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the Mamlatdar's Court was always regarded as a Revenue Court empowered to deal with a claim to possession, and the maxim *optimus legis interpres consuetudo* may well be now applied in construing such an Act.

The order in question was against the appellant, and by s. 1, cl. 7 of Act XIV of 1859 a suit to recover the property would be barred after three years from the date of the order,—that is, on 17th January, 1867, and as that suit was not brought, the defendants cannot, we think, now assert a title other than what their actual possession may afford them. This was decided as regards an order under s. 246 of the Code of Civil Procedure of 1859 in *Nilo Pandurang* v. *Rama Patloji* (1), and is, in our opinion, equally applicable to an order under s. 1, cl. 2 of the Act of 1838. That order was conclusive as to [377] the successful party's right to possession "until he was ejected by a decree of the adalat," and after three years had elapsed should be held to "preclude the appellant from asserting his title", as was held by the Allahabad High Court with respect to an order under s. 246 of the Code Civil Procedure of 1859 in the Full Bench decision in *Badri Parsad* v. *Muhammad Yusuf* (2). The Subordinate Judge has found that Lalitabai was in possession in 1866 when she granted the *miraspatra*, and, therefore, appellant could not have acquired any title by possession before this suit was instituted in 1871.

It has, however, been urged upon us that the Subordinate Judge was wrong, having regard to *Ranchoddas Krishnadas* v. *Bapu Narhar* (3), in admitting the decision in suit No. 560 of 1881 as evidence of Shivaji's title. On the other hand, it was contended by Mr. Apte that the remand order having directed that Pandoji should be made a party, the judgment was admissible. It is not necessary to decide this question, as the admission of the decree was not objected to in the Court of first instance, nor indeed an appeal, except on the ground that it was not final, and the objection cannot be taken now in second appeal. We must, therefore, confirm the decree of the Court below, with costs on appellant.

Decree confirmed.

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APPELLATE CIVIL.

Before Mr. Justice Jadine and Mr. Justice Candy.

BULAKHI GANU SHET (*Original Plaintiff*), *Appellant v.* TUKARAMBHAT BIN MOTIRAMBHAT AND OTHERS (*Original Defendants*), *Respondents.** [7th October, 1889.]

Mortgage—Hypothecation bond containing a power of sale in case of default—Construction—Limitation Act (XV of 1877), art. 147—Suit by a mortgagee to recover the mortgage-debt from mortgaged property and from mortgagor personally—Limitation.

Where certain land was given as security for repayment of a loan under an instalment bond which contained an express provision for sale of the property in case of default, it was

[378] *Held* that the bond was a mortgage-bond, and that art. 147 of the Limitation Act (XV of 1877) applied to a suit to recover the instalments due under the bond by sale of the mortgaged property.

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* Second Appeal, No. 266 of 1888.

(1) 9 B. 35. (2) 1. A. 381. (3) 10 B. 439.

Held, also, that the limitation for the personal remedy against the mortgagor was three years.

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[Disc., 38 B. 177 (180) = 23 Ind. Cas. 353.]

SECOND appeal from the decree of W. H. Horsley, Acting District Judge of Khandesh, in appeal No. 99 of 1886 of the District File.

On the 9th August, 1869, defendants 1, 2 and 3 executed to the plaintiff a registered mortgage-bond for Rs. 695, agreeing to pay the mortgage-debt with interest by instalments as follows:—The first instalment of Rs. 79 was to be paid in January, 1869. Further instalments of Rs. 79 were to be paid in January of each year, from 1871 to 1874 inclusive. In each of the three following years, *viz*, 1875, 1876 and 1877, instalments of Rs. 75 were to be paid, and the last instalment of Rs. 75 was to be paid in February, 1878.

The bond contained a power of sale, in case of default, in the following terms:—

"The said plots in the two villages are given to you in mortgage. If payment is not made according to the above-mentioned covenant, reimburse yourself by selling the above-mentioned mortgaged property. If payment is not made out of the proceeds of the fields, I am personally responsible for the balance."

On the 15th August, 1885, the present suit was filed to recover the amount of the last six instalments by sale of the mortgaged property, as well as from the mortgagors personally.

The Subordinate Judge found that Rs. 180 was due to the plaintiff, and passed a decree, directing that the defendants should pay the same within six months, in default of which the plaintiff might recover the amount by sale of the mortgaged premises, and, if necessary, from the defendants 1, 2 and 3 personally.

