defendant relief in respect of the monthly payment of Rs.40 and in respect of the rate of interest.

The result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

RADHEY SHIAM (PLAINTIFF-APPELLANT) *v.* MOHAMMAD NASIR KHAN AND ANOTHER (DEFENDANTS-RESPONDENTS)*

1937 *April*, 6

Civil Procedure Code (Act V of 1908), section 11, Explanation 4 and order XXIII, rule 1—Res Judicata—*Suit for possession—Set off claimed by defendant for certain constructions and repairs—Claim for set off subsequently withdrawn—Second suit for mesne profits—Claim for set off in second suit, if barred by* res judicata—*Order XXIII, rule 1, Civil Procedure Code, if applies to set off claimed in defence—Limitation Act (IX of 1908), Articles 61 and 120—Limitation applicable to claim for set off—Improvements made by co-sharer—Right of co-sharer to be reimbersed for costs of improvements.*

In a suit for possession it is not incumbent on the defendant to raise a plea of set off in respect of an amount spent by him on constructions and repairs of the property in suit or in other words it cannot be said that it was a defence that he ought to have raised in such a case within the meaning of Explanation 4 to section 11 of the Code of Civil Procedure. Where, therefore, a defendant raises such a plea of set off in a suit for possession but withdraws it in the end saying that he would bring a separate suit in respect of the amount due to him and the suit is decreed, then the defendant is not barred by Explanation 4 to section 11 of the Code of Civil Procedure from raising the claim of set off again in a subsequent suit for mesne profits from the date of delivery of possession in pursuance of the former decree up to the date of the subsequent suit. *Nawbut Pattak* v. *Mahesh Narayan Lal* (1), and *Fateh Singh* v. *Jagannath Bakhsh Singh* (2), distinguished.

*Second Civil Appeal No. 204 of 1935, against the decree of Babu Bhagwati Prasad, Civil Judge of Lucknow, dated the 7th of March, 1935, confirming the decree of Babu Girish Chandra, Munsif of Havali, Lucknow, dated the 31st of July, 1934.

(1) (1905) I.J R., 32 Cal., 654. (2) (1925) L.R., 52 I.A., 100.

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Order XXIII, rule 1 of the Code of Civil Procedure applies to suits and not to defences. Where, therefore, the defendant in a suit for possession having raised a claim for set off withdraws it at the last moment without the leave of the court, he can raise it again in a subsequent suit for mesne profits.

Article 61, Limitation Act, applies to a case in which the plaintiff has paid money which was due from the defendant to a third party. Where the defendant's claim is not for money that the plaintiff should have paid to a third party but is a claim for a set off for money spent by the defendant on behalf of and for the benefit of the plaintiff, the period of limitation applicable to the defendant's claim for set off is six years under Article 120, Limitation Act and not 3 years under Article 61. *Upendra Krishna Mandal* v. *Naba Kishore Mandal* (1), relied on. *Vyravan Chetty* alias *Somasundaram Chetty* v. *Deivasikamani Nataraja Desikar* (2) *Panuganti Narasimha Rao* v. *Vellanki Srinivasa Jagannatha Rao* (3), and *Suraj Prasad Dwarkadas* v. *Karmali Abdulmiya* (4), distinguished.

Where it is found that the improvements made by a co-sharer were necessary and there is no allegation, much less proof, that the other co-sharers ever objected to the said constructions while they were in progress, nor is there any allegation that the improvements in question were made with a view to embarrass the other co-sharers or at an inordinate expense, the co-sharer making the improvement is entitled to be reimbersed for their cost. *Solaiman Musaji Asmal* v. *Jatindranath Mandal* (5), distinguished. *Jokhu* v. *Saraswati* (6) and *Shiam Lal* v. *Radha Ballabh* (7), relied on.

Messrs. *D. K. Seth* and *R. K. Bose,* for the appellant.

Messrs. *Ehtisham Ali, Naziruddin* and *Habib Ali Khan,* for the respondents.

ZIAUL HASAN, J.:—This is a plaintiff's second appeal against a decree of the learned Civil Judge of Lucknow who affirmed a decree of the learned Havali Munsif, Lucknow.

