APPEAL FROM INSOLVENCY JURISDICTION

Before Mr. Justice Gajendragadkar and Mr. Justice Gokhale.

1955 *Aug.* 18

KHETRAPAL AMARNATH, APPELLANT (ORIGINAL JUDGMENT-DEBTOR) *v.* MADHUKAR PICTURES, RESPONDENTS (ORIGINAL JUDGMENT-CREDITORS).*

Presidency Towns Insolvency Act (III of 1909), s. 9—Rules of Bombay High Court under said Act, Rule 52 B (5) (b)—Indian Contract Act (IX of 1872), s. 125—Contract of indemnity—Suit by indemnity-holder against indemnifier for specific performance of contract of indemnity—Whether during pendency of suit his right to claim indemnity could be regarded as counter-claim under Rule 52 B (5) (b)?—Rights of indemnity-holder—Whether s. 125 of Indian Contract Act exhaustive?

The provisions contained in s. 125 of the Indian Contract Act, 1872 are not an exhaustive statement of the law applicable to contracts of indemnity or the rights of the indemnity-holder.

A contract of indemnity, according to principles of equity, does not mean a contract merely to re-imburse the indemnity-holders in respect of the moneys paid; it also means in derivative sense the liability of the indemnifier to save the indemnity-holder from a claim by a third party in respect of which the contract of indemnity has been made. It would, therefore, be open to the indemnity-holder to sue the indemnifier for the specific performance of the contract of indemnity even though he has not satisfied the claim in respect of which the right of indemnity arises, provided that he has incurred a liability which is absolute and which is covered by the contract of indemnity.

Gajanan Moreshwar Parelkar v. *Moreshwar Madan Mantri*,[1] *Kumar Nath Bhuttacharjee* v. *Nobo Kumar*,[2] *Ramlinga Thudayar* v. *Unnamalai Achi*[3] and *Shiam Lal* v. *Abdul Salal*,[4] relied on and followed.

Shankar Nimbaji v. *Laxman Supdu*,[5] explained.

On the dissolution of a firm, M. P., K. A., the outgoing partner agreed to pay to the continuing partners a sum of Rs. 30,000 in consideration of the outgoing partners undertaking the liability to pay all the debts due by the partnership including the liability of the partners to pay income-tax payable by the firm on or upto May 31, 1950 and agreeing to indemnify the out-going partner against the same. On failure of K. A. to pay Rs. 30,000 as agreed the continuing partners filed a suit in the Bombay City Civil Court against K. A. and obtained a decree for Rs. 30,000. A sum of Rs. 7,613-4-0 remaining due and unpaid under the decree an insolvency notice was taken out against K. A. on September 15, 1954 and was served on him on September 22, 1954.

In the meantime, an assessment order was passed by the Income-tax Department on November 30, 1953 against the firm M. P. for assessment year 1950-51 for the relevant year of account 1949-50 ending on May 31, 1950. The Income-tax Department called upon K. A. to pay Rs. 11,847-7-0 as his share of income-tax liability of the firm. K. A. moved the Department and obtained an order for payment of the said sum by instalments. K. A. paid one instalment of Rs. 1,000 on February 26, 1955. A garnishee notice was served on K. A. by the Income-tax Department under s. 46 (5A) of the Indian Income-tax Act, 1922 ordering

* Appeal No. 42 of 1955 : Insolvency No. N/291 of 1955.

1. [1942] 44 Bom. L. R. 703.
2. [1899] 26 Cal. 241.
3. [1915] 38 Mad. 791.
4. [1931] A. I. R. All. 754.
5. [1940] 42 Bom. L. R. 175.

him not to make any payment to the firm and calling upon him to pay the amount due by him to the firm to the Income-tax Officer on account of the income-tax dues by the continuing partners. K. A. paid a sum of Rs. 2,000 to the Department in pursuance of the said notice.

K. A. thereupon, took out a notice of motion for setting aside the Insolvency Notice on the ground that he had a counter-claim against the judgment-creditors. The trial Judge dismissed K. A.'s notice of motion. On appeal,

Held, that the contract of indemnity by itself did not make K. A. a creditor of the continuing partners; it merely gave him a cause of action to claim specific performance of the contract and till the disposal of the suit for specific performance his right was inchoate and incomplete.

