Karnataka High Court
V.K. Srinivasa Setty vs Premier Life And General ... on 9 October, 1957
Equivalent citations: AIR 1958 Kant 53, AIR 1958 Mys 53
Author: S Iyer
Bench: S Iyer, Sadasivayya
JUDGMENT Somnath Iyer, J.

1. The plaintiff was the owner of a Studebaker Champion Motor Car. On June 24, 1949 he signed a proposal (Ex. I) for insuring this motor car with the defendant, (hereinafter called the company) against loss or damage to it and third party liability arising from its use. On that proposal, a policy (Ex. II dated July 26, 1949 was issued by the Company insuring the car for one year, so far as material to this case, against any damage occasioned by accidental external means.

The policy contained a recital that the proposal and declaration as stated in the schedule to that policy shall be the basis of the contract between the parties and shall be deemed to be incorporated in it. The policy was made subject to the conditions contained in it or endorsed thereon. One of those conditions provided that the due observance and fulfilment of such conditions and the endorsements and the truth of the statements and answers in the proposal shall be conditions precedent to the liability of the company under the policy.

2. On the night of November 15, 1949, while the car was being driven by the plaintiff's driver Pushparaj P.W. 5. when the plaintiff was returning from Kolar to Bangalore, it met with an accident at a place eighteen miles from Bangalore. This accident, according to the other evidence which the plaintiff adduced in the case, was the result of an attempt made by his driver to avoid two cyclists coming from the opposite direction on the wrong side of the road without lights.

The car then, according to the plaintiff's story dashed against a stone culvert and capsized. The car, according to the plaintiff, was very seriously damaged although the plaintiff and his driver escaped with minor injuries.

3. It is undisputed that the plaintiff immediately reported this accident to Sreeramulu P.W. 1, who was the then Chief Agent of the company and its Branch Manager when he was examined by the plaintiff as his witness. The car was then removed with the aid of a crane to the premises of a firm known as Shanti Kiran Motors, although the company does not admit that it was so removed by P.W. 1 on its behalf.

The plaintiff's case is that the Company neglected either to effect the necessary repairs to the damaged car or to substitute a new car in its place as it was, according to him, bound to do. He therefore, brought this suit for the recovery from the company of a sum of Rs. 15,660/- which is the aggregate of the sum of Rs. 13,500/- the value of the car insured, charges claimable for removing the car from the place of accident to the premises of Shanti Kiran Motors and compensation for the period during which the car was unavailable to him. The learned District Judge dismissed the plaintiff's suit and the plaintiff has appealed.

4. In the Court below the company denied the plaintiff's story that the car was damaged as a result of the accident mentioned by the plaintiff. The company also contended that it was entitled to avoid its liability under the contract of Insurance on account of two raise statements made by the plaintiff in his proposal for the insurance.

The company contended that the statement made by the plaintiff in that proposal that his car was a new car, was admittedly incorrect and that the plaintiff when he gave his estimate of the value of the car as Rs. 13,500/-, although he had paid a smaller sum of money for its purchase, had made another incorrect statement.

The company further contended that it was the plaintiff's omission to remove the car, as he was bound to do, to the place selected by the company for getting the necessary repairs effected, that prevented the company from performing its part of the contract and that the plaintiff was therefore not entitled to recover.

5. It is not disputed that the car was found in a badly damaged condition at the place mentioned by the plaintiff on November 16, 1949 when it was removed to the premises of Shanti Kiran Motors. The learned District Judge; however, did not believe the plaintiff's story that the car was damaged in that way as a result of an accident as described by the plaintiff. It was argued by Mr. Venkataramiah learned Advocate for the plaintiff that this finding of the learned District Judge was unjustified.

6. The evidence in the case relating to this accident is that given by the plaintiff who examined himself as P.W. 3 and his driver Pushparaj P.W. 5 who, according to the plaintiff, were the only two persons travelling in that car on the night of the accident. P.W. 5 has given evidence that he was driving the car on that night when the plaintiff was travelling from Kolar to Bangalore, and that when he found two cyclists coming from the opposite direction riding their bicycles without any lights on the wrong side of the road, he made an attempt to avoid them and in doing so, dashed against a culvert.

The car then capsized and was badly damaged. He has given evidence that he was a licensed driver and produced his licence (Ex. MM). He further stated that this accident was immediately reported to the police authorities who recorded his statement. According to him. he sustained an injury on his eye and on his knee for which he treated himself.

7. The plaintiff who examined himself as P.W. 3 also gave similar evidence and added that the report of the accident was made to the police authorities at a place called Hoskote which was proximate to the scene of the accident. P.W. 4, Venkatasami who was the writer at the Police Station of Hoskote has given evidence that an accident report was made by one Sreenivasa Setty which is the name by which the plaintiff is known on November 16, 1949 at the police station house at Hoskote and that Ex. LL-1 is the entry relating to that accident in the Station House Diary maintained in that Police Station. He alto produced Ex. LL-2, the report relating to the enquiry about that accident.

8. Bheemacharya learned Advocate for the company has strenuously contended that this evidence was rightly found to be insufficient by the District Judge to reach the conclusion that the car met

with an accident in the way stated by the plaintiff. He has urged that the learned District Judge was justified in refusing to believe the plaintiff's story on account of the omission on the part of the plaintiff to produce more evidence in support of his story which according to Mr. Bheemacharya, was available in this case.

has argued that the two cyclists who were responsible for the accident should have been examined by the plaintiff. He has also urged that the persons who admittedly were post-ed near the car to keep watch over it until it was removed to Bangalore and also the large number of other persons who collected near the scene of accident sometime after It happened should also have been examined.

has further contended that since P.W. 4 the Police Station Writer did not write the entries in the station House Diary, those entries had not been proved as required by law,

9. It appears to me that these criticisms made by Mr. Bheemacharya suffer among others from the infirmity that the company at no stage after the accident and before it produced its defence in the suit suggested in any part of the voluminous correspondence which passed between it and the plaintiff that the story of the plaintiff about the accident was not true.

Tin's correspondence, to which I shall allude in another context, proceeded on the assumption that the damage caused to the car was the result of the accident described by the plaintiff. Further it appears to me that it is unreasonable to suggest that the evidence of the plaintiff and his driver who were the only persons in the car when it met with the accident, should be discarded on the ground that no other witness has been examined to corroborate their evidence.

