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NANDA RAI
v.
RAGHU-
NANDAN
SINGH.

in *Mungul Pershad Dichit v. Grija Kant Lahiri* (1) governs this case. The judgment-debtor cannot now object to the execution of the decree by the appellants for their shares. The orders of the Courts below are set aside, and the case remanded to the first Court for disposal. Costs to follow the result.

Appeal allowed.

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January 15.

Before Mr. Justice Oldfield and Mr. Justice Duthoit.

PRAGI LAL (PLAINTIFF) v. MAXWELL AND OTHERS (DEFENDANTS).*

Set-off—Civil Procedure Code, s. 111—“Ascertained” sum—Act XV of 1877 (Limitation Act), s. 22, sch. ii, Nos. 52, 53, 83.

A suit was brought by *P* against the Elgin Mills Company for recovery of the price of wood supplied under two contracts, each of which contained a clause by which the plaintiff contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for. No wood was supplied after the 11th November, 1879. The suit was brought on the 10th October, 1882. In January, 1883, the partners of the Elgin Mills Company were, on their own application, brought upon the record as defendants. The defendants claimed a set-off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for, such loss having arisen on the 25th October, 1879, and subsequently.

Held that art. 53, and not art. 52, sch. ii of the Limitation Act was applicable to the plaintiff's claim, the intention of the parties having been that the price of wood was not claimable as of right on the date of its being supplied, but rather when the contract was completed by the whole wood being supplied, or when the contract came to an end.

Held that although, taking the word “ascertained” to mean “liquidated,” the claim of the defendants for damages would not come within the meaning of a set-off under s. 111 of the Civil Procedure Code, that section was one regulating procedure, and was not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions; that the right of set-off would be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arose out of one and the same transaction, or were so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit, and that as, in the present case, the claim sprang out of the same contract which the plaintiff sought to enforce, and could readily be determined in the same suit, it was equitable that it should be so determined. *Gauri Sahai v. Ram Sahai* (2), *Kistnasamy Pillay v. The Municipal Commissioner of Madras* (3), and *Kishor Chand Chumpha Lal v. Madhowji Visram* (4) followed.

* Second Appeal No. 1480 of 1883, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 23rd July, 1883, reversing a decree of Maulvi Farid-din Ahmad, Subordinate Judge of Cawnpore, dated the 3rd April, 1883.

(1) I. L. R., 8 Calc. 51; L. B., 8 Ind. Ap., 123. (2) N.-W. P. H. C. Rep., 1875, p. 157.

(3) 4 Mad. H. C. Rep., 120.

(4) I. L. R., 4 Bom., 407.

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Held that the law of limitation applicable to the set-off was art. 83, sch. ii of the Limitation Act; that limitation would run from the time when the plaintiff was actually damnified, and should be reckoned to the date of the institution of the suit, and not to that of claiming the set-off, which was after the defendant's names were brought on the record; and that the set-off was therefore in time. *Walker v. Clements* (1) referred to.

Per OLDFIELD, J.—That the excess of the set-off in favour of the defendants over and above the claim of the plaintiff might properly be decreed to them, and that the set-off should be allowed, if at all, to its full extent, and not merely to the extent of defeating the claim.

Per DUTHOIT, J.—That although the set-off might properly be admitted as an equitable protection to the defendants against being cast in the plaintiff's suit, the defendants could not, failing the provisions of s. 111 of the Civil Procedure Code, be allowed to recover a sum of money from the plaintiff, they having paid no court-fees on that account.

Held that s. 22 of the Limitation Act refers to cases where a new defendant is substituted or added, and that when the partners of the Elgin Mills Company were brought on the record as defendants in January, 1883, there was no institution or addition of new defendants, the defendants having been comprised in the designation of Elgin Mills Company, and at most what was done was to correct a misdescription.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Mr. T. Conlan and the Junior Government Pleader (Babu Dwarika Nath Banarji), for the appellant.

Mr. C. H. Hill, for the respondents.

OLDFIELD, J.—This is a suit by the plaintiff against the partners of the Elgin Mills Company, for recovery of the price of wood supplied under two contracts dated the 22nd October, 1878, and 27th July, 1879. A certain amount of firewood was to be supplied by certain dates, and each contract contained a clause by which the plaintiff contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for.

It is admitted that the plaintiff did not supply all the wood contracted for, and as a matter of fact the defendants did not keep him to the strict terms of the contracts, but received wood after the dates specified in the contracts had expired, and it appears that the plaintiff received payment for what he supplied from time to time,

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and on the 11th November, 1879, he presented a bill to the respondents for Rs. 1,367-10-9 alleged due to him on that date, and was met by a counter-claim on the defendants' part for a sum due for damages in consequence of his failing to supply wood. After that date no further wood was supplied, and it is admitted that the plaintiff failed to supply all the wood contracted for.

