

(1998) 07 CAL CK 0020

Calcutta High Court

Case No: G.A. No. 1372 of 1998

Jitendra Kumar Khan

APPELLANT

Vs

The Peerless General Finance
and Investment Co. Ltd.

RESPONDENT

Date of Decision: July 28, 1998

Citation: 1 CWN 545 : (1999) 1 ILR (Cal) 114

Hon'ble Judges: Amitava Lata, J

Bench: Single Bench

Advocate: Bhaskar Prasad Gupta and Abhijit Chatterjee, for the Appellant; Anil Mukherjee and Debasish Das, for the Respondent

Final Decision: Dismissed

Judgement

Amitava Lata, J.

This is an application of the Defendant No. 1 for the purpose of obtaining leave to amend the written statement and various other consequential reliefs by incorporating para 20(A) to 20(G) as underlined by red ink to set up a claim of set off and/or counter claim for the purpose of recovering loan given by the Defendant No. 1 to the Plaintiff No. 1.

2. The original suit was instituted in the year 1993 by the Plaintiffs being agents of the company for recovery of their claim praying inter alia:

(a) Leave under Clause 12 of the letter Patent;

(b) Declaration that the Plaintiffs are entitled to be paid all commissions and other incentives, payable to agents/field officers by the Defendants in respect of the transactions and/or business which was done through the customers/certificate holders introduced by the Defendant No. 9 and/or her field officers/agents introduce by her in accordance with the relevant circular/terms and conditions of appointments of all agents/field officers of the Defendants until suitable disciplinary actions are taken by the Defendant No. 1 against the offending Defendant Nos. 8 to

10 and/or there, superior officers/agents working of the concern until responsible for such direction of business of the Plaintiffs;

(C) A decree for Rs. 25,00,000.00 against the Defendant No. 1 and against other Defendants jointly Severally or in the alternative;

(d) An enquiry into the damage suffered by the Plaintiffs and decree such sums as may be found due upon such enquiry a decree be passed on the amount as may be found due and payable;

(e) Accounts;

(f) Receiver;

(g) Injunction;

(h) Costs and

(i) Further and/or other reliefs

3. On the other hand, by way of proposed amendment the Defendant wanted to incorporate the following reliefs":

(a) A decree for a sum of Rs. 4,19,509.43 (Rupees Four lakhs nineteen thousand five hundred nine and forty three paise only) in favour of the Peerless General Finance and Investment Company Ltd., the abovenamed Defendant no 1 and against Jitendra kumar khan the abovenamed Plaintiff No. 1, stated in paragraph 201E above (b) A decree for further interest, as stated in paragraph 20F above; (c) If necessary an enquiry into the sum due and payable by Jitendra Kumar Khan, the abovenamed Plaintiff No. 1, to the Peerless General Finance and Investment Company Ltd., the abovenamed Defendant No. 1, and a decree for the sum found due on such enquiry; (d) Receiver; (e) Injunction; (f) Attachment; (g) Costs and (h) Further or other reliefs.

4. By making this application Mr. Bhaskar Prasad Gupta, learned senior counsel appearing with Mr. Avijit Chatterjee Advocate Procedure speaks for the amendment of pleadings, then Order VIII Rule 6 of the CPC speaks about the particulars of set off. In this case, both should be read together.

5. Upon perusing Order VI Rule 17 of the CPC it appears that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question of controversy between the parties.

6. Upon perusing the Order VIII Rule 6 of the Code of Civil Procedure, it appears that where in a suit for recovery of money, the Defendant claims set off against the Plaintiffs' demand, any ascertained sum of money legally recoverable by him from the Plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court and both parties fill the same character as they fill in the Plaintiff's suit, the Defendant

may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing particulars of the debt, sought to be set off.

7. Therefore, prima facie, Order VI Rule 17 of the CPC has its limit in case of set off as prescribed under Order VIII Rule 6 of the Code of Civil Procedure. In other words in a case of set off Order VI Rule 17 of the CPC would be applicable subject to Order VIII Rule 6 of the Code of Civil Procedure.

8. Mr. Gupta cited two judgments in [Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon](#), and Suram Prakash Bhasin v. Smt. Raj Rani Bhasin AIR 1931 S.C. 435 p. 6, 7 and 8 to establish that the Courts while exercising discretion for amendment of pleading ought to be very liberal and only consideration would be a compensation by and order for costs.

