
(1936) 01 CAL CK 0048
In the Calcutta High Court

Jitendra Nath Ray

APPELLANT

Vs

Jnanada Kanta Das Gupta

RESPONDENT

Date of Decision : 22-01-1936

Acts Referred:

Court Fees Act, 1870 — Section 6

Citation : AIR 1936 Cal 277

Hon'ble Judges : Nasim Ali, J;Henderson, J

Bench : Full Bench

Judgement

Nasim Ali, J.—Plaintiff's case is that he is the Zamindar of Taraf Kalia in the District of Jessore. He had a Kutchery in a village called Kalia. Defendant 1 was his Naib in that Kutchery from 18th Pous 1329 to 5th Falgoon 1335 B.S. He was dismissed on 6th Falgoon 1335. He made over all the papers and cash to the plaintiff. On examination of these papers and deducting the amount due to defendant 1 Rs. 1,747-5-9 was found due from defendant 1. The present suit is for the recovery of this amount. The defence of defendant 1 who contested the plaintiff's suit in the Courts below is that nothing was due from him and that he was entitled to get Rs. 1,076 from the plaintiff, namely Rs. 576 for his pay and Rs. 500 which he deposited with the plaintiff at the time when he was appointed Naib. The learned trial Judge dismissed the plaintiff's suit and passed a decree for Rs. 838-15-0 in favour of defendant 1. The plaintiff filed an appeal before the lower appellate Court and defendant 1 filed cross-objections. The plaintiff's suit was dismissed but the amount of the decree in favour of defendant 1 was enhanced to Rs. 865-9-6 by the lower appellate Court. Hence this second appeal by the plaintiff. Defendant 1 has also filed cross-objections.

2 .The first point urged by the learned advocate for the appellant is that the claim for set off by defendant 1 is not maintainable as the written statement pleading the set off was not properly stamped. This objection was not raised in any of the Courts below. But it is not disputed by the learned advocate for defendant 1 that the written statement should have been stamped with courtfees

stamp on Rs. 1,076, the amount pleaded as set off in the written statement. The written statement however though not stamped was accepted by the trial Judge through mistake or inadvertence. It appears however that the trial Judge directed defendant 1 to pay court-fees on Rs. 838-15-0 when he passed a decree in his favour for that amount, and defendant 1 paid court-fees on this amount accordingly. By Section 6, Courtfees Act, no document on which Courtfees are payable under the Court-fees Act shall be filed in Court unless in respect of such document the court-fees have been paid. A document not properly stamped is not however a nullity: *Faizullah v. Mauladad* 1929 P C 147 Section 28, Courtfees Act, lays down that no document which ought to bear a stamp shall be of any validity unless and until it is properly stamped. But if any such document is through mistake or inadvertence filed or used in any Court without being properly stamped, the presiding Judge may, if he thinks fit, order that such document be stamped as he may direct and on such document being stamped accordingly the same and every proceeding relating thereto shall be valid as if it had been properly stamped in the first instance. Defendant 1 was liable to pay Court-fees on Rs. 1,076. He was however directed by the trial Judge to pay Court-fees only on Rupees 838-15-0 and has paid Court-fees on that amount. His written statement claiming set off is not therefore even now properly stamped. The question of amount of Court-fees payable by defendant 1 has been wrongly decided to the detriment of revenue. Defendant 1 in his written statement undertook to pay proper Courtfees on the amount of set off claimed by him. The trial Judge through mistake did not realize the full Court-fees. The learned Advocate for defendant 1 states before us that his client is willing to pay the additional Court-fees. u/s 12 (ii), Court-fees Act, and Section 149, Civil P. C., we direct defendant 1 to pay the additional Court-fees. On such payment being made the question of the validity of the claim for set-off by defendant 1 will no longer arise.

3. The next point urged by the learned Advocate for the appellant is that the amount which defendant 1 claimed as set off was not legally recoverable at the date when the set off was claimed in the written statement and consequently the Courts below should have wholly rejected the plaintiff's claim for set off in respect of Rs. 1,076. A set-off is either legal or equitable. Legal set off must be in respect of an ascertained amount. Order 8, Rule 6 is restricted to legal set off. Claim for equitable set-off is allowed when the demands arise out of the same transaction or are so connected in their nature and circumstances that they can be looked upon as a part of one transaction. Equitable set off is allowed if the amount be unascertained. Order 20, Rule 19 (3), recognizes equitable set off. Again a set off may be purely defensive, that is it may amount to an adjustment or satisfaction of the plaintiff's claim, or it may be a counterclaim under which the defendant claims a decree for the surplus amount due to him. Limitation applies to both these claims. In a defensive set off the set off claimed must be recoverable at the date of the plaintiff's suit. In a counterclaim, the sum claimed by the defendant should be legally recoverable at the date when he makes the

claim, that is at the date when he files the written statement. The words "legally recoverable" in Order 8, Rule 6, mean legally recoverable at the date of the institution of the suit in one case and as meaning legally recoverable at the date when the counter-claim is made in the other case. It is true that in Order 8, Rule 6, and in Order 20, Rule 19, there is no clear distinction between a mere set-off, that is, a defensive set off and a counter-claim. But in Indian Courts a distinction has been made in accordance with the law of England as it is based on a sound "principle. The sum of Rs. 1,076 which is claimed by defendant 1 as set off consists of: (1) his arrears of pay, (2) deposit made by him with the plaintiff. So far as the claim regarding the deposit is concerned it comes either under Article 120 or Article 145, Lim. Act. There is nothing to show that the cause of action for recovering this amount arose beyond six years from the date of filing the written statement. So far as the arrears of pay are concerned the question is when these arrears had become due: (Article 102, Lim. Act.) This is a question of fact. It depends upon the contract between the parties.

4. The question of limitation was not raised in any of the Courts below. Under these circumstances it is not possible for us in second appeal to decide when the arrears became due to defendant 1. It may however be mentioned here that in the plaint which was filed within three years from the date of defendant 1's dismissal, the plaintiff distinctly admitted that the arrears were recoverable from him and, in fact, he deducted this amount from his claim in the suit. Under these circumstances we are not in a position to hold that defendant's claim for arrears of pay was barred at the date of the written statement which was filed within three years from the date of the filing of the plaint. Defendant 1 is therefore entitled to claim the entire amount, that is Rs. 1,076 both as defensive set off as well as a counter-claim. There is therefore no substance in this contention. The last point urged by the learned advocate for the appellant was about costs. The learned Judge has definitely found that defendant 1 explained all the papers to the plaintiff. The claim of the plaintiff has been found to be substantially false. Defendant's claim for set off has been allowed in full. Under these circumstances I am not prepared to say that the trial Judge was wrong in giving the defendant his costs and in refusing costs to the plaintiff. So far as the cross-objection by defendant 1 is concerned, the only complaint is that the learned Judge in appeal should have given defendant 1 his costs in appeal. In view of the facts and circumstances of this case, I am not prepared to say that the learned Judge has not used his discretion properly. The cross-objection is therefore dismissed without costs.

5. The additional Court-fees which defendant 1 is directed to pay must be paid into this Court within one month from this date. On such payment being made the appeal will be dismissed with costs and defendant 1 will be entitled to recover this amount from the plaintiff and the amount will be included in the decree of this Court in favour of defendant 1 for costs. If however the additional Court-fees be not paid within the time aforesaid the appeal will be allowed in part and the plaintiff will get a decree against defendant 1 for Rs. 210-6-6 with

proportionate costs throughout.

Henderson, J.

6. I agree.