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MA MYA SHWE AND TWO v. MAUNG MAUNG.

LENTAIGNE, J.

In my opinion it is therefore immaterial what findings we should come to on the facts except in so far as it affects the question of costs. For the latter purpose I may say that I agree with the findings of fact come to by my brother Carr.

The defendants failed to take the point of law as to absolute privilege in the District Court, but instead allowed the case to go to a lengthy trial on the facts; and it is obvious that on the facts the case arose from the hasty action of the defendants, who have made allegations which they have failed to establish, besides making most contradictory statements in the different proceedings. It was only on this appeal that the appellant urged the law points on which the appeal has been decided. Under the circumstances I would direct each party to bear his or her costs in both Courts.

APPELLATE CIVIL.

Before Mr. Justice Lentaigne, and Mr. Justice Carr.

HOE MOE
v.
I. M. SEEDAT.*

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Mar. 24.

Set-off, valuation of—Set-off and plea of payment—Pecuniary jurisdiction—Rangoon Small Cause Court—Suits Valuation Act (VII of 1887), section 8—Rangoon Small Cause Court Act, 1920, section 13—Civil Procedure Code (V of 1908), Order 8, rule 6 (1)—Promissory-note and receipt, burden of proof of payment of consideration.

The plaintiff sued the defendant in the Rangoon Small Cause Court for work done and materials supplied to the defendant's house for which Rs. 3,567-1 had become due to him and towards which he had received payments aggregating to Rs. 1,600. The defendant admitted that Rs. 3,567-1 had been due; but pleaded that he had made four payments totalling Rs. 3,000 and also that he

* Special Civil First Appeal No. 36 of 1923 from the decree of the Small Cause Court of Rangoon in Civil Regular No. 7226 of 1922.

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had lent plaintiff Rs. 1,300 under a promissory-note bearing interest, and that the plaintiff had agreed to credit the amount of the promissory-note to his bills and to pay the amount that may be found due in excess. He claimed by way of set-off Rs. 1,005-15 as balance due to him and paid Court-fees on that amount. It further appeared that the receipts produced by the defendant were in the form of promissory-notes.

Held, that the fact that the defendant claimed only Rs. 1,005-15 was not the test to be applied in this case in order to ascertain whether the set-off is within the pecuniary limits of the jurisdiction of the Court, and that the proper test must be whether the ascertained sum or the aggregate of the ascertained sums, which the defendant seeks to set-off does not exceed the pecuniary limits of the jurisdiction of the Court.

Held, *also*, that where documents admitted by both parties to be *mere* receipts for money paid were taken on partially filled up forms of a kind ordinarily used for promissory-notes, the burden of proof of the amount of each payment lay on the party alleging that he had made such payment.

Per LENTAIGNE J.—" It is also necessary to distinguish between a plea of payment and a defendant's plea of set-off. In the case of a plea of payment, the allegation in effect means that the debt or amount of the demand alleged to be due to the plaintiff (or, in the case of a partial payment, the amount of the debt or demand *pro-tanto* paid off) had ceased to be due by reason of the alleged payment, and that consequently, it was not a just demand validly in existence at the time of the institution of the suit, or at the time of the written statement, as the case may be. This plea is quite different in its nature from a plea of set-off raised by the defendant under the Code, which is in effect a request that the debt or amount to be found due to the plaintiff shall *thereafter* be treated as extinguished or satisfied in whole or *pro-tanto* by being set-off against the debt or ascertained sum due to the defendant."

Brojendra Nath Das v. *Budge Budge Jute Mills Co.*, (1893) 20 Cal., 527—*referred to.*

Campagnac—for the Appellant.

Villa—for the Respondent.

LENTAIGNE, J.—The Plaintiff-Appellant sued the Respondent in the Court of Small Causes, Rangoon, alleging that he had done work and supplied material to respondent's house for which Rs. 3,567-1 had become due to him and that he had received payments aggregating Rs. 1,600, and he prayed for a decree for the balance Rs. 1,967-1.

