

IN THE HIGH COURT AT CALCUTTA  
CIVIL REVISIONAL JURISDICTION  
APPELLATE SIDE

*Present:*

*Hon'ble Justice Shampa Sarkar*

**C.O. 4077 of 2023**

Gopa Sen

vs.

Kanhailal Bharat Mal Gugar (HUF)

For the petitioner : Mr. Aniruddha Chatterjee,  
Mr. Shaunak Ghosh,  
Ms. Shreyashi Maity

For the opposite party : Mr. Kartick Kumar Bhattacharya,  
Mr. Dhananjoy Mukherjee,  
Mr. Krishnendu Bera,  
Ms. Soumashree Dutta,  
Ms. Papiya Naskar

Hearing concluded on: 24.04.2024

Judgment on: 13.05.2024

**Shampa Sarkar, J.:-**

**1.** The amendment application for incorporation of a counter-claim, arises out of an order dated October 12, 2023 passed by the learned Additional Civil Judge, (Junior Division) at Alipore in Title suit number 904 of 2018. By the order impugned, the learned Court rejected an application for amendment of the written statement, on the ground that there was substantial delay in filing the application. The Court also found that the amendment was not necessary for adjudication of the dispute between the parties.

**2.** The amendment application was filed on the date fixed for framing of issues. There was no explanation as to why the delay had occurred. While

rejecting the application for amendment, the learned Court observed that the plaintiff filed the suit for eviction of the defendant on the ground that the defendant was a trespasser. The defendant entered appearance and filed the written statement on February 8, 2019. Subsequently, after disposal of the interlocutory applications, June 6, 2023 was fixed for framing of issues. On the same date, an application was filed for amendment of the written statement.

**3.** The defendant contended that in view of the contentions of the parties in the interlocutory applications and the orders passed therein, incorporation of a counter-claim by amending the written statement was necessary. The plaintiff filed an objection to the said application on the ground that amendment of the written statement was sought for after 4.5 years from filing of the written statement, as a dilatory tactic and with mala fide intention. Further contention was that the pleadings sought to be incorporated by the amendment, had already been averred in the written statement. Although, the court was of the view that the issues had not been framed and the amendment application could be brought at any time prior to framing of issues, the delay of 4.5 years in filing the amendment application, was nothing but a dilatory tactic and should not be encouraged. The conduct of the defendant was taken note of by the learned Court while rejecting the said application. The Court noted that the suit was initially fixed ex parte. When the suit was fixed for evidence, the defendant appeared and filed a written statement. The order by which the suit was fixed for ex parte hearing was vacated and the written statement was accepted by the order of the Court dated February 12, 2019. Subsequently, after the passage

of 4.5 years, the defendant again filed an application for amendment, seeking incorporation of a counter-claim. Such application was filed on the date on which the suit was kept for framing of issues. From the conduct of the defendant, it was difficult to hold that the defendant had acted in good faith and the action was bona fide. According to the court, no cogent reasons had been assigned as to why the delay had occurred. Mere averment that pursuant to the developments which took place during the pendency of the suit and the orders passed by the learned Court, it was imperative that the counter-claim should be filed, would not be sufficient explanation for the delay. Hence, the prayer for amendment of the written statement was rejected. The learned Court relied on certain decisions of the Hon'ble Apex Court and held that the Court also did not find that the counter-claim was necessary.

**4.** Mr. Aniruddha Chatterjee, learned advocate appearing on behalf of the petitioner submitted that a counter-claim could be filed at any time during the pendency of the suit, but not after issues had been framed. He relied on the decision of **Ashok Kumar Kalra vs. Wing CDR Surendra Agnihotri** reported in **(2020) 2 SCC 294**.

**5.** Mr. Chatterjee, drew the attention of this Court to the observations of the learned trial judge and submitted that the learned court was conversant with the law that a counter-claim could be filed before framing of issues. Only because the previous conduct of the defendant was not appreciable, the amendment could not be rejected. The counter-claim was like a plaint and the petitioner had the right to pray for the declaration. Nobody could

prevent the petitioner from filing a separate suit for declaration of tenancy. Such declaratory prayer was not barred by any law.

**6.** Mr. Bhattacharjee, learned Advocate appearing on behalf of the opposite party submitted that the Hon'ble Calcutta High Court in the decision of ***Sri Chandreswar Prasad Shaw & anr. vs. Sri Chandra Sekhar Biswas*** reported in ***2015 (3) CLJ (Cal) 401*** had categorically held that the Court may refuse to exercise discretion in permitting a counter-claim either by way of an amendment or by subsequent pleading, if it caused delay in the progress of the suit, by forcing retreat on the steps already taken. Counter-claim should not be allowed if the same hindered the smooth flow of the proceeding. The counter-claim could not be utilized as an instrument to reopen a trial or to put a fetter in the progress of the case.

**7.** Heard learned Advocates for the respective parties. The fact situation are as follows:-

- a) A suit for eviction of a trespasser was filed against the defendant/petitioner.
- b) In the written statement, it had be categorically claimed that the petitioner was a joint tenant along with her mother and sisters after the death of their predecessor S.C. Mitter. After the death of the mother, all the sisters had become tenants in respect of the property in question. The defendant and her sisters, regularly lived with their mother in the premises in question.
- c) By way of a counter-claim, the written statement was sought to be amended, and a prayer for declaration of tenancy and permanent injunction restraining the plaintiff and its men and agents from

disturbing the possession of the petitioner, was sought to be incorporated;

d) Issue had not been framed, and trial had not commenced;

**8.** Merely because the counter-claim was presented after 4.5 years from filing of the written statement, the delay would not be a ground for rejection of the counter-claim. What is to be ascertained is, whether the prayer for declaration could be incorporated in the fifth year of the suit.

