

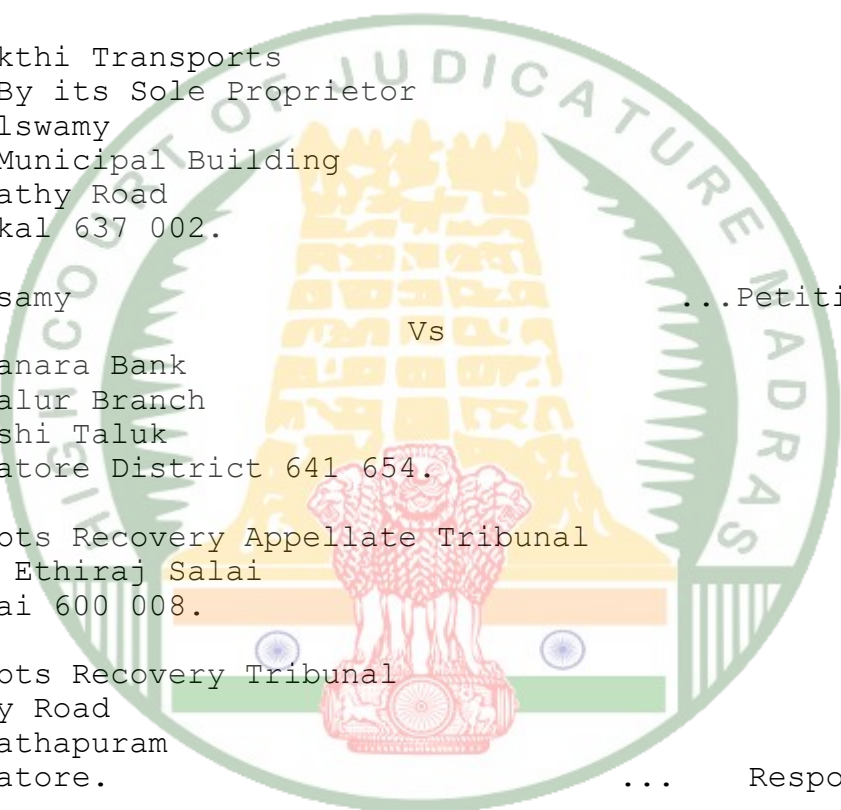
IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19/1/2017

C O R A M

The Honourable Mr.Justice S.Manikumar
and
The Honourable Mr.Justice M.Govindaraj

Writ Petition No.8352 of 2016

- 
1. Sri Sakthi Transports
rep. By its Sole Proprietor
S. Mylswamy
No.6 Municipal Building
Paramathy Road
Namakkal 637 002.
2. S. MylsamyPetitioners
- Vs
1. M/s. Canara Bank
Thekkalur Branch
Avinashi Taluk
Coimbatore District 641 654.
2. The Debts Recovery Appellate Tribunal
No.55 Ethiraj Salai
Chennai 600 008.
3. The Debts Recovery Tribunal
Trichy Road
Ramanathapuram
Coimbatore. Respondents

Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of certiorarified mandamus to call for the records pertaining to the order dated 12/10/2015 passed by the Debts Recovery Appellate Tribunal, Chennai, in M.A.No.52 of 2014 and quash the same and consequently direct the third respondent to dispose the Transferred Application No.539 of 2002 along with the counter claim made by the petitioner on merits.

For petitioners ... Mr.Jayesh B.Dolia
for M/s.Aiyar and Dolia

For respondents ... Mr.R.Rajesh for R.1

O R D E R

(Order of the Court was made by M.Govindaraj,J)

This writ petition has been filed praying to quash the order, dated 12/10/2015, passed by the Debts Recovery Appellate Tribunal, Chennai, in M.A.No.52 of 2014 and consequently direct the third respondent, to dispose of Transferred Application No.539 of 2002, along with the counter claim, made by the petitioners, on merits.

2. The brief facts leading to this case are as follows:-

The first respondent/Canara Bank, Coimbatore, has filed Original Application No.152 of 1997. The defendants therein had entered appearance in the month of May 1997, before the Debts Recovery Tribunal - I, Chennai, in O.A.No.152 of 1997. In spite of several opportunities given to the defendants right from 13/3/1998, they have not filed their written statement and protracting the proceedings under the pretext of amicable settlement and assured the payment of Rs.1 crore. Virtually, the matter was adjourned for several years and got transferred to the Debts Recovery Tribunal, Coimbatore, on account of transfer of jurisdiction, it was renumbered as T.A.No.539 of 2002.

