

**IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Sugato Majumdar

**CS-COM/788/2024
[OLD NO. CS/332/2012]**

**MIHIJAM VANASPATI LTD & ANR
VS
SHINING VYAPAR PVT LTD AND ORS**

For the Plaintiff : Mr. Satadeep Bhattacharya, Adv.
Ms. Sriparna Mitra, Adv.
Mr. Bipin Ghosh, Adv.

For the Defendant Nos. 1 & 2 : Mr. Rishad Medora, Adv.
Mr. Rohit Banerjee, Adv.
Ms. Kanchan Jaju, Adv.
Ms. Vanshika Lamba, Adv.

Hearing concluded on : 20/06/2025

Judgment on : 07/07/2025

Sugato Majumdar, J.:

This is a suit with counter-claim. The Plaintiffs filed the suit praying for declaratory as well as money decree. The Defendant No.1 filed counter-claim praying for recovery of money.

The plaint case may be summarized as follow:

- a) Plaintiff no. 1 carries on business from B – 2/2, “Gilander House”, 8, N.S. Road, Kolkata – 700001 and the Plaintiff no. 2 carries on business from 11, Crooked Lane, Ground Floor, Kolkata – 700069. Both are companies registered under the Companies Act, 1956 and substantially owned, controlled and managed by the same family, namely, Agarwallas.
- b) The Defendant no. 4 carries on business from 4, Khairu Place, Kolkata – 700072 and is well-known to the Agarwallas family and used to advise them on investments and business opportunities.
- c) Defendant no. 1, 2 and 3 were not known to the Plaintiffs; rather they were introduced by the Defendant no. 4 with the Plaintiffs.
- d) On 2nd week of August, 2011, the Defendant No.4 made proposal to the Plaintiff no. 1 for accommodation of loan between the parties and it was finally agreed that
- i) The Plaintiff No.1 shall accommodate a loan of Rs.70, 80,000/- to the Defendant No.3 which would carry interest at a rate of 12 per cent per annum and would be for a period of 180 days.
 - ii) Another loan of Rs.15,00,000/- in the form of inter corporate deposit was arranged, to be provided by the Defendant No.1 to the Plaintiff No.2.
 - iii) There would be another loan of Rs.25,00,000/- to be advanced by Defendant No.2 to the Plaintiff No.1.

- e) The Plaintiffs, in proportion, should receive a sum of Rs.40 lakhs (15 lakhs from the Defendant no. 1 to the Plaintiff N.2 and 25 lakhs from the Defendant No.2 to the Plaintiff no. 1) as intercorporate deposit, carrying simple interest at a rate of 11 per cent per annum which would be repayable until the Defendant No.3 fully discharge its obligation to the Plaintiff no. 1 in respect of the inter-corporate deposit of Rs.70.80 lakhs. In other words, Plaintiffs would repay a sum of Rs.40 lakhs with interest to the Defendant no. 1 and 2 as and when the Defendant no. 3 would repay the loan to the Plaintiff no. 1 to it and till that time the Defendant no.1 and 2 would continue to renew the intercorporate deposit loans made to the Plaintiff no. 1 and 2 respectively.
- f) In order to facilitate the transactions balance confirmation statements were to be issued by the respective parties from time to time and cheques were issued by the Plaintiff no. 1 and 2 as security for the repayment of the principal sums but with express instructions in writing from the Plaintiffs that such cheques for the principal sum would not be encashed in view of the fact that repayment to the Defendant no. 1 and 2 would depend upon whether the Defendant no. 3 had repaid the loan to the Plaintiff no. 1.
- g) As performance of the agreements, so reached between the parties, the Plaintiff no. 1 lent a sum of Rs.70.80 lakhs to the Defendant no. 3 as an intercorporate deposit loan carrying interest of 12 per cent per annum; Plaintiff no. 1 also accepted intercorporate deposit loan of Rs.25 lakhs from the Defendant no. 2; the Plaintiff no. 2 also

accepted intercorporate deposit loan of Rs.15 lakhs from the Defendant no. 1.

- h) Plaintiff no. 2 made payment of interest of Rs.15 lakhs, coming to an amount of Rs.37,431/- to the Defendant no. 1 in terms of a cheque dated 21/11/2011. Plaintiff no. 1 paid an amount of Rs.62,383/-, on account of interest of Rs.25 lakhs to the Defendant no. 2 in terms of a cheque dated 21/11/2011.
- i) Plaintiff no. 2 issued a cheque for Rs.15 lakhs, drawn on the same day for securing the principal sum lent, namely, Rs.15 lakhs on understanding that the cheque should not be encashed which itself was to be given if the Defendant no. 3 repayment of loan taken from the Plaintiff no. 1. Similarly, Plaintiff no. 1 also issued a cheque on the same date for Rs.25 lakhs to the Defendant no. 2 securing the amount of loan of Rs.25 lakhs on understanding that such cheque will not be encashed unless and until Defendant no. 3 repays the loan to the Plaintiff no.1.
- j) When the renewals of loans were made in the year 2012, the Plaintiff no. 1 and 2 paid higher rate of interest at a rate of 12 per cent per annum on their respective loans.
- k) Dispute cropped up between the parties when a Defendant no. 3 defaulted its obligation of repayment. The Defendant no. 3 who had initially made the intercorporate deposit for 60 days, defaulted in repayment of loan. The Defendant no. 4 was also not available. Subsequently, at the intervention of the Defendant no. 4, an arrangement was made and the parties agreed as follows:

