

Ashok Kumar Kalra vs Wing Cdr Surendra Agnihotri on 19 November, 2019

Equivalent citations: AIRONLINE 2019 SC 1525, 2020 (2) SCC 394, (2019) 16 SCALE 544, (2019) 4 CIVILCOURTC 796, (2019) 4 CURCC 376, (2019) 4 KER LT 790, (2020) 129 CUT LT 249, (2020) 1 CIVLJ 33, (2020) 1 ICC 18, (2020) 1 RECCIVR 255, (2020) 2 MAD LJ 189

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Bench: Mohan M. Shantanagoudar, N.V. Ramana

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SLP (C) NO. 23599 OF 2018

ASHOK KUMAR KALRA

...PETITIONER

VERSUS

WING CDR. SURENDRA AGNIHOTRI
& ORS.

...RESPONDENTS

JUDGMENT

N.V. RAMANA, J.

1. Questions about procedural justice are remarkably persistent and usual in the life of Common Law Courts. However, achieving a perfect procedural system may be feasible or affordable, rather more manageable standards of meaningful participation needs to be aspired while balancing cost, time and accuracy at the same time.

2. The present reference placed before us arises out of the order dated 10.09.2018 passed by a two Judge Bench of this Court, wherein clarification has been sought as to the interpretation of Order VIII Rule 6A of the Civil Procedure Code (hereinafter referred to as “the CPC”), regarding the filing of counter claim by a defendant in a suit. The reference order dated 10.09.2018 is extracted below:

“

The papers to be placed before the Hon’ble Chief Justice of India for constitution of a three Judge Bench to look into the effect of our previous judgments as well as whether the language of Order VIII Rule 6A of the Civil Procedure Code is mandatory in nature.” (emphasis supplied)

3. Before we proceed further, we need to allude to the brief factual background necessary for the disposal of this reference. A dispute arose between the Petitioner (defendant no. 2) and Respondent No. 1 (plaintiff) concerning performance of agreement to sell dated 20.11.1987 and 04.10.1989. Respondent No.1 (plaintiff) filed the suit for specific performance against the petitioner (defendant no. 2) on 02.05.2008. Petitioner (defendant No.2) herein filed a written statement on 2.12.2008 and counter claim on 15.3.2009, in the same suit. By order dated 12.05.2009, the trial court rejected the objections, concerning filing of the counter claim after filing of the written statement and framing of issues. Order dated 15.05.2009 was challenged before the High Court, in Civil Revision No. 253 of 2009, the High Court allowed the same and quashed the counter claim. Aggrieved by the aforesaid order of the High Court, the petitioner (defendant No.2) herein approached the Division Bench of this court, which has referred the matter to a three Judge Bench.

4. The learned counsel appearing on behalf of the Petitioner submitted that the intent behind Order VIII Rule 6A of the CPC is to provide an enabling provision for the filing of counter claim so as to avoid multiplicity of proceedings, thereby saving the time of the Courts and avoiding inconvenience to the parties. Therefore, no specific statutory bar or embargo has been imposed upon the Court’s jurisdiction to entertain a counter claim except the limitation under the said provision which provides that the cause of action in the counter claim must arise either before or after the filing of the suit but before the defendant has delivered his defence. The learned counsel also submitted that if permitting the counter claim would lead to protracting the trial and cause delay in deciding the suit, the Court would be justified in exercising its discretion by not permitting the filing of the counter claim. Relying on the judgments of this Court in Salem Advocate Bar Association, Tamil Nadu v. Union Of India, AIR 2005 SC 3353, and Jai Jai Ram Manohar Lal v. National Building Material Supply, Gurgaon, (1969) 1 SCC 869, the learned counsel lastly submitted that rules of procedure must not be interpreted in a manner that ultimately results in failure of justice.

5. On the other hand, the learned Senior counsel for the respondent submitted that the language of the statute, and the scheme of the Order, indicates that the counter claim has to be a part of the written statement. The learned senior counsel strengthened the above submission by relying on the statutory requirement that the cause of action relating to a counter claim must arise before the filing of the written statement, and submitted that the counter claim must therefore form a part of the written statement. The learned senior counsel also relied on the language of Order VIII Rule 6 of the CPC, which requires a defendant’s claim to set off to be a part of the written statement, to suggest that the same rules should also apply to the filing of a counter claim, keeping in mind the placement of the provision relating to counter claim in Order VIII Rule 6A of the CPC.

6. We have heard the learned counsel on either side at length and perused the material available on record. In the light of the reference and the arguments advanced on behalf of the parties, the following issues arise for consideration before this Court:

1) Whether Order VIII Rule 6A of the CPC mandates an embargo on filing the counter-claim after filing the written statement?

