APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

NARNA, MINOR BY GUARDIAN VITTAPPA SHANBHOGA (PLAINTIFF'S LEGAL REPRESENTATIVE), APPELLANT,

1916. April 27.

v.

AMMANI AMMA (SECOND DEFENDANT), RESPONDENT.*

(Indian) Limitation Act (IX of 1908), arts. 132 and 75—Mortgage bond—Interest payable annually—Principal, payable on a future date—Principal and interest payable immediately on default—Option to mortgagee to enforce payment—Suit after twelve years from default, if barred—Gift by a Hindu widow of a mortgage bond due to her husband—Gift, if valid and to what extent—Suit by widow, competency of transferee to continue—Decree, nature of.

Suits for money due on hypothecation bonds, though containing stipulations for payment in instalments, are governed by article 132 and not by article 75 of the Indian Limitation Act (IX of 1908) and there is no warrant for importing into the former the words of the latter article. A hypothecatee is not *bound* to take advantage of a clause in his bond, which, in case of default in payments of interest, enables him (*a*) to demand the principal before its due date and (*b*) also claim a higher rate of interest from the date of default. Hence a suit restricted to a claim to recover the principal and interest at the original rate, brought within twelve years from the date originally fixed for payment of the principal, though beyond twelve years from the date of first default in respect of interest, is not barred by limitation.

Nettakaruppa Goundan v. *Kumarasami Goundan* (1899) I.L.R., 22 Mad., 20, *Astley* v. *Earl of Essex* (1874) 18 Eq., 290 and *Governors of Magdalen Hospital* v. *Knotts* (1876) 5 Ch.D., 175, followed.

Perumal Ayyan v. *Alagirisami Bhagavathar* (1897) I.L.R., 20 Mad., 245, explained.

A gift by a Hindu widow, of a mortgage-bond executed to her in discharge of a debt due to her husband, is valid to the extent of the interest that had accrued due at the date of the gift, and the transferee is competent after her death to prefer a second appeal in a suit filed by her on the bond and obtain a decree for recovery of interest only due thereon.

SECOND APPEAL against the decree of V. VENUGOPAL CHETTI, the District Judge of South Canara, in Appeal No. 76 of 1912 preferred against the decree of K. APPAJI RAO, the District Munsif of Puttur, in Original Suit No. 553 of 1911.

The suit was originally instituted by one *B*, a Hindu widow, on a mortgage-bond executed in her favour on the 1st of November 1888 by the mother of the second defendant. The bond was in discharge of a previous mortgage-bond executed to her husband and provided that the interest due on the principal

* Second Appeal No. 1958 of 1913.

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amount of Rs. 200 at the rate of 6½ per cent per annum should be paid on the 1st November of every year, and that the principal amount should be paid on the 1st November 1899 together with interest due for the previous year; the bond contained a further stipulation that, in the event of default by the mortgagor in the payment of interest in any year or of the principal on the due dates specified therein, the mortgagor should pay "the principal sum together with interest at 12 per cent per annum from the date of default till the date of payment without raising the plea of future instalments on the liability of the mortgage property." The mortgagor made default in paying interest on the 1st November 1896 and in subsequent years, nor was the principal amount paid on the due date. The mortgagee brought a suit on the 31st October 1911 on the mortgage-bond to recover by sale of the hypotheca the principal and interest due thereon at 12 *per cent per annum* from the 1st November 1899 (the date fixed for payment of the principal amount), and gave up her claim for interest due prior to that date. The defendants contended, inter alia, that the suit was barred by limitation, as the principal had become payable on the date of the first default and more than twelve years had elapsed at the date of suit from the accrual of the cause of action. The District Munsif upheld the contention of the defendant and dismissed the suit. On appeal by the plaintiff, the District Judge dismissed the appeal on similar grounds. During the pendency of the appeal in the lower Appellate Court, the widow, who was the original plaintiff, transferred her rights in the bond by way of gift to one Narna, a minor represented by his father and guardian Vittappa Shanbhoga; the widow died subsequent to the passing of the decree in the lower Appellate Court against her as the appellant. The transferee preferred a second appeal to the High Court against the decree of the lower Appellate Court.

