

(1952) 12 KL CK 0007
In the High Court Of Kerala
Case No : A.S. No. 520 of 1123 (T)

Richard Facey Hunter Crowther

APPELLANT

Vs

Pakkianathan Jananabharanom and Others

RESPONDENT

Date of Decision : 12-12-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 2 Rule 2(3)
Transfer of Property Act, 1882 — Section 100, 5

Citation : (1952) 12 KL CK 0007

Hon'ble Judges : Vithayathil, J;Sankaran, J

Bench : Division Bench

Advocate : P. Govindan Nair, for the Appellant; M. Madhavan Nair, for the Respondent

Judgement

Vithayathil, J.—Defendant 4 is the Appellant. The suit is for damages charged on the plaint property. The property is forest land 646 acres in extent in Darsanamkoppu Pakuthy. It belonged to one Thiruvambalam Pillai, the deceased husband of Defendant 1 and the father of Defendants 2 and 3. They belong to the Vellala community following the Marumakkathayam system of inheritance. Thiruvambalam Pillai made a settlement of this property in favour of Defendant 1. Subsequently, Defendant 1 executed a release in favour of Thiruvambalam Pillai. Defendant 1's daughter and grandchildren filed a suit (O.S. No. 115 of 1100 of the Nagercoil District Court) for setting aside the release deed on the ground that the property belonged to their sub-tarwad. While that suit was pending Thiruvambalam Pillai executed a sale deed, Ex. A, in favour of the Plaintiff on 24-12-1102 conveying the right to receive from the State the kudivila, for all the royal trees which the State might mark and fell from the plaint property during the years 1103, 1104 and 1105 as also the right to the other trees, firewood and bamboos that stood in the property with the reservation that in the case of some blocks the trees that had already been felled would belong to Thiruvambalam Pillai himself. It was also provided in the sale deed that if the Plaintiff met with any obstruction in working out his rights, under

the sale deed at the instance of persons, other than the creditors whose debts the Plaintiff undertook to discharge Thiruvambalam Pillai would remove those obstructions and that he would be liable to the Plaintiff for any loss which the Plaintiff might be put to by reason of the failure on the part of Thiruvambalam Pillai to remove such obstructions. It was also provided that the Plaintiff would be entitled to recover such damages from the plaint property. It is alleged in the plaint that on account of the claim put forward by the daughter and grandchildren of, Thiruvambalam Pillai and also because of the obstruction of Thiruvambalam Pillai himself the State did not pay to the Plaintiff the kudivila for royal trees felled by the State. The State filed an interpleader suit, O.S. No. 75 of 1109 of the Nagercoil District Court, impleading as parties to the suit the Plaintiff, Thiruvambalam Pillai, his wife, daughter and grandchildren and deposited the kudivila amount in Court for payment to the rightful claimant.

The Plaintiff who was Defendant 1 in that case contended that the amount belonged to him as per the sale deed, Ex. A, while Thiruvambalam Pillai who was Defendant 2 contended that the Plaintiff was entitled only to Rs. 5000, that even that amount he could draw only after discharging all the debts recited in Ex. A and that the balance amount of Rs. 11259 odd was the value of trees not conveyed to the Plaintiff under Ex. A. The daughter and grandchildren contended that the sale deed, Ex. A, in favour of the Plaintiff was not valid and that they were entitled to the kudivila amount. The Court held that the present Plaintiff was entitled to the whole amount. It was also held that the Plaintiff was entitled to get interest on the amount deposited by the State at 4 per cent, per annum and also the costs of the suit from the assets of Thiruvambalam Pillai and from the present Defendant 1 who was Defendant 10 in that case. The present Plaintiff preferred an appeal from that decree claiming interest and costs from Defendants 3 to 5 also in that case, namely, the daughter and grandchildren of Thiruvambalam Pillai. That appeal A.S. No. 554 of 1116 was dismissed by the Travancore High Court. The judgment is reported in "1945 Trav LR 352 (A)". While that suit was pending in the District Court the daughter and grandchildren of Thiruvambalam Pillai filed Anr. suit in that Court, i.e., O.S. No. 44 of 1110, claiming right to the kudivila amount deposited by the State. That suit as well as the earlier suit filed by them, namely, O.S. No. 115 of 1100, were dismissed with costs. The present suit was filed by the Plaintiff even before the interpleader suit was disposed of. The prayer in the suit is for a decree charging the interest on the kudivila amount as well as the costs in the interpleader suit and in O.S. Nos. 115 of 1100 and 45 of 1110 on the plaint property. The Plaintiff has also claimed a sum of Rs. 1000 as value of timber and firewood cut and removed by Thiruvambalam Pillai from out of the timber and firewood sold to the Plaintiff under Ex. A and also a further sum of Rs. 100 as costs incurred by the Plaintiff in respect of a criminal case filed against the servants of the Plaintiff by the lessees of Thiruvambalam Pillai. The amount of interest on kudivila claimed in the suit is 44395 fanams. Rs. 500 is claimed as approximate costs of the interpleader suit while Rs. 200 is claimed as costs of O.S. No. 115 of 1100 and O.S. No. 44 of