2) if the answer to the aforesaid question is in negative, then what are the restrictions on filing the counter-claim after filing of the Written Statement?

7. At the outset, there is no gainsaying that the procedural justice is imbibed to provide further impetus to the substantive justice. It is this extended procedural fairness provided by the national courts, which adds to the legitimacy and commends support of general public. On the other hand, we must be mindful of the legislative intention to provide for certainty and clarity. In the name of substantive justice, providing unlimited and unrestricted rights in itself will be detrimental to certainty and would lead to the state of lawlessness. In this regard, this Court needs to recognize and harmoniously stitch the two types of justice, so as to have an effective, accurate and participatory judicial system.

8. Having observed on nuances of procedural justice, we need to turn our attention to the Order VIII of the CPC, which deals with written statement, set-off and counter-claim. Rules 1 to 5 of Order VIII of the CPC deal with the written statement. This Order dealing with the written statement was amended extensively by the Code of Civil Procedure (Amendment) Act, 2002 (Act No. 22 of 2002) (hereinafter referred to as “Act 22 of 2002”), whereby the defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence. In case he 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.

9. Order VIII Rule 6 of the CPC specifies the particulars of set-off to be given in written statement and the same reads as under:

Order VIII Rule 6:

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.

Order VIII Rule 6A, which pertains to the counter-claim, reads as under:

Order VIII Rule 6A:

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. Thus, as per Order VIII Rule 6 CPC, the defendant can claim set-off of any ascertained sum of money legally recoverable by him from the plaintiff, against the plaintiff's demand, in a suit for recovery of money. Whereas, Rule 6A deals with counter-claim by defendant, according to which 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 filing of the suit but before the defendant has delivered his defence or before the time prescribed for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not.

11. The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. Order VIII Rule 6G says that the rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim. As per Rule 8, any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-

off or counterclaim may be raised by the defendant or plaintiff, as the case may be, in his written statement. Rule 9 of Order VIII prohibits presentation of pleadings subsequent to the written statement of a defendant other than by way of defence to set off or counterclaim, except by the leave of the Court, and upon such terms as the Court thinks fit; and the provision further stipulates that the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same. This amendment with respect to subsequent pleadings was made to the CPC by way of Act 22 of 2002. At the cost of repetition, we may note the conditions for filing a counterclaim under Order VIII Rule 6A(i). Counterclaim can be for claim of damages or otherwise.

ii. Counterclaim should relate to the cause of action, which may accrue before or even after filing the suit.

iii. If the cause of action in the counterclaim relates to one accrued after filing of suit, it should be one accruing before filing of the written statement or the time given for the same.

When we look at the whole scheme of Order VIII CPC, it unequivocally points out at the legislative intent to advance the cause of justice by placing embargo on the belated filing of written statement, set off and counterclaim.

12. We have to take note of the fact that Rule 6A was introduced in the CPC by the Code of Civil Procedure (Amendment) Act of 1976 (Act No.104 of 1976), and before the amendment, except in money suits, counterclaim or set off could not be pleaded in other suits. As per the recommendation of the Law Commission of India, to avoid multiplicity of proceedings, the counterclaim by way of Rule 6A was inserted in the Civil Procedure Code. The statement of objects and reasons for enacting the Code of Civil Procedure (Amendment) Act, 1976 (Act No.104 of 1976), were

- 1) A litigant should get a fair trial in accordance with the accepted principles of natural justice.
- 2) Every effort should be made to expedite the disposal of civil suits and proceedings, so that justice may not be delayed;
- 3) The procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community who do not have the means to engage a pleader to defend their cases.

13. Before we proceed further, we deem it appropriate to note that any provision under the procedural law should not be construed in such a way that it would leave the Court helpless [refer to Salem Advocate Bar Association Case (supra)]. In fact a wide discretion has been given to the civil court regarding the procedural elements of a suit. As held by this Court, procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice.

14. Now we need to observe certain earlier judgments of this Court which have dealt with Order VIII Rule 6A. In *Mahendra Kumar and Anr. v. State Of Madhya Pradesh and Ors.*, (1987) 3 SCC 265 [hereinafter referred to as 'Mahendra Kumar Case'], where the appeals were preferred against concurrent findings of the Courts below in dismissing the counter-claim as barred under Section 14 of the Indian Treasure Trove Act, 1878, this Court, while considering the scope of Rule 6A(1) of Order VIII of the CPC, has held that on the face of it, Rule 6A(1) does not bar the filing of a counter-claim by the defendant after he had filed the written statement. As the cause of action for the counter-claim had arisen before the filing of the written statement, the counter-claim was held to be maintainable. This Court further observed that under Article 113 of the Limitation Act, 1963, the period of limitation is three years from the date of the right to sue accrues, when the period of limitation is not provided elsewhere in the Schedule. As the counter-claim was filed within three years from the date of accrual of the right to sue, this Court held that the learned District Judge and the High Court were wrong in dismissing the counter-claim. The issue concerning applicability of limitation period for filing the counter-claim was also discussed in *Jag Mohan Chawla And Another v. Dera Radha Swami Satsang & Ors.*, (1996) 4 SCC 699 and *Shanti Rani Das Dewanjee (Smt.) v. Dinesh Chandra Day (Dead) by LRs.*, (1997) 8 SCC 174.

