FULL BENCH.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Jardine, Mr. Justice Farran, Mr. Justice Ránade and Mr. Justice Fulton.

1895. *March* 13.

DATTO DUDHESHVAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* VITHU BIN TULJA'JI, DECEASED, BY HIS WIDOW AND HEIRESS HARIBA'I AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation Act (XV of 1877), Sch. II, Arts. 132 and 147—Bond—Mortgage—Security pledge (táran gahán)—Hypothecation—Charge—Simple mortgage without possession.

Where a bond given for a loan contained the following condition as to security and repayment of the money:—

"The security pledge (*táran gahán*) for this is our own property, Survey Nos. 170 and 778 in the village Ped, on all the land of which two numbers do you take satisfaction for the said money; and if it should be insufficient, I will personally make satisfaction."

Held, that the transaction was a mortgage governed by article 147, Schedule II of the Limitation Act (XV of 1877) and not a charge governed by article 132.

Khemji v. *Ráma*(1), *Rángásámi* v. *Muttukumarappa*(2) and *Girwar Singh* v. *Thákur Náráyan Singh*(3) dissented from.

Motirám v. *Vitai*(4), *Venkatesh* v. *Náráyan*(5) and *Baváji* v. *Tátya* (6) followed.

SECOND appeal from the decision of John FitzMaurice, Assistant Judge of Sátára, confirming the decree of Ráo Sáheb S. B. Gole, Subordinate Judge of Vita.

The plaintiff Datto was the assignee of a bond executed to one Bábájibhat by the defendant Vithu, who had borrowed a sum of money from Bábájibhat, and had given the bond, dated the 12th September, 1876, as security. The plaintiff in 1891 sued to recover the money due on the bond by a sale of the lands mentioned in it.

The bond provided that both principal and interest were to be paid within a year from its date, and that, in case of default, the creditor should recover the amount from the land which was in the possession of the debtor. The following is a translation of the provision in the bond:—

*Second Appeal, No. 764 of 1892.

(1) I. L. R., 10 Bom., 519
(2) I. L. R., 10 Mad., 509
(3) I. L. R., 14 Calc., 730.
(4) I. L. R., 13 Bom., 90.
(5) I. L. R., 15 Bom., 183.
(6) P. J., 1891, p. 35.

"The security-pledge (*táran gahán*) for this (is) our own property, Survey Nos. 170 and 778 in the village Ped, on all the land of which two numbers do you take satisfaction for the said money; and if it should be insufficient, I will personally make satisfaction."

The lower Court held that the bond merely created a charge on the lands and was not a mortgage; that article 132 and not article 147, Schedule II of the Limitation Act (XV of 1877) applied; and that the suit was barred.

Báláji A. Bhágvat appeared for the appellant (plaintiff).

Vishnu K. Bhatávdekar appeared for the respondent (first defendant).

The second appeal came on for hearing before a Division Bench, consisting of Jardine and Ránade, JJ., who, in view of the conflict of decisions on the point as to whether the transaction in suit should be held to be a charge on immoveable property or mortgage, made a reference to a Full Bench in the following terms:—

JARDINE, J.:—After hearing able arguments we determine to refer to a Full Bench the question whether article 132 or article 147 of the Limitation Act (XV of 1877) applies to the present suit. The suit is based on a bond which contains the following condition as to security and repayment:—"The security-pledge (*táran gahán*) for this is our own property, Survey Nos. 170 and 778 in the village Ped, on all the land of which two numbers do you take satisfaction for the said money; and if it should be insufficient, I will personally make satisfaction."

