# *JUDICIAL PRONOUNCEMENT ON*
# *WRITTEN STATEMENT AND REPLY STATEMENT*
# *ADDITIONAL WRITTEN STATEMENT*
# *COUNTER CLAIM AND SET OFF*

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***INTRODUCTION:-***

Jurisprudential definitions of the following terms are absolutely necessary:

**I.**

1. ***Counter -*** Adverse, antagonistic; opposing or contradicting; contrary.

2. ***Counter affidavit*** - An affidavit made and presented in contradiction or opposition to an affidavit which is made the basis or support of a motion or application.

***3. Counter Claim*** - A claim presented by a defendant in opposition to or deduction from the claim of the plaintiff. Fed.R.Civil P.13. If established, such will defeat or diminish the plaintiff's claim. Under federal rule practice and also in most states, counterclaims are either compulsory (required to be made) or permissive (made at option of defendant).

A counterclaim may be any cause of action in favour of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable. New York C.P.L.R. 3019(a).

4. ***Compulsory counter claim*** - A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim. Fed.R.Civil P.13(a).

For claim to constitute a compulsory counterclaim, it must be logically related to original claim and arise out of same subject matter on which original claim is based; many of same factual legal issues, or offshoots of same basic controversy between parties must be involved in a compulsory counterclaim. Tasner v. Billera, D.C.Ill., 379 F.Supp.809, 813.

5. ***Permissive counter claim*** – A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. Fed.R.Civil P.13(b).

**II.**

1. ***Cross action*** - An action brought by one who is defendant in a suit against the party who is plaintiff in such suit, or against a co-defendant, upon a cause of action growing out of the same transaction which is there in controversy, whether it be a contract or tort. An independent suit brought by defendant against plaintiff or co-defendant.

2. ***Cross claim*** - Cross-claims against co-parties are governed in the federal district courts and in most state trial courts by Rule of Civil Procedure 13(g): "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant".

3. ***Counterclaim distinguished:*** "Cross-claims" are litigated by parties on the same side of the main litigation, while "counterclaims" are litigated between opposing parties to the principal action. Resource Engineering, Inc. v. Siler, 94 Idaho 935, 500 P.2d 836, 840.

4. ***Cross complaint*** - A defendant or cross-defendant may file a cross-complaint setting forth either or both of the following:

> (a) Any cause of action he has against any of the parties who filed the complaint against him.
>
> (b) Any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his cross-complaint, (1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause brought against him.

5. ***Cross demand*** - Where a person against whom a demand is made by another, in his turn makes a demand against that other, these mutual demands are called "cross-demands".

**III**.

1. ***Replicatio*** - In the civil law and old English pleading, the plaintiff's answer to the defendant's exception or plea; corresponding with and giving name to the replication in modern pleading.

2. ***Replication*** - In common law pleading, a reply made by the plaintiff in an action to the defendant's plea or in a suit in chancery to the defendant's answer.

In equity practice (now obsolete in the federal and most state courts), a general replication is a general denial of the truth of defendant's plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. A special replication is occasioned by the defendant's introducing new matter into his plea or answer, which makes it necessary for the plaintiff to put in issue some additional fact on his part in avoidance of such new matter.

3. ***Reply*** - In its general sense, the plaintiff's answer to the defendant's set off or counter claim. Under Fed.R.Civil P.7(a), a reply is only allowed in two situations: to a counterclaim denominated as such, or on order of court to an answer or a third-party answer.

4. ***Rejoinder*** – In common-pleading, the second pleading on the part of the defendant, being his answer to the plaintiff's replication. Rejoinder occurs during the trial stage where the defendant answers the plaintiff's rebuttal.

**IV.**

1. ***Set off*** - A counter-claim demand which defendant holds against plaintiff, arising out of a transaction extrinsic of plaintiff's cause of action. Remedy employed by defendant to discharge or reduce plaintiff's demand by an opposite one arising from transaction which is extrinsic to plaintiff's cause of action. Edmonds v. Stratton, Mo.App., 457 S.W.2d 228, 232.

A claim filed by a defendant against the plaintiff when sued and in which he seeks to cancel the amount due from him or to recover an amount in excess of the plaintiff's claim against him. In equity practice it is commenced by a declaration in set-off, though under rules practice (which merged law and equity) it has been displaced by the counterclaim. Fed.R.Civil P.13.

The equitable right to cancel or offset mutual debts or cross demands, commonly used by a bank in reducing a customer's checking or other deposit account in satisfaction of a debt the customer owes the bank.

