

(1999) 11 MP CK 0066
In the Madhya Pradesh High Court
Case No : First Appeal No. 110 of 1998

VXL India Limited and another	Vs	APPELLANT
Keshav Brij Bhushan Das Aggarwal and another		RESPONDENT

Date of Decision : 24-11-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 16, 96

Citation : (2001) 1 MPLJ 344

Hon'ble Judges : S.P. Srivastava, J; R.B. Dixit, J

Bench : Division Bench

Advocate : J.P. Gupta and J.S.L. Sinha, for the Appellant; K.N. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Srivastava, J.

Heard the Learned Counsel for the applicants/judgment-debtor as well as the Learned Counsel representing the Respondent/deeree-holder.

Perused the record.

The Judgment-debtor/Defendant No. 1 has filed the present application praying for the permission to incorporate various amendments in the written statement filed by it in the suit, the judgment and decree passed wherein is under challenge in the First Appeal before this Court filed u/s 96 of the Code of Civil Procedure.

The Defendant proposes to delete the last paragraph 21 of the written statement as originally framed and proposes to add paragraphs 21 to 35 containing various factual assertions.

In paragraphs 30 and 31 of the proposed amendments, the Defendant has asserted that the Plaintiff is liable to pay a sum of Rs. 21,88, 492/- to the Defendant and the Defendant is entitled to recover the aforesaid amount as unpaid seller with interest from the date of filing of the suit on 22-6-1992 at the

rate of 20% per annum.

In paragraph 33 of the proposed amendments, it has been stated that the cause of action for the counter-claim had arisen on 16-4-1998 when the IX Additional District Judge, Gwalior, granted a preliminary decree for accounts and as such it had become necessary upon the Defendant to prove his dues and accounts. In the same paragraph, it has been further asserted that the Defendant had filed a suit on 22-6-1992 at Jamnagar, the cause of action for which suit had arisen on various dates when the goods were supplied and especially on 5-12-1991 and 18-12-1992 whereafter the suit had been filed for the recovery of the aforesaid amount at Jamnagar on 22-6-1992.

The Defendant in paragraph 35 of the proposed amendment has valued the counter-claim at Rs. 21,88,492/- and has prayed that the Plaintiffs suit be dismissed with costs and allowing the counter-claim, a decree for Rs. 21,88,492/- together with interest from 22-6-1992 at the rate of 20% per annum till the date of realisation of decree for the counter claim be passed.

The aforesaid application has been contested by the Plaintiff/Respondent who has filed a reply in opposition to the said application which is duly supported by an affidavit.

The Plaintiff has denied the assertions of fact urged by the Defendant under the proposed amendments. The Plaintiff has further asserted that the counter-claim has been preferred by the Defendant much beyond the prescribed period of limitation and deserves to be rejected outright. It has also been asserted that the facts which are now sought to be incorporated in the written statement were in the knowledge of the Appellants from the very beginning and no reason has been assigned for not incorporating the claim sought to be taken now at this belated stage.

The Plaintiff has further urged that the application for amendments has been moved with a mala fide intention with an effort to reopen the case nullifying the decree passed in favour of the Plaintiff and prolonging the litigation. It has also been asserted that such a counter claim cannot be entertained for which a separate suit is already pending. The Plaintiff has further pointed out that the Appellant/applicant has not paid any Court Fee on the so called counter claim and since the proposed amendment is only to protract the litigation, the application deserves to be rejected.

The suit giving rise to this First Appeal had been filed by the Plaintiff claiming a declaratory decree and permanent injunction. The Plaintiff had claimed that from 12-4-1990, he had been functioning as an agent of the Defendant No. 1 and had been selling the goods manufactured by the Defendant No. 1 as its agent in the show-room being run in the name and style of "Mangaldeep".

The Defendant No. 1 had however asserted that the Plaintiff had never been appointed as its agent and the Defendant had never been in direct dealing with

the Plaintiff. In the written statement it had been asserted that the Plaintiff No. 1 had not made the payment of the cloth which had been supplied to him on his request and an amount of Rs. 17,98,695/- remained outstanding against the Plaintiff No. 1 which is to be recovered from him by the Defendant No. 1. In the written statement as originally framed, it had however been indicated that for the recovery of the aforesaid amount, the Defendant No. 1 had filed a civil suit bearing No. 110/1992 against the Plaintiffs which was pending in the Court of Civil Judge, Senior Division, Jamnagar, Gujarat. In this suit, the Defendant had prayed for a decree for the recovery of an amount of Rs. 21,88,492/- .

The trial Court vide its judgment and decree dated 16-4-1998 had decreed the suit only in part and issuing certain directions regulating the accounting had granted a decree under Order XX, Rule 16 CPC Code.

The question which arises for consideration in this case is as to whether the Defendant/Appellant No. 1 who had set up a plea of "equitable set-off in the written statement filed by it as originally framed can be permitted to raise a counter-claim at this belated stage where the trial is over, specially when as noticed by the trial Court, no evidence had been led by it.