15. In the case of *Vijay Prakash Jarath v. Tej Prakash Jarath*, (2016) 11 SCC 800, this Court directed the Court below to entertain the counter-claim which was filed 2½ years after framing of issues, as the evidence was still pending and this Court felt that no prejudice would be caused to the plaintiff. However, in the case of *Bollepanda P. Poonacha & Anr. v. K.M. Madapa*, (2008) 13 SCC 179 [hereinafter referred to as 'Bollepanda Poonacha Case'], this Court while referring to *Ramesh Chand Ardawatiya v. Anil Panjwani*, (2003) 7 SCC 350, discouraged the belated filing of counter-claims. Further, the Court elucidated on the serious harm caused by allowing such delayed filing. In any case, in *Bollepanda Poonacha Case* (supra), the Court could not expound any further as the counter-claim was rejected on the basis that the cause of action had arisen after the filing of the written statement.

16. The time limitation for filing of the counter-claim, is not explicitly provided by the Legislature, rather only limitation as to the accrual of the cause of action is provided. As noted in the above precedents, further complications stem from the fact that there is a possibility of amending the written statement. However, we can state that the right to file a counter-claim in a suit is explicitly limited by the embargo provided for the accrual of the cause of action under Order VIII Rule 6A. Having said so, this does not mean that counter-claim can be filed at any time after filing of the written statement. As counter-claim is treated to be a plaint, generally it needs to first of all be compliant with the limitation provided under the Limitation Act, 1963 as the time-barred suits cannot be entertained under the guise of the counter-claim just because of the fact that the cause of action arose as per the parameters of Order VIII Rule 6A.

17. As discussed by us in the preceding paragraphs, the whole purpose of the procedural law is to ensure that the legal process is made more effective in the process of delivering substantial justice. Particularly, the purpose of introducing Rule 6A in Order VIII of the CPC is to avoid multiplicity of proceedings by driving the parties to file a separate suit and see that the dispute between the parties is decided finally. If the provision is interpreted in such a way, to allow delayed filing of the counter-

claim, the provision itself becomes redundant and the purpose for which the amendment is made will be defeated and ultimately it leads to flagrant miscarriage of justice. At the same time, there cannot be a rigid and hyper-technical approach that the provision stipulates that the counter-claim has to be filed along with the written statement and beyond that, the Court has no power. The Courts, taking into consideration the reasons stated in support of the counter-claim, should adopt a balanced approach keeping in mind the object behind the amendment and to subserve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counter-claim has to be filed, by curtailing the discretion conferred on the Courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counter-claim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects sought to be achieved through the amendment. But however, we are of the considered opinion that the defendant cannot be permitted to file counter-claim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for the particular amendment to the CPC.

18. In this regard having clarified the law, we may note that the Mahendra Kumar Case (supra) needs to be understood and restricted to the facts of that case. We may note that even if a counter-claim is filed within the limitation period, the trial court has to exercise its discretion to balance between the right to speedy trial and right to file counter-claim, so that the substantive justice is not defeated. The discretion vested with the trial court to ascertain the maintainability of the counter-claim is limited by various considerations based on facts and circumstances of each case. We may point out that there cannot be a straitjacket formula, rather there are numerous factors which needs to be taken into consideration before admitting counter-claim.

19. We may note that any contrary interpretation would lead to unnecessary curtailment of the right of a defendant to file counter-claim. This Court needs to recognize the practical difficulties faced by the litigants across the country. Attaining the laudable goal of speedy justice itself cannot be the only end, rather effective justice wherein adequate opportunity is provided to all the parties, need to be recognized as well [refer to Salem Advocate Bar Association Case (supra)].

20. We sum up our findings, that Order VIII Rule 6A of the CPC does not put an embargo on filing the counter-claim 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 counter-claim 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 counter-claim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counter-claim, 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.

21. We answer the reference accordingly. The instant Special Leave Petition may be placed before an appropriate Bench after obtaining orders from the Hon'ble Chief Justice of India, for considering the case on merits.