9. On an apprehension on a question of limitation to be raised by the Respondent, Mr. Gupta took me to para 7 of the aforesaid cited judgment being [Abdul Rahim Naskar Vs. Abdul Jabbar Naskar and Others](#), and Govardhan Bang v. Govt. of the Union of India AIR 1953 Hyd. 212 paras 8 and 13 therein and contended that the question of limitation is a question on defence which touches the merit of the claim. Therefore, such question can only be decided at the time of hearing of the suit. However, Mr. Gupta stated that in the para 20D of the proposed amended written statement an explanation is given by them from which it appears even factually the claim is not barred by law of limitation.

10. Lastly, Mr. Gupta submitted that set off or a counter claim is to be considered as a separate suit but to prevent multiplicity of the proceedings a party can be allowed to make a claim of set off or a counter claim in the suit itself. Mr. Gupta again stressed that if there is real question of controversy in between the parties only in respect of the money claim, it is better to be decided in one shot. He has relied upon the judgment reported in [Nichhalbhai Vallabhai and Others Vs. Jaswantlal Zinabhai and Others](#), on a question of putting claim of set off or counter claim by way of amendment to prevent the multiplicity of proceedings.

11. Mr. Anil Mukherjee, learned senior counsel appeared with Mr. Debasis Das, Advocate submitted that the suit is instituted by three Plaintiffs claiming reliefs jointly or severally and the relief sought for is in the nature of declaratory relief. Therefore, under no stretch of imagination it can be said that both the claims are identical in nature and can be adjudicated upon in the same suit.

12. Moreover, there is inordinate delay in making the claim of set off and/or counter claim in the suit. Upon analysing the situation, Mr. Mukherjee contended that the original suit was instituted in the year 1993 and the Defendants filed their written statement in the year 1994. In the said written statement, there is no whisper about money claim of the Defendant No. 1 against the Plaintiff No. 1. The proposed amendment of written statement is sought for after a lapse of period of four years

from the time of filing written statement. Therefore, such delay in making the amendments cannot be condoned. In support of his contention, he relied upon a judgment reported in [Baijnath Bhalotia Vs. State Bank of India and Others,](#)

13. He further contended that the discretion for allowing amendment is dependable upon the fact that the Petitioner is acting on good faith. It is well established principle that the amendment of written statement at a very late stage should not be allowed. He relied upon another two judgments reported in Beni Persad Bhargava v. Narayan Glass Works, Makhanpur AIR 1949 Ajm 19 head notes and para. 7 therein and Burrakur Coal Co. Ltd. v. Sachindra Mohan Ghosh AIR 1933 Fat. 443.

14. Mr. Mukherjee further said that from the structure, form, contents, matter, prayers etc. of the application of the amendment of the written statement, it will appear that this is really an application under Order VI Rule 17 of the Code of Civil Procedure. The concept of conversion of application under Order VI Rule 17 of the CPC to be read with Order VIII Rule 6 of the CPC developed only in the affidavit-in-reply for the first time upon pursuing the objection raised by the Respondent-Plaintiff in their affidavit-in-opposition. Assuming for the moment that the Defendant company may take recourse to Order VIII Rule 6 of the Code of Civil Procedure, but it should be borne into mind that such an attempt would fail summarily in view of the fact that the purported claim of the Defendant company entitled to set off against the Plaintiffs' demand in no ascertained sum of money. Mr. Mukherjee also extended the scope of his argument by saying that if the set off is admitted, then the claim of the Plaintiff should be presumably admitted.

15. He further contended that the real controversy between the parties should be understood, otherwise amendment by induction of the written statement of a stale and untenable set off will be encouraged. He has relied upon the judgments reported in [I.T.C. Limited Vs. M.M.P. Lines Pvt. Ltd. and Others,](#) and [Nrisingh Prosad Paul Vs. Steel Products Ltd.,](#) He also contended that the amendment should be refused when the amendment is not necessary to decide the real question of controversy.

