

(1904) 07 CAL CK 0002

In the Calcutta High Court

Case No : Appeal from Original Decree No. 1 of 1902

Khetsidas Agarwala

APPELLANT

Vs

Shib. Narayan Murda and Another

RESPONDENT

Date of Decision : 25-07-1904

Acts Referred:

Citation : (1904) 07 CAL CK 0002

Judgement

1. The Plaintiffs-Respondents in this appeal, sued on an amanati receipt, on a receipt given for a deposit, to recover from the Defendant the sum of Rs. 7,774-5-10, which had been deposited with him by them on the 23rd September 1899 with interest thereon from the 29th December 1899, the date on which it was alleged that repayment of the deposit had been demanded up to the date of institution of the suit amounting to Rs. 855, making a total claim of Rs. 8,629-5-10 with costs, and interest pending suit. It was alleged in the plaint that the Plaintiffs had sold to the Defendant for Rs. 40,000 a decree which they had obtained in suit No. 326 of 1898 and that out of that sum Rs. 7,774-5-11 was deposited by the Plaintiffs with the Defendant on condition that he would repay the same to them whenever they jointly demanded payment, and that the Defendant gave the Plaintiffs a receipt containing that condition. On the 15th Pous 1306 = 29th December 1899, the Plaintiffs jointly demanded the sum deposited from the Defendant but he did not pay them and therefore they were compelled to bring the suit. Both parties, it may be mentioned, are Marwari merchants. The substantial defence which the Defendant put forward was that the plaint did not disclose the real facts under which the deposit was made. These facts were said to be as follows :--A sum of Rs. 20,225-10-10 was due to the Defendant from the Plaintiffs on previous transactions between the two firms. To pay this off and in order to borrow a further sum of money the Plaintiffs in Assin 1306 agreed to sell to Defendant for Rs. 40,000 the decree in suit No. 326 of 1898 which they had obtained against Surendra Nayan Chowdhury. The Defendant ascertained that that decree had been attached before judgment on the 25th August 1899 in a suit No. 221 of 1899 brought by Nim Chand Bhaturia

and others to recover a debt of Rs. 6,289-12-5. The Defendant accordingly refused to purchase the decree unless it was released from attachment. The Plaintiffs agreed to have the attachment removed and as a guarantee that this should be done deposited the sum of Rs. 7,774-5-10 with the Defendant, on the understanding that the debt due to Nim Chand Bhaturia, etc., should be paid off out of that sum if the decree was not otherwise released from attachment. On this arrangement being made Plaintiffs executed the deed of sale, dated the 7th Assin 1306 B. S. = 23rd September 1899, in favour of the Defendant of the decree for the sum of Rs. 40,000. Of the purchase-money Rs. 20,225-10-10 was set off against the debt due by the Plaintiffs to the Defendant. Two hundies for Rs. 12,000 were given by the Defendant to the two Plaintiffs and the balance of Rs. 7,774-5-10 was placed in deposit with Defendant and on the same day he executed the amanati receipt in favour of the Plaintiffs on which the suit has been brought.

