

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.3294/2019

Sohan Minerals and Mining Co. Pvt. Ltd, through its Authorized Signatory : Shri Sunil
s/o Hiralal Mittal

Vs.

M/s. Lloyds Metals and Energy Limited

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri W.T.Mathew, Advocate for petitioner.

Shri M.P.Khajanchi, Advocate for respondent-sole.

CORAM : A.S.CHANDURKAR, J.

DATED : May 04, 2019

The challenge in this writ petition filed under Article 227 of the Constitution of India is to the order dated 15.01.2019 passed below Exhibit 44 by the learned District Judge-1, Gadchiroli, thereby rejecting the application moved by the petitioner-defendant seeking permission to amend the written statement so as to raise a counter-claim.

The respondent is the original plaintiff that has filed a suit for recovery of an amount of Rs. 1,58,50,000/- with interest. According to the respondent, it is entitled to recover damages under the provisions of Section 73 of the Contract Act, 1872 from the defendant as there was failure on the part of the said defendant to perform its part of the contract. The aforesaid suit was filed on 26.04.2014. The petitioner herein filed its written statement on 20.08.2014 and denied the claim as made. Thereafter, the petitioner sometime in October, 2015 filed Civil Suit No.301 of 2015 before the High Court of Calcutta against the respondent herein seeking a decree for liquidated damages

to the tune of Rs.45,44,32,155/-. In that suit the respondent filed an application under Section 10 of the Code of Civil Procedure, 1908 (for short, the Code) seeking stay of the said suit on the count that the issues involved in the said suit were already raised in the suit filed by the respondent in the Court at Gadchiroli. By order dated 26.07.2017, the High Court of Calcutta allowed that application and stayed the proceedings in Civil Suit No. 301 of 2015. In the said order it was observed that the petitioner herein, if so advised, could make a counter-claim in that suit that was pending in the Court at Gadchiroli. Thereafter, the petitioner moved an application below Exhibit 44 seeking to amend the written statement and raise a counter-claim. The cause of action for the said counter-claim was stated to have arisen from December 2010 and had continued till July, 2013. The respondent filed its reply and opposed the said application. By the impugned order, the learned Judge of the Commercial Court rejected the said application below Exhibit 44. Being aggrieved, the petitioner has challenged the said order.

Shri Wilson Mathew, learned counsel for the petitioner submitted that the trial Court erred in refusing to grant permission to amend the written statement and raise the counter-claim. He referred to the order dated 26.07.2017 passed by the Calcutta High Court in the suit filed by the petitioner to urge that after such liberty was granted by the said High Court, the present application below Exhibit 44 came to be moved. He referred to the averments made in para 18 of the application and submitted that there was no deliberate delay in seeking the said amendment. Referring to the provisions of order VIII Rule 6-A of the Code, it was submitted that the defendant has not yet delivered its defense and hence it was

permissible for the said defendant to raise the counter-claim. Placing reliance on the decisions in *Rajesh Kumar Agrawal Vs. K.K.Modi*, reported in 2006(4) SCC 385 and *Hubtown Limited Vs. IDBI Trusteeship Service Limited* reported in 2017 (4) BCR 310, it was submitted that in the light of the fact that the suit filed by the petitioner had been stayed under Section 10 of the Code, the counter-claim ought to have been permitted to be raised for being entertained on merits. It was thus submitted that the application below Exhibit 44 was liable to be allowed.

