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A.No.3614 of 2022

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in C.S.No.104 of 2021

SENTHILKUMAR RAMAMOORTHY J.

The defendant in the suit has presented this application for leave to present a counter claim. The suit was presented on 26.02.2021 as a summary suit for recovery of a sum of Rs.2,67,28,393/- from the defendant with interest on Rs.2,45,92,542/- at 24% per annum from the date of plaint until realization. The defendant filed an application for leave to defend (A.No.1109 of 2021). The said application was allowed unconditionally by order dated 23.08.2021 and the defendant was directed to file the written statement by 02.09.2021. The defendant filed the written statement on 02.09.2021, as recorded in the order of even date. Thereafter, the matter was listed for filing affidavits of admission / denial. At the hearing on 19.04.2022, the defendant submitted that it intends to file a counter claim. Pursuant thereto, the counter claim was lodged some time in July 2022, and the present application for leave was filed.

2. Learned counsel for the applicant / defendant states that a counter claim may be received even after the written statement is filed provided such counter claim is within the period of limitation. In support of this contention,



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reliance is placed on the judgment of the Hon'ble Supreme Court in *Ashok*

Kumar Kalra v. Wing Commander Surendra Agnithotri and others (Ashok Kalra), (2020) 2 SCC 394. Learned counsel invited my attention to paragraphs 2, 14, 17, 18, 19 and 21 of the said judgment to contend that the only restriction imposed by Rule 6A of Order VIII of the Code of Civil Procedure, 1908 (the CPC) is with respect to the cause of action. By drawing reference to the illustrative factors set out therein for deciding such application, learned counsel submitted that permitting the defendant to lodge the counter claim would prevent multiplicity of proceedings. It was also submitted that the present suit was instituted as a summary suit and, therefore, upon leave to defend being granted unconditionally, the defendant was only given 10 days time to file the written statement.

3. These contentions were refuted by learned counsel for the plaintiff. Learned counsel submitted that this is a commercial dispute. As such, it should be decided by applying the time limit specified in the CPC, as applicable to commercial disputes. With regard to the filing of a written statement, he submitted that Order VIII Rule 1 of the CPC was amended by introducing, in the proviso thereto, a maximum time limit of 120 days from the date of service of suit summons for such purpose. By referring to the judgment of Hon'ble



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Supreme Court in *SCG Contracts (India)(P) Limited v. K.S. Chamankar*

Infrastructure Private Limited (SCG Contracts) (2019) 12 SCC 210, he submitted that the Court has no discretion with regard to extension of the said time limit.

4. Consequently, he submits that the judgment of the Supreme Court in *Ashok Kalra* cannot be construed as extending the outer limit of 120 days for filing a written statement in a commercial dispute. If so interpreted, he contends that the object and purpose of the Commercial Courts Act would be defeated. He further submits that the applicant / defendant would not be without remedy in as much as a separate suit may be filed provided the counter claim is within the period of limitation. Even with regard to Court fee, he submits that the defendant would be in a position to adjust the Court fee if a separate suit is filed in respect of the counter claim.

5. At the outset, it should be noticed that the suit was instituted by the plaintiff as a summary suit. Consequently, the time limit specified in Order VIII Rule 1, including the proviso thereto, as applicable to a commercial dispute, does not apply. Likewise, the substituted second proviso to sub-rule (1) of Rule 1 of Order V also does not apply. Instead, the procedure prescribed in Order VII



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of the Original Side Rules (the OS Rules) applies. As regards Order VIII Rule

6A CPC, the said provision has not been amended in its application to commercial disputes. In *Ashok Kalra*, the Hon'ble Supreme Court interpreted Order VIII Rule 6A CPC and concluded that the counter claim may be filed after the written statement is filed. The Supreme Court also concluded that the language of sub-rule (1) thereof does not place an embargo on the filing of the counter claim and that the restriction is with respect to accrual of the cause of action. The Supreme Court also enumerated illustratively the factors to be taken into consideration while deciding an application for leave to present a counter claim. The illustrative factors include the period of delay, the limitation period, the reason for delay, the similarity of the cause of action between the main suit and counter claim, cost of fresh litigation, prejudice to the counter party and the like.

6. Turning to the facts of this case, as stated earlier, the suit was presented as a summary suit on 26.02.2021. Leave to defend was granted by order dated 23.08.2021 and the written statement was filed pursuant thereto on 02.09.2021. The present application was filed in July 2022 after lodging the counter claim in April 2022. Therefore, the counter claim was lodged after 120 days from the date of receipt of the suit summons but it cannot be said that the



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counter claim was lodged after considerable delay. Both the suit claim and

counter claim arise out of or pertain to the Memorandum of Understanding dated 26.09.2017 between the parties and the addendum thereto. The defendant claims the right to be indemnified in respect of losses arising from alleged misrepresentations that are allegedly attributable to the plaintiff. Thus, it also appears that the claim and counter claim are closely connected. Therefore, if the illustrative factors enumerated by the Supreme Court are applied to the facts of the case, a case is made out for granting leave as prayed for. However, before drawing conclusions, the objections raised by learned counsel for the plaintiff should be considered.

7. The principal ground on which learned counsel for the plaintiff opposed the application is that the counter claim was lodged after the time limit of 120 days as per the proviso to Order VIII Rule 1. Upon examining Order VIII Rule 1 and the proviso thereto, it is clear that it does not apply to suits presented as summary suits. Indeed, the time limits and procedures with regard to summary suits are contained in Order XXXVII CPC, except where a special procedure is prescribed, such as by Order VII of the OS Rules of this Court. The judgment of the Supreme Court in **SGS Contracts** is also in the statutory context of the proviso to Order VIII Rule 1 and Order V Rule 1(1).



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Consequently, the time limit prescribed by the proviso cannot be read into sub-rule (1) of Rule 6A of Order VIII in its application to a summary suit. Without doubt, as contended by learned counsel for the plaintiff, this has the consequence of enabling a defendant in a summary suit to file the written statement or lodge the counter claim after 120 days from the receipt of suit summons. In the absence of an amendment to the applicable and corresponding provisions of the CPC or the OS Rules governing summary suits, this legislative lacuna cannot be filled-up by applying the 120 day limit. In order to ensure expeditious disposal of commercial disputes and thereby further the object of the enactment, nonetheless, the Court may take into account the extent of delay in lodging a counter claim while deciding such application in the context of a commercial dispute.

8. It should also be recognised that the defendant would be in a position to file a separate suit as regards the counter claim if the counter claim is within the period of limitation. From the pleadings in support of the counter claim, it does not appear *ex facie* to be barred by limitation. As such, permitting the defendant to file the counter claim in this suit precludes multiplicity of proceedings and eventually would be in the interest of all parties. For all these reasons, the objections of the plaintiff are overruled and this application is



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allowed as prayed for. As a corollary, the plaintiff is granted ***three weeks*** time to file a written statement in response to the counter claim.

02.09.2022

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