No reasons have been suggested by Mr. Bheemacharya nor do I find anything in the cross-examination of these two witnesses as to why their evidence should be disbelieved. There is nothing in the evidence to suggest that the plaintiff and his driver were able to identify the cyclists who were about to collide against the plaintiff's car. in which event alone an inference adverse to the plaintiff's case could be drawn by reason of his omission to examine them.

Likewise, the omission by the plaintiff to examine the watchmen or any of those who assembled near the scene of the accident sometime after it happened cannot be regarded as of any significance when it is remembered that it is not disputed by the company that the car was found in a badly damaged condition at the place where it is stated to have met with the accident, before its removal to Bangalore.

Similarly, the omission to examine the Sub-Inspector of the Hoskote Police Station who wrote Exs. LL-1 and LL-2 in the Station House Diary is not one on which the Company could ask the Court to disbelieve the plaintiff's story for the reason that it is clear from the evidence of P W. 4 that immediately after the accident a report about it was made by the plaintiff and his driver, although the statements made by the plaintiff and his driver during the enquiry made by the Sub-Inspector may not be said to have been proved as required by law.

10. I do not think that any serious argument can be constructed out of the fact that the plaintiff and his driver did not get themselves treated for the injuries which according to them, they sustained during the accident. I do not see any reason for disbelieving their story that those injuries were so trivial that they were able to treat themselves for it.

11. Mr. Bheemacharya -- although at one stage he urged that the entries in the Station House Diary (Ex. LL-2) had not been properly proved -- also urged that the evidence of the plaintiff's driver P.W. 5 as to the cause of the accident was at variance with what was recorded in the Station House Diary (Ex. LL-2). Whereas in Ex. LL-2 it was recorded that the Daffedar who visited the spot was informed that the car went out of control and went into halla and so got damaged, the evidence of P.W. 5 was that it dashed against a culvert.

I do not consider Ex. LL-2 as affording any basis for such an argument for the reason that Ex. LL-2 recorded only what the Daffedar heard from someone, about whose identity nothing is known as to how the accident happened.

12. It is important to notice in this context that on November 16, 1949, the day next to the date of the accident, plaintiff wrote a letter (Ex. III) to P.W. 1 the then Chief agent of the Company in which he mentioned that the car dashed against a small bridge when his driver attempted to avoid two cyclists who were coming in the opposite direction and was damaged as a result thereof.

P.W. 1 who immediately visited the place of the accident, sent a report about it (Ex. S) to the company that very day. He made a similar report (Ex. U) that very day to D.W. 4, the General Manager of the company. While these four letters provide, in my opinion, abundant corroboration of the evidence of the plaintiff and his driver, it appears to me very difficult for anyone to reasonably suggest that the serious damage caused to the plaintiff's car was attributable to a cause other than that stated by the plaintiff or that the accident had been, as suggested by Mr. Bheemacharya at one stage during his argument, staged by the plaintiff --a theory never put to the plaintiff or his driver when they were in the box -- with the fraudulent intention of securing a new car in place of his old.

It appears to me therefore, that the finding of the District Judge that the plaintiff had not proved the accident as pleaded by him was not justified.

13. The next contention urged on behalf of the company is that in this case there was no breach on the part of the company of the performance of any of its obligations under the contract of insurance. Mr. Bheemacharya has urged that it was the plaintiff that prevented the company from performing those obligations.

His argument is that it was the duty of the plaintiff, under the terms and conditions of the policy and as provided by Section 1 of it to remove the damaged car to the place selected by the company for the purpose of getting it repaired and that the plaintiff had failed to so remove it. It was argued by Mr. Bheemacharya that it was as provided by Section 3 of the policy of insurance, optional for the company to either replace the car or to repair it.

The company. he argued, was always ready and willing to get the necessary repairs effected by a firm known as Addison and Co. Ltd., to whose premises the plaintiff had been more than once requested to remove the damaged car, which it is urged, he failed to do.

14. The finding of the learned District Judge on this branch of the company's case was against it, but Mr. Bheemacharya has canvassed before us its correctness. A discussion of the evidence on this part of the company's case requires a scrutiny into the letters that passed between the plaintiff the company and the company's agent P.W. 1.

15. There is undisputed evidence that on November 16, 1949. the damaged car was, as I have mentioned above, removed from the place of the accident to the premises of Shanti Kiran Motors. Mr. Bheemacharya has strenuously urged before us that it is the plaintiff who so removed it and that he failed to remove it further to Addison and Co. Ltd., although repeatedly required by the company so to do.

It was urged on the other hand for the plaintiff that it was P.W. 1 the company's representative that took the car to Shanti Kiran Motors and that he did so in his capacity as the Chief Agent of the Company. To my mind, it is clear from Exs. S and U, the two letters be dressed by P.W. 1 to the Company and to its General Manager respectively that P.W. 1 who removed the car to Shanti Kiran Motors did so in the discharge of his duties as the Chief Agent of the Company.

In Ex. S dated November 16, 1949 addressed to the Company P.W. 1 has stated that after getting the information that the car was seriously damaged, he went to the spot to inspect the car and having found the car in a condition in which it could not be removed, he returned to Bangalore, and arranged it to be brought and left with Shanti Kiran Motors who were the then agents for the Studebaker cars.

He also stated in that letter that Shanti Kiran Motors would be giving an estimate of the damage and the required repairs on the next day. In that letter P.W. 1 also requested the Company to send one of their representatives to do the needful, as according to him, the car could not be repaired and needed replacement by a new car.

In Ex. U the letter addressed to D. W. 4 he has stated that he had made arrangements with Messrs. Simpson and Co., to take the damaged car to Shanti Kiran Motors. In Ex. A dated November 16, 1949 a letter written by P.W. 1 to the plaintiff, he has stated as follows:

"x x x x x AS desired by you, we have made arrangements with M/s. Simpson and Co., for removal of the damaged car to the workshop of Shanti Kiran Motors. We have this day intimated of all these facts in detail, both to our head office as well as to our General Manager who is at present at Mysore and are awaiting necessary instructions from them. x x x " This letter purports to have been written by P.W. 1 in his capacity as the Chief Agent of the Company. It is argued on behalf of the Company that P.W. 1's removal of the car to Shanti Kiran Motors was, as stated in Ex. A, done at the request of the plaintiff and that the car was, after its removal in that way to Shanti Kiran Motors, still in the custody and possession of the plaintiff.

It was also argued that even otherwise, P.W. 1 had not the authority of the company to remove it from the place of accident to Shanti Kiran Motors as he did.

