

## MISCELLANEOUS CIVIL.

1902  
May 6.

*Before Mr. Justice Knox and Mr. Justice Blair.*

SUKHDEO PRASAD (PLAINTIFF) v. LACHMAN SINGH AND OTHERS  
(DEFENDANTS)\*

*Civil Procedure Code, section 53—Suit on a mortgage for sale or “any other relief to which the plaintiff might be entitled”—Subsequent prayer for money decree relinquishing claim for sale.*

The plaintiff, a mortgagee, came into Court asking for a decree for sale on his mortgage, or “any other relief to which the plaintiff might be entitled.” The mortgage sued upon contained the usual covenant for payment, in addition to the further covenant that in default of payment proceedings might be taken against the mortgaged property. *Held* that there was nothing to prevent such plaintiff in the course of the suit relinquishing his claim for sale of the mortgaged property, and asking merely for a simple money decree. Such an amendment of the pleadings did not amount to a conversion of the suit into a suit of another and inconsistent character.

THIS was a reference by the local Government, based upon an application under section 17 of the Kumaun Rules for revision of an appellate judgment and decree of the Commissioner of Kumaun.

The facts of the case sufficiently appear from the order of the Court.

Pandit *Moti Lal Nehru*, for the applicant.

Babu *Satya Chandar Mukerji*, for the opposite parties.

KNOX and BLAIR, JJ.—In this case the final decree of the Commissioner has been referred to this Court for report and opinion under rule 17 of the rules for the administration of justice in the Kumaun district. The suit in which the decree and judgment were passed was an ordinary suit brought by a mortgagee, asking for the sale of property mortgaged under section 88 of the Transfer of Property Act. In his prayer for relief the plaintiff, in addition to the prayer for sale, added a prayer that “any other relief which the plaintiff may be entitled to may be granted, because the mortgaged property is at present under kham management.” The suit was heard out, and had proceeded up to judgment and decree, when the plaintiff by a fresh application withdrew his prayer for sale of the mortgaged property and asked for a simple money decree. The

Court of first instance granted a money decree. The Commissioner, however, in appeal set aside the decree; the only reason given in his judgment being that if the plaintiff had originally wanted a money decree he should have sued for it at first. It is admitted that the mortgage deed contains the usual covenant for payment, in addition to the further covenant that in default of payment proceedings will be taken against the mortgaged property.

We do not see on what grounds the prayer for a simple money decree can be refused. When the mortgage covenants were entered into both parties contemplated the possibility of a simple money decree; indeed the decree for sale pre-supposes and gives specific time for payment of the money, and it is only in default of payment that the sale can be resorted to.

One objection was taken by the learned vakil for the opposite party, which was to the effect that if we granted a simple money decree we should be practically allowing the plaintiff to alter his suit for sale into a suit of another and inconsistent character. We fail to follow this argument. Looking to the words in which the relief was couched, we are satisfied that the plaintiff all along asked for a simple money decree, if for any reason the decree against the property mortgaged were to prove ineffectual. No provision has been pointed out to us in the Transfer of Property Act, nor do we know of any, which forbids a simple money decree being granted under circumstances like these. Since hearing the arguments we have been furnished with an unreported case of this Court, Letters Patent Appeal No. 35 of 1901, *Lala Bishun Sarup v. Mangal Sen*, decided on the 15th February 1902,\*

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\* The judgment in this case was as below :—

BANERJI and AIKMAN, JJ.—This is an appeal under section 10 of the Letters Patent. The suit was brought for sale upon a mortgage. It having been discovered that there was a prior mortgage upon the property, the plaintiff withdrew his claim against the property and asked for a simple money decree. It was contended in the appeal to this Court that the suit was of the nature cognizable in a Court of Small Causes, and therefore no second appeal lay. This contention was repelled by the learned Judge of this Court who heard the appeal, and has been repeated in the appeal before us. We are of opinion that the objection was rightly overruled. The jurisdiction of the Court depends upon the nature of the suit as brought and not upon the character

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and we find on looking into that case that the view which we now take is shared by two other Judges of this Court.

The decree of the Commissioner of Kumaun should be set aside, and that of the Court of first instance restored with costs in all Courts. Let this be the answer returned to the reference made to us.

which it ultimately assumes. The suit as brought was clearly one which a Court of Small Causes could not entertain. Therefore a second appeal to this Court did lie. The mortgage upon which the suit was based was made by one Nand Lal, the uncle of the defendant appellant before us, and it was alleged by the plaintiff that Nand Lal and the appellant formed a joint Hindu family, of which Nand Lal was the manager. This allegation was denied by the appellant. The Additional Subordinate Judge of Saharanpur, from whose decree the second appeal to this Court was preferred, did not decide the issue whether Nand Lal and the defendant were or were not members of a joint Hindu family. He was of opinion that as the defendant was the legal representative of Nand Lal, the plaintiff was entitled to a decree for the amount of his claim, and to recover it from the property, if any, left by Nand Lal, deceased. In the judgment now under appeal our learned brother says:—"It has been found that the amount borrowed was borrowed by the deceased uncle as *karta* of the joint Hindu family, consisting of himself and his nephew." This, as we have shown above, is not correct. Our learned colleague goes on to say that, under the circumstances stated by him, the law of agency prevailed. This view is opposed to the ruling in *Muhammad Askari v. Radhe Ram Singh*, (1) in which it was held that the manager of a Hindu family is not in the position of an ordinary agent as representing the other members of the family. For the determination of the appeal preferred to this Court it was, in our opinion, necessary to have findings on the issues—(1) Whether Nand Lal and the defendant formed a joint Hindu family, and whether Nand Lal was the managing member of that family. (2) Whether the debt in question was incurred for the purposes of the joint Hindu family. We refer the above issues to the Court of first appeal under section 566 of the Code of Civil Procedure. The Court will try the above issues, taking such additional evidence as may be necessary. On receipt of the findings ten days will be allowed for objections.

(1) (1900) I. L. R., 22 All., 307.