Shri M.P.Khajanchi, learned counsel for the respondent supported the impugned order. He submitted that since according to the petitioner the cause of action for filing the counter-claim had arisen much prior to filing of the written statement, it was not permissible to raise the counter-claim after issues were framed and the evidence was led in the suit. He submitted that in January 2016 the suit was fixed for final arguments in view of the fact that the petitioner's evidence was closed on 11.12.2015. There was considerable delay in seeking amendment in the written statement and there was absence of due diligence on the part of the petitioner. After the order was passed by the Calcutta High Court, the application below Exhibit 44 was moved after 191 days. In any event, it was submitted that no liberty was granted by the Calcutta High Court to raise the counter-claim and same could be permitted subject to satisfying the requirements of law. Learned counsel placed reliance on the decisions in *Rohit Singh and others Vs. State of Bihar (Now State of Jharkhand) and others*, (2006) 12 SCC 734, *Nagnath s/o Jagannath Lomate and anr. Vs. Narsingh s/o Sambha More and others*, 2009(3) Mh.L.J. 564 and *Inacio Amorim V.D'Costa (since deceased) through LRs. Vs. Rocky Andrade and others*, 2015(1)Mh.L.J. 206. Learned

counsel also referred to the provisions of Sections 8 and 13 of the Commercial Courts Act, 2015. It was thus submitted that the writ petition was liable to be dismissed.

I have heard learned counsel for the parties at length and I have perused the material placed on record. It could be seen that the respondent had filed its suit for recovery of amount in April 2014. The petitioner filed its written statement therein in August 2014. Thereafter the petitioner invoked the jurisdiction of the Calcutta High Court by filing Civil Suit No.301/2015. The said suit has been stayed under Section 10 of the Code by order dated 26.07.2017. It has been observed that the petitioner, if so advised, could make a counter-claim in the suit that was filed by the respondent. It is pursuant to those observations that application below Exhibit 44 has been moved. That application is dated 03.02.2018. While considering the challenge to the order passed below Exhibit 44 the progress of the suit in question has to be taken into consideration. As noted above, the plaintiff completed its evidence and thereafter on account of failure on the part of the defendant in leading evidence its side was closed on 11.12.2015. In January, 2016 the suit was fixed for final arguments after which the defendant sought amendment of the issues already framed. The pendency of the suit as filed in the High Court at Calcutta was not disclosed. In the meanwhile, the plaintiff sought deletion of issue no.1. The suit filed by the respondent herein was dismissed in default and thereafter restored on 30.01.2017. Thereafter the plaintiff's application for amendment was allowed and after lapse of more than 191 days from the order passed by the Calcutta High Court, an application below Exhibit 44 came to be moved.

In Rohit Singh and Others (supra) it has been observed by the Hon'ble Supreme Court that a counter-claim can be filed even after the writ statement is filed but the same would not mean that the counter-claim could be raised after the issues are framed and the evidence is closed. Following the said decision, it has been held in Nagnath s/o Jagannath Lomate and anr. (supra) that raising of counter- claim after settlement of the issues and recording of evidence was not permissible. Similar view has been taken in Idacio Amorim V D'Costa (supra).

The law as laid down in the aforesaid decisions squarely applies to the case in hand. In the application below Exhibit 44, it has been clearly pleaded that the cause of action for the counter-claim had arisen from 09.12.2010 and had continued till the end of July 2013. As noted above, the petitioner filed its written statement in August 2014. In the light of the fact that after issues were framed and evidence of the defendant was closed, the said suit was fixed for final arguments in January 2016, the application below Exhibit 44 as moved is belated. Even after the order passed on 26.07.2017 there is absence of due diligence on the part of the defendant in seeking the counter-claim on 03.02.2018. Moreover, it cannot be said that any such liberty was granted by the Calcutta High Court for raising the counter-claim. The request to raise the counter-claim has to be considered within the parameters of Order VI Rule 17 read with Order VIII Rule 6-A of the Code.

It is found that since the issues were framed long back and the plaintiff had led its evidence, the trial Court was justified in dismissing the application below Exhibit 44. Ratio of the decisions in Raj Kumar Agrawal and Hubtown Limited

(supra) cannot be made applicable to the case in hand. Considering the progress of the suit in question, it is found that the trial Court was justified in passing the impugned order. I do not find any jurisdictional error committed by the trial Court while passing the impugned order.

Hence for the aforesaid reasons, there is no case made out to interfere in writ jurisdiction. Writ Petition is accordingly dismissed with no orders as to costs.

JUDGE

Andurkar.