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build, but he chose to build upon it and the lessor stood by, and the question was raised whether the lessor was estopped in equity from bringing ejectment by reason of the tenant having erected a pucca structure upon the land; and the Judicial Committee observed that the lessor was not so estopped. And they observed: "If there be one point settled in the equity law of England, it is that, in circumstances similar to those of the present case, the mere erection by the tenant of permanent structures upon the land let to him, in the knowledge of and without interference by his lessor, will not suffice to raise the equitable right against the latter, which has been affirmed by the Courts below." There, as we have already [653] indicated, the lessee had no right whatsoever to build, but he chose to build at his own risk; and clearly there was no equity on his side.

For all these reasons we are of opinion that it was the intention of the parties to grant a permanent lease of the land demised, and that the plaintiff is not entitled to obtain ejectment in this case. The result, therefore, is that this appeal is allowed, the decree of the Court of Appeal below is set aside and that of the Court of first instance restored with costs.

32 C. 654 (=1 C. L. J. 364.)

[654] APPELLATE CIVIL.

Before Mr. Justice Harington and Mr. Justice Mukerjee.

NAWBUT PATTAK v. MAHESH NARAYUN LAL. *

[11th April, 1905.]

Suit, maintainability of—Civil Procedure Code (Act XIV, of 1882), ss. 43, 111.—Set-off—Previous suit—Omission to claim set off in the previous suit in respect of the sum due—Effect of such omission—Cross suit.

In a previous suit brought by A against B, the latter had claimed a set-off in respect of a portion of the sum due to him upon adjustment of accounts between the parties, and had omitted to claim a set-off in respect of the remainder.

In a subsequent suit brought by B against A for the remainder, the defence was that the suit was not maintainable.

Held that, B, having claimed a set-off in respect of a part of the cause of action in the previous suit brought against him, was debarred under s. 43 of the Civil Procedure Code from bringing this suit.

[Ref. 19 I. C. 918=17 C. L. J. 365; 12 C. L. J. 351.]

APPEAL by the plaintiff Nawbut Pattak.

Mohesh Narayan Lal instituted a suit against Nawbut Pattak, in which the latter claimed a set-off in respect of Rs. 175, being a part of the sum due upon adjustment of accounts between him and Mohesh Narayan, which was allowed by the Court. Nawbut Pattak subsequently instituted a suit claiming Rs. 1,238 and odd, being the remainder of the sum found due upon the said adjustment of accounts. The defendant pleaded *inter alia* that the suit was barred by sections 12 and 13 of the Civil Procedure Code, and at the hearing of the suit it was urged that section 43 of the Code was also a bar to the suit. The lower Court gave effect to the objections raised by the defendant and dismissed the plaintiff's suit. Against this decision the plaintiff appealed to the High Court.

*Appeal from Original Decree No. 112 of 1903, against the decree of W. H. Thomson, Subordinate Judge of Rajmahal, dated the 27th of January, 1902.

[655] Dr. *Rash Behary Ghose* (with him *Babu Nalini Ranjan Chatterjee*) for the appellant. The provisions of s. 43 of the Civil Procedure Code, in terms, apply to the plaintiff in a suit and there is no reason to justify its application to the case of a defendant, who claims a set-off under s. 111 of the Code. It will be encroaching upon the functions of the Legislature and putting an interpretation on s. 43, which it cannot possibly bear, if the construction put upon that section by the Court below be held to be correct. The rule against splitting up of claims embodied in that section is not of such fundamental importance as to justify a Court in extending its application to the case of a defendant, who claims a set-off under s. 111 of the Code. If the view taken by the lower Court be upheld, it will practically follow that all the provisions of the Code relating to a plaintiff will in substance be extended to a defendant, who has included a claim to set-off in his written statement; and as it will be impossible to draw a line of demarcation, it may be contended by way of analogy that the provisions of s. 366 and the penultimate paragraph of s. 368 of the Code will be applicable, and similarly the provisions of s. 373 may become applicable. A claim to a set-off does not stand in every particular on the same footing as a claim made in a separate suit. It has been held in the case of *Pakir Chandar v. Gisborne & Co.* (1) that a written statement, in which a set-off is claimed, is not chargeable with a Court-fee as on a plaint. A set-off cannot be regarded as a counter-claim. The distinction between a set-off and a counter-claim is still maintained in English Law.

