

ORIGINAL CIVIL.

Before Mr. Justice B. J. Wadia.

1939
April 11

ANWAR F. J. LALJEE, PLAINTIFF *v.* EBRAHIM F. J. LALJEE AND OTHERS,
DEFENDANTS AND BARJOR HOSHANGJI VAKIL, APPLICANT.*

Solicitor's lien for costs—Subject to equities between parties—Principles applicable to attorney's lien—Governed by English common law—Right of party to set-off damages or costs—Discretion of Court to allow or refuse set-off.

The right of an attorney in respect of his lien is a claim to the equitable interference of the Court for his protection. The attorney's lien is an equity claimed on his behalf. Such lien is subject to all the equities between the attorney's client and any other party or parties interested in the property over which the lien is claimed.

The Civil Procedure Code does not contain exhaustive general principles of the law applicable to attorney's lien and the question of the attorneys' lien in the High Courts in India is governed by the relevant principles of the English common law.

The practice of the English Courts and English cases discussed.

The right of set-off of damages or costs in different actions may be allowed to be intercepted by the attorney's lien, but it is not so intercepted as regards costs in the same action.

The Courts in India have complete discretion to allow a set-off whether in the same action or in different actions, and it extends to the setting-off of costs against costs and also in a proper case to the setting-off of debts or damages against costs.

SUMMONS to enforce attorney's lien.

The facts and contentions of parties are set out in the Judgment.

V. F. Taraporewala, for the applicant.

M. L. Manekshaw, for the plaintiff.

B. J. WADIA J. This is a chamber summons taken out by the applicant, who is practising as a solicitor of this Court in the name of B. H. Vakil & Co., for a declaration that he has an attorney's lien for his costs on the sum of Rs. 774-11-0 paid by Anwar Fazalbhoy Laljee, the plaintiff in suit No. 980 of 1929, to the Sheriff of Bombay, under the warrant of attachment dated February 23, 1939, and for payment of the said sum to him. The two persons to whom the summons is addressed are Anwar and his brother Adam, defendant No. 2 in that suit.

* O. C. J. Suit No. 980 of 1929.

The facts leading up to the chamber summons are not in dispute. There was a consolidated consent decretal order of reference in all the above suits to the Commissioner for taking Accounts on the footing of the award made by the arbitrator, and ultimately a consent decree was passed on July 2, 1935, under which a sum of Rs. 59,860 was found due and owing by Adam to Anwar. The decree contained no specific direction to Adam to pay that sum to Anwar. On February 1, 1938, Anwar took out a notice against Adam under O. XXI, r. 22 of the Code, requiring him to show cause why the decree should not be executed against him. Adam opposed the notice, and one of the grounds was that the decree was not executable, as it contained no direction to pay. The notice was heard by Mr. Justice Engineer, who dismissed it on that ground on July 25, 1938, and ordered Anwar to pay Adam's taxed costs of and incidental to the notice. Those costs have been taxed at Rs. 495-11-0.

Thereafter, on October 6, 1938, Anwar took out a notice of motion for amendment of the consent decree by inserting in it a direction that Adam should pay the said sum with interest to him. The notice of motion was also heard by Mr. Justice Engineer, and on November 1, 1938, the amendment was allowed, but Anwar was ordered to pay Adam's costs amounting to Rs. 175.

On February 2, 1939, the applicant as Adam's attorney wrote to Anwar's attorneys demanding the two sums of costs together aggregating Rs. 670-11-0; but Anwar failed to pay the same or any portion thereof. Thereupon, Adam made an application for execution of the two orders for recovery of costs awarded to him by attachment of Anwar's share in an immoveable property at Warden Road. A warrant of attachment was issued, which provided for the payment by Anwar of a further sum of Rs. 104 for the costs relating to the attachment.

1939
ANWAR
v.
EBRAHIM
B. J. Wadia J.

1939

ANWAR
v.
EBRAHIM*B. J. Wadia J.*

The total amount payable by Anwar for costs came to Rs. 774-11-0, and that is the sum over which the applicant claims his lien. Anwar paid the sum under protest to the Sheriff of Bombay, and on March 16, 1939, he took out a chamber summons against Adam for an order that this sum of Rs. 774-11-0 might be set-off against the decretal amount of Rs. 59,860 payable to him. In his affidavit on the chamber summons Adam stated that the applicant claimed an attorney's lien on the said sum, and on March 17 the applicant himself wrote to Anwar's solicitors that he claimed a lien on the sum of Rs. 774-11-0 and that Anwar was not entitled to the set-off claimed by him. The summons came on for hearing before Mr. Justice Somjee on March 20, 1939, when the attachment was ordered to be raised; and the Court ordered that the sum of Rs. 774-11-0 and the further costs of raising the attachment should be set-off against the decretal amount of Rs. 59,860. The Court also ordered that the Sheriff of Bombay should, after deducting his poundage, repay to Anwar the balance out of the amount deposited with him under protest, and that Adam should pay Anwar's costs of the summons.