16. In support of the argument that it was the plaintiff who removed the car to Shanti Kiran Motors, our attention was drawn to two letters addressed by the plaintiff to the Company - Exts. XIX and V. In Ex. XIX which the plaintiff wrote on December 6, 1949 to the Company, he has stated that with the help of P.W. 1 he had the car removed through Simpson and Co., to Shanti Kiran Motors.

In Ex. V, which he wrote to the Company about a week later he stated that the car was removed from the place of accident in the presence of P.W. 1 to Shanti Kiran Motors and that although he had removed the car to that workshop, it was strange that he should again be asked to remove it to another place. These two letters do not in my opinion, support the contention of the company.

All that they state is that for the removal of the car, plaintiff and P.W. 1 both collaborate ed, but they do not support the contention of the company that P.W. 1 did not either arrange for its removal or that he did so unauthorisedly. On the contrary, the evidence of D.W. 4 the General Manager of the Company and the other documentary evidence in the case fully negative that contention.

17. D.W. 4 Basavarajiah, the General Manager of the Company has given evidence that after he received the report from the Chief Agent P.W. 1 about this accident he and the plaintiff had a talk about it in Madras. What happened during that conversation is best described in his own words.

"A week after the accident, I met the plaintiff in Madras Hotel where the plaintiff wanted 8000 rupees in full settlement of his claim. By that time I had seen the vehicle. I have not referred to this offer of plaintiff to accept Rs. 8000 in any of my letters. Our Chief Agent S.V. Ram was present when the plaintiff offered to accept Rs. 8000.

On the day on which I and plaintiff went to Shanti Kiran and Company that he demanded a new ear. Ex. L is our letter to Shanti Kiran and Co. In it we have under-taken to pay garage charges. I offered first 7000 to plaintiff and at the instance of S.V. Ram I raised it to Rs. 7,500/-".

Neither D. W. 4 nor anyone on behalf of the company at any time repudiated the action of P.W.. 1 removing the car to Shanti Kiran Motors. On the contrary, it is P.W. 1 who corresponded with the company and D. W. 4, in regard to the manner in which the plaintiff's claims against the company should be settled.

In Ex. Y a letter addressed by P.W. 1 to D. W. 4 on November 23, 1949, he suggested that the company may keep the damaged car and buy a new car after making some further necessary adjustments. In Ex. W. a reply sent by D. W. 4 to that letter on November 24, 1949, D. W. 4 refused to consider that proposal but offered to make a payment of Rs. 7000/- to the plaintiff so that he might utilise that amount for the purchase of a new car.

In Ex. BB, a letter written by P.W. 1 to the Company on November 30, 1949, referring to the controversy between the General Manager and the Plaintiff in regard to the amount payable to the

plaintiff as compensation in respect of the accident he said this:-

"Since we have left the damaged car at the workshop of M/s Shantikiran Motors for the last 15 days and more and have not instructed them to do anything in the matter, and they are sending word to us either to remove the same from there or arrange for its early repairs or any such thing. Personally the undersigned feels that at least we should pay them a compensation of Rs. 8,500/_ if at all we want to settle it amicably. ....."

To this the company sent a reply Ex. AA bearing the date December 2, 1949 to the effect that they had instructed D. W. 4 their General Manager to contact P.W. 1 and have a personal discussion for the purpose of hastening a settlement, it is of the greatest significance that neither D.W. 1 nor the company took exception in any of their above letters to the removal of the car by P.W. 1 to Shanti Kiran Motors.

18. This is not all that has to be said about this matter. The further correspondence that passed between the Company, the plaintiff and Shanti Kiran Motors, reveals, what in my opinion is utterly irreconcilable with the stand now taken by tile company. It is seen from this correspondence that in the early part of December 1949 by his letter (Ex. XIV), the plaintiff asked Shanti Kiran Motors to furnish an estimate of the repairs required for the damaged car to the company.

On the same date, he wrote another letter (Ex. XIX) to the company asking them to secure such an estimate from that firm. On the next day, i.e., December 7, 1949 the company wrote to P.W. 1, the letter Ex. CO. asking him to ascertain from Shanti Kiran Motors certain particulars about the hire payable to them for having garaged the vehicle with them.

The plaintiff again wrote on December 14, 1949 to the company (EX. V) in which he urged on the company to have the car removed to any place where it could satisfactorily be repaired and to have It repaired without any further delay. The company's reply to this letter (Ex. VI) of December 17, 1949, is a very important piece of evidence in this case which in my opinion, fully establishes the un sustain ability of the complaint made by the company against the plaintiff in this suit. That letter reads:-

"We are in receipt of your letter dated 14th instant giving your views regarding the repairs by M/s. Shanti Kiran Automobiles and Engineers. We note that you want the car to be satisfactorily repaired and delivered to you We have this day instructed our Chief Agents M/S, Jai Hind Co., to send their representative and ascertain, what the garage charges claimed by M/S. Shanti Kiran Automobiles are and on receipt of the information, we shall make arrangements to take delivery of the car and get it repaired as early as practicable.

When things are being expedited by us in all possible ways, we do not find any justification in your writing threatening letters about your inconvenience and expenses and hope that you will co-operate with us to see to the satisfactory disposal of this matter without unnecessary correspondence on either sides." The company, quite consistently with what they said in Ex. VI, wrote the letter Ex. G. to Shanti Kiran Motors on January 5, 1950 asking them to send an estimate of

the cost of repairs required for the damaged car. The plaintiff who was getting impatient in the meanwhile, caused a lawyer's letter (Ex. XXIV) addressed to the company on January 24, 1950 demanding performance of their obligations under the contract to which the company sent a reply Ex. (XXIII) on January 23, 1950 to the plaintiff.

In that letter, the plaintiff was told by the company that the delay in the settlement of the plaintiff's claim was due to causes beyond its control and that actually there had been a delay in its getting an estimate of the cost of repairs for the damaged motor car from Shanti Kiran Motors. The company further suggested to the plaintiff that he might assist them by advising Shanti Kiran Motors to expedite the despatch of the estimate.

19. Shanti Kiran Motors appear to have however, demanded in their letter Ex. D. dated February 7, 1950 for the payment of a sum of Rs. 150/- towards the cost of the preparation of the estimate which the company it appears was unwilling to pay. The company accordingly took the strange step of advising Shanti Kiran Motors in its letter dated February 21, 1950, not to send any such estimate.

