

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 795 of 2022

M/s Pentagon

VERSUS

Sankari Basu

For the petitioner:

Mr. Udayan Datta, Adv.

for the opposite party:

Mr. Sanjay Mukherjee, Adv.

Mr. Sourav Choudhury, Adv.

Last Heard on: June 28, 2024

Judgment on: July 5, 2024

Biswaroop Chowdhury, J:

The petitioner before this Court is a plaintiff in a money suit, and is aggrieved by the Order dated March 05, 2021 passed by Learned Civil Judge (Senior Division) 4th Court at Alipore District – South 24 Parganas in M.S. No. 33 of 2000 refusing the prayer of the petitioner for rejection of the counter claim of the opposite party/defendant. The petitioner being aggrieved by the

order of learned trial Judge has come up before this Court with an application under Article 227 of the Constitution of India.

The case of the petitioner before the learned court below for rejection of counter claim may be summed up thus.

1. The defendant has appeared in the suit and filed written statement with purported counter claim.
2. It will be evident from the allegations made in the written statement that defendant's right to claim for the purported counter claim and cause of action for the same expired long back in the year 2002, but the defendant filed her written statement with counter claim on or about 4th October 2005. Thus the counter claim is hopelessly barred by the law of limitation.
3. That the defendant has no right to set up her counter claim after expiry of period of limitation. As such the counter claim of the defendant be rejected without taking trouble for trial or for evidence on such counter claim.

The defendant/opposite party contested the petition of the petitioner/plaintiff by filing within objection, denying the allegations of the petition. It is the contention of the defendant/opposite party that the application for rejection of counter claim is not maintainable in law and facts. It is further contended that the defendant came to know about the institution of the suit from a letter of Sri Rajat Chowdhury, Advocate dated 25-05-2005

enclosing a copy of the plaint in which the plaintiff admitted receipt of Rs 73,000/- from the defendant. Hence the defendant's counter-claim is not barred by Law of Limitation. It is also contended that direction was issued upon the Sheristadar to submit report in respect of whether the Court fees on the counter-claim filed by the defendant which already paid is correct or not. Accordingly dates were fixed on 13-12-2005, 20-02-2006 and 26-04-2006. Subsequently learned trial Court was pleased to accept the said counter claim filed by the defendant against which the plaintiff did not raise any objection. It is contended that the defendant's counter claim is required to be adjudicated upon taking evidences and not to be thrown out at this stage on the alleged ground of Law of Limitation.

Upon considering the petition for rejection of counter claim and the objection filed therein the learned court below was pleased to dispose the said petition with the following observation

‘Having regard to the respective submissions of both the Ld. Advocates for the parties and taking note of the contents of the application and objections filed thereto and also on meticulous scrutiny of the case record it appears that plaintiff has brought the suit against the defendant claiming Rs. 35,000/- as damages in the year 2000 and the defendant appeared in the suit on 19.07.2005 and filed the written statement on 25-10-2005 along with counter claim and thereafter the W/S of the written statement of the defendant was accepted by order no. 34 dated 26.04.2006 which goes to show that the written

statement along with the counter claim was entirely accepted. It further appears from the record that subsequently issues were framed and the suit was fixed for peremptory hearing on 02.05.2011 and since then the suit is pending for disposal. It also appears that during the stage of peremptory hearing the plaintiff has come up with the instant application praying for rejection of counter claim, after a gap of 13 years. I have carefully gone through the decisions referred from the side of the defendant and on careful perusal of the decision of the Hon'ble Apex Court in connection with SLP(C), No. 23599 of 2018 wherein Hon'ble Apex Court expressed their views regarding the limitation in filing counter claim of which the maximum time limit has been prescribed as and when the cause of action accruing to the defendant against the plaintiff either before or after filing of the suit. But before the time prescribed for delivering his defence has expired. Hon'ble Apex Court also observed that there cannot be any hard and fast rule that in a particular time of counter claim has to be filed by curtailing the discretions conferred on the Courts and that the trial Court has to exercise his discretion to balance between the right to speedy trial and right to file counter claim, so that the substantive justice is not defeated.

