

March 11, 2024  
Sl. No.13  
Court No.19  
s.biswas/srm

CO 3029 of 2022

*Mohan Bhattachajee*

*vs.*

*Smt. Shibani Bhattacharjee and others*

Mr. Buddhadeb Ghosal  
Mr. C. Chatterjee

... for the Petitioner.

Mr. Srinjay Sengupta  
Mr. Saurav Roy  
Mr. Ankush Ghosh  
Mr. Narattom Acharya

... for the opposite party nos.1 to 4

1. The revisional application is disposed of upon hearing the petitioner and the plaintiffs/opposite party Nos.1 to 4. The revisional application deals with the amendment of the written statement. The application for amendment was contested in the learned court only by the plaintiffs. Service upon the other opposite parties is dispensed with.
2. By an order dated July 22, 2022 passed in Title Suit No.126 of 2015, the court rejected the application for amendment of the written statement by which the defendant No.1 wanted to incorporate certain factual aspects with regard to the defence case and also introduce a counter-claim with certain prayers. The learned court rejected the application for amendment on the ground that under the guise of amendment, the defendant no.1 was praying for declaratory reliefs

which were within the domain of the thika controller. Moreover, such amendment would change the nature and character of the suit.

3. Mr. Ghosal, learned advocate for the defendant No.1/petitioner submits that the order impugned suffers from the following irregularities:

- a) Apart from the counter-claim, there were other averments which were sought to be incorporated in various paragraphs of the written statement by way of an amendment;
- b) Such averments were in the nature of elaborations and clarifications of the defence case;
- c) No new cause of action was introduced. No new defence was being incorporated;
- d) The claims were not barred by limitation;
- e) The amendment of the written statement should be allowed elaborately especially because neither contrary pleas were sought to be introduced, nor withdrawal of admissions were sought to be carried out;
- f) At the time of preparation of the written statement, the learned advocate was not properly instructed. As such, vital factual aspects which required further elaboration in the written statement, had been left out.

4. The learned advocate for the plaintiffs opposes such application and submits that the thika controller had already held that the plaintiffs were thika tenants.
5. The prayer for introduction of a non-evictable right on account of the defendant no.1 being a thika tenant along with defendant no.4 were not available in view of the decision of the learned thika controller.
6. Secondly, a suit for eviction of a licensee was maintainable. The issue which the defendant no.1 wanted to introduce by way of amendment was already pending adjudication before the West Bengal Land Reforms and Tenancy Tribunal. At the fag end of the suit and at the stage of evidence, the amendment should not be allowed. The defendant no.1 had also not been able to satisfy that in spite of due diligence, the facts sought to be incorporated were not within his knowledge and could not be introduced in the written statement, before trial commenced.
7. Heard the rival contentions of the parties. Although Mr. Ghosal relies on the decision of the Hon'ble Apex Court in the matter of **Mahendra Kumar and another v. State of Madhya Pradesh and others** reported in AIR 1987 SC 1395, this court is of the view that filing of a

counter-claim after the issues have been framed, cannot be allowed. The proposition laid down by the Hon'ble Apex Court in **Mahendra Kumar** (supra), is that counter-claim need not be filed along with written statement. The same can be filed after the written statement had been filed. However, the law is that the counter-claim even if filed after the filing of written statement must be before the issues are framed.

8. Reference is made to the decisions of **Mahesh Govindji Trivedi vs. Bakul Maganlal Vyas and Ors.** decided in **Civil Appeal No.- 7203 of 2022.**

The Hon'ble Apex Court held as follows:-

**“20.** We sum up our findings, that Order VIII Rule 6A of the CPC does not put an embargo on filing the counterclaim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counterclaim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counterclaim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counterclaim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:

- i. Period of delay.
- ii. Prescribed limitation period for the cause of action pleaded.
- iii. Reason for the delay.
- iv. Defendant's assertion of his right.
- v. Similarity of cause of action between the main suit and the counterclaim.
- vi. Cost of fresh litigation.

- vii. Injustice and abuse of process.
- viii. Prejudice to the opposite party.
- ix.
- and facts and circumstances of each case.
- x.
- In any case, not after framing of the issue.”

**9. In the decision of *Ashok Kumar Kalra vs Wing Cdr. Surendra Agnihotri and Ors.***

reported in **(2020) 2 SCC 394**, 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 a counter-claim is designed to avoid multiplicity of proceedings; that time limit for filing a counter-claim is not explicitly 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.

