

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CIVIL REVISIONAL JURISDICTION**

**BEFORE:
HON'BLE JUSTICE RAJA BASU CHOWDHURY**

CO 206 of 2024

**Dr. Kamalika Mandal
Versus
Dr. Arunava Datta**

For the petitioner : Ms. Sidhi Sethia
Ms. Rima Sarkar
Ms. Suparna Paul

For the opposite party: Mr. Bapi Sarkar
Mr. Soumabha Saha
Mr. Chayan Moni Bhowal
Ms. Taniya Deb

Heard on : 02.12.2024, 03.12.2024, 05.12.2024 &
06.12.2024.

Judgment on : 05.02.2025.

RAJA BASU CHOWDHURY, J:

1. Challenging the order No. 18 passed on 16th November, 2024 by the learned Additional District Judge (first Track Court) at Siliguri, in MAT Suit No. 372 of 2022, whereby in effect the counter claim filed by the respondent/wife by invoking the provisions of Section 23A of the Hindu Marriage Act, 1955 (hereinafter referred to the "said Act") was rejected on the ground of having not complied with the provisions of Order VIII Rule 6A of the Code of Civil Procedure, the instant revisional application has been filed.

2. To understand the scope of the aforesaid revisional application, it would be necessary to briefly indicate the facts leading to filing of this application.
3. The petitioner is the legally married wife of the opposite party and claims to have been married on 25th November, 2020 at Mandarmoni which was a destination wedding. On 22nd September, 2022 the opposite party filed a suit praying for a decree for dissolution of marriage or in the alternative to pass an order for judicial separation. The petitioner is contesting the same by filing written statement. The written statement in this case had been filed on 27th September, 2023.
4. Following the above, on 26th July, 2024 issues were framed. Still later some times in September 2024 the petitioner filed an application seeking amendment of the written statement to bring on record certain subsequent events. 26th September, 2024 was the date fixed for peremptory hearing. On the aforesaid date, the petitioner, for the first time, applied before the Trial Court to permit the petitioner to file counter claim under Section 23A of the said Act, *inter alia*, praying for the following reliefs.

“Under the premise, it is prayed that Your Honour would graciously be pleased to allow the Respondent/wife to file counter claim application Section 23A of Hindu Marriage Act, 1955 so that she can claim relief of dissolution of marriage and lumpsum alimony for ends of justice”.

5. On 6th November, 2024, an application under Section 9 of the said Act for restitution of conjugal rights was filed by way of counter

claim under Section 23A of the said Act. It is this application which ultimately came to be rejected by order no. 18 dated 16th November, 2024 giving rise to the aforesaid revisional application.

6. The parties have elaborately advanced arguments. Ms. Sethia, learned advocate appearing in support of the aforesaid revisional application has, inter alia, contended that Section 23A of the said Act provides for certain special protection which cannot be confined to the procedural rigours of Order VIII Rule 6A of the Code of Civil Procedure 1908 (hereinafter referred to as the code). Section 23A of the said Act is a special provision which has been engrafted with the object to minimize multiplicity of judicial proceedings, as such, Order VIII Rule 6A of the code cannot be applied to defeat a legitimate right of a party to seek a restitution of conjugal rights. In support of her aforesaid contention she has placed reliance on a judgement delivered by the Rajasthan High Court in the case of **Smt. Manju v. Dharampal Khincha**, reported in **AIR 2012 Rajasthan 117**. She has also placed reliance on the judgment delivered by the Hon'ble Madhya Pradesh High Court in the case of **Sameeran Roy v. Smt. Leena Ro**, reported in **AIR 2001 Madhya Pradesh 192** on the question whether a special provision as that contained in Section 23A of the said Act can be bound by the rigours of Order VIII Rule 6A of the Code. She has also placed reliance on an unreported judgment delivered by the Hon'ble High Court of Judicature of Bombay, Nagpur Bench, in the case of **Ruchi v. Bhanupratapsingh Gour**, in Writ Petition No. 5768 of 2016

delivered on 29th January, 2019. In the facts noted hereinabove she would submit that the learned Court had failed to exercise jurisdiction vested in him in refusing to allow the counter claim in the form of restitution of conjugal rights to be taken on record.