16. He has made further emphasis on a question of limitation by saying that the purported claim for set off is hopelessly barred by limitation. There is no particulars about the dates of payments by the Plaintiff No. 1 so as to save the limitation. The Defendant company tried to get protection u/s 19 of the Limitation Act, 1963 without disclosing any materials as to the part payments allegedly made by the Plaintiff No. 1 within a period commencing from July 19, 1978 and ending with December 9, 1996, so that, this Court can find out saying of limitation with reference to various dates from 1978 to 1996. Even the purported payment of Rs. 1393.32p. allegedly on December 9, 1996 is shown by the Petitioner/Defendant No. 1 company by adjustment of commission voucher which is not permitted u/s 19 of the Limitation Act, 1963. This was done only for the purpose of saving the period of

limitation.

17. Lastly, Mr. Mukherjee contended that there was no pleading for counter claim in the written statement not even in the affidavit-in-reply. At the time of hearing, when he argued to establish a distinction between a set off and a counter claim, to plug the loop-holes, on the last date of reply, the Petitioner/Defendant No. 1 company filed a supplementary affidavit to bring the counter claim which does not find any place in the application and/or affidavit-in-reply of the Defendant company filed earlier. The filing of supplementary affidavit is illegal and motivated and should not be entertained at all. The Plaintiff No. 1 did not get any scope to deny the allegations made in the supplementary affidavit. Under such circumstances, purported counter claim should not be entertained at all on the extended provisions contained in Order VIII Rule 6A of the CPC which has no relevance in connection with an application for amendment under Order VI Rule 17 of the Code of Civil Procedure.

18. In reply thereto, Mr. Gupta firstly wanted to distinguish the scope and ambit of the judgment reported *Bajinath Bhalotia v. State Bank of India and Ors.* (Supra) by saying that the amendment of written statement was sought for by introducing a plea of set off in appeal in the year 1967 while the original suit was instituted in 1958 and on such ground, prayer was disallowed. Therefore, the ratio of the judgment reported on the basis of the facts therein cannot be equated in the present case. Secondly, he submitted that so far as the judgment reported *Beni Persad Bhargava v. Narayan Glass Works, Makhanpur* (Supra) is concerned, the Order was passed by the then Judicial Commissioner which cannot have binding effect upon this Court and more significantly, the amendment was sought for on a question of jurisdiction when was disallowed.

19. Mr. Gupta further contended that so far the judgment *I.T.C. Limited v. M.M.P. Lines Pvt. Ltd. and Ors.* (Supra) as cited by the Respondent/Plaintiff No. 1 is concerned the amendment was allowed and the claim was within the period of limitation. However, the observations regarding the time barred claim is clearly obiter since the same is in conflict with the Supreme Court judgment. Next, Mr. Gupta contended that on the basis of the judgment *Nrishngh Prosad Paul v. Steel Products Ltd.* (Supra), the written statement was sought to be amended after 5 years and the reasons for delay, as given in the application for amendment, were given therein. The merits of the proposed amendment were given in para. 6 of the judgment. The learned Judge held that the claim of the Defendant would be barred by limitation. Possibly Mr. Gupta wanted to show the period for delay was about 5 years i.e. more than the period herein.

20. He further contended that so far the *Burrakur Coal Co. Ltd. v. Sachindra Mohan Ghosh* (Supra) is concerned, the application for amendment, was even taken out after the issues were settled. Lastly, Mr. Gupta wanted to distinguish the decision reported in [Maitreyee Banerjee Vs. Prabir Kumar Mukherjee](#), the observations are obliter.