In 1927 the present appellant brought a suit against the respondent for possession of certain shops situated in the Sadar Bazar, Lucknow, and the suit was decreed

(1) (1921) 25 C.W.N., 813.
(2) (1916) I.L.R., 39 Mad., 939.
(3) (1920) A.I.R., Mad., 819.
(4) (1920) I.L.R., 44 Bom., 591
(5) (1930) I.L.R., 57 Cal., 538.
(6) (1925) Oudh, 45.
(7) (1925) All., 770.

in respect of a one-fourth share in some of the shops and a moiety share in others. The plaintiff obtained formal delivery of possession in pursuance of this decree in November, 1930 and also realized mesne profits awarded to him by the decree up to the date of delivery of possession. The suit from which this appeal arises was brought by the plaintiff on the 18th of November, 1933, for recovery of mesne profits from the date of delivery of possession to him in pursuance of the former decree up to the date of the present suit.

The defence was that the defendant No. 1 had reconstructed three of the shops and re-roofed two of them, that he spent Rs.172 between 1924 and 1930 over the repairs of the shops, that the plaintiff's share of the money spent by him (defendant) came to Rs.681, that the plaintiff had agreed to pay this amount by deduction from the rent of the shops payable to him. It was further contended that the defendant had built at his own expense a room in the upper storey and that the plaintiff was not entitled to get a share in the rent of that room without paying Rs.1,000 as his proportionate share of the cost of that room. It appears that in the previous suit of 1927 also the defendant had raised these pleas but withdrew them in the end saying that he would bring a separate suit in respect of the amount due to him by the plaintiffs. On these pleas being raised again in the present suit the plaintiff pleaded that the pleas were barred by section 11 of the Code of Civil Procedure and by order II, rule 2 of the Code. It was further contended that the defendant No. 1's claim was barred by time.

The following issues were framed by the trial Judge:

(1) Did defendant 1 make the constructions and repairs as alleged in paragraph 9 of the written statement?

(2) If so, is he entitled to claim the amount spent by him on the constructions and repairs?

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(3) Is the plaintiff estopped from bringing this suit as pleaded in paragraph 10 of the written statement?

(4) Has the plaintiff a four anna share in the room on the upper storey of shops Nos. 1037/1 to 3 and (*c*)?

(5) Is the claim of defendant No. 1 for the repairs and constructions barred by time as pleaded by the plaintiff?

(6) Is it necessary for defendant No. 1 to pay court fee on the amount claimed by him?

(7) To what relief is the plaintiff entitled?

The first issue was decided by the learned Munsif in the affirmative. The second issue was also found in favour of the defendant and it was held that the actual cost of the constructions to which the plaintiff has to contribute rateably shall be determined at the time of the final decree. The third issue was found against the defendant. The fourth issue was found against the plaintiff and it was said that the plaintiff could not in the absence of evidence that the room was built out of the income of the shops in dispute treat it as joint property. On the fifth issue the learned Munsif held that the claim for plaintiff's share in the costs of the constructions even though barred by time must prevail as an equitable set off. The sixth issue did not arise as defendant paid the necessary court fee. In view of the findings mentioned above a preliminary decree for accounts was passed and the question of costs was left to be determined at the time of the final decree.

Dissatisfied with the above decree, the plaintiff appealed and in appeal the learned Civil Judge upheld the findings of the trial court but while dismissing the appeal added a direction that in the course of the final decree the costs of the room on the upper storey will be determined in case the plaintiff should consent to pay his proportionate share of the liability. The

plaintiff now brings this second appeal and the pleas put forward in the trial court and in the lower appellate court are again repeated. I shall consider each point separately.

