

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 15TH DAY OF JUNE 2022 / 25TH JYAISHTA, 1944

OP(C) NO. 2434 OF 2021

AGAINST THE ORDER DATED 28.10.2021 IN IA.NO.5/2021 IN OS
624/2012 OF III ADDITIONAL SUB COURT, KOZHIKODE

PETITIONER/PETITIONER/DEFENDANT:

SOUTHERN DREDGING CO (P) LTD
PIONEER TOWERS, FLAT NO.905, MARINE DRIVE,
ERNAKULAM, KOCHI-682031,
REPRESENTED BY ITS DIRECTOR, BIJU NARAYANAN,S/O
NARAYANAN, AGED 50 YEARS.

BY ADV MILLU DANDAPANI

RESPONDENT/RESPONDENT/PLAINTIFF:

K. MUHAMMED HAJI, AGED 72 YEARS,
S/O MOIDEENKUTTI, NPK MANZIL, PO EDAYANNUR,
EDAYANNUR AMSOM,
KANNUR DISTRICT-670595.

BY ADV K.V.PAVITHRAN

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 15.06.2022,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

“C.R”

A. BADHARUDEEN, J.

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O.P(C).No.2434 of 2021

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Dated this the 15th day of June, 2022

J U D G M E N T

This Original Petition has been preferred by the defendant in O.S.No.624/2012 on the file of the IIIrd Additional Sub Court, Kozhikode (formerly O.S.No.190/2011 on the file of Sub Court, Thalassery) challenging Ext.P6 order, viz., order in I.A.No.5/2021 dated 28.10.2021. The respondent herein is the sole plaintiff before the trial court.

2. Heard the learned counsel Sri Millu Dandapani, appearing for the petitioner and Advocate K.V.Pavithran, appearing for the respondent.

3. It is argued by the learned counsel for the petitioner that the petitioner filed written statement in the Suit claiming Rs.16,83,000/- by the respondent herein, on 21.10.2011 and thereafter additional written statement was filed on 07.10.2021 with petition to receive the same. It is submitted further that by way of additional written statement, the petitioner put up plea of 'adjustment' of the Suit amount towards the damages sustained to the petitioner which is assessed as Rs.77,41,970/-.

4. The respondent herein, the plaintiff in the Suit, filed objection and zealously opposed acceptance of additional written statement, which was filed after a period of 10 years with plea of 'adjustment'.

5. It is submitted by the learned counsel for the respondent that there is no pleading in the original written statement regarding the adjustment and the amount which the defendant wanted to

adjust is yet to be decided by the trial court. Further, unilateral adjustment is not permitted in law and the defendant could not raise a totally new case by way of adjustment, by filing additional written statement.

6. Reply affidavit also has been filed before this Court stating that when the original written statement was filed as early as on 21.10.2011, the plea of set off or counter-claim or 'adjustment' not raised in the said original written statement and at a much belated stage, plea of 'adjustment' being pressed into by filing additional written statement. It is averred further that the plea of 'adjustment' is barred by limitation also.

7. While crystallising the controversy being posed, reference to relevant provisions in the Code of Civil Procedure is essential. Order 8 Rule 6A of the Code of Civil Procedure permits a defendant in a Suit to plea 'set off' or 'counter claim' against the

claim of the plaintiff in respect of any right or claim based on 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. Similarly, Order 8 Rule 9 deals with subsequent pleadings. Order 8 Rule 9 is extracted hereunder for clarity:

“Subsequent pleadings:-- No pleadings 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.”

Thus in order to raise a plea of adjustment, permission of the Court contemplated under Order 8 Rule 9 is mandatory.

8. In a decision reported in [2009 KHC 4489 : 2009 (3)

KLT SN 54 : 2009 (14) SCC 525], ***P.A.Jayalakshmi v. H.Saradha & Ors.***, while dealing with Order 8 Rule 9 and Order 6 Rule 17, the Apex Court held that ordinarily at a much belated stage, leave for filing additional written statement is usually not granted.

9. In another decision of the Apex Court reported in [2019 (5) KHC 735 : 2019 (4) KLT 790 : 2020 (2) SCC 394], ***Ashok Kumar Kalra v. Wing Cdr. Surendra Agnihotri & Ors.*** (3 Bench decision), restrictions on filing counter-claim, after filing of written statement has been discussed and it has been held that there is no absolute right to the defendant to file counter-claim with substantive delay even if limitation period prescribed has not elapsed. Majority view in this decision is as under:

“O.8 R.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 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 counter-claim. 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.

Scope of discretion vested with the Court under O.6 R.17 and O.8 R.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 O.8 R.6A and the Limitation Act, 1963. To ensure that the objective of introducing the statutory amendments with respect to counter claims was not defeated, it was rightly held that a belated counter claim raised by way of an amendment to the written statement (under O.6 R.17) or as a subsequent pleading (under O.8 R.9) should not be allowed after the framing of issues and commencement of trial. 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.”

