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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION No.1630 OF 2020

1. Rajendra Manohar Kowli,
Age 52 years,
Occupation : Architect,
R/at 24, Dayan Sagar,
S.K. Bole Road, Dadar,
Mumbai-400 028.
2. Manohar Bhaskar Kowli,
(since deceased through
Legal Representative)
2(a) Ms. Rekha Manohar Kowli (daughter)
(since deceased)
(b) Ms. Sandhya Manohar Kowli (daughter)
Age 40 years,
Occupation : Business,

Both of them R/o. 24, Dayan Sagar,
S.K. Bole Road, Dadar,
Mumbai-400 028.

: PETITIONERS

...VERSUS...

Bank of India,
Banking Company Incorporated,
Under the Banking Companies
(Acquisition and Transfer of
Undertakings) Act, 1970,
Having its Head Office at Express
Towers, Nariman Point, Mumbai-21
And a Branch amongst others
At Dadar (W), Mumbai.

: RESPONDENT

Shri Sudhir V. Somalwar, Advocate for the Petitioners.
Shri O.A. Das, Advocate for the Respondent.

**CORAM : DIPANKAR DATTA, CJ &
M.S. KARNIK, J.**

RESERVED ON : DECEMBER 14, 2021
PRONOUNCED ON : MAY 6, 2022

JUDGMENT (PER M. S. KARNIK, J.) :

1. Mounting challenge to the order dated 26.12.2019 passed by the Debts Recovery Appellate Tribunal, Mumbai (hereafter "DRAT", for short) in Misc. Appeal No.166 of 2005, the petitioners approach this Court by way of a writ petition under Article 226 and 227 of the Constitution of India praying for the following reliefs, *inter alia*, as under :

"(a) that this Hon'ble Court be pleased to issue a writ of certiorari or any other writ in the nature of certiorari calling for the records and proceedings of the Order dated 26.12.2019 passed by DRAT in Appeal No.166 of 2005 this Hon'ble Court be pleased to quash and set aside in impugned order/Judgment dated 26.12.2019.

(b) quashed and set aside the order passed by DRT-II Mumbai. The respondent pray compensation of Rs.50,00,00,000/- (Rupees Fifty Crores only) to petitioner along with interest rate of 18% p.a."

2. The facts of the case in brief are as under :

Mr. Manohar Kowli, since deceased, obtained a bank guarantee of Rs.27,00,000/- from United Western Bank at the commission rate of 0.5% sometime in 1989. As the respondent-Bank of India (hereinafter "the Bank", for

short) promised to give concessional rate of commission for bank guarantee, the petitioners shifted their Fixed Deposit Receipts ("FDR" for short) worth Rs.20,00,000/- to the Bank against the bank guarantee of Rs.27,00,000/-. The petitioners also secured additional FDR of Rs.1,00,000/-, Rs.20,000/-, Rs.70,000/-, Rs.50,000/- and Rs.1,00,000/- with the Bank on the understanding that the Bank will charge less than 0.5% commission. The Bank, however, started charging 1 to 2% commission for different intervals without the consent of the petitioners. The bank guarantee was encashed on 20.7.1994. The Bank adjusted the FDR secured by the petitioners against the encashment. After adjustment of the securities, an amount of Rs.7,00,000/- (Rs. Seven lacks) was found due and payable by the petitioners to the Bank.

3. The petitioners failed to repay the outstanding amount. The Bank filed a suit on 17.12.1997 for recovery in this Court against the petitioners. The suit was later on transferred to the Debts Recovery Tribunal (in short, "the DRT") upon its establishment. The petitioners disputed their liability to pay the amount of which recovery was claimed by the Bank. So far as the liability of the petitioners to pay the outstanding amount is concerned, the DRT held the Bank is entitled for recovery of the outstanding amount. The appeal filed before the DRAT by the petitioners against DRT's order was dismissed. The order of the DRAT holding the petitioners liable was

challenged by the petitioners in a connected Writ Petition No.1629 of 2020 filed before this Court which is heard along with the present petition and is disposed of by a separate order.

4. In the present petition, the challenge is to the rejection of the counter-claim of the petitioners by the DRT and the consequent rejection of the petitioners' appeal by DRAT. Pursuant to the transfer of the aforementioned suit filed by the Bank in this Court for recovery before the DRT, the written statement came to be filed by the petitioners on 17.1.2003. The petitioners then filed an application on 1st September, 2003 to examine the Bank officer for the purpose of obtaining statement of accounts. Since the respondent-Bank submitted the statement of account only for the period 1994 till 1997 but not for the period 1989 to 1994, the petitioners filed a misc. application on 21.4.2004 before the DRT requesting for details of the account. The DRT directed the Bank to give detailed accounts vide order dated 8.7.2004. It is contended that the respondent-Bank filed an affidavit on 31.7.2004 without furnishing details of the Bank account.

