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C.O. 3591 of 2023

Jayanta Sounth
Vs.
Nawab India Cement Private Limited & Ors.

Mr. Sudip Deb,
Mr. Riju Ghosh,
Mr. Aranyak Saha,
Ms. Ipsita Ghosh
... for the Petitioner.

The revisional application arises out of an order dated August 8, 2023 passed by the learned Civil Judge (Senior Division) at Jhargram in Other Suit No.90 of 2015.

The petitioner is the defendant no.2 in the suit. The opposite party no.1 as plaintiff, filed a suit for declaration, injunction and accounts.

The plaint case was that the plaintiff manufactured Portland Slag Cement. The factory of the plaintiff was situated at Khasjungle, morefully described in schedule 'A' of the plaint. The defendant no.1 was also a manufacturing company and engaged in the business of marketing cement in the name and style 'Roofers Cement'. The plaintiff found it inconvenient to market the cement manufactured by the company. The defendants approached the plaintiff and agreed to market the cement produced by the plaintiff. The parties entered into a memorandum of agreement on February 7, 2012. On the same day, another memorandum of agreement was executed for marketing the cement manufactured by the plaintiff company. In the first memorandum it was agreed that ownership and share of the plaintiff company would be taken over by the defendant no.1 and the second agreement provided that till the ownership and share was taken over, the marketing of the cement manufactured by the plaintiff would be done by the defendants.

Both the memorandum of agreements are depicted as schedule 'C' of plaint. On the basis of the said agreement, a sum of Rs.12,75,00,000/- was fixed as the price for transfer of ownership/share. It was also decided that the defendants would liquidate the loan of the plaintiff company with the bank, out of the agreed price of Rs.12,75,00,000/-. The defendants deposited a sum of Rs.8,37,86,304/- directly to the bank on different dates. The defendants also deposited in the bank, a sum of Rs.2,53,00,000/- on different dates in favour of the director of the plaintiff company. A total sum of Rs.10,90,86,304/- was deposited by the defendants out of 12,75,00,000/-. A sum of Rs.1,84,13,696/- was due to the plaintiff by the defendants. The defendants failed and neglected to pay the said amount. On the other hand, Hirak Nath Sounth the defendant No.3, requested the plaintiff to accomodate

Rs.25,00,000/- and assured to pay the entire balance amount shortly. The sum of Rs.25,00,000/- was paid. A sum of Rs.2,09,13,696/- became due to the plaintiff. The defendants failed and neglected to pay the amount. A grace period was also allowed by the plaintiff by accommodating a sum of Rs.25,00,000/-. The defendants also failed to perform the obligations on the basis of the memorandum of agreement. Accordingly, the agreements being schedule 'C' became inoperative and the amounts paid by the defendants on different dates towards the price of the share/ownership stood, forfeited. Some persons armed with deadly weapons entered the factory of the plaintiff and created vandalism. They claimed to be persons from Roofers Cement Private Limited. The suit was filed.

The plaintiff prayed for declaration of right, title and interest in the Schedule 'A' and Schedule 'B' of the plaint. Further declaration was prayed for, that the Schedule 'C' of the plaint was not acted upon. The suit was filed sometime in 2015. The defendant no.2 filed the written statement in 2017.

In the written statement, the defendant no.2/petitioner, denied the contentions of the plaintiff. It was specifically stated that the plaintiff had failed and neglected to perform the terms and conditions under the memorandum of agreement dated February 7, 2012. The defendant agreed to liquidate the money and accordingly, a sum of Rs.2,53,00,000/- was deposited on different dates. The plaintiff also failed to hand over documents, release the employees upon payment of their legitimate dues and further refused to transfer the share in favour of the defendants. The defendants were victim of such non-performance of the plaintiff and suffered irreparable loss after having made substantial payment. The defendants could not get any advantage of the memorandum dated February 7, 2012, due to sheer negligence of the plaintiff who refused to perform their part of the agreement. The plaintiff neglected to supply their manufactured products, for marketing by the defendants. The plaintiff failed to deliver the consignment of the cement to the defendants. The omission and commission of the plaintiff resulted in huge loss of business. Not only did the defendant suffer loss of capital in the form of capital investments, but also loss of goodwill. The defendants were required to be compensated due to non-performance of the plaintiff's part of the contract. It was not possible for the defendants to continue with the performance of the contract and the defendants were entitled to refund of money already paid along with permissible bank interest and compensation for a sum of Rs.10

crores for the loss of business from February 7, 2012 till the year 2017.

