

APPELLATE CIVIL.

1934
January, 1

Before Mr. Justice Niamat-ullah and Mr. Justice Bennet

BANSIDHAR KUNJILAL (PLAINTIFF) *v.* LALTA PRASAD
AND OTHERS (DEFENDANTS)*

Civil Procedure Code, order VIII, rule 6 ; order XX, rule 19—Set off—Counterclaim—Whether set off admissible when plaintiff's claim is denied—Whether set off can be decreed where suit itself is dismissed—Suit against several defendants jointly—Whether set off can be claimed as due to one defendant alone—Civil Procedure Code, order XXI, rule 22—Cross-objection where suit was dismissed but defendant-respondent's claim to recover an amount as set off was not dealt with.

Plaintiff sued defendants 1 to 5 for price of goods supplied from time to time to two firms *A* and *B*, both of which, according to plaintiff, belonged to the same joint Hindu family consisting of the five defendants. It was admitted by the plaintiff in the plaint that nothing was due to him on the *khata* or account of firm *A*, on the contrary a sum of Rs.212 was due to the *khata* of that firm; but there was a large balance due to him on the *khata* of firm *B*, and according to him all the defendants were jointly liable therefor. Defendants 1 to 3 pleaded, and it was found in their favour, that they were the sole owners of firm *A* and that they were entirely separate from defendants 4 and 5, who alone were the owners of firm *B*. In their written statement defendants 1 to 3 pleaded that nothing was due from them, on the other hand they claimed that a decree might be passed in their favour against the plaintiff for the sum of Rs.212 admittedly due to them, for which they put in the requisite court fee. The trial court passed a decree in favour of the plaintiff for a certain sum as against defendants 4 and 5, and dismissed the plaintiff's suit as against defendants 1 to 3, but was silent about the latter's claim for the Rs.212. Plaintiff appealed against defendants 1 to 3, and the latter filed a cross-objection in respect of the Rs.212. *Held* (NIAMAT-ULLAH, J., *dubitante*) that order VIII, rule 6 of the Civil Procedure Code applied to the claim of defendants 1 to 3, whose cross-objection ought to be allowed.

Per BENNET, J.:—

(1) A set off under order VIII, rule 6 may be pleaded although the claim of the plaintiff is denied. It is not merely a

*First Appeal No. 379 of 1930, from a decree of Raja Ram, Additional District Judge of Cawnpore, dated the 26th of June, 1930.

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defence to the plaintiff's claim and a decree may be granted under order XX, rule 19 to the defendant although the suit of the plaintiff is dismissed by the decree.

(2) A set off under order VIII, rule 6 is wider than a set off at English law, but it is not so wide as a counterclaim.

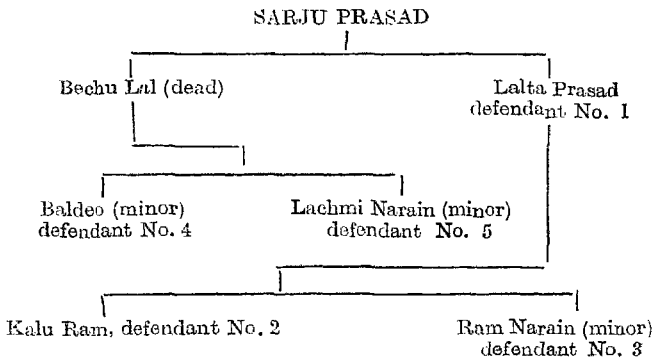
(3) Where a plaintiff sues several defendants, alleging a joint debt, a defendant who denies the joint debt may plead a set off due to him alone.

(4) A defendant respondent whose set off has not been decreed, or has not been referred to in the decree, may make this a ground of cross-objection in the appeal by the plaintiff.

Dr. K. N. *Katju* and Mr. *Shambhu Nath*, for the appellant.

Mr. S. N. *Verma*, for the respondents.

BENNET, J.:—This is an appeal by the plaintiff, whose suit has been dismissed against one set of defendants, Nos. 1 to 3, and has been decreed only against defendants Nos. 4 and 5. The pedigree of the defendants is as follows:



The plaintiff is a firm in Cawnpore and it was in the habit of supplying for a number of years groceries to two firms as set out in paragraph 1 of the plaint. One of those firms was called Sarju Prasad Bechu Lal, situated in the town of Bahraich, and the other firm was called Bechu Lal Lalta Prasad, situated in the town of Chilwaria, in the district of Bahraich. The plaintiff alleges that both these firms belong to a joint Hindu

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family constituted by all the defendants. The defendants, on the other hand, claim that the firm at Bahraich is owned only by the branch of Bechu Lal and the firm at Chilwaria is owned only by the branch of Lalta Prasad, and that the branches are separate. The short issue is whether these two brothers were joint or separate; but I must note that even if it is shown that the family was joint, it is further to be shown by the plaintiff that the firm of Sarju Prasad Bechu Lal was started with joint family funds.

