APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

1882 *July* 19.

GOPAL SITARAM GUNE AND TWO OTHERS (ORIGINAL DEFENDANTS NOS. 5, 6 AND 7), APPELLANTS, *v.* DESAI AND SEVEN OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Mortgage—Subsequent agreement conveying to mortgagee for a term of years—Effect of such agreement.—"Once a mortgage always a mortgage"—Suit by heirs of mortgagor to recover the property—Limitation—Usufructuary mortgage.

Where, after the expiration of the period prescribed for redemption, the mortgagor and mortgagee agreed that the mortgagee should continue in absolute possession for a fixed term, and then restore the property free from the mortgage lien.

Held that the agreement was distinct from the original mortgage, and was not intended to be a mortgage, but a conveyance for a term of years, and a suit to recover the property must be brought within twelve years from the expiration of the term stipulated in the agreement.

THIS was a second appeal from the decision of J. L. Johnston, Assistant Judge of Ratnagiri, confirming the decree of Rao Saheb A. K. Kothare, Subordinate Judge of Rajapur.

The facts of the case, in so far as they are material, are as follows:—

In the year 1814 the plaintiff's ancestor, Hari Narayan, mortgaged to one Limaye his moiety of the village of Gavane with possession for Rs. 1,275 for a term of years. Of this money a part was advanced by Vithal Pitre, the father of defendant No. 1 (Bhaskar), and in 1824 or 1825 Vithal Pitre obtained from Limaye an assignment of the whole mortgage. In 1826, Pitre mortgaged the same moiety to Phadke, the father of defendant No. 3, who continued in possession of it till 1873. On the 1st of November, 1829, Pitre passed to Hari Narayan the following document:—

"Formerly I paid to you * * * in all Rs. 1,725. I obtained from you a mortgage-deed dated 19th November, 1814, in the name of G. B. Limaye. By that deed I took in mortgage from you a moiety of the village of Gavane on an agreement of three years. On its expiry you offered to pay my money through B. L. Joshi. You said that Joshi had agreed to advance money

* Second Appeal, No. 338 of 1880.

up to twenty-two hundred rupees on the said moiety of the village, to get his money paid off in forty years, and to set his village free from encumbrance. I dissuaded you from adopting this course. Just as agreed to by Joshi, I undertake to have my mortgage money paid in forty years, and to set free from mortgage and deliver the said moiety of this village to you. In respect of the said mortgage the sum due to me in all is Rs. 2,126 ; made up of Rs. 1,725 original sum and Rs. 471 interest. I agree to carry on the management of the moiety of the said village which is mortgaged, to take the gross income of the moiety, to have my said amount liquidated in forty years, and to make the moiety free from mortgage in the forty-first year. Accordingly, a deed has been taken in writing from you, and the deed, which is in the name of the said Limaye, ought to be returned to you. But as the deed in Limaye's name is deposited by me elsewhere, and as the same cannot be obtained to be returned to you, instead of taking from you another document in writing, according to the above agreement, I give you an agreement as follows:—With reference to the said mortgage an agreement was made in November, 1817, to have the sum of Rs. 2,196 paid within forty years together with interest. Out of the forty years agreed upon, twelve years have elapsed up to now. After deducting the said forty years there remain twenty-eight years from the current year. Within these twenty-eight years I will get my money paid with interest as mentioned above, and in the 29th year I will hand over to you the said moiety and your deed in Limaye's name." * * *"

The present suit to recover the moiety of Gavane was brought by the heirs of Hari Narayan within sixty years from the original mortgage, but after twelve years from the expiration of the period prescribed in the deed of 1829. The defendants denied the agreement, which, however, the Subordinate Judge found proved, and on a consideration of the merits of the case decreed that the plaintiffs should recover possession of one-half of the estate mentioned in the plaint. No point of limitation was raised or considered in the Court of first instance; it was raised for the first time in appeal. The Assistant Judge considered that the whole case depended upon the genuineness and construction to be put on the agreement of 1829. He agreed with the Subordinate

1882

GOPAL SITARAM GUNE v. DESAI.

Judge in holding that agreement to be proved, and he also held this claim not to be time-barred, and upheld the decree of the Subordinate Judge. The original defendants 5, 6, and 7 appealed to the High Court.