The respondent in his written statement dated the 12th December admitted that Rs. 3,567-1 had been due to plaintiff appellant as alleged but he

stated that he had made the following four payments totalling Rs. 3,000, namely :—

	Rs.
On the 27th January 1922 ...	100
On the 11th February 1922 ...	300
On the 26th February 1922 ...	1,200
On the 20th February 1922 ...	1,400
Total ...	3,000

In his written statement respondent also alleged that on the 14th May 1922 he had lent Rs. 1,300 to plaintiff under a promissory-note bearing interest at Rs. 3 per cent. per mensem, that plaintiff had agreed to credit the amount of this promissory-note to his bills and to pay defendant the amount that may be found due in excess. He then deducted the alleged payments of Rs. 3,000 from the admitted total of Rs. 3,567-1 and treated Rs. 567-1 as the balance. Then he calculated interest on Rs. 1,300 from the date of the promissory-note to that date and added the amount of Rs. 273, so calculated to the Rs. 1,300, principal on the promissory-note ; and deducted the amount of Rs. 567-1 from the total—and claimed the sum of Rs. 1,005-15 as a balance due to him, and paid a Court-fee on that amount as an amount claimed by way of set-off.

I may here point out that even on the face of this written statement, it appears open to question whether the defendant was entitled to claim interest on more than the difference between Rs. 567-1 and Rs. 1,300 as there is in effect an admission that the Rs. 1,300 was to be applied towards payment of the balance due to plaintiff, and if so, it would have effected a payment and a corresponding reduction of the principal amount when it was first ascertained that

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a portion should have been applied to such debt; and that point appears to have escaped the attention of everybody.

In the written statement the defendant also referred to another promissory-note for Rs. 1,300 dated the 14th August 1922 which was only referred to because defendant intended to file a subsequent suit on it.

The plaintiff then filed a reply to this defence and repeated his allegation that he had received payments aggregating only Rs. 1,600 and consisting of the following amounts which he stated are entered in his Chinese Books :—

		Rs.
On 3rd January 1922	...	100
On 3rd February 1922	...	300
On 13th March 1922	...	200
On 21st April 1922	...	400
On 15th May 1922	...	300
On 12th July 1922	...	300
Total	...	1,600

He also added the statement that when he took advances his signature was taken on printed receipts which were blank except for the figures which were written thereon in ink; and that he did not know how to read or write English except that he recognised English figures, and that he did not know what was printed on the receipts. These allegations acquire some significance when one examines the documents relied on by the defendant which had already been filed in the suit six days prior to this reply, and this point will be discussed later on. Plaintiff further alleged that the cross claim for Rs. 1,005-1 was a false claim and (in addition to a general denial), he questioned the

admissibility of such set-off. This reply was filed on the 19th December 1922, and on the same date the following entry was made in the diary :—

"Surty. Plaintiff admits the first four receipts filed with the written statement but not the 5th receipt for Rs. 1,400. He denies signature on that. Also disputes the amounts on the 3rd and 4th receipts (promissory-notes)."

If this entry in the diary is read together with the plaintiff's reply and as referring to the documents filed by the defendant in the sequence in which they are marked as exhibits and appear on the record, the points in dispute would be the general dispute arising on the allegation that the printed forms were in blank when signed, and the following additional points as regards particular documents :—

Exhibit 1 (*a*).—Promissory-note for Rs. 100 dated 27th January is admitted as a receipt signed by plaintiff but the date of payment is alleged to have been the 3rd January 1922.

Exhibit 1 (*b*).—Promissory-note for Rs. 300 dated 11th February 1922 is admitted as a receipt signed by plaintiff, but the date of payment is alleged to have been the 3rd February 1922.

Exhibit 1 (*c*).—Promissory-note for Rs. 1,200 dated the 26th February 1922 is admitted as a receipt signed by plaintiff, but the amount is disputed and it is said to refer to a payment of Rs. 200 on the 13th March.

Exhibit 1 (*d*).—Promissory-note for Rs. 1,300 dated the 14th May 1922 with a clause for interest at 3 per per cent. per mensem is admitted as a receipt signed by plaintiff but the amount is disputed and it is said to refer

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to a payment of Rs. 300 made on the 15th May.

Exhibit 1 (*e*).—A receipt for Rs. 1,400 dated the 20th March 1922 is disputed and the signature is denied but a payment of Rs. 400 is admitted for the 21st April.

Exhibit 2.—Promissory-note for Rs. 1,300 dated the 14th August 1922 with clause for interest at 3 per cent. per mensem was not put to plaintiff on the 19th December and apparently it had not then been filed in Court. I find however that it was put to the plaintiff at the hearing of the suit, and he then admitted signature of it but in effect alleged that the figures as to the amount of Rs. 300 had been altered to Rs. 1,300 his statement of reply had alleged a payment of Rs. 300 on the 12th July 1922.