2. Subsequently on the 28th Pous 1306 = 11th January 1900 an account of the amount due to the Defendant was made up as the decree had not then been released from attachment. This was done in the house of Ram Chandra Sen, Pleader. A sum of Rs. 1,269-9, including interest due on the sum of Rs. 20,225-10-10 from 2Gth Choit to the 6th Assin 1306 and a remission of Rs. 300 was deducted from the Sum of Rs. 7,774-5-10 in deposit with the Defendant leaving a balance of Rs. 6,504-12. It was settled that out of this Rs. 3,027-15 was due to Plaintiff No. 1 and Rs. 3,476-13 was due to Plaintiff No. 2, and two hundis, one for Rs. 3,000 in favour of Plaintiff No. 1 and the other for Rs. 3,500 in favour of Plaintiff No. 2, were executed by the Defendant. It was settled that the Plaintiffs were to furnish security in order that the attachment might be removed from the decree and when they did so the hundis were to be made over to them, Plaintiff No. 1 receiving Rs. 27 more and Plaintiff No. 2 paying back Rs. 23-3. The hundis and the receipt for the deposit were in the meantime deposited with Ram Chandra Sen, the pleader by Defendant and Plaintiffs, respectively. The security offered by the Plaintiffs was not however accepted, and in the end the receipt was returned to the Plaintiffs and the hundis to the Defendant. The Defendant on the 15th January 1900 applied for execution of the decree which Plaintiffs had sold to him and Plaintiffs put in a petition praying that he might be substituted for them as decree-holder. This prayer and the security bond offered by the Plaintiffs were both disallowed on the 27th January 1900. The Plaintiffs then told the Defendant that they would appeal to the High Court. The Defendant took no further action till Hari Krishna Chowdhury and Harish Chandra Sarkar, who were second mortgagees of the property covered by the decree which had been sold to the Defendant, took out execution of a decree obtained on their mortgage and had the property proclaimed for sale. He then went to the Plaintiffs and they asked him to release the attached decree, according to previous contract, by depositing in suit No. 221 of 1899 (the suit brought by Nim Chand Bhaturia and others against the Plaintiffs) the sum of Rs. 6,289-12-5 out of the balance of the money in deposit with him, viz, Rs. 6,504-12, and

accordingly the Defendant on depositing in Court the sum of Rs. 6,289-12-5 on the 15th May 1900 got his purchased decree released from attachment on the 17th May 1900. That left in deposit the sum of Rs. 214-5-7 which owing to a mistake as to interest should have been Rs. 215-9-4. Deducting there from interest and small items for the purchase of stamp, etc., there remained a sum of Rs. 51-0-10 which the Defendant was willing to pay to the Plaintiffs.

3. The Plaintiffs on the other hand denied that there was any such verbal contract modifying the terms of the deposit receipt and empowering the Defendant to pay Rs. 6,289-12-5 to satisfy the decree in the suit No. 221 of 1899 brought by Nim Chand Bhaturia and others against the Plaintiffs out of the Rs. 7,774-5-10 placed in deposit with him. It was contended that under the terms of the agreement as embodied in the receipt the Defendant was only empowered to pay the money deposited to the Defendant on their joint demand. It was not however denied that the money had been paid by the Defendant as he alleged in part satisfaction of the decree and that the Plaintiffs had been benefited by the payment.

4. Both parties adduced evidence, oral and documentary, and the result of the trial was that the Subordinate Judge decreed the Plaintiffs' claim in full with costs. The Subordinate Judge held that as the oral agreement relied on by the Defendant was "entirely at variance with the written contract as embodied in the amanati receipt" the evidence adduced by the Defendant to prove the oral agreement could not "therefore in his opinion help him in any way," and in support of this view he relied on the case of Daimoddee Paik v. Kaim Taridar I. L. R. 5 Cal 300 (1879). He further held that though the Defendant had deposited the sum of Rs. 6,289-12-5 in suit No. 221 of 1887 brought by Nina Chand Bhaturia against the Plaintiffs and though the Plaintiffs had been benefited by the deposit the Defendant could not plead that payment as against the Plaintiffs' claim in the suit, but must seek his remedy in another suit. He held that the Defendant had failed to pay the money deposited with him to the Plaintiffs on their joint demand and that therefore the Plaintiffs were entitled to a decree for their full claim. The Defendant has appealed.

5. In support of the appeal the learned pleader for the Appellant has contended that the Subordinate Judge erred in Law in holding that the evidence adduced by the Defendant to prove facts in connection with the deposit receipt on which the Plaintiffs' suit was brought was inadmissible under sec. 92 of the Evidence Act. He contended that the evidence adduced was admissible under provisos 1, 2, and 3 of that section. The evidence adduced to prove the subsequent oral agreement of the 11th January 1900, when an account was taken in respect of the money in deposit and two hundies for the aggregate sum of Rs. 6,500 were executed by the Plaintiffs, was clearly admissible under proviso 4 of that section. He has further contended that whether that evidence was admissible or not, the Subordinate Judge was wrong in holding that the Defendant was not entitled to a deduction either as a set off or by way of part payment in this suit of the sum of

Rs. 6,289-12-5 paid by him for the Plaintiffs in satisfaction of the decree in suit No. 221 of 1887 brought against them by Nim Chand Bhaturia and others. It was also contended that the evidence was insufficient to prove the demand of the deposit by Plaintiffs.