Evidence has been given on both sides, and a perusal of that evidence leads me to the conclusion that the trial court was right in holding that these two brothers were separate. [After discussing the evidence the judgment continued.] For these reasons I come to the conclusion that the plaintiff has failed to prove that the family was joint. Therefore the plaintiff cannot hold the branch of Lalta Prasad responsible for the debit balance in the account of the branch of Bechu Lal. It is admitted by the plaintiff that in the account of Lalta Prasad there was a credit balance of Rs.212-12-0. The suit, therefore, was correctly dismissed against the branch of Lalta Prasad. Accordingly I would dismiss the appeal against Lalta Prasad and his sons with costs.

A cross-objection has been brought by Lalta Prasad and his sons. This cross-objection is to the effect that the lower court has erred in not allowing this Rs.212-12-0 to the respondents, and asks that the decree should be modified by this claim being decreed against the plaintiff. Objections of various sorts have been taken to this cross-objection. The matter arose in the following manner. In the plaint it was stated in paragraph 4 that there was a surplus of Rs.212-12-0 in the account of the firm Bechu Lal Lalta Prasad with the plaintiff The written statement in paragraph 17 set out the following claim: "Rs.212-12-0 is admittedly due to the contesting defendants by the

plaintiff, for which a decree may be passed in favour of the contesting defendants. A court fee of Rs.16-8-0 is paid in respect thereof." Now in my opinion this claim in the written statement amounts to a claim by way of set off under the provisions of order VIII, rule 6 of the Civil Procedure Code. The suit of the plaintiff is for the recovery of money, and the defendants claim to set off against the plaintiff's demand an ascertained sum of money legally recoverable by them from the plaintiff. The objection has been taken by Mr. *Shambhu Nath* for the plaintiff that these defendants do not admit the claim of the plaintiff and therefore they cannot plead a set off. There is nothing in rule 6 which requires the defendant to admit any part of the claim of the plaintiff. His next objection was that a set off could not be decreed if the suit of the plaintiff was dismissed against the defendant claiming the set off. This idea comes from English common law. Odgers in his "Pleading and Practice in Civil Actions", eighth edition, states on page 250:

"A set off is a statutory defence to the whole or to a portion of the plaintiff's claim. At common law a defendant who had any cross-claim against the plaintiff could not raise it in the plaintiff's action; he had to bring a cross-action. He might, it was true, when sued for the price of goods, give evidence of a breach of any warranty, express or implied, in reduction of the price. But that was all. Then two statutes were passed in the reign of George II, (2 Geo. II. c. 22, and 8 Geo. II c. 24) which enabled a defendant in the plaintiff's action to plead what is known as a "set off"—but only in certain cases. In the first place, only a debt of a liquidated amount could be set off; and it could only be set off in an action in which the plaintiff's claim was also liquidated. This is so still. Both debts must be due from and to the same parties in the same right . . . If the debt due from the plaintiff to the defendant exceeded the amount due from the defendant to the plaintiff, the defendant could not recover the difference in the plaintiff's action; he could only set off an amount equal to the plaintiff's claim; he had to bring a cross-action for the balance."

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On page 254 Odgers says :

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“The Judicature Act, which gave every defendant a very wide power of counterclaiming, did not alter the rules as to set off. Whatever was a good set off, either at law or in equity, in 1875, is a good set off still; and nothing else is admissible as a set off, though it may be an excellent counterclaim. The distinction is important, because it carries with it this result—that a set off is still a defence proper to the plaintiff’s action, while a counterclaim is practically a cross-action.”

On page 255 Odgers states :

“The modern counterclaim is entirely the creation of the Judicature Act, 1873. By virtue of section 24, sub-section (3) of that Act, every Judge of the High Court of Justice and of the Court of Appeal now has power to grant to any defendant in respect of any estate, right, or title, legal or equitable, claimed or asserted by him, all such relief against the plaintiff as such defendant shall have properly claimed by his pleading to the same extent as if the defendant had brought an action against the plaintiff for the purpose; and the court will give judgment in the plaintiff’s action both on claim and counterclaim. The defendant’s counterclaim need not relate to or be in any way connected with the plaintiff’s claim, or arise out of the same transaction . . . It may exceed in amount the plaintiff’s claim: *Winterfield v. Bradnum* (1).”