3. On account of the demise of the defendants 5 and 11, their legal heirs were impleaded. At the time of impleading the legal heirs of the defendants 5 and 11, defendants 1 and 2 have prolonged the process for more than 3 ½ years. But they have not filed any reply statement. Therefore, the Debts Recovery Tribunal, by its order, dated 12/12/2006, forfeited the right to file reply statement by the defendants 1 and 2. Thereafter, on 13/2/2007, the evidence on the side of the defendants was also closed. Even though the legal heirs of the third respondent was impleaded, during December 2007, they did not file any written statement. Respondent Bank moved an interim Application in I.A.No.805 of 2008, seeking attachment of certain properties in the hands of the Bank and the same was allowed. The defendants therein had moved I.A.Nos.206 and 207 of 2009 for setting aside the ex parte order passed earlier and for reopening the case. The Debts Recovery Tribunal opined that the Tribunal was not inclined to hear the said applications, unless the defendants deposits 25% of the claim amount in O.A., within fifteen days from 6/4/2011. If the said amount was deposited, the defendants

will be permitted to file their written statement, duly supported by the proof affidavit and documents, if any, which on confirmation with regard to deposit having been made will be taken on record and opportunity will be given to the defendants to make their submissions on their defence.

4. It is seen from the records that even though the deposit was made, neither the written statement nor the Counter Proof Affidavit were filed. On the basis of request to extend time, on 2/5/2011, a similar order, to deposit another sum of Rs.5 lakhs was passed, if the defendants wanted the Tribunal to take their written statement and evidence on file. In spite of two adjournments, no written statement was filed and application for extension of time was made on 2/9/2011, as a last opportunity to the defendants to file written statement in fifteen days, failing which their defence will be struck off.

5. Fifteen days time for filing the written statement from 2/9/2011 had expired, on 17/9/2011. The defendants 1 and 2 had filed their written statement, on 19/9/2011 along with an application in I.A.No.1041 of 2011, however, without depositing Rs.5 lakhs, which was a precondition. The application was countered by the Bank and had submitted that the defendants 1 and 2 have mischievously filed affidavits, as if the Tribunal had permitted them to file reply statement and counter claim on the said date. The Bank had contended before the Tribunal that filing of the counter claim was never a matter of consideration before the Tribunal, at that distance of time, i.e., after fifteen days of pendency of Transferred Application. It was further contended that counter claim cannot be filed at the belated stage and as it is barred by limitation and principles of res judicata. Therefore, prayed for dismissal of the application.

6. Mr.R.Rajesh, learned counsel for the respondent Bank had relied on a decision in Ramesh Chand Ardawatiya Vs. Anil Panjwani {(2003) 3 MLJ 26 SC and Sections 19 (8) and 19 (9) are pari materia with Rule 6 A (1) and 6 A (2) of Order 8 of the Code of Civil Procedure, 1908 and submitted that counter claim in the nature of Cross-Suit is equally affected by the provisions of Limitation Act, for which also he had relied on Rakesh Ahuja and Another Vs. Jagannath {(2004) 138 PLR 249} and Section 3 of the Limitation Act.

7. The Tribunal, after considering the arguments advanced on either side, held that counter claim is barred by limitation and it should be dismissed at the threshold. More so, for not complying with the condition, to deposit a sum of Rs.5 lakhs,

subject to which the defendants filed their written statements, before the Tribunal. However, the Tribunal had given a last opportunity to the defendants 1 and 2, to file their counter proof affidavit, along with reply statement, since the Bank had already filed proof affidavit long back. One more opportunity was given to the defendants to file their Counter Proof Affidavit, within fifteen days, from the date of the order of the Tribunal and the matter was listed for final hearing, on 2/7/2012.

8. Aggrieved by the order of the Tribunal, dated 29/5/2012, in I.A.No.1041 of 2011 in T.A.No.539 of 2002, the petitioners/defendants 1 and 2 had preferred an appeal before the Debts Recovery Appellate Tribunal, Chennai. The Debts Recovery Appellate Tribunal, after considering the factual matrix held that right to file the reply statement by the defendants was forfeited, on 12/12/2006 itself. Therefore, the petitioners herein were not entitled to seek for filing of the reply statement, later on filing the counter claim. Added factor was that the evidence was closed on 13/2/2007 itself. The Debts Recovery Appellate Tribunal had found that filing of the counter claim is barred by limitation, relying on the judgment of Smt.Parvathamma Vs. K.R.Lokanath, reported in AIR 1991 Karnataka 283.

