

LETTERS PATENT APPEAL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice
LeRossignol.

1925

Nov. 23.

ROSHAN (DEFENDANT) Appellant

versus

NIGAHIA (PLAINTIFF)
AND OTHERS (DEFENDANTS) } Respondents.

Letters Patent Appeal No. 17 of 1925.

Res judicata.—*Mortgage—Suit for redemption—one of the defendants in possession, not pleading that he is purchaser of the equity of redemption of part of the mortgaged property and subsequently suing for possession of it as owner.*

In a suit by *R.* for redemption of a mortgage, *N.* pleaded merely that on the basis of the mortgage certain money was due to him. Subsequently *N.* brought a suit against *R.* for possession of a part of the mortgaged property, on the ground that the equity of redemption of that part had been sold to him before the sale to *R.*

Held, that *N.* being a defendant in possession at the time of *R.*'s suit, was bound to resist it on all grounds which it was possible for him on his knowledge at that time to bring forward, and his subsequent suit must therefore be dismissed as barred by the rule of *res judicata*.

Srimut Rajah v. Katama Natchiar (1), followed.

Appeal under clause 10 of the Letters Patent from the judgment of Mr. Justice Harrison, dated the 19th December 1924.

MUHAMMAD TUFAIL, for Appellant.

DEV RAJ SAWHNEY, for Respondents.

The judgment of the Court was delivered by—

LEROSSIGNOL J.—Nigahia, Roshan and Jani were co-sharers in a piece of land but Jani's share was already mortgaged to Nigahia when Jani contracted to sell his equity of redemption to both Roshan and

Nigahia for Rs. 700. The transaction, however, fell through and subsequently Jani sold the equity of redemption of his share to Roshan alone. Roshan then sued Nigahia and Jani for redemption and obtained a decree on payment of Rs. 300. In that suit Nigahia did not plead that one-half of Jani's share had been sold to him, but contended merely on the footing of the mortgage that over Rs. 500 were due to him. Then Nigahia brought the suit out of which the present appeal arises for possession of one-half of Jani's share on the ground that it had been sold to him.

The District Court and the trial Court dismissed the suit, holding that the matter was *res judicata*, but the learned Judge of the Single Bench has held that the matter is not *res judicata*, inasmuch as "Nigahia could not have pleaded in the redemption suit that he hoped in time to assert his rights and become owner by purchase of one-half of Jani's share." From that judgment the present Letters Patent appeal has been preferred, and we consider that it must succeed.

The present suit is not a suit for specific performance of the alleged contract of sale. The facts now alleged by Nigahia are the same facts as existed at the time of the redemption suit, and what he now pleads is a completed sale. At the time of the redemption suit he was in possession of the land, and had he alleged and proved in that suit what he must prove in this suit in order to succeed, Roshan's suit for possession of one-half of Jani's share would have failed. The rule laid down in *Srimut Rajah v. Katama Natchiar* (1) is that a defendant being in possession is bound to resist a claim on all grounds

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that it is possible for him on his knowledge at the time to bring forward. Now at the time of Roshan's suit Nigahia on his present pleas was in possession and the owner of one-half of Jani's share. He did not plead that in respect of that half share his mortgage charge had merged in a sale. On the contrary, he accepted the contest on the footing of the mortgage and claimed merely that before ouster he was entitled to Rs. 516, which included a sum representing the improvements which he alleged he had effected in the land.

For the foregoing reasons we accept the appeal and dismiss the suit with costs throughout.

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice Zafar Ali and Mr. Justice Addison.

RUGH NATH DASS-RAM SARUP (DEFENDANTS)

Appellants

versus

MESSRS. SULZER BRUDERER AND Co.

(PLAINTIFFS) Respondents.

Civil Appeal No. 2586 of 1922.

Arbitration—Suit on Award under an indent—where the completion of the contract is denied—Trial Court deciding case on some issues only, not dealing with defendants' objection—Practice of trying cases piecemeal, deprecated.

In a suit based on the award of an umpire or in the alternative on an alleged contract for the sale of goods, the Court ordered the parties to produce evidence on the first three issues which dealt solely with the validity of, and the amount payable under, the award, and notwithstanding the defendants' objection thereupon proceeded to decree the whole suit. No evidence was admitted on issues 4 and 5, namely,

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Dec. 2.