- i) The Plaintiff would make payment of Rs.2 lakh to the Defendant no. 1 and Rs.3 lakhs to the Defendant no. 2 at once, thereby reducing the principal liability of the Plaintiff no. 2 to the Defendant no. 1 from Rs.15 lakhs to Rs.13 lakhs and reducing the principal liability of the Plaintiff no. 1 to the Defendant no. 2 from Rs.25 lakhs to Rs.22 lakhs.
 - ii) Defendant no. 3 would liquidate the entire liability of the outstanding principal amount being Rs.77 lakhs that it owed to the Plaintiff no. 1.
 - iii) Defendant no. 1 and 2 would not encash any cheque paid to them for securing the principal amounts due to them and would not make any demand from the Plaintiff until the Defendant no. 3 paid in full towards the Plaintiff.
- l) Payments were made by the Plaintiffs but the Defendant no. 3 did not liquidate its liability of Rs.70.80 lakhs in its entirety, but rather paid to the Plaintiff no. 1, a part sum of Rs.35.8 lakhs leaving another sum of Rs.35 lakhs unpaid. At the same time, the respective Defendants, namely, Defendant no. 1 and 2 encashed the cheques handed over to them by the respective Plaintiffs as security of loan advanced to them, giving a go by to the agreement and understanding arrived at that the cheques should not be encashed until the Defendant no. 3 liquidates its liability fully. These cheques were dishonored since they were presented after their period of validity. The Defendants were poised to threat the

Plaintiffs with prosecution under the Negotiable Instrument Act, 1882 (hereinafter referred to as NI Act) for dishonoring of the cheques.

- m) It is the plaint case that the Plaintiff had to get an outstanding amount of Rs.35 lakhs from the Defendant no. 3. The Plaintiff, therefore, instituted the instant suit, praying for declaration that Defendant no. 2 and 3 are not entitled to recover any sum from the Plaintiffs; perpetual injunction against the Defendant no. 1 and 2 or their main servants and agents from making any claim based on the cheques; decree for recovery of sum of Rs.35 lakhs against the Defendant no. 3; interest along with other prayers.

The Defendants contested the suit by filing written statement.

The Defendant no. 1 filed separate written statement, contesting the suit and raising counter claim. The Defendant no. 1 denied all allegations and factual matrix set forth by the Plaintiff in the suit. According to Defendant no. 1, the Plaintiffs have no cause of action against the Defendant no. 1; the suit is bad for misjoinder of causes of action and misjoinder of parties, is not maintainable and should be dismissed. The positive cases made out by the Defendant in the written statement are as follows:

- a) In the second week of August 2011, the Plaintiff no. 2 requested the Defendant no. 1 to provide temporary accommodation of loan to be commercial in nature, of Rs.15 lakhs as the Plaintiff no. 2 was in urgent financial need. It was agreed between the parties and pursuant to such agreement Defendant no. 1 lent and advanced a sum of Rs.15 lakhs to the Plaintiff on 23rd August, 2011 through RTGS. In consideration, the Plaintiff no. 2 forwarded to post-dated

cheques along with a letter dated 24th August, 2011, one of Rs.15 lakhs as security of the principal amount and another cheque dated same, containing a sum of Rs.37431 on account of interest at a rate of 11 per cent per annum from 23/08/2011 to 21/11/2011.

- b) Plaintiff no. 2 neglected and failed to pay the loan. It was subsequently agreed between the Plaintiff no. 2 and the Defendant no. 1 that the interest, rate should be raised to 12 per cent per annum with effect from 22/05/2011. The Plaintiff no. 2 agreed to the terms and in token of acceptance handed over one cheque with a bearing date 20th January, 2012 for the principal amount of Rs.15 lakhs in favour of the Defendant no. 1. Another cheque dated same was handed over containing a sum of Rs.26,630/- on account of enhanced rate of interest from 22/11/2011 to 20/01/2012.
- c) On 20/01/2012 further extension of time for repayment was sought for by the Plaintiff no. 2 which followed various negotiations. The Defendant no. 2 subsequently agreed to extend time with enhancement of rate of interest 24 per cent per annum with further stipulation that the Plaintiff no. 2 shall have to make an advanced payment of Rs.2 lakhs within the period of one month. The said amount of Rs.2 lakh was paid by the Plaintiff no. 2 on 08/02/2012.
- d) The Defendant no. 1 received a letter from the Plaintiff no. 2 dated 09/02/2012 containing a request to apply the sum of Rs.2 lakh towards part payment of the principal sum. Immediately, the Defendant no. 1 made discussion with the Director of Plaintiff no. 1 Mr. Amit Kumar Aggarwal and it was agreed that the said amount would remain on account of interest payment and the rate of

interest would be 24% per annum and the loan amount would be liquidated in the last week of June 2012.