2. ***Recoupment*** – to recover a loss by a subsequent gain. In pleading, to set forth a claim against the plaintiff when an action is brought against one as a defendant. A keeping back something which is due, because there is an equitable reason to withhold it. A right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract. It implies that plaintiff has cause of action, but asserts that defendant has counter cause of action growing out of breach of some other part of same contract on which plaintiff's action is founded, or for some cause connected with contract.

The right of the defendant to have the plaintiff's monetary claim reduced by reason of some claim the defendant has against the plaintiff arising out of the very contract giving rise to plaintiff's claim. First Nat.Bank of Louisville v. Master Auto Service Corp., C.A.Va., 693 F.2d 308, 310. Unlike a counter claim, recoupment only reduces plaintiff's claim; it does not allow recovery of affirmative money judgment for any excess over that claim. Tuloka Affiliates, Inc.V. Moore, 275 S.C.199, 268 S.E.2d 293, 295.

Recoupment is a purely defensive matter growing out of transaction constituting plaintiff's cause of action and is available only to reduce or satisfy plaintiff's claim and permits of no affirmative judgment. Schroeder v. Prince Charles, Inc., Mo., 427 S.W.2d 414, 419.

Recoupment is the equivalent of the old counterclaim in which a defendant sets up a claim owed to him by the plaintiff though it need not arise out of the same transaction as the plaintiff's claim and the defendant may not recover more than the amount claimed by the plaintiff against him. Under rules practice, recoupment has been replaced by the modern counterclaim.

3. ***Set-off distinguished:*** A "set-off" is a demand which the defendant has against the plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action, whereas a "recoupment" is a reduction or rebate by the defendant or part of the plaintiff's claim because of a right in the defendant arising out of the same transcation.

4. ***Off-set*** - A deduction; a counterclaim; a contrary claim or demand by which a given claim may be lessened or cancelled. A claim that serves to counterbalance or to

compensate for another claim.

**V. *Order VIII Rule 1 of the Code of Civil Procedure Code is mainly relating to written statement, set off and counter claim.***

Order VIII Rule 1 of the Code of Civil Procedure envisages the filing of the written statement by the defendant within 30 days from the date of service of summons on him. Without filing written statement, as per the current Code of Civil Procedure, no defendant has got right to participate in the proceedings. It is therefore, just and necessary to call the case on the 30th day in the court to verify as to whether the written statement is filed or not. If there is default, the Court has to exercise its discretion to proceed ex parte, unless, the court itself intends to call upon the defendant to file written statement under Order VIII Rule 9 of the Code of Civil Procedure. Mechanically, without judicial application of mind, the matter should not be adjourned beyond 30 days. On application filed by the defendant, time could be extended for filing written statement up to 90 days; on the 90th day, if no written statement is found filed, the court without waiting for the plaintiff to make prayer to set exparte the defendant, should proceed with the matter exparte. If there is any application for further extension of time, the same should be considered on merits, as per the dicta laid down by the Hon'ble Apex Court in this regard. The following decisions of the Hon'ble Apex Court could fruitfully be cited relating to filing of written statement.

***I. WRITTEN STATEMENT:***

(i) ***2009 (3) SCC 513 (Mohammed Yusuf vs. Faij Mohammad and others)***

*"4. The appellant filed an application for grant of temporary injunction which was rejected on 28.1.2004. An appeal was preferred thereagainst which was disposed of by an order dated 14.05.2004. It is neither in doubt nor in dispute that the respondent-defendants filed applications for extension of time for filing written statement a number of times. The matter was also adjourned on one ground or the other.*

*5. On or about 31.1.2005, the appellant also filed an application before the learned trial Judge for pronouncing judgment in terms of Order 8 Rule 10 of the Code of Civil Procedure, inter alia, on the premise that the respondent-defendants did not file any written statement. It is on the same date the defendants filed an application for filing written statement. No application for condonation of delay in filing the written statement was however, filed. However, on 23.9.2005, as indicated hereinbefore by reason of an order dated 24.10.2005, while rejecting the said application of the respondents, the trial Judge allowed the plaintiff to examine his own witnesses in support of his case.*

*9. It is urged that the provisions of Order 8 Rule 1 of the Code of Civil Procedure having been held to be directory in nature by this Court in Kailash v. Nanhku, this Court may not exercise its discretionary jurisdiction under Article 136 of the Constitution of India. Order 8 Rule 1 of the Code of Civil Procedure reads thus:*

> *"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:*
>
> *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".*

*Although in view of the terminologies used therein the period of 90 days prescribed for filing the written statement appears to be a mandatory provision, this Court in Kailash upon taking into consideration the fact that in a given case the defendants may face extreme hardship in not being able to defend the suit only because he had not filed written statement within a period of 90 days, opined that the said provision was directory in nature. However, while so holding this Court in no uncertain terms stated that the defendants may be permitted to file written statement after the expiry of period of 90 days only in exceptional situation.*

