

## COURT FEES ACT REFERENCE.

*Before Mr. Justice Ba U.*U BA PE *v.* THE SUN PRESS, LTD.\*1940  
Feb. 9.

*Court fees—Suit for injunction restraining Company from selling shares—Company's claim to sell shares in respect of debt due—Averment of Company's claim in written statement—No counter-claim or set off—Court Fees Act, art. 1, Sch. 1.*

The plaintiff sued the defendant Company for an injunction restraining the Company from selling his shares in the Company in respect of an alleged debt due by him to the Company. He denied the debt as well as the power of the Company to sell the shares in respect of such debt. The Company by its written statement contended that the debt was owing in respect of which it had the power to sell the shares under its articles. *Held*, that the suit was not a money suit and the written statement did not plead any counter-claim or set off. No relief was asked for or claim made against the plaintiff and the sole question was whether the Company had the power to sell the shares. The written statement was not required to be stamped.

*Furness v. Booth*, 4 Ch. Div. 587; *Hoe Moe v. Seccat*, I.L.R. 2 Ran. 349; *Ishri v. Gopal Saran*, I.L.R. 6 All. 352; *Saya Bya v. Maung Kyaw Shun*, I.L.R. 2 Ran. 276, referred to.

*Robertson* for the plaintiff.

*E Maung* for the defendant.

*Tun Byu* (Government Advocate) for the Crown.

The plaintiff sued the defendant Company of which he was a shareholder restraining it from selling his shares in respect of an alleged debt. He denied the debt and stated that the lien and power of sale claimed by the Company under articles 37 and 38 of its articles of association in respect of "members' debts, liabilities and engagements to or with the Company" could not be asserted in respect of the alleged claims against him. In its written statement the Company stated that a sum of Rs. 4,568 was due by the plaintiff to the Company for causing loss to the Company as its managing director by acts of negligence and malfeasance and that

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\* Reference arising out of Civil Reg. Suit No. 261 of 1938, Original Side.

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therefore it was entitled to exercise its power of sale. The plaintiff in his reply contended that the Company must first establish its claim by a separate suit and that on the pleadings he was entitled to judgment. The Court held that the Company was entitled to prove its lien in the present case. Thereupon the plaintiff claimed that the Company was making a counter-claim against him and that Court fees should be paid thereon. The Taxing Master referred the matter to the Court. S. 4 of the Court Fees Act did not apply to the High Court in the exercise of its Ordinary Original Civil or Criminal jurisdiction ; but the High Court had issued a notification under clause 35 of the Letters Patent making schedules 1 and 2 of the Court Fees Act applicable.

BA U, J. (after setting out the facts in detail and referring to the above-mentioned notification continued).—According to Article 1, Schedule 1, plaint and written statement pleading a set-off or counter-claim are documents chargeable with fees.

Now, what is a “set-off” or “counter-claim”? Neither of these two terms is defined or explained in the Court Fees Act. Even in the Civil Procedure Code reference is made only to a “set-off” in Order 8, Rule 6 and no mention is made anywhere in the Code of a “counter-claim.”

The doctrine of “set-off” is explained by Mahmood J. in *Ishri v. Gopal Saran and another* (1) as follows :

“The doctrine of set-off, which owes its origin to Roman jurisprudence, was well known to the civil law under the more comprehensive title of compensation, which, in the words of Story J. may be defined to be the reciprocal acquittal of debts between two persons who are indebted, the one to the other ; or, as it is perhaps better stated by Pothier, compensation is the extinction of debts, of which two persons are reciprocally debtors.

to one another, by the credits of which they are reciprocally creditors to one another."

This Court also explains it in *Hoe Moe v. I. M. Seedat* (1) as follows :

"In the case of a plea of payment, the allegation in effect means that the debt or amount of the demand alleged to be due to the plaintiff (or, in the case of a partial payment, the amount of the debt or demand *pro-tanto* paid off) had ceased to be due by reason of the alleged payment, and that consequently, it was not a just demand validly in existence at the time of the institution of the suit, or at the time of the written statement, as the case may be. This plea is quite different in its nature from a plea of set-off raised by the defendant under the Code, which is in effect a request that the debt or amount to be found due to the plaintiff shall *thereafter* be treated as extinguished or satisfied in whole or *pro-tanto* by being set-off against the debt or ascertained sum due to the defendant. In short, a payment refers to a satisfaction or extinguishment effected prior to the raising of the defence of payment, whilst a defendant's plea of set-off prays for a satisfaction or extinguishment commencing in the future after the date of the application."

A set-off can thus be pleaded only in a money suit.

In the case of a counter-claim as it is not mentioned in the Code of Civil Procedure it looks as if such a thing as counter-claim is not known to our Law. This is the view of the Calcutta High Court in *Gour Chandra Goswami and another v. The Chairman of the Navadwip Municipality* (2).

The same view was taken by the counsel for the defendant in the case of *Currimbhoy & Co., Ltd. v. L. A. Creet and others* (3) where the learned counsel submitted that a counter-claim is incompetent in Mofussil Courts. His submission was accepted by their Lordships of the Privy Council without any comment thereon.

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(1) (1924) I.L.R. 2 Ran. 349.

(2) A.I.R. (1922) Cal. 1

(3) A.I.R. (1933) P.C. 29, 32.

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On the other hand, as the term "counter-claim" is used in the Court Fees Act, it seems that in suitable cases it can be allowed to be pleaded. This is so held in *Saya Bya and one v. Maung Kyaw Shun* (1) where a Bench of this Court has said :

"The respondents urged that the counter-claim was a form of suit unknown to the Code of Civil Procedure and would not lie.

This is strictly speaking correct, but there is nothing to prevent a Judge treating the counter-claim as the plaint in a cross suit and hearing the two together if he is so disposed and if the counter-claim is properly stamped."

A "counter-claim" is thus a cross action brought by the defendants against the plaintiff and as such the defendants must ask for some kind of relief against the plaintiff. A pleading which asks no cross relief against a plaintiff either alone or with some other person is not a "counter-claim" [*per* Jessel M.R. in *Furness v. Booth* (2)].

Therefore, in cases where the defendant makes no claim against the plaintiff by a written statement and asks for no relief against the latter, the written statement should not be stamped.

The present case not being a money suit a "set-off" cannot be, and in fact is not, pleaded. The question is: Whether the defendant Company makes any claim against the plaintiff and asks for any relief against him?

From the pleadings set out above, it will be seen that the case of the plaintiff, in short, is, that the defendant Company has no power of sale over his shares in respect of its disputed claim.

The short defence of the defendant Company is that it has the power of sale over the shares of any of its shareholders in respect of any of its claims, disputed

(1) (1924) I.L.R. 2 Ran 276.

(2) 4 Ch. Div. 587.

or otherwise, against the said shareholder. The whole question for decision in my opinion, therefore, is whether the defendant Company has such a power of sale or not.

For these reasons I hold that the written statement does not plead a counter-claim and consequently it does not require to be stamped. I allow five gold mohurs as costs to the defendant Company.

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