

RAJASTHAN HIGH COURT

Govind M. Pujara

Vs.

Bank of India

Civil W.P. No. 8807 of 2006
(R.M. Lodha and Dr. Vineet Kothari, JJ.)

27.09.2007

JUDGEMENT

R. M. Lodha, J.

1. We shall refer to the parties thus: respondent No.1, 'the bank', respondents Nos.2 and 3, 'the borrowers' and petitioner, 'the guarantor'.
2. The bank filed an application on 22nd December, 2003 for recovery of its dues under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, 'the Act of 1993') against the borrowers and the guarantor. The bank also applied for an interim order. On 20th January, 2004, the Debt Recovery Tribunal (for short, "the Tribunal")) passed an order restraining borrowers and the guarantor from selling, alienating or disposing of the property secured with the bank including hypothecated goods.
3. On 15th January, 2004, the bank is said to have made an application for attachment of the property of the guarantor. Notices of the said application are said to have been issued and on 2nd April, 2004, the order was passed by the Tribunal attaching the property of guarantor.
4. According to the guarantor, the order of attachment dated 2nd April, 2004 was passed by the Tribunal without following the due process prescribed under the Act of 1993. He made an application for review of the order dated 2nd April, 2004.
5. Initially, by its order dated 6th May, 2005, the Tribunal ordered that the application for review of the order dated 2nd April, 2004 shall be decided along with the original application. The guarantor felt that the application for attachment of its property was made by the bank *mala fide* and the order dated 2nd April, 2004 came to be passed by

the Tribunal on misrepresentation of the bank. Consequently, the guarantor made an application purporting to be under Section 22(2) (h) read with Section 19(8) of the Act of 1993 seeking leave of the Tribunal for amendment in the written statement by way of counter claim, claiming damages to the extent of Rs. 20 lacs.

6. No written reply was filed by the bank to the said application despite the fact that after making the said application, on few occasions, the matter was adjourned. However, the bank opposed the grant of such application by making oral submissions.

7. On 20th February, 2006, the Tribunal granted the application for amendment and permitted the bank to file written statement to the counter claim/rejoinder within 15 days there from and posted the matter for final hearing after one month. By the same order, the Tribunal dismissed the application made by the guarantor for release of the property from attachment.

8. The bank challenged the correctness of the order dated 20th February, 2006 by filing an appeal before the Debts Recovery Appellate Tribunal (for short, 'the appellate Tribunal').

9. The appellate Tribunal after hearing the parties vide its order dated 9th October, 2006 set aside the order of the Tribunal. It is this order which is impugned in the writ petition at the instance of the guarantor.

10. The order passed by the appellate Tribunal is brief and we think it appropriate to extract the same as it is:

"An order passed by the Tribunal below on 20-2-2006 in I. A. 418 is subject matter of challenge before this Tribunal.

2. Heard Mr. V. Seshatiri, counsel for the appellant and Mr. A. Maitra, counsel for the respondents. On the basis of submissions made by both the counsels, in the facts and circumstances, I am of the view that the Tribunal below should not have entertained the application filed by the respondents for amendment of written statement, making counter claim. It is noticed that the respondents moved the application for making counter claim on the premise that the appellant-bank misrepresented the facts before Tribunal below and obtained an order for attachment of the property. I do not think a ground of this nature can be urged, seeking amendment in the written statement for making counter claim inasmuch as the counter claim and the claim for damages are quite distinct from each other which factor has not been examined by the Tribunal. On that ground

alone the impugned order is liable to be set aside, and it is accordingly set aside.

3. Accordingly, the appeal is allowed. As a result of allowing the appeal, the counter claim filed by the respondents shall be taken off the record.

4. At this stage, counsel for the respondent's states that the respondents have paid requisite Court fee on the counter claim and in view of this order respondents be allowed to seek refund of such Court fee. In the circumstances, respondents shall be entitled to seek refund of such Court fee. If an appropriate application is filed before the Tribunal, the Tribunal shall pass appropriate orders."

11. In our considered view, the order of the appellate Tribunal is unsustainable. The appellate Tribunal overlooked and ignored the provisions contained in Section 19(8), (9), (10) and (25) of the Act of 1993. The said provisions read thus:

"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 application, 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 defense or before the time limited for delivering his defense 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.

(25) The Tribunal may make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice."