This bond resembles that in *Khemji* v. *Ráma*[1], in that it gives no possession, nor right of entry, nor, in our opinion, power to sell without the intervention of a Court. There it was held by Birdwood and Jardine, JJ., that article 132 applied. But in *Onkár Rámshet* v. *The Firm known as Govardhan Parshotamdás*[2], Scott and Telang, JJ., in a similar case, took the contrary view, holding article 147 to apply. In *Venkatesh* v. *Náráyan*[3], which also is on all fours, Sargent, C.J., and Telang, J., held article 147 to apply. The decisions in these two cases are influenced by the views expressed by Sargent, C.J., and, Nánábhai, J., in the Full Bench case

(1) I. L. R., 10 Bom., 519. (2) I. L. R., 14 Bom., 577.
(3) I. L. R., 15 Bom., 183.

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Motirám v. *Vitái*[1], which, though, as expressly remarked in *Venkatesh* v. *Náráyan*, it was not necessary for the decision of the case to consider what limitation applies to a bond like the present, throw some doubt on the decision in *Khemji* v. *Ráma*. In *Báváji* v. *Tátyá*[2], Sargent, C.J., and Candy, J., treat the Full Bench case as if it overruled the latter.

There is thus a conflict of decisions on the very question on which the decision of the present appeal depends.

The conditions of the bonds in the Full Bench case and in *Bulákhi* v. *Tukárám*[3] are, in our opinion, distinguishable and have been correctly distinguished by the Courts below.

The learned Judges who have expressed opinions doubting the correctness of the decision in *Khemji* v. *Ráma* do not appear to have had their attention drawn to the judgment of the Full Bench at Madras in *Rángasámi* v. *Muttukumarappa*[4] on the same point. It has since been determined by a Full Bench at Calcutta in *Girwar Singh* v. *Thákur Náráyan Singh*[5]. Both of these judgments dissent from the majority of the Full Bench in the Allahabad Court in *Shib Lál* v. *Ganga Prasád*[6] whose views are expressly followed in the Bombay Full Bench case. These Full Bench decisions at Madras and Calcutta support the views expressed in *Khemji* v. *Ráma*. In order that the important question may, as regards this Presidency, be solemnly determined, we refer it to a Full Bench of this Court.

RA'NADE J.:—A series of decisions of this Court commencing with the ruling in *Tukárám* v. *Khandoji*[7] and ending with *Venkatesh* v. *Náráyan*[8] have been (with the exception of the decision in *Khemji* v. *Ráma*[9]) in favour of treating simple hypothecation bonds as mortgages, and not as charges, in so far as the application of article 132 or 147 of the Limitation Act is concerned. The authority of the decision in *Khemji* v. *Ráma*[9] has been much questioned, if not overruled, in the later decisions, one of them a Full Bench decision, *viz.*, *Kane Lakshman Prabhu* v. *Lakshman*[10]; *Onkár Rámshet* v.

(1) I. L. R., 13 Bom., 90.
(2) P. J., 1891, p. 35.
(3) I. L. R., 14 Bom., 377.
(4) I. L. R., 10 Mad., 509.
(5) I. L. R., 14 Calc., 730.
(6) I. L. R., 6 All., 551.
(7) 6 Bom. H. C. Rep., p. 134, O. C. J.
(8) I. L. R., 15 Bom., p. 183.
(9) I. L. R., 10 Bom., p. 519.
(10) P. J. for 1889, p. 182.

The Firm known as Govardhan Parshotamdás(1); *Firm known as Nánáji Mádhavráv* v. *Pándu*(2); *Báváji* v. *Tátya*(3); *Motirám* v. *Vitai*(4), and *Venkatesh* v. *Nárávan*(5). The Allahabad High Court has also taken the same view as that of this Court in the cases cited above. See *Shib Lál* v. *Ganga Prasád*(6). On the other hand, the High Courts of Madras and Calcutta have taken the opposite view, that which found support in *Khemji* v. *Ráma*(7), and one of these decisions was passed after a full review of the authorities on the other side, *viz.*, *Girwar Singh* v. *Thákur Nárávan Singh*(8) and *Davani* v. *Ratna*(9).