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21. We sum up our findings, that Order 8 Rule 6-A CPC does not put an embargo on filing the counterclaim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counterclaim with substantive delay, even if the limitation period

prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counterclaim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counterclaim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:

- i. Period of delay.
- ii. Prescribed limitation period for the cause of action pleaded.
- iii. Reason for the delay.
- iv. Defendant's assertion of his right.
- v. Similarity of cause of action between the main suit and the counterclaim.
- vi. Cost of fresh litigation.
- vii. Injustice and abuse of process.
- viii. Prejudice to the opposite party.
- ix. and facts and circumstances of each case.

x. In any case, not after framing of the issue.

13.1. In the partly dissenting and partly concurring judgment, one of the Hon'ble Judges of the Bench stated his opinion that though the normal rule is that subsequent to filing of written statement, counter-claim cannot be filed after issues have been framed, under exceptional circumstances, counter-claim may be permitted to be filed even after issues have been framed, but before commencement of recording of plaintiff's evidence. The Hon'ble Judge observed, inter alia, as follows: -

"31. From the foregoing discussion, it is clear that a counterclaim can be filed if two conditions are met: first, its cause of action complies with Order 8 rule 6-A(1); and second, it is filed within the period specified under the Limitation Act. Clearly, by itself, Rule 6- A does not specifically require that a counterclaim has to be filed along with the written statement. In the absence of a particular mandate under this Rule, it is necessary to look to other provisions of CPC to determine whether

a counterclaim can be filed after a written statement.

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38. A conjoint and harmonious reading of Rules 6-A, 9 and 10 of Order 8 as well as Order 6 Rule 17 CPC thus reveals that the court is vested with the discretion to allow the filing of a counterclaim even after the filing of the written statement, as long as the same is within the limitation prescribed under the Limitation Act, 1963. In this regard, I agree with the propositions laid down in the decisions discussed below.

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56. The above discussion lends support to the conclusion that even though Rule 6-A 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.

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60. ....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 counterclaim 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 maybe permitted to be filed after a written statement till the stage of commencement of recording of the evidence on behalf of the plaintiff."

10. Under such circumstances, this court rejects the counter-claim which was sought to be introduced after paragraph 14 of the written statement.

11. With regard to the amendments sought to be incorporated in the written statement, this court is of the view that the amendment should be allowed. They are in the nature of elaborations of the defence case. The defence case in paragraphs 8 and 12, have been perused. The defence was that the defendant No.1 was claiming to be a thika tenant through his father Kanailal Bhattacharya who was the original thika tenant along with Indubhushan Bhattacharya. After death of Kanailal Bhattacharya, Sushama Bhattacharya (mother), since deceased, and the defendant Nos.1 to 4 became the thika tenants along with two other sisters. Further defence case was that the defendant Nos.2 and 3 were *bharatias* under Kanailal Bhattacharya and after death of Kanailal, the said defendants became *bharatias* under the defendant Nos.1 and 4.

12. By the application for amendment, apart from introduction of the counterclaim which this Court has not allowed, paragraphs 6(a) to 6(q)

were sought to be incorporated. In order to trace out the history as to how the defendant Nos.1 and 4 had become thika tenants in respect of the property along with the heirs of Indubhushan, some averments were attempted to be introduced. The further case was that the defendant Nos.1 and 4 were residing in the premises. An elaboration as to how Jaladhar Bhattacharya the great grandfather of the defendant No.1 who was a regular worshiper of Kalighat Temple started residing in the said premises along with his brothers Sashadhar Bhattacharya and Anath Bandhu Bhattacharya, were further elaborated. Statements that Jaladhar permitted Sashadhar and Ananth Bandhu to reside in the said premises, who later constructed a tin structure consisting of 18 rooms were sought to be introduced. After demise of Jaladhar, Indubhushan and Kanailal became joint tenants. During subsistence of such tenancy, Calcutta Thika Tenancy Act, 1949 came into effect and the rights of Kanailal and Indubhushan were covered by the said Act. That the occupier's share in respect of the corporation tax was deposited by Indubhushan and Kanailal.

Thereafter, Kanailal died leaving behind his wife, the petitioner and the defendant No.4 as also one Mini Gupta as his legal heirs. Indubhushan also died leaving behind his heirs. The tenancy later came to be governed by the 1981 Act. The plaintiffs were never thika tenants and did not have any locus to file the suit.

