**SUPREME COURT OF INDIA**

Indian Bank

Vs

ABS Marine Products Private Limited

Appeal (Civil) 10074-10075 of 2003

(Dr. Ar. Lakshmanan and R.V. Raveendran, JJ)

18.04.2006

**JUDGMENT**

**R. V. RAVEENDRAN, J.**

1. These appeals by special leave are filed against the judgment dated 10.5.2002 of the Calcutta High Court, dismissing A.P.O. Nos.57-58 of 2001 filed by the appellant-Bank against orders dated 24.1.2001 and 13.3.2001 passed by a learned Single Judge of that court, rejecting an oral application and a written application respectively, filed by the appellant- Bank for transfer of Civil Suit No.7/1995 (filed by first respondent herein against the appellant and others and pending on the file of the Calcutta High Court) to the Debt Recovery Tribunal, Calcutta, for being tried with O.A. No.170/1995 (filed by the appellant against the first respondent and its guarantors).

2. The first respondent (also referred to as the 'borrower' or 'company') approached the appellant-Bank (for short 'the Bank') for certain credit facilities. By Sanction Advices dated 12.7.1991 and 6.12.1991, the Bank sanctioned ad hoc packing credit facilities to a limit of Rs.20 lakhs and Rs.5 lakhs respectively. According to the Bank, the company utilized the said credit facilities, but committed default in repaying the amounts advanced. Therefore, the Bank filed O.A. No.170/1995 on 21.8.1995 before the Debt Recovery Tribunal (for short 'the Tribunal') under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short 'Debt Recovery Act') seeking a certificate to recover Rs.30, 67, 820/04 with interest from the company and its four

guarantors (Directors), jointly and severally. The said application is pending and trial therein is yet to commence.

3. On 19.12.1991, the Bank sanctioned a Middle Term Loan of Rs.90 lakhs and certain other credit facilities to the company. The sanctioned loans were not released. The company filed C.S. No.7/1995 against the Bank in the Calcutta High Court in January, 1995, for recovery of Rs.25, 38, 58, 000/- as damages (for non-disbursal of the loans) with interest. By the end of 2000, recording of evidence in the suit was completed and the suit was ripe for arguments.

4. On 24.1.2001, the Bank made an oral submission that the suit could not be tried by the High Court and it should be transferred to the Tribunal. A learned Single Judge rejected the said request by the following order :-

*"Though not pleaded in the written statement specifically, the learned counsel for the defendant contends that in view of the amendment of section 19 of the Recovery of debts due to Banks and Financial Institutions Act, 1993, this suit cannot be tried by this court. I have gone through section 19 of the said act as amended up to date. It appears from the said amendment that the debtor/respondent will be entitled to make counter claims in the same proceeding initiated by the bank. Before amendment there was no such specific provision. But in this case, the plaintiff/debtor had filed the suit before the bank could file appropriate proceeding. It is a separate suit. It is neither a cross suit nor can be termed as counter-claim. So the suit is perfectly entertainable by this court. Therefore, the preliminary objection raised by the Bank is hereby overruled."*

5. Thereafter, the Bank filed an application in writing, praying for transfer of C.S. No.7/1995 filed by the borrower to the Tribunal on the ground that the said suit was broadly in the nature of a counter-claim to Bank's O.A. No.170/1995 and was integrally connected with its application. The learned Single Judge rejected the said application by order dated 13.3.2001, as barred by res judicata, in view of the fact the same prayer made orally earlier had been rejected on 24.1.2001. The said two orders dated 24.1.2001 and 13.3.2001 were challenged by the Bank in two appeals (APO Nos.57-58/2001) before a Division Bench of the High Court. In support of its contention that C.S. No.7/1995 should be transferred from the High Court to the Tribunal for being tried with OA No.170/1995, the Bank relied on Sections 19(6) to (11) of the Debts Recovery Act and the following observations of this Court in United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd. (distinguished):-

*"If a set-off or a counter-claim is to be equated to a cross-suit under Section 19, a fortiori there can be no difficulty in treating the cross-suit as one by way of set-off and counter-claim, and as proceedings which ought to be dealt with simultaneously with the main suit by the Bank."*

In our view, 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.