In this state of the law on the point, the Courts in this Presidency are bound to follow the rulings of this Court in preference to those of the other High Courts. If that view were followed, the decisions of the lower Courts in the present case will have to be reversed. As, however, the authority of the decision in *Khemji* v. *Ráma*(7) has not been expressly overruled by the later decision in *Motirám* v. *Vitai*(4), I think the present is a fit case for reference to a Full Bench, and I, therefore, agree with Mr. Justice Jardine in his order of reference.

The reference was argued before a Full Bench composed of Sargent, C. J., Jardine, Farran, Ránade and Fulton, JJ.

Báláji A. Bhágvat, for the appellant (plaintiff):—The expression *táran gahán* in the document literally means 'security mortgage,'—that is, mortgage without possession. With respect to payment, the words in the document are *zaminivar áplé rupayácha ulagada karun ghyává*,—that is, "you should realize your money on the land." The expression *táran gahán* has been held to mean "mortgage without possession"—*Onkár Rámshet* v. *The Firm known as Govardhandás Parshotamdás*(10). The current of decisions of this High Court has been that bonds which contain no power of sale or right of entry are mortgage transactions—*Venkatesh* v. *Nárávan*(5). The Full Bench ruling in *Motirám* v. *Vitai*(4) has practically decided the question. There it has been distinctly held

(1) P. J. for 1890, p. 79.
(2) P. J. for 1891, p. 16.
(3) P. J. for 1891, p. 35.
(4) I. L. R., 13 Bom., p. 90.
(5) I. L. R., 15 Bom., p. 183.
(6) I. L. R., 6 All., p. 551.
(7) I. L. R., 10 Bom., p. 519.
(8) I. L. R., 14 Calc., p. 730.
(9) I. L. R., 6 Mad., p. 417.
(10) I. L. R., 14 Bom., 577.

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that transactions like the one in dispute are mortgages governed by article 147, Schedule II of the Limitation Act.

[SARGENT, C. J.:—If the money is to be realized from the land, that means that the money is to be realized by the sale of the land.]

Yes. If the money is to be realized by the sale of the land under the document, then the transaction is a mortgage and not merely a charge on immoveable property. This contention is strengthened by a subsequent clause in the document, namely, *áni kami ályás mi játivar bharun dein*,—that is, "and if less be realized, I will pay (the balance) personally." The decisions which are in conflict with the aforesaid current of authorities are *Khemji* v. *Ráma*(1), *Rangasami* v. *Muttukumárappa*(2), *Girwar Singh* v. *Thákur Náráyan Singh*(3). The practice of the Calcutta and Madras High Courts is different from the practice of this and the Allahabad High Court, which takes the same view as this Court does—*Krishnalál* v. *Gangárám*(4).

Náráyan G. Chandávarkar (for *Vishnu K. Bhatávdekar*) appeared for respondent No. 1 (defendant No. 1):—The documents in the cases relied on, contain one or other of three conditions, namely, either a right of entry, or a right of redemption, or a right of sale. As the document in the present case contains none of these conditions, we submit that it is not a mortgage, but it merely creates a charge on immoveable property. The term 'charge' is defined in section 100 of the Transfer of Property Act (IV of 1892). A charge differs from a mortgage—*Barlinson* v. *Hall*(5); *Rámdin* v. *Kalka Pershád*(6).

[RA'NADE, J.:—The document in dispute does contemplate a sale for the recovery of the money.]

No doubt it does contemplate a sale; but that circumstance alone would not make the transaction a mortgage.

[JARDINE, J.:—The words in the document are *táran gahán*; the word *gahán* means mortgage.]

[SARGENT, C. J.:—We are all agreed that we should follow the ruling in *Motirám* v. *Vitai*(7).]

(1) I. L. R., 10 Bom., p. 519.
(2) I. L. R., 10 Mad., 509.
(3) I. L. R., 14 Calc., p. 730.
(4) I. L. R., 13 All., 28.
(5) L. R., 12 Q. B. Div., pp. 347, 350.
(6) L. R., 12 I. App., 12.
(7) I. L. R., 13 Bom., p. 90.

