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therefore failed to establish any custom under which he has a preferential right, and that therefore the suit should be dismissed. In so far as the original meaning of the word *shafi* is concerned, it is quite clear that it never contemplated the question of blood relationship. It means a conjunction, and under the Muhammadan Law there are three classes of pre-emptors: co-sharers in the subject-matter of sale: co-sharers in its appurtenances, and contiguous neighbours. If the original meaning be applied to the word *shafi* in the present case, it is clear that the interpretation placed by the court of first instance upon this document is a correct one. It is true that there are instances in these provinces of blood relations having a prior right of pre-emption under customs existing in certain villages. But these instances are comparatively rare as compared to those in which the prior right of pre-emption depends upon nearness of space. It seems to us that the interpretation placed by the court below is justified. In addition to this it seems to us that the wording of this wajib-ul-arz, wherein it speaks of a co-sharer of a patti in the *khalisa* selling his right, indicated that his co-sharers in that same patti would be his pre-emptors (*apna shafi*). We see no reason to differ from the interpretation placed by the court below. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

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December 21.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RAM SAHAI (DEFENDANT) v. AHMADI BEGAM AND OTHERS (PLAINTIFFS)*

Civil Procedure Code (1882), sections 13, 43—Res judicata—Dismissal of suit for redemption of a mortgage—Second suit for redemption of another mortgage of the same properties—Civil Procedure Code (1908), section 11; order II, rule 2.

Held that the dismissal of a previous suit for redemption of an alleged oral mortgage was no bar to the institution of another suit for redemption of a written mortgage in respect of the same properties of a different date. *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnen Nair* (1) followed.

THIS was an appeal under section 10 of the Letters Patent from a judgement of KARAMAT HUSAIN J. The facts of the

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*Appeal No. 53 of 1910, under section 10 of the Letters Patent.

(1) (1906) I. L. R., 29 Mad., 153.

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case are fully stated in the judgement under appeal, which was as follows: –

"The facts of the case are these:—In 1881, one Achroo brought an action against Sheo Prasad for redemption of a mortgage. The judgement of the learned Munsif, dated the 30th September, 1881, a certified copy of which is on the record of this case, shows that the claim of Achroo was as follows:—Jhande, father and Puran, uncle of the plaintiff, who were co-sharers in equal share in 3 pies, 16 krants, 7 jau, in pargana Jalalpur, mortgaged the property in suit in Sambat 1915, corresponding to 1859-1860 A. D., to Mohan, father of the defendants, under an oral mortgage, with this condition that the mortgagee during his possession would not be entitled to interest. One of the pleas in defence to that suit was that the transaction of mortgage was evidenced by the written mortgage deed of the 19th July, 1858. The following issues were framed by the learned Munsif:—(1) Was the mortgage in suit an oral or a written mortgage and, if it was written, was the mortgage deed produced by the defendant, the mortgage executed by the predecessors in title of the plaintiff? (2) Was the plaintiff bound to comply with the terms of the written mortgage produced by the defendant? (3) If the mortgage was oral, then did the plaintiff offer to pay the money secured by that oral mortgage to the defendant for redemption, and if he did offer, did the defendant deny to take it? The court found that the mortgage deed produced by the defendant was a genuine document and dismissed the suit. The learned Munsif towards the end of his judgement says in effect 'when the mortgage deed (*rehan-namah*) is proved, it is not necessary for the court to adjudge upon other issues. As the plaintiff could not prove his claim, which under the circumstances he was bound to prove, his claim is dismissed with costs.'

"There was an appeal by the plaintiff Achroo to the lower appellate court, and the paper book of S. A. 390 of 1882, decided on the 9th March, 1883, shows that the following pleas among others were taken in the memorandum of appeal to the lower court:—(1) The evidence of the appellant's trustworthy witnesses sufficiently proves that the mortgage was effected verbally and that it was agreed upon that it should be redeemed upon repayment of the principal mortgage money. The respondent's father, as *dakhilkar*, has been in possession of the disputed share since the time of the mortgage alleged by the appellant, and in the Revenue Court records also he has been entered as *dakhilkar*, therefore the evidence of the appellant's witnesses is considered probable. The second plea attacks the genuineness of the mortgage deed. The 5th plea is as follows:—'Since the parties agree as to the amount of the principal mortgage money and the respondent admits the fact of the mortgage of the property, the dispute is only with reference to the interest, therefore even if it be assumed that the document was correct, it was necessary to determine the rights of the parties and find the correct amount of interest, therefore the dismissal of the claim is legally improper.'