.....J. (N.V. RAMANA)J. (MOHAN M. SHANTANAGOUDAR)
.....J. (AJAY RASTOGI) NEW DELHI;

November 19, 2019.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

S.L.P. (Civil) No. 23599 of 2018

Ashok Kumar Kalra

...Petitioner

Versus

Wing Cdr. Surendra Agnihotri & Ors.

...Respondents

JUDGMENT

MOHAN M. SHANTANAGOUDAR, J.

1. I have read the opinion given in this reference by my learned Brothers. I agree with their conclusion that a Court may exercise its discretion and permit the filing of a counter-claim after the written statement, till the stage of framing of the issues of the trial. However, in addition to this, I find that in exceptional circumstances, the subsequent filing of a counter-claim may be permitted till the stage of commencement of recording of the evidence on behalf of the plaintiff. I deem it fit to state the reasons for arriving at this conclusion through this opinion.

2. This reference arises out of the order of this Court dated 10.09.2018 in SLP (C) No. 23599/2018 in Ashok Kumar Kalra v. Wing CDR Surendra Agnihotri & Ors., which states as follows:

“The papers to be placed before the Hon’ble Chief Justice of India for constitution of a three-Judge Bench to look into the effect of our previous judgments as well as whether the language of Order VIII Rule 6A of the Code of Civil Procedure is mandatory in nature.” Essentially, in light of the previous judgments of this Court, the question referred to this Court is whether it is mandatory for a counter-claim of the defendant to be filed along with the written statement.

3. Counsel for both parties argued about the scope of Order VIII Rule 6A of the Code of Civil Procedure, 1908 [hereinafter “CPC”] and whether a counter-claim must necessarily be filed along with the written statement. Since the arguments have been elaborated upon by my learned Brother Judge, they are not reproduced herein for the sake of brevity.

4. To fully understand the expanse of the legal questions in this case, it is essential to appreciate the context in which the rules relating to counter-claims were introduced in the CPC. The originally enacted CPC of 1908 did not provide a statutory right to file a counter-claim. At that time, Order VIII only pertained to written statements and set-offs. Taking note of this omission, the Law Commission of India, in its 27th and 54th Reports, had recommended that express provisions on counter-claims should be included in the CPC to avoid multiple proceedings and to dispel ambiguity on whether counter-claims could be entertained at all. These recommendations were implemented through the Code of Civil Procedure (Amendment) Act, 1976, which introduced the following rules to Order VIII of the CPC:

“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.

6B. Counter-claim to be stated.—Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.

6C. Exclusion of counter-claim.—Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.

6D. Effect of discontinuance of suit.—If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.

6E. Default of plaintiff to reply to counter-claim.— If the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit. 6F. Relief to defendant where counter-claim succeeds.—Where in any suit a set-off or counter-claim is established as a defence against the plaintiff's claim, and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.

6G. Rules relating to written statement to apply— The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.”

5. For the first time, through the introduction of Rules 6A-6G to Order VIII, an explicit right of filing a counter-claim was accorded to the defendant, and rules governing the same were laid down. In this scheme, Rule 6A(1) is the cornerstone provision. It specifically grants the right of filing a counter-claim. In addition to this, it also places a categorical limitation on the accrual of the cause

of action for a counter-claim. This is in the form of the requirement that the cause of action pertaining to the counter-claim must arise either before or after the filing of the suit, but before the defendant has delivered his defence (i.e. before the filing of the written statement), or before the expiry of the time period for delivering such defence.

Further, under Rule 6A(2), a counter-claim is stated to have the same effect as the plaint in a cross-suit, so as to enable the Court to pronounce a final judgment on the original claim as well as the counter-claim in the same suit itself. Thus, it is evident that Rule 6A has been carefully designed to meet the purpose of avoiding multiplicity of proceedings.

6. It is clear that Rule 6A(1) only places a limitation on the time within which the cause of action for a counter-claim must arise. Besides this limitation, there is no explicit guidance in Rule 6A(1) as to the time within which the counter-claim itself must be filed. In this respect, Rule 6A(4) provides that a counter-claim is governed by the rules applicable to plaints. It is well-established that a plaint must be presented within the period prescribed under the Limitation Act, 1963 [hereinafter “the Limitation Act”]. For counter-claims as well, the period within which they must be filed can be inferred from Section 3(2)(b)(ii) of the Limitation Act, 1963, which states thus:

“(2) For the purposes of this Act, —

(b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted—

(ii) in the case of a counter claim, on the date on which the counter claim is made in court;” (emphasis supplied) This provision mandates that in order to determine the limitation period applicable to a counter-claim, it must be treated as a separate suit, which is deemed to have been instituted on the date on which it is made in Court. Thus, evidently, in consonance with the provisions of Order VIII Rule 6A(4), the Limitation Act also treats a counter-claim like a plaint. This means that much like a plaint, the limitation for filing a counter-claim also depends on the nature of the claim and is accordingly governed by the period of limitation stipulated in the Limitation Act.