Held, therefore, that mere right to sue for specific performance of the contract of indemnity cannot be regarded as a counter-claim within the meaning of Rule 52 B (5) (b) of the Rules and Forms of Bombay High Court under the Presidency Towns Insolvency Act, 1909.

Lacey v. *Hill,*[6] *British Union and National Insurance Company* v. *Rawson,*[7] *Liverpool Mortgage Insurance Company's Case,*[8] *In re, Richardson*[9] and *Framroze Merwanji* v. *Hormasji Maneckji,*[10] referred to and relied on.

Prior to May 31, 1950 Khetrapal Amarnath, Judgment-debtor and Appellant was carrying on business as cinema film producer in partnership with one Madhukar N. Navalkar and Kedarnath Lall in the firm name and style of Madhukar Pictures. On May 31, 1950 the partnership was dissolved and the Appellant retired from the firm allowing the other partners to continue the business of the firm. On such dissolution, the Appellant agreed to pay to the continuing partners a sum of Rs. 30,000 in consideration of the continuing partners undertaking to pay all the debts and liabilities of the dissolved partnership including the payment of income-tax, if any, payable by such partnership on or upto May, 31, 1950 and to indemnity the appellant from such debts and liabilities.

After the dissolution of the firm Kedarnath Lall died and Madhukar N. Navalkar carried on the business of Madhukar Pictures as a sole proprietor.

As the Appellant failed to pay the sum of Rs. 30,000 as agreed, the Madhukar Pictures (Judgment-Creditors and Respondents) filed a suit against him in the City Civil Court, Bombay for the recovery of the said amount and a decree for Rs. 30,000 was passed in favour of the Respondents on April 10, 1951. The Appellants paid in all Rs. 24,000 in instalments and a balance of Rs. 7,613-6-0 remained due and unpaid. The respondents thereupon obtained leave to execute the decree on July 16, 1954 and took out an insolvency notice against the Appellant dated September 15, 1954. On October 22, 1954 the Appellant took out a notice of motion for setting aside the insolvency notice against the Respondents on the ground that

6. [1874] L. R. 18 Eq. 182.
7. [1916] 2 Ch. 476.
8. [1914] 2 Ch. 617.
9. [1911] 2 K. B. 705.
10. [1946] 48 Bom. L. R. 737.

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he had a counter-claim against the Respondents for Rs. 16,129-14-10 which arose under circumstances hereinafter stated

After the Appellant retired from the said partnership as aforesaid, the Income-tax Department passed an order against the firm on November 30, 1953 for the assessment year 1950-51 the corresponding accounting year being 1949-50 ending on May 31, 1950. The firm being registered under the Indian Income-tax Act, 1922, on the assessment of the firm, a notice of demand dated October 20, 1954 was served on the Appellant for payment of Rs. 16,129-14-0 as his share of taxes in respect of his share of profits in the said partnership for that year. The Appellant's contention was that this was a liability in respect of which the continuing partners had undertaken to indemnify the Appellant and that, therefore, he had a right to counter-claim against the Respondents for being indemnified in respect of that sum. The Appellant further stated that on October 20, 1954 he also received a notice issued by the Income-tax Officer under s. 46(5*A*) of the Indian Income-tax Act, 1922 stating that a sum of Rs. 2,219-1-0 was due by the said Madhukar R. Navalkar being the then sole proprietor of the Respondents for Income-tax and calling upon the Appellant to pay to the Income-Tax Officer any amount due by the Appellant to the Respondents to the extent of Rs. 2,219-1-0 and asking him not to make any payment to the Respondents.

The Appellant moved the Department and obtained an order for the payment of the said sum by instalments and he in fact paid one instalment of Rs. 1,000 on February 26, 1955. The Appellant also paid to the Department a sum of Rs. 2,000 in pursuance the garnishee notice served on him as aforesaid.

After taking out the above notice of motion for setting aside the Insolvency notice on the ground that he had a counter-claim as aforesaid, the Appellant filed a suit in the City Civil Court Bombay against the Respondents paying, *inter alia,* for a declaration that he was entitled to be indemnified by the continuing partners in respect of his liability for payment of Income-tax for the accounting period ending on May 31, 1950, and for an order that the continuing partners do pay the plaintiff or the Income-tax Department the amount of Income-tax for which notice of demand was served on term. The said suit was pending

Mr. Justice Coyaji dismissed the motion on April 19, 1955. The Appellant therefore filed the present appeal.

