

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

MONDAY, THE 20TH DAY OF MAY 2013/30TH VAISAKHA 1935

OP(C).No. 4552 of 2012 (O)  
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AGAINST THE ORDER/JUDGMENT IN OS 785/2010 of I ADDL.SUB COURT,ERNAKULAM  
DATED 17/11/2012

PETITIONER :  
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KIRAN JOSE,. S/O.LATE JOSEPH, AGED 34 YEARS,  
KALAYATHINAKUZHIYIL HOUSE,  
POOVARANI P.O., PALA  
KOTTAYAM.

BY ADVS.SRI.GIGIMON ISSAC  
SMT.SUMITHA.K.S.

RESPONDENT :  
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VEMBANADU RUBBERS (P) LTD.  
43/2921, STT ROAD, KADAVANTHRA P.O.  
KOCHI - 682020 REPRESENTED BY ITS MANAGING DIRECTOR  
MR.K.S.KRISHNA SARMA

R BY ADV. SRI.DINESH MATHEW J.MURICKEN  
R BY ADV. SRI.P.V.BALAKRISHNAN

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 20-05-2013,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

O.P. (C) No.4552/2012

APPENDIX

PETITIONER'S EXHIBITS:

Ex.P1	True copy of the plaint
Ext.P2	True copy of the written statement.
Ext.P3	True copy of the written statement filed by the respondent.
Ext.p4	copy of the judgment dated 17.11.2012.

true copy

P.S.TO JUDGE

**A.V.RAMAKRISHNA PILLAI, J**

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O.P.(C) No.4552 of 2012  
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Dated this the 20<sup>th</sup> day of May, 2013

**JUDGMENT**

Under challenge in this Original Petition is the order passed by the learned Sub Judge, Ernakulam directing the petitioner who is the defendant in the Original Suit to value the counter claim at Rs.8,22,000/- and to pay the court fee for that sum within a period of two weeks from the date of the order.

2. The respondent in this case filed the Original Suit before the Sub Court against the petitioner alleging that a cheque for Rs.7,01,472/- issued to the respondent by the petitioner towards sale consideration of four tons of rubber sheets was dishonoured. The suit was for realisation of the said sum with interest and costs.

3. The petitioner resisted the suit denying the issuance of cheque towards any legal liability. He stated that the cheque in question has been given as security at the time when the business transaction started, i.e. on

24.11.2009. It was contended that from 24.11.2009 to 9.6.2010, tons of rubber sheets were purchased for more than crores of rupees. However, the materials purchased for Rs.8,22,000/- on 16.2.2010 by the petitioner for Apollo Tyres were found defective and they were returned by Apollo Tyres. When this was intimated to the respondent, it was agreed that the said sum would be adjusted in future purchase. Thus, an amount of Rs.7,01,472/- i.e. the present suit claim was adjusted towards the value of goods found defective. Along with the written statement containing the aforesaid contentions, the petitioner also raised a counter claim to the effect that after the adjustment as above, a sum of Rs.87,528/- is due to him. He has also remitted the court fee on the said amount.

4. The respondent filed a written statement to the counter claim stating that the petitioner has not returned the defective goods for reimbursement.

5. The trial court after framing issues posted the case for trial. However, at the instance of the respondent, an additional issue has been raised regarding the court

fee in the counter claim. The said issue was found against the petitioner by the impugned order.

6. Arguments have been heard and the impugned order was perused.

7. While passing the impugned order, the learned Sub Judge proceeded on the assumption that the petitioner is claiming a set off of Rs.8,22,000/- and after the set off the petitioner is claiming a sum of Rs.87,528/- by way of counter claim. Therefore, the learned Sub Judge directed the petitioner to value the counter claim at Rs.8,22,000/- and to pay court fee on the said amount.

8. There cannot be any quarrel against the proposition that a written statement pleading a set off or counter claim shall be chargeable with fee in the same manner as in the plaint (See Section 8 of the Kerala Court Fees and Suits Valuation Act).

9. In the instant case, the specific case of the petitioner is that towards the value of the defective goods, the suit amount, i.e. a sum of Rs.7,01,472/- was adjusted. Only for the balance sum of Rs.87,528/-, the counter claim

was preferred. In this context, it is necessary to understand the basic difference between a set off and adjustment.

10. A Division Bench of this Court in **Cheria Elias v Surendra Chit Fund** (1989(1) KLT 449) observed as follows:

"Set off is a plea open to a defendant by which he could claim wiping off or reducing the plaintiff claim by adjustment of the amount due to him from the plaintiff. A plea of set off is distinguishable from a plea of payment or adjustment. Set off extinguishes the debt or reduces the same. Payment or adjustment refers to a satisfaction or extinguishment of a debt effected prior to the raising of defence in the written statement. The question of set off can arise only in respect of dues which are outstanding and which have not already been adjusted. Thus, a plea of payment or adjustment is definitely and essentially a different plea and can be pressed into service only if the same was raised before the institution of the suit and not afterwards. To determine whether a plea raised in defence is a plea of set off or of payment by adjustment it has to be ascertained as to whether a separate action could be maintained by the defendant on the basis of his claim. If he could institute a separate suit for realisation of the amount due to him, it is a case of set off. If the adjustment was made prior to the filing of the suit by the plaintiff and a plea is taken to that effect, it would be a plea of adjustment by payment. In such a case no court fee would be payable on the amount as it stood adjusted prior to the institution of the suit."

11. In the instant case, there is a plea of payment by adjustment and he is claiming only the balance amount.

Therefore, the petitioner is liable to pay court fee only on the amount sought to be realised by way of counter claim.

I, therefore, allow this petition. The impugned order is set aside. The trial court is directed to proceed with the suit and the counter claim and to dispose of the same in accordance with law within a period of three months from the date of receipt of a copy of this order.

No order as to costs.

**sd/- A.V.RAMAKRISHNA PILLAI  
JUDGE**

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True copy

P.S.TO JUDGE