

ought to discharge the goods. In my opinion the view taken by the Courts below is entirely correct.

The case referred to by the Court of first instance, the case of the *B. B. C. I. Ry. Co. v. Jacob Elias Sassoon* (1), entirely supports the case of the plaintiffs. Mr. *Sushil Madhab Mullick* argues before us that that case was wrongly decided. Well, we are not prepared to dissent from the view taken by Mr. Justice Parsons in that case. We must accordingly dismiss this appeal with costs.

A question was raised by Mr. *Sushil Madhab Mullick* as to whether the Railway Company are entitled to reasonable warehouse rent for the time the goods remained with them. This claim has never been put forward on behalf of the Railway Administration and we cannot adjudicate on it in this Court in second appeal when the facts are not before us. If they are entitled to any reasonable warehouse rent they are entitled to enforce that claim in a properly constituted suit against the plaintiffs. We cannot entertain the claim in this appeal.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad, A. C. J. and Ross, J.

JAMUNA RAI

v.

RAMTAHAL RAUT.*

1921.

August, 1.

Court-Fee—suit on mortgage dismissed—on appeal suit decreed together with interest between date of suit and date of appellate decree—whether Court-fee payable on interest.

Where a suit on a mortgage was dismissed by the first court, and the plaintiffs appealed, paying on the memorandum

* Second Appeal No. 707 of 1920, from a decision of Ashutosh Chatterji, Esq., District Judge of Darbhanga, dated the 1st April, 1920, reversing a decision of Maulavi Sayid Abul Fath, Munsif of Darbhanga, dated the 16th August, 1919.

(1) (1694) I. L. R. 18 Bom. 231.

1921

JAMUNA RAI
c.
RAMTAHAL
RAUT.

of appeal the same court-fee as had been paid on the plaint, and the appellate court awarded the plaintiffs the sum claimed in the plaint together with a certain sum as interest which had accrued between the institution of the suit and the date of the decree, held, that the plaintiffs-appellants were bound to pay additional court-fee on the sum awarded as interest.

Srinivas Row v. Ramasami Chetti(1), *Ramasami v. Subasami*(2) and *Percival v. Collector of Chittagong*(3), referred to.

The facts of the case material to this report were as follows :—

The plaintiffs instituted a suit on the 8th September, 1918, to enforce a mortgage, claiming Rs. 311 as principal and Rs. 446-3-3 as interest at 2 per cent. per annum, the rate provided in the bond, up to the date of the suit. They also claimed interest *pendente lite* and future interest up to the date of realization at the same rate. The trial court dismissed the suit and the plaintiffs appealed to the District Judge. On the memo. of appeal they paid a court-fee calculated on Rs 757-3-3. They had paid a similar fee on the plaint.

The appellate court reversed the Munsif's decision and decreed the plaintiffs' suit. The decree awarded the plaintiffs Rs. 311 as principal, Rs. 446-3-3 as interest up to the date of the institution of the suit and Rs. 117-3-0 as interest from the date of the plaint up to the date of the appellate court's decree. No additional court-fee was paid on this last mentioned sum.

The defendant appealed to the High Court. The Stamp Reporter reported the fact that the respondents had not paid any court-fee in the lower appellate court in respect of the sum of Rs. 117-3-0.

Janak Kishore, for the appellant.

Md. Hasan Jan, for the respondents.

JWALA PRASAD, A. C. J.—The learned vakil for the respondents disputes the view taken by the Stamp Reporter that there is a deficiency on the part of the

(1) (1900) 10 Mad. L. J. 144.

(2) (1890) I L. R. 13 Mad. 508.

(3) (1903) I. L. R. 30 Cal. 516.

1921

respondents with respect to the court-fee payable by them in the lower appellate Court to the extent of Rs. 9. The respondents were plaintiffs in the case and instituted the suit to enforce a mortgage claiming Rs. 757-3-3 principal with interest at the bond rate up to the date of the suit. They also claimed interest *pendente lite* and future interest up to the date of realization at the rate entered in the bond. The suit was dismissed by the Munsif. They appealed to the District Judge, paying a court-fee on the aforesaid sum of Rs. 757-3-3, which they had paid on the plaint. The lower appellate Court reversed the decision of the Munsif and decreed the plaintiffs' suit with costs in both the Courts. As to interest, the decree directed that interest was to be paid at the bond rate up to the date of grace, which was six months from the date of the decree, namely, 1st April, 1920. There was also direction as to future interest up to the date of payment.

