

*Referred Case.*1867.
Aug. 24.

EWART, LATHAM, & CO. v. HAJI MUHAMMAD SIDDI'K.

Small Cause Court—Jurisdiction—Balance of Account—Set-off—Part Payment—Counter Claim—Credits by Agreement—Agency—Authority—Account-Sales—Commission to take Evidence.

The plaintiffs advanced Rs. 15,000 against the defendant's grain, consigned to Hongkong, to be there sold on his account by the plaintiffs' agents. The plaintiffs subsequently gave credit to the defendant for Rs. 14,115-3-3, alleged to have been received by them as the proceeds of the sale, and sued him for the balance in the Bombay Small Cause Court, abandoning the excess so as to bring the claim within the court's extended jurisdiction of Rs. 1,000. The defendant disputed the correctness of the account-sales forwarded by the agents at Hongkong, and contended that the court had no jurisdiction to try the case; and the Judge, subject to the opinion of the High Court upon the facts as stated, struck the case out of the list for want of jurisdiction:—

Held, that as both the plaintiffs and the defendant were bound, by the nature of the transaction, to have the proceeds of the sale applied to satisfy the advance made by the plaintiffs to the defendant, the receipt by the plaintiffs of the amount, for which they gave credit in their particulars of demand, was in the nature of a part payment; and that the suit was, therefore, on a balance of account, and within the jurisdiction of the Court of Small Causes.

CASE stated for the opinion of the High Court of Judicature, pursuant to the provisions of Sec. 55 of Act IX. of 1850, and Sec. 7 of Act XXIV. of 1864, by John O'Leary, Acting First Judge of the Bombay Court of Small Causes:—

"In this case the plaintiffs, abandoning a portion of their claim to bring the case within the jurisdiction of the Court of Small Causes, sought to recover the sum of Rs. 1,000 from the defendant, being part of the sum of Rs. 1,355-14-5, balance of an account, a copy of which was annexed to the summons.

"In or about the month of May 1865, the defendant' consigned certain bags of rice and grain to Hongkong, through the plaintiffs, to be there sold by the agents of the plaintiffs, for the account of the defendant.

"Against this consignment the plaintiffs, on the 26th of May 1865, advanced to the defendant the sum of Rs. 15,000. The plaintiffs allege that down to August 1865 the defendant

1867: EWART, LA- was indebted to them in this sum with interest, amounting
THAM, AND Co. to Rs. 15,380.

v.
HAJI MUHAM- "On the 7th of August 1865 and the 25th of October 1865,
MAD SIDDI'K. the plaintiffs gave credit to the defendant for certain sums, alleged to have been received from the plaintiffs' agents at Hongkong, as the proceeds of the sale of the defendant's grain, and amounting in all to the sum of Rs. 14,115 3q. 3r., leaving a balance due to the plaintiffs of Rs. 1,264 2q. 16r. This balance with interest, amounting in all to Rs. 1,355 3q. 61r., the plaintiffs claim to be due to them from the defendant.

"The defendant disputed the correctness of the account-sales; and pleaded want of jurisdiction in this court to try the case.

"The plaintiffs contended that the amount of their claim was properly reduced, by payments on account and by abandonment of the excess, to a sum within the jurisdiction of this court; that the sum of Rs. 14,115-3-3, for which the plaintiffs gave credit to the defendant as against the plaintiffs' original claim of Rs. 15,380, was not in the nature of a set-off, but was a payment on account; and, therefore, whether the defendant disputed the correctness of the payment or not, this court had jurisdiction to hear and determine the case.

"The plaintiffs further contended that the account-sales, having been received in the ordinary course of business from the plaintiffs' agents in Hongkong, were *prima facie* evidence of the correctness of their own contents, and that the burden of proof lay on the defendant.

"In the first place, I was of opinion that the sum of Rs. 14,115-3-3, for which the plaintiffs give credit to the defendant, did not come within the description of cash payments on account, by which, according to the law and practice of this court, a plaintiff has always been permitted to reduce a claim of over Rs. 1,000, so as to bring it within the jurisdiction of the court.

"Secondly, even supposing this was such a cash payment, I was of opinion that this court could not properly, or at all,

investigate the facts of the case. Admitting that the production of the account sales threw the *onus* of proving the incorrectness of their contents on the defendant; then, as this court could not, at any stage of the proceedings, have granted a commission to the defendant to take evidence at Hongkong, the effect would be, that the defendant would be absolutely concluded by the statements in the account-sales; whereas he ought, in justice, to be allowed an opportunity of proving the incorrectness of their contents, if they were incorrect.

1867.
 EWART, BA-
 THAM, AND Co.
 v.
 HAJI MUHAM-
 MAD SIDDI'K.

“For the above reasons, I was of opinion that this court had no jurisdiction to try the case.

“The plaintiffs having required me to give judgment, subject to the opinion of the High Court, on the question:— Upon the facts stated in this case, has the Bombay Court of Small Causes jurisdiction to try and determine the question between the parties. Subject to the opinion of the High Court on the above question, I struck the case out of the list, for want of jurisdiction.

“Should the High Court be of opinion that I was wrong in so doing, the case will be restored to the list, and heard in due course.”