Babu Saligram Singh (with him *Babu Baghunandan Prosad* and *Babu Makhan Lal*) for the respondent. The judgment of the Court below is right. The defendant in the previous suit, when he claimed a set-off, was, so far as his claim to set-off was concerned, in the position of a plaintiff within the meaning of s. 43 of the Civil Procedure Code. That being so, the present plaintiff was debarred from bringing the suit. S. 216 of the Civil Procedure Code lends support to my contention.

Dr. Rash Behary Ghose in reply.

[656] HARRINGTON, J. This is an appeal by the plaintiff against the judgment of the Subordinate Judge dismissing his suit with costs.

The plaintiff claimed the sum of 1,238 rupees 12 annas and 3 pies against the defendant on an account stated. In a previous suit in which the now defendant was plaintiff and the now plaintiff was defendant, the present plaintiff had as defendant filed a written statement claiming to set-off as against the claim of the plaintiff the sum of 175 rupees part of the sum due under the stated account, which is his present cause of action. The learned Subordinate Judge has dismissed the suit on the ground that having claimed a set-off in respect of part of the cause of action in a suit brought against him by the present defendant he was debarred under section 43 of the Code of Civil Procedure from bringing a suit to enforce his claim in respect of the same stated account. Under section 43 of the Civil Procedure Code, it is provided that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. A person therefore who has a right of action against another for money payable on an account stated is not entitled to sue first for one portion of the money payable on the stated account, and then bring another action in respect of the balance. He is bound to include the whole amount in his claim founded on that one cause of action in one suit. Section 111 of the Code of Civil Procedure entitles the defendant to set-off against the

(1) (1903) 8 C. W. N. 174.

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plaintiff's demand an ascertained sum of money legally recoverable by him from the plaintiff, provided that the amount claimed to be set-off does not exceed the pecuniary limits of the jurisdiction of the Court. It is to be observed that the set-off is not limited to a sum equivalent to the amount claimed by the plaintiff, but so long as it is within the pecuniary jurisdiction of the Court it may be a greater sum. By section 216 it is provided: "If the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount (if any) is due to the defendant and shall be for the recovery of any sum which appears to be due to either party and the decree of the Court with respect to any sum awarded to the defendant shall have the same effect and be subject to the [657] same rules in respect of appeal or otherwise as if such sum had been claimed by the defendant in a separate suit against the plaintiff."

The result is that, if the defendant's claim exceeds that which is made against him by the plaintiff he will be entitled, supposing he succeeds in his plea, to enforce his claim by means of a claim of set-off. It is true that the defendant is not bound to plead a set-off. He may, if he thinks proper, sue for the amount that is owing to him in a separate action; but if he does rely upon a set-off, it is provided by section 111 that the set-off shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in the same suit both on the original and on the cross-claim.

I think therefore that the defendant, who sets up a claim by way of set-off, cannot split it in half, and while enforcing a portion of it under section 111 also brings a suit to enforce the remainder. The set off has the effect of a plaint in a cross-suit for the purpose of enabling the Court to adjudicate on the cause of action, on which the set-off is claimed and as such, it is in my opinion subject, as a claim in a cross suit would be, to the provisions of section 43 of the Civil Procedure Code, and must include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, on which he relies.

The judgment of the lower Court is right and the appeal must be dismissed with costs.

MOOKERJEE, J. I agree with my learned brother that the decree made by the Subordinate Judge is correct and ought not to be disturbed.

