

of Rs. 37 a month. It is not asserted that defendant was provided with funds, or that there was any likelihood of his producing Rs. 1,950 within eight days. It is admitted that defendant has not paid the money, and plaintiff is thus relegated to his original remedy under the mortgage bond. Plaintiff is thus not damnified. It is not a case in which the Court, while refusing to take any action, is unable to leave the parties in their original position. I should be doing more mischief by forcing defendant to remain idle till 1st February, 1903, or to join plaintiff's shop, than by leaving the parties alone.

For these reasons, I hold that the contract is not void; and though the Court is not precluded from granting the injunction prayed for, still in the exercise of a sound discretion I should refuse to grant it; and I accordingly do so refuse, and dismiss the suit with costs.

Attorneys for the plaintiff:—Messrs. *Bhaishankar and Kanga*.

Attorney for the defendant:—Mr. *Balkrishna V. N. Kirtikar*.

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[717] ORIGINAL CIVIL.

Before Mr. Justice Starling.

ROULET (*Plaintiff*) v. FETTERLE. (*Defendant*)* [21st July, 1894.]

Civil Procedure Code (XIV of 1882), s. 491—Claim made by defendant for compensation for arrest—Claim for compensation made by defendant in a summary suit when defendant has not got leave to appear and defend—Cross claim when allowed—Set-off—Practice—Procedure—Summary suit—Civil Procedure Code (XIV of 1882), ss. 532, 533.

In a summary suit, if a defendant has been arrested before judgment and claim compensation for such arrest under s. 491, he is entitled on that ground to apply for leave to defend the suit, and, if a *prima facie* case is made out, leave to defend should be given.

Under the Civil Procedure Code (XIV of 1882) a cross claim made by a defendant against a plaintiff cannot, in ordinary cases, be set up as a defence, except when it arises out of the very transaction sued upon and is in the nature of a set-off, but the special cross claim provided for by s. 491 of the Code, *v. z.*, a claim for compensation for arrest on insufficient grounds, may under that section be taken into account in any suit, and the amount awarded as compensation be awarded in the decree and thus *pro tanto* be a defence to the plaintiff's claim in the suit.

SUMMARY suit under chap. XXXIX of the Civil Procedure Code (Act XIV of 1882).

The plaintiff sued the defendant to recover Rs. 5,874-5-6 due upon a promissory note passed by him on the 2nd October, 1893. The plaint was filed on the 30th May, 1894, and on the same day the plaintiff applied for arrest before judgment against the defendant. The application was granted, and the defendant was arrested on the 31st May, 1894. He remained in jail for ten days, and on the 11th June he showed cause against the arrest, and was set at liberty.

On the 13th June the summons in this suit was served upon the defendant requiring him to obtain leave to appear and defend within ten days from the summons. On the 23rd instant he applied in chambers for

* Suit No. 253 of 1894.

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leave to appear and defend, but it was refused. His counsel then applied that the defendant might be allowed in the suit to claim compensation for his arrest under s. 491 of the Civil Procedure Code (XIV of 1882). The Judge ordered that this application should be made at the hearing.

[718] The suit came on for hearing on 25th June.

Inverarity, for the defendant, applied under s. 491 of the Civil Procedure Code (XIV of 1882) that the Court should award against plaintiff in its decree the sum of Rs. 1,000 as compensation to the defendant for his arrest before the decree on insufficient grounds.

Scott, for plaintiff, objected:—The defendant has no right to appear. This is a summary suit and defendant has got no leave to defend: see ss. 532 and 533 of the Civil Procedure Code (XIV of 1882). Section 491 does not imply that in such a case he may appear without leave. A defendant cannot appear unless he has leave to appear and defend. He cited the Annual Practice, 1890-91, p. 298; *Sheppards & Co. v. Wilkinson* (1); *Zadone Co. v. Barret* (2); *Newman v. Lever* (3); *Jackson v. Murphy* (4); *Mersey Steamship Co. v. Shuttleworth & Co.* (5); *Bacon v. Turner* (6).