The District Judge, in appeal, held that the suit was governed by art. 132 of the Limitation Act; that the plaintiff's claim for the instalments, which fell due in 1869, 1871, 1872 and 1873, was time-barred; and that he could only sue for the last five [379] instalments. He found, on taking accounts, that a sum of Rs. 123-5-0 was due to the plaintiff. He, therefore, passed a decree for this amount, directing that, in default of payment, the plaintiff should recover the same by sale of the mortgaged property, and from defendants 1, 2 and 3 personally.

Against this decree the plaintiff appealed to the High Court.

Manekshah Jehangirshah, for appellant.—The suit is governed by art. 147 and not by art. 132 of the Limitation Act. The bond on which we sue is clearly a mortgage-bond. Property is assigned as a security for the debt. And the bond contains a power of sale in case of default. The transaction is, therefore, a mortgage, whether we take the term as defined by the Transfer of Property Act (IV of 1882), or in the sense as generally understood by the Courts in the Mofussil. The Full Bench case of *Motiram* v. *Vitai* (1) is conclusive on the point. We are, therefore, entitled to recover all the instalments for which we sue. None of them is time-barred.

Daji Abaji Khare, for respondents.—The Full Bench case cited does not overrule or conflict with the ruling in *Khemji Bhagvandas Gujar* v. *Rama* (2). The latter ruling is in my favour. I contend that the bond

(1) 13 B. 90. (2) 10 B. 519.

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in question merely creates a charge, and not a mortgage in the strict sense of the term. There is no clause for possession, and the obligee could not sell, except through Court.

JUDGMENT.

JARDINE, J.—This appeal has been argued with special reference to the views expressed in *Khemji Bhagvandas Gujar* v. *Rama* (1) and *Motiram* v. *Vitai* (2) as to whether art. 132 or art. 147 of the Limitation Act of 1877 should be held applicable to the claim which is made by the plaintiff for money advanced on the security of defendants' land and for sale of the property.

It is important to remark that, in the present case, the bond contains a power of sale in case of default, expressed in the following terms :—

[380] " The said plots in the two villages are given you in mortgage (*gahan*). If payment is not made according to the above covenant, re-imburse yourself by selling the above-mentioned mortgaged property. If payment is not made out of (the proceeds of) the field, I am personally responsible for the balance."

On the question whether this bond creates a mortgage or a charge, we are of opinion that it is a mortgage, whether we follow the definition of s. 58 of the Transfer of Property Act IV of 1882, or the meaning of the word as generally understood in the Courts of this Presidency where that Act is not at present in force. It seems to fall under the class of mortgages called " simple mortgages " as defined in s. 58 of that Act, and described by Macpherson on Mortgages, pp. 14, 598, 7th edition —see *Sheoratan Kuar* v. *Mahipal Kuar* (3) and *Gopal Pandey* v. *Parsotamdas* (4). We do not see that the question is essentially affected by that raised, but not determined, in *Keshavrav Krishna Joshi* v. *Bhavanji Babaji* (5), *Pitamber* v. *Vanmali* (6) and *Jagjivan Nanabhai* v. *Shridhar Balkrishna Nagarkar* (7) as to whether a mortgagee in the mofussil can validly effect a private sale in pursuance of a power of sale in the deed. See Macpherson on Mortgages, (7th ed.), pp. 139 to 148, and s. 69 of the Transfer of Property Act.

For these reasons we are of opinion that, as regards the sale, the period of limitation is that of sixty years prescribed by art. 147. We must also notice that the limitation for the personal remedy is three years, as the decision of the Privy Council in *Ramdin* v. *Kalka Prasad* (8) overrules *Lallubhai* v. *Naran* (9), as is pointed out in *Khemji Bhagvandas Gujar* v. *Rama* (1) and ruled in *Miller* v. *Runga Nath Moulick* (10). The decree to be drawn up here in accordance with this judgment. Respondents to pay appellant's costs in all Courts.

Decree reversed.

(1) 10 B. 519.(525).
(2) 13 B. 90.
(3) 7 A. 258 (266).
(4) 5 A. 121 (137).
(5) 8 B.H.C.R.A.C.J. 142
(6) 2 B. 1, (7).
(7) 2 B. 252.
(8) 12 I.A, 12=7 A. 502.
(9) 6 B. 719.
(10) 12 C. 389 (395).