6. The learned Advocate-General on behalf of the Respondents has argued on the other hand that the Subordinate Judge was right in rejecting the evidence as inadmissible. He has contended that the amanati receipt on which the suit was brought embodied the result of the agreement between the parties in clear and distinct terms. There were, no doubt, long negotiations leading up to the sale of the decree to the Defendant for Rs. 40,000 which according to the Defendant were all carried on in Dinajpore and according to the Plaintiffs partly in Dinajpore and partly in Calcutta but as the deposit was in this case accompanied by a written receipt embodying the agreement between the parties the Defendant is bound by the terms of that agreement and cannot rely on oral evidence to prove what occurred during the negotiations. No evidence could also be given to prove any separate previous or contemporaneous agreement to modify the terms of the agreement as set out in the receipt. As to the alleged subsequent agreement, it is argued that, if there was any, it was subsequent to the demand made by the Plaintiffs for payment of the deposit and that what Defendant then gave was not two hundies but two letters of indemnity in favour of the Plaintiffs in case they should incur loss by giving security in order to release the Defendant's purchased decree from attachment. It was lastly urged that the payment by the Defendant of the sum of Rs. 6,289-12-5 in the suit No. 221 of 1887 would not entitle him to credit for the same in this suit. Under the terms of the receipt he was bound to pay back the money deposited when the Plaintiffs jointly demanded it. He had no authority himself to make any payment out of the money placed in deposit with him.

7. In support of the agreement that the evidence was admissible under the first proviso of sec. 92 of the Evidence Act the learned pleader for the Appellant has relied on the case of Baksu Lakshman v. Govinda Kanji I. L. R. 4 Bom. 594 (1880) and the Full Bench case of this Court Preonath Shaha v. Modhusudan Bhuiya 2 C. W. N. 562 : s. o. 1. L. R. 25 Cal. 608 (1898) and has pointed out that the latter case practically overrules the case of Daimoddee Paik v. Kaim Taridar I. L. R. f. Cal. 300(1879) on the authority of which the Subordinate Judge has based his conclusion. The contention advanced is that the fraud which may be proved under the proviso is not necessarily contemporaneous fraud but may include fraud on the part of one of the contracting parties who insisted on the performance of the written contract though he knew it did not cover all the terms agreed to between the parties at the time of its execution. The learned Counsel for the Respondent, however, in answer to this contention argues that the cases relied on are distinguishable from the present case. In each of them the question was whether a document which as drawn might be a complete sale or a mortgage by way of conditional sale was in fact intended by the parties to be a sale or mortgage, and evidence on that question was admitted and was

admissible. In the present case the evidence offered is to prove an agreement entirely inconsistent with the terms of the written contract as stated in the receipt.

8. In support of his contention that the evidence was admissible under second proviso of sec. 92 the learned pleader for the Appellant has relied on the case of Guddalur Rathna Mudaliyar v. Kunnattar Arumuga Mudaliyar 7 Mad. H. C. Rep. 189(1872) and on the English cases of Palmer v. Johnson 13 Q. B. P. 351 (1884) and Newlove v. Shrewsbury 21 Q. B. D. 41 (1888) and his argument has been that in this case the receipt was not the real contract, that it was in the nature of a voucher given for the performance of the real contract, that the agreement which the evidence was adduced to prove was something outside the contract itself and that the mere fact that the written receipt was given would not bar the Defendant from giving evidence to prove what the real contract was, and that it was something not included in the agreement evidenced by the receipt.

9. He also relied on the case of Jervis v. Berridge 8 Ch. App. 351 (1873) and contended that as the receipt in this case was intended as a mere piece of machinery subsidiary to and for the purpose of the verbal and only real agreement, evidence could be given to prove the real agreement and to show that the use of the receipt for purposes inconsistent with that agreement was dishonest and fraudulent.