1110.

2. Defendant 4 purchased the plaint property from Defendant 1 under Ex. IX dated 10-11-1114. Defendants 1 and 4 contested the suit. Defendant 1 contended that she was entitled to get damages from the Plaintiff for the trees wrongfully felled by the State at the instance of the Plaintiff, that neither she nor Thiruvambalam Pillai obstructed the Plaintiff in realising the kudivila amount due to him and that the Plaintiff was not entitled to get any of the amounts claimed in the plaint. Defendant 4 also contended that the Plaintiff was not entitled to get a decree for any of the amounts claimed in the plaint charged on the plaint property and that, so far as the claim for interest on the kudivila amount was concerned, the suit was barred by Order II, Rule 2, CPC since the Plaintiff did not claim a charge on the plaint properties for this amount in the interpleader suit in which the amount was claimed as damages.

3. The Court below held that the Plaintiff was entitled to a charge on the plaint property for the interest on the kudivila amount and also for the costs of O.S. No. 75 of 1109 and O.S. 44 of 1110. The claim for Rs. 1000 as value of timber and firewood and for the costs of O.S. No. 115 of 1100 and the criminal case was disallowed. A decree was passed in the following terms:

(1) The Plaintiff is allowed to realise as damages and charged on the plaint property the amounts .detailed below: namely, (a) the amount awarded to him as interest on the kudivila amount under the final decree of the High Court in "A.S. No. 554 of 1116 (A); (b) the amount awarded to him as costs as per the above decree;

(c) fanams 714-3-3, costs awarded to him in Ex. R decree with interest thereon at 6 per cent, from the date of Ex. R.

(2) The Plaintiff is allowed to enforce the charge on the plaint property for items 1(a) to (c) only to the extent they are left unrealised after his executing in the first instance the final decree of the High Court in "A.S. No. 554 of 1116 (A)" as regards items (a) and (b) and Ex. R decree as regards item (c).

(3) Costs of this suit as per the finding on issue 15.

The order relating to costs was that the Plaintiff should recover 1/4th of his costs from Defendant 1 and Anr. 1/4th from Defendant 4 and that Defendants 1 and 4 should suffer their own costs.

4. In this appeal the Plaintiff has not objected to that portion of the decree which disallowed some of the items claimed by him in the suit. The only question to be decided in the appeal is whether the Plaintiff" is entitled to a charge on the plaint property for the interest on the Kudivila amount and the costs of O.S. Nos. 75 of 1109 and 44 of 1110.

5. As for the interest on the kudivila amount the argument of learned Counsel for the Appellant is that this would not come within the purview of the indemnity

clause, that no charge is created for this amount on the property and that the suit in respect of this amount is barred by Order II, Rule 2, Code of Civil Procedure

6. With regard to the first point, the argument is that according to the indemnity clause in Ex. A Thiruvambalam Pillai would be liable to the Plaintiff only for damages caused to him by reason of any obstruction to his cutting and removing the trees sold to him under the document and that it does not contemplate, a case of loss of interest occasioned by an interpleader suit filed by the State. It is argued that it could not have been in the contemplation of the parties that the State would file an interpleader suit in respect of the kudivila amount seven years after the date of the document and that it was a mere accident that the State thought fit to file such a suit instead of paying the amount to the Plaintiff. The indemnity clause is to the following effect: (Original in Malayalam).

