

\$~177

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 19th February, 2020
+ **CM(M) 1418/2018 and CM APPL. 48588/2018**
SANJIV TIWARI Petitioner
Through: Mr. Sanjay Kumar Viseh and Mr.
Arvind K. Sharma, Advocates (M:
9899980152).

versus

DEEPAK POPTANI Respondent
Through: Mr. Aditya Rathee, Mr. Rohan
Dewan and Ms. Archana Saxena,
Advocates (M: 9810120000).

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This petition raises an important question as to whether the counter-claim filed by the Defendant/Respondent (*hereinafter*, “*Defendant*”) after the commencement of the evidence of the Plaintiff/Petitioner (*hereinafter*, “*Plaintiff*”) can be permitted or not.
2. A suit for recovery of Rs.19,44,073/- was filed by the Plaintiff – Mr. Sanjiv Tiwari against Mr. Deepak Poptani in 2013 under Order XXXVII CPC before the District Judge, Saket Courts Complex. The leave to defend application was filed by the Defendant in the suit, however, the suit was withdrawn with liberty to refile the same vide order dated 21st January, 2015, which reads as under:-

“Learned Sh. Viseh submits that since there is technical defects and as such he wants to withdraw the present suit. Let his statement be recorded. Statement is recorded.

In view of the statement of the counsel for plaintiff,

the present suit is permitted to be withdrawn with liberty to file fresh suit/appropriate proceedings on the same cause of action before the appropriate court/forum.

The suit is disposed off as withdrawn with liberty to file fresh suit/appropriate proceedings on the same cause of action before the appropriate court/forum.

File be consigned to record room after due compliance.”

3. Thereafter, the present suit has been instituted before the District Judge, Tis Hazari Courts on 19th September, 2015, again under Order XXXVII CPC. The suit, though filed under Order XXXVII CPC, is stated to have been treated as an ordinary suit. The written statement was filed on 3rd March, 2016. The following issues were framed on 16th July, 2016:

- “1. Whether plaintiff is entitled for recovery of a sum of Rs. 19,44,073/- as claimed for? OPP*
- 2. Whether plaintiff is entitled for interest, if any, at what rate and for which period? OPP*
- 3. Whether suit of the plaintiff is bar by Section 23 Rule 2 CPC? OPD*
- 4. Relief”*

4. Thereafter, the Plaintiff filed his affidavit-in-evidence and the cross-examination of PW-1 has commenced in the suit. The Defendant's right to cross-examine the Plaintiff's witnesses was closed on 25th May, 2017, however, on 6th November, 2017, this Court allowed the Defendant's application for recall of order dated 25th May, 2017, subject to costs of Rs.4,000/-.

5. The Defendant's counter-claim for a sum of Rs.56,41,129/- was filed on 29th November, 2017. The Plaintiff took an objection that the said counter-claim was not maintainable and accordingly filed an application

under Order VII Rule 11 CPC seeking rejection of the counter-claim.

6. Vide the impugned order dated 26th September, 2018, the said application has been dismissed and the counter-claim has been taken on record.

7. A perusal of the impugned order shows that the Trial Court relied on the Supreme Court's judgment in ***Vijay Prakash Jarath vs. Tej Prakash Jarath [SLP (C) Nos. 8536-37, decided on 1st March, 2016]***. The observations of the Trial Court are as under:

"11. I have carefully gone through the entire material available on record and heard the rival submissions of both the Ld. Counsels for the parties.

12. The chronology of the events leading to the filing of the present application by the plaintiff is that the present suit was instituted by the plaintiff in September 2015, The issues was framed on 16.07.2016 by the Ld. Predecessor of this Court. The matter was fixed for PE thereafter. The written statement was filed by the defendant in the present suit on 03.03.2016. However, the counter-claim was filed by the defendant only on 29.11.2017 when the matter was fixed for cross-examination of PW-1.

13. The present suit has been instituted by the plaintiff for the recovery of the amount of Rs. 1,94,40,733/- on the basis of the invoices/bills on account of the supply of the goods by the plaintiff to the defendant. In the written statement, amongst other pleas, the defendant has taken the plea that the goods supplied by the plaintiff were defected and the defendant had suffered huge losses.

14. As stated herein above, the written statement has been filed by the defendant on 03.03.2016

but the counter-claim for the amount of Rs, 56,41,129/- has been filed on 29.11.2017,

15. Now, it is true, in the light of the abovesaid factual matrix that in the case in hand the matter was already at the stage of PE when the counter-claim was filed by the defendant on 29.11.2017 after filing of the written statement on 03.03.2016. But the fact remains that even PW-1 has not been cross examined fully till date. The evidence on behalf of the plaintiff is yet to be concluded. No doubt the turn of DE is yet to come. The counter-claim has been instituted after a period of approximately 1 year and 8 months from the date of filing of the written statement.