M. M. Jhaveri with *F. S. Nariman,* for the Appellant.

S. C. Chagla, for the Respondent.

Gajendragadkar J.—Is the appellant's claim that the insolvency notice which has been served on him should be set aside

on the ground that he has a counter-claim which exceeds the decretal amount ordered to be paid by him justified under Rule 52B (5)(b) of the Rules framed by this Court under the Presidency Towns Insolvency Act, 1909? That is the short question which arises in the present appeal. This question arises in this way. It appears Madhukar Pictures, which was a firm dealing in the business of film production. On May 31, 1950, the appellant retired from this partnership and a formal deed of dissolution was drawn up. Under this deed of dissolution the appellant promised to pay the continuing partners Rs. 30,000 and agreed that the assets of the partnership should likewise remain with him. In consideration for this promise, the continuing partners undertook the liability to pay all debts due by the partnership including the amount of income-tax payable by the firm on or up to March 31, 1950. As often happens, neither party to this agreement appeared to be anxious to fulfil his part of the contract. The appellant failed to pay the whole of the amount of Rs. 30,000 and a suit had to be brought against him to recover the amount due. A decree was passed against the appellant on April 10, 1951, for Rs. 30,000. Under this decree the appellant made several payments from August 4, 1951 to July 15, 1952. Rs. 7,613-4-0 however still remained to be paid by the appellant. To recover this decretal balance the respondent obtained leave of the Court for taking out execution proceedings on July 16, 1954, and on September 15, 1954, insolvency notice was taken out by the respondent against the appellant. The said notice was served on the appellant on September 22, 1954. After this notice was served on the appellant, he took out a notice of motion on October 22, 1954. By this notice of motion the appellant urged that the insolvency notice served on him should be set aside because he had a counter-claim to make against the respondent and the amount of the counter-claim exceeded the balance due to the respondent under the decree passed in his favour. Mr. Justice Coyajee, who heard this notice of motion, has taken the view that the plea made by the appellant is premature and that it was impossible to say at the time when the notice of motion was taken out that the appellant was entitled to make any counter-claim against the respondent at all. That is why Mr. Justice Coyajee dismissed the notice of motion; the appellant has challenged this decision of Mr. Justice Coyajee.

Whilst the proceedings between the appellant and the respondent were going on in respect of the suit filed by the respondent against the appellant some other developments took place, to which it is necessary to refer before dealing with the merits of the contentions raised before us by Mr. Javeri on behalf of the appellant. On November 30, 1953, an assessment order was passed by the Income-tax Department determining

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the liability of the firm of Madhukar Pictures for payment of income-tax. Notices were issued in respect of this assessment, parties were heard and ultimately the appellant was called upon to pay Rs. 11,848-7-0 as his income-tax for the year 1950-51. The notice which was issued against the appellant calling upon him to pay the said amount also imposed upon him the penalty of Rs. 600. After this notice was served on the appellant, he appears to have moved the Income-tax Department and obtained an order for the payment of the said amount by instalments. Accordingly he has in fact paid one instalment of Rs. 1,000 by cheque on February 26, 1955. It also appears that a garnishee notice was served on the appellant on October 20, 1954, and in pursuance of this notice the appellant has paid Rs. 2,000 to the Income-tax Department. Whilst the notice of motion taken out by the appellant was pending in the Court below, he filed a suit in the City Civil Court on April 7, 1955, seeking his remedies under the contract of indemnity included in the deed of dissolution. It is on these facts that the question of the right of the appellant to demand the cancellation of the insolvency notice falls to be considered.

Two facts are not in dispute. A decree has been passed against the appellant and a balance of Rs. 7,613-4-0 out of the decretal debt still remains to be paid. This is not disputed by the appellant. On the other hand, the respondent does not dispute the fact that an order has been passed against the appellant by the Income-tax Department calling upon him to pay as his income-tax Rs. 11,848-7-0. Indeed, the notice issued by the Income-tax Department against the appellant has been produced in the present proceedings. Under the relevant provisions of s. 23 of the Income-tax Act, it is clear that in the case of a registered firm income-tax is levied against the individual partners of the firm after determining their income in respect of the period in question. A registered firm as such is not directed to pay any income-tax in respect of the profits made by the firm. But the profits are determined in the first instance, they are apportioned to the respective partners having regard to their shares in the partnership, and the respective partners are then called upon to pay the respective amounts of income-tax in the light of the said apportionment of profit. If the amount thus assessed is not paid by the assessee, it is liable to be recovered as arrears of land revenue. In other words, it is not disputed that the balance due to be paid by the appellant in respect of the amount of income-tax levied against him for the year 1950-51 can be recovered by the Department as arrears of land revenue.

