

Karnataka High Court The State Trading Corporation Of ... vs Vanivilas Co-Operative Sugar ... on 29 March, 2001 Equivalent citations: 2001 (5) KarLJ 570 Bench: R Raveendran, B Sangalad JUDGMENT 1. This is a plaintiffs appeal under Section 96 of the CPC against the judgment and decree dated 15-4-1994 in O.S. No. 35 of 1990 on the file of the Civil Judge, Chitradurga. Plaintiff (State Trading Corporation of India Limited) is a company wholly owned by the Central Government. It is engaged in the business of importing/exporting goods of various kinds including sugar, and acts as a canalising agency of Government of India for import/export of various goods. In the course of its business, it purchased, among other things, levy sugar from manufacturers for the purpose of export as per release orders issued by the Government of India at the levy sugar price notified by the Government of India. Defendant is a co-operative society registered under the Karnataka Co-operative Societies Act, 1959 running a sugar factory at Hiriya. For convenience appellant will also be referred to as the 'plaintiff or 'STC' and respondent will also be referred to as the 'defendant'. 2. On 12-8-1983 Government of India issued a release order releasing 1,920 metric tonnes of sugar of 1982-83 crushing season (conforming to ISS specification) produced by the defendant for export at the price provided in Sugar (Price Determination for 1982-83 Production) Order, 1983, to be supplied to plaintiff. In pursuance of it, the plaintiff through its Handling Agent (Indian Sugar Industry Export Corporation Limited), issued delivery orders dated 11-10-1983, 9-11-1983, 28-11-1983/4-12-1983 for 600, 660 and 660 tonnes of sugar at the price of 2,947.60 per metric tonne (levy price plus sugar cess) to be supplied in 50 kg. bags. Defendant supplied 1,795.5 M.T. of sugar as against 1,920 M.T. between 15-10-1983 and 15-12-1983 as detailed in defendant's letter dated 19-12-1983. 3. Plaintiff paid Rs. 17,68,560/- in regard to 600 M.T. of Sugar (vide Receipt dated 14-10-1983 for Rs. 17,20,560/- and Receipt dated 20-10-1983 for Rs. 48,000/- issued by defendant). Defendant supplied the said quantity covered by Invoice No. 1/20-10-1983 for Rs. 17,68,560/- between 15-10-1983 and 20-10-1983. 3.1 Plaintiff paid Rs. 19,45,416/- in regard to 660 M.T. of Sugar (vide Receipt dated 17-11-1983 for Rs. 18,92,616/-, Receipt No. 1170, dated 25-11-1983 for Rs. 52,600/- and Receipt No. 1171, dated 25-11-1983 for Rs. 200/- issued by defendant). It supplied 660 M.T. between 21-11-1983 and 25-11-1983. Defendant however issued an Invoice No. 2/30-11-1983 for Rs. 18,86,464/- for 640 M.T. only. 3.2 Plaintiff paid Rs. 18,92,616/- in regard to the last 660 M.T. of Sugar (vide Receipt dated 6-12-1983 for Rs. 8,60,280/-, Receipt dated 7-12-1983 for Rs. 8,60,280/- and receipt dated 7-12-1983 for Rs. 1,72,056/-). Plaintiff supplied only 535.5 M.T. of Sugar between 6-12-1983 to 15-12-1983 of the value of Rs. 15,78,439.80 which included re-bagging charges of Rs. 42,840/-. After giving credit to the said sum, Rs. 3,14,176.20 was due plaintiff as it did not supply the balance of 124.5 M.T. of Sugar. The defendant was thus liable to refund the said sum of Rs. 3,14,176.20. 4. As the sugar was to be released against the export release order, it had to be rebagged in 50 kg. gunny bag. As the sugar was already bagged in 100 kg. bags, it was agreed that plaintiff would supply 50 kg. capacity gunny bags to the defendant free of cost and the defendant would retain the once used 100 kgs. A-Twill gunny bags

in lieu of rebagging charges and other incidental expenses including excise duty, spillages, etc. The defendant agreed for the same. The defendant utilised 41,402 gunnies of 50 kgs. capacity supplied to it free of cost by the plaintiff, during 1983-84. In view of cancellation of export release regarding 1983-84, the sugar so rebagged was sold by the defendant in the internal market. The defendant in its letter dated 10-9-1984, gave an undertaking to plaintiff to pay the cost of 41,402 gunny bags (50 kgs. capacity) utilised by it, immediately after the said sugar was sold in the internal market. Thus, the defendant became liable to pay a sum of Rs. 1,65,988.10 being the cost of gunny bags to plaintiff (that is cost price of Rs. 76.50 per 20 bags plus sales tax). But, defendant did not pay the same. However, it confirmed by letter dated 7-7-1987 that Rs. 3,14,176.20 was to the credit of STC and it will make a part payment on 8-7-1987. Defendant accordingly paid Rs. 3,000/- on 8-7-1987, but did not pay the balance. 5. The plaintiff therefore filed a suit claiming a sum of Rs. 10,15,648.40 with interest at 18% p.a. from the date of suit till the date of realisation, as detailed below: Rs. Ps. The advance value paid by the STC for 124.5 M.T. of levy sugar (1982-83 season) which was not supplied by defendant 3,14,176.20 Interest on Rs. 3,14,176.20 from 4-12-1983 to 10-7-1987 (date of payment to date of part payment) 2,03,431.10 Notice charges 200.00 Total 5,17,807.30 Less: Demand draft received (Dated 8-7-1987) 3,000.00 5,14,807.30 Interest @ 18% p.a. on Rs. 3,11,176.20 from 10-7-1987 to 10-7-1990 (date of suit) 1,68,035.00 Cost of 41,402 gunnies of 50 kgs. capacity (supplied for 1983-84 season) 1,65,988.10 Interest on Rs. 1,65,988.10 from 7-12-1984 to 10-7-1990 1,66,818.05 Total 10,15,648.45 6. The defendant filed its written statement on 12-6-1991. It admitted the advance payments made by plaintiff and that after taking into account, the value of supplies made by defendant a sum of Rs. 3,14,176.20 remained to the credit of plaintiff, as defendant did not supply the balance quantity of 124.5 M.T. of sugar. Defendant however contended that it is not liable to pay the said sum on three grounds: (i) There was delay on the part of the plaintiff in supplying 50 kg. gunny bags required for rebagging 124.5 M.T. of sugar and therefore it could not supply the said sugar; (ii) It was agreed that the said amount could be adjusted towards the supplies to be made from 1983-84 production, but plaintiff failed to take delivery regarding 1983-84 production and therefore the said amount need not be paid; (iii) The claim is barred by limitation. 6.1 In regard to the claim for the value of 41,402 gunny bags (Rs. 1,65,988.10), the defendant did not deny the receipt of the said gunny bags. It stated that it had used the bags for rebagging the sugar to be supplied for export from its 1983-84 production, but the plaintiff committed breach by not taking delivery of the said sugar and therefore it was not liable to pay the cost of the gunny bags. 6.2 The claim for interest was denied on the grounds that (i) there was no contract for payment of interest; (ii) the payments were not made by defendant, on account plaintiff failing to perform its obligation in time and defendant being prevented by sufficient cause, from complying with the demand; and (iii) plaintiff failed to prove any loss on account of non-payment, and the claim for interest being in the nature of damages cannot therefore be granted. 7. However, ultimately in para 21 of written statement it admitted the liability to pay a sum of Rs.

