REVISIONAL CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

1935 *January*, 2

RAM SARUP AND ANOTHER (DEFENDANTS) *v.* PEARE LAL AND OTHERS (PLAINTIFFS)*

Civil Procedure Code, order II, rule 2—Instalment bond with default clause—Option—Waiver—Suit for recovery of instalments, although whole amount had become recoverable—Plaint expressly waiving benefit of default clause and reserving right to sue for future instalments—Subsequent suit for such further instalments—Maintainability.

An instalment bond, payable in ten years by half-yearly payments, also provided that on default of payment of any two instalments the whole amount would become payable and the creditors would be at liberty to sue for the entire amount. Default having been made in the payment of five instalments, a suit was brought for the recovery of those instalments; and in the plaint the creditors expressly mentioned that they were abandoning their right to recover the whole amount in a lump sum, and that in future they would sue for the future instalments as they fell due. Later on they brought another suit for the recovery of one such subsequent instalment which had fallen due: *Held* that the suit was not barred by order II, rule 2 of the Civil Procedure Code.

Order II, rule 2 does not deal with cases where there is an option to sue for the whole amount and the option is waived before the suit is brought. Where a creditor has an option either to sue for the whole amount or to sue for the instalments only, and he exercises his option of suing for the instalments only and waives the right to sue for the whole amount, there is no longer any cause of action left to him for suing for the whole amount; as a result of the waiver the only cause of action available to him is to exercise his remedy in the way that he has chosen.

Mr. G. S. *Pathak*, for the applicants.

Messrs. *B. Malik* and *S. B. L. Gaur*, for the opposite parties.

SULAIMAN, C.J., and BENNET, J.:—This is an application in revision by the defendants arising out of a suit brought on an instalment bond for Rs.5,000 payable

*Civil Revision No. 84 of 1934.

in 10 years. The bond contained a provision that half-yearly instalments of Rs.250 would be paid, and on default of payment of any two instalments the whole amount would become payable, and the creditors would be at liberty to sue for the entire amount. Defaults were made for five instalments, and a suit for recovery of these instalments was filed in 1933. In the plaint the creditors expressly mentioned that they were abandoning their right to recover the whole amount in a lump sum, and that in future they would sue for the future instalments as they fell due. This suit was decreed. Later on they brought another suit for recovery of one further instalment when it fell due, and it was ultimately withdrawn on condition of the plaintiffs' paying the costs of the defendants. The plaint was returned to the plaintiffs, although they had not deposited the defendants' costs in the court. They then brought the present suit in November, 1933, for the recovery of that particular instalment. The defendants resisted the claim on two principal grounds. The first was that the present claim was barred by order II, rule 2, inasmuch as in the first suit the claim for this instalment had not been included. The second plea was that the condition under which permission to withdraw the suit was granted had not been fulfilled inasmuch as the costs had not been paid to the defendants before the institution of the suit. Both these contentions have been repelled by the court below and the claim has been decreed.

So far as the question whether the plaintiffs have or have not failed to comply with the condition, under which permission was granted, is concerned, we are of the opinion that this is a mere matter of interpretation of the order passed by the original court, and we should not interfere in revision on such a point. The lower court has taken into consideration the fact that the learned Munsif, who had passed the conditional order, allowed the plaint to be withdrawn, and that the order

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did not clearly and expressly mention that the costs must be deposited before the fresh suit is filed. In view of these considerations, he has come to the conclusion that the payment of the costs was not a condition precedent to the institution of the suit. We would not interfere with the decree of the court below on the ground of interpretation only.

The principal point for consideration is whether the present claim is barred by order II, rule 2, of the Civil Procedure Code. In order to avoid multiplicity of suits the rule quoted above provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and that where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

The court below has interpreted the instalment bond as giving an option to the creditors either to sue for the whole amount in case of two successive defaults or to sue for the instalments only. In the case of *Lasa Din* v. *Gulab Kunwar* (1) a mortgage deed which was before their Lordships of the Privy Council for consideration contained a similar clause under which the creditor was given power in case of default to realise the entire mortgage money and interest in a lump sum. Their Lordships interpreted the document as containing a provision exclusively for the benefit of the mortgagees and purporting to give them an option either to enforce the security at once or, if the security was ample, to stand by their investment for the full term of the mortgage. We think that in the present case also the creditors were given an option either to sue for the whole amount at once or to sue for successive instalments as they fell due.

