Privy Council Appeal No. 27 *of* 1920.

Allahabad Appeal No. 24 *of* 1917.

Muhammad Hafiz and another - - - - - *Appellants*

v.

Mirza Muhammad Zakariya and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH NOVEMBER, 1921.

Present at the Hearing:

LORD BUCKMASTER.
LORD CARSON.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD BUCKMASTER.]

In this appeal their Lordships have not had the advantage of hearing counsel for the respondents, but owing to the full and able argument of Mr. Hyam they have been placed in complete possession of the facts.

The appeal arises out of a mortgage suit. The appellants and the second, third and fourth respondents represent together the mortgagee. The first respondent was himself one of the mortgagors and represents the other. The mortgage deed in question was executed on the 14th September, 1910, and was a simple mortgage but it took an unusual form. It created security for the repayment to the mortgagees of Rs. 14,000 principal and interest at the rate of 8 annas per cent. per month, it then provided by Clause 2 that the interest should be paid on the bond as each month went by, and that if the interest was not paid for six

months, the creditor should be competent to realise only the unpaid amount of interest due to him, or the amount of principal and interest both by bringing a suit in court without waiting for the expiration of the time fixed, and that the mortgagors should take no objection to such proceedings. The time fixed was that mentioned in Clause 7, which provided that if the amount secured by the bond, with interest, should not be paid after the expiration of three years, the creditor should be entitled to realise by bringing a suit for the whole of the amount of the principal and interest, together with other incidental expenses, and again the clause concluded by provision that the mortgagors should have no objection, and, if they took objection to such proceedings, it should be regarded as false.

Three years elapsed after the deed had been executed and no interest was paid, with the result that in April, 1914, the mortgagee had the power, so far as the terms of the deed were concerned, either to bring an action for the purpose of realising the security in order to obtain repayment of the full principal money and the interest, or simply of the interest alone. He selected the latter course, and on the 16th April, 1914, he instituted a suit which set out, with perfect fairness and clearness, the provisions of the bond and the fact that he had elected to pursue the remedies that the bond gave him in respect only of the interest that was then due. The amount of that interest was Rs. 3,010 and in respect of that sum, and no more, he paid the court fees upon the plaint. The learned judge before whom this suit was brought made a decree on the 11th August, 1914, granting the relief that was claimed, but he appears to have overlooked the peculiar character of the mortgage, for he made a decree which, upon the face of it, was not the decree that the plaintiff had asked for, and certainly not the decree to which the defendants could, on any hypothesis, be entitled. What he did was this : He declared that the amount due to the mortgagee for principal, interest and costs was Rs. 3,270–12–0, a statement that the consideration of the plaint itself would have shown to be manifestly inaccurate, for it was perfectly plain from the proceedings that the amount of Rs. 3,010 was the amount claimed as due and this was for interest alone and did not include one single rupee in respect of the principal, which still remained at the sum of Rs. 14,000. He then provided that if the defendant paid into court the amount so declared to be due, which was the amount of the interest and costs, on or before the 11th February, 1915, the mortgagees should deliver up the documents relating to the property, and if required, re-transfer it to the defendant free from the mortgage and from all incumbrances created by the mortgagees or any persons claiming under them. Paragraph 2 of the decree proceeded upon the same footing, and provided that if the money was not paid in there should be a sale, out of the money realised the claim for Rs. 3,270 should be satisfied, and after that the balance of the money in court should be paid out to the mortgagor.

The result of this decree would have been that the mortgagor could have secured complete redemption by payment of money which, by common consent, was nothing but interest on the sum that he owed and the costs. It is impossible to consider how it was that such a decree passed either the vigilance of the pleader who was appearing for the plaintiff or the consideration of the court, for such a decree was not the decree asked for nor that which, in the circumstances, ought to have been made.

