

## **ORDER VIII – INDIAN CIVIL PROCEDURE CODE, 1908**

### **WRITTEN STATEMENT, SET-OFF AND COUNTER CLAIM**

**By: Himanshu Arora**

#### **I. WRITTEN STATEMENT (Rule 1-5 & 7-10)**

##### **(a) *Introduction –***

In legal dictionary, the word written statement means a pleading for defence. However, the expression 'written statement' has not been defined in the code; it is a term of specific connotation ordinarily signifying a reply to the plaint filed by the plaintiff. In other words, a written statement is the pleading of the defendant wherein he deals with every material fact alleged by the plaintiff in his plaint and also states any new facts in his favour or takes legal objections against the claim of the plaintiff.

##### **(b) *Explanation of Rules –***

#### **R.1. - Written statement.**

"The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence.

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Provided that where the defendant 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."

A defendant should, within 30 days from the service of summons on him, present a written statement of his defence. The said period, however, can be extended up to 90 days, but for reasons to be recorded for such extension.

A written statement should be drafted carefully and artistically. All the general rules of pleading apply to a written statement also. Before proceeding to draft a written statement it is absolutely necessary to examine the plaint carefully. Like a plaintiff, a defendant may also take a number of defences, either simply or in the alternative, even though they may be inconsistent, provided they are maintainable at law and are not embarrassing.<sup>1</sup>

#### **Court has power to condone non filing of written statement within 90 days.**

Though a defendant is required to file written statement within 30 days after receipt of summons and though the court can extend the time till 90 days, the court is not divested of any power to fix further time for filing the written statement. It is well settled that this cardinal principle of interpretation of law with an enactment has to be read as a whole and then the entire section has to be read and thereafter the Act has to be interpreted section by section. One Rule or one Section in the enactment cannot be a guiding factor for arriving at the intendment of the legislature. The very fact that Rule 10 is re-introduced by Act 22 of 2002 by the Parliament would show that the Parliament never intended the Civil Court to pronounce judgment immediately after the failure on the part of the defendant to file written statement within 90 days.<sup>2</sup>

Speaking for a three-judge Bench of the Supreme Court, **J.Sabharwal** (as he then was) explained the object behind the amendment of O 8, r 1 and the manner in which the provision is to be construed. In paragraph 21 of the judgment it was observed as follows:

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<sup>1</sup>Takwani, C.K, *Civil Procedure*, 5<sup>th</sup> edition (reprinted)2007, Eastern Book Company, New Delhi, P.175

<sup>2</sup> Tandon, J., '*The Code Of Civil Procedure*', 26th edition 2005, Allahabad Law Agency, Faridabad, P.161

“21. The use of the word (shall) in Order VIII Rule I by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word ‘shall` is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory The rule in question has to advance the cause of justice and not to defeat it, The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules of procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.”<sup>3</sup>

**R-1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him**

(1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set off or counter claim, he shall enter such document in a list, and shall produce it in court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents—

(a) produced for the cross-examination of the plaintiff's witnesses, or

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<sup>3</sup> Prasad B.M , ‘MullaThe Code Of Civil Procedure’, 17<sup>th</sup> edition, Vol 2 , Lexis Nexis Butterworth, Wadhwa Publications, Nagpur, P.468

(b) handed over to a witness merely to refresh his memory.

### **Meaning of Rule 1 (A)**

Sub-rule (I) requires that the documents on which the defendant places reliance either for his defence, or claim for set-off or counter-claim shall be entered in a list if those documents are in his possession. This list of documents along with the document itself was required to be presented in court at the time of filing-the written statement. Sub-rule (3) enacts a bar and prevents the defendant from filing such documents later on except with the permission of the court.<sup>4</sup>

### **Production of documents and list of documents.**

Save as otherwise provided in Rule 8-A, where the defendant relies on any document (whether or not in his possession or power) in support of his defence or claim for set-off or counter—claim he shall enter such a document in a list, and shall (a) if a written statement is presented, annex the list to the written statement (and where he claims a set-off or makes a counterclaim based on a document in his possession or power, he shall produce it in court at the time of presentation of the written statement and shall at the same time deliver the document or copy thereof to be filed with the Written statement); and (b) if a written statement is not presented, present the list to the court at the hearing of the suit.<sup>5</sup>