6. A Division Bench of the Calcutta High Court dismissed the Bank's appeals by an order dated

10.5.2002. The High Court held that :

(i) In the absence of a provision in the Debt Recovery Act enabling a borrower to file a suit (application) against the bank or a financial institution, in the Debt Recovery Tribunal, the jurisdiction of the civil court to entertain a suit filed by the borrower against the bank is not excluded under Section 18 of the said Act.

(ii) Section 31 of the Debts Recovery Act providing for transfer of the pending suits/cases, from courts to tribunals, applies only to those suits or proceedings which were pending before any court immediately before the establishment of a Tribunal under the said Act and will not apply to any suit or proceeding validly initiated in a civil court after the establishment of the Tribunal.

(iii) Sub-section (8) of Section 19 of the Act is merely a provision enabling a defendant (in a Recovery Application filed by the Bank before the Tribunal) to raise a counter-claim in his written statement against the bank, and empowering the Tribunal to try such a counter-claim. Such an enabling provision cannot be construed as ousting or excluding the jurisdiction of the civil court to entertain a suit for damages filed by the borrower against the bank, or enabling the bank to seek transfer of such a suit, to the Tribunal. The observation in Abhijit (supra) that the borrower's suit should be transferred to the Tribunal by treating the independent suit of the borrower as a counter-claim in the application of the Bank, was in exercise of the extraordinary power under Article 142 of the Constitution of India, on the special and peculiar facts of that case. As the High Court in its jurisdiction as a civil court, did not possess the power available to the Supreme Court under Article 142, it could not pass any order for transfer of a suit validly instituted before it, to the Tribunal.

(iv) Even assuming that the High Court could transfer the suit, the basic requirement for transfer laid down in Abhijit (supra), that is, the subject-matter of the borrower's suit pending before the Court, and the Bank's application pending before the Tribunal should be inextricably connected, was not present in this case.

Therefore, there could be no transfer.

(v) Where a borrower's suit is deemed to be a counter-claim in respect of the Bank's application, and is transferred to the Tribunal, it would be open for the Bank, to contend, as enabled by Section 19(11) of the Debts Recovery Act, that such suit should be tried independently. If such a contention is accepted by the Tribunal, the suit transferred from the civil court to the Tribunal will have to be re-transferred from the Tribunal to the civil court, as the Tribunal has no jurisdiction to entertain or try an independent suit of the borrower against the bank. That will lead to an anomalous situation.

(vi) The civil court has jurisdiction to try all suits of civil nature, except those excluded by reason of an express or implied bar in a statute. The jurisdiction of a civil court can never be contingent upon an order passed by the Tribunal, and that too on an application by one of the parties to the proceeding before the Tribunal. Nor will the jurisdiction vested in a civil court to proceed with a suit, cease on the Bank or financial institution filing an application for recovery before the Tribunal.

7. The said decision of the Division Bench of the Calcutta High Court is challenged by the Bank in these appeals by special leave, on the ground that the subject matter of the Bank's application and the first respondent's suit were inextricably connected, and though the suit of the borrower was prior to the Bank's application before the Tribunal, in view of the law laid down in Abhijit (supra), the borrower's suit should be considered as a counter-claim in the Bank's application before the Tribunal and consequently, transferred to the Tribunal. On the contentions raised, the following questions arise for our consideration :

(a) Whether the subject-matter of the borrower's suit before the High Court and Bank's application before the Tribunal were inextricably connected?

(b) Whether the provisions of Debts Recovery Act mandate or require the transfer of an independent suit filed by a borrower against a Bank before a civil court to the Tribunal, in the event of the Bank filing a recovery application against the borrower before the Tribunal, to be tried as a counter-claim in the Bank's application?

