jurisdiction of this Court. Therefore the Judge in Chambers was justified in giving leave to file this suit in this Court.

Then the next point to consider is, whether it was a condition precedent that the Panch at Phulgaon should settle the question of rates before payment can be demanded by the plaintiff. No evidence has been produced except that of the defendant himself. Against that I have the evidence of Pardhan Ramdhan and Devikissen Jethmal and of the plaintiff's *moonim* Keshrichand. They all deny such a custom. It is curious that this alleged custom did not prevent the defendant himself from suing his own constituents at Phulgaon in spite of the rate not having been fixed by the Panch. I hold that the alleged custom is not proved.

The result is that there must be a decree for the plaintiff.

I pass a decree for Rs. 3,860-4-6 with interest at 6 per cent. per annum from the 21st July, 1904, the date on which the plaint was admitted till this day. Further interest at 6 per cent. per annum till payment, with costs.

Suit decreed.

Attorneys for the plaintiff: *Messrs. Mulla and Mulla.*

Attorneys for the defendants: *Messrs. Tyabji and Company.*

G. B. R.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

THE AHMEDABAD ADVANCE SPINNING AND WEAVING COMPANY (ORIGINAL PLAINTIFFS), APPELLANTS, v. LAKSHMISHANKER DEOSHANKER AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1904. *August 26, September 16, & February 3,* 1905.

Practice—Ex parte *order—False representation—Suit for relief inconsistent with order—Set off claimed in Written Statement—Omission to frame issue—Civil Procedure Code (Act XIV of 1882), sections 111, 146, 561, 566—Company—Liquidation—Indian Companies Act (VI of 1882), sections 149, 214—Meaning of "legally recoverable."*

The Ahmedabad Advance Spinning and Weaving Company, Limited (the plaintiff Company), was registered as a Limited Company on April 19, 1895.

* Suit No. 607 of 1900; Appeal No. 1293.

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By the Articles of Association, T. Ralph Douse and the firm of Lakshmishanker Deoshanker & Co. (the members of which were Lakshmishanker and Miranda, the defendants in this suit) were appointed Secretaries, Treasurers and Agents of the Company.

On the 12th May, 1898, a mortgage was executed by the plaintiff Company, in favour of the defendant Miranda, to secure Rs. 1,50,000, alleged to have been borrowed from him from time to time, to meet the wants of the Company, and debentures for Rs. 1,50,000 were issued.

The Rs. 1,50,000, alleged to have been borrowed from Miranda, was made up of 8 items, the first 3 of which aggregated Rs. 48,458-14-0, and the remaining 5, Rs. 1,01,541-2-0.

On the 13th August, 1898, the accounts of the plaintiff Company, which had been kept by the defendant Lakshmishanker, showed a balance to the Company's credit of Rs. 1,26,659-2-2.

On that date, T. Ralph Douse became the sole Secretary, Treasurer and Agent of the plaintiff Company, and thenceforth the balance of Rs. 1,26,659-2-2 was not shown in the Company's books.

On the 31st August, 1898, a mortgage was executed by the plaintiff Company in favour of Mr. Tata to secure Rs. 3,50,000, and a memorandum on the document stated, that after paying off certain prior mortgagees amounting to Rs. 1,03,223-5-4 and the debenture trustees (Rs. 1,50,000) the balance of Rs. 96,776-10-8 was paid to the Company.

On the 13th October, 1899, the plaintiff Company was wound up, under an order of the Court.

On the 21st November, 1899, the Court passed an order *ex parte* against Douse, directing him, within 4 days, to pay to the Official Receiver, Rs. 1,26,659-2-2, being the balance to the credit of the Company, appearing to be in cash in his hands, and to which the Company was *primâ facie* entitled. The hypothesis on which this order proceeded being that this amount was an existing asset improperly taken by Douse from the plaintiff Company's coffer.

On a summons being taken out by Douse for revocation the order, it was confirmed with costs.

On the 28th August, 1900, the plaintiff Company, with tl leave of the Court, filed a suit against the defendants, for the recovery of R 1,01,541-2-0. The suit, in contradiction of the grounds on which the order in ·inding up proceedings was made, was based on the allegation, that the 5 items aggregating Rs. 1,01,541-2-0, or parts thereof, were fraudulently and fictitiously credited to the defendant Miranda and that the same were not paid to the plaintiff Company.

The defendants contended, that the suit was arred by the proceedings and order against Douse, and the defendant Lakshmishanker in his written statement asserted a claim to set off Rs. 57,930. No issue, however, on the claim of Lakshmishanker was raised; no pronouncement on it was made by the 1st Court; it was not made the subject of any cross-objection; and it was not urged before the Appeal Court in argument.

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In the lower Court, the plaintiff's suit was dismissed with costs. On appeal,

Held, that the decree of the lower Court with reference to the defendant Miranda must be confirmed with costs. The plaintiff Company was, however, entitled to be paid the sum of Rs. 41,891-2-0 by the defendant Lakshmishauker. The proceedings of the Official Liquidator were based on a representation by Lakshmishanker that certain sums had been advanced to the Company, partly by Miranda and partly by Lakshmishanker. The sums amounting to Rs. 41,891-2-0, alleged to have been advanced by Lakshmishanker, were not paid to the Company and Lakshmishanker could not be heard to say that the plaintiff Company was barred from bringing the present suit.

Moxon v. *Payne*(1) followed.

Per JENKINS, *C. J.*:—In the conditions which prevail here, the practice of passing *ex parte* orders, involving the person affected in serious liability, is much to be deprecated.

