

application to the District Court; if they fail to do so in that time, the *ex-parte* decree will stand in the same way as if they failed to satisfy the Judge of the District Court that they had good reasons for their non-appearance. If they satisfy the Judge that they had good reasons for their non-appearance, the case will be re-opened and be heard in the ordinary way.

The costs of this appeal to be costs in the case as ultimately decided.

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CHANDANAM
AND
ANOTHERv.
A. M. C. P.
SAMSUGANY
AND OTHERSDAS AND
BAGULEY, JJ.

APPELLATE CIVIL.

Before Mr. Justice Das and Mr. Justice Baguley.

E. H. JOSEPH

v.

A. P. JOSEPH.*

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Sep. 4.

Civil Procedure Code (Act V of 1903), O. 2, r. 2—Previous suits for arrears of interest—Subsequent suit for principal on mortgage, when due—Power of sale if interest in arrears, effect of—Absence of right to sue for principal on default of payment of interest does not debar the suit for principal when due.

A mortgage deed relating to Rangoon property in the English form with a power of sale provided for the repayment of the principal amount in five years and for monthly payment of interest. The power of sale was to be exercised if the principal amount, when due, was not paid after three months' notice or if at any time during the continuance of the security interest amounting to Rs. 500 was in arrears and unpaid for three months. The mortgagee had filed suits against the mortgagor for recovery of interest. After the expiry of five years he filed a suit for his principal amount and arrears of interest. The mortgagor contended that by virtue of the power of sale a right of suit on the mortgage for the principal amount had arisen when the mortgagee filed his last suit for interest alone and that therefore he was precluded from filing the present suit under the provisions of O. 2, r. 2 of the Civil Procedure Code.

Held, that, there was no clause in the mortgage stating that if the interest is in arrears to the extent of Rs. 500 for more than three months, the mortgagee could call in the principal amount also, and moreover the power of sale on account of arrears of interest only entitled the mortgagee to

* Civil First Appeal No. 132 of 1928 against the judgment of the Original Side in Civil Regular No. 356 of 1925.

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exercise the power himself and not through the agency of the Court. There was no right to sue for the principal amount until the five years elapsed, hence the suit was not barred.

Gokal Dass v. Eastern Mortgage and Agency Company, 33 Cal. 410; *Webb v. Macpherson*, 31 Cal. 57—referred to.

Edwards v. Martin, L.J.R. Ch. 25, 284—distinguished.

Shaffee for the appellant.

Banerji for the respondent.

DAS and BAGULEY, JJ.—This is a suit upon a mortgage. The mortgage is one covering the mortgagor's life interest in certain immoveable property. The parties are Jews. The property is within Rangoon and the mortgage is in the English form with a power of sale, which is the power governed by section 69 of the Transfer of Property Act. The date of the mortgage is 16th May 1919 and the date fixed for payment is 15th May 1924. It is agreed that the mortgagor has been in arrears of interest more than once and that the mortgagee has filed suits against him to recover the interest. The last of these suits was filed before the 15th of May 1924. The only point for decision in this appeal is whether owing to the filing of these suits the plaintiff is debarred from suing on his mortgage for the recovery of the principal and the interest which subsequently became due.

There is no doubt that at the date of the filing of the last of the suits for interest the principal money had not become due in the ordinary way and that therefore Order II, rule 2, would not bar his suit. It is claimed however that by virtue of the power of sale a right of suit on the mortgage for the payment of the principal money would arise before the 15th of May 1924, and if this contention is good then no doubt Order II, rule 2, would bar the suit. The mortgage is a somewhat complicated

one, but I would only give the salient points. First of all, in consideration of the sum Rs. 10,000 the mortgagor assigned all his life interest to the mortgagee subject to the proviso that he might redeem his interest by repaying the mortgage money on the 15th of May 1924 together with all arrears of interest at 9 per cent. per annum. It further covenants for payment of interest month by month on or before the 15th day of the month succeeding that for which the interest is due. So far it is clear that the mortgage money had not become due before the 15th of May 1924, and it is also clear that there is a separate covenant for payment of it. We then come to the clause giving the power of sale:—

“It is hereby agreed and declared that if the said Mortgagor shall fail to pay the said sum of Rs. 10,000 with arrears of interest due thereon on the expiration of the period of three months from the serving of a notice on him by the Mortgagee calling upon him to pay up the said sum of Rs. 10,000 and interest on the said 15th day of May 1924 or if at any time during the continuance of this security interest due hereunder amounting to Rs. 500 at the least shall be in arrear and remain unpaid for three months then and in such case the Mortgagee shall be at liberty and shall have the power to sell the said premises hereby assigned either by public auction * * * * .”

