



THESE WRIT PETITIONS ARE FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA WITH A PRAYER TO QUASH THE COMMON ORDER DATED 19.2.2005 PASSED ON I.A.NOS. II AND III FILED UNDER ORDER VIII RULE 9 R/W SEC 151 OF THE C P C, IN OS NO 6772/04 ON THE HONBLE IX ADDL CITY CIVIL JUDGE, BANGALORE [CCH-8][ANX-A] AND FURTHER BE PLEASED TO ALLOW THE SAID I.A. NOS. III & II RESPECTIVELY.

THESE WRIT PETITIONS COMING ON FOR PRELIMINARY HEARING, THIS DAY, THE COURT MADE THE FOLLOWING:

### ORDER

Both these petitions are disposed of by this common order.

2. These petitions are by the plaintiff which is a company incorporated under the Companies Act, 1956. A suit is filed by them against the respondents herein who are the defendants.

3. The plaint averments would disclose that the 1<sup>st</sup> defendant namely the 1<sup>st</sup> respondent herein is the owner of the property bearing Sy.No.19 situated at Mailasandra village, Bangalore South Taluk measuring 15 acres 9 guntas. The 1<sup>st</sup> respondent/1<sup>st</sup> defendant entered into a memorandum of understanding dated 23.12.1996 with the 2<sup>nd</sup> respondent /2<sup>nd</sup> defendant under which the 1<sup>st</sup> respondent/1<sup>st</sup> defendant agreed to sell the schedule



property in favour of the 2<sup>nd</sup> respondent/2<sup>nd</sup> defendant and both of them agreed to develop the property through a Company, in which both of them were to be the shareholders. It appears during December 2000, the 2<sup>nd</sup> respondent/2<sup>nd</sup> defendant approached the plaintiff-petitioner for himself and on behalf of the 1<sup>st</sup> respondent/1<sup>st</sup> defendant offering to sell the schedule property in favour of the plaintiff/petitioner. After due negotiations, it was agreed and a MOU dated 27.12.2000 was entered into between the plaintiff/petitioner and respondents/defendants under which the defendants/respondents agreed to sell the schedule property in favour of the plaintiff/petitioner for a total sale consideration of Rs.2,25,00,000/- (Rupees two crores and twenty five lakhs). It is their further case that an amount of Rs.5,00,000/- (Rupees five lakhs) was paid through cheque by the plaintiff/petitioner favouring the 2<sup>nd</sup> defendant/2<sup>nd</sup> respondent as advance and part of sale consideration by way of part performance of the contract. Since the respondents resiled from the stand and declined to execute the required sale deed, the suit was presented by the plaintiff/petitioner for the following reliefs:



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1. *for specific performance of the MOU/ agreement dated 27.12.2000 by directing the defendants to execute and register a sale deed conveying and selling the schedule property to the plaintiff after complying with the terms and conditions of the said MOU/agreement and after receiving the balance sale consideration of Rs.1,85,00,000/- and consequently directing the defendants to deliver the vacant physical possession of the schedule property to the plaintiff.*
2. *in the event of the defendants refusing to execute and register the sale deed in favour of the plaintiff, this Hon'ble Court may be pleased to direct any officer of this Hon'ble Court to execute and register the sale deed conveying and selling the schedule property to the plaintiff as per the terms and conditions of the said MOU/agreement upon the plaintiff depositing the balance sale consideration of Rs.1,85,00,000/- in this Hon'ble Court and consequently deliver the possession of the schedule property to the plaintiff.*
3. *Issue a permanent injunction restraining the defendants, their men, their agents, or*



*anyone claiming through or under them, from selling, mortgaging, leasing or in any way alienating, or parting with the possession of the suit schedule property in favour of any third party, except the plaintiff, and altering the nature of the suit schedule property or putting up any construction on the suit schedule property.*

4. *direct the defendants to pay the costs of this suit and grant such other and further reliefs as are just.*

