

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**CR No.7522 of 2017 (O&M)
Date of decision:25.01.2018**

Punjab National Bank

... Petitioner

Vs.

Narinder Chugh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Harsh Garg, Advocate
for the petitioner.

Mr. C.S.Bakshi, Advocate
for the caveator-respondents.

AMIT RAWAL J. (Oral)

Notice of motion.

Mr. C.S.Bakshi, Advocate accepts notices on behalf of the
caveator/respondents.

The petitioner-Bank is in revision petition against the order dated 29.09.2017 (Annexure P-1) rendered by the Additional District Judge, Ludhiana, whereby, the appeal preferred against the judgment and decree dated 22.11.2016 passed by the Civil Judge (Junior Division), Ludhiana vide which Civil Suit No.3741 of 2016 titled as Narinder Chugh vs. Punjab National Bank and others, was rejected by invoking the provisions of Order 7 Rule 11 CPC, was allowed, for, as per the definition of the decree enumerated in Section 2(2) of CPC, any order rejecting the suit, would be a decree, therefore, an appeal was preferred by the respondent-plaintiffs. The

Lower Appellate Court while entertaining the appeal, has set aside the order and remitted the parties to the trial Court. It is in this background of the matter, the present revision petition has come to this Court.

The fulcrum of dispute arisen in the present revision petition is that as to whether the civil suit filed by the respondents would be maintainable before the Civil Court or would be treated as counter pleading in a petition filed by the Bank for recovery of amount as the counter claim.

For answering the aforementioned question, it would be apt to give few facts.

Respondent No.1-plaintiff instituted a suit claiming declaration to the effect that purported guarantee agreement dated 30.03.2015 alleged to have executed by the plaintiff in favour of defendant no.1 i.e. Punjab National Bank, Large Corporate Branch, Ludhiana, in the sum of ₹136.34 crores with respect to the financial facilities given to defendant No.5-Rama Krishna Knitters Private Limited being illegal, null and void, sham; with a further declaration that the aforesaid guarantee deed alleged to have been caused to be executed by the plaintiff alongwith defendants No.6 and 7 in favour of defendant no.2 in the sum of ₹12.21 crores; for mandatory injunction directing defendants no.1 and 2 to return and deliver back the original of the said guarantees to the plaintiff and for a decree of permanent injunction restraining them from enforcing or setting up other guarantees on the grounds stated therein. In the aforementioned suit, the petitioner-Bank moved an application for rejection of the plaint.

Mr. Harsh Garg, learned counsel appearing on behalf of the petitioner submitted that the relief sought in the suit was *ex facie* barred by jurisdiction as per Section 18 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as “1993 Act”) and the remedy, if any, for the respondents was to file application/petition under Section 17 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as “2002 Act”), now since the Bank had already filed petition under Section 19 of 1993 Act claiming the outstanding dues from respondent No.5-company, suit for want of jurisdiction, can be transferred and treated as counter claim, thus, the Lower Appellate Court has committed illegality and perversity in accepting the appeal by remitting the matter to the trial Court.

In support of his contention, he relied upon the judgment rendered by the Hon'ble Apex Court in **United Bank of India, Calcutta Vs. Abhijit Tea Co. Pvt. Ltd. 2000(7) SCC 357** and referred to the provisions of sub-section 6 of Section 19 of 1993 Act, which enables the defendant to claim set off or set up counter claim in view of the amount being recovered by the Bank and therefore, the suit was liable to be rejected. Elaborating his argument, reference has been made to question no.3 posed by the Court which was answered by referring to paragraph 37 of the judgment in favour of the Bank.

Per contra, Mr.C.S.Bakshi, learned counsel appearing on behalf of the caveator/respondents/plaintiffs submitted that the judgment rendered

by the Hon'ble Supreme Court in *United Bank of India, Calcutta* (supra) had not only given the findings by treating the suit, filed by any of the debtors seeking specific performance of the agreement and also with regard to charging the interest before coming into force 1993 Act, be treated as counter claim but did not envision further remedy vis-a-vis decision given thereon.

Noticing the aforementioned situation, the matter again came to be debated before the Hon'ble Apex Court in ***Nahar Industrial Enterprises Ltd. Vs. Hong Kong & Shanghai Banking Corporation*** 2011 (7) RCR (Civil) 95 where instead of moving an application under Order 7 Rule 11 of CPC, the provisions of Section 24 of 1993 Act, was pressed into service for transfer of the suit before the Tribunal by treating it as counter claim. After discussing the provisions particularly Sections 96 and 20 of 1993 Act which imposed an onerous condition of payment of 75% by the affected party, it was held that for such purposes only Civil Court would have jurisdiction.