Held, also, that it was essential to the right decision of the suit, that appropriate issues should be framed and tried with a view to determining the validity of Lakshmishanker's claim to set off the Rs. 57,920.

On issues having been framed and sent down for trial, the lower Court found that Lakshmishanker had lent the moneys referred to in his written statement and held that he was entitled to set off the same as against the sum of Rs. 41,891-2-0 for which the Appellate Court had held him liable. The plaintiff appealed.

Held, that section 111 of the Civil Procedure Code applied and that the amount due to Lakshmishanker must be set off against the plaintiff Company's demand.

Ince Hall Rolling Mills Company v. *Douglas Forge Company*(2) and *Ex parte Pelly*(3) distinguished.

Per JENKINS, *C. J.*:—In my opinion the words "legally recoverable" in section 111 of the Civil Procedure Code, 1882, have no reference to the ability of the debtor to pay the demand in full; and a sum is legally recoverable though in the result the creditor must be satisfied with a dividend.

APPEAL from Tyabji, J.

On the 19th April, 1895, the Ahmedabad Advance Spinning and Weaving Company, Limited (the plaintiff Company), was registered as a Limited Company under the Indian Companies Act, 1882.

By the memorandum of Association, it was agreed, that T. Ralph Douse and the firm of Lakshmishanker Deoshanker & Co. (the members of which were Lakshmishanker and Miranda, the defendants in this suit) should be the Secretaries,

(1) (1873) L. R., 8 Ch. 881 at p. 887. (2) (1882) 8 Q. B. D. 179.
(3) (1882) 21 Ch. D. 492.

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Treasurers and Agents of the Company, and by clause 56 of the Articles of Association they were so appointed.

By an agreement, dated the 19th April, 1895, between T. Ralph Douse and the Company, Douse agreed to supply the plaintiff Company with weaving machinery and extras for the sum of £33,000, payable one-half in cash and one-half in fully paid up shares of the plaintiff Company of Rs. 3,00,000.

The shares were allotted and the cash payments were made, though not at the dates stipulated.

On the 1st July, 1897, a mortgage was executed by the plaintiff Company in favour of Govindji Thackersey Mulji and Virchand Dipchand to secure an advance of Rs. 50,000.

On the 12th May, 1898, a mortgage was executed by the plaintiff Company in favour of the defendant Miranda, to secure Rs. 1,50,000, alleged to have been borrowed from him from time to time, to meet the wants of the plaintiff Company, and debentures for Rs. 1,50,000 were issued.

The Rs. 1,50,000 alleged to have been borrowed from Miranda was made up of 8 items, the first three of which aggregated Rs. 48,458-14-0, and the remaining 5, Rs. 1,01,541-2-0.

On the 20th June, 1898, a mortgage was executed by the plaintiff Company in favour of Shankerlal Jethabhai, to secure an advance of Rs. 50,000.

On the 13th August, 1898, the accounts of the plaintiff Company, which had been kept and signed from time to time by the defendant Lakshmishanker, showed a balance to the Company's credit of Rs. 1,26,659-2-2.

On the 13th August, 1898, T. Ralph Douse became the sole Secretary, Treasurer and Agent of the plaintiff Company, and from that date the balance of Rs. 1,26,659-2-2 was not shown in the Company's books.

On the 31st August, 1898, a mortgage was executed by the plaintiff Company in favour of Mr. Tata, to secure an advance of Rs. 3,50,000. A memorandum on the document stated that the Rs. 3,50,000 were paid as follows:—

	Rs.	a	p.
To Govindji Thackersey Mulji and Virchand Dipchand, Debenture Trustees	53,223	5	4
S. C. Miranda, Debenture Trustee	1,50,000	0	0
Shankerlal	50,000	0	0
The Company	96,776	10	8

On the 13th October, 1899, the plaintiff Company was wound up under an order of the Court and Mr. C. A. Turner was appointed Official Liquidator.

On the 21st November, 1899, Mr. Justice Russell passed an order *ex parte* against Douse, directing him within 4 days to pay to the Official Receiver "the sum of Rs. 1,26,659-2-2, being the balance to the credit of the above Company appearing to be in cash in the hands of the said T. Ralph Douse and to which the said Company is *primâ facie* entitled."

On a summons being taken out by Douse for the revocation of the order, it was confirmed with costs.

On the 2nd May, 1900, Mr. N. C. Macleod was appointed Official Liquidator in Mr. Turner's place.

On the 28th August, 1900, the plaintiff Company, with the leave of the Court, filed a suit against the defendants, for the recovery of Rs. 1,01,541-2-0. The suit, in contradiction of the grounds on which the order in winding up proceedings was made, was based on the allegation, that the 5 items aggregating Rs. 1,01,541-2-0, or parts thereof, were fraudulently and fictitiously credited to the defendant Miranda, and that the same were not paid to the plaintiff Company.

The defendants contended, that the suit was barred by the proceedings and order against Douse, and the defendant Lakshmishanker, in his written statement, asserted a claim to set off Rs. 57,930.

By an oral judgment, passed on the 8th August, 1903, Tyabji, J., dismissed the plaintiff's suit with costs. The learned Judge held, that the plaintiff's case was devoid of foundation; that the suit was a malicious and vexatious suit; that out of the enormous quantity of documents put in in evidence on the part of the plaintiffs, not one of them had any bearing upon the case brought by the plaintiffs; that there was not the shadow of a shred of evidence of any fraud such as was alleged in the plaint; that everyone of the documents put in in evidence by the plaintiffs showed conclusively, that the transactions, so far from being fraudulent, were transactions which were perfectly genuine and *bonâ fide*; that the evidence given by the defendants was truthful and that he had no hesitation in holding that the

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moneys were paid by the defendants as alleged by them, and, finally, that the defendants had proved to his entire satisfaction, that they had paid various sums of money, which the plaintiffs charged as fictitious.

