SUPREME COURT OF INDIA

Jitendra Kumar Khan

Vs.

The Peerless General Finance and Investment Company Limited

C.A.Nos.6784 of 2013

(Anil R. Dave and Dipak Misra JJ.)

07.08.2013

JUDGMENT

DIPAK MISRA, J.

1. Delay in filing the application for substitution is condoned and prayer for substitution of appellant No. 2 is allowed.

2. Leave granted.

3. The appellant Nos. 1 and 3 along with the predecessor-in-interest of appellant No. 2 instituted suit No. 301 of 1993 in the High Court of Calcutta principally for a declaration that they are entitled to be paid all the commissions and other incentives payable to the agents/field officers by the defendants in respect of the transactions and/or business which was done through the customers/certificate holders in accordance with the circulars/terms and conditions of appointment of all agents/field officers of the defendant company and for a decree of Rs.25 lacs against the defendant No. 1 company jointly and severally or in the alternative to cause an enquiry pertaining to the damages suffered by the plaintiffs and pass a decree for such a sum.

4. After issuance of notice of the plaint which was presented on 11.8.1993, the defendants entered appearance and filed their written statement on 12.8.1994. Thereafter, on 7.4.1998, the defendants filed an application for amendment of the written statement. The amendment that was sought for by the defendants was to the effect of grant of a decree for a sum of Rs.4,19,509.43 in favour of the defendant No. 1 and a decree for further interest and, if necessary, to enquire into the sum

which is payable by the plaintiff No. 1 to the defendant company. The said application was seriously opposed by the plaintiffs on the ground that such an amendment was totally impermissible and by seeking incorporation of such a plea by way of amendment the defendants were actually taking recourse to an adroit method of introducing a counter claim or set-off.

5. The learned single Judge scanned the anatomy of the language employed in Order VI Rule 17, Order VIII Rule 6 and Rule 6-A of the Code of Civil Procedure and after referring to decisions in Jai Jai Ram Monohar Lal v. National Building Material Supply, Gurgaon[1], Suraj Prakash Bhasin v. Smt. Raj Rani Bhasin and others[2], Nichhalbhai Vallabhai v. Jaswantlal Zinabhai[3], Abdul Rahim Naskar v. Abdul Jabbar Naskar and ors.[4], Baijnath Bhalotia v. State Bank of India and others[5] and I.T.C. Limited v. M.M.P. Lines Pvt. Ltd. and others[6] and analyzing the principles stated therein, came to hold that there is no scope for entertaining a counter claim when the time had expired long back and there was no justification to accede to the claim at the desire of the party. Be it noted, the learned Judge came to hold that the claims were not identical in nature and, hence, the defendants could not have asked for adjustment of any claim on the basis of a cause of action inasmuch as the nature of cause of action, as pleaded by the defendants in their amendment application, is different from the cause of action set forth by the plaintiffs in the suit. It was further opined that conceptually they did not meet the same character and the spacious plea that the amendment should be treated as equitable set-off was not acceptable. Emphasis was laid on the relief sought in the plaint which pertained to declaration and the entitlement of the plaintiffs to the commission and incentives payable by the defendants to the plaintiffs. Being of this view, the learned single Judge rejected the application for amendment.

6. Dissatisfied with the order of rejection an appeal was preferred and the Division Bench vide order dated 17.6.2004 came to hold that the claim put forth by the defendants by way of written statement could no longer be legally recoverable at that distance of time; and that the claim could not be treated as a counter claim and set-off as envisaged under the Civil Procedure Code. The Division Bench, after referring to Mackinnon Mackenzie and Company Pvt. Ltd. v. Anil Kumar Sen and Anr.[7], came to hold that the provisions of the Limitation Act do not necessarily bar an equitable set-off and the provisions of Order VIII Rule 6 do not do away with the principles of equitable set-off. Eventually, the Division Bench clarified by stating as follows: -

> "It is clarified that though the amendments are allowed, if the appellant's set-off are found to be barred by limitation at trial, then and in that event,

they would never be entitled to a decree on their own but only to a wiping off pro-tanto of the plaintiff's claim. The amendment by way of paragraph 20G of the written statement is particularly to be read in this light at trial."

7. The aforesaid order is the subject-matter of assail in the present appeal by special leave.

8. We have heard Mr. Ranjan Mukherjee, learned counsel for the appellants, and Mr. Bhaskar P. Gupta, learned senior counsel for the respondents.

9. Mr. Mukherjee, learned counsel for the appellants, has strenuously urged that in the garb of equitable set-off an endeavour has been made to introduce a claim which is really in the nature of set-off as incorporated under Order VIII Rule 6 of the Code and, therefore, the learned single Judge was absolutely justified in not allowing the same. He has seriously criticized the opinion expressed by the Division Bench on the ground that in the case at hand the equitable set-off, as argued, encroaches into the compartment of legal set off. It is urged by him that the High Court has committed grave illegality in allowing the amendment as a result of which the defendants have been able to procrastinate the proceeding.