JAMUNA RAI
v.
RAMTAHAL
RAUT.

JWALA
PRASAD,
A. C. J.

The lower appellate Court prepared the decree stating the principal to be Rs. 311 and interest at the bond rate of 2 *per cent per annum* up to the 8th September, 1918, the date of filing the plaint, making a total of Rs. 757-3-3, upon which court-fee was paid on the plaint as well as on the memorandum of appeal. To this sum the lower appellate Court added in the decree a further sum as interest at the bond rate from the date of the plaint up to the date of its decree, namely, 1st April 1920. This sum came up to Rs. 117-3-0. No court-fee was paid by the plaintiffs upon this additional sum added in the decree.

It may be conceded that the suit having been dismissed the plaintiffs were entitled to value their appeal at the sum of Rs. 757-3-3 claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and they were not bound to value the future interest which they claimed from the date of the suit up to the date of realization, or to pay any court-fee thereunder, as was held in *Srinivas Row v.*

1921

JAMUNA RAI
v.
RAMTAHAL
RAUF.

JWALA
PRASAD,
A. C. J.

Ramasami Chetti (1) and *Ramasami v. Subasami* (2). But in the present case the plaintiffs obtained a decree not only for Rs. 757-3-3 at which they had valued their appeal and which they had claimed in the plaint but for a larger sum, namely, Rs. 874-6-3 which was arrived at by adding Rs. 117-3-0 as interest from the date of the suit up to the date of the lower appellate Court's decree. The plaintiffs cannot contend that this sum has been wrongly entered in the decree as there is no cross-appeal on their behalf. This is not therefore an unascertained sum but has now been specified in the decree and the plaintiffs are entitled to recover it by mere execution of the decree.

It has been well settled that the plaintiff-decreeholder seeking to enforce a decree directing payment of future interest is bound to pay the court-fee upon the interest claimed by him in execution for which no court-fee was paid in the suit. There can hardly be any doubt that a mortgagee seeking to enforce the mortgage and praying to recover the amount due thereunder has to pay court-fee not only upon the sum decreed but also upon the interest that becomes due to him subsequent to the decree and which he claims in the execution. It is also obvious that the lower appellate Court was not bound and should not have passed a decree for a larger sum than that claimed by the plaintiffs in the memorandum of appeal unless, before the judgment was pronounced, an amendment of the memorandum of appeal was allowed and proper court-fee paid in [*Percival v. Collector of Chitagong*(3)]. The plaintiffs accepted the decree of the Court below and it appears that the decree was signed by the pleaders of the parties. The value of the appeal was therefore admittedly increased by adding to the decree the amount of future interest from the date of the institution of the suit to the date of the lower appellate Court's decree. The plaintiffs are therefore bound to

(1) (1900) 10 Mad. L. J. 144.

(2) (1890) I. L. R. 13 Mad. 502.

(3) (1903) I. L. R. 30 Cal. 516.

pay additional court-fee and the view taken by the Stamp Reporter appears to be correct.

The deficit court-fee having just been paid, the appeal will be heard.

Ross, J.—I agree.

1921

JAMUNA RAI
v.
RAMTAHAL
RAUT.

APPELLATE CIVIL.

Before Das and Adami, J.J.

KHUB LAL UPADHYA

v.

JUGDISH PRASAD SINGH.*

1921.

August, 1.

Limitation—how to be pleaded—when facts not alleged and no issue raised question not to be entertained in second appeal.

Where the defendant in a suit pleads that the suit is barred by limitation he is entitled to shew that upon the allegations made in the plaint the suit is so barred. But if he intends to raise any question of fact in connection with the plea of limitation it is obligatory on him to state the facts on which he relies in the written statement and to invite the court to frame an issue on the facts so stated.

Where this was not done, *held*, that the defendant was not, in second appeal, entitled to argue that he had a good title to the land by adverse possession and that the suit was also barred under Article 137 of the Limitation Act, 1908.

The facts of the case material to this report were as follows:—

Ramsunder Tewari owned a 2-annas 8-pies share in village Machhagara. On the 21st April, 1900, Bhukhal and Bhawan, sons of Ramsunder, and Binda the son of Mangal, the third son of Ramsunder, executed two mortgage bonds for Rs. 1,500 and

* Appeal from Appellate Decree No. 155 of 1920, from a decision of G. J. Monahan, Esq., District Judge of Saran, dated the 30th July, 1919, confirming a decision of Maulavi Wali Muhammad, Additional Subordinate Judge of Chapra, dated the 30th May, 1918.