

## APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and  
Mr. Justice Muhammad Raza.

1929  
October, 1.

MUSAMMAT NANDO (PLAINTIFF-APPELLANT) v. PANDIT  
RAM BATAK AND OTHERS (DEFENDANTS-RESPONDENTS).\*

*Civil Procedure Code (Act V of 1908), order II, rule 2—Construction of documents—Mortgage—Anomalous mortgage—Mortgagee put in possession and mortgagor re-taking possession by executing a rent note to pay rent monthly—Rent to be considered as interest—Default in payment of interest entitling mortgagee to recover mortgage money with interest from mortgaged property—Suit to recover arrears of rent—Subsequent suit for recovery of principal and interest due under mortgage, whether barred by order II, rule 2 of the Code of Civil Procedure.*

Where under a mortgage the mortgagor put the mortgagee in possession of the mortgaged property and then executed a rent note to pay a monthly rent and re-took possession as a tenant and the mortgage stated that the rent was to be considered as interest on the principal mortgage money and that if interest were not paid each month the mortgagee was at liberty to recover the entire mortgage money with interest through court from the mortgaged property, *held*, that it was an anomalous mortgage under which a default in paying rent was equivalent to a default in paying interest, that a default in paying interest gave the mortgagee a cause of action to come into court, and that that cause of action entitled the mortgagee to the whole of the mortgage money due, and not only to the interest due, such money being a charge on the mortgaged property.

Where on a default the mortgagee brought a suit for arrears of rent (which was the interest) and obtained a simple money decree, *held*, that a subsequent suit for the mortgage money together with interest as against the mortgaged property was barred by order II rule 2 of the Code of Civil Procedure as the former suit should have included the whole of the claim which the plaintiff was entitled to make in respect of the cause of action, it being not a case where the

\*Second Civil Appeal No. 15 of 1929, against the decree of M. Mahmud Hasan, 3rd Additional District Judge of Lucknow, dated the 4th of October, 1928, upholding the decree of Pandit Tika Ram Misra, Subordinate Judge Mohanlalganj, Lucknow, dated the 5th of April, 1928.

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plaintiff was entitled to more than one relief in respect of the same cause of action. *Mohammad Hafiz and another v. Muhammad Zakariya* (1), and *Kishan Narain v. Pala Mal* (2), referred to.

The case was originally heard by PULLAN, J., who referred it to a Bench consisting of two Judges for decision. His order of reference is as follows :—

PULLAN, J. :—This appeal raises a question on which there is no decision of this Court, and there is no ruling of other courts which appears to me to decide definitely the point in dispute. The plaintiff is a mortgagee and she has brought this suit for the mortgage money together with interest from the 16th of December, 1917. The mortgage purported to be a usufructuary mortgage of the 15th of November, 1915, and it contained a clause by which the mortgagee was required to execute a *sarkhat* or lease in favour of the mortgagors at a rental of Rs. 24-12-0 per month. Such a lease was executed and the mortgagee brought a suit on the basis of that lease for the rent due from the date of its execution to the 16th of December, 1917, and obtained a decree. The question is whether the present suit is or is not barred by order II, rule 2 of the Code of Civil Procedure. It cannot be held that the decision of the Privy Council in *Muhammad Hafiz v. Muhammad Zakariya* (1), is a decision on this point, because there the mortgage was a simple mortgage and there was no question of a lease, either separate or included, in the mortgage deed. In a suit almost exactly parallel to the present one a single Judge of the Lahore High Court decided that the second suit was not barred and the decision is reported in *Bela Singh v. Ganda Singh* (3). In the present case the main point in favour of the appellant is that the first suit was based on the *sarkhat* and not on the mortgage, whereas the best point for the respondent is that the mortgage

(1) (1921) L. R., 49 I. A., 9; I. L. R., 44 All., 121.

(2) (1922) L. R., 50 I. A., 115.

(3) (1926) A. I. R., 661.

itself contains the clause requiring the execution of the *sarkhat*, laying down that the rent is in lieu of interest and that if the interest is not paid in each month, the mortgagees are at liberty to recover their entire mortgage money with interest. This appears to me to be a matter which deserves the consideration of a Bench and I, therefore, refer the appeal to a Bench of two Judges under section 14(2) of the Oudh Courts Act.

Mr. *Ram Bharose Lal*, for the appellant.

Messrs. *Ali Zaheer*, *Makund Behari Lal*, *Ghulam Imam*, and *Har Govind Dayal*, for the respondents.

STUART, C. J. and RAZA, J. :—The hearing of this appeal has been referred to a Bench by a learned Judge of this Court, as he considered that the question was one which had never been decided in this Court, and on which there should be a definite pronouncement of a Bench. We do not consider that the decision in this appeal will ordinarily be a guide to the decision of other appeals, as on our view the decision here turns upon the wording of a somewhat peculiar anomalous mortgage. Under this mortgage the mortgagor put the mortgagee in possession of the mortgaged property. He then executed a rent note to pay a monthly rent and re-took possession as a tenant. The mortgagee stated that the rent was to be considered as interest on the principal mortgage money due. The terms of the mortgage laid down that, if the interest were not paid in each month, the mortgagee was at liberty to recover the entire mortgage money with interest through court from the mortgaged property. It is thus clear that a default in paying rent was equivalent to a default in paying interest, that a default in paying interest gave the mortgagee a cause of action to come into court, and that that cause of action entitled the mortgagee to the whole of the mortgage money due, and not only to the interest due, such money being a charge on the mortgaged property. We find that

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subsequently the mortgagee sued for the interest (which was the rent in arrears) and obtained a simple money decree. It appears to us, that in these circumstances the courts below were correct in their decision that order II, rule 2 bars the present suit, which is a suit for the mortgage money alleged to be due and interest as against the mortgaged property. The former suit should have included the whole of the claim which the plaintiff was entitled to make in respect of the cause of action, and as there was an omission to sue in respect of a portion of the claim, the plaintiff cannot be permitted to sue subsequently in respect of the portion so omitted. This was not a case where the plaintiff was entitled to more than one relief in respect of the same cause of action. We have examined with respect the principles laid down by their Lordships of the Judicial Committee in *Muhammad Hafiz and another v. Muhammad Zakariya* (1) and *Kishan Narain v. Pala Mal* (2) and have derived assistance from those decisions. Cases of this kind have usually to be decided upon the actual facts and the words of order II, rule 2 are usually sufficiently clear to permit a decision to be made as to whether a suit is or is not barred under the provisions of that rule. As a result we dismiss this appeal with costs.

*Appeal dismissed.*

(1) (1921) L. R., 49 I. A., 9.

(2) (1922) L. R., 50 I. A., 115.