

Privy Council Appeal No. 94 of 1921.

Kishan Narain - - - - - *Appellant*

v.

Pala Mal and others - - - - - *Respondents*

FROM

THE CHIEF COURT OF THE PUNJAB.

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 28TH NOVEMBER, 1922.**

Present at the Hearing :

LORD BUCKMASTER.

LORD PHILLIMORE.

SIR JOHN EDGE.

LORD SALVESEN.

[*Delivered by* LORD BUCKMASTER.]

The difficulty in this case is due to the provisions of Rule 2 of Order 2 of the Code of Civil Procedure, 1908. This 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 the 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 moveable and immoveable 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 the 4th July, 1905, but no further payment being made in respect of interest, on the 17th November, 1908, the mortgagee sued the mortgagors, and the first question that arises is what was the effect of that suit ?

The plaint set out the mortgage ; set out payment of the interest up to the 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 Asarh Sudi 2, Sambat 1962, to Mangsar Badi 8, Sambat 1965, 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 the 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 the 19th November, 1914, instituted the proceedings out of which this appeal has arisen, asking the full mortgagee's relief in respect of the mortgaged property. The District Judge held that Rule 2 of Order 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 Rule 2 of Order 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 Rule 2 of Order 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*, 49 I.A., 9, where a similar question arose and was determined by this Board.

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.

In the Privy Council.

KISHAN NARAIN

0.

PALA MAL AND OTHERS.

DELIVERED BY LORD BUCKMASTER.

Printed by

Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1922.