He further submitted that a specific plea of fraud had also been pleaded, therefore, jurisdiction of Civil Court cannot be ousted. During existence of 1993 Act, Legislature had also come out with Act called, 2002 Act, whereby a Bank had been given powers to take the possession of the property by resorting to the provisions of Section 13 of the Act and any party aggrieved against measure taken, is at liberty to challenge the same as per the provisions of Section 17 of 2002 Act. While interpreting the aforementioned provisions, the Hon'ble Apex Court in ***Mardia Chemicals***

Ltd. Etc. vs. Union of India and others 2004(2) RCR (Civil) 665 held that jurisdiction of the Civil Court could not be ousted in case the party alleges or pleades fraud. He, thus, urged this Court that the order under challenge is perfectly legal and justified, much less does not call for any interference.

I have heard the learned counsel for the parties and appraised the paper book.

Filing of the suit, institution of petition under Section 19 of 1993 Act, post filing of the suit (Annexure P-2) are not in dispute. Before coming to the arguments of learned counsel for the parties extracted above, it would be apt to extract relevant findings rendered by the Lower Appellate Court, relevant paragraphs of the judgments cited above and relief sought in the suit which read as under:-

Paragraphs 13 and 17 of the Lower Appellate Court

“13 That on the same very day, in pursuance to the aforesaid letter dated 30.3.2015, the plaintiff alongwith defendants No.6 and 7 executed a joint guarantee agreement dated 30.3.2015 with defendants no.2 Bank, i.e., Corporation Bank for an amount of Rs.12,21,00,000/-. An agreement of guarantee was also executed between the petitioner and defendant no.1 Bank on the same very day, i.e., 30.03.2015. On the same very day, a demand promissory note for a sum of Rs.7,35,00,000/- was also executed by the company in favour of Corporation Bank. It is pertinent to mention here that the said demand promissory

note (DPN) was executed in anticipation of Company's request dated 30.03.2015 for grant of overdraft facility/cash credit limit to the tune of ₹7,35,00,000/-. A perusal of the guarantee agreement shows that the same was executed in lieu of sanctioning of that much amount i.e. ₹12,21,00,000/- by the Corporation Bank in favour of the borrower company. As a matter of fact, neither on the date of execution of said guarantee agreement i.e. 30.03.2015 nor even thereafter, even a single penny has been disbursed by the defendants Banks to the borrower company. The only intention and purpose to execute the said Guarantee was to secure the disbursement of the enhanced funding. The previous exposure stood already secured by the Banks during the lifetime of Shri Naresh Gupta and there was no occasion for any additional security or collateral but to secure the disbursement of the enhanced funding. The previous exposure stood already secured by the Banks during the lifetime of Shri Naresh Gupta and there was no occasion for any additional security or collateral but to secure the enhanced funding which was sought to be released. It is also pertinent to mention here that before executing the aforesaid guarantee agreement, the company held its meeting on 30.03.2015. Various other documents were executed in favour of the Corporation Bank on 30.03.2015 itself viz letter

of undertaking/declaration from the borrower(s); take delivery letter to D.P.N; Agreements for Term Loans; Deeds of Hypothecation etc with the sole objective that they shall be valid and enforceable only once the enhanced funds were released and not otherwise in the absence of the enhanced funds being disbursed, there was no consideration at all which would support the impugned guarantee(s) and they were void ab initio and sham documents. It is also important to mention here that no sanction letter has been given by the Corporation Bank while executing the various loan and guarantee documents. As SBI reneged on the commitment, the whole financial support to the defendant no.5 company collapsed. Even the representations made and advanced by the defendants no.1 and 2 in causing the said personal guarantee executed turned out to be false and sham.

17. That on 27.01.2016, the plaintiff sent a detailed representation to the defendant banks wherein after giving each and every detail as to what transpired from the day i.e. 27.12.2014 when he was asked to assume larger role in the company by providing personal guarantee and introduction of funds till the consortium backed out from its promise to do the restructuring of the company and also from releasing the additional funds, the plaintiff requested for the return of his personal guarantees which were obtained by the said two

banks from him in anticipation of the restructuring through JLF mechanism as per the JLM being approved unanimously by the member consortium banks. In this said representation dated 27.01.2016, the plaintiff placed on record that he has already suffered loss of valuable time and resources and also an amount of ₹.9.54 crores advanced by him to the company which is in the state of jeopardy on account of defendant Banks having reneged from CDR process. Moreover the aforesaid Guarantee(s) remained completely without consideration and sham and null and void documents. There was no new funds which the plaintiff was to guarantee the repayment.”