Kashinath Trimbak Telang with *Yashvant Vasudev Athlye* for the appellants.—The agreement of 1829 is not a mortgage, but a conveyance for a term of years. It is in supersession of the original mortgage. There is no right to an account in the present case: *Bapuji Apaji* v. *Senavaraji*(1). And there is no trust: Coote on Mortgages, 175 (3rd ed.) The principle laid down in *Goodman* v. *Grierson* (2) was adopted by this Court in *Subabhat* v. *Vasudevbhat*(3), in which the tests of a mortgage transaction are given. Plaintiffs are not the owners during the term. Hence the only remedy is ejectment after the expiration of the term against the trespassers: *Yates* v. *Hambly* (4). This transaction is not analogous to *gahan lahan*, as the agreement is not contemporaneous with the original mortgage. The doctrine "once a mortgage always a mortgage" does not, therefore, apply, nor the limitation of sixty years. The limitation of twelve years applies, and it begins from the close of the term of forty years,—that is form 1857. This suit brought in 1873 is, therefore, barred.

Rao Saheb *Vasudev Jagannath* for the respondents.—The transaction evidenced by the agreement of 1829 is a mortgage, the intention of the parties being to create a charge; the form of the expression used is immaterial: *Rajkumar R. G. N. Singh* v. *Ram Dutt Chowdhry*(5). The agreement clearly and expressly recites that, in consideration of our refraining from mortgaging our moiety of the village to Joshi, as we had intended to do, Pitre offered us the same terms, and in lieu of the debt due from us the present mortgage was effected for a fixed period, during which Pitre says he would hold it as mortgage, and after which period he would restore our moiety "free from the mortgage". This amounts to a usufructuary mortgage: *Ruttonsing* v. *Greedharilal* (6); *Keval Sahu* v. *Rash Narain Singh* (7); *Puriag Dutt Roy* v.

(1) I. L. R. 2 Bom. 231.
(2) 2 B. & B. 279.
(3) I. L. R. 2 Bom. 113.
(4) 2 Atk. 361; Sp. Eq. 219.
(5) 5 Beng. L. R. 264, F. B.
(6) 1 Calc. W. R. 7; 8 *Ibid.* 310.
(7) 13 *Ibid.* 445.

Felloo Roy (1). Even a lease for term of years is a mortgage when it is executed by a debtor to his creditor in consideration of or as security for the debt: *Ishan Chandra* v. *Sujan Bibi*(2). *Ex-parte Hill*(3); *Mashosk Ameen Suzzada* v. *Marew Reddy*(4). *Zuri peshgi* leases are so construed: Macpherson on Mortgage, p. 8, (6th ed). To every holding on the footing of a mortgage the limitation of sixty years applies. In a case falling under the Limitation Act XIV of 1859 the Privy Council held that "the rule of limitation was enacted in the most general terms, and in language sufficiently large to embrace every kind of mortgage: *Luchmee Buksh Roy* v. *Runjeet Rain Panday*(5). The case of *Subabhat* v. *Vasudevbhat* does not apply. The relation of mortgagor and mortgagee admittedly subsisted, at least till the expiration of the stipulated period; and at the expiration of it nothing took place by which the relation was altered. The rule "once a mortgage always a mortgage" therefore, applies: *Ramji* v. *Chinto*(6); *Krishnaji Keshav* v. *Ravji Sadashiv* (7); Story's Equity, sec. 1004. The present is a case of a mortgagee holding over. Where a mortgage is satisfied, and the suit is for the recovery of the mortgaged property, as the present one is, the rule of sixty years applies: *Lall Doss* v. *Jamal Ali*(8).

KEMBALL, J.—This is a suit to recover possession of the moiety of a village, belonging to a family surnamed Desai, which was mortgaged by one of the members of the family, Hari Narayan, an ancestor of the plaintiffs, on the 19th November, 1814, to secure an advance of Rs. 1,725, which sum was paid off in 1857.