20. It was the payment of this sum of Rs. 150/- which Shanti Kiran Motors demanded that appears to have brought about a change in the attitude of the Company which until that date had been willing to either pay the garage hire to Shanti Kiran Motors and take the car to Addison and Co. Ltd., or to get the car repaired by Shanti Kiran Motors after getting their estimate for that purpose.

The company having changed its mind in that way, asked the plaintiff in its letter (Ex. Q) dated February 21, 1950 to make arrangements to take the car from Shanti Kiran Motors and send it to Addisons. which the company itself had undertaken to do in its letter Ex. VI referred to above. Not unnaturally the plaintiff pointed out in his reply Ex. XXVII dated 28, 1950 that that was a matter which had to be attended to by the Company and not by him.

Thereafter, Shanti Kiran Motors wrote to the Company (Ex. K) on March 1, 1950 asking for thc payment of the amount due to them and requesting the company to remove the car after the payment of the amount due to them. Ex. L dated March 6, 1950 is the company's reply to it and this again is another document which strikes at the root of the defendant's case. In that letter the company states this-

"Re: Vehicle No. MY-1658-Z belonging to Mr. V.K. Srinivasa Setty, Bangalore Policy No. 19957-

We shall thank you to kindly deliver the abovesaid vehicle to M/s Addison and Co., Bangalore, on our behalf at an early date and send us your Bill of towing and garage charges when we shall be glad to do the needful. Please give your immediate attention to this matter and oblige." In response to this request made by the company, Shanti Kiran Motors wrote to the company (Ex. M) on March 9, 1950, claiming a sum of Rs. 590/- towards the garage and towing charges and requesting the company to authorise Addison and Co., to take delivery of the car against the payment of that amount.

21. The claim made by Shanti Kiran Motors for the payment of this amount appears to have brought about a further change in the attitude of the company. It is remarkable that on the very day on which Shanti Kiran Motors wrote Ex. M. claiming the amount due towards garage rent and towing charges, the company wrote to the plaintiff in its letter No. XXVIII, suggesting for the first time, contrary to what they had agreed to do in Exts. VI and M, that it was the plaintiff that had on his own responsibility handed over the car to Shanti Kiran Motors and that it was therefore for the plaintiff to take delivery of the car from them and hand it over to Addison and Co. Ltd.

It is obvious that the attempt of the company when it wrote this letter was to evade its liability for the payment of the amount due to Shanti Kiran Motors which it had already undertaken to pay. The plaintiff then caused another lawyer's letter (Ex. JJ) to be addressed to the company on March 16, 1950 in which he repudiated the stand taken by the company as aforesaid.

The company having further neglected to do anything in this matter, the plaintiff invoked in the letter Ex. KK, the arbitration clause contained in the contract of Insurance. But the company's Advocate in Ex. HH written by him on April 24, 1950, very strangely repudiated that there was any dispute between the company and the plaintiff in respect of which the arbitration clause could be invoked. It was thereupon that the plaintiff filed this suit.

22. it is clear from the above documentary evidence that although the Company had in Ex. VI and Ex. I, consented and undertaken to take delivery of the damaged car from Shanti Kiran Motors after payment to them of the amount due towards garage rent and other charges for the purpose of getting it repaired by Addison and Co. Ltd., it suddenly resiled from that position and repudiated its obligation to do so after Shanti Kiran Motors sent their claim for a sum of Rs. 590/- towards such charges in its letter Ex. M.

The position therefore was that when the company wrote Ex. L. to Shanti Kiran Motors and also wrote Ex, VIII on March 9, 1950 to Addison and Co., instructing them to take the car from Shanti Kiran Motors and undertaking to pay the expenses of such removal, the company was the custodian or had assumed the custody of the Plaintiff's car for the purpose of implementing its obligations under the contract of insurance.

Its failure to take any action to get the car repaired as it was bound to do, was clearly attributable to its unwillingness to incur its indisputable liability for the garage rent & other charges claimed by Shanti Kiran Motors. That being so, it is, I think, extremely difficult for the company to sustain its stand that the plaintiff was in any way responsible for its failure to get the necessary repairs effected to the damaged car.

The finding of the learned District Judge on this issue which is against the defendant, is, in my opinion, unassailable and there is nothing in the evidence of D. W. 3 Jayarama Reddy on which Mr. Bheemacharya depended, justifying a contrary view. D.W. 3, a Salesman in Shanti Kiran Motors gave no evidence which was of any assistance to the defendant but admitted on the other hand, that after his firm wrote Ex. K to the company requiring it to take the car after payment of the amount due by it, the company made no arrangement to take delivery of the car in spite of a reminder (Ex.

M) sent to it to which the company sent no reply.

23. The only other contention urged by Mr. Bheemacharya, is that the company was entitled to avoid its liability under the policy by reason of two mis-statements made by the plaintiff in his proposal for the insurance of his car. As I have already mentioned, the first incorrect statement according to the company was that the plaintiff had described his car as a new car, whereas he was actually its second owner.

The estimated value of the car which the plaintiff mentioned in that proposal as Rs. 13,500/- was, it is urged, another incorrect statement. It was argued that the plaintiff had purchased the car for a smaller sum and that therefore the higher estimate given by him was a misstatement. To test the validity of this contention urged on behalf of the company, it would be necessary to refer to the relevant particulars of the proposal (Ex I) and the policy issued by the Company Ex. II.

Ex. I the proposal is a printed form in which the particulars were entered, according to the evidence of P W. 1. the then Chief Agent of the company, by him although the plaintiff has affixed his signature to it in English at the end of it. In that form the name, address and occupation of the plaintiff are first set out. Then follows the description of the car in a tabular form in which the registered letters and numbers of the car, the make of the car its horsepower, type of body, year of manufacture, seating capacity, estimate of the car's value, its cost price to the present owner and the information whether the car is a new or second hand car at the time of delivery are all entered in their sequence.

The entry made under the heading relating to the estimate of the value of the car and that made under the further heading whether the car was a new or second-hand car at the time of delivery were, according to the contention of the company, untrue statements vitiating the policy and entitling it to repudiate it. As I have mentioned above, under the former heading the estimate is given as Rs. 13,500/- and under the latter, the word 'new' is written.

24. I may mention here, although I shall advert to it in another context, that the words 'whether new or second hand at time of delivery' constitute the question in the eleventh column of the tabular statement under which P.W. 1 wrote the word 'new'. I doubt whether the question put to the plaintiff in that way without the proponent being clearly asked to state whether the car was new or second hand when it was delivered to him can be regarded as an unambiguous question.

