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less has he a claim to it. The Pensions Act XXIII of 1871 bars such a suit.—*Parbhudrs Rayaji* v. *Motiram Kalyandas* (1). Government is not estopped from denying the plaintiff's right for the acts of its agents.

Daji Abaji Khare, in reply.—The objection under the Pensions Act cannot now be taken for the first time.

JUDGMENT.

SARGENT, C. J.—This is a suit by the *inamdar* of the villages of Golap and Randpar to recover from Government the abkari revenue of those villages. He relies on a grant by the Peshwa's Government of the villages with "water, trees, grass, wood, quarries, mines, buried treasures, present and future cesses, and taxes and assessments." It is contended that the revenue derived by Government from the licenses granted for tapping trees in the villages is a tax within the contemplation of the grant.

As we think the case falls under the Pensions Act XXIII of 1871, and the Court is, therefore, ousted of its jurisdiction, we express no opinion on that question. It is true that the grant is not, in terms, one of a sum of money, and that taxes might not necessarily have been paid in money in the days of the Peshwa; but the tax in question is a money tax, and as soon as it was imposed, the grant, if it entitled the *inamdar* to the tax, operated as a grant of the money to be derived from the Government Treasury, and was, therefore, within the spirit, if not the precise letter, of the Pensions Act, the object of which, as stated in the Legislative Council in introducing the Bill, and which is referred to by Mr. Justice Melvill in *Parbhudas Rayaji* v. *Motiram Kalyandas* (2), was to reserve to the Government the determination of all questions affecting grants of money, the bestowal of which was an act of grace or State policy on the part of the ruling power.

We must, therefore, confirm the decree of the Court below for the above reasons with costs.

Decree confirmed.

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[577] APPELLATE CIVIL.

Before Mr. Justice Scott and Mr. Justice Telang.

ONKAR RAMSHET MARWADI (*Original Plaintiff*), *Appellant* v. THE FIRM KNOWN AS GOVARDHAN PARSHOTAMDAS AND OTHERS, (*Original Defendants*), *Respondents.** [14th March, 1890.]

Mortgage as distinguished from a charge—Limitation Act (XV of 1877), art. 147, sch. II —Suit to enforce mortgage lien by sale of mortgage property—Construction.

A bond contained the following stipulation as regards the liabilities of the sureties:—"In respect of this we have given to you, in writing, as a *nazar gahan* (*i.e.*, sight mortgage), the fields which belong to ourselves, and which we ourselves are enjoying..... If we do not pay according to contract, you may sell the said fields through the Court and recover the amount. If any balance remains, we will pay it off personally or by means of our other property."

* Second Appeal No. 233 of 1888.

(1) 1 B. 203.

(2) 1 B. 203 (206).

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Held, that the above stipulation, created a mortgage and not a mere charge on the fields in question, and that art. 147 of sch. II of the Limitation Act (XV of 1877) applied to a suit by the obligee against the surety under the bond to enforce his lien by sale of the property mortgaged.

[R., 15 B. 183; 20 B. 408.]

SECOND appeal from the decision of W. H. Horsley, Acting District Judge of Khandesh.

On the 29th August, 1872, one Nithu executed in plaintiff's favour a bond for Rs. 90, agreeing to repay the principal with interest in six months.

Defendant No. 2 was Vithu's surety in this bond, and by way of security he mortgaged two fields to the plaintiff by the same instrument.

The stipulation relating to the mortgage was in the following terms :—

" I have given you in writing, as a *nazar gahan*, the fields which belong to me and which I am myself enjoying .....
.....Therefore I shall pay off the amount as above stated. If I do not pay according to contract, you may sell the aforesaid fields through the Court and recover your amount. If any balance remains, I will pay it off personally, or by means of other property belonging to me."

[578] On the 15th June, 1874, defendant No. 1 purchased the two fields at a Court-sale in execution of a money-decree against defendant No. 2.

On 14th July, 1874, the plaintiff filed a suit against defendant No. 2 on the mortgage-bond of the 29th August, 1872. He obtained a decree, and in execution put up the two fields to auction. He purchased them himself on 20th February, 1875. He tried to take possession, but he was obstructed by defendants Nos. 1 and 3.

In 1885 the plaintiff filed the present suit to establish his title as purchaser and to recover possession of the fields in dispute.

The Court of the first instance held that as defendant No. 1's purchase in 1874 was prior to plaintiff's in 1875, the plaintiff had acquired no title to the property in dispute. He, therefore, rejected the plaintiff's claim.

On appeal the District Court held that though the plaintiff could not succeed by right of purchase, still he was entitled to fall back on the mortgage-bond of 29th August, 1872, and enforce his mortgage lien against the property in dispute in the hands of defendants Nos. 1 and 3. The District Court, therefore, remanded the case to the Court of first instance for a finding on the following issues :—

(1) Does plaintiff prove that the defendant No. 2 hypothecated the property in dispute to him ?

(2) Is the plaintiff entitled to recover the amount for which the land was hypothecated by sale of the land, or from any of the defendants, and, if so, from whom ?