7. From the foregoing discussion, it is clear that a counter-claim can be filed if two conditions are met: first, its cause of action complies with Order VIII Rule 6A(1); and second, it is filed within the period specified under the Limitation Act. Clearly, by itself, Rule 6A does not specifically require that a counter-claim has to be filed along with the written statement. In the absence of a particular mandate under this Rule, it is necessary to look to other provisions of the CPC to determine whether a counter-claim can be filed after a written statement.

8. It would be appropriate to begin with a reference to Order VIII Rule 9, which states thus:

“9. Subsequent pleadings.—No pleading subsequent to the written statement of a defendant other than by way of defence to set off or counter-claim shall be presented

except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same.” (emphasis supplied) According to this Rule, after the filing of the written statement, it is open to plead a defence to a set-off or counter-claim without the leave of the Court. However, any other pleading sought to be filed after the written statement requires the leave of the Court. The Rule also vests the Court with a discretion to allow filing of a written statement or additional written statement within a period not exceeding thirty days.

A plain reading of Order VIII Rule 9 makes it clear that the Court has the discretion to allow any subsequent pleading upon such terms as it thinks fit. It is important to appreciate here that such subsequent pleading or additional written statement may include a counter-claim. This is because Rule 9 does not create a bar on the nature of claims that can be raised as subsequent pleadings. As long as the Court considers that it would be proper to allow a counter-claim by way of a subsequent pleading, it is possible to file a counter-claim after filing the written statement.

In addition to this, it is also possible to introduce a belated counter-claim by way of an amendment to the original written statement under Order VI Rule 17, CPC. However, as is the case with Order VIII Rule 9, the filing of such a counter-claim through an amended written statement is subject to the leave of the Court, and not accorded to the defendant as a matter of right.

9. In this regard, it would be relevant to note the observations of this Court in *Ramesh Chand Ardawatiya v. Anil Panjwani*, (2003) 7 SCC 350:

“28. Looking to the scheme of Order 8 as amended by Act 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule 6A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases the counter-claim though referable to Rule 6A cannot be brought on record as of right but shall be governed by the discretion vesting in the court, either under Order 6 Rule 17 CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the court under Order 8 Rule 9 CPC if sought to be placed on record by way of subsequent pleading.” (emphasis supplied) I fully agree with this proposition, and affirm on the basis of the foregoing discussion that the Court has the discretion to allow a counter-claim to be filed after the written statement in exercise of its power under Order VIII Rule 9 and Order VI Rule 17 of the CPC.

10. It can also be gleaned from Order VIII Rule 10 that it is permissible to file a belated counter-claim under the scheme of Order VIII, CPC:

“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.” (emphasis supplied) Under this Rule, the Court is afforded with the discretion to pass any order that it deems fit in the event that a written statement is not filed within the prescribed statutory limit. To determine whether this discretion extends to allowing the filing of a belated counter-claim as well, it would be useful to appreciate the scope of the discretion accorded under this provision.

In *Salem Advocate Bar Association, T.N. v. Union of India*, (2005) 6 SCC 344, this Court, while construing the nature of Order VIII Rule 1, relied on the broad discretionary power under Order VIII Rule 10, and observed as follows:

“21. In construing this provision, support can also be had from Order 8 Rule 10 which provides that 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, the court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit... In construing the provision of Order 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 Order 8, the court in its discretion would have the power to allow the defendant to file written statement even after expiry of the period of 90 days provided in Order 8 Rule 1. There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to “make such order in relation to the suit as it thinks fit”. Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory.” (emphasis supplied) Thus, under Order VIII Rule 10, the Court has the power to condone the delay in filing of a written statement, if it deems it fit in the facts and circumstances of the case. If it is so, there is no reason as to why the delay in filing a counter-claim cannot be condoned by the Court as well.

11. A conjoint and harmonious reading of Rules 6A, 9 and 10 of Order VIII as well as Order VI Rule 17, CPC thus reveals that the Court is vested with the discretion to allow the filing of a counter-claim even after the filing of the written statement, as long as the same is within the limitation prescribed under the Limitation Act, 1963. In this regard, I agree with the propositions laid down in the decisions discussed below.