### **R.2. New facts must be specially pleaded.**

The defendant must raise by his pleading all matters which show the suit not be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

The effect of the rule is, for reasons of practice and justice and convenience, to require the party to tell his opponent what he is coming to the Court to prove, If he does not do that, the

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<sup>4</sup> Supra note 3, P.471

<sup>5</sup>Supra note 2, P.160

Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give leave to amend by raising it and protect the other party. If necessary, by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject-matter for decision simply on the ground that it is not pleaded. It leaves the party at the mercy of the Court and the Court will deal with him as is just.<sup>6</sup>

The effect of the rule is, for reasons of practice and justice and convenience, to require the party to tell his opponent what he is coming to the court to prove. And therefore, if the plea is not taken, it may lead the plaintiff to believe that the defendant has waived his right by not relying on that point. And the defendant will not be entitled, as of right, to rely on any ground of defence which he has not taken in his written statement.<sup>7</sup>

Where the defendant has stated in his pleadings all the facts on which he bases his defence without stating the legal effect thereof, the defence cannot be rejected on the ground that the legal effect of the facts was not stated.<sup>8,9</sup>

### **Right of defendant to raise all pleas available to him.**

Suit for possession filed by plaintiff on basis of sale-deed in his favour. Possession of property sought from one of the defendants. The said defendant can raise all pleas available to him to defeat suit of plaintiff.<sup>10</sup>

### **R.3. Denial to be specific.**

It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

### **R.4. Evasive denial.**

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<sup>6</sup> Robinson's Settlement, In re (1912) 1 Ch D 717 (728)

<sup>7</sup> Udhav Singh v. Madhav Rao Scindia, (1977) 1 SCC 511

<sup>8</sup> *Ibid*

<sup>9</sup> Supra note 1, P.176 & 177

<sup>10</sup> Saha A.N., 'The Code Of Civil Procedure', 6<sup>th</sup> edition, Vol I, Premier Publication Co. New Delhi, P.1178

Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

#### **R.5. Specific denial.**

[(1)] Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

[(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.

### **Specific Denial and deemed Admission.**

Rule 3 of Order VIII requires that the defendant must deal specifically with each allegation of fact of which he does not admit the truth. Rule 5 provides that every allegation of fact in the plaint, if not denied in the written statement shall be taken to be admitted by the defendant, What this rule says is that any allegation of fact must either be denied specifically or by a necessary implication or there should be at least a statement that the fact is not admitted. If the plea is not taken in that manner, then the allegation shall be taken to be admitted.<sup>1112</sup>

The combined effect of Rules 3, 4 and 5 has been considered by Subba Rao ,J. (as he then was) in the case of *Badat & Co. v. East India Trading Co.*<sup>13</sup> in the following words:

"These three rules form an integral code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact; he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary."

A few illustrative cases will make the position clear:

In an action against a lessee to set aside the lease, the plaintiff alleges in his plaint that the defendant offered to the manager of the plaintiff a bribe of Rs 5000 at the defendant's office on January 15, 1997; and the defendant in his written statement states that he did not offer to the plaintiff's manager a bribe of Rs 5000 at the defendant's office on January 15, 1997; the denial is evasive. Here the point of substance is that a bribe was offered (neither the day nor the amount) and that is not met. The defendant might have offered any other amount on another day at a different place. Since the point of substance is the offer of bribe, it must

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<sup>11</sup> Assam v. Atmaram Kumar, Supreme Court and full Bench Rent Cases, 1993, P.404

<sup>12</sup> Supra note 2, P. 162

<sup>13</sup> AIR 1964 SC 538

be clearly and specifically denied and the defendant should state that he never offered a bribe of Rs 5000 or of any other sum, on any day, at any place, to the plaintiff's managers as alleged or at all.

Similarly, if the plaintiff asserts:

The defendant broke and entered into the shop of the plaintiff and seized, took and carried away all the furniture, stock-in-trade, and other effects which were therein.

The correct traverse will be:

The defendant never broke or entered into the shop of the plaintiff or seized, took or carried away any of the furniture, stock-in-trade, and other effects which were therein.

