IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3378 OF 2014

Ajaykumar Vishnu Dasture. ...Petitioner.

Versus

Gracious Herbals Pvt. Ltd. ..Respondent.

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Mr. R. S. Apte, Senior Advocate with Mr. S. S. Bedekar for the petitioner.

Mr. Vishwajit P. Sawant, Senior Advocate for the respondent.

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Coram : Sharmila U. Deshmukh, J.

Date : June 23, 2023.

P. C. :

1. By the impugned order dated 11th December 2013, the petitioner's application for amendment of written statement to claim equitable set-off under the provisions of Order-VIII Rule-6 of the Code of Civil Procedure, 1908 [for short "CPC"] came to be dismissed.

2. Heard Mr. Apte, learned senior counsel appearing for the petitioner and Mr. Sawant, learned senior counsel appearing for the respondent. For the sake of convenience, the parties are hereinafter referred to by their status before the trial Court.

3. Mr. Apte, learned senior counsel appearing for the defendant submits both the parties fill the same character as they fill in the plaintiff's suit and the amount which is claimed as an equitable set-off is a sum of money which is legally recoverable by him from the plaintiff. He would urge that finding of the trial Court that there are two distinct causes of action is erroneous inasmuch as the pleadings in the plaint itself substantiate the position that the transactions in question are intrinsically linked. He has invited the attention of this Court to the relevant pleadings to urge that there was no separate transaction apart from the agreement which was entered into between the parties to develop 15 herbal products. He submits that pursuant to the agreement between the parties, 50% of the amount had been paid and the balance 50% amount is required to be paid and the claim in the suit is intrinsically linked with the payment which is due and payable and, as such, the defendant is entitled to claim set-off. He has invited the attention of this Court to the document which is annexed at page-112 which acknowledges the receipt by defendant of a sum of Rs.75,50,000/- as advance payment for development work carried out by him and would urge that upon development work being carried out, the balance 50% was due and payable. He would further submit that the plaintiff's

demand for a sum of Rs.79.90,703/- along with interest is pursuant to the oral agreement which was entered into between the parties. He urged that there was no say which was filed by the plaintiff objecting to the application.

4. *Per contra*, Mr. Sawant, learned senior counsel appearing for the plaintiff submits that the agreement between the parties was for development of herbal products along with the transfer of know-how, and, there was responsibility upon the defendant to market the same in Indonesia. He submits that upon a representation by the defendant that the directors of Indonesian company were coming to India and required accommodation, a loan was advanced by the plaintiff to the defendant and out of the said loan amount, a flat had been purchased. He submits that the plaint proceeds on the basis of fraud and deception and the transaction for recovery is distinct from the case set up by the defendant for equitable set-off. He distinguishes between an equitable and a legal set-off provided under the provisions of Order-VIII Rule-6 CPC by placing reliance on the decision of the Apex Court in the case of ***Jitendra Kumar Khan v. Peerless General Finance & Investments Co., Ltd [(2013) 8 SCC 769]***, on which decision reliance is also placed by learned senior counsel appearing for the defendant. He would further

urge that in event the defendant has any claim against the plaintiff, it is open for the defendant to file a counter-claim or institute a separate suit, however, in the present case, the equitable set-off cannot be claimed.

5. Considered the submissions of the parties and perused the documents with the assistance of learned senior counsel appearing for the respective parties.

6. As the issue in question is regarding the claim of set-off by the defendant, it would be relevant to reproduce sub-rule (1) of rule 6 of Order-VIII of CPC, which deals with the particulars of set-off to be given in written statement, which reads thus :

> *"Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off."'*

7. Upon a plain reading of above provision, it is clear that in a suit for recovery of money, the defendant can claim a set-off against the

plaintiff's demand in respect of an ascertained sum legally recoverable by him subject to the condition that both parties fill the same character as they fill in plaintiff's suit.

8. For that purpose, it will be necessary to refer to the pleadings in the plaint inasmuch as the contention of learned senior counsel for the plaintiff is that the suit was for recovery of an amount which was given as loan to the defendant and had no connection with the oral agreement for exchange of know-how. It is averred in the plaint that the plaintiff had offered 25% share of the profits to the defendant after deducting advance / loan given to the defendant for the purchase of furnished flat and Honda City car subject to the reimbursement received from Indonesian company – Sanbe Farma, as assured by the defendant. It is further averred that relying upon the assurances and representations given by the defendant and said Indonesian company that they will reimburse the expenses incurred for the defendant by the plaintiff, a duplex flat in a project which was developed by one of the partners of plaintiff was transferred to the defendant. Pertinently, it is the case of plaintiff that consideration for the said flat was given to the defendant by the plaintiff and the director of plaintiff in person and his family members, as advance from the plaintiff company and a brand new

Honda City car was also purchased in the defendant's name in a through similar transaction mode. It is further averred that the plaintiff was keeping a follow up about the payments against the product formulae transferred to Indonesian company and also informed them about the transfer of flat and providing other facilities to the defendant and relying upon the representations and assurances from the company through their emails, the plaintiff spent an amount of Rs.79,90,903/- over the defendant including the transactions of said flat and car. The particulars of the said amount is given in paragraph 11 of plaint. The case of plaintiff is that motive of the defendant was to rob and dupe the plaintiff without fulfilling any of his representations and assurances for assistance or technical improvements or marketing of the herbal products by developing 15 products and the cause of action arose when the defendant used money paid by the plaintiff for purchasing the flat and the Honda City car and started claiming its possession and ownership. Armed with this case, the plaintiff has approached the trial Court and sought recovery of the amount of Rs.79,90,703/-.