Plaintiffs' case was, that the mortgage of 1814 (exhibit 28) was for three years; that the property remained in the possession of the mortgagee till 1829, when a document (exhibit 82) was executed by Vithal Bhaskar Pitre, the father of the deceased defendant No. 1, whereby the said Pitre agreed, in consideration of his being allowed to remain in possession of the said moiety of the village for twenty-eight years more, that he would satisfy his claim of Rs. 1,725 principal *plus* Rs. 471 interest, and would

(1) 19 Calc. W. R. 160.
(2) 7 Beng. L. R. 14.
(3) I. L. R. 8 Calc. 254.
(4) 8 Mad. H. C. Rep. 31.
(5) 13 Beng. L. R. 177 P. C.
(6) 1 Bom. H. C. Rep. 199.
(7) 9 *Ibid.* 79.
(8) 9 Calc. W. R. 187, F. B.

1832

GOPAL SITARAM GUNE v. DESAI.

in the twenty-ninth year, *i. e.*, in 1857, hand over to the said moiety to the mortgagor, and would have "no interest in any way in the mortgage of the moiety."

This suit to be put back into possession under the aforesaid agreement, was brought in 1873, and the first question which we have to determine is—was it in time ? The answer to this question depends upon the construction to be put on this agreement (exhibit 82) on which, as the Assistant Judge rightly observed, the whole case rests. Exception has been taken to the findings of the Courts below as to the genuineness of this document, which is, on the face of it, a copy—(findings to which both the Courts came not without some hesitation), in consequence of a remark in the Assistant Judge's judgment which was obviously not well founded, but we do not think that the error adverted to, would justify our interfering with a finding of fact based as it is on other and independent grounds.

In the Court of first instance the question of limitation appears to have been neither raised nor considered, though the Subordinate Judge laid down the issue, whether the agreement (exhibit 82) was part of the original mortgage, and found it was distinct. In the Appellate Court, however, an objection was taken to the Subordinate Judge's decree on the ground of the suit being barred by the Limitation Law ; but the Assistant Judge while noting this objection confined himself to the issues framed by the lower Court, though he found that the agreement "must modify the original mortgage contract between Hari Narayan and the father of defendant No. 1, and must, therefore be taken to form part of the mortgage deed, contract and transaction."

If the view of the Assistant Judge was right, the suit, which was brought within sixty years of 1814, was doubtless not barred. But it is contended for the appellant that the arrangement under the agreement of 1829 was purely a conveyance for a term of years intended to supersede the original mortgage, and in no sense of the term a mortgage ; and that the suit being simply to get back the estate, (to the possession of which the plaintiffs were entitled in 1857) not having been brought within twelve years from that time, was barred.

The original mortgage of 1814 was, it appears from exhibit 27, executed to one Gangadhar Bhikaji Limaye; and, although the Assistant Judge considered that Pitre was virtually the mortgagee, it is apparent from a statement in exhibit 82 that Limaye alone for some time after 1814 dealt with the mortgagor. However that may be, a formal assignment of his rights (exhibit 29) was, it is found, executed by Limaye to Pitre in 1824, so that we may take it that, some few years before 1829, Hari Narayan was aware of Pitre's interest. The agreement of 1829 is not very intelligible; but this much, we think, is clear, that on the expiration of the term of the original mortgage of 1814, *i. e.*, in 1817, Hari Narayan had been desirous of redeeming his moiety of the village from Limaye, and that, in consideration of his consenting not to do this, and of his allowing the said moiety to be retained absolutely for a fixed term of years, it was agreed first by Limaye and subsequently by Pitre to restore possession at the end of that term free from all claim: and, regard being had to these conditions, we think the Subordinate Judge was right in holding the agreement to be distinct from the original mortgage, and we are unable to discover any circumstance tending to show that the transaction was by way of security.

It is contended by Rao Saheb Vasudev Jagannath, who has argued the whole case for the respondents very ably, that, as the original conveyance was intended as a security for the money advanced, it must ever after be considered as a mortgage, and further that the subsequent transaction was of the nature of a *zur i peshgi* lease or usufructuary mortgage common on the other side of India. But with regard to the first point, it is clearly necessary to distinguish between what passed at the time of the original conveyance and the after arrangement. This arrangement, further, was plainly to the advantage of Hari Narayan, so much so that the appellants' counsel argued from it that the original of it could never have been executed by Pitre, and it is not disputed, in fact it is part of the plaintiffs' case, that Pitre received the entire rents and profits without accounting or being expected to account to Hari Narayan for them; so that, having a due regard to the nature of the agreement of 1829

1882

GOPAL SITARAM GUNE v. DESAI.

and the extraneous facts, we are of opinion that a mortgage was not intended.