4. The 1<sup>st</sup> respondent/1<sup>st</sup> defendant having been served, filed a detailed written statement inter alia contending that the reliefs sought for by the petitioner/plaintiff are not at all maintainable. He would deny the MOU. It is no doubt the said MOU is admitted by 1<sup>st</sup> defendant/ 1<sup>st</sup> respondent, but the defense is that the said amount of Rs.35,00,000/- (Rupees Thirty five lakhs) as reflected in MOU was a personal loan given to the 2<sup>nd</sup> defendant/2<sup>nd</sup> respondent. According to him, the said amount was not an earnest money towards the MOU to sell the suit schedule property, but is essentially a personal transaction between the plaintiff/petitioner and 2<sup>nd</sup>



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defendant/2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent/2<sup>nd</sup> defendant has also filed a written statement inter alia contending that the amount mentioned in the MOU is a personal loan given to him, which according to him, he has already discharged. In the circumstances, the question of investigating the said MOU would not arise.

5. The facts would further disclose that an application for ad interim injunction was also maintained by the plaintiff/petitioner, restraining the respondents from alienating or developing the suit schedule property or putting up any construction pending disposal of the said suit. The learned Trial Judge rejected the said application. The same was carried in appeal in M.F.A. 8964/2004. This Court by its order dated 15.12.2004 declined to entertain and dismissed the appeal confirming the order passed by the learned Trial Judge.

6. After filing of separate written statements by both respondents 1 & 2/defendants 1 & 2, the plaintiff/petitioner sought leave of the Trial Court to file a rejoinder statement by filing two applications under Order 8 Rule 9 read with Section 151 of the Code of Civil Procedure, to the written



statements filed by the respondents/defendants. In the said rejoinder they would refute the allegations and contentions made by the defendants/respondents. The said rejoinder was seriously objected to by the defendants/respondents contending that certain admissions, which were made by them in the plaint are being withdrawn by the said rejoinder, which is not permissible under law and certain new facts, which are not pleaded in the plaint are sought to be pleaded in the said rejoinder statement. The learned Trial Judge, on consideration of the materials on record was of the opinion that the leave to file replication cannot be granted for three reasons. One is that the replication does not attract the provisions of Order 8 Rule 9 of the Code of Civil Procedure in as much as it is not in the nature of a set off or the counter claim. The second reason being that certain admissions, which were made in the plaint are being withdrawn or resiled by filing the said replication. It was also of the opinion that under Order 8 Rule 9 of the Code of Civil Procedure the plaintiff-petitioner cannot be permitted to plead new facts, which are not pleaded in the original plaint, by way of rejoinder. The 3<sup>rd</sup> reason for refusing the leave is that the controversy, which was sought to be raised by way of plaint,



written statement and rejoinder is to be decided during the course of trial, in as much whether it is essentially in the nature of loan transaction or money was passed under the said MOU for enforcing certain conditions incorporated in the MOU. On these three facts, the learned Trial Judge rejected the said applications, which are challenged in these two writ petitions.

7. W.P.11735/2005 is filed challenging the rejection of the rejoinder to the written statement of 1<sup>st</sup> respondent/1<sup>st</sup> defendant and W.P.11736/2005 is filed in respect of rejection of rejoinder in respect of 2<sup>nd</sup> respondent/2<sup>nd</sup> defendant.

8. Mr.Udaya Holla, learned Senior Counsel appearing for the petitioner in both these writ petitions would strenuously contend that the learned Trial Judge was incorrect in rejecting the said applications seeking leave to file a replication to the written statements, under Order 8 Rule 9 of the Code of Civil Procedure, on the ground that, it does not fall under the definition of set off or a counter claim. He was at great pains to convince me that the scope of Order 8 Rule 9 is not in respect of a set off or a counter



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claim, but a statement which requires leave of the Court to traverse the averments made in the written statement. In the circumstances, the learned Trial Judge was not justified in rejecting the permission on the ground that it would not fall under Order 8 Rule 9 of the Code of Civil Procedure. He would further submit that by filing such a replication statement, the plaintiff/petitioner has neither taken away any benefit, which has accrued, to the respondents/defendants nor any admission made in the plaint is being withdrawn. In the circumstances, he would commend that the learned Trial Judge ought to have accepted the rejoinder to the written statement.

