

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE BIVAS PATTANAYAK

**C.O. 2406 of 2022
Tufan Basak
versus
Tumpa Basak & Anr.**

For the Petitioner	: Mr. Asit Baran Raut, Advocate Ms. Ishita Raut, Advocate Mr. Tuhin Subhra Raut, Advocate Mr. Atul Basak, Advocate
For the Opposite Parties	: Mr. Debdipto Banerjee, Advocate Mr. Soumen Banerjee, Advocate
Heard on	: 28.02.2023
Judgment on	: 26.07.2023

Bivas Pattanayak, J. :-

1. This revisional application has been filed under Article 227 of the Constitution of India challenging Order dated 14th June, 2022 passed by learned Civil Judge (Junior Division), 1st Court, at Bidhannagar, North 24 Parganas in Title Suit No. 145 of 2005 allowing the application of the defendants-opposite parties for amendment of written statement.
2. The brief fact of the case is that the petitioner-plaintiff filed a suit for a decree of declaration and for recovery of *khas* Possession against the defendants-opposite parties being Title Suit No. 145 of 2005. In the said suit, the defendant-opposite party no.1 entered appearance and filed her written statement on 11.05.2006. Thereafter issues were framed in the suit and plaintiff-petitioner filed his examination-in-chief on affidavit and was cross-examined by defendant-opposite party no.1. At the stage of cross-

examination of plaintiff-petitioner, the defendant-opposite party no.1 filed application for amendment of written statement along with a prayer for counter-claim. The learned Trial Judge, upon considering the materials on record, allowed the application of defendant-opposite party no.1 for amendment of written statement.

3. Being aggrieved by and dissatisfied with the impugned order of the learned Trial Court, plaintiff-petitioner filed the present revisional application.

4. Mr. Asit Baran Raut, learned advocate for the plaintiff-petitioner, submitted at the outset that the application for amendment of the written statement has been filed almost after 15 years since filing of the written statement on 11.05.2006. The trial of the suit has already commenced and examination of the petitioner-plaintiff (PW1) has begun. The defendant-opposite party no. 1 without assigning any cogent ground filed application for amendment of written statement after commencement of trial. The provisions for amendment of pleadings under Order VI Rule 17 of the Code has been substantially amended by Civil Procedure Code (Amendment) Act, 2002 which clearly envisages that after commencement of the trial, no application for amendment shall be allowed unless it is shown that in spite of due diligence, the matter could not be raised before the commencement of trial. The defendant-opposite party no.1, in her application for amendment of written statement, has not disclosed and/or provided any explanation for seeking amendment of the written statement at a belated stage, that too, after commencement of trial and the contents of the

application for amendment is silent on this aspect. Such being the position, the impugned order of the Trial Court allowing the application of the defendant-opposite party no.1 for amendment of written statement is not sustainable in law and is liable to set aside. To buttress his contention, he relied on the decision of Hon'ble Supreme Court passed in **Vidyabai and Others versus Padmalatha and Another** reported in **(2009) 2 SCC 409** and also of this Court passed in **Smt. Jayasri Guha (Nee Ghosh) versus Smt. Sukla Ghosh** reported in **AIR 2012 Cal 237**.

He further submitted that, by way of amendment, the defendant has also introduced prayer for counter-claim. However, such counter-claim is hopelessly time barred under Article 113 of the Limitation Act read with Section 3(2)(b) of the Limitation Act. In support of his content, he relied on the decision of this Court passed in **M/s. Oriental Ceramic Products Pvt. Ltd. versus Calcutta Municipal Corporation** reported in **AIR 2000 Cal 17**. Further under the provisions of Order VIII Rule 6A of the Civil Procedure Code, counter-claim is not maintainable after disclosure of defense. He relied on the decision of this Court passed in **Shyamal Kumar Das versus Sanjoy Chowdhury** reported in **2011 (5) CHN (Cal) 115**. Further relying on the decision of this Court passed in **Aninda Saha and Another versus Amal Saha** reported in **AIR 2001 NOC 101 (Cal)**, he submitted that counter-claim cannot bring something which is foreign to the suit. In view of his above submissions, he prayed for setting aside the impugned order under challenge of the learned Trial Judge.

5. In reply to the contention raised on behalf of the plaintiff-petitioner, Mr. Debdipto Banerjee, learned advocate for the defendants-opposite parties, submitted that lately the defendants approached a new advocate who upon going through the relevant papers and documents opined that certain important facts which should have been pleaded in the written statement has been left out and those needs to be incorporated by way of amendment of written statement with a prayer for counter claim. Thus the defendants-opposite parties could not introduce such facts at the time of filing of the written statement. The amendment of written statement sought for are required for just decision of the case and adjudication of real controversy between the parties and as such the learned Trial Judge has rightly allowed the application for amendment of the written statement filed by the defendants-opposite parties. In light of his aforesaid submissions, he prayed that the order of the learned Trial Judge should be affirmed.

