1928
April, 30.

Before Mr. Justice Mukerji and Mr. Justice Bennet.

TAMIZ-UN-NISSA BIBI (DEFENDANT) *v.* SYED MUHAMMAD HUSAIN (PLAINTIFF).*

Civil Procedure Code, section 11—Res Judicata—"*Might and ought*"—*First suit for possession based on title—Second suit for possession as mortgagee—Two courts of different grades—Second suit comprising property claimed in first suit as well as other claims against other defendants.*

R mortgaged with possession a certain property to *M*. After *R's* death, *F*, who had inherited a two-fifths share in the property, sold without authority the entire property to the mortgagee *M*. *T*. who had inherited a one-fifth share, brought a suit in the Munsiff's court for possession of her share. Her title was proved and the suit was decreed, *M* not having raised the defence that in any case he was entitled to retain possession as usufructuary mortgagee. Thereafter *M's* name was removed from the revenue records as a mortgagee, and he brought a suit in the Subordinate Judge's court against *T* and the other heirs of *R*, for recovery of possession as mortgagee over a three-fifths share of the property (excluding the two-fifths share of *F*, of which *M* had become full owner).

Held, that so far as *T* and her one-fifth share were concerned, the suit was barred by the principle of *res judicata*.

THE facts of the case sufficiently appear from the judgement of the Court.

Babu *Piari Lal Banerji* and Babu *Hem Chandra Mukerji*, for the appellant.

Maulvi *Haidar Mehdi*, for the respondent.

MUKERJI and BENNET, JJ. :—The only question before us is whether a part of the claim is not barred on the ground of *res judicata*. One Riyaz Husain was the owner of a certain property which he mortgaged with possession to the respondent, Syed Muhammad Husain. He died, leaving him surviving three daughters and one son. The son, Faiyaz Husain, sold the entire property

*Second Appeal No. 1204 of 1925, from a decree of A. G. P. Pullan, District Judge of Moradabad, dated the 14th of April, 1925, reversing a decree of Hanuman Prasad Verma, Subordinate Judge of Bijnor at Moradabad, dated the 9th of October, 1923.

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to the respondent, Muhammad Husain, alleging that he was the sole heir of his father. Out of the sum of Rs. 4,000, Rs. 2,400 went to pay off the mortgage and the balance was paid to the vendor. Tamiz-un-nissa, the appellant before us, a sister of Faiyaz Husain, brought a suit (No. 336 of 1920) in the court of the Munsif of Moradabad for recovery of her one-fifth share of the inheritance. Muhammad Husain, in that suit, in his defence, did not set up his usufructuary mortgage. The result was that the suit of Tamiz-un-nissa was decreed for possession. The respondent, Muhammad Husain, has now brought the suit, out of which this appeal has arisen, for recovery of possession over three-fifths share in Riyaz Husain's property, on the ground that he was entitled to possession of this share as a mortgagee. Faiyaz Husain's legitimate share in his father's property was two-fifths. The plaintiff has, evidently, kept this two-fifths as his property on the ground that his vendor was the owner of this share.

In the court of first instance Tamiz-un-nissa pleaded that the suit was barred on two grounds, namely, *res judicata* and estoppel. This defence found favour in the court of first instance and the whole suit was dismissed. On appeal by the plaintiff, the learned District Judge set aside the decree of the court of first instance and decreed the entire suit. He was of opinion that the earlier suit did not operate as *res judicata*, and that there was no question of estoppel.

In this Court it has been urged that so far at least as Tamiz-un-nissa is concerned the claim as regards her one-fifth share is barred as *res judicata*.

As a matter of history, it appears that the appeal came up before a Bench of this Court and was heard and decreed *ex parte*. That decree has been set aside at the instance of the respondents and the appeal has now come up before us for disposal.

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The only question that has been urged before us is that of *res judicata*. It appears to us that in the former suit (No. 336 of 1920) it was the duty of the respondent to urge that if he could not succeed on the ground of his purchase from Faiyaz Husain he was, at any rate, entitled to continue to be in possession as the mortgagee from the father, Riyaz Husain. This was a defence which, in our opinion, Muhammad Husain not only might but ought to have taken in the earlier suit.

The learned District Judge was of opinion that it was only because Tamiz-un-nissa's suit succeeded that a cause of action arose to Muhammad Husain to bring the second suit. We do not agree with this contention. Two defences, as we have already said, were open to the respondent and he ought to have taken both the defences.

The second ground on which the judgement of the lower appellate court proceeded was that the second suit brought by Muhammad Husain was not cognizable by the Munsif because its valuation was more than Rs. 1,000. This is perfectly true, but so far as Tamiz-un-nissa was concerned her suit was rightly brought in the court of the Munsif of Moradabad. The three sisters did not claim one under another, and if there was any claim by the other sisters they were all independent claims. It has been discovered now that, as a matter of fact, only one suit was brought, and that by Tamiz-un-nissa. The revenue court removed the name of the respondent, from the record, as a mortgagee. The plaintiff may have a cause of action against the other sisters of Tamiz-un-nissa, but, certainly so far as Tamiz-un-nissa herself was concerned, there was no valid ground on which Muhammad Husain could bring his suit against her in the court of the Subordinate Judge of Moradabad. In our opinion the claim as against Tamiz-un-nissa was barred by the principle of *res judicata*.

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We are not satisfied that there was any valid reason for dismissing the entire suit of the respondent. His learned counsel tells us that he confined his claim to two-fifths share only when he appealed to the lower appellate court. Out of this two-fifths share, the claim to one-fifth share fails as against Tamiz-un-nissa. There will, therefore, be a decree as against the other respondents for one-fifth share only.

The result is that we allow the appeal in part and dismiss the plaintiff respondent's suit as against Tamiz-un-nissa in respect of one-fifth share in the entire property of Riyaz Husain. We dismiss the claim as regards a similar share on the ground that it has been withdrawn by the plaintiff. We decree the plaintiff's suit with respect to the remaining one-fifth share against the defendants other than Musammat Tamiz-un-nissa and Muhammad Husain. The appellant will have her costs in all courts.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Kendall.

RAM SARUP (DEFENDANT) *v.* HARDEO PRASAD (PLAINTIFF).* 1927 *July*, 5.

Act No. XXVI of 1881 (*Negotiable Instruments Act*), *sections* 9 *and* 59—*Suit by endorsee against drawer of a cheque*—"*Holder in due course*".

A cheque is payable on demand and the amount becomes payable when the cheque is presented for payment to the drawee.

Where the plaintiff, on the 28th of September, took a cheque which had been drawn on the 5th of June, in good faith, for consideration, without notice of its having been dishonoured, and without having any reason to believe that there was

*Civil Revision No. 67 of 1927.