

IN THE HIGH COURT OF BOMBAY AT GOA**CIVIL REVISION APPLICATION NOS.28 AND 29 of 2016**

M/s Enas United Services
Through its partner Dharshat
Singh,
No.OF-2, Pooja Sadan Building,
1st Floor, Opposite KTC Bus Stand,
Mundvel, Vasco da Gama, Goa ... Applicant

V/s.

1. Flag Officer Commanding
Goa area,
Indian Navy, Vasco da Gama,
Goa- 403 802
2. Union of India
through Secretary,
Ministry of Defence,
Union Secretariat,
104 South Block
New Delhi - 110 001. .. Respondents.

Mr. Bhargav Khandeparkar, Advocate for the applicant
in both the applications.

Mr. Mahesh Amonkar, Central Government Standing
Counsel for the respondents in both the applications.

CORAM :- C. V. BHADANG, J.

Reserved on :- 26th August, 2016

Pronounced on:- 29th August, 2016

COMMON JUDGMENT :

Admit. The learned Central Government Standing
Counsel waives service for the respondents. Heard

finally by consent of the parties.

2. Both these Revision Applications under Sections 115 of the Code of Civil Procedure (CPC, for short) arise out of the order passed in Civil Suit No.87/2015 between the parties. As such, they are being disposed of by this common judgment.

3. Brief facts, necessary for the disposal of the applications, may be stated thus :

The applicant filed aforesaid Civil Suit against the respondents for recovery of Rs.4,62,000/- with interest. The case made out in the plaint is that the applicant is a Partnership Firm registered under the Indian Partnership Act, 1932 and has been supplying material requirements to the defendants and others. By letter dated 02/09/2011, the respondents had placed a work order for supply of several material requirements, with the applicant, at a cost not exceeding Rs.4,62,000/-. The applicant accordingly supplied the material and fulfilled its obligation under the contract, whereupon a 'Work Completion Certificate' was issued on 08/09/2011. The applicant

accordingly raised an invoice for Rs.4,62,000/-. As the respondents failed to make the payment, a letter dated 15/07/2013 was sent, requesting for payment. The respondents issued a reply on 19/07/2013, stating that they were making all efforts to make the payment expeditiously. As the payment failed to materialise, the applicant issued a notice on 09/12/2014, which was not complied with, which led the applicant to file the aforesaid suit for recovery of the amount along with interest.

4. The respondents filed Written Statement and raised a counterclaim. In para 5 of the Written Statement, it is not disputed that the respondents had received a letter dated 15/07/2013. However, for reasons as explained in the Written Statement and the counterclaim, the defendants have withheld the payment as the same is required to be adjusted against the claim of the respondents, in respect of losses suffered by the respondents, on account of supply of defective/ substandard OM 15 Oil to the respondents by the applicant. In other words, the respondents did not dispute the liability towards the payment of

amount as claimed by the applicant. The respondents have placed reliance on a Navy Order (NO) No.21/2003 to claim that the respondents are entitled to withhold the payment due to the applicant and are entitled to adjust such payment, as against any liability of the applicant towards the respondents. In para 25 of the Written Statement-cum-counterclaim, it is contended that in the year 2012, a process for procurement of 22 types of Oil, Lubricants and Grease Items (for short, OLG) was initiated and a request for proposal (RFP) dated 22/02/2012 was placed on 8 Firms, including the applicant herein. Based on the quotes received from several Firms, L1 rates were finalised and supply orders were accordingly placed on various Firms. The bid of the applicant for Item Nos.11 and 13 was accepted by the respondents. Supply order was placed on 31/07/2012. The oil was for the use of the respondents for its Fighter Jets. In short, it is contended that Items supplied by the applicant were substandard, which has resulted into the Fighter Jets, being damaged. The respondents are, therefore, claiming an amount of Rs.1,91,08,628/- as damages. In the alternative, it is prayed that the applicant be

directed to pay to the respondents a sum of Rs.1,25,04,761/- after adjusting the sum of Rs.66,03,867/- along with interest.

5. The applicant filed two applications before the Trial Court (i) an application (Exh.18) under Order VIII, Rule 6C of the CPC for exclusion of the counterclaim and (ii) an application (Exh.25) for rejection of the counterclaim under Order VII, Rule 11(a) of the CPC, on the ground that it does not disclose cause of action. Both these applications were opposed by the respondents. The learned Trial Court has dismissed application (Exh.18) by an order dated 07/04/2016, which is subject matter of challenge in Civil Revision Application No.29/2016. The application (Exh.25) has been dismissed by an order dated 24/06/2016, which is subject matter of challenge in Civil Revision Application No.28/2016.