The matter in dispute in this appeal lies within a narrow compass and the facts upon which the decision of the question raised depends are not disputed. The plaintiff appellant commenced this action to recover from the defendant respondent a sum of money alleged to be due on adjustment of mutual accounts between the parties. The defendant pleaded that the suit was barred under the second paragraph of section 43 of the Civil Procedure Code inasmuch as the plaintiff had in a previous suit instituted against him by the present defendant [658] claimed a set-off in respect of a portion of the sum due to him upon adjustment of accounts under section 111 of the Civil Procedure Code, and had omitted to claim a set-off in respect of the remainder, which he seeks to recover in the present action. The Subordinate Judge gave effect to this contention and dismissed the suit. The plaintiff has appealed to this Court and on his behalf it has been contended that section 43 of the Civil Procedure Code, has no application to this case, because it cannot be said that when the plaintiff omitted to claim a set-off in the previous litigation in respect of the whole of the sum due to him upon adjustment of accounts,

he omitted to sue in respect of or relinquished a portion of his claim. The learned Vakil for the respondent has argued, on the other hand, that the defendant in the previous suit, when he claimed a set-off under section 111 of the Civil Procedure Code, was, so far as his claim to set-off was concerned, in the position of a plaintiff within the meaning of section 43 of the Civil Procedure Code. The question is not free from difficulty and does not appear to be covered by any authority precisely in point, but after a careful consideration of the arguments addressed to us on both sides, I am of opinion that the view put forward by the respondent is well founded and must be accepted.

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Paragraph 1 of section 111 of the Civil Procedure Code specifies the conditions subject to which a defendant in a suit for the recovery of money may, if he so chooses, include in his written statement a claim to set-off against the plaintiff's demand, a debt due to him from the plaintiff. Paragraph 2 provides for an enquiry into the claim set up by the defendant, and directs that, if the case fulfils the requirements of the former part of the section, and the amount claimed to be set-off does not exceed the pecuniary limits of the jurisdiction of the Court, the Court shall set-off one debt against the other. Paragraph 3 next describes the effect of the set-off, and lays down that such set-off shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim. Section 216 then deals with the question of the manner in which a decree is to be made, when a set-off is allowed, and the effect of such decree, in the [659] following terms: "If the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount, if any, is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party. The decree of the Court, with respect to any sum awarded to the defendant, shall have the same effect, and be subject to the same rules in respect of appeal or otherwise, as if such sum had been claimed by the defendant in a separate suit against the plaintiff." From these provisions, it appears to be clear that a claim to set-off does stand, in several respects, in the same position as a claim by the defendant against the plaintiff in a separate suit; for, in the first place, as regards the jurisdiction of the Court to allow the set-off, it is made dependent, not upon the amount claimed by the plaintiff, but upon the amount which the defendant seeks to set-off; in the second place, a decision by the Court upon the claim set up by the defendant is final between the parties, and the same matter cannot be litigated in another action; in the third place, if the amount due to the defendant by the plaintiff is found to exceed that due to the plaintiff by the defendant or if the plaintiff is unable to substantiate his claim at all, the suit may practically fail, and the decree may be one in favour of the defendant against the plaintiff; and in the fourth place, the forum of appeal in relation to the claim of the defendant depends upon the sum claimed by him and not upon the valuation of the suit made by the plaintiff; for instance, if the claim of the plaintiff exceeds five hundred rupees, whereas that of the defendant falls short of that sum, there may be a right of second appeal to the High Court against the decree in relation to the claim of the plaintiff, although such second appeal may be barred under section 586 of the Civil Procedure Code, in relation to the claim of the defendant. The question therefore arises whether the defendant, whose claim to set-off stands in the position of a claim by a plaintiff in a

