

IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
COMMERCIAL DIVISION

Present:

The Hon'ble Justice Krishna Rao

G.A. (Com) No. 2 of 2024

In

C.S. (COM) No. 10 of 2023

Prabhat Marketing Co. Ltd.

Versus

Tirrihannah Co. Ltd.

Mr. Sankarsan Sarkar

Mr. Sunil Kumar Singhania

Ms. Kalpana Singhania

... For the plaintiff.

Mr. Rohit Banerjee

Mr. Vishwarup Acharyya

Mr. Suman Majumder

Mr. Akash Dutta

... For the defendant.

Hearing Concluded On : 30.04.2025

Judgment on : 13.06.2025

Krishna Rao, J.:

1. The defendant has filed the present application being G.A. (Com) No. 2 of 2024 praying for amendment in the written statement by incorporating Counter Claim.
2. It is the case of the defendant that the defendant in its written statement specifically stated that the chemical supplied by the plaintiff was not to be used against pests and the same was not made for protection of tea plantation. The defendant has suffered loss and damage due to the conduct of the plaintiff.
3. Mr. Rohit Banerjee, Learned Advocate representing the defendant submits that the assessment of the loss suffered by the defendant came to its knowledge through a report of the Chartered Accountant dated 3rd February, 2020 and the said report is also disclosed in the written statement.
4. Mr. Banerjee submits that the defendant has not introduced any new case or changed the nature and character of the written statement. He submits that the counter claim arises out of the same set of transactions as alleged in the plaint.
5. Mr. Banerjee submits that the defendant has already mentioned the facts leading to the counter claim in the written statement. He submits that the Chartered Accountant has ascertained the compensation of Rs. 1,09,73,340/- which the defendant is entitled to receive from the

plaintiff. He submits that before filing of the present application, the defendant has initiated pre-institution mediation process but the plaintiff failed to appear in the mediation process and after receipt of non-starter report, the defendant has filed the present application.

6. Mr. Sankarsan Sarkar, Learned Advocate representing the plaintiff submits that on perusal of the proposed amendment, it appears that the defendant seeks to introduce a counter claim which was already available to the defendant since 3rd February, 2020 that is the date of the report of Chartered Accountant, thus the counter claim sought to be introduced is barred by limitation.
7. Mr. Sarkar submits that Order VIII, Rule 6A of the Code of Civil Procedure, 1908, cast a duty upon the defendant to file counter claim either before the defendant delivers its defense or before the time limited for delivery of its defense has expired. He submits that if Order VIII, Rule 6A is read with proviso of Order VIII, Rule 1 of the Code of Civil Procedure, 1908, it is incumbent on the defendant to file counter claim prior to the expiry of 120 days from the date of receipt of writ of summons.
8. Mr. Sarkar submits that any amendment of pleadings of the written statement is clearly barred under Order VIII, Rule 1 proviso, Order V, Rule 1 proviso and Order VIII, Rule 10 proviso of the Code of Civil Procedure, 1908 as amended by the Commercial Courts Act, 2015.

9. Mr. Sarkar relied upon the judgment in the case of **SCG Contracts (India) Private Limited vs. K.S. Chamankar Infrastructure Private Limited and Ors.** reported in **(2019) 12 SCC 210** and submits that the defendant forfeits its right to amend written statement after the period of 120 days from the date to receipt of writ of summons. He submits that this Court in the similar situate case held that though no time limit has been stipulated for filing of additional written statement by the plaintiff to the counter claim filed by the defendant but provisions of Order VIII, Rule 1 proviso read with Order VIII Rule, 10 proviso is squarely applicable.
10. The issue in the present application whether amendment in the written statement can be allowed after the period of 120 days from date of receipt of writ of summons.
11. Writ of summons was served upon the defendant on 24th January, 2024 but the defendant has not filed written statement with the prescribed period of 30 days. The defendant had filed an application for extension of time to file written statement and this Court by an order dated 10th June, 2024, allowed the defendant to file written statement and on 12th June, 2024, the defendant filed the written statement.
12. In the written statement, the defendant has made out the following case:

“5.h) *The defendant placed orders for the 'Miteshot' brand chemical from time to time beginning from 2018 till mid-2019. In the year 2018, a large area of tea plantation and*

substantial tea crop got infected and ruined the tea crops causing huge financial loss to the defendant. Again in the year 2019, a large area of tea plantation and substantial area of tea crop got infected and ruined the tea crops resulting in huge financial loss to the defendant. Such incidents made the defendant suspicious with regard to the effectiveness 'Miteshot' supplied by the plaintiff. The defendant called upon the plaintiff and informed same to the director of the plaintiff namely Mr. Kailash Dhaundiyal. Sometime in May 2019, the plaintiff sent its representative Mr. Ishan Dhaundiyal, being the son of Mr. Kailash Dhaundiyal, to the tea state of the defendant to see and inspect the recurring damage of the crops from the pest attack. It is pertinent to mention hearing that the representative of the plaintiff acknowledged and admitted that 'Miteshot' was not effective in controlling the pest resulting in huge loss.

i) Upon a detailed enquiry it came to the notice of the defendant that 'Miteshot' was not a chemical to be used against pests and the same was not meant for the protection of tea plantation.

j) Thereafter, the defendant returned the balance chemical of 'Miteshot' brand to the plaintiff in May 2019 and the plaintiff in return issued a credit note to the respondent in respect of the returned 'Miteshot' brand chemicals and immediately supplied 'Magister' in place of 'Miteshot'.

k) By a letter dated 29 July 2019, the defendant informed the plaintiff regarding the financial loss suffered by the defendant due to the plaintiff. A copy of the letter dated 29th July 2019 is annexed hereto and marked with the letter "**A**". The plaintiff replied to the said letter by its letter dated 2nd August 2019, a copy whereof is annexed hereto and marked with the letter "**B**" and raised frivolous allegations. The defendant thereafter made further enquiries and was shocked to find out that Mr. Kailash Dhaundiyal, a director of the plaintiff has a partnership firm named Proxichem LLP. The designated partner of Proxichem LLP are Kailash Dhaundiyal and his son Ishan Dhaundiyal.

l) It is evident that Proxichem LLP is the manufacturer/supplier of Miteshot. It is further evident that the seller of Miteshot brand is Proxichem LLP and the buyer is the plaintiff. Furthermore, the website of Proxichem LLP states that Proxichem LLP is the manufacturer of Miteshot. It also appeared from the said website that the registered office of Proxichem LLP is at 4, Synagogue Street, Kolkata and its sales office is at 39/2B, Kalighat Road, 2nd floor, Kolkata and Siliguri branch office is at Siliguri Basera Building. A copy of the printout obtained from the website of "Proxichem.com" is annexed hereto and marked with the letter "**C**". It would be evident from the documents that the Guwahati branch office address of the plaintiff and Proxichem LLP is the same. Copies of the master data of the plaintiff and the Proxichem LLP obtained from the official website of the Ministry of Corporate Affairs are annexed hereto and collectively marked with the letter "**D**" & "**E**" respectively.

m) The plaintiff and its directors persuaded the defendant to purchase Miteshot. The plaintiff knowing fully well that Miteshot is not applicable for tea plantation and also for the purpose required by the defendant, misrepresented to the defendant that Miteshot is effective and induced the defendant to buy the said brand resulting in huge financial loss to the defendant. It is clear that Miteshot being a growth promoter of vegetables was not applicable for tea plantation.

n) The plaintiff approached the Learned National Company Law Tribunal, Kolkata Bench, Kolkata by filing an application under section 9 of the Insolvency and Bankruptcy Code, 2016 being CP (IB) No.138/KB/2020. By an order dated 12th September, 2022 the Learned Tribunal was pleased to dismiss the said application. The plaintiff thereafter preferred an appeal against the order dated 12th September, 2022 before the National Company Law Appellate Tribunal Principal Bench, New Delhi Company Appeal (AT) (Ins.) No. 1536 of 2022. By an order dated 2nd January 2023, the Learned Appellate Tribunal was pleased to dismiss the appeal as withdrawn. A copy of the order dated 2nd January, 2023 is annexed hereto and marked with the letter "**F**".

