APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Sharpe.

1937

July 13.

CAPTAIN C. R. SMITH
v.
MRS. HEPTONSTALL.*

Mortgage suit—Personal remedy barred at date of suit—Civil Procedure Code, O. 34, r. 3 (4)—Balance "legally recoverable"—Mortgage claim and personal claim—One single cause of action—Mode of enforcing personal remedy—Application in existing mortgage suit—Necessity for cause of action being complete before plaint filed—Fresh promissory note—Acknowledgment—New cause of action—Limitation Act, s. 19—Contract Act, s. 25.

A personal decree under Order 34, rule 3 (4) of the Code of Civil Procedure, as amended by this Court, cannot be obtained when, at the date of filing the suit, the personal remedy in the mortgage suit is barred.

There is neither one cause of action on the mortgage and a separate and distinct cause of action on the deficiency, nor is there a single cause of action divisible into two parts. It is but a single cause of action, and a mortgagee's right to a personal decree is a part of, and arises out of, the original mortgage transaction. The right is enforced by an application in an existing mortgage suit.

A cause of action must be complete before the filing of a plaint. Nothing arising after action brought can either create a new, or complete a then incomplete, cause of action entitling the plaintiff to any relief in that same then-existing suit.

Chattar Mal v. *Thakuri*, I.L.R. 20 All. 512; *Jangi Singh* v. *Chandar Mol*, I.L.R. 30 All. 388, followed.

Where in a case of a mortgage by deposit of title-deeds accompanied by the giving of a promissory note for the amount of the loan the mortgagee files a suit for a mortgage decree, but his personal remedy is at that time barred on account of the plaint being filed more than three years after the date of such promissory note, he cannot rely upon a fresh promissory note of the mortgagor as an acknowledgment of liability if such second note was given after his personal remedy on the first note was time-barred.

The giving of a fresh promissory note constitutes a new promise under s. 25 (3) of the Contract Act, but it does not alter the pre-existing cause of action. It gives rise to a new cause of action, but in order to avail himself of it, the plaintiff must have sued upon it.

Talukder for the appellant. In a mortgage suit, where the personal remedy is barred, the only way

* Civil First Appeal No. 102 of 1936 from the order of this Court on the Original Side in Civil Regular Suit No. 26 of 1934.

in which the mortgagee can recover his money is by sale of the mortgaged property. *Hanmant Desai* v. *Raghavendrarao Desai* (1). A personal decree cannot be passed under Order 34, rule 3 (4) of the Civil Procedure Code if, at the date of the mortgage suit, the personal remedy is barred. For an on demand note given with the deposit of title deeds the period is three years from the date of the note. The balance must be "legally recoverable" from the mortgagor. It is not legally recoverable if the right to recover the mortgage debt from the mortgagor personally is barred by limitation at the date of the suit. On an application for a personal decree the Court must see that the debt was alive at the date of the suit, and not merely that the application was filed within three years from the date of sale.

Chattar Mal v. *Thakuri* (2) ; *Jangi Singh* v. *Chandar Mol* (3) ; *Rahmat Karim* v. *Abdul Karim* (4).

The fresh promissory note of the defendant cannot be used as an acknowledgment because it was given only after the first promissory note had become barred. It gave rise to a new cause of action, but the plaintiff has never sued upon it. He cannot rely upon it in this suit as a mere piece of evidence. *Gulam Husein* v. *Mahamadali Ibrahimji* (5). The plaintiff cannot be allowed at a late stage of the suit to bring forward for the first time allegations which it was necessary to prove in order to show that he was entitled to a further decree against the defendant personally.

Paget for the respondent. The loan was made on the 6th June 1929 when the defendant deposited his title deeds with the plaintiff and acknowledged his

(1) 24 Bom. L.R. 410.
(2) I.L.R. 20 All. 512.
(3) I.L.R. 30 All. 388.
(4) I.L.R. 34 Cal. 672.
(5) I.L.R. 34 Bom. 540.