No issue was raised in the lower Court, with reference to the claim of Lakshmishanker to set off Rs. 57,930; no pronouncement upon it was made in the judgment; it was not made the subject of any cross-objection, and it was not urged before the Appeal Court in argument.

Scott (Advocate General) and *Padshah* for the appellants (plaintiffs).

L. M. Wadia and *Kanga* for respondent 1 (defendant 1).

Davar and *Jardine* for respondent 2 (defendant 2).

The judgment of the Court was delivered by

JENKINS, C. J.:—The Ahmedabad Advance Spinning and Weaving Company, Limited (to whom I will hereafter refer as the plaintiff Company), was registered on the 19th April, 1895, as a Limited Company under the Indian Companies Act, 1882, having been promoted by T. Ralph Douse and the defendants.

Its capital was Rs. 7,00,000 divided into 700 shares of Rs. 1,000 each: and by the memorandum of Association it was provided that T. Ralph Douse and the firm of Lakshmishanker Deoshanker & Co., the members of which were the defendants in this suit, were to be the Secretaries, Treasurers and Agents of the plaintiff Company, and by the 56th of the Articles of Association the defendants and Douse were so appointed.

On the 19th April, 1895, an agreement in writing was made between Douse, of the one part, and the plaintiff Company, of the other part, whereby Douse agreed with the plaintiff Company that in consideration of the sum of £33,000 sterling, he would supply the plaintiff Company with spinning and weaving machinery, together with engine, boiler, girders and extras as therein specified, and he agreed to accept payment of the purchase price as to one-half in cash, and as to the other half in fully paid up shares of the plaintiff Company of Rs. 3,00,000.

The cash portion of the consideration was payable as follows:—

1/3 by three payments of £1,000 at the current rate of exchange on the day when the contract is signed, £5,000 at the

current rate of exchange of the day on the 15th June, 1895, and £5,000 at the current rate of exchange of the day on the 1st September, 1895.

The balance of the cash was to be paid by the plaintiff Company upon arrival of each further shipment of machinery in Bombay harbour, "each separate payment to be *pro rata* to the contract price, together with freight, insurance and actual cost of shipping charges."

The 300 shares were allotted to Douse in accordance with the contract and the amount of the 3 instalments has also been paid though not at the dates stipulated. Payments have also been made in respect of the balance which was payable *pro rata.*

In addition to the 300 shares allotted to Douse, he subscribed and paid for 41 shares.

The 1st and 2nd defendants subscribed and paid for 67 and 51 shares respectively and 117 shares were allotted to other persons.

On the 1st July, 1897, the plaintiff Company executed in favour of Govindji Thackersey Mulji and Virchand Dipchand a mortgage on its property to secure an advance of Rs. 50,000.

On the 12th May, 1898, the plaintiff Company executed in favour of the defendant Miranda a mortgage of their property to secure Rs. 1,50,000, alleged to have been borrowed from Miranda from time to time, to meet the wants of the plaintiff Company, and debentures to that amount were issued on the 20th June, 1898, a mortgage was executed in favour of Shankerlal Jethabhai to secure Rs. 50,000.

On the 31st August, 1898, the plaintiff Company executed in favour of Mr. Tata a mortgage on their property to secure Rs. 3,50,000, and in a memorandum on the document it is stated that the Rs. 3,50,000 were paid as follows:—

	Rs.	a.	p.
To Govindji Thackersey Mulji and Virchand Dipchand,			
Debenture Trustees	53,223	5	4
Debenture Trustees	1,50,000	0	0
Shankarlal	50,000	0	0
The Company	96,776	10	8

On the 13th October, 1899, the plaintiff Company was wound up under an order of the Court, and Mr. C. A. Turner was appointed Official Liquidator.

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On the 2nd May, 1900, Mr. N. C. Macleod was appointed Official Liquidator in Mr. Turner's place.

At page 9 of the plaintiff Company's ledger is the defendant Miranda's current account, and therein are given the items which are said to have made up the sum for which Rs. 1,50,000 were paid to him out of the Tata mortgage moneys.

Those items are 8 in number. The first three aggregate Rs. 48,458-14-0, and the remaining Rs. 1,01,541-2-0.

The plaintiff Company's books show that on the 13th August, 1898, there was a cash balance to the plaintiff Company's credit of Rs. 1,26,659-2-2. On that date Douse became the sole Secretary, Treasurer and Agent of the plaintiff Company, and thenceforth that balance is not shown in the Company's books.

In the course of the winding up proceedings Douse was ordered to pay the Official Liquidator the sum of Rs. 1,26,659-2-2 and the hypothesis on which that order proceeded was that this amount was an existing asset improperly taken by Douse from the plaintiff company's coffer.

On the 28th of August 1900 this suit was commenced with the leave of the Court, and the plaintiff company prays that the defendants may be decreed to pay to the plaintiff company the sum of Rs. 1,01,541-2-0 or such other sum as may be found to have been improperly received by them.

This suit in contradiction of the grounds on which the order in winding up proceedings was made is based on the allegation that the sums amounting to Rs 1,01,541-2-0, to which I have already referred, or parts thereof, were fictitiously credited to Miranda, and that the same were not paid to the plaintiff company.