The first point which we have to consider is whether the material clauses in the deed of dissolution constitute a contract of indemnity as alleged by the appellant or not. The

appellant relies on two clauses in the deed of dissolution. Clause 5 provides that the continuing partners jointly and severally covenanted with the retiring partner that they would duly pay and satisfy or cause to be paid and satisfied all debts and liabilities of the partnership which was then dissolved and that they would from time to time thereafter effectually indemnify and keep indemnified the retiring partner his estate and effects from the said debts and liabilities and from all actions and proceedings in respect thereof. There can be no doubt that this clause clearly constitutes an agreement of indemnity and covers all the debts and liabilities of the partnership which was then dissolved. Clause 7 made a specific provision in respect of income-tax. It provides that the continuing partners agreed and undertook to pay the income-tax, if any, payable by the firm on and up to May 31, 1950. It has been faintly argued before us by Mr. Chagla that cl. 7 cannot be read as amounting to a contract of indemnity. It is true that this clause is not specific and unambiguous as cl. 5. But we have no hesitation in holding that, like cl. 5, cl. 7 also constitutes a contract of indemnity. I have already stated that in regard to a registered firm income-tax has to be paid not by the registered firm as such, but by its partners individually, and the liability of the partners to pay income-tax is several and individual. In our opinion, therefore, it is clear that, by virtue of cls. 5 and 7 of the deed of dissolution, the continuing partners executed a contract of indemnity and by this contract of indemnity the appellant would be entitled to claim reliefs which may be relevant and legitimate under the law of the contract of indemnity.

What then are the rights to which the appellant is entitled under this contract of indemnity? The material provision with regard to such contracts of indemnity is to be found in s. 125 of the Indian Contract Act. This section deals with the rights of the indemnity-holder and it provides that the promisee in a contract of indemnity, acting within the scope of his authority, is entitle to recover from the promisor damages which he may be compelled to pay in any suit in respect of any matter to which the promise to idemnify applies. It also provides for the indemnity-holder's right to recover costs and other sums as mentioned in sub-ss. (2) and (3) of s. 125. It is true that if this section is literally construed, the right of the idemnity-holder to sue the promisee under a contract of indemnity would arise only after the indemnity-holder has incurred damages. In terms, sub-s. (1) of s. 125 provides for a decree for damages and such a decree can be passed only if and after the indemnity-holder has had to incur damages by being compelled to discharge an obligation in respect of which a contract of indemnity has been executed in his favour. But, in our

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opinion, the provisions contained in s. 125 cannot be regarded as an exhaustive statement of the law applicable to contracts of indemnity. If s. 125 was held to include an exhaustive statement of the law on this point, it would obviously lead to unreasonable consequences. The object of obtaining a contract of indemnity is to protect the indemnity-holder from a claim made by a third party against him. If it is held that despite such a contract of indemnity the indemnity-holder cannot make a claim against the indemnifier unless and untill he suffers damage, it might, in a sense, defeat the object of the contract of indemnity itself. That is why it has been held, following equitable principles, that a contract to indemnify does not mean a contract merely to reimburse in respect of monies paid, but it also means in a derivative sense the liability of the indemnifier to save the indemnity-holder from a claim by a third party in respect of which the contract of indemnity has been made. On this view, an indemnity-holder is entitled to sue the indemnifier even before he has incurred any damage, provided of course the indemnity-holder is able to satisfy the Court about the existence of a clear enforceable claim against him and is able to show that it is in respect of such a clear enforceable claim that a contract of indemnity has been executed. In this connection, we may refer to the decision of Mr. Justice Chagla, as he then was, in *Gajanan Moreshwar* v. *Moreshwar Madan*[11]. In considering the scope and effect of the provisions of ss. 124 and 125 of the Indian Contract Act, Mr. Justice Chagla has observed that s. 124 deals only with one particular kind of indemnity which arises from a promise made by the indemnifier to save the indemnified from the loss caused to him by the conduct of the indemnifier himself or by the conduct of any other person, but that it does not deal with those classes of cases where the indemnity arises from loss caused by events or accidents which do not or may not depend upon the conduct of the indemnifier or any other person. In other words, according to the learned Judge, s. 124 does not exhaustively deal with all classes and kinds of contracts of indemnity. Similarly, s. 125 deals only with the rights of the indemnity-holder in the event of being sued, and it is by no means exhaustive of the rights of the indemnity-holder who has other rights besides those mentioned in the section. With respect we agree with the view thus expressed by Mr. Justice Chagla. In our opinion, in dealing with the rights and obligations flowing from a contract of indemnity, the Court must always ask itself whether the indemnified party has incurred a liability, and if it is shown that the liability has been incurred and is absolute, then he has a cause of action to call upon the indemnifier to save him from that liability and to meet that obligation. It