*10. The question came up for consideration before this Court in M.Srinivasa Prasad vs. Comptroller and Auditor General of India, wherein a Division Bench of this Court upon noticing Kailash held as under:*

> *"7. Since neither the trial court nor the High Court have indicated any reason to justify the acceptance of the written statement after the expiry of time fixed, we set aside the orders of the trial court and that of the High Court. The matter is remitted to the trial Court to consider the matter afresh in the light of what has been stated in Kailash case. The appeal is allowed to the aforesaid extent with no order as to costs".*

*11. The matter was yet again considered by a three-Judge Bench of this Court in (R.N.Jadi & Bros. V.Subhashchandra). P.K.Balasubramanyan, J., who was also a member in Kailash in his concurring judgment stated the law thus:*

> *"14. It is true that procedure is the handmaid of justice. The court must always be anxious to do justice and to prevent victories by way of technical knockouts. But how far that concept can be stretched in the context of the amendments brought to the Code and in the light of the mischief that was sought to be averted is a question that has to be seriously considered. I am conscious that I was a party to the decision in Kailash v. Nanhku[1] which held that the provision was directory and not mandatory. But there could be situations where even a procedural provision could be construed as mandatory, no doubt retaining a power in the court, in an appropriate case, to exercise a jurisdiction to take out the rigour of that provision or to mitigate genuine hardship. It was in that context that in Kailash v. Nanhku[1] it was stated that the extension of time beyond 90 days was not automatic and that the court, for reasons to be recorded, had to be satisfied that there was sufficient justification for departing from the time-limit fixed by the Code and the power inhering in the court in terms of Section 148 of the Code. Kailash[1] is no authority for receiving written statements, after the expiry of the period permitted by law, in a routine manner.*
>
> *15. A dispensation that makes Order 8 Rule 1 directory, leaving it to the courts to extend the time indiscriminately would*

*tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasise that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order 8 Rule 1 must be adhered to and that only in rare and exceptional cases, will the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in courts. The lament of Lord Denning in Allen v. Sir Alfred McAlpine & Sons[14] that law's delays have been intolerable and last so long as to turn justice sour, is true of our legal system as well. Should that state of affairs continue for all times?"*

*12. In view of the authoritative pronouncements of this Court, we are of the opinion that the High Court should not have allowed the writ petition filed by the respondents, particularly, when both the learned trial Judge as also the Revisional Court had assigned sufficient and cogent reasons in support of their orders.*

*13. As indicated hereinbefore, the High Court allowed the writ petition and thereby set aside the orders passed by the trial Court as also the Revisional Court without assigning any reason therefore. The jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India is limited. It could have set aside the orders passed by the learned trial Court and the Revisional Court only on limited grounds, namely, illegality, irrationality and procedural impropriety. The High Court did not arrive at a finding that there had been a substantial failure of justice or the orders passed by the trial Court as also by the Revisional Court contained error apparent on the face of the record warranting interference by a superior court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India.*

*14. For the reasons stated above, the impugned judgment of the High Court cannot be sustained. It is set aside accordingly. The appeal is allowed. In the facts and circumstances of this case, there shall be no order as to costs."*

(ii) ***(2007) 14 SCC 431 (Aditya Hotels (P) Ltd. V. Bombay Swadeshi Stores Ltd.***

(iii) ***(2007) 10 SCC 246: (2008) 1 SCC (L & S) 1095 (M.Srinivasa Prasad v. Comptroller and Auditor General of India.***

(iv) ***(2007) 6 SCC 420 (R.N.Jadi & Bros. V.Subhashchandra)***

(v) ***(2005) 4 SCC 480 ( Kailash vs. Nanhku)***

(vi) ***(1968) 2 QB 229: (1968) 2 WLR 366: (1968) 1 All ER 543 (CA) (Allen v. Sir Alfred McAlpine & Sons Ltd.)***

(vii) ***2008 (11) SCC 769 (Salem Advocate Bar Association II vs. Union of India***

(viii) ***AIR 2005 SC 3304 (Rani Kusum vs. Smt.Kanchan Devi and others)***

(ix) ***AIR 2006 SC 396 (Shaikh Salim Haji Abdul Khayumsab vs. Kumar and others)***

***REFER CODE OF CIVIL PROCEDURE***

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

***ORDER VIII RULE 2*** – New facts must be specially pleaded
***ORDER VIII RULE 3*** – Denial to be specific
***ORDER VIII RULE 4*** – Evasive denial
***ORDER VIII RULE 5*** – Specific denial
***ORDER VIII RULE 6 & 6-A***

