

We think, therefore, that in this case as the plaintiff has shown that the certificate for ten cases was not produced, and the defendants have not shown why it was not produced, they are certainly liable on their bond to the extent to which they failed to perform its condition, and therefore it would be reasonable to exact one-fifth of the penalty.

The papers therefore will be returned to the Political Resident with this expression of our opinion.

Costs will be costs in the appeal.

SHAH, J. :—I agree.

J G, R.

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## APPELLATE CIVIL.

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*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.*

SARDAR T. G. GOKHALE (ORIGINAL DEFENDANT NO. 2), APPELLANT *v.* RAMCHANDRA TRIMBAK KIRTANE AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS\*.

1921.

January 28.

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*Set off—Suit by liquidators on joint promissory note—Claim to set off separate debt—Indian Companies Act (VII of 1913), section 229—Provincial Insolvency Act (III of 1907), section 30—Mutual dealings—Indian Contract Act (IX of 1872), section 43.*

One of two defendants, sued on a joint promissory note by the liquidators of a bank, sought to set off an amount admittedly due to him from the bank on his own separate deposit account :

*Held*, that, under the Indian Companies Act (VII of 1913), section 229, the provisions of the Provincial Insolvency Act (III of 1907), section 30 applied, and, the dealings in question not being "mutual dealings" within the meaning of that section, the amount claimed could not be set off.

As to the effect of section 43 of the Indian Contract Act,

Per MACLEOD, C. J. :—"I do not think that the mere fact that a suit could lie against one of two joint promissors could alter the fact that the

\* Second Appeal No. 475 of 1920.

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original liability of defendant No. 2 was incurred, not on his own account only, but jointly with another, and so result in the nature of the dealings taken as a whole being altered."

SECOND appeal against the decision of P. E. Percival, District Judge of Poona, reversing the decree passed by R. T. Kirtane, Subordinate Judge at Poona.

Suit on a promissory note.

The plaintiff Bank, (in liquidation) by its liquidators sued to recover a sum of Rs. 1,800, due on a promissory note passed by the defendant.

The defendant No. 1 did not appear.

Defendant No. 2 admitted the promissory note but claimed to set off against the amount of the note, a sum of Rs. 7,000 due to him by the Bank on deposit account.

The Subordinate Judge held that the liquidators were bound to set off the debt against the balance in favour of second defendant and to sue only for the amount due to the Bank; that this right of set off in favour of the debtor was recognised by section 229 of the Indian Companies Act read with section 30 of the Provincial Insolvency Act. He, therefore, dismissed the suit.

On appeal, the District Judge held that the set off claimed by the second defendant could not be allowed. His reasons were :

"There must be mutual dealings between the parties, that the mutual nature of the debt is to be considered not the mutual nature of the parties. For instance the fact that the debt in question would be recoverable in cross action is not sufficient for the purpose of a set off. If the debt is contracted in a different capacity the set off cannot be claimed".

The decree of the Subordinate Judge was therefore reversed, and suit allowed against both the defendants.

Defendant No. 2 appealed to the High Court.

*S. R. Bakhale*, for the appellant.

*J. R. Gharpure*, for the respondents.

MACLEOD, C. J.—The question in this appeal is whether the second defendant who was sued together with the first defendant on a joint promissory note for Rs. 1,800 can seek to set off against the Bank's claim on the promissory note the amount admittedly due to him from the Bank of his deposit account. Under section 229 of the Indian Companies Act—

“In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent...”.

We have, therefore, to refer to section 30 of the Provincial Insolvency Act which says:—

“Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively”.

The question, therefore, is whether the dealings in respect of the joint promissory note, and the dealings between the Bank and the second defendant in respect of his deposit account, were mutual dealings. That question arose in Civil Extraordinary Application No. 146 of 1918 between the liquidators of the Deccan Bank, who are now before us, and the then two defendants who had together borrowed money on a promissory note, and made themselves jointly and severally responsible for the debt. It was held by Mr. Justice Heaton that those were not mutual dealings. It is undisputed that a joint debt cannot be set off against a separate debt either under the English Bankruptcy Act or under the Indian Insolvency Acts. But it has been argued

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that there is this difference, that under the Indian Contract Act joint promissors are jointly and severally liable, so that a suit could be filed against one without joining the other, and, therefore, it could be deduced, that since defendant No. 2 could have been sued separately on this promissory note by the liquidators, therefore he could have set off the amount due on his deposit account. I do not think that the mere fact that a suit could lie against one of two joint promissors could alter the fact that the original liability of defendant No. 2 was incurred, not on his own account only, but jointly with another, and so result in the nature of the dealings taken as a whole being altered. I think, therefore, that since the dealings on the deposit account and on the promissory note were of a different character, they cannot come within the term "mutual dealings". Therefore the judgment of the lower appellate Court was right. The appeal must be dismissed with costs.

SHAH, J. :—I agree.

*Appeal dismissed.*

J. G. R.

## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.*

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BHAILAL CHATURBHAI PATEL (ORIGINAL DEFENDANT), APPELLANT v.  
KALYANRAI VRAJRAI DESAI (ORIGINAL PLAINTIFF), RESPONDENT<sup>o</sup>.

*Contract—Sale of goods—Delivery of goods to be given on arrival of a steamer—Steamer arriving without goods—Warranty that the goods were on board the steamer—Vendor liable for breach of contract.*

The defendant contracted to sell goods to the plaintiff under the following terms : " We have duly made a contract to give you the delivery of two tons