

Before Mr. Justice Tyrrell and Mr. Justice Duthoit.

188.
June

PIARI (DEFENDANT) v. KHIALI RAM (PLAINTIFF)*

Omission to sue for one of several remedies—Act X of 1877 (Civil Procedure Code), s. 43—Mortgage.

A mortgagee had two remedies in respect of the mortgagor's breach to pay the stipulated interest at the time fixed by the contract of mortgage, one being a suit on foreclosure proceedings to convert the mortgage into a sale, and the other a suit to recover his money against his debtor by enforcement of his lien against the mortgaged property. He sued for the first remedy in respect of such breach, omitting the second. His suit was dismissed on the ground that he was not entitled to such remedy until the expiration of the mortgage-term. He afterwards sued for the second remedy. *Held* that, inasmuch as the mortgagee was not at the time of his suing for the first remedy "a person entitled to more than one remedy," not being "entitled" to the first but only to the second, his omission at that time to sue for the second remedy was not under s. 43 of Act X of 1877 a bar to his afterwards suing for it.

THE defendant in this suit gave the plaintiff a mortgage for Rs. 500 on certain immovable property. The instrument of mortgage contained the following, amongst other, stipulations: "I (mortgagor) shall pay the said amount with interest at two per cent, per mensem within two years: I shall pay the interest every month, and in the event of default the mortgagee shall be at liberty to realize the whole sum due to him, with the interest for two years, without waiting for the expiry of the term, by instituting a suit or by making an application for foreclosure as absolute owner: these two courses are open to the mortgagee; it is optional with him to pursue whichever he pleases." A default in the payment of interest having occurred, the plaintiff, mortgagee, applied under Regulation XVII of 1806 for foreclosure, and after the usual proceedings under that Regulation had been taken the mortgage was foreclosed. The plaintiff then sued the defendant for possession of the mortgaged property. This suit was dismissed, it being held that it had been brought "prematurely," that is to say, before the expiry of the term of two years stipulated for the payment of the principal amount in the instrument of mortgage. The plaintiff thereupon instituted the present suit, in which he claimed to recover the principal amount of the mortgage, Rs. 500, and interest thereon, from the defendant

* Second Appeal, No 1335 of 1880, from a decree of J. H. Prinssep, Esq., Judge of Cawnpore, dated the 21st September, 1880, affirming a decree of Munshi Lalta Prasad, Munsif of Cawnpore, dated the 30th June, 1880

personally, and by the sale of the mortgaged property. The defendant set up as a defence to the suit, *inter alia*, that it was barred by the provisions of s. 43 of Act X of 1877, inasmuch as the plaintiff was claiming a remedy which he might have claimed in the former suit, but omitted so to do. Both the lower Court disallowed this contention. On second appeal to the High Courts the defendant again contended that the suit was barred by the provisions of s. 43 of Act X of 1877.

The *Senior Government Pleader* (Lala Juala Prasad) and Shah Asad Ali, for the appellant.

Mr. *Siraj-ud-din* and Pandit *Ajudhia Nath*, for the respondent.

The judgment of the High Court (TYRRELL, J., and DUTHOIT, J., so far as it is material to the purposes of this report, was as follows:—

TYRRELL, J.—There is ingenuity in the other plea that the suit is barred by the last, that is, the new, provision of s. 43 of the Civil Procedure Code: “A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.” It is plain that the plaintiff-respondent had under his bond secured to him two remedies in respect of his loan, a suit (a) on foreclosure proceedings to convert the mortgage transaction into an absolute sale to him of the mortgaged property, and a suit (b) to recover his money against his debtor by enforcement of his lien against the masonry house and against her other estate generally. He chose to adopt the first remedy, omitting the second, when he brought his suit for absolute sale of the property, after proceedings being had under the Regulation for foreclosure in January, 1880. But the plaintiff-respondent was mistaken in thinking and acting at that time as if he was “a person then entitled” to this alternative remedy. He was not so; and for this reason he was non-suited in that action, because it had been brought “prematurely,” that is to say, before the expiry of the two years term stipulated for the payment of the principal debt in the deed of mortgage. This decree was correct, being based on the principle laid down on this subject in many leading cases, and most

recently in the Allahabad High Court's ruling in the case exactly analogous to the present,—*Imdad Husain v. Mannu Lal* (1). Therefore the plaintiff-respondent was not, when he sued in 1880, a person entitled to more than one remedy. He had then only the remedy he is seeking to enforce in this present action. His remedy by way of foreclosure and suit to make the mortgage and absolute sale was at that time inchoate only, and had not accrued completely to the mortgagee. There is of course no room for the contention that the plaintiff's "cause of action" was not identical in both suits. It was so, being nothing else than his obligor's breach of contract to pay the stipulated interest at the time fixed for such payment by the bond. Under these circumstances, and in this view of the law, the plea based on the last clause of s. 43 of the Civil Code cannot be allowed, and the decree of the lower appellate Court must be affirmed. The appeal is dismissed with costs.

1881
 PIARIE
 v.
 KHIALI R.

Appeal dismissed.

(1) I. L. R., 3 All. 509.