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The judgment of Sargent, C. J., and Farran and Fulton, JJ., was delivered by

SARGENT, C. J.—We think that the instrument in question would probably be regarded by an English lawyer as a hypothecation bond falling under section 132 of the Statute of Limitations, and such we cannot doubt would be the view taken of it by the Madras High Court—*Rangasami* v. *Muttukumarappa*[1]. But, as regards this Presidency, the question as to the article of the Statute of Limitations applicable to such an instrument must, we think, be regarded as concluded by the decision of the Full Bench in *Motiṛám* v. *Vitaí*[2] subsequent to the decision in *Khemji* v. *Ráma*[3]. In that case it was held (differing doubtless from the Calcutta High Court) that the object of the Legislature by the introduction of article 147 was to provide a special article for suits by mortgagees, leaving article 132 in its original form to apply to charges other than those which arise from loans, and further that the article was applicable to simple mortgages without possession, or right of entry, on the ground that they constituted 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. These conclusions enunciated in the judgment of the majority of the Court were acted upon in *Venkatesh* v. *Náráyan*[4] and *Bávájí* v. *Tátya*[5]. The principle of *stare decisis* is one of the utmost importance in questions of this nature as producing uniformity of practice. We must, therefore, answer the question by holding that article 147 is applicable to the instrument in question.

JARDINE, J.:—The material part of the bond is the following:—"The security pledge (*táran gaḥan*) for this is our own property, Survey Nos. 170 and 778, in the village Ped, on all the land of which two numbers do you take satisfaction for the said money; and if it should be insufficient, I will personally make satisfaction." *Zamini-var rúpaya'cha ulgáda karun ghyáva; a'ni kami a'lya's mi jativar ulgada karun dein.*

The Maráṭha words used are terse and vague; but after consideration, it is admitted by the pleaders on both sides that the meaning

(1) I. L. R., 10 Mad., 509.
(2) I. L. R., 13 Bom., p. 90.
(3) I. L. R., 10 Bom., p. 519.
(4) I. L. R., 15 Bom., 183.
(5) P. J., 1891, p. 35.

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is that the debt is to be realized out of the land, and if not so realized, the debtor is to be personally responsible. The words do not say *how* the debt is to be realized from the land; but as there is no power of entry, nor possession given, and as it is not the practice of the creditor to sell without first obtaining a decree, it is also admitted that the necessary implication is that the debt might be recovered by sale through a Court. We all concur in these constructions of the bond.

The question for decision of the Full Bench is whether article 132 or article 147 of the Limitation Act of 1877 applies to the suit to recover the debt by sale of the property. The conflicting decisions of this Court are noticed in the referring minutes. With regard to them the question may be stated to be whether the bond creates a charge or a mortgage within the meaning of the above articles.

Until the new enactment, article 147, became law, the bond would have been treated by the High Courts as coming under the word "charge," and covered by article 132 of the Limitation Act of 1871. In the Full Bench case—*Rangasami* v. *Muttukumara'ppa*[1]—the learned Judges treat such bonds as hypothecations, to be distinguished from mortgages, and coming under article 132 of the Act of 1877. Their reasons are largely special, much influenced by the maxim *stare decisis*, a rule based on policy and of great weight in the quieting of titles. Applied to Bombay the result is different, as bonds like that in suit have for long been treated by this Court as mortgages and dealt with on the same principles. Let it be admitted that, as pointed out by the learned Judges at Calcutta in the Full Bench case—*Girwar* v. *Thákur Náráyan Singh*[2]—the word "charge" in article 132 may be applied to this bond. It may yet be urged that article 147 by its language includes this suit specifically and thus excludes it from article 132 impliedly. The transaction, as such, may be called a mortgage, following the remark in the first page of Coote, that for the ordinary purposes of conveyancers a mortgage has been considered as a pledge of real or personal estate evidenced by deed for securing the repayment of money. The word "charge" unaided by context may in an Act drawn by English lawyers be conceived to mean such provisions as are found in family