5. An application for condonation of delay in filing the counter-claim of Rs.19,36,069/- was made by the petitioners on 11.01.2005. The said application for condoning the delay in filing the counter-claim was rejected by the DRT on 11.1.2005 itself. Against the said

rejection by DRT of the application made for condoning the delay in filing the counter-claim, the petitioners preferred Misc. Appeal No. 166 of 2006 before DRAT. The DRAT by the order dated 26.12.2019 impugned in this petition, dismissed the appeal.

6. Learned advocate for the petitioners submitted that the Bank has failed to give the statement of the account regarding interest payable to the petitioners on the FDR. According to the petitioners, the interest is not calculated properly and the benefit thereof is not credited to the petitioners account. According to learned advocate, even after adjusting the dues claimed by the Bank to the tune of Rs.7,00,000/-, not only the petitioners are not liable to pay anything to the Bank, but it is the Bank which has to make good the amount claimed as per the counter claim. Learned counsel contended that the legitimate claim of the petitioners as claimed in the counter claim amounting to Rs.19,36,069/- has been summarily rejected by the DRT, as well as DRAT by refusing to condone the delay in filing the counter-claim.

7. Learned advocate for the Bank, on the other hand, contends that there is a gross delay in filing the counter-claim, apart from the petitioners' claim itself being barred by the law of limitation. Learned advocate submitted that the statement of accounts are properly maintained and even in response to this petition a detailed affidavit-in-reply has been filed by the Bank setting out

details of the manner in which the FDRs and the interest accrued thereon is appropriated towards the dues. For the purpose of the present petition it may not be necessary for us to examine this aspect on merits regarding the appropriation of the interest accrued on the FDRs while settling the accounts of the petitioners. The DRT and the DRAT have dismissed the counter-claim on the ground of delay as well as on the ground that the claim itself is barred by the law of limitation.

8. To appreciate the controversy raised in this petition, it would be appropriate to reproduce the relevant findings of the DRAT. The same reads thus :

"4. I have perused material papers. In the connected Appeal i.e. Appeal No.153/2005, original record and proceedings are called for and I have verified the original record. From a perusal of the original record, it is found that on 11/01/2005, Tribunal below passed an order rejecting the request of the Defendants to condone delay in filing Counter Claim for Rs. 19,36,069/-. It appears that Defendants have filed application for condonation of delay in filing/ making Counter Claim. Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the RDDB&FI Act) provides a right of set off and the Counter Claim. Section 19(8) of RDDB&FI Act provide this right. It may be useful to examine that provision which reads as follows:

Section 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 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.

5. According to Sub-Rule 9, Counter Claim made u/s 19(8) shall have the same effect of Cross Suit, so as to enable the Tribunal below to pass final order, both in Original Application and on the Counter Claim. Therefore, Counter Claim is nothing but a Cross Suit. Both Advocates have no dispute on the principle that the original Suit cannot be filed with delay condonation application. A combined reading of Rules 7, 8 and 9 of Section 19 denote that Counter Claim is a Cross Suit and Written Statement shall have same effect of plaint. Therefore, necessary particulars required for a plaint have to be disclosed in the Written Statement where Counter Claim is made. As per provisions of RDDB&FI Act and Rules made thereunder, Application under Section 19 which is treated as Plaint shall be in the format of Form No.I. Details required under this Form are not furnished. When the Counter Claim is a Cross Suit, Defendants must disclose the date on which cause of action has arisen to claim that money and other necessary details are to be furnished that are required in a suit including Court Fee. Admittedly, when the W.S. is filed in the year 2003, no such claim is made in that W.S. From the record it appears that the date on which case is posted for hearing arguments, the Defendants have come forward with this request to condone the delay in filing Counter Claim and after rejecting the said application, the Tribunal below heard arguments of both sides and then posted the matter to judgment to 17/01/2005 on which date O.A is disposed of. When the statute has not provided any right to file Original Suit after period

of limitation, request of the Defendants which is not provided by the statute is not tenable and the Tribunal below rightly rejected the said request.