The plaintiff company's case as stated in the plaint is shortly this :—

That Douse was to the knowledge of the defendants considerably overpaid for the machinery which he actually supplied to the plaintiff company under the agreement :

That in the month of July 1897 Douse agreed with the defendant Miranda to purchase his interest in the firm of agents and also his shares in the plaintiff company :

That on the 26th of January 1898 Douse agreed to purchase from the defendant Lakshmishanker his interest in the firm of

agents and also 134 shares in the plaintiff company held by the 1st defendant.

That Douse having no money to carry out the agreement of the 26th January 1898, he and the two defendants devised the fraudulent scheme by which the defendants and their friends should be paid the par value of the shares held by them out of moneys of the plaintiff company and Douse obtain sole control of the plaintiff company.

The scheme is described in the 13th paragraph of the plaint in the following terms :—

The said scheme was as follows :—The said T. Ralph Douse was to be made to appear as a large creditor of the said Company for moneys due to him for the said machinery and the 2nd defendant was to be credited with large sums in the books of the said company as for cash loans made by him to and for the said company which were to be shown as part of the cash balance in hand from day to day, and when the moneys so credited were equivalent to the par value of the shares held by the 1st and 2nd defendants and their friends, debentures for the said amount were to be issued to the said 2nd defendant in payment thereof and the said debentures were to be paid off by mortgaging the property of the said company, and the said T. Ralph Douse was to be debited with the aggregate amount of the said loans alleged to have been made by the said 2nd defendant as soon as all the shares of the 1st and 2nd defendants and their friends were transferred to the said T. Ralph Douse or his nominees.

[His Lordship, after discussing at length the evidence, as to the alleged fictitious advances, proceeded as follows :—]

The result of my several findings is that I hold that (*a*) the sum of Rs. 16,000, part of Rs. 23,000, (*b*) Rs. 1,650, (*c*) Rs. 17,000, and (*d*) Rs. 25,000, part of Rs. 40,000, have not been successfully impugned by the plaintiff company, or, in other words, that so far as the entries in Exhibit A 121 represent sums alleged to have been advanced by Miranda (and I here include Pereira's Rs. 10,000), they are not fictitious, but in so far as they represent sums alleged to have been found by Lakshmishanker they are, and that those sums, amounting in all to Rs. 41,891-2-0, were not paid to the plaintiff company.

There is I think good ground for the distinction I have drawn between the evidence adduced in favour of Miranda's advances, on the one hand, and Lakshmishanker's on the other. In Miranda's favour there are one or two facts that stand out prominently and which lend support to the conclusions at which I have

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arrived. In the first place, Miranda was a man of means, and it is beyond question that by the 1st of April he had honestly become a creditor of the plaintiff company to the amount of Rs. 48,458-14-0. It certainly is not shown that at that time he was a party to the scheme alleged in the plaint; it is I think conclusively proved, that of his impugned advances there was paid to the plaintiff company (*a*) Rs. 10,000 of the Rs. 23,000, (*b*) Rs. 10,000 of the Rs. 17,000 and (*c*) Rs. 25,000 of the Rs. 40,000, aggregating together Rs. 45,000.

I feel no doubt too, on the evidence, that the sum of Rs. 1,650 was actually paid to the plaintiff company.

This then leaves a balance of Rs. 13,000 out of the alleged total of Miranda's advances.

This sum of Rs. 13,000 is made up of the Rs. 6,000, part of the Rs. 23,000, and Rs. 7,000, part of the Rs. 17,000, and though with regard to them the evidence is not so strong, still, as I have already shown, it is (in my opinion) sufficient for the purposes of this case.

Miranda's evidence as to the application of the Rs. 1,50,000 received from Tata is that he paid thereout to Lakshmishanker Rs. 85,525 with interest, and this sum is said to represent Rs. 42,000 advanced by Lakshmishanker in April 1898 and Rs. 43,525-13-4 advanced by him in May.

The Rs. 42,000 is identified with Rs. 41,891-2-0, which I have held was not advanced. The difference being referable to the Rs. 108-14-0 which Miranda is said to have taken away when the sum of Rs. 19,891-2-0 was credited.

So much of the money borrowed by the plaintiff company from Mr. Tata as was applied in payment of these sums, has *primâ facie* gone to discharge a false claim, and thereby Lakshmishanker has been wrongfully enriched at the expense of the plaintiff company on whom a fraud has been committed.

I first propose to consider how far Miranda is thereby affected. No doubt the whole of the Rs. 1,50,000 was paid to him as alleged in the plaint. Also it is involved in the findings at which I have arrived, that the sum of Rs. 1,50,000 was not due to him by the plaintiff company. Only so much was due as he himself found. But can he justify his receipt of that which was not advanced? The chief difficulty in this part of the case arises

from what I believe has been a failure on the part of Miranda to tell the Court the exact truth.

I have already stated, and need not now repeat, my reasons for not believing so much of the story as implies that the amounts said to have been found by Lakshmishanker actually passed through Miranda's hands. At the same time the receipts handed to Miranda in the name and on behalf of the plaintiff company were a distinct representation to him that those amounts had been received and were treated as advances by him.