The applicant claims a lien on the ground that Adam has not paid him anything towards the costs of the notice under O. XXI, r. 22, and of the notice of motion, beyond a sum of Rs. 100 paid as advance, that Adam has also told the applicant that he will not be in a position to make payment at least in the near future, that Adam is in very involved circumstances, and there seems to be no likelihood of the applicant recovering his costs from him. It is contended on behalf of the applicant that the set-off could only be allowed subject to his lien. On the other hand, it was contended on behalf of Anwar that it would be unfair that his claim to a set-off should be intercepted by the attorney's lien for costs. It has always been held that the right of an attorney in respect of his lien is really in essence a claim to the equitable interference of the Court for his protection.

1939

ANWAR

v.

EBRAHIM

B. J. Wadia J..

The attorney's lien is really an equity, claimed on his behalf. Such a lien is subject to all the equities between the attorney's client and any other party or parties interested in the property over which the lien is claimed; see *Bawtree v. Watson*⁽¹⁾ where it was held on the same ground that the plaintiff's right to set-off costs payable to him by the defendant against the sum found due from him to the defendant on the taking of accounts in the same suit, was not affected by the defendant's solicitor's lien. It is said that an attorney has no higher rights than his client. If, therefore, the applicant's client, Adam, could not have asked for payment of the costs ordered to be paid to him, when he in turn was ordered to pay Rs. 59,860 to Anwar, could the applicant, as Adam's attorney, ask for payment of the costs, and thereby defeat Anwar's right of set-off, which right he claims under the equitable jurisdiction of the Court?

Two questions arise on this summons: first, whether it is as of right or only discretionary with the Court to allow the attorney's lien to intercept the party's right of set-off; and, secondly, if it is only discretionary, whether under the facts and circumstances of this case the Court's discretion should be exercised to the prejudice or in favour of the applicant's lien.

In England the Court has now a discretion to allow a set-off of judgments for damages, that is debt, or costs against each other, either with or without prejudice to a solicitor's lien on either of those judgments. In the case of judgments in the same proceedings, this discretion rests on O. LXV, r. 14, of the Rules of the Supreme Court, which provides that a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought. In the case of judgments in distinct and

⁽¹⁾ (1838) 7 L. J. Ch. 183.

1939
 ANWAR
 v.
 EBRAHIM

B. J. Wadia J.

independent litigations the discretion rests on the Court's general jurisdiction to do what is just and equitable in disputes before it.

In India the position appears to be substantially the same. It was held by the Appeal Court in *Tyabji Dayabhai & Co. v. Jetha Devji & Co.*⁽¹⁾ that the rights and duties of attorneys were in no way part of the indigenous law or practice in India, that the profession of attorneys originated from England and the English common law governed their rights and duties. The attorney's lien in the High Courts of India is governed exclusively by the law as it existed in England before the passing of the Solicitor's Act of 1860, by which that lien was very much extended; see also *Devkabai v. Jefferson, Bhaishankar and Dinsha.*⁽²⁾ The Solicitor's Act of 1860 has now been replaced by the Solicitor's Act of 1932. It is, therefore, necessary to give a short history of the early practice prevailing in England before 1860. Before 1832, and also long thereafter the Courts of Chancery, King's Bench, and Exchequer, generally permitted in their discretion a set-off for costs incurred in the same cause without regard to the attorney's lien; but, generally also, these Courts did not allow a set-off of judgments for costs or damages awarded in distinct causes except subject to the attorney's lien. The Court of Common Pleas, however, laid down a different and directly opposite rule, and an attorney's lien on a judgment was regarded generally by that Court as subject to the equities between the parties, and a set-off was allowed even in distinct causes without regard to the attorney's lien. The different Courts thus exercised their discretion in different ways. In 1832 it was provided by the Hilary Term Regulations, 2 Will. 4, r. 93, that no set-off of damages or costs between parties should be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought;

⁽¹⁾ (1927) 51 Bom. 855.

