

CIVIL REVISION.

Before Mr. Justice Dunkley.

1938

MOHAMED AFZAL *v.* MOHAMED ISMAIL.**June 14.*

Cause of action, Splitting up of—Forbearance of creditor to sue if debtor pays punctual instalments—Remedy of creditor on breach of agreement—One whole cause of action—Creditor's suit for breach of instalments due—Subsequent suit for balance debt—Civil Procedure Code, O. 2, r. 2 (2).

Where a cause of action for the recovery of the whole amount of the debt exists, but the creditor agrees to forbear and not to sue upon that cause of action so long as the debtor pays him a certain sum every month and until the monthly payments are at least three months in arrears, the creditor's remedy is to sue for the whole balance amount of the debt due if three monthly instalments are in arrears. If he merely sues and obtains a decree for the amount of the instalments up to the time of his filing the suit, he is debarred afterwards from filing a suit to recover the balance of the debt in view of the provisions of O. 2, r. 2 (2) of the Civil Procedure Code.

Lasa Din v. Gulab Kunwar, I.L.R. 7 Luck. 442 ; *Ram Sarup v. Peare Lal*, I.L.R. 57 All. 838, distinguished.

Rauf for the applicant.

Dadachanji for the respondent.

DUNKLEY, J.—The defendant-applicant owed the plaintiff-respondent a sum of Rs. 3,350 and, being unable to pay the whole amount at once, he entered into an agreement, dated the 22nd August, 1935, which is Exhibit D on the record of the Rangoon Small Cause Court, for the payment of this amount by instalments of Rs. 30 per month, and the plaintiff-respondent on his part agreed not to exercise his right of action for the recovery of the debt until at least three monthly instalments were in arrears. It is necessary, I think, in order to understand this case properly, to

* Civil Revision No. 121 of 1938 from the judgment of the Small Cause Court of Rangoon in Civil Reg. No. 7649 of 1937.

set out the terms of this agreement Exhibit D. The following are the two operative clauses :

" 1. That in pursuance of the said agreement and in consideration of the sum of Rupees Three Thousand three hundred and fifty (Rs. 3,350) due as aforesaid by the Debtor to the Creditor (the indebtedness whereof the Debtor hereby acknowledges) the Debtor hereby covenants to pay to the Creditor the said sum of Rs. 3,350 by monthly instalments of Rs. 30 commencing from the 1st week of October 1935 and thereafter month by month during the 1st week of each succeeding month and shall also pay to the Creditor interest on the principal sum at the rate of Re. 0-4-0 per cent per month with each instalment of principal on the date fixed for payment thereof.

2. The Debtor hereby further agrees and covenants that in the event of the failure of the Debtor to pay three consecutive instalments of Rs. 30 or three consecutive instalments of interest when the same shall become due the Creditor shall be at liberty to claim from the Debtor the whole of the balance then due giving credit to the Debtor of the amount of instalments already paid by him to the Creditor with all interest due thereon and the Debtor shall on demand pay the same to the Creditor."

No instalments were paid, and in 1936 the respondent filed a suit against the applicant in the Small Cause Court of Rangoon for recovery of ten instalments, which were then overdue, and interest thereon (Civil Regular No. 6205 of 1936) ; the applicant confessed judgment and a decree was passed. Subsequently, in the next year, the suit out of which the present application arises was filed for the recovery of a further fourteen instalments and interest (Civil Regular No. 7649 of 1937), and in defence the applicant raised the point that this second suit was barred by the provisions of Order II, rule 2, of the Code of Civil Procedure. The learned Second Judge of the Small Cause Court has held that the suit was not barred by the provisions of this rule, and this is the question which has been argued before me on

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this application in revision. Order II, rule 2, of the Code of Civil Procedure reads as follows :

" 2. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action ; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

Now, were it not for the judgment of a Bench of the Allahabad High Court in the case of *Ram Sarup and another v. Peare Lal and others* (1), I should have had no difficulty in holding that the judgment of the learned Second Judge of the Small Cause Court was incorrect and that the second suit was clearly barred by the provisions of this rule. The judgment of the Allahabad Court was based upon the decision of their Lordships of the Privy Council in the case of *Lasa Din v. Gulab Kunwar and others* (2), but, with the greatest respect, it seems to me that this latter case hardly touched the point for decision. Like all the other cases which have been quoted before me in the course of the argument, it is a decision on a question of limitation arising out of a suit on a mortgage, and therefore can scarcely be an authority for a decision on a question under Order II, Rule 2, arising out of a suit on a bond for the payment of money. The *ratio decidendi* of the judgment of their Lordships is to be found on page 452, where it is said that

" a proviso of this nature is inserted in a mortgage deed exclusively for the benefit of the mortgagees."

The Bench of the Allahabad High Court, as I have said, purported to follow this judgment in *Ram Sarup's*

(1) (1935) I.L.R. 57 All. 838.

(2) (1932) 1 I.L.R. 7 Luck. 442.

case. Unfortunately, the terms of the bond in the Allahabad case are not set out in the judgment, which proceeds upon the footing that the creditor had two options given to him under the terms of the bond, namely, an option to sue for the instalments as they became due, and an option to sue for the whole amount of the debt, and that, therefore, two separate and distinct causes of action arose under the bond. The basis of the judgment is that this option was given by the bond to the creditor, and, as the learned Judges purported to follow the judgment of the Judicial Committee in *Lasa Din v. Gulab Kumwar* (1), I am obliged to conclude that there must have been such an option "exclusively for the benefit of the creditor" expressed in the bond itself.

Now, that is not the case in the present bond. I have set out the terms of the bond and it is only necessary to read these terms to see that, so far from their being exclusively for the benefit of the creditor, they were obviously intended exclusively for the benefit of the debtor. There was only one cause of action under this bond, and that was the right of the respondent to recover the amount of his debt. Under the bond he agreed not to enforce his remedy in respect of that cause of action so long as the debtor paid him a sum of Rs. 30 a month, and he agreed also that he would not enforce his remedy until at least three of these instalments of Rs. 30 a month were in arrears. The meaning of the bond is, to my mind, perfectly plain, namely, that, although a cause of action for the recovery of the whole amount of the debt existed, the creditor agreed to forbear and not to sue upon this cause of action so long as the debtor paid him the sum of Rs. 30 a month and until the monthly payments were at least three

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months in arrears. When three monthly instalments were in arrears, the remedy upon this cause of action became enforceable, and that was to sue for the whole amount of the debt. When the respondent, by an unfortunate error, decided to sue for ten instalments only instead of suing for the whole amount due to him, he obviously, in the terms of sub-rule (2), of rule 2, of Order II, omitted to sue in respect of a portion of his claim which he was entitled to make in respect of the single cause of action arising under the bond.

Consequently, his second suit was barred by the provisions of this rule, and, therefore, the judgment and decree of the learned Second Judge of the Small Cause Court are set aside, and the suit of the plaintiff-respondent is dismissed with costs in both Courts, advocate's fee in this Court four gold mohurs.