In *Mahendra Kumar v. State of Madhya Pradesh*, (1987) 3 SCC 265, it was held that:

“15. The next point that remains to be considered is whether Rule 6A(1) of Order 8 of the Code of Civil Procedure bars the filing of a counterclaim after the filing of a written statement. This point need not detain us long, for Rule 6A(1) does not, on the face of it, bar the filing of a counterclaim by the defendant after he had filed the written statement. What is laid down under Rule 6A(1) is that a counterclaim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not. The High Court, in our opinion, has misread and misunderstood the provision of Rule 6A(1) in holding that as the appellants had filed the counterclaim after the filing of the written statement, the counterclaim was not maintainable...Under Article 113 of the Limitation Act, 1963, the period of limitation of three years from the date the right to sue accrues, has been provided for any suit for which no period of limitation is provided elsewhere in the Schedule. It is not disputed that a counterclaim, which is treated as a suit under Section 3(2)(b) of the Limitation Act has been filed by the appellants within three years from the date of accrual to them of the right to sue.” (emphasis supplied) In *Shanti Rani Das Dewanjee v. Dinesh Chandra Day*, (1997) 8 SCC 174, it was held that the right to file a counterclaim is referable to the date of accrual of the cause of action:

“2. In our view, the impugned decision does not warrant interference. Such question was specifically raised before this Court in *Mahendra Kumar v. State of M.P.* [(1987) 3 SCC 265] It has been held by this Court that right to file a counterclaim under Order VIII Rule 6A of the Code of Civil Procedure is referable to the date of accrual of the cause of action. If the cause of action had arisen before or after the filing of the suit, and such cause of action continued up to the date of filing written statement or extended date of filing written statement, such counterclaim can be filed even after filing the written statement. The said Civil Case No. 248 of 1982, in which the application under Order VIII Rule 6A has been filed by the defendant-respondents was instituted on 15-7-1982 and the application under Order VIII Rule 6A was presented on 22-6-1985. It cannot be held that the cause of action for the suit or counterclaim was ex facie barred by limitation under the Limitation Act” (emphasis supplied) I am unable to persuade myself to arrive at a different conclusion than the one found in the aforementioned judgments.

12. It was argued by Counsel for the Respondent that Order VIII Rule 6A(1) requires that the cause of action for a counterclaim should arise before the filing of the written statement, and hence it is logical that the counterclaim, or the grounds upon which it is based, should also find a mention in the written statement. To support this, he relied on Order VIII Rule 6B, which states that a defendant seeking to rely upon any ground in support of his right of counterclaim, shall specifically state in his written statement that he does so by way of a counterclaim.

I do not agree with this view for two reasons. First, it is possible that at the time of filing the written statement, the defendant is unaware of the facts giving rise to the cause of action for his counter-claim. For instance, in a suit for declaration of title brought by the plaintiff against his sister, the defendant may be unaware that the plaintiff has wrongfully detained her belongings kept at the said property, at the time of filing her written statement. In such a situation, even though the cause of action for her counter-claim of wrongful detention of belongings may have arisen before the filing of the written statement, it may not have been possible for her to raise the said counter-claim. Similarly, limited access to justice, especially in rural areas, shaped by the socio-economic context of parties, may compel the filing of belated counter-claims.

Second, a perusal of Order VIII Rule 6B suggests that it is only limited to cases where the counter-claim is made along with the written statement. In instances where a belated counter-claim is raised by way of an amendment to the written statement, or as a subsequent pleading, Rule 6B cannot be said to be applicable. This is because in any such case, if the Court relies on a technical interpretation of Rule 6B to disallow the filing of a belated counter-claim, the defendant would still be free to file a fresh suit for such a claim. He may, in such matters, after filing the separate suit, request the Court to club the suits or to hear them simultaneously. This may further delay the process of adjudication and would certainly not help the plaintiff in the first suit, who may have opposed the filing of the belated counter-claim. Such multiplicity of proceedings goes against the object with which Rules 6A-6G were introduced to the CPC. Thus, the provisions under Order VIII should not be read in isolation, but in a conjoint and harmonious manner, and Rule 6B cannot be read as a limitation on the Court's discretion to permit the filing of a belated counter-claim. Therefore, I do not find force in the argument raised by Counsel for Respondent.

13. Further, the contention that the limitation on filing of set-offs under Order VIII Rule 6 should be read into Rule 6A(1) is untenable. The nature of a set-off and a counter-claim is different. For instance, a set-off must necessarily be of the same nature as the claim of the plaintiff and arise out of the same transaction. These requirements do not hold for counter-claims, which may be related to "any right or claim in respect of a cause of action accruing to the defendant against the plaintiff" as stated in Order VIII Rule 6A(1). Further, in case of set-offs, there is no provision akin to Order VIII Rule 6A(4), which provides that a set-off must be treated as a plaint. Thus, it appears that the Legislature has consciously considered it fit to omit a specific time limit for filing of counter-claims in Rule 6A. In such a scenario, a limitation cannot be read into this Rule.