6. I have heard Shri Khandeparkar, the learned Counsel for the applicant and Shri Amonkar, the learned Central Government Standing Counsel for the respondents. With the assistance of the learned

Counsel for the parties, I have gone through the plaint, as well as the counterclaim and the impugned orders passed.

7. It is submitted by the learned Counsel for the applicant that the counterclaim is in respect of a distinct contract, which has nothing to do with the contract for supply of various materials vide Work Order dated 02/09/2011. It is submitted that such a counterclaim in respect of an unconnected and separate cause of action, cannot be permitted to be raised and the counterclaim is liable to be excluded under Order VIII, Rule 6C of CPC. The learned Counsel submits that the trial of the counterclaim in the suit would cause embarrassment and the same would result in trial of separate and distinct causes of action, which would complicate and stifle the trial of the suit filed by the applicant. He, therefore, submits that the counterclaim is liable to be excluded under Order VIII, Rule 6C of CPC. The learned Counsel has placed reliance on the decision of this Court in the case of **Sahebrao Vithoba Pawar Vs. Bapurao Ravji Pawar**, [AIR 1985 BOM 426], in order to submit that a counterclaim

in respect of a heterogeneous cause cannot be allowed to be raised.

8. In so far as the claim for rejection of counterclaim is concerned, reliance is placed on the decision of this Court in the case of **M/s Cyrus Marine Servies Vs. K. A. Shivraman**, [CRA No.41/2015, dated 13/01/2016.]. It is submitted that the claim made in the counterclaim is on the basis of a tortious liability and the amount of damages are neither liquidated nor an ascertained sum. It is submitted that the respondents also did not issue any notice, staking a claim for the amount as claimed in the counterclaim. The learned Counsel for the applicant submits that unless and until there is pleading in the plaint that demand was made and was refused or neglected, no cause of action would arise to file the counterclaim and as such, the counterclaim is liable to be rejected under Order VII, Rule 11(a) of CPC.

9. On the contrary, the learned Central Government Standing Counsel for the respondents has placed heavy reliance on the Navy Order No.21/2003, in order to

submit that the respondents can withhold the payment even in respect of a separate and distinct contract, if there is claim of the respondents, against the applicant, under such a separate contract. The learned Counsel points out that the counterclaim is in the nature of set off under Order VIII, Rule 6 of CPC, to which the provisions of Order VIII, Rule 6C of CPC would not apply. The learned Counsel has pointed out illustration (e) to Rule 6 of Order VIII of CPC, in order to contend that a set off can be justifiably raised in respect of a distinct and even heterogeneous claim and it is not necessary that such set off should arise out of the transaction which is the subject matter of the claim in the plaint. He, therefore, submits that the Trial Court has rightly rejected both the applications, which orders do not call for interference.

10. I have carefully considered the rival circumstances and the submissions made.

11. It is not in dispute that under Work Order dated 02/09/2011, the applicant was to supply certain

material requirements of the respondents, which obligation was fulfilled and a Work Completion Certificate was issued on 08/09/2011. In other words, the claim of Rs.4,62,000/- made in the plaint is not disputed. The only contention is that in respect of another contract of the year 2012, for supply of OLG, the applicant had supplied substandard OLG, which has resulted into the Jet Fighters being damaged. It is contended that on the basis of the Navy Order, the respondents are entitled to withhold the amount payable to the applicant against liability of the applicant in respect of the contract of the year 2012.

12. I would first propose to consider the claim as regards the exclusion of the counterclaim under Order VIII, Rule 6C of CPC. This is because in the event it is found that the counterclaim is liable to be excluded, the further question of its rejection under Order VII, Rule 11(a) of CPC would not arise.

13. Rule 6A to 6G of Order VIII of CPC were introduced by an amendment in the year 1976. Presently, we are only concerned with Rule 6A and 6C

of Order VIII of CPC, which read thus :

"6A. Counter claim 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 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:

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.

6C. Exclusion of counter claim.- *Where a defendant sets up a counter claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counterclaim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter claim, apply to the court for an Order that such counter claim may be excluded, and the court may, on the hearing of such application make such Order as it thinks fit."*

It can, thus, be seen that a defendant in a suit may, in addition to his right of pleading a set off, under Rule 6, set up, by way of counterclaim against the claim of 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', whether such counterclaim is in the nature of claim for damages or not. It is, thus, clear that Order VIII, Rule 6A is couched in a wide language, in which the counterclaim can be raised in respect of any right or claim in respect of a cause of

action accruing either prior to, or subsequent to the filing of the suit and such counterclaim can, in a given case, include a claim for damages also. The fact that Rule 6A of Order VIII of CPC permits the raising of the counterclaim in respect of a different cause of action (which would be evident from the fact that such cause of action for filing of counterclaim can even be subsequent to the filing of the suit), it cannot be said that the said counterclaim, as raised by the respondent, was not permissible or was not competent.