6. While deciding the issue in the present revisional application whether the learned Trial Court was justified in allowing the application for amendment of written statement filed by the defendants-opposite parties, the relevant provisions of Civil Procedure Code under Order VI Rule 17 is required to be referred to which is read as under:

***“R 17. Amendment of pleadings.*—The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of**

determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

Order VI Rule 17 of the Civil Procedure Code provides for amendment of the pleadings. The Court may at any of the proceedings allow either party to alter or amend his pleadings (including the written statement) in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. Proviso to Order VI Rule 17 provides that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the parties could not have raised the matter before the commencement of trial.

7. Bearing in mind the provisions of law enumerated hereinabove, let me revert to the facts involved in the case. The plaintiff filed a suit for a decree of declaration and recovery of *khas* possession. It is not in dispute that in the said suit, the defendant-opposite party no.1 entered appearance and filed written statement in the year 2006. The application for amendment of written statement has been filed in the year 2021. Undisputedly such application for amendment of written statement has been filed after commencement of trial which is at the stage when the examination of PW1 was going on. The amendment of written statement has been sought for

after almost 15 years. It is contended in the application for amendment of written statement that the defendants' new advocate upon going through the relevant papers and documents was of the opinion that certain important facts which should have been pleaded in the written statement has been left out and hence for incorporation of the same the amendment has been sought for. The aforesaid explanation does not fulfil the precondition envisaged in the proviso to Order VI Rule 17 of the Code pertaining to a reasonable ground of due diligence. Save and except the aforesaid ground no explanation has been provided in the application for amendment that in spite of due diligence, the defendant-opposite party no.1 could not have raised the matter before the commencement of trial. I find substance in the submissions of Mr. Raut, learned advocate for the petitioner, relying on *Vidyabai (supra)* and *Smt. Jayasri Guha (Nee Ghosh) (supra)* in this regard.

8. With regard to the counter-claim, from the amendment application it is found that the cause of action of the counter-claim arose on and from date of filing of the suit, and on 18.09.2014 as well as on 10.02.2021 and is continuing daily as contended by defendant-opposite party no.1.

9. Before delving to discuss the acceptability of the counter-claim, it would be apposite to refer to the relevant provisions of the Code under Order VIII Rule 6A which is reproduced hereunder:

“R 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 according to the defendant against the

plaintiff either before or after the filing of the suit but before 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.”

On bare perusal of the aforesaid provisions, it indicates that a counter-claim can be filed where the cause of action accrued either before or after filing of the suit and, in any case, before the filing of the written statement. It is not in dispute that the written statement had been filed by the defendant-opposite party no.1 on 11th May, 2006. From the averments made in the application for amendment of written statement relating to counter-claim, it is noted that the cause of action in the counter-claim pertains to two periods namely (i) On the date of institution of the suit and (ii) On 18th September, 2014 as well as on 10th February, 2021 and is continuing thereafter.

9.1. So far as the first cause of action on the date of institution of the suit is concerned, it arose prior to filing of the written statement. Relying on *Shyamal Kumar Das (supra)*, Mr. Raut, learned advocate for the petitioner, contended that counter-claim is not maintainable after disclosure of the defense. In ***Mahendra Kumar & Anr. versus State of Madhya Pradesh & Ors.*** reported in **1987 (3) SCC 265**, the appellants filed counter-claim after filing of the written statement and objection was raised against that counter-claim on the ground that it was barred by limitation as prescribed by certain provision of a Special Act and it was also not maintainable under Order VIII Rule 6A(i) of the Civil Procedure Code. The learned District Judge dismissed the counter-claim on a finding that it was barred by limitation prescribed by the Special Act. The High Court in revision upheld the finding of the District Judge and further held that the counter-claim having been filed after the filing of written statement was not maintainable under Order VIII Rule 6A(i) of the Code of Civil Procedure. In the appeal by special leave, the Hon'ble Supreme Court reversed the concurrent findings of the Courts below on the question of bar of limitation and held that Order VIII Rule 6A(i) does not on the face of it bar the filing of the counter-claim after filing of the written statement and as the cause of action for the counter-claim had arisen before the filing of the written statement, the counter-claim was quite maintainable. The proposition of the Hon'ble Court in *Mahendra Kumar (supra)* was not pressed for consideration before the Co-ordinate Bench of this Court in *Shyamal Kumar Das (supra)*. Thus, the argument advanced on behalf of the