(1) I. L. R., 10 Mad., 509. (2) I. L. R., 14 Calc., p. 739.

settlements, rent-charges and other incumbrances to which redemption and foreclosure do not apply. Where the language of a statute is doubtful, the argument derived from convenience has weight in determining the meaning. It coincides with the maxim above quoted and the apparent breadth of the term mortgage. This argument may be based on two considerations. The Judicial Committee of the Privy Council have in *Rámdín* v. *Kalka Pershád*(1) noticed the inconvenience which would be caused if mortgagees were by reason of short terms of limitation forced into litigation. Our own experience tells us that prolonged and expensive litigation will increase if this Court requires the Courts under its superintendence to draw fine distinctions between mortgage and hypothecation in the construction of bonds. The simplicity and vagueness of those executed in the Mofussil of this Presidency cause misunderstandings between parties and difficulties to the interpreting Courts. These inconveniences will be greatly increased if such distinctions are encouraged.

For these reasons, I am of opinion that the decision in *Khemji* v. *Ráma*(2), though based on a possible construction of the enactment, does not declare the correct construction; and it ought, therefore, to be overruled.

The opinion taken by the learned Judges in *Girwar Singh* v. *Thákur Náráyan*(3) was partly influenced by special circumstances of Bengal legislation and partly by a mode of interpreting article 147, which was dissented from by the Full Bench here in *Motirám* v. *Vitai*(4). In a case of equitable mortgage by deposit of title-deeds—*Mánekji* v. *Rustomji*(5)—Parsons, J., and myself followed our own Full Bench on this point. The correct view of the law is stated there by Sargent, C. J.

"Under the prior Limitation Act of 1871, the only article applicable to suits for sale of mortgaged property under any mortgage instrument was article 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

(1) L. R., 12 I. A., 12.
(2) I. L. R., 10 Bom., 519.
(3) I. L. R., 14 Calc., 733.
(4) I. L. R., 13 Bom., 95.
(5) I. L. R., 14 Bom., 269.

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in that article; but in the absence of any article expressly referring to mortgages, article 132 was, as a matter of practice—with which we may presume the framers of article 147 of the Act, 1877, were acquainted—applied to the case of mortgages, and, therefore, article 147 of that Act, which in terms applies to mortgages generally, doubtless introduced 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 article 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 article 132 in its original form to apply to all other charges."

I would, therefore, answer the question stated by saying that article 147 applies.

RA'NADE, J.:—The questions involved in this reference are two: one relates to the proper construction and legal import of the document on which the claim is based, and the other is concerned with limitation. The document is called a security mortgage, or *táran gahán*, *i.e.*, mortgage without transfer of possession. There is a personal covenant to repay the money within one year, at the end of which period the creditor is authorized to take satisfaction of the debt due on (or from) the land, and in case there is a deficiency, the debtor holds himself personally responsible for the balance. The first question to be considered is whether, as far at least as this Presidency is concerned, such an instrument with such covenants is a mortgage of immoveable property, or whether it creates only a charge. The Calcutta and Madras High Courts have held that such instruments are not mortgages in the sense of being transfers of interest in immoveable property by way of security for the payment of debt —*Girwar Singh* v. *Thákur Náráyan Singh*[1]; *Aliba* v. *Nánu*[2]; *Davani* v. *Ratnâ*[3]. A Division Bench of this Court also in *Khemji* v. *Ráma*[4] took the same view, and held that where the bond did not expressly confer a power of sale, or transfer possession, or allow a right of entry to the creditor, there was no mortgage, and only a charge was created by it. This view was admittedly based on the definition

(1) I. L. R., 14 Cal., 730.
(2) I. L. R., 9 Mad., 218.
(3) I. L. R., 6 Mad., 417.
(4) I. L. R., 10 Bom., 519.