**paragraph 37 to 39 and 42 of United Bank of India,
Calcutta's judgment**

“37. In our view, the above pleas raised by the respondent company are all inextricably connected with the amount claimed by the Bank. The plea of the company is that interest is not to be charged or is to be charged at a lesser rate, that instalments are to be permitted and more monies should have been advanced. In our view, these claims made by the Company in its suit 272/85 against the Bank amount to 'counter claim' and fall within sub-clauses (8) to (11) of [section 19](#) of the Act (as introduced by Act 1/2000). The plea for deduction of damages is in the nature of a 'set off' falling under

sub-clauses (6) and (7) of [section 19](#). Sub-clauses (6) to (11) of [section 19](#) read as follows:

"(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."

38. Sub-clause (6) says that a 'set-off', if claimed, can be adjudicated by the Tribunal. Sub-clause (7) states that the written statement pleading a set-off shall have the same effect as a plaint in a cross-suit to be adjudicated by the Tribunal. Similarly, sub-clause (8) of [section 19](#) permits a defendant to make a 'counter-claim' by way of an application and sub-clause (9) of [section 19](#) states that such a 'counter-claim' 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 as a 'cross-suit'. Sub-clause (11) of [section 19](#) is important and it permits the Bank or financial institution to apply to the Tribunal that particular claim raised by the debtor against the Bank or

financial institution, as the case may be, ought not to be disposed of by way of a counter-claim but that the debtor must be directed to file an independent action. The Tribunal would then consider whether the debtor should be directed to file an independent action in regard to any part of the debtor's claim.

39. *In our view, the Company's suit 272/85 in so far claims a relief for specific performance, perpetual and mandatory injunctions, it is in substance in the nature of a counter-claim under sub-clauses (8) to (10) of [section 19](#) and are in the nature of a counter-claim. The plea for deduction of damages is in the nature of a set-off falling within [section 19\(6\)](#) and (7). Both are equated to cross-suits. If a set-off or a counter claim is to be equated to a cross suit under [section 19](#), afortiori 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 fact, the Bank has not objected to such a course. Indeed, [section 19\(11\)](#) says that if any particular counter-claim raised in the suit 272/85 cannot be decided by the Tribunal while deciding the Bank'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. In our view, in the context, the word 'counter-claim' in [section 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. An agreement not to charge interest, the specific performance of which is claimed is nothing but a plea that the Bank could not charge interest. A permanent injunction directing the Bank not to charge interest because of an alleged agreement in that behalf is likewise a plea that no interest is chargeable. So far as the plea for further financial assistance is concerned, it is also, broadly, in the nature of a 'counter-claim'. All these fall under [section 19\(8\)](#) to (10). Again, the plea for deducting 'damages' though raised in the suit is indeed broadly a plea of "set off" falling under sub-clause (6) and (7) of section 19.

42. For the aforesaid reasons, we hold under Point 3 that the pendency of the company's suit 272/85 in the High Court is not a ground for retaining the Bank's suit 410/85 in the Calcutta High Court. The suit 272/85 filed by the debtor company is also a suit to be necessarily tried only by the Tribunal. The pendency of the Company's suit 272/85 in the High Court is no reason for keeping the Bank's suit 410/85 in the High Court. The suit 410/85 is liable to be transferred to the Tribunal. Incidentally, we also hold that even suit 272/85 is to be tried only by the Tribunal.”

Paragraph 113 of Nahar Industrial Enterprises Ltd.

113. The Tribunal was constituted with a specific purpose as is evident from its statement of objects. The preamble of the Act

also is a pointer to that too. We have also noticed the scheme of the Act. It has a limited jurisdiction. [Under the Act](#), as it originally stood, did not even have any power to entertain a claim of set off or counter-claim. No independent proceedings can be initiated before it by a debtor. A debtor under the common law of contract as also in terms of the loan agreement may have an independent right. No forum has been created for endorsement of that right. Jurisdiction of a civil court as noticed hereinbefore is barred only in respect of the matters which strictly come within the purview of [Section 17](#) thereof and not beyond the same. The Civil Court, therefore, will continue to have jurisdiction. Even in respect of set off or counter-claim, having regard to the provisions of sub-sections (6) to (11) of [Section 19](#) of the Act, it is evident :-

- a) That the proceedings must be initiated by the bank*
- b) Some species of the remedy as provided therein would be available therefor.*
- c) In terms of sub-section (11) of [Section 19](#), the bank or the financial institution is at liberty to send a borrower out of the forum.*
- d) In terms of the provisions of the Act, thus, the claim of the borrower is excluded and not included.*