14. The Apex Court in the case of ***Jag Mohan Chawla and another Vs. Dera Radha Swami Satsang and others***, [AIR 1996 SC 2222], has held that Rule 6A to 6G of Order VIII of CPC confer a statutory right on the defendant to set up a counterclaim independent of the claim on the basis of which the plaintiff has led the suit. (See para 5 of the judgment). It has further been held that the words "any right or claim in respect of a cause of action accruing with the defendant" would show that the cause of action, from which the counterclaim arises, need not necessarily

arise from or have any nexus with the cause of action on the basis of which the suit is filed. The only limitation is that the cause of action should arise before the time fixed for filing Written Statement expires. The question, however, is whether the counterclaim is liable to be excluded under Order VIII, Rule 6C of CPC. Now let us go to Order VIII, Rule 6C of CPC, which says that where the defendant sets up a counterclaim and the plaintiff contends that the claim thereby raised "ought not to be disposed of by way of counterclaim, but in an independent suit", the plaintiff may at any time before issues are settled, in relation to the counterclaim, apply to the Court, for an order that such counterclaim may be excluded and the Court may, on the hearing of such application, make such order as it thinks fit. It is, thus, evident that although under Rule 6A of Order VIII of CPC, the defendant has a statutory right to raise counterclaim in respect of a distinct cause of action, which may not necessarily be relatable to the claim in the plaint, the said statutory right is subject to the powers of the Court to exclude such counterclaim under Order VIII, Rule 6C of CPC. Thus,

where the Court finds that such a counterclaim raised "ought not to be disposed of by way of counterclaim, but in an independent suit", the Court can direct exclusion of such counterclaim. There is no indication in Rule 6C of Order VIII of CPC, as to under what circumstances, the Court can find that the counterclaim, as raised, ought not to be disposed of by way of counterclaim, but in an independent suit. It is, thus, evident that the question would depend upon the facts and circumstances of each case. The Court has to exercise the discretion and the power under Rule 6C of Order VIII of CPC on a careful consideration and weighing of the claim made in the plaint and the one raised in the counterclaim. One of the circumstances, which may justifiably lead the Court, to exclude the counterclaim, would be where the Court finds that the trial of the counterclaim along with the suit would either complicate, stifle or embarrass the trial of the suit and thus, finds that it would be appropriate that the same is excluded, relegating the defendant to file a separate suit.

15. Coming back to the present case, the suit is

based on the Work Order issued on 02/09/2011 while counterclaim arises out of a claim for damages, based on the contract of the year 2012. As noticed earlier, the respondents are not disputing the claim made in the suit. However, they claim the benefit of Navy Order No.21/2003 to withhold the said payment against the claim for damages to the Fighter Jet, allegedly on account of the supply of substandard OLG by the applicant. In my considered view, the counterclaim would result into embarrassment of the trial and would stifle the trial of the suit. The controversy in the suit, having regard to the rival contentions, is extremely limited, while the controversy in the counterclaim would require in depth examination of question whether OLG supplied was indeed of a substandard quality and whether it had resulted into the damage to the Fighter Jets. Even if these aspects are established, there would be further question as to the assessment of the quantum of such damages. The entire exercise would be highly technical in nature and would unnecessarily stifle the trial of the suit. Thus, in my considered view, this is a fit case, in which the learned Trial Court ought to have excluded

the counterclaim. In fact, the learned District Judge in para 10 of the impugned order, has accepted that the enquiry in the suit is very limited, while the enquiry in the counterclaim, would be extensive. However, the learned District Judge has found that this cannot be the sole consideration for excluding the counterclaim. In para 13, the learned District Judge has noticed that Order VIII, Rule 6C of CPC does not specify any circumstances under which a counterclaim has to be excluded and a wide discretion is given to the Court to exercise its powers thereunder. In fact, the learned District Judge has placed reliance on the decision of this Court in the case of **Sahebrao Pawar** (supra) to find (in para 18) that such a counterclaim should have relevance and concern as against the claim set out by the plaintiff. In my considered view, in the light of the decision of the Supreme Court in the case of **Jag Mohan Chawla** (supra), it cannot be said that the counterclaim has to have some relevance with the claim in the suit. Thus, the counterclaim in this case cannot be said to be impermissible under Order VIII, Rule 6A of CPC. However, the question is whether it is liable to be

excluded. It is necessary to emphasize that there is clear distinction between a counterclaim, which would be incompetent and a counterclaim, which is liable to be excluded. A counterclaim may be perfectly competent under Order VIII, Rule 6A of CPC. However, that would not preclude the Trial Court in excluding the same, when it finds that the counterclaim ought to be tried in a separate suit as contemplated under Order VIII, Rule 6C of CPC.