(c) Whether the observation in Abhijit (supra) that the suit filed by the borrower against the Bank has to be transferred to the Tribunal for being tried as a counter- claim in the applications of the Bank, is to be construed as a principle laid down by this Court, or as an observation in exercise of power under Article 142 in order to do complete justice between the parties?

Re : Question No. (i) :

8. The Bank sanctioned an ad hoc packing credit limit of Rs.20 lacs on 12.7.1991 and an additional ad hoc packing credit limit of Rs.5 lacs on 6.12.1991, subject to the terms contained in the Sanction Advice dated 12.7.1991. In regard to the initial limit of Rs.20 lacs, the company executed an agreement dated 15.7.1991 and its 4 Directors executed a guarantee dated 15.7.1991. In regard to the additional amount of Rs.5 lacs, a promissory note and an agreement were executed on 20.11.1991. Claiming that the company failed to pay the amounts advanced, the Bank filed an application before the Tribunal for recovery of Rs.30, 67, 820.04. The cause of action for the Bank's application is the alleged non-payment of the amounts advanced to the borrower, in pursuance of ad-hoc limits sanctioned on 12.7.1991 and 6.12.1991. On the other hand, the subject matter of the suit filed by the borrower against the Bank and the cause of action therefor, are totally unconnected with and different from the subject matter of and cause of action for the Bank's application. On the request of the borrower, the Bank by letter dated 19.12.1991 sanctioned several credit facilities to the borrower, namely, (i) a Medium Term Loan of Rs.90 lacs;

(ii) packing credit loan facilities to a limit of Rs.50 lacs; (iii) bridge loan of Rs.15 lacs; and (iv) guarantee facility to an extent of Rs.85.42 lacs. The Bank also agreed to absorb the ad hoc packing credit facilities of Rs.25 lacs already sanctioned within the fresh limits sanctioned. The borrower alleged that it proceeded to a arrange its affairs and activities on the assumption that the Bank will be releasing the loans; and that the Bank failed to release the credit facilities, thereby putting it (the borrower) to huge losses, apart from denying the profits from the business. Consequently, it filed

C.S. No.7/1995 for recovery of Rs. 25, 38, 58, 000/- made up of Rs. 11, 33, 22, 000/- towards loss of profits, Rs.10 crores as compensation for loss of goodwill and reputation, Rs.3.50 croress as damages on account of the impact of inflation and difference in foreign exchange rates, Rs.31, 36, 000/- towards expenditure which became infructuous on account of the Bank's failure to release the loans, and Rs.24 lacs towards interest up to the date of the suit. The cause of action for the borrower's suit is the alleged breach by the Bank, in not releasing the sanctioned loans.

9. The issues that arose in the Bank's application was whether the borrower failed to repay the sums borrowed and whether the Bank was entitled to the amounts claimed. On the other hand, the issues that arose in the borrower's suit were whether the Bank had promised/agreed to advance certain monies; whether the Bank committed breach in refusing to release such loans in terms of the sanction letter; whether the borrower failed to fulfil the terms and conditions of sanction and therefore the Bank's refusal to advance, was justified; and even if there was breach, whether the borrower suffered any loss on account of such non-disbursement and if so whether the borrower was entitled to the amounts claimed. While the claim of the Bank was for an ascertained sum due from the borrower, the claim of the borrower was for damages which required firstly a determination by the court as to whether the Bank was liable to pay damages and thereafter assessment of quantum of such damages. Thus there is absolutely no connection between the subject matter of the two suits and they are no way connected. A decision in one does not depend on the other. Nor could there be any apprehension of different and inconsistent results if the suit and the application are tried and decided separately by different forums. In the circumstances, it cannot be said that the borrower's suit and the Bank's application were inextricably connected.

Re : Question No. 2 :

10. Section 17 of the Debts Recovery Act deals with jurisdiction, powers and authority of the Tribunals. Sub-section (1) thereof provides that 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. "Debt" is defined under Section 2(g) as follows :

*"(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;"*

Section 18 provides that 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 Article 226 and 227 of the Constitution) in relation to the matters specified in Section 17.

