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serve the summons, the plaintiff must be considered to have relinquished his claim as against him, and the surety stands discharged—*Narayan Govind Ok v. Ganesh Atmaram Fadke* (1).

JUDGMENT.

[269] SARGENT, C.J.—The declining by the plaintiff to effect service of the summons on defendant No. 1 would enable the Court to dismiss the suit as against defendant No. 1 after the expiration of one year, under s. 99A of Act XIV of 1882, leaving the plaintiff to bring a fresh suit, but has no effect in discharging the defendant No. 1 from his liability. The defendant No. 2 is, therefore, not discharged from his liability.

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Before Mr. Justice Jardine and Mr. Justice Parsons.

MANEKJI FRAMJI (*Original Plaintiff*), Appellant v. RUSTOMJI NASERWANJI MISTRY (*Original Defendant*), Respondent.*

[30th September, 1889.]

Mortgage—Equitable mortgage by deposit of title-deeds—Suit by equitable mortgagee for foreclosure and sale—Limitation—Limitation Act (XV of 1877), art. 147.

An equitable mortgagee by deposit of title-deeds is a mortgagee within the meaning of art. 147, sch. II of the Limitation Act (XV of 1877), and the period of limitation for a suit by such a mortgagee is sixty years, as therein prescribed.

A mortgagee by deposit of title-deeds has the right to sue for foreclosure or sale.

[F., 4 Bur. L.T. 169=11 Ind. Cas. 721=6 L.B.R. 23; Appr., 14 B. 577 (581); R., 14 A. 238; 15 B. 299 (305); 20 B. 409; L.B.R. (1872—1892) 555 (562); 70 P.R. 1903=160 P.L.R. 1903; 53 P.W.R. 1907.]

THE plaintiff sued to recover Rs. 2,500 and interest, at the rate of 12 per cent. *per annum*, on a promissory note executed by the defendant on the 5th February, 1872. He alleged that at the time of the execution of the note the defendant had created an equitable mortgage in his favour by a deposit of his title-deeds relating to certain immoveable property. The plaintiff, therefore, prayed for foreclosure or sale of the property mortgaged.

The suit was filed in 1887.

The defendant contended (*inter alia*) that the suit was barred by limitation.

The Subordinate Judge held that art. 147 of the Limitation Act (XV of 1877) did not apply to the case of an equitable mortgage, and rejected the plaintiff's claim as barred by limitation.

Against this decision the plaintiff appealed to the High Court.

[270] Latham, Advocate-General (with him Shamrao N. Bele), for appellant.—The lower Court erred in holding that an equitable mortgage by deposit of title-deeds is a mere charge. An equitable mortgage stands

* Appeal No. 41 of 1888.

(1) 7 B.H.C. R. A. C.J. 118.

on the same footing as a legal mortgage. Where there is a deposit of title-deeds, it is treated as an agreement to execute a legal mortgage, and, therefore, carries with it all the remedies incident to such a mortgage—*Carter v. Wake* (1); Coote on Mortgages (4th ed.), 320, 992. A suit on an equitable mortgage is held to be a suit for foreclosure, but this Court has always preferred to grant a sale in the case of an equitable mortgage: see *Ganpat Pandurang v. Adarji Dadabhai* (2). Form No. 109 in the 4th schedule to the Code of Civil Procedure shows also that the Legislature makes no distinction between an equitable and a legal mortgage. Article 132 of the present Limitation Act is almost the same as art. 132 of the Act of 1871; but art. 147 of the present Act is a new provision. There was no such provision in the former Acts. It is, therefore, quite clear that the Legislature intended to apply art. 147 to mortgages generally—*Shib Lal v. Ganga Prashad* (3). The views of the Allahabad High Court were adopted by a Full Bench of this Court in *Motiram v. Vithai* (4). In that case the ruling of the Calcutta High Court in *Girwar Singh v. Thakur Narain Singh* (5) is expressly dissented from, the present case is governed by art. 147 of the Limitation Act.

