

APPELLATE CIVIL.

Before Mr. Justice Phear and Mr. Justice Morris.

1874
April 29

HOSSEINA BIBI (PLAINTIFF) v. JAMES SMITH (DEFENDANT).*

Set-off—Act VIII of 1859, s. 121—Contribution.

In a suit brought against a lessee of a portion of an estate by one of the co-shares for money alleged to be due as the plaintiff's share of arrears of rent for a certain period, where the claim was admitted, *Held*, the defendant was not entitled to set-off under s. 121, Act VIII of 1859, the plaintiff's share of the Government revenue of the whole estate which had been paid by the defendant for the period for which the arrears of rent were alleged to be due.

Held also that there was no such connexion between the claim of the plaintiff and the counter-claim of the defendant, as would entitle the defendant, as a matter of equity apart from legislative enactment, to a set-off.

THE plaintiff, one of several co-sharers in Mauza Ekbalpore, sued the defendant who held a lease of the said property from the plaintiff and her co-sharers, to recover a sum of Rs. 623 as the plaintiff's share of arrears of rent alleged to be due for the years 1276, 1277, and 1278 F.S. (1869, 1870, 1871). The defendant, whilst admitting the plaintiff's claim to the rent for which she sued, pleaded that, during the years in question, he had paid on behalf of all the co-sharers in the estate the Government revenue in respect thereof, and claimed to set-off in this suit the plaintiff's quota of such revenue against the arrears of rent due to her.

The first Court gave a decree in favor of the plaintiff, holding that, as the payments made by the defendant were entirely voluntary, he was not entitled to set them off against the plaintiff's claim for rent.

The Judge on appeal, however, allowed the set-off claimed by the defendant: and from that decision, the plaintiff now appealed to the High Court.

Special Appeal, No. 1272, of 1873, against a decree of the Additional Judge of Zilla Tirhoot, dated the 13th February 1873, modifying a decree of the Munsif of Tajpore, dated the 17th September 1872.

Mr. *Sandel*, for the appellant, contended that, under the provisions of Act VIII of 1859, s. 121, the defendant was not entitled to set off his claim against the plaintiff's claim for arrears of rent. The two claims were not of the same nature, nor was there any such connexion between them that the one could not be judged by a Court of Equity without the other being also taken into consideration. S. 121 contemplates the set off of two debts of an exactly similar character. The defendant's counter-claim was of the nature of a claim for contribution, and did not come within the provisions of s. 121.

Mr. *Allan*, for the respondent, submitted that there was such a connexion between the two claims as to entitle the defendant to a set-off in equity, even if there was no provision for it under statutory enactments, Courts of Equity always allow a set-off by way of equitable relief of claims which, by the position of the parties, or the nature of the case, are connected with each other; Story's Equity Jurisprudence, s. 1434. In this case the counter-claim set up by defendant was intimately connected with plaintiff's claim, in as much as the Government revenue was paid by defendant on account of his being a tenant of the plaintiff.

Mr. *Sandel* in reply.

The judgment of the Court was delivered by

PHEAR, J. (who, after stating the facts, continued) :—The question now before us is whether the defendant can in this suit set off these items against the plaintiff's claim.

We think that he cannot. The section of the Civil Procedure Code which authorizes a defendant when sued for a money-debt to set off a money claim against him is s. 121. It is in these words :—“If in a suit for debt the defendant desire to set off against the claim of the plaintiff the amount of any debt due to him from the plaintiff, he shall tender a written statement containing the particulars of his demand, and the Court shall thereupon enquire into the same. Provided that, if the sum claimed by the defendant exceed the amount cognizable by the Court, the defendant shall not be allowed to set off the same, unless he abandon the excess.”

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If this section were absent from the Code, then the remedy of a defendant who had a money-claim against the plaintiff who sued him for money, could be obtained only by bringing a separate suit. And this remedy is still open to the defendant in all cases, to which s. 121 does not apply, or in which the defendant has not availed himself of it. Now, on looking closely at the words of this section, we see, as probably it might have been reasonably anticipated, that the claim which the defendant may thus set off against the claim of the plaintiff must itself be of the nature of a debt. It would be exceedingly inconvenient if in answer to a simple money-claim made by a plaintiff, it were open to the defendant to set up matter which ought to be the subject of a substantive suit, and to be explained and set out at length in a plaint rather than in a written statement filed in answer to the claim of the plaintiff. It never was intended by the words of s. 121 that two suits entirely different in their character should be tried together, the one instituted by the plaintiff against the defendant, and the other instituted by the defendant against the plaintiff. And so we find that the claim which, under s. 121, can be set up by a defendant in answer to a money-claim of the plaintiff must be a debt.

