APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh, M.A., K.C.

1917
March, 2.

MUHAMMAD ZAKARIYA (DEFENDANT) *v.* MUHAMMAD HAFIZ AND OTHERS (PLAINTIFFS.)*

Civil Procedure Code (1908), *order II, rule* 2 : *order XXXIV, rules* 2 *and* 4—*Mortgage—Suit for sale—Construction of document—Possibility of separate suits for interest and principal.*

A mortgage bond executed on the 14th of September, 1910, provided that the mortgage debt should be repayable after the expiry of three years. It also provided that, if interest remained unpaid for more than a specified time, the mortgagee might, without waiting for the expiry of the term of the mortgage, sue for either the unpaid interest or the whole amount of principal and interest then due. It further provided that, if the mortgage debt was not paid at due date, the whole amount, principal and interest, might be recovered by suit. After the expiry of the term of the bond, the mortgagee sued to recover arrears of interest only and obtained a decree, the defendant not entering an appearance. In that suit the plaintiff did not allege that he had a right to sue for the principal separately at a subsequent date.

Held on a construction of the bond in suit, and with reference to the former pleadings, that the subsequent suit was barred by order II, rule 2, of the Code of Civil Procedure. *Read* v. *Brown* (1) and *Murli* v. *Bhola Ram* (2) referred to. *Yashvant Narayan Kamat* v. *Vithal Divakar Parulekar* (3), and *Rambhaj* v. *Devia* (4) distinguished.

Per PIGGOTT, J.—Rules 2 and 4 of order XXXIV of the Code of Civil Procedure do not contemplate that there should be more than one suit for sale on a mortgage. Whether or not it might be possible so to draft a mortgage as to evade this statutory obligation, this had not been done in the present case.

THE facts of this case were as follows :—

A mortgage was executed on the 14th of September, 1910, for Rs. 14,000, carrying interest at the rate of 8 annas per cent. per mensem. The time stipulated for repayment was three years. Some of the terms of the mortgage-deed were as follows :—Clause (2).—"That we shall continue to pay interest on the amount of this bond to the creditor monthly. If, for any reason, we be not able to pay interest for 6 months, the said creditor shall be competent to realize by suit, without waiting for the expiry of the term either the unpaid interest due to him or the principal and interest both, with costs, from us, the property hypothecated and other property movable and immovable and the persons of

* First Appeal No. 276 of 1915, from a decree of Abdul Ali, Subordinate Judge of Agra, dated the 16th of March, 1915.

(1) (1888) 22 Q. B. D., 128.
(2) (1873) I. L. R., 16 All., 165.
(3) (1896) I. L. R., 21 Bom., 267.
(4) Punj. Rec., 1881, p. 296.

us." Clause (3).—"That if with the consent of the creditor the amount of this bond shall remain unpaid by us even after the expiry of the term of three years, then, after the expiry of the term also, the same rate and mode of interest *(sharah wa tariqa sud)* shall hold good." Clause (7).—"If we fail to pay the amount of this bond with interest within the stipulated period of three years the said creditor shall in default be entitled to realize by suit the whole of principal and interest with other incidental expenses due to him and costs." The heirs of the original mortgagee filed, on the 18th of April, 1914, a suit on the mortgage. In the plaint they set out that the amount then due was Rs. 14,000 on account of principal and Rs. 3,010 on account of interest, but that it was in respect of the latter sum alone that the suit was brought, "according to the terms of the bond." The cause of action was alleged to have arisen on the 14th of March, 1911, the date of expiry of 6 months from the date of the mortgage. It was further stated in the plaint that the plaintiffs were entitled to realize only the amount of interest without instituting a suit in respect of the principal, and that they were entitled to bring the property to sale subject to the principal and the amount of interest thereafter remaining due under the bond. The relief claimed was that the amount due (namely, Rs. 3,010) might be awarded with interest thereon, *pendente lite* and future, and that in default of payment the mortgaged property might be sold by auction. The suit was not contested, and it was decreed *ex parte* on the 11th of August, 1914. The decretal amount was deposited in court and consequently there was no sale. Thereafter, on the 23rd of January, 1915, the same plaintiffs filed another suit upon the same mortgage, for realization of Rs. 14,000 principal and Rs. 429 the remaining amount of interest. It was mentioned in the plaint that the plaintiffs had, according to the provisions contained in the document, obtained a separate decree for Rs. 3,010 on account of interest. One of the pleas raised in defence was that the suit was barred by the provisions of order II, rule 2, of the Code of Civil Procedure. The court overruled this plea and gave the plaintiffs a decree under order XXXIV, rule 4, to the extent of Rs. 14,000 together with interest thereon, *pendente lite* and future, and costs. The defendant appealed to the High Court.