10. The legal position is not in dispute further that when set off or counter-claim is raised in the written statement, the defendant shall pay court fee for the same and no court fee is liable to be paid if a plea of 'adjustment' is raised. As per the impugned order, the court below relied on 2 decisions to dismiss the application, which are; (i) [1989 (1) KLT 449], ***Cheriya Elias v. Surendran Chit Fund*** and (ii) [ILR 2021 (3) Ker. 46], ***Crompton Greaves Limited v. Icon Integrated Industries and Software Limited***. In ***Cheriya Elias v. Surendran Chit Fund***'s case (*supra*), a Division Bench of this Court while differentiating set off and adjustment had held as under:

“Set off is a plea open to a defendant by which he could claim wiping off or reducing the plaintiff claim by adjustment of the amount due to him from the plaintiff. A plea of set off is distinguishable from a plea of payment of adjustment. Set off extinguishes the debt or reduces the same. Payment of adjustment refers to a satisfaction or extinguishment of a debt effected prior to the raising of defence in the written statement. The question of set off can arise only in respect of dues which are outstanding and which have not

already been adjusted. Thus, a plea of payment or adjustment is definitely and essentially a different plea and can be pressed into service only if the same was raised before the institution of the suit and not afterwards. To determine whether a plea raised in defence is a plea of set off or of payment by adjustment it has to be ascertained as to whether a separate action could be maintained by the defendant on the basis of his claim. If he could institute a separate suit for realisation of the amount due to him, it is a case of set off. If the adjustment was made prior to the filing of the suit by the plaintiff and a plea is taken to that effect, it would be a plea of adjustment by payment. In such a case no court fee would be payable on the amount as it stood adjusted prior to the institution of suit. As a plea of set off is pleaded in the written statement and not a claim for rendition of accounts or a plea of payment by adjustment, the 1st defendant cannot contend that he has no liability to pay court fees.”

Going by the ratio of the decision, plea of payment or adjustment is definitely and essentially different plea and can be pressed into service only if the same was raised before the institution of the suit.

In ***Crompton Greaves Limited v. Icon Integrated Industries and Software Limited***'s case (*supra*), this Court held as under:

“A contention has been raised that the plea raised by the defendants is not one falling under set off or counter-claim but only an adjustment and as such, the same can be adjudicated without raising set off or counter claim or paying court fee. One of the basic factors which has to be taken into consideration while determining whether a plea raised in a defence is a plea of set off or payment by adjustment, is to find out as to whether a separate

action could be maintained by the defendant on the basis of claim made by him. If a separate claim could be maintained by him and put forward in a separate suit, then the plea would be a plea of set off and court fee will have to be made on the claim. On the other hand, if adjustment had been made prior to the filing of the suit, no court fee would be payable on the amount which stood adjusted prior to the institution of the suit, as the plea in that case would be plea of adjustment by payment. But no court fee need be paid on the plea of adjustment for the simple reason that the plea of adjustment is in the nature of informing the Court that prior to the institution of the suit, the amount or a part of it stood adjusted and the plaintiff was not entitled to claim that amount.”

11. Thus the legal position regarding adjustment is no more *res integra* on the point that a plea of adjustment by payment is definitely and essentially a different plea and can be pressed into service only if the same was raised before the institution of the suit and not afterwards. To determine whether a plea raised in defence is a plea of set off or of payment by adjustment it has to be ascertained as to whether a separate action could be maintained by the defendant on the basis of his claim. If he could institute a separate suit for realisation of the amount due to him, it is a case of

set off. If the adjustment was made prior to the filing of the suit by the plaintiff and a plea is taken to that effect, it would be a plea of adjustment by payment. That apart, no pecuniary liability arises till the Court determine that the party complaining of the breach is entitled to damages. The Court in the first place must decide that the other side is liable and then, it should proceed to assess and quantify the liability. Till the said determination, there is no liability at all upon the other side and no 'adjustment' in regard to the damages which is not quantified is liable to sustain.

In view of the matter, the plea of 'adjustment' that has been canvassed by filing additional written statement in the present case appears to be not tenable and, therefore, the trial court rightly dismissed the application and the same does not suffer from any perversity, illegality or irregularity and hence requires no interference by this Court.

Accordingly, this Original Petition stands dismissed.

The interim stay in force shall stand vacated. Since the Suit is of the year 2012 (a 5+ old matter), the trial court is directed to expedite the trial as early as possible, within a period of 4 months from the date of receipt of a copy of this judgment or its production by the concerned parties.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/

APPENDIX OF OP(C) 2434/2021

PETITIONER'S EXHIBITS

- Exhibit P1 TRUE COPY OF THE PLAINT DTD 30.04.2011 FILED BY THE RESPONDENT BEFORE THE DISTRICT JUDGE, THALASSERY (VACATION COURT) AS OS 190/11 WHICH IS TRANSFERRED TO THE III ADDL.SUB JUDGE KOZHIKODE AND RENUMBERED AS OS 624/12.
- Exhibit P2 TRUE COPY OF THE WRITTEN STATEMENT DATED 21.10.2011 FILED BY THE DEFENDANT IN OS 624/2012 OF III ADDL.SUB COURT, KOZHIKODE.
- Exhibit P3 TRUE COPY OF THE I.A.NO.5/21 IN OS 624/2012 DATED 07.10.2021 OF III ADDL.SC, KOZHIKODE.
- Exhibit P4 TRUE COPY OF THE ADDITIONAL WRITTEN STATEMENT 07.10.2021 FILED BY THE DEFENDANT IN OS 624/2012 OF III ADDL.SUB COURT, KOZHIKODE.
- Exhibit P5 TRUE COPY OF THE COUNTER FILED BY THE RESPONDENT IN IA 5/21 IN OS 624/12 DATED 11.10.2021.
- Exhibit P6 TRUE COPY OF THE ORDER DTD 28-10-2021 IN IA NO.5/21 IN OS 624/12 OF III ADDL.SC, KOZHIKODE.
- Exhibit P7 TRUE COPY OF THE IA 7/21 DTD 03.11.2021 IN OS 624/12 OF III ADDL.SUB COURT, KOZHIKODE.