11. Section 19 related to the procedure of Tribunal, in regard to filing of applications. Section 19, as it originally stood, was substituted in entirety by Act 1 of 2000. Sub-section (1) of section 19 provides that a Bank or financial institution can make an application to jurisdictional Debt Recovery Tribunal. Sub-sections (6) to (11) of new Section 19, relevant for our purpose, are extracted below :

*"(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 counter-claim is in the nature of a claim for damages or not.*

*(9) A counter-claim under sub-section (8) shall have the same effect as a cross-suit so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter-claim.*

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

*(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 counter-claim but in an independent action, the applicant may, at any time before issues are settled in relation to the counter-claim, apply to the Tribunal for an order that such counter-claim may be excluded, and the Tribunal may, on the hearing of such application make such order as it thinks fit."*

12. Section 31 of the Debts Recovery Act provides that every suit or other proceeding pending before any court immediately before the date of establishment of a Tribunal under the said Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal.

13. Section 9 of the Code of Civil Procedure provides that the courts shall have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly

barred.

14. It is evident from Sections 17 and 18 of the Debts Recovery Act that civil court's jurisdiction is barred only in regard to applications by a bank or a financial institution for recovery of its debts. The jurisdiction of civil courts is not barred in regard to any suit filed by a borrower or any other person against a bank for any relief. It is not disputed that the Calcutta High Court had jurisdiction to entertain and dispose of C.S. No.7/1995 filed by the borrower when it was filed and continues to have jurisdiction to entertain and dispose of the said suit. There is no provision in the Act for transfer of suits and proceedings, except section 31 which relates to suit/proceeding by a Bank or financial institution for recovery of a debt. It is evident from Section 31 that only those cases and proceedings (for recovery of debts due to banks and financial institutions) which were pending before any court immediately before the date of establishment of a tribunal under the Debts Recovery Act stood transferred, to the Tribunal. In this case, there is no dispute that the Debt Recovery Tribunal, Calcutta, was established long prior to the company filing C.S. No.7/1995 against the bank. The said suit having been filed long after the date when the tribunal was established and not being a suit or proceeding instituted by a bank or financial institution for recovery of a debt, did not attract section 31.

15. As far as sub-sections (6) to (11) of section 19 are concerned, they are merely enabling provisions. The Debts Recovery Act, as it originally stood, did not contain any provision enabling a defendant in an application filed by the bank/financial institution to claim any set off or make any counter claim against the bank/financial institution. On that among other grounds, the Act was held to be unconstitutional (see Delhi High Court Bar Association vs. Union of India 1995 Indlaw DEL 356. During the pendency of appeal against the said decision, before this Court, the Act was amended by Act 1 of 2000 to remove the lacuna by providing for set off and counter-claims by defendants in the applications filed by Banks/financial institution before the Tribunal. The provisions of the Act as amended were upheld by this Court in Union of India vs. Delhi High Court Bar Association . The effect of sub-sections (6) to (11) of Section 19 of the amended Act is that any defendant in a suit or proceeding initiated by a bank or financial institution can : (a) claim set off against the demand of a Bank/financial institution, any ascertained sum of money legally recoverable by him from such bank/financial institution; and (b) set-up by way of counter-claim against the claim of a Bank/financial institution, any right or claim in respect of a cause of action accruing to such defendant against the bank/financial institution, either before or after filing of the application, but before the defendant has delivered his defence or before the time for delivering the defence has expired, whether such a counter claim is in the nature of a claim for damages or not. What is significant is that Sections 17 and 18 have not been amended. Jurisdiction has not been conferred on the Tribunal, even after amendment, to try independent suits or proceedings initiated by borrowers or others against banks/financial institutions, nor the jurisdiction of civil courts barred in regard to such suits or proceedings. The only change that has been made is to enable defendants to claim set off or make a counter-claim as provided in sub-sections (6) to (8) of Section 19 in applications already filed by the bank or financial institutions for recovery of the amounts due to them. In other words, what is provided and permitted is a cross-action by a defendant in a pending application by the bank/financial institution, the intention being to have the claim of the bank/financial institution made in its application and the counter-claim or claim for set off of the defendant, as a single unified proceeding, to be disposed of by a common order.

