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IMDADUL
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v.
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Mahomedan law in spite of there being some conflict between the principles of that law and the wording of section 16 of the Insolvency Act. In the case before us there is no conflict between the Mahomedan law and the provisions of any enactment and consequently there is all the more reason to apply the Mahomedan law to the case.

*Nanavutty
and Ziaul
Hasan,
J.J.*

We therefore decree the appeal with costs and setting aside the decree of the learned District Judge restore that of the trial court.

Appeal allowed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava,
Chief Judge and Mr. Justice H. G. Smith*

1937
January, 15

MUSAMMAT RAJANA, (PLAINTIFF-APPELLANT) *v.* MUSAHEB
ALI (DEFENDANT-RESPONDENT)*

Estoppel between mortgagor and mortgagee—Mortgage of plaintiff's share by her mother during plaintiff's minority—Suit for possession by plaintiff on ground that mortgage not binding on her—Defendant, if estopped from questioning plaintiff's title—Oudh Court's Act (IV of 1925), section 12(2)—Third appeal—Point not raised before Judge whose decree is appealed against, if can be allowed to be raised in third appeal.

The rule of estoppel between the mortgagor and the mortgagee cannot be invoked in a case where the suit is not based on the mortgage, but is one in repudiation of the mortgage. Accordingly in a suit for possession on the ground that the mortgage of the property in suit made by the plaintiff's mother during the plaintiff's minority is not binding on her, the defendants are not estopped from disputing the title of the plaintiff by reason of their having obtained the deed of mortgage from her mother on the footing of the plaintiff's being the owner of the property, inasmuch as the suit is undoubtedly one for ejectment of the defendants by evidence of the mortgage.

*Section 12(2), Oudh Courts Act Appeal No. 1 of 1935, against the decree of the Hon'ble Mr. Justice E. M. Nanavutty, Judge of the Chief Court of Oudh, Lucknow, dated the 21st of February, 1935, upholding the decree of Babu Bhagwat Prasad, Civil Judge of Mohanlalganj at Lucknow, dated the 31st of July, 1933.

In an appeal under section 12(2) Oudh Court's Act, an appellant is not entitled to be heard on points which he has not raised before the Judge against whose decree he is appealing. *Ramzani v. Bansidhar Chaudhri* (1), referred to.

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Messrs. *M. Wasim* and *Ali Hasan*, for the appellant.

Mr. *D. K. Seth*, for the respondent.

SRIVASTAVA, C.J., and SMITH, J.:—These are two appeals against the judgment of our learned brother Justice NANAVUTTY passed in two second appeals, Nos. 276 and 277, of 1935. These appeals arose out of two suits brought by Musammat Rajana, plaintiff for possession on the ground that the mortgages in respect of the property in suit made by her mother, Musammat Sundar, during her minority in favour of the defendants were not binding on her. The suits which gave rise to these appeals were instituted within three years of her attaining majority on 2nd August, 1928. In one of the mortgages questioned by the plaintiff it was stated by Musammat Sundar that she was the owner of 2 annas, and that her minor daughter, Musammat Rajana, owned the remaining 14 annas. The other mortgage in question also related to the entire 16 annas, but did not specify the shares of Musammat Sundar and of Musammat Rajana. The trial court held that Rs.720-12-0 out of the consideration for the first mentioned mortgage, and Rs.100-11-0 out of the consideration for the second mortgage, had been utilised for the benefit of the plaintiff. The trial court therefore decreed the plaintiff's suit for possession over the 14 annas share subject to the payment of the aforesaid sums of money to the defendants in the two suits. On appeal the learned Civil Judge held that Musammat Rajana was entitled only to an 8 annas share in the property. He therefore modified the decree, and ordered that the plaintiff was to get possession over an 8 annas share only, in place of the 14 annas share decreed by the trial court. When the cases came

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Srivastava,
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in second appeal before Justice NANAVUTTY, elaborate arguments seem to have been addressed to him about the defendants in the two suits being estopped from disputing the title of Musammat Rajana in respect of the 14 annas share as they had obtained deeds of mortgage from her mother on the footing of Musammat Rajana being the owner of a 14 annas share. Our learned brother disallowed the contention, holding that no question of estoppel arises in the case as the plaintiff's suits for possession were not based on the mortgages, but were suits in ejectment by avoidance of the mortgages in question. It was also argued before him that in any case the plaintiff had acquired title to the entire 14 annas by adverse possession. The learned Judge held that this plea also was untenable, and could not be entertained.

The first contention urged by Mr. Wasim on behalf of the plaintiff-appellant is that the plaintiff was in possession of the entire 14 annas share at the date of the mortgages in question and had therefore a possessory title to the property in suit. The argument proceeded that the plaintiff is entitled to a decree in the present suit on the basis of this possessory title against the defendants, who had no lawful title to the property. It is not seriously denied that no plea in this form was raised when the appeals were argued before our brother Justice NANAVUTTY. In fact we find that no such plea based on possessory title was raised either in the pleadings, or in either of the lower courts. It was recently held by this Bench in *Ramzani v. Bansidhar Chandhri* (1), that in an appeal under section 12(2) of the Oudh Courts Act an appellant is not entitled to be heard on points which he has not raised before the Judge against whose decree he is appealing. We are therefore of opinion that the plaintiff-appellant is not entitled to urge this new plea now for the first time in third appeal.

Next it was argued that as the plaintiff has been given a decree on payment of part of the consideration of the

(1) (1937) I.L.R., 13 Luck., 76.

mortgages in dispute, this is tantamount to a partial recognition of the mortgages in question, and the rule of estoppel between the mortgagor and the mortgagee should therefore apply to the present suit. In our opinion the argument is fallacious. The suit is undoubtedly one for ejectment of the defendants by avoidance of the mortgages. The plaintiff has not been required to pay any portion of the consideration of the mortgages as such, but she has been ordered to pay certain sums on the principle that a minor is bound to refund any amount which has been utilised for his or her benefit. The correctness of the decision of Mr. Justice NANAVUTTY that the rule of estoppel invoked on behalf of the plaintiff cannot be invoked in a case where the suit is not based on the mortgage, but is one in repudiation of the mortgage, has not been questioned before us. We are therefore of opinion that he is right in holding that no question of estoppel arises. The result therefore is that the appeals fail, and are dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava,
Chief Judge and Mr. Justice H. G. Smith*

1937
January, 15

DALMIR KHAN (DEFENDANT-APPELLANT) *v.* SHAMSHER
KHAN AND ANOTHER (PLAINTIFFS-RESPONDENTS)

Pre-emption—Village community—Lessee, if member of village community—Sale of leasehold right—Co-sharer in the same right, if can pre-empt—Pleader's fee, taxation of—Fees to be taxed on value for purposes of jurisdiction and not value for court-fee.

A village community under the Oudh Laws Act includes heritable lessees in village lands. Where, therefore, a person who possesses a share in a heritable and transferable lessees interest in certain lands sells his share to a stranger, a co-sharer in the leasehold right who is a member of the same

*Second Civil Appeal No. 46 of 1935, against the decree of S. Abid Raza, Civil Judge of Partabgarh, dated the 14th of November, 1934, confirming the decree of Babu Kali Charan Agarwala, Munsif of Partabgarh, dated the 6th of August, 1934.

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*Srivastava,
C. J. and
Smith, J.*