

WRITTEN STATEMENT AND SET-OFF: ORDER- VIII*

Introduction

Provisions relating to pleadings are given in order VI, VII and VIII of Code of Civil Procedure. Order VI, deals with general rules with regard to pleadings which are applicable on both the plaint as well as written statement. Order VII contains rules that apply to plaint only. As such we can say that rules relating to plaint are contained in both Order VI and Order VII. Rules embodied in Order VIII apply to written statement only. That may provision of both, the Order VI and Order VIII apply to written statements. Now we shall deal with the provisions of Order VIII that is written statement.

Written Statement and Set-off

➤ Written Statement

Order VIII Rule 1:- **Written Statement.** - *The defendant shall, within thirty days for the date of service of summons on him, present a written statement of his defence:*

Provided that where the defendant fails to file the written statement within the periods 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.

As the pleading of the plaintiff is his plaint, so the pleading of the defendant is his written statement. 'Written Statement' is the pleading filed by the defendant in a suit stating his ground of defence.¹

Order VIII Rule 1 makes it obligatory on the defendant to submit his written statement within a period of 30 days from the date of the service of summons. But if the defendant fails to submit

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¹ See, Legal Glossary, op Cit p.371.

his written statement within the said period of 30 days, the period may be extended by the court but it will not exceed 90 days, the period may be extended by the court but it will not exceed ninety days counted from the date of the service of the summons. In other words, the defendant failing to file the written statement within 30 days, though the period can be extended but in no case it will exceed 90 days.² The court has to record the reasons in writing for extending the time. It should be remembered that the written statement of one defendant does not bind the others.³

Whether the maximum period of 90 days contemplated under this rule can further be extended? The supreme court of India says ‘yes’, but subject certain conditions. The supreme court observed in *Kailash v. Nanhku*,⁴ that provisions of order VIII, Rule 1 fixing time for of written statement are directory and not mandatory, since it is a part of procedural law. Rule 1 of order VIII spells out disability on the defendant, it does not impose embargo on Courts power. Extention may be granted not as matter of routine and merely for asking but only by way of exception, for reason to be assigned by the defendant as also by the Court on being satisfied. Extention of time beyond 90 days may be allowed:

- i. For the circumstances which are exceptional;
- ii. Occasioned beyond the control of the defendant; and
- iii. Grave injustice would be caused if the time was not extended;
- iv. Costs may be imposed and affidavit or documents in support of grounds pleaded by the defendant for extention of time may be demanded, depending upon the facts and circumstances of a given case.

Thus, the Apex Court differed from its own earlier decision in *Dr. J.J. Merchant v. Shrinath Chaturvedi*,⁵ by observing that since Order VIII, Rule 1 of the code did not directly arise for considerations before the Court, the observation of the Court in the said case are *obiter*. The observation of the Apex Court in this case was that ‘the mandate of the law is required to be strictly adhered to.’⁶

Justifying the extention beyond 90 days in exceptional cases the Supreme Court on India observed that the object of the rule is to “expedite the hearing and not to scuttle the same. While justice delayed in justice denied, justice hurried may in some cases amount to justice

² *Dr. J.J. Merchant v. Shrinath Chaturvedi*, AIR 2002 SC 2931.

³ *Jagesar v. Sheopujan*, AIR 1986 Pat 35.

⁴ AIR 2005 SC 2441.

⁵ AIR 2002 SC 2931.

⁶ *Ibid*.

buried.”⁷ It also said that proviso to Rule 1 is directory use of word ‘shall’ not by itself is sufficient to indicate its mandatory nature.⁸

➤ **Set -off**

Order VIII, Rule 6 deals with set-off as also those conditions under which a defendant can up the claim of set-off. The set-off of which rule 6 talks of is legal set-off.

Meaning

Literal meaning of set-off is a claim set against another.⁹ It is also said as a counter claim or counter balancing debt pleaded by the defendant in an action to recover the money due.¹⁰ In other words, it is a reciprocal acquitted of debts between two persons.¹¹

In other words, a set-off is a kind of counter-claim that operates as a defence to a claim. The doctrine of Set Off allows the defendant to put his own claim against the plaintiff before the court under certain circumstances. Technically, a set off can be defined as a discharge of reciprocal obligations to the extent of the smaller obligation. For example, A files a suit against B claiming 5000/- . B may take a defence that A owes 3000/- to B as well. Thus, B is basically asking to set off 3000/- of A's claim and pay only 2000/-.

Condition for the applicability of the rule

The rule may set up a claim of set-off is the following conditions are satisfied:

1. The suit must be one for the recovery of the money;
2. The sum of money must be ascertained or definite;
3. Such sum must be legally recoverable
4. It must be recoverable by the defendant or by all the defendants if more than one
5. It must be recoverable from the plaintiff or from all the plaintiffs, if more than one
6. It must not exceed the pecuniary jurisdiction of the court in which the suit is filed; and
7. Both the parties must fill, in the defendant's claim of set-off, the same character as they fill in the plaintiff's suit.

Effect of Set-off

⁷ *Rani Kusum v. Kanchan Devi*, AIR 2005 SC 3304.

⁸ *Zolba v. Keshao*, AIR 2008 SC 2099.

⁹ *M/s. Gupta Private Loan Committee v. Moti Ram*, AIR 184 J & K 38.

¹⁰ Legal Glossary Op, Cit, p. 309.

¹¹ *Pramada Prasad Mukherjee v. Sagar Mal*, AIR 1954 Pat 439.

The claim of set off by the defendant is a counter claim for a sum of money. As such the defendant with regard to the sum of set-off is in the position of a plaintiff. In this way there are two suits- one by plaintiff against the defendant and the other by defendant against the plaintiff, but they are tried together. However, no separate suit number is given to set-off.