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of mortgage contained in section 58 of the Transfer of Property Act. The instrument in the present case is not governed by that Act, and it may be noted that it is unlike the instrument which was considered in *Khemji* v. *Ráma*[1], in that it does provide for a satisfaction of the debt on or from the land, which was not the case in the second of the two documents chiefly considered in that case. The definition of a mortgagee-deed in the Stamp Act is more general in its terms than that in section 58 of Act IV of 1882, and all instruments transferring, or creating a right over specified property, to, or in favour of, a creditor, are there stated to be mortgages. The right of bringing a particular property to sale with a preferential claim to the proceeds (*vide* section 295 of Civil Procedure Code and section 97, Act IV of 1882) is a right over specified immoveable property conferred on the creditor within this definition.

The four classes of mortgages expressly defined in section 58 of Act IV of 1882 do not, moreover, exhaust all possible kinds of mortgage instruments, for section 98 provides for what it calls anomalous mortgages, which do not fall under any of the four principal classes. These considerations lead to the conclusion that instruments which create a right in favour of a creditor over specified immoveable property are mortgage instruments. The present instrument, as creating such a right of compulsory sale, and preferential claim in favour of the creditor, must be regarded as a mortgage. The narrower view taken by the High Courts of Madras and Calcutta has not much been favoured on this side of India, and long before, as also since the decision of the Division Bench noticed above, it has been ruled that simple bonds securing the repayment of money advanced on specified immoveable property were mortgages. This was expressly held to be the case in *Tukárám* v. *Khandóji*[2] by Sir R. Couch, C. J. In *Parmaya* v. *Sonde Shrinivasapa*[3], Sir Michael Westropp affirmed the same view, and noticed that such instruments were in constant use. West and Nánábhai, JJ., took the same view in *Mahábaleshwarbhat* v. *Ratnábái*[4], where the bond did not confer any right of possession. The decision in *Khemji* v. *Ráma*[1] was thus in conflict with many previous decisions, none of which were referred to by the Judges who decided that case, and it was disapproved in

(1) I. L. R., 10 Bom., 519.
(2) 6 Bom. H. C. Rep., O. C. J., 134.
(3) I. L. R., 4 Bom., 459.
(4) P. J., 1884, 29.

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many subsequent rulings, chief of which were the Full Bench decision in *Motiram* v. *Vitai*(1) followed in *Onkár Rámshet* v. *The Firm known as Govardhan Parshotamdás*(2); *Venkatesh* v. *Náráyan*(3); *Káne* v. *Lakshman*(4); *Báváji* v. *Tátya*(5); *Firm known as Nánáji Mádhavráv* v. *Pándu*(6).

In all these cases, the instruments were of the nature of simple mortgages, *nazar* or *táran gahán*, or security mortgages without immediate transfer of possession. There was, indeed, in *Motirâm* v. *Vitai*(1) a right of entry on default, and on this account Mr. Justice Birdwood, who was one of the Judges who decided that case, gave in his adhesion to the views of the present Chief Justice and other Judges. In the other cases noticed above, there was only a power of sale through process of Court, as in the present case. These decisions must, therefore, be held to have clearly established the position that the bond sued upon in the present case is of the nature of what has been all along generally understood in this Presidency to be a mortgage, and is not a mere money-bond which created a charge, but transferred no interest to, or created no right in favour of, the creditor in specific immoveable property. This Court has generally been in agreement on this point with the rulings of the Allahabad High Court—*Shib Lál* v. *Ganga Prasád*(7). It may be that the current of decisions in the Madras and Bengal Presidencies has been influenced by the special peculiarities of the course of dealings in those provinces, and the authority of their decisions cannot, therefore, be accepted as binding on the Courts on this side of India for the reasons mentioned above.

