

FULL BENCH.

Before Goldstream, Jai Lal and Skemp JJ.
PURAN CHAND (PLAINTIFF) Appellant

versus

HAR PARSHAD AND ANOTHER (DEFENDANTS)
Respondents.

Civil Appeal No. 1233 of 1932.

Civil Procedure Code, Act V of 1908, Order II, rule 2 : whether this rule bars a suit for recovery of overdue interest on a mortgage by sale of the mortgaged property — where there has been a previous suit for recovery of overdue interest against the mortgagor personally.

On 23rd July, 1927, defendants mortgaged a house to plaintiff to secure the repayment of Rs.1,250. This amount with interest at Re.1-4-0 *per cent. per mensem* was repayable in two years (*i.e.* by the 22nd July, 1929). The interest was to be paid monthly, and if not paid for three months, the rate was to be increased to Re.1-8-0 *per cent. per mensem* and the mortgagee was empowered to recover interest alone by separate suit irrespective of the term of two years. On failure to pay principal and interest within the specified time the mortgagee was entitled to recover principal and interest by sale of the mortgaged property. On 20th March, 1930, the mortgagee sued for arrears of interest from 25th July, 1927, to 24th January, 1930, and got a personal decree against the mortgagor. On 5th May, 1931, the mortgagee brought the present suit for interest from 24th January, 1930, to 4th May, 1931, which was dismissed by the lower Courts as barred under Order II, rule 2, of the Code of Civil Procedure.

Held, by the Full Bench, that the present suit, being for sale of mortgaged property, was not barred under Order II, rule 2 of the Code of Civil Procedure. The right of the mortgagee to recover the money from the mortgagor personally arose out of the covenant to repay the loan, and his right to realise the security accrued from the hypothecation, and each of these two rights furnished an independent and distinct cause of action. Order II, rule 2 makes it obligatory only to include in a suit the whole of the claim and all

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the reliefs to which the plaintiff is entitled *in respect of the same cause of action*. It, therefore, follows that the mortgagee was not bound to sue for the realisation of his security in the previous suit for enforcement of the *personal* covenant of the mortgagor to pay the overdue interest and, therefore, Order II, rule 2 was not applicable to the present suit.

Sultan Singh v. Joti Sarup (1), *Mathra Das v. Nihal Singh* (2), and *Parmeshri Das v. Fakiria* (3), relied on.

Kishan Narain v. Pala Mal (4), and *Mohammad Hafiz v. Mohammad Zakariya* (5), distinguished.

Second Appeal from the decree of R. S. Lala Ghanshyam Das, District Judge, Ambala, dated 21st June, 1932, affirming that of K. S. Sheikh Mohammad Hassan, Subordinate Judge, 1st Class, Ambala, dated 4th March, 1932, dismissing the plaintiff's suit.

ACHHRU RAM and INDAR DEV, for Appellant.

LAKSHMI NARAIN SINGH, for Respondents.

JAI LAL J.—On the 23rd of July, 1927, Har Parshad and Nand Lal executed a mortgage deed in favour of Puran Chand to secure the repayment of Rs.1,250. The mortgage was a simple one and it was stipulated that the principal amount of Rs.1,250 would carry interest at Re.1-4-0 *per cent. per mensem* and that the whole amount, principal and interest, would be repaid in two years. It was also stipulated that the interest would be paid every month and that if default were made in payment thereof for three months, then enhanced interest at the rate of Re.1-8-0 *per cent. per mensem* would be paid from the date of the bond till the date of payment, and further that the mortgagee would be entitled to recover interest alone by a separate suit irrespective of the term of two years for payment of the principal and interest. It was also provided that

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(1) (1928) 109 I. C. 613. (3) (1920) I. L. R. 1 Lah. 457 (F.B.).
(2) (1928) 110 I. C. 207. (4) (1923) I. L. R. 4 Lah. 32 (P.C.).
(5) (1921) I. L. R. 44 All. 121.

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in case of non-payment of principal and interest within the specified time, the mortgagee would be entitled to recover the same with costs and future interest by sale of the mortgaged property and from the other property of the mortgagors.

The mortgagors paid some interest to the mortgagee, but subsequently made default for three months. Thereupon the mortgagee instituted a suit against them for recovery of interest alone from the 25th of July, 1927, to the 24th of January, 1930. This suit was instituted on the 20th of March, 1930, and was decreed. It must be noted that only a personal decree against the mortgagors was claimed and was granted by the Court. On the 5th of May, 1931, the mortgagee instituted another suit for the recovery of interest due to him from the 24th of January, 1930, to the 4th of May, 1931, by sale of the mortgaged property. This suit was dismissed by the trial Court on the ground that it was barred under the provisions of Order 2, rule 2, of the Code of Civil Procedure. The mortgagee appealed to the District Judge, but his appeal was dismissed, the learned Judge having agreed with the trial Court that the suit was barred under Order 2, rule 2.