***Rule 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 sit, the defendant may, at the first hearing of the suit,but not afterwards unless permitted by the Court, present 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 of both 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 statement by a defendant apply to a written statement in answer to a claim of set-off.*

***Rule 6-A Counter claim by defendant:-***

*1. A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, 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.*

***REFER CODE OF CIVIL PROCEDURE***

***ORDER VIII RULE 6-B*** - Counter claim to be stated
***ORDER VIII RULE 6-C*** - Exclusion of counter-claim
***ORDER VIII RULE 6-D*** - Effect of discontinuance of suit
***ORDER VIII RULE 6-E -*** Default of plaintiff to reply to counter-claim ***ORDER VIII RULE 6-F*** - Relief to defendant where counter-claim succeeds
***ORDER VIII RULE 6-G*** - Rules relating to written statement to apply ***ORDER VIII RULE 7*** - Defence or set-off founded upon separate grounds

The following Hon'ble Apex Court's decisions concerning counter claim and set off are set out here under:

***Precedent under Order VIII Rule 6-A:***

***2007 (7) SCC 517 (Union of India vs. Tata Teleservices (Maharashtra) Ltd.).*** An excerpt from it would run thus:

> *"25. It has also to be noted that while prescribing the procedure under Section 16 of the Act, what is said is that TDSAT shall not be bound by the procedure laid down by the Code of Civil Procedure but it shall be guided by the principles of natural justice. It is significant to note that it is not a case of exclusion of the powers under the Code of Civil Procedure and conferment of specific powers in terms of sub-section (2) of that section. It is really a right given to TDSAT even to go outside the procedural shackles imposed by the Code of Civil Procedure while dealing with a dispute before it. Therefore, it will be difficult to keep out the provisions for the filing of a counterclaim enshrined in Order 8 Rule 6-A of the Code of Civil Procedure which could be applied by TDSAT. The sweep of Order 8 Rule 6-A of the Code now takes in even claims independent of the one put forward in the application if it is one the respondent therein has against the applicant. On the whole, we are of the view that TDSAT was in error in dismissing the counterclaim as not maintainable."*

***Precedents concerning Counter Claim/Set Off:-***

(i) ***2008 (12) SCC 392 (G.Rama vs. T.G.Seshagiri Rao (dead) by Lrs.).*** An excerpt from it would run thus:

> *"16. On 19.08.1991 O.S.No.4949 of 1991 ie., suit for partition was filed claiming the partition. There is no challenge to the release deed dated 17.4.1989 in the suit for partition. The appellant took the stand that it was a joint family property and, therefore, she had half-share. No specific issue regarding the nature of the property was framed. There was no issue relating to Section 14 (1) of the Act and there was also no evidence led in that regard. Strangely the trial court treated the suit as one for partition though the suit was for declaration. There was no counterclaim filed by defendant Rama. It is pointed out that Vasudeva Murthy was alive when the trial of the suit proceeded. Before the High Court an undertaking was given to vacate the premises which was accepted subject to filing of an undertaking which was in fact filed on 21.5.2004 after delivery of the judgment on 7.1.2004. After two years a review petition was filed on*

*10.8.2006 and the same was withdrawn on 30.8.2006."*

(ii) ***2006 (5) SCC 72 (Indian Bank vs. ABS Marine Products (P) Ltd.,)***
(iii) ***2006 (10) Scale 150 : 2006(7) Supreme Today 734 (State Bank of India vs. M/s.Ranjan Chemicals).*** *Certain excerpts from it would run thus:*

*"9. On going through the application filed by the bank and the plaint filed by the company in the present case, we find that both causes of action arise out of a cash credit facility extended by the bank to the company and while the claim by the bank is for recovery of amounts due under that account, the suit of the company is for recovery of compensation based on the alleged failure of the bank to fulfil its obligations under the cash credit facility in time and in a meaningful manner. Obviously, if the company is able to establish its claim, the amount that may be awarded to it by way of damages has necessarily to be set off against any amount that may be found due to the bank on the basis of the loan transaction including the cash credit facility extended by it to the company. The decree to the one or the other would depend upon an ascertainment of the rights and obligations arising out of the loan transaction and the state of the loan account. We are therefore of the view that the two claims are inextricably inter linked. The consequences arising out of the respective claim are referable to the cause of action arising out of the vary transactions between the bank and the company. We have already indicated that the claim of the company is in essence a claim for set off and/or a counter claim, which could be tries by the Debt Recovery Tribunal in view of the amended Section 19 of the Act.*