3,14,176.20 plus 1,65,988.10 but sought set-off. Defendant contended that it suffered a loss of Rs. 9,08,452.98 on account of the cancellation of the order by plaintiff, in respect of 1983-84 export quota as detailed in its letter dated 7-7-1987 which is extracted below: Rs. Ps. (1) Charges for rebagging sugar from 100 kg. bag to 50 kg. bag (20,727 bags x Re. 1.00 = 20,727) 20,727.00 (2) Shortage of sugar 23 bags of 100 kgs. due to rebagging into 50 kg. bags (23 x Rs. 600 = 13,800.00) 13,800.00 (3) Excise duty remitted on shortage of sugar (item No. (2)) (23 bags x Rs. 64 = 1,472.00) 1,472.00 (4) Interest paid to Bank on unlifted export on Rs. 63,21,735.00 (that is cost of 20,727 bags at the rate of Rs. 305 per bag) @ 20% from 26-5-1984 to 31-5-1985 8,69,453.00 (5) Supervision charges for rebagging (this represents overtime paid to employees in addition to item No. (1) above paid to contractor) 3,000.00 Total 9,08,452.00 The defendant contended that out of the sum of Rs. 9,08,452.00 due to it as damages, Rs. 4,80,164.30 due by it (defendant) to the plaintiff (that is Rs. 3,14,176.20 due as refund of advance cost of sugar on account of non-supply of 124.5 quintals of sugar plus Rs. 1,65,988.10 due towards the cost of gunny bags) should be set-off. In regard to the balance of Rs. 4,28,288.68, it reserved the right to file a separate suit against the plaintiff for recovery. 8. On the said pleadings, the Trial Court framed the following issues: “(1) Whether the plaintiff proves that it was ready and willing to perform its part of the contract of lifting the sugar from the defendant factory as per the agreement entered into between plaintiff and the defendant contained in the letters dated 11-10-1983, 9-11-1983, 28-11-1983 and 4-12-1983? (2) Whether the defendant proves that there has been default committed by the plaintiff in not lifting balance of 124.5 M.T. levy sugar in spite of repeated requests and demands made to the plaintiff? (3) Whether time was the essence of the contract? (4) Whether the defendant was ready and willing to perform its part of the contract in the matter of supply of 124.5 M.T. levy sugar to the plaintiff? (5) Who is liable to supply 50 kgs. capacity Gunny Bags? (6) Whether the defendant is liable to pay the interest on the value of 124.5 M.T. levy sugar? (7) Whether the plaintiff is entitled to get the costs of 41,402 gunny bags of 50 kgs. capacity and the interest on it as claimed? (8) Whether the defendant is entitled for the set-off of Rs. 4,80,164.30? (9) Whether the suit is barred by time? (10) Whether the plaintiff is entitled for the reliefs claimed? (11) To what order or decree?” 9. Parties let in evidence. The Deputy Marketing Manager and Power of Attorney holder of the plaintiff was examined as P.W. 1 and Exs. P. 1 to P. 48 were marked. On behalf of the defendant, the Manager of DCC Bank, Hiriyur was examined as D.W. 1 and an employee of the defendant who was in charge of the Sales Section was examined as D.W. 2 and Exs. D. 1 to D. 49 were marked. 10. After appreciating the evidence, the Trial Court has decreed the suit in part. It answered issues (2), (3), (4) and (8) in the affirmative. It answered issue (9) in the negative. It answered issues (1) and (6) partly in the negative and issue (7) partly in the affirmative. It answered issue (5) as ‘plaintiff was to supply the 50 kgs. capacity gunny bags’. It held that there was breach on the part of plaintiff in not supplying the gunny bags (of 50 kgs. capacity) and that resulted in defendant not supplying 124.5 M.T. of sugar to plaintiff, though defendant