Inverarity, for the defendant:—Section 491 of the Code gives the defendant the right to apply for compensation "in any suit;" and s. 532 only prohibits the defendant from appearing for the purpose of defending the suit: see also s. 533. The application here is not an independent cross claim, but is an application for compensation for something done in the suit: so the English cases are no guide. The Code permits this application.

Scott, for the plaintiff, *contra*.

JUDGMENT.

21st July, 1894. STARLING, J.—This is a summary suit brought upon two promissory notes signed by, and one bill of exchange accepted by, the defendant. When the plaint was presented, an application was made for the arrest of defendant before judgment, on the ground that he was disposing of his property with intent to defeat and delay the execution of any decree which might be passed against him, which was granted, and the defendant was arrested and remained in jail for some days.

On the 21st June last, Mr. *Inverarity*, for the defendant, applied for leave to defend the suit on various grounds. Some of the [719] grounds of defence set up appeared, on inspection of the documents, not to be sustained by the documents themselves. Another ground was that the defendant wished to make a claim under s. 491 of the Civil Procedure Code (XIV of 1882) for compensation for arrest before judgment on insufficient grounds, which in my then opinion was not a defence within the meaning of chap. 39 of the Code, and the remaining ground was that the defendant at the time of suit brought was not a resident in Bombay. I thought there was a bare possibility of his showing that, but so slight that I did not consider the defence was a *bona fide* one, as he apparently had no substantial defence to the claim for the payment of the bills; consequently, I only gave him leave to defend on payment of Rs. 3,000 into Court.

The payment was not made, and on the 25th June the case came on for hearing as a summary suit. On that occasion Mr. *Inverarity*, for the

(1) 6 Times Law Rep. 13.
 (3) 4 Times Law Rep. 91.
 (5) 11 Q. B. D. 531.

(2) 26 Solicitor's Jour. 657.
 (4) 4 Times Law Rep. 92.
 (6) 3 Ch. D. 275.

defendant, applied to be heard to advance his claim under s. 491. I heard his argument and reserved my decision, but allowed the plaintiff in the meantime to prove his case, and passed judgment for him for the amount claimed, but directed that the decree should not be drawn up until further orders.

After reading the English cases referred to on that occasion I came to the conclusion that I ought to have some materials before me from which I could judge whether there was any *prima facie* case made for compensation under s. 491, and not merely decide the point whether a defendant in a summary suit who was not allowed to appear and defend was competent to make such an application. Accordingly the whole matter was so argued on the 20th July, when I reserved my judgment.

In England, cross claims advanced in summary suits on negotiable instruments and in cases of specially endorsed writs, in which a plaintiff can sign judgment as a matter of course, are treated as a defence to the action; but then it must be remembered that, under the English practice, cross demands are allowed to be set up as a defence to any suit. In this country the case is different. The Civil Procedure Code (XIV of 1882) does not provide in general terms for a cross demand being set up by a [720] defendant as a defence to a suit filed against him, and the only case in which a cross demand can be so relied upon by a defendant is where it arises out of the very transaction sued upon, and is in the nature of a set-off. See *Kishorchand v. Madhooji* (1).

In ordinary cases, therefore, cross demands would not be a defence to a summary suit; but s. 491 provides that the special cross demand set up in this case may be taken into account in any suit, and any amount awarded as compensation be provided for in the decree, and thus *pro tanto* be a defence to the plaintiff's claim in the suit. Consequently I think I was not right in refusing the claim of defendant to defend this summary suit on the ground of his having this cross demand to urge, but I ought to have proceeded on the 21st June, as I have eventually done, and heard the application for leave to defend on that ground on its merits.