12. At this stage, we deem it proper to reproduce Order 8 Rule 6A of the Civil Procedure Code that provides for filing of counter claim by the defendant. The said provision reads thus:

"Order 8, Rule 6A. Counterclaim by defendant-

(1) A defendant in a suit may, in addition to his right of pleading a set off under Rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against

the plaintiff either before or after the filing of the suit but before the defendant has delivered his defense or before the time limited for delivering his defense has expired, whether such counter claim is in the nature of a claim for damages or not;

Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter claim shall have the same effect as a cross suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.

(3) The plaintiff 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 Court.

(4) The Counter claim shall be treated as a plaint and governed by the rules applicable to plaints."

13. The object and purpose of Section 19(8), (9) and (10) of the Act of 1993 like Order 8, Rule 6A of the Civil Procedure Code is to avoid multiplicity of proceedings and that all disputes between the same parties are decided in the course of same proceedings. The counter claim under Order 8, Rule 6A cannot be filed by the defendant as a matter of right but by making a case for exercise of such discretion by the Court. Similarly by virtue of Section 19(8), (9) and (10) of the Act of 1993, the non applicants cannot claim the filing of counter claim as a matter of right but by making a case for exercise of such discretion. Like all judicial discretion, the discretion for grant or refusal to file counter claim has to be exercised in a reasonable manner. By virtue of the power given, to the Tribunal under sub-section (25), to make such order necessary or expedient to secure the ends of justice, the Tribunal needs to consider the application of the defendant for filing the counter claim under Section 19(8). The provision contained in Section 19(8) enables the defendant to file counter claim after he has already filed the written statement. What is provided in the said Section is that the counter claim can be filed provided the cause of action had accrued to the defendant before the delivery of its defiance or before the time limit of delivery of defiance has expired whether such counter claim is in the nature of damage of claim or not.

14. While dealing with the provision contained in Order 8, Rule 6A, the Supreme Court in the case of *Mahendra Kumar and another v. State of Madhya Pradesh and Others*¹ held that the counter claim filed after filing of the written statement cannot be said to be not maintainable, as the cause of action for the counter claim had arisen before the filing of the written statement. Supreme Court referred to Article 113 of the

Limitation Act, 1963 and held that since counter claim is to be treated as a suit under Section 3(2) (b) of the Limitation Act and the counter claim having been filed within three years from the date of accrual to them of the right to sue, the filing of the counter claim was within time. This is what the Supreme Court said in paragraph 15 of the report:

"15. The next point that remains to be considered is whether Rule 6A(1) of Order 8, Civil P. C. bars the filing of a counter claim after the filing of a written statement. This point need not detain us long, for R. 6A(1) does not, on the face of it, bar the filing of a counter claim by the defendant after he had filed the written statement. What is laid down under Rule 6A (1) is that a counter claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defense or before the time limited for delivering his defense has expired, whether such counter claim is in the nature of a claim for damages or not. The High Court, in our opinion, has misread and misunderstood the provision of Rule 6A(1) in holding that as the appellants had filed the counter claim after the filing of the written statement, the counter claim was not maintainable. The finding of the High Court does not get any support from R. 6A(1), Civil P. C. As the cause of action for the counter claim had arisen before the filing of the written statement, the counter claim was, therefore, quite maintainable. Under Article 113, Limitation Act, 1963, the period of limitation of three years from the date the right to sue accrues, has been provided for any suit for which no period of limitation is provided elsewhere in the Schedule. It is not disputed that a counter claim, which is treated as a suit under Section 3 (2)(b), Limitation Act, had been filed by the appellants within three years from the date of accrual to them of the right to sue. The learned District Judge and the High Court were wrong in dismissing the counter claim."

15. The provisions contained in Section 19(8), (9) and (10) of the Act of 1993 are exactly identical (virtually bodily lifted) to Order 8 Rule 6A of the Civil Procedure Code.

16. The cause of action for claiming damages is alleged to have accrued to the defendant on attachment of its property which, according to him, was ordered on misrepresentation made by the bank and without following the procedure prescribed under the Act of 1993 and, thus, after the written statement was filed by him but merely because, the cause of action accrued to the defendant after filing the written

statement, in our considered view, it is not rendered outside the purview of the provisions contained in Section 19(8). If a cause of action has accrued to the defendant against the applicant either before or after filing of the application, before or after the defendant has filed his written statement such counter claim, even if in the nature of claim for damages is entertain able provided filing of such counter claim is not an abuse of the process and rather necessary to secure the ends of justice and filed within three years of the accrual of cause of action. As a matter of fact, the Tribunal exercised its discretion in granting leave to the guarantor to amend the written statement by way of counter claim for damages. The exercise of such discretion by the Tribunal did not suffer from any legal or jurisdictional flaw and, therefore, the appellate Tribunal was not justified in interfering with the order of the Tribunal that was founded on sound exercise of discretion.

