

1921.

Legislature and not upon such *a priori* considerations as the argument suggests.

VACUUM OIL
COMPANY
v.
THE
SECRETARY
OF STATE
FOR INDIA.

I think, therefore, that the decision of the trial Court is perfectly right.

Solicitors for the appellants : Messrs. *Crawford & Co.*

Solicitors for the respondents : Messrs. *Little & Co.*

Appeal dismissed.

G. G. N.

ORIGINAL CIVIL

Before Sir Norman Macleod, Kt., Chief Justice, and Mr Justice Coyajee.

1922.

January 26.

VITHALDAS GULABDAS SETH, APPELLANT (PLAINTIFF) v. THE HYDERABAD PINNING & WEAVING CO., LTD., RESPONDENT (DEFENDANT)*.

Civil Procedure Code (Act V of 1908), Order VIII, Rule 6—Set-off—Claim for damages—Distinction between equitable set-off and counter-claim—High Court Rules (1909), Rule 118—Jurisdiction—Practice.

The plaintiff, a resident of Hyderabad (Deccan) sued the defendant company to recover the amounts payable to him as a share-holder in respect of two dividends declared by the company. The defendant company claimed that they were entitled to recover damages for breach of contract against two firms in which the joint family of which the plaintiff was the manager was a partner, and that the plaintiff being liable to pay those damages the defendant company were entitled under Article 131 of the Articles of Association of the company to deduct from the dividends payable to the plaintiff "all sums of money due from him to the company". In the alternative, the defendant company counter-claimed that in the event of it being held that the amount of the damages could not be set off against the claim in respect of the dividends, the plaintiff as the head of the joint family might be ordered to pay to the defendant company a reasonable sum by way of damages for breach of contract.

* O. C. J. Appeal No. 120 of 1921.

The plaintiff took out a summons for an order that the counter-claim of the defendant company might be excluded or that the Court should refuse permission to the defendants to avail themselves of the counter-claim and require them to file a separate suit in respect thereof. The summons was adjourned to the hearing of the suit.

Held (reversing the order of the trial Judge), (1) that the counter-claim must be struck out inasmuch as if the defendants were to file a separate suit on the subject matter of the counter-claim, the Court could have no jurisdiction to try the same as the plaintiff resided and the whole of the cause of action arose outside the jurisdiction ;

(2) that the defendants were not entitled to set off against the plaintiff's claim for dividends their claim for damages for breach of contract as it was not "money due" to the company within the meaning of Article 131 of the Articles of Association ;

(3) that, apart from the said Article 131, the defendants were not entitled to an equitable set-off as the claim for damages did not arise from the same transaction as that which was the subject matter of the plaintiff's suit.

Friendtoveen v. Hamlyn & Co.⁽¹⁾, distinguished.

APPEAL from an order of Kajiji J. in a Chamber Summons for striking out counter-claim of defendants.

The plaintiff, Seth Vithaldas Gulabdas, who resided at Residency Bazar, Hyderabad (Deccan), was the registered holder of thirty-six shares in the defendant company having its office in Church Gate Street within the Fort of Bombay.

Prior to 17th April 1919, the said shares stood in the name of the plaintiff's brother, Jivandas Gulabdas, and on his death were transferred to the plaintiff's name. The shares formed part of the joint family property of the deceased Jivandas, the plaintiff and other members of the family.

On 26th January 1920, the plaintiff received from the Secretaries, Treasurers and Agent of the defendant company printed notice, dated 22nd January 1920, notifying declaration of the 72nd dividend at the rate of Rs. 150 per share for the year ending 30th June 1919

⁽¹⁾ (1892) 8 T. L. R. 231.

1922.

VITHALDAS
GULABDAS
v.
THE
HYDERABAD
SPINNING
AND
WEAVING
Co., LTD.

1922.

VITHALDAS
GULABDAS
v.
THE
HYDERABAD
SPINNING
AND
WEAVING
Co., LTD.

payable on and after the 5th February 1920 at the Hyderabad Office of the company. On 18th April 1920, another notice, dated 10th April 1920, was received, notifying the declaration of 73rd dividend payable on and after the 19th April 1920.

On 18th July 1920, the plaintiff through his pleader demanded payment of the amounts due in respect of both the dividends, but no reply was received to the notice of demand.