16. Making a counter claim in the Bank's application before the Tribunal is not the only remedy, but an option available to the borrower/defendant. He can also file a separate suit or proceeding before a civil court or other appropriate forum in respect of his claim against the Bank and pursue the same. Even the Bank, in whose application the counter-claim is made, has the option to apply to the tribunal to exclude the counter-claim of the defendant while considering its application. When such application is made by the Bank, the Tribunal may either refuse to exclude the counter-claim and proceed to consider the Bank's application and the counter-claim together; or exclude the counter-claim as prayed, and proceed only with the Bank's application, in which event the counter-claim becomes an independent claim against a bank/financial institution. The defendant will then have to approach the civil court in respect of such excluded counter claim as the Tribunal does not have jurisdiction to try any independent claim against a bank/financial institution. A defendant in an application, having an independent claim against the Bank, cannot be compelled to make his claim against the Bank only by way of a counter-claim. Nor can his claim by way of independent suit in a court having jurisdiction, be transferred to a Tribunal against his wishes.

17. In this case, the first respondent does not wish his case to be transferred to the Tribunal. It is, therefore, clear that the suit filed by the first respondent against the Bank in the High Court for recovery of damages, being an independent suit, and not a counter-claim made in the application filed by the bank, the Bank's application for transfer of the said suit to the Tribunal was misconceived and not maintainable. The High Court, where the suit for damages was filed by the company against the bank, long prior to the bank filing an application before the tribunal against the company, continues to have jurisdiction in regard to the suit and its jurisdiction is not excluded or barred under Section 18 or any other provision of Debts Recovery Act .

Re : Question No. (iii) :

18. Let us examine what happened in Abhijit (supra). A suit (No.410/1985) filed by the Bank in the Calcutta High Court, was disposed of in terms of an alleged compromise on 29.3.1984. The Tribunal was established on 27.4.1994. Subsequently, the compromise decree was set aside by a Division Bench on 11.8.1998 and the said suit stood restored to file. The debtor company filed an application praying that the Bank's suit should be retained on the original side of the Calcutta High Court and should not be transferred to the tribunal, as the said suit was "not pending" on 27.4.1994 and therefore Section 31 of the Debts Recovery Act was not attracted. A learned Single Judge of the Calcutta High Court accepted the said contention and directed that the Bank's suit should be retained and proceeded with before the High Court. That order was challenged by the Bank before this Court. Before this Court, the debtor company urged an additional ground for seeking retention of the Bank's suit in the High Court by contending that the Bank's suit was inextricably connected with a suit filed by it against the Bank (Suit No. 272/1985) and therefore, the Bank's suit should not be transferred to the Tribunal. This Court formulated the following four questions as arising for its consideration :

*"(1) Whether Suit No.410 of 1985 by the Bank which was disposed of by judgment dated 29.3.1994 and which judgment was set aside by the Bench on 11.8.1998 and remanded to the Single Judge, could not be treated as pending immediately before the commencement of the Act on 27.4.1994 (in West Bengal) and whether it could not be transferred to the Recovery Tribunal ?*

*(2) What is the combined effect of Sections 18 and 31 and of the Act on pending proceedings ?*

*(3) Whether the pendency of Suit No.272 of 1985 filed by the debtor Company against the Bank for specific performance and for perpetual and mandatory injunctions raising common issues between parties in both these suits was a sufficient reason for retention of the Bank's suit No.410 of 1985 on the original side of the High Court to be tried along with Suit No.272 of 1985 filed by the debtor Company ?*

*(4) Whether Suit No.272 of 1985 filed by the debtor Company was, in substance, one in the nature of a "counter-claim" against the Bank and was one which also fell within the special Act by reason of Sections 19(8) to (11) of the Act (as introduced by amending Act 1 of 2000) and if that be so, whether it could still be successfully pleaded by the respondent Company that the pendency of the Company's Suit No.272 of 1985 was a ground for retention of the Bank's Suit No.410 of 1985 on the original side of the High Court ?"*