16. The moot question which arises for consideration is as to whether, in the light of the ratio of the abovestated authorities, the counter-claim instituted by the defendant can be taken on record or the same has to be rejected.

17. A perusal of the abovesaid authority titled as Vijay Prakash Jarath vs. Tej Prakash Jarath decided by the Hon'ble Supreme Court of India on 01.03.2016 categorically state that the counter-claim was allowed to be filed after framing of the issues and after a period of 2 and a half year from the date of framing of the issues.

18. In the case in hand, the issues have been framed only on 16.07.2016 and if, counted from that date, the counter-claim has been instituted after a period of approximately 1 year and 4 months. In the said authority, the Hon'ble Supreme Court of India has categorically stated that no prejudice was going to be caused to the plaintiff, if the counter-claim was allowed to be adjudicated alongwith the main suit.

19. Now, coming to the authorities relied upon

by the Ld. Counsel for the plaintiff, it is true that in some of the authorities, it has been stated that counter-claim should not be entertained once the trial has commenced but it has to be seen that in the authority cited as 2016(3) ALJ 412 titled as M/s Narendra Road Lines Pvt. Ltd. v. Rashtriya Ispat Nigam Limited, a counter-claim was filed after a period of 5 years from the date of framing of the issues, which is not so to the present case.

20. In the light of the abovesaid discussion, to my mind, in the case in hand, the matter is only at the stage of PE and no prejudice is going to be caused to the plaintiff, if the counter-claim filed by the defendant is allowed to be taken on record. As such, I have no hesitation to hold that the present application filed by the plaintiff under order 7 Rule 11 of the CPC for rejection of the counter-claim is absolutely devoid of any merits and the same is hereby dismissed.”

8. The contention of ld. counsel for the Plaintiff is that in view of the recent judgment of the Supreme Court in **Ashok Kumar Kalra v. Surendra Agnihotri and Ors., 2019 (16) SCALE 544**, the counter-claim is not maintainable, as the same has been filed after the framing of issues and after the commencement of the Plaintiff's evidence. Reliance is placed on paragraphs 16 to 20 of the said judgment, as also the concurring opinion in paragraphs 43 to 46.

9. Ld. counsel further submits that the counter-claim is also barred by limitation as the first notice was issued by the Plaintiff in 2013, to which a reply was sent by the Defendant, but the counter-claim has only been filed in 2017. In any event, it is submitted that the settled legal position, as per the judgment in **Ashok Kumar Kalra (Supra)**, is now a binding precedent which

does not permit the filing of a counter-claim after the commencement of recordal of evidence.

10. On the other hand, Mr. Asutosh Lohia, Id. counsel appearing for the Defendant submits that the concurring opinion in ***Ashok Kumar Kalra (Supra)***, especially paragraph 44, shows that even after commencement of evidence, the counter-claim can be entertained, however, the Court's discretion has to be exercised "*wisely and pragmatically*". Id. counsel also wishes to rely upon ***Vijay Prakash Jarath (Supra)*** to submit that the view of the Supreme Court has not changed in its recent judgment. It is further submitted that the counter-claim is not barred by limitation, as there is a continuing cause of action in favour of the Defendant.

11. On behalf of the Defendant, Id. counsel Mr. Aditya Rathee submits that the judgement in ***Vijay Prakash Jarath*** has not been overruled by the Supreme Court in ***Ashok Kumar Kalra*** and would thus continue to hold the field. Reliance is placed on paras 15 and 44 of ***Ashok Kumar Kalra (supra)*** to argue that the Supreme Court has not overruled the judgement in ***Vijay Prakash Jarath (supra)*** even in its latest judgement, and thus the facts of the present case being close to those in the judgment of ***Vijay Prakash Jarath (supra)***, the Trial Court has not erred in following the said judgement.

12. Reliance is placed on ***Sukhpreet Singh v. Kamaljeet Kaur, CRP No. 21/2010 (Decided on 4th February, 2010)*** in which a Id. Single Judge of this court has held that the Defendant has the option of either filing a counter claim as a cross suit or a separate suit at its own choice.

