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Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Nanabhi Haridas, and Mr. Justice Birdwood.

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MOTIRAM (*Plaintiff*) *v.* VITAI AND ANOTHER (*Defendants*).* [1st May, 1888.]

Limitation Act XV of 1877, *sch. II, arts.* 132 *and* 147—*Mortgage as distinguished from a charge.*

In 1867 the defendant borrowed Rs. 125 from the plaintiff and gave him a bond agreeing to pay interest at two *per cent. per month*. The bond provided that the whole debt, including principal and interest, was to be re-paid within four years from the date of its execution. It further stated that certain property had been mortgaged to the plaintiff as security for the loan, and that if the principal and interest were not paid within the time fixed, the plaintiff was to take up the management of the property. It also contained the following clause: "We will redeem the mortgaged property on the day on which we shall pay the amount of the principal and the amount of the interest that may be found due on making up the account." In 1886 the plaintiff sued the defendants to recover, by sale of the property, the sum of Rs. 250 as principal and interest due on the bond. It was contended that the bond created merely a charge upon the [91] property in question and was not a mortgage, and that the suit was barred by art. 132 of sch. II of the Limitation Act XV of 1877.

Held, that the document was a mortgage and that the suit was not barred, being governed by art. 147 and not by art. 132 of sch. II of the Limitation Act.

[**Diss.**, 21 M. 326 (**F.B.**); L.B.R. (1872—1892) 555; **F.** 14 B. 269; 14 B. 377; 14 B. 577; 15 B. 183; 20 B. 408; 25 M. 220; 14 A.W.N. 57; **Rel.**, 11 Ind. Cas. 629=21 M.L.J. 562; **R.**, 13 A. 28; 34 A. 446=9 A.L.J. 550; 35 C. 837=7 C.L.J. 492=12 C.W.N. 849; 12 C.P.L.R. 26 (31).]

THE plaintiff sued in 1886 on a mortgage-bond, dated the 18th July 1867, to recover from the defendants by a sale of the mortgaged property the sum of Rs. 250 as the principal and interest due upon the bond, which ran as follows:—

"Bond for debt (executed) to the creditor named Rajashri (*i.e.*, the respected, &c.) Balaram Gujar (having his) shop at mauze Nevri, kasbe Vita, taluka Khanapur, by the debtors named Kedari and Krishna bin Dongari Chavan, inhabitants of the mauze aforesaid, the Fasli year 1277 [A. D. 1867-68]. We pass this bond in writing as follows:—We have borrowed and received from you principal Rs. 125, in letters one hundred and twenty five, of the Company's currency. We shall pay interest on this amount at the rate of Rs. 2 *per cent. per* month. As to the period fixed for [the payment of interest of] this amount, we shall pay the interest that may accrue due each twelve month. And if we fail to pay the interest on this amount, we shall pay interest on the said interest at the rate of 6 *rukas* (*i.e.*) two pice *per* rupee *per* month and shall pay off the money within the time that may have elapsed. The period fixed for the payment of money is four years. We shall, therefore, pay the principal sum within the said four years. We shall annually pay the interest due for each year. If the interest [due for a particular year] be not paid by us in that very year, we shall pay interest on the said interest at the rate of two pice [*per* rupee *per* month] as stated above and thus we shall

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pay the whole amount. The property mortgaged as security for this amount is the undermentioned land and house situate at the village of Nevri in the district of Satara, sub-distric ,aluka Khanapur." (Here followed the description of the property) " The property described above is mortgaged [to you]. If the amount due to you on account of principal and interest as agreed upon be not paid to you by us within the time fixed [for the payment thereof], then you are to take up the management of the land and the house. We will redeem the mortgaged property on the day on which we shall pay the amount of the principal and the amount of the interest [that may be found due], on making up the account. We have this day put the said land and the house into your possession. You are to carry on the management thereof yourself. We have now no objection to your doing so. We have received in full the amount of rupees one hundred and twenty-five in cash paid by you as mentioned in the bond. We both of us have no objection as regards the receipt of payment. This bond is duly given in writing. The lunar date the 2nd of *Ashad Vadya* in *Shake* 1789 in the cyclical year named *Prabhava* [18th July 1867]. * * * *"

It was contended for the defendants that the above document merely created a charge upon the land and was not a mortgage **[92]** and that the suit was barred by art. 132 of sch. II of the Limitation Act XV of 1877.