7. *Per contra*, Mr. Sarkar learned advocate representing the opposite party has drawn attention of this Court to the provisions of Section 21 of the said Act. By relying on such provision he would submit that the provisions of Code are applicable to the provisions of he said Act. Since, the language used in the said Section provides for applicability of Code subject to provisions contained in the said Act and the provisions of Order VIII Rule 6A of the Code not being inconsistent with Section 23A of the said Act, the code is squarely applicable in the facts of the case. He would submit though a substantive right has been provided to the respondent in a suit or proceedings for divorce or judicial separation to seek restitution of conjugal rights while opposing the claim, the procedure for filing such application is to be guided by the provisions contained in the Code. In support of such contention he has placed reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***Guda Vijayalakshmi v. Guda Ramachandra Sekhara Sastry***, reported in **(1981) 2 SCC 646**. He has also placed reliance on a judgment delivered by a Coordinate Bench of this Court in the case of ***Sanjita Das v. Somnath Das***, reported in **2014 (4) Cal HCN 480** to drive home the point that a belated application for restitution of conjugal rights cannot be taken on record by way of

counter claim. On the same issue, he has placed reliance on a judgment delivered by a Division Bench of Hon'ble High Court of Punjab and Haryana in the case of ***Sanjay Sarin v. Payal Sarin***, reported in **2013 (3) ICC 784** and the judgment delivered by the Hon'ble Supreme court in the case of ***Ashok Kumar Kalra v. WING CDR. Surendra Agnihotri & Ors.***, reported in **(2020) 2 SCC 394**. He would submit that in this case the application for restitution of conjugal right by way of counter claim was filed belatedly as an afterthought, and as such the same had been rightly rejected by the learned Court. As such no interference is called for.

8. Heard the learned advocates appearing for the respective parties and considered the materials on record. Having regard to the submissions made by the parties although, the learned advocate representing the petitioner has strenuously argued that having regard to the provisions contained in Section 23A of the said Act, the provisions of Order VIII Rule 6A of the Code is not applicable, I am of the view, the question posed to this Court is little different. The parties to the suit are involved in a matrimonial dispute and admittedly they had been married on 26th November, 2020 according to the Hindu Rights and Customs in presence of the relatives of both the parties. Later, on 5th February, 2021 the marriage was registered under the provisions of the said Act and the parties were issued marriage certificate of even date. I find from the pleadings filed in the proceedings under Section 13(1) of the said Act that after the marriage the parties started residing as husband

and wife. After the suit was filed for dissolution of marriage and/or divorce under Section 13(1) of the said Act, the matter was referred to a mediator. I find that the petitioner claims that she was loath to contest the proceedings and wanted to resolve the disputes by way of settlement and as such initially she did not file any written statement. When the matter was fixed for *ex parte* hearing on 27th September, 2023, the petitioner filed the written statement along with an application for condonation of delay for vacating the *ex parte* order. Accordingly, the next date for hearing of the petition for vacating *ex parte* hearing was fixed on 19th December, 2023. However, on the said date since the opposite party prayed for time, the matter was adjourned and fixed on 24th January, 2024 on which date the written statement was accepted by the learned Court on payment of costs, and 29th February, 2024 was fixed for deposit of the money receipt towards costs and appearance. After framing of the issues on 26th July, 2024, the next date was fixed on 16th November, 2024. However, having regard to the direction for expeditious disposal issued by the Circuit Bench of this Hon'ble Court at Jalpaiguri, the learned Court had re-fixed the matter on 9th September, 2024 for evidence. On the said date the petitioner filed an application for amendment of the written statement under Order VI Rule 17 of the Code, which was allowed and the date was fixed for evidence on 13th September, 2024. The opposite party had thereafter filed his examination-in-chief on 26th September, 2024 when on the said date the petitioner had sought for an opportunity

to file an application under Section 23A of the said Act for filing counter-claim on the next date.