But if the plaintiff makes general allegations in the plaint and they are answered by equally general denials, no complaint can be made by the plaintiff on the ground that they are not specific.<sup>14</sup> Thus, where the plaintiff alleges in the plaint that the order of his removal from service was violative of Articles 14 and 16 of the Constitution of India since he was arbitrarily picked up, the denial in the written statement of the allegation that there had been a violation of Articles 14 and 16 of the Constitution of India is sufficient.<sup>15</sup>

The rule of implied admission by '**non-traversal**' has not been strictly applied to pleadings in our country. The court has discretion to require a party to prove a particular fact, notwithstanding the implied admission thereof by the opposite party.<sup>16</sup>

The Bombay High Court has construed the rule more strictly and has held that if there is no pleading by the defendant denying the allegations in the plaint, the court may take the facts stated in the plaintiff admitted unless the court in its discretion under the proviso requires any fact so admitted, to be proved otherwise than by such admission. The Karnataka High Court has accepted the Bombay view.<sup>17</sup> In another case the Karnataka High Court has held that a judgment in favour of the plaintiff is not automatic on the failure of the defendant to

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<sup>14</sup> *Munshi Das v. Mal Singh*, (1977) 4 SCC 65

<sup>15</sup> *Supra* note 1. P. 178 & 179

<sup>16</sup> *East India Trading co. v. Badat & co.* AIR 1959 Bom 414

<sup>17</sup> *Sakini Bee v. Mohd Ameer Saheb* AIR 1976 Kant 226



file written statement. The court has to consider the case of the plaintiff before granting a decree in his favour.<sup>18</sup>

### **Except damages.**

It is not necessary for a defendant, in a suit for damages, to deny specifically the damages; it is quite sufficient if he pleads generally to the damages.<sup>1920</sup>

### **R.7. Defence or set-off founded upon separate grounds**

Where the defendant relies upon several distinct grounds of defence or set-off<sup>1</sup> [or counter-claim] founded separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

### **R.8. New ground of defence**

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 counter-claim] may be raised by the defendant or plaintiff as the case may be, in his written statement.

The additional ground of defence must be taken before the commencement of trial. A plea that the suit was liable to be stayed in view of an arbitration clause in the contract was held to have been waived, although an additional written statement containing such plea was filed and accepted by the trial court.<sup>2122</sup>

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<sup>18</sup> Syed Ismail v. Shamshian Begum AIR 2001 Kant 99

<sup>19</sup> Ross & Co. v. Scriven (1916) 43 Cal 1001

<sup>20</sup> Supra note 3. P.475 and 482-483

<sup>21</sup> National Insurance Co. v. Calcutta Duck Labour Board AIR 1977 Cal 492

<sup>22</sup> Supra note 3. P. 508

### **R.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.

### **Additional Written Statement.**

Order VII, Rule 9, C.P.C. lays down an important rule of pleading that no pleading subsequent to the written statement by a defendant other than by way of defence to a set-off shall be presented except by leave of the Court. The rule requires leave of the Court before any party can make a further pleading after written statement has been filed. Where a defendant intends to file additional written statement, he must file an application showing the circumstances as to why he failed to raise the plea in the original written statement, and the other party must be given opportunity to meet the motion.

### **Additional written statement in consistent with original written statement.**

In view of Order VIII, Rule 9, C.P.C. subsequent to filing of original written statement, with the leave of the Court, a defendant can file additional written statement. But no leave can be granted when it is inconsistent with original pleading. To do so resort may be had to Order VI, Rule 17, and C.P.C.<sup>23</sup>

### **{Order VI, Rule 17, and C.P.C.– Amendment of Pleadings-**

The Court may at any stage of the proceeding allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties :

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<sup>23</sup>Supra note 10. P 1201-2

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.}

If the plaintiff has applied for temporary injunction and the defendant has replied to it, the plaintiff can file a rejoinder. The contingency for filing of rejoinder arises; only where some new plea is introduced by the defendant in this reply. Moreover, leave of the court is to be obtained. It is meant only for denying or clarifying the fact stated in the written statement. Fresh cause of action or fresh case is not brought up by filing replication. The principles deduced from the above discussions may be summarised thus—

(i) The plaintiff cannot be allowed to introduce new pleas by way of filing rejoinder, so as to alter the basis of his plaint.

(ii) In rejoinder, the plaintiff can be permitted to explain the additional facts which have been incorporated in the written statement.