10. To this agreement the learned Advocate-General has replied, on behalf of the Respondent, that the case in the Madras High Court Reports has no application to the present as in that the learned Chief Justice relied on the case of Pym v. Cambell 6 E. and B. 370(1856) and held that evidence might be given to prove that while the transaction was still incomplete, the document in question was given not as a writing which expressed the final contract, but as a voucher only. The receipt in the present case embodied the final contract. The cases of Palmer v. Johnson 13 Q. B. D. 351 (1884) and Newlove v. Shrewsbury 21 Q. B. D. 41 (1888) he has argued, are also not in point. In the first case evidence was admitted to prove an error in a deed of sale which was subsequently discovered, and in the latter it was admitted that the receipt given was not intended to and did not express the contract between the parties. In the case of Jervis v. Berridge 8 Ch App. 351 (1873) it was held that a gross fraud had been committed which is not the fact in the present case.

11. Lastly in support of the contention that the evidence was admissible under the third proviso of sec. 92 the learned pleader has relied on the case of Wallis v. Littell 11 O. B. N. S. 369 (1861) and has argued that as in this case the agreement which the Defendant wished to prove was an oral agreement operating as a suspension of the written agreement and not in defiance of it the evidence was admissible.."

12. To this argument the learned Advocate-General has replied that the case relied on has no application as in that case the Judges held that the written

document did not contain the full terms of the agreement, whereas in the present case the receipt embodies the whole agreement between the parties.

13. In support of the case of the Respondent the learned Advocate-General relies also on the case of *Ramjibon Serowgy v. Aghore Nath Chatterjee* 2 C. W. N. 188 : s. 0. I. L. R. 25 al. 401 (1897) to support his contention that under proviso 3 of sec. 92 of the Evidence Act the only contemporaneous oral agreement which can be proved is one which is to the effect that the written contract was to be of no force or effect and it was to impose no obligation until the happening of a certain event. He then relies on the case of *Leggott v. Barrett* 15 C. D. 306 (1880) to support his argument that the evidence in this case was inadmissible as the preliminary contracts having once been reduced into writing the rights of the parties were entirely governed by the writing. He further relies on the following remarks of Lord Cairns in the case of *Shaw v. Foster* L. It. 5 E. & I. A. 321 (1872): "Although it is a well established rule of Equity that a deposit of a document of title without more, without writing or without words of mouth, will create in Equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed." His contention is that after the delivery of the deposit with the written receipt the parties were bound by the terms of the receipt, and no evidence to contradict those terms was admissible.

14. We do not propose to deal at length with the question whether and how far the evidence offered by the Defendant to prove the agreements previous to or subsequent to the delivery of the receipt was admissible or not, as in our opinion the appeal can be decided on the facts which are admitted and on the other point which has been raised. We refer to the question whether the Defendant was in defence to the present claim entitled to a deduction either as a set off or by way of part payment of the sum of Rs. 6,289-12-5 deposited by him on behalf of the Plaintiff in suit No. 221 of 1887 in which Nim Chand Bhatia and others were decree-holders.

15. It is not denied by the Plaintiffs in this case that the execution of the deed of sale of the decree by the Plaintiffs in favour of the Defendant on the 7th Assin 1306 = 23rd September 1899 by which they sold for Its. 40,000 to the Defendant the decree which they had obtained in suit No. 326 of 1898 against Surendra Nayan Chowdhury, and the deposit (ama-nati) receipt for Its. 7,774-5-10 executed by the Defendant in favour of the Plaintiffs on the same date were parts of the same transaction, and that the money covered by the receipt was part of the consideration money paid for the decree. The learned Advocate-General was not prepared to dispute on behalf of his clients that at the time of the sale of the decree to the Defendant there must have been an understanding on the part of the Plaintiffs that they would pay off the sum

claimed in the suit in which that decree had been attached before judgment and by so doing release the decree from attachment. The evidence adduced by the Defendant so far as it goes to prove these facts was clearly admissible.