Though the questions raised were four, the issues were only two. The first was whether suit disposed of on 29.3.1994 and restored on 11.8.1998 could be deemed to be pending on 27.4.1994, when the Tribunal was established, for purpose of Section 31. The second was, whether the Bank's suit, even though liable to be transferred to the Tribunal under section 31, could be retained in the High Court on the ground that it was inextricably connected with an earlier suit filed by the borrower against the Bank. The question whether a suit filed by the borrower against a Bank in a civil court, could be transferred to the Tribunal against his wishes, neither arose for decision nor was considered or decided.

19. With reference to the first issue, this Court held that when the appeal against the compromise decree dated 29.3.1984 was allowed and the compromise decree was set aside, the suit stood restored and it should be deemed to be pending from 29.3.1984 itself, and consequently, must be deemed in the eye of law to be pending on 27.4.1994 when the Tribunal was constituted at Calcutta, and Sections 18 and 31 of the Debts Recovery Act would apply to the said suit. There is no dispute that the decision of this Court on the first issue is the law declared by this Court.

20. The second issue, as noticed above, was whether the suit of the Bank against the borrower should be retained in the High Court, merely because the borrower's suit was pending in the High Court. There was no application or prayer for transfer of the borrower's suit [OS No.272/1985] to the Debts Recovery Tribunal. Neither the Bank nor the borrower had sought transfer of the said suit from the High Court. In fact, before the High Court, the borrower had not even contended that the Bank's suit should be retained in the High Court on the ground that it was inextricably connected with its suit pending in the High Court. However, the borrower raised an additional ground in support of its request for retention of the Bank's suit in the High Court, for the first time, in this Court by contending that the subject matter of the Bank's suit was inextricably connected with the subject matter of its suit, and therefore, both should be tried together by the High Court itself. The borrower submitted that as the borrower's suit could not be transferred to the Tribunal, having regard to Sections 17, 18 and 31 of the Debts Recovery Act, the Bank's suit should also not be transferred to the tribunal. This Court held that having regard to the mandate contained in Section

31, it was not possible to retain the Bank's suit before the civil (High) Court on the ground that it was connected with another suit filed against the Bank. This answered the second issue. But this Court thereafter proceeded to consider as an incidental issue whether the borrower's suit could be transferred to the Tribunal as the borrower was insisting that his suit and Bank's suit should be tried together. It found a solution by holding that the principle underlying sub-section (8) of Section 19 which enabled the defendant making a counter-claim in an application filed by the Bank, can broadly be extended and applied to an independent prior suit of the borrower by considering such suit as a counter-claim, so that both could be transferred to the Tribunal, instead of transferring only the Bank's suit. This Court, however, held so only because of the following circumstances :-

(i) The borrower contended that its suit and the Bank's suit cannot be tried independently, as the subject-matter of its suit and the Bank's suit were inextricably connected;

(ii) the Bank also agreed that the borrower's suit can be tried along with its suit; and

(iii) the court on examination found that the two suits were in fact inextricably connected.

But the confusion is in regard to this 'incidental' decision/observations made while deciding the second issue. While the Appellant contends that the said incidental observations, made on an issue not arising for decision, are also in the nature of law declared by this Court, the first Respondent contends that they are merely observations made on the peculiar facts and circumstances of that case, in exercise of the power under Article 142 to do complete justice.

21. The first Respondent drew our attention to the following circumstances in support of its contention that the observations relating to treating a borrower's independent suit as a counter claim, was in exercise of power under Article 142 :

(a) Though there was no prayer for transfer of the borrower's suit to Tribunal at any stage, this Court held that borrower's suit should be transferred to the Tribunal.

(b) The four questions that were formulated for consideration (extracted above) clearly showed that the question as to whether borrower's suit should be transferred never arose for consideration. In fact, no arguments were addressed by either party on the question whether the borrower's suit can be or should be transferred to the Tribunal.