On 25th October 1920, and the 8th November 1920 the plaintiff's attorneys wrote to Messrs. Ewart Latham & Co., the duly constituted attorneys for the Secretaries, Treasurers and Agents of the defendant company intimating that if the dividend warrants were not sent to the plaintiffs before the 15th November 1920, the plaintiffs would proceed against the defendant company as advised. Messrs. Ewart, Latham & Co. merely replied that the letters received by them were forwarded to the main office at Hyderabad.

The plaintiff, not having received any explanation of the withholding of the dividend warrants, sued to recover Rs. 10,800, being the amount payable in respect of two dividends and Rs. 710-1-6 interest thereon at 9 per cent. per annum.

The defendant company contended that the plaintiff was after the death of Jivandas the manager of the joint family firm of Gulabdas Haridas & Sons, which was a partner in the two firms of Vithaldas Venkatlal and Tricumdas Purshottamdas; that the said two firms had become liable in March 1917 and March 1918 respectively to pay damages for breach of contract to sell cotton and that the total amount of damages exceeded the amounts of the plaintiff's claim for dividends; that the firm of Gulabdas Haridas & Co. of which the plaintiff was the manager became liable as a partner in

the said two firms to pay the amount of damages ; and lastly that the defendant company were entitled to set off against the plaintiff's claim their claim for damages under the Articles of Association of the company.

The material articles on which the defendant company relied and which were set out in their written statement were 13, 130 and 131 as under :—

13. The company shall have a first and permanent charge upon all the shares of any share holder for all moneys from time to time due or payable to the company from him alone or jointly with any other person and where a share is held by more persons than one, the company shall have a charge thereon in respect of all moneys so due to them from all or any of the holders thereof and the shares of any member who may be indebted to the company, may, by order of the Directors, be sold to satisfy the company's charge thereon and transferred into the name of the purchaser without any consent and notwithstanding any opposition on the part of the indebted member, and a complete title to the shares of any member, alleged by the Directors to be indebted to the company, which shall be sold and transferred, shall be acquired by the purchaser by virtue of such sale and transfer, against such indebted member, and all persons claiming under him, whether he may be indebted to the company in point of fact or not.

130. No member shall be entitled to receive payment of any dividend or bonus in respect of his share or shares whilst any moneys may be due or owing from him to the company in respect of such share or shares.

131. The Directors may deduct from the dividend or bonus payable to any share holder all sums of money due from him to the company.

In the alternative, the defendant company counter-claimed as follows :—

The defendant company says that should it be held that the amounts of the said damages cannot be set off against the claim in respect of the said dividends or that the plaintiff is otherwise entitled to claim the said dividends or any part thereof the defendant company will counter-claim the said amounts against the plaintiff as the managing member of the said joint family firm of Gulabdas Haridas & Sons. The defendant company says that the said counter-claim is within time as the plaintiff and other members of the said joint family have been absent from British India at all times material in this counter-claim. The defendant company prays as and by way of counter-claim

1922.

VITHALDAS
GULABDAS
v.
THE
HYDERABAD
SPINNING
AND
WEAVING
CO., LTD.

1922.

VITHALDAS
GULABDAS
v.
THE
HYDERABAD
SPINNING
AND
WEAVING
Co., LTD.

(a) that the plaintiff as the head of the said joint family firm of Gulabdas Haridas & Sons may be ordered to pay to the defendant company a reasonable sum by way of damages, (b) that the plaintiff may be ordered to pay the defendant company, costs of the counter-claim and (c) that the plaintiff may be ordered to pay interest on judgment at 6 per cent. per annum till payment.

The plaintiff, thereupon, took out a summons for an order that the counter-claim of the defendant company should be excluded, or that the Court should refuse permission to the defendants to avail themselves of the said counter-claim and require them (if so advised) to file a separate suit in respect thereof. The summons was adjourned to the hearing of the suit and was put down on the board of the trial Judge for the trial of an issue on demurrer.

Kajiji J. held that the defendant company was under Rule 118 of the High Court Rules (1909) entitled to counter-claim for damages even though based on a cause of action arising outside the jurisdiction and that the proper construction of Article 131 of the Articles of Association was that "all sums of moneys due" included both ascertained sums and all claims that might be owing from or payable by a share-holder.