14. *The contents of the notice dated 22nd November, 2019 are false, frivolous and incorrect and ought not to be relied upon. The said letter was duly replied by the defendant by way of a letter dated 11th December 2019, a copy whereof is annexed hereto and marked with the letter "I", refuting the allegations made therein and further making a counterclaim of Rs. 90, 00, 000/- along with interest @ 18% per annum on account of loss and damages suffered by the defendant for the reasons stated hereinabove. The defendant has audited the loss suffered by the defendant. In this regard a copy of the report of Chartered Accountant, Ghosh & Basu LLP dated 3.2.20 stating that the defendant suffered loss and damages to the tune of Rs. 1,09,73,340/- is annexed hereto and marked with the letter "J". It is stated that there was no necessity and/or obligation on the part of the defendant to make any payment to the plaintiff for any dues as alleged or at all. The plaintiff preferred an appeal against the order dated 12th September, 2022 before the National Company Law Appellate Tribunal Principal Bench, New Delhi being Company Appeal (AT) (Ins.) No. 1536 of 2022. By an order dated 2nd January 2023, the Learned Appellate Tribunal was pleased to dismiss the appeal as withdrawn. A copy of the order dated 2nd January, 2023 is annexed and marked with the letter "F". It is denied that the pre-existing disputes by the defendant as recorded in the various letters issued by the defendant is concocted or false story as alleged or at all. The plaintiff became aware of the misrepresentation and fraud perpetrated by the plaintiff upon the defendant sometime in May, 2019 and returned the product "Miteshot" and further came to learn about the conspiracy of the plaintiff and its directors named hereinabove to sell the product not applicable to tea industry. The plaintiff took advantage of the faith and trust reposed by the defendant upon the plaintiff and its directors' and made illegal gain at the expense of the defendant thereby causing wrongful loss to the defendant."*

13. After filing of written statement, the defendant has filed the present application for amendment for incorporating counter claim which reads as follows:

***“16.** The defendant became aware of its claim on account of compensation for loss and damage suffered due to the conduct of the plaintiff only after the report dated February 3, 2020, by Chartered Accountant Ghosh & Basu LLP was received.*

***17.** In the circumstances, it is evident that the plaintiff is liable to pay the defendant a substantial sum of money, particulars whereof are as follows:-*

<i>Particulars</i>	<i>Amount (INR)</i>
<i>Principle sum as on 03.02.2020</i>	<i>1,09,73,340/-</i>
<i>Interest @18% per annum from 03.02.2020 till 31.03.2024</i>	<i>24,98,62,952/-</i>
<i>Total</i>	<i>26,08,36,292/-</i>

***18.** Thus, there is now due and owing to the defendant from the plaintiff a sum of Rs. 26,08,36,292/- including interest thereon @18% per annum. Such rate of interest is reasonable in the circumstances. Alternatively, this Hon'ble Court is empowered to conduct an enquiry and ascertain the actual quantum of loss and damage suffered by the defendant due to the conduct of the plaintiff and award equivalent compensation thereof to the defendant along with reasonable interest thereon.*

***19.** The defendant has exhausted the pre-institution mediation prescribed under Section 12(A) of the Commercial Courts Act, 2015. The parties have not been able to resolve the disputes through mediation as will appear from the report dated 28th November, 2024, issued by the Mediation Centre, a copy whereof is annexed hereto and marked with letter "K".*

20. *The defendant submits that it could not institute the present counter claim earlier due to the effects of the Covid-19 pandemic and seeks exemption for the delay, if any. As such, no part of the defendant's claim is barred by limitation.*