The first plea is that the defendant's claim was barred by section 11 and order II, rule 2 of the Code of Civil Procedure. The learned counsel for the appellant relies on *Nawbut Pattak v. Mahesh Narayun Lal* (1) and *Fateh Singh* v. *Jagannath Bakhsh Singh* (2) but neither of these cases in my opinion helps the appellant. In the present case the defendant is not bringing a suit as he did in those cases, but only claiming a set off. I agree with the courts below that the defendant's plea was not barred either by section 11 or by order II, rule 2 of the Code of Civil Procedure. The learned counsel for the appellant relies on Explanation 4 to section 11 of the Code but under that Explanation it is necessary for the bar of *res judicata* to arise that the matter which shall be deemed to have been a matter directly and substantially in issue in the former suit should be such that it not only might but ought to have been made ground of defence or attack in the former suit. In the present case, however, it cannot be said with reason that it was incumbent on the defendant to raise the plea of set off in the previous suit for possession brought by the plaintiff. In other words, it cannot be said that it was a defence that he ought to have raised in that case. I therefore decide this point against the appellant.

Ziaul Hasan J.

The next point urged was that the defendant having raised the claim for set off withdrew it at the last moment and that as he did so without the leave of the court, he could not raise it again in the present suit. This plea is hardly worth any serious consideration as order XXIII, rule 1 of the Code of Civil Procedure applies to suits and not to defences.

(1) (1905) I.L.R., 32 Cal., 654. (2) (1925) L.R., 52 I.A., 100.

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The point that was most stressed on behalf of the appellant was that the claim for set off was barred by time and in this connection reliance was placed on *R. M. M. S. T. Vyravan Chetty* alias *Somasundaram Chetty* v. *Srimath Deivasikamani Nataraja Desikar* (1) and *Panuganti Narasimha Rao* v. *Sree Raja Vellanki Srinivasa Jagannath Rao* (2). These cases no doubt support the appellant's contention to a certain extent but in the case of *R. M. M. S. T. Vyravan Chetty* alias *Somasundaram Chetty* v. *Srimath Deivasikamani Nataraja Desikar* (1) itself SESHAGIRI AYYAR, J., remarked:

> "I am therefore of opinion that as the defendant's claim was barred by limitation the plea of equitable set off was not open to him. An exception to this rule has been recognized in some cases. Where there is a fiduciary relationship between the parties as in the case of trustee and *cestui que* trust and there is accountability, even barred claims may be taken into account in passing the final accounts. This exception has been extended in some of the decided cases in India to mortgages, persumably on the ground that there is accountability between the parties."

Moreover, the period of limitation applicable to the respondent's claim for set off is in my judgment six and not three years. The learned counsel for the appellant argues that the proper limitation for a claim of the nature put forward by the defendant is under article 61 of the first schedule of the Indian Limitation Act which applies to a claim "for money payable to the plaintiff for money paid for the defendant". It appears to me that this article applies to a case in which the plaintiff has paid money which was due from the defendant to a third party. Here the defendant's claim is not for money that the plaintiff should have paid to a third party but for money spent by the defendant on behalf of and for the benefit of the plaintiff. I am supported in this view by the case of *Upendra Krishna Mandal* v. *Naba Kishore Mandal* (3). In this case P and D were

(1) (1916) I.L.R., 39 Mad., 939. (2) (1920) A.I.R., Mad., 819.
(3) (1921) 25 C.W.N., 813.

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owners of an insanitary tank, and for ignoring an order of the Municipal Corporation for filling up the tank. were sued criminally whereupon P filled up the tank and brought a suit for contribution against D who also was in receipt of rent from the tenants who were settled on the filled up tank. It was held that this was clearly a case under section 70 of the Contract Act and the article 120 of the Indian Limitation Act applied and not article 61 as the liability arose when the tank was filled up and the contemplated benefit conferred. In the course of his judgment MOOKERJEE, C. J., distinguishing the case of *Sukhamoni* v. *Ishan Chunder* (1), remarked:

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> "Here, however, the position is entirely different. The liability of the defendant did not arise in successive fragments as plaintiff paid money to the contractor from day to day; the liability arose when the tank was filled up and the contemplated benefit conferred. In such circumstances the District Judge has rightly held that article 120 was applicable and time ran against the plaintiffs from the date of completion of the work."