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The Hon'ble Sir *Sundar Lal* (with him The Hon'ble Munshi *Narayan Prasad Ashthana*), for the appellant :—

The suit is barred under the provisions of order II, rule 2. According to the terms of the mortgage-deed the principal as well as the interest had become recoverable by suit at the time when the first suit was instituted; in other words, the cause of action for a suit to recover the principal had already matured when the first suit, for the interest alone, was filed. Under clause (2) of the mortgage-deed the cause of action for recovery of an arrear of interest and of the principal was one and the same. The plaintiffs had a clear option of realizing the principal as well as the interest when they first sued; they set out in the plaint that Rs. 14,000 principal and Rs. 3,010 interest had become due and yet they deliberately omitted to sue for the principal. A second suit, for the principal, cannot be maintained. Reference was made to the following cases :—*Brij Lal* v. *Ram Rattan* (1), *Chaudhri Kudan Mal* v. *Sardar Allahdad Khan* (2), *Ganga Ram* v. *Abdul Rahman* (3), *Abdul Hakim* v. *Karan Singh* (4) and *Gaya Din* v. *Jhumman Lal* (5).

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Pandit *Shiam Krishna Dar*), for the respondents :—

Reading the terms of the mortgage deed it is clear that two distinct rights accrued to the plaintiffs, one for recovery of the interest in arrears and the other for recovery of the principal. The obligation to pay interest month by month is distinct and separate from the obligation to pay the principal and interest at the end of the stipulated period of three years The cause of action for recovery of interest as it fell due is not the same as that for realization of the principal. The remedies sought in the two suits did not arise out of one and the the same obligation, but related to the infraction of different rights. Reliance was placed on the case of *Ram Bhaj* v. *Devia* (6) the facts of which, it was submitted, were on all fours with those of the present case. It was entirely optional for the plaintiffs to sue either for the interest which had accrued due or for the principal as well ;

(1) (1912) 17 Indian Cases, 581.
(2) Punj. Rec., 1910, p. 55 ; 5 Indian Cases, 821.
(3) Punj. Rec., 1907, p. 107.
(4) (1915) I. L. R., 37 All., 646.
(5) (1915) I. L. R., 37 All., 400.
(6) Punj. Rec., 1881, p. 296.

under the terms of the deed they were not bound to sue for the whole. The breach of the covenant to pay interest monthly gave rise to a cause of action which could be sued upon without suing for the principal; virtually there were two separate contracts contained in the same instrument. The following cases are in plaintiff's favour; *Yashvant Narayan Kamat* v. *Vithal Divakar Parulekar* (1), *Badi Bibi Sahibal* v. *Sami Pillai* (2). The principle underlying the rule formulated in order II, rule 2, was discussed in the cases of *Anderson, Wright and Co.* v. *Kalagarla Surjinarain* (3) and *Mandal and Co.* v. *Fazul Ellahie* (4). It was pointed out that the contracting parties themselves determined, by the form of their convention, whether the rule was applicable to them, and it was laid down that no wider construction should be given to order II, rule 2, than it would reasonably bear, so as to do as little injustice as possible in individual cases. The meaning of the expression "cause of action" was explained in the cases, of *Read* v. *Brown* (5), *Cooke* v. *Gill* (6), *Murti* v. *Bhola Ram* (7) and *Salima Bibi* v. *Sheikh Muhammad* (8). Secondly, the *ex parte* decree in the first suit operates as *res judicata* against the respondents contesting the right of the plaintiffs under the terms of the mortgage deed to sue separately for the interest and for the principal. In their plaint in the suit of 1914, the plaintiffs expressly put forward that interpretation of the terms of the deed and made it clear that they were exercising their option in a particular manner. If objection had then been taken by the defendants, the plaintiffs could have amended or withdrawn their suit. It was open to the defendants at that time to raise this issue distinctly. They must by implication be deemed to have accepted the interpretation put upon the contract by the plaintiffs, and they cannot question it now.

