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SHIVA SHANKAR DAS v. YUSUF HASAN

BY THE COURT—We allow the appeal and, setting aside the order of the court below, send the case back to that court with directions to restore the application for execution to its original number on the file and dispose of it according to law.

REVISIONAL CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice King

BHARTA (DEFENDANT) *v.* CHET RAM (PLAINTIFF)*

1933 *December*, 22

Civil Procedure Code, order VIII, rule 6—Set off and counter-claim—Limitation—Stare decisis—*Agra Tenancy Act (Local Act III of 1926), section 222—Jurisdiction—Civil and revenue courts—Revenue paid by a co-sharer which was payable by the lambardar, partly on account of his own share and partly on account of other co-sharers.*

Although order VIII, rule 6 of the Civil Procedure Code does not draw any distinction between a set off, which merely amounts to an adjustment or satisfaction of the plaintiff's claim, and a counterclaim, by which the defendant claims a decree for the surplus amount due to him, the courts in India have consistently recognized and adopted such a distinction, which is based upon a sound principle and is in accordance with the law in England, and have held that in the case of a merely defensive set off it is only necessary that the sum claimed as a set off should be within limitation at the date of the suit, whereas in the case of a counterclaim it should be within limitation at the date of the written statement; the result being that the defendant can get a set off up to the amount of the plaintiff's claim if the defendant's claim was not time barred at the date of the suit, but he cannot get a decree for the excess amount unless his claim was within time at the date of his written statement. This view, which has been consistently held by the courts, should not be departed from, on the principle of *stare decisis*.

It is not free from doubt whether section 222 of the Agra Tenancy Act applies to a suit by a co-sharer who has paid arrears of revenue which was payable by the defendant lambardar, not on account of the lambardar's own share, but on account of the shares of other co-sharers, and whether such a suit is cognizable by the revenue court or by the civil court.

*Civil Revision No. 509 of 1932.

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Dr. *N. C. Vaish*, for the applicant.

Mr. *B. Mukerji*, for the opposite party.

SULAIMAN, C. J.:—This is an application in revision by the defendant from a decree of the court of small causes. The plaintiff's case was that he as lambardar was entitled to recover water rates from tenants but the defendant wrongfully realised some rates from some of the tenants; that when the plaintiff claimed the amount from the tenants, they pleaded payment to the defendant, in consequence of which his suit was dismissed by the revenue court. Accordingly, the plaintiff claimed that as lambardar he is entitled to recover the amount from the defendant through the civil court. The defendant did not deny the fact that he had realised the sum claimed, but pleaded a set off on account of a payment made by him on account of default in the payment of Government revenue by the plaintiff. It appears that both the plaintiff and the defendant are lambardars, but it is admitted that the plaintiff alone was entitled to recover the water rates claimed in the suit. while he was liable to deposit the Government revenue which had been paid by the defendant on account of the plaintiff's default. The defendant claimed that Rs.133-10-9 was the amount paid by him towards the revenue, but he merely asked for a set off as against the plaintiff's claim without claiming a decree for the balance, that is to say, without any counterclaim.

The court below held that the defendant's claim for a set off was barred by time because, on the date when he filed the written statement, his remedy would have been barred by the law of limitation. It is admitted that his remedy would have been so barred on the date when the written statement was filed.

The first point for consideration in revision is whether the court was right in disallowing the claim for a set off.

No doubt in England a clear distinction has been drawn between a set off which merely amounts to an adjustment or satisfaction of the plaintiff's claim, and

a counterclaim under which a defendant claims a decree for the surplus amount due to him. Courts in India have adopted the same distinction and have held that in the case of a mere set off, in the strict sense of the word, the law of limitation should be considered to be applicable on the date on which the plaintiff's claim is brought; whereas in the case of a counterclaim the law of limitation should be applicable on the date when the written statement is filed. If we examine the language of the relevant provisions of the Code of Civil Procedure, there does appear to be considerable difficulty in accepting this distinction. Order VIII, rule 6 provides that where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, then he may present a written statement containing the particulars thereof. Then, sub-rule (2) provides that the written statement shall have the same effect as a plaint in a cross-suit. Sub-rule (3) says that the rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set off. We next have order XX, rule 19, under which 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. Sub-rule (3) provides that the provisions of this rule shall apply whether the set off is admissible under rule 6 of order VIII or otherwise.