The learned advocate for the applicants strongly contends before us that inasmuch as the creditors were

(1) (1932) I.L.R., 7 Luck., 442.

entitled to sue for the whole amount, the mere fact that they chose not to sue for the whole amount but sued for some instalments only would not take them out of the scope of order II, rule 2. This argument necessarily implies that there is no real option to a creditor at all. He must either sue for the whole amount or at his peril sue for instalments only. If he sues for the instalments only, then his further claim for the whole amount would be barred by order II, rule 2. This would amount to nullifying the option given to him under the deed. As a matter of fact, order II, rule 2 does not deal with cases where there is an option to sue for the whole amount and the option is waived before the suit is brought. It seems to us that where a creditor has an option either to sue for the whole amount or to sue for the instalments only, and he exercises his option of suing for the instalments only and waives the right to sue for the whole amount, there is no longer any cause of action left to him for suing for the whole amount. It follows that at the time when the suit is brought he disentitles himself from suing for the whole amount, and therefore order II, rule 2 would not be a bar to a future claim brought by him when further instalments fall due.

Great reliance has been placed by the learned advocate for the applicants on two cases decided by their Lordships of the Privy Council, which, however, are both easily distinguishable. In the case of *Muhammad Hafiz* v. *Muhammad Zakariya* (1) a suit was brought to realise the amount of interest due on a mortgage deed after the term of the mortgage had actually expired. It was accordingly held by their Lordships of the Privy Council that a subsequent suit to recover the principal amount of the mortgage money was barred by order II, rule 2. Under the deed there was a right to recover the whole amount if interest was not paid for 6 months, and there was also a right to recover the whole amount

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

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when the term of 3 years fixed for the mortgage deed expired. After the expiry of 3 years there was no longer any option left in the mortgagee to sue for one part of the amount and wait for the other. The whole cause of action had accrued. Their Lordships accordingly held that there was only one cause of action which gave occasion for, and formed the foundation of, the suit and which enabled him to ask for the whole relief at once.

Similarly in the case of *Kishen Narain* v. *Pala Mal* (1) the mortgage deed had provided that the whole amount would be recoverable if there was any default in the payment of interest for six months, as well as when the full period of two years expired. A suit was brought for the recovery of the interest that had fallen due after the expiry of the term fixed in the mortgage deed and was decreed. A subsequent suit to recover the balance was held to be barred by order II, rule 2. Here, too, the whole cause of action had arisen, and there was no question of any option in the mortgagee to sue for part or for whole, and, therefore, no question of any waiver arose. As already pointed out, where there is an option which can be exercised one way or the other, and the creditor chooses to exercise it in one way, he must be deemed to have waived his right to exercise it in the other way, and, therefore, the cause of action that accrues to him is only to exercise his remedy in the way that he has chosen.

As regards the case of *Shrinivas Laxman Naik* v. *Chanbasapagowda Basangowda* (2) it is sufficient to point out that in the plaint filed in the previous suit the creditor had not expressly mentioned that he was waiving his right to sue for the whole amount. The learned Judges apparently thought that there had been no waiver, and that, therefore, there had been a cause of action to recover the whole amount. Similarly in

(1) (1922) I.L.R., 4 Lah., 32. (2) (1922) 72 Indian Cases, 290.

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the case of *Mukyaprana Bhatta* v. *Kelu Nambiyar* (1) there was possibly no option under the terms of the deed given to the creditor. In any case the same Bench differed from their own decision subsequently in *Rego* v. *Phillip Tauro* (2).

We are, therefore, of the opinion that the view taken by the court below that the present claim is not barred by the provisions of order II, rule 2 is correct. The revision is accordingly dismissed with costs.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

SECRETARY OF STATE FOR INDIA (DEFENDANT) *v.* SIMLA FOOTWEAR COMPANY (PLAINTIFF)*

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Railways Act (IX of 1890), section 77—Suit for compensation for wrongful sale by railway of goods consigned—Notice of claim not necessary—Suit not for "loss" or non-delivery—Limitation Act (IX of 1908), articles 31, 48—Railways Act (IX of 1890) sections 55, 56—Auction sale by railway on less than 15 days' notice—"Local newspapers".

Delivery of a consignment was not taken after arrival at destination, and the railway gave a notice to the consignor that proceedings would be taken under sections 55 and 56 of the Railways Act. The consignor sent a reply asking the railway to continue to keep charge of the goods for him and that he would take delivery about the 1st of May, 1929. The railway waited till the 10th of August, 1929, when it sent to some newspapers, of the place where the auction sale was to be held, an advertisement announcing that the consignment, along with some others, would be sold by auction on the 1st of September, 1929. The newspapers made some delay in publishing the advertisement, which did not actually appear before the 18th of August. The auction sale was held on the 1st of September, and thereafter the railway offered to the consignor the sale proceeds, less the rates and charges due. He declined to accept

*Second Appeal No. 385 of 1932, from a decree of Muhammad Akib Nomani, Subordinate Judge of Agra, dated the 4th of February, 1932, confirming a decree of S. M. Ahsan Kazmi, Additional Munsif of Agra, dated the 15th of June, 1931.

(1) A.I.R., 1928 Mad., 705. (2) A.I.R., 1929 Mad., 371.