The Hon'ble Sir *Sundar Lal*, in reply :—

The expression "cause of action" in order II, rule 2, and in other parts of the Code of Civil Procedure, bears the wider and more general significance which the case of *Read* v. *Brown* (5)

(1) (1895) I. L. R., 21 Bom., 267.
(2) (1892) I. L. R., 18 Mad., 257.
(3) (1885) I. L. R., 12 Calc., 339 (345).
(4) (1914) I. L. R., 41 Calc., 825.
(5) (1888) L. R., 22 Q. B. D., 128.
(6) (1873) L. R., 8 C. P., 107.
(7) (1893) I. L. R., 16 All., 165.
(8) (1895) I. L. R., 18 All., 131.

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has interpreted it to have. This was pointed out in the cases in I. L. R., 18 All., 131 and 28 P. R., 107, cited above. So, there was only one cause of action, at the date of the former suit, for the principal and the interest, both of which had accrued due. The plaintiffs had, at that time, become entitled to recover the whole under one and the same obligation, namely, that embodied in the general clause (7), to pay the principal and interest at the end of three years. Clause (2) of the deed was only a special modification, providing a mode for the regular payment of interest, of the general clause (7), and was limited in its application only to the period prior to the expiry of the fixed term of three years. After the term expired, the plaintiffs had but one cause of action for the principal and the interest. No question of *res judicata* arises. There was no suggestion in the plaint of the former suit of any subsequent suit. There was no prayer for leave to bring a separate suit: the plaintiffs did not ask for sale subject to any charge for the principal. The suit as brought was for sale for Rs. 3,010. The appellant had no defence to the suit as framed and did not make any. If the plaintiffs chose to sue for a smaller sum than they were entitled to, it was no business of the defendant to raise any objection.

WALSH, J.—I have come to the conclusion that this appeal must be allowed. The suit is one to recover the principal due, the interest being abandoned under circumstances which I will mention in a moment, and for the sale of the property hypothecated, under a bond dated the 14th of September, 1910. The plaintiffs in April, 1914, had brought a suit against the defendant for interest for three years and seven months due from the date of the bond, namely, the 14th of September, 1910, to the 14th of April, 1914, the date of the suit. That action had been brought and determined after the expiration of the period of three years from the date of the bond, three years being the period stipulated for the repayment of the money; and the question which arises in the present suit, raised by the defendant and decided against him by the learned Subordinate Judge, is whether, having regard to the provisions of order II, rule 2, of the Code of Civil Procedure, and of this particular bond, the plaintiffs can, after having sued for the interest in the way which I have mentioned, none the

less institute a fresh and a subsequent suit for the principal. The question really turns on the view we take of the meaning of order II, rule 2, and of the provisions of this particular bond. The preliminary clause of the bond recites the advance of the money and the promise of the obligor to repay within three years at a stipulated rate of interest. Clause 7, which is in common form, provides that after the expiration of three years the creditor shall be entitled to sue for the whole amount of principal and interest, if failure is made to pay the amount of the bond with interest within that time. If that clause providing for repayment of principal and interest and for the right of the creditor upon default stood alone, there would be, in my opinion, no doubt at all that claims for principal and interest would be claims which the plaintiffs were entitled to make within the meaning of order II, rule 1. The provision of that rule is that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." The meaning of the expression "cause of action" has long been judicially settled and finally pronounced in the courts in England in *Read* v. *Brown* (1) and adopted by a Full Bench of this Court in *Murti* v. *Bhola Ram* (2), a decision which is binding upon us, to mean every fact necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. This definition obviously involves in it the addition made by Lord Justice FRY in *Read* v. *Brown* (1) "every thing which, if not proved, gives the defendant an immediate right to judgement." Applying that definition to this case, the plaintiffs, in order to recover the interest, would have to prove the execution of the bond, the advance, although of course that would be involved in the bond, unless there was some circumstance calling upon them to do it, the terms of the bond, and the right to recover interest under clause 7, namely, the non-payment of the principal. They would have to prove precisely the same facts if they were suing for the principal. And I feel constrained to hold that if clause 7 stood alone, the application of order II, rule 2, would compel the plaintiffs to include both principal and interest in one suit, being the whole of the claim which they

