1935 *Present :* **Koch J. and Soertsz A.J.**

SAIBO *et al. v.* ABUTHAHIR *et al.*

83—D. C. Badulla, 5,569.

Res judicata—*Bond—Separate covenants as regards principal and interest —Action for interest—Subsequent action for principal—Civil Procedure Code, s. 34.*

Where it was stipulated by bond that the principal sum shall be payable on demand, and that the interest shall be payable for a period of four years once in six months and thereafter monthly,—

***Held,* that the covenants regarding the payment of principal and interest were separate and independent, and that an action to recover interest was no bar to a subsequent action to recover the principal.**

APPEAL from a judgment of the District Judge of Badulla.

Keuneman (with him *Theagarajah*), for defendants, appellants.
H. V. Perera, for plaintiff-respondent and petitioner in Revision.

Cur. adv. vult.

October 3, 1935. SOERTSZ A.J.—

the plaintiffs-respondents sued the defendants-appellants to recover a sum of Rs. 1,500 the principal amount due on the document P 1 and a sum of Rs. 195 as interest due for a certain period. They also claimed a sum of Rs. 69.10 the cost of two deeds of transfer executed by them in favour of the defendants.

The plaintiffs had on three prior occasions sued the defendants to recover certain amounts which they alleged were owing at the dates of the institution of those cases for interest payable on the bond, and had obtained judgments for the amounts claimed.

In the present case, when they filed their plaint to recover the principal amount and balance interest due, they averred that although by the terms of the bond P 1 the principal amount was payable on demand, there was a subsequent agreement (document P 2) by which they undertook not to demand from the defendants the said principal sum until they had executed certain transfers in favour of the defendants. They had now executed those transfers and therefore claimed the principal sum. This averment was apparently made by way of explanation and justification for their not suing for the principal in the earlier cases. The defendants, however, in their answer pleaded *inter alia* "that as a matter of law the plaintiffs are estopped from bringing this action by virtue of decrees in cases No. 4,645 and No. 5,225 of this Court which operate as *res judicata*". This was the question really debated on appeal. Before going on to examine it, it is necessary to get a clear view of the two documents P 1 and P 2. P 1 is dated December 16, 1925. By it the defendants and their deceased father of whose estate the first defendant is the administrator declared themselves "jointly and severally held and firmly bound unto" the two plaintiffs "jointly and severally in the sum of Rs. 1,500 being value of shop goods and furniture bought and received by the defendants from the plaintiffs which said sum we jointly and severally do hereby engage and bind ourselves and our and each of our heirs, &c., to pay the said obligees jointly and severally, their heirs, &c., *on demand* together with interest thereon at the rate of 16¾ per cent. per annum computed from the date hereof for a period of four years, and thereafter at the rate of 18 per cent. per annum, the said *interest to be payable half yearly* for the first four years (the first of such payments to be made on or before the 5th day of May, 1926), *and thereafter monthly*".

P 2 was executed six days later, the 22nd of December, 1925. By it the first plaintiff alone "stated" that he would not "demand payment to me of the sum of rupees one thousand five hundred (Rs. 1,500) due to me on bond No. 903 dated December 16, 1925 . . . . from the obligees (should be obligors) mentioned in the said bond until I transfer and assign", &c.

The first question that arises for consideration is whether the terms of the bond P 1 show the existence of two separate and independent

covenants as regards payment of interest and of principal, and if they do, whether it was open to the plaintiffs to sue on separate occasions for only the interest that had fallen due, without being liable to be repelled by the plea of *res judicata* when later they came into Court seeking to recover the principal sum. This question was, if I may say so, argued with great ability on both sides, and having given it my most careful consideration I have come to the conclusion that the plea of *res judicata* fails on a true construction of the terms of P 1. It is clear that the principal was payable on demand, and the interest was payable, for the first four years once in six months, the first payment on or before May 5, 1926, and thereafter monthly. I am of opinion that the words "together with" in the context of P 1 means nothing more than "and". It does not mean "at the same time as". The non-payment of interest on May 5, 1926, clearly entitled the plaintiffs to sue the defendants for six months' interest. It gave them a cause of action. Similar defaults at the end of every other period of six months for the first four years, and thereafter defaults every month gave rise to a fresh cause of action. As against this, a cause of action to sue for the principal arose only if a demand was made and was not complied with. That was an entirely different cause of action. Apart from demand, it did not accrue on the non-payment of interest on the due dates. In the case of *Sawmy Rao v. Official Assignee of Madras*[1] where the material terms of a mortgage deed were:—"We and our heirs shall pay severally and jointly the said sum of rupees five thousand with interest at 1 per cent. per mensem to you and your heirs whenever demanded. We shall pay the interest of the said debt every month within the fifth of that month, commencing from the fifth of the current month. We and our heirs pay the principal amount rupees five thousand and interest due therefor to you and your heirs whenever demanded", the Court, Coutts Trotter C.J. and Krishnan J., held that a suit based on the covenant to recover interest did not bar a subsequent suit for the principal and interest due on the bond. Krishnan J. said, "If we look at the mortgage bond, it clearly contains separate covenants as regards payment of interest and of principal. It provides that the mortgagors 'shall pay the interest of the said debt, every month, within the fifth of that month, commencing from the fifth of the current month May, 1921'. It then goes on to provide that the mortgagors and their heirs shall pay the principal amount, Rs. 5,000 and the interest due therefor to the mortgagee and his heirs whenever demanded. It is quite clear that here we have two independent covenants; and it leaves it open to the mortgagee to call in his mortgage money whenever he likes, or to leave it under mortgage with the mortgagors; but the right to get the interest every month is specifically provided for and requires no demand whatsoever, for the interest is payable independently of demand on the fifth of every month."