9. The learned counsel for the petitioners would submit that the Tribunal had permitted the writ petitioners, to file written statement, on payment of Rs.5 lakhs. The conditional order was complied with and payment of Rs.5 lakhs was made. However, the Tribunal had extended the time for filing the reply statement till 17/9/2011. However, the petitioners had filed their written statement, on 19/9/2011, along with an application for condoning the delay, for filing the counter claim and also extending the time for filing counter proof affidavit. The Tribunal had extended the time limit for filing the reply statement and dismissed the I.A for filing counter claim.

10. According to the petitioners, as per Section 19 (8) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, counter claim can be filed at any stage and in the case on hand, the case was posted for filing counter proof affidavit and to proceed with the evidence of the defendants 1 and 2. In such circumstances, the counter claim which is set out in the reply statement should also be considered and the finding of the Tribunal below, with regard to limitation, is not sustainable and it is liable to be set aside.

11. Section 19 (8) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 reads as under:-

"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."

12. In the present case, the Tribunal has permitted the petitioners/defendants 1 and 2, to file their defence upto 17/9/2011. Accordingly, the petitioners have also set out the counter claim in their defence by filing their reply statement, on 19/9/2011, which was taken on record. By accepting the reply statement on record, the time limit has been extended and counter claim which is set up in the reply statement has also deemed to have been taken on record. Therefore, the learned counsel for the petitioners contended that counter claim is not barred by limitation.

13. Per contra, the learned counsel appearing for the respondent Bank would submit that the original application was instituted in the year 1997. Time limit for filing the reply statement, as per Section 19 (5) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, is 30 days. But the defendants 1 and 2 had successfully protracted the proceeding for more than 3 ½ years, till 12/12/2006, till the Tribunal had forfeited the right of the defendants 1 and 2, to file their reply statement and accordingly closed their evidence, on 13/2/2007. The defendants are very much aware of all the developments and they had in fact, filed an application for release of vehicles, on payment of Rs.15 lakhs and they also made similar applications, in I.A.Nos.3379 and 3380 of 1999 and another I.A.No.3381 of 1999 was filed for seeking compensation. In I.A.No.553 of 2000, the Bank was directed to depute an Officer from Thekkalur Branch, to handover vehicles at Bombay. The case got transferred to Debts Recovery Tribunal - II, Chennai and was renumbered as O.A.No.50 of 2001, upon transfer of jurisdiction and the defendants kept avoiding filing the written statement under the pretext that the matter would be settled amicably very shortly. Therefore, the learned counsel for the Bank submitted that the defendants 1 and 2 have successfully protracted the proceedings without filing reply statement. Therefore, delay in filing the reply statement was deliberate and however, the Tribunal had graciously permitted them to file reply statement by imposing cost of Rs.5 lakhs at

the first instance and thereafter, another 5 lakhs, on 2/5/2011. However, the defendants 1 and 2 have not complied with the condition and deposit of Rs.5 lakhs in the second instance. In this process, the question of filing counter claim was not at all in existence and it was never a matter for consideration before the Tribunal at any point of time.

14. The defendants 1 and 2 have surprisingly come out with a petition for filing counter claim at the belated stage. The counter claim should be filed before the filing of the reply statement and it cannot be filed at the belated stage. Even assuming, the Tribunal has permitted the defendants 1 and 2, to file their counter claim, it should have been filed in time. According to the learned counsel for the respondent Bank, the defendants 1 and 2 had entered their appearance in the month of May 1997 before the Debts Recovery Tribunal, Coimbatore. From May 1997, time limit for filing written statement was over by June 1997. Even assuming that they have got further time, they should have filed their reply statement in the month of April 2002, when the matter was transferred to Debts Recovery Tribunal, Coimbatore. Taking into account these cause of action and legal right to file their counter claim, it had arisen as early as in June 1997 much less in May 2002. But the counter claim came to be filed only on 19/9/2011, which is hopelessly barred.

15. The learned counsel appearing for the Bank would rely on Sections 19 (8), 19 (9), 19 (11) and 19 (5) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. He would submit that the counter claim is not sustainable, as the right to file reply statement was forfeited much earlier, on 12/12/2006 and when the defence was closed, on 13/2/2007, the defendants 1 and 2 are not entitled to sustain the counter claim in the absence of complying with the condition of depositing a sum of Rs.5 lakhs. Therefore, in any event, filing of counter claim is clearly barred by limitation, on the basis of various judgments of the Supreme Court, in this regard. Therefore, it was also submitted that the Debts Recovery Tribunal, Coimbatore, in its order, dated 29/5/2012 had clearly recorded the fact that the counter claim was not a matter of consideration before the Tribunal. Both the Tribunals below have not granted permission to file the counter claim at any point of time. Therefore, the claim for filing counter claim is barred by limitation.