The question of limitation still remains to be considered, and as the inquiry into the legal import of such documents comes up chiefly for consideration in connection with the question of limitation, it is of importance to have an authoritative decision on this aspect of the case also. The same considerations which led the High Courts of Madras and Calcutta to hold what were called hypothecation bonds to be not included under mortgages, led them to hold that article 147, which provides a period of sixty years for suits by mortgagees for foreclosure or sale of mortgaged property, did not apply to suits

(1) I. L. R., 13 Bom., 91.
(2) I. L. R., 14 Bom., 578.
(3) I. L. R., 15 Bom., 183.
(4) P. J., 1889, 182.
(5) P. J., 1891, 35.
(6) P. J., 1891, 16.
(7) I. L. R., 6 All., 551, F. B.

on such bonds, when the relief allowed by the bond was by way of Court-sale, and that article 147 applied only to English mortgages. It was further held that, in respect of suits on simple mortgages, article 132 applied, and the period of limitation was twelve, and not sixty, years. This was also the view taken by the Division Bench which decided *Khemji* v. *Ráma*[1]. This Court has, however, all along agreed with the Allahabad High Court in its view that article 147 applied to all mortgages, and that article 132 had reference only to charges as distinguished from mortgage transactions. Previous to Act XV of 1877 there was no room for this conflict of views, for there was no special article which provided a separate period of limitation for suits brought by mortgagees to recover the debt due to them by the sale of mortgaged property. The old article 132 of the Act of 1871 was, in the absence of any specific provision, held to apply to charges and mortgages alike—*Sheoratan Kuar* v. *Mahipat Kuar*[2]; *Lallubhái* v. *Náran*[3]; *Davani* v. *Ratna*[4]; *Ramdin* v. *Kalka Pershád*[5]. The Limitation Act of 1877 for the first time inserted a new article for suits by mortgagees for foreclosure or sale, and also made very significant changes in the wording of the old articles 132, 148. The High Courts of Madras and Calcutta have held that this new insertion and these changes were not intended to have any wide range, and that, in so far as simple mortgages were concerned, they left the law on this point where it stood before Act XV of 1877 was passed. Except the ruling in *Khemji* v. *Ráma*[1], this Court, agreeing with the Allahabad High Court, has taken a contrary view of the effects of this change, and held that charges and mortgages were intended to be separately provided for by the two articles 132, 147. The decision of the Division Bench noticed above, though dissented from and distinguished in subsequent cases, has not, however, been expressly overruled, and this circumstance suggested the necessity of the present reference. The various considerations which have been urged in support of the narrower and the more liberal interpretation of these articles, in the several Full Bench rulings of the different High Courts, may with advantage be brought together here to see on which side the balance of arguments leans.

(1) I. L. R., 10 Bom., 519.
(2) I. L. R., 7 All., 258.
(3) I. L. R., 6 Bom., 719.
(4) I. L. R., 6 Mad., 417.
(5) L. R., 12 I. A., 12.

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(1) The usual rule of construing statutes in their natural and ordinary sense is certainly violated when the general words used in article 147 are held only to relate to one class of mortgages, namely, to English mortgages, as has been done in the Bengal and Madras decisions. These English mortgages are not very numerous even in Presidency towns, and are absolutely unknown in the Mofussil. If the Legislature had intended this restricted application of article 147, it would certainly have used qualifying words to that effect.

(2) The narrower interpretation does violence to the wording of article 147 in another way when it reads suits for foreclosure or sale, not distributively, but as if the words used were suits for foreclosure and sale, as remedies open to the mortgagee on an English mortgage-bond.

(3) It is not absolutely necessary in English mortgages that the mortgagee should bring a suit for the sale of mortgaged property. He can exercise his right of private sale, which does not appear to be contemplated in article 147, coupled as suits for sale are with those for foreclosure. The words must, therefore, obviously refer to suits for sale by mortgagees generally, *i. e.* in the Mofussil by process of Court, private sales being unknown, and held to be undesirable—*Keshavrávv. Bhavánji*[1].