14. Lastly, as regards the Respondent's reliance on Order VIII Rule 1A, which requires the documents in support of a counter-claim to be presented along with the written statement itself, I am of the view that this requirement should not be read as being mandatory. Rule 1A(2) itself provides instances where such documents are not in the possession of the defendant, by requiring him to specify the person in whose possession the documents rest. Accordingly, Rule 1A(3) (as amended in 2002) also provides that these documents may be produced later, with the leave of the Court. The discretion accorded in these provisions goes on to support the conclusion that it is possible to file a counter-claim even after the written statement, with the leave of the Court.

15. Finally, then, the scope of discretion vested with the Court under Order VI Rule 17 and Order VIII Rule 9 to allow for belated counter-claims remains to be examined. It must be determined when it may be proper for the Court to refuse a belated counter-claim, in spite of it being permissible within the scheme of Order VIII Rule 6A and the Limitation Act, 1963.

16. In several cases, it is possible that the period of limitation for filing of counter-claims may extend up to a long period of time and prolong the trial. For instance, in a suit for declaration of title, the defendant may bring a counter-claim for possession of the immovable property based on previous possession. In terms of Order VIII Rule 6A, such a claim would be admissible as long as the dispossession had occurred before the filing of the written statement, or before the expiry of the time provided for filing of the written statement. However, as per the Limitation Act, such a claim would be valid even if it were brought within twelve years from the date of the defendant's dispossession.

In such a situation, it is possible that by the time the counter-claim is brought, the issues in the original suit have already been framed, the evidence led, arguments made, and the judgment reserved. Allowing a counter-claim to be filed at this stage would effectively result in a re-trial of the suit, since the Court would have to frame new issues, both parties would have to lead evidence, and only then would the judgment be pronounced. If this is permitted, the very purpose of allowing counter-claims, i.e. avoiding multiplicity of litigation, would be frustrated.

17. It is well-settled that procedural rules should not be interpreted so as to defeat justice, rather than furthering it. This is because procedural law is not meant to serve as a tyrant against justice, but to act as a lubricant in its administration. Thus, when Courts set out to do justice, they should not lose sight of the end goal amidst technicalities. In some cases, this means that rules that have traditionally been treated as mandatory, may be moulded so that their object and substantive justice is not obstructed. It would be apposite to remember that equity and justice should be the foremost considerations while construing procedural rules, without nullifying the object of the Legislature in totality. Thus, rules under the Limitation Act which may allow for filing of a belated counter-claim up to a long period of time, should not be used to defeat the ends of justice.

18. Keeping this in mind, in *Ramesh Chand Ardawatiya* (supra), this Court considered the scope of discretion in allowing for belated counter-claims. It is useful to refer to the observations made by the Court in the context of Order VIII Rule 6A (as it was in 1976):

“28. ...The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the court, the court would be justified in exercising its discretion not in favour of permitting a

belated counterclaim. The framers of the law never intended the pleading by way of counterclaim being utilized as an instrument for forcing upon a reopening of the trial or pushing back the progress of proceeding. Generally speaking, a counterclaim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced... A refusal on the part of the court to entertain a belated counterclaim may not prejudice the defendant because in spite of the counterclaim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counterclaim.” (emphasis supplied) To ensure that the objective of introducing the statutory amendments with respect to counterclaims was not defeated, it was rightly held that a belated counterclaim raised by way of an amendment to the written statement (under Order VI Rule 17) or as a subsequent pleading (under Order VIII Rule 9) should not be allowed after the framing of issues and commencement of trial.

19. Later, in *Rohit Singh v. State of Bihar*, (2006) 12 SCC 734, this Court read in a similar limitation on the filing of belated counterclaims:

“18. ... A counterclaim, no doubt, could be filed even after the written statement is filed, but that does not mean that a counterclaim can be raised after issues are framed and the evidence is closed. Therefore, the entertaining of the so-called counterclaim of Defendants 3 to 17 by the trial court, after the framing of issues for trial, was clearly illegal and without jurisdiction. On that short ground the so-called counterclaim, filed by Defendants 3 to 17 has to be held to be not maintainable.” (emphasis supplied) It is crucial to note that even though the Court held that a counterclaim can be filed after the filing of a written statement, it must necessarily be filed before the issues are framed and the evidence is closed. In fact, since the counterclaim in the said matter was filed at the stage where the judgment was reserved, the Court went as far as saying that entertaining such a claim was illegal and without jurisdiction.

