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[407] ORIGINAL CIVIL.

Before Mr. Justice Marriott.

KISHORCHAND CHAMPALAL, *Plaintiff* v. MADHOWJI VISRAM, *Defendant.** [19th July, 1880.]

Set-off—Right of demand to set off a claim for unliquidated damages—Civil Procedure Code (Act X of 1877), s. 111—Costs—Act XXVI of 1864, s. 9.

The provisions of the Civil Procedure Code (X of 1877) do not give the right to set off claims for unliquidated damages, but that Code does not take away any right of set off, whether legal or equitable, which parties to a suit would have independently of its provisions.

Where, therefore, in a suit for the price of goods sold and delivered, the defendant admitted that there was a sum of Rs. 1,159-12 due by him to the plaintiff, but sought to set off the sum of Rs. 972 as damages sustained by him by reason of the non-delivery of some of the goods contracted for, it was *held*, that as the claim of the defendant against the plaintiff was connected with the same transaction, and arose out of one and the same contract, as that in respect of which the plaintiff's suit was brought, and as the amount of the defendant's claim was capable of being immediately ascertained, the defendant might set off his claim.

Clark v. *Ruthnavaloo Chetti* (1) and *T. Kistnasamy Pillay* v. *The Municipal Commissioner of Madras* (2) *followed.*

Where the defendant proved a set-off against the plaintiff, and thus reduced the amount which he (plaintiff) was entitled to recover from the defendant, for breach of contract, *held* that, notwithstanding the provisions of s. 9 of Act XXVI of 1864, the plaintiff was entitled to his costs.

[F., 7 A. 284; 11 C. 557; R., 10 A. 587 (599); 15 A. 9; 18 B. 717; 21 B. 126 (135); 29 M. 333=16 M.L.J. 63.]

THE plaintiff in this action sued to recover the sum of Rs. 2,279, being the balance of purchase-money (with interest) of goods sold and delivered.

The plaintiff alleged that by a contract, dated the 17th February 1879, the defendant agreed to purchase from him "between 210 and 225 bales of wool" at the rate of Rs. 195-2-0 *per* candy. The plaintiff was then expecting the arrival of wool from upcountry, but as he did not know the exact amount to arrive, he was unable to specify more precisely in the contract the number of bales sold to the defendant. The defendant subsequently took delivery of 172 bales. The total sum due in respect of these bales was Rs. 17,779, of which the defendant had paid Rs. 15,500, leaving a balance of Rs. 2,279, which plaintiff sought to recover in this suit.

[408] The defendant contended that the price agreed upon was Rs. 185-2-0 *per* candy, and not Rs. 195-2-0 as stated in the plaint. He alleged that he was ready and willing to take delivery of and pay for the remainder of the bales contracted for. He admitted that there was a sum of Rs. 1,159-12-0 due from him to the plaintiff in respect of the 172 bales already delivered, but against this sum he claimed to set off the sum of Rs. 972 as damages sustained by him by reason of the plaintiff's failure to deliver the remainder of the bales contracted for. The balance of Rs. 187-12-0, remaining due to plaintiff after deducting the set-off claimed, the defendant paid into Court.

* Suit No. 379 of 1879.

(1) 2 M.H.C.R. 296. (2) 4 M.H.C.R. 120.

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At this trial one of the issues was, whether the defendant could raise the question of set-off in this suit.

Inverarity (with *Lang*), for the defendant.—We claim a right of set-off. First, we claim it under the express terms of s. 111 of the Civil Procedure Code (Act X of 1877). We seek to set off an *ascertained* sum of money. The Code does not require that the amount should be ascertained when the suit is filed, and we say it is sufficient if the amount is ascertained when the decree is about to be passed. See observations of Scotland, C.J., in *T. Kistnasamy Pillay* v. *The Municipal Commissioner of Madras* (1). Illustration (*e*) to s. 111 of the Code seems to be founded on these observations, and to indicate that, as soon as a defendant proves his claim, the amount is ascertained within the meaning of the section. The claim of defendant against plaintiff arises out of the same transaction as gives rise to the plaintiff's demand against defendant, and the same inquiry will ascertain the amount of both. As soon as the Court has allowed our claim, the plaintiff will owe us a "*debt*" within the meaning of s. 215 of the Code. The only result of refusing the defendant the right of set-off would be to require a second investigation of the same matter.

Secondly, even if we cannot have the right of set-off under the express terms of s. 111, we claim it independently of that section. That section does not take away any right of set-off which a defendant had before the Act was passed, and under the previous [409] Code (Act VIII of 1859) it was held that a right of set-off existed independently of its provisions, and that such a right must be admitted, although it did not come under the terms of the Act. In *Clark* v. *Ruthnavaloo Chetti* (2) the Court says, at p. 303, that "the Procedure Code was not intended to take away any right of set-off, whether legal or equitable, which practice would have had independently of its provisions. It seems to us that the right of set-off will be found to exist, not only in cases of mutual debts and credits, but also where the cross demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit." See, also, *T. Kistnasamy Pillay* v. *The Municipal Commissioner of Madras* (1).