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liability to repay by a promissory note of the same date. The promissory note was renewed on the 14th June 1932. The defendant's objection that the balance due upon the second promissory note is not recoverable, because the second promissory note was not pleaded in the plaint, cannot be sustained at this stage of the case. It appears upon the face of the record that that promissory note was pleaded in the reply and issues were framed and the parties went to trial upon the footing that that promissory note was properly before the Court.

The decision of the Judge on the Original Side was right, and the decisions of the Allahabad Court which hold that the cause of action for an application under Order 34, r. 6 of the Civil Procedure Code (now the amended rule 3 of this Court) is the same as the cause of action for a preliminary decree for sale are wrong. A cause of action is not merely the original event which gives the right of suit but the whole bundle of facts which, if traversed, the plaintiff would have to prove. In the present mortgage suit to obtain a decree for sale of the properties the plaintiff merely had to prove the loan, the deposit of title deeds within 12 years of the suit and the failure to repay. In the subsequent application for a personal decree there are additional matters which go to form the cause of action which have to be proved. There must be proved an acknowledgment or a promise to pay within three years before the institution of the suit, and there must be a shortfall as a result of the sale of the mortgaged property.

The cause of action in a mortgage suit consists of two parts. Part one leads to the preliminary mortgage decree. The second part of it is to obtain a personal decree. That part is not complete and cannot be considered until the sale takes place and a deficiency arises.

On the application for a personal decree all that the Court has to do is to see that the balance is "legally recoverable."

[SHARPE, J. But the personal remedy on the first promissory note had become barred when the second promissory note was executed.]

The promissory note of the 14th June 1932 related back to the original loan, and was within three years before the date of the institution of the suit, and the sum due on it was therefore legally recoverable. A party is not debarred by anything in the Evidence Act from showing that the real consideration for the promissory note was the original mortgage debt. *Abdullakin* v. *Maung Ne Dun* (1). Evidence has been given that this promissory note was intended to be a renewal of the promissory note of the 6th June 1929. Section 25 of the Contract Act is applicable to the facts and not section 19 of the Limitation Act. The second promissory note can no more be a separate cause of action from that upon which the preliminary decree was passed than the first promissory note can be, and it has never been contended that a promissory note taken at the time of a loan made on a deposit of title deeds is a separate cause of action from the mortgage debt.

ROBERTS, C.J.—This appeal arises out of an action which was brought by Mr. Charles Arthur Petley against the appellant for a declaration that the plaintiff was a mortgagee by deposit of title deeds, for the usual mortgage decree, and for a personal decree against the defendant. The mortgage arose by way of security for a loan (originally of Rs. 35,000) and the plaint was filed on January the 13th, 1934. The mortgage by deposit

(1) I.L.R. 7 Ran. 292.

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of title deeds took place on June the 6th, 1929, and on the same day a promissory note was given by the defendant for the amount of the mortgage debt.

After a preliminary consent decree there was a sale of the mortgaged property in November 1935, and as the sale proceeds were insufficient to repay the mortgage debt, the plaintiff desired to have recourse to Order XXXIV, rule 3 (*4*), which runs as follows :

> " Where the proceeds of the sale are not sufficient for the payment of the money due to the plaintiff or any other party to the suit and the balance due to the plaintiff or such other party is legally recoverable by him from the mortgagor the Court shall, on application made in this behalf by the plaintiff or some other party, pass a decree against the mortgagor personally for the payment of such balance."

On June 14, 1932, the defendant by his promissory note promised to pay to the agent of the plaintiff the sum of Rs. 26,000 which sum (it is pleaded) was the balance due on the Rs. 35,000 formerly lent. This promissory note was not a renewal of the former note so as to keep the personal remedy alive. This remedy was barred by limitation on June 6, 1932, and thereafter, in my opinion, the balance due in respect of the mortgage suit ceased to be legally recoverable from the mortgagor by the plaintiff by reason of the provisions of section 19 of the Limitation Act.

But on June 14, 1932, there was (within the meaning of section 25 (*3*) of the Contract Act) a new promise to pay a debt barred by the law of limitation. I agree with Mr. Paget's argument that it is not necessary that such an agreement should refer in terms to the barred debt. [See *Abdullakin* v. *Maung Ne Dun* (1).]