It therefore follows that in the Code as it stands, there is no clear distinction between a mere set off and a counterclaim. In either event the defendant is called upon to file a written statement and the written statement is to have the same effect as the plaint in a cross-suit and the decree has to be for the recovery of any sum which appears to be due to either party, and this rule

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applies where the set off is under order VIII, rule 6 or under any other provision.

In the view which has prevailed in India and which has been accepted by all the High Courts in India, there would be a different *terminus ad quem* for the case of a mere set off and the case of a counter demand. In the former case the amount claimed must be legally recoverable by him on the date of the suit, while in the latter it must be legally recoverable by him on the date of his written statement. The result is that he can get a set off up to the amount of the plaintiff's claim, provided his claim was not time barred at the time of the suit. But if he wants to have a decree for the excess amount, he must show that it was not time barred at the time when he filed his written statement.

There is no doubt that in spite of the difficulty caused by the language of these rules, there is a sound principle drawing a distinction between the two classes of cases.

A good answer to the plaintiff's contention that the set off should be held to be time barred is that, strictly speaking, the Indian Limitation Act does not provide any bar of limitation in the case of a written statement. It is only by taking an equitable view that a plaintiff is allowed to take advantage of the bar of limitation against a defendant. No doubt in order VIII, rule 6 the words "legally recoverable" are to be found, but they can be interpreted to mean "legally recoverable at the time that the action is brought to recover an amount against which the defendant claims a set off".

It is, however, quite clear that following the view expressed in England, the courts in India have so far consistently adopted the same distinction. The learned counsel for the appellant has not been able to bring to our notice any case in which a contrary view has been definitely taken. Litigants have therefore acted upon this interpretation of the rules, and it would not be fair to the defendant if we depart from the view so consistently taken and adopt a new interpretation which

would throw out many written statements that might have been filed on the strength of the existing rulings. On this ground we think it would not be proper for us to depart from the view taken so far as regards the true interpretation of the rules. We accordingly hold that the defendant's claim for a set off in this case was not barred by time, inasmuch as it was legally recoverable on the date when the suit was filed.

The next point raised on behalf of the plaintiff respondent is that the defendant could not claim a set off because a suit brought by him to recover the amount claimed would not have been cognizable by the civil court at all. Unfortunately, this point was not raised clearly at the time of the trial, as the plaintiff did not file any replication by way of reply to the written statement filed by the defendant. But the facts are clear. The defendant claims that he paid some amount in the Government Treasury on account of the default made by the plaintiff as lambardar in payment of the arrears of revenue. He alleged that the payment was made by him on account of the plaintiff's share in the Government revenue. If we take his admission literally, it would follow that the amount was due on account of the plaintiff's own share and not on account of other co-sharers. In such a contingency section 222 of the Agra Tenancy Act would be applicable and the defendant would be allowed to sue the plaintiff in the revenue court for the recovery of this amount under that section.

Assuming that the whole of the amount so paid by the defendant was not due on account of the share of the plaintiff but was due both on account of the plaintiff's share as well as on account of the share of some other co-sharer, it is not yet ascertained how much was due on account of the other co-sharers.

There seems to be some force in the contention of the learned advocate for the appellant that if money is paid by a co-sharer on account of the amount due from

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other co-sharers who have paid the amount to the plaintiff lambardar, and the latter has defaulted, the suit would not, strictly speaking, fall within the language of sections 222 and 221 of the Agra Tenancy Act, if interpreted literally. It cannot fall under the former section because his claim is not for recovery of arrears of revenue on account of the defendant's share, nor can it fall under section 221 because the defendant co-sharer was not liable to pay the amount to the plaintiff lambardar inasmuch as the amount was not payable by the defendant co-sharer to the plaintiff lambardar.