B. Tyabji (with *Starling*), for the plaintiff, *contra*.—We contend that no set-off ought to be allowed in this suit. First, we say that, there can be no "set-off," unless it is allowed by the Civil Procedure Code. The question of set-off is a mere question of procedure, and must be governed entirely by the provisions of the Code of Civil Procedure, s. 111. It is not, in any sense, a question of substantive right which in this case must be governed by the Contract Act. It is one thing to say that the defendant is entitled to damages for breach of contract, and quite another to say that he can recover those damages in this particular manner, *viz.*, by setting off against the plaintiff's claim. This would, in effect, be to try two distinct suits, which must necessarily cause great inconvenience (3). By disallowing the set-off the defendant is not deprived of any right he may have to the damages, but is only compelled to resort to the procedure which the Legislature has provided for such purposes, *viz.*, a distinct suit.

(1) 4 H.C. R. 120 (128, 129). (2) 2 M.H.C. R. 296.
(3) *Hosseina Bibi* v. *Smith*, 12 B.L.R. 442.

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Secondly, we say that the damages claimed by the defendant cannot be set-off under the Code, as they are unliquidated; they are not "an ascertained sum of money" within the meaning of s. 111. "Ascertained sum of money" must mean, not what may ultimately be ascertained by the Court at the time of passing the decree, but what is in itself already "an ascertained [410] debt" *at the time of filing the written statements* required by s. 111. To put any other construction upon those words, would be, in fact, to give no meaning to them at all, as every claim must necessarily be ascertained after the Court has adjudicated upon it. The object of inserting those words was to exclude claims not ascertained at the time of the written statements, or, in other words, "unliquidated damages" from being set off. The case of *T. Kistnasamy Pillay* v. *The Municipal Commissioner of Madras* (1) is distinguishable from this. There, the express terms of the agreement contemplated that the claim of the defendant should be deducted from the amount due to the plaintiff. It was not so much a case of set-off as of deductions or allowances which must be made before the clear amount payable to plaintiff could be ascertained. Besides, that was a case under the old Code (Act VIII of 1859), where the word "debt" is used in s. 121. The Legislature had, no doubt, that case in view, and we say that s. 111 of the new Code was advisedly framed to exclude all claims in the nature of unliquidated damages from being set-off: see illustration (*e*).

Thirdly, we contend that no set-off can be allowed in this case independently of the Code. The observations in *Clark* v. *Ruthnavaloo Chetti* (2) as to the right of set-off, were extra-judicial, and not borne out by the authorities cited. Besides, the cross demands in this case do not arise out of one and the same transaction within the meaning of the rule which governs set-off in Courts of Equity. It is true that the claims of the plaintiff and the defendant arise under the same agreement; but the plaintiff's claim arises from the performance of the agreement, whereas the defendant's claim is in respect of the breach of it. And this has been expressly held to exclude the one claim from being set-off against the other; *Rawson* v. *Samuel* (3), *Best* v. *Hill* (4).

JUDGMENT.

July 19. MARRIOTT, J.—[His Lordship, after deciding the other issues in the case, continued, with reference to the right of set-off]:—Then, is the defendant entitled to set-off, against the claim of the plaintiff, the amount of damages which he (the defendant) has sustained by the plaintiff's breach of contract?

[411] In the case of *Clark* v. *Ruthnavaloo Chetti* (2), which was a suit against the acceptor to recover the amount due upon several bills of exchange against which the defendant sought to set off a claim for unliquidated damages unconnected with the bills of exchange, Scotland, C.J., in delivering judgment, after referring to the provisions of s. 121 and s. 195 of the Civil Procedure Code (Act VIII of 1859), says: "These, however, are provisions of a Code regulating procedure only; and whilst we think that the language used, has not the effect of enlarging the right of set-off, we ought, at the same time, to say that, according to our present opinion, the Procedure Code was not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions. It seems to us that the right of set-off

(1) 4 M. H.C.R. 120, 128, (129).
(2) 2 M. H. C. R. 296.
(3) Cr. & Phil. 161.
(4) L. R. 8 C. P. 10.

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will be found to exist, not only in cases of mutual debts and credits, but also where the cross demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit. In the present case the defendant's claim appears to us not to come within the rule by which this Court is governed, and he must be left to seek in a cross suit any damage to which he can prove himself entitled."