*10. A joint trial can be ordered by the court if it appears to it that some common question of law or fact arises in both proceedings or that the right to relief claimed in them are in respect of or arise out of the same transaction or series of transactions or that for some other reason it is desirable to make an order for joint trial. Where the plaintiff in one action is the same person as the defendant in another action, if one action can be ordered to stand as a counter claim in the consolidated action, a joint trial can be ordered. An order for joint trial is considered to be useful in that, it will save the expenses of two attendance by counsel and witnesses and the trial Judge will be enabled to try the two actions at the same time and take common evidence in respect of both the claims. If therefore the claim made by the company can be tried as a counter claim by the Debt Recovery Tribunal, the Court can order joint trial on the basis of the above considerations. It does not appear to be necessary that all the questions or issues that arise should be common to both actions before a joint trial can be ordered. It will be sufficient if some of the issues are common and some of the evidence to be let in also common, especially when the two actions arise out of the same transaction or series of transactions.*

*11. A joint trial is ordered when a court finds that the ordering of such a trial, would avoid separate overlapping evidence being taken in the two causes put in suit and it will be more convenient to try them together in the interests of the parties and in the interests of an effective trial of the causes. This power inheres in the Court as an inherent power. It is not possible to accept the argument that every time the Court transfers a suit to another court or orders a joint trial, it has to have the consent of the parties. A court has the power in an appropriate case to transfer a suit for being tried with another if the circumstances warranted and justified it. In the light of our conclusion that the claim of the company in the suit could be considered to be a claim for set off and a counter claim within the meaning of Section 19 of the Act, the only*

*question is whether in the interests of justice, convenience of parties and avoidance of multiplicity of proceedings, the suit should be transferred to the Debt Recovery Tribunal for being tried jointly with the application filed by the bank as a cross suit. Obviously, the proceedings before the Debt Recovery Tribunal could not be transferred to the Civil Court since that is a proceeding before a Tribunal specially constituted by the Act and the same has to be tried only in the manner provided by that Act and by the Tribunal created by that Act. Therefore, the only other alternative would be to transfer the suit to the Tribunal in case that is found warranted or justified.*

*12. It is clear that in both proceedings what are involved are, the nature of the loan transaction and the cash credit facility extended, the relationship that has spring out of the transactions, the right and obligations arising out of them, their breach if any, who is responsible for the breach and its extent. The same basic evidence will have to be taken in both the proceedings. The accounts of the bank will have to be scrutinized not only to ascertain the sum, if any, due to the bank but also to ascertain as to when and in what manner the cash credit facility was permitted to be availed of by the company. Of course, evidence will have to be taken on whether there was any violation of conditions or latches on the part of the bank in fulfilling its obligations causing damage to the company. At least a part of the evidence will be common. Duplication of evidence could be avoided if the two actions are tried together. If a decree is granted to the bank on the basis of its accounts, and the damages, if any, is decreed in favour of the company, a set off could be directed and an ultimate order or decree passed in favour of the bank or the company. In such a situation, we are of the view that this is a fit case where the two actions should be ordered to be tried together."*

(iv) ***2000 (7) SCC 357 (United Bank of India, Calcutta vs. Abhijit Tea Co.Pvt.Ltd.and others)***

***VII. <u>CONCLUSION:</u>***

A deep analysis of the aforesaid decisions would highlight and spotlight the distinction between counter claim and set off; reply and rejoinder.

It should be borne in mind that an additional written statement as contemplated under Order VIII Rule 9 of the Code of Civil Procedure is different from amendment of the written statement; a reply to the written statement is different from amendment of the plaint. It is the duty of the Judge to prevent misuse of the pleadings by a litigant. What could not be achieved by getting the pleading amended should not be allowed to be got over, by filing reply or rejoinder as the case may be and vice versa.

At this juncture my mind is reminiscent and redolent of the following two maxims, which are quoted here under for ready reference.

(i) ***Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud -*** When anything is commanded, everything by which it can be accomplished is also commanded.

(ii) ***Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*** - When anything is prohibited, everything by which it is reached is prohibited also. That which cannot be done directly shall not be done indirectly.

The legislators in their wisdom thought fit in an unusual manner to emphasis twice that there should be time limit for filing the written statement and that object got exemplified and expatiated under Order V Rule 1 of the Code of Civil Procedure and Order VIII Rule 1 of the Code of Civil Procedure. Judiciary should respond to such genuine effort of the legislators and see to it that written statements and pleadings in general, are made to be filed as expeditiously as possible without harping on the discursive discussion as to whether the time frame as fixed in the Code of Civil Procedure is mandatory or directory.

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