16. The receipt on which the suit is brought is, briefly expressed, in the following terms:--

17. To--B. Shib Narayan Murdah and Har Narayan Murdah, &c.

18. I, Khetsidas Agarwala, son of &c, &c., execute this amanati receipt as follows :--

That you keep in deposit with me Rs. 7,774-5-10 in order to pay off the debts due to your Calcutta creditors on account of your joint business as well as to meet the expenses of your joint law suit. I shall return the said deposit money to you when you both will come to and jointly demand payment from me of the said money in deposit. If I fail to pay the amount at the time, then from the date of demand of the said money, you shall get interest at the rate of Re. 1 per cent, per mensem, provided that I shall not be liable to pay interest on the said deposit money up to the day preceding the demand. I give this receipt for the deposit to you by signing my name with my own hand. Dated 7th Assin 1306." It is signed by the writer Anath Bandhu Bondopadhyaya. Defendant adduced evidence to prove the object for which the deposit was made with him and to explain the meaning of the first sentence in the receipt. This evidence was not for the purpose of contradicting, varying, adding to, and subtracting from, its terms, and so far as its object was to explain the reason for the deposit it was not inadmissible under the provisions of sec. 92 of the Act.

19. The evidence of Ram Chandra Sen, Pleader, Sarat Ram, the gomastha of the Defendant, and Khetsidas Agarwala, the Defendant, is to the effect that the deposit of Rs. 7,774-5-10 was made by the Plaintiffs with the Defendant because the decree which they had sold to the Defendant was then under attachment and in order that if they, the Plaintiffs, could not get the attachment otherwise, removed they might be able to pay off out of the deposit money the sum claimed in the suit in which the decree had been attached. The evidence, it is true, goes further; but to this extent certainly it was admissible. In fact it is not seriously contended on behalf of the Plaintiff that this was not the object of the deposit. It is moreover an agreement between the parties which is quite in accordance with probability having regard to the fact that both are Marwari merchants, and on that account possibly distrustful of each other and to the circumstances under which the deposit was made, and one which might reasonably be inferred from the circumstances of the case.

20. What however it is desired on behalf of the Defendant to prove beyond" this is that there was an additional agreement that if the Plaintiffs failed to pay off the sum due to the Plaintiffs in the suit in which the decree had been attached, the Defendant should be at liberty to make the payment out of the deposit and so release the property from attachment. This, it is suggested on behalf of the

Defendant-Appellant was the real contract and the terms under which the Defendant in the receipt acknowledged that he received the deposit were merely subsidiary to the real contract, so that the receipt amounted to a mere voucher or to a mere subsidiary agreement and the Plaintiff in putting forward the receipt as the complete contract and in attempting to enforce its terms was endeavouring to perpetrate a fraud on the Defendant. If these facts could be accepted as correct the evidence adduced by the Defendant would be admissible under the provisos to sec. 92 of the Evidence Act, and the cases on which the learned pleader for the Appellant relies would apply. Of the witnesses examined for the Defendant, his gomastha and the Defendant himself can hardly be regarded as independent. The third witness, the pleader Ram Chandra Sen, only professes to give the purport of the agreement between the parties and he gave his evidence two years after the transaction between the parties.

21. For the Appellant it has been suggested that the evidence of Deo Chand Ram, a witness examined in commission for the Plaintiffs, practically admits the truth of Defendant's case when he says that the money was deposited with Khetsidas in order to secure the release of the decree from attachment. The evidence is not however conclusive that Khetsidas was himself to pay the money out of the deposit in order to secure the release.

22. The learned Advocate-General has very pertinently argued that if the intention of the parties had been to give the Defendant authority to pay off the claim of Nim Chand Bhaturia and the other Plaintiffs in suit No. 221 of 1899 there is no reason why a stipulation to that effect should not have been entered in the receipt. He suggests that at the time of the agreement neither party was inclined to trust the other implicitly, and therefore though the money was deposited with the Defendant it was agreed that he should pay the money to the Plaintiffs jointly and that they should pay off the claim.

23. We are of opinion that on the evidence the Defendant has not made out a case which would indicate that the receipt itself did not embody the terms of the agreement between the parties made with regard to the deposit and under these circumstances we must hold that the evidence offered to prove that there was a separate agreement by which the Defendants were empowered, in the event of Plaintiffs' default, to pay off the claim of the Bhaturia's was not admissible under any of the provision as to sec. 92 of the Evidence Act.

