

(1942) 06 CAL CK 0009
In the Calcutta High Court

Rai Harendra Nath Chaudhury	Vs	APPELLANT
Rai Sourindra Nath Choudhury and Others		RESPONDENT

Date of Decision : 10-06-1942

Acts Referred:

Limitation Act, 1963 — Section 3

Citation : AIR 1942 Cal 559

Hon'ble Judges : R.C. Mitter, J;Khundkar, J

Bench : Full Bench

Judgement

R.C. Mitter, J.—The plaintiffs are the sons and heirs of Rai Satindra Nath Choudhury of Nakipore. Rai Harendra Nath Chowdhury, the defendant-appellant and his cousin Rai Dhirendra Nath Chowdhury of Taki jointly held under Rai Satindra a number of ganti tenures. Later on some of those tenures were split up and Rai Harendra Nath became the sole tenant under Rai Satindra in respect of the four tenures which are the subject-matter of the suit in which this appeal arises. The plaintiffs have sued him for arrears of rent and cesses together with damages for the years 1341 to 1344 B.S. The claim as laid in the plaint is for Rs. 9271-13-1. The suit was filed on 19th April 1938.

2. The plaintiffs in their turn hold five tenures under Rai Harendra and others. The total rent annually payable for them is Rs. 8715 odd. In his written statement filed on 5th August 1938 Rai Harendra states that in respect of the said five tenures the sum of Rs. 8106-6-1 is due to him from the plaintiffs for the years 1341 to 1344. He claims a set-off for the said amount. At the time when the plaint was filed his claim for none of these years was barred by time, but at the date when he filed his written statement the claim for his share of the rent for the year 1341 B.S. was so barred. In a rejoinder filed by the plaintiffs on 15th August 1938, they stated that the mutual claims of themselves and of Rai Harendra Nath up to the year 1332 B.S. had been set off against each other but there had not been any adjustment after that year. They further stated that by reason of the assurances given by Rai Harendra to the plaintiff's father, Rai

Satindra, the latter desisted from suing the former for arrears of rent for the four tenures in suit for the years 1333 to 1340 B.S. with the result that their claim for that period became barred by time. They accordingly prayed that the claim of Rai Harendra Nath for rent against the plaintiffs for the years 1341 to 1344 may be set off not against their claim as made in the suit, that is against the arrears for 1341 to 1344, but against their claim for rent for those years, namely 1333 to 1340 B.S.

3. The learned Subordinate Judge held that on the assurance of Rai Harendra Nath the plaintiffs' father, Rai Satindra Nath, did not sue the former for the arrears of rent due to him for the years 1333 to 1340 with the result that his claim for that period became barred by time. This finding of the learned Subordinate Judge has not been challenged by the appellant. The learned Subordinate Judge further held that the plaintiffs were entitled to "claim equitable set-off of their admitted time-barred rent dues against the defendant." He accordingly took accounts of what was due to the plaintiffs from the defendants on account of rent and cesses from the year 1333 to 1344 and set off against the said amount the arrears of rent and cesses due from the plaintiffs to the defendant for the years 1341 to 1344 B. S. and passed a decree for the balance in favour of the plaintiffs. This part of the judgment only is challenged by the defendant appellant. In our judgment, the learned Subordinate Judge is not right in this respect. The expression used by the learned Subordinate Judge "that the plaintiff is" entitled to claim equitable set-off" is unhappy. The claim of the plaintiff's to the arrears of rent for the years 1333 to 1340 can on no account be taken to arise out of the same "transaction" out of which arose the claim of the defendant for the rent of the years 1341-1344 to which he laid claim in his written statement. Moreover set-off is a plea in defence, a plea available to the defendant only. In its original and strict sense it is a defence pure and simple, which by adjustment would either wipe off or reduce the plaintiff's claim for money as made in the suit. In its enlarged sense, and that is of statutory creation, it is a defence and a counterclaim combined, defence to the extent of wiping out the plaintiff's claim and a claim by the defendant in the suit itself for the balance. We accordingly take it that the learned Subordinate Judge meant that in equity the plaintiff was entitled to say that the claim of the defendant was to be adjusted not against the money claimed by the plaintiffs in their plaint but against what they had not claimed in the plaint and what they could have claimed as plaintiffs, if the defendant had not lulled them to inaction by his assurance that he would not set up the plea of limitation. Even if this be the meaning of the learned Subordinate Judge we do not think that he is right. The learned Subordinate Judge has in effect given the plaintiffs a decree for a sum not only not included in their plaint but the claim at the date of their suit to which was barred by limitation. Even if that claim had been included in the plaint he would have been under a duty to dismiss it in view of Section 3, Limitation Act.