(iii) The plaintiff cannot be allowed to come forward with an entirely new case in his rejoinder.

(iv) The plaintiff cannot be permitted to raise inconsistent pleas so as to alter his original cause of action,

(v) Application under O 8, r 9 of the Code of Civil Procedure 1908, cannot be treated as one under O 6, r 17 of the Code of Civil Procedure 1908, as both are contextually different.<sup>2425</sup>

The general rule applicable is that leave to amend ought to be granted unless the party applying is acting mala fide or by his blunder has done some injury to his opponent which cannot be compensated by award of costs; otherwise whether the original omission arose from negligence, carelessness, or accidental error, the defect may be allowed to be remedied if no injustice is done to the other side.<sup>2627</sup>

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<sup>24</sup>State of Rajasthan v. MohdIqbalAIR 1999 Raj 169

<sup>25</sup>Supra note 3. P.509-10

<sup>26</sup>Union of India v. Shalimar Tar Products ILR 31 Patna 775

#### **R.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 relating to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

In **Modula India v. Kamakshya Singh**<sup>28</sup>, explaining the ambit and scheme of Rules 1, 5 and 10 of Order 8, the Apex Court observed: "Rule 1 merely requires that the defendant should present a written statement of his defence within the time permitted by the Court. Under Rule 5(2), where the defendant has not tiled a pleading it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint except against a person under disability but the court may at its discretion require any such fact to be proved. Again under Rule 10 when any party from whom a written statement is required fails to present the same within the time permitted or fixed by the Court, the Court 'shall pronounce judgment against him or make such order in relation to the suit as it thinks fit'. It will be seen that these rules are only permissive in nature. They enable the Court in an appropriate case to pronounce a decree straightway on the basis of the plaint and the averments contained therein. Though the present language of Rule 10 says that the Court 'shall' pronounce judgment against him, it is obvious from the language of the rule that there is still an option with the Court either to pronounce judgment on the basis of the plaint against the defendant or to make such other appropriate order as the Court may think fit. Therefore, there is nothing in these rules, which makes it mandatory for the Court to pass a decree in favour of the plaintiff straightway because a written statement has not been filed."<sup>29</sup>

#### **Cause of action —**

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<sup>27</sup> Supra note 2. P.164

<sup>28</sup> (1988) 4 SCC 619

<sup>29</sup> Supra Note 1, P 180

Cause of action as understood in the civil proceedings means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. To put it in a different way, it is bundle of facts which taken with law applicable to them, gives the plaintiffs a right to relief against the defendant.

## II. SET-OFF (RULE -6)

### **R.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, presents 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.

#### **(a) Meaning-**

In law, a **set-off** is a statutory defense to the whole or to a portion of a plaintiff's claim. It had no existence under the English common law, being created by 2 Geo. II c. 22 for the relief of insolvent debtors, although set-off was recognized in equity. Such a defense could

be pleaded only in respect of mutual debts of a definite character, and did not apply to cases in which damages were claimed, nor to equitable claims or demands.<sup>30</sup>

Set off is reciprocal acquittal of debts. In an action to recover money set-off is a cross-claim for money by the defendant, for which he might maintain an action against the plaintiff and which has the effect of extinguishing the plaintiff's claim *pro tanto*<sup>31</sup>. Where in a suit for recovery of money by the plaintiff, the defendant finds that he has also a claim of some amount against the plaintiff, he can claim a set-off in respect of the said amount. The doctrine of set-off may be defined as "the extinction of debts of which two persons are reciprocally debtors to one another by the credits of which they are reciprocally creditors to one another".<sup>32</sup>

### **(b) Types of Set-off**

#### **1. Legal Set-off –**

It can be explained with the help of following illustrations-

1. A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.
2. A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite, pecuniary demands may be set-off.
3. A and B sue C for Rs. 1,000 C cannot set-off a debt due to him by A alone.
4. A owes the partnership firm of B and C Rs. 1,000. B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set-off the debt of Rs. 1,000

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<sup>30</sup> [http://en.wikipedia.org/wiki/Set-off\\_\(law\)](http://en.wikipedia.org/wiki/Set-off_(law))

<sup>31</sup> Supra note 2. P.164

<sup>32</sup> Supra Note 1. P.181

The set-off mentioned above is a legal set-off. It is apparent from a reading of the above provisions that in order to constitute legal set-off the following **conditions** must be fulfilled, viz.