24. Evidence to prove a subsequent agreement rescinding or modifying the original agreement was no doubt admissible under proviso 4 of sec. 92, but the question is whether the evidence adduced has satisfactorily proved the subsequent agreement of the 11th January 1900 as set forward by the Defendant, and whether, if there was such an agreement, it rescinded or modified the original contract. The evidence on both sides is to the effect that an attempt was made by the Plaintiffs in January 1900 to obtain the release of the decree from the order of attachment passed in suit No. 221 of 1899 by depositing security and that it failed as the Court refused to accept the security

offered. Both parties gave different account of what was done on that occasion. Admittedly the deposit receipt was temporarily made over to the charge of the pleader Ram Chandra Sen by the Plaintiffs and two documents for sum of Rs. 3,000 and for Rs. 3,500 were made over to him by the Defendant, pending the result, of the Plaintiffs' application to the Court for permission to put in security and to release the decree. The Plaintiffs vaguely suggest that two letters of indemnity for those sums were deposited by the Defendant, while Defendant and his witnesses including the pleader with whom the deposit was made say that two hundies for Rs. 3,000 and Rs. 3,500 were deposited by the Defendant. The two hundies have been produced in evidence and proved. We are of opinion that on this point the Defendant's witnesses are entitled to reliance and that in fact two hundies were deposited by the Defendant. The Plaintiffs, it is true, set up the case in the lower Court that the Defendant, at the time of the purchase of the decree, agreed himself to pay off the claim of the Bhaturias for which the decree had been attached and to release the decree from the attachment but on this point the evidence is so uncertain that it is not entitled to any credit. The Plaintiff, Shib Narayan Murda, in his evidence after having stated that the Defendant had agreed to this afterwards said, " I do not know whether Khetsidas would pay the Rs. 0,289 over and above the Rs. 40,000. The consideration for the kobala was fixed at Rs. 40,000." The other Plaintiff suggested that at the time of the sale the decree was worth more than Rs 40,000 but in the argument before us an account was made and it was found that it could not have exceeded Re. 40,000 by more than a few hundred rupees. It was highly improbable then that Khetsidas, the Defendant, would have made any such agreement at the time of the purchase. It has been suggested that he was anxious to recover the Rs. 20,225-10-10 which the Plaintiffs owed him and so proposed to purchase the decree. It must, however, be remembered that at the same time he paid over to the Plaintiffs Rs. 12,000 in two hundies. In our opinion the evidence entirely fails to prove that the Defendant ever agreed to himself pay the money to release the decree from attachment. Under these circumstances there was no reason at all why he should have executed letters of indemnity in favour of the Plaintiffs when they offered their property as security to release the decree from attachment.

25. There is however nothing in the circumstances connected with the deposit of the two hundies and the amanati receipt with the pleader to give rise to the inference that the original agreement under which the deposit receipt had been given by the Defendant had been modified or rescinded. In fact the deposit of the hundies goes to support the conclusion that the agreement still held good and that the deposit was to be repaid to the Plaintiffs. Under these circumstances we are unable to rely on the evidence adduced on behalf of the Defendant that it was then agreed that on the Plaintiffs' failing to obtain the release of the decree from attachment by depositing security the Defendant should pay off the claim of the Bhaturias out of the money in deposit with him. We hold therefore that the Defendant has failed to prove the existence of a subsequent agreement rescinding or modifying the original agreement between the parties as to the

deposit.

26. It remains for us to consider whether the Defendant was entitled to claim in this suit a deduction either as a set off or by way of part payment of the sum of Rs. 6,289-12-5 paid by him on behalf of the Plaintiffs into Court in suit No. 221 of 1887 in which Nim Chand Bhaturia and others were the decree-holders.