The mortgagee has presented a second appeal in this Court, and in view of the importance of the question involved and somewhat conflicting opinions expressed thereon, the following question has been referred to the Full Bench :—

“ Where a mortgage deed provides that principal and interest secured thereby shall be payable in two years and in default shall be recoverable by sale of the mortgaged immovable property and from the mortgagor personally and further that interest shall be paid monthly and in default the mortgagee shall be

entitled to sue for interest alone without regard to the term of two years fixed for the payment of principal and interest and on default being made in payment of the interest the mortgagee files a suit for recovery of interest alone and obtains a personal decree against the mortgagor, is a subsequent suit for recovery of interest, which has accrued subsequent to the previous suit, by sale of the mortgaged property, barred by Order 2, rule 2, Civil Procedure Code, when the first suit was instituted after two years from the date of the mortgage?"

Now, it would be observed that the first suit was instituted after the expiry of two years fixed for the repayment of the principal and interest and, therefore, the mortgagee had a right then to sue for the recovery of the whole amount due under his mortgage from the mortgagors personally if he chose to relinquish his security, and by sale of the mortgaged property if he did not do so, and also personally from the mortgagors if the proceeds of the sale were found to be insufficient to pay the amount due to him. Order 2, rule 2, 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 a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court: and that 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, and also that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

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The contention of the appellant is that the previous suit and the suit out of which this appeal has arisen cannot be described to be based on the same cause of action and consequently that Order 2, rule 2 does not bar the present suit. In support of this contention reliance is placed principally on the observations of Lord Buckmaster who delivered the judgment of the Judicial Committee of the Privy Council in *Kishan Narain v. Pala Mal* (1). It is true that in that case it was held by their Lordships that Order 2, rule 2 of the Code of Civil Procedure, was a bar to the suit with which they were concerned; but this conclusion was based on an interpretation of the mortgage deed which was before them, as would appear from the following observation of the noble Lord:—

“ 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 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:

(1) (1923) I. L. R. 4 Lah. 32 (P.C.).

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."

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It would thus appear that in the case before their Lordships, on a date when both principal and interest had become payable, the mortgagee had sued for the recovery of interest alone, but by sale of the mortgaged property, and that in the subsequent suit he had claimed a decree both for principal and interest also by sale of the mortgaged property. This fact their Lordships considered brought the case within the prohibition of Order 2, rule 2, of the Code of Civil Procedure. They made a clear distinction between a relief for a personal decree and for a decree for sale of the mortgaged property, which they considered to be based on distinct causes of action. This judgment is relied upon by the District Judge in support of his conclusion in this case: but, in my opinion, it clearly does not bear the construction that the learned Judge has sought to place upon it.

The matter came subsequently before a Division Bench of this Court, consisting of Harrison and Tek Chand JJ. in *Sultan Singh v. Joti Sarup* (1). The relevant facts were similar to those in this case, but the first suit for recovery of interest alone personally from the mortgagor was instituted before the expiry

(1) (1928) 109 I. C. 613.

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of the term fixed in the mortgage deed for payment of principal and interest, though the mortgagee could have sued for the recovery of both on the date of the suit owing to default of the mortgagor in paying the interest on due date. The learned Judges held that the second suit for recovery of principal and interest by sale of the mortgaged property was not barred by Order 2, rule 2 of the Code of Civil Procedure. They observed that in the case of a simple mortgage the mortgagee had, generally speaking, on the default of the debtor a two-fold cause of action, one arising out of the breach of the covenant to repay and the other arising out of the hypothecation. The following observation of Tek Chand J. sums up the view of the learned Judges :—

“ It will thus be seen that the mortgage transaction in question gave rise to two independent obligations; the right of recovering the amount due as a loan and that of enforcing the relief against the property, and each of them furnished an independent cause of action. In the former suit the plaintiffs claimed a personal decree for interest against the mortgagors and so enforced the first obligation only. In the present suit they seek relief against the property and the cause of action, therefore, is wholly distinct. Consequently, no question of the applicability of Order 2, rule 2, arises.”

The learned Judge further observed that the case of *Kishan Narain v. Pala Mal* (1), supported his view. The learned District Judge has distinguished this case from the present case on the ground that in the former case the first suit for recovery of interest alone from the mortgagor personally was instituted before the time fixed in the mortgage deed for pay-

(1) (1923) I. L. R. 4 Lah. 32 (P.C.).

ment of the principal and interest had expired; but it would be observed that the principal and interest had become recoverable by virtue of default in the payment of interest and that the decision of the learned Judges did not proceed on the ground of this distinction, but on the ground that the right of the mortgagee to recover interest from the mortgagor personally and his right to recover the principal and interest by sale of the mortgaged property constituted two distinct causes of action. The distinction, therefore, observed by the learned District Judge was not material for the decision of this case.