Turning, then, to the second point that this is a *zur i peshgi* lease, the obvious remark suggests itself, that the advance of the money and the grant of the lease were not contemporaneous, and, so far as we understand the several decisions to which we have been referred, *zur i peshgi* leases are placed on the footing of usufructuary mortgages only when there is a power of redemption reserved to the lessor expressly or by implication. Such power was clearly non-existent here, and, moreover, as we have already observed, Hari Narayan could not admittedly have sued Pitre for an account at the expiration of the term. We are unable, therefore, to hold that the grant to Pitre was a usufructuary mortgage or in the nature of one. This is clearly not a suit for redemption: the plaint sets forth that the forty years expired on the 23rd October, 1857, and that on that date the cause of action for obtaining back the village accrued. Why the plaintiffs have remained quiet all these years it is difficult to understand; but we think that, as they have allowed more than twelve years to elapse, their suit has become barred. Without, therefore, going into the other questions that have been argued before us, we must reverse the decrees of the Courts below, and reject the claim with costs.

PINHEY, J.—I also am of opinion that the claim is barred. You cannot call the agreement of 1829 a mortgage bond, for under it none of the relations of mortgagor and mortgagee accrues; there can be no suit for an account; there can be no foreclosure; there can be no suit for recovery of the property on payment of money advanced, and interest. Under that document the property was assigned for a term of forty years (that is for twenty-eight years from its date) in lieu of the principal sum ascertained to be due on the date of the agreement and the interest accruing thereon. The forty years expired in 1857, and the owner of the land was at once entitled to assume possession of the land. Instead of taking possession of the land, he allowed the holder under the agreement to hold on, or over; and his heirs (the plaintiffs in this suit) have filed this suit on 30th September, 1873, for the recovery of the property—sixteen years after 1857. Therefore, I consider

1882

GOPAL SITARAM GUNE v. DESAI.

the claim barred, and that, without considering any other point in the case, the decrees of the Courts below should be reversed and the claim rejected with costs.

Decree reversed.

NOTE.—This ruling was followed in *Abbesing Dosabhai* v. *Maharana Jasvatsingh*, Reg. Ap. 31 of 1880, decided on 4th October, 1882, by MELVILL and PINHEY, JJ.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

September 5.

PIRJADE (ORIGINAL PLAINTIFF), APPELLANT, *v.* PIRJADE (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation—Decree—Execution—Act XV of 1877, Section 14, Schedule II, Article 179, Clause 4—The Code of Civil Procedure Act X of 1877, Sections 374 and 647.

The rule laid down in section 374 of the Code of Civil Procedure Act X of 1877, that, where a suit is withdrawn with leave to bring a fresh suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought, applies to applications for execution; and, therefore, in counting the time of three years prescribed by the Limitation Act XV of 1877, Sch. II, art. 179, cl. 4, an application allowed to be withdrawn must be discarded as if it had never been presented. The bar created by section 374 of the Code of Civil Procedure is, in such a case, not removed by section 14 of the Limitation Act, as causes for which the withdrawal of a suit or application may be permitted, are not causes "of a like nature" with defect of jurisdiction.

THIS was an appeal from the order of W. H. Newnham, Judge of Poona, confirming an order of the First Class Subordinate Judge of Poona, who rejected the application of the applicant for execution of his decree.

The facts sufficiently appear from the judgment of the High Court.

Manekshah Jehangirshah for the appellant.

Ghanasham Nilkanth for the respondent.

MELVILL, J.—The decree which the plaintiff seeks to execute was passed on the 14th July, 1862.

An application for execution was presented on the 15th June, 1876; another on the 17th April, 1878; and a third, which is that with which we have to deal, on the 15th April, 1881.

* Second Appeal, No. 693 of 1881.