

allowed redemption. There was no impropriety or illegality in the finding arrived at by the Subordinate Judge. The Special Judge had, therefore, no jurisdiction to interfere with the finding of the Subordinate Judge.

Vasudev Ramchandra Joglekar, for the opponent:—The wording of ss. 53 and 54 of the Dekkhan Agriculturists' Relief Act is wide enough; and under them the Special Judge can interfere if he finds that the decision of a lower Court is wrong on a question of fact.

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JUDGMENT.

BIRDWOOD, J.—We think that the Special Judge has exceeded his powers of revision under ss. 53 and 54 of Act XVII of 1879 by reversing the decision of the Subordinate Judge on a question of fact, *viz.*, whether the plaintiff had mortgaged his land to the defendant. Under those sections he can interfere with an improper as well as an illegal decree or order. His revisional jurisdiction resembles, therefore, that possessed by the High Court under the Code of Criminal Procedure; and ought, if it be held to include the power of setting aside the decision of a lower Court on the facts, to be exercised only in very exceptional cases. The Subordinate Judge's decision in the present case was based on evidence which appeared to him to satisfactorily establish the mortgage; and the case was not an exceptional one in which the interference of a revisional Court was necessary in the interests of justice.

We, therefore, reverse the decision of the Special Judge and restore that of the Subordinate Judge. Costs throughout on the defendant.

Order reversed.

15 B. 183.

[183] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

VENKATESH SHETTI BIN SANTYA SHETTI (*Original Plaintiff*),
Appellant v. NARAYAN SHETTI BIN TAMANA SHETTI AND OTHERS
(*Original Defendants*), *Respondents*.* [11th August, 1890.]

Bonds creating interest in land, construction of—Mortgage—Limitation Act (XV of 1877), sch. II, art. 147—Charge on immoveable property.

Bonds by which the property mentioned therein is declared to be a security for a loan, have been always regarded in the Bombay Presidency as creating the relationship of a mortgagor and mortgagee, and fall under art. 147 of sch. II of the Limitation Act (XV of 1877).

[F., 20 B. 408; R., 17 C.P.L.R. 26 (31).]

THIS was a second appeal from the decision of Gilmour McCorkell, District Judge of Kanara.

The plaintiff sued the defendants to recover money due to him under two bonds passed in his favour by one Tamana, the manager of the defendant's family, in the years 1858 and 1866. The bond of the year 1858 was for Rs. 400 and was registered. The suit was filed in the year 1885.

* Second Appeal, No. 564 of 1889.

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The Subordinate Judge found that only one of the bonds produced by the plaintiff, namely, that of the year 1858, was proved. The Subordinate Judge applied art. 132, sch. II of the Limitation Act (XV of 1877) to the plaintiff's claim, and held, as the plaintiff failed to prove any payment made to him by the defendants within twelve years prior to the institution of the suit, the claim was time-barred, and dismissed the suit.

The plaintiff appealed to the District Court. The District Judge held that both the bonds produced by the plaintiff were proved, but confirmed the decree of the Subordinate Judge, on the ground of limitation. The District Judge held that art. 132 and not art. 147 of the Limitation Act was applicable to the claim, and relied, in support of his decision, on the rulings in *Aliba v. Nanu* (1) and *Khemji Bhagvandas Gujar v. Rama* (2).

Against the decree of the District Court, the plaintiff appealed to the High Court. In the High Court, the point whether the bond dated 1858 was a mortgage transaction or not, was argued, [184] in order to determine what article of the Limitation Act governed the plaintiff's claim.