was ready to supply the same. The Trial Court held that plaintiff was entitled to refund of the advance of Rs. 3,14,176.20 less Rs. 3,000.00 which was received by it by demand draft i.e., Rs. 3,11,176.20 as claimed by the plaintiff. It also held that plaintiff was entitled to Rs. 1,65,988.00 as cost of gunny bags. While the plaintiff had sought interest at the rate of 18% p. a. from 4-12-1983 to 10-7-1990, on the value of Rs. 124.5^M.T. of sugar and from 7-12-1984 to 10-7-1990 on the value of 41,402 gunny bags, the Court awarded interest at 18% p.a. on Rs. 3,11,176.20/- and Rs. 1,65,988.00 only from 10-7-1987 to 10-7-1990 (date of suit) on the ground that the demand for interest was made for the first time in the legal notice dated 17-7-1987 (Ex. P. 40) (Note.—In fact, the date of Ex. P. 40 is 17-7-1987 and not 10-7-1987 and date of suit is 6-7-1990 and not 10-7-1990). The Trial Court also awarded Rs. 200.00 towards notice charges. Thus, the Trial Court held that plaintiff was entitled to a sum of Rs. 7,35,032.20 as on the date of the suit including interest (i.e., Rs. 3,11,176.20 plus Rs. 1,65,988.00 plus interest of Rs. 2,57,668.00 plus Rs. 200.00 as notice charges). 10.1 The Trial Court also held that plaintiff committed breach by not lifting the sugar from 1983-84 season and as a consequence defendant had to pledge the sugar stocks to its bank, until they could be sold in the open market and had to pay interest of Rs. 6,88,133.73 to the Bank. It found that defendant had to rebag the sugar in 50 kg. bags, to meet the requirements of plaintiff and when plaintiff did not take delivery, the cost of rebagging became a waste. The Trial Court therefore, held that defendant was entitled to damages of Rs. 20,727.00 towards the cost incurred for rebagging and Rs. 6,88,133.73 being the interest paid to Bank till the sugar was sold in the open market. The Trial Court has held that the defendant was thus entitled to a set-off of Rs. 7,08,860.00 (Rs. 20,727.00 plus Rs. 6,88,133.73) against the sum found due to plaintiff. After setting off the said sum of Rs. 7,08,860.73, against Rs. 7,35,032.20, the Trial Court found that plaintiff was entitled to only Rs. 26,171.47. It therefore decreed the suit as follows: “The plaintiff is entitled to recover from the defendant a sum of Rs. 26,171.47. The defendant is directed to pay the Court fee on Rs. 7,08,860.73 within 15 days from the date of this judgment since the same has been allowed as set-off. In case the said Court fee is not paid within the stipulated period the said set-off is deemed to have been rejected. In such an event the plaintiff will be entitled to get not only Rs. 26,171.45 but also the said set-off amount of Rs. 7,08,860.73. The plaintiff also will be entitled to get interest at 18% on the said amount from the date of suit till the date of realisation. Thus, the suit is decreed with proportionate costs accordingly”. 10.2 Subsequent to the judgment, the defendant paid the Court fee of Rs. 70,887.00 on 30-5-1994 on Rs. 7,08,860.73 which was accepted by the Court. 11. Feeling aggrieved, plaintiff has filed this appeal. Plaintiff has challenged grant of Rs. 7,08,860.73 as set-off made up of two claims for damages made by the defendant that is Rs. 20,727.00 as rebagging charges for 20,727 bags and Rs. 6,88,133.73 as interest paid to its Bank (on account of failure of plaintiff to take delivery of sugar for 1983-84 season). The challenge is made both on the ground that such a claim ought not to have been entertained on account of non-payment of Court fee on the written statement and on the ground that even on merits, the defendant was not enti-

tled to the same. Plaintiff has also challenged the rejection of claim of interest for the period prior to 10-7-1987 (i.e., for the period 4-12-1983 to 9-7-1987 in regard to Rs. 3,14,176.20 and for the period 7-12-1984 to 9-7-1987 in regard to Rs. 1,65,988.10). 12. Therefore, the following questions arise for consideration in this appeal: (i) Whether the Trial Court was justified in granting set-off in a sum of Rs. 7,08,860.73 when the defendant did not pay any Court fee on the set-off claimed on the written statement?

- (ii) Whether the Trial Court was justified in granting set-off in respect of Rs. 7,08,860.73
- (iii) Whether the Trial Court could grant set-off by permitting payment of Court fee on the s
- (iv) If the answer to the first three questions are in the affirmative, then, whether the Co
- (v) Whether the plaintiff is also entitled to interest on Rs. 3,14,176.20 from 4-12-1983 t

Re: Points (i) to (iii):

- 13. Before examining these points we may refer to the legal position relating to 'payment', 'adjustment', 'set-off and 'counter-claim' with reference to Order 8, Rules 6 and 6-A of the Code of Civil Procedure ('CPC', for short) and Sections 8, 14 and Article 1 of Schedule I of the Karnataka Court Fees and Suits Valuation Act, 1958 ('KCF Act', for short). I. 'Payment'
- 14. 'Payment' refers to the satisfaction or extinguishment of a debt (or part of a debt) effected prior to the stage of filing defence (written statement). No Court fee is payable in regard to such a plea.

II. Adjustment and set-off

- 15. When there are mutual demands between plaintiff and defendant, that is monies are due and payable by each to the other, both are entitled to mutual adjustment of the monies due and recoverable. Each party is entitled to adjust the amount due by him to the other, towards the amount due by the other to him. An 'adjustment', results in an extinguishment of debt on account of an appropriation and adjustment made by the debtor himself, as contrasted from a 'payment', where there is an extinguishment of a debt (or part of debt) by an actual payment by the debtor to the creditor. A plea of 'adjustment', in a written statement refers to an extinguishment of the debt due by defendant to plaintiff, on account of appropriation or adjustment by the defendant, of such debt towards a debt due by the plaintiff to defendant, before filing of the suit. 15.1 A defendant pleading adjustment, should be able to show that certain amount which the plaintiff owed him has been adjusted by him towards the amount due by him to plaintiff (which is claimed in the suit) and such adjustment took place before the filing of the suit with notice to plaintiff. Such notice to