17. The counsel for the bank relied upon the judgment of the Supreme Court in the case of *Ramesh Chand Ardawatiya v. Anil Panjwani* ² Having considered the said judgment, we find that the view that we have taken above is not inconsistent with the judgment of the Supreme Court in the case of Ramesh Chand Ardawatiya. In paragraphs 26 and 28 of the report, it was observed thus :

"A perusal of the above said provisions shows that it is the Amendment Act of 1976 which has conferred a statutory right on a defendant to file a counter claim. The relevant words of Rule 6A are "A defendant in a suit may, in addition to his right of pleading a set off under Rule 6,..... before the defendant has delivered or before the time limited for delivery of defense has expired". These words go to show that a pleading by way of counter claim runs with the right of filing a written statement and that such right to set up a counter claim is in addition to the right of pleading a set off conferred by Rule 6. A set off has to be pleaded in the written statement. The counter claim must necessarily find its place in the written statement. Once the right of the defendant to file written statement has been lost or the time limited for delivery of the defense has expired then neither the written statement can be filed as of right nor a counter claim can be allowed to be raised, for the counter claim under Rule 6A must find its place in the written statement. The Court has a discretion to permit a written statement being filed belatedly and, therefore, has a discretion also to permit a written statement containing a plea in the nature of set-off or counter claim being filed belatedly but needless to say such discretion shall be exercised in a reasonable manner keeping in view all the facts and

circumstances of the case including the conduct of the defendant, and the fact whether a belated leave of the Court would cause prejudice to the plaintiff or take away a vested right which has accrued to the plaintiff by lapse of time.

28. Looking to the scheme of Order 8 as amended by Act No. 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counter claim which in the light of Rule 1 read with R. 6-A would be a counter claim against the claim of the plaintiff preferred in exercise of legal right conferred by R.6A. Secondly, a counter claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter claim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases the counter claim though referable to R. 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under Order 6, Rules 17 of the C. P. C. if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter claim either by way of amendment or by way of subsequent pleading could be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favor of permitting a belated counter claim. The framers of the law never intended the pleading by way of counter claim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a counter claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. But certainly a counter claim is not entertain able when there is no written statement on record. There being no written statement filed in the suit, the counter claim was obviously not set up in the written statement within the meaning of Rule 6 A. There is no question of such counter claim being introduced by way of amendment; for there is no written statement available to include a counter claim therein. Equally there would be no question of a counter

claim being raised by way of 'subsequent pleading' as there is no 'previous pleading' on record. In the present case, the defendant having failed to file any written statement and also having forfeited his right of filing the same the Trial Court was fully justified in not entertaining the counter claim filed by the defendant-appellant. A refusal on the part of the Court to entertain a belated counter claim may not prejudice the defendant because in spite of the counter claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter claim."

18. The counsel for the bank contended that the application for leave to amend written statement by way of counter claim was designed to delay the proceedings while the law contemplates the application to be disposed of by the Tribunal within 18 days of its filing. According to him more than three years have passed but the application for recovery is yet to be disposed of by the Tribunal. Having perused the proceedings, we find that the borrower cannot be held guilty for this delay. Quite a few applications were made by the bank and their disposal took time. Besides that on number of occasions, it is the bank that sought adjournment from the Tribunal and resulted in delay. Even statement of account, despite the order of the Tribunal has not been filed so far.

19. Be that as it may, on a thoughtful consideration of the entire matter, we are of the view that the order of the Tribunal dated 20th February, 2006 allowing the amendment in the written statement did not call for any interference by the appellate Tribunal.

20. We asked the counsel for the bank as to whether the rejoinder/written statement to the amended written statement/counter claim has been filed by the bank so far or not. He answered in the negative.

21. We, accordingly, disposed of this writ petition by the following order :

(i) The order dated 9th October, 2006 passed by the appellate Tribunal-Debt Recovery Appellate Tribunal, Delhi is set aside.

(ii) The applicant (Bank of India) is granted time of fifteen days from today for filing rejoinder/written statement to the amended written statement/counter claim.

(iii) The Tribunal shall hear and dispose of the original application No. 6/2004 as expeditiously as possible and in no case later than 31st December, 2007.

22. The parties shall bear their expense lit is.

Petition allowed.

Cases Referred.

1. AIR 1987 SC 1395
2. AIR 2003 SC 2508