The bond ran as follows :—

"The deed of mortgage of land without possession executed on the 1st of the dark half of the moon in the month of *Margashir* of the cyclical year *Kalitakshi*, corresponding to 1858 A. D., and *Fasli* year 1268, by Tamana, son of Bab Shetti, living in Gudeangadi, to Venkatesh Shetti, son of Ramkrishna Santaya, living in Gudbale, is as follows :—

"This itself is a memorandum (to show) that I have received the sum of Rs. 400 or 100 pagodas (in words, one hundred pagodas) which I have taken from you to day in cash to pay off the debt which has fallen to my share. For this money there are lands which we hold as proprietors in the village of Holangdde (namely) Bollna Parambhata's Warga Muli No. 55 bearing an assessment of Rs. 28, Barsagani Ganpayabhata's Warga Muli No. 3 bearing an assessment of Rs. 5-4-0, Irara Kuppa's Warga Muli No. 52 bearing an assessment of Rs. 6-4-0, Bill Parmaya Hegade's Warga Muli No. 59 bearing an assessment of Rs 8-4-10 and the Muli No. 40 bearing an assessment of Rs. 4-10-8 and obtained from Bhikya Baba,—the lands bearing the total assessment of Rs. 52-7-6 : from these lands the three-fourths share which belongs to my younger brother Jattaya and my elder brother Gonpaya's sons Lakshman and Manju, and my elder brother Parameshvara Shetti's adopted son Pandu being deducted, the remaining one (fourth) share belonging to me bearing the assessment of Rs. 13-1-10½ consisting of rice land, gajni (salt water land called *khar*) land and also garden land, I have given to you in mortgage without possession. Therefore, I will enjoy the aforesaid lands myself and will pay every year interest in due time on the aforesaid amount, which come to Rs. 30 at the settled rate of 3 *hagas* per pagoda per annum and obtain a receipt for the payment made. I will pay you the aforesaid principal in one lump whenever you demand it, and redeem this mortgage without possession ; and the sum of Rs. 150 together with its interest due from me in respect of a former document having been allotted to the share of your sharer, I have executed this document besides that. To this effect the deed of mortgage of land without possession is passed in writing.

Signature of Tamana.

(1) 9 M. 218.

(2) 10 B. 519.

(Registrar's endorsement.)

Narayan Ganesh Chandavarkar, for the appellant:—The lower Courts wrongly held the suit to be time barred. The bond was registered, and the transaction evidenced by it is a mortgage transaction. The period of limitation is sixty years and not twelve years; and art. 147 applies and not art. 132 of the Limitation Act. The lower Courts were wrong in applying the latter article. The document begins with the words "the deed of mortgage of land without possession", and such transactions [185] have been held to be mortgages—*Tukaram Vithoji v. Khandoji Malhari* (1), *Onkar Ramshet v. Firm known as Govardhan Purshottamdas* (2); *Motiram v. Vitai* (3); *Parmaya v. Sonde Shrinivasapa* (4), *Sheoratan Kuar v. Mahipal Kuar* (5); *Manekji Framji v. Rastamji Naservanji* (6).

Shamrav Vitthal, for the respondent.—The mere description with which the document starts cannot make it a mortgage transaction—*Onkar Ramshet v. Firm known as Govardhan Purshottamdas* (2). In the bond there is a clear provision that the executant thereof is to remain in possession. The nature of a transaction must be determined by the language of the document, the intention of the parties and the surrounding circumstances. In the present Limitation Act (XV of 1877) there are separate articles prescribing the period of limitation for a charge and a mortgage transaction. In the former Limitation Act (XIV of 1859) there were no separate provisions of this kind, and, therefore, the decisions arrived at under that Act will not be applicable now. The bond in dispute creates a mere charge on immoveable property. To constitute a mortgage there must be power of sale reserved to the mortgagee or some clause as to foreclosure in the deed—*Gopal Sitaram Gune v. Desai* (7). The Full Bench ruling, *Motiram v. Vitai* (3) only indicates the line as to how such documents should be construed.

JUDGMENT.

SARGENT, C. J.—The bond in this case is almost identical in form with that in *Tukaram Vithoji v. Khandoji Malhari* (1), where Couch, C.J., speaks of it both as an instrument creating an interest in land and as a form of mortgage in constant use. In *Mahbleswarbhat v. Ratnabai* (8) the mortgage was an hypothecation bond. It is so described in the plaint, and we are informed by Mr. Narayan Chandavarkar, who was pleader in the case, that the instrument gave no right of possession to the mortgagee, and the Court, consisting of West and Nanabhai Haridas, JJ., held [186] that art. 147 of Limitation Act must be applicable to it. In *Parmaya v. Sonde Shrinivasapa* (4) Westropp, C. J., speaks of these instruments, which it appears are in common use in Kanara, as mortgages. In *Motiram v. Vitai* (3) Sargent, C. J., and Nanabhai Haridas, J., expressed the opinion, although not necessary for the decision of the case, that bonds by which the property is merely declared to be a security for a loan have been always regarded in this Presidency as creating the relationship of mortgagor and mortgagee, and fall under art. 147, and this view was adopted by Scott and Telang, JJ., in *Onkar Ramshet v. Firm known as Govardhan Purshottamdas* (2).