plaintiff may either be express, that is by communicating the adjustment to the plaintiff or implied, that is when an adjustment takes place in terms of a pre-existing contract. When the adjustment does not take place before filing of the suit and the defendant claims adjustment in the written statement, the plea of adjustment becomes a plea of set-off. 15.2 An 'adjustment' is an act of a party by which he seeks to extinguish a debt or part thereof by an act of appropriation and adjustment. But a claim to set-off is a request or prayer to the Court for adjustment by the Court. A plea of 'adjustment' does not require payment of Court fee. A plea of set-off requires payment of Court fee. The need for such payment of Court fee is obvious. So long as the matter is one governed by a contract or acts of parties, a party can adjust an amount due by him to the other party towards an amount due by the other party to him, and there is no intervention of Court. But, once the other party (plaintiff) files a suit for recovery of the amount due to him, such claim of the other party is seized by the Court and therefore, the party (defendant) who wants to adjust the amount due by him towards the amount due by the other party (plaintiff) has to seek the leave of the Court. 15.3 It is also well-settled that what can be adjusted, either before filing of a suit by way of adjustment, or after filing of a suit by claiming a set-off, is only an amount due by him to the other towards an ascertained amount due by the other to him. Thus, if the amount claimed by him (defendant) as due by the other (plaintiff) is not an ascertained or admitted sum due, but is merely a claim for damages by him (defendant) against the plaintiff, then the plaintiff is not really due any amount, until a Court of law determines the liability and the quantum of damages. Where the amount claimed by defendant is damages, defendant cannot say that the plaintiff is 'due' in any ascertained sum due which could be adjusted towards the amount due by the defendant to the plaintiff. Where the claim of defendant is for damages, he cannot seek set-off, but will have to make a counter-claim. 15.4 The difference between 'damages' and 'ascertained sum of money' has been explained by Chagla, C.J., in the following classic passage in *Iron and Hardware (India) Company v Firm Shamlal and Brothers* : "In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party. As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary lia-

bility which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But, till that determination there is no liability at all upon the defendant". This is reiterated by the Supreme Court in *Union of India v Roman Iron Foundry*, thus: "Now the law is well-settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instante incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages". 15.5 What could be set-off against the suit claim and in what circumstances, set-off can be claimed, is contained in Order 8, Rule 6 of the Code of Civil Procedure. Sub-rule (1), which is relevant, is extracted below: "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 plaintiffs 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 plaintiffs suit, 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". It is clear from Order 8, Rule 6 of the CPC that set-off can be claimed by defendant, only if the following conditions are fulfilled:

- (a) the suit by the plaintiff must be for recovery of money;
- (b) the defendant's claim against the defendant which is sought to be set-off must be an as
- (c) both the parties to the claim for set-off should fill the same character as they fill i
- (d) the amount claimed by way of set-off should not exceed the pecuniary jurisdiction of th
- (e) the amount must be recoverable by defendant from the plaintiff or all the plaintiffs, i

III. Counter-claim

16. None of the restrictions that are applicable to a claim for set-off, apply to a counter-claim. A counter-claim of defendant can be any claim against the plaintiff without any limitations, the only restricting factor being the limit of pecuniary jurisdiction of the Court, if any. It can even be a claim for damages or a claim other than one for money. Before amendment to the Code of Civil Procedure, by Amendment Act of 1976, there was no provision for a counter-claim in the Code of Civil Procedure. Therefore, any claim of the defendant which did not fall under Order 8, Rule 6, was

classified either as an equitable set-off or as a cross suit. Where both plaintiffs claim and defendant's claim arose out of the same transaction/s and it was found to be inequitable to drive the defendant to a separate suit, the defendant's claim, even one for damages used to be entertained as an equitable set-off, at the discretion of Court. If it was legal set-off falling under Order 8, Rule 6, the Court had no option to refuse to adjudicate upon it, but if it was an equitable set-off, the Court was not bound to entertain and adjudicate upon the plea and had a discretion to either adjudicate upon it in the same suit or direct that it may be dealt with in a separate suit. Similarly any independent claim of the defendant against the plaintiff, which did not fall under the head of set-off was being treated as a cross suit. The hardship and confusion caused were put an end by inserting Order 8, Rule 6-A dealing with counter-claims. After such amendment, all claims of the defendant, which do not fall under the plea of payment, adjustment or set-off, including a claim of the defendant against the plaintiff for damages, are covered by Order 8, Rule 6-A, dealing with counter-claims. Sub-rule (1) of Rule 6-A of Order 8 is extracted below for ready reference: "(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".

17. The nature of counter-claim is explained by the Supreme Court in *Jag Mohan Chawla and Another v Dera Radha Swami Satsang and Others*, as follows: ". . . In sub-rule (1) of Rule 6-A, the language is so couched with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim that would be the subject-matter of an independent suit. Thereby, it is no longer confined to money claim or to cause of action of the same nature as original action of the plaintiff. It need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. The words "any right of claim in respect of a cause of action accruing with the defendant" would show that the cause of action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit. The only limitation is that the cause of action should arise before the time fixed for filing the written statement expires. The defendant may set up a cause of action which has accrued to him even after the institution of the suit. The counter-claim expressly is treated as a cross suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite Court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protraction, the legislature intended to try

both the suit and the counterclaim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the said cause of action adjudicated without relegating the defendant to file a separate suit“.