I shall remove all obstruction caused by litigation from working out the rights given to you as per this deed, other than the obstruction caused by creditors whose debts you have to discharge, and if you are damnified as a result thereof or on account of non-performance of any other obligation, the properties scheduled below would be liable for the same.

It is clear from this that if the Plaintiff" was prevented from working out his rights under the sale deed by reason of any obstruction caused by Thiruvambalam Pillai or by anybody other than the creditors whose debts the Plaintiff" undertook to discharge Thiruvambalam Pillai and the plaintiff property would be liable to the Plaintiff for damages resulting from such obstruction. The damages claimed in the suit in respect of the kudivila amount is the interest on that amount from the date of deposit of the amount to the date on which the Plaintiff was allowed to draw it from Court. We are, therefore, not concerned with the question whether the interpleader suit itself was occasioned by any obstruction put forward either by Thiruvambalam Pillai or by his daughter and grandchildren. The only question for consideration is whether the Plaintiff was prevented from drawing the amount from Court by reason of the obstruction of Thiruvambalam Pillai or of his daughter and grandchildren and if so, whether the Plaintiff is entitled to claim interest as damages. The necessity for inserting such a provision in the document was the fact that the daughter and grandchildren of Thiruvambalam Pillai had already put forward a claim in respect of the property covered by Ex. A. The Plaintiff had, therefore, reason to apprehend that they might put forward similar obstructions and prevent him from working out his rights under the sale deed. Such obstruction need not necessarily be an injunction obtained by them restraining the Plaintiff either from receiving the kudivila amount from the State or from cutting and removing the trees sold to him. We have no doubt that the obstruction contemplated by the parties includes any, hindrance caused to the Plaintiff in the matter of realising the kudivila amount from the State. Such obstruction may be either by himself or by persons other than the creditors whose debts the Plaintiff had undertaken to discharge. It

is seen that the Plaintiff was prevented from drawing the amount deposited by the State not only by reason of the claim put forward by the daughter and grandchildren of Thiruvambalam Pillai but also by the contentions raised by Thiruvambalam Pillai himself in the Interpleader suit. Exhibit G is the written statement filed in that case by Thiruvambalam Pillai who was Defendant 2 in the case. Paragraph 12 of the written statement is to the following effect: (Original in Malayalam)

The 1st Defendant has not discharged till today and freed the property from the prior debts directed to be discharged in the Sale Deed; he has not handed over the title deeds to the 2nd Defendant. The 1st Defendant is not entitled to the money.

In para 17 it is stated that the present Plaintiff was entitled to get only Rs. 5000 out of the amount deposited by the State. In para 18 it is contended that Thiruvambalam Pillai was entitled to the balance amount: (Original in Malayalam)

The remaining Rs. 11,259-0-0 and odd represents the trees that were not included in the sale deed and cut, and the timber mentioned in para 15. The 1st Defendant has no manner of rights over this. It belongs to the 2nd Defendant. This kudivila amount and interest at 12 per cent, interest per annum from the date of sale of timber to the date of deposit of the amount in court, the 2nd Defendant is entitled.

It is clear from this that Thiruvambalam Pillai objected to the Plaintiff drawing the kudivila amount deposited by the State. This was certainly an obstruction that prevented the Plaintiff from working out his rights under the sale deed, and according to the express provision in the document, Thiruvambalam Pillai and the plaintiff property would be liable to the Plaintiff for the damages resulting from such obstruction. The loss of interest on the kudivila amount deposited by the State is a direct result of the breach of the indemnity clause by Thiruvambalam Pillai. We have no doubt that the damage claimed on this account comes within the scope of the rule in - "Hadley v. Baxendale" (1884) 9 Ex. 341 (B) which is the leading case on the point. This is what was laid down in that case:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or 1 such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the Plaintiff to the Defendant, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other

hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract.

We cannot, therefore, agree with the contention of learned Counsel for the Appellant that the damage claimed by the Plaintiff on this account does not come within the purview of the indemnity clause.