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separate suit for the purposes I have described, may be rightly regarded in relation to his cross-claim, as a plaintiff within the meaning of the second paragraph of section 43 of the Civil Procedure Code. I think this question should be answered in the [660] affirmative, and I am fortified in this view by the provisions of the second paragraph of section 111 which restricts the jurisdiction of the Court to allow the set-off only to cases in which the amount claimed to be set-off does not exceed the pecuniary limits of that jurisdiction. To my mind, such a restriction as this would be wholly unnecessary, if it was open to the defendant to split up his claim, ask for a set-off in respect of such amount as does not exceed the pecuniary limits of the jurisdiction of the Court, and then institute a separate suit for the remainder of the claim. If we accept the narrow construction which the appellant invites us to place upon section 43, the consequences might be startling and extremely inconvenient. To take one illustration: X sues Y for the recovery of money in the Court of a Munsiff; Y claims a set-off in respect of Rs. 1,000 due upon a promissory note for Rs. 5,000, the amount claimed being the maximum which the Munsiff could deal with; that officer finds the promissory note to be a forgery, and dismisses the claim for set-off; Y then sues X for the balance due upon the promissory note for Rs. 4,000 in the Court of the Subordinate Judge; the decision of the Munsiff would not operate as *res judicata*, and there would be nothing to prevent Y from litigating the same question a second time, possibly with a different result. I think the Court is bound by every principle of judicial interpretation to find, if possible, a construction of the Statute, which does not involve consequences so inconsistent with the fundamental principles upon which our Code of Civil Procedure is based. The learned Vakil for the appellant strenuously contended that, if we put upon section 43 of the Civil Procedure Code the construction suggested by the respondent, we shall encroach upon the functions of the Legislature and put an interpretation on that section, which the language cannot possibly bear. I am wholly unable to accept this argument as well founded; we cannot legitimately construe a particular provision of the Code as if it was isolated from the rest of the enactment, and, as it is unquestionable that for certain purposes a defendant in relation to his claim for set-off stands in the same position as a plaintiff in a separate suit, the only question is whether he may be regarded as a plaintiff in relation to that cross-claim within the [661] meaning of section 43 of the Civil Procedure Code, and whether, without undue straining of language, he may be said to have omitted to sue in respect of or to have intentionally relinquished a portion of his claim, when he claimed a set-off in respect of only a portion of the sum due to him. For the reasons already given, I must hold that the question should be answered against the appellant. The learned vakil for the appellant further contended that a set-off cannot be regarded as a counter-claim, and he referred to the distinction between the two still maintained in the English law, under which every set-off could be pleaded as a counter-claim, but a counter-claim cannot be pleaded as a set-off; see Odgers on Pleading, 4th Ed., p. 227, Annual Practice for 1905, Vol. 1, p. 281. It is unnecessary, however, for the purposes of the present case to examine the principle upon which the distinction may rest; it is enough to point out that under section 111 of our Civil Procedure Code, the claim to set-off is regarded as a cross-claim, and, for certain purposes, the set-off is said to have the same effect as a plaint in a cross-suit. It was further contended on behalf of the appellant that a claim to set-off does not stand in every parti-

cular on the same footing as a claim made in a separate suit, and reliance was placed upon the judgment of Mr. Justice Banerjee in the case of *Fakir Chandar v. Gisborne & Co.* (1), where that learned Judge, dissenting from the view taken by the other Indian High Courts in the cases of *Amir Zama v. Nathu Mal* (2), *Baishri Majirajbai v. Narotam Hargovan* (3), and *Chennappa v. Raghunatha* (4), held that a written statement, in which a set-off is claimed, is not chargeable with a Court-fee as on a plaint. The question, however, which has been raised before us stands on an entirely different footing, and it does not follow by any means that the principles which regulate the construction of the Court-Fees Act, which imposes a tax on a public justice, can be held applicable to the construction of the provisions of the Civil Procedure Code. At the same time, I do not desire to express any opinion upon the question raised before Mr. Justice Banerjee; it is not necessary to do so for the purposes of this appeal, and the [662] question, which is by no means free from difficulty has not been discussed at the Bar with that fulness which its importance demands. I must accordingly reserve my opinion upon it. The learned vakil for the appellant further contended that if the view taken by the Court below be upheld, it will practically follow that all the provisions of the Civil Procedure Code, which apply in terms only to a plaintiff in a suit, will in substance be extended to the defendant, who has included a claim to set-off under section 111 of the Civil Procedure Code, and that as it will be impossible to draw any line of demarcation, it may be contended by way of analogy that section 366 of the Civil Procedure Code may become applicable when upon the death of the defendant his legal representative does not come forward to prosecute the claim to set-off, that the penultimate paragraph of section 368 may become applicable when upon the death of the plaintiff the defendant claiming a set-off omits to take steps to bring on the record the legal representative of the deceased, and that in the same way section 373 may become applicable when the defendant, who has preferred a claim to a set-off, subsequently desires to withdraw that claim with liberty to sue upon it in another suit, but fails to obtain the leave of the Court. In my opinion it is not necessary for the purposes of this case to examine the effect of these sections; when the question does arise upon the construction of any of them, it will have to be determined with reference to its language, scope and object, taken along with the provisions of sections 111 and 216. But I am by no means satisfied that if, as suggested by the learned vakil for the appellant, the consequence of our decision in this case with regard to section 43 be, that a similar construction, by analogy, may come to be placed upon the other sections to which he has referred, the result will be at all undesirable or inconsistent with the provisions of the Code; for example, I cannot see any good reason why a defendant, who has included a claim to set-off in his written statement has got an issue raised upon the point, and has adduced evidence upon it should at the last moment, when he discovers that he has failed to make out his claim and is bound to lose, be in a position to withdraw his claim as of [663] right and be at perfect liberty to litigate the same matter in a different suit, probably in a different Court; I should not regret if, when section 373 comes to be interpreted, it is found possible legitimately to place upon its language a construction which may prevent a result of this description. It is unnecessary, however, to pursue this line of argument further. There