Apparently the money was paid into court, but the mortgagor never asked for re-transfer of the property, and the property therefore apparently remaining still subject to the mortgage, the representatives of the mortgagee who had died proceeded, on the 23rd January, 1915, to institute the proceedings out of which this appeal has arisen, seeking relief similar to, but not the same as, that formerly claimed. It was stated that the amount due on the mortgage was the principal moneys and the interest that had accrued due, less the amount which had been provided by the proceedings formerly taken, and they sought realisation of the security and consequential relief. To that suit objection was taken that it was not competent to the mortgagees by reason of rule 2 of Order 2 of the Code of Civil Procedure. The learned judge before whom the matter came, being obviously impressed by the injustice which would be done if effect was given to such a defence, decided in favour of the plaintiffs, but upon appeal to the High Court that judgment has been reversed and judgment entered for the defendant; from the judgment of the High Court the present appeal lies.

Now the whole question depends upon considering whether the terms of rule 2 of Order 2 does really bar the plaintiffs from the relief that they seek, and no one would be anxious to stretch or strain the language of that rule in order to cover a case where, if it be made applicable, it is obvious that the plaintiffs may suffer a substantial wrong. The rule runs in these terms:—

> (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."

There are other provisions of the Order to which reference need not be made, because, in their Lordships' opinion, the exact provisions of rule 2, sub-section 1, which has been read, covers and fits the present dispute. What was the cause of action that the plaintiffs possessed when the proceedings were first instituted? It was the cause of action due either to the fact that the interest had been unpaid for more than six months, or that the three years had elapsed, and the principal was also unpaid, and in either case they could have sued for realisation to provide for the whole amount secured by the deed.

The plaintiffs now purported to proceed under Clause 2 of the deed, but even in that case the non-payment of the interest was the sole cause upon which they were entitled to ask either for the limited relief that was sought or the larger relief which

they abstained from seeking. It is also important to point out that the only relief that could be sought in both cases was realisation of the mortgage security, for the mortgage was a simple mortgage containing no express covenant for the payment of the principal and the interest.

Their Lordships think therefore that the rule covers the present dispute, and it is only necessary, in deference to the careful argument that is placed before the Board, to refer to one or two of the authorities to which the learned counsel called attention. The first was *Mussummat Chand Kour* v. *Partab Singh* in 15 I.A., 156, and that can be dealt with very simply. In that case what happened was that a Hindu widow having sold the whole of the estate, and a suit being instituted to set aside the sale, the proceedings were objected to upon the ground that before the sale was effected other proceedings were instituted to obtain an injunction to prevent the sale taking place. It was pointed out that the actual cause and circumstances which gave rise to the dispute were different in both cases, because in the one all that could be alleged was an intention, and all the relief that could be sought was an injunction. In the other, the matter alleged was an act done and the relief sought was the restoration of the property that had been sold. In the case of *The Rajah of Pittapur* v. *Sri Rajah Venkata Mahipatisurya*, in 12 I.A., 116, it is said that the cause of action means the cause of action for which the suit is brought, and it does not say that every suit includes every cause of action. Their Lordships see no reason to attempt to qualify or to extend those words, because they are in fact nothing but a repetition of the exact words of the Code ; the cause of action is the cause of action which gives occasion for and forms the foundation of the suit, and if that cause enables a man to ask for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. The case of *Yashvant* v. *Vithal*, I.L.R., 21 Bomb. 267, really illustrates this view, for there the learned judge held that both the causes of action and the remedies were distinct.

Their Lordships, in expressing this opinion, have in mind the fact that, owing possibly to faulty advice, or, it may be, to a misapprehension of their strict legal rights, the plaintiffs are in hazard of losing Rs. 14,000 in respect of a transaction which, so far as can be seen, was a perfectly straightforward transaction effected at a reasonable rate of interest. Whether there be any means now, according to the law in India, of remedying what does appear to be a misapprehension underlying the decree that was made on the 11th August, 1914, their Lordships are not prepared to say, but if such opportunity can be afforded consistently with the well-known rules establishing practice in India, their Lordships see no reason to doubt that it will receive considerate attention by the court before whom it is brought.

Their Lordships will humbly advise His Majesty that the appeal be dismissed.

In the Privy Council.

MUHAMMAD HAFIZ AND ANOTHER

v.

MIRZA MUHAMMAD ZAKARIYA AND OTHERS.

DELIVERED BY LORD BUCKMASTER.

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