The present suit has been brought on the 10th October, 1882, to recover the above sum of Rs. 1,367-10-9 with interest.

There is no dispute that the above sum was due for wood supplied, but the defendants, who are proprietors of the firm, pleaded that they were made defendants after the period of limitation had expired for bringing this suit, that some of the items composing the claim are barred by limitation, and they claimed a set-off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for.

The lower appellate Court, modifying the decree of the first Court, has held that the plaintiff's claim is not barred by limitation, but that the set-off was properly claimable by the defendants, and in consequence it dismissed the suit. The plaintiff has appealed, and there are cross-objections on the part of the defendants. The plaintiff's appeal is directed against the order allowing the set-off, and it is contended that the claim for damages is not one which can be set-off under s. 111 of the Civil Procedure Code, it not being an ascertained sum of money legally recoverable.

Taking the term "ascertained" to mean liquidated, that is, in a claim for damages to mean a case where a certain sum has been agreed upon as the just amount of damages sustained, the claim will not come within the meaning of a set-off under s. 111; but it has been held by this Court in *Gauri Sahai v. Ram Sahai* (1), following a ruling of the Madras High Court in *Kistnasamy Pillay v. The Municipal Commissioner of Madras* (2), and by the Bombay High Court in *Kishor Chand Champa Lal v. Madhowji* (3), that this provision in the Code is one regulating procedure, and not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions, and that the right of set-off will be found to exist not only in cases

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of mutual debts and credits, but also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstance as to make it inequitable that the plaintiff should recover, and the defendant be driven to a cross-suit. And so, in the case before us, the claim springs out of the same contract which the plaintiff seeks to enforce, and can be readily determined in this suit, and it is equitable that it should be so determined.

There is another objection that the claim by way of set-off is barred by limitation, but this has no force. The loss which arises from the defendants being obliged to purchase coal in place of the wood not supplied was incurred on the 25th October, 1879, and subsequently. The law of limitation applicable is art. 33, and limitation will run from the time when the plaintiff was actually damaged, and will be reckoned to the date of the institution of the plaintiff's suit, and not to that of claiming the set-off, which was the 14th January, 1883, after the defendants' names were brought on the record,—see *Walker v. Clements* (1),—and the set-off is in consequence within time. The other plea that the defendants waived their right to damages is not made good.

The appeal of the plaintiff therefore fails. The first objection on the part of defendants is to the effect that, inasmuch as they were not made defendants till January, 1883, the suit is barred by s. 22, Limitation Act. It appears that the plaintiff made the Elgin Mills Company defendant, and upon the application of the defendants, who are the partners in the firm, they were brought on the record as defendants. S. 22 refers to cases where a new defendant is substituted or added. In the case before us there has been no substitution or addition of new defendants; the defendants were comprised in the designation of the Elgin Mills Company, and at most what was done was to correct a misdescription, for which the plaintiff cannot be blamed, seeing that the defendants trade under the designation of Elgin Mills Company, and he was not in a position to know who the partners were.

The next objection is, that all items of the claim for wood supplied prior to three years antecedent to the date of institution of

(1) 15 Q. B., 1046.

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suit are barred by art. 52, Limitation Act, the limitation running from the date of delivery of the goods.

It appears to me, however, that the intention of the parties was that the price of the wood was not claimable as of right on the date of its being supplied, but rather when the contract was completed, by the whole wood being supplied, or when the contract came to an end. I would apply art. 53, and hold that no portion of the plaintiff's claim is barred by limitation. The objection on the defendants' part, however, that the Court below should have decreed in their favour the excess of their set-off over and above the claim allowed to the plaintiff is valid, for if it is right to allow a set-off at all in this suit, it seems reasonable that it should be allowed to its full extent, and not to admit it to the extent of merely defeating the present claim. It should be either allowed in full or not allowed at all, and I would so far modify the decree, and give a decree in favour of the defendants against the plaintiff for Rs. 1,808-5-6. There is no dispute in appeal before us either as to the amount of the plaintiff's claim or that of the defendants for damages.

The appeal of the plaintiff is dismissed. Each party to bear their own costs in both Courts.

DUTHOIT, J.—I am agreed with my learned brother upon all the points raised in this appeal and objection, except as regards the defendants' objection that their claim to recover the difference between the amount of the set-off and the sum found to be due to the plaintiff should have been decreed. I am not prepared to admit the validity of this claim. It is, I think, clear that, not being *liquida causa*, the set-off could not be claimed under the provisions of s. 111 of the Code of Civil Procedure; and this being so, though I am prepared to allow that the set-off may be admitted as an equitable protection to the defendants against being cast in the plaintiff's suit, I do not see how, failing the provisions of s. 111 of the Civil Procedure Code, the defendants, who have paid no court-fees on this account, can be allowed to recover a sum of money from the plaintiff. I would affirm the decree of the lower appellate Court, and dismiss the appeal and the defendants' objection, both without costs.