6. Ld. Advocate for Appellants, without pointing this aspect, argued this Appeal as if a Counter Claim is made in the W.S. and that Counter Claim is rejected in the O.A. and against which present Appeal is preferred.

7. I have already dismissed Appeal No.153/2005 which is filed challenging the judgment in O.A. No.1173/2009 wherein there was no rejecting of Counter Claim. On the other hand, it was referred to in the judgment that request to condone delay in making Counter Claim was negatived on 11/01/2005 and only on the basis of that this order could be traced.

8. On a scrutiny of the material, I am of the considered view that the Tribunal below has not committed any error or illegality in rejecting the request of Defendants and that there are no grounds to interfere with the order dated 11/01/2005."

9. We firstly have to examine when the counter-claim was set up by the petitioners. An application for condoning the delay in filing the counter claim was made on 11.01.2005. If 11.01.2005 is to be regarded as the date for setting up the counter claim, then it was set up at such stage of the proceedings when arguments were being heard. It is a matter of record that arguments were heard on 11.01.2005 and the original application was posted for judgment on 17.01.2005. The original application was finally decided on 17.1.2005.

10. We cannot help but emphasize that in the appeal memo filed before the DRAT, in paragraph V(o), it is

stated thus :

"Appellant states that he filed his counter claim on 11.01.2005 in respect of rest of the amount."

Thus, it is the petitioners' plea that the counter-claim is filed on 11.01.2005, i.e. at a stage when the original application was at the final stage of adjudication. In the light of this plea, we need not have examined the issue any further on the aspect as to stage at which the counter-claim was set up. Nonetheless, an attempt is made on the part of the petitioners which is also apparent from the observations of the DRAT in paragraph 6 of the impugned order, that the counter-claim is made in the written statement itself. Let us examine if there is any substance in this contention. The written statement was filed by the petitioner No.1 before the DRT on 17.1.2003. We have perused the written statement. We do not find a semblance of a counter-claim set up by the petitioners in the written statement. It is only in the application Exhibit 65 filed on 11.01.2005 seeking condonation of delay in filing the counter-claim, that the counter-claim is set up for the first time.

11. The DRAT noted that on the date when the DRT posted the original application for arguments, the petitioners came forward with an application to condone the delay in filing the counter-claim. It is not demonstrated that the counter-claim is set up with all material particulars required to stake such a claim. We are

in complete agreement with the DRAT that necessary particulars of the counter-claim are not set up in the present case.

12. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (in short, "the RDDB Act") provides for filing of the counter-claim. In this context, it is material to reproduce sub-sections (8) and (9) of Section 19 of the RDDB Act which reads thus :

"(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."

13. We notice that sub-section (8) of Section 19 of the RDDB Act is in pari materia with order VIII Rule 6-A(1) of the Code of Civil Procedure, 1908 (hereafter 'CPC', for short); sub-section (9) of Section 19 of the RDDB Act is in pari materia with order VIII Rule 6-A(2) of the CPC.

14. The Supreme Court had an occasion to explain the legislative intention behind imposing restrictions of belated filing of the written statement, set off, counter-

claim under Order VIII of CPC in the case of **Ashok Kumar Kalra vs. Wing CDR Surendra Agnihotri and others**, reported in **(2020) 2 SCC 394**. Paragraphs 17 and 18 which has an important bearing on the decision of the present case is reproduced hereunder, which reads thus :

17. The time limitation for filing of the counter-claim, is not explicitly provided by the Legislature, rather only limitation as to the accrual of the cause of action is provided. As noted in the above precedents, further complications stem from the fact that there is a possibility of amending the written statement. However, we can state that the right to file a counter-claim in a suit is explicitly limited by the embargo provided for the accrual of the cause of action under Order VIII Rule 6-A. Having said so, this does not mean that counter-claim can be filed at any time after filing of the written statement. As counter-claim is treated to be plaint, generally it needs to first of all be compliant with the limitation provided under the Limitation Act, 1963 as the time-barred suits cannot be entertained under the guise of the counter-claim just because of the fact that the cause of action arose as per the parameters of Order VIII Rule 6A.