11. (1942) 44 Bom. L. R. 703.

is true that in an earlier decision of this Court in *Shankar Nimbaji* v. *Laxman Supdu*[12], some general observations have been made which appear *prima facie* to be inconsistent with the view taken by Mr. Justice Chagla. If these observations had amounted to a decision properly so-called on the point with which we are concerned, we may have had seriously to consider whether the point in question should not be referred to a larger bench. But it appears to us that the observations made by Mr. Justice Lokur, who delivered the judgment of the Bench, clearly amount to *obiter dicta* having regard to the facts with which the Court was concerned in the said case. It appears that in that case one Supdu used to deposit moneys with the defendant No. 2. After Supdu's death defendant No. 2 withdrew Rs. 5,000 from Supdu's *khata* and lent it to defendant No. 1 on a mortgage-bond in his own favour. The plaintiffs in the case were the sons of Supdu. They had protested against the conduct of defendant No. 2, but after some correspondence defendant No. 2 passed a promissory-note for Rs. 5,000 in favour of the plaintiffs. The plaintiffs then filed a suit to recover this amount from defendant No. 1 by sale of the mortgaged property and they prayed that in case of deficit a decree against the estate of defendant No. 2 should be passed. It would appear that, before the suit was filed, defendant No. 2 had died and his estate had come into the hands of his sons. It was on these facts that the Court was called upon to consider the question of the plaintiff's rights against defendant No. 2's estate. The promissory-note on which the suit was primarily based was construed by the Court as an indemnity given by defendant No. 2 to the plaintiffs in case any loss was caused to them by his unauthorised meddling with their moneys. It would thus appear that on the view taken by the Court it was open to the plaintiffs to repudiate the mortgage transaction altogether and then claim the whole of the amount from defendant No. 2. But the plaintiffs had elected to accept the mortgage transaction and to treat defendant No. 2 as their benamidar. In that view of the matter, it was clear that the only right which the plaintiffs could claim against the estate of defendant No. 2 was to recover the loss, if any, that they might suffer in consequence of the mortgage transaction, and so until the mortgaged property was sold and it was shown that the sale proceeds were not enough to meet the plaintiff's claim there would be no justification for a claim against the estate of defendant No. 2. The decision of the Court in this case, therefore, turned upon the special facts of the case and the decisive factor clearly was the attitude adopted by the plaintiffs themselves in accepting the mortgage transaction and consequently treating defendant No. 2 as their benamidar.

12. (1939) 42 Bom. L. R. 175.

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With respect, we think that the general observations made in the course of the judgment, which suggest that under a contract of indemnity the cause of action arises when the damage which the indemnity is intended to cover is suffered and that a suit brought before actual loss accrues is premature, must be regarded as *obiter*. The question as to whether the provisions contained in s. 125 of the Indian Contract Act exhaustively dealt with the rights of the indemnity-holder and the remedies available to him does not appear to have been argued before the Court, and indeed on the facts found by the Court the question which really arose for the decision of the Court lay within a much narrower compass. We are, therefore, disposed to take the view that the rights of the idemnity-holder should not and need not be confined to those mentioned in s. 125 of the Indian Contract Act. Even before damage is incurred by the indemnity-holder, it would be open to him to sue for the specific performance of the contract of indemnity, provided of course it is shown that absolute liability has been incurred by him and that the contract of indemnity covers the said liability. We may point out that the view which we are disposed to take in this matter has been taken by the High Courts of Calcutta, Madras and Allahabad (vide *Kumar Nath Bhuttacharje* v. *Nobo Kumar*[13] *Ramalingathudayar* v. *Unnamalai Achi*[14], and *Shiam Lal* v. *Abdul Salal*,[15]) and has besides received the approval of the commentators in Pollock and Mulla's Indian Contract Act.