21. *For the purpose of jurisdiction, the counter claim is valued at over Rs. 1 Crore and as such the Commercial Division of this Hon'ble Court is empowered to receive, try and determine the claim of the defendant.*

22. *For the purpose of Court fees, the counter claim of the defendant is valued at over Rs. 1 Crore and the defendant has paid maximum Court fees thereon.*

In the premises, the defendant claims as follows:-

- a) A decree for Rs. 26,08,36,292/- against the plaintiff on account of compensation for loss and damage together with interest thereon @18% per annum and at such rate as this Hon'ble Court may think proper;*
- b) Alternatively, an enquiry be made by this Hon'ble Court regarding the actual quantum of compensation for loss and damage caused to the defendant and payable by the plaintiff together with reasonable interest thereon;*
- c) Attachment;*
- d) Receiver;*
- e) Injunction;*
- f) Costs;*
- g) Such further and/or other reliefs."*

14. Order VIII Rule 1, Order VIII Rule 10 and Order V Rule 1 of the Code of Civil Procedure, 1908, reads as follows:

"Order VIII, Written Statement, Set-Off and Counter-Claim

[Rule 1, Written Statement. – The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.]

[Rule 10, Procedure when party fails to present written statement called for by Court. – Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.]

Order V, Issue and Service of Summons

1. Summons—

(1) When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file written statement of his defence, if any, within thirty days from the date of service of summons on that defendant:

Provided that no such summons shall be issued when a defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim:

Provided further that where a defendant fails to file written statement within the said period of thirty days, he shall be allowed to file the same on such other days as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear—

(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.”

15. The defendant has not filed written statement within the prescribed period of 30 days but on an application filed by the defendant, this Court allowed the defendant to file written statement. This Court has granted leave to file written statement within the outer period of 120 days and the same is filed within the said period, thus this Court is of the opinion that the plaintiff cannot take benefit of proviso of Order VIII, Rule 10 of the CPC. Similarly, the plaintiff also cannot take the benefit of the proviso of Order V, Rule 1 of the CPC as the defendant has filed written statement within the outer period of 120 days with the leave of this Court. In the above circumstances, the judgment relied by the plaintiff in the case of **SCG Contracts (supra)** is not applicable in the present case.

16. Order VIII, Rule 6A of the Code of Civil Procedure, 1908, reads as follows:

“Order VIII, Written Statement, Set-Off and Counter-Claim

[/“Rule 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.]”

- 17.** Admittedly, the defendant has not filed counter claim along with written statement. The defendant has filed written statement in the month of June, 2024 with the leave of this Court. This application for amendment incorporating counterclaim is filed on 11th December, 2024. The suit is at the stage of discovery and inspection of documents. Till date no issues is framed. Order VIII, Rule 6A is not amended under the Commercial Courts Act, 2015. Order VIII, Rule 1 and Order VIII, Rule 10 of the Code of Civil Procedure, 1908, are amended under the Commercial Courts Act, 2015. Order VI, Rule 17 of the Code of Civil

Procedure, 1908, is also not amended under the Commercial Courts Act, 2015. As per proviso clause of Order VI, Rule 17 of the Code of Civil Procedure, 1908, no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before commencement of trial. Under Order VIII, Rule 6-A of the Code of Civil Procedure, 1908, time for filing of counter claim is not explicitly provided by the legislature. Only limitation as to the accrual of cause of action is provided.