The Subordinate Judge, Rav Saheb Bhau Yeshvant Gupte, felt doubt as to whether the bond, in the absence of a stipulation for sale therein, should be regarded as a mortgage-bond. He, therefore, submitted the reference to the High Court.

A Division Bench referred the case to a Full Bench.

NANABHAI HARIDAS, J.—I think the document in this case is a mortgage-deed, though there is no power of sale expressly given therein to the mortgagee, which is very seldom done in a native mofussil mortgage. The present suit is, therefore, one by the mortgagee for sale of the mortgaged property, and comes within the words of the Indian Limitation Act, sch. II, art. 147. The question referred to us should, I think, be answered accordingly. But as my brother Jardine entertains a different opinion, and having reference to *Khimji Bhagvandas Gujar* v. *Rama* (1) and *Girwar Singh* v. *Thakur Narain Singh* (2), we agree to refer this case to a Full Bench with a view to have the law settled for this Presidency.

JARDINE, J.—I agree to the proposed reference.

The reference now came on for argument.

Shivram Vithal Bhandarkar, for the plaintiff.—The Subordinate Judge is right in construing the document. It is a mortgage, and the suit is governed by art. 147 of sch. II of the Limitation Act XV of 1877. The case of *Girwar Singh* v. *Thakur Narain Singh* (2) is no authority in the Bombay Presidency, for the Transfer of Property Act IV of 1882 has not been made applicable here. That decision is based upon that Act. There is a difference between a charge and a mortgage. Article 132 of the Limitation Act applies to the cases of charge upon immoveable property. In the case of mortgage there is a running debt, but not under mere hypothecation, nor in the latter case is there any personal covenant to pay. Under a mortgage the mortgagee can proceed against the mortgagor personally. The document here gives the mortgagee the management of the property in the event of default **[93]** which makes this a case of a usufructuary mortgage. Before the Limitation Act of 1877 the period for redemption and foreclosure was thirty years, but under the present Act

(1) 10 B. 519. (2) 14 C. 730.

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it is extended to sixty by art. 147. Article 147 should be read distributively, or it would not cover the case of equitable mortgages. Article 132 would bar a suit if brought after twelve years in respect of the personal remedy only; but if the mortgaged property is to be appropriated to the payment of the debt, as in the present case, art. 147 is the only article that should apply: see *Mahableshwarbhat* v. *Ratnabai* (1).

[BIRDWOOD, J.—Where there is no transfer of interest it is a mere charge.]

There is a right of entry here which is as good as transfer of interest. A power of sale is not necessary to constitute a mortgage. What is necessary is a personal covenant. Article 147 has been rightly held applicable to mortgages of all kinds—*Shib Lal* v. *Ganga Prasad* (2).

Goverdhānram Madhavram Tripati, for the defendants.—The suit is governed by art. 132 and, therefore, barred. The bond in question created a mere charge. There is no power of sale given under it, and, therefore, art. 147 does not apply—*Aliba* v. *Nanu* (3); *Sheoratan Kuar* v. *Mahipal Kuar* (4); *Khimji Bhagvandas* v. *Rama* (5); *Girwar Singh* v. *Thakur Narain Singh* (6). Simple mortgages are not covered by art. 147. The power of sale through the Court, though not held expressly necessary under the Limitation Act, is given under s. 15 of Reg. V of 1827. There must be an immediate transfer of interest, and not one contingent or at a future date. In the present case the mortgagee is to come into possession after four years. The property here is merely hypothecated as a security for the debt. Article 147 applies to cases of foreclosure and redemption, and not to mere recovering money by the sale of property. In short, art. 147 applies to English mortgages, for there is s. 135 which applies to cases other than those of foreclosure and redemption. In determining [94] the nature of such a document the intention of the parties is essential. If they have created it as a mere charge, art. 132 would apply. In this case evidently the defendant simply hypothecated the property and did not intend to mortgage it, and, therefore, art. 132 should apply. *Rangasami* v. *Muttukumarappa* (7) is in point.

JUDGMENT.

SARGENT, C. J.—The questions intended to be referred to us are, we presume, first, whether the document in question is a mortgage which entitles the mortgagee to realize his mortgage-debt by sale of the mortgaged property; secondly, whether such suit falls under art. 132 or under art. 147 of the Second Schedule of the Limitation Act, XV of 1877.