- e) On 28th June, 2012, the Defendant no. 1 deposited the cheque in the bank account but it was dishonoured on 30th June, 2012. The Defendant, thereafter, issued statutory notice dated 25th July, 2012 under Section 434(1)(a) of the Companies Act, 1956 claiming the money due and further contending that the Plaintiff no. 2 was commercially insolvent. Subsequently, a company petition, namely, 306 of 2012 was filed by the Defendant no. 1 against the plaintiff no. 2. At the same time, the Defendant no. 1 initiated prosecution under Section 138 read with Section 141 of the Negotiable Instruments Act, 1882 before the Chief Metropolitan Magistrate, Calcutta. The Company Petition being 306 of 2012 went up to the Supreme Court of India by way of special leave petition. Initially, the Plaintiff was directed to deposit a sum of Rs.13 lakh with the Calcutta High Court. The special leave petition came up for hearing on 13th September, 2013. The Supreme Court of India directed the Defendant no. 1 to withdraw a sum of Rs.10 lakh out of the said Rs.13 lakh. It is submitted by the Defendant no. 1 that the said withdrawal is against partial liquidation of loan, the winding up proceeding was also dropped reviving the claim of the Defendant No.1 against the Plaintiff no. 2, which the Defendant set out in the written statement in the form of counter claim. The Defendant no. 1, therefore, paid for the reliefs that the instant suit may be dismissed; decree for declaration that the sum withdrawn by the Defendant no. 1 towards the dues of the Defendant no. 1 against the Plaintiff no. 2; decree for a sum of Rs.10,13,157/- along

with interest as well as consequential reliefs as detailed herein below:

PARTICULARS

(a)	Principal Amount	Rs.15,00,000.00
(b)	Interest at the rate of 24 percent from 21 st July, 2012 to 7 th October, 2012	Rs.4,7,918.00
	Total	Rs.19,37,918.00
(c)	Less received from Calcutta High Court on 8 th October, 2013	Rs.10,00,000.00
(d)	Amount due as on 8 th October, 2013	Rs.9,37,918.00
(e)	Interest at the rate of 24 percent per annum from 8 th October, 2013 to 6 th February, 2014	Rs.75,239.00
(f)	Amount due and payable as on 6 th February, 2014	Rs.10,13,157.00

The Defendant no. 2 filed a separate written statement denying all the contentions made in the plaint, further raising the plea that the Plaintiffs have no cause of action against the Defendant no. 2; the suit is bad for misjoinder of cause of action as well as misjoinder of parties; the suit is not maintainable in the present form. The positive case made out by the Defendant no. 2 is that,

- a) The Plaintiff no. 1 approached the Defendant no. 2 for intercorporate deposit of Rs.25 lakhs. Acting in good faith and on trust, the Defendant no. 2 agreed to accommodate the loan of Rs.25

lakhs for a period of 92 days with rate of interest at the rate of 11 per cent per annum. Subsequently, the Defendant no. 2, in terms of cheque dated 23/08/2011 lent the sum of Rs.25 lakhs. In terms of a letter dated 24/08/2011, the Plaintiff no. 2 handed over a cheque dated 21/11/2011 for a sum of Rs.25 lakhs, in discharge of its liability, on account of repayment of principal loan and another cheque date same on account of payment of interest at a rate of 11 per cent per annum from 23/08/2011 to 21/11/2011.

- b) Prior to presentation of the cheques by the Defendant no. 1, the Plaintiff no. 1 sought for renewal of the intercorporate loan for a further period of 60 days and agreed to enhance the interest, at the rate of 12 per cent per annum. The Defendant no. 2 agreed to the proposal and the cheque no.278561 containing the interest part was cleared. The intercorporate deposit loan of Rs.25 lakhs was extended for a further period of 60 days and the Plaintiff no. 1 issued two cheques – one being cheque no. 681596 dated 20th January, 2012 for a sum of Rs.25 lakhs to secure repayment of loan and the other cheque no. 6821597 dated 20th January, 2012 for Rs.44, 384/- on account of enhanced rate of interest.
- c) Similarly, on 28th January, 2012, the tenure of loan was further extended for six months on enhanced rate of interest of Rs.24 per cent per annum. This time also the Plaintiff handed over one cheque on account of advanced interest and another cheque containing the principal amount of Rs.25 lakhs securing repayment of loan. It was further agreed that the principal amount shall be repaid in the last week of June by presentation of the aforesaid

cheque, containing the deposit of the cheque, containing the principal amount. The Plaintiff no. 1 made payment of Rs. 3 lakhs by RTGS.

- d) On 28th June, 2012 the Defendant no. 2 deposited the cheque of principal amount for repayment of the loan but the cheque was dishonoured. The Defendant no. 2 demanded payment of the loan due but no payment was made by the Plaintiff no. 1 to the Defendant no.2. This led the Defendant no. 2 to initiate prosecution under Section 138/141 of the Negotiable Instruments Act, 1882.
- e) The Defendant no. 2 filed also a summary suit against the Plaintiff no. 1 for recovery of the amount which had been pending at the time of institution of this suit. Defendant no. 2 did not make any counter claim.
- f) The Defendant no. 2 denied all other allegations contained in the plaint.

The Defendant no. 3 in his written statement denied each and every allegation of the plaint taking recourse to standard defense like maintainability, non-joinder of the parties, non-disclosure of cause of action and others. The positive case set out by the Defendant no. 3 in his written statement may summarize as follow:

- a) The Plaintiff no. 1 visited the Defendant no. 3 in the month of March 2010 and expressed willingness to purchase various items like S.S. Pipe, M.S. Pipe, S.S. Flat, S.S. Square Bar, Beam, M.S. Plate. Corrugated Sheet, M.S. Angle, Joist, M.S. Channel, M.S.