9. Mr. Shyam Koundinya, learned counsel appearing for the respondents/defendants in both these writ petitions would support the order passed by the learned Trial Judge. He would stress more on the fact that certain admissions, which were made in the plaint, are being withdrawn by this rejoinder. He pointedly drew my attention to para.5 of the plaint, wherein it is stated that the said amount of Rs.35,00,000/- was paid to the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent has admitted that the amount, which was



mentioned in MOU was given to him as a personal loan, but not towards performance of any contract as stated. He would submit that the amount of Rs.30,00,000/- which was paid to the 2<sup>nd</sup> respondent was essentially a loan transaction and did not relate to the MOU. Consequently, he would submit that the learned Trial Judge was justified in rejecting the said application.

10. I have heard both, the learned Senior counsel appearing for the petitioner/plaintiff as well as Counsel appearing for the respondents/defendants in both these petitions. The question whether a replication to a written statement can be filed or not or whether it would fall under the realm of set off or as a counter claim has been set at rest by the judgment of this Court reported in **1972(2) Mysore Law Journal Page 328 (R.Dayananda Sagar V/S.Vatal Nagaraj and others)**. It is to be noticed what Order 8 Rule 9 would contemplate is in respect of subsequent pleadings, which would read as under;

*"Subsequent pleadings - No pleading subsequent to the written statement of a defendant other than by way of defence to set off or counter-claim shall be presented except*



*by the leave of the Court and upon such terms as the Court thinks fit but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same."*

Order 8 Rule 9 would deal with a subsequent pleading which is filed subsequent to the filing of written statement of a defendant. It is not a case where the rejoinder is being filed to claim a set off or a counter claim. It is in the nature of a replication filed to the written statement, which is always permissible under the law. The Code of Civil Procedure far from pinning down the plaintiff to the plaint and the defendant to the written statement does contemplate further pleading. It is permissible to the plaintiff-petitioner to file a replication to add to his pleas already made in the plaint. The only condition is the leave of the Court. It is only meant for denying or clarifying the facts stated in the written statement. Fresh cause of action or fresh case is not brought about by filing replication. It is mainly clarificatory in nature. Consequently, I am of the considered view that the learned Trial Judge was not justified in rejecting the leave to file replication on the ground that it does not squarely fall under



Order 8 Rule 9 of the Code of Civil Procedure. But however, the remaining two grounds for rejection of the leave would be more appropriate in the circumstances of the case. One is that the admission which is made in the plaint cannot be taken away by filing a replication. It is always in the nature of an additional statement of objections to the written statement denying certain facts. But however, such denial shall not take away the admissions made in the plaint. By such a replication, the plaintiffs cannot be permitted to wriggle out of the situation. The second ground on which the learned Trial Judge has declined to grant the prayer is also more appropriate in the sense that, it is a matter in which, the controversy could be resolved during trial. It is a question of one of assertion and denial, which is a matter for evidence. Be that as it may, the fact that such a replication can be filed to the written statement to the extent indicated above, the learned Trial Judge was not justified in rejecting the said permission. The anxiety or apprehension of the respondents regarding certain admissions are being taken away and new facts are pleaded can be set at rest by making an observation that during the Trial the withdrawing of admissions and new pleadings shall be eschewed from the



replication. To that extent the replication which is filed will have to be accepted by the learned Trial Judge.

11. For the reasons stated above, the writ petitions are disposed of with a direction to the Trial Court to eschew the withdrawal of admissions made in the plaint by filing replication statement and also such new pleadings which are not pleaded in the original plaint. To that extent, the replication shall be accepted.

With this observation, the petitions stand disposed.

Sd/-  
Judge

SPB

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