petitioner that counter-claim cannot be filed after disclosure of written statement, fall short of merit. Be that as it may, it is apparent on the face of record that the counter-claim by way of amendment has been instituted after 15 years of filing of the written statement. It is pertinent to note that the defendant-opposite party no.1 has not disclosed any reason whatsoever as to why she did not make this counter-claim which arose on the institution of the suit when she filed the written statement or before the issues were settled or before the evidence of plaintiff was initiated and why she had to wait so long before putting forward this counter-claim. At a belated stage, if such counter-claim of defendant-opposite party no.1 is accepted, it would seriously prejudice the petitioner-plaintiff in defending the counter-claim. Upon plain reading of order VIII Rule 6A and 6G of the Code of Civil Procedure, it manifest that the counter-claim has to be treated as a cross-suit and has to be tried along with original claim made in the suit. Therefore, when the counter-claim is to be tried along with the original claim and all the rules of the pleadings apply to the counter-claim, it becomes a plaint in the cross-suit and the plaintiff is entitled to file his defense to the counter-claim by way of filing written statement in answer to such counter-claim of the defendant, it necessarily follows that a counter-claim, if not set up in the written statement, has to be set up before the issues are framed, before recording of evidence commence. Unless that is done, the acceptance of counter-claim would cause great prejudice to the plaintiff in the suit of being taken by surprise (***See Smt. Parvathamma versus K. R. Lokanath & Others, AIR 1991 Kant 283***).

This Court in *M/s. Oriental Ceramic Products Pvt. Ltd. (supra)* has considered the aforesaid decision of Karnataka High Court in *Smt. Parvathamma (supra)* and upheld the rejection of counter-claim by the learned Trial Court since the application was devoid of any reason whatsoever for filing the counter-claim after filing of the written statement or after issues were settled or evidence were taken. Mr. Raut, learned advocate for the petitioner, relying on *M/s. Oriental Ceramic Products Pvt. Ltd. (supra)* has rightly pointed out that there was inordinate unexplained delay in raising counter-claim. Even though Rule 6A of Order VIII of the Code permits the filing of a counter-claim after the written statement, the Court has the discretion to refuse such filing if it is done at a highly belated stage (See ***Ashok Kumar Kalra versus Wing Cdr. Surendra Agnihotri & Ors.*** reported in **(2020) 2 SCC 394**). Thus, even though the cause of action of the counter-claim arose on the date of institution of the suit prior to filing of the written statement yet cannot be accepted for inordinate unexplained delay.

9.2. The second cause of action of counter-claim pertains to the period after filing of the written statement. The question which needs consideration is whether such counter-claim raised after filing of the written statement can be accepted by the Court.

In ***Jag Mohan Chawla & Another versus Dera Radha Swami Satsang & Others*** reported in **1996 (4) SCC 699**, the Hon'ble Supreme Court held in paragraph 5 as follows:

"....The only limitation is that the cause of action should arise before the time fixed for filing written statement

expires. The defendant may set up a cause of action which has accrued to him even after institution of the suit....”

In ***Smt. Shanti Rani Das Dewanjee versus Dinesh Chandra Dey (Dead) by LRs.*** reported in **1997 (8) SCC 174**, the Hon’ble Supreme Court held as hereunder:

“2....If the cause of action had arisen before or after the filing of the suit, and such cause of action continued up to the date of filing written statement or extended date of filing written statement, such counter-claim can be filed even after filing the written statement....”

Similar view has also been taken by the Hon’ble Supreme Court in *Mahendra Kumar (supra)*. The Hon’ble Supreme Court held as follows:

“15. The next point that remains to be considered is whether Rule 6A(1) of Order VIII of the Code of Civil Procedure bars the filing of a counter-claim after the filing of a written statement. This point need not detain us long, for Rule 6A(1) does not, on the face of it, bar the filing of a counter-claim by the defendant after he had filed the written statement. What is laid down under Rule 6A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not.”

Bearing in mind that aforesaid observation of the Hon’ble Court, it is apparent that the counter-claim cannot be filed in respect of a cause of action which accrues to the defendant after filing of the written statement. In the present case, the written statement was filed on 11th May, 2006 and

the cause of action as contended by the defendant-opposite party no.1 accrued on 18.09.2014 as well as on 10.02.2021 and is continuing daily which is after the filing of the written statement. It manifest from the aforesaid provisions that any counter-claim in respect of cause of action pertaining to the aforesaid period cannot not be filed in the present proceedings in view of the mandatory provision under Order VIII Rule 6A of the Code. In view of above, the counter-claim, whose cause of action has arisen after filing of the written statement, cannot be accepted.

10. Although it has been argued relying on *Aninda Saha (supra)* by learned advocate for the petitioner-plaintiff that the counter-claim cannot be pressed on something which is completely foreign to the plaint of the plaintiff, yet it is found that the facts involved in the cited decision is squarely different from the case at hand.

11. In view of the above discussion, the impugned order of the learned Tribunal allowing the application for amendment of the written statement with the prayer for counter-claim is liable to be set aside.

12. Accordingly, the Civil Revisional application being **C.O. 2406 of 2022** is allowed on contest. The impugned order dated 14th June, 2022 passed by learned Civil Judge (Junior Division), 1st Court at Bidhannagar, North 24 Parganas in Title Suit No. 145 of 2005 is hereby set aside. No order as to costs.

13. All connected applications, if any, stand disposed of.

14. Interim order, if any, stands vacated.

15. Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of necessary legal formalities.

(Bivas Pattanayak, J.)