It is argued that in this clause default of payment of interest amounting to Rs. 500 for more than three months gives the mortgagee the right to claim his principal money. The appellant relies upon one old English case only, *Edwards v. Martin* (1).

It is quite clear that in these cases the rights of the parties and the question of whether any default accelerates the claim on which the principal money can be called in would depend entirely upon the

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(1) (1856) L.J.R. 25 Ch. 284.

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wording of the mortgage in question. It must also be remembered that English cases are not necessarily good guides for the decision of mortgage suits in the Indian Courts, for the Indian cases are governed by the Transfer of Property Act and the Indian Courts know nothing of the refinements between the legal estate and the equitable estate which form the basis of all such decisions in the Court of Chancery, *vide Webb v. Macpherson* (1) and *Gokul Dass v. Eastern Mortgage and Agency Company* (2). This particular power of sale is one which is to be exercised by the mortgagee himself personally and not through the agency of the Court, and supposing Rs. 500 interest had been in arrears for more than three months, we entirely fail to see how he could approach the Court with any form of suit on this clause. The Court could merely tell him to go away and sell the property himself, if he was advised that the clause conformed with section 69 of the Transfer of Property Act and that default had arisen. There is no clause in this mortgage stating that if the interest is in arrears to the extent of Rs. 500 for more than three months, the mortgagee shall have the power to call in the principal money mentioned in the deed.

With regard to the case cited, *Edwards v. Martin* (3), in this case there was a mortgage of leaseholds upon which interest was payable half-yearly. The mortgagee took possession and asked for foreclosure, although the time or the date fixed for repayment had not arrived. It was admitted that in this case the capital was not due but it was claimed that the right to foreclose had arisen. The circumstances of this case are therefore quite different to the circumstances in the present case. There is no claim to

(1) (1904) 31 Cal. 57, at p. 72.

(2) (1906) 33 Cal. 410, at p. 421.

(3) (1856) L.J.R. 25 ch. 284.

foreclose and the mortgage deed is quite silent with regard to any right to foreclose. In fact the power of sale would appear to negative the idea that any question of foreclosure was contemplated between the parties. It is also to be noted that in this case no reasons are given for the decision but the Court merely followed a dictum in another case for which no reasons have been given.

We are of opinion that as there is no clause providing that on default of payment of interest the mortgagee shall have the right to claim repayment of principal, he had no right of suit on the mortgage before the 15th of May 1924. No suit for interest has been filed since that date and therefore Order II, rule 2 cannot apply. The appeal will be dismissed with costs.

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APPELLATE CIVIL.

Before Sir Henry Pratt, Kt., Officiating Chief Justice, and Mr. Justice Ormiston.

MA KHO U AND OTHERS

v.

MAUNG BA SEIN AND ANOTHER.*

1928

Sep. 7.

Civil Procedure Code (Act V of 1908), s. 10—Common issue not sufficient for stay—Subject matter of the suits must be same to stay suit—Claim of second suit arising subsequent to that of first suit—First suit for possession of land, second suit for mesne profits—Applying for leave to appeal or obtaining leave to appeal to Privy Council does not amount to pendency of appeal.

Held, that a suit cannot be stayed under s. 10 of the Civil Procedure Code if the subject matter of the second suit was different from that of the first suit notwithstanding that there is a common issue in both the suits. So also if the second suit relates to mesne profits which accrued subsequently to the institution of the prior suit which related to title and possession of the land, the second suit cannot be stayed.

Chowdhury v. Midnapur Zamindary Company, 27 C.W.N. 772; *N. K. L. Kubaran v. P. K. Koman Nair*, 48 M.L.J. 251; *Wahidunnisa v. Zamin Ali*, 42 All. 290—referred to.

* Civil First Appeal No. 93 of 1928 against the judgment of the District Court of Pyapôn in Civil Regular No. 34 of 1927.