

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Raja Basu Chowdhury

CO 3441 of 2024

**OGO USA INC
Versus
Krishna Tissue Pvt. Ltd.**

For the petitioner	:	Ms. Shohini Chakraborty Ms. Soumi Guha Thakurta
For the opposite party	:	Mr. Sudhir Mehta , Sr. Advocate Mr. Anurag Bagaria
Heard on	:	19.12.2024 & 09.01.2025.
Judgment on	:	9th January, 2025.

Raja Basu Chowdhury, J.:

1. The present revisional application has been filed, *inter alia*, challenging the order dated 9th August, 2024 passed by the learned Judge, Commercial Court, Rajarhat, North – 24 Parganas in Commercial Suit being T.S. No. 26 of 2021 (C.C) whereby the plaintiff/petitioner's application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code) and the application under Order VIII Rule 6C of the Code has been rejected.

2. To understand the scope of the aforesaid revisional application, it would be relevant to note down the facts leading to filing of such application. The petitioner who is the plaintiff in the above commercial suit claims to have been incorporated under the relevant laws of United States of America and is engaged in the business of International Trade of paper and other allied products. The plaintiff claims to have entered into the contractual relationship with the defendant in respect of supply of waste paper of agreed quantity and specifications. The plaintiff claims that it was agreed by and between the parties that the payment would be in the form of letter of credit which would be 180 days from the date of bill of lading, which was later altered to direct payment at site for 3,000/MTs and the balance 3,000/MTs would be vide Letter of Credit of 180 days from the date of Bill of lading. In furtherance to the above 3,000/MTs of the waste paper was shipped in respect of the contract dated 18th May, 2018. On the basis of the letter of credit opened by the defendant, the plaintiff had shipped waste paper of agreed quantity and specifications. Unfortunately, despite the above, the plaintiff's banker had intimated the plaintiff that the bills under several invoices had been returned due to defendant's refusal to make payment. Certain invoices were also refused to be paid citing minor discrepancy in L.C. terms. Notwithstanding the above, the defendant/opposite party managed to clear/unload the shipped

goods under several invoices. Although, the attempts were made to resolve such disputes amicably, the same having not been resolved the plaintiff had filed the aforesaid suit after having exhausted the remedy provided under Section 12A of the Commercial Courts Act, 2015 (hereinafter referred to as the “said Act”) of pre-institution mediation and settlement.

3. According to the plaintiff, since the defendant did not participate in the mediation, the mediation failed.
4. Records would reveal that the defendant has been contesting the suit and had filed not only the written statement but simultaneously along with the written statement had filed a counter-claim. According to the plaintiff, since the counter-claim was filed without complying with the provision of Section 12A of the said Act, an application under Order VII Rule 11 of the Code was filed. The plaintiff also filed an application under the provisions of Order VIII Rule 6C of the Code, *inter alia*, on the ground that the counter-claim did not comply with the rules of the Code as applicable for filing of plaints.
5. By order no.22 dated 9th August, 2024, the learned Judge, Commercial Court at Rajarhat, had rejected the application filed under Order VII Rule 11 of the Code as also the application filed under Order VIII Rule 6C of the Code. Challenging the aforesaid order, the present revisional application has been filed.

6. Ms. Chakraborty, learned advocate appearing in support of the aforesaid revisional application by drawing attention of this Court to the provisions contained in Section 12A of the said Act would submit that as to whether the said Section is mandatory is no longer *res integra*. She would submit that it has been settled by successive pronouncements of the Hon'ble Supreme Court that the provisions of Section 12A of the said Act are mandatory, and the defendant having not complied with such mandatory provision, the counter-claim filed by the defendant which partakes the character of a plaint in an independent suit cannot be continued and the plaintiff/petitioner by following the guidelines laid down in the case of ***Patil Automation Private Limited v. Rakheja Engineers Private Limited*** reported in **(2012) 10 SCC 1** has filed application for rejection of the counter-claim. By placing reliance before this Court on an unreported judgment delivered in the case of ***Aditya Birla Fashion and Retail Limited v. Mrs. Saroj Tandon*** on 2nd September, 2024 in CM(M) 459 of 2023 and CM APPL. 13679 of 2023, she would submit that a Coordinate Bench of the Hon'ble High Court at Delhi has come to specific finding that the provisions of Section 12A of the said Act are squarely applicable to a counter-claim as well, by reasons of the counter-claim partaking the character of a plaint in an independent suit, and non-compliance of such