This new promise could have been enforced within the time allowed by the Limitation Act, namely three

(1) (1929) I.L.R. 7 Ran. 292.

years : it could have been sued upon, and the suit, if necessary, could have been stayed pending the ascertainment of the sale proceeds. But the only action taken by the plaintiff was to file the suit with which we are at present dealing : he then sought to say that the second promissory note was a promise to pay the mortgage debt and that after the sale proceeds proved insufficient there was a balance due to him which was legally recoverable from the mortgagor.

The learned trial Judge thought that the cause of action on the mortgage and the cause of action on the deficiency were quite separate and distinct. But in my opinion no separate cause of action for the personal remedy accrued after the mortgaged property was found on sale to be insufficient to satisfy the mortgage debt—*Chattar Mal* v. *Thakuri* (1). There was one cause of action only which accrued upon June 6, 1929, and I cannot agree that "another cause of action has emerged in the course of the mortgage suit." I hold, therefore, that at the date of institution of the suit the balance sought to be recovered had ceased to be legally recoverable in that suit, though it is doubtless true that the promissory note of June 14, 1932, might have been sued upon at that date. As was said by Aikman and Griffin JJ. in *Jangi Singh* v. *Chandar Mol* (2)

"on an application under section 90" (of the Transfer of Property Act, 1882) "it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant."

A decree under Order XXXIV (which corresponds to section 90 of the Transfer of Property Act) cannot be obtained when at the date of filing of the suit the personal remedy in the mortgage suit is barred.

(1) (1898) I.L.R. 20 All. 512. (2) (1908) I.L.R. 30 All. 388.

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The difficulty in which the respondent, the legal representative of the deceased plaintiff, finds herself appears to me to be this. The cause of action on the mortgage suit is all one and the same, and thus the personal remedy upon it was time-barred before action was brought. The giving of a promissory note not in renewal of the personal liability so as to save the mischief of limitation but so as to constitute a new promise under section 25 (3) of the Contract Act could not alter the pre-existing cause of action though it did give rise to a new one. But the plaintiff never sued upon it. Accordingly owing to his failure to keep the personal remedy alive by complying with the provisions of section 19 of the Limitation Act his cause of action arising on June 6, 1929, became, so far as it relates to an application under Order XXXIV, barred by limitation: and in like manner his failure to bring an action on the new promissory note is fatal to his cause of action. What the respondent has sought to do is to try and set up the new cause of action as though in some way it had re-created the old one. But, for the reasons stated and in the light of the authorities cited, I am of opinion that she cannot do this and that the appeal must accordingly be allowed.

SHARPE, J.—This case really lies within a very small compass, although the able arguments addressed to us on both sides have been somewhat lengthy. It is said, and I think it is rightly said, that the present appeal raises a point of considerable importance affecting the practice of the Court in the matter of mortgage suits generally. It is therefore desirable if this case is to be reported and our decision acted upon as laying down some new general principle, that the material facts of this case should be stated at the outset, so that, when it is hereafter sought to apply our present decision to some

other case, it may be readily ascertained whether the facts of such other case are sufficiently in agreement with the facts of this case to require this decision to be followed. The present case has unfortunately been through many vicissitudes, but the following are the only facts now material.