IV. Counter-claim and set-off

18. We may now conveniently note the points of difference between set- off and counter-claim as follows: Set off Counter claim
19. Amount claimed should be an ascertained sum of money.
20. Claim can be for an ascertained sum or for damages.
21. Can be claimed only in a suit for recovery of money.
22. The claim can be in any suit.
23. Is a ground of defence.
24. Is a weapon of offence enabling the defendant to enforce the claim as effectually as an independent action.
25. Both parties should fill the same character, as they fill in the plaintiff's suit.
26. Character of parties in regard to plaint and counter-claim need not be same.
27. The amount claimed must be recoverable by defendant from plaintiff on the date of suit by plaintiff.
28. The amount must be recoverable on the date of written statement. A cause of action accruing after the date of suit by plaintiff can also be the subject-matter of the counter-claim.
29. Court is bound to adjudicate upon the claim for set-off.
30. The Court may on its discretion exclude counter-claim from consideration in the suit and direct defendant to file a separatesuit.
31. The defendant admits the whole or part of the suit claim and then seeks to extinguish it by way of adjustment.
32. The defendant need not admit any part of the suit claim. By making provision both for set-off and counter-claim in the CPC, the need to differentiate between a set-off and counter-claim has now practically disappeared. If a claim is not one falling under Order 8, Rule 6 dealing with set-off, it will fall under Order 8, Rule 6-A dealing with counter-claims. Insofar as procedure is concerned, there is virtually no difference between set-off and counter-claim. Both are in the nature of cross suits and both attract the same Court fee and are covered by Section 8 and Article 1 of Schedule I of the Karnataka Court Fees and Suits Valuation Act, 1958. In both, the written statement setting up a claim for set-off or a counter-claim, is treated as a plaint in a cross-suit and the plaintiff is given an opportunity to file written statement in answer to the claim for set-off or counter-claim. In both, Court fee is chargeable in the same manner as a plaint and should

be paid when the claim is made and not when claim is adjudicated. V. Court fee

33. Section 8 of the KCF Act deals with set-off and counter-claim and provides that a written statement pleading a set-off or counter-claim shall be chargeable with fee in the same manner as a plaint. Section 14 of the KCF Act provides that where fee is payable in a written statement, the provisions of Section 11 (decision on proper Court fee) shall apply. Article 1 of Schedule I of the KCF Act provides for payment of ad valorem Court fee in regard to plaint, as also written statement pleading a set-off counter-claim. 19.1 In *A.Z.M. Reazai Karim v Mohammad Israil Ostagar and Another* and in *Sadasheo Krishnarao Buty v Nathu Bala Mahar*, it is held that there is no difference between a legal set-off and equitable set-off in the matter of Court fee and in both cases, Court fee must be paid ad valorem on the amount claimed. It was also held payment of Court fee after decision is impermissible. It was held that when a defendant who claims to have suffered loss on account of the acts and conduct of the plaintiff, asks for an equitable set-off, must estimate his claim as accurately as he can and pay ad valorem Court fee thereon and cannot be allowed to put a tentative valuation for the claim as if it was a suit for accounts or mesne profits. 19.2 In *M/s. Cool All Corporation and Others v Miss. Jane A. Vaz*, a learned Single Judge of this Court held that the object of permitting a claim for set-off or a counter-claim by the defendant in plaintiff's suit, instead of requiring the defendant to raise such claim in a separate suit is to avoid inconvenience and extra expense for parties and save Court's time. In regard to Court fee, it is held thus: "A cause of action or a relief, which could normally be the subject of an independent suit, is permitted to be pleaded as a set-off or counter-claim by virtue of the provisions of the Code of Civil Procedure. Since, it is an avatar of an independent suit, the Court Fees Act provides for payment of Court fees on the relief sought by the defendant. The approach to the question of Court fee, therefore, has to be, to see what would be the Court fee payable on the relief sought by the defendant, in case, the defendant had to file an independent suit to realise the said relief. 19.3 In *Smt. Parvathamma v KM. Lokanath and Others*, K.A. Swami, J. (as he then was) reiterated the position thus: "The first defendant has not paid the Court fee and has not requested the Court to register it as a counter-claim. Counter-claim is a plaint in a cross suit. Therefore, if a counter-claim is set up in the written statement and no Court fee is paid, it is as good as filing a plaint without a Court fee. Section 8 of the Karnataka Court Fees and Suits Valuation Act, 1958 provides that written statement pleading a set-off or a counter-claim shall be chargeable with fee in the same manner as a plaint. As per Order 7, Rule 11(c) of the Code of Civil Procedure, where the plaint is written upon paper insufficiently stamped the Court is required to fix a time for payment of the Court fee and if the Court fee is not paid within the time fixed, it is open to the Court to reject the plaint. The provisions of Order 7, Rule 11 are attracted to a counterclaim. Therefore,

the Court has to determine as to whether the Court fee paid is sufficient or not. If the Court fee paid is found to be insufficient, the Court has to fix a date for payment of Court fee. Even then, the defendant who has set up a counter-claim in the written statement or by preferring a separate counter-claim fails to pay requisite Court fee, it would be open to the Court to reject the counter-claim. It is open to the defendant to set up a counter-claim in the written statement or make a separate application for raising a counter-claim. In the instant case, in the written statement the first defendant has set up a counter-claim but has not paid the Court fee required to be paid on it. The Court also has failed to fix a date for payment of Court fee. Even after fixing a date for payment of Court fee, the first defendant has failed to pay the Court fee it would have been open to the Court to reject the counter-claim. Even though the petitioner can be blamed for not paying the requisite Court fee and not requesting the Court to register it but the Court is also at fault. It ought to have fixed a date for payment of requisite Court fee". 19.4 In the case of *Syndicate Bank, Gadag v M/s. A.V. Angadi and Others*, a Division Bench of this Court, held as follows:"12. Admittedly, in this case, an amount of Rs. 5,30,000/- was advanced to the defendants on the security of the equitable mortgage as mentioned in the plaint, which is admitted in the written statement. The case of the defendants is that they were not able to complete the construction of the godown in time, whereby, the F.C.I, terminated the contract. It is the defendants case that the godowns could not be completed in time due to the default of the plaintiff-Bank in advancing the loan under the scheme in time in produced necessary certificates from the F.C.I, showing the progress of the construction. They have also alleged in the written statement that due to the default of the plaintiff, they incurred a loss of Rs. 12,000/- per month which was the rent agreed to be paid by the F.C.I, on completion of the godown and handing over the same to them. In support of their case, the defendants have adduced large material before the Trial Court and the Trial Court has also found that the defendants incurred loss due to the default. But it is to be noted that the defendants never made a counter-claim claiming damages for the alleged breach of the agreement by the plaintiff. It is well-settled that if there is such a claim by the defendants in a suit, they have to make a counterclaim alleging necessary facts and also to pay Court fee on the same. Without doing so, by simply saying that they have incurred a loss, the Trial Court, should not have considered that claim and dismissed the suit of the plaintiff on the ground that the defendants had suffered damages due to the delay on the part of the plaintiff-Bank in advancing the loan. Without making a counterclaim in the written statement, the Trial Court should not have gone into that issue at all and the question whether the defendants suffered any damages did not arise at all In these circumstances, we are clearly of the view that the Trial Court erred in dismissing the suit on the ground that defendants suffered loss due to the fault of the plaintiff so long as there was no counterclaim by the defendants, and