The plaintiff appealed.

Inverarity, for the appellant.

Kania, for the respondent.

MACLEOD, C. J. :—The plaintiff filed this suit against the defendant company to recover the amount payable to him by way of dividends in respect of the 72nd and 73rd dividends payable on the 5th February 1920 and 19th April 1920, respectively.

In their written statement the defendants claimed that they were entitled to recover damages from the firms of Vithaldas Venkatlal and Trikamdas Purshotamdas in respect of certain cotton contracts. The

joint family of Gulabdas Haridas, of which the plaintiff was the manager, was a partner in these two firms and was liable to pay these damages. Reference was then made in para. 7 to Articles 13, 130 and 131 of the Articles of Association. Articles 13 and 130 had nothing to do with plaintiff's claim; but Article 131, entitling the Directors to deduct from the dividend or bonus payable to any share-holder all sums of money due from him to the company, would be in point, if certain facts were proved. The defendant company submitted that by reason of the said Articles the plaintiff was not entitled to claim the dividends referred to in paras. 3, 6 and 7 of the plaint, and submitted that the suit should be dismissed with costs. They, then, counter-claimed, in the event of it being held that the amounts of the damages could not be set off against the claim in respect of the dividends, that the plaintiff as the head of the joint family firm of Gulabdas Haridas & Sons might be ordered to pay to the defendant company a reasonable sum by way of damages on account of the premises mentioned in paragraph 6 of the written statement.

The plaintiff then took out a summons asking for an order that the counter-claim of the defendant company might be excluded, or that the Court should refuse permission to the defendants to avail themselves of the counter-claim, and require them (if so advised) to file a separate suit in respect thereof. On the 11th June 1921, an order was made on the summons that it should be adjourned to the hearing of the suit, and it was further ordered by the Court that the suit should be put down on the board of the learned Judge peremptorily for the trial of an issue on demurrer. Accordingly, the suit came on for hearing before Mr. Justice Kajiji on the 29th July 1921.

1922.

VITHALDAS
GULABDAS
v.
THE
HYDERABAD
SPINNING
AND
WEAVING
Co., LTD.

1922.

VITHALDAS
GULABDAS
v.
THE
HYDERABAD
SPINNING
AND
WEAVING
Co., LTD.

Now, the order that was made on the 11th June 1921 is couched in somewhat unfortunate terms. In the first place, it is not desirable to use the word "demurrer", as demurrer in English Practice has been abolished since the passing of the Judicature Act, while the term has never been recognised in India by any of the Codes of Civil Procedure. It can only be used in India by way of analogy to a bygone English form of procedure. The proper order to have made, following the provisions of the Code, was to direct the suit to be set down for settlement of issues, and when the issues had been settled, it could be seen whether any of the issues were sufficient for the decision of the case under Order XV, Rule 3.

There were two questions: (1) whether the counter-claim should be struck out; (2) whether, if the counter-claim were struck out, the defendant company would be entitled to set off their claim. Those were two entirely distinct issues, depending, for their decision, upon entirely different considerations; and the confusion which arose from not raising definite issues is apparent when we come to the judgment of the learned Judge, because these two questions, which ought to be dealt with separately, are dealt with together, and the decision is that "this issue must be answered in the negative." On that finding an order was drawn up declaring not only that the defendants were entitled to plead by way of defence the facts set out in paragraphs 6, 7 and 8 of their written statement, but were also entitled to maintain the counter-claim in the written statement of defence.

I will first deal with the question whether the counter-claim should be struck off. Now it is admitted that if the defendants were to file a separate suit on the subject matter of the counter-claim, this Court would have no jurisdiction to try such a suit

Therefore, it is quite clear that the counter-claim must be struck out.

1922.

VITHALDAS
GULABDAS
v.
THE
HYDERABAD
SPINNING
AND
WEAVING
Co., LTD.

Then, there is the question whether the defendant company can set off against the plaintiff's claim for dividends their claim for damages under the contracts referred to in paragraph 6 of the written statement. It is obvious that this question must be answered in the negative, because, under Article 131, the directors can only deduct from the dividend or bonus payable to a share-holder sums of money due from him to the company. The claim for damages on the contracts is not money due.

That would be sufficient to dispose of the question because in paragraph 8 of the written statement the defendant company only claim to be entitled to set off by reason of Article 131.