By the document the property is stated to be mortgaged as a security for the principal and interest which the mortgagor had in the earlier part of the instrument undertaken to pay,—as to the interest, annually and, as to all the money due in respect of principal and interest, within four years from the date of the instrument,—and it is further provided that, in default of payment of principal and interest as agreed on, the mortgagee is to take the management of the land and house, and that the mortgagor "will redeem the property on the day on which he shall pay the principal and interst on making up the account." And the instrument concludes by saying: "We have this day put the said land and the house into your possession." It is, therefore, clearly a "mortgage" whether as defined by s. 58 of the Transfer of Property Act (IV of 1882) or as

(1) Printed Judgments for 1884, p. 29. (2) 6 A. 551. (3) 9 M. 218.
(4) 7 A. 258. (5) 10 B. 519. (6) 14 C. 730. (7) 10 M. 509.

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generally understood in the Courts of this Presidency where that Act is at present not in force. It seems to fall under the class of mortgages termed "simple mortgages usufructuary" as described in Macpherson on Mortgages, p. 11, one of the anomalous mortgages referred to in s. 98 of the Transfer of Property Act, and which, as Mr. Macpherson says, carry with them the right by the mortgagee to have the property sold on default.

It remains to consider within what period a suit to enforce that right must be brought. The High Court of Allahabad has [95] held that art. 147 is applicable to all mortgage instruments—*Shiv Lal* v. *Ganga Prasad* (1). In *Aliba* v. *Nanu* (2) the Madras High Court held that under a simple mortgage-bond passed before the date of the Transfer of Property Act a claim for the sale of hypothecated property was one to enforce a charge and came under art. 132 of the Limitation Act of 1877. The Court would appear, however, to have thought that such an instrument, if passed subsequent to the above Act, would fall under art. 147. In *Girwar Singh* v. *Thakur Narain* (3) the Calcutta High Court held a suit on a simple hypothecation bond to enforce payment by sale of the premises was governed by art. 132. Wilson, J., in referring the case to a Full Bench, argued that "in such Acts as the Limitation Act forming a connected series, the presumption is strong against the intention to make a sudden and unexplained departure from the general line of policy running through the whole series; and that the policy as to mortgages is to keep the right of suit within narrow limits of time," and expressed the opinion that art. 147 only applied to mortgages in the English form "where the mortgagee usually prays for foreclosure or sale" in the alternative. The judgment of the Full Bench rests their decision on the circumstance that there is no material alteration in art, 132, which, previous to the Limitation Act of 1877, was always deemed applicable to suits for sale of mortgaged property, and second, that unreasonable consequences would follow if art. 147 were made applicable beyond the original jurisdiction of the High Court.

Under the prior Limitation Act of 1871 the only article applicable to suits for sale of mortgaged property under any mortgage instrument was art. 132 by treating mortgages as creating a charge. It may be fairly doubted whether it was the intention of the Legislature, when the Act of 1871 was passed, to include mortgages in that article; but in the absence of any article expressly referring to mortgages, art. 132 was, as a matter of practice, with which, we may presume, the framers of art. 147 of the Act, 1877, were acquainted, applied to the case of mortgages, [96] and, therefore, art. 147 of that Act, which, in terms, applies to mortgages generally, doubtless introduces a very important change in the relation of mortgagee and mortgagor; but we do not feel the force of the argument much relied on by the Calcutta High Court, that such a change, if intended, would have been made by an alteration in art. 132 itself. On the contrary, the more obvious and natural mode of effecting that intention would seem to be to introduce a special clause for suits by mortgagees, leaving art. 132 in its original form to apply to all other charges.