20. The decision of this Court in *Bollepanda P. Poonacha v. K. M. Madapa*, (2008) 13 SCC 179 is also significant in this regard. Referring to *Ramesh Chand Ardawatiya* (supra), it acknowledged that belated counterclaims were to be discouraged, and called upon the Court to consider questions of serious injustice and irreparable loss while permitting any such claim. However, in *Bollepanda* (supra), the Court did not have an occasion to expound further on this proposition, as the counterclaim had been rejected on the basis that its cause of action had arisen after the filing of the written statement.

21. It was in *Gayathri Women’s Welfare Association v. Gowramma*, (2011) 2 SCC 330, that this Court once again had the occasion to look into the filing of a belated counterclaim. In this case, filing of the initial counterclaim was not in challenge. Instead, the Court was considering the effect of an amendment to an existing counterclaim. While the Trial Court had refused to allow such an amendment, the High Court had granted the same. Reiterating the concerns noted in *Ramesh*

Chand Ardawatiya (supra), this Court held as follows:

“44. The matter herein symbolises the concern highlighted by this Court in Ramesh Chand [(2003) 7 SCC 350]. Permitting a counterclaim at this stage would be to reopen a decree which has been granted in favour of the appellants by the trial court. The respondents have failed to establish any factual or legal basis for modification/nullifying the decree of the trial court.” The Court also relied on Rohit Singh (supra) and observed that a counterclaim cannot be filed after the framing of issues.

22. In Vijay Prakash Jarath v. Tej Prakash Jarath, (2016) 11 SCC 800, this Court further refined the limitation in Rohit Singh (supra) that counterclaims cannot be raised after the issues are framed and the evidence is closed. In the said case, even though the issues had been framed, and the case was in the early stages of recording of the plaintiff's evidence, a counterclaim filed at that point was allowed, as no prejudice was caused to the plaintiff.

23. The above discussion lends support to the conclusion that even though Rule 6A permits the filing of a counterclaim after the written statement, the Court has the discretion to refuse such filing if it is done at a highly belated stage. However, in my considered opinion, to ensure speedy disposal of suits, propriety requires that such discretion should only be exercised till the framing of issues for trial. Allowing counterclaims beyond this stage would not only prolong the trial, but also prejudice the rights that may get vested with the plaintiff over the course of time.

At the same time, in exceptional circumstances, to prevent multiplicity of proceedings and a situation of effective re-trial, the Court may entertain a counterclaim even after the framing of issues, so long as the Court has not started recording the evidence. This is because there is no significant development in the legal proceedings during the intervening period between framing of issues and commencement of recording of evidence. If a counterclaim is brought during such period, a new issue can still be framed by the Court, if needed, and evidence can be recorded accordingly, without seriously prejudicing the rights of either party to the suit.

At this juncture, I would like to address the observation in Rohit Singh (supra) that a counterclaim, if filed after the framing of the issues and closing of the evidence, would be illegal and without jurisdiction. In my opinion, this is not a correct statement of law, as the filing of counterclaims after the commencement of recording of evidence is not illegal per se. However, I hasten to add that permitting such a counterclaim would be improper, as the Court's discretion has to be exercised wisely and pragmatically.

24. There are several considerations that must be borne in mind while allowing the filing of a belated counterclaim. First, the Court must consider that no injustice or irreparable loss is being caused to the defendant due to a refusal to entertain the counterclaim, or to the plaintiff by allowing the same. Of course, as the defendant would have the option to pursue his cause of action in a separate suit, the question of prejudice to the defendant would ordinarily not arise. Second, the interest of justice must be given utmost importance and procedure should not outweigh substantive

justice. Third, the specific objectives of reducing multiplicity of litigation and ensuring speedy trials underlying the provisions for counter-claims, must be accorded due consideration.

25. Having considered the previous judgments of this Court on counter-claims, the language employed in the rules related thereto, as well as the intention of the Legislature, I conclude that it is not mandatory for a counter-claim to be filed along with the written statement. The Court, in its discretion, may allow a counter-claim to be filed after the filing of the written statement, in view of the considerations mentioned in the preceding paragraph. However, propriety requires that such discretion should ordinarily be exercised to allow the filing of a counter-claim till the framing of issues for trial. To this extent, I concur with the conclusion reached by my learned Brothers. However, for the reasons stated above, I am of the view that in exceptional circumstances, a counter-claim may be permitted to be filed after a written statement till the stage of commencement of recording of the evidence on behalf of the plaintiff.

26. The reference is answered accordingly.

.....J. (Mohan M. Shantanagoudar) New Delhi;

November 19, 2019.