K. P. Madhava Rao and *K.P. Lakshmana Rao* for the appellants.

B. Sitarama Rao for the respondent.

The case coming on for hearing in the first instance, the following judgment of the Court was delivered by

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SESHAGIRI AYYAR, J.—The suit was instituted by a widow on a mortgage. Her suit was dismissed by the District Munsif. She preferred an appeal. During the pendency of the appeal she assigned her rights in the mortgage to the present appellant.

She ~~then~~ afterwards died and the appellant was allowed to continue the appeal. The appeal was also dismissed. This second appeal was preferred by the assignee. A preliminary objection is taken by Mr. Sitarama Rao for the respondent to the competency of the appeal on the ground that as the widow sued for property belonging to her husband, she was not entitled to make a gift of that interest in favour of the appellant.

Before deciding the point, we think it desirable to call for a finding on the question whether the original plaintiff had any interest of her own in the subject matter of the litigation which she was competent to transfer to the appellant.

Fresh evidence may be taken. The finding will be submitted within two months from this date and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of South Canara submitted the following

FINDING.

"I have been directed to return a finding on the question whether the original plaintiff, Bhagirathi Amma, had any interest of her own in the subject matter of the litigation, which she was competent to transfer to the appellant.

"Appellant has examined two witnesses and respondent's vakil has stated that he has no instructions.

"Appellant's case is that the property transferred to him was acquired by Bhagirathi Amma with her savings from the income of her husband's property. It is probable enough that she was able to make large savings as the income is said to have been Rs. 10,000, but the mortgage to which the suit relates was executed in discharge of a prior mortgage in favour of Bhagirathi Amma's husband. So far as the principal is concerned, I do not think she had any interest of her own which she was competent to transfer, but she could dispose of the interest, which was so much accumulated income, and that is my finding."

This Second Appeal coming on for final hearing the following judgment of the Court was delivered by

SESHAGIRI AYYAR, J.—The suit is by the assignee of a widow on a mortgage executed in her favour. On the last occasion, we called for a finding whether the widow had any assignable interest in the debt transferred to the plaintiff. The finding

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returned is that the widow was competent to assign away the interest that remained due on the date of the assignment and not the principal of the mortgage debt. We accept the finding.

Mr. Sitarama Rao, however, raised the question that the claim is barred by limitation. The mortgage is dated the 1st November 1888. It provides for the payment of the principal on the 1st of November 1899, and for annual payment of interest at 6¼ per cent per annum. There is a further stipulation in the document which is in these terms: "If I, without paying the interest on the due date and also the principal and interest on the respective due dates according to the aforesaid conditions, allow the same to fall into arrears, I shall pay the principal sum together with interest at 12 per cent from the date of default till the date of payment without raising the plea of future instalment on the liability of the mortgage property." We read this clause as entitling the mortgagee to the original rate of interest only, if he does not desire to enforce the clause for enhanced interest, but that should he claim the higher interest on account of the default in the punctual payment of the ordinary rate, he shall be entitled to sue for the principal sum also without waiting for the due date. In other words, an option is reserved by the clause above referred to, to the mortgagee to anticipate the due date. It is not disputed that the interest was not paid as provided for. The question therefore is, is the mortgagee bound to take advantage of the default clause, and whether limitation begins to run against him from the date of the first default? Under very similar circumstances two learned Judges of the Allahabad High Court held that the cause of action accrued on the date of the first default, whereas BANNERJEE, J., held that the right to sue did not accrue until the date provided for the payment of the principal arrived—*Gaya Din* v. *Jhumman Lal*(1). We are inclined to agree with the view taken in the dissenting judgment. The article applicable to the suit is 132 and not 75. There is no warrant for importing into the former the words of the latter.

Can it be said that the money sued for became due when the first default was made if the mortgagee wants only the principal and the original rate of interest? If the claim is for the enhanced

(1) (1915) I.L.R., 37 All., 400.

interest, it can well be argued that that became due when the first default was committed. When the creditor chooses to exercise the option which limits his claim to the ordinary interest, it would be straining the language of article 132, to hold that his right of action accrued when the benefit which he does not choose to avail himself of might have been enforced by him.