Round etc. on terms and conditions that the Plaintiff no. 1 would pay the price of goods to the Defendant no. 3 within a week or sometimes in advance; in case of failure of the Defendant no. 3 to supply the goods, so ordered, advanced amount would be refunded to the Plaintiff no. 1 without interest. The Plaintiff No.1 to take delivery of goods by its own carrier.

- b) Pursuant to the terms and conditions settled between the parties, the Defendant no. 3 had dealings and transactions with the Plaintiff no. 1 and during the period from 19/03/2010 to 31/03/2010, the Defendant no. 3 sold and delivered goods to the Plaintiff no. 1, amounting to Rs.1,57,02,504/- and the Plaintiff no. 1 paid a sum of Rs.83,00,000/- in part payment of the dues leaving a balance of Rs.74,02,504/- outstanding.
- c) Between 01/04/2010 to 31/03/2011, the Defendant no. 3 sold and delivered goods to the Plaintiff no. 1, amounting to Rs.7,88,26,022/- and the Plaintiff no. 1 paid a sum of Rs.8,62,28,526/- towards payment. Between 01/04/2011 to 31/03/2012 the Plaintiff paid a sum of Rs.70,80,000/- to the Defendant and the Defendant sold and delivered goods to the Plaintiff no. 1 amounting to Rs.35,00,000/-. After that the Defendant was unable to supply further goods to the Plaintiff no. 1 and refunded a sum of Rs.10,00,000/- to the Plaintiff no. 1 leaving a balance sum of Rs.25,80,000/-. The said sum was brought forward to 01/04/2012.
- d) During the month of April 2012, the Defendant no. 3 refunded the balance amount of Rs.25,80,000/- on account of inability to supply

goods. Thereafter, no goods were supplied to the Plaintiff no. 1.

The Defendant no. 3 had no dealing or transaction with the Plaintiff no. 2 or other Defendants at any point of time.

- e) The Defendant no. 3 denied all other allegations and statements contained in the plaint without raising any counter claim.

The Defendant no. 4 filed written statements, denying all allegations, contained in the plaint, raising standard defenses like another maintainability of the suit, non-discloser of the cause of action, barred by limitation and others. It is specifically stated that the Plaintiff filed the instant suit by giving false statements attracting of Section 340 read with Section 195 of the Code of Criminal Procedure. It is further pleaded that the Defendant no. 4 is neither a necessary party nor a proper party. According to the Defendant no. 4, the suit should be dismissed.

Additional written statement is filed by the Plaintiff against the counter claim of the Defendant no. 1 wherein the contents of the written statement filed by the Defendant no. 1 are denied. It is stated in the additional written statement that the winding up proceeding against the Plaintiff no. 2 was admitted for a principal sum of Rs.13 lakhs. Pursuant to the Order of the Hon'ble Supreme Court of India, the Plaintiff no. 2 deposited a sum of Rs.13 lakhs with the Registrar, High Court, Calcutta. Subsequently, the dispute between the Plaintiff and the Defendant no. 1 was amicably settled. Consequently, the Defendant no. 1 withdrawn a sum of Rs.10 lakhs out of the total sum of Rs.13 lakhs deposited by the Plaintiff no. 2. The Plaintiff no. 2 was permitted to withdraw the balance sum of Rs.3 lakhs which is still to be withdrawn by the Plaintiff no.2. Payment of Rs.10 lakhs with Defendant no. 1 was in full and final settlement of date of the Plaintiff no. 2 towards the Defendant no. 1 and they are remained nothing due and payable by the Plaintiff no. 2 to the Defendant no. 1. It is further stated that the entire counter claim is a

result of fraud; there is no cause of action for the Defendant no. 1 in making the counter claim. According to the Plaintiff, the counter claim is liable to be dismissed.

On the basis of rival pleadings, the following issues were framed:

1. Is the suit maintainable in law and in fact?
2. Is the suit barred by limitation?
3. Whether the Plaintiff no. 1 entitled to the negative declaration prayed for?
4. Whether the Defendant no. 1 is lent and advanced a sum of Rs.15,00,000/- (Rupees fifteen lakhs) only on interest at the rate of 24% per annum?
5. Whether the defendant no. 1 is entitled to claim decree for the principal sum of Rs.15,00,000/- (Rupees fifteen lakhs) only along with interest at the rate of 24% per annum from the Plaintiff no. 2?
6. Whether the Defendant is entitled to receive any further sum after receipt of sum of Rs.10,00,000/- (Rupees ten lakhs) only on 8th October, 2013 in terms of the order passed by the Hon'ble Supreme Court on 13th September, 2013?
7. Whether any amount is recoverable from the Defendant no. 3 to the Plaintiff no. 1?
8. Whether the Plaintiffs are entitled to a decree as prayed for?

9. Whether the Defendant no. 1 is entitled to a decree as prayed for in the counter claim?

10. What relief or reliefs Plaintiffs and Defendant no. 1 is entitled?

Issue No. 1 & 2:

To decide this issue, averments made in the plaint may be looked into.

It is averred that on renewal of the loan, the Plaintiff nos. 1 & 2 issued two cheques to the Defendant nos. 1 & 2. One was cheque no 222844 dated 20/01/2012 for Rs.25,00,000/- and the other cheque no. 681596 dated 20/01/2012 for a sum of Rs.15,00,000/-. These cheques were given to secure the payment of the principal amount. These cheques were deposited, according to the plaint after expiry of validity on 28/06/2012 and were dishonoured. Thus, the amount covered in the said cheques were unpaid. This court allowed the prayer of the Defendant no. 1 to amend the written statement to incorporate counter-claim in it. Counter-claim was raised in the amended written statement which was re-verified on 28/03/2014. Considering the time limit, as prescribed by the Limitation Act, 1963, it can be easily said that the counter-claim is not barred by the Limitation Act, 1963.