13. In my opinion, the basic defence of the defendant No.1 in the original written statement does not change upon incorporation of the above statements. The said defendant has only sought to introduce an elaboration as to how his predecessors had become a thika tenant. It also appears that an issue had been framed in this regard and a learned co-ordinate Bench of this Court had directed that such issue will be decided along with all the issues in the suit.

14. The contention of the plaintiffs that the decision has already been taken by the Thika Controller with regard to the thika tenancy of the plaintiffs, shall be taken into account by the learned court in the final hearing of the suit and not at this stage.

15. However, as the nature of amendment is an elaboration of the defence case, this Court is of

the view that for the ends of justice the amendment of the written statement for incorporation of paragraphs 6(a) to 6(o), must be allowed.

16. This Court deems it fit to refer to a decision of the Hon'ble Apex Court with regard to the liberal approach to be adopted by courts while considering amendment of written statements, namely, ***Revajeetu Builders and Develpers vs. Narayanaswamy and Sons and ors.*** reported in ***(2009) 10 SCC 84***, Paragraph 26, of which is quoted below:-

“26. In the same judgment of Usha Balashaheb Swami [(2007) 5 SCC 602] , the Court dealt with a number of judgments of this Court and laid down that the prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute the cause of action or the nature of claim applies to amendments to the plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.”

17. The Apex Court in the case of ***Andra Bank vs. ABN Amro Bank N.V. and others*** reported in ***2007 SC 2511*** observed that delay was no ground for refusal of prayer for amendment of

a written statement. The only question to be considered by the Court was whether such amendment would be necessary for decision of the real controversy between the parties in the suit and the Court could not go into the question of merits of amendment. The Hon'ble Apex Court in the case of ***Ramchandra Sakharam Mahajan vs. Damodar Trimbak Tanksale (Dead) and others*** reported in ***(2007) 6 SCC 737***, held that if the amendment enables the Court to pin-pointedly consider the real dispute between the parties and helps to decide the case more satisfactorily, the amendment ought to be allowed.

18. In the case of ***Raghu Thilak D. John vs. S. Rayappan*** reported in ***AIR 2011 SC 699***, it was held that amendment should generally be allowed, unless it was shown that permitting the amendment would be unjust and would cause prejudice to the opposite side, which could not be compensated by costs or would deprive him of a right which had accrued to him with the lapse of time. Amendment may also be refused if the same is barred by time.

19. In the decision of ***Rajesh Kumar Aggarwal and others vs. K.K. Modi and others***

reported in **AIR 2006 SC 1647**, the Apex Court held on similar lines and directed that the Court was not to go into the merits. The relevant portion is quoted below:-

"While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment."

20. In the decision of **Life Insurance Corporation of India vs Sanjeev Builders Private Limited & Anr.** decided in **Civil Appeal No. 5909 of 2022**, the Hon'ble Apex Court laid down the principles of governing amendment in paragraph 70 of the decision. The relevant portions are quoted below:-

- (ii) All amendments are to be allowed which are necessary for determining of the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order VI Rule 17 of the CPC.
- (iii) The prayer for amendment is to be allowed:-
  - (i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and
  - (ii) to avoid multiplicity of proceedings, provided
    - (a) the amendment does not result in injustice to the other side,
    - (b) by the amendment, the parties seeking amendment does not seek to withdraw any

clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is malafide, or

(iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.”

21. The amended written statement will be filed within four weeks. The plaintiffs will be entitled to file replication to the said amendment written statement. The issues as have been framed, covers the amendment sought to be introduced. The Civil Judge (Junior Division) 4<sup>th</sup> Court at Alipore may also frame additional issue. The PW1 shall be allowed to adduce further evidence-in-chief, if required, and the suit shall proceed from the examination-in-chief of P.W.1. As the suit is at the stage of evidence, the suit should be

expedited. The evidence already on record shall be retained.

22.However, the facts sought to be incorporated in the said written statement are not subsequent events. Those facts were within the knowledge of the petitioner when the written statement was filed. Under such circumstances, due to the delay, cost of Rs.10,000/- shall be paid to the plaintiffs and the amended written statement shall be accepted by the learned court upon being satisfied that such cost had been paid within three weeks from date.

23.With the aforesaid observations, this revisional application is disposed of.

24.There shall be no order as to costs.

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

**(Shampa Sarkar, J.)**