7. The second argument advanced by learned Counsel for the Appellant with regard to the liability of the plaintiff property for this amount is that the indemnity clause in Ex. A does not create a charge on the property. According to learned Counsel the charge which the clause purported to create is of the nature of a contingent charge which is not a Charge known to law. Reference was made to three decisions of the Calcutta High Court, namely, - "Kishanlal v. Bhawan Kuar" 8 Ind Cas 864-"Madho Misser v. Sidh Binaik Upadhya" 14 Cal 687 (C) and - Mohini Debi Vs. Purna Sashi Gupta and Others, The view taken in those cases was that a charge cannot be created on a future contingency. The Allahabad High Court also took the same view in -"Harjas Rai v. Naurang" 3 All LJ 220 (E). This view was, however, not followed by the Madras High Court in - "Balasubramania Nadar v. Sivaguru Asari" 21 Mad LJ 562 (F). In that case Arnold White C.J. and Krishnaswami Iyer J. held that there was nothing

Opposed to any principle of law that there should be a charge created on the happening of a condition where the condition is stipulated and the condition happens afterwards.

The same view was taken in - "Imbichi v. Achampat Avukoya Haji" AIR 1918 Mad 674 (G). In that case Couts-Trotter J. and Srinivasa Iyengar J. held that

an instrument by which a liability not existent "in praesenti" but which will arise, if at" all, in the future is secured, may create a present charge within the meaning of Section 100, T.P. Act.

This case was followed by a Pull Bench of the Travancore High Court in - "Krishna Vadhyar v. Karthiyayani" 23 Trav LJ 486 (H). Venkata Rao J. quoted in that case the following passage from the judgment of Couts-Trotter J. (as he then was):

If the two cases (i.e., "14 Cal 687 (C)" and "3 All LJ 220 (E)") mean that, there is no particular harm in that, though whether one would agree with the view they take of the construction of the particular instrument is Anr. question. But if they are supposed to enunciate the proposition which is contended for here - and nothing short of that proposition will avail the Respondent - namely, wherever

you have a charge to secure a liability which is not a liability existent "in praesenti" but will arise, if at all, in the future, then that cannot be a present charge within the meaning of the Transfer of Property Act - then I think, this Court is bound to say that those decisions, if they mean that, are bad law and should not be followed. The most forcible illustration, I think, is the one given by my learned brother of a Government servant who gives security by the deposit of fidelity bond or other security for the faithful discharge of his duties. Is the charge bad, because he has not been dishonest at the time the deposit is made? Another equally good illustration is the case of a man who while his account is in credit at the bank, deposits his title deeds to secure any future over-drafts there may be. It is idle to contend that those are not, perfectly good charges on the property over which they purport to operate, notwithstanding the fact that the indebtedness in both cases is future and is contingent.

Reference may also be made to the following- passage in Mulla's Transfer of Property Act, Edn. 3, page 606, relating to this point:

Some cases distinguish a charge from the possibility of a charge. Thus the words "If I do, not pay the money according to the stipulation, then I declare in writing that I shall lose my, right to one "Bhiga" 7 "quotas" of "Guzassta" land" were held to create not a charge but a possibility of a charge. But these cases have been dissented from and the proposition is obviously incorrect if as soon as the promise is made the promisee is entitled to look to the land as security for the performance of the promise. Section 5 recognises the future transfer as a transfer and future crops may be the subject of a mortgage or of a charge. Again, a charge may be given in the present to secure an indemnity or other contingent liability.

We are clearly of opinion that the charge created on the plaint property under the indemnity clause in question is a valid charge enforceable in law.

8. The third argument advanced by learned Counsel for the Appellant is that the claim relating to interest on the kudivila amount is barred under Order II, Rule 2 CPC since the Plaintiff did not claim in the written statement filed by him in the interpleader suit a charge for this amount on the plaint property. Order II, Rule 2 reads thus:

1) Every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action; but a Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

2) Where a Plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any

relief so omitted.

"Explanation:

For the purpose of this rule an obligation and a collateral security for its performance and successive claims arising under the said obligation shall be deemed respectively to constitute but one cause of action.