On the 6th June 1929 the plaintiff (who has since died and whose place upon the record has been duly taken by his legal representative Mrs. C. H. Heptonstall) through his agents Balthazar & Son Ltd. lent Capt. Clement Smith the sum of Rs. 35,000. On the same date Capt. Smith deposited with the plaintiff's said agents the title deeds of the Allandale Hotel, Rangoon, and he also on the same date gave Balthazar & Son Ltd. a promissory note for Rs. 35,000, for value received payable on demand, and bearing interest at the rate of 9 per cent per annum. Capt. Smith repaid Rs. 9,000 of the principal sum lent, and on the 14th June, 1932, he gave Balthazar & Son Ltd. a second promissory note, this time for Rs. 26,000 for value received, payable on demand and bearing interest at the like rate. On the 13th January, 1934, the plaint in the present suit was presented, and by it the plaintiff alleged in paragraph 8, that there was then due to him "the sum of Rs. 26,000 by way of principal upon the said mortgage together with the sum of Rs. 585 by way of interest for three months to 31st December 1933." No mortgage had actually been referred to earlier in the plaint, but the implication undoubtedly was that there had been a mortgage by deposit of the said title deeds to secure an advance of Rs. 26,000, which was stated by the plaintiff in paragraph 1 of his plaint to have been made to Capt. Smith on the 6th June 1929. That was an inaccurate statement of the position, but it was accepted as correct by the defendant in paragraph 1 of his written statement. The plaint concluded with a

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prayer for the following reliefs : (*a*) a declaration that he was a mortgagee by deposit of title deeds, (*b*) the usual mortgage decree, and (*c*) a personal decree against the defendant. By paragraph 13 (*b*) of his written statement, the defendant submitted that the plaintiff was not entitled to a personal or any decree in that the alleged debt if any was barred. The plaintiff, by his further written statement in reply, stated that the said mortgage debt was not barred by limitation by reason, *inter alia*, of the second promissory note for Rs. 26,000 given by the defendant on the 14th June 1932.

On the 13th December the suit came on for hearing before Leach J. and the third issue then formulated was "Is the claim barred by the law of limitation?" On the following day, before the conclusion of the hearing, a preliminary mortgage decree in the usual form was passed by consent, in which decree it was declared that the amount due to the plaintiff by the defendant was the sum of Rs. 27,776 being as to Rs. 26,000 the amount due to the plaintiff for principal on the mortgage and as to Rs. 1,776 for costs of suit. The amount so found due was not paid by the defendant within the time specified in the preliminary decree, and on the 25th July 1935 a final decree for sale of the property was passed in the absence of the defendant. For reasons which do not appear, there was expressly excluded from the final decree the usual declaration as to extinguishment of the mortgage and the right to redeem the same, except as to the right to obtain a personal decree against the defendant for any balance unpaid.

On the 23rd November 1935 the property mentioned in the final decree was sold ; the net proceeds of that sale amounted to only Rs. 19,735. The sale was confirmed on the 18th January 1936 and four days later the Court granted a certificate under O. 21, r. 94 in the Code of Civil Procedure. As the net proceeds of sale

were found insufficient to pay the amount due to him, the plaintiff, on the 27th February 1936 filed an application under paragraph 3 (4) of the Order substituted by this Court for O. 34 (r. 6 of which had in its turn replaced section 90 of the Transfer of Property Act) for a personal decree for a balance of Rs. 8,882-1-10 being the decretal sum of Rs. 27,776 *plus* further interest and costs and less the net proceeds of sale. The defendant filed his objections on the 19th March, 1936, and in paragraph 4 thereof, he submitted that the application for a personal decree was out of time. That application finally came to be heard on the 7th April of the present year, by Braund J., who then granted the plaintiff a decree against the defendant for the said sum of Rs. 8,882-1-10 with interest thereon at the Court rate from February 1936. The present appeal is from that decision, and the only ground now relied upon by the defendant-appellant is the fifth ground in his Memorandum of Appeal dated the 6th July 1936, namely, that the learned Judge should have held that the relief by way of personal decree is barred by limitation.

The point of law is in a nutshell. The whole appeal turns upon the meaning of the two words "legally recoverable" in what in this Court is paragraph 3 (4) of Order 34. The appellant has urged it upon us that there is only one cause of action here, giving rise both to the relief by way of final decree for sale and also to the additional remedy by way of a personal decree for the balance. That is a view which was rejected by the learned Judge below, who held that there were two separate causes of action. In the course of his judgment Mr. Justice Braund said :

"The cause of action on the mortgage and the cause of action on the deficiency are to my mind quite separate and distinct. It doesn't follow that the latter will ever arise and at the commencement of a mortgage suit it does not exist. No money is

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recoverable from the mortgagor in this country until the security has been realized. I do not for a moment believe that the personal liability is part of the original cause of action in a mortgage suit, as a mortgage suit is understood and known in this country."