(a) The suit must be for recovery of money.

(b) The defendant must claim an ascertained sum of money. A sum of money due in respect of a disputed transaction cannot constitute an ascertained sum.

(c) That ascertained sum must be legally recoverable from the plaintiff, i.e. it is not barred by the law of limitation.

(d) The plaintiff's claim and the set-off must be claimed in the same character. The amount must be recoverable by the defendant and if there is more than one defendant then by all the defendants. Again, the amount must be recoverable by the defendant from the plaintiff and if there are more than one plaintiff then from all the plaintiffs.

(e) The set-off should be within the pecuniary jurisdiction of the court.

The above provisions further establish that the court must treat the claim of the defendant exactly as if the defendant had filed a plaint and the court must pass a decree in favour of the defendant, if his claim is established. It is only in a written statement that a plea of set-off can be raised. The rule further confines only to set-off and does not provide for a counter-claim, which is allowed by way of equitable set-off, and is not expressly provided in rule 6-A of Order VIII by C.P.C. (Amendment) Act, 1976.<sup>33</sup>

#### **Explanation of some of the above-mentioned conditions-**

- 1. The suit must be for recovery of money.** This rule applies only the suit is for recovery of money and has no application to as suit in ejectment against a tenant,

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<sup>33</sup> Supra Note 2. P.165

though it is based on default of payment of rent.<sup>34</sup> It is also held in **Madho Saran's case**<sup>35</sup>, that a suit for redemption is not a suit for money.

2. **That ascertained sum must be legally recoverable from the plaintiff.** The amount claimed by way of set-off under this rule must be 'legally' recoverable. It follows from this that if the defendant's claim is barred by the law of limitation; it cannot be pleaded by the way of set-off under this rule.<sup>36</sup>
  
3. **The set-off should be within the pecuniary jurisdiction of the court.** One of the riders of the jurisdiction of the court before which a plea in the nature of set-off or counterclaim is advanced, is that only such court can entertain the plea as would have been empowered to take its cognisance had it been made the subject—matter of a separate suit. The valuation of a set-off for the purpose of jurisdiction must be taken as relating to the whole amount pleaded as a set-off and without reference to any portion of the plaintiff's claim admitted by the defendant. A sues B in a Presidency Small Cause Court for Rs 1,000. B claims to set-off a sum of Rs 2,700, and claims judgment for Rs 1,700, after giving a credit for Rs 1,000 admitted by B to be due to A. The Small Cause Court has no jurisdiction to try the claim as to set-off the value of the amount claimed set-off being above Rs 2,000.<sup>37</sup>

#### **Effect-**

When a defendant pleads set-off, he is put in the position of a plaintiff as regards the amount claimed by him. There are two suits—one by the plaintiff against the defendant and the other by the defendant against the plaintiff; and they are tried together. A separate suit number, however, is not given to a set-off. Where the plaintiff does not appear and his suit is dismissed for default, or he withdraws his suit, or he fails to substantiate his claim at the

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<sup>34</sup>ManoharLal v. MadanLal AIR 1956 Punj 190

<sup>35</sup> AIR 1953 Patna 73

<sup>36</sup>Bharta v. Cheta Ram AIR 1934 All 427

<sup>37</sup>Supra note 3. P.487 & 491 & 493



trial and his suit is dismissed, it does not affect the claim for a set-off by the defendant and a decree may be passed in favour of the defendant if he is able to prove his claim.<sup>38</sup>

## **2. Equitable Set-off -**

By equitable set-off we mean that form of set-off which the Court of Equity in England allowed when cross-demands arose out of the same transaction; even if the money claimed by way of set-off was an unascertained sum of money. The Common Law Courts refused to take notice of equitable claims for they were not ascertained sums. The Courts of Equity however, held that it would be inequitable to drive the defendant to a separate cross-suit and that he might be allowed to plead a set-off though the amount might be unascertained. Such a set-off is called an equitable set-off.<sup>39</sup>

