

**\*IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **IA No.989/2009 in CS(OS)**  
**No.2242/2007 & Counter Claim No.5/2009.**

% **Date of decision:18.05.2009**

**GASTECH PROCESS ENGINEERING**  
**(INDIA) PVT. LTD.** ..... Plaintiff

Through: Mr. Jayant Bhushan, Sr. Advocate,  
Mr. Anurag Dubey, Mr. Neelesh  
Dubey & Mr. D.P. Pandey, Advocates

**Versus**

**M/S SAIPEM** ..... Defendant/Counter  
Claimant

Through: Mr. Sanjay Jain, Sr. Advocate with  
Mr. Manish Bhatnagar & Ms. Prachi  
Vashist, Advocates

***CORAM :-***  
**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

1. Whether reporters of Local papers may be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

**RAJIV SAHAI ENDLAW, J.**

1. The maintainability of a counter claim against a non party to the suit and the application of the counter claimant/defendant in the suit for impleading the said party as a party to the suit are for consideration.

2. The plaintiff instituted the suit for recovery of Euro 2,80,632/- from the defendant together with pendente lite and future interest and for permanent injunction restraining the defendant from encashing the bank guarantee. The defendant filed a written statement contesting the suit. It was inter-alia stated in the written

statement that the defendant had sent its proposal for supply of various equipment for Fuel Gas Treatment Package to M/s Gastech USA being the parent company of the plaintiff herein; that M/s Gastech USA thereafter forwarded the said proposal to the plaintiff; the plaintiff subsequently accepted the said proposal of the defendant by issuing a letter of intent along with quotation for supply of equipment as per the specifications envisaged by the defendant. After so stating, the written statement thereafter proceeds to talk of the relationship/agreement between the plaintiff and the defendant. The defendant has of course in para 7 (viii), after reproducing the relevant terms and conditions of the purchase order placed by the defendant on the plaintiff, stated that during the negotiations between the defendant, M/s Gastech USA and the plaintiff, M/s Gastech USA had expressly assured to the defendant that there will be a full time involvement of one Mr. Museeb Sharif of M/s Gastech USA who was identified as the Project Manager under Article 10 of the purchase order and assurances were given by M/s Gastech USA that he shall be deputed for taking care of the entire project. It is further the averment of the defendant in the written statement that the said Mr. Museeb Sharif was never deputed and in his place one Mr. V.P. Sharma was incharge of the entire project.

3. The defendant after filing the written statement preferred the counter claim aforesaid against not only the plaintiff but also against M/s Gastech Engineering Corporation USA (M/s. Gastech USA) for recovery of Euros 44,01,929/- along with pendente lite and future interest from the plaintiff and M/s Gastech USA jointly and severally. The defendant along with the said counter claim also filed the application aforesaid under Order 1 Rule 10 of the CPC for

impleading M/s Gastech USA as a party to the suit. The counter claim and the application came up first before the court on 23<sup>rd</sup> January, 2009 when this court recorded reservation regarding maintainability of counter claim against a person other than the plaintiff. Arguments were heard thereafter on the maintainability of the counter claim as well as on the application for impleadment of the said M/s Gastech USA as a party to the suit.

4. M/s Gastech USA is sought to be impleaded as a party to the suit inter-alia on the ground that it was an integral part of the entire transaction, subject matter of the suit since the inception of negotiation which finally emerged in the contractual relationship forming the subject matter of the suit. It is further pleaded that the plaintiff is a 100% owned subsidiary of M/s Gastech USA; that M/s Gastech USA had been involved in the transaction and all purchase and deviation alleged of the plaintiff are as much attributable to M/s Gastech USA as to the plaintiff. It is thus alleged that M/s Gastech USA ought to have been joined as co-plaintiff and is a necessary party for adjudication of the suit. It is further pleaded that since the counter claim has been preferred by the defendant not only against the plaintiff but also against M/s Gastech USA, for the said reason also it is also desirable that M/s Gastech USA be added as a co-plaintiff in the suit.

5. As would be noticed from above the defendant in the written statement as originally filed did not plead that the suit was bad for non impleadment of M/s Gastech USA or that the suit could not be adjudicated in the absence of M/s Gastech USA or that M/s Gastech

