

PRIVY COUNCIL.

Before—*Lord Buckmaster, Lord Phillimore, Sir John Edge and
Lord Salvesen.*

KISHEN NARAIN (PLAINTIFF) Appellant,

versus

PALA MAL AND OTHERS (DEFENDANTS) Respondents

Privy Council Appeal No. 94 of 1921.

[Chief Court Civil Appeal No. 1384 of 1915 (1).]

Civil Procedure Code, Act V of 1908, Order II, rule 2—Mortgage—Cause of action—Suit to realise interest—Subsequent suit to realise principal.

If a mortgage deed provides for the payment of principal and interest as independent obligations, Order II, rule 2 of the Code of Civil Procedure, 1908 does not preclude the mortgagee from suing to recover the principal by reason of his having previously sued for a personal decree for the interest due. But in the case of a mortgage-deed which upon a default in the payment of interest gives the mortgagee the right to realize both the principal and interest, if, upon such a default occurring, the mortgagee sues to realize the interest from the property, the rule above referred to precludes him from afterwards suing to realize the principal due, even if by his plaint in the first suit he has purported to reserve the right to do so.

Muhammad Hafiz v. Muhammad Zakariya (2).

Judgment of the Chief Court affirmed.

Appeal from a judgment and decree of the Chief Court of the Punjab [March 16, 1918 (1)] affirming a decree of the District Judge of Delhi.

The appellant in 1914 brought the present suit against the respondents under a mortgage deed, dated 19th January 1904. By his plaint he alleged that certain sums were due in respect of principal and interest after crediting the proceeds of a partial realization; he claimed a decree for the aggregate amount "from the defendants or the mortgaged property". The appellant had sued in 1908 claiming a decree for interest then

due "against the defendants, recoverable from the mortgaged property, and the other property, and persons of the defendants."

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The only question upon the present appeal was whether the appellants were precluded by Order II, rule 2 of the Code of Civil Procedure, 1908, from maintaining the present suit having regard to the suit which they had brought in 1908.

The facts, and the relevant terms of the mortgage-deed appear from the judgment of the Judicial Committee.

Both the District Judge of Delhi and the Chief Court, on appeal, had held that the rule in question barred the present suit.

DE GRUYTER K. C. and DUBE for the Appellant—The decision of the Board in *Muhammad Hafiz v. Muhammad Zakariya* (1) is not applicable. The appellant had been precluded from selling the equity of redemption under the decree obtained in his former suit on the ground that although Order XXXIV, rule 14 did not apply in Delhi or the Punjab, the Transfer of Property Act, 1882, not being in operation there, yet the principle of that rule applied; *Jagan Nath v. Buthwa* (2). But it is part of the rule, and of the principle, that the plaintiff may sue to enforce the mortgage notwithstanding anything in Order II, rule 2. Further, in this case the appellant had two causes of action, namely for the interest and for the principal. The suit in 1908 was on the personal obligation to pay the interest. In *Muhammad Hafiz's* case (1) the plaintiff had tried to get the property sold twice. [Reference was also made to *Payana Reena Sambathan v. Panna Lana Palantappa* (3)].

WALLACH for the Respondents—The suit is barred by Order II, rule 2, *Muhammad Hafiz's* case (1) applies. The cause of action in 1908 was the default in paying the interest; in respect of that default the deed gave the appellant the right to two reliefs against the property, namely to recover the interest and to recover the principal. His suit in 1908 was not merely upon the personal obligation; his plaint claimed a decree to re-

(1) (1921) I. L. R. 44 All. 121; I. B. 49 I. A. 9. (2) 2 P. B. 1907.

(3) (1914) A. C. 618.

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cover from the mortgaged properties. It is not material that he purported to reserve a right to claim in respect of the principal ; he could not do that by reason of Order II, rule 2. Since Order XXXIV, rule 14 does not apply it cannot affect this case, which falls within the express provisions of Order II, rule 2.

DE GRUYTHER K. C. replied.

The judgment of their Lordships was delivered by—

LORD BUCKMASTER.—The difficulty in this case is due to the provisions of Order II, rule 2 of the Code of Civil Procedure, 1908. That rule 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. But the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. The illustration given shows that a personal claim for the mortgage money under a mortgage and the enforcement of the security for the debt are to be regarded as one and the same cause of action. This provision is in marked distinction to the law of this country, where a mortgagee is at liberty to appoint a Receiver under his deed to sue for the debt and to take proceedings for sale or foreclosure independently and at the same time. It is important, therefore, in considering the effect of the Code to bear in mind that its obvious intention is to establish a rule of law different from that accepted here.