It must be admitted that Birdwood and Jardine, JJ., in *Khemji Bhagvandas Gujar v. Rama* (9) expressed the opinion that there is only a

(1) 6 B.H.C.R. O.C.J. 134.

(4) 4 B. 459.

(7) 6 B. 674.

(2) 14 B. 577, (578).

(5) 7 A. 258.

(8) P.J. for 1884, p.29.

(3) 13 B. 90.

(6) 14 B. 269.

(9) 10 B. 519.

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mortgage where there is a transfer of interest in immoveable property as provided by s. 58 of the Transfer of Property Act; but whether such be the correct view of that Act, as to which we express no opinion, we think that all the authorities in this Presidency point to such instruments being regarded as mortgages; and if so, there can be no reason why they should not fall under art. 147.

We must, therefore, reverse the decrees of the Court below and send back the case to be disposed of on the merits, so far as the same have not been already adjudicated on. Appellant to have his costs of this appeal.

Decree reversed.

15 B. 186.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

LAKSHUMAN GIRIRAYA NAIK (*Original Defendant*), Appellant *v.*
MADHAV KRISHNA SHENVI (*Original Plaintiff*), Respondent. *
[18th August, 1890.]

Mortgage by three sharers—Partition of equity of redemption—Redemption by two sharers—Excess payment—Suit for redemption by the third sharer—Set off.

Three undivided brothers, Janga, Rama and Narain, mortgaged certain land to the defendant. They afterwards separated and partitioned their property. [187] Rama and Narain redeemed their respective shares of the mortgaged land. Besides paying the defendant two-thirds of the sum due on the mortgage, they paid him Rs. 189-13-4, being two-thirds of a sum of Rs. 284-12-0, which he alleged he had been obliged to pay as assessment in respect of the mortgaged lands. Subsequently the plaintiff purchased the whole of the lands comprised in the mortgage, and he now sued to redeem the one-third share which remained in mortgage. The defendant claimed to charge the plaintiff with the remaining one-third of the sum which he alleged he had paid as assessment. The Subordinate Judge disallowed the defendant's claim, and ordered redemption on payment by the plaintiff of Rs. 570-10-8, being one third of the sum due on the mortgage. In appeal, the District Judge found that the defendant had not proved the alleged payment of assessment, and he allowed the plaintiff to deduct from the sum due on the mortgage Rs. 189-13-4 which had been paid to the defendant by the other two mortgagors. On second appeal by defendant.

Held, varying the decree of the District Judge, that the plaintiff was not entitled to the deduction. The three mortgagors had severed their interest. The plaintiff's right to redeem his one third was perfectly distinct from the redemption by the other two mortgagors, and there was no longer any joint account to which the sum previously paid could be credited.

[R., 6 C.L.J. 46 (53); 10 C.L.J. 150 (176); 14 C.L.J. 530 = 12 Ind. Cas. 155; 17 Ind. Cas. 337 = 23 M.L.J. 576 = 12 M.L.T. 484 = (1912) M.W.N. 1168.]

SUIT for redemption and possession. Second appeal from the decision of G. McCorkell, District Judge of Kanara.

The land in question was a one-third share of certain land which had been mortgaged to the defendant by three brothers, Janga Naik, Rama Naik and Narain Naik, who were then living in union. Subsequently, however, they separated and partitioned their property, and Rama and Narain redeemed their shares from the defendant and got possession. The plaintiff afterwards bought the whole property at a Court sale, and he now sued

* Second Appeal, No. 481 of 1889.