16. The learned counsel appearing for the respondent Bank would further submit that total liabilities of defendants was Rs.1,77,68,936.65, as on 6/4/1997, with future interest, at the rate of 20.25%. The present liability shall be more than 59 crores, apart from the costs. The loans were availed in the year 1998 against the mortgage of properties belong to the

father of the petitioners/defendants 1 and 2. Thereafter, it came to light that the petitioners have fraudulently sold some of the mortgaged properties to third persons and also mortgaged the properties in favour of State Bank of India and later in favour of UCO Bank and availed a huge loan of Rs.8 crores, and finally, it transpired that the loans having become Non-Performing Asset, in the books of UCO Bank, UCO Bank had issued a possession notice, on 13/3/2008 and the same was published, whereupon the first respondent, had realised the fraud played by the petitioners. The conduct of the petitioners/defendants 1 and 2 was fraudulent, mischievous and cause undue loss and multiplicity of litigations in recovering the dues of public money. The counter claim by the petitioners is deliberate, mala fide and willful intention to protract the matter on vexatious and non-existent issues. Therefore, the learned counsel for the respondent Bank would submit that the petition shall be dismissed.

17. We have given our consideration to the issues.

18. The very core issue before us is to find as to whether the counter claim sought to be filed by the petitioners is barred by limitation or not.

19. Section 19 (6) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, reads as under:-

"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."

20. It was also specified that 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 of both original application and of the set off, as per Section 19 (7) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

21. Section 19 (8) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, specifies two occasions.

(i). right of pleading set off and

(ii). in addition to set up a counter claim against the claim of the applicant.

Such counter claim in respect of the cause of action accruing to the defendants against the applicant either before or after filing of the application, but before the defendants had delivered his defence or before the time limit for delivering his defence has expired.

22. In the present case, the issue is that whether the time has been expired for filing counter claim before the time limit for delivering the defence. The defendants 1 and 2 were set ex parte, on 13/2/2007. Their right to file reply statement was forfeited, on 12/12/2006. But the Tribunal had granted extension of time to the defendants to file their reply statement, on condition, to deposit a sum of Rs.5 lakhs, within fifteen days, from 6/4/2011. The deposit of Rs.5 lakhs was made but the reply statement was not filed. Again, on 2/5/2011, it was further extended on a further condition, to deposit a further sum of Rs.5 lakhs thereafter. Again, an extension was made, on 2/9/2011, granting 15 days time, for filing their reply statement. But the petitioners/defendants 1 and 2 have not filed their reply statement and however, it was filed only on 19/9/2011 along with application, in I.A.No.1041 of 2011 for filing counter claim, but without complying with the pre-condition to deposit, a sum of Rs. 5 lakhs as ordered on 2/5/2011.

23. Section 3 of the Limitation Act, 1963 shall also be considered at this juncture which reads as under:-

"3. Bar of limitation - (1) Subject to the provisions contained in sections 4 to 24 (inclusive) every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence,

(2). For the purposes of this Act -

(a) a suit is instituted -

(i). in an ordinary case, when the plaint is presented to the proper Officer;

(ii). In the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii). In the case of a claim against a company which is being wound up by the

Court, when the claimant first sends in his claim to the official liquidator;

(b). any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted -

(i). in the case of a set off, on the same date as the suit in which the set off is pleaded;

(ii). In the case of a counter claim, on the date on which the counter claim is made in Court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that Court.

24. According to Section 3 (2) (b) of the Limitation Act, 1963, any claim set off or a counter claim, shall be treated as a separate suit and should have been filed within the limitation prescribed. Even assuming the petitioners are permitted to file their defence, on 2/9/2011, counter claim should have been filed on or before 17/9/2011, but it was not filed in time. Therefore, it can be easily inferred that within the time limited for delivering his defence, counter claim was not made.