13. In rejoinder, Id. counsel for the Plaintiff submits that there are various other High Courts, which have taken a view that the counter claim cannot be

filed after evidence commences. Specific reliance is placed on the judgments of the Madras High Court and the Calcutta High Court in ***Southern Ancillaries Pvt. Ltd. v Southern Alloy Foundaries AIR 2003 Mad 416*** and ***M/S. Oriental Ceramic Products Pvt. Ltd. Vs. Calcutta Municipal Corporation AIR 2000 Cal 17*** wherein both the Courts have held that the counter claim cannot be permitted after issues are settled and evidence is adduced. He submits that the recent judgment of the Supreme Court in ***Ashok Kumar Kalra (supra)*** has held categorically that once issues are framed and evidence is commenced, the counter claim cannot be entertained. This, according to him, completely binds the facts of the present case.

14. A perusal of the various judgments cited across the bar shows that the Trial Court had followed the view of the Supreme Court in ***Vijay Prakash Jarath (supra)***. However, in the recent judgement of the Supreme Court in ***Ashok Kumar Kalra (supra)*** the Supreme Court after considering the various cases, has laid down the principles as to when counter claims can be entertained. The observations of the Supreme Court are as under:-

“18. In this regard having clarified the law, we may note that the Mahendra Kumar Case (supra) needs to be understood and restricted to the facts of that case. We may note that even if a counter-claim is filed within the limitation period, the trial court has to exercise its discretion to balance between the right to speedy trial and right to file counter-claim, so that the substantive justice is not defeated. The discretion vested with the trial court to ascertain the maintainability of the counter-claim is limited by various considerations based on facts and circumstances of each case. We may point out that there cannot be a straitjacket formula, rather there are numerous factors which

needs to be taken into consideration before admitting counter-claim.

19. We may note that any contrary interpretation would need to unnecessary curtailment of the right of A Defendant to file a counter-claim. This Court needs to recognise the practical difficulties faced by the litigants across the country. Attaining the laudable goal of speedy justice itself cannot be the only end, rather effective justice wherein adequate opportunity is provided to all the parties, need to be recognised as well [refer to Salem Advocate Bar Association Case (supra)].

20. We sum up our findings, that Order VIII Rule 6A of the Code of Civil Procedure 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 provide 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.”

15. The above findings of the Supreme Court, are quite clear to the effect that after framing of issues, in any case, the counter claim cannot be permitted to be filed. Even in the concurring opinion, it has been observed clearly that the commencement of evidence would bring the time period for filing of the written statement to a complete halt. Though the judgement of ***Vijay Prakash Jarath (supra)*** has not been specifically overruled, the judgement in ***Ashok Kumar Kalra (supra)*** would be completely binding on this Court, being the judgment of a 3-judge bench of Supreme Court.

16. In ***Sukhpreet Singh (supra)*** the issue raised was whether the Counter Claim had to be filed only with the written statement and whether it is liable to be rejected if not filed with the written statement. The Court held that the Counter claim can be filed even independent of the written statement or as a separate suit and the same would not be liable to be rejected under Order 7 Rule 11 CPC.

17. Even in the case of ***Southern Ancillaries Pvt. Ltd. v Southern Alloy Foundaries and Oriental Ceramic Products Pvt. Ltd. Vs. Calcutta Municipal Corporation***, the High Courts of Madras and Calcutta have held that the counterclaim is not liable to be taken on record after the evidence has commenced.

18. Under these circumstances, the ultimate question is as to what is the prejudice caused to the Plaintiff, which is the basic test which follows across all the judgements.

19. The law that has now been settled in view of the judgment of the Supreme Court in *Ashok Kumar Kalra* is that in any case after framing of issues, the counter claim cannot be taken on record. The only exception would be as found in the concurring opinion in the said judgment, wherein it is observed that if the recordal of the evidence has not commenced, and a case is made out for taking the counter claim on record, only in exceptional circumstances, the same would be permissible.

20. The Plaintiff's evidence has commenced. Prejudice is definitely going to be caused to the Plaintiff, inasmuch as entertaining the counter claim at this stage would put the clock back on the entire suit. Considering that enormous prejudice would be caused to the Plaintiff if the Defendant's counter claim is taken on record, on both tests i.e. prejudice caused and on the ground that issues have already been framed and evidence had commenced, the present petition is liable to be allowed. The question of applying the judgment in *Vijay Prakash Jarath* in these circumstances would not apply as even by applying the said judgment, the impugned judgment is not sustainable. Accordingly, the impugned order is set aside. The counter claim is rejected. The Defendant is left to avail its remedies, if the same are available in law.

21. The question of limitation, if a fresh suit is filed by the Defendant, would be a question for Court dealing with the said matter would consider at that stage.

22. The petition is allowed in the above terms.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 19, 2020/MR/R.G.