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(1) (1903) 8 C. W. N. 174.

(2) (1886) I. L. R. 8 All. 593.

(3) (1889) I. L. R. 13 Bcm. 572.

(4) (1891) I. L. R. 16 Mad. 29.

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is only one other observation of the learned vakil for the appellant, to which I need make a reference. He suggested that the rule against splitting up of claims embodied in section 43 is not of such fundamental importance as to justify this Court in extending its application to the case of a defendant, who claims a set-off under section 111, when by its very terms the rule is limited to a plaintiff in a suit; and as an illustration, he referred to the case of *Ram Soondur Sein v. Krishno Chunder Goopto* (1), where Mr. Justice Jackson held that it was questionable whether the corresponding section of the Civil Procedure Code of 1859 (section 7, Act VIII of 1859) was applicable to rent suits under Act X of 1859. The doubt, however, which that learned Judge expressed, was obviously based on the ground that Act X of 1859 was a complete Code in itself and could not be supplemented by the incorporation of the provisions of other Codes; see *John Poulson v. Madhusudan Pal Chowdhry* (2), *Unnoda Persaud Mookerjee v. Kristo Coomarr Moitro* (3) and *Nagendro Nath Mullick v. Mathura Mohun Parhi* (4). The question on the other hand, which we have to consider, is the true meaning and effect of two provisions of the law, which find a place in the same Code; the relation between these must obviously be determined upon entirely different principles.

The result, therefore, is that the decree made by the Court below must be affirmed, and this appeal dismissed with costs.

Appeal dismissed.

32 C. 664 (=2 Cr. L. J. 512.)

[664] CRIMINAL REVISION.

Before Mr. Justice Henderson and Mr. Justice Geidt.

BHAGWATI SAHAI v. EMPEROR.*

[4th April, 1905.]

Public servant—Clerk to a Sub-Registrar—Illegal gratification—Penal Code (Act XLV of 1860), ss. 21, 161—Registration Act (III of 1877), ss. 6 to 14, 69, 84.

A clerk appointed by a Sub-Registrar and paid out of an allowance given to the Sub-Registrar is not a "public servant" within the meaning of s. 21 of the Penal Code.

RULE granted to Bhagwati Sahai, the petitioner.

On the 17th of September, 1904, the Magistrate of the district who is also Collector and District Registrar, went to Bihpur (in the district of Bhagalpur) and while he was in camp a petition was presented to him complaining against the petitioner, who was the Head Clerk in the Sub-Registrar's office at Bihpur, to the effect that the complainant, Srinandan Singh, went on the 16th of September to the Bihpur Registry office to get a document registered; and, according to the usual practice, the document was made over in the first instance to the Head Clerk to see, if there were any corrections to be made; that when the deed was given to the Head Clerk he demanded a bribe of Rs. 2-8 as *tehrir*, and when this was refused he threw the deed down, but finally accepted it when Rs. 2 was paid by the complainant.

The District Magistrate at once made what enquiry was possible and ordered the petitioner to be prosecuted. In the result, the petitioner was

* Criminal Revision No. 127 of 1905, against the order of W. H. Vincent, Sessions Judge of Bhagalpur, dated Jan. 16, 1905.

(1) (1872) 17 W. R. 320.

(2) (1865) B. L. R. Sup. Vol. 101.

(3) (1872) 19 W. R. 5.

(4) (1891) I. L. R. 18 Cal. 368.