That raises the question as to whether the right of the indemnity-holder to sue for the specific performance of the contract can be regarded as a counter-claim within the meaning of r. 52-B (5) (*b*) of the Rules framed by this Court under the Presidency Towns Insolvency Act, 1909. In dealing with this question, it would be necessary to examine more carefully the contents of this right. It is true that the indemnity-holder can sue the indemnifier even before he has incurred any damage. But the indemnity-holder can sue for the specific performance of the contract. He may, in such a suit, implead his own creditor and the indemnifier and may ask for a decree directing the indemnifier to pay the amount due to his own creditor. He may meet the liability himself and then sue the indemnifier for the recovery of the amount which he had to pay. On the other hand, he may also sue merely the indemnifier without impleading creditor and without meeting his liability towards the creditor, and even in such a suit it may be open to him to claim either that the indemnifier should deposit the amount in the Court to be paid to his creditor or that he should pay the said amount to himself. Dealing with the rights of

13. (1899) 26 Cal. 241.
14. (1915) 38 Mad. 791.
15. [1931] A. L. R. All. 754.

the indemnity-holder both at law and in equity, this is what Halsbury says (*Halsbury*, Vol. 16, pp. 14-15):—

"At law an action on the contract of indemnity normally does not lie until the promisee has been actually damnified by paying the third party's claim.....The right to indemnity, however, may arise under a special contract, on the true construction of which the right may be enforced, even at law, before actual loss has been sustained."

"But in equity, the rules of which now prevail in all Courts, even in the absence of such a special agreement, the person entitled to the indemnity may enforce his right as soon as his liability to the third party has arisen, and therefore he may obtain relief before he has actually suffered loss. He may, therefore, in an appropriate case obtain an order compelling the promisor to set aside a fund out of which the liability may be met, or to pay the amount due directly to the third party, or even, when the promisor is under no liability to the third party, as is the case in contracts of mere indemnity, to the promisee himself....."

Naturally, Halsbury has also added that in the case of such claims the equitable right to enforce the indemnity does not constitute a debt. It would thus be seen that on this statement of the law it is only in one class of cases that the indemnity-holder is not entitled to ask for a decree for payment of money to himself and that class of cases is one where the indemnifier is himself interested in the application of the money. In this class of cases, the only relief to which the indemnity-holder is entitled is to call upon the indemnifier to perform specifically the contract of indemnity and pay the amount in question to the creditor concerned. In all other cases it may be open to the indemnity-holder to ask for a decree for the amount in question in his own favour. This statement of the law is borne out by the English decisions to which our attention has been invited by Mr. Jhaveri. In *Lacey* v. *Hill*,[16] Sir G. Jessel, M. R., had occasion to deal with this point and he observed :—

".....Whatever may be the case at law (as to which I say nothing, because it is not necessary,) it is quite plain that in this Court any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him....."

These observations were cited with approval and applied in *British Union and National Insurance Company* v. *Rawson*[17] The plaintiff company in this case had recovered judgment against a married woman in respect of unpaid calls on shares against which the defendant had indemnified her. The woman had no separate property of her own, but she assigned the benefit of her right of indemnity to the plaintiff company, who, after written notice of the assignment, sued

16. [1874] L. R. 18 Eq. 182.
17. [1916] 2 Ch. 476.