(4) The narrower interpretation takes no account of the admitted reciprocity of the rights of mortgagors and mortgagees. The Legislature, in inserting the new article 147 immediately before article 148, appears to have recognized this reciprocity, and the two articles must be read together, and when so read, article 147 must be construed as being as general in its scope as article 148 admittedly is, for sixty years is the period for all redemption suits.

(5) This view is further strengthened by the fact that the words "to redeem" have been expressly added in the new article 148, in which the words before used were confined to mortgagors' suits to recover possession.

(6) While too great importance need not be attached to the contemporaneous drafting of the Bill, which subsequently became Act IV of 1882, with the Limitation Act of 1877, it certainly cannot be lost sight of that the words "monies charged" used in article 132

(1) 8 Bom. H. C. Rep., A. C. J., 144.

were intended to refer to charges other than mortgages as defined in sections 58 and 100 of Act IV of 1882. The intention is still more clearly manifested by the illustration to article 132 referring to malikána and other haks. The other charges must clearly refer to similar claims, such as those referred to in section 95 of the Transfer of Property Act, or to dower, or maintenance charged on land, or the claim for unpaid purchase-money, &c. The changes made in law appear thus to have been intended to remove the doubts and anomalies formerly felt in applying article 132 to mortgage claims, and this could best be done by adding a new article distinguishing mortgages from charges by a clear line of separation.

(7) The smaller periods of time provided for suits for possession brought by mortgagees furnish no analogy in respect of suits for sale, because suits for possession do not deprive the mortgagor of his rights, which is the effect of a sale in execution of a mortgage decree. The analogy of suits for sale is more complete with foreclosure suits, with which they are linked distributively.

(8) Limitation laws must always be strictly construed in the interest of the party prejudicially affected by these limits.

(9) The shortening of the periods of limitation in England from twenty to twelve years furnishes no reason of policy for a similar contraction in this country, where the circumstances are so different, and where, since 1871 at least, it has been the steady policy of the Legislature to protect the indebted classes by discouraging, as far as possible, premature or forced sales. The narrower interpretation would force mortgagees to sell up their debtors' lands, when otherwise they would prefer to wait.

These considerations satisfy me that, both on grounds of policy and in accordance with well-accepted rules of construction, the interpretation which has been placed by this Court on articles 132 and 147 of the Limitation Act of 1877 is correct, and that the arguments for narrowing the scope of article 147 derive no support from general considerations such as those alluded to above.

On the whole, therefore, I feel satisfied that, both on the question of limitation, as also of the legal import of the document, the decisions of this Court favour the view that security mortgages, *nazar gahán* or *táran gahán* mortgages are mortgages proper, even though

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there be no express power of sale, or right of entry, or words transferring possession, and that the power of compulsory sale to realize the debt implied in such a transaction, unless specially excluded, is itself a right and interest in immoveable property transferred to the creditor, which satisfies section 58 of Act IV of 1882, and the requirements of the definition of mortgage under the Stamp Act, and that the period of limitation for suits for sale in respect of such mortgages is that laid down by article 147, as such a transfer of right is not meant to be included in the charge transactions to which alone article 132 applies. The correctness of the decision in *Khemji* v. *Rámá*[1] has already been questioned in previous decisions, and it must now be held to be overruled both on the point of limitation and on the nature and scope of mortgage transactions.

The case subsequently came back to the Appellate Court where the following decision was given:—

Judgment:—As the Full Bench has decided that article 147 of the 1st Schedule to the Limitation Act (XV of 1877) applies to this suit, and the District Court had held the suit to be time-barred under article 132, we reverse the Assistant Judge's decree, and remand the cause to the District Court for re-hearing of the appeal on the merits: costs to be allotted when a new decree is passed.

Decree reversed and case remanded.

(1) I. L. R., 10 Bom., 519.