The provisions contained in Order VIII Rule 6 and 6-A and Order XX, Rule 19 of the Code of Civil Procedure, 1908, are to the following effect:

ORDER VIII. Written statement, set-off and Counter-claim.

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Particulars of set-off to be given in written statement. - (1) Where in a suit for the recovery of money the Defendant claims to set-off against the Plaintiff's 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 the particulars of the debt sought to be set-off.

(Emphasis supplied)

Effect of set-off. - (2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the setoff; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree. (3) The rules relating to a written statement by a

Defendant apply to a written statement in answer to a claim of set-off"

6-A. 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 according 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."

...

(Emphasis supplied)

ORDER XX. RULE 19

Decree when set-off or counter-claim is allowed.- (1) Where the Defendant has been allowed a set-off or counter-claim against the claim of the Plaintiff, the decree shall state what amount is due to the Plaintiff and what amount is due to the Defendant, and shall be for the recovery of any sum which appears to be due to either party. Appeal from decree relating to set-off or counter claim.- (2) Any decree passed in a suit in which a set-off or counter-claim is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off or counter-claim had been claimed.

(3) The provisions of this rule shall apply whether the set-off or counter-claim is admissible under Rule 6 of Order VIII or otherwise:

(Emphasis supplied)

From a reading of the rules, it is clear that the Defendant can file the counter-claim before delivering his defence or before the time limited for delivering his defence expires. He has also to mention that fact in the written statement. It is thus evident that the Defendant can file the counter-claim before he files the written statement, and cannot be allowed to do so by amending the written statement. The object of incorporating the provision for setting up the counter-claim before the filing of the written statement appears to be, that the disposal of the suit may not be delayed.

There can be no manner of doubt that "set-off " and the "counter-claim" are not the same. "Set-off" is a ground of defence and if established it affords an answer to the Plaintiff's claim wholly or protanto. A "counterclaim" on the other hand is in effect a weapon of offence.

"Set-off" is a defence proper to the Plaintiff's action. In English law while a counter-claim is practically a cross-action, it may not relate to or be in any way connected with the Plaintiff's claim and could also exceed the Plaintiff's claim. However, under the provisions of the CPC Code, some of the attributes of a counter-claim as known to English Law are attributed to "set-off and some of the attributes of "set-off" stand attributed to a "counter-claim" as envisaged under the present CPC Code. This appears to have been done in regard to the attribute of a "set-off" as a statutory defence of the whole or a portion of the Plaintiff's claim and that a Defendant had to bring a cross-action for the balance due to him over what was due to the Plaintiff. Order VIII, Rule 6, CPC Code, however, does not make a "set-off" as wide as a counter-claim. The provision now embodied in Order VIII of the Code of CPC as framed by the Legislature, the expression "counter-claim" as, envisaged under the English Law was not introduced but only some of the attributes of a "counter-claim" were given to a "set-off" and some of the attributes of a "set-off" at English law were modified. The "set-off" as contemplated under Order VIII, Rule 6 CPC Code, does not contemplate cross-action for the balance due to the Defendant over what was due to the Plaintiff. The written statement containing a plea of set-off as is clearly stipulated in Sub-rule (2) of Order VIII Rule 6 has the same effect as a plaint in a cross-suit only so as to enable the Court to pronounce a final judgment in respect of both the original claim and of the "set-off". The aforesaid provision read with Order XX, Rule 19 CPC Code, indicate that the Court must treat the claim of the Defendant exactly as if the Defendant had filed a plaint and the Court must pass a decree in favour of the Defendant if his claim is established even though the claim of the Plaintiff against the Defendant is dismissed. But the CPC does not make a "set-off" under Order VIII, Rule 6 as wide as a counter-claim as the suit of the Plaintiff must be "for the recovery of the money" and the "set-off" of the Defendant must be of "any ascertained sum of money legally recoverable by him from the Plaintiff." A set-off under Order VIII, Rule 6, CPC Code, is wider than a set-off at English Law, but it is not so wide as a counter-claim. The Defendant, however, may or may not demand a decree in his own favour while setting up a claim of set-off against the Plaintiff's demand.

It may be noticed that the plea of payment means and signifies that the debt claimed by the Plaintiff has ceased to be due or stands paid off protanto (partially paid). A plea of set-off may also include a request that the debt to be found due the Plaintiff be treated as extinguished or reduced protanto by being set-off against the debt of the Defendant. It may be noticed that the expression "set-off" as contained in the rules referred to hereinabove, it seems to us has been used in a wider sense.

The question as to what is the real nature of "set-off" as claimed is to be determined as a matter of law and is not in any way governed by the language used by the parties in their pleadings.