⁽²⁾ (1886) 10 Bom. 248.

provided nevertheless that interlocutory costs in the same suit awarded to the adverse party might be deducted. This rule was replaced in 1853 by Hilary Term Regulations, 1853, r. 63, which also did not forbid a set-off where the judgments for costs or damages were awarded in the same cause. With the Judicature Acts these rules were abolished, and O. LXV, r. 14 of the Rules of the Supreme Court, now provides for a set-off notwithstanding the lien, as I have stated before. By O. LXV, r. 27 (21), a discretion to adjust costs by way of set-off on taxation also is conferred on a taxing master. According to the decision in *David v. Rees*,⁽¹⁾ O. LXV, r. 14, only applies to proceedings in the same action. In cases, however, to which O. LXV, r. 14, did not apply the old practice prevailed, and, as there was a diversity in that practice, the High Court in England was free to adopt in its discretion whichever practice it thought best. It is now the general rule that a set-off should not be refused on account of a solicitor's lien, if, as between the parties themselves, it would work justice and there was no fraud or collusion against the solicitor. The Court had a discretion to allow the set-off, and a discretion also as to the terms upon which it should be allowed. The present rule of complete discretion has not been adopted from the practice of any particular former Court; but is the establishment of a fair and salutary rule of practice in the matter, where there was a diversity in practice before: see *Cordery on Solicitors*, 4th edn., pp. 476 to 478. See also *Reid v. Cupper*⁽²⁾ where the correctness of the decision in *David v. Rees*⁽¹⁾ was questioned, and the Court's discretion was asserted in very broad terms by the Court of Appeal.

It was argued on behalf of the applicant that under the English law regarding the attorney's lien before 1860, the Court had, under r. 93 of 1832, no discretion in the matter, that the attorney's lien was as of right, and that no set-off for damages or costs between parties should be allowed to

1939
 ANWAR
 v.
 EBRAHIM
 B. J. Wadia J.

⁽¹⁾ [1904] 2 K. B. 435

⁽²⁾ [1915] 2 K. B. 147.

1939
 ANWAR
 v.
 EBRAHIM
 B. J. Wadia J.

the prejudice of the attorney's lien for costs "in the particular suit" against which the set-off was sought. As pointed out by Buckley L. J. in *Reid v. Cupper*⁽¹⁾ the words, namely "the particular suit" showed that there was in contemplation some other suit or action. It was further argued that even though that rule did not apply specifically in India, the principle was applicable, and that, therefore, the applicant's lien could not be prejudiced by reason of the set-off of the costs payable in execution proceedings as against the decretal amount in the suit, on the ground that the proceedings in the suit and proceedings in execution were distinct and separate. It has, however, been held that even in distinct and independent actions the common law Courts in England had a discretion to allow a set-off either subject to, or notwithstanding, the lien, under the practice prevailing before 1853: see *Edwards v. Hope*⁽²⁾ which was an application to set-off cross judgments, followed in *Blakey v. Latham*.⁽³⁾ See also *Reid v. Cupper*⁽¹⁾ referred to before, and *Puddephatt v. Leith (No. 2)*.⁽⁴⁾ The result of all these cases is that the right of set-off of damages or costs in different actions may be allowed to be intercepted by the attorney's lien; but that it is not so intercepted as regards costs in the same action. The decision in *Edwards v. Hope*⁽²⁾ however, shows that the repeal of the rules of 1832 and 1853 in England restored the old jurisdiction of the Courts which approached the question as one of discretion. Some of the English cases were referred to by Blackwell J. in *Vallabhdas v. Pranshankar*⁽⁵⁾ and he held that where there were cross-claims between parties to the same suit, they can be allowed to set-off the one against the other, irrespective of the attorney's lien for costs. He also held that it was a matter of discretion in India whether an

⁽¹⁾ [1915] 2 K. B. 147.

⁽²⁾ (1885) 14 Q.B.D. 922.

⁽³⁾ (1889) 41 Ch. D. 518.

⁽⁴⁾ [1916] 2 Ch. 168.

⁽⁵⁾ (1932) 34 Bom. L. R. 1429.

attorney's lien should or should not be allowed to intercept a set-off between the parties to a suit. In an earlier judgment reported in *In Re Ebrahim Ahmed*⁽¹⁾ the same Judge held that where the petitioning creditors failed in their petition to adjudicate the debtor an insolvent, and were ordered to pay the debtor's costs, the petitioning creditors were not, on the subsequent adjudication of the debtor, entitled to set-off the amount of those costs against the amount payable by the debtor to them, so as to defeat the lien of the debtor's attorneys in respect of the costs awarded to the debtor. In that case, however, there were separate and independent actions, and the costs that were sought to be set-off against the decretal amount were incurred in independent insolvency proceedings. The learned Judge accordingly exercised his discretion in favour of the lien. It was argued on behalf of the applicant that the execution proceedings, in which these costs were allowed to Adam, were also independent and separate proceedings; but, in my opinion, execution proceedings, though separate, are not independent proceedings in the sense of being an independent action or litigation. They are only a continuation of the suit. I may, however, point out here that in *Bhupendra Nath Bhowe v. Sassoon & Co.*⁽²⁾ Chaudhuri J. went further, and held that even where the actions were separate and independent, the attorney's lien need not necessarily be allowed to intercept the set-off between the parties, and he held on the facts of the particular case that the attorney's lien should not be allowed to intercept the set-off claimed. The Civil Procedure Code does not contain exhaustive general principles of the law applicable to attorney's lien, and the question, therefore, must be governed by the relevant principles of the English law. The old practice of the Courts in England with regard to set-off was, as pointed out by the Lords Justices, and specially by Pickford L. J. in