25. There is no evidence in this case that the plaintiff had purchased his car for a price less than Rs. 12,700/-. Even if there had been such evidence, I see no reason why and particularly in a case like this where there is evidence that during the relevant period there was a steady rise in the price of motor cars, a person who insures at car would not be justified and particularly if he had made an advantageous bargain when he himself made the purchase, to give as his estimated value of the car a sum in excess of what he him sell paid for its purchase.

If he did that, it is difficult to understand how it could be said that he was either making a false or incorrect statement. It appears to me therefore that the contention that the plaintiff made any

untrue statement "in that way has to fail, particularly when it is seen that in the proposal form (Ex. I) the plaintiff has not concealed the fact that he had purchased it for Rs-12,700/-.

The learned District Judge appears to have fallen into a small error when he was considering the contention of the company in this regard. He appears to have thought that the company's contention was that when the plaintiff mentioned in his proposal that he had purchased the car for a sum of Rs. 12,700/- he was making a misrepresentation. It is not denied by Mr. Bheemacharya that that was no part of the defence of the company.

26. The question then is whether the statement in the proposal that the car was a new although it was not so, entitles the company to repudiate its liability under the policy and avoid it on that ground. As I have mentioned above, this information that the car was new is given by the plaintiff in his proposal under the heading "description of motor car".

Under that description there are a number of questions against which the plaintiff has set out his answers. In that part of the proposal the plaintiff is asked to state many particulars about the car, its use, its location and ownership together with particulars of accidents and loss during a period of three years antecedent to the date of proposal.

Towards the end of the proposal, the plaintiff has subscribed to a statement agreeing mat the proposal and declaration made by him shall be the basis of and be considered as incorporated in the policy to be issued by the Company,

27. The policy issued by the company persuant to this proposal is divided into three sections. The first section sets out the indemnity agreed to be provided by the company to the insured against loss or damage to the car. The second section deals with the liability to third parties and it is the third section that enumerates the general exceptions and conditions of the policy.

It is stated again in the preamble of this policy that the proposal of the insured and the declaration as stated in the Schedule shall be the basis of the contract and deemed to be incorporated in the policy. The schedule of course, refers to the proposal (Ex. I). To this policy again, is another schedule attached, which contains many other matters -- particulars of the insured, the period of insurance and the motor car which is the subject matter of insurance.

28. Mr. Bheemacharya, in support of this branch of the argument has relied strongly on condition 8 of Section 3 of the policy which reads :

"The due observance and fulfilment of the terms, conditions and endorsements of this policy is so far as they relate to anything to be done or complied with by the insured and the truth of the statement and answers in the said proposal shall be conditions precedent to any liability of the company to make any payment under this policy." It is argued by him that the truth of the statements and answers in the proposal (Ex. I) are conditions precedent to the validity of the policy (Ex. II) and to the liability of the company to make any payment under it. His contention is that the statement in the proposal that the subject-matter of the insurance was a new car was admittedly not

a true statement. That being ftp it is argued, that the company Is under no liability to make any payment under the policy.

29. This contention is met on behalf of the plaintiff by pointing out that the impugned statement in the proposal was not untrue or made by the plaintiff, but by P. W 1 the company's then Chief Agent. It is submitted that P.W. 1 was Informed by the plaintiff that the car was his new acquisition and not that it was a new car. P.W. 1, who, when he gave evidence, was still in the employment of the company and had been promoted to a higher position as Branch Manager, has fully supported that part of the plaintiff's case.

The contention for the plaintiff is that the statement made by him to P.W. 1 that the car was his new acquisition was quite a correct statement and that if P.W. 1 stated, however, in the proposal that the car was new, the company would not be entitled to repudiate its liability on the basis of a statement made by its own employee P.W. 1 when he filled up the form Ex. I. It was urged that the knowledge of P.W. 1 that the car was really not a new car has to be imputed to the company. Mr. Venkataramiah for the plaintiff has relied in support of this contention on a decision of the High Court of Madras in Kulla Ammal v. Oriental Government Security Life Assurance Co. Ltd., (A). In that case Mack J.. referring to the decision in East and West Life Insurance Co. v. Venkiah, AIR 1944 Mad 559 (B), said this:

"With respect, we are unable to regard that as a general proposition of law binding on every insured person who merely puts his signature to forms in a language quite unknown to him when these forms are filled in by an agent of the Insurance Company without proof that the document was properly interpreted and explained to him." X X X X X X In this case, the plaintiff has affixed his signature to the proposal in English although he has given evidence that he knows only how to sign his name in that language.

30. Now it is clear that a person who affixes | his signature to a proposal which contains a statement which is not true, cannot ordinarily escape from the consequence arising therefrom by pleading that he chose to sign the proposal containing such statement without either reading or understanding it. That is because, in filling up the proposal form, the agent normally, ceases to act as agent of the insurer but becomes the agent of the insured and no agent can be assumed to have authority from the insurer to write the answers in the proposal form.

If an agent nevertheless does that, he becomes merely the amanuensis of the insured, and his knowledge of the untruth or inaccuracy of any statement contained in the form of proposal does not become the knowledge of the insurer. Further, apart from any question of Imputed knowledge, the insured by signing that proposal adopts those answers and makes them his own and that would clearly be so, whether the insured signed the proposal without reading or understanding it, it being irrelevant to consider how the inaccuracy arose if he has contracted, as the plaintiff has done in this case that his written answers shall be accurate.

(Newsholme Brothers v. Road Transport and General Insurance Co. Ltd., 1929-2 KB 356 (C); Great Eastern Life Assurance Co. Ltd. v. Bai Hira. AIR 1931 Bom 148 (D); Lakshmishankar Kanji Bawal v.

Gresham Life Assurance Society Ltd., AIR 1932 Bom 582 (E); 18 Halsbury's Laws of England, Hailsham Edn. 420). The decision in AIR 1954 Mad 638 (A) on which Mr. Venkataramiah has strongly relied which does not, as I understand it, enunciate any principle to the contrary is therefore of little use to him. The result in that cage depended on its own facts.

31. The plaintiff cannot therefore, hope to escape from the consequence arising put of his statement in the proposal that the subject-matter of the insurance was a new car merely on the ground that he signed the proposal filled up by P.W. 1 in a language in which he knew only how to sign.

32. But the more important question is whether that statement was untrue and if so whether the company is entitled to avoid its liability under the policy on that ground.