10. Mr. Gupta, learned senior counsel appearing for the defendants, the respondents herein, conceded that the claim put forth in the written statement cannot be regarded as a counter claim or a legal set-off as both are really not permissible at the stage when the application to amend the written statement was filed. The learned senior counsel would submit that the claim put forth in the amended written statement has to be restricted to equitable set-off which is beyond the scope of legal set-off. It is urged by him that equitable set-off is not governed by the Code and, in fact, there is an immense distinction between the equitable set-off and legal set-off.

11. In view of the aforesaid submissions we are required to restrict our deliberations to the controversy whether the claim of equitable set- off, as put forth, is tenable or not. To appreciate the said issue it is relevant to understand what is the requirement of set-off in the Code. Order VIII Rule 6 deals with set-off. It reads as follows:-

"6. 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.

(2) Effect of set-off. – 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 set-off; 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."

12. On a reading of the aforesaid Rule it is noticeable that certain conditions precedent are to be satisfied for application of the said Rule. Two primary conditions are that it must be a suit for recovery of money and the amount sought to be set-off must be a certain sum. Apart from the aforesaid parameters there are other parameters to sustain a plea of set-off under this Rule. As far as equitable set-off is concerned, it has been enunciated in the case of Clark v. Ratnavaloo Chetti[8] that the right of set-off exists not only in cases of mutual debits and credits, but also where cross-demands arise out of the same transaction. The said principle has been reiterated by the Calcutta High Court in Chishlom v. Gopal Chander[9].

13. In Raja Bhupendra Narain Singha Bahadur v. Maharaj Bahadur Singh and others[10] it has been opined that a plea in the nature of equitable set-off is not available when the cross-demands do not arise out of the same transaction and not connected in its nature and circumstances. It has been further stated therein that a wrongdoer who has wrongfully withheld moneys belonging to another cannot invoke any principles of equity in his favour and seek to deduct therefrom the amounts that have fallen due to him. There is nothing improper or unjust in telling the wrongdoer to undo his wrong, and not to take advantage of it.

14. In M/s. Lakshmichand and Balchand v. State of Andhra Pradesh[11], this Court has ruled that when a claim is founded on the doctrine of equitable set-off all cross-demands are to arise out of the same transaction or the demands are so connected in the nature and circumstances that they can be looked upon as a part of one transaction.

15. In Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd. and others[12], while referring to concept of set-off, this Court has stated thus:-

> "15. "Set-off" is defined in Black's Law Dictionary (7th Edn., 1999) inter alia as a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. The dictionary quotes Thomas W. Waterman from A Treatise on the Law of Set-Off, Recoupment, and Counter Claim as stating:
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> "Set-off signifies the subtraction or taking away of one demand from another opposite or cross-demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish both. It was also, formerly, sometimes called stoppage, because the amount to be set off was stopped or deducted from the cross-demand"."
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> Thereafter, the learned Judges referred to Sub-rule (1) of Rule 6 of Order VIII and proceeded to opine thus:-
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> "What the rule deals with is legal set-off. The claim sought to be set off must be for an ascertained sum of money and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the two claims sought to be set off or adjusted. Apart from the rule enacted in Rule 6 abovesaid, there exists a right to set-off, called equitable, independently of the provisions of the Code. Such mutual debts and credits or cross-demands, to be available for extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross- suit of his own. When a plea in the nature of equitable set-off is raised it is not done as of right and the discretion lies with the court to entertain and allow such plea or not to do so."

16. From the aforesaid enunciation of law it is quite clear that equitable set-off is different than the legal set-off; that it is independent of the provisions of the Code of Civil Procedure; that the mutual debts and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances; that such a plea is raised not as a matter of right; and that it is the

discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience. The discretion rests with the court to adjudicate upon it and the said discretion has to be exercised in an equitable manner. An equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due, as has been stated in Dobson & Barlow v. Bengal Spinning & Weaving Co.[13] and Girdharilal Chaturbhuj v. Surajmal Chauthmal Agarwal[14].

17. Tested on the aforesaid principles we are disposed to think that the Division Bench has rightly allowed the amendment on the base that the claim put forth could be treated as a plea in the nature of equitable set-off, for it has treated the stand taken in the amendment petition to be a demand so connected in the nature and circumstances that they can be looked upon as a part of one transaction. The view expressed by the Division Bench has to be treated as a prima facie expression of opinion. Needless to emphasise, whether the claim would be allowable or not will depend upon the evidence adduced before the Court so as to sustain a claim of equitable set-off. These aspects are to be gone into by the learned single Judge while disposing of the suit. As the suit is pending since 1993, the High Court is requested to dispose of the same as expeditiously as possible preferably within one year from today.

18. Ex-consequenti, with the aforesaid observations, the appeal stands disposed of with no order as to costs.

[1] AIR 1969 SC 1267
[2] AIR 1981 SC 485
[3] AIR 1966 SC 997
[4] AIR 1950 Cal 379
[5] AIR 1967 Pat 386
[6] AIR 1978 Cal 298
[7] AIR 1975 Cal 150
[8] 2 M.H.C.R. 296 (1865)
[9] ILR 16 Cal 711 (1889)
[10] AIR 1952 SC 782
[11] (1987) 1 SCC 19
[12] (2004) 3 SCC 504
[13] (1897) 21 Bom 126
[14] AIR 1940 Nag 177