

APPELLATE CIVIL.

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December 3.*Before Mr. Justice Banerji and Mr. Justice Aikman.*GHULAM KADIR KHAN AND OTHERS (PLAINTIFFS) v MUSTAKIM KHAN
AND OTHERS (DEFENDANTS).**Act No. IV of 1882 (Transfer of Property Act) section 85—Mortgage—Suit for payment of mortgage money or foreclosure—Non-joinder of persons interested in the mortgaged property, effect of—Appeal—Plea taken for first time in appeal.*

The non joinder in a suit to which Chapter IV of Act No. IV of 1882 applies of a person interested in the mortgaged property within the meaning of section 85 of that Act, and of whose interest the plaintiff has notice, is a fatal defect in the suit, unless cured by the action of the Court under section 32 of the Code of Civil Procedure; and where such non-joinder is brought to the notice of the Court, the Court will give effect to the objection and dismiss the suit, even though such objection be raised for the first time in appeal. *Mata Din Kasodhan v. Kazim Husain* (1), *Janki Prasad v. Kishen Dai* (2), and *Bhawani Prasad v. Kallu* (3), referred to.

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. *T. Conlan* and *Munshi Madho Prasad* for the appellants.

Mr. *Abdul Majid* and *Babu Jogindro Nath Chaudhri* for the respondents.

BANERJI and AIKMAN, JJ.—The appellants in the suit out of which this appeal has arisen were plaintiffs in the Court below. They brought the present suit on the basis of a mortgage-deed, dated the 14th of May 1861, as modified by a subsequent instrument dated the 12th of April 1862. They alleged that they held a mortgage by conditional sale over the property of the respondents, and they prayed that the defendants be directed to pay to them Rs. 2,270 on account of the principal mortgage money, and Rs. 22,730 on account of interest, after giving credit for Rs. 3,370, which they admit they had received as interest; that in the event of the defendants failing to pay the aforesaid amount, they be

*First Appeal No. 197 of 1893, from a decree of Pandit Rajnath, Subordinate Judge of Moradabad, dated the 25th May 1893.

(1) I. L. R., 13 All., 432.

(2) I. L. R., 16 All., 478.

(3) I. L. R., 17 All., 537.

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declared foreclosed of their right of redemption, and that the plaintiffs be put in possession of the said property. The suit was dismissed by the Court below. The learned vakil for the respondents has contended that the decree of the Court below is a right decree, inasmuch as upon their own plaint the plaintiffs failed to comply with the requirements of section 85 of Act No. IV of 1882, and consequently their suit has been properly dismissed. The list A attached to the plaint shows that a part of the property claimed is in the possession of one Amirzada, a prior mortgagee. That person has not been joined as a defendant. It is urged that Amirzada was a necessary party to the suit, and the omission to implead her was fatal to the suit. The objection was not, it is true, raised in the Court below, but having regard to the opinion expressed by the majority of the Judges of this Court in three Full Bench cases, we feel that we are bound to give effect to the objection, although it has now been raised for the first time. Section 85 of Act No. IV of 1882 requires that all persons having an interest in the property comprised in a mortgage, of whose interest the plaintiff has notice, must be joined as parties to any suit relating to such mortgage, brought under the fourth chapter of the Act. The present suit is a suit under that chapter, and upon the admission contained in the plaint, Amirzada has an interest in the property comprised in the mortgage. Amirzada was therefore a necessary party to the suit within the meaning of section 85. In *Mata Din Kasodhan v. Kazim Husain* (1) the majority of this Court held that the omission to join as a party a person who was a necessary party to the suit was a fatal omission by reason of which the suit of the plaintiff was liable to dismissal, and this notwithstanding the provisions of section 34 of the Code of Civil Procedure. At page 465 of the report the learned Chief Justice observed as follows:—"Notwithstanding section 34 of that Code, I am of opinion that we must act upon the imperative words in section 85 of Act IV of 1882." * * * "It is necessary that litigants should be made to know and feel that

(1) I. L. R., 13 All., 432.

the Statute Law, when it affects their right of suit, must be complied with, and that in such a case as this Chapter IV of Act IV of 1882 must not be ignored and treated as a dead letter. Section 85 was advisedly, and with the object of preventing multiplicity of suits, introduced into Act No. IV of 1882, and we must give effect to it by dismissing, as I would, on that ground alone, if there were no other, this appeal with costs." In this view three other learned Judges of this Court concurred. In another Full Bench case—*Janhi Prasad v. Kishen Dat* (1);—it was stated in the judgment of the Full Bench, that "the object of section 85 of Act No. IV of 1882 was to compel any person suing on a mortgage to bring into one suit, so far as he had notice of their interests, all persons interested in the property, so that in one suit, instead of in several, the rights and interests of the different persons interested in the mortgaged property might be ascertained, protected and dealt with. The result of the system which obtained previously to Act No. IV of 1882 was that mortgaged property, when sold in execution of a decree, seldom fetched anything like its value, and that was a result only to be expected from the uncertainty of the title obtained under a decree for sale under the system then in operation." In the Full Bench case of *Bhavani Prasad v. Kallu* (2), the learned Chief Justice observed as follows in his judgment:—"The word 'must' is one of the strongest words of compulsion which a Legislature can employ, and Courts are, in my opinion, bound to give effect to it and not to ignore it and its significance." In another part of the same judgment he said:—"Section 85 is highly imperative and * * it is the duty of a Court to dismiss a suit brought and attempted to be maintained by the plaintiff in contravention of that section, * * but the Court, if it sees fit so to do, may add necessary parties under section 32 of Act No. XIV of 1882." This view was concurred in by the majority of the Judges constituting that Full Bench. We have thus an expression of opinion by a majority of the Judges of this Court regarding the imperative nature of the provisions of s. 85 which we, as a

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Division Bench, are bound to give effect to. According to the opinion of the learned Judges to which we have referred, when a suit is brought in contravention of s. 85, it is the duty of the Court to dismiss the suit, unless it chooses to exercise the discretion vested in it by s. 32 of the Code of Civil Procedure, and to bring upon the record the party omitted from the suit. In this case the plaintiffs having failed to join as defendant Amirzada, of whose interest on their own showing they had notice, it was the duty of the Court below to dismiss the suit in accordance with the Full Bench rulings referred to above. We, as an Appellate Court, ought now to do what the Court below ought to have done in the first instance. We have been asked to exercise our powers under section 32 of the Code of Civil Procedure, and to add Amirzada as a party to the suit. We are of opinion that we should not be justified in complying with the request of the learned counsel for the appellants. The appellants, as we have said at the outset of this judgment, claimed, in lieu of Rs. 2,270 advanced by them, a sum of Rs. 25,000, although they have already realized more than the principal amount lent by them; they are therefore persons who are not entitled to the sympathy of the Court. In the next place the addition of Amirzada as a party at this stage of the proceedings would necessitate the amendment of the plaint in some respects, and might involve a fresh trial of new issues. We are therefore of opinion that this is not a case in which we should exercise the discretion vested in us by section 32 of the Code of Civil Procedure. The plaintiffs having violated what has been held to be the imperative requirement of the law, their suit should have been dismissed on this ground. We dismiss the plaintiffs' suit, and, confirming the decree below, dismiss this appeal with costs.

The objection under section 561 of the Code of Civil Procedure is not pressed.

Appeal dismissed.