Now, when the provisions now embodied in order VIII, rule 6 of the Civil Procedure Code were framed by the legislature, the word counterclaim was not introduced, but some of the attributes of a counterclaim were given to a set off, and some of the attributes of a set off at English law were modified. This has been done in regard to the attribute that “a set off is a statutory defence to the whole or a portion of the plaintiff’s claim”, and that a defendant had to bring a cross-action for the balance due to him over what was due to the plaintiff. There is nothing in order VIII, rule 6 to make either of these attributes apply to a set off under that rule. On the contrary it is provided in sub-rule (2) that “The written statement shall have the

(1) (1878) 3 Q.B.D., 324.

same effect as a plaint in a cross-suit so as to enable the court to pronounce a final judgment in respect both of the original claim and of the set off;” And in order XX, rule 19(1) it is provided: “Where the defendant has been allowed a set off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.” These two provisions show that the court must treat the claim of the defendant exactly as if the defendant had filed a plaint, and the court must pass a decree in favour of the defendant if his claim is established, even though the claim of the plaintiff against the defendant is dismissed.

I may note that the Civil Procedure Code does not make a set off under order VIII, rule 6 as wide as a counterclaim, as the suit of the plaintiff must be “for the recovery of money” and the set off of the defendant must be of “any ascertained sum of money legally recoverable by him from the plaintiff”.

For the plaintiff Dr. *Katju* took objection that on the principle of illustration (g) to order VIII, rule 6, defendants 1 to 3 could not plead any set off. That illustration is as follows: “*A* sues *B* and *C* for Rs.1,000. *B* cannot set off a debt due to him alone by *A*.” The illustration is very brief and does not explain on what principle it is based. I consider that the illustration is introduced to prevent a decree being given for *A* against *B* and *C* jointly, with a decree for *B* alone against *A* on a set off, as difficulties might arise in the execution of such a decree. But where *B* pleads that there is no joint debt due from him and *C* to *A*, as is pleaded by *B* in the present case, the case is different, and I do not consider that the illustration is intended to apply to such a case. There is nothing in the wording of order VIII, rule 6 to show that a set off could not be pleaded in such a case. The expression, “and both parties fill the same character as they fill in the

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plaintiff's suit", is illustrated by illustrations (a) and (b) which show how a person fills different characters, for example as legal representative and as vendor.

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The last argument made was that in any case this matter cannot be raised by way of cross-objection; that the period for filing an appeal had elapsed when the cross-objection was filed, and that the defendants 1 to 3 were not making any objection to any part of the decree of the lower court, as that decree dismissed the claim of the plaintiff against these defendants with costs. But in my opinion these defendants are taking an objection to the decree on the ground that it omits to give them the relief which they asked for in the set off, a decree for Rs.212-12-0. They could have filed an appeal against the decree on the ground of this omission. As they have been made respondents in this appeal, under order XLI, rule 22 they are entitled to 'take any cross-objection to the decree which they could have taken by way of appeal'. In my view, therefore, on the claim for set off this Court should grant a decree in favour of defendants 1 to 3.

I may enumerate the propositions of law on which I base this opinion, as follows:

1. A set off under order VIII, rule 6 may be pleaded although the claim of the plaintiff is denied. It is not merely a defence to the plaintiff's claim and a decree may be granted under order XX, rule 19 to the defendant although the suit of the plaintiff is dismissed by the decree.

2. A set off under order VIII, rule 6 is wider than a set off at English law, but it is not so wide as a counter-claim.

3. Where a plaintiff sues several defendants alleging a joint debt, a defendant who denies the joint debt may plead a set off due to him alone.

4. A defendant respondent whose set off has not been decreed or has not been referred to in the decree, may make this a ground of cross-objection in appeal.

In regard to the last proposition it was pointed out that the lower court framed no issue on the set off and the judgment and decree do not refer to it. Under order VIII, rule 6(g) the plaintiff might have filed a written statement in reply to the set off, but he did not do so. He had admitted the facts alleged in the set off, and he depended for his defence to it on his claim that there was a joint debt. No issue was therefore necessary on the set off. It was apparently by oversight that the judgment and decree did not refer to it. When the court below dismissed the claim of the plaintiff to a joint debt, it should have decreed the set off in favour of defendants 1 to 3. This Court should remedy the omission and should grant the defendants respondents a decree for the set off.