Did he then believe those representations? I see no reason for holding that he did not; though he had been an official of the plaintiff company, I doubt whether he ever knew much about its inner working; on the 4th of April he had actually sent in his resignation which was subsequently accepted, and I do not believe at the time the advances are said to have been made, he knew that the amounts were not paid to the plaintiff company. I am therefore of opinion that he was entitled to believe, and actually did believe, what the receipts represented, and that in the circumstances he received from out of Mr. Tata's advance the Rs. 1,50,000 odd in good faith and believing that the same was properly payable by the plaintiff company and distributable between him and Lakshmishanker. It is true that this is not in accordance with the letter of Miranda's evidence, but then I have disbelieved the suggestion that actual cash passed to and fro between him and Lakshmishanker. At the same time we have the fact that documents were furnished to Miranda, showing that the plaintiff company had received the amounts advanced, and the reasonable inference for him to draw would be that advances to the amount specified had been made by Lakshmishanker, for it never was pretended that Miranda had found the money for the whole of Rs. 1,50,000.

Under all the circumstances I do not think it would be right or a safe conclusion to pin Miranda literally to the version he has given in the witness-box, and I hold therefore that as against Miranda no conscious participation in the scheme and fraud alleged is established and that no decree in respect of the fictitious credits can be passed against him.

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But these considerations do not apply to Lakshmishanker, he was a direct party to the fraud and was the person who benefitted by it.

There can be no doubt, that in this view of the facts, Lakshmishanker would ordinarily be liable to repay to the plaintiff company this sum of Rs. 41,891-2-0; it only remains to be seen whether the circumstances of this case afford any defence to this liability.

Though originally raised in the pleadings the plea of limitation has been abandoned and has not been made the subject of argument before us.

In fact the only legal points urged have been (1) that the cause of action did not bring the case within the jurisdiction of the Court and (2) that this suit is barred by the proceedings and order against Douse.

The point of jurisdiction was urged but faintly, and Mr. Davar did not address us on it, and with good reason, for it is clear that the payment of the Rs. 1,50,000, which is a part of the cause of action, was made in Bombay. I therefore hold that this plea fails.

Then are the proceedings and order against Douse a bar to the suit?

To answer this question it will be as well to set out precisely what happened in those proceedings.

In the winding up of the plaintiff company Mr. Justice Russell passed an order against Douse directing him within four days to pay the Official Receiver "the sum of Rs. 1,26,659-2-2 being the balance to the credit of the above company appearing to be in cash in the hands of the said T. Ralph Douse and to which the said company is *primâ facie* entitled."

This order was made *ex parte* and apparently under section 149 of the Indian Companies Act.

On a summons taken out by Douse for revocation of the order it was confirmed with costs.

The order against Douse proceeded on, or at any rate involved, the theory that the plaintiff company had actually received the amounts, which I have held were fictitiously entered, and that

theory is inconsistent with the allegation on which this suit is based.

Ordinarily he who seeks assistance from the Court cannot for the purpose of securing to himself a further measure of relief assert that, on the negation of which, relief has already been awarded to him in relation to the same transaction.

But I do not think this rule applies here where the earlier relief the plaintiff has obtained against Douse is an order under section 149 of the Indian Companies Act on the basis of false representation, for which Lakshmishankar was responsible. The accounts of the plaintiff company were kept and signed from time to time by Lakshmishankar, and they represented the amount to which the order related as actually received: on the faith of that representation the liquidator took proceedings against Douse: further investigations have shown (in my opinion) that this representation was to the extent I have indicated false, and it follows, I think, that Lakshmishanker, who was in this manner responsible for the official Liquidator's proceedings, cannot be heard to say that the plaintiff company is now estopped. There was no election with knowledge of the facts; the liquidator acted in ignorance of the facts and that ignorance was the reasonable and natural consequence of Lakshmishanker's fraud.

But while I am dealing with this matter I cannot refrain from commenting on the *ex parte* order passed in the 1st instance against Douse. I have had occasion from time to time to express my opinion that in the conditions which prevail here the practice of passing *ex parte* orders involving the person affected in serious liability is much to be deprecated, and this case illustrates the danger that lies in the tendency towards such orders that undoubtedly exists; for it is conceded, and is obvious, that the order was passed on contentions which have been repudiated in this suit. I feel the more constrained to refer to this matter as the learned Judge has laid it down as a rule of procedure that in the cases he indicates *ex parte* orders should ordinarily be passed where proceedings are taken under section 149 of the Indian Companies Act. I cannot agree with that view and I earnestly hope that *ex parte* orders will not under that section or otherwise be treated as a matter of course.

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They should in my opinion be granted with the greatest caution, and where rapid action is desired it is always possible under the rules of this Court to serve with leave short notice of any application to the Court.

There is one other point that I desire to consider, and that is whether there is such a variance between the pleadings and my findings that we ought to withhold relief.

The plaintiff company has in my opinion failed to establish the scheme as alleged in para. 13 of the plaint, but has proved that a part of the Rs. 1,01,541-2-0 was fictitiously credited to Miranda, (see para. 24 of plaint) and that the 1st defendant fraudulently obtained payment from the plaintiff company of the amounts fictitiously credited without any consideration (para. 26). There is much therefore in the plaint that has not been proved but enough fraud has been established in Lakshmishankar to entitle the plaintiff company to a decree against him had it stood alone, and so the case appears to me to fall within the principle enunciated in *Moxon* v. *Payne*(1), where it is said:—

"It is true that when a case is based on fraud, the fraud must be proved, and no relief could be given in this suit on any different ground. But the obtaining of property, or of any benefit, through the undue and unconscientious abuse of influence by a person in whom trust and confidence are placed, has always been treated as a fraud of the gravest character; and if such frauds are alleged and proved, the allegation that they were parts of a scheme very early conceived and deliberately carried out is, whether it be made out or not, of no material consequence in such a suit. It is at most a rhetorical exaggeration, which a person who commits the frauds has no right to complain of. If a man robs his fellow traveller, and is indicted for so doing, the allegation that he became the companion of his victim with a pre-conceived design to rob him is wholly immaterial.