That case was followed by the case of *T. Kistnasawmy Pillay* v. *The Municipal Commissioner for the Town of Madras* (1), in which suit the plaintiff sought to recover the balance alleged to be due to him by the defendants under a contract, and for damages for its breach. The defendants denied that they had committed a breach of the contract and, on the other hand, alleged that the plaintiff had committed several breaches of contract, and claimed to set off against the claim of the plaintiff the damages they had incurred by reason of the plaintiff's breach of contract. In his judgment, Bittleston, J., by whom the case was tried, says at p. 126 of the report: "Now, can the damages, which have been above ascertained, be set off in this suit? It appears to me that they can, and I come to that conclusion mainly in consequence of the nature of the agreement between these parties indicating very clearly, as [412] it seems to me, an intention that any claim of the defendants for breach of the agreement by the plaintiff, should be deducted from the sums becoming due to the plaintiff under it, so that only the balance should be the debt on either side." But, in appeal, Scotland, C.J., says at p. 135: "The remaining question is, whether the last-mentioned amount of damages can be set off, and we are of opinion that the decision of the learned Judge on the point is right, although we are not prepared to go quite the length, that he does, in resting the case on the ground of mutual credit derived from the intention of the parties as evidenced by the contract. We would rather confine ourselves to saying that the terms of the contract are quite consistent with the claim to the set-off, and rest our judgment on the general principle of equitable protection; and we think the principle deducible from the case of *Rawson* v. *Samuel* (2) and the other authorities bearing on the point, and acted upon in the recent case of *Watson* v. *Mid Wales Railway Company* (3), is correctly stated in *Clark* v. *Ruthnavaloo Chetti* (4). The right exists, not only when there appears to be mutual debits and credits, but also 'where the cross demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit.' Here the cross demands are connected with the same transaction, and arose out of one and the same contract, and an amount appeared to be payable from the plaintiff, and was capable of being immediately determined in the suit. In truth, the case made in the plaint, involved the very question of breach in respect of which the set-off was claimed. There could hardly be a much stronger case for equitable protection for a recovery of more than the balance justly due. No purpose would be served by rejecting the set-off, except simply driving the defendants to bring another suit."

Every word of this passage from the judgment of the Chief Justice is applicable to the present suit. The demands here are connected with

(1) 4 M. H. C. R. 121.
(2) Cr. & Phil. 161.
(3) L.R. 2 C.P. 593.
(4) 2 M.H.C.R. 296.

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the same transaction, and arise out of one and the same contract. The amount payable by the plaintiff is capable of being immediately determined. The plaintiff's case [413] involves the very question of breach in respect of which the right of set-off is claimed, and certainly no purpose could be served by rejecting the set-off, except simply that of driving the defendant to file another suit.

Section 111 of the present Code of Civil Procedure (Act X of 1877) does not, I think, enlarge the right of set-off. In that section the words "any ascertained sum of money" and "debt" are used in lieu of the words "debt" and "demand" in s. 121 of Act VIII of 1859. So that it would appear that, under the provisions of the present Code, claims for unliquidated damages (such as the present) are not capable of being set off; but the right to set off in *Clark* v. *Ruthnavaloo Chetti* was based upon this, that "the Procedure Code was not intended to take away any right of set-off, whether legal or equitable, that the parties would have had independently of its provisions."

It appears to me that that reasoning is as applicable to Act X of 1877 as to Act VIII of 1859, and, consequently, that the two Madras decisions are as applicable to a claim to set off under the former as they were under the latter Act. I must, therefore, allow the defendant in this case the right to set off the damages he has proved.

[His Lordship found that the amount which the plaintiff was entitled to recover, was Rs. 1,241, and, on the other hand, that the damages proved by the defendant, and admitted as a set-off, were Rs. 583. The decree for the plaintiff, was, therefore, only for Rs. 658. The question then arose, under s. 9 of Act XXVI of 1864 (1), as to whether the plaintiff could recover his costs.]

[414] The following cases were cited by counsel:—*Blake* v. *Appleyard* (2), *Neale* v. *Clarke* (3), *Potter* v. *Chambers* (4), *Myers* v. *Defries* (5), *Walesby* v. *Goulston* (6).

MARRIOTT, J.—I think the section of the Act does not apply to such a case as this, and that the plaintiff is entitled to his costs. He has proved himself to be entitled to recover Rs. 1,241, and against this sum he was not bound to admit the amount claimed by the defendant. The defendant has proved his set-off, but there was no obligation upon the plaintiff to admit the claim. This, however, he must have done in order to bring his suit within the jurisdiction of the Small Cause Court.

Judgment for the plaintiff.

Attorney for the plaintiff.—Mr. *Janardhan Gopal.*

Attorneys for the defendants.—Messrs. *Jefferson, Bhaishankar and Dinsha.*

(1) "If any action shall, after the passing of this Act, be commenced in the High Court for any cause other than those specified in s. 100 of Act IX of 1850, for which a summons might have been taken out from a Court held under the said Act IX of 1850, or under this Act, and in which such Court would have had jurisdiction, and if a verdict shall be found for the plaintiff for a sum less than one thousand rupees if the said action is founded on a contract or less than three hundred rupees if it is founded on wrong, the plaintiff shall have judgment to recover such sum only and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the Judge who shall try the case shall certify that by reason of the difficulty, novelty or general importance of the case, or of some erroneous course of decisions in like cases, in the Court of Small Causes, the action was fit to be brought in the High Court."

(2) 3 Ex. D. 195. (3) 4 Ex. D. 286. (4) 4 C.P.D. 451.
(5) 5 Ex. D. 15. (6) L. R. 1 C. P. 576.