33. Now it is admitted by the plaintiff that the car had, when he purchased it run 2000 miles and ran another 5000 miles and more after his purchase. P.W. 1 has given evidence that the plaintiff informed him that he had purchased it from a doctor. It is therefore argued for the company that when the plaintiff described his car as a new car in the form of proposal, he made a false statement to the company. The truth of the statements in the form of proposal which were agreed to be Incorporated in the policy to be issued by the company, it is contended, was made the basis of the contract and that the legal effect therefore was that the contract was avoided if any of those answers were untrue irrespective of their materiality.

34. The policy issued by the company in this case commences with the recital that the proposal for the policy of insurance 'shall be the basis of this contract and is deemed to be incorporated herein'. The eighth condition among the conditions set out in Section III of the policy provides that 'the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the company to make any payment under this policy.' The accuracy of the answers in the proposal was thus by special stipulation, made a condition precedent to the validity of the contract of insurance.

35. As observed by Lord Buskmaster in Provincial Insurance Company Ltd. v. Morgan and Foxon, 1933 AC 240 at p. 246 (F), "now It is old and well known law that parties to an insurance contract are at liberty to contract upon the footing that any statement can be made the basis of the contract, and If the statement be inaccurate its materiality does not arise."

In Oriental Government Security Life Assurance Co. Ltd. v. Narasimha Chari, ILR 25 Mad 183 (G), Bhashyam Ayyangar J., referring to a similar stipulation in a policy of insurance that any untrue statement made by the insured in his declaration would make the policy void, said that "according to authorities it is now well established that the question for the consideration of the Court is not the materiality or otherwise of such statement or allegation but its truth." In Dawsons Ltd. v. Bonnin 1922-2 AC 413 at p. 421 (H), Viscount Haldane said:

"If the respondents can show that they contracted to get an accurate answer to this question, and to make the validity of the policy conditional on that answer being accurate, whether the answer was of material importance or not, the fulfilment of this contract is a condition of the appellants being able

to recover." So, in a case like this where the parties have agreed that the truth of the statements in the proposal shall be foundational to the enforceability of the contract of insurance, the argument that what avoids the contract is only a material inaccuracy which would influence the insurer in determining whether or not to accept the risk or in fixing the amount of the premium would be unavailable.

36. Mr. Bheemacharya has strenuously contended on the authority of 1922-2 AC 413 (H), that apart from the materiality of the plaintiff's statement in the proposal that the vehicle to be insured was a new car at the time of its dell-very, its untruth rendered the policy void.

37. The decision in 1922-2 AC 413 (H), which has been referred to by the Court of appeal in re, Morgan v. Provincial Insurance Co Ltd. 1932 2 KB 70 (I), and also by the House of Lords in 1933 AC 240 (P), has to be understood, as pointed out in the later cases, as one which rested on the construction of the policy of insurance in that case. That was what Lord Buckmaster emphasised in 1933 AC 240 (F). In 1922-2 AC 413 (II), the insured had by inadvertence, stated in his proposal that the vehicle would be garaged at a place where it was never so garaged during the currency of the policy. It was held by the House of Lords that the assured could not recover as he had broken the condition of the policy as to the place where the car was to be garaged. It was, as pointed out by Lord Wright in 1933 AC 240 (F), held, by the House of Lords that tile incorporation of the wrong answer into the contract as its basis constituted it a condition.

Viscount Haldane himself made it very clear that it is not every untrue statement made by the assured, but a statement which itself imports a condition that must be shown to have been complied with by the assured, whether material from an ordinary business stand point or not. In illustration of what he said, the noble Lord pointed out that a mere slip in a Christian name for instance would not be held to vitiate the answer given if the answers were really in substance true and unambiguous. So, the question which lies at the root of the matter is, as pointed out by Viscount Haldane in 1922-2 AC 413 (H), simply one of construction. Indeed, in 1933 AC 240 (P), in referring to this observation of the noble Lord, Lord Buckmaster said this :

"He then continues in words which I think must have been overlooked in some of the other cases, for he says that the question which lies at the root of the matter is simply one of construction. From that it follows that unless some other contract of insurance is either couched in identical terms or terms the effect of which cannot be distinguished from those which were there considered, this authority, except so far as it shows that a contract as to future conduct can equally be made the basis of a contract with a statement of existing fact, does no more than apply well established principles to a special state of facts.

It is for that reason that I cannot see that either the antecedent case of Farr v. Motor Traders Mutual Insurance Society Ltd., 1920-3 KB 669 (J), or the consequent case of Roberts v. Anglo-Saxon Insurance Association, 1927-137 LT 243 (K), are affected by the decision. In each of these cases it was held that a description as to the use to which a vehicle was to be put was descriptive of the character of the risk rather than a warranty that that particular use and no other was the one to which the vehicle was confined, and this depended upon the meaning of the words in a particular

document."

So the question in every case is one of the interpretation of the particular policy and its true construction.

38. Two years before the decision in 1922-2 AC 413 (H), in 1920-3 KB 669 (J), a policy of Insurance containing what may be called the usual 'basis' clause was the subject-matter of interpretation. That was a case in which the plaintiff who was the owner of two taxicabs which he Insured with the defendants, made a statement In the proposal which was agreed to be the basis of the contract and to be considered as incorporated therein, that one of the cabs was driven in one shift only.

During the currency of the Policy of insurance and for a short time that cab was driven in two shifts for twentyfour hours. But when the cab was destroyed by an accident it was being driven in one shift only. In an notion on the policy to recover in respect of the damage so caused, the defendants contended that the statement in the proposal that the cab was to be driven in one shift only was not true and amounted to a warranty and upon breach thereof the Insurance came to an end.

The Court of appeal however, repelled that contention holding that the statement was not a warranty but was merely descriptive of the risk insured against, Bankes L. J. in reaching that conclusion pointed out that it was doubtful how much is to be inferred from the mere description of the premises or goods insured. He referred to a passage in Macgillivray on Insurance Law which was as follows:

"It is a little doubtful how much is to be inferred from the mere description in a fire or burglary policy of the premises or goods insured. It may be put in three ways: (i) that the description is a representation of the state of the premises or goods; (ii) that the description is a definition of risk; (iii) that the description is a warranty that the premises or goods shall correspond thereto."