as such an issue was unnecessary and was beyond the scope of the suit“.

(emphasis supplied) 19.5 Rule 6-B of Order 8 of the Civil Procedure Code requires the defendant, who seeks to rely upon any ground as supporting a right of counter-claim, to state specifically in his written statement that he does so by way of counter-claim. Rule 6 of Order 8 of the CPC requires a defendant who wants to claim set-off in regard to any ascertained sum legally recoverable by defendant from plaintiff, against plaintiff's claim, to do so by presenting the written statement containing the particulars of the debt sought to be set-off, at the first hearing of the suit, but not afterwards unless permitted by the Court. These provisions make it clear that the defendant should state in the written statement specifically that he is claiming a set-off or making counter-claim with a memo of valuation relating to Court fee and pay the Court fee in regard to the claim for set-off or counter-claim. If the relief of set-off or counter-claim is properly valued, but the defendant pays only a part of the Court fee, the Court should fix a time for payment of the deficit under Order 7, Rule 11 of the CPC. But, where the defendant fails to specify in the written statement that he is making a claim for set-off or counter-claim or fails to pay any Court fee at all, then, the question of Court fixing a date for payment of Court fee does not arise. Rule 11(c) of Order 7 of the CPC providing for fixing of time for payment of deficit fee is applicable only if at least some Court fee is paid and is inapplicable where no Court fee is paid at all. Where no Court fee is paid at all, it is as if there is no claim for set-off or counter-claim. When a defendant fails to comply with Order 8, Rule 6 or Order 8, Rule 6-B by specifying that he is claiming set-off or counter-claim and pay the Court fee, the defendant cannot expect the Court to examine the written statement and find out whether there is any claim for set-off or counter-claim and then fix a time for payment of Court fee. The observations in *Smt. Parvathamma's case*, *supra*, that Court should fix the time for payment of Court fee is applicable only in regard to cases where the defendant specifies in the written statement that he has made a claim for set-off or counter-claim and pays at least a part of Court fee.

19.6 When the written statement is filed, normally the Court does not go through the written statement to find out whether it contains the claim for set-off or counter-claim. Unless the defendant states while filing the written statement that he has made a claim for set-off or counter-claim in the written statement, the Court will not give an opportunity to the plaintiff (who is in position of the defendant insofar as claim for set-off or counter-claim is concerned) to file his written statement. Giving such opportunity is mandated by Rules 6(3) and 6-A(3). If the Court fee is not paid by the defendant on the set-off or counter-claim and the plaintiff is not given an opportunity to file his written statement to the claim of defendant, it is not permissible to the Court to consider or grant the set-off or counter-claim, as it would amount to granting a decree against plaintiff without giving him due opportunity to meet the claim against him.

19.7 The position regarding Court fee may be summarised thus:

- (i) A defendant who wants to claim set-off or make a counterclaim should state specifically in the written statement that he is claiming set-off or making a counter-claim. He should show the valuation regarding the set-off or counter-claim for purposes of Court fee and pay Court fee. The Court shall decide whether the Court fee paid on the written statement is proper as done in the case of plaint under Section 14 read with Section 11 of the KCF Act.
 - (ii) The amount sought to be set-off or the subject-matter of counter-claim should be specified. If the claim of defendant is for damages, then the amount claimed should be stated. The claim for set-off or counter-claim cannot be tentative. Making a tentative claim, followed by ascertainment of the amount due and direction to pay Court fee on the difference after judgment (between the amount found due and the tentative claim) is permissible only where the relief sought is for accounts or for dissolutions of partnership or for mesne profits under Sections 33, 34 and 42 of the KCF Act.
 - (iii) If the relief of set-off or counter-claim is properly valued, but only a part of the Court fee is paid thereon by the defendant, the Court shall fix a time for payment of deficit Court fee as contemplated under Order 7, Rule 11(c) of the CPC. If there is no valuation and if no Court fee is paid, then there is no need for the Court to grant time for payment of the Court fee under Order 7, Rule 11 or any other provision of the CPC.
 - (iv) Where no Court fee is paid, there is no need to frame any issue on the set-off claimed or counter-claim. On the other hand, if necessary Court fee is paid by defendant, after giving due opportunity to the plaintiff to file his defence (written statement) regarding such claim for set-off or counter-claim, the Court should frame appropriate issues thereon in addition to the issues on the claim in the plaint, and then proceed with the evidence.
 - (v) Where no Court fee is paid, it is impermissible for the Court to examine the claim for set-off or counter-claim in the judgment and grant relief and then permit the defendant to pay Court fee.
20. We will now refer to the decision in *M/s. Anand Enterprises and Others v Syndicate Bank*, on which strong reliance is placed by the defendant. In that decision, a learned Single Judge of this Court differentiated set-off and counter-claim (following the statement of law in “Halsbury’s Laws of England”, 4th Edition, Volume 42, page 407) thus: “A set-off is a defence put forward seeking absolvment from payment of the claim made, whereas counter-claim is a separate and independent action for recovery of money from the other person and such a counter-claim need not be limited to monetary claims only. Therefore, set-off is essentially different from a counter-claim, in that it serves only as a ground of defence being a mere shield and not a sword which if established would account either for a dismissal of the plaintiffs claim in toto or would diminish it, whereas a counter-claim without being any defence for the suit claim nonetheless enables the defendant to effectively enforce a claim against the plaintiff in

