

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

BRIJNATH DASS v. JUGGERNATH DASS.

1879
March 10 &
25.

Redemption Suit—Set off of Costs against Mortgage-Money—Civil Procedure Code (Act X of 1877), ss. 111, 221.

The decree in a redemption suit directed the plaintiff (the mortgagor) to pay the mortgage-money and interest to the defendant, and directed the defendant to pay the plaintiff the costs of the suit.

Held, that the plaintiff was entitled to set off the amount of his taxed costs against the mortgage-money which he was liable to pay under the decree, notwithstanding any claim that the defendant's attorney might have against the defendant in respect of the defendant's costs of suit.

THE facts and arguments sufficiently appear from the judgment.

Mr. T. A. Apcar for the plaintiff.

Mr. Jackson for the defendant.

PONTIFEX, J.—This is an application in a redemption suit, by the decree in which the plaintiff (the mortgagor) was directed to pay the mortgage-money and interest to the defendant (the mortgagee), but the defendant was directed to pay the plaintiff the costs of the suit.

The plaintiff, who has taxed his costs, now seeks to set off the amount payable to him under the taxation against the mortgage-money which he is liable to pay under the decree.

The application is resisted by the solicitor of the defendant, who claims a lien on the mortgage-money which the plaintiff has been directed by the decree to pay; such lien being claimed in respect of the costs owing to the solicitor by the defendant for conducting the suit on his behalf.

In support of the plaintiff's application, *Bawtree v. Watson* (1) and *Verity v. Wylde* (2) have been referred to as authorities to

(1) 2 Keen, 713.

(2) 4 Drewry, 427.

show that when a decree directs mutual payments between the parties to the cause, the lien of the solicitor does not extend to all sums coming to the credit of his client, but only to the ultimate balance to be paid to him in the suit.

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On the other hand, two cases decided by Lord Cairns—namely, *Ex parte Cleland* (1) and *In re The Bank of Hindustan* (2)—have been cited as authorities to show that the lien of a solicitor on a sum due or payable to his client prevents a set-off against a sum due from his client. Neither of these cases, however, relates to mutual payments under the same decree, and in each of these cases the amount sought to be set off was an unconnected or independent demand. Those cases are not, in my opinion, authorities to govern the rights of the parties in a redemption suit.

But the latter part of s. 221 of the new Code of Civil Procedure is also relied on by the defendant's solicitor as preventing a set-off. The same provision is attached to s. 111, where it not improperly applies, for that section permits the set off of independent or unconnected demands, which, except for the provisions of that section, would not have been the subjects of set-off. Though, whether, after permitting a set-off to be pleaded so early in a suit, as by the defendant's written statement, it was desirable to sustain the lien to that extent instead of following the doctrine of *Bawtree v. Watson* (3) and *Verity v. Wylde* (4) may be questionable, seeing that the lien has always been treated as merely an indemnity to the solicitor for his exertions in recovering a fund in a particular suit. As however s. 111 treats the set-off as if a cross-suit had been instituted, it may have been considered advisable to leave the question of lien as it would have continued if it had been necessary to institute a cross-suit. But it is difficult to understand how this provision came to be attached to s. 221. As it stands, it seems to assume that it is usual for a decree to make costs payable to the pleader, instead of to the party; which practice, if it existed, would of itself negative the right of set-off; and it leaves wholly undefined what is intended by the word 'lien.'

(1) L. R., 2 Ch. App., 808.

(2) L. R., 3 Ch. App., 125.

(3) 2 Keen, 713.

(4) 4 Drewry, 427.

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At all events, in the present case, it cannot be said that any costs are payable to the defendant's solicitor under the decree.

If I were to decide that the provision applies in the present case, I should be giving to the solicitor of an unsuccessful litigant preference and priority over the successful litigant; and this preference would be given in respect of the defendant's costs of a suit which I must assume ought not to have been defended, as the defendant has been ordered to pay the plaintiff's costs of it. If indeed I were so to decide, I should in fact go far towards rendering nugatory that part of the decree which directs the defendant to pay the plaintiff's costs of suit.

The present application arising out of a redemption suit, I am prepared to hold that the plaintiff is entitled to set off or deduct the amount of the costs payable to him under the decree, from the mortgage-moneys payable by him to the defendant, notwithstanding any claim the defendant's solicitor may have against the defendant in respect of the defendant's costs of suit; and I, therefore, make the order asked for, and I must give the plaintiff the costs of this application.

Attorneys for the plaintiff: *Ghose and Bose.*

Attorneys for the defendant: *Dignam and Robinson.*

PRIVY COUNCIL.

P. C. * CHOTAY LALL (DEFENDANT) v. CHUNNOO LALL AND DHUNNOO
1878 LALL (PLAINTIFFS) AND THE ADMINISTRATOR-GENERAL OF
Nov. 22 & 23. BENGAL (DEFENDANT).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Jain Customs—Daughter's Estate.

In the absence of proof of special custom varying the ordinary Hindu law of Inheritance, that law is to be applied to Jains.

According to the law of the Mitakshara, a daughter's estate inherited from her father is, like that of a widow inherited from her husband, a limited and

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.