9. The submission of Mr. Sawant is that the amount of which recovery is sought before the trial Court is a loan amount unconnected with the business transactions between plaintiff and defendant. To my

mind, a reading of the averments in plaint indicates that both these transactions are intrinsically linked inasmuch as a specific statement is made in paragraph 11 of the plaint that based on the representations and assurances as well as the false email communications received from Sanbe Farma, the plaintiff has spent and paid the amount for the benefit of defendant. If the suit, as contended, was simplicitor for recovery of amount which was advanced as loan, there was no necessity for the plaintiff to plead and aver as regards the business transactions between the parties as well as the communications, claimed to be forged, from the Indonesian company. The specific case in the plaint is that defendant was entitled to a share in the profits after deducting the advance / loan given to the defendant for purchase of the flat and Honda City Car. By these very averments in plaint, the plaintiff has pleaded that payment of the amount of Rs.79,90,703/- was required to be adjusted against the amount due and recoverable, if any, to the defendant.

10. Mr. Apte, learned senior counsel has rightly pointed out the document at page 112 of the petition which is an acknowledgment by the defendant as having received a total sum of Rs.75,50,000/- as advance payment for the development work carried out for 15 herbal products.

11. The Apex Court in ***Jitendra Kumar (supra)*** has analysed the provisions of Order-VIII Rule-6 of CPC as regards legal set-off and an equitable set-off. The Apex Court in the said decision has referred to its earlier decision in ***Union of India v. Karan Chand Thapar and Bros. (Coal Sales) Ltd [(2004) 3 SCC 504]*** it had opined as under :

> *"What the rule deals with is legal set-off. The claim sought to be set-off must be for an ascertained sum of money and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the two claims sought to be set-off or adjusted. Apart from the rule enacted in Rule 6 abovesaid, there exists a right to set-off, called equitable, independently of the provisions of the Code. Such mutual debts and credits or cross-demands, to be available for extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the Court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross-suit of his own. When a plea in the nature of equitable set-off is raised it is not done as of right and the discretion lies with the Court to entertain and allow such plea or not to do so."*

. The Apex Court having considered various decisions on the subject, has held in paragraph 16 as under :

> *"From the aforesaid enunciation of law it is quite clear that equitable set-off is different than the legal set-off; that it is independent of the provisions of the Code of Civil Procedure; that the mutual debts and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances; that such a plea is raised not as a matter of right; and that it is the discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental*

> *principles of equity, justice and good conscience. The discretion rests with the court to adjudicate upon it and the said discretion has to be exercised in an equitable manner. An equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due."*

12. The law laid down by the Apex Court is that the cross- demands to be available for extinction by way of equitable set-off, they must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make inequitable for the Court of law to allow the claim before it and leave the defendant high and dry unless he files a cross suit. The concept of equitable set-off having founded on the fundamental principles of equity, justice and good conscience has to be exercised in an equitable manner whether the claim would be allowed or not would of course depend upon the evidence before the Court. However, considering the pleadings itself, in my opinion, the cross-demands arise from the same transaction and are connected. As held by the Apex Court, it is the discretion of the Court to entertain and allow such plea or not. However, the settled position in law is that the discretion has to be exercised judicially.

13. In the present case, the trial Court has rightly held that the parties filled the same character in respect of two claims. Having held

so, the claim of the defendant for equitable set-off was required to be allowed. In that view of the matter, the writ petition stands allowed. The impugned order dated 11th December 2013 passed in Special Civil Suit No.3 of 2022 pending before the 8th Joint Civil Judge, Senior Division, Pune is hereby quashed and set aside and the defendant's application for amendment at Exhibit-20 is allowed.

14. Considering that the proceedings before the trial Court are of the year 2012 and could not proceed further due to the pendency of present petition, it will be in the interest of justice that the trial Court decides the same expeditiously and in any event within a period of one year from today. The parties are directed to co-operate with the trial Court so as to ensure that the proceedings are disposed of expeditiously. Needless to mention that the trial Court to decide the matter on its own merits, uninfluenced by the observations made herein.

[Sharmila U. Deshmukh, J.]

[Pursuant to speaking to the minutes order dated **3rd July 2023**, this order is corrected. The correction is in the appearance of advocates which is shown in **bold**.]