So far as the plaint case is concerned, it was filed within three years from the date of cause of action. Hence, the suit itself is also not barred by limitation.

Maintainability:

Although this issue was framed, the Learned Counsel for the Defendants did not press or argued that procedurally, the suit is not maintainable. Rather, the

Learned Counsel for the Plaintiff's principal limb of argument was that the counter-claim is not maintainable.

It is argued by the Learned Counsel for the Plaintiffs that according to the Defendant no. 1, winding up proceeding was initiated pursuant to a purported statutory notice dated 25/07/2012 in respect to the demand of its principal sum of Rs.15,00,000/- along with interest at a rate of 24% per annum. The Supreme Court of India by the Order dated 08/10/2013, reported in **Bhasa Construction & Industrial Projects Pvt. Ltd. Vs. Shinning Vyapar Pvt. Ltd. [(2013) 10 SCC 543]** dropped the winding up petition and had direction the Defendant no. 1 to withdraw the amount, deposited to the tune of Rs.13,00,000/- with the Calcutta High Court, to the extent of Rs.10,00,000/-. The Plaintiff no. 2 was given liberty to withdraw the balance sum of Rs.3,00,000/-. It is argued that the Defendant no. 1 neither sought any leave to proceed with the balance claim against the Plaintiff no. 2 nor such liberty was granted. Therefore, according to the Learned Counsel for the Plaintiffs' the balance claim stood abandoned.

It is further argued that in view of abandonment of claim, by applying the principles of Order XXIII Rule 1(4) of the Code of Civil Procedure, 1908 and/or principles analogous thereto, the counter-claim of the Defendant no.1, for recovery of the principal amount due post winding up proceeding is being dropped. It is further stated that in view of Rule 6 of the Companies (Court) Rules 1959, the provisions of the Code of Civil Procedure, 1908 is applicable to a winding up proceeding. Thus, according to the Learned Counsel for the Plaintiffs, the counter-claim is barred under the law and is not maintainable. The Learned Counsel referred to the decision of the Supreme Court of India reported in **Sarguja Transport Service Vs. State Transport Appellant Tribunal [(1987) 1 SCC 5]**.

Next it is argued by the Learned Counsel for the Plaintiffs that the language of Order XXIII Rule 1(3) (b) read with Order XXIII Rule 1(4) of the Code of Civil Procedure, 1908 makes it clear that a Court must be satisfied as to existence of sufficient ground for permitting a Plaintiff to file a fresh suit on the self-same cause of action. It cannot be contended by the Defendant no. 1 that from the Order of the Supreme Court of India it is manifest that leave was granted to them to file a counter-claim based on the self-same cause of action as that of winding up petition. It is argued that it is now the settled law that leave for filing a fresh proceeding on the self-same cause of action cannot be implied to have been granted. The Learned Counsel relied upon **State of West Bengal Vs. Subiman Saha [(2019) 2 CHN 241]**.

Per contra, the Learned Counsel for the Defendant no. 1 argued that winding up petition was filed by the Defendant no. 1 against the Plaintiff no.2. The Defendant no. 1 had not or could not have made any monetary claim against the Plaintiff no. 2 in as much as relief sought for in a winding up petition are completely different from the relief sought for in a civil suit. The only dispute or issue considered by the Supreme Court of India, at that point of time, was whether the Plaintiff no. 2 should be wound up or not in the liquidation proceeding in respect of admitted dues of Rs.13,00,000/-. Hence the question of abandonment of claim by the Defendant no. 1 or any question of operation of estoppel against the Defendant no. 1 is groundless. This could have been raised, had there being another winding up proceeding by the Defendant no. 1 against the Plaintiff no. 2 subsequent to passing off the order by the Supreme Court of India on 13/09/2013.

It was further argued that amicable resolution of the dispute as recorded by the Supreme Court of India meant resolution of the disputes relating to winding up proceedings and not resolution of the disputes related to monetary claim of the

Defendant no. 1 against the Plaintiff no. 2. Thus, the Supreme Court of India specifically recorded that the disputes were resolved “for the time being” only as opposed to any full and final settlement of the same. According to the Learned Counsel for the Defendant no. 1, no embargo was placed upon the Defendant no. 1 to pursue its claim against the Plaintiff no. 2. This being the position, this counter-claim is not barred by any law or principles analogous to estoppel or abandonment of claim.

I have heard rival submissions.

It is seminal principle of law that a suit is decided on its own facts and circumstances. Putting in a broader way, each *lis* is decided on the basis of its own facts and circumstances. Fact specificity is a crucial thing in deciding and adjudicating a *lis*. There can be different outcome in different litigations for this fact specificity. Principles of law apply on the basis of uniqueness of facts and circumstance of each case.

The Learned Counsel for the Plaintiff no. 2 referred to different decisions. Each case was decided on its own facts and circumstances. Here, the counter-claim owes its origin to the transaction between the parties prior to the winding up proceeding and the order of the Supreme Court of India dated 13/09/2013. The findings and observations as well as directions given by the Supreme Court of India should be taken into consideration while deciding the issue.