From the written statement, it is clear that the defence case was that defendants had performed their part of the contract, but the plaintiff failed to do so. As a result, the defendants suffered monetary loss. The defendants were not only entitled to refund, but were also entitled to be compensated by way of damages to the tune of Rs.10 crores for the loss of business between February 2012 to 2017.

The suit proceeded. Issues were framed on March 26, 2021. Thereafter, the petitioner/ defendant no.2 filed an application for amendment of the written statement on June 20, 2022 for incorporation of a counter-claim. The learned Court below rejected such application. Hence, this revisional application has been filed.

The plaintiff urged before the learned Court below that issues had been framed, evidence on affidavit under Order 18 Rule 4 of the Code of Civil Procedure had been filed, thus, the counter-claim should not be allowed after evidence had commenced. According to the learned Court below, the period of limitation to file a counter-claim was three years. It was further found that the proposed amendment to incorporate the relief of damages to the tune of Rs.17 crores would offend the guidelines laid down by the Hon'ble Apex Court with regard to the period within which a counter-claim should be filed. According to the learned Court, the counter-claim also suffered from mis-joinder of causes of action because Hirak Sounth, one of the Directors of the company had not made any such claim on behalf of the company.

Mr. Deb, learned Advocate appearing on behalf of the petitioner, relies on a decision of the Uttarakhand High Court in the matter of **Jayanti Prasad Nautiyal Vs. Kamla Nand Bahuguna & anr.** reported in **AIR 2009 Uttarakhand 26**. In the said decision, placing reliance on a decision of the Hon'ble Apex Court in the case of **Ramesh Chand Ardawatlya Vs. Anil Panjwani,** reported in **2003(7) SCC 350,** it was held that a counter-claim could be preferred by a defendant by way of an amendment to the original written statement. The said learned Court had allowed amendment of the written statement by incorporating a counter-claim after almost 4½ years from filing of the written statement.

According to Mr. Deb, in the present case also, the petitioner sought to amend the written statement by incorporating the counter-claim. The basis of the counter-claim had already been laid in several paragraphs of the written statement. No new cause of action was introduced.

Mr. Deb further submits that amendment of a written statement should be allowed liberally. Limitation is a mixed question of law and fact and the counter-claim could not have been rejected on the ground of being time barred. His further submission is that, whether the other defendant made a similar claim or not, was a non-issue. The counter-claim was filed for the loss of business suffered by the company as a whole. The petitioner filed the same as one of the directors of the company. Further reliance was placed on the decision in the case of **Ragu Thilak D. John Vs. S. Rayappan and ors.,** reported in **AIR 2001 Supreme Court 699** wherein it was held that the object of Order 6 Rule 17 of the Code of Civil Procedure was to avoid multiplicity of proceeding and for proper adjudication of the disputes between the parties. A liberal approach should be taken as a general Rule. Technicalities of law should not be allowed to hamper the court's administration of justice. The plea of limitation being a disputed question of law and fact should not be a ground for rejection of the amendment of the written statement by which the petitioner wanted to incorporate the claim for damages.

Further reliance is placed in the case of **Andhra Bank Vs. ABN Amro Bank N.V. & ors.,** reported in **(2007) 6 S.C.C. 167** to substantiate the contention that amendment of a written statement should be allowed liberally and the Court should not go into the merits of the amendment while deciding the application.