16 Aug. The case came on for hearing this day, before COUCH, C.J., and WESTROPP, J.

White, for the plaintiffs:—The question is, whether the receipt by the plaintiffs of the proceeds of the consignment, for which they give credit to the defendant, is not more in the nature of a part payment than of a set-off. Looking at the transaction in substance, it was an authority by the defendant to the plaintiffs to pay themselves the amount, which they had advanced to him, out of the proceeds of the consignment; and the defendant cannot say that the plaintiffs received less than they admit. It is of the essence of the agreement between the parties here, that the proceeds of the sale should be allowed for by the plaintiffs. They could not sue for the whole advance of Rs. 15,000. Either party could only sue for a balance. If damages are claimed by the

1867.
 EWART, LA-
 THAM, AND CO.
 v.
 HAJI MUHAM-
 MAD SIDDI'K.

defendant in the Small Cause Court for negligence in effecting the sales, he must bring a separate suit. The following cases were cited: *Jenkinson v. Morton* (a); *Woodhams v. Newman* (b); *Re Ackroyd*, (c).

Green, for the defendant:—This is a case of detainer, not of payment. If the defendant disputes the amount credited by the plaintiffs, the court must try the question how much was realised by the sales. The fact that the Legislature has not given the Small Cause Courts the power to issue a commission to take evidence elsewhere, shows that it was not intended to give them jurisdiction to try cases like the present. *Woodhams v. Newman* (*supra*), *Beswick v. Capper* (d), *Avards v. Rhodes* (e), were referred to.

White was heard in reply.

Cur. adv. vult.

COUCH, C.J.:—I am of opinion that the receipt by the plaintiffs of the amount, for which they gave credit in their particulars of demand, is in the nature of a part payment; and that the suit is, therefore, on a balance of account, and within the jurisdiction of the Court of Small Causes.

The defendant authorised the agents at Hongkong to sell the grain, and remit the proceeds to the plaintiffs in Bombay, in payment of the sum advanced by them to the defendant; and both the plaintiffs and the defendant were bound, by the nature of the transaction, to have the proceeds of the sale applied to satisfy the advance made by the plaintiffs to the defendant.

The cases of *Woodhams v. Newman* and *Beswick v. Capper* decide that a plaintiff cannot treat a counter-claim of the defendant as a payment in reduction of the plaintiff's demand, without an assent on the part of the defendant; but if the parties have reduced the amount by payments, or by settling and ascertaining a balance, so as to bring it within the limit, the court has jurisdiction to try the case.

(a) 1 M. & W. 300.

(b) 7 C. B. 604; 18 Law J., C. P., 213; 13 Jur. 456. (c) 1 Ex. 490.

(d) 7 C. B. 669; 18 Law J., C. P., 216. (e) 8 Ex. 318.

In *Joseph v. Henry* (f) the facts were like those of the present case. The defendant's wife having accepted two bills of exchange, amounting together to above 20*l.*, the plaintiff, as indorsee, levied a plaint in the County Court of S. for the sum of 4*l.* 19*s.*, the balance alleged to be due. The drawer of the bill induced the defendant's wife, in his absence, to deposit with him some articles of jewellery belonging to the defendant, which were handed by him to the plaintiff. The plaintiff sold these articles, and treated the proceeds of the sale as part payment. Upon the hearing of the plaint, the defendant produced evidence to show that his wife had no authority to accept the bills, or to deliver the articles in question to the drawer of the bills, and contended that the plaintiff had, therefore, no right to sell the jewellery, or appropriate the proceeds of the sale as a part payment of the bills; and, therefore, that, as the demand originally exceeded 20*l.*, the Judge of the County Court had no jurisdiction. The Judge, however, gave a verdict in favour of the plaintiff for the balance claimed, on the ground that the articles given were in part payment. An application was then made for a prohibition to restrain the Judge of the County Court from proceeding further in the suit: but the Court refused to grant the writ, because the plaint, on the face of it, stated a matter within the jurisdiction of the court, and the facts on which the question of jurisdiction arose were contested. The Judge was at liberty to inquire into them, and his decision on the merits was founded on the very point on which the question of jurisdiction arose.

In that case it was admitted that the County Court had jurisdiction, if the defendant had assented to the goods being appropriated in the way the plaintiff sought to establish; but it was contended that there was no such assent shown, but on the contrary, the defendant throughout repudiated the right of the plaintiff to do so. *Coleridge, J.*, in giving judgment, said:—"The Judge, however, has arrived at a conclusion of fact, if we understand him as stating that he considered the defendant to have conferred the power of

1867.

EWART, LA-
THAM, AND Co.v.
HAJI MUHAM-
MAD SIDDIK.

1867.
 EWART, LA-
 THAM, AND Co.
 v.
 HAJI MUHAM-
 MAD SIDDI'K.

sale and appropriation of the proceeds on the plaintiff, which would certainly give him jurisdiction. * * * *
 The plaintiff claims a sum under 20*l.*, the balance remaining due on two bills of exchange, together amounting to 23*l.* He cannot recover, unless he proves the sum due as a balance remaining due on those bills; and, if he proves that, the Judge has jurisdiction. Now this court cannot review his decision on the merits. Moreover, even after the objection made to the jurisdiction, as that did not arise upon the face of the proceedings, but was founded on facts contested and to be proved, the Judge had clearly power to inquire into those facts. If, upon the inquiry, he had found that the money claimed was not a balance remaining due, for that no part of the 23*l.* could be considered as paid, it would have been his duty to have abstained from proceeding further, and the court has no right to presume that he would not."

In this case the Judge, in coming to the conclusion that he had no jurisdiction, appears to have been influenced by the fact that the Small Cause Court has no power to issue a commission to take evidence; but the defendant may bring a suit, if he has any ground of action, and may show that the consignment produced more than he was allowed for by the plaintiffs, and the Court may inquire into this.

I am therefore, of opinion, that, upon the facts stated in the case, the Court of Small Causes had jurisdiction to determine the question between the parties, and that the Judge ought to have given judgment for the plaintiffs for the amount claimed, with costs; and that the defendant should pay the costs of reserving and stating the case for the opinion of this court.

WESTROPP, J. :—I fully concur.

Judgment reversed.