### **ILLUSTRATIONS-**

1. A sues B to recover Rs 6,000 due under a contract. B admits A's claim, but claims to set-off several sums of money alleged to be damages sustained by him by reason of A's breach of some of the terms of the same contract. B is entitled to claim the set-off, for the claim arises from the same transaction.
2. A agrees to sell, and B agrees to purchase, 200 bales of wool. B takes delivery of 170 bales and is ready and willing to take delivery of the remaining 50 bales, but A fails to deliver them. A sues B for the price of the 170 bales. B claims to set-off the damages sustained by him by reason of A's failure to deliver the remaining bales. B is entitled to claim the set-off, as the claim arises out of the same transaction.
3. A sues B, his master, for Rs 800 being arrears of salary. B claims to set-off Rs 625, being the loss sustained by him by reason of neglect and misconduct on the part of A

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<sup>38</sup>Supra note 1. P 183

<sup>39</sup>Supra Note 2. P. 165

as his servant. B is entitled to claim the set-off, as his claim arises out of the same relation from which A's claim arose namely, that of master and servant.<sup>40</sup>

### **Principles governing equitable set-off.**

As a result of a series of decisions of the Courts in India there emerge the following propositions of law with regard to equitable set-off:

1. As equitable right of set-off exists in this country when both the claim of the plaintiff and that of the defendant arise out of the same transaction.
2. The law of equitable set-off applies where the cross-claims, though not arising out of the same transaction, were closely connected together.
3. In order that a claim for equitable set-off may arise, it is not sufficient that there are cross-demands; it is further necessary that there should be a connection between them which makes it inequitable to drive the defendant to a separate suit-as when the demands arise out of the same transaction or when there is on each side knowledge of and confidence in one debt discharging the other.<sup>41</sup>

### **Applicability of Equitable set-off.**

The plea of legal set-off in which it is not necessary that the amount claimed should be ascertained, is recognised by Rule 6. It, however, does not take away from the parties right to claim equitable set-off and while the plea of legal set-off having been recognised by Rule 6, can be raised as of right and the Court is bound to entertain and adjudicate upon it when raised in the same suit, the equitable set-off cannot be claimed as of right and the Court has a discretion to adjudicate upon it in the same suit or to order it to be dealt with in a separate suit.<sup>42,43</sup>

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<sup>40</sup>Supra Note 3. P. 490

<sup>41</sup>Supra Note 2. P.166-167

<sup>42</sup>Laxmidar v. Munnabhai, AIR 1964 SC 11

<sup>43</sup>Supra note 10, P. 1193

### **Distinction between Legal and Equitable Set-off**

The distinction between legal and equitable set-off may now be noted:

1. In a legal set-off the amount claimed must be an ascertained sum of money but in an equitable set-off the claim must be allowed even with respect to an unascertained sum of money.
2. In a legal set-off the court is bound to entertain and adjudicate upon the plea when raised. In the case of an equitable set-off, however, it is not obligatory on the court to adjudicate upon it and the defendant cannot claim it as a matter of right. The court has the discretion to refuse to take notice of the equitable set-off if the investigation into the equitable claim is likely to result in delay.
3. In a legal set-off it is not necessary that the cross-demands arise out of the same transaction, but an equitable set-off is allowed only when the cross-demands arise out of the same transaction as the plaintiff's claim.
4. In a legal set-off the amount claimed to be set off must be legally recoverable and not barred by limitation at the date of the suit, but a claim by way of equitable set-off can be allowed even if it is barred at the date of the suit where there is fiduciary relationship between the plaintiff and the defendant.
5. If the defendant's claim is barred at the date of the written statement but not barred at the date of the suit, the defendant can get an equitable set-off to the extent of the plaintiff's claim only but not for the balance found due to him. In a legal set-off the whole claim is admissible and the defendant can even get a decree for the balance.
6. A legal set-off requires a court-fee because it is a claim that might be established by a separate suit in which a court-fee would have to be paid. But there is no such fee required in an equitable set-off which is for an amount that may equitably be deducted from the claim of the plaintiff where a court-fee has been paid on the gross amount.

### III. COUNTER-CLAIM (RULE--6A - 6G)

#### **R.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 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 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.