It is argued that in the interpleader suit the present Plaintiff was in the position of a Plaintiff so far as the claim for interest on the kudivila amount was concerned. It is, therefore, contended that the omission on the part of the Plaintiff to claim a charge on the plaint property in that suit brings the case under Order II, Rule 2(3), Reference was made to the decisions in - Manubothula Rama Rao Vs. Manubothula Venkayamma and Another, and - Jwala Prasad Vs. Mt. Padmawati, In those cases the wife at first filed a suit against the husband for maintenance without claiming a charge on property. A subsequent suit filed by her claiming charge on property was held to be barred under Order II, Rule 2, CPC We do not think that these rulings apply to the facts of this case. The scope of the interpleader suit was only the determination of the question as to which of the Defendants in the suit was entitled to the Kudivila amount deposited by the State. That was the only point that the Court was called upon to decide in that suit. The Court really went out of its way in adjudicating upon disputes between the Defendants in the suit in respect of matters not coming within the scope of the suit. A copy of the written statement filed by the present Plaintiff in that case is not produced in this case although a copy of the written statement filed by Thiruvambalam Pillai is filed as Ex. G. We are, therefore, not in a position to know the exact nature of the contentions raised by the present Plaintiff in that suit. The issue raised in the case relating to interest is this:

6. Is interest on the whole or any portion of the amount payable and it so from what dates, by whom, and at what rate.

The finding on that issue was that the State was not liable to pay any interest and that Defendants 2 and 10 in that case, namely, Thiruvambalam Pillai and Defendant 1 in this case, were liable for the interest on the amount from the date of suit and the rate of interest was fixed at 4 per cent. Even if the present Plaintiff claimed interest on the amount from Defendants 2 and 10 in that case it is not clear whether such claim, was made on the basis of Ex. A. It is also doubtful whether in that suit the present Plaintiff could claim a charge on the plaint property which was not scheduled to the plaint in the suit. Order II, Rule 2 only prohibits a person who has filed a suit on a former occasion from filing a second suit for a relief in respect of the cause of action which was the basis of the former suit. In the first place, the present Plaintiff was not the Plaintiff in the interpleader suit and the cause of action in that suit was also different. What the Plaintiff claims in this suit is a charge on the plaint property for the amount decreed to him under Ex. H suit, and that charge is claimed on the basis of the indemnity clause in Ex. A. We are of opinion that the cause of action in this suit

is entirely different from that in the interpleader suit. We, therefore, hold that the suit is not barred under Order II, Rule 2, Code of Civil Procedure.

9. In the result, we uphold the decree of the Court below so far as the claim for interest on the kudivila amount is concerned.

10. The other item of damages of which a charge was given by the Court below on the plaint property is the costs of the interpleader suit and of O.S. No. 44 of 1110 (Ex. R suit). In both those suits, the present Plaintiff was awarded his costs. The Plaintiff cannot, therefore, say that he has incurred damages on account of those suits. It is also doubtful whether the damages claimed on this account were in the contemplation of the parties when they made the contract. In any case the claim for damages in respect of the costs of the two suits can arise only if the Plaintiff is able to establish that he cannot realise the costs awarded under the decrees from the Defendants in those cases who were made liable for the costs. It is only then that the cause of action for damages in respect of those amounts will arise. There is no allegation in the plaint that it is not possible to realise the costs awarded to the Plaintiff under the two decrees. So far as the costs in the interpleader suit are concerned, this suit was filed even before that suit was decreed and a sum of Rs. 500 was claimed approximate costs of that suit. The Plaintiff who was examined as P.W. 1 in the case does not even swear that he will not be able to realise the costs in the two suits by executing the decrees. When he was asked whether he had executed the decree in O.S. No. 44 of 1110 he answered that he was not sure whether he had applied for the execution of the decree. In the circumstances, we do not think that a cause of action has arisen for the Plaintiff for damages in respect of the costs of the two suits. It was pointed out by learned Counsel for the Respondent that under the decree of the Court below the Plaintiff can proceed against the plaint property in respect of these amounts only if the amounts are not realised in execution of the decrees in the two suits. But a decree cannot be given on a cause of action which has not arisen at least on the date of the decree. It is clearly wrong to give a decree on a cause of action which may or may not arise after the date of the decree.

The Court below has gone wrong in giving a decree in favour of the Plaintiff charging on the plaint property the costs awarded to him under the two decrees. The judgment and decree of the Court below are, therefore, set aside so far as these amounts are concerned. The direction in the decree of the Court below that the Plaintiff will be allowed to enforce the charge on the plaint property in respect of the interest on the kudivila amount only after executing in the first instance the final decree in the interpleader suit will stand.