- e) In the event the bank withdraws his claim the counter-claim would not survive which may be contrasted with Rule 6 of Order VIII of the Code.*
- f) Sub-section (9) of [Section 19](#) of the Act in relation thereto has a limited application.*
- g) The claim petition by the bank or the financial institution must relate to a lending/borrowing transaction between a bank or the financial institution and the borrower.*
- h) The banks or the financial institutions, thus, have a primacy in respect of the proceedings before the Tribunal.*
- i) An order of injunction, attachment or appointment of a receiver can be initiated only at the instance of the bank or the financial institution. We, however, do not mean to suggest that a Tribunal having a plenary power, even otherwise would not be entitled to pass an order of injunction or an interim order, although ordinarily expressly it had no statutory power in relation thereto.*
- j) It can issue a certificate only for recovery of its dues. It cannot pass a decree.*
- k) Although an appeal can be filed against the judgment of the Tribunal, pre-deposit to the extent of 75 % of the demand is imperative in character.*
- l) Even cross-examination of the witnesses need not be found to be necessary.*

m) Subject to compliance of the principle of natural justice it may evolve its own procedure.

n) It is not bound by the procedure laid down under [the Code](#). It may however be noticed in this regard that just because the Tribunal is not bound by [the Code](#), it does not mean that it would not have jurisdiction to exercise powers of a court as contained in [the Code](#). Rather, the Tribunal can travel beyond [the Code](#) of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice.' [[See Industrial Credit and Investment Corpn. of India Ltd. v. Grapco Industries Ltd.](#), (1999) 4 SCC 710]”

Paragraph 51 of Mardia Chemicals Ltd

“51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely V.Narasimhachariar (supra) p.135 at p.141 and 144, a judgment of the learned single Judge where it is observed as

follows in para 22:

"The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the Court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: 'Adams v. Scott, (1859) 7 WR (Eng.) 213 (Z49). I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See Rashbehary Ghose Law of Mortgages, Vol.II, Fourth Edn., page 784).

Relief sought in the suit

“Suit for a decree of declaration to the effect that the purported agreement of guarantee dated 30.3.2015,

purportedly caused to to be executed by the plaintiff in favour of defendant no.1 in the sum of Rs.136.34 crores with respect to the financial faculties of defendant no.5 is absolutely illegal, null and void ab initio, sham and without consideration, unenforceable and inoperative and not binding on the plaintiff;

AND

For a declaration to the effect that the purported guarantee agreement dated 30.3.2015, purportedly caused to be executed by the plaintiff alongwith defendants no.6 and 7 in favour of defendant no.2 in the sum of Rs.12.21 crores with respect to the financial facilities of defendant no.5 is absolutely illegal, null and void ab initio, sham and without consideration, unenforceable and inoperative and not binding on the plaintiff;

AND

For a decree of mandatory injunction directing the defendants no.1 and 2 to return and deliver back the original of the said guarantee to the plaintiff;

AND

For a decree of permanent injunction restraining the defendants no.1 and 2 from enforcing or setting up or otherwise acting on the basis of the impugned guarantees against the plaintiff in any manner whatsoever or from

declaring the plaintiff as a willful defaulter with defendant no.8.”

On conspectus of the observations rendered by the Hon'ble Apex Court in United Bank of India, Calcutta (supra), Nahar Industrial Enterprises Ltd. (supra) and Mardia Chemicals Ltd. Etc. (supra) and relief claimed in the suit, I am of the view that nature of the suit would not fall within the expression “counter claim”, whereby, the respondents, herein, have sought relief of reduction in the rate of interest or some adjustment of the amount. Essentially, the claim in the suit was with regard to certain transaction being sham, null and void and as well as the scope of execution of the bank guarantee owing to demise of bank guarantor.

There is another aspect of the matter. Sub-section 11 of Section 19 of 1993 Act, also empowers the Tribunal to relegate the party to set up a counter claim or set off in the civil suit. For the sake of brevity, sub-section 11 of Section 19 of 1993 Act, reads thus:-

“(11) Where a defendant sets up a counter-claim and the applicant contends that the claim thereby raised ought not 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”

In Nahar Industrial Enterprises Ltd., it has been held that the Tribunal would not be a civil Court. It envisioned that in case of dismissal of the suit (to be treated as counter claim) as per the arguments of learned counsel for the petitioner, the aggrieved party would have to avail the remedy under Section 20 of 1993 Act, i.e., by filing an appeal before the Appellate Authority which cannot be entertained without payment of 75% amount. Though discretion to relax has been given but in my view, relegating the respondent-plaintiffs to Tribunal by treating their suit as counter claim would be horrendous task. The claim of the Bank in petition under Section 19 would only entitle them to claim the amount on the basis of outstanding debt as per the statement of account/balance sheet, whereas, both the reliefs are totally opposite to each other, therefore, cannot be decided by the Tribunal by treating it to be counter claim.

As an upshot of my findings, I am of the view that the order under challenge is perfectly legal and justified, much less, the same cannot be said to have been passed without jurisdiction.

Accordingly, while upholding the order under challenge, revision petition stands dismissed.

(AMIT RAWAL)
JUDGE

January 25, 2018
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No