25. Section 19 (5) (i) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, states that the defendants shall file their written statement of defence including claim for set off under Sub-Section (6) or a counter claim under Sub-Section (8), if any, within a period of thirty days, from the date of service of summons. In the present case, the defendants had entered appearance in May 1997. As stated supra, they should have filed their reply statement before June 1997. Provisio to Section 19 (5) would specify that in exceptional and special circumstances, the Tribunal after recording the reasons, extend the said period by such further period not exceeding 15 days to the defendants to file written statement. In spite of the restriction in provisio to Section 19 (5) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Tribunal had granted three extensions viz., on 6/4/2011, 2/5/2011 and 2/9/2011. Even though there is an embargo that the extension cannot be given for more than one occasion, for the special reasons, the Tribunal was more liberal and had granted three extensions.

26. Even overlooking the discretion exercised by the Tribunal, if noticed as to whether the petitioners/defendants 1 and 2 had availed the opportunity of filing the written statement, in time, even after three extensions, it is seen that they had not filed the same, within the stipulated period. From the perusal of pleadings and the records, we could infer that consideration of the Tribunal was only in respect of filing reply statement and to file the counter proof affidavit and not for counter claim. The Tribunal at the first instance itself had rejected the claim of the petitioners/defendants 1 and 2 for filing the counter claim. Therefore, as contended by the learned counsel for the respondent Bank, it is clearly seen that filing of the counter claim was never a matter for consideration before the Tribunal, but by way of an application in I.A.No.1049 of 2011 only the petitioners for the first time had come up with the plea of filing counter claim.

27. On the aspect of limitation, the petitioners ought to have filed their counter claim, as early as 1997. It is not that the petitioners were unaware of the developments, but they were so vigilant and filed several I.As, seeking for the release of vehicles on payment of Rs.15 lakhs and also for delivering the same at Bombay. They have also claimed compensation by way of an interim application. Therefore, it can be easily inferred that the defendants 1 and 2 are very much aware of the developments of their right and legal provisions of the Act. This Court should also consider the counter affidavit filed by the first respondent Bank about the conduct of the petitioners before this Court. From the pleadings it is seen that dues which was Rs.1,77,68,936.65 in the year 1997 and it is Rs.59 crores, today. Further more, the conduct of the petitioners in obtaining loan from State Bank of India and UCO Bank to the tune of Rs.8 crores. The contention of the learned counsel for the respondent Bank was not denied.

28. Be that as it may, we are not delving into the factual matrix, which is the subject matter for consideration before the Tribunal. We would only restrict ourselves to the point of limitation and from the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, we come to the conclusion that the counter claim has sought to be filed by the petitioners/defendants 1 and 2, is barred by limitation. Therefore, the writ petition filed by the petitioners is liable to be dismissed.

29. Accordingly, this writ petition is dismissed. The order passed by the Debts Recovery Appellate Tribunal in M.A.52/2012 in I.A.No.1041 of 2011 in T.A.No.539 of 2002, dated 12/12/2015 is hereby confirmed.

30. As stated supra, the petitioner had prolonged the issue almost for the past two decades. Such prolonged litigation is contrary to the object of the act in the interest of economy of the Nation. The petitioners should have filed their reply statement in time, as observed earlier. Even thereafter, they had occasions to file impleading petition, to bring the legal heirs of the defendants 5, 11 and 3, or at the time of filing their objection to reopen the case. Even after obtaining the orders to set aside the order of ex parte from the Tribunal, the petitioners had successfully dragged on the proceedings and had obtained two more extensions. Considering the extensions granted and displeasure expressed by the Tribunal and taking note of the attitude of the defendants, we direct the petitioners to pay Rs.25,000/- (Rupees Twenty Five thousands only), as costs, to the credit of the Tamil Nadu Juvenile Justice Fund, by way of Demand Draft or by way of cheque, , within a period of three weeks, from the date of receipt of a copy of this order.

31. Post on 15/2/2017, for compliance.

32. As the Transferred Application is pending since 2007, ten days time is granted from today to file counter proof affidavit. If counter proof affidavit, is not filed within the extended time, the Tribunal is at liberty to pass appropriate orders, under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. If proof affidavit is filed, within the extended time, the Tribunal is directed to dispose of the Transferred Application No.539 of 2002, within a period of two months thereafter.

No costs. Consequently, the connected Miscellaneous Petition is closed.

सत्यमेव जयते

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1. M/s. Canara Bank
Thekkalur Branch
Avinashi Taluk
Coimbatore District 641 654.
2. The Debts Recovery Appellate Tribunal
No.55 Ethiraj Salai
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Coimbatore.

+lcc to M/S.Aiyar & Dolia, Advocate sr.3834
+lcc to M/S.R.Rajesh, Advocate sr.4228

Writ Petition No.8352 of 2016

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srg 25/01/2017



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