But I may also deal with the question whether, apart from Article 131 of the Articles of Association, the defendants can set off the claim for damages. It could only be in the nature of an equitable set-off, which is not permitted by Order VIII, Rule 6, of the Civil Procedure Code. The learned Judge considered that the defendants could counter-claim for damages which could not form the basis of an equitable set-off under Rule 118 of the High Court Rules and referred to the case of *Griendtoveen v. Hamlyn & Co.*^(a). But that case is only an authority for the proposition that where a claim in damages is preferred by a defendant which arises out of the same contract as the one on which the plaintiff is suing, the defendant could be allowed to counter-claim for those damages although a separate suit could not lie for want of jurisdiction. Now, set-off and counter-claim are governed by rules of procedure, and a plaintiff can only plead by way of

(a) (1892) 8 T. L. R. 231.

1922.

VITHALDAS
GULABDAS
v.
THE
HYDERABAD
SPINNING
AND
WEAVING
CO., LTD.

set-off or counter-claim that which is permitted by those rules. A set-off can be pleaded as a defence and can only arise where the claims to be set-off one against the other whether by the plaintiff or defendant exist in the same right. A set-off can also be the subject-matter of a separate action or a counter-claim. And hence the confusion between the terms, as though every set-off can be pleaded as a counter-claim if the defendant so desires, every counter-claim cannot be pleaded as a set-off. It would be much better if the two terms were kept distinct, and, if an equitable set-off is to be allowed, it should be provided for by rule, while Rule 118 might be amended by omitting the mention of set-off. But even assuming that Rule 118 of the High Court Rules, although the marginal note is "counter-claim by defendant," provides for an equitable set-off, then it is quite clear, under the decisions which lay down the principles on which an equitable set-off can be allowed, that the claim for damages must arise from the same transaction as that which is the subject-matter of the plaintiff's suit; and it is only when the claim for damages forms the subject-matter of a counter-claim that it makes no difference whether damages are based on a claim arising on the subject-matter of the suit, or are based on some transaction which is entirely outside the plaintiff's claim. It is, therefore, of the greatest importance to keep separate the questions of set-off and counter-claim when the defendant seeks to claim as a set-off not money due but an unascertained sum for damages.

In any event, it is perfectly clear that in this case the counter-claim is bad because it could not form the subject-matter of a separate suit in this Court for the reason that the defendant, who is now plaintiff, resides outside the jurisdiction, and the whole of the cause of action arose outside the jurisdiction.

It is also quite clear that the defendants' claim does not come within the definition of equitable set-off.

Therefore, the defendants clearly have no answer to the plaintiff's claim for dividends, and as the issue which I have raised as the real issue argued in the lower Court must be found against the defendants, there must be a decree for the plaintiff for the amount claimed, that is to say, Rs. 10,800, the amount of the dividends, with interest at nine per cent. per annum from the 18th July 1920, when notice was given that interest would be charged, till judgment; and costs and interest on judgment at six per cent. per annum.

Solicitors for the appellant: Messrs. *Merwanji, Kola & Co.*

Solicitors for the respondents: Messrs. *Ardeshir, Hormusji Dinshaw & Co.*

Appeal allowed.

G. G. N.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Kanga.

DINKARRAO GANPATRAO KOTHARE AND ANOTHER, APPELLANTS v.
NARAYAN VISHWANATH MANDLIK, RESPONDENT*.

1922.

March 20.

Covenant, construction of—Vendor and purchaser—Right of pre-emption in favour of vendor and his heirs against purchaser and his heirs—Whether creating a right in rem or a mere personal contract—Rule against perpetuities—Transfer of Property Act (IV of 1882), sections 14 and 54—Contract Act (IX of 1872), section 23—Public policy—Hindu law regarding contracts creating interest in immovable property—Originating Summons—Declaratory decree—High Court Rules, Rule 214.

By a sale-deed in Marathi language, dated 18th September 1878, the vendor conveyed to the purchaser a plot of land forming part of a larger piece of

* O. C. J. Appeal No. 103 of 1921; O. C. J. Suit No. 1284 of 192 .

1922.
* VITHALDAS
GULABDAS
v.
THE
HYDERABAD
SPINNING
AND
WEAVING
Co., LTD.