(c) Sub-section (8) of Section 19 refers only to a counter-claim in the Bank application, and does not contemplate a separate suit filed against a Bank, being treated as a counter-claim.

The first respondent also pointed out that this Court, in the operative portion, only directly transfer of Bank's suit, but not the borrower's suit, to the Tribunal. The first respondent also relied on the following observations/ directions in paras 42, 43, 44 and 45 of the judgment to demonstrate that the decision was by exercising power under Article 142 :

*"Our decision in regard to the real nature of Suit No.272 of 1985 has become necessary in the context of a plea by the debtor Company that the Company's Suit No.272 of 1985 is liable to be retained in the civil court and on account of the plea that the connected suit by the Bank Suit No.410 of 1985 is also to be retained*

*We, therefore, direct the Bank's Suit No.410 of 1985 to be transferred by the Registrar, Calcutta High Court to the appropriate Tribunal under the Act. So far as the debtor Company's Suit No.272 of 1985 is concerned, action has to be taken likewise by the Registrar in the light of our finding, which finding has become necessary in view of the contention on behalf of the debtor Company before us, as explained above*

.

*The pendency of the Company's Suit No. 272 of 1985 in the High Court is no reason for keeping the Bank's suit No. 410 of 1985 in the High Court. Suit No. 410 of 1985 is liable to be transferred to the Tribunal. Incidentally, we also hold that even Suit No. 272 of 1985 is to be tried only by the Tribunal.*

*The appeal is allowed. The order of the learned Single Judge is set aside and Suit No. 410 of 1985 is directed to be transferred by the Registrar, High Court to the Tribunal. In the light of our finding as to the real nature of the Company's Suit No. 272 of 1985, it will be for the Registrar of the High Court to pass appropriate orders. We hope that appropriate orders will be passed in relation to suit no. 272 of 1985 expeditiously, at any rate, within one month from today."* (Emphasis supplied)

It is further submitted that any direction issued in exercise of power under Article 142 to do proper justice and the reasons, if any, given for exercising such power, cannot be considered as law laid down by this Court under Article 141. It is pointed out that other courts do not have the power similar to that conferred on this Court under Article 142 and any attempt to follow the exercise of such power will lead to incongruous and disastrous results.

23. Though there appears to be some merit in the first Respondent's submission, we do not propose to examine that aspect. Suffice it to clarify that the observations in Abhijit that an independent suit of a defendant (in Bank's application) can be deemed to be a counter claim and can be transferred to the Tribunal, will apply only if the following conditions were satisfied :-

(i) The subject matter of Bank's suit, and the suit of the defendant against the Bank, should be inextricably connected in the sense that decision in one would affect the decision in the other.

(ii) Both parties (the plaintiff in the suit against the Bank and the Bank) should agree for the independent suit being considered as a counter-claim in Bank's application before the Tribunal, so that both can be heard and disposed of by the Tribunal.

In short the decision in Abhijit is distinguishable both on facts and law.

23. One word before parting. Many a time, after declaring the law, this Court in the operative part of the judgment, gives some directions which may either relax the application of law or exempt the case on hand from the rigour of the law in view of the peculiar facts or in view of the uncertainty of law till then, to do complete justice. While doing so, normally it is not stated that such direction/order is in exercise of power under Article 142. It is not uncommon to find that courts have followed not the law declared, but the exemption/relaxation made while moulding the relief in exercise of power under Article 142. When the High Courts repeatedly follow a direction issued under Article 142, by treating it as the law declared by this Court, incongruously the exemption/relaxation granted under Article 142 becomes the law, though at variance with the law declared by this Court. The courts should therefore be careful to ascertain and follow the ratio decidendi, and not the relief given on the special facts, exercising power under Art. 142. One solution to avoid such a situation is for this Court to clarify that a particular direction or portion of the order is in exercise of power under Art. 142. Be that as it may.

**Conclusion**

24. In view of the above, we find that the order of the High Court does call for any interference. These appeals are accordingly dismissed. Parties to bear their respective costs.