It may further be noticed in this connection that a cross-claim may be set up as a shield or as a sword. When set up as a shield, it is a defensive weapon and may be pleaded by the Defendant to reduce the liability against him even to the full extent of the Plaintiff's claim. The "set-off" may be "legal" or "equitable". The provision contained in Order XX, Rule 19(3) CPC clearly indicates that "set-off" may be one as admissible under Rule 6 of Order VIII or otherwise. If the claim be for unliquidated damages for any alleged breach of contract of legal obligation, the amount that may ultimately be ascertained may be claimed as an equitable set-off but not under Order VIII, Rule 6 of the Code of Civil Procedure. This rule, however, does not preclude an equitable "set-off" and the Defendant may therefore claim an equitable "set-off" provided his cross-demand arises out of the same transaction as the, Plaintiff's claim or if its transactions are so connected in their nature and circumstances as to make it inequitable that the Defendant should be driven to a cross-suit.

It should not be however lost sight of that the provision of Order VIII, Rule 6 CPC Code, are not exhaustive and an "equitable setoff" may be pleaded if the Defendant's claim is shown to have arisen out of the same transaction and further that the said transaction do not take away any right to set-off whether "legal" or "equitable" which the party would have independently of the Code.

A "legal set-off", it may be noticed requires a Court Fee because it is a claim that might be established by a separate suit in which the Court Fee would have to be paid. An equitable "set-off" may, however, can only be claimed by the Defendant for a claim arising out of the same transaction as the Plaintiff's claim. The two claims must arise out of the same transaction and there must be knowledge on both the sides of an existing debt due to one party and a credit of the other party founded on and treating such debt as a means of discharging it. But there is no such fee required in the case of equitable "set-off" which is for an amount that may equally be deducted from the claim of the Plaintiff where a Court Fee had been paid on the gross amount.

The equitable "set-off" cannot be claimed as a matter of right and the Court has the discretion to refuse or allow it if a protracted enquiry is necessary for the determination of the sum due. This may be a good ground for refusing or rejecting it. The view taken by the Nagpur High Court in its decision in the case of AIR 1940 177 (Nagpur) , to the above effect represents the correct legal position.

In the present case, what we find is that the Defendant had only come up with a plea of equitable "set-off" in the written statement as originally framed. In the written statement, the Defendant had not claimed a decree in its favour. The Defendant had in clear terms indicated that a separate suit for the recovery of

the amount claimed due by the Defendant had already been filed and was pending. The suit giving rise to the present appeal was, however, filed earlier to the filing of the suit by the Defendant. The fact remains and is not disputed by the Defendant that the suit filed by the Defendant No. 1 against the Plaintiff/ Respondent for the recovery of the amount alleged to be due as against the Plaintiff and claimed to be payable by the Plaintiff is being diligently prosecuted by the Defendant.

As has already been noticed hereinabove, the trial Court has clearly pointed out that the Defendant had not led any evidence. Such an action on the part of the Defendant coupled with the fact that no Court Fee was paid is clearly indicative of the fact that the plea raised in the written statement was only a plea of equitable "set-off" and raising a "counter-claim" in the written statement was never intended, specially when the Defendant had already filed a suit for the recovery of the said amount which suit was pending on the date when the written statement was filed.

The provisions contained in Order VIII, Rule 6 and 6-A CPC Code, clearly stipulate that a counter-claim has to be filed within the period prescribed thereunder. The Defendant in spite of full knowledge did not choose to put any counter-claim as envisaged under the aforesaid provisions and remained contented with the raising of the plea of equitable "set-off" only and continued to prosecute its suit for the recovery of the amount and now faced with the present decree against it. has come forward with a counter-claim which is sought to be included, in the written statement as originally framed by amending the same.

In its decision in the case of Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others, , the Apex Court while approving of the observations made by the Bombay High Court in its decision in the case of Kisandas Rupchand v. Rachappa Vithoba, reported in 33 Bom 644, had indicated that amendments ought to be allowed subject to the condition that the proposed amendments do not have the effect of injustice to the other side and should be necessary for the purpose of determining the real questions in controversy between the parties, pointing out further that the amendment should however be refused only where the other party cannot be placed in the same position as if the pleadings had been originally correct and the amendment must be refused if it purports setting up of a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation.

Taking into consideration the facts and circumstances indicated hereinabove, we are clearly of the opinion that the present application seeking permission to amend the written statement at this belated stage when the trial of the suit giving rise to the present appeal is over, setting up a counter-claim especially when the suit for the recovery of the amount claimed to be due from the Plaintiff had already been filed by the Defendant long back in the year 1992 which is still pending cannot be treated to be a bona fide application. We are further of the opinion that the Defendant should not be permitted at such a belated stage to

convert the plea of "equitable set-off" into a "counter-claim" which will require protracted enquiry for the determination of the sum due and such a course ought to be avoided when the matter is under appeal, the trial being over.

In view of our conclusions indicated hereinabove, this application deserves to be and is hereby dismissed.