**(a) Meaning.**

A defendant may file a written statement against the contentions raised by the plaintiff in the plaint. He has the right to file a counter claim also in appropriate cases. It is a claim by

the defendant against the plaintiff. It is like the plaint of the defendant against the plaintiff. The courts normally treat the counter claim as a plaint. In a counter claim, the defendant has some sort of right to be established against the plaintiff and has some reliefs to be realised.<sup>44</sup>

"Counter-claim" may be defined as "a claim made by the defendant in a suit against the plaintiff". It is a claim independent of and separable from, the plaintiff's claim which can be enforced by a cross-action. It is a cause of action in favour of the defendant against the plaintiff. One of the pleas open to a defendant to defeat the relief sought by the plaintiff against him is a counter-claim. Counter-claim may be defined as 'a claim made by the defendant in a suit against the plaintiff'. Therefore, a defendant in a suit may, in addition to his right to plead a set-off, set up a counter-claim. It may be set up only in respect of a claim for which the defendant can file a separate suit. Thus, a counter-claim is substantially a cross-action.<sup>45</sup>

#### **(b) Object.**

Rule 6-A contemplates counter-claim in any suit. The scheme of the new rule is to permit the defendants to set up counter-claims, which arise between the parties and which are cognizable by the court where the suit is pending. The object appears to be to reduce pendency of cases so that cause of action and cross-claim similar in nature could be clubbed together and disposed of by a common judgment.<sup>46</sup>

#### **(c) Some important aspects.**

##### **Counter-claim can be filed after filing of written statement.**

In **Smt. Shanti Rani Das v. Dinesh**<sup>47</sup> Roy it has been held that the right to file a counter claim is referable to the date of accrual of cause of action. If the cause of and such action had arisen before or after filing of the suit, cause of action continued up to the date of filing of

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<sup>44</sup> <http://senseoflaw.blogspot.com/2011/02/counter-claim-in-cpc.html>

<sup>45</sup> Supra note 1. P.184

<sup>46</sup> Supra note 2. P.168

<sup>47</sup> AIR 1997 SC 3985

the suit and such cause of action continued up to the date of filing written statement or extended date of filing plaintiff statement, then such counter claim can be filed even after filing the written statement.

**Claim and counter-claim decision by a single judgment.**

Although Order VIII, Rule 6-A speaks of a counter-claim as a plaint in one place and as across-claim in another place, in its operative provision it lays down the Court should deliver a single judgment both on the original claim and counter-claim. Rule 6-C specifically lays down a special procedure to separate the suit claim from the counterclaim. This provision emphasises the general rule that the suit claim and counter-claim ought to properly be regarded as constituting a unified proceeding. Rule 6-C provides an exception and it is this that should the plaintiff desire that the suit claim and counter-claim be dealt with as separate suits, he ought to apply therefore before the trial Court before the issues are settled.<sup>4849</sup>

**Distinction between Set-off and Counter-claim**

The distinction between set-off and counter-claim may now be noted:

(1) Set-off must be for an ascertained sum or must arise out of the same transaction as the plaintiff's claim; a counter-claim, however, need not arise out of the same transaction.

(2) Set-off is a statutory ground of defence and has to be pleaded in the written statement. It can, however, be sued as a shield and not as a sword. Counter-claim, on the other hand, does not afford any defence to the plaintiff's claim; it is a weapon of offence which enables the defendant to enforce his claim against the plaintiff as effectually as in an independent action. It is a sort of cross-action.

(3) If the statute of limitation is pleaded to a defence of set-off the plaintiff in order to establish his plea has to prove that set-off was barred when the plaintiff commenced the action; it is not enough to prove that it was barred at the time when it was pleaded. In the

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<sup>48</sup>T.K.V.S Vidyapoornacharya, AIR1983 Mad 291

<sup>49</sup>Supra note 10, P.1196 & 1197

case, however, of a counter-claim it is enough for the plaintiff to prove that the counter-claim was barred when it was pleaded.

(4) An equitable set-off is a claim by the defendant in defence, which generally cannot exceed the plaintiff's claim. A counter-claim by the defendant may however, exceed the plaintiff's claim, being in the nature of the cross-action. Under the provision of Rule 6-F of Order VIII, if 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 defendant, as the case may be, the court may give judgment to the party entitled to such balance.

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By the above research work, I have tried to provide all the necessary and imperative details pertaining to the written statement, set-off and counter-claim, a right of a defendant/s in pursuance of his defence.

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