27. It has been proved by the evidence and by the production of copies of the order-sheet and the decree in the suit No. 221 of 1899 brought by Nim Chand Bhaturia and others against the Plaintiffs and by a copy of the chalan, dated the 15th May 1900, that the sum of Rs. 6,289-12-3 was in fact paid by the Defendant into Court in that suit, that the decree which had been attached was in consequence released from attachment and that execution of the decree in that suit was taken out against the Plaintiffs only for the balance of the claim after deducting the amount so deposited in part satisfaction. This is in fact admitted on behalf of the Plaintiffs and it is clear that the Plaintiffs benefited by the payment.

28. The learned Advocate-General has however contended on behalf of the Plaintiffs-Respondents that the Defendant cannot be allowed any deduction on that account in this suit as framed and that the Subordinate Judge is right in holding that the Defendant's remedy to recover that sum lay in a separate suit. We are unable to accept that view as correct, We think that the learned pleader for the Appellant is right in his contention that in this case when from the deed of sale it appears that the decree was sold to the Defendant by the Plaintiffs free of incumbrances the Plaintiffs were bound upon a principle analogous to that embodied in clause (g) of sub-sec. (1) of sec. 55 of the Transfer of Property Act to discharge the incumbrance, that is to say, to pay off the claim in the suit, in which the decree had been attached before judgment and the purchaser, the Defendant had a right under clause (c) of sec. 18 of the Specific Relief Act to compel the Plaintiffs to pay off the incumbrance and to make over the decree to him free of such incumbrance and further that upon a principle analogous to that embodied in clause (b) of sub-sec. 5 of sec. 55 of the Transfer of Property Act the Plaintiff as purchaser had a right to retain out of the purchase-money a sum sufficient to pay off the claim outstanding against the decree to the persons entitled thereto. These were rights which the Defendant had apart from the agreement between him and the Plaintiffs.

29. In this case, however, it is practically admitted that the Plaintiffs when they sold the decree for Rs. 40,000 to the Defendant engaged to pay off the claim in respect of which that decree has been attached and as an assurance that they would do so, deposited the money required to pay off that claim with the Defendant. Under such circumstances the Defendant was certainly entitled to compel the Plaintiffs to pay off that claim. When however the Plaintiffs failed to do so and when the Defendant was in danger of losing the security which the decree afforded him for the satisfaction of his dues owing to the fact that a second mortgagee of the property covered by the decree had applied to take out

execution of the decree which he had obtained on his mortgage by sale of the property, and when in order to save the security the Defendant was compelled to pay off the claim he had in our opinion a right in a suit brought to recover the money deposited with him to claim a deduction for the payment which he was compelled to make for his own protection. The principle laid down in the case of *James Hills v. Woomamoyee Burmonee* 15 W. H. 545 (1871) would certainly apply.

30. Furthermore, as the payment was undoubtedly made by the Defendant on behalf of the Plaintiffs, and the Plaintiffs have had the benefit of it the Defendant is entitled to a deduction for that payment from the amount of the claim of the Plaintiffs in the present suit either in accordance with the ordinary view, under the fiction of an implied contract or adapting the later view of the American commentator Keenes (*Treatise on Quasi Contracts*, pp. 396--401) by reason of the unjust enrichment of the Plaintiffs by such payment. The claim for repayment of the deposit and payment made to release the decree were in fact so connected together as to form parts of the same transaction.

31. In our opinion therefore the Plaintiffs in this suit were entitled only to a decree for the balance of the deposit of Rs. 7,774-4-5 after deducting there from the sum of Rs. 6,289-12-3, that is to say for Rs. 1,484-8-2 with interest at 12 per cent, per annum from the 17th May 1900, the date of the payment made by the Defendant to discharge the decree from attachment up to the date of this suit and thenceforward at 6 per cent, per annum up to the date of realization.

32. We accordingly set aside the judgment and decree of the Subordinate Judge and in lieu thereof direct that a decree be granted to the Plaintiffs in the terms stated. The parties in the two Courts will recover and pay costs in proportion to their respective success and failures. The learned pleader for the Appellants has invited our attention to the very unsatisfactory evidence offered by the Plaintiffs that any demand for payment of the deposit was ever made by them. We agree with him that the story is most improbable, that the Plaintiffs would have sent their cook to make the demand and we do not consider the evidence is entitled to reliance. The point is however immaterial for the purposes of this appeal having regard to our findings on the other points.