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the defendant for the full amount of their judgment. It was held that although the married woman had paid nothing, nevertheless she was entitled to have the amount of the calls paid by the defendant either to the plaintiffs or to herself and that this right was capable of assignment. Accordingly the plaintiffs as assignees were held entitled to have the contract of indemnity enforced by an order directing payment to themselves. It would be noticed that the plaintiff company in this case was itself the creditor of the indemnity-holder, so that it was not very difficult for the said company to succeed in its claim for a decree for the amount covered by the contract of indemnity. In effect, the plaintiff company sued to recover the amount due under the indemnity bond, not so much as the creditor of the indemnity-holder, but as the assignee of the rights under the contract of indemnity. Both the rights had been combined in the plaintiff company and so the main and substantial defence which could be raised, and was in fact raised, was whether such a right can be assigned at law. It was held that the right was capable of assignment and a decree was passed in favour of the plaintiff company for the amount in question. Dealing with the plaintiff company's right as assignee to recover the amount, Warrinton L. J. came to the conclusion that the claim was well-founded and that in equity it was open to the assignee to claim the amount even though the indemnity-holder may have incurred no damage. In this connection, the observations made by Sir George Jessel M. R., to which I have just referred, were cited.

The distinction between cases where the indemnifier is not concerned with the application of the amount and those where he is so concerned was pointedly drawn out by another judgment to which our attention has been invited by Mr. Jhaveri. In *Liverpool Mortgage Insurance Company's Case,*[18] Buckely L. J., in the course of his judgment, cited with approval the observations of Lord Lindley in his work on Partnership to the effect that, if one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been damnified, and that the limit of the defendant's liability to the plaintiff is the full amount for which he is liable or, if he is dead or insolvent, the full amount provable against his estate, and not only the amount of divident which such estate can pay. The position, however, would be different where the indemnifier is himself concerned with the application of the money. In such a case, the indemnifier cannot be directed to pay the amount to the indemnity-holder. Vide In re *Richardson.*[19]. Therefore, if must be conceded in favour of Mr. Jhaveri that in a proper case it would be open to the idemnity-holder not to implead

18. (1914) 2 Ch. 617.

19. (1911) 2 K. Bom. 705.

his creditor to his suit, but to claim a decree for the payment of the amount in question directly to himself. Incidentally we may point out that the final order passed by Mr. Justice Chagla in Gajanan's case directed the defendant to procure from the mortgagee a release of the plaintiff from all liabilities under the deed of mortgage and further charges. It also directed that in default of his doing so the defendant should pay into the Court the amount required to pay off the whole amount due to the mortgagee under the mortgage and further charge and that the amount so brought into Court should be utilised for the purpose of paying off the said mortgage and further charge. This order was, with respect, rightly passed in this case because the indemnifier was concerned with the appropriation of the amount in question and so the indemnity-holder was not entitled to a decree for the payment of the amount to himself. If that be the nature of the appellant's rights against the respondent, does it follow that the claim which he set up under the present notice of motion and in respect of which he has filed a suit in the City Civil Court amounts to a counter-claim within r. 52B (5) (*b*)? Mr. Jhaveri has relied upon the provisions of r. 131 of the Rules and Forms of this Court on the Original Side in support of his argument that the right which vests in his client should be regarded as constituting a counter-claim. Rule 131 enables the defendant to set up by way of counterclaim against the claims of the plaintiff any right or claim in respect of a cause of action accruing to the defendant either before or after the filing of the suit, but before the defendant has delivered his defence and before the time for delivering his defence has expired, whether such counter-claim sounds in damages or not. Mr. Jhaveri has also relied upon the decision of Mr. Justice Bhagwati in *Framroze Merwanji* v. *Hormasji Manekji*,[20] where the learned Judge has expressed the view that, in considering whether a person seeking to have an insolvency notice set aside sets up a counter-claim, it would be necessary to decide the merits of the counter-claim at that stage; all that the Court would be concerned to consider at that stage would be whether *prima facie* the party invoking r. 52-B(5)(*b*) has a counter-claim to make against his creditor or not. This position cannot be disputed. But the difficulty in the way of Mr. Jhaveri is that the right which he claims, and which undoubtedly vests in him by virtue of the contract of indemnity, merely gives him a cause of action to claim specific performance to the contract of indemnity. It is obvious that even in a case where the plaintiff prays for a decree for the payment of the amount to himself, his claim can be defeated if the indemnifier proceeds to satisfy the claim of the creditor of the plaintiff. In substance, the

20. (1946) 48 Bom. L. R. 737.