That opinion is a applicable with even greater force to the facts in the present case.

This judgment of the Madras Court proceeds upon the authority of the rulings of the Privy Council in the two cases of *Muhammad Hafiz and another v. Muhammad Zakariya*[2] and *Kishen Narain v. Pala Mal*[3]. In

[1] *I. L. R. 48 Madras 703.* [2] *I. L. R. 44 Allahabad 121.*

[3] *I. L. R. 4 Lahore 32.*

the former case the mortgage deed created security for the repayment to the mortgagees of Rs.. 14,000 principal and interest at the rate of eight annas per cent. per mensem. It provided 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 entitled to realize 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 term fixed. The time was fixed by a clause which provided that if the amount secured by the bond with interest was not paid after the expiration of three years, the creditor was entitled to realize by bringing a suit for the whole amount of the principal and interest. Three years elapsed and no interest was paid and the mortgagee had the power so far as the terms of the deed were concerned, either to bring an action for the purpose of realizing the security in order to obtain repayment of the full principal and interest, or simply of the interest alone. He took the latter course. About a year later proceedings were instituted to recover the principal and interest that had accrued due, less the amount which had been provided by the proceedings formerly taken. To that suit objection was taken that it was not competent to the mortgagees by reason of Rule No.. 2 of Order No. 2 of the Code of Civil Procedure. What then is this rule, and have we an equivalent rule? The rule in the Indian Code is in the following terms : " 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 ". In that state of the law and of the facts the Privy Council said, " 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 realization to provide for the whole amount secured by the deed. The plaintiffs purported to proceed under the earlier clause, 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 they abstained from seeking ". They were therefore barred from bringing the second action.

In the latter case, the Privy Council said, " 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 our law the equivalent provision to the Indian Rule No. 2 of Order No. 2 is to be found in section 34 which enacts:—" Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action ". Except that our section uses the word " action " in place of the word " suit " in the Indian section—the provisions are identical. They require a plaintiff to exhaust all the claims he may make *on the cause of action on which he is suing.*

Now in the case before us, the cause of action upon which the plaintiffs sued in the earlier cases was the failure to pay the interests due according to the covenant. That failure did not result in the principal falling due. According to the bond the principal fell due on a demand being made and not being complied with. It was quite a separate cause of action. If, for instance, at the time the plaintiffs became entitled to sue for interest, the principal was also due to be claimed in consequence of a demand for payment not compiled with, they were *entitled* to include that cause of action as well in their plaint and to sue for both interest and principal, but they were *not bound* to do so. They could have set about reclaiming the principal in a separate action. In that view of the matter, even if the evidence in this case establishes the fact that before the plaintiffs instituted the last action for the recovery of interest, a cause of action had accrued to them to sue for the principal in consequence of a disregarded demand for its payment, the fact that the plaintiffs did not include a claim for that amount in the action they brought to recover the interest, cannot prevent them from suing in a subsequent action to recover the principal, for the two things were dependent upon separate causes of action. The law provides that a plaintiff subject to certain restrictions *may* unite several causes of action in one plaint. It is at his option. The case would have been different if the bond had provided for the payment of principal and interest without discrimination on demand, or on or before a certain date and there was failure to pay on demand, or the occurrence of that date. In such an instance, both things fell due on the same cause of action, namely, the neglected demand, or the occurrence of the date. Spencer Bower on *Res judicata* puts the matter very vividly. On page 195 he says, " A party is entitled to swallow two separate cherries in successive gulps, but not to take two bites at the same cherry. He cannot limit his claim to a part of one homogeneous whole, and treat the inseparable residue as available for future use, like the good spots in the Curate's egg ". To apply the simile to this case, every instalment of interest that fell due half yearly for the first four years, and monthly thereafter, was a separate cherry that ripened separately and that could have been gulped down successively. I hold, therefore, that the plaintiffs are not barred by the earlier cases from maintaining the present action.

In this view of the matter, it is not necessary to consider the other interesting questions raised and discussed in the course of the argument whether (1) the document P 2 was an agreement to vary the terms of P 1, or a mere declaration devoid of legal consequence, or an undertaking which at best gave rise only to an action for damages without affecting the obligations under P 1; (2) whether, if it was an agreement, it bound both plaintiffs as they were joint and several obligees, although only one of them was expressly a party to it; (3) whether, if the decrees in the earlier cases operated as *res judicata,* the defendants were not precluded by section 207 of the Civil Procedure Code from setting up the plea, as they had not set it up when sued a second and third time for interest.

It only remains to say with regard to the claim in reconvention that the trial Judge's finding on it is supported by the evidence. The appeal, therefore, fails and must be dismissed with costs. The plaintiffs are

entitled to the costs of the trial in the Court below. I delete the order as to costs made by the District Judge. I do not interfere with the District Judge's finding as regards the Rs. 69.10 claimed by the plaintiffs.

There was an application for revision of the judgment so far as the second plaintiff was concerned. With regard to that, it is sufficient to say that the grounds stated in the petition are inadequate for excusing him his failure to avail himself of his right of appeal, and for exercising the extraordinary powers of this Court in revision, in order to grant him relief.

KOCH J.—I agree.

Appeal dismissed.