**9.** In exceptional cases as has been held in ***Ashok Kumar Kalra (supra)*** counter-claim can be allowed. One of such exception being, if the counter-claim would prevent a multiplicity of proceeding.

**10.** This does not mean that the counter-claim can be filed at any time after filing of the written statement. Counter-claim is in the nature of a plaint. Generally, it is to comply with the limitation provided under the Limitation Act, 1963. There cannot be a straightjacket formula rather, there are numerous factors which have to be seen and taken into account before accepting a belated counter-claim. Some of such factors have been illustrated in paragraph 21 of the decision in ***Ashok Kumar Kalra (supra)***, namely period of delay, prescribed period of limitation, reason for the delay, defendant's assertion of his right, similarity of cause of action between the main suit and the counter-claim, cost of fresh litigation, injustice and abuse of process, prejudice to the opposite party. The relevant portion is quoted below:-

“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 issues.”

**11.** Justice Mohan M. Shantanagoudar, in the dissenting view in ***Ashok Kalra, (Supra)***, opined that, a counterclaim could be accepted even after framing of issues, but before recording evidence, if such counterclaim would not prejudice the right of either of the parties to the suit.

**12.** In the decision of ***Ashok Kumar Kalra (supra)***, the Hon’ble Apex Court held that the time limitation for filing counter-claim had not been explicitly provided by the legislature. Rather, only limitation as to the accrual of cause of action was provided. Right to file a counter-claim was also explicitly limited by the embargo provided under Order 8 Rule 6A of the Code of Civil Procedure, for the accrual of cause of action. However, this would not mean that the counter-claim could be filed at any time after the filing of the written statement as the counter-claim was to be treated as a plaint. Generally, it needed to first of all comply with the limitation provided under Limitation Act, 1963. A time barred suit could not be entertained

under the guise of a counter-claim, just because of the fact that the issues had not been framed in the case in hand.

**13.** The purpose of introducing a counter-claim was to avoid multiplicity of proceedings. Instead of driving the parties to file a separate suit, the dispute should be resolved in the existing suit. The test is whether, the suit for declaration of tenancy could be filed in 2023, when the denial of tenancy took place with the filing of the eviction suit in 2018 and the petitioner had been treated to be a trespasser. The Hon'ble Apex Court held that one of the key factors for deciding whether a counter-claim should be allowed at a belated stage or not was to see whether the same had been filed within the prescribed period of limitation for the cause of action pleaded.

**14.** As per Section 3 (2) (b) of the Limitation Act, any claim by way of set off or a counter-claim would be treated as a separate suit and would be deemed to have been instituted on the date on which the counter-claim was made in court.

**15.** In the facts of this case, the counterclaim is barred by limitation. Thus, introduction of the counterclaim by way of an amendment would cause prejudice to the plaintiff. The right to sue accrued when the suit was filed and summons had been received by the petitioner. The petitioner entered appearance in 2019 and filed a written statement on 08/02/2019. Counter-claim should have been filed within three years from the date of filing of the suit for eviction of a trespasser.

**16.** The cause of action as pleaded in the counter-claim arose with the filing of the eviction suit and continued when the defendant came to know

about the suit, as pleaded in paragraph 22 of the application. Paragraph 22 is quoted below :-

“22. The cause of action of the counter claim arose on the date when the suit was filed and thereafter when the defendant came to know about the suit such cause of action is continuing till date at Premises No. 2, Mullen Street, Kolkata – 700020.”

**17.** Even assuming that the defendant came to know of the suit in 2019, even then the period of three years was over. In the written statement the petitioner had already averred that she was a joint tenant in respect of the property in question along with her mother and sisters. In paragraph 3 it has been stated that originally the plaintiff had filed a suit for recovery of khas possession against the mother of the petitioner, Smt. Anjali Mitra, which was registered as ejectment suit No.159 of 2004. The mother of the petitioner was impleaded as the sole defendant in the suit. The suit was filed under the West Bengal Premises Tenancy Act, 1997. During the pendency of the said suit, the petitioner’s mother expired. The suit was thereafter withdrawn. It has also been averred that the plaintiff had taken rent for the months of August 2018, September 2018 from the petitioner, after withdrawal of the prior eviction suit. Thus, the plaintiff had accepted the petitioner as a tenant, as per the defence case.

**18.** Further averments in paragraph 9 deal with the petitioner’s claim for tenancy. The petitioner has clearly stated that after demise of S. C Mitter in 1979 who was the original tenant and the father of the petitioner, the tenancy devolved upon his wife and three daughters. Only to facilitate the process of issuance of rent receipts, the receipts had been issued in the name of Smt. Anjali Mitra, who was one of the joint tenants. The other heirs

namely Gopa Sen, Santa Roy and Chitralekha Chakraborty did not surrender or release their tenancy. Sometime in the year 1996, the Will of the original landlord was probated and all the tenants sent a letter to Subrata Chatterjee and Sujoy Chatterjee, about the joint tenancy of Smt. Anjali Mitra (since deceased), the petitioner and her sisters.

**19.** Categorical averments with regard to the joint tenancy of the petitioner with the sisters and mother and the fact that they lived with the mother in the suit property, have been mentioned.

**20.** Thus, in my opinion, the petitioner would have adequate opportunity to prove her case by leading cogent evidence on the basis of the averments made. An issue as to whether the petitioner is a trespasser or a tenant in respect of the suit property, will be framed by the learned court and if the petitioner succeeds in proving her case, the suit will fail. Under such circumstances, the time barred counter-claim cannot be allowed.

**21.** Under such circumstances, the revisional application is dismissed

**22.** The order impugned is affirmed.

**23.** Parties are to act on the basis of the server copy of this judgment.

**(Shampa Sarkar, J.)**