Again, as to the probability or improbability that such should have been the intention of the Legislature, it cannot, we think, be safely or properly treated as an element in the question. We may, however, remark that the advantage of prolonging the period within which the mortgagee

(1) 6 A. 551. (2) 9 M. 218. (3) 14 C. 730.

can exercise his rights of foreclosure and sale has often in the Presidency been urged in the interest of mortgagors. If, however, for the sake of argument we assume that there was no intention to alter the law as regards mortgagees in general, it appears to us still more extraordinary that an article couched in such general terms as No. 147 should have been introduced to effect such a very special and limited purpose as is attributed to it by the Calcutta Full Bench decision. Again, if arts. 147 and 148 are read in their plain and natural sense, they provide for two classes of suits, the object of which is the exercise of the well-understood reciprocal rights of mortgagees and mortgagors, *viz.*, suits by mortgagees for foreclosure or sale on the one hand, and by mortgagors for redemption on the other. Moreover, it is difficult to suppose that the Legislature could have intended to have drawn such an important distinction in the period allowed for the exercise of those rights as is the necessary consequence of holding that " or " in art. 147 is not to be read distributively, and that the article only applies to mortgages in the English form, which are rarely to be met with out of the Presidency towns. The form of suit No. 119 in the Fourth Schedule to the Civil Procedure Code does not appear to us to assist the argument for the restrictive construction of art. 147, as suit No. 120 for redemption is in the same form, and yet **[97]** it has never been contended that art. 148 is limited to mortgages in the English form.

Lastly, the argument of the Allahabad Full Court, that as the Bill which subsequently became the Transfer of Property Act was pending before the Legislature in the year in which the Limitation Act of 1877 was passed, it would be reasonable to infer that the Legislature used the word " charge " in the latter Act in the sense in which it is used in the Transfer of Property Act, has, in our opinion, much force. Upon the whole, we see no sufficient reason for construing art. 147 otherwise than in its plain and natural sense, and the ruling of the Allahabad High Court in *Shib Lal* v. *Ganga Prasad* ought, therefore, in our opinion, to be followed. Whether art. 147 would include the case in which the property is merely declared to be a security for the loan, having regard to s. 58 (*a*) of the Transfer of Property Act, is a question of some difficulty. In the case of *Khimji Bhagvandas* v. *Rama*(1), to which we have been referred, the Division Court, consisting of Birdwood and Jardine, JJ., held that art. 147 applied to all suits properly brought by a mortgagee for foreclosure or sale, but that as the instrument in that case simply made the land a security for the loan, and contained no express power of sale, it was not a mortgage, but only created a charge within the sense of s. 100 of the Transfer of Property Act, to be realized within the period of twelve years fixed by cl. 132. This view as to the nature of the document would appear to agree with the decision of Sir Comer Petheram, C. J., in the Allahabad Full Bench decision—*Sheoratan Kuar* v. *Mahipal Kuar* (2), differing, however, from the rest of the Court, who held that the Indian simple mortgage without possession was a mortgage within the contemplation of s. 58 of the Transfer of Property Act. It is to be remarked that in *Girwar Singh* v. *Thakur Narain* the High Court of Calcutta treat the document in that case, which was a simple mortgage in the same form as Ex. 3, the subject of discussion in *Khimji Bhagvandas* v. *Rama*, as a mortgage within the contemplation of the Transfer of Property Act, and it is certainly very difficult to suppose that the framers **[98]** of that Act intended to exclude from their definition of mortgage a large class

(1) 10 B. 519. (2) 7 A. 258.

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of instruments which were not only in every-day use, but regarded and described by the natives of this country as mortgages and treated as such by all the Courts of the mofussil. The question, however, does not arise on this reference, as the Transfer of Property Act (IV of 1882) does not apply in this Presidency, and we, therefore, abstain from expressing any decided opinion. But we see no reason for holding that in this Presidency such instruments have been otherwise regarded either by the people or the civil tribunals than as creating the relationship of mortgagor and mortgagee with its ordinary correlative rights.

NANABHAI HARIDAS, J.— I concur.