Reliance is further placed in the decision of Hon'ble Apex Court in the case of **Ramesh Chand Ardawatiya Vs. Anil Panjwani,** reported in **AIR 2003 S.C. 2508** in support of the contention that the purpose of enabling the defendant to file a counter-claim was to avoid multiplicity of proceeding and to save court's time as also to exclude the inconvenience caused to the parties. All disputes between the same parties must be decided in the course of the same proceeding.

The next decision placed by Mr. Deb is in the case of **Vijay Prakash Jarath Vs. Tej Prakash Jarath,** reported in **(2016) 11 S.C.C. 800,** the Hon'ble Apex Court held that usually a counter-claim is not permitted after framing of issues and after evidence is concluded, but in certain exceptional situations, the counter-claim could be filed even if evidence commenced, but was not concluded. All that the Court was required to consider was whether any serious prejudice would be caused to the other side or not.

Lastly, it is submitted that the Hon'ble Apex Court held in the case of **Ashok Kumar Karla Vs. Wing CDR, Surendra Agnihotri & ors.** reported in **(2020) 2 SCC 394** that in exceptional circumstances, a counterclaim may be permitted to be filed after a written statement till the stage of commencement of recording of the evidence.

It was incumbent upon the learned Court below to look into certain factors before rejecting the application for amendment by which the counter-claim was sought to be incorporated. In this case, evidence had not commenced.

Considered the submissions of Mr. Deb, the decisions cited by Mr. Deb and the conclusion arrived at by the learned Court below. The learned Court below rejected the counter-claim on the following grounds-

(a) issues were framed on March 26, 2021;

(b) evidence on affidavit was filed;

(c) the counter-claim should have been filed within three years from the cause of action;

(d) the other director of the company did not raise any claim towards damages and there was mis-joinder of causes of action.

Counter claim can be filed even after the written statement has been filed by the defendant.

The law is also well-settled that amendment of a written statement shall be allowed liberally. Further, when the question of limitation involves mixed question of law and facts and elaborate arguments would be ncessary, the amendment should not be rejected on the ground of limitation, alone. It has also been settled judicially that counter-claim cannot be allowed to be filed after issues were framed.

The question whether a counter claim can be filed at any time, even after the filing of the written statement, is no more res integra. It has been held by the Hon'ble Apex Court that in exceptional cases the counter claim can be filed even after framing of issues, but before evidence has started.

Reference is made to the decision of ***Mahesh Govindji Trivedi vs. Bakul Maganlal Vyas & Ors.*** decided in ***Civil Appeal No.- 7203 of 2022***. The Hon'ble Apex Court held as follows:-

> "**13.** In Ashok Kumar Kalra (supra), the 3-Judge Bench of this Court essentially considered the question on reference as to whether it is mandatory for a counter-claim of the defendant to be filed along with the written statement. While answering this question, this Court underscored the basic principles that procedural law should not be construed in such a way that it would leave court helpless; and that a wide discretion had been given to the Civil Court regarding the procedural elements of a suit. Having said so, this Court observed that <u>a counter-claim is designed to avoid multiplicity of proceedings; that time limit for filing a counter-claim is not explicitly</u>

provided for but there is limitation as to the accrual of the cause of action. However, the majority opinion has been that the defendant cannot be permitted to file counter-claim after the issues are framed and the suit has proceeded substantially. It was observed and held in the lead judgment, inter alia, as under:-

'**18.** As discussed by us in the preceding paragraphs, the whole purpose of the procedural law is to ensure that the legal process is made more effective in the process of delivering substantial justice. Particularly, the purpose of introducing Rule 6-A in Order 8 CPC is to avoid multiplicity of proceedings by driving the parties to file separate suit and see that the dispute between the parties is decided finally. If the provision is interpreted in such a way, to allow delayed filing of the counterclaim, the provision itself becomes redundant and the purpose for which the amendment is made will be defeated and ultimately it leads to flagrant miscarriage of justice. At the same time, there cannot be a rigid and hyper-technical approach that the provision stipulates that the counterclaim has to be filed along with the written statement and beyond that, the court has no power. The courts, taking into consideration the reasons stated in support of the counterclaim, should adopt a balanced approach keeping in mind the object behind the amendment and to subserve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counterclaim has to be filed, by curtailing the discretion conferred on the courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counterclaim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects sought to be achieved through the amendment. But however, we are of the considered opinion that the defendant cannot be permitted to file counterclaim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for the particular amendment to CPC."