NIAMAT-ULLAH, J.:—I agree with my learned brother in dismissing the appeal, but I wish to make a few observations with regard to the claim of defendants 1 to 3 in respect of the sum of Rs.212-12-0. I feel considerable difficulty in holding that the defendants' claim comes within the purview of order VIII, rule 6 of the Civil Procedure Code. Before considering the terms of rule 6, I would like to mention the nature of the claim made by the defendants. The plaintiff claimed a decree for Rs.7,068-9-9 against defendants 1 to 3, alleging that they belonged to one joint Hindu family and had two branches of the joint family business, one at Bahraich under the name and style of Sarju Prasad Bechu Lal and the other at Chilwaria under the name and style of Bechu Lal Lalta Prasad. According to the plaintiff's case the entire joint family was liable for sums due from one or the other of the two concerns. It is in evidence that each branch had a separate "khata" with the plaintiff. The "khata" standing in the name of the branch Bechu Lal Lalta Prasad showed a balance of Rs.212-12-0 against the plaintiff, so that the plaintiff had to pay that sum to Bechu Lal Lalta Prasad. On the other hand a sum of Rs.7,581-5-9 was

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due to the plaintiff in the "khata" of Sarju Prasad Bechu Lal. According to the plaintiff's allegations contained in his plaint, the sum of Rs.212-12-0 was due to the same body of individuals who were liable to pay to him Rs.7,581-5-9. Accordingly he gave credit for Rs.212-12-0, and claimed the balance of Rs.7,368-9-9. The defendants 1 to 3 resisted the plaintiff's claim and pleaded that they were not liable to pay any part of what was due from Sarju Prasad Bechu Lal, that is to say, any part of Rs.7,581-5-9. On the contrary they maintained that a sum of Rs.212-12-0 ought to be paid by the plaintiff to them. Paragraph 17 of their written statement was as follows: "Rs.212-12-0 are admittedly due to the contesting defendants by the plaintiff, for which a decree may be passed in favour of the contesting defendants. A court fee of Rs.16-8-0 is paid in respect thereof."

It is clear that defendants 1 to 3 intended to make a counterclaim against the plaintiff for Rs.212-12-0 and paid a court fee of Rs.16-8-0. For all practical purposes paragraph 17 of their written statement might well have been considered to be a plaint; and as the plaintiff did not deny that that sum was due to the firm Bechu Lal Lalta Prasad, a decree in favour of defendants 1 to 3 could have been passed but for the difficulty that the defendants' claim in its nature is one cognizable by the court of small causes, and the Additional District Judge, before whom the suit was pending had no jurisdiction to pass a decree in a suit cognizable by a court of small causes.

Order VIII, rule 6 of the Civil Procedure Code clearly contemplates cases in which the defendant claims to set off "*against the plaintiff's demand*" an ascertained sum of money legally recoverable by him from the plaintiff. Where the defendant does not claim a set off against the plaintiff's demand but a decree in his own favour, I doubt that order VIII, rule 6 can in terms apply. It is noteworthy that the

entire claim of the plaintiff is to be decreed against one set of the defendants without any set off while the claim of another set of the defendants is to be decreed in its entirety against the plaintiff. It is not a case in which the decree in favour of the defendant is in respect of the excess left after the set off. As my learned brother is inclined to take the view that order VIII, rule 6, applies, and as his view leads to substantial justice between the parties. I do not consider it desirable to record my dissent from his well considered decision. In this view I agree in decreeing the cross-objection in terms proposed by my learned brother.

BY THE COURT:—We dismiss this appeal with costs, and we decree the cross-objection with costs throughout.

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and
Justice Sir Lal Gopal Mukerji*

RAM PRASAD RAM AND ANOTHER (JUDGMENT-DEBTORS) *v.* JADUNANDAN UPADHIA (DECREE-HOLDER)*

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Limitation Act (IX of 1908), articles 181, 182(7)—Instalment decree—Instalments payable on specified dates—Default clause—On default of two successive instalments whole of the balance realisable—Option of decree-holder—Whether option recurrent or once for all—Starting point of limitation—Effects of failure to exercise such option—Civil Procedure Code, order XXI, rule 2—Uncertified payment out of court—Statement by decree-holder after filing application for execution.

A decree was made payable in annual instalments, beginning in 1925 and ending with 1932, on a specified date in June of each year. It was further provided that in case of default in payment of two consecutive instalments the decree-holder would be entitled to recover the whole of the balance in a lump sum. An application for execution was made in May, 1931, seeking to recover the last five instalments, namely those for 1928 to 1932; it did not mention whether the previous three instalments, for 1925 to 1927, had been paid or not. The judgment-debtors pleaded in reply that none of the instalments had been paid

*Second Appeal No. 92 of 1932, from a decree of Shiva Harakh Lal, Additional Subordinate Judge of Ballia, dated the 10th of November, 1931, confirming a decree of Shah Wali Alam, Munsif of Ballia, dated the 22nd of August, 1931.

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