He eventually reached the conclusion that if the description embodied in the policy is merely descriptive of the risk undertaken by the insurer in the sense that it embodies a limitation of the risk or defines it, it is not a warranty of which the insurer could take advantage, for avoiding his liability under the policy but would entitle the insured for recovering under the policy provided that it was a true description of the risk at the time of the accident.

Although this case was cited during the arguments in 1922-2 AC 413 (H) there is no reference to it in the decision. Then again, in (1927) 137 LT 243 (K), a case decided four years after the decision in 1922-2 AC 413 (H), the insurance policy incorporated a proposal form signed by the respondent which contained a stipulation that the statement in the proposal shall be held promissory and shall form the basis of the contract of insurance. In that proposal the insured had stated that the purpose for which the vehicle was to be used was only commercial travelling.

At the time of its destruction by fire it was found that the motor vehicle was being used for carrying passengers. The Insurance company resisted the claim of the insured on the ground that they were not liable in respect of an accident while the motor car was being used to carry passengers as that

was not within the risk described. Although the claim made by the insured failed on the ground that the contract between the parties definitely stated as a condition thereof that the user of the vehicle shall be only for the purpose indicated and therefore amounted to a warranty, it is important to notice that Romer J. pointed out that the words constituting the description of an insured motor vehicle are capable of three constructions. He said as follows:

"I understand from the decision of this Court In 1920-3 KB 669 (J), a case which I gather was not drawn to the attention of the Divisional Court, that those words are capable of three constructions, that is to say, they must bear one of three constructions; either they are pure words of description--words of description only--or they constitute a definition of the risk, or the words amount to a warranty or promise that the motor car will be used in a particular way only.

That the solution of that question is not an easy one is apparent from the fact that Salter J., thought that the words constituted a warranty when he came to the conclusion on the facts, on the construction of the warranty, that there had been no breach of it, and MacKinnon J. thought that the words were description only. But the question is not an insoluble one. If it were, then I suppose the policy would be void for uncertainty. There can be, if the question is soluble, only one real answer to it, and, therefore, there can be in law only one construction of the words in question."

It is clear what he said that if the words were mere words of pure description they could not be construed as a definition of the risk or a warranty and so would not, even if incorrect, render the policy void. In 1932-2 K B 70 (I), was another case in which there was another similar 'basis' clause in the policy of insurance. The question was whether if the proposal contained a statement that the insured motor vehicles would be used only for the purpose of delivering coal, the company had a right to avoid the contract on the ground that the insured, during the period covered by the policy, was using the lorry for carrying loads of timber together with coal although when the accident happened the vehicle Was only carrying coal.

In an action by the insured on the policy, the insurer resisted the claim on the ground that since the statement made by the assured that the vehicle would be used only for carrying coal was the basis of the contract & had been incorporated in the policy, its untruth avoided the contract. It was held by the Court of appeal that the plaintiff was entitled to recover on the ground that the statement in the Policy would not amount to a warranty but was only a definition or description of the risk insured against. In that case the two earlier cases, 1920-3 KB 669 (J) and (1927) 137 LT 243 (K), were cited on behalf of the assured, while the decision in 1923-2 AC 413 (H), was strongly relied upon on behalf of the Insurance company.

Indeed, it was contended on behalf of the Insurance company that the decision in 1920-3 KB 689 (J), must be taken to have been over-ruled by the decision in "1922-2 AC 413 (H). But the Court of appeal came to the conclusion that there was nothing in 1922-2 AC 413 (H) which Was incinsistent with the decision in 1920-3 KB 669 (J), or in 1927-137 LT 243 (K). Lawrence L. J., pointed out that the only point decided in 1932-2 AC 413 (H), was that on the true construction of the particular contract there in question it was made a fundamental condition of liability under the policy that the car should be usually garaged at a place throughout the currency of the policy.

He also pointed out that the question which arose in 1920-3 KB 669 (J), and (1927) 137 LT 243 (K), whether the statement in the proposal amounted to a description of the risk or to a warrant was not raised or decided in 1922-2 AC 413 (H). Scrutton L. J. emphasised the distinction between statements which are conditional and those that are merely descriptive.

39. It was the decision of the Court of appeal in 1332-2 KB 70 (I), that was affirmed by the House of Lords in 1933 AC 240 (F), to which I have already made reference. It was there that Lord Buckmaster drew attention to words Uttered by Viscount Haldane in 1922-2 AC 413 (H), which he thought had been over-looked in other cases, that the question in each must depend upon the true construction of the particular Contract of insurance and that the decision in any one particular case cannot be of assistance in construing a contract of insurance in another unless the terms and conditions in policies in both the cases are couched in identical terms.

40. The decision in 1932-2 AC 413 (H), as explained in the later cases to which I have referred rested on the construction that the statement in the proposal was a warranty, the breach of which vitiated the policy That was also the basis of the decision in ILR 25 Mad 183 (G). That a policy becomes void in such a case is also what was held in those later decisions. But what was further decided in 1920-3 KB 669 (J), and in the other later cases, is, that if a motor vehicle is described by the insured in his form of proposal in a particular way and that description is contained in words which are merely and purely words of description, such description will neither amount to a description of the risk nor to a warranty, not in the sense in which the word warranty is used in the law relating to sale of goods but as it is understood in the Insurance Law.

The proper significance Pf that word in Insurance Law as quite often explained is an agreement which refers to the subject-matter of a contract but not being an essential part of it either intrinsically or by agreement is collateral to Us main purpose. Any statement of fact bearing on the risk or a promise that a certain state of things shall continue or a certain course of conduct shall be pursued during the whole period covered by the policy is to be construed as a warranty.

It was this construction that was placed by Viscount Haldane in 1922-2 AC 413 (H), to reach the conclusion that the plaintiff in that case could not recover because the statement that the motor vehicle would be usually garaged in a particular place amounted to a condition or a warranty and that the risk did not attach to the vehicle garaged in a place different from the one where it should have been.

41. It is clear that if the description of a motor vehicle in the proposal, the statements in which are incorporated in and made the basis of a contract of insurance are pure words of description, then such description being neither a definition of the risk nor a warranty will not, even if inaccurate, entitle the insurer to avoid his liability under the policy. If such description is however in the nature of a definition of the risk, then any untrue statement in such description will not vitiate the policy, the only consequence of such misdescription being the risk In the case of the vehicle is not covered when the vehicle does not correspond to that description and is covered again when it corresponds to it. If the description however amounts to a warranty, a breach of that warranty disentitles the insured to recover.