(1) (1888) 22 Q. B. D., 128. (2) (1893) I. L. R., 16 All., 165.

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were entitled to make in respect of the cause of action. It is quite true that one or two authorities which are entitled to great respect have been relied upon by Dr. *Sapru*, for the respondents, which throw doubt upon the correctness of this view. It is sufficient to say that in each of these cases, namely, *Yashvant Narayan Kamat* v. *Vithal Divakar Parulekar* (1) and *Rambhaj* v. *Devia* (2) the circumstances of the contract were not the same as that before us, and the *ratio decidendi* proceeds upon a consideration of English authorities which are not really relevant to this point, inasmuch as the provision we are now considering does not occur, so far as I am aware, in any express provision of English law. It should be observed that no injustice is contemplated or really can occur by the application of this provision, because any result of that kind is carefully guarded against by the further provision which enables the court in a proper case upon the application of the plaintiff to allow him to pursue one or other of his claims and to suspend the other. We have, however, to give effect to all the provisions of this document, and in interpreting it as a whole, to examine each independent provision relied upon in support of the plaintiff's contention. It is argued on behalf of the respondents that, even if order II, rule 2, has the effect which we think it has, clause 2 of the bond enables them to do what they did here. I do not agree. I think the meaning of clause 2 is quite clear. It gave the creditor an additional right inconsistent with that contained in clause 7, and was therefore a modification of that clause. I think that it relates only to the period between the expiration of six months from the date of the bond and the expiration of three years from the date of the bond. And all that clause 2 does is to confer upon the creditor an option to do two things during that period which otherwise he could not do. One is to sue for the principal within three years; secondly, to sue for interest without suing for the principal. I think this is the only possible construction which can be read consistently with clause 7. The respondent's contention makes clause 7 superfluous, and this is the error we think the learned Judge below, who agreed with the respondent's view, fell into. Clause

(1) (1896) I. L. R., 21 Bom., 267. (2) Punj. Rec., 1881, p. 296.

7 is the basis of the contract, clause 2 provides for a special contingency and confers special rights, clause 3 merely as the result of clause 2 defines the rights given by clause 7 and provides that the rate of interest and mode of payment shall be the same and are not to be affected by the provisions of clause 2.

The result may seem somewhat startling. The defendant out of a debt of Rs. 14,000 with considerable accumulation of interest has repaid only Rs. 3,000, and the learned Judge, being in a difficulty with regard to the authorities, not unnaturally took a view which he thought was in accordance with the justice of the case. But if the law is clear, we have no right to consider the consequences, and it is to be borne in mind, as already observed, that the plaintiffs might have protected themselves against such consequences by an ordinary application such as that indicated in the last clause of order II.

A further contention has been raised on behalf of the respondent which creates a certain amount of difficulty. I am not prepared to say that if the plaintiffs had clearly put forward their interpretation of the document as a necessary part of the claim which they were making in the previous suit, and their explanation of the form of the claim, in such a way that the defendant ought to have, but did not contest it, it might not be held that the parties were bound by that view of their own contract whatever the general law might otherwise be. But when the proceedings in the first suit are carefully examined, it is clear that nothing of the kind really occurred when the plaintiffs were, so to speak, cutting down their claim to a claim for interest. In the plaint in the previous suit they said that Rs. 3,010 were due on account of interest, in respect of which only the claim was brought according to the terms of the bond. That was a correct statement of a claim for interest. In paragraph 5 of the plaint they stated that they were entitled to realize only the amount of interest due under this bond without instituting a suit in respect of the principal. That was a perfectly innocuous and accurate statement. In paragraph 6 they alleged that they were entitled to bring the property to sale subject to the principal and the remaining amount of interest due on the bond. Nowhere did they allege that they still had a right, or claimed to have a