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 the claim is established.¹²

Where the plaintiff, suit is dismissed for default, or he withdraws his suit, or fails to prove his claim at the trial and suit is dismissed, it makes no difference for the claim of set-off of the defendant and a decree may be passed in favour of the defendant if he is able to prove his claim before the Court.¹³

Kinds of Set-off

Set-off is of two types:¹⁴

- i. Legal set-off
- ii. Equitable set-off

The right of legal set-off has been dealt with above as it is embodied in Rule 6.¹⁵

Equitable Set-off

Order XX, Rule 19(3) recognizes equitable set-off. It says that:

The provisions of this rule shall apply whether the set-off is admissible under Rule 6 of Order VIII or otherwise;

‘Otherwise’, here refers to ‘equitable set-off’.

By equitable set-off we mean that form of set-off which the Courts of Equity in England allowed when cross demands arose of the same transaction, even if the money claimed by way of set-off was an unascertained sum of money. The Court of Common Law refused to take notice of equitable claim for they were not ascertained sums. The court 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

¹² *Bansidhar kunjilal v. Lalta Prasad*, 1934 ALJ 393.

¹³ See, Order 20, Rule 19(1).

¹⁴ *Cofex Exports Ltd. v. Canara Bank*, AIR 1997 Del 355.

¹⁵ *Cofex Exports Ltd. v. Canara Bank*, AIR 1997 Del 355.

called Equitable Set-off. In short, a set-off allowed by the courts of Equity in England possessing equitable jurisdiction is called equitable set-off.

The courts in India have, apart from and independent of provisions contained in the code, followed the principle adopted by the Court of Equity. They recognised equitable set-off even when the claim of set-off was for an unascertained sum of money.¹⁶

The conditions subject to which the Courts of India allowed equitable set-off are following:

- i. When both the claim of the plaintiff and that of the defendant, that is cross claims (demand) arose out of the same transaction; or
- ii. Where the cross claims are so connected in their nature and circumstances that they can be looked upon as arising out of one transaction;
- iii. The claim of the defendant is for an unascertained sum of money; and
- iv. It is necessary that the claim of set-off must be within limitation on the date on which the written statement was presented.

As equitable set-off cannot be claimed as a matter of right and the Court has discretion to refuse or allow it. It stands on a lower pedestal than the plea of legal set-off. If a protracted enquiry is necessary for determination of the sum due, it may be a ground for refusing it. In allowing such a claim to be raised the Court is entitled to put the defendant on such terms as it may think reasonable and proper.¹⁷

If the defendant's version of equitable set-off would involve an elaborate and complicated enquiry unconnected with and over a period different from the version of the plaintiff the matter should be left to fresh suit by defendant. The question is not of the right of the party or that of the jurisdiction of the Court but that of "the convenience and the mechanism of the litigation."¹⁸

In the case of damages, set-off can be allowed only by way of equity and is in the discretion of the Court. It is essential for a party claiming an equitable set off that the cross demand should arise out of the same transaction. Thus, where the plaintiff bases his claim on a contract and the defendant claim is for damages not arising from the same transaction nor connected with it, the defendant is not entitled to claim equitable set-off.¹⁹

Illustrations

¹⁶ *Ramdhari v. Parmanand*, 19 CWN 1183.

¹⁷ *Gulla v. Prem Sukhdas*, 1954 RLW 749.

¹⁸ *Bhagwati Prasad v. Hukum Chand Mills*, 1961 MPLJ 272.

¹⁹ *Narsingh Rao Ram Krishnappa v. Veerayya Rajanna*, AIR 1952 Hyd. 104.

1. A sues B to recover Rs. 6000 due under a contract. B admits A's claim, but claims set-off of 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 demand arises from the same transaction.²⁰
2. Where a suit is filed by the washer man for his wages against the employer, the defendant (employer) can set up set-off for the price of clothes short returned to him against the wages.

Difference between Legal and Equitable Set-off

Following differences between a legal set-off and equitable set-off may be noted:

Legal Set-off	Equitable Set-off
<ol style="list-style-type: none"> 1. In a legal set-off the amount claimed must be for an ascertained sum of money 2. It is not necessary that the cross claims arise out of the same transaction. 3. The amount claimed to be set-off must be legally recoverable and must not be time barred at the date of the suit. 4. A legal set-off requires Court fee because it is a claim that might be established by a separate suit in which Court fee would have to be paid. 	<ol style="list-style-type: none"> 1. An equitable set-off may be allowed even for an unascertained sum of money. 2. The cross claim must arise out of the same transaction. 3. Claim can be allowed even if time barred at the date of the suit where there is fiduciary relationship between the plaintiff and the defendant. 4. No court fee is required in case of an equitable set-off which is for an account that may equitably be deducted from the claim of the plaintiff where a court fee has on the gross amount.²¹

Conclusion

Order VIII Rule 1 talks provide about written statement, it is obligatory on the defendant to submit his written statement within a period of 30 days from the date of the service of summons. But if the defendant fails to submit his written statement within the said period of 30 days, the period may be extended by the court but it will not exceed 90 days, the period may be

²⁰ Illustration given in Mulla, Abridged 14th edn. p. 886-87.

²¹ *Madan Mohan Garg v. Bohra Ramlal*, 1934 ALJ 421.

extended by the court but it will no exceed ninety days counted from the date of the service of the summons. Whereas a set-off is a kind of counter-claim that operates as a defence to a claim. The doctrine of Set Off allows the defendant to put his own claim against the plaintiff before the court under certain circumstances. Technically, a set off can be defined as a discharge of reciprocal obligations to the extent of the smaller obligation.