Much the same line of defence was taken in the case of *Huguenin* v. *Baseley*,(2) and it may be worth while to quote what Lord Eldon said in that case; 'I agree, further, that the relief must proceed upon what is alleged and proved by the persons complaining, that their complaints must be treated as effectual or ineffectual according to what they have, not what they could have, represented..... I have, therefore, looked through this bill with reference to the frame of it, and I have no doubt this case might have been more clearly reached if the situation of the parties had enabled them to go through all the difficulties as to amendment; also that many circumstances might have been

(1) (1873) L. R. 8 Ch. 881, at p. 887. (2) (1807) 14 Ves. 273, 290.

brought forward on behalf of the defendants, which I am bound not to look at. But, taking the case as it stands, though there is in this bill much foul allegation, which, if not true, ought not to be there, and a great deal of which is denied and clearly disproved, there is enough upon the bill and in evidence to show that this deed cannot stand, if the whole transaction taken together cannot stand.'

The plaintiffs have, in our judgment, substantially proved the material allegations of fraud in respect of the several transactions by which the defendant *Payne* has appropriated their property, and they are entitled substantially to the relief they have prayed."

The result then is that so far as Miranda is concerned we confirm the decree of the 1st Court with costs, but Lakshmishanker's case demands further consideration on a point that has not been as yet argued before us.

This is a matter of some importance and before disposing of it we think it right to give the parties an opportunity of placing before us their contentions in relation to it.

On the 16th September 1904, after further argument the following judgment was delivered by the Court:—

JENKINS, C. J.—We now have to decide what course should be taken with reference to Lakshmishanker's claim to set off Rs. 57,930.

This claim was asserted in his written statement; no issue however on the point was raised: no pronouncement on it was made by the 1st Court: it was not made the subject of any cross-objection; nor was it urged before us in argument.

Therefore, the appellant contends, Lakshmishanker cannot be permitted to advance the claim at this stage of the suit.

Reliance too is placed on the judgment of Mr. Justice Scott in *The New Fleming Spinning and Weaving Company, Limited,* v. *Kessowji Náik.*[1]

I will deal with the 2nd of these points first: it is argued that as the plaintiffs' claim was to make the defendants jointly and severally liable there cannot according to the opinion of Mr. Justice Scott be a set off. But the liability here is (in our opinion) Lakshmishanker's alone and clearly as against that this claim if established can be set off.

(1) (1885) 9 Bom. 373 at pp. 403 and 404.

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But then is Lakshmishanker debarred from the benefit of this set off by the failure to claim it in the lower Court? Section 146 of the Civil Procedure Code casts on the Court the obligation of framing issues, and under section 566, if the Court against whose decree, an appeal is made, has omitted to frame or try any issue or to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues for trial, and may refer the same for trial to the Court, against whose decree the appeal is made, and in such case shall direct such Court to take the additional evidence required.

The first question then is whether this claim of set off appears to us, as an appellate Court, essential to the right decision of the suit.

On this I think there can be no doubt; if the claim is not allowed Lakshmishanker will be obliged, so far as he can, to pay the amount decreed against him in full, while he will (as far as we can see) be unable to recover in respect of his claim anything more than such dividend (if any) as the Insolvent Company's assets will allow.

That the claim of set off forms an integral part of the suit is plain from the language of section 116.

Therefore I am of opinion that it is essential to the right decision of the suit that appropriate issues should be framed and tried with a view to determining the validity of Lakshmishanker's claim to set off the Rs. 57,930.

Then it only remains to consider whether there is any obstacle in the way of our acting under section 566.

In support of his argument that we cannot so act, the Advocate General has referred us to the decision of the Privy Council in *Nan Karay Phaw* v. *Ko Htaw Ah* (1) and also to section 561 of the Civil Procedure Code.

But it is clear that the decision of the Privy Council does not govern the present case; apart from the fact that their Lordships doubted whether a set off could be pleaded to the claim advanced in that suit, it is to be noted that they made no pronouncement on section 566, which had no application to their Lordships' Board,

(1) (1886) 13 Cal. 124: L. R. 13 I. A. 48.

and that the circumstances under which the determination was there given, differ from those with which we are now concerned, and in the exercise of discretion each Court must be guided by the exigencies of the particular case.

If this case had gone to the Privy Council or come to us on second appeal without the point being raised different considerations would have arisen.

Nor do I think that section 561 places any obstacle in our way; it is not as if Mr. Justice Tyabji had decided the point adversely to Lakshmishanker: he has not dealt with it, and so it falls (in my opinion) within the operation of section 566.

No doubt there is evidence on the record relevant to the question, but I think the Advocate General is entitled to claim that we should not decide the question on it alone: in the absence of an issue it well may be, and the Advocate General assures us it is the case, that the plaintiff company did not adduce all the evidence available to refute Lakshmishanker's demand.

No doubt the expense of the litigation will be increased by our proceeding in the manner authorised by section 566, but when we come to deal with the question of costs we will not overlook the rule that the party by the act of whose counsel a difficulty has arisen must ordinarily pay the costs (*Neale* v. *Gordon Lennox*)[1].

I think too this is a case where the plaintiff Company may fairly ask for security for costs and that we should require Lakshmishanker to furnish security to the amount of Rs. 1,000 to be deposited in Court within a fortnight from this date and with liberty to the plaintiff company to apply to the 1st Court for further security in case the hearing is not completed on the 2nd day.

The issues we frame and refer for trial to the 1st Court are:

1. Has the defendant Lakshmishanker lent to the plaintiff company at different times the sum of Rs. 57,930 or some other and what sum?