1939

ANWAR

v.

EBRAHIM

B. J. Wadia J.

⁽¹⁾ (1929) 55 Bom. 377.⁽²⁾ (1916) 43 Cal. 932.

1939

ANWAR
v.
EBRAHEM

B. J. Wadia J.

Reid v. Cupper,⁽¹⁾ at p. 155, really discretionary in all Courts, and there are cases to show that under certain circumstances the attorney's lien was protected, and in others the set-off was allowed to the prejudice of the lien. The Courts in India have, in my opinion, complete discretion to allow a set-off, whether in the same action or in different actions, and it extends to the setting-off of costs against costs and also in a proper case to the setting-off of debt or damages against costs and *vice versa*. The discretion has to be exercised judicially, having regard to the facts and circumstances of each case, and not upon any preconceived view that to allow the attorney's lien to prevail must in every case be contrary to natural justice. The circumstances considered by the Court are matters relating to the attorney whose lien is sought to be affected irrespective of his client, because as between the parties themselves there can hardly be a ground for resisting a set-off. In this connection I may refer to the pertinent observation of Sir George Jessel in *Pringle v. Gloag*.⁽²⁾ He says (p. 680) :—

“It appears to me that it would be a monstrous extension of the rights of a solicitor against the parties to an action to say that he should have the right to make the party who may have been successful in the ultimate result pay the losing party's costs; and unless I found an authority so deciding, I should decline to accede to any such proposition.

If a solicitor says, ‘unless I have a lien I cannot get paid,’ the answer is, he should see before he undertakes a particular business for a client, that that client is able to pay him for it: a solicitor is not compelled to work for an insolvent client.”

In this case it must be remembered that an order for set-off has already been made by Somjee J., and under his order the Sheriff was ordered on deducting his poundage to refund to Anwar the balance out of the amount deposited with him. To now order the Sheriff to pay the amount to the applicant would result in making two contradictory orders, as the order made by Somjee J. stands. There is also no doubt that, after an order for payment by the Sheriff, the moneys become immediately payable to the person to whom they are

⁽¹⁾ [1915] 2 K. B. 147.⁽²⁾ (1879) 10 Ch. D. 676.

ordered to be paid, even though the order is not drawn up and signed. Moreover, the attorneys themselves did not take out this summons till after that order was made, though before the order was made they wrote a letter to the attorneys for Anwar claiming the lien, and left it there. No case has been pointed out to the Court in which the attorney's lien was protected after the set-off had already been allowed. Taking all the facts and circumstances of the case into consideration, I am of the opinion that the equities are not in favour of allowing the applicant's lien.

1939
ANWAR
v.
EBRAHIM
B. J. Wadia J.

In the result, the summons must be dismissed with costs. Counsel certified.

Attorney for plaintiff: Messrs. *Mulla & Mulla*.

Attorney for the applicants: Messrs. *B. H. Vakeel & Co.*

Summons dismissed.

N. K. A.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice.

THE BOROUGH MUNICIPALITY OF AHMEDABAD (ORIGINAL APPLICANT),
APPLICANT v. THE AHMEDABAD MANUFACTURING AND CALICO
PRINTING Co. LTD., AHMEDABAD (ORIGINAL OPPONENT), OPPONENT.*

1939
April 13

*Bombay Municipal Boroughs Act (Bom. Act XVIII of 1925), s. 110 (2) (b) (i) (ii)—
“Rate on buildings or lands”—Interpretation—Appeal—Revision—Second
revision—High Court's power to interfere—Civil Procedure Code (Act V of 1908),
s. 115.*

Prima facie, when two different expressions are used in an Act of Parliament, the Court ought to assume that they were intended to bear distinct meanings, but, on the other hand, it may appear from the context that two expressions are used interchangeably, and are not intended to have different meanings.

*Civil Revision Application No. 469 of 1938 (With Civil Revision Application Nos. 467, 468 and 470 to 473 of 1938).