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is not so in the present case. The sale accordingly is not pre-emptible.

We should not be understood to decide that no right of pre-emption would accrue *inter se* if co-sharers in the inferior proprietary interest were claiming pre-emption on account of a sale of an inferior proprietary right.

We accordingly allow the appeal and setting aside the decree of the court below dismiss the plaintiff's suit with costs in both courts.

*Before Mr. Justice Banerji and Mr. Justice King.*

LALTA PRASAD (DEFENDANT) v. PURAN LAL  
(PLAINTIFF).\*

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May, 8.

*Civil Procedure Code, order II, rule 2 and order XXXIV, rule 14—Mortgage—First suit for interest only—Second suit for principal—Whether suit maintainable.*

In a simple mortgage the condition was that the mortgagor would pay the principal with interest in five years, that the interest was to be paid every six months and that the creditor was entitled to recover the interest by a separate suit. After the principal money had become payable the mortgagee sued for the interest alone, claiming only a personal relief, and the suit was decreed. While the suit was pending the mortgagee filed another suit for recovery of the principal by sale of the mortgaged property. *Held* that the second suit was not barred by order II, rule 2 of the Code of Civil Procedure by reason of the provisions of order XXXIV, rule 14. *Muhammad Hafiz v. Muhammad Zakariya* (1), and *Kishen Narain v. Pa'a Mal* (2), distinguished. *Indarpal Singh v. Mewa Lal* (3), referred to.

\*Second Appeal No. 1131 of 1926, from a decree of Shankar Lal, Additional Subordinate Judge of Farukhabad, dated the 19th of March, 1923, confirming a decree of Banwari Lal Mathur, Munsif of Kaimganj, dated the 7th of November, 1925.

(1) (1921) I. L. R., 44 All., 121. (2) (1922) I. L. R., 4 Lah., 92.

(3) (1914) I. L. R., 36 All., 264.

Messrs. *B. Malik* and *H. P. Sen*, for the appellant.

Messrs. *B. E. O'Connor*, *K. O. Carleton* and *Ambika Prasad*, for the respondent.

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LALTA  
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PURAN LAL.

BANERJI and KING, JJ.:—This is a defendant's appeal in a suit for sale on a mortgage of the 25th of July, 1918. Lalta Prasad defendant mortgaged certain immovable property under a deed of the 25th of July, 1918. The mortgage is a simple mortgage and it provided that the mortgagor will pay the principal with interest in five years, that he will pay interest every six months and that the creditor will be entitled to recover the interest by a separate suit. The mortgage provided that on failure of payment of the principal and interest the mortgagee was entitled to recover the principal and interest from the mortgagor as well as from his other movable and immovable property.

On the 28th of August, 1925, that is after the principal money had become payable, the mortgagee instituted a suit in the court of the Munsif of Kaimganj for recovery of interest only due to him up to the date of suit. The plaintiff claimed a personal relief. After contest that suit was decreed on the 22nd of October, 1925. While that suit was pending the mortgagee instituted the present suit on the 2nd of September, 1925, for the recovery of the principal amount payable under the mortgage.

The defence of Lalta Prasad was that the plaintiff having brought a suit for interest only and having omitted to sue for the principal amount of money due under the mortgage in that suit, the claim was barred under order II, rule 2 of the Code of Civil Procedure. The court of first instance repelled the contention of the defendant and granted a decree to the plaintiff as prayed. The defendant went up in

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appeal to the District Judge of Farrukhabad and his appeal was dismissed.

Defendant has now come up in appeal before us and it is contended by the learned advocate for the appellant that the claim of the plaintiff is barred under order II, rule 2, inasmuch as on the date when the plaintiff instituted his suit for interest only, the whole of the mortgage money being payable, he not having claimed the amount of the principal money, the present suit must be deemed to be barred under order II, rule 2. It is contended by the learned advocate for the appellant that under the Explanation to order II, rule 2 the cause of action in respect of the claim for interest and principal is the same and the plaintiff having relinquished a portion of his claim, or having omitted to sue, he cannot institute a fresh suit in respect of the portion so omitted or relinquished. In support of his contention he has referred to the Explanation to order II, rule 2 and he has further contended that in view of the pronouncement of their Lordships of the Privy Council in the cases of *Muhammad Hafiz v. Muhammad Zakariya* (1) and *Kishen Narain v. Pala Mal* (2), the plaintiff's claim is barred by the provisions of order II, rule 2. It appears to us that what was held in those two cases has no bearing on the facts of this case.

In our opinion the plaintiff's claim is not barred by order II, rule 2 of the Code of Civil Procedure. Order XXXIV, rule 14 is as follows:—"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and

(1) (1921) I. L. R., 44 All., 121.

(2) (1922) I. L. R., 4 Lah., 33.

he may institute such suit notwithstanding anything contained in order II, rule 2." In our opinion the plaintiff had a right under the terms of the mortgage to recover the interest due on the mortgage from the defendant personally. Plaintiff had not sought in the first suit any relief as against the mortgaged property and under the provisions referred to above the mortgagee was entitled to recover the amount due on the mortgage in spite of the provisions of order II, rule 2. Order XXXIV, rule 14 has been interpreted by this Court in various cases and it has been held that a mortgagee in spite of having sued for a simple money decree in respect of a claim arising under a mortgage was entitled to institute a suit for sale: See *Indarpal Singh v. Mewa Lal* (1). We are therefore of opinion that there is no force in this appeal and we dismiss it.

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 REVISIONAL CRIMINAL.
 

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Before Mr. Justice Dalal.

GHAMANDI NATH v. BABU LAL.\*

*Criminal Procedure Code, sections 240, 403—Conviction on one of two charges—Withdrawal of revision application by complainant in respect of the other charge—Operates as acquittal on that charge—Trial for act falling within two sections of the Penal Code—Conviction under one section—Second trial under the other section barred.*

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G was tried for offences under sections 211 and 500 of the Indian Penal Code on the complaint of M that G had made a false report against M, and B alleging that they had taken part in a dacoity. G was convicted under section 500 only. M applied in revision to the High Court for a sentence under section 211 also, but withdrew the application. There-

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\*Criminal Reference No. 198 of 1929.

(1) (1914) I. L. R., 36 All., 264.