9. Having regard to the rival contention raised although, it appears that an issue has cropped up as to whether the provisions of Order VIII Rule 6A of the Code are applicable to filing of a counter-claim under Section 23A of the said Act however, having regard to the applicability of the Code provided under Section 21 of the said Act, I find such an issue is no longer *res integra*. Considering the judgment delivered by the Hon'ble Supreme Court in the case of **Guda Vijayalakshmi** (*supra*), it would appear that in paragraph 3 of such judgment the Hon'ble Supreme Court while considering the scope of Section 21 of the said Act has concluded that the same does not make any distinction between procedural and substantive provisions of the code and all that it provides is that the Code as far as may be shall apply to all proceedings under the Act and the phrase "as far as may be" means and is intended to exclude only such provisions of the Code as are or may be inconsistent with any of the provisions of the said Act. Applicability of the provisions of the Order VIII Rule 6D of the Code to section 23A of the said Act has also been taken note of by the Division Bench of this Hon'ble Court in the case of **Anthoni Cornalious v. Usha Cornalious**, reported in **2013 SCC OnLine Cal 541**, wherein the Division Bench of this Court, having regard to the counter-claim filed by the husband though for divorce, was of the view that the same is to be considered independently, even after dismissal of the plaintiff's suit

for divorce for default by applying the provisions of Order VIII Rule 6D of the Code. Having, thus, answered the aforesaid issue, although, Mr. Sarkar has strenuously argued that having regard to the provisions contained in Order VIII Rule 6A of the Code, a counter-claim must accompany a written statement and a belated counter-claim cannot be taken on record to appreciate the aforesaid contention, it would be relevant to consider the scope of Order VIII Rule 6A of the Code, which was incorporated by the Parliament by the Civil Procedure Code (Amendment) Act, 1976 with effect from 1st February, 1977, the said provision is reproduced hereinbelow:

“6A. Counter-claim by defendant. – (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 counter-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.”

10. Having regard thereto, I find that the only requirement for maintaining the counter-claim, is that the cause of action must accrue to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence and the only limitation is that the same shall not exceed the pecuniary limits of the jurisdiction of the Court. Thus, there is no statutory bar of filing a counter-claim after filing of the statement of defence by the defendant provided the cause of action for filing the counter-claim has accrued before the filing of the written statement or the time for filing of the written statement has expired. It must be noted that the object behind inserting the aforesaid provision was to avoid multiplicity of judicial proceedings; the time limit for filing counter-claim is not explicitly provided, the only limitation being accrual of cause of action. While deciding the aforesaid issue as regards the counter-claim in the form of relief in an application under Section 23A of the said Act, it must not be lost sight of that the right to file an application under Section 9 of the said Act for restitution of conjugal rights is a substantive right and independent of a counter-claim under Section 23A of the said Act, and a proceeding can be filed for the same. Having regard thereto, it would be necessary to consider whether the application for restitution of conjugal rights as and by way of a counter-claim under Section 23A of the said Act filed belatedly can be rejected on the ground the same does not comply with the provisions of the code so as to