The Subordinate Judge found the first issue in the affirmative. As regards the second issue, he held that the plaintiff was entitled to recover the amount by sale of the mortgaged property, that defendants 1 and 3 should be ordered to pay plaintiff the amount of his mortgage lien with

interest and costs within six months, or be for ever foreclosed, and plaintiff be then entitled to possession.

On the return of these findings, the District Court held that the plaintiff's claim was time-barred, as it was one to enforce payment [579] of money charged on immoveable property, and as such fell within art. 132 of the Limitation Act (XV of 1877). The suit having been filed more than twelve years after the accrual of the cause of action, was barred by limitation.

Against this decision the plaintiff appealed to the High Court.

The sole question argued at the hearing of the appeal was whether the bond of the 29th August, 1872, created a mortgage within the meaning of art. 147 of the Limitation Act.

Daji Abaji Khare, for appellant.

M. C. Apte, for respondent No. 1.

Manekshah Jehangirshah, for respondent No. 3.

The following authorities were cited in argument:—*Motiram* v. *Vitai* (1); *Tukaram Vithoji* v. *Khandoji Malharji* (2); *Lallubhai* v. *Naran* (3); *Manekji Framji* v. *Rustomji Naserwanji Mistry* (4), *Shib Lal* v. *Ganga Prasad* (5); *Rangasami* v. *Muttukumarappa* (6); Macpherson on Mortgage, p. 14.

JUDGMENT.

TELANG, J.—The only point argued before us on behalf of the appellant is whether Ex. 79 constitutes a mortgage within the meaning of cl. 147 of sch. II of Act XV of 1877, or whether it creates a mere "charge" as held by the District Judge. Other points were raised on behalf of the respondents, but we decided at the hearing that, having regard to the course which the case had taken in the Court below, such points were not now open for argument in this Court.

As regards the proper legal effect to be given to Ex. 79, we think it must be treated as creating a mortgage, and not a mere charge. The document at the outset is doubtless called a debt-bond, but that is not conclusive as to its character, especially because that designation is perfectly apt as applied to the principal debtor's obligation evidenced by the document. In addition to that obligation, however, the present defendants, who were not the principal debtors, also entered into an obligation as sureties by the same instrument. They say that if the principal [580] debtors fail to pay, they themselves will pay the whole amount. And then they go on to add—"In respect of this we have given to you in writing, as a *nazar gahan* (literally, sight-mortgage), the fields which belong to ourselves, and which we ourselves are enjoying." And after setting out a description of the fields, they proceed thus: "In this manner we have given to you in writing as *nazar gahan* the two survey numbers. Therefore we shall pay off your amount as above stated. If we do not pay according to contract, you may sell the aforesaid numbers through the Court and, recover your amount. If any balance remains, we will pay it off personally, or by means of our other property."

We find it difficult to see any substantial distinction between these provisions and the provisions contained in the instrument that was considered

(1) 13 B. 90 (93). (2) 6 B. H. C. R. O. C. J. 134. (3) 6 B. 719.
(4) 14 B. 269. (5) 6 A. 551. (6) 10 M. 509.

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by Sir R. Couch, C. J., in the case of *Tukaram Vithoji* v. *Khandoji Malharji* (1), which I referred to during the argument. Indeed, there are stronger reasons for holding the instrument before us to be one creating a mortgage than there were in the case before Sir R. Couch. In the instrument there in question there was no power of sale, expressly reserved, either through the Court or otherwise; there was no provision about the creditor going into possession; and there were no words of conveyance; yet Couch, C. J., said: "There is no ground for the contention that the bond does not create an interest in land. As creating a mortgage it is a form in constant use." We think we must follow that decision, which we think to be correct, and we need not here consider the effect of the Transfer of Property Act, as that Act is at present not in force in this Presidency. It is also unnecessary, for the same reason, to consider the observations made in the case of *Khemji Bhagvandas Gujar* v. *Rama* (2), which turned to a considerable extent on the effect of the Transfer of Property Act; and more especially is it unnecessary, as in the case of *Motiram* v. *Vitai* (3) the opinion of the majority of the Full Bench evidently leaned in favour of the view expressed by Sir R. Couch, although their attention was not drawn to his decision. In *Motiram* v. *Vitai*, Sir C. Sargent, C. J., said: "It is certainly very difficult to suppose that the framers [581] of that Act (*i.e.*, the Transfer of Property Act) intended to exclude from their definition of mortgage a large class 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.....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." We may add that when we bear in mind the rights and remedies of an equitable mortgagee, the case of *Manekji Framji* v. *Rustomji Naserwanji Mistry* (4) cited by Mr. Khare, (in which it was held that an equitable mortgage by deposit of title-deeds falls under cl. 147 and not 132 of sch. II of Act XV of 1887) may also be treated as supporting the conclusion at which we have arrived.

This being our view, we must reverse the decree of the District Judge and restore that of the Subordinate Judge made on remand. The respondents to pay to the appellant the costs of this appeal.

Decree reversed.

(1) 6 B. H. C. R. O. C. J. 134 (137).
(2) 10. B. 519.
(3) 13 B. 90 (97, 98).
(4) 14 B. 269. *ante*, 269.