mandatory provision would make the same liable to be rejected following the ratio of the judgment delivered in the case of ***Patil Automation Private Limited*** (*supra*). By drawing attention of this Court to the counter-claim filed by the defendant, she would submit that the counter-claim does not concern the cause of action based on which the instant suit has been filed, at least, there is no averment in that regard in the counter-claim. By placing before this Court the provisions contained in Order VIII Rule 6A(4) of the Code she would submit that a counter-claim is required to be treated as plaint and is also required to be governed by the rules applicable to the plaints. Since, the defendant has not complied with the rules as are applicable to plaints and having not pleaded the cause of action and having not disclosed as to how such claim is connected with the cause of action of the suit, the same deserves to be rejected. In the alternative she would submit that if the defendant has a cause of action against the plaintiff, the same may give an independent right to the defendant to move against the plaintiff, however, such claim cannot be included in the suit by way of counter-claim unless, the same is interlinked and inexplicably connected with the cause of action in the suit. In the facts noted hereinabove, she would submit that this Court may be pleased to reject the counter-claim.

7. *Per contra*, Mr. Mehata, learned advocate representing the defendant/opposite party by placing before this Court the provisions contained in Order VIII Rule 6A would submit that the Code has not created any embargo on the defendant to restrict its claim to the cause of action of the suit. He would rather submit that Order VIII Rule 6A amplifies that the defendant is entitled to make a counter-claim against the claim of the plaintiff in respect of a cause of action accruing to the defendant against the plaintiff either before or after filing of the suit but before the defendant has delivered his defence. By placing reliance on such provision, he would submit that the right of the defendant to file written statement is not limited to the right of the defendant to its file claim upto the date of filing of the suit. Having regard thereto, he would submit that even if the mediation proceeding is initiated and if the defendant's cause of action against the plaintiff accrues after the mediation proceeding but before filing of defence by the defendant, the defendant is not precluded from making such a claim by way of counter-claim in the suit. He submits that since there is no embargo in the defendant making any claim which is *de hors* the cause of action of the suit, the question of the defendant incorporating cause of action in the written statement for maintaining the same cannot and does not arise. By placing reliance on Order VIII Rule 6A (2), (3) & (4), he would submit

that a counter-claim, is only deemed to be tried as a separate suit and is treated to be a plaint. The same does not make the counter claim a plaint but the legal fiction of treating the counter claim as of plaint is to be construed for the consequence which are incidental or inevitable corollaries to give effect to the fiction. In support of his aforesaid contention he has placed reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***State of Maharashtra v. Laljit Rajshi Shah & Ors.***, reported in **(2000) 2 SCC 699**. On the question whether there is any impediment in filing a counter-claim which does not concern the cause of action of the suit, he has also placed reliance on a judgment delivered by a Coordinate Bench of the Hon'ble High Court of Bombay in the case of ***Barthels & Luders Gambh v. M. V. Dominique***, reported in **1988 Mah LJ 728**. He would submit that it is true that the provisions contained in Section 12A of the said Act are mandatory, however, such provision cannot be made applicable insofar as a counter-claim is concerned as the statute does not recognize the same. Such contention would corroborate from a plain reading of Section 12A of the said Act itself. In support of his aforesaid contention he has placed reliance on a judgment delivered by the Division Bench of the Hon'ble High Court at Delhi in the case of ***Sanjana Agarwal v. Namoshivai Apparels Private Limited***, reported in **2024 SCC**

Online Del 9272. He would submit that the counter-claim can very well be *de hors* the cause of action of the suit. There is no provision in Order VIII Rule 6 of the Code which mandates that the counter-claim must comply with the requirements of the territorial jurisdiction. The only compliance referred therein is the pecuniary jurisdiction. Having regard thereto he would submit that no case for interference has been made out and the instant revisional application should be dismissed. He would still further submit that ordinarily where a matter deals with such extensive argument, the exercise of jurisdiction under Article 227 of the Constitution of India is not called for.