18. In the case of **Ashok Kumar Kalra vs. Wing CDR. Surendra Agnihotri & Ors.** reported in **(2020) 2 SCC 394**, the Hon'ble Supreme Court held that:

“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.”*

- 19.** The plaintiff on 22nd November, 2019, issued a notice to the defendant under Section 8 of the Insolvency and Bankruptcy Code, 2016 calling upon the defendant for payment of Rs. 46,39,622/- along with interest at the rate of 14% per annum within 90 days from the date of invoices till the date of payment. The defendant sent a reply to the said notice denying the claim of the plaintiff and has made counter claim of Rs. 90,00,000/- along with interest at the rate of 18% per annum on account of damages suffered by the defendant. It is the further case of the defendant that the defendant has audited the loss suffered by the defendant through the Chartered Accountant, namely, Ghosh and Basu LLP and as per audited report dated 3rd February, 2020, the defendant suffered loss and damages to the tune of Rs. 1,09,73,340/-.
- 20.** As the defendant has not paid the amount as claimed by the plaintiff, the plaintiff has initiated proceeding under Section 9 of the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal at Kolkata but by an order dated 12th September, 2022, the Learned Tribunal has dismissed the proceeding initiated by the plaintiff. Being aggrieved with the order of dismissal, the plaintiff has preferred an appeal before the Appellate authority but the appeal was also dismissed on 2nd January, 2023. Thereafter the plaintiff has filed the instant suit.

- 21.** The defendant has narrated all the facts in the written statement and also disclosed all the relevant documents along with the written statement. After filing of written statement, the defendant has initiated a mediation process before the High Court Mediation Centre on 13th September, 2024 but in spite of receipt of notice, the plaintiff did not appear before the Mediation Centre and on 28th November, 2024, non-starter report was issued. After receipt of nonstarter report, the defendant has filed the present application on 11th December, 2024.
- 22.** The defendant has made initial claim of Rs. 90,00,000/- from plaintiff through its reply dated 11th December, 2019. The defendant relied upon the judgment passed by the Hon'ble Supreme Court in the case of **SUO MOTU WRIT PETITION (C) NO. 3 OF 2020** dated **10th January, 2022** wherein the Hon'ble Supreme Court held that:

“5.III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.”

- 23.** The Coordinate Bench of this Court in the case of **Qamrul Hoda Vs. Md. Wakil Khan & Ors.** reported in **2011 SCC OnLine Cal 1831** held that:

“The amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimize the litigation. The plea that the relief sought by way of amendment was barred by time

is arguable in the circumstances of the case. The plea of limitation being disputed could be made a subject matter of the issue after allowing the amendment prayed for.”

24. In the case in hand, since inception, the defendant is making counter claim against the plaintiff. In the written statement also the defendant has made out the case of counter claim relying upon the report of the Chartered Accountant but the plaintiff has not incorporated the prayer for counter claim. In the proposed amendment, the defendant has not made out any new case. The only document which the defendant intent to disclose with the counter claim is the non-starter report issued by the Mediation Centre dated 28th November, 2024 and the said document is after the filing of written statement.
25. The judgment relied by the plaintiff in the case of **A.K. Ghosh and Company and Ors. Vs. Biman Bose & Ors.** reported in **2025 SCC OnLine Cal 1781** is not applicable in the present case as in the said case, the question before the Court whether amended provision Order VIII, Rule 1 under the Commercial Courts Act, 2015 is applicable in filing additional written statement to the counter claim. In the present case, the plaintiff intent to introduce counter claim by way of amendment.
26. The defendant has already pleaded with regard to his claim in terms of the Chartered Accountant's report in the written statement but has not specifically prayed for relief by way of counter claim. This Court finds that the amended sought for by the defendant will not change the

nature and character of the suit and has not pleaded any new facts which will be prejudice to the plaintiff.

27. In view of the above, the department is directed to carry out the proposed amendments within a period of two weeks from date. After amendment is carried out by the department, the defendant is directed to re-verify and re-affirm the written statement and to pay the requisite Court Fee within two weeks thereafter. The defendant is also directed to serve the copy of amended written statement along with counter claim to the plaintiff. The plaintiff is at liberty to file written statement within 30 days from the date of receipt of amended written statement along with counter claim.

28. G.A. (Com) No. 2 of 2024 is disposed of.

(Krishna Rao, J.)