If we, however, inquire into the character of the set-off which the defendant makes in the present case, we see at once that it is not a debt. This claim against the plaintiff, if it is valid, and capable of being established, is a claim which he would have to make against her jointly with her co-sharers, and would have to be supported by evidence of facts which had occurred affecting both her and the co-sharers, and would depend for its merits upon the conduct of the co-sharers, as well as that of the plaintiff herself towards the defendant: rather, perhaps I ought to say it would depend upon conditions of equity to be made out between the defendant on the one side, and the plaintiff and her co-sharers on the other side. On the whole it would be a matter that could not be fairly and properly tried, excepting in a separate suit instituted for the purpose. For what is the answer of the defendant when looked at closely? He says, it is true that I agreed under the terms of my lease, to pay to you and the owners of this property, a certain rent for this land; and in

particular, to pay you individually the share which you claim, but I have, under the circumstances which have occurred, been in the habit of paying on behalf of the owners of the property the Government revenue which is due in respect of it and have hitherto been allowed to deduct the money so paid from the total amount of rent due from me to the shareholders ; and I say that the aliquot part of the Government revenue which you, the plaintiff, in your relation with your co-sharers, ought to pay is, or rather was, in the year 1276 (1869), Rs. 111 ; 1277 (1870), Rs. 114 ; and so on.

If the defendant had to make out the case which he here sets up, he would be bound to show what the portion of the Government revenue which the plaintiff was bound to contribute in aid of, and as regards, her other co-shareholders was in these particular years, 1276, 1277, &c. But this is precisely a case of contribution. And it is now sometime ago settled that the liability to contribute towards a burden of [this kind is a liability which, in the absence of express words, does not rest upon contract, but which is based upon principles of equity. Therefore the obligation of the plaintiff, if there is such an obligation, to repay the defendant a portion of the money which he has advanced on behalf of all the shareholders of the property for the purpose of paying the Government revenue, is not a debt resting upon a contract between herself and him, or even upon a quasi contract, but is an obligation to be ascertained and determined by the application of the principles of equity to circumstances surrounding the defendant, her co-sharers, and the plaintiff, which are far from being necessarily simple, and which may be exceedingly complicated. It appears to us that the Court cannot try a question of this kind by the way of set-off to a plaintiff's claim under the provisions of s. 121 of the Civil Procedure Code, but the defendant must have recourse to a separate action for the purpose.

Mr. Allan pressed upon us that, apart from statutable enactment, Courts of Equity always take into consideration claims by way of equitable set-off set up on the part of the defendant, which are by the nature of the case connected with the claim of the plaintiff ; and in support of this position he referred us to s. 1434 of Story's

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Equity Jurisprudence. But the answer to this, in the first place, is, that the plaintiff's claim is not a claim, in the proper sense of the term, of an equitable character. The plaintiff seeks to recover a simple money-debt, not to enforce an equity. And in the second place I apprehend that the connexion which is intended by the words used in the section referred to, is a connexion in equity between the claim of the plaintiff and the counter-claim of the defendant. If the claim which the plaintiff in equity brings against the defendant is so connected with the counter-claim which the defendant sets up against the plaintiff, that the one cannot be properly and sufficiently inquired into and ascertained without consideration of the other, then a Court of Equity will allow a set-off which the defendant in this way makes. There must be, by the nature of the two claims, such a connexion between them that the truth or completeness of the one cannot be judged of or measured without reference to and a consideration of the other. But, as I have already endeavoured to point out, the claim of the plaintiff in this case is a simple money-claim resting upon the plain words of a contract, whereas the claim which the defendant sets up against her is a claim arising out of transactions by no means simple in their character, in which the interests of other people besides the plaintiff are even more largely involved than those of the plaintiff herself, and which has no immediate connexion with his contract to pay rent to the plaintiff.

Therefore, it appears to us that, apart from any legislative enactment, the Court could not rightly in the present suit take into consideration the matter of the defendant's set-off for the purpose of determining whether the plaintiff's claim was good or not; and also that s. 121 of Act VIII of 1859 does not enable it to do so.

In this view we are of opinion that the decision of the lower Appellate Court was erroneous, and that of the first Court was in substance correct. We reverse the decree of the lower Appellate Court, and affirm that of the Munsif, with costs in both the Courts.

Appeal allowed.