Therefore, in view of the observation of the Hon'ble Apex Court and taking note of the facts and circumstances of the case and also considering the prolonged delay in raising the issue of rejecting counter claim specially when the trial has already commenced, I do not find any merit of the instant application and as such the same is liable to be rejected.

Hence it is.

ORDERED.

that the application for rejecting the counter claim dated 26.08.2019 as raised by the plaintiff is hereby rejected on contest but without any order as to cost.

T O 04.05.2021 for peremptory hearing of the suit.’

The petitioner being aggrieved by the Order dated 05-03-2021 passed by the learned trial court has come up with the instant application under Article 227 of the Constitution of India.

It is the contention of the petitioner that the Learned Judge acted with material irregularity by not exercising the jurisdiction vested in him and rejecting the application of the petitioner. It is further contended by the petitioner that the learned Judge acted with material irregularity when he went on to hold that the counter claim of the opposite party was filed within the period of limitation when in fact cause of action that accrued in favour of the opposite party in December 1999 and expired in December 2002.

It is also contended that the Learned Judge overlooked the provision of law while rejecting the application of the petitioner.

Pursuant to filing of this application notice was issued upon the opposite party and the opposite party appeared and contested the application.

Heard Learned Advocate for the petitioner and Learned Advocate for the opposite party, perused the petition filed and the materials on record.

Learned Advocate for the petitioner submits that the counter claim filed by the opposite party is not maintainable in the eye of law as it is filed at a belated stage. Learned Advocate further submits that the Learned Judge erred in not rejecting the counter claim when the said claim is not maintainable. Learned Advocate also submits that the defendant could have filed fresh suit if he had cause of action instead of filing counter claim.

Learned Advocate relies upon the following Judicial decision.

Ramesh Chand Ardawatiya Vs Anil Panjwani. [Reported in (2003) 7 SCC. P-350.]

Learned Advocate for the opposite party submits that the counter claim of the opposite party is filed along with the written statement and thus it cannot be rejected. Learned Advocate further submits that the written statement along with counter claim was filed in the year 2005 when the petitioner/plaintiff raised no objection and after a period of about fourteen years when the suit is fixed for evidence plaintiff filed such application. Learned Advocate also submits that the petitioner/plaintiff instead of proceeding with the suit has sought for several adjournments. Learned Advocate relies upon the following Judicial decisions.

Ashok Kumar Kalra Vs Wing CDR. Surendra Agnihatri and others

[reported in (2020) 2 SCC P-394].

Unreported decision Salim D.Agboatwala and Ors Vs Samalji Oddhavji Thakkar and Ors civil Appeal 5641 of 2021.

In order to decide the matter regarding rule of filing counterclaim it is necessary to consider the provisions contained in Order 8 Rule 6A of the Code of Civil Procedure and the Judicial decision relied upon.

Order 8 Rule 6A- 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 accruing to 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 counters 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.

In the case of **Ramesh Chand Ardawatiya (supra)** the Hon'ble Supreme Court observed as follows:

'26. A perusal of the abovesaid provisions shows that it is the Amendment Act of 1976 which has conferred a statutory right on a defendant to file a counter-claim. The relevant words of Rule 6A are—

"A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6,.....before the defendant has delivered his defence or before the time limited for delivery of defence has expired".

These words go to show that a pleading by way of counter-claim runs with the right of filing a written statement and that such right to set up a counter claim is in addition to the right of pleading a set-off conferred by Rule 6. A set-off has to be pleaded in the written statement. The counter-claim must necessarily find its place in the written statement. Once the right of the defendant to file written statement has been lost or the time limited for delivery of the defence has expired then neither the written statement can be filed as of right nor a counter-claim can be allowed to be raised, for the counter-claim

under Rule 6A must find its place in the written statement. The Court has a discretion to permit a written statement being filed belatedly and, therefore, has a discretion also to permit a written statement containing a plea in the nature of set-off or counter-claim being filed belatedly but needless to say such discretion shall be exercised in a reasonable manner keeping in view all the facts and circumstances of the case including the conduct of the defendant, and the fact whether a belated leave of the Court would cause prejudice to the plaintiff or take away a vested right which has accrued to the plaintiff by lapse of time.’