8. Having heard the learned advocates appearing for the respective parties and having considered the materials on record, I find that in the instant case, the plaintiff/petitioner has contended that unless the defendant complies with the very provision of Section 12A of the said Act, the counter-claim filed by the defendant which is an additional right given to the defendant cannot be entertained. To appreciate the aforesaid provision, it is necessary to understand the scope of Section 12A of the said Act, which is reproduced hereinbelow:-

“12A. Pre-Institution Mediation and Settlement – 1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

(2) The Central Government may, by notification authorize the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987) for the purpose of pre-institution mediation.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987) the authority authorized by the Central Government under sub-section (2) shall complete the process of mediation within a period of three months from the date of application made by the plaintiff under sub-section (1)

Provided that the period of mediation may be extended for a further period of two months with the consent of the parties;

Provided further that, the period during which the parties remained occupied with the pre-institution mediation, such period shall not be computed for the purpose of limitation under the Limitation Act, 1963 (36 of 1963)

4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.

5) The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996 (26 of 1996) ”

9. From a perusal of the aforesaid provision, it would clearly indicate that a suit shall not be instituted without exhausting the remedy provided under Section 12A of the said Act, unless the same contemplates an urgent interim relief. Admittedly in this case, the plaintiff having exhausted the aforesaid remedy provided therefor had instituted the suit. Although, the plaintiff contends that the defendant did not participate in the

said proceeding, the fact that the defendant had a right to file a counter-claim even after the period for the pre-institution mediation cannot be ruled out. The Section, however, does not contemplate that a written statement would be required to be filed after having exhausted the remedy provided for in Section 12A of the said Act. In this context it must be noted that ordinarily a counter-claim can only be entertained provided such counter-claim is filed along with the written statement in terms of Order VIII Rule 6A of the Code. Such claim/cause of action may arise not only before the filing of the suit but even after filing of the suit provided the same accrues before the defendant has delivered his defence or before the time limited for delivery of defence has expired. Having regard thereto, if the defendant chooses not to file counter-claim and waits for having its remedy by the way of mediation, the defendant may lose its valuable right of filing a counter-claim, since the said Act provides for outer time limit within which written statement is required to be filed. This apart, considering the object of the said Act, which is to ensure speedy resolution of the commercial dispute, any steps taken by the defendant to delay the filing of the written statement by reasons of pendency of a pre-institution mediation would defeat the very object for which the said Act has been enacted. Having regard thereto, I am of the view that there is no requirement in law for

proceeding with pre-institution mediation prior to filing of a counter-claim. Similar view has also been taken by the Division Bench of the Hon'ble High Court at Delhi in the case of ***Sanjana Agarwal*** (*supra*). Having regard thereto, I respectfully disagree and I am not inclined to be persuaded by the view taken by the Coordinate Bench of the Hon'ble Delhi High Court in the case of ***Aditya Birla Fashion and Retail Limited*** (*supra*).

10. On the contention raised by Ms. Chakraborty as regards non-compliance of the rules applicable to plaints by the deeming provision contained in Order VIII Rule 6A (4) of the Code, I find that the provisions of the Code do not impede upon the defendant's right to maintain a counter-claim which is not related with the cause of action pleaded in the suit. A perusal of the provisions contained in Order VIII Rule 6A clearly identify that the jurisdiction of the Court to entertain a counter-claim flows from the provisions of Order VIII Rule 6A of the Code. There is no provision in the Code which requires the defendant that the claim of the defendant is to be limited/confined within the territorial jurisdiction of the Court. The only requirement in that regard is restricted to the pecuniary limit. Admittedly, in this case, the learned Court has the pecuniary limit to entertain the case. I find that the learned Court has also returned the finding that a counter-claim need

not relate to the original cause of action, the cause of action can be made independent or may be different from the cause of action of the plaint and that the parties can bring its own independent cause of action in respect of any claim that may also be the subject matter of an independent suit. I also find from the order impugned that the learned Judge has noted in detail, the only limitation for bringing a counter-claim is that the cause of action should arise before the time fixed for filing written statement. In this context, I must note, as rightly pointed out by Mr. Mehata that Order VIII Rule 6A(4) incorporates a deeming provision so as to treat the counter-claim as a plaint. The said deeming provision of treating the counter-claim as a plaint cannot be extended to such an extent so as to make the written statement a plaint, or in other words to ensure that the written statement complies with all the provisions of the Code for filing a plaint. In this context it would be relevant to note that the Hon'ble Supreme Court in the ***State of Maharashtra v. Laljit Rajshi Shah & Ors.*** (*supra*) has interpreted scope and ordinary effect of a provision creating legal fiction. The Hon'ble Supreme Court has noted that the Court while interpreting legal fiction is to ascertain for what purpose the legal fiction is created and only thereafter is to assume all those facts which are incidental or inevitable corollary to give effect to the same. Before considering the

