

circumstances and we leave it to the plaintiffs to seek his remedy from the revenue authorities.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Mr. Justice LeBossignol and Mr. Justice Harrison.*

PARTAP SINGH (PLAINTIFF)—*Appellant,*  
*versus*  
 NATHU AND OTHERS (DEFENDANTS)—  
*Respondents.*

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April 18.

Civil Appeal No. 695 of 1919.

*Mortgage—mortgagee entitled to possession on failure of annual payments of interest—whether mortgagor entitled to notice, where mortgagee has waived his right on previous default.*

*Held*, that there is no general rule that a mortgagee who in the past has waived his right on the occurrence of a default is bound to give notice, before enforcing his penalty, that the waiver will not be repeated, although it may be equitable in certain cases to insist upon such notice.

*Held also*, that in the present case, where the mortgagor-defendants had not pleaded waiver and had failed entirely in their pleas, plaintiff's suit for possession should not have been dismissed for want of notice to the defendants that a suit would be brought if they failed in future to pay the annual sums stipulated.

*Banu Mal v. Pars Ram* (1), distinguished.

*Second appeal from the decree of F. W. Kennaway, Esquire, District Judge, Hoshiarpur, dated the 19th December 1918, affirming that of Rai Sahib Lala Diwan Chand, Senior Subordinate Judge, Hoshiarpur, dated the 27th June 1918, and dismissing plaintiff's suit.*

MUKAND LAL PURI, for Appellant.

B. N. KAPUR, for Respondents.

The judgment of the Court was delivered by—

LEBOSSIGNOL J.—This appeal arises out of a suit by a mortgagee to obtain possession of the land mortgaged on the failure of the mortgagors to pay

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him the stipulated annual sum of interest. The pleas of the defendants were that with the exception of 3 *ghumaons* which had remained with the defendants, possession of all the mortgaged land had been made over to the plaintiff in lieu of interest. The first Court found throughout against the defendants and held that possession of the land had not been made over to the plaintiff, as alleged by the defendants, but it dismissed the plaintiff's suit on the ground that as in the past the plaintiff had waived his right to demand possession of the land on the default of the defendants to pay the annual sum due as interest, so he was not entitled suddenly to sue for possession without giving notice to the mortgagors that a suit would be brought if they in future failed to pay the annual sums stipulated. As an authority for its view the trial Court referred to *Banu Mal v. Pars Ram* (1). The plaintiff appealed to the District Judge who held that the ruling quoted by the trial Court applied to this case and dismissed the appeal.

The plaintiff has come to this Court in second appeal and we have no hesitation in holding that his appeal must succeed. There are many points on which the facts of this case can be differentiated from those of *Banu Mal v. Pars Ram* (1), in which case the facts on which the learned Judges had to adjudicate were very peculiar; but the main point of difference between that case and this is that in that case waiver of the penal clause by the plaintiff was pleaded by the defendants. In this case no such plea was entered by the defendants who on the contrary pleaded compliance with the terms of the mortgage covenant except for a small area of 3 *ghumaons*. We are unable to accept as a general proposition that a mortgagee who in the past has waived his right on the occurrence of a default, is bound to give notice before enforcing his penalty that the waiver will not be repeated, although it may be equitable in certain cases to insist upon such notice. In this case waiver was not pleaded and the pleas of the defendants failed entirely.

For these reasons this appeal must succeed. It is urged, however, on behalf of the respondents that

had the learned District Judge not decided the appeal against the plaintiff on the preliminary point of notice, they would have supported the judgment of the first Court on grounds that had been decided against them by the first Court. In the absence of an affidavit that such grounds would have been argued before the District Judge, we did not feel ourselves bound to hear counsel for the respondents on those points; but we have given him an opportunity of arguing them before us with the result that we have no hesitation in concurring in the findings of the first Court that the respondents' story of a settlement with the plaintiff is entirely unsubstantiated.

For these reasons, we accept the appeal and decree plaintiff possession as mortgagee of the land in litigation with costs throughout.

M. R.

*Appeal accepted.*

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