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indemnity-holder claims the amount, not for himself, but for his creditor; the amount is really not due to the indemnity-holder personally, but from him to his creditor. Indeed, in the suit filed by the appellant, he has been content to make an alternative claim. It is not as if he has claimed only one relief and has asked for a decree to be passed in his favour in respect of the amount in question. Having made this claim, he has alternatively claimed that a decree may be passed calling upon the respondent to pay the amount to the Income-tax Department. When it is remembered that this suit was filed after the present notice of motion was taken out, presumably at the suggestion of Mr. Justice Coyajee, the alternative claim made in the plaint assumes some significance. The plaintiff must have been advised that in law it was necessary that he should make such an alternative claim. But apart from that, the very nature of the right to claim specific performance of the contract of indemnity cannot, in our opinion, be regarded as a counterclaim at all. This right may mature into a counterclaim if the indemnity-holder actually pays the amount to his creditor or if and after he obtains a decree for the payment of the amount in a Court of competent jurisdiction. In the present case, the amount has not been paid and the decree for the payment of the amount in question is yet to be passed. The right which can be properly regarded as a counterclaim does not, therefore, vest in the appellant at this stage. What vests in him at present, considered in the light of the legal denotation of a counterclaim, is inchoate and incomplete. He is entitled to claim specific performance of the contract and no more. If the present claim is compared with an ordinary claim for money, which can and would be regarded as a counterclaim, the distinction would be obvious. A claim on a promissory-note, for instance, bears obvious marks of dissimilarity and difference with the claim which the plaintiff is entitled to make on the bond of indemnity. A counterclaim properly so-called, if decreed, should be able to wipe out the claim made against the alleged insolvent. It is not possible to assume at present that the claim made by the appellant would necessarily end in a decree or that the decree would necessarily be in favour of the appellant so as to enable him to wipe out the respondent's claim against him. The contract of indemnity by itself does not make the indemnity-holder a creditor of the indemnifier. Therefore, in our opinion, with respect Mr. Justice Coyajee was right in coming to the conclusion that the notice of motion based on the appellant's right under the contract of indemnity was premature. It is somewhat unfortunate that the present insolvency proceedings will have to continue though it is common ground that besides the respondent the appellant has no other creditor with a

subsisting claim. But however much we may deplore the present development between persons who were once partners in a firm, that cannot affect the decision of the point of law which has been raised before us by Mr. Jhaveri.

After this appeal was argued fully before us, and even while it was being argued, we gave the parties ample opportunity to settle this dispute between themselves amicably. Indeed, after the arguments were over, at the request of both Counsel we did not proceed to deliver judgment in order to give time to the parties to settle if they could. Efforts at settlement, we are told, have failed, and when the matter was called out to-day for judgment Mr. Jhaveri attempted to refer to Ground No. 7 in his memorandum of appeal. We have not allowed Mr. Jhaveri to refer to this ground or to address us on the merits of this ground. When the appeal was adjourned on the last occasion, it was clearly understood that the arguments were over and that Counsel were to tell us on the next day whether the matter had been compromised or not and Counsel were told in clear and unambiguous terms that, if the Court was informed that the matter is compromised, an order in terms of compromise would be passed ; otherwise we would proceed to deliver judgment. That is why we have not heard Mr. Jhaveri on ground No. 7 to which he attempted to invite our attention.

The appeal fails and must be dismissed with cost.

Attorneys for Appellant : *Thakordas Daru Hamani & Co.*

Attorneys for Respondents : *Dabholkar & Co.*

Appeal dismissed,

P. M. P.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Desai.

THE MAJOOR SAHAKARI BANK LTD. *v.* N. M. MAJMUDAR AND ANOTHER.*

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Bombay Co-operative Societies Act (Bom. VII of 1925), ss. 23, 54, 68, 70—Bombay Industrial Relations Act (Bom. XI of 1947), s. 2 (3)—Bombay Industrial Disputes Act (Bom. XXV of 1938) s. 2 (3)—Notification issued by State Government making Act applicable to business of banking companies—Whether co-operative Societies doing banking business governed by Industrial Relations Act, 1947—Disputes between employee and Society regarding reinstatement of employee—Whether Industrial Court can decide the dispute—Indian Companies Act (VII of 1913), s. 4.

The business of banking carried on by a Co-operative Society registered under the Bombay Co-operative Societies Act, 1925, is an industry to

*Special Civil Application No. 1368 of 1955.