42. The statement in the form of proposal in this case that the car was new at the time of its delivery has no bearing on the risk and does not by itself import a condition precedent to the validity of the policy. Nor can it be construed as a promise by the plaintiff that a certain state of things shall continue or a certain course of conduct shall be pursued during the currency of the policy. That being so, it is impossible to construe that statement as either a definition of the risk insured against, or as a warranty.

43. Indeed, it is not the case of the company that that statement is a warranty or has to be construed as one. The company did not say so in its written statement it merely relied on its untruth. The statement in the proposal that the vehicle was new when delivered is, in my view, a mere statement of description and a statement of description only. That was the construction placed in Gopal Singh v. Mutual Indemnity and Finance Corporation Ltd., AIR 1937 All 535 (L), by Sulaiman C. J. when he was interpreting a policy of insurance which incorporated a statement in the proposal that the purpose for which the vehicle would be used was to carry passengers, whereas at the time of the accident, the vehicle war, carrying tins of oil in addition to passengers. Sulaiman C. J. construed those words as mere words of description and said this:

"The proposal form certainly contains some parts which are merely descriptive. For instance, the registered number was 3893 as entered in the proposal. In point of fact the real number as now found is 3993. It will be difficult to contend that a mistake of this kind would exonerate the defendant from all liability."

X X X X In (1927) 137 LT 243 (K), it was pointed out on p. 248 by Romer J., that it was to be inferred by Farr's case (J) that the words used in the proposal form may be capable of three constructions, that is to say; they must bear one of three constructions: (1) either they are pure words of description--words of description only--or (2) they constitute a definition of the risk, or (3) the words amount to a warranty or promise that the motor car will be used in a particular way only. In the first case the words would not affect the liability of the insurance company at all."

In this view of the matter and in my opinion, the company would not, in the present case, be entitled to avoid the policy on the ground that the plaintiff had given an incorrect description of his car in the form of proposal.

44. It is I think an important feature of the policy in this case that it contains another schedule in which the subject matter of insurance is again described. Although in the description of the car contained in the proposal (Ex. I) it is described as a new car, the schedule to the policy in which the description is repeated makes no mention of it. Again, in the proposal (Ex I), under the heading 'Old Number', MYX 1525 is mentioned along with what was presumably its new number MY 1658 Z -- mentioned under the heading 'Registered letters and Numbers'. It was disclosed in the proposal that the car had been the subject-matter of insurance once before and that the year of its manufacture was 1943.

There is no evidence in this case nor was it suggested during the course of arguments by Mr. Bheemacharya that the company would have declined the insurance on the ground that it was not a

new car when delivered to the plaintiff or that the premium payable by the insurer in the case of a second hand car was higher than that chargeable in respect of a new one. That being so, it is clear that the description of the vehicle, while it had no bearing on the risk insured against, so as to make it a warranty, was substantially accurate.

45. Indeed, in the protracted and long correspondence which the company carried on with the plaintiff and with its agent P.W. 1, there is no suggestion at any stage that there was any inaccurate statement in the proposal or that there was a breach of any warranty. At no stage and not even when it sent its replies to the notices (Exs. XXIV and JJ) issued to the company on behalf of the plaintiff by his Advocate, did the company repudiate its liability on that ground. This contention was raised for the first time when it produced its defence in the suit and even when it did so, it did not plead that the statement in the proposal was a warranty, the breach of which had freed it from its liability.

The conduct of the company after the accident in which the car was involved was reported to it by P.W. 1, makes it plain that while the company did not seek to avoid the policy on the ground that it raised for the first time in its defence, it adopted a course of action entirely inconsistent with any such intention, for very nearly four months after it became, as I have-found, the custodian of the plaintiff's car for the purpose of getting it repaired as it had agreed to do, under the contract of insurance, the company gave repeated assurance to the plaintiff that it would do so.

46. In my opinion, the finding of the learned District Judge or the second issue that the plaintiff is not entitled to recover, cannot be sustained and has to be reversed.

47. The only other question is as to what should be the measure of compensation payable by the defendant to the plaintiff. The effect of the evidence of D. W. 4 is that in the year 1949 there was a steady rise in the price of Studebaker Cars. The damaged car in this case was admittedly manufactured in the year 1948 and its value in the market at the time of the accident must-have been comparatively high. Indeed, in the correspondence between P.W. 1, D.W. 4 and the company it appears to have been assumed that the damaged car was, before it met with the accident, worth nearly Rs. 13,000/- (Ex. Y) and that even in its damaged condition it was. likely to fetch in the market a price of Rs. 4,000/- to Rs. 4,500/-.

D. W. 4 has admitted that in the negotiations between him and the plaintiff at Madras, he was willing to pay a sum of Rs. 7,500/- to the plaintiff in full settlement of his claim. Even in his letter (Ex. V) to P.W. 1, he expressed his willingness to consider the payment of Rs. 7,000/-to the plaintiff. Unfortunately, the company appears to have resiled from that stand in the hope of being able to get the damaged car repaired. The Company eventually refused to do even that.

48. The proper measure of compensation payable to the plaintiff by the defendant is, in my opinion, the difference between the price of the car before it was damaged and its value when it was removed to Shanti Kiran Motors and by what must be regarded as highly disingenuous conduct on the part of the company, no steps were taken by it to get it repaired or restored it to its original condition. As I have mentioned above, Ex. Y provides what I consider as some, though not very accurate, data on this matter according to which the price of the car about Rs. 13,000/- before it was damaged arid

about Rs. 4,000/- to Rs. 4,500/- after the accident to it.

This appears to have provided the basis on which the plaintiff and D. W. 4 negotiated for a settlement of this matter while they were in Madras. Taking into account all the circumstances of the case, it appears to me that a sum of Rs. 7,500/- which D.W. 4 appears to have been at one stage willing to consider as a reasonable payment to be made to the plaintiff, would be the compensation properly payable by the defendant to the plaintiff as damages to which the plaintiff would be entitled under the Insurance policy.

49. In my opinion, the dismissal of the plaintiff's suit by the learned District Judge was unjustified. His decree dismissing the suit should be net aside and there should now be a decree in favour of the plaintiff and against the defendant for this sum of Rs. 7,500/- together with interest thereon at six per cent, per annum from the date of the institution of the suit till its payment. As the plaintiff has not fully succeeded in his suit, the proper order as to costs should be that the parties shall pay and receive in this Court and in the Court below, costs proportionate to their success or failure.

Sadasivayya, J.

50. I agree.

51. Appeal allowed.