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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 10.08.2016

+ CM(M) 57/2015 and CM No. 1214/2015

SARLA SAHNI AND ANR Petitioners

Through Mr.M.Dutta, Advocate

versus

YAMAHA MOTOR INDIA PRIVATE LIMITED
AND ANR

..... Respondents

Through Mr.Rahul Malhotra, Advocate for R-1

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (Oral)

1. By the present petition the petitioner seeks to impugn the order dated 25.8.2014 by which the application filed by the petitioner seeking amendment in the written statement was dismissed.
2. The brief facts of the case are that the petitioners entered into a lease with the respondents for premises No.I-5, Maharani Bagh, New Delhi-110065 w.e.f. 1.4.1996. The lease expired on 31.3.1998. A further lease deed was executed for a further period of two years. The lease deed came to an end on 31.3.2000 and the premises were said to have been handed over to the petitioners on 26.3.2000. By the present suit the respondent seek recovery of Rs.4,32,000/- which was the interest free refundable security deposit deposited with the petitioners.
3. The trial court by its order dated 28.4.2003 while deciding upon an

application under Order VII Rule 11 CPC filed by the petitioners allowed the application and dismissed the suit. The only ground for dismissal of the suit was that the lease was entered into by the petitioner with Escorts Yamaha Motors Limited whereas the present suit was filed by M/s.Yamaha Motor India Pvt. Ltd.

4. Against the said order dated 28.4.2003 the respondent filed an RFA No.444/2003. This court on 22.12.2011 allowed the appeal and set aside the order of the trial court dated 28.4.2003 and remanded the matter back to the trial court for fresh adjudication in accordance with law. After remanding the matter back the petitioners have in May 2012 now moved the present application under Order 6 Rule 17 CPC seeking amendment of the written statement.

5. A perusal of the application filed by the petitioner shows that it seeks to introduce in the written statement paragraphs 15 to 52 by introducing counter claim/set off. The counter-claim/set -off is by way of an amendment seeking a sum of Rs.10,44,177/- against the respondents on various heads including mesne profit for illegal occupation towards expenses incurred for restoring and repairing the suit property to its original status, towards loss of rent caused to the petitioner and towards expenses incurred qua repaying of electricity, water and gas bills consumed by the respondent during the period of occupation.

6. The trial court by the impugned order dated 25.8.2014 noted that in the earlier written statement filed no such plea of counter-claim/set off was made. Now, the claim being sought to be introduced is hopelessly time barred as the lease deed has expired on 31.3.2000. The application was dismissed.

7. Learned counsel for the petitioner has vehemently argued that there is no occasion for the petitioner to have earlier moved the present application for amendment. He submits that the suit was dismissed by the trial court on 28.4.2003. It has now been remanded back by this court after quashing the order of the trial court on 22.12.2011. The present application is filed almost immediately thereafter in May 2012. Hence, he submits that the petitioner cannot be penalised for the period when the matter was pending in the High Court. He secondly submits that the amendment which is now sought to be introduced apart from introducing a counter-claim also seeks to introduce an equitable set-off. He relies upon judgment of the Supreme Court in the case of *Jitendra Kumar Khanand Others vs. Peerless General Finance and Investment Company Limited and Others*, (2013) 8 SCC 769 to submit that in somewhat similar facts the Supreme Court had permitted raising of the plea of equitable set-off.

8. Learned counsel appearing for the respondent has vehemently submitted that the amendment sought are completely time barred and cannot be allowed.

9. The legal position regarding amendment of written statements has been well established by a catena of judgments. The Supreme Court has held that normally claims which are barred by limitation would not be allowed by way of an amendment. Reference may be had to the judgment of the Supreme Court in *M/s. Ganesh Trading Co. Vs. Moji Ram*, (1978) 2 SCC 91 where the Supreme Court held as follows:-

“5. It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a

new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometime be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation; to be put on every defective state of pleadings. Defective pleadings are generally curable, if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute cause of action where there was none, provided necessary conditions, such as payment of either any additional court fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings.”

10. The above proposition was reiterated in ***B.K.Narayana Pillai vs. Parameswaran Pillai and Another, (2000) 1 SCC 712.***
11. Similarly, the Supreme Court in the case of ***Pankaja & Anr. v. Yellappa & Anr., 2004(6) SCC 415,*** held that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. There is discretion in such cases and it depends upon facts and circumstances of the case. The Supreme Court held as follows:

“14. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straitjacket formula for allowing or disallowing an amendment of pleadings. Each case depends upon the factual background of that case.”

12. Regarding the contention of equitable set-off as urged by the petitioner, the Supreme Court in *Jitendra Kumar Khan and Others vs. Peerless General Finance and Investment Company Limited and Others*, (supra) held that discretion rests with the court to adjudicate upon a claim of equitable set-off. Further, where a protracted enquiry is needed to determine the sum due, equitable set-off would not be allowed. The facts of that case were that a suit was filed in 1993. Defendants entered appearance and filed the written statement in 1994. In 1998 defendants filed an application for amendment of the written statement where they sought grant of a decree for above Rs.4 lacs. The Supreme Court noted that the only controversy is whether the claim of equitable set-off as put forth is tenable or not. It was conceded by the defendant that the claim put forth in the written statement cannot be conceded as a counter-claim or a legal set-off were not permissible at the stage when the application to amend the written statement was filed. On the issue of equitable set of the court held as follows:-

“16. From the aforesaid enunciation of law it is quite clear that equitable set-off is different than the legal set-off; that it

is independent of the provisions of the Code of Civil Procedure; that the mutual debts and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances; that such a plea is raised not as a matter of right; and that it is the discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good con science. The discretion rests with the court to adjudicate upon it and the said discretion has to be exercised in an equitable manner. An equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due, as has been stated in *Dobson and Barlow v. Bengal Spinning and Weaving Co.* (1897) 21 Bom 126 and *Girdharilal Chaturbhuji v. Surajmal Chauthmal Agarwal.*”

13. Hence an equitable set-off may be allowed at the discretion of the court provided there is no necessity for a protracted enquiry.

14. I may now come to the facts of the present case. Admittedly, in response to the suit filed by the respondent a written statement was filed by the petitioners in April 2003. The written statement is absolutely silent about any claim which are now sought to be introduced i.e. issues pertaining to mesne profit/damages, restoration and repairing of premises, loss of rent, unpaid electricity, water and gas bills. These are now being raised for the first time after a lapse of nine years from the date of filing of the original written statement. No doubt, the appeal was pending before this court and no suit existed for the period form 2003-2011. However, in my view, the facts which are now sought to be incorporated under the plea of equitable set-off are belated, stale and cannot be permitted, at this stage. Admittedly, the premises were handed over to the petitioner in the year 2000. Twelve years down the line the petitioners cannot be permitted to introduce these

kinds of claims which a landlord would have normally agitated when the original written statement was filed.

15. Further the issues sought to be raised by the petitioner would require a detailed enquiry/examination. The same would require a protracted enquiry. Hence, the attempt to introduce equitable set-off would also be liable to be disallowed in view of the judgment of the Supreme Court in the case of *Jitendra Kumar Khan and Others vs. Peerless General Finance and Investment Company Limited and Others*,. (*supra*).

16. I see no reason to interfere with the impugned order. The present petition is accordingly dismissed.

JAYANT NATH, J.

AUGUST 10, 2016/n/v