In the case of **Ashok Kumar Kalra (supra)** the Hon’ble Supreme Court observed as follows:

‘55. In *Vijay Prakash Jarath v. Tej Prakash Jarath*, (2016) 11 SCC 800, this Court further refined the limitation in *Rohit Singh*¹¹ that counterclaims cannot be raised after the issues are framed and the evidence is closed. In the said case, even though the issues had been framed, and the case was in the early stages of recording of the plaintiff’s evidence, a counter claim filed at that point was allowed, as no prejudice was caused to the plaintiff.

56. The above discussion lends support to the conclusion that even though Rule 6A permits the filing of a counterclaim after the written statement, the Court has the discretion to refuse such filing if it is done at a highly belated stage. However, in my considered opinion, to ensure speedy disposal of suits, propriety requires that such discretion should only be exercised till the framing

of issues for trial. Allowing counterclaims beyond this stage would not only prolong the trial, but also prejudice the rights that may get vested with the plaintiff over the course of time.

57. At the same time, in exceptional circumstances, to prevent multiplicity of proceedings and a situation of effective retrial, the Court may entertain a counterclaim even after the framing of issues, so long as the Court has not started recording the evidence. This is because there is no significant development in the legal proceedings during the intervening period between framing of issues and commencement of recording of evidence. If a counterclaim is brought during such period, a new issue can still be framed by the Court, if needed, and evidence can be recorded accordingly, without seriously prejudicing the rights of either party to the suit.

58. At this juncture, I would like to address the observation in Rohit Singh¹¹ that a counterclaim, if filed after the framing of the issues and closing of the evidence, would be illegal and without jurisdiction. In my opinion, this is not a correct statement of law, as the filing of counterclaims after the commencement of recording of evidence is not illegal per se. However, I hasten to add that permitting such a counterclaim would be improper, as the Court's discretion has to be exercised wisely and pragmatically.

59. There are several considerations that must be borne in mind while allowing the filing of a belated counterclaim.

59.1 *First*, the Court must consider that no injustice or irreparable loss is being caused to the defendant due to a refusal to entertain the counterclaim, or to the plaintiff by allowing the same. Of course, as the defendant would have the option to pursue his cause of action in a separate suit, the question of prejudice to the defendant would ordinarily not arise.

59.2 *Second*, the interest of justice must be given utmost importance and procedure should not outweigh substantive justice.

59.3 *Third*, the specific objectives of reducing multiplicity of litigation and ensuring speedy trials underlying the provisions for counterclaims, must be accorded due consideration.

60. 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 counter-claim 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.'

In the unreported Judgment of **Salim D.Agboatwala and ors** (supra) the Hon'ble Supreme Court observed as follows:

'10. Insofar as the rejection of plaint on the ground of limitation is concerned, it is needless to emphasis that limitation is a mixed question of fact and law. It is the case of the appellants/plaintiffs that only after making inspection of the records in connection with the suit land available in the office of defendant No.3 (Court Receiver) that they came across the correspondence and documents relating to the transactions and that the proceedings before the ALT were collusive, fraudulent and null and void. The appellants/plaintiffs have even questioned the authority of the Court Receiver to represent them in the tenancy proceedings.

11. The above averments may or may not be true. But if the plaintiffs succeed in establishing the above averments, the issue of limitation cannot be put against the plaintiffs. Generally a party, who never had any notice of a particular proceeding before a quasijudicial authority, is entitled to approach the Court upon gaining knowledge of the proceedings. Limitation cannot be put against such a party'

Upon plain reading of Rule-6A of Order 8 it is clear that the defendant may file counter claim in respect of a cause of action which arises 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.