While passing the Order dated 13/09/2013, the Supreme Court of India noted:

“We are happy to note that in the course of hearing of this appeal, the parties to the litigation have amicably resolved their dispute

for the time being and therefore, the appeal is being disposed of with certain directions.”

It was further directed by the Supreme Court of India in the same Order:

“The winding-up proceedings shall be dropped or permitted to be withdrawn and the hearing of Civil Suit No. 332 of 2012 filed by the appellant along with its sister concern against the respondent and others, before the Calcutta High Court shall be expedited.”

It is very clear that the winding up proceeding was directed or permitted to be dropped. The compromise was made in respect of the winding up proceeding. This was a measure adopted “for the time being”. There was no settlement, no compromises in respect of the instant suit and that is why this suit was directed to be expedited. I agree with the argument made by the Learned Counsel for the Defendant no. 1.

There is another aspect of the matter. Counter-claim was made by amending the written statement. Leave was granted by this Court in terms of an Order dated 07/03/2014. Nothing is there on record to show that either the Plaintiffs challenged the order resulting in setting aside the same or the counter-claim itself. This apart, pendency of litigations saves the counter claim from being time barred. After long hibernation, the Plaintiff cannot be heard to say that the counter-claim is barred by law.

For reasons stated above, it is concluded that the counter-claim itself is not barred by any law. The merit of the counter-claim would be addressed at appropriate stage.

These issues are decided accordingly.

Issue No. 3 & 8

The Plaintiffs have sought for a declaratory decree that the Defendant nos.2 & 3 are not entitled to recover any money from the Plaintiffs or any of them whether Rs.25,00,000/- or Rs.15,00,000/- or any part thereof, till the Defendant no. 3 makes full payment of the sum due from it to the Plaintiff no. 1 being Rs.35,00,000/- at present in accordance with the contract as pleaded in paragraphs 4 and 9 of the plaint. Decree for permanent injunction is also sought for restraining the Defendant No.1 & 2 from raising any claim of the outstanding amount against the Plaintiffs.

It is pleaded in the plaint that the parties understood the contract to mean that the Plaintiffs would repay the sum of Rs.40,00,000/- to the Defendant no. 1 & 2 as and when the Defendant no. 3 would repay the loan made by the Plaintiff no. 1 to it and till that time, the Defendant nos. 1 & 2 would continue to renew the inter-corporate deposit loans made to the Plaintiff nos. 1 & 2 respectively.

In Para 9 it is stated that the Defendant no. 4 and the representatives of the other sat together with the Plaintiffs and it was agreed upon that the Plaintiffs would make payment of Rs.2,00,000/- to the Defendant no. 1 and Rs.3,00,000/- to the Defendant no. 2 at once, thereby reducing the principal liability of the Plaintiff no. 2 to the Defendant no. 1 to Rs.13,00,000/- as well as reducing principal liability of the Plaintiff no. 1 to the Defendant no. 2 from Rs.25,00,000/- to Rs.22,00,000/-. In return, the Defendant no. 3 would liquidate the entire liability towards the principal being Rs.77,00,000/- that it owed to the Plaintiff no. 1.

Although documentary as well as oral evidences were adduced by the Plaintiff, there is no evidence in support of the contention of the Plaintiffs that any loan to the tune of Rs.70.8 lakhs was advanced by the Plaintiff no. 1 to the

Defendant no. 3. Oral evidence of the plaintiffs' witness is absolutely silent on such agreements between the parties as pleaded in Para.4 or 9 of the plaint. There is no oral or documentary evidence in support of the contention that the Plaintiffs would repay the loan to the Defendant nos. 1 & 2 as and when the Defendant no. 3 would repay the loan to the Plaintiff no. 1. Interestingly, the Plaintiff no. 1 has not made any prayer for recovery of the said loan amount from the Defendant no. 3. In absence of any evidence, as stated above, the contentions of the plaint case is not proved. Pleadings of Para 4 & 9 are thus not proved.

Since, the factual matrix on which the reliefs are prayed for are not proved, the Plaintiffs are not entitled to any decree prayed for. The plaint case is, therefore, liable to be dismissed.

These issues are decided against the Plaintiffs.

Issue Nos. 4, 5, 6, 9 & 10

This is manifest and admitted on plain reading of the plaint that a cheque of Rs.15 lakh was dishonoured. The Plaintiff paid Rs.2 lakhs which, according to the plaint case had been adjusted or was supposed to be adjusted with the principal amount of Rs.15 lakhs, reducing the principal amount from Rs.15 lakhs to Rs.13 lakhs. The Defendant No. 1, on the other hand, pleaded that Rs.2 lakh had been adjusted against accrued interest and not against principal amount reducing principal amount to Rs.13 lakhs. Now this issue has already been decided by the Supreme Court of India in Civil Appeal No. 8258 of 2013 (reported as **Bhasa Construction & Industrial Projects Private Limited Vs. Shining Vyapar Private Limited [(2013) 10 SCC 543]**), clearly noting as follow:

“2. The respondent Company has filed Winding-Up Petition No. 306 of 2012 in the High Court of Calcutta as, according to the respondent, the

appellant Company could not pay its dues. It is an admitted fact that the appellant had borrowed Rs 15 lakhs from the respondent and out of the said amount Rs 2 lakhs had already been paid before filing of the winding-up petition. A sum of Rs 13 lakhs was due and payable, which was not paid by the appellant in spite of receiving a statutory notice from the respondent. According to the appellant, certain amount is due and payable by the sister concern of the respondent Company to the sister concern of the appellant Company and as the accounts had to be adjusted, the appellant had refused to pay the aforestated amount of Rs 13 lakhs."