Exhibit 3.—An undated promissory-note form in blank except for entries of figures of Rs. 600 and the signature of the plaintiff is apparently on a similar form to that used by defendant and was produced and filed by plaintiff who said that it did not refer to amounts on the contract sued on.

On the 6th February 1922 the case came on for trial and the plaintiff made a belated application for discovery which was refused. But the learned Chief Judge then made a note which shows that he had not realised the real position taken up by the plaintiff in his reply, and that he thought that the sole intelligible point of the reply was the denial of the receipt for Rs. 1,400. Evidence was then recorded and the plaintiff was refused the right to cross-examine the defendant as to the alleged fraudulent insertion of the figure "1" in one of the

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documents on the ground that this was a new line of attack not raised in the pleadings. On the following day the learned Chief Judge delivered judgment dismissing the plaintiff's suit with costs and granting the defendant a decree for the balance claimed under the set-off with costs.

The present appeal is against that decision. The first objection is the contention that the set-off pleaded by the defendant was really one for a series of amounts exceeding Rs. 4,500 in the aggregate and more than Rs. 2,900 in excess of the set-off or payments allowed by the plaintiff; that therefore the set-off was in excess of the pecuniary limits of the jurisdiction of the Court, and that the Court had no jurisdication to entertain the set-off. In order to obtain a clear conception of the points of law arising on this contention and in order to clear away some misconceptions, it should be noted that there is an important difference between the method of valuation for purposes of jurisdiction permissible in the case of a claim for money decree made in a plaint and the method of valuation for purposes of jurisdiction permissible in the case of a set-off pleaded by a defendant in his written statement.

Section 8 of the Suits Valuation Act, 1887, is ordinarily the provision regulating the valuation of a suit for the purpose of jurisdiction but in the case of the Rangoon Court of Small Causes, section 13 of the Rangoon Small Cause Courts Act, 1920, limits the jurisdiction of the Court *inter alia* to the trial of suits in which the amount or value of the subject matter does not exceed two thousand rupees; and it also contains an additional provision in the form of an "Explanation" which provides that—"When in any suit the sum claimed is, by a set-off admitted by both parties, reduced to a balance not

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exceeding two thousand rupees, the Court shall have jurisdiction to try such suit."

I think, however, that the application of the "Explanation" in question should be limited to the valuation of the plaintiff's claim, because the same Act also provides for the application to the suit of the provisions of the Code of Civil Procedure relating to set-off; and Order 8, Rule 6 (1) of the Code indicates that a similar method of reducing valuation for the purposes of jurisdication is not permissible in the case of a set-off pleaded by a defendant in his written statement. That rule commences with the words:—"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, *not exceeding the pecuniary limits of the jurisdiction of the Court* . . ." etc., I think that the words "not exceeding the pecuniary limits of the jurisdiction of the Court" must be construed as applying to the whole of the "ascertained sum." I assume that it was in consequence of this construction of the above rule relating to what is known as a "legal set-off" that the Calcutta High Court held in the case of *Brojendra Nath Das* v. *Budge Budge Jute Mills Company* (1), that even in the case of an equitable set-off it was not permissible for the defendant in the Calcutta Court of Small Causes after admitting the plaintiff's claim for Rs. 1,197-5-6, to plead an equitable set-off of Rs. 2,738-4 being the compensation or damages representing the loss caused by a breach of contract, and after allowing for and deducting therefrom the amount of the admitted claim, to claim a decree for the balance Rs. 1,540-14-6, because the Rs. 2,738-4 was in excess of Rs. 2,000

(1) (1893) 20 Cal., 527.

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the pecuniary limits of the jurisdiction of that Court.

For the above reasons I would hold that the fact that the defendant claims only Rs. 1,005-15 is not the test to be applied in this case in order to ascertain whether the set-off is within the pecuniary limits of the jurisdiction of the Court, and that the proper test must be whether the ascertained sum, or the aggregate of the ascertained sums, which the defendant seeks to set-off does not exceed Rs. 2,000 the pecuniary limits of the jurisdiction of the Court.

In the present case it is also necessary to distinguish between a plea of payment and a defendant's plea of set-off. In the case of a plea of payment, the allegation in effect means that the debt or amount of the demand alleged to be due to the plaintiff (or, in the case of a partial payment, the amount of the debt or demand *pro-tanto* paid off) had ceased to be due by reason of the alleged payment, and that consequently, it was not a just demand validly in existence at the time of the institution of the suit, or at the time of the written statement, as the case may be. This plea is quite different in its nature from a plea of set-off raised by the defendant under the Code, which is in effect a request that the debt or amount to be found due to the plaintiff shall *thereafter* be treated as extinguished or satisfied in whole or *pro-tanto* by being set-off against the debt or ascertained sum due to the defendant. In short, a payment refers to a satisfaction or extinguishment effected prior to the raising of the defence of payment, whilst a defendant's plea of set-off prays for a satisfaction or extinguishment commencing in the future after the date of the plea.