In the instant case the Defendant/opposite party has filed counter claim along with the written statement. It is the contention of the defendant in the counter claim that the plaintiff signed an undertaking in writing on 15.1.2000 to refund the said sum of Rs. 73,100/- to the defendant within one and half months from the said date. It is further contended that the defendant came to know about the institution of the suit from a letter of Sri Rajat Chowdhury Advocate dated 22.05.2005 enclosing a copy of the plaint in which the plaintiff admitted receipt of Rs. 73,000/- from the defendant. Hence the defendant's counter claim is not barred by limitation. It is also contended by the defendant/opposite party that the defendant is entitled to and claims interest on the said sum of Rs. 73,100/- upon expiry of one and half month from 15.01.2000. thus from the counter-claim it is clear that the cause of action for filing counter claim arose prior to the filing of the suit. Hence there is no contravention of the provision contained in order-8 Rule 6-A of the Code of Civil Procedure.

With regard to the submission of Learned Advocate for the Petitioner/plaintiff that the defendant could have filed a separate suit instead of filing counter claim it is necessary to consider the provisions contained in Rule-6C of Order 8 of Code of Civil Procedure Order 8 Rule 6C provides as follows:

‘Where a defendant sets up a counter claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-

claim but by an independent suit the plaintiff may at any time before issues are settled in relation to the counter claim, apply to the Court for an order that such Counter-claim may be excluded and the Court may, on the hearing of such application make such order as it thinks fit. As the plaintiff has not taken any steps under Rule 6C of Order 8 of the Code of Civil Procedure and the case is fixed for evidence such stand cannot be taken by the plaintiff/petitioner at this stage.

Now once again it is necessary to peruse the petition of the plaintiff/petitioner for rejection of counter claim. The plaintiff/petitioner in his petition dated 26/08/2019 for rejection of counter claim filed by the opposite party/defendant has contended in paragraph-3 of the petition that the defendant's right to claim for the purported counter claim and cause of action for the same expired long back in the year 2002, but the defendant filed her written statement with counter claim on or about 4th October 2005 thus the counter claim is hopelessly barred by the law of limitation.

Now upon perusing the order dated 5.03.2021 passed by the learned trial Court it appears that the learned trial Court only considered the provision in filing counter claim under Order 8. Rule 6A of the Code of Civil Procedure, and held that written statement on 25-10-2005 was filed along with counter-claim and that by order dated 26-4-2006 the written statement along with the counter claim was entirely accepted. With due respect this Court has to hold that the learned Judge failed to consider the relief sought in the petition by the

petitioner/plaintiff and the grounds on which such relief was sought for. The petition of the plaintiff/petitioner shows that the plaintiff sought for rejection of the counter claim solely on the ground of being barred by law of limitation and not for non-compliance of the provision under Order 8 Rule 6A of the Code of Civil Procedure.

The plaintiff has contended that the counter claim is hopelessly barred by the law of limitation. Upon perusing the order of Learned Trial Judge nowhere it appears that the Learned Judge has considered the issue of limitation Act with regard to the counter claim of the defendant/opposite party. Learned Judge has only considered the issue with regard to compliance of Order 8 Rule 6A of the Code of Civil Procedure in filing counter claim and not whether the claim is barred by law of limitation. Thus the Learned Judge has not appreciated and applied the correct proposition of law with regard to the matter in issue. Order 8 Rule 6-A(4) provides that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. As counter claim is to be treated as a plaint if from the pleadings of the counter-claim it appears that the claim is barred by any law then necessary orders have to be passed under Order 7 Rule 11 of the Code of Civil Procedure. In the instant matter the learned Judge erred by not treating the application of the petitioner/plaintiff dated 26/08/2019 as an application under Order 7 Rule 11 of the Code of Civil Procedure and not deciding it in accordance with the said provision. Thus the order passed by learned trial Judge cannot be sustained and the same should be set aside.

Hence this Revisional Application stands allowed. Order dated March 5, 2021 passed by Learned Civil Judge (Senior Division) 4th Court at Alipore District-South 24 Parganas in M.S. 33 of 2000 is set aside. The matter is remitted back to the Learned Trial Court to treat the application dated 26/08/2019 filed by plaintiff as petition under Order 7 Rule 11 of the Code of Civil Procedure and decide the same in accordance with law.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Biswaroop Chowdhury,J)