

HEATON, J. :—I agree to the order proposed and entirely concur with the views expressed by my learned Colleague generally and especially on the point of limitation. I think it probable that had I been the Judge of first instance, I should have framed the issues which the defendant asked for. But I confess I do not feel that I can say with confidence that the Judge was indubitably wrong in refusing to frame them, and whatever may be the error in the decision arrived at, if there is an error, is undoubtedly due to the negligence of the defendant in declining to produce whatever evidence he had and to put his case fully before the Court.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

*Before Sir Stanley Batchelor, Kt., Ag. Chief Justice and
Mr. Justice Shah.*

RAGHAVENDRA RAOJI KATHAWATE (ORIGINAL DEFENDANT), APPLICANT *v.* YALGURAD RAMCHANDRA PADKI AND Co. (ORIGINAL PLAINTIFFS), OPPONENTS.*

Civil Procedure Code (Act V of 1908), Order VIII, Rule 6—Set-off—Plaintiffs' claim based upon an account of goods supplied—Defendant pleaded by way of set-off amount of wages due—Claims based upon a money demand—Capacities of parties not varied—Set-off can be allowed.

The plaintiffs' claim was based upon an account of goods supplied to the defendant. The defendant admitted the claim but urged by way of set-off the amount of pay due to him by the plaintiff. The Subordinate Judge allowed the set-off and found that the plaintiffs' claim was satisfied. The District Judge was of opinion that it was not open to the defendant to urge by way of set-off the claim which he did urge. On application by the defendant to the High Court,

* Application No. 126 of 1916 under extra-ordinary jurisdiction.

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VINAYAK
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SITABAL.

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RAGHA-
VENDRA
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YALGURAD
RAM-
CHANDRA.

Held, that under Order VIII, Rule 6, it was competent to the defendant to urge by way of set-off the claim which he sought to urge as the capacity in both these cases was nothing but the personal capacity, the claims being based upon a money demand.

APPLICATION under extra-ordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the decree passed by F. J. Varley, District Judge at Bijapur in Appeal No. 95 of 1914.

Suit to recover a sum of money.

The plaintiffs sued to recover a sum of Rs. 235 due on account of goods supplied to the defendant.

The defendant admitted the plaintiffs' claim but pleaded a set-off of Rs. 287 due to him in respect of his wages as Gumasta in plaintiffs' shop.

The Subordinate Judge held that the defendant was entitled to deduction of the amount of pay and the same was found sufficient to discharge the debt. He, therefore, dismissed the plaintiffs' suit.

The District Judge reversed the decree on the ground that the set-off could not be allowed as the parties did not fill the same capacities. He was of opinion that the plaintiffs' claim was in their capacity of vendor of goods and the defendant's claim to set off was in the capacity of a servant.

The defendant preferred an application to the High Court.

G. S. Mulgaokar, for the applicant:—I submit Order VIII, Rule 6 of Civil Procedure Code, 1908, applies here. The defendant claims a set-off in regard to wages due to him from plaintiff. It is an ascertained amount. The capacity of the parties remains the same. Illustration (e) supports my contention. The parties fill the same character in both cases: see *Amir Zama v. Nathu Mal.*⁽¹⁾

⁽¹⁾ (1836) 8 All. 396.

The defendant can plead a set-off even though there may not be an agreement to the effect between the parties. It is a legal right.

H. B. Gumaste, for the opponent:—Set-off cannot be pleaded as the parties do not fill the same character in both the transactions. In the suit they are buyer and seller; in the set-off pleaded master and servant. The capacity in the latter is different and Order VIII, Rule 6 of the Civil Procedure Code, 1908, cannot apply. Besides the agreement to set off which is pleaded by defendant is held not proved. Illustration (e) cannot support the applicant's contention. The case falls under illustrations (a) and (b) and therefore there can be no set-off.

BATCHELOR, Ag. C. J.:—The District Judge here has reversed the decree of the learned Judge of trial, because in the District Judge's view of the question of law it was not open to the defendant to urge by way of set-off the claim which he did urge, that is to say, the claim that the amount of pay due to him by the plaintiff should be reckoned against the sum due to the plaintiff by him on the accounts. The District Judge's view was that the plaintiffs and the defendant did not fill the same character in regard to the attempted set-off as they filled in the suit, and therefore, Rule 6 of Order VIII of the Civil Procedure Code could not be applied. But looking to the illustrations of this rule, and in particular comparing illustrations (a) and (b) with illustration (e), it appears to us that the District Judge has misunderstood the provisions of the law. It is quite true to say that in regard to the plaintiffs' suit the plaintiffs' claim is based upon an account for goods supplied, whereas the claim attempted to be made by way of set-off is in regard to wages due. But in regard to both these claims the capacity of the parties is not varied. The capacity in both the cases is nothing but

1916.

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the personal capacity, the claims being based upon a money demand. We make the Rule absolute, set aside the District Judge's decree and remand the appeal to the District Judge to be decided on the merits. All that we have here decided is that under Order VIII, Rule 6, it is competent to the defendant to urge by way of set-off the claim which he seeks so to urge. Costs costs in the appeal:

Decree set aside.

J. G. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.

1916.

Septem-
ber 14.

NIWAJ KHAN NATHANKHAN (ORIGINAL DEFENDANT), APPLICANT v.
DADABHAI MUSSE VALLI (ORIGINAL PLAINTIFF), OPPONENT.*

Limitation Act (IX of 1908), section 20—Part-payment—Payment recorded by endorsements in the hand-writing of the person receiving—Endorsement only signed by the debtor—Whether sufficient acknowledgment.

To save the suit from being barred by limitation, the plaintiff relied on part-payments made by the defendant. The part-payments were recorded by endorsements which the plaintiff admitted were in his hand-writing, but he contended that the endorsement being signed by the defendant was a sufficient acknowledgment within section 20 of the Limitation Act, 1908 :

Held, that the fact of payment recorded being not in the hand-writing of the person making the payment the provisions of the section were not satisfied.

Santishwar Mahanta v. Lakhikanta Mahanta, (1) applied.

APPLICATION for revision (under section 25 of the Provincial Small Cause Courts Act IX of 1887) against the decree passed by K. H. Kirkire, First Class Subordinate Judge at Broach, in Small Cause Suit No. 636 of 1915.

Suit for rent.

The plaintiff claimed to recover Rs. 219-14-0 as due on two rent notes. The rent notes were dated the 27th

* Application No: 185 of 1916 under revisionary jurisdiction.

(1) (1908) 35 Cal. 813.