In this final judgment the direction was passed also to expedite the hearing of Civil Suit No. 332 of 2012, namely, the present suit. By virtue of the settlement, the winding up proceeding was dropped and that was noted in the said judgment of the Supreme Court of India.

This judgment was passed on 13th September, 2013. On 04/10/2012, the plaint was presented. On 08/02/2012 that is prior to the institution of the suit a sum of Rs.2 lakh was received by the Defendant no. 1. Therefore, on the date of the institution of the suit, the outstanding principal amount was Rs.13 lakh.

Before giving an anxious thought and cerebation on entitlement of interest as well as rate of interest it is apt to look at Section 34 of the Code of Civil Procedure, 1908 which deals with interest:

"34. Interest.- (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent, per annum, as the Court deems reasonable on such principal sum, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent, per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalized banks in relation to commercial transactions.

Explanation .- In this sub section, "nationalized banks" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970.

Explanation I.- For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.

(2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest and a separate suit therefor shall not lie"

Interest is basically compensation fixed by agreement or allowed by law for use or detention of money or for the loss of money by one who is entitled to use especially the amount owed to a lender in return for the use of the borrowed money. Five Judges Bench of the Supreme Court of India in **Central Bank of India Vs. Rabindra and Ors. [(2002) 1 SCC 367]** explained the scope of Section 34 of the Code of Civil Procedure, 1908. Referring to Mulla on the Code of Civil Procedure (1995 edition) the Supreme Court of India considered three periods, namely,

- a) interest accrued due prior to the institution of the suit on the principal sum adjudged;
- b) additional interest on the principal of sum adjudged, from the date of the suit to the date of the decree, at such rate as the court deems reasonable;

c) further interest on the principal sum adjudged, from the date of the decree to the date of the payment or to such earlier date as the court thinks fit, at a rate not exceeding 6 per cent per annum.

Thus, there are three stages of payment of interest, namely, pre-suit interest, interest pendente lite and post decretal or future interest. Interest for the period anterior to institution of the suit is not a matter of procedure. Interest pendent lite is not a matter of substantive law. It was further observed in this case that pre-suit interest is referable to substantive law and can be sub-divided into two sub-heads:

i) where there is a stipulation for the payment of interest at a fixed rate; and

(ii) where there is no such stipulation.

If there is a stipulation for the rate of interest, the Court must allow that rate up to the date of the suit subject to three exceptions: (i) any provision of law applicable to the money lending transactions or usury laws or any other debt law governing the parties and having an overriding effect on any stipulation for payment of interest voluntarily entered into between the parties; (ii) if the rate is penal, the Court must award at such rate as it deems reasonable; (iii) even if the rate is not penal the Court may reduce it if the interest is excessive and the transaction was substantially unfair. If there is no express stipulation for payment of interest, the Plaintiff is not entitled to interest except on proof of mercantile usage, statutory right to interest, or an implied agreement. Interest from the date of suit to the date of decree is in the discretion of the Court. Interest from the date of decree to the date of payment or any other earlier date appointed by the Court is again in the discretion of the Court – to award or not to award as also the rate at which to

award. The Court explained the term principal sum adjudged in the following language:

“**41.** A few points are clear from a bare reading of the provision. While decreeing a suit if the decree be for payment of money, the court would adjudge the principal sum on the date of the suit. The court may also be called upon to adjudge interest due and payable by the defendant to the plaintiff for the pre-suit period which interest would, on the findings arrived at and noted by us hereinabove, obviously be other than such interest as has already stood capitalised and having shed its character as interest, has acquired the colour of the principal and having stood amalgamated in the principal sum would be adjudged so. The principal sum adjudged would be the sum actually loaned plus the amount of interest on periodical rests which according to the contract between the parties or the established banking practice has stood capitalised. Interest pendente lite and future interest (i.e. interest post-decree not exceeding 6 per cent per annum) shall be awarded on such principal sum i.e. the principal sum adjudged on the date of the suit. It is well settled that the use of the word “may” in Section 34 confers a discretion on the court to award or not to award interest or to award interest at such rate as it deems fit. Such interest, so far as future interest is concerned may commence from the date of the decree and may be made to stop running either with payment or with such earlier date as the court thinks fit. Shortly hereinafter we propose to give an indication of the circumstances in which the court may decline award of interest or may award interest at a rate lesser than the permissible rate. “

If the judgment of the Supreme Court of India be considered again, it will be found that Rs.2,00,000/- was adjusted against the principal sum of Rs.15,00,000/- leaving a balance amount of Rs.13,00,000/- as principal money. This was so adjudged. What is to be noted that accrued interest, till the date of order, was not capitalized. Speaking in another way, Rs.2,00,000/- was not

adjusted against an outstanding sum composed of the original principal amount as well as capitalized interest. In this case, no evidence is there to show or establish that the parties agreed to capitalize the interest on periodic rest. Therefore, though claimed, any rate of interest would be applied to the principal sum only, shorn off any capitalized interest.