11. Learned Counsel for the Appellant further argued that Defendants 1 and 4 had raised a contention in their written statements relating to a counter-claim and that the Court below went wrong in not considering that contention. The Plaintiff had undertaken in Ex. A to discharge a debt due from Thiruvambalam Pillai to one Vetti Velu Pillai. As the debt was not discharged Vetti Velu Pillai filed

a suit as O.S. No. 102 of 1105 of the Nagercoil District Court for the amount due to him. Defendant 1 had to pay a sum of Rs. 1475 towards the decree in that case. Defendants 1 and 4 contended that Ex. A was not supported by consideration to this extent and that they were entitled to have that amount set off against the plaint claim. This contention was not denied in the replication filed by the Plaintiff. Issue 2 raised in the case relates to the question whether the sale deed in favour of the Plaintiff is fully supported by consideration. In dealing with that issue in para 15 of the judgment the Court below proceeded on the assumption that the whole decree debt in O.S. No. 102 of 1105 was paid by the Plaintiff himself. The issue was accordingly found in favour of the Plaintiff.

12. Exhibit IV is the copy of the plaint in O.S. No. 102 of 1105, Ex. V the copy of the judgment, Ex. VI the copy of the decree, Ex. VII the copy of the Progress Diary and Ex. VIII, the copy of the Execution Diary in that case. The present Plaintiff was Defendant 3 in that case. The plaint claim in that suit was for 34869 3/4 fanams. The present Plaintiff contested that suit. He contended that Anr. member of the tarwad of the Plaintiff in that case had sued for the same amount in O.S. No. 86 of 1103 and that the daughter of Thiruvamablam Pillai and her children had sued in O.S. 115 of 1100 claiming the property which was the subject-matter of the hypothecation bond in favour of Vetti Velu Pillai and that the trial of the suit should be stayed till the disposal of those two suits. The Plaintiff in O.S. No. 102 of 1105 applied for an injunction restraining Defendant 3 in that case (namely, the present Plaintiff) from cutting timber and realising kudivila as per the sale deed in his favour. The present Plaintiff deposited Rs. 4981, 11 chukrams, i.e., the plaint amount in that case, on 8-12-1105 as security for getting the injunction order withdrawn. He, however, objected to the Plaintiff in that suit drawing the amount till the disposal of the suit. Therefore, in the decree that was finally passed in the case Defendant 1, namely, Thiruvambalam Pillai, and the hypotheca were made liable for the interest on the plaint amount till the date of decree. Consequently, an amount of Rs. 1475 more had to be paid by way of interest to the Plaintiff in O.S. No. 102 of 1105. The property was brought to sale in execution of the decree and the amount was paid by the present Defendant 1 after the death of Thiruvamablam Pillai on. 13-11-1114 and the decree was struck off. The sale deed in favour of Defendant 4 by Defendant 1, viz., Ex. IX, was on 10-11-1114 and Defendant 4's case is that it is out of the consideration for that sale deed that this amount was paid by Defendant 1. It is, therefore, contended that Defendants 1 and 4 are entitled to have this sum of Rs. 1475 set off against the plaint claim. Exts. IV to VIII prove this case of Defendants 1 and 4. The Plaintiff had no case that more amount was due to the creditor than what was recited in Ex. A and that it was because of that that he did not discharge the debt. It was because he objected to the amount deposited by him being drawn by the Plaintiff in that case that this sum of Rs. 1475 had to be paid by the present Defendant 1 towards the decree in that case. In the circumstances we are of opinion that Defendants 1 and 4 are entitled to claim this amount as a set off. But neither Defendant 1 nor Defendant 4 paid

court-fee in the Court below for this amount nor has court-fee been paid for this amount in this Court.

The counter-claim can, therefore, be allowed only in case the requisite court fee is paid by the Appellant in this Court. If the court-fees for this amount of Rs. 1475 which ought to have been paid in the Court below and in this Court are paid by the Appellant in this Court within two weeks from this date the sum of Rs. 1475 will be set off against the amount decreed to the Plaintiff as on the date of payment of the court-fee. In that case the Plaintiff will be allowed to execute the decree only for the balance amount. If court-fees are not paid within that time this counter claim shall stand disallowed. The parties will pay and receive proportionate costs both here and in the Court below.

13. The appeal is allowed to the extent mentioned above and dismissed in other respects.