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As I have stated above, the defence in the written statement is in effect an allegation that the original liability of defendant to the plaintiff had been satisfied by payments to the extent of Rs. 3,000, and that consequently there was only an admitted liability for a balance of Rs. 567-1 ; and against this balance the defendant further pleaded a right to claim a set-off of a sum of Rs. 1,573 being the principal and interest due on a promissory-note. In that form I can see no legal objection to that defence or against the right of the defendant to claim such balance ; and the fact that defendant also alleged an agreement made at the time of the execution of the promissory-note that it should be applied towards payment of any balance due to plaintiff does not affect that question.

The complication however arises when we refer to the documents Exhibits 1 (*a*), 1 (*b*) and 1 (*c*) filed with that written statement and relied on in support of the defence though not in fact either pleaded or relied on in the written statement. These documents purport to be promissory-notes and not receipts for money paid. The written statement treats the amounts covered by these documents as payments made on the dates specified on the documents ; but that allegation is inconsistent with the wording of the documents as promissory-notes, because if the documents were executed as and intended to be promissory-notes, they could not have been payment on the dates they bear, though each note might subsequently have been turned into a payment by a separate agreement, such a separate agreement has not been alleged either in the written statement or in the evidence, and it is noticeable that the Exhibits 1 (*a*), 1 (*b*) and 1 (*c*) are still in the hands of the payee and do not contain any indorsement

indicating that they have been discharged by being set-off against the debt due to the plaintiff. Consequently, if these documents are taken at their face value as promissory-notes, they in fact contradict the defendant's allegation as to payment, and they could only be the basis of a set-off, and in that respect the set-off (including the aggregate of these documents and that in Exhibit 2) being in excess of the pecuniary limits of the jurisdiction of the Court would be inadmissible; and the plaintiff would be entitled to a decree for his claim with costs.

On the other hand if these documents were considered to be mere receipts, they would properly remain with defendant; the plaintiff admits the payments in Exhibits 1 (*a*) and 1 (*b*) though on different dates from such documents and, also admits a payment of Rs. 200 under Exhibit 1 (*c*) on a different date; and asserts that he executed such documents as receipts, and the written statement in its present form is possibly in effect an admission of the correctness of the allegation of the plaintiff that these documents were mere receipts, though with this difference that the defendant asserts that Rs. 1,200 and not merely Rs. 200 was paid under Exhibit 1 (*c*). For this point it is not necessary to repeat the other points in dispute as to the entries in the documents. If the documents are regarded as receipts, the onus of proof that Rs. 1,200 was paid under Exhibit 1 (*c*) would lie on the defendant. This would be the position arising on the pleadings where no document except Exhibit 1 (*d*) out of the documents relied on as a defence is alleged to be a promissory-note. No cross-claim is now made on Exhibit 2. I think that the written statement and not the outside documents which were not specified in the written statement should be the guide to the

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decision of the question as to the admissibility of the set-off; and that the onus of proof should be placed on the defendant to prove the alleged payment of Rs. 1,200 and that for such purpose he should not be allowed to treat Exhibit 1 (*c*) as other than a receipt, unless he applies to amend his written statement. Of course if he applies to amend his written statement, the question of the admissibility of the set-off will then arise on the different allegations.

* * * * *

CARR, J.—I concur.

(Suit remanded.)

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

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May 2.

NASU MEAH
v.
KING-EMPEROR.*

Criminal Procedure Code, section 562—Failure to furnish security by an accused person ordered to be released—Correct procedure—Before passing order Magistrate should satisfy himself that security can be given.

Held, that before passing an order under section 562 of the Code of Criminal Procedure directing an accused to be released on his entering into a bond with sureties, the Magistrate must satisfy himself that the accused is in a position to furnish security.

CARR, J.—On the merits of this case I see no sufficient reason to interfere with the conviction.

But the Magistrate has gone wrong in his procedure. He ordered that the appellant be released on security

* Criminal Appeal No. 373 of 1924 against the order of the Third Additional Magistrate of Rangoon, dated the 10th day of March 1924 passed in Criminal Regular Trial No. 200 of 1924.