Again, in Civil Appeal No. 1804 of 1927, *Mathra Das v. Nihal Singh* (1), Addison J. held in circumstances similar to the present case, following the two cases already cited by me, that a subsequent suit for recovery of the principal and interest by sale of the mortgaged property was not barred by Order 2, rule 2 of the Code of Civil Procedure. In *Parmeshri Das v. Fakiria* (2), the learned Chief Justice when delivering the judgment of the Full Bench, held that where a mortgage deed contained a stipulation as to the payment of interest and on breach of such stipulation the mortgagee was entitled to sue for interest alone or to obtain possession of the mortgaged property, a previous suit instituted for recovery of interest alone personally from the mortgagor was no bar under Order 2, rule 2 Civil Procedure Code, to a second suit instituted by the mortgagee for possession of the mortgaged property on a fresh default by the mortgagor.

Mohammad Hafiz v. Mohammad Zakariya (3), cited for the respondents, is no authority against the contention of the mortgagee before us because in that

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case the first suit was for recovery of the overdue interest by sale of the mortgaged property, and the second suit was also for recovery of the principal and interest which had subsequently become due by sale of the mortgaged property. It is obvious that the mortgagee chose to seek the same relief in the two suits, which were, therefore, in view of the law that I have stated above, based on the same cause of action.

The Madras High Court in *B. R. Sawmy Rao v. The Official Assignee of Madras* (1), interpreted the judgment of the Privy Council in *Kishan Narain v. Pala Mal* (2), in the same manner in which it has been interpreted in the previous judgments of this Court.

I have refrained from referring to some cases cited at the Bar, in which the second suit for sale of mortgaged property has been held to lie under Order 34, rule 14, because that rule does not apply to this Province and those cases, therefore, are not of material assistance in deciding the question referred to us. There is, in my opinion, also no force in the contention of the respondent's counsel that Order 34, rule 14, supports his proposition. That rule no doubt provides that mortgaged property shall not be sold in execution of a money decree obtained in respect of amount due under the mortgage unless the mortgagee brings a suit for sale of such property, notwithstanding the provisions of Order 2, rule 2. When carefully examined this rule, which as stated above, does not apply to this Province, is really intended to create a prohibition to the mortgagee securing the sale of the mortgaged property without first bringing a suit for the sale thereof. There is no ground, in my

(1) (1925) I. L. R. 48 Mad. 703. (2) (1923) I. L. R. 4 Lah. 32 (P.C.)...

opinion, to hold that but for this rule such a suit would have been barred under Order 2, rule 2.

Reference was made to *Ganga Ram and others v. Abdur Rahman* (1), *Chaudhri Kaudan Mal and others v. Sardar Allah Dad Khan* (2), *Chhabil Das v. Massu and another* (3) and *Natha Singh v. Chuni Lal and others* (4). The first two cases are distinguishable on the ground that at the time when they were instituted no distinction was observed in this Province as to the form of the relief in a suit for a personal decree and in a suit for sale of the mortgaged property. The relief claimed and usually granted was for a personal decree against the mortgagor with a lien against the mortgaged property. Under the new Code of Civil Procedure a clear distinction has been made in the forms of suits and the decrees that should be passed in such cases. In the third case the deed provided that in default of payment of interest the mortgagee would be entitled to take possession of the land mortgaged. No right was given to him to recover the unpaid interest. On this ground it was held that, as under the terms of the mortgage deed on default by the mortgagor the mortgagee had only one form of relief open to him, the provisions of Order 2, rule 2 were a bar to the second suit for possession, even where in the first suit on default having been made by the mortgagor the mortgagee had obtained a decree for the value of the produce in lieu of interest and had not claimed possession of the mortgaged land. In the last case the question involved in the present reference was not discussed and it was taken for granted that the cause of action in a suit for recovery of interest personally

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(1) 28 P. R. 1907.

(2) 19 P. R. 1910.

(3) 4 P. R. 1914.

(4) 69 P. R. 1918.

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from the mortgagor and a subsequent suit for recovery of the amount due by sale of the mortgaged property was the same; moreover it is not clear from the judgment whether the second suit was for recovery of the amount due from the mortgagor personally or whether it was for the sale of the mortgaged property.

Thus it has now been authoritatively laid down that the right of the mortgagee to recover the money from the mortgagor personally arises out of the covenant to repay the loan and his right to realise the security, *viz.* to have the mortgaged property sold to satisfy his claim accrues from the hypothecation, and that each of these two rights furnishes an independent and distinct cause of action to the mortgagees. Order 2, rule 2 of the Code of Civil Procedure makes it obligatory on the plaintiff to include in the suit the whole of the claim and all the reliefs which he is entitled to make and pray for only, in respect of the cause of action, it therefore follows that a mortgagee is not bound to sue for the realisation of his security in a suit to enforce the personal covenant of the mortgagor to pay the over-due interest as the two claims arise out of distinct causes of action.

I would, therefore, answer the question referred to the Full Bench in the negative.

COLDSTREAM J.

COLDSTREAM J.—I agree.

SKEMP J.

SKEMP J.—I agree and have nothing to add.

P. S. .

Reference answered in the negative.