Branson (with him *Manekshah Jehangirshah*), for respondent.—The only case in which the question as to an equitable mortgage is discussed is *Ganpat Pandurang v. Adarji Dadabhai* (6). But the observations of Sargent, J., are there *obiter dicta*. The point in appeal does not touch this question. I rely on the Calcutta Full Bench case of *Girwar Singh v. Thakur Narain Singh* (5), which distinctly lays down that art. 147 of the Limitation Act applies only to English mortgages. In the case of *Motiram v. Vithai* (4), Birdwood, J., adheres to his views in *Khimje Bhavandas Gujar v. Rama* (7). This [271] case is in point. It is based on *Lallubhai v. Naran* (8). For the purpose of the Limitation Act, art. 147 should be limited to mortgages, as defined by the Transfer of Property Act (IV of 1882).

An equitable mortgage is a contract to execute a legal mortgage. It confers no right of possession, and no power of sale out of Court. In the case of an equitable mortgage a suit for redemption is unknown. There is no authority or precedent for holding that an equitable mortgagee in the Mofussil is entitled to foreclosure. Refers to *Marshall v. Shrewsbury* (9).

Latham in reply.—The Transfer of Property Act (IV of 1882) includes an equitable mortgage in the definition of a mortgage: see s. 59 of the Act. An equitable mortgage possesses all the essential incidents of a mortgage. As between the parties to the transaction, it is a full and complete mortgage. It is only when the mortgagor gives a third party a legal title, that the equitable mortgagee runs the risk of losing his priority.

JUDGMENT.

JARDINE, J.—The plaintiff brought a suit to recover money advanced to the defendant on a note and for foreclosure or sale of immoveable property of which the title-deeds had been pledged by the defendant as security for the advance. The alleged loan and deposit took place in Bombay: the parties are Parsis: the property is situated outside Bombay. There can be no doubt that the transaction, if proved, amounted to an equitable mortgage by deposit of title-deeds, as described in Coote on

(1) L.R. 4 Ch.D. 606.

(4) 13 B. 90.

(7) 10 B. 519.

(2) 3 B. 312.

(5) 14 C. 730 (733).

(9) 6 B. 719.

(3) 6 A. 551.

(6) 3 B. 312.

(9) 10 Ch. App. 254.

1889 Mortgage, c. 31 (4th ed.), 339; Story's Equity Jurisprudence, s. 1020 ;
SEP. 30. and by Lord Abinger in *Keys v. Williams* (1).

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The Court below rejected plaintiff's claim as barred by the limit of twelve years prescribed in art. 132 of the Limitation Act (XV of 1877). The learned Advocate-General has argued here for plaintiff-appellant that the period of limitation is the sixty years prescribed in art. 147 for a suit by a mortgagee for foreclosure or sale. Mr. Branson, who appeared for defendant, argued that art. 132 alone was applicable.

The question of law to be decided is, whether the deposit in an equitable mortgage is to be considered as a mortgage within [272] the meaning of art. 147. In cases of doubt an Act of Limitation is to be construed in the manner most favourable to the person whose right is the subject of the limitation—*Lallubhai v. Naran* (2). The transaction is everywhere called a mortgage : and the deeds become pledged from the very nature of the transaction, they having been deposited as a present security. The particular transaction between the parties was also such as is called a mortgage in the last sentence of s. 59 of the Transfer of Property Act (IV of 1882).

Then it was argued for the defendant that art. 147 does not apply, because the proper and ordinary remedy of an equitable mortgagee is foreclosure, not sale—*James v. James* (3) ; *Carter v. Wake* (4). There has been difference of opinion as to how the word "or" in art. 147, is to be read. I follow the reasoning of our learned Chief Justice in *Motiram v. Vithai* (5) and, therefore, dissent from the view expressed on this matter of construction by the learned Judges at Calcutta composing the Full Bench in *Girwar Singh v. Thakur Narain Singh* (6). I base my decision on narrower grounds than those on which the above cases and the Full Bench case of *Shib Lal v. Ganga Prashad* (7) were decided, and, therefore, I do not feel it incumbent on me to discuss those cases further.