2. How much is now due from the plaintiff company in respect thereof?

(1) [1902] A. C. 465 at p. 471.

3. Is the defendant Lakshmishanker entitled to set off the same and have any and what judgment pronounced in respect thereof?

On the 26th November 1904, Tyabji, J., recorded the following findings on the issues remitted to him: —

Issue No. 1.—I find that Lakshmishanker has lent all the moneys which are mentioned in this issue, and that they are due with interest from their respective dates, *i. e.*—

Rs. 40,000	due with interest at	7½ per cent.	from 7th September 1898.
„ 8,000	„	„	23rd December 1898.
„ 5,000	„	„	27th January 1899.
„ 500	„	6	11th April 1899. I say 6 per cent. here because there is no specific evidence as to the rate of interest.
„ 151	„	„	6 per cent. from 18th September 1899. Here also I say 6 per cent. because no particular rate of interest is proved.
„ 279	„	„	With 6 per cent. interest but this must be taken from the date when the claim was received by the official Liquidator, *viz.,* 22nd November 1899.

Then there is also due Rs. 3,578-7-0 in respect of the decree and interest and costs from the 17th January 1903 which I take to be the date when it was paid off.

Issue No. 2.—I find all these sums are due to the defendant Lakshmishanker with interest from the different dates as I have already stated.

Issue No. 3—I find that Lakshmishanker is entitled to set off all the above sums and interest on them as against the sum of Rs. 41,891 and interest for which the appellate Court has held him liable.

The appellant filed objections to these findings.

Inverarity, Raikes, Lowndes and *Padshah* for the appellants (plaintiffs).

L. M. Wadia and *Kanga* for respondent (defendant 1).

JENKINS, C. J.—The sums, which the defendant Lakshmishanker seeks to set off, are:—

Rs. 40,000	with interest at	7½ per cent.	from 7th September 1898.
Rs. 8,000	„	„	23rd December 1898.

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Rs. 5,000 with interest at 7½ per cent. from	27th January 1899.
Rs. 500 „ „	11th April 1899.
Rs. 151 „ „	18th September 1899.
Rs. 279	
Rs. 3,578-7-0	

These being the amounts in respect of which Tyabji, J., found that his claim is established.

The plaintiff company disputes this finding except as to the sums of Rs. 5,000, Rs. 500, Rs. 151, Rs. 279, and Rs. 3,578-7 and even as to them objection is taken that no right to set off exists.

The sum of Rs. 40,000 is made up of three sums of Rs. 20,000, Rs. 17,000 and Rs. 3,000: the first two are said to have been paid to the plaintiff company by the endorsement to Douse, as its agent, of two cheques for those amounts respectively, drawn by Miranda in Lakshmishanker's favour, and the third by a cheque drawn by Lakshmishanker.

The evidence has been minutely discussed by Tyabji, J., and he has come to the conclusion that Lakshmishanker is entitled to this sum of Rs. 40,000 from the company.

The reasoning of the learned Judge has been criticised before us, and in particular it has been urged that he has fallen into three errors. First, it is said, he was wrong in stating that there was the evidence of Miranda, Lakshmishanker, and Douse concurring in the story that the three cheques aggregating Rs. 40,000 were paid over to the plaintiff company as a deposit, inasmuch as Miranda does not speak directly to the deposit.

But I think this is hypercriticism: it is clear what the Judge meant, as he sets forth Miranda's evidence, which goes to show that Lakshmishanker had the means to pay the Rs. 37,000.

Then it is said that the learned Judge was in error so far as he may have supposed that the cheques for Rs. 37,000 were endorsed to Douse as agent of the plaintiff company, and have omitted to notice that the amount of the cheques was paid into Douse's Bank.

But notwithstanding these criticisms I agree with the conclusion of the learned Judge that Lakshmishanker should be regarded as a creditor of the plaintiff company for this sum of Rs. 40,000.

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It is true that the entry in the plaintiff company's book treats the Rs. 40,000 as received from Douse, but giving to this all the weight it deserves, I do not think it is sufficient to turn the scale against Lakshmishanker.

Douse at the time was the sole agent; in that character he was vested with power to take the advance from Lakshmishanker for the plaintiff company; and I hold that he in fact so took it.

Mr. Justice Tyabji has further held that Lakshmishanker is a creditor for the Rs. 8,000.

Accepting as I do, the learned Judge's conclusion that as against the plaintiff company the *hundi* was without consideration, and that Lakshmishanker took it with that knowledge, I am unable, in the circumstances of the case, to agree with the opinion that Lakshmishanker can be treated as a creditor of the plaintiff company in respect of that sum.

The learned Judge thought that if the claim of Lakshmishanker had rested merely upon the *hundi* he could not have succeeded but he apparently held that the *hundi* must be taken to have been paid off as if the whole amount had been paid in cash, and that thus the present must be regarded as a claim to recover back cash.

But this is not what actually happened, and having regard to Lakshmishanker's knowledge there can be no application of the principle of estoppel which improves his claim. His claim must ultimately be referred to the *hundi*, and he, therefore, cannot stand as a creditor against the plaintiff company for its amount.

Nor can the claim to set off in this suit the sum of Rs. 3,578-7-0 be allowed. The particulars of this debt are not contained in any written statement tendered by Lakshmishanker, it was not even mentioned to us when the suit was last in this Court, and is not included in the issues sent down.

Therefore the claim cannot now be entertained.