In the matter of ***Ashok Kumar Kalra vs. Wing Cdr. Surendra Agnihotri & Ors.*** reported in ***(2020) 2 SCC 394,*** one of the Hon'ble Judges of the bench was of the view that though the normal rule was that subsequent to filing of written statement, counter-claim could not be filed after issues had been framed, but under exceptional circumstances, counter-claim could be permitted to be filed even after issues had been framed, but before commencement of recording of plaintiff's evidence. His Lordship observed, inter alia, as follows:-

> "**25.** Having considered the previous judgments of this Court on counterclaims, the language employed in the rules related thereto, as well as the intention of the Legislature, I conclude that it is not mandatory for a counterclaim to be filed along with the written statement. The Court, in its discretion, may allow a counterclaim to be filed after the filing of the written statement, in view of the considerations mentioned in the preceding paragraph. However, propriety requires that such discretion should ordinarily be exercised to allow the filing of a counter claim till the framing of issues for trial. To this extent, I concur with the conclusion reached by my learned Brothers. However, for the reasons stated above, I am of the view that in exceptional circumstances, a counterclaim may be permitted to be filed after a written statement till the stage of commencement of recording of the evidence on behalf of the plaintiff."

With these settled principles, this Court proceeds to decide whether the learned Court below acted illegally or with material irregularity.

In the decision of **Ashok Kumar Kalra** (supra) the majority view was that once the issues had been framed the Court could not entertain belated counter-claims, filed after submission of written statement.

In the case in hand, the issues were framed on March 26, 2021, the purpose of introduction of provisions of Order 8 Rule 6A was to avoid of multiplicity of proceeding instead of driving the parties to file separate suit. It would be convenient for the parties if they were relegated to the same suit. On the basis of such proposition, if Mr. Deb's submission that the question of delay would not be relevant as the purpose was to avoid multiplicity of suit is accepted, the very purpose of speedy disposal of a litigation would be frustrated. Parties cannot wait for an unending period to file a counter-claim. In this case, it was filed well after 5 years from filing of the written statement, and a year after the issues were framed. The learned Court below records that evidence by way of affidavit-in-chief has also been submitted. Although there cannot be a rigid and hyper-technical approach while accepting a counter-claim, the Court should adopt a balanced approach keeping in mind the object of the provisions of law. The object is to sub-serve the ends of justice. That is why, the principle has been clearly laid down by various judicial decisions that counter-claim cannot be accepted beyond the framing of the issues. In very exceptional situations, even after framing of issues counter-claim can be accepted, but before evidence commences.

In the case of **Vijay Prakash Jarath (**supra), the Hon'ble Apex Court had held that counter-claim would be permissible after framing of issues and under special circumstances after the evidence had commenced, but had not been concluded.

The issue is whether in the case in hand, exceptional situation had been made out before the learned Court below which would allow acceptance of the counter-claim almost 5 years after the written statement had been filed and almost a year after the issues were framed.

The application for amendment which was rejected and by which the counter-claim was sought to be introduced, has been perused in detail by this Court. The Court does not find any ground made out, which would qualify an exceptional situation. There are no averments which would lead the court to accept such a belated counter-claim, upon exercising discretion. Not a single paragraph has been dedicated to explain the delay caused in filing the counter-claim. Moreover, the counter-claim is a money claim in the form of damages for non-performance of a memorandum of agreement dated 2012 and for loss of business between 2012 and 2017. The same was filed in June, 2022.

Thus, in my view, the learned Court below did not act illegally or material irregularity in rejecting the amendment by not allowing incorporation of a belated counter-claim. Issues were also framed on the basis of plaint and the written statement and the evidence-in-chief has also been filed.

Under such circumstances, the revisional application is dismissed.

Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)