BIRDWOOD, J.—I have no difficulty in holding that Ex. No. 24 in this case is a mortgage, as it gives the creditor the right to take possession of the property described in it for the purpose of realizing from the profits thereof the amount of the debt with interest if such amount is not paid within four years. When such a right is given for such a purpose there is "transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced," which brings the transaction within the definition of a mortgage contained in s. 58 (*a*) of the Transfer of Property Act, 1882, which, though not in force in this Presidency, may, I think, be properly referred to when the question is as to the right construction of arts. 132 and 147 of Sch. II of the Limitation Act; for as Oldfield, J., remarks in *Shib Lal* v. *Ganga Prasad* (1), "the Transfer of Property Bill of 1877 was before the Legislature at the time of the passing of the Limitation Act, and though it did not become law till 1882, and in a form considerably altered from that of the Bill of 1877, the latter recognized the distinction between mortgage and charge. It is reasonable, then, to suppose that, in introducing art. 147, while allowing art. 132 of the former law of limitation to remain in its altered form, the Legislature had in view the distinction between a mortgage and a charge, and that the suits for [99] sale referred to in art. 147 are all suits brought by a mortgagee to enforce the remedy which the law has always given him, namely, to obtain a decree or order that the mortgaged property be sold to satisfy the debt." In this view I concur, though I do not concur with the Allahabad High Court in holding that a simple hyothecation bond, in which there is no express or implied agreement for sale without the intervention of a Court, satisfies the definition of a mortgage contained in the Transfer of Property Act. It is the view practically held by Jardine J, and myself in *Khimji Bhagvandas* v *Rama* (2) where we expressed the opinion that the special provision of art. 147 must now be applied to all suits properly brought by a mortgagee for foreclosure or sale, and the general provision of art. 132 to suits for sale by a creditor having a right to realize a charge not amounting to a mortgage. We held that the creditor in that case was not a mortgagee, inasmuch as by the instrument, Ex. No. 3, on which he sued, no power was given him, expressly or by implication, to sell the property out of Court. That decision seems to have caused some difficulty to the Subordinate Judge who has made the present reference; but it must be clearly read with Ex. No. 3 in the case, which, as we pointed out in our judgment, contained no stipulation for the entry of the creditor under certain circumstances on the property made security for the debt. The effect of our decision really was, not that there could only be a mortgage where there was an express or implied power of sale out of Court, but that where there was no right

(1) 6 A. 551 (555). (2) 10 B. 519.

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of entry and no power of sale except through the intervention of a Court there was no mortgage. Wherever there is a "transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced," there is, in my opinion, a mortgage within the meaning of art. 147 of the Limitation Act. Where there is no such transfer, as where land is merely appropriated or hypothecated for the discharge of a debt, only a charge is created, which, no doubt, can be realised by sale but only after a decree has been obtained. In an ordinary hypothecation, which is the most common form of a Hindu mortgage, neither an absolute nor a special property in the subject [100] of the security passes to the creditor, "nor any right of possession, but only a right of realization by judicial process in case of non-payment of the debt." See Fisher on Mortgage, (4th ed)., chap. I, Pt. 3, s. 133. In such a case, where a decree is obtained against the land, it is the decree which transfers the interest, not the original transaction between the parties. This view is in accordance with Sir Comer Petheram's judgment in *Sheo Ratan* v. *Mahipat* (1). Where, however, a right of entry is given to the creditor, there is a transfer of an interest in immoveable property just as much as if possession were actually transferred. The delivery of possession of mortgaged property is recognized in the Transfer of Property Act as a transfer of such an interest, for usufructuary mortgages clearly come within the general definition of a mortgage given in s. 58 (*a*). In the present case, indeed, though the creditor has not yet actually taken possession, the instrument contains the sentence "We have this day put the said land and the house into your possession."

The Ex. No. 24 being then a mortgage, the next question is whether the creditor has the right to ask for a decree for the sale of the mortgaged property. The mortgage in this case is, in my opinion, simply a usufructuary mortgage. It does not appear to me to be a combination of a simple and a usufructuary mortgage, because it contains no express or implied agreement that in the event of the debtor "failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold." The mortgagee has that right, I think, in the present case; but it is given him, not by the instrument, but by law, that is, by cl. 3 of s. 15 of Reg. V of 1827. Under the Transfer of Property Act, a usufructuary mortgagee has not apparently such a right (see Macpherson on Mortgage, 7th ed., p. 667); but it is different in this Presidency. The circumstance that it is so would not apparently raise any implication as to the terms of the agreement entered into by the contracting parties. But however that may be, it is sufficient for the purposes of the present reference that the plaintiff, having the right to be placed in possession of the property, has the same [101] right as to the sale of the property as if he had been placed in possession, and that he can, therefore, under the Regulation, "by the institution of a civil suit, cause the property to be applied to the liquidation of the debt, the surplus, if any, being restored to the owner." I concur, therefore, but on the above grounds only, with the Chief Justice and Mr. Justice Nanabhai in holding that art. 147 of the Limitation Act applies to the present suit.

(1) 7 A. 258 (266).