USA was a necessary or a proper party to the suit. During the course of hearing also it was put to the senior counsel for the defendant whether there was any such averment in the written statement. The answer was in the negative. In the absence of any plea to the said effect in the written statement, I find the application to be guided more for the reason of the defendant in the counter claim having made a claim against the said M/s Gastech USA also rather than for the reason of M/s Gastech USA being a necessary or a proper party to the suit. The claim of the plaintiff against the defendant is out of a contractual relationship reduced into writing and admittedly between the plaintiff and the defendant. It is the case of defendant itself in the written statement that the proposal sent by defendant to M/s. Gastech USA was forwarded by Gastech USA to the plaintiff and the plaintiff accepted the said proposal of defendant by issuing letter of intent. The agreement between the parties after detailed negotiations alleged, be that with plaintiff or be that with M/s Gastech USA, having been recorded in writing, the rights of the parties thereafter are to be determined by the said document only. If the defendant was desirous of having the agreement with M/s Gastech USA, nothing prevented the defendant from at the time of executing agreement in writing insisting so. The defendant having entered into the agreement with the plaintiff, cannot now be permitted to ask for impleadment of M/s Gastech USA as a co-plaintiff. Even otherwise M/s Gastech USA cannot be compelled to sue the defendant when it has not chosen to do so. Thus the application for impleadment of M/s Gastech USA in the suit is found to be beyond the pleadings of the defendant and even otherwise no case for impleadment is made out and the application is dismissed. Merely because M/s Gastech USA may be a witness does not make

them a necessary or a proper party to the suit.

6. That brings me to the core question addressed i.e. of maintainability of counter claim against a non party to the suit. The provision for counter claim is made in Order 8 Rule 6 A to 6 G of the CPC which are as under:-

**[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.** - Whether 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 plaintiffs 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.]

7. The counter claim is defined in shorter **Oxford English Dictionary 6<sup>th</sup> Edition** as a claim made to rebut a previous claim and as a claim made by defendant against the plaintiff.

8. **Black's Law Dictionary 6<sup>th</sup> Edition** defines a counter claim as a claim presented by a defendant in opposition to or deduction from the claim of the plaintiff; something which if established will defeat or diminish the plaintiff's claim.

In the **8<sup>th</sup> Edition**, it is defined as a claim for relief asserted against an opposing party after an original claim has been made and especially a defendant's claim in opposition to or as a set off against the plaintiff's claim.

9. That is how in ordinary English language a counter claim is understood. It is not understood as a claim by the defendant against the person other than the plaintiff; such person having not made any claim against the defendant, the question of the defendant having a "counter" claim against such person does not arise and it would be a claim of defendant against such person and not a counter claim.

10. What has to be adjudicated is whether the legislature in adding Rule 6A to 6G aforesaid to the CPC by the amendment of the year 1976 intended the counter claim to be anything different than as ordinarily understood as aforesaid. On a reading of the aforesaid rules I am unable to hold that the legislature had intended to allow a counter claim to be made against persons other than the plaintiff also and who had not made any claim against the counter claimant.

11. Rule 6A(i) provides for counter claim of "right or claim .....against the plaintiff". Thus the reference is to the cause

of action against the plaintiff only and not to the cause of action if any against persons other than the plaintiff. The senior counsel for the plaintiff has also drawn attention of Rule 6 A (3) where the right of filing written statement to the counter claim has been given to the plaintiff only and not to any other person and correctly contended that it follows therefrom that counter claim cannot be against any person other than the plaintiff.

12. Rule 6C vests the right of applying to the court for an order that the counter claim be disposed of not by way of counter claim but as an independent suit, only in the plaintiff. If the legislature had intended the counter claim being made against persons other than the plaintiff also, there is no reason for discriminating between the plaintiff and such other person and by vesting the right for so applying only in the plaintiff and not in such other person. This is also indicative of the legislative intent being of a counter claim being maintainable against a plaintiff only and not against persons other than the plaintiff.

13. Rule 6E again provides for default by plaintiff only in putting the reply to the counter claim and consequences thereof. If the contention of the senior counsel for the defendant of the counter claim being maintainable against persons other than the plaintiff is to be accepted then it would lead to an anomalous situation that while upon the default by the plaintiff of replying to the counter claim the court is empowered to pronounce judgment against the plaintiff but there being no power in the court to pronounce such judgment upon default by persons other than the plaintiff to file reply to the counter claim.

14. Rule 6F is against structured on the premise of the counter claim being against the plaintiff only.

15. This Court on an interpretation of the aforesaid rules thus is of the opinion that the counter claim is maintainable against the plaintiff only and cannot be treated as a counter claim if including a claim against persons other than the plaintiff.

16. The senior counsel for the defendant has referred to the judgments of the Kerala, Madra & Bombay High Courts in support of his contention of counter claim being maintainable against persons other than the plaintiff also.

17. In ***Sarojini Amma Vs. Dakshyani Amma*** 1996 A I H C 5061 (Kerala) it was held that a counter claim has the same effect as a cross suit and has to be disposed of along with the main suit in which it is filed; the only limitation is that the court should be competent to dispose of the counter claim and the main purpose of setting up a counter claim is to prevent multiplicity of proceedings between the parties. It was held that Order 8 Rule 6A CPC does not say as to who shall be the parties to the counter claim and the provisions of Order 1 Rule 10 CPC would apply to a counter claim. It was noticed in this judgment that the High Court of Bombay has by adding Rule 15 to Order 8 provided for the counter claim being made against persons other than the plaintiff. It was observed that a rule on similar lines seemed to be necessary but even in its absence the court can permit the counter claim against persons other than the plaintiff.