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right, or intended to pursue such right, to sue for the principal at a subsequent date. And, inasmuch as the defendant did not appear and put in no written statement, it is impossible to hold that any issue as to the construction of the bond on this point was raised and determined in that suit, or that the plaintiffs compelled the defendant to plead to the point. Furthermore, the court rightly and carefully decided the plaintiff's suit in the proper form, that is to say, gave a decree for sale of the mortgaged property in respect of the amount claimed in the suit, but made no decree in the form claimed by the plaintiffs indirectly in paragraph 6 of the plaint; so that, even if it could be said that the plaintiffs raised the point in the former proceeding, the court left it entirely undecided. As a matter of fact the place and time to determine such a point is on a proper application by the plaintiff to abandon a part of his claim and to have it decided by the court before the suit is finally entertained.

Two further observations may be made. It is a remarkable circumstance that in view of the fact that the original suit for Rs. 3,010 was brought by these plaintiffs for interest only, they should in the suit now before us have expressly abandoned any claim for interest on conscientious grounds; secondly, it by no means follows from this decision, nor indeed does order II appear to provide, that the liability for the principal is extinguished, and it may be that any view of the justice of the case may be reconciled by a subsisting liability from the defendant to the plaintiff to pay interest so long as the principal is outstanding. As to this I express no opinion. The parties can, if so advised, raise that question in another suit.

The result is that I allow this appeal, set aside the decree of the court below and dismiss the plaintiffs' suit with costs here and in the court below.

PIGGOTT, J.—While concurring generally in the above judgement I desire to add a few remarks. In the suit of 1914, the plaintiffs asserted that they were entitled to bring the mortgaged property to sale "subject to the principal and the remaining amount of interest due under this bond." I am clearly of opinion that such a claim could not be sustained, in view of the provisions of rules 2 and 4 of order XXXIV of the Code of Civil

Procedure. The object of these rules seems to be that, in any suit for sale on a mortgage, an account should be taken, once and for all, of the amount due—"for principal and interest on the mortgage." Two successive suits for sale on one and the same mortgage should be an impossibility. I do not believe it to be possible for parties to draw up a contract of mortgage so drafted as to avoid these statutory obligations; but in any case they have not done so on the wording of the document in suit, or on the facts of this particular case. When the suit of 1914 was instituted there was no room for the contention that the entire mortgage-debt, both principal and interest, was not "due."

If, however, in the suit of 1914, the plaintiffs had in plain terms claimed the relief to which they said they were entitled, namely, a decree for the sale of the mortgaged property, subject to the principal debt due on the same bond and to any further interest that might accrue due under the same, it might with some force be contended that an obligation would thereby have been cast on the defendant mortgagor of resisting this claim. A defendant who deliberately elects to enter no defence against an improper claim, or one legally unsustainable, cannot complain if in a subsequent litigation he finds himself caught by the rule of *res judicata*.

I do not find any such rule to be applicable in the case. When we come to look at the plaint in the suit of 1914, we find that the plaintiffs carefully refrained from including this inadmissible relief, to which they said they were entitled, in the specification of the reliefs actually claimed. What they asked for was simply—"that the amount due may be awarded, with interest *pendente lite* and future interest; otherwise the property mortgaged may be sold by auction." This claim the defendant obviously could not resist; the amount claimed was due from him and the mortgaged property was liable to be sold in satisfaction of the debt. I do not see that any obligation was cast on the defendant of warning the plaintiffs as to the probable consequences of their claiming a decree for a much smaller amount than was due to them on the date of the suit. The court decreed the claim as brought; that it is to say, the decree passed