21. The strongest rival points as appear or seem to be whether; a) by such amendment a party wanted to introduce a new cause of action or not, b) whether the claim, as wanted to introduce is barred by law of limitation or not.
22. Therefore, if the Court strike a balance in between these two aspects on the basis of the arguments advanced by the parties, there would not be any difficulty in coming to a right conclusion.
23. The contention of the Petitioner is that the pleadings include both plaint and written statement. In the instant case, the amendment was sought for as to the written statement but not to the plaint. Therefore, the question of change of nature of cause of action does not arise at all. "The real question of controversy" is the parameter of determination of the issue of amendment. In the instant case, the real question of controversy is how much money the Plaintiffs will get and how much money the Defendant No. 1 company would be entitled to adjust as against the claim of the Plaintiff No. 1. The question as agitated by the Respondent/Plaintiff No. 1 that the claim of the Plaintiff is in the nature of declaration with other consequential reliefs, the Petitioners stated that although the claim is in the nature of declaration but by such declaration the Respondents/Plaintiffs made a money claim. Therefore, there cannot be any difficulty in allowing the amendment for adjustment of account so to say, "the real question of controversy".
24. In addition thereto, the Petitioner contended that in view of Order VIII Rule 6 of the Code of Civil Procedure, where the suit is for recovery of money, the Petitioner/ Defendant No. 1 can claim set-off against the Plaintiffs' demand "not ascertained sum of money legally recoverable by him from the Plaintiff. Therefore, any sum due and payable can be set up as set-off, provided the Plaintiffs claim is for recovery of money.
25. Therefore, if the Plaintiff is made a claim in respect of any cause of action only for money decree, the Defendant will be able to claim any ascertained sum of money, so to say adjustment irrespective of any cause of action which will be as good as cross suit but to avoid the multiplicity of the proceedings introduced in the same suit.
26. I believe that there is a fallacy in the argument advanced by them. The Order VIII Rule 6 of the CPC definitely allows a Defendant to claim set off against the Plaintiffs money claim any ascertained sum of money legally recoverable from him but there is one proviso which is not only restricted to the question of pecuniary jurisdiction of the Court, but also claim of both the parties should fill the same character as they fill in the Plaintiffs suit. Therefore, at least one aspect is very clear that the Defendant cannot ask for adjustment of any claim whatsoever in the world as because a suit for purported money decree has been sought for by the Plaintiff on the basis of a cause of action. Therefore, there cannot be a different characters of a claims brought forward by way of set off taking only plea that by virtue of Order VIII Rule 6 of the

CPC giving qualification the Defendant to bring any claim whatsoever if there is any money claim of the Plaintiff irrespective of the fact as to whether the claim of the Plaintiffs herein are money claim simplicitor or not. I have gone through the meaning of set off in the Osborn's Concise Law Dictionary, Seventh Edition, as pointed out by Mr. Mukherjee, which is as follows:

Set-off. A claim in a liquidated amount by the Defendant to a sum of money as a defence to the whole or part of a money claim made by the Plaintiff, which may be included in the defence and set off against the Plaintiff's claim, whether or not it is added as a counterclaim.

26. The Respondent/Plaintiff No. 1 seems to be very much aggrieved since this Court allowed the Respondent/Defendant No. 1 company to file a supplementary affidavit at the end of reply, I, therefore, want to give an explanation to that score.

27. The supplementary affidavit was allowed to file with a clear understanding that the Respondent/Defendant No. 1 company will only rely upon para 3 therein in which he has given written explanation to incorporate the scope and applicability of Rule 6A along with Rule 6 under Order VIII of the Code of Civil Procedure. This Court did not allow to file a counter affidavit only for the reason that the submission as made by the Respondent/Defendant No. 1 company as to Rule 6A is a question of law and they have already agitated the same in the course of argument.

28. I think that the Respondent/Plaintiff No. 1 did not get the catch of introduction of Rule 6A along with Rule 6 under Order VIII of the CPC and travelled on a track of technicality being forgetfull that receiving of the affidavit at any stage is the discretion of the Court. He would have been much more careful on the question that by such filing of supplementary affidavit whether at all the Petitioner becoming benefitted or not. But instead of making any point in connection to the merit of supplementary affidavit to the extent of Rule 6A he left the job for the Court of decide.

29. Under Rule 6A, the Petitioner/Defendant No. 1 company 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 of claim in respect of a cause of action accruing to the Defendant against the Plaintiff either before or after the filing of the suit. Therefore, their intention is to incorporate counter claim which is much more wider in sense in respect of cause of action as against the Plaintiff irrespective of their claim but the fallacy is such claim should be made before delivery of his defence or before the time limited for delivering his defence. In the instant case, delivery of the defence expired long back in 1994. Therefore, there is no scope or ambit under Order VIII Rule 6A of the CPC to incorporate a counter claim when the time of delivering the defence expired long back unless extended by the Court. It is to be remembered that Order VIII Rule 6A of the CPC was inserted by amendment of the Code in 1976. Therefore, the intention of the legislature is that the filing of the counter claim

should be time bounded and not to be allowed as and when it is desired by a party.