16. As noticed earlier, the statutory right of the defendant to raise a counterclaim under Order VIII, Rule 6A of CPC, is subject to the powers of the Court to exclude such counterclaim under Order VIII, Rule 6C, provided the conditions as mentioned therein are satisfied. In my considered view, once the learned Trial Court had found that the enquiry in the suit was quite limited, while the enquiry in the counterclaim is extensive, the learned Trial Court was not justified in holding that this cannot be the sole consideration for excluding the counterclaim. It is true that the nature and depth of the enquiry, in the suit and the one in the counterclaim may not always be

comparable or similar. However, the question is the extent of the difference between the nature of such enquiries. The Court has to weigh the circumstances carefully and then to decide whether the counterclaim is liable to be excluded. It hardly needs to be stated that discretion under Order VIII, Rule 6A of CPC is a judicial discretion, which has to be exercised in the facts and circumstances of each case. Thus, even assuming that the mere difference in the nature of the enquiry may not be the sole criterion, the extent of such difference certainly would be relevant, in order to decide whether said claim ought not to be disposed of by way of counterclaim but in an independent suit, within the meaning of Order VIII, Rule 6C of CPC. I, therefore, find that the learned District Judge was in error in holding that the counterclaim was not liable to be excluded.

17. The contention on behalf of the respondent that the counterclaim in the present case is in the nature of a set off, to my mind, would not make any difference. This Court in **Sahebrao Pawar** (supra), has held that a set off and the counterclaim, (if both are

in the nature of a monetary claim), would be of the same genre. On behalf of the respondents, reliance is placed on illustration (e) to Rule 6 of Order VIII of CPC, which reads thus :

"Illustration (e)- A sues B for compensation on account of trespass. B holds a promissory note for Rs.1,000 from A and claims to set off that amount against any sum that A may recover in the suit. B may do so, for as soon as A recovers, both sums are definite pecuniary demands."

It can, thus, be seen that although set off can be claimed in respect of any sum that the defendant may seek to recover, it presupposes that both the sums are definite pecuniary demands. In the illustration, A sues for a compensation on account of trespass which is an indeterminate sum. The illustration says that B, who holds a Promissory Note, can claim set off for that amount against any sum that A may recover in the suit. The illustration makes it explicitly clear that B may do so, for as soon as A recovers, both the sums are definite pecuniary demands. In the present case, the counterclaim is in respect of an indeterminate

sum.

18. In so far as the Navy Order is concerned, the learned Trial Court has observed thus in para 23 of the impugned order :

"23. The matter can also be looked into from another angle i.e. what will be the course to be adopted in case the court comes to a finding that the defendants were entitled to withhold the payments in terms of Navy Order (NO) 21/2003 and to adjust the payment due to the plaintiff as against any liability of the plaintiff to the defendants, if the counterclaim is excluded and the defendants are directed to file a separate suit. Therefore, in my considered view, to take care of such a situation, this is not a fit case for exclusion of the counterclaim."

19. In my considered view, the reasons articulated cannot be accepted. It is neither necessary nor appropriate to examine the question whether under the Navy Order, the defendants are entitled to withhold the payment. The learned Counsel for the applicant has pointed out that the navy order is an unilateral

act of the respondents, which cannot bind the applicant. I do not propose to go into this question as the present issue is only limited as to whether the counterclaim is liable to be excluded. In my considered view, the navy order, issued by the respondents, cannot impinge upon the powers of the Court to exclude the counterclaim, provided it finds that the claim in the counterclaim has to be tried by way of a separate suit. In the result, Civil Revision Application No.29/2016 will have to be allowed and the counterclaim will have to be excluded. In that view of the matter, it is not necessary to examine whether the counterclaim is liable to be rejected under Order VII, Rule 11(a) of CPC.

20. In the result, following order is passed :

(i) Civil Revision Application No.29/2016 is allowed.

(ii) The impugned order dated 07/04/2016 is hereby set aside.

(iii) Application Exh.18 filed by the applicant is allowed. The counterclaim filed by the respondents stands excluded.

(iv) Needless to mention that the respondents would be at liberty to file a separate suit for such a claim, if so advised and in accordance with law.

(v) Civil Revision Application No.28/2016 is disposed of as infructuous.

(vi) In the circumstances, parties to bear their own costs.

C. V. BHADANG, J.

SMA