Next point to consider is the rate of interest which the Plaintiff no. 2 is liable to pay to the Defendant no. 1. The plaint nowhere speaks of liability to pay interest at a rate of 24 % per annum although the Defendant no. 1 in the written statement claimed this rate of interest. Therefore, the burden of proof lies on the Defendant No. 1. PW 1 in cross-examination declined that the Plaintiff is liable to pay interest at a rate of 24% per annum on the principal amount. Ext. G is certified copy of an application filed under Section 397/401 read with Section 482 of the Code of Criminal Procedure, 1973 in this Court, containing sworn in statement. This document was adduced in evidence on behalf of the Plaintiffs containing sworn in statement of Rajesh Agarwal, one of the directors of the Plaintiff no. 2 that the Plaintiff no.2 agreed to pay interest at a rate of 24% per annum to the Defendant No. 1 w.e,f 21/01/2012 on condition that the cheque should not be deposited for encashment. P.W.1 was shown Ext.G and he stated that it contains true statements.

Mr. Medora, the Learned Counsel for the Defendant No.1 urged before this Court that Ext.G contains sworn statement of the Plaintiff admitting that he is liable to pay 24% interest. According to Mr. Medora, once on oath the Plaintiff has stated that he is liable to pay 24% interest for valuable consideration, there cannot be escape from it.

Per contra, Mr. Bhattacharyya, the Learned Counsel for the Plaintiff vehemently argued that any statement must be clear and unambiguous in order to

be considered as admission. The statement contained in Ext.G being not clear and unambiguous, are disqualified it to be an admission. According to the Learned Counsel, Ext.G should not be looked into for the purpose of proving the rate of interest.

PW 1 declined in cross-examination that rate of interest was agreed to be 24%. However, he affirmed that Ext.G contains true statements here it is explained that interest rate was enhanced from 12% to 24% per annum in consideration that cheques would not be deposited in the month of January 2012. The Defendant no. 1 agreed to that and did not deposit the cheques in the month of January 2012. Rather the cheque was deposited when it was about to expire that is in the month of July 2012. Mr. Medora submitted that there was no agreement that cheques would never be deposited but interest rate was enhanced to 24% on consideration that deposit of cheques would be deferred and would not be in the month of January 2012. Ext.G provides a plausible explanation and consideration as well as reason for enhancement of interest rate. Ext.G contains the statements of PW 1 on oath and it was confirmed by PW 1 that these are true statements. Therefore, it is established and proved that interest rate was fixed at 24% per annum from the month of January 2012 and the Plaintiff is liable to pay interest at this rate.

The suit was instituted on 04/10/2013 when the principal outstanding amount, as decided by the Supreme Court of India, was Rs.13,00,000/-. On 08/10/2013, the Defendant no. 1 received a sum of Rs.10,00,000/- or rather withdrawn a sum of Rs.10,00,000/- pursuant to the order passed by the Supreme Court of India reducing the principal amount by Rs.10,00,000/-. Rate of interest, therefore, shall be charged at a rate of 24% per annum on the principal amount of Rs.13,00,000/- from the date of 04/10/2013 to 07/10/2013. Rs.10,00,000/- shall

be adjusted against the principal sum as on 08/10/2013. The balance amount of Rs.3,00,000/- shall attract interest rate of 24% per annum from 08/10/2013 till recovery.

Ext. G, as stated above, contains affirm statement of the Plaintiff that the Plaintiff no. 2 would be liable to pay interest 24% on the principal amount of Rs.15,00,000/- with effect from 21/01/2012. In the preceding part of this judgment it has already been decided what would be the principal sum. A further elaboration is given herein. There is no dispute that a sum of Rs.2,00,000/- was received by the Defendant no. 1 on 08/02/2012. Although the Defendant no. 1 claimed to have adjusted the said payment of Rs.2,00,000/- against accrued interest, the Supreme Court of India in the order dated 13/09/2013 in **Bhasha Construction & Industrial Projects Pvt. Ltd. Vs. Shining Vyapar Pvt. Ltd. [(2013) 10 SCC 543]** made it clear that the sum of Rs.2,00,000/- had been adjusted against the principal amount of Rs.15,00,000/- leaving a sum of Rs.13,00,000/- outstanding. The Plaintiff, therefore, shall pay interest at a rate of 24% on the principal sum of Rs.15 lakh from 21/01/2012 to 08/02/2012. From 09/02/2012 till 7th October, 2013, the Plaintiff shall be liable to pay interest at a rate of 24% on the outstanding principal sum of Rs.13,00,000/-. The Defendant no. 1 received a sum of Rs.10,00,000/- on 08/10/2013 from this Court. This amount of Rs.10,00,000/- would be applied to the principal amount outstanding i.e. Rs.13,00,000/- leaving a sum of Rs.3,00,000/- as outstanding principal amount. This outstanding principal amount of Rs.3,00,000/- will attract interest at a rate of 24% till payment, from 08/10/2013.

In nutshell, the plaint case is dismissed.

The counter-claim is allowed partly.

It is ordered that the Plaintiff no.2 shall be liable to pay to the Defendant No.1 the outstanding principal amount with 24% interest per annum as stated above.

The Plaintiff no.2 shall also pay a sum of Rs.1,50,000/- as cost of litigation to the Defendant no.1 and another sum of Rs.50,000/- to the Defendant no.3. This will not carry any interest.

The Plaintiff no. 2 shall pay the outstanding amount within 60 days in case of default of which the Defendant no. 1 shall be at liberty to draw the execution proceeding.

Let decree be drawn up.

The instant suit stands disposed of.

(Sugato Majumdar, J.)