4. The claim to set-off as made by the defendant comes within Order 8, Rule 6,

Civil P.C. The defendant was entitled to claim set-off, if the money was legally recoverable. The only way in which the plaintiffs could have met the defendants' claim was by pleading and showing that the money was not legally recoverable by the defendant, either by reason of some legal bar or by reason of facts which if established would have been an answer on the merits. For instance they could have pleaded that the claim was barred by time or that the sum claimed was not due, or it was paid up before or adjusted in fact against other claims of theirs or there was an agreement to adjust the same against other claims of theirs. They have not, however, in their rejoinder taken defences of the nature indicated above. Moreover, in the evidence led by them they have expressly stated that the rent of 1341-1344 due to the defendant was never adjusted against their claim for rent for the years 1333 to 1340 nor was there an agreement to adjust the same in that manner. We accordingly hold that the plaintiffs are not entitled to have the defendant's claim adjusted towards their claim for rent for the years 1333 to 1340 B. S. The arrears claimed by the defendants are admitted. The only material question therefore is whether any portion thereof is barred by time.

5. At the date when the plaintiffs filed their suit no portion of the defendant's claim was so barred. At the time when the defendant filed his written statement his claim for the arrears for 1341 B. S. was barred by time. The question is what date, the date of the presentation of the plaint or the date of the written statement in which set-off was pleaded, would be the material date. Order 8, Rule 6, Civil P.C., does not deal with this point. By enacting in Sub-rule (1) that the money claimed by the defendant must be "legally recoverable" the Legislature indicated among others the question of limitation. The claim of the defendant which is sought to be set-off must not be a dead claim. Sub-rule (2) enacts that the written statement shall have the effect of a plaint in a cross suit, the object being, as is expressed in the Sub-rule itself and in Order 20, Rule 19, to confer power on the Court to adjudicate also upon the claim to the sum of money made by the defendant in his written statement and to pass a decree in his favour in case the balance turned in his favour. There being thus no clear indication on the point in the rule itself we will have to decide the question in accordance with principles and precedents. We have already stated that in its origin set-off was purely a weapon of defence and not of attack. Both set-off and counter-claim are creatures of statute. They are, however, essentially different. In *Stooke v. Taylor* (1881) 5 Q.B.D. 569 Cookburn C. J. dealing with set-off in its original sense thus observed:

In my opinion it is altogether a mistake to treat a counter-claim and set off as standing on the same footing, or a counter-claim as equivalent only to a set-off. Set-off and counter-claim may be, and commonly are, essentially different; and it becomes necessary, therefore, to see in each case whether a counter-claim amounts in effect to no more than a set-off, or whether it is in effect a cross action.... The plea (of set-off) can only be used in the way of defiance to the plaintiff's action, as a shield, not as a sword. Though the defendant succeeded in proving a debt exceeding the plaintiff's demand, he was not entitled to recover

the excess; the effect was only to defeat the plaintiff's action, the same as though the debt proved had been equal to the amount of the claim established by the plaintiff and no more.

6. The learned-Chief Justice after quoting with approval the following observations of Brett, L.J. made in *Winterfield v. Bradman* (1878) 3 Q.B.D. 324;

A counter-claim is sometimes a mere set-off, sometimes it is the nature of a cross action; sometimes it is in respect of a wholly independent transaction," finally observed thus:

I am therefore of opinion that, while under the special enactment of the statutes relating to set-off a plaintiff recovers no more than the amount of his claim as reduced by the set-off, the effect of a counter-claim is altogether different, and where such a claim is set up as a cross action, each party recovers the amount of his claim, although by a wise and salutary provision the party establishing his claim for the larger amount, whether plaintiff or defendant, obtains judgment for the excess only of his claim over that of the other.

7. In this passage the learned Chief Justice was obviously referring to Order 19, Rule 3 of the Supreme Court Rules which runs thus:

A defendant in an action may set off, or set up by way of counter claim against the claims of the plaintiff, any right or claim, whether such set-off or counter claim sound in damages or not, and such set-off or counter-claim shall have the same effect as the statement of a claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim.