Lakshmishanker's claim therefore must be limited to the sums of Rs. 40,000, Rs. 5,000, Rs. 500, Rs. 151, and Rs. 279, with such interest thereon as may be sanctioned.

But it is argued for the plaintiff company that there is an answer to this claim to set off, over and above the objections which were urged when the appeal was last before us. It is argued

that there can be no set off because we have not mutual dealings, and, having regard to the provisions of the Indian Companies Act and the fact that the plaintiff company is in liquidation, Lakshmishanker must discharge his indebtedness to the plaintiff company in full, and himself be limited to a proof in the plaintiff company's winding up proceedings.

The claim to set off is rested on section 111, Civil Procedure Code, which runs as follows:—

"If in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, and if in such claim of the defendant against the plaintiff both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, tender a written statement containing the particulars of the debt sought to be set-off.

The Court shall thereupon inquire into the same, and if it finds that the case fulfils the requirements of the former part of this section, and that the amount claimed to be set-off does not exceed the pecuniary limits of its jurisdiction, the Court shall set-off the one debt against the other.

Such set-off shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross claim; but it shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree."

This is a suit for the recovery of money, and Mr. Inverarity concedes that illustration (*e*) to the section answers the first objection urged by him.

What Lakshmishanker claims is an ascertained sum of money, but it is suggested that it is not legally recoverable, as Lakshmishanker's remedy is only proof in the liquidation, where probably he would recover, not the whole of this ascertained sum but only a dividend.

In my opinion the words legally recoverable have no reference to the ability of the debtor to pay the demand in full, and a sum is legally recoverable though in the result the creditor must be satisfied with a dividend.

Then it is objected that in the claim of Lakshmishanker against the plaintiff company both parties do not fill the same character as they do in the plaintiff company's suit, as the plaintiff company, it is said, changed its character when it went into liquidation. It is sought to support this contention by the judgment in

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The Ince Hall Rolling Mills Co. v. *The Douglas Forge Co.*[1], where it was held that though after its winding up a company may with proper sanction continue to carry on its business, it does so "in a new interest and a new capacity," and on that ground it was determined that the right of set off claimed therein could not be allowed. But of the two debts in that case one was created before, and the other after the liquidation; had both been before, then in the view of the Court they would have been in "the same interest and could have been set off one against the other."

"That case was decided upon the principle that the goods supplied by the liquidator were supplied in performance of a distinct contract with him: and, of course, a liquidator selling the goods of a company would not sell them to a man who would pay the price by set-off." *Mersey Steel and Iron Company* v. *Naylor*[2].

Here each liability arose prior to the liquidation, though the amounts were ascertained after it, and neither results from a dealing with the liquidator, so there is nothing in the decision, which compels us to hold that in the claim and in the plaintiff's suit both parties do not fill the same character.

Then we have been referred to those cases, of which *Ex parte Pelly*[3] is one, in which it has been held that a director has no right to set off a debt due to him from the company against a claim made by the liquidator under section 165 of the Companies Act, 1862, with which section 214 of the Indian Companies Act corresponds.

But in *Ex parte Pelly*[3] reliance was placed on the fact that the proceeding before the Court was one under section 165 of the Companies Act and thus outside the scope of the statutory rule of set off. Both Jessel M. R. and Brett L. J. seem to have assumed that had it been an action the result would have been different.

The position here is different: the proceeding is a suit to which the right of set off as defined in section 111 of the Civil Procedure Code is precisely applicable, and I can see no sufficient reason for not giving due effect to the plain words of the section.

(1) (1882) 8 Q. B. D. 179. (2) (1882) 9 Q. B. D. 648 at p. 669.
(3) (1882) 21 Ch. D. 492.

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The amount thus due to Lakshmishanker must be set off against the plaintiff company's demand but as provided by section 111 of the Civil Procedure Code not so as to affect the lien upon the amount decreed of either attorney in respect of the costs payable to him under the decree.

Looking at all the circumstances the proper order as to costs will be that Lakshmishanker do pay one-half of the plaintiff company's costs of the suit and appeal to this date exclusive of the costs of his claim, and that the plaintiff company do pay three-fourths of Lakshmishanker's costs of his claim to set off commencing with the proceedings on remand and in respect of these costs there will be set off as between them and also such set off of costs against the sum found due as is provided by section 221 of the Civil Procedure Code. The amount due to the plaintiff company is (*a*) Rs. 41,891-2, (*b*) interest on that sum at the rate of 8 per cent. from the 1st May 1893 to the 7th September 1898, both inclusive, and (*c*) interest at that rate on Rs. 1,891-2 from the 8th of September 1898 to the 27th of January 1899, both inclusive.

The amount due to Lakshmishanker is (*a*) the aggregate of the sums of Rs. 40,000, Rs. 5,000, Rs. 500, Rs. 151 and Rs. 279, (*b*) interest on the balance of Rs. 5,000 after deducting therefrom Rs. 1,891-2 at 7½ per cent. from the 27th of January 1899 to the 4th of September 1899, and (*c*) interest at 6 per cent. on the Rs. 500 from the 11th of April 1899 to the same date.

The decree must be drawn up in accordance with section 216 of the Civil Procedure Code, and after stating the amount due to the respective parties shall be for the recovery of the sum which shall appear to be due.

The decree must also direct the set off in respect of costs for which provision is made in section 221 and also a set off of the costs of the respective parties.

Decree accordingly.

Attorneys for appellants :—*Messrs. Bhaishanker, Kanga and Girdharlal.*

Attorneys for respondents :—*Mr. K. D. Mehta* and *Messrs. Pestonji, Rustim and Kola.*

A. H. S. A.