the very suit as if it was in independent action by the defendant". The learned Single Judge then held that a claim for damages by the defendant would not be a counter-claim, but only an equitable set-off if the defendant did not want a decree for the amount but only wanted to wipe off a part of plaintiffs claim. He next examined whether Court fee should be paid on such a claim for equitable set-off, when the written statement is filed or when judgment is given and held as follows: "I must agree that we cannot fix any liability on the defendants to pay Court fee on the sum of Rs. 4 lakhs claimed as damages, since it is merely an estimate of the targeted figure claimed as damages and, there is therefore little reason to pin them down to that statement to ring out money by way of Court fee..... Set-off claimed by the defendant is liable for Court fee only when the written statement claiming set-off is liable to be treated as a plaint.... If what is claimed as a set-off can be treated as a sum ascertained as legally recoverable, only then the plea for recovery of such claim merits being treated as a plea couched in a plaint liable for rendition under the law..... Liability of the defendant to pay Court fee on the claim of set-off must be postponed to a further stage and must pend till the Court adjudicates upon it and holds that any particular sum is legally recoverable by the defendant thereby ascertaining reciprocally the plaintiffs liability in that behalf. Unless that stage is reached it would be premature to make a demand for payment of Court fee by the defendant on the basis of a tentative claim made for recovering damages..... Surely Court fee cannot be claimed on such a basis both so nebulous and tenuous. . . . Accordingly, I hold that by the mere fact of pleading set-off in a sum of Rs. 4 lakhs, defendant does not become liable to pay Court fee instantaneously. Their liability will arise only after the Court ascertains the sum due to them in the context of the claim made by them and only thereafter have to be called upon to pay Court fee and of course if they do not pay the Court fee demanded, then they will not get the benefit of the said claim". The decision in M/s. Anand Enterprises case, supra, does not lay down the correct law. It wrongly assumes that in regard to a claim for damages, Court fee is payable only after the sum due is ascertained by a Court of Law and not till then. Firstly, claim for damages is not a claim for an ascertained sum due and therefore cannot be the subject-matter of a claim for set-off under Order 8, Rule 6 of the CPC. Secondly, even if defendant's claim is to be treated as one for equitable set-off, there is no difference between a claim for legal set-off (falling under Order 7, Rule 6 of the CPC) and a claim for equitable set-off (falling outside Order 8, Rule 6 of the CPC) insofar as payment of Court fee is concerned. At all events, after introduction of Rule 6-A in Order 8, any claim for equitable set-off which does not fall under Rule 6, will fall under Rule 6-A. Thirdly, payment of Court fee on tentative claim initially and payment of balance Court fee on determination of amount due by the Court is permissible only where KCF Act specifically provides for such mode of payment (as in the case of suit for accounts, dissolution of partnership, administration, and mesne

profits under Sections 33, 34, 37 and 42 of the KCF Act, respectively). Such a facility is not available in regard to a claim for damages. Lastly, even in suits falling under Sections 33, 34, 37 and 42 of the KCF Act, if the plaintiff had tentatively made a claim for Rs. 4 lakhs, Court fee has to be paid on Rs. 4 lakhs. There is no question of not paying any Court fee, merely on the ground that the claim is tentative.

21. We will now refer to the factual position in this case, on examining the order sheet and records in the suit.

- (i) The plaintiff filed the suit for recovery of Rs. 10,15,648.40 (with interest at 18% per annum).
- (ii) The defendant's representative appeared in Court on 14-8-1990 and sought time to engage counsel.
- (iii) The case was adjourned for filing written statement to 24-10-1990 and at the request of the plaintiff.
- (iv) The defendant filed its written statement on 12-6-1991 with the caption "Written statement of defendant".
- (v) The written statement did not contain any valuation in regard to Court fee and did not contain any particulars of the claim.
- (vi) When defendant filed the written statement on 12-6-1991, the Court did not post the matter for written statement of plaintiff in regard to the defendant's claim, but straightaway posted the matter to 8-8-1991 for framing issues. Issues were framed on 22-11-1991. Issue No. 8 was "Whether the defendant is entitled for the set-off of Rs. 4,80,164.30?"
- (vii) The defendant did not admit the suit claim of Rs. 10,15,648.40 and then seek set-off of Rs. 4,80,174.30 due by plaintiff as wrongly assumed by the Trial Court while framing Issue 8.
- (viii) The defendant stated that plaintiff was liable to pay damages and compensation of Rs. 9,08,452.98 as claimed in its letter dated 7-7-1987. It did not give particulars of the claim for damages in the written statement. The defendant stated in para 21 of the written statement that it admitted that Rs. 3,14,176.20 was due by it to plaintiff in regard to non-supply of 124.5 quintals of sugar and Rs. 1,58,385.40 towards the cost of gunny bags, in all Rs. 4,80,164.30. It set-off the said sum of Rs. 4,80,164.30 (from out of the suit claim) towards its claim of Rs. 9,08,452.98 for damages and stated that it will file a separate suit for recovery of Rs. 4,28,288.68, which was the balance due towards damages claimed by it (Rs. 9,08,452.98 minus Rs. 4,80,164.30). Thus defendant admitted the suit claim only in respect of Rs. 4,80,164.30 and sought set-off only in regard to Rs. 4,80,164.30.
- (ix) The Trial Court decreed the suit of plaintiff for Rs. 7,35,032.20, on the basis of the admissions of defendant (that is Rs. 4,80,164.20 admitted by defendant, with Rs. 2,57,668/- as interest thereon at 18% per annum from 10-7-1987 to 10-7-1990 plus Rs. 200/- as notice charges). Then, the Court set-off Rs. 7,08,860.73 as damages (made up of Rs. 20,727/- incurred towards rebagging expenses and Rs. 6,88,133.73 paid as interest

by defendant to its Bankers from 26-4-1984 to 31-5-1985 on account of failure on the part of plaintiff to take delivery of Sugar) and held that defendant was liable to pay to plaintiff only the balance of Rs. 26,171.47.