The learned counsel for the appellant relies on *Suraj Prasad Dwarkadas* v. *Karmali Abdulmiya* (2) but this was a case in which the plaintiff and the defendant jointly owned a well. They entered into a registered agreement to the effect that the repairs of the well were to be made by them jointly. The repairs were effected by the Municipality at the instance of the plaintiff who paid a certain amount to the Municipality in 1911. The plaintiff having sued the defendant in 1916 for the contribution claimable in respect of the repairs of the well, it was contended that the suit being covered by article 116 of the Indian Limitation Act, was not barred by limitation. In this case reliance was placed on article 116 of the Limitation Act on account of the registered agreement but it was held that the suit was really one for contribution and the proper period was rightly held, if I may say so with respect, to be three

(1) (1898) L.R., 25 I.A., 95. (2) (1920) I.L.R., 44 Bom., 591.

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years as it was a claim for money paid by the plaintiff on behalf of the defendant who owed money for repairs of the well to the Municipality. The constructions in dispute in the present case were begun in 1929 and the claim for set off was put forward by the defendant in 1933 well within six years of even the commencement of the constructions. The claim was not therefore barred by time.

The last point urged on behalf of the appellant was that the defendant having made the constructions in question without the plaintiff-appellant's consent was not entitled to be reimbursed for their cost. The case of *Solaiman Musaji Asmal* v. *Jatindranath Mandal* (1) relied on by the counsel for the appellant does not appear to help him much. It was held in that case that it would be unjust to permit a co-tenant at his pleasure to charge another co-tenant with improvements he may not have desired and that in such a case the improver stands as a mere volunteer and cannot without the consent of his co-tenant lay the foundation for charging him with improvements. In the present case however it has been found by both the courts below that the improvements made by the defendant were necessary and there is no allegation, much less proof, that the plaintiff ever objected to the said constructions while they were in progress. In the case of *Jckhu* v. *Musammat Saraswati* (2) the learned Judicial Commissioner of Oudh held that when one of several co-sharers re-constructs joint property without protest from the other co-sharer it is equitable that when the other sharers demand their share of the property they should be called upon to defray the proportionate expense of the new constructions. A similar view was taken in *Shiam Lal* v. *Radha Ballabh* (3) in which it was held that where a co-tenant spends money and restores a property which is in ruins to a state in which it is of use and can bring in some profit he is entitled to

(1) (1930) I.L.R., 57 Cal., 538. (2) (1925) Oudh, 45.
(3) (1925) All., 770.

compensation at the hands of the other co-tenants though he may not have made improvements with the consent of the other co-sharers provided he has not made the improvements with a view to embarrass his co-sharers at the time of partition. In the present case there is no allegation that the improvements in question were made with a view to embarrass the plaintiff or at an inordinate expense.

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The result is that I find no force in any of the pleas raised by the appellant and dismiss this appeal with costs. The decree of the learned Civil Judge will stand.

Appeal dismissed.

REVISIONAL CIVIL

Before Mr. Justice H. G. Smith

BALDEO NARAIN (APPLICANT) *v.* DEBI DIN AND ANOTHER (OPPOSITE-PARTY)*

1937 *April*, 7

United Provinces Agriculturists' Relief Act (XXVII of 1934), sections 2(5) and 5(1)—Provincial Small Cause Courts Act (IX of 1887), section 25—Instalments under section 5(1) refused by Small Cause Court—Appeal under section 5(2) or revision under Small Cause Courts Act, whether proper remedy.

Where the Court of Small Causes declines to grant instalments under section 5, sub-section (1) of the United Provinces Agriculturists' Relief Act the remedy is an appeal under section 5(2) of the Act, and not an application under section 25 of the Small Cause Courts Act. According to section 2(5) of the Agriculturists' Relief Act, the word "Court" means a Civil Court, and therefore includes a Small Cause Court. The special provisions of the United Provinces Agriculturists' Relief Act are not restricted by anything contained in the Provincial Small Cause Courts Act. In other words, the provisions for an appeal which are contained in section 5(2) of the Agriculturists' Relief Act are not curtailed or governed by section 27 of the Provincial Small Causes Courts Act, so as to make an application under section 25 of that Act, the proper remedy

*Section 25 Application No. 12 of 1936, against the decree of Babu Pratap Shankar, First Additional Judge, Small Cause Court, Lucknow, dated the 19th of October, 1935.