"The lower appellate court affirmed the decree of the first court. That court in its judgement said:—'The mortgage was effected between the predecessors of the present parties. Achroo says it was a verbal transaction that no interest was to be paid because the mortgagee took possession of the land and enjoyed

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the profits. The defendant produces a deed of mortgage which he says was drawn up at the time. It is dated 19th July, 1858, and states that the land was mortgaged till Baisakh Sudi 15, 1915 (Sambat), and that Rs. 2 per cent. per mensem is payable. It is not stamped, but Sheo Prasad has paid the penalty on it. Achroo says that the deed is a forgery and that no interest was payable as the mortgagee was to enjoy possession of the land. The lower court has held this deed to be genuine and consequently dismissed the claim. In appeal, the plaintiff prays that the question of interest may be inquired into and settled, but this he should have stated to the lower court. As he contested the suit in order to redeem the land without paying interest, I do not consider myself authorized to enter now into the question of how much interest is payable. The terms of the deed produced by Sheo Prasad are not clear, and it seems strange that the mortgagee should both enjoy the profits of the land and also receive interest for his money. However, it is certain that some interest was payable and that perhaps only for the period during which the land was to be mortgaged. For the settlement of all these points, Achroo should bring a suit for settlement of accounts.'

"The plaintiff Achroo preferred a second appeal to this Court which was S. A. 390 of 1882. The point taken in the memorandum of appeal was that the lower appellate court was wrong in dismissing the appeal without finding whether or not the mortgage deed produced by the defendant was genuine. A Bench of this Court by the order, dated 13th December, 1882, sent down the following issue for determination by the lower appellate court:—'Is the mortgage deed produced by the defendant genuine or not?' The lower appellate court submitted the following finding:—'After considering the whole of the evidence, I cannot but come to the conclusion that the deed is genuine.' Objections were taken to this finding. The first was to the effect that the finding was not based on good evidence. The second was that even if the mortgage deed was a genuine document, the learned Judge should have given the plaintiff a decree making him liable to pay interest at 24 per cent. per annum and that the Judge was wrong in referring the plaintiff to a fresh suit. The appeal was dismissed by this Court by the following order:—'We accept the finding on remand and over rule the first objection. The second objection cannot be entertained now. We dimiss the appeal with costs.'

"After the above mentioned litigation, Achroo, under a sale-deed of 13th June, 1886, sold the equity of redemption to one Parichat. His widow, Mahrain, succeeded him. *Niamat Ullah Khan in execution of a decree against Mahrain* purchased the equity of redemption on the 21st November, 1898. His representatives are the plaintiffs in the present suit and they sue for redemption of the mortgage of the 19th July, 1858. One of the pleas taken in defence is that the suit is barred by section 13, Civil Procedure Code. The first portion of the first issue framed by the court of first instance is in these terms:—'Is the present suit barred by section 13 of the old Code in consequence of the previous suit of Achroo for redemption of the property being dismissed?'

"The finding of the court on this portion of the issue is to the effect that the suit brought by Achroo was for redemption of the alleged oral mortgage and not for redemption of the mortgage evidenced by the deed produced by the father of

defendant No. 1, dated the 19th July, 1858, and that therefore the suit is not barred by the doctrine of *res judicata*.

"There was an appeal by the defendant to the lower appellate court which reversed the decree of the court of first instance. That court came to the conclusion that the present suit was to redeem the same mortgage, to redeem which the former suit was brought and that therefore it was not maintainable.