disentitle the petitioner of the relief. Although, Mr. Sarkar by relying on the judgment delivered in the case of **Sanjita Das** (*supra*) would submit that a belated attempt to slip in a counter-claim for restitution of conjugal rights should not be accepted, I find that the judgment delivered in the case of **Sanjita Das** (*supra*) proceeds on an entirely different premise. The objection raised therein was with regard to the belated application for counter-claim being barred by limitation and the application being devoid of explanation for filing such counter-claim at belated stage. Such is not the case here, a substantive application has been filed for allowing the petitioner to file a counter-claim under Section 23A of the said Act. It has been specifically stated in paragraph 9 of such application that the learned Counsel for the respondent could not draft the counter-claim within a short span and hence, there was a delay. Prima facie the counter-claim filed by the petitioner certainly is not barred by limitation and the cause of action of such counter-claim has accrued prior to the filing of the statement of defence. I may, however, note that the learned Judge has proceeded to dismiss the application for acceptance of the counter-claim on two fold grounds; one that the same does not comply with the provisions of Order VII Rule 14 of the Code of Civil Procedure as also on the ground that the same does not comply with the provisions of Order VIII Rule 6A of the Code and in proceeding on such premise the learned Judge has noted in page 4 of his judgment, while considering the judgment delivered by the Hon'ble Supreme Court in the case of

Guda Vejayalakshmi (*supra*) and the case of **Nitaben Dinesh Patel. v. Dinesh Dahyabhai Patel.**, reported in **AIR Online SC 856** has concluded that the outer time limit as specified in Order VIII Rule 6A of the Code as applicable to any counter-claim is also applicable to a counter claim preferred under Section 23A of the Hindu Marriage Act. In this context I may, however, note that Order VIII Rule 6A does not provide for any outer time limit for filing counter-claim, to reiterate, the only requirement in the said provision is that the cause of action must accrue to the defendant against the plaintiff either before or after filing of the suit but before the defendant has delivered his defence. The Hon'ble Supreme Court in the case of **Guda Vejayalakshmi** (*supra*) had only considered the applicability of the code to the provisions of the said Act. In the case of **Nitaben Dinesh Patel** (*supra*) the Hon'ble Supreme Court was considering the scope of the amendment of pleading sought for under Order VI Rule 17 of the code and the scope of granting relief to a third party within the ambit of section 23A of the said Act. Having regard thereto, the above observation made by the learned Judge in the consideration for rejecting the counter-claim on the ground that the same has been filed beyond the outer time limit provided under Order VIII Rule 6A of the Code cannot be sustained, as there is no outer time limit specified under Order VIII Rule 6A of the Code. The other observation of the learned Judge that the counter-claim does not comply with the provision of Order VII Rule 14 of the Code, in my view, cannot disentitle a

counter-claim to be taken on record. The legal fiction of treating the counter-claim as a plaint is provided for in Order VIII Rule 6A(4) of the Code. Such provision of treating the counter claim as a plaint does not make a counter claim a plaint nor does it extend so far so as to require the counter-claim to conform to all requirements of the plaint. As to whether the provision contained in Order VIII Rule 6A(4) of the Code requires a counter claim to conform to all the rules applicable to plaints had been considered by this Court in the case of **OGO USA INC v. Krishna Tissue Pvt. Ltd.** in C.O. 3441 of 2024 delivered on 9th January, 2025. This Court is of the view that the legal fiction of treating the counter-claim as a plaint do no extend so far so as to require the counter-claim to conform to all the requirements of a plaint. This Court had noted that the basis for such finding flows from that fact that there is no 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,

or before the time limit for filing the defence has expired, subject to the pecuniary limits as aforesaid.

11. Considering the above, I am of the view that mere defect in pleadings or in compliance of procedure in the form of production of documents, is unlikely to defeat the valuable right of the petitioner to maintain a counter-claim. In view thereof, a liberal approach is necessary. Thus, being the position, I am of the view that the order passed by the learned Additional District Judge, 1st Track Court, Siliguri in MAT Suit No. 372 of 2022 dated 16th November, 2024 cannot be sustained, the same is accordingly set aside with a direction that the counter-claim filed by the petitioner under Section 23A of the said Act be accepted and be proceeded with.

12. With the above observations and directions, the revisional application is allowed.

13. There shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be made available to the parties on priority basis upon compliance of all formalities.

(RAJA BASU CHOWDHURY, J.)