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"the next day afterwards on which the Court was open" was just as good a payment as would have been a payment on 10th April had the Court been open on that day.

Therefore I think the orders of the Courts below were wrong, that they must be reversed and the original Court directed to dispose of the application according to law. Costs to be costs in the Darkhast.

CHANDAVARKAR, J.:—I concur.

Order reversed.

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APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

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IRAWA KOM LAXMANA MUGALI AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SATYAPPA BIN SHIDAPPA MUGALI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 11—Res judicata—Decision of first suit on merits but its dismissal for not paying the deficient Court-fees—Second suit for trial on same merits.

A previous suit between the parties failed on the ground that the claim was undervalued and the plaintiff when called upon to pay the deficient Court-fees omitted to do so. There were issues on merits also decided. In a subsequent suit for trial on the same merits, the decision in the first suit was pleaded as *res judicata*.

Held, that the rejection of the suit on the ground of undervaluation at any stage of it did not make it *res judicata* for the purposes of a subsequent suit on the same cause of action or litigating the same title.

Held, further, that the dismissal of the suit on the ground of undervaluation having been sufficient by itself, the findings on the issues on the merits were not necessary for the decision of the suit and could not have the force of *res judicata*.

APPEAL from order passed by V. V. Phadke, First Class Subordinate Judge of Belgaum, reversing the decree passed by, and remanding the suit to, C. G. Kharkar, Subordinate Judge at Gokak.

* Appeal No. 13 of 1910 from order.

Suit for possession of property.

The property in dispute belonged to one Laxmana, who died leaving him surviving his widow Irawa (defendant No. 1), a sister Shidawa (plaintiff No. 2) and a distant relative Satyappa (plaintiff No. 1).

Irawa, after her husband's death, sold a portion of his property to her father Satyappa (defendant No. 2); and subsequently adopted her brother Shidappa (defendant No. 3).

Satyappa alone first brought a suit in 1904 against the defendants to recover possession of the property, alleging an oral will made in his favour by Laxmana. The Court found on the merits that the plaintiff was not the next reversionary heir of Laxmana and could not sue. It also found that the plaint was engrossed on a deficient stamp-paper. The plaintiff was asked to satisfy the deficiency, and failed to do so, whereupon the suit was rejected.

In 1908, Satyappa and Shidawa brought another suit against the same defendants for the same relief.

The defendants contended *inter alia* that the suit was barred by *res judicata*.

The Subordinate Judge upheld the contention on the following grounds:—

Thus the matter "directly and substantially" in issue in this suit had also been "directly and substantially" in issue in the suit in Chikodi Subordinate Judge's Court. It is not necessary to constitute a matter "directly and substantially in issue" that a distinct issue should have been raised upon it. It is sufficient if the matter was in issue in substance (12 B. L. R. 304). It also appears from the judgment of Chikodi Subordinate Judge's Court (exhibit 30) that the matter in issue has been heard and finally decided. It is unnecessary that the whole matter in issue should have been finally heard and decided. The principle of *res judicata* applies both to the trial of suits and to the trial of issues (I. L. R. 7 All. 615 and I. L. R. 28 All. 727). The learned pleader for the plaintiff admits that the finding of Chikodi Subordinate Judge on issue No. 3 in his judgment is a finding on the merits but contends that the finding has not been properly arrived at after going fully into evidence and arguments and that the Subordinate Judge went into the matter superficially as he wanted to dismiss the suit for want of proper Court-

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fee, that he should have rejected the suit under O. VII, r. 11 of Civil Procedure Code and therefore the finding on the 3rd issue was improper and in fact an *obiter dictum*, and in this respect relies on the ruling in *Ahmedbhoy Habibhoy* v. *Sir Dinshaw M. Petit, Bart.*, 11 Bom. L. R. 366. I do not think the ruling applies here. The finding of the Subordinate Judge of Chikodi on the 3rd issue cannot be called an *obiter dictum* but would be binding as *res judicata* notwithstanding the fact that the suit was disposed of also on other grounds (I. L. R. 1 All. 480 and I. L. R. 2 All. 842). Moreover the principle of *res judicata* does not depend for its application upon the question whether the decision which is used as a bar was a right decision or a wrong decision and it is immaterial whether the decree set up as a bar was rightly or wrongly passed (I. L. R. 24 All. 138 and 23 All. 459).

This decree was reversed on appeal by the lower appellate Court, who remanded the suit for trial on its merits.

The defendants appealed to the High Court.

C. A. Rele, for the appellants.

S. R. Bakhale, for the respondents.

CHANDAVARKAR, J.:— There was no doubt a decision on the merits in the previous suit, which is relied upon by the appellant as barring the present suit as *res judicata*; and the title of reversionary heir, which was claimed there as it is claimed here by the 1st respondent, was negatived by the finding of the Subordinate Judge, who tried that previous suit. But the Subordinate Judge also gave another reason for dismissing that suit of the respondent. The reason was, that the plaint had been undervalued and that the plaintiff (the 1st respondent in this second appeal) had refused to pay the additional Court-fee. If this last reason was sufficient by itself for the dismissal of the previous suit, the findings on the issues on the merits were not necessary for the decision of the suit and cannot have the force of *res judicata*: *Ghela Ichharam* v. *Sankalchand Jetha*[1].

The question, then, is whether the ground of undervaluation was sufficient by itself for the dismissal of the previous suit. Section 54 of the Code of Civil Procedure (Act XIV of 1882), which was in force then, required that the "plaint shall be

(1) (1893) 18 Bom. 597.

rejected," if undervalued. Instead of rejecting the plaint before registration, the Subordinate Judge dismissed the suit after its registration and after trial. But after the suit had been registered, the Subordinate Judge had power to reject it at any subsequent stage on the ground of improper valuation. And, as was held by this Court in *Dullabh Jogi* v. *Narayan Lakhu*[1] whether a suit is rejected on that ground before registration or at any subsequent stage, the effect is the same "as if the plaint had been originally rejected". It was also held in that case that the rejection of a suit on the ground of undervaluation at any stage of it does not make it *res judicata* for the purposes of a subsequent suit on the same cause of action or litigating the same title, because, as was said there by Couch, C. J., "the former suit was not heard and determined, for it failed by reason only of an informality; and it would be contrary to all principles of justice that the parties should be held to be conclusively barred thereby."

For these reasons the order of remand appealed from must be confirmed with costs.

HEATON, J. :—I concur in the order and reasons for it but express no opinion on the question whether if the decision in the earlier suit were to be regarded as a decision on the merits it would operate as a bar under section 11 of the Code of Civil Procedure.

Order confirmed.

R. R.

(1) (1867) 4 B. H. C. A. C. J. 110.