The fact however remains that in the present case it is still unknown how much was paid on account of the plaintiff's own share and how much on account of the share of the other co-sharers. The defendant did not make any such specification in his written statement and it has not been ascertained by any court as to how much was actually paid by the plaintiff lambardar on account of the share of the other co-sharers. Without an inquiry into this question it is impossible to determine or ascertain how much was legally recoverable by the defendant which can be sued for in any civil court. The payment made by him was a lump sum without any specification. I, therefore, think that a claim for a set off in respect of such an unascertained sum cannot be allowed.

KING, J.:—I agree. Order VIII, rule 6 of the Civil Procedure Code does not make any distinction between a set off and a counterclaim. In all the cases to which we have been referred on this point, the courts have been unanimous in making a distinction between a defensive set off and a counterclaim in which the defendant asks for a decree to be passed for a sum of money in his favour. The courts have also been unanimous in holding that if the defendant pleads a set off merely as a defence to the plaintiff's claim, then it is only necessary

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that the sum claimed as a set off should be legally recoverable at the date of the institution of the plaintiff's suit. If, on the other hand, a defendant makes a counterclaim asking that a decree for a sum of money should be passed in his favour, then the courts are unanimous in holding that the sum claimed by him should be legally recoverable at the date when he makes his claim, that is, at the date when he files his written statement. There is some difficulty in interpreting the language of order VIII, rule 6 so as to make the words "legally recoverable" mean legally recoverable at the date of the institution of the suit in one case, and as meaning legally recoverable at the date when the counterclaim is made in another case. It appears, however, that the distinction between a defensive set off and a counterclaim is based upon a sound principle and is in accordance with the law in England. Moreover, the courts in India have been unanimous on this point and I think that we are bound to follow the unanimous trend of decisions.

On the question of jurisdiction, I think that the defendant who had paid a certain sum of money as arrears of revenue, which should have been paid by the plaintiff as a lambardar, should have brought his suit against the plaintiff in the revenue court under section 222 of the Agra Tenancy Act. If the revenue paid by the defendant is on account of the plaintiff's share, then there can be no doubt about it that the suit should have been brought in the revenue court. The only doubt arises when the revenue payable by the plaintiff was payable partly on account of his own share and partly on account of the shares of other co-sharers. In such a case, it might be argued that the language of section 222 does not strictly apply, because the arrears of revenue paid by the defendant would not strictly be on account of the plaintiff in the sense of being on account of the plaintiff's share of revenue, although in another sense it would be on account of the plaintiff because it would

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be on account of a sum which the plaintiff as lambardar was bound to pay. Probably, if the suit had been brought in the revenue court, no objection regarding the jurisdiction of the revenue court would ever have been raised. However this may be, the defendant himself stated that the revenue had been paid on account of the plaintiff's share, and if this is true, then it is clear that this sum could not have been recovered in a civil court. If, on the other hand, the sum was paid partly on account of other co-sharers, then the sum is not an ascertained sum and cannot be claimed as a set off.

BY THE COURT:—We accordingly dismiss this revision, but inasmuch as the revision fails on a ground not raised at the trial, we order that the parties should bear their own costs in both courts.

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

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GAEKWAR BARODA STATE RAILWAY (DEFENDANT) *v.* HABIB ULLAH (PLAINTIFF)*

Civil Procedure Code, section 20(c)—Foreigner—Suit against a subject of an Indian State—Jurisdiction—Powers of Indian legislature—Indian Councils Act, 1861 (24 *and* 25 *Vic. c.* 67) *—Indian Councils (Amending) Act,* 1865, (28 *and* 29 *Vic., c.* 17) *section* 1*—International law—Applicability to Indian States—Allegiance to Sovereign power—Civil Procedure Code, section* 86*—Suit against railway owned and run by Ruler of Indian State—Privilege—Waiver—Submission to jurisdiction by defending suit on merits—Civil Procedure Code, order XXIX—Suit against corporation in its own name*—Corporation sole—*Civil Procedure Code, order XXX, rule* 10*—Contract Act (IX of* 1872), *section* 39*—Anticipatory breach—Rescission of contract.*

Several contracts were entered into between the plaintiff, a timber merchant of Agra, and the Gaekwar Baroda State

*First Appeal No. 455 of 1929, from a decree of Maulvi Muhammad Junaid, Subordinate Judge of Agra, dated the 3rd of July, 1929.