18. As discussed by us in the preceding paragraphs, the whole purpose of the procedural law is to ensure that the legal process is made more effective in the process of delivering substantial justice. Particularly, the purpose of introducing Rule 6-A in Order VIII of the CPC is to avoid multiplicity of proceedings by driving the parties to file separate suit and see that the dispute between the parties is decided finally. If the provision is interpreted in such a way, to

allow delayed filing of the counter-claim, the provision itself becomes redundant and the purpose for which the amendment is made will be defeated and ultimately it leads to flagrant miscarriage of justice. At the same time, there cannot be a rigid and hyper-technical approach that the provision stipulates that the counter-claim has to be filed along with the written statement and beyond that, the Court has no power. The Courts, taking into consideration the reasons stated in support of the counter-claim, should adopt a balanced approach keeping in mind the object behind the amendment and to sub-serve the ends of justice. There cannot be an hard and fast rule to say that in a particular time the counter-claim has to be filed, by curtailing the discretion conferred on the Courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counter-claim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects sought to be achieved through the amendment. But however, we are of the considered opinion that the defendant cannot be permitted to file counter-claim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for the particular amendment to the CPC."

15. The Supreme Court has clearly opined that the defendant cannot be permitted to file counterclaim after issues are framed and after the suit has proceeded substantially as it would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for a particular amendment to

CPC. The Supreme Court further held that as counter-claim is treated to be plaint, generally it needs to first of all be compliant with the limitation provided under the Limitation Act, 1963 as the time-barred suits cannot be entertained under the guise of the counter-claim just because of the fact that the cause of action arose as per the parameters of Order VIII Rule 6-A.

16. Having regard to the law laid down by the Supreme Court in the case of **Ashok Kumar Kalra** (supra), we are of the opinion that the filing of the counter-claim is belated. The DRAT as well as DRT are justified in finding that the counter-claim does not deserve to be entertained on the ground of delay. In the present case, first of all, we do not find a semblance of a counter-claim set up in the written statement. Secondly, we find that at the final stage of adjudication of the original application before the DRT when arguments were being heard, an application is made for condoning the delay in filing the counter claim. The material particulars prerequisite for setting up a counter-claim are not brought to our notice. Following the dictum of the Supreme Court in para 21 of the decision in **Ashok Kumar Kalra** (supra), even if we are to hold that sub-section 8 of Section 19 of RDDB Act does not put an embargo on filing the counter-claim after filing the written statement, this by itself does not give absolute right to the petitioners to file the counter-claim after substantive delay, in the present case

at the stage when final arguments were being heard by the DRT. The Supreme Court has observed that the Court has to take into consideration the outer limit to file the counter-claim, which is pegged till the issues are framed. As to what are the factors to be taken into consideration while exercising the discretion in such cases to entertain the filing of the counter-claim are laid down in para 21 of the decision in **Ashok Kumar Kalra** (supra). Para 21 reads thus :

"21. We sum up our findings, that Order VIII Rule 6A of the CPC does not put an embargo on filing the counter-claim\ after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counter-claim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counter-claim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counter-claim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:

- i. Period of delay.
- ii. Prescribed limitation period for the cause of action pleaded.
- iii. Reason for the delay.
- iv. Defendant's assertion of his right.
- v. Similarity of cause of action between the main suit and the counter-claim.
- vi. Cost of fresh litigation.
- vii. Injustice and abuse of process.
- viii. Prejudice to the opposite party.
- ix. And facts and circumstances of each

case.

x. In any case, not after framing of the issues."

17. Though the order passed by the DRT is not placed on record, we refer to that portion of the order of the DRT, which has been re-produced in para 37 of the additional affidavit filed on behalf of the Bank in the connected Writ Petition No.1629/2020 that remains uncontroverted. Para 37 which contains a reference to the relevant portion of the order passed by the DRT on 11.1.2005 reads thus :

"The Defendant's Letter dated 28.7.1996 i.e. Exhibit "G4" annexed to the Exhibit 67 in the Trial Court. In that Letter the Defendant had sought details of the interest on deposit of Rs.20,00,000/-. It is therefore submitted that, if the Bank had not replied, the cause of action on the Defendant's own showing had arisen in April 1996. The defendants appeared in August 2001 before the Hon'ble Trial Court. In any case, the Defendants ought to have in the latest made counter claim in the Written Statement which was filed on 20.01.2003."

18. It is, therefore, clear that even the DRT has correctly understood that no counter claim is set up in the written statement filed on 20.1.2003. The DRT did not entertain the filing of the counter claim made at a belated stage when the matter was fixed for arguments. We do not find any material irregularity or perversity in the impugned order to warrant interference.

19. There is no merit in the writ petition.

Consequently, the writ petition is dismissed with no order as to costs.

(M.S. KARNIK, J.)

(DIPANKAR DATTA, CJ.)

Wadode