It is a well settled principle of law that no one is obliged to take advantage of a forfeiture, section 4 of 3 & 4 Will. IV, cap. 27. This rule has been applied to cases providing a right of entry on a forfeiture ; and it has been held that the landlord should not be compelled to take advantage of the forfeiture clause, so as to make limitation run against him, if he does not choose to avail himself of it—*Astley* v. *Earl of Essex*(1). In a later case, Sir GEORGE JESSEL, M.R., who decided the case just quoted used some very forcible language against the contention to accelerate limitation. In *Governors of Magdalen Hospital* v. *Knotts*(2), the learned Master of the Rollssays: "The mere statement of such a proposition was shocking to one's intellectual perception when one considered for what objects the Statute of Elizabeth was enacted." It was also pointed out that a benefit secured to the creditor should not be availed of by the debtor when the former does not want it. No doubt, in *Reeves* v. *Butcher*(3) and *Hemp* v. *Garland*(4) a different view was taken. Lord DENMAN, C.J., says in the latter case: "If he chose to wait till all the instalments became due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time that the plaintiff had a right to maintain it. The Statute of Limitations runs from the time the plaintiff might have brought his action, unless he was subject to any of the disabilities specified in the statute ; and, as the plaintiff might have brought his action upon the first default, if he did not choose to enter up judgment, we think that the defendant is entitled to the verdict upon the plea of the Statute of Limitations." It is most probable that the language of article 75 of the Limitation Act was borrowed from this judgment. Banning on Limitation points out that this decision does

(1) (1874) 18 Eq., 290.
(2) (1876) Weekly Notes ; s.c., 5 Ch. D., 175 at p. 180.
(3) (1891) 2. Q.B., 509.
(4) (1843) 4 Q.B., 519.

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not consider the principle that no one ought to be forced to take advantage of a forfeiture. Whatever may be the effect of the learned Chief Justice's view regarding the construction of article 75 of the Limitation Act, we see no reason for not giving the language of article 132 its plain and natural significance. As pointed out by BANNERJEE, J., the Judicial Committee in *Juneswar Dass* v. *Mahabeer Singh*(1) seem to indicate that the creditor is not compellable to take advantage of a defeasance clause.

There have been numerous cases under article 75. We are not concerned with them. There are two cases in this Court dealing with article 132. In *Perumal Ayyan* v. *Alagirisami Bhagavathar*(2) the default clause did not reserve any option to the mortgagee. On the other hand in *Nettakaruppa Goundan* v. *Kumarasami Goundan*(3), when the mortgagee was given the option of claiming the whole amount "when he required it," the learned Judges held that the cause of action did not accrue on the date of the first default.

Sitab Chand Nahar v. *Hyder Malla*(4) follows *Hemp* v. *Garland*(5). In all the above cases, it seems to have been taken for granted that the words of article 75 should be imported into article 132. We are of opinion that it would not be in consonance with the ordinary rules of interpretation of statutes to regard a specific provision in one of the articles of an Act as containing a general rule of law applicable to claims under other articles. We think the proper view is to limit the restrictive period to the particular claim provided for, and to construe the language of the other articles in their natural sense. Our conclusion is that the claim is not barred by limitation and that the plaintiff is entitled to recover the sum of Rs. 150 which represents the interest due on the mortgage at $6\frac{1}{4}$ *per cent.* The decrees of the Courts below must be reversed and a decree should be given to the plaintiff for Rs. 150 with further interest thereon at 6 per cent per annum from the date of the plaint. The parties will pay and receive proportionate costs.

K.R.

(1) (1876) I.L.R., 1 Calc., 163.
(2) (1897) I.L.R., 20 Mad., 215.
(3) (1899) I.L.R., 22 Mad., 20.
(4) (1897) I.L.R., 24 Calc., 281.
(5) (1843) 4 Q.B., 519.