

## A. I. R. 1916 Lahore 451

CHEVIS AND SHADI LAL, JJ.

*Jahan Khan*—Defendant—Appellant.

v.

*Chandi Shah*—Plaintiff—Respondent.

Second Appeal No. 1540 of 1913, decided on 5th June, 1915, from the Decree of the Divnl. Judge, Attock, dated 24th April, 1913.

**Limitation Act (9 of 1908), Article 132—Suit on mortgage for principal and interest—Mortgagee entitled to sue for arrears of interest—He cannot recover interest becoming due 12 years before suit.**

A mere omission to sue is not sufficient proof of waiver of the right to sue. 188 P. R. 1883, ref. to.

Where a mortgage-bond dated 11th August, 1890 provided that the interest on the mortgage-money would be paid yearly and the mortgagee could recover arrears of interest by suit and after 10 years, if the land was not redeemed, he could recover principal and interest by suit and get the land attached and sold in execution. and only a small sum having been paid towards interest in the early years of the mortgage the mortgagee sued the mortgagor :

*Held*, that, inasmuch as the plaintiff held the option of suing every year, the suit was governed by Article 132 of the first Schedule of the Limitation Act and the plaintiff could not recover interest that had become due 12 years before the institution of the suit. [P. 451, C. 2.]

*Muhammad Iqbal*—for Appellant.

*Nand Lal*—for Respondent.

**Judgment** :—This a claim based on a mortgaged-deed, dated 11th August, 1890, by which defendants mortgaged certain land to plaintiff for Rs. 600. The mortgagors were to retain possession, the money was to carry interest at  $12\frac{1}{2}$  annas per Rs. 100 per mensem, interest was to be paid yearly, the mortgagee could recover arrears of interest by suit, and after ten years if the land was not redeemed, the mortgagee could recover principal and interest by suit and get the land attached and sold in execution of decree. Rupees 175-8-8 was paid towards interest in the early years of the mortgage. Nothing else has been paid. The lower Courts have given the plaintiff a decree for principal and interest calculated from date of mortgage to date of institution of suit, less the Rs. 175-8 paid, with costs and with lien on the land and future interest at 6 per cent. from date of decree of first Court to date of payment. The defendants appeal.

The only questions raised in appeal relate to the interest. First as regards interest which fell due more than twelve years prior to suit. Now the plaintiff had the option of suing for each year's interest as it fell due. No doubt he could have waived his option but there is absolutely nothing on the record to show that he did waive the option. All that can be said is that he omitted to sue, and this is not sufficient proof of waiver, see *Khairuddin v. Atu Mal* (1). Thus for the year's interest due on 11th August 1899 he could have sued anywhere after 11th August, 1899, and applying Article 132 the claim for this year's interest is time-barred as the limitation is twelve years from the time when the money becomes due i.e., when the plaintiff could have claimed it. So we find that all the yearly instalments of interest are time-barred up to and including the interest for the years 1898-99. But the interest for the years 1899-1900 is within the time as this could not be claimed till 11th October 1900, which is a date within twelve years of institution of suit.

But for the defendants it is urged that the conditions of interest provided in the deed should only hold good for the first ten years of the mortgage. But Counsel for defendants admits that after the first ten years interest can be allowed at a reasonable rate, and we do not regard the rate entered in the deed, which is a rate of  $9\frac{6}{16}$  per cent. per annum as unreasonable. We shall, therefore, not interfere except as regards interest for the period up to 11th August 1899, which we hold to be time barred. Interest after that date to date of institution of suit (thirteen years less a few days) comes to Rs. 730. We so far accept the appeal as to reduce the amount of the decree from Rs. 1,661-9-3 to Rs. 1,330, (Rs. 600, principal and Rs. 730, interest). In all other respects the decree of the lower Courts will stand, except that as regards costs we direct that the parties, each of whom has partially succeeded in appeal, shall bear their own costs in this Court and in the lower Appellate Court. Costs in the first Court to be as ordered by that Court. R.M./R.K.

*Decree modified.*

(1) (1883) 188 P. R. 1883.