"The plaintiff comes here in second appeal and his contention is that the suit is not barred by the doctrine of *res judicata*. This contention is, in my opinion, sound. The history of the previous litigation very distinctly shows that, on the pleadings of the parties in the former suit, the basis of the claim was an oral mortgage executed between the years the 1859 and 1860, with terms different from the terms of written mortgage, dated 19th July, 1858, and the suit of Achroo was dismissed by the learned Munsif on the ground that he failed to prove his case. The former suit was not brought for redemption of the mortgage transaction embodied by the document of the 19th July, 1858. This being so, it cannot be said that the dismissal of the suit instituted by Achroo, upon an oral mortgage of a different date and with different terms, operates as *res judicata* in the present suit. The former suit was rightly dismissed, having regard to the ruling reported in I. L. R., 18 All., 403, and the present suit is not barred by the doctrine of *res judicata*. I therefore set aside the decree of the lower appellate court and remand the case under order 41, rule 23, for trial on the merits."

The defendant appealed.

Mr. *A. H. C. Hamilton*, and Babu *Piari Lal Banerji*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

STANLEY, C. J., and BANERJI, J.—This is an appeal under the Letters Patent from an order of remand made by a learned Judge of this Court. The facts of the case are fully set forth in the judgement of our learned colleague. It is contended that the dismissal of the suit brought by the predecessor in title of the plaintiffs in 1881 is a bar to the present suit, which is one for the redemption of a mortgage of 1858. The former suit was brought for the redemption of an oral mortgage alleged to have been made at some time between 1859 and 1860. It was found in that suit that no such mortgage existed and the claim was accordingly dismissed. It was further found that the property in question was held by the defendant under a mortgage of 1858. It is this mortgage of 1858 which the plaintiffs now seek to redeem. We agree with our learned colleague that the second suit is not barred by the provisions of sections 13 and 43 of Act XIV of 1882 and of section 11 and order II, rule 2, of the

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present Code. The learned counsel for appellant referred us to the case of *Rangasami Pillai* v. *Krishna Pillai* (1). That case has been overruled by the later Full Bench ruling of the same court in *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnan Nair* (2). This last ruling is clearly against the appellant and supports the view of our learned colleague. We dismiss the appeal with costs.

Appeal dismissed.

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December 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

BISHAMBHAR NATH (DEFENDANT) *v.* GADDAR (PLAINTIFF).*

Execution of decree—Attachment—Property under wrongful attachment stolen by bailiff—Liability of attaching decree-holder—Small Cause Court—Act No. IX of 1887 *(Provincial Small Cause Courts Act), schedule II, article* 35 *(j)—Jurisdiction.*

Where crops of a third party had been wrongfully attached by a decree-holder as those of his judgement-debtor, and, while so attached, were stolen by the *shahna* (or bailiff, in whose custody they were, it was *held* that the decree holder was responsible to the owner for their value; also that a suit by the owner against the decree-holder to recover the value of the crops and damages was not a suit cognizable by a Court of Small Causes. *Goma Mahad Patil* v. *Gokaldas Khimji* (3) followed. *Musamat Subjan Bibi* v. *Sheikh Sariatulla* (4) not followed. *Kisori Mohun Roy* v. *Harsukh Das* (5) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgement of GRIFFIN, J. The facts of the case appear from the judgement under appeal, which was as follows:—

"The defendant, who is appellant in this court, in execution of a decree held by him against one Tula Ram, attached, as the property of his judgement-debtor, the crops of the plaintiff Gaddar. The plaintiff filed an objection against the attachment. His objection was allowed and the attachment was removed. While the property was under attachment and in the custody of the *shahna* (or temporary bailiff) of the court, most of the attached crops disappeared. The *shahna* was prosecuted and found guilty under section 403, I. P. C., and sentenced to imprisonment. The plaintiff has instituted the present suit to recover a sum of Rs. 457-8-0, which is made up of two items, namely, Rs. 417-8-0, the value of the crops which disappeared while under attachment and Rs. 40 as damages for the wrongful act of the defendant. The court of first instance decreed the suit for Rs. 40, that is, for the damages claimed by the plaintiff, and dismiss-

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*Appeal No. 72 of 1910 under section 10 of the Letters Patent.

(1) (1883) I. L. R., 26 Mad., 259.
(2) (1906) I. L. R. 29 Mad., 153.
(3) (1878) I. L. R., 3 Bom., 74.
(4) (1869) 3 B. L. R., A. J., 418.
(5) (1880) I. L. R., 7 Calc., 436.