30. Therefore, in all, neither the set-off as proposed is filling in the same character as filled in the Plaintiffs' suit, nor the counter claim has made before delivery of the defence or before the time limited for delivering the defence. Under such circumstances, not only question of delay is involved herein but other questions as above inclusive of such question of limitation. It seems the application is net outcome of alterthought. Therefore, before going into the question or limitation, I hold that the cause of action as pleaded by the Petitioners/Defendants company in the proposed written statement is arising out of a cause of action different from the cause of action as pleaded by the Plaintiff in the suit and cannot fill the same character as they fill in the Plaintiffs suit and long after delivering the defence.

31. So far the question of limitation is concerned, although it has been pleaded before this Court that the question of limitation is a question of defence on the part of the Respondent/Plaintiff No. 1 in the suit cannot be readily acceptable by this Court and as such, a research is needed.

32. Factually, in para 20D of the proposed written statement, an explanation was given as to the question of limitation by the Petitioner/Defendant No. 1 company. This is in respect of his own account. Therefore, from where the question of acknowledgement arrives on the part of the Respondent/Plaintiff No. 1 is totally unknown. The Court cannot shut out its eyes as to the question of limitation and allow the amendment when there is a prima facie, dissatisfaction on perusal. Section 19 of the Limitation Act, as also submitted by the Respondent/Plaintiff No. 1, a fresh period of limitation shall be computed from the time when the payment was made by a debtor before the expiration of the prescribed period by the persons liable to pay the debt.

33. The Petitioner/Defendant No. 1 company contended that the Court should be satisfied with the above, apart from the pleading as proposed for amendment of the written statement, at the time of hearing of the suit. But one question is striking the mind of this Court that if a person defending the suit, at any stage of the proceedings, even if at the earliest opportunity, for an example at the interlocutory stage take the question of limitation, and then the Court cannot shut out its eyes as to such question being one of the foundation of a suit.

34. The question of limitation cannot be only parameter but definitely is one of the parameter in disallowing an application for amendment as sought for. Therefore, even on the question of limitation when it appears that the suit was instituted in 1993 and the original written statement was filed in the year 1994, and just at the time of hearing of this suit, amendment was sought for in respect of a claim which is unfounded in the original written statement and appears to be barred by law of limitation cannot be allowed by this Court.

35. More emphasis was given by the Respondent/Plaintiff No. 1 in opposing the application for amendment and by the Petitioner/Defendant No. 1 company in giving reply thereto, in dealing with a reported judgment as above, being *Baijnath Bhalotia v. State Bank of India and Ors.* (Supra). The point which was discussed therein is that if a cause is already there in the original pleading and it is sought to be extended either by way of adding another relief and putting another ground of defence or claim alternatively or in addition to, what is stated in the original pleading, it can be permitted. But if a new cause is sought to be made out and facts of claims based upon a different cause of action are sought to be introduced by way of amendment, that has to be prevented because it will cause unnecessary prejudiced to the other side. Principally the logic is acceptable by this Court.

36. An elaborate argument was advanced by the Petitioner's Counsel as to the question of legal set-off, the equitable set-off and the counter claim which cannot be said to be academic absolutely in the context of the case. "Legal set-off means that set-off in between the same parties and against the same transactions. "Counter claim", is a claim may be more than the claim of the opposite party wherein in "equitable set-off is less than the claim of the opposite party. The argument as advanced by the Petitioner/Defendant No. 1 company that since there is a scope of "equitable set-off which may not arise out of same transaction, why they will be debarred from bringing the same before the Court to avoid the multiplicity of the proceedings. To it is context, I again say that "equitable set-off does not necessarily mean that totally outside the scope and ambit of the original claim and if it is so, there is no necessity of writing a line under Order VIII Rule 6 of the Code of Civil Procedure, that is "both parties fill the same character as they fill in the Plaintiffs suit" Therefore equitable principle cannot be applicable dehors the law.

37. Finally three Plaintiffs jointly instituted a suit for the purpose of declaration as to their entitlement of certain commissions and incentives under certain circumstances as available in the prayer "b" of the plaint. Therefore, the suit cannot be declared as money suit simplicitor. Unless a declaration as to the question of prayer "b" is allowed, there is no scope to adjudge the claim under prayer "c" or "d".

38. Therefore, upon considering the totality of the circumstances I hold that the application should fail.

39. Hence, the application is dismissed but the payment of cost is reserved till the disposal of the suit.

40. Parties are to act on a signed copy of the minute of the operative part of the order.