be accorded to strict or liberal construction, it would make no difference whether statute involved was penal, criminal, remedial or in derogation of any rights as a distinction based upon it classification would then mean nothing". Strict .pr liberal construction, therefore, should be used as a tool in the process of ascertaining the legislative intent when it is in doubt. Otherwise they will have little or no value. This is a part of interpretive process assigned to the Court as a subject to make the legislative intent clear, effective and efficacious. By showing Smt. Abhilash Vinodkumar Jain Vs. Cox and Kings (India) Ltd. and others,) he stated that principles of deeming provisions can be applied in the appropriate circumstances. From K.V. Muthu Vs. Angamuthu Ammal, I find that a construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted. He concluded his argument by saying if the Court liberally construed "debt" as damages or by necessary implication the defendant should be construed as party or parties u/s 25 of the Act, there would not, be any embargo for either of the parties to proceed before the Tribunal to get an appropriate order in connection thereto.

15. In reply Mr. Mukherjee has distinguished the distinguishing features of the judgments cited by the respondents and also clarified the Sections 19. 21 and 25.

However, most important feature of his argument in the reply is that he has given an comparative statement in between Section 51 of the Code of Civil Procedure, 1908 and Section 25 of the Act, 1993. He further contended that under Order 8 Rule 6 (2) of the CPC the written statement shall have the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the cost payable to him under the decree.

16. According to me, by and large, an Act has come into force being known as Recovery of Debts due to Banks and Financial Institutions Act, 1993. Such Act was amended in the year 2000. There were reasons for amendment. The Act was not happily drafted. Even it has not been happily amended. If the law is properly written and implemented, there will lesser chances to interpret it by the judiciary. Neither the writings nor the amendments were given to safe hands. The necessary implication was not understood. From the nomenclature it is apparent that only mode was adopted by the legislature to recover debts from the borrowers by the Bank. This was done when they found that public exchequer is suffering gradually after bank nationalisation. The codified legislation is a legal sanction of the same. But if hurry caused bad drafting it will give advantage to the unscrupulous persons. Today''s dispute is not for the applicability of the Act but effectivity of the implementation of the Act being outcome of the bad drafting. If power of the civil Court in regulating the dispute between two contesting parties is taken of and given to a Tribunal to show interest to one of such congesting parties, such legislation cannot be declared as beneficial piece of legislation for the both. Even then when introduction and amendment of such Act has been declared as intra vires by the Supreme Court we have no other alternative but to accept that the legislative intent under the Act is intra vires subject to clarification of the necessary implication of the point/s as raised by the petitioners hereunder.. Therefore, the short campus of the dispute is given hereunder :
(a) Whether the claim of damages can be construed as debt?

(b) Whether the word defendant in the necessary provisions of the Act; is to be treated as ''parties''?

17. Whenever I go through the Section 2(g) of the Act repeatedly I find that either before or after amendment ''debt'' is defined as liability due from a person by a bank etc. There is no indication that ''damages'' to borrowers by the bank also to be debt. As such maxim of ubi jus ibi remedium i.e. when there is no right there is no remedy, will have to be applicable hereunder unless it is clarified by the Court. Therefore in one hand it can be said that when there is no definition there cannot be any .application. On the other hand, it can be said if applicability is available it implies existence of definition. Therefore which one will have to be accepted. According to me later one because When the law is declared as intra vires it is to be declared intra vires as a whole. In a case of choice between convenience and

inconvenience, choice should be convenience not the true insertion of the wordings in a proper place of the Act. Moreover when the word ''damages'' is not alien to the Act and process of recovery is made thereunder, the tribunal can entertain, try and determine such claim. The claim includes both debts and damages. It may be by way of set off or counter claim. The counter claim, if any, can be treated as cross-suit. Therefore the only snag Js no determination is there about ''damages'' nor included in the definition of ''debts''. Therefore although damages cannot be construed as ''debt'' as per the meaning of the Act but can be included as a claim for the adjudication under the Act. It can be said simply that damages are nothing but counter part of the debt and both are claims within the jurisdiction of the tribunal under the Act. As a necessary implication ''Modes of recovery of debts'' u/s 25 of the Act will be read as ''Modes of recovery of debts and damages'' and the word ''defendant'' will be read as ''parties''. It is expected that amendments will be expeditiously be made but till such time tribunal will be governed by the interpretation of this Court in addition to the declaration of the Act i.e. Recovery of Debts due to Banks and Financial Institutions Act, 1993 as intra vires by the Supreme Court .

18. The writ petition is accordingly disposed of. No order is passed as to costs. There should not be any delay in sending the matters laying, if any, to the Tribunal/s and such Tribunal/s will proceed as expeditiously as possible to dispose of the matters preferably within a period of six months from the date of communication of this order or from receiving the records whichever is later.

19. Prayer for stay is made, considered and refused.

20. Xerox certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of the order and certified copy of this judgment.