The learned Judge is there referring to the all-important distinction, which he had pointed out at the beginning of his judgment, between the characteristic of a mortgage in this country, which divorces the remedy on the security from the personal remedy (for in India a mortgage does not necessarily import a personal obligation to repay) and that characteristic of an English mortgage which gives a remedy by way of personal recovery from the mortgagor. Mr. Talukder on behalf of the appellant submits that this conception in the mind of the learned Judge of a dual cause of action is wrong, and his authority is the joint judgment of Aikman and Griffin JJ. in *Jangi Singh* v *Chandar Mol* (1) where it was held that the right to such a personal decree as is here applied for was a part of and arose out of the original mortgage transaction and that it was the date of filing the suit which had to be looked at in considering the question whether the balance is legally recoverable from the defendant. It being conceded by both parties that the appropriate limitation of time in the present case is three years, it is, therefore, contended on behalf of the appellant that, as this suit was filed more than three years after the original mortgage transaction, the balance, for which a personal decree has now been passed, was not " legally recoverable."

Mr. Paget on behalf of the respondent relies upon two grounds as entitling his client to retain the personal decree which has been passed by Mr. Justice

(1) (1908) I.L.R. 30 All. 388.

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Braund. In the first place, Mr. Paget takes up a position mid-way between Mr Talukder's stand point of a single and complete cause of action arising at the date of the mortgage transaction and the learned Judge's decision that there are two distinct causes of action. He says that his client's cause of action, though a single one, was capable of being split into two parts and that that part of it which entitled him to a personal decree was not complete until after the actual sale of the property and the ascertainment of the deficiency : hence as the application under Order XXXIV was made within three years of the ascertainment of the deficiency it was not time-barred and the deficiency was legally recoverable from the mortgagor. Mr. Paget's second ground is that even if the date of filing the suit is the material date to be considered the second promissory note of the 14th June 1932 was an acknowledgment by the defendant of his liability in respect of the balance of the mortgage debt and the present suit was brought within three years from the giving of the second promissory note.

In my judgment it is impossible to say either that that were two causes of action or that the single cause of action was divisible into two parts. To my mind the case of *Jangi Singh* v. *Chandar Mol* (1) mentioned above, concludes the matter so far as concerns the first part of the respondent's case. The respondent's right to a personal decree was a part of, and arose out of, the original mortgage transaction. In the opening sentence of his judgment Mr. Justice Braund called attention to an all important matter which must be borne in mind, namely, that the present proceeding is not a suit but an application in a suit. The latter words truly and correctly state the position that this is an application in an existing suit. A cause of action must be complete

(1) (1908) I.L.R. 30 All. 388.

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before the filing of a plaint. Nothing arising after action brought can either create a new, or complete a then incomplete, cause of action entitling the plaintiff to any relief in that same then existing suit. I therefore think that the respondent's first point must be rejected.

I also think that the respondent's second point fails. By the terms of section 19 sub-section (*1*) of the Limitation Act, an acknowledgment in writing of a liability, to permit of a fresh period of limitation, shall be computed from the date of the acknowledgment, only where the acknowledgment is made before the expiration of the period prescribed. In the present case the only acknowledgment upon which any attempt can be made to rely is the promissory note of the 14th June 1932. That was made after the expiration of three years from the original mortgage transaction and is, therefore, of no assistance to the respondent by way of an acknowledgment.

For these reasons, therefore, I agree with my Lord the Chief Justice that this appeal must be allowed and the personal decree passed by Mr. Justice Braund set aside.

July 21. Their Lordships, after hearing counsel on the question of costs, passed the following order:

We have decided on consideration that the proper award for the amount of advocate's fees is ten gold mohurs for the first day's hearing in the appellate Court, six gold mohurs for each of the two subsequent days, and one gold mohur for to-day. The order by Mr. Justice Braund with regard to the amount of costs in his Court will stand and they will, of course, be recoverable by the appellant.