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VICTORIA
MILLS
COMPANY,
LIMITED,
v.
BRIJ MOHAN
LAL.

claimed that they were entitled to Rs. 14 " by way of damages in lieu of notice. " The court below made a decree for the wages for March and dismissed the remainder of the claim. It was of opinion that the defendants were not entitled to any further damages. It is contended in this application for revision that the court below ought to have allowed a set-off of the damages claimed. I am of opinion that this contention cannot prevail. Order VIII, rule 6, of the Code of Civil Procedure provides that in a suit for the recovery of money, the defendant can claim to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff. The amount claimed as damages is not an ascertained sum of money. So that, according to the Code of Civil Procedure, there cannot be a set-off of damages. This is clear from Illustration (c) to the rule. The cases on the point have been quoted in Woodroffe and Ameer Ali's edition of the Code of Civil Procedure, and I need not refer to them. The present case is not a case of equitable set-off nor is it a case of damages arising out of the same transaction. Therefore under the provisions of order VIII, rule 6, referred to above, the damages claimed could not be set off in this case. The court below was, in my opinion, right. I dismiss the application, but without costs as the other side is not represented.

Application dismissed.

APPELLATE CIVIL.

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February, 3.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

GAYA DIN (PLAINTIFF) v. SRI RAM AND OTHERS (DEFENDANTS).*

Act No. XXVI of 1891 (Negotiable Instruments Act), sections 64, 76—Hundi—Presentation—Liability of drawer—Burden of proof.

Where it is sought, with reference to section 76 (d) to render liable the drawer of a *hundi* which has not been presented for payment, the *onus* of proving that the drawer could not suffer damage from the want of presentation is on the party who wants to excuse himself for the non-presentation of the

* Second Appeal No. 1550 of 1914, from a decree of C. E. Guiterman, Additional Judge of Moradabad, dated the 14th of July, 1914, reversing a decree of Ganga Sahai, Subordinate Judge of Moradabad, dated the 6th of January, 1914.

hundi. Madho Ram v. Durga Prasad (1) followed, *Phul Chand v. Ganga Ghulam* (2) distinguished.

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THIS was a suit on a *hundi* against the drawers, the drawees and the payee, the plaintiff being a holder in due course. The principal defence was that the *hundi* had never been presented for payment. The court of first instance accepted this plea, except as regards the drawers, against whom it gave the plaintiff a decree. On appeal, however, the lower appellate court dismissed the suit *in toto*. The plaintiff appealed to the High Court.

Munshi Panna Lal (The Hon'ble Dr. Sundar Lal, The Hon'ble Pandit Moti Lal Nehru and Babu Saila Nath Mukerji with him), for the appellant, contended that, although the *hundi* was not presented at its maturity, the drawer had in no way been prejudiced. The non-presentment at maturity of a promissory note the presentment of which is required by section 66 of the Negotiable Instruments Act (1881) has not the effect of relieving from liability the maker of the note; *Phul Chand v. Ganga Ghulam*, (2). Neither presentment nor notice of dishonour is necessary if it be shown that at the time the *hundi* matured there were no funds belonging to the drawer in the hands of the drawee; *Manjapa v. Sub Rao* (3). In the present case the *hundi* was for Rs. 2,500, and admittedly the drawee had only Rs. 1,900 of the drawer in his hand at the time the *hundi* matured. The burden of proving that he suffered loss by non-presentment lay upon the drawer. That is a circumstance particularly within his knowledge. The plaintiff cannot be called upon to prove a negative fact. It is in evidence that the Rs. 1,900 that were in the hands of the drawee were returned to the drawer when the holder did not present the *hundi*.

Pandit Kailas Nath Katju (with him The Hon'ble Dr. Tej Bahadur Sapru), for the respondent was not called upon, but cited *Madho Ram v. Durga Prasad* (1) and submitted that the language used in section 98 and section 76 of the Negotiable Instruments Act was similar.

Munshi Panna Lal, was heard in reply.

RICHARDS, C.J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit brought by the holder of a *hundi* against the drawer,

(1) (1910) I. L. R., 33 All., 4.

(2) (1899) I. L. R., 21 All., 450.

(3) (1900) 2 Bom. L. R., 891.

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the parties on whom the *hundi* was drawn and the persons in whose favour it was made. The court of first instance dismissed the suit as against all the parties except the drawer. The lower appellate court has dismissed the suit altogether on the ground that the note was not presented. It is admitted that the note was not presented ; but the appellant contends that this is no defence as against the drawer, unless it is shown that the drawer suffered damage, and it is urged that the *onus* lies on the drawer of showing that he suffered damage. Section 64 of the Negotiable Instruments Act provides that promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee by or on behalf of the holder. This also is the English law, and on the face of the *hundi* it ought to have been presented. In other words, that was the contract. Section 76 provides that presentment for payment is unnecessary in certain cases—the last instance is set forth in section 76 (d) in these words “as against the drawer if the drawer could not suffer damage from the want of presentment.” It seems that the *onus* of showing that the drawer could not suffer damage is thrown on the party who wants to excuse himself for the non-presentation of the negotiable instrument. This very point seems to have been decided in the case of *Madho Ram v. Durga Prasad* (1). It is true that the Court was there considering the words of section 98 in respect of notice of dishonour, but the very same language occurs in section 98 as occurs in section 76. The appellant relies upon the case of *Phul Chand v. Ganga Ghulam* (2). In that case the learned Judges seem to have thought that, section 64 not having specified what the result of non-presentation was, presentation was not necessary. Section 76 (d) does not seem to have been referred to. The case was remanded for retrial and no final decision was given. We think that the first decision we have quoted is one which decided the exact point which in principle is the point we have to consider in the present appeal. We think we ought to follow the later decision. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1910) I. L. R., 38 All., 4. (2) (1899) I. L. R., 21 All., 450.