consequence and effect of the legal fiction of treating the counter-claim as a plaint especially having regard to the impact of insertion of Order VIII Rule 6A of the Code vide Code of Civil Procedure (Amendment) Act, 1976, it would be relevant to consider the judgment delivered by the Hon'ble Supreme Court in the case of **Bollepanda P. Poonacha & Anr. v. K.M. Madapa** reported in **(2008) 13 SCC 179** wherein in paragraph 18 thereof the Hon'ble Supreme Court had noted down the passage from the case of **Laxmidas Dayabhai Kabrawala v. Nanabhai Chunilal Kabrawala** reported in **AIR 1964 SC 11** which, *inter alia*, records as follows:-

“18. *This Court in Laxmidas Dayabhai Kabrawala v. Nanabhai Chunilal Kabrawala held: (AIR p.17, para 11)*

“11. The question has therefore to be considered on principle as to whether there is anything in law – statutory or otherwise – which precludes a court from treating a counterclaim as a plaint in a cross-suit. We are unable to see any. No doubt, the Civil Procedure Code prescribes the contents of a plaint and it might very well be that a counterclaim which is to be treated as a cross-suit might not conform to all these requirements but this by itself is not sufficient to deny to the court the power and the jurisdiction to read and construe the pleadings in a reasonable manner. If, for instance, what is really a plaint in a cross-suit is made part of a written statement either by being made an annexure to it or as part and parcel thereof, though described as a counterclaim, there could be no legal objection to the court treating the same as a plaint and granting such relief to the defendant as would have been open if the pleading had taken the form of a plaint. Mr. Desai had to concede that in such a case the court was not

prevented from separating the written statement proper from what was described as a counterclaim and treating the latter as a cross-suit. If so much is conceded it would then become merely matter of degree as to whether the counterclaim contains all the necessary requisites sufficient to be treated as a plaint making a claim for the relief sought and if it did it would seem proper to hold that it would be open to a court to convert or treat the counterclaim as a plaint in a cross-suit. To hold otherwise would be to erect what in substance is a mere defect in the form of pleading into an instrument for denying what justice manifestly demands. We need only add that it was not suggested that there was anything in Order 8 Rule 6 or in any other provision of the Code which laid an embargo on a court adopting such a course.”

19. *Parliament, however, has placed an embargo while giving effect to the decision of this Court in inserting Order 8 Rule 6-A of the Code of Civil Procedure. While there exists a statutory bar, the Court’s jurisdiction cannot be exercised.”*

11. Thus, noting the observations made by the Hon’ble Supreme Court in the case of **Laxmidas Dayabhai Kabrawala** (*supra*), and despite the later embargo placed by the Parliament in inserting Order VIII Rule 6A of the Code, having regard to the judgment delivered in the case of **State of Maharashtra v. Laljit Rajshi Shah & Ors.** (*Supra*), I am of the view that the legal fiction of treating the counter-claim as a plaint does not extend so far so as to require the counter-claim to confirm to all the requirements of a plaint. The basis for such finding flows from the fact that there is no statutory requirement for a counter-claim to be filed within the territorial

jurisdiction wherein the cause of action arises. The only requirement as regards cause of action is that the same must accrue to the defendant against the plaintiff either before or after filing of the suit but before the defendant has delivered his defence and the only limitation is that the same shall not exceed pecuniary limits of the jurisdiction of the Court. As such the incidental and/or inevitable corollary to give effect to the deeming fiction of treating the counter-claim as a plaint is that the cause of action of the defendant against the plaintiff must accrue to the defendant against the plaintiff either before or after filing of the suit but before the defendant has filed his defence, subject to the pecuniary limit as aforesaid. Considering the above, I am also of the view that a mere defect in pleadings is unlikely to defeat the valuable right of the defendant to maintain a counter-claim, which has been filed within time and in accordance with law. In view thereof, a liberal approach is necessary.

12. Thus, being the position, I am of the view that no case for interference is called for. The order impugned does not suffer from any jurisdiction error far to speak of any legal infirmity. The revisional application, accordingly, fails and is dismissed.

13. There shall be no order as to costs.

14. All parties shall act on the basis of the server copy of this order duly downloaded from this Court's official website.

(Raja Basu Chowdhury, J.)

SB/S. Kundu
A.R. (Court)