18. With respect, I am unable to subscribe to the said view. The judgment aforesaid without discussing the aspects/language of

Order 8 Rule 6A set out herein above generally states that Rule 6A does not say who shall be parties to the counter claim. I have noticed above that the cause of action for the counter claim can be against the plaintiff only and against no other person under Rule 6A. The Kerala judgment also does not notice the impact/effect of the other rules (supra). Further, it having been noticed that wherever the legislature intended the counter claim to be maintainable against persons other than the plaintiff amendment to the CPC has been made, is also conclusive that without such amendment being carried out it is not possible to hold a counter claim to be maintainable against persons other than the plaintiff.

19. In my opinion the Madras High Court in ***Vediammal Vs. M.Kandasamy*** 1997 (1) MLJ 529 cited by the senior counsel for the plaintiff has merely referred to the judgment aforesaid of the Kerala High Court but was not really concerned with the issue aforesaid.

20. Similarly, the judgment of the Bombay High Court in ***Teofilo Barreto Vs. Sadashiva G. Nasnodkar*** 2007 (6) Maharashtra Law Journal also in view of the amendment to Order 8 of the CPC in Mumbai is of no help in as much as there is no equivalent amendment to the CPC in this court.

21. The senior counsel for the defendant/counter claimant also drew attention to ***Shri Jag Mohan Chawla Vs. Dera Radha Swami Statsang*** 1996 (5) JT SC 428 but the same is on general principle of counter claim being in the nature of a fresh suit and being maintainable in relation to claims of the defendant against the

plaintiff, not necessarily relating to transaction subject matter of the suit. Said general propositions also in my view do not help in adjudication of the controversy aforesaid. Merely because the apex court has held that the cause of action for the counter claim can be different from that for the suit does not mean cause of action against persons other than plaintiff can also be the subject matter of counter claim.

22. The senior counsel for the plaintiff per contra referred to ***Hem Narain Thakur Vs. Deo Kant Mishra*** 2000 A I H C 945 of the Patna High Court and to ***Allahuddin Kadri Vs. Devander Singh*** RLW 1996 (1) Raj. 408 which seem to indicate that the counter claim is not maintainable against persons other than the plaintiff.

23. I find that the Punjab & Haryana in High Court in ***Kulvant Singh Vs. Gursharan Singh*** AIR 2003 Punjab & Haryana 1 has also held that the counter claim cannot be made against the co-defendant and can be made against the plaintiff only.

24. The counter claim is a weapon of defence and enables the defendant to enforce a claim against the plaintiff and is allowed to be raised to avoid multiplicity of proceedings. Reading of the rules aforesaid shows that the counter claim has to be disposed of along with the suit. If it is to be held that counter claim can be made against persons other than the plaintiff also, it has the potential of becoming a tool in the hands of an unscrupulous defendant to delay the disposal of the suit indefinitely and by making a claim jointly and severally against the plaintiff and a large number of other persons. Such course has to be definitely avoided.

25. It is not as if the defendant/counter claimant by being so prevented from making a counter claim would be prejudiced in any manner whatsoever. It would always remain open to such defendant to institute a suit against the plaintiff and others. In a given case, theoretically, if the court finds that the two suits should be tried together, the courts can always allow so.

26. I may notice that Rule 6C permits the plaintiff to even without the counter claim being against persons other than the plaintiff, to apply to the court for disposal of the counter claim, not as a counter claim but by an independent suit. The reasons on which the courts have allowed such prayers are of, such counter claim causing embarrassment to the plaintiff or having potential to delay the suit of the plaintiff. In my view, holding a counter claim to be maintainable against plaintiff and others may lead to the same situation and rather than the courts being required to exercising the powers under Rule 6, it is expedient to hold that counter claim by its very nature is by way of counter to the claim of the plaintiff only and against the plaintiff only and if it is made against the plaintiff and others then it ceases to be a counter claim and is an independent suit.

27. The senior counsel for the plaintiff had also contended that while the right to institute a suit is a common law right, the right to file a counter claim is a statutory right under the provisions aforesaid. However, that in my opinion is not the correct legal position. Even prior to the amendment of 1976 to the CPC incorporating Rule 6A to 6G it had been held that the defendant was entitled to maintain a counter claim against the plaintiff.

28. I, therefore, hold the counter claim of the defendant to be beyond the domain of counter claim within the meaning of Order 8 Rule 6A of the CPC and thus not entertainable as a counter claim to the present suit. The same be returned to the defendant. The defendant shall, of course, have liberty to maintain an independent suit against the plaintiff and M/s Gastech USA aforesaid.

**RAJIV SAHAI ENDLAW  
(JUDGE)**

**May 18, 2009  
PP**