8. The first part of this rule is wider than Order 8, Rule 6, Sub-rule (1), Civil P.C, for the Counter-claim may be in respect of a debt, i.e., an ascertained sum of money, as also in respect of damages. But the last part of this rule, corresponds substantially to Sub-rule (2) of Order 8, Rule 6. Although the word "counterclaim" is not used in our statute and although generally speaking a counter claim is incompetent under the procedure laid down in the Code of Civil Procedure and such a claim by the defendant must be enforced in a separate suit (AIR 1933 29 (Privy Council) Order 8, Rule 6 read with Order 20, Rule 19 does permit what is in essence a counter claim of a specific kind, namely where the counter claim is in respect of an ascertained sum of money exceeding the plaintiff's demand and in that case it is permissible for the Court to pass a decree in favour of the defendant for the excess sum over the plaintiff's demand. Although the word set-off only is used in Order 8, Rule 6 and not the word counter-claim also, the claim to the ascertained sum of money which the Code permits the defendant to set up in the plaintiff's action for money may not only be what is strictly termed set-off but what is also a counter claim. If the claim set up by the defendant is in respect of a debt which is less than or equal to the plaintiff's claim in the suit, it is a plea of set-off pure and simple, but it exceeds the plaintiff's claim it is to the extent of the excess a cross claim, for the

excess he is to be given a decree against the plaintiff in the same action.

9. In the case before us what has been pleaded is pure set-off, for the defendant claims an ascertained sum of money which is less than the plaintiff's demand in the suit. On general principles there would have been no question of limitation, for a defence is not barred by lapse of time. But a plea of set off urged by way of defence and only as a defence to the plaintiff's claim for money being of statutory creation must be regulated by the provisions of the statutes which creates it. By the terms of Order 8, Rule 6 of the Code the claim must be legally recoverable, that is, must not be a dead claim. As the set off we are considering is merely defensive (for the defendant does not claim a sum in excess of the plaintiff's claim)--an answer to the plaintiff's claim, on principle the relevant enquiry would be whether it was a dead claim at the date of the plaintiff's suit. If the other view be taken, namely that the material date is to be the date of the written statement, it would lie in the power of the plaintiff to defeat such a plea of the defendant by simply delaying the service of the summons on the defendant. In *Walker v. Clements* (1850) 15 Q.B. 1046, the view we take was adopted and though the judgment does not give any reason the argument of the counsel that "any other view would lead to this injustice; that the defendant might not bring an action on his claim, knowing that the plaintiff had a claim, whereas the plaintiff by issuing his writ and not declaring till the defendant's right of action was barred, might avail himself of his own claim and get rid of the demand against him," is worth consideration.

10. In such a case, duty requires, that the plaintiff should himself deduct from his demand the debt which was due from him to the defendant and which was not dead at the time of his suit and sue the defendant for the balance, and if he does not act in that manner, the Court will place him in the same position in which he ought to have placed himself. The view we are adopting is supported by a long series of decisions of all the High Courts, *Pragi Lal v. Maxwell* ('85) 7 All. 284 at p. 287, *Bharta Vs. Chet Ram*, , *Narendra Lal v. Taru Bala Dassi* AIR 1921 WB. 67 , *Jitendra Nath Ray Vs. Jnanada Kanta Das Gupta*, , *Najan Ahmed-Haji Ali v. Sale Mohamed Peermahomed* AIR 1923 10 Bom. 113 and *Narasimha Rao v. Sri Rajah Vellanki Srinivasa Jagannatha Rao* AIR 1920 Mad. 819. Where, however, the defendant pleads for or sum of money which is in excess of the plaintiff's claim he occupies to the extent of the excess the position of a plaintiff in a cross suit and in such a case and for the excess amount time is to be reckoned not from the date of the plaintiff's suit hut from the date when he filed his written statement. On the facts of this case, we hold that the claim of the defendant for the rent of 1341 also can be set off against the plaintiffs' demand.

11. A new point was raised before us for the first time by the plaintiff's advocate, namely, that the claim of the defendant cannot be set off against the plaintiffs' demand, inasmuch as the debt due by the plaintiffs was not due to the defendant alone, but to the defendant and others. In the written statement, the defendant distinctly alleged that the sum claimed by him by way of set-off was

due to him alone. In the rejoinder of the plaintiffs that fact was not denied. We cannot, accordingly, allow the plaintiffs to raise the said plea at this stage, it depending upon facts which were not put in issue in the lower Court, The result is that this appeal is allowed. The defendant is allowed set-off to the extent of Rupees 8106-0-3 from the plaintiffs' demand of Rs. 9272-13-1. The plaintiffs will accordingly get a decree for the balance, namely for rupees 1166-10-1. The plaintiffs would get proportionate costs of the lower Court, but the parties will bear their respective costs of this Court, except that the defendant would get from the plaintiffs-respondents the costs of the court-fee stamp paid on the memorandum of appeal. The cross-objection is dismissed. We make no order as to costs in the cross-objection.

Khundkar, J.

12. I agree.