The appellant was a mortgagee under a mortgage executed on 19th January 1904, by the three respondents. It was a mortgage to secure Rs. 11,748 with interest at Rs. 8 per month, and provided that the money was to be paid in two years. The conditions of the mortgage enabled the mortgagors to redeem within the two years if they thought fit. It also contained an express promise on the part of the mortgagee to pay interest for the first year, and provided that if the interest were not paid for the first year it should be competent to the mortgagee to cancel the fixed term and to realise. Clause 5 dealt with the conditions that would arise if the interest were paid for the first year and there

was difficulty thereafter. It is one of the critical clauses in the present dispute, and it is in the following terms:—

“ 5. If we pay the interest on the expiry of the first year, we shall pay the interest on the mortgage money after every three months after the expiry of the first year. If by chance we are unable to pay the interest after every three months, we shall pay it after six months, without any objection. If we do not pay the remaining interest after six months, the mortgagee will be at liberty to cancel the term of two years and to realise with costs all the principal mortgage money with interest by means of a suit from the mortgaged property and our other movable and immovable property and our person. If the mortgagee of his own accord wishes to maintain the term of mortgage, he will have a right to realise only the remaining interest by means of a suit from the said property and our person. We and our representatives shall have no objection and refusal.”

The interest was paid up to 4th July 1905 but no further payment being made in respect of interest, on 17th November 1908, the mortgagee sued the mortgagors, and the first question that arises is what was the effect of that suit ?

The plaintiff set out the mortgage ; set out payment of the interest up to 4th July 1905, and certain further payments on account of principal. It then stated that the plaintiff only sued for the remaining interest, and that a suit for the recovery of the principal and of the future interest would be brought later on, and it asked for a decree in the following terms :—

“ A decree for Rs. 2,390-8-0 interest at the above rate from *Asakh Sudi 2, Sambat 1902 to Mangsar Badi 8, Sambat 1905*, corresponding to the 16th November 1908, with costs in favour of the plaintiff against the defendants, recoverable from the mortgaged property and the other property and persons of the defendants.”

The only question that appears to have been tried was what was the correct amount of interest ; and a decree passed by the Subordinate Judge on 27th January 1909, was a decree for Rs. 2,226-13-0, which it was stated should be charged on the mortgaged property. The mortgagee then attempted to get the equity of redemption sold, and in this he succeeded before the Subordinate Judge, but failed on appeal. He thereupon on 19th November 1914, instituted the proceedings out of which this appeal has arisen, asking the full mortga-

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gee's relief in respect of the mortgaged property. The District Judge held that Order II, rule 2 barred the case and dismissed the suit; this decree was supported in the Chief Court of the Punjab; and from this judgment the present appeal has been brought.

That Order II, rule 2 of the Code of Civil Procedure is the relative section of the Code applicable to the dispute is not in contest. The whole question is what does it mean? It does not appear to their Lordships that if the mortgage had provided, as mortgages always do in this country, for an independent obligation to pay the principal and the interest, that in a suit brought to obtain a personal judgment in respect of the interest alone the rule would have prevented a subsequent claim for payment of the principal. In such a case the cause of action would have been distinct. The matter is, however, different if the non-payment of the interest causes the principal money to become due, as in that case the cause of action—the non-payment of the interest—gives rise to two forms of relief which the Code provides shall not be split. This is illustrated by the present suit. The interest was paid during the first year, and the interest in arrear was that under clause 5. If, therefore, the plaint originally brought came to be properly interpreted as claiming only a personal relief in respect of the unpaid interest, the appellant's case would be on surer ground; but although their Lordships are anxious that claims for a just debt should not be defeated by the intricacies of legal procedure, yet they are unable to hold that the plaint that was originally issued by the appellant can properly bear that interpretation. The claim is for a decree for the interest "recoverable from the mortgaged property," and the other property and persons of the defendants. The words are not dissimilar from the words of clause 5 of the mortgage-deed, which clearly points to the interest being payable (that is by sale) out of the mortgaged property.

Their Lordships are unable to give any other interpretation of the phrase "recoverable from the mortgaged property . . ." in the appellant's plaint than a claim for realisation, and the fact that the decree he obtained was not a decree for sale but in the

nature of a personal judgment, does not alter its effect, for Order II, rule 2 provides that every suit shall include the whole of the claim. The suit so brought by the plaintiff did not include it, and this consequently barred the institution of a further suit in respect thereof. Indeed, when once it be accepted that the original plaint did seek, by its prayer, for realisation, this case becomes indistinguishable from the case of *Muhammad Hafiz v. Muhammad Zakariya* (1) where a similar question arose and was determined by this Board.

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There were, no doubt, good grounds of policy that caused the introduction into the Code of Civil Procedure of the provisions which, in the result of this case, will involve the appellant in some pecuniary loss, and it is the duty of the Courts to interpret and carry into effect those rules uninfluenced by the consideration of the individual loss that may be occasioned by disobedience of the provisions.

Their Lordships think that this case was rightly decided; that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

A. M. T.

Appeal dismissed.

Solicitors for appellant : *Barrow, Rogers & Nevill*

Solicitors for respondents : *T. L. Wilson & Co.*

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