We reverse the decree, and remand the cause to the Court below for disposal on the merits. Costs already incurred, including those of this appeal, to be provided for in the final decree to be passed.

PARSONS, J.—In order to allow of the application of art. 147 of Act XV of 1877, two conditions have to be fulfilled : first, there must be a mortgage ; secondly, there must be a suit for foreclosure or sale brought by the mortgagee. The latter condition certainly is fulfilled in the present case (see the plaint). In my opinion, the former condition is fulfilled likewise. The contention of the respondent's counsel, that as between Parsis a deposit of title-deeds in the Presidency town of Bombay does not create a mortgage but only a charge, appears to rest on no valid [273] foundation. In Coote on Mortgage, Vol. I (5th ed.), p. 340, it is said "such deposit is of itself evidence of an agreement executed for a mortgage of the estate, of which agreement the creditor may avail himself as of an agreement in writing for that purpose"; and, again, at p. 352 "when there is a deposit of title-deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage. The relief.....is either sale or foreclosure." In *Oldham v. Stringer*, W. N. (1884) 235 (quoted in Morgan's Chancery Acts

(1) 3 Y. & C. 55, 61.

(4) L. R. 4 Ch. D. 605.

(6) 14 C. 730 (736).

(2) 6 B. 719 (724).

(3) L. R. 16 Eq. 153.

(5) 13 B. 90 (96).

(7) 6 A. 551.

and Orders, p. 116) it is ruled that "an equitable mortgagee by deposit may have a sale though there is no memorandum of deposit and no agreement to execute a legal mortgage." The case of *Carter v. Wake* (1) shows also that an equitable mortgagee by deposit of title-deeds is entitled to the right of foreclosure

If, then, by a deposit of title-deeds a mortgage is effected, which although equitable has the same effect as a legal mortgage and can be enforced by the same remedies, I fail to see how art. 147 can be held to be restricted so as to exclude such mortgages from its operation. It is contended that it applies only to mortgages under which the mortgagee would have the right to institute a suit for foreclosure or for sale under the Transfer of Property Act. Irrespective, however, of the difficulties of construing an Act of 1877 by an Act of 1882 and of applying to the disposal of this case an Act which is not in force in the Bombay Presidency, the contention fails, because the Transfer of Property Act recognizes that the delivery of documents of title does create a mortgage and does not invalidate them (s. 59), and it does not declare that such mortgagees shall not have the right which they have by English law to sue for foreclosure and sale.

Being, then, of opinion that a mortgage by deposit of title-deeds, such as the one in the present case, is a mortgage, and that under it the mortgagee has the right to sue for foreclosure or sale, I hold that art. 147 of the Limitation Act applies, and that the present suit is not time-barred, and I concur in the decree just passed.

Decree reversed.

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[274] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Candy.

SAJAJIPANHAJI (*Original Defendant No. 2*), Appellant v.
MARUTI (*Original Plaintiff*), Respondent*.
[30th September, 1889.]

Interest—Penalty—Stipulation in a mortgage-bond for enhanced interest in default of payment on a certain day—Contract Act (IX 1872), s. 74.

A mortgage-bond provided for repayment of the loan on a certain date with interest at the rate of $8\frac{1}{2}$ per cent. In default of payment on the due date, interest was to be paid at the rate of 37 per cent., to be calculated from the commencement of the loan.

Held, that the higher rate of interest was a penalty, and not to be enforced.

[*Appr.*, 19 C. 392 (F.B.); R., 17 B. 106 (110); 30 C. 15=7 C.W.N. 152; 36 M. 229=18 Ind. Cas. 417=24 M.L.J. 155=13 M.L.T. 20.]

SECOND appeal from the decree of W. H. Crowe, District Judge of Poona, in appeal No. 73 of 1886 of the District File.

The plaintiff sued, as assignee of equity of redemption, to redeem certain property which had been mortgaged by the defendant No. 1 to defendant No. 2 by a mortgage-bond for Rs. 1,999, dated 17th February 1868.

* Second Appeal No. 738 of 1887.

(1) L. R. 4 Ch. D. 605.