- (x) By judgment dated 15-4-1994, the Court granted time to defendant to pay the Court fee on Rs. 7,08,860.73 within 15 days (subsequently extended till 2-6-1994 by order dated 21-4-1994). The defendant paid a Court fee of Rs. 70,887/- on 30-5-1994 and thereafter the decree was drawn and signed on 20-7-1994.
22. The claim of defendant is for damages (as detailed in para 7 above) and not for any ascertained sum of money and it therefore does not fall under the category of legal set-off under Rule 6 of Order 8 of the CPC. The claim of defendant cannot also be considered as one for equitable set-off. To claim on equitable set-off, the cross demand by defendant should have arisen out of the same transaction on which plaintiff's claim is based and so interconnected with plaintiff's claim that it will be inequitable to drive defendant to a separate suit. In this case, the claim of plaintiff relates to non-supply of 124.5 M.T. of sugar out of the order for the supply of 1,920 M.T. of Sugar of 1982-83 crushing season by defendant to plaintiff and cost of gunny bags, relating to release order of the Central Government dated 12-8-1983. The claim for damages by defendant on the other hand related to alleged breach by plaintiff to take delivery of sugar in respect of different release orders (dated 29-12-1983 and 4-1-1984) relating to 1983-84 crushing season, which was cancelled on 10-10-1984. Therefore, the claim of defendant is a counter-claim and not set-off. As defendant failed to specify the claim as a counter-claim as required by Rule 6-B of Order 8 and failed to pay Court fee as required by Section 8 read with Article 1 of Schedule I of the KCF Act, the counter-claim is liable to be rejected.
23. Even assuming that the claim is one for set-off, the position is no better. The defendant has claimed a set-off in respect of Rs. 4,80,164.20. But, strangely the Court below has set-off Rs. 7,08,860.73 which is far more than what was sought. Secondly, the defendant did not pay any Court fee even on Rs. 4,80,164.20 in regard to which set-off was sought. It was therefore impermissible for the Court to have considered the claim and grant set-off by its judgment and permit the defendant to pay the Court fee thereafter.
24. Even assuming that it was permissible to consider the claim for set-off, the finding that defendant was entitled to compensation of Rs. 7,08,860.73/- as damages is not based on pleadings or evidence. The defendant has averred that the order based on release orders dated 29-12-1983 and 4-1-1984 (re: production of 1983-84 crushing season) was cancelled on 10-10-1984; that the sugar stocks had been pledged with DCC Bank on 26-5-1984 and it was paying interest at 17 1/2 % per annum on the amount drawn by defendant by such pledge; that if the release orders had not been cancelled on 10-10-1984, it would have effected supplies to plaintiff

and received the price immediately; that on account of cancellation, it had to sell the sugar in the local market from 26-11-1984 to 17-5-1985 and until the sale proceeds were realised, they had to pay interest to DCC Bank aggregating to Rs. 6,88,133.73 and that amount had to be reimbursed by plaintiff as damages. But the written statement does not contain any of these pleas except stating that by cancelling the order, plaintiff became liable to pay damages. Further, there is no pleadings about date of contract, date of breach, nature of breach, contract price, price on date of breach, difference in rate, mitigation etc. No opportunity was given to plaintiff to traverse the said claim of defendant, by filing its written statement. Plaintiff cannot therefore be required to pay damages claimed by defendant. It is unnecessary to examine this aspect in detail as this question does not arise in the absence of a valid counter-claim.

25. Hence Points (i) to (iii) are answered in the negative and against the defendant. Consequently Point (iv) does not survive for consideration. Point (v):
26. The plaintiff claimed interest on Rs. 3,14,176.20 from 4-12-1983 and interest on Rs. 1,65,988.10 from 7-12-1984 to 10-7-1990. But, the Court has awarded interest only from 9-7-1987 to 10-7-1990. The question is whether plaintiff is entitled to claim interest for the period prior to 9-7-1987. It is not in dispute that there is no contract to pay interest. In the absence of any contract, interest is payable only from the date of issue of notice claiming interest. Such notice was issued only on 17-7-1987 (Ex. P. 40). The Court below has however taken the date of notice of demand for interest as 10-7-1987 and awarded interest from that date. We do not therefore find any ground to award interest prior to 10-7-1987.
27. In view of the above, this appeal is allowed in part and the judgment and decree dated 15-4-1994 in O.S. No. 35 of 1990 on the file of the Civil Judge (Senior Division), Chitradurga, is modified as follows:

- (i) Decreeing the plaintiffs suit for Rs. 7,35,032.20 is upheld.
- (ii) The prayer of the plaintiff-appellant for decreeing the suit for Rs. 10,15,648.40 instead of Rs. 7,35,032.20 is rejected.
- (iii) The judgment and decree of the Court below permitting set-off in respect of Rs. 7,08,867/- is upheld.
- (iv) As a consequence the Court fee of Rs. 70,887/- paid by the defendant on 30-5-1994 in terms of the judgment and decree of the Court below is ordered to be refunded to the defendant.
- (v) In view of the above the suit stands decreed for Rs. 7,35,032.20 with costs and with interest at 12% per annum from the date of decree.
- (vi) The appellant will be entitled costs in proportion to its success in this appeal.