Has, then, the defendant shown that there is a *prima facie* case against the plaintiff of an application for an arrest "on insufficient grounds"? This wording of s. 491 is not, to my mind, satisfactory. How can I say that the plaintiff has applied on "insufficient grounds" when a Judge of this Court on hearing the plaintiff has been satisfied that the grounds he alleged were sufficient, and has issued a warrant of arrest? The fact that the defendant was subsequently released from custody does not affect the question. What I have to look to is, whether the plaintiff, or rather his agent, had a knowledge of facts sufficient to justify him in applying to a Judge for the arrest of the defendant before judgment? I think, therefore, I must interpret the words "on insufficient grounds" as being equivalent to "without reasonable and probable cause." Has the defendant, then, made out a *prima facie* case that the plaintiff had no reasonable and probable cause for the defendant's arrest? [His Lordship then referred to the evidence at length and continued:—]

Taking all these facts into consideration, I find it difficult to come to the conclusion that there is a *prima facie* case of want of reasonable and probable cause.

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[721] Under these circumstances I must refuse the defendant leave to appear and urge this claim; but in so doing I do not deprive him of all opportunity of obtaining redress for the wrongs which he alleges he has suffered, for he is still at liberty, if so advised, to file a suit against the plaintiff for abuse of the process of the Court.

Attorneys for plaintiffs:—Messrs. *Roughton and Byrne*.

Attorneys for defendants:—Messrs. *Framji and Moos*.

18 B. 721.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

SHRI DHUNDIRAJ GANESH DEV AND OTHERS (*Original Plaintiffs*),
*Appellants v. GANESH (Original Defendant), Respondent.**
[13th November, 1893.]

Compromise—Set-off—Equitable defence—Suit by trustees to eject a trespasser from trust property—Civil Procedure Code (Act XIV of 1882), s. 539.

Dharnidhar was the manager of a religious endowment called the Chinchvad *Sansthan*. On his death in 1852, disputes arose between Chinto and Ganesh regarding the management of the *sansthan*, each claiming to be the heir and successor of Dharnidhar. After a long litigation they entered into a compromise in 1881, by which a portion of the *sansthan* property, consisting of certain *inam* villages, lands, and *varshasans*, were assigned to Ganesh, and Chinto was left in charge of the rest of the *sansthan* property, together with all the rights, privileges, and *manpans* enjoyed by the hereditary trustee of the endowment. In 1886 by a decree made in a suit called the "Charity suit," Chinto was removed from his office, and the plaintiffs were appointed trustees in his place. In 1889 the plaintiffs filed the present suit to set aside the compromise of 1881, and recover back the *sansthan* property assigned to Ganesh under that compromise. Ganesh pleaded, by way of set-off or equitable defence, that if the plaintiffs were at liberty to set aside the compromise, they were bound to restore to him in lieu of the trust property assigned to him under the compromise certain private property belonging to his adoptive father, which he had given up.

Held, that Ganesh could not claim—as a set-off or as an equitable defence—to recover from the plaintiffs the private property in question, there being nothing in the compromise to show that there was any exchange of private property for trust property.

Held, also, that the suit did not fall under s. 539 of the Code of Civil Procedure (Act XIV of 1882).

[R., [20 B. 250 (253); 24 B. 170 (181) = 1 Bom. L.R. 649; 33 C. 789 (804) = 10 C.W.N. 581; 2 C.L.J. 431 (439).]

[722] APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona, in suit No. 417 of 1889.

This suit was filed by the trustees of a religious and charitable endowment, called the Chinchvad *Sansthan*, to recover certain property belonging to the *sansthan*.

The circumstances out of which it arose were as follows:—

In 1852 Shri Dharnidhar Dev, the manager of the Chinchvad *Sansthan*, died, leaving behind him three widows, Bayabai, Laxmibai, and Bahinabai.

On his death disputes arose regarding the management of the *sansthan*. There were two claimants to the management: (1) Ganesh, the defendant,

* Appeal, No. 88 of 1891.