

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

1885
November 19.
1886
February 6.

ALIBA (DEFENDANT), APPELLANT,

and

NANU (PLAINTIFF), RESPONDENT.*

Limitation Act, sch. II, arts. 132, 147—Hypothecation.

In 1884 N sued A to recover the principal and interest due on a registered bond executed in 1870. It was stipulated that the amount should be repaid with interest in 1871 and certain immovable property was hypothecated as security for repayment of the debt:

Held, that the suit did not fall under art. 147 of sch. II of the Indian Limitation Act, which allows sixty years to a mortgagee to sue for foreclosure or sale from the date the money becomes due, but under art. 132 of the same schedule which allows twelve years to enforce a payment of money charged on immovable property.

THIS was an appeal from the decree of H. J. Stokes, Acting District Judge of South Malabar, reversing the decree of U. Achutan Náyar, District Múnsif of Betatnád, in suit 135 of 1884.

The plaintiff Motavangattil Nanu Panikar sued the defendant Aliba to recover Rs. 130, being 56 rupees principal and 93 rupees interest due under a bond executed in 1870 by which certain land was hypothecated by way of security for the repayment of the debt, giving credit for a payment alleged to have been made by defendant in 1872.

The bond stipulated that the principal should be paid with interest at twelve per cent. in April 1871.

The Múnsif dismissed the suit as barred by limitation.

On appeal the District Judge held that the suit was governed by art. 147 of sch. II of the Indian Limitation Act and was therefore not barred.

Defendant appealed.

Sankara Menon for appellant.

Sankaran Náyar for respondent.

* Second Appeal 654 of 1885.

The Court (Muttusámi Ayyar and Parker, JJ.) delivered the following judgments:—

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MUTTUSÁMI AYYAR, J.—The respondent instituted this suit upon a deed of hypothecation dated 1870 and asked for a money decree and for a decree for the sale of the hypothecated property. The appellant pleaded, *inter alia*, limitation in bar of the claim. On appeal the Judge overruled the contention and held that art. 147, sch. II, Act XV of 1877 applied, and that sixty years was the period of limitation prescribed by that article. On this ground he decreed the whole claim, and the objection taken in second appeal is that the suit is barred by limitation.

I do not consider that this decision can be supported. It is at variance with *Davani Ammal v. Ratna Chetti*, (1) That was a suit brought to recover the interest due under a mortgage deed, such interest being charged on land. Following the decision in *Lallu Bhai v. Naran*, (2) this Court held that the suit might be brought under art. 132 within twelve years, though until then six or three years had been considered to be the prescribed period of limitation for mere money decrees according as the instrument was registered or not. The Bombay case was one in which the plaintiff asked for a money decree for the debt due upon an instrument of mortgage, and the High Court at Bombay held that art. 132 was applicable. It was argued in that case that under Act XIV of 1859 and Act IX of 1871, a suit for a money decree was a suit "for money lent" and subject to the three or six years' rule according as the bond was not or was registered; and that a suit for foreclosure or sale was held to be a suit "for the recovery of immovable property or of an interest in immovable property" and, therefore, governed by the twelve years' rule. The Court then drew attention to the words, "to enforce payment of money charged upon immovable property," substituted in art. 132, Act XV of 1877 for the words in Act IX of 1871, "for money charged upon immovable property" and observed that the change was not made without intention. The learned Judges further observed that art. 147 had introduced a special provision, not contained in the previous Acts, for a suit by a mortgagee for foreclosure or sale. They then referred to the provisions of the Transfer of Property Act and came to the conclusion that art. 132 applied to a suit by a mortgagee for a money

(1) I.L.R., 6 Mad., 417.

(2) I.L.R., 6 Bom., 719.

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decree. I may also refer to *Mahammad Zaki v. Chalku*(1) in which the same view was taken by the High Court at Allahabad. In the case before us the claim for a money decree would be barred even under the twelve years' rule, but for the acknowledgment pleaded by the respondent. The Judge must therefore be asked to determine the question whether the acknowledgment is true or not, and if it is true, to proceed to dispose of the case on the merits.

As to the claim for a decree for the sale of the hypothecated property, the Judge's view is in accordance with the opinion expressed by the High Court at Allahabad. *Shib Lal v. Ganga Prasad*.(2)

In that case it was held by the Full Bench of that Court that a suit by the obligee for a decree for the sale of hypothecated property was governed by art. 147, sch. II, Act XV of 1877. The Court then said, and it seems to me very justly, that if the transaction, which is the subject of the suit, really amounts to a mortgage, and the right to pay off the encumbrance is in law a right to redeem, there is no reason why the right of the mortgagee to bring the mortgaged property to sale, and that of the mortgagor to pay off the encumbrance, should stand on a different footing in respect of limitation. The provisions of the Transfer of Property Act which were next referred to to show that the right of the obligor to pay off the debt due under a simple mortgage and to recover back the mortgage deed, is as much a right to redeem as that of the obligor to satisfy the debt payable on a mortgage with possession and to recover the mortgaged property. Section 60 of Act IV of 1882 leaves no room for doubt on this point. Such being the case, the construction placed on arts. 147 and 148 is that the right to redeem and the right to foreclose or sell are related to one another as rights arising out of the same mortgage in favor respectively of the mortgagor and the mortgagee, that the suits mentioned in arts. 147 and 148 are the remedies provided for the enforcement of those rights, and that they are both governed by the sixty years' rule. This view appears to me to be reasonable. There then remained for decision the further question what suits are then to be treated as suits brought under art. 132 "to enforce payment of money charged upon immovable property." It has already been stated that a suit for a money decree upon a mortgage

(1) I.L.R., 7 All., 120.

(2) I.L.R., 6 All., 551.

deed would fall within those words. As pointed out by the Allahabad High Court, a suit for the enforcement of a charge on immovable property as defined by s. 100 of Act IV of 1882, might also fall under that section. It is of importance that that Act and the Limitation Act should be read together, and that the mode in which mortgages are classified, the remedies enacted as available for each description of mortgage, and the distinction made between a mortgage and a charge should be steadily kept in view. Section 58 defines a mortgage to be the transfer of an interest in immovable property for the purpose of securing the payment of money lent. Clause B defines a simple mortgage to be one in which there is no delivery of possession of the mortgaged property, but in which the mortgagor binds himself to pay the debt personally and agrees expressly or impliedly that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of the sale to be applied, so far as may be necessary, in payment of the mortgage money. In s. 100, a charge is defined to arise where immovable property of one person is by the act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage. The distinction then between a simple mortgage and a charge consists in this, viz., where a power of sale is conferred upon the mortgagee expressly or impliedly by the instrument of mortgage, the transaction is a mortgage; otherwise it only creates a charge. Clause C, s. 58 defines a mortgage by way of conditional sale. Clause D defines a usufructuary mortgage as generally understood in this country. Clause E defines an English mortgage. Section 60 creates a right in the mortgagor to require the mortgagee, on payment or tender of the debt, to deliver up the mortgage deed, if any, and where the mortgage is with possession, to deliver the mortgaged property. It then enacts that this right shall be called the right to redeem, and that a suit to enforce it shall be called a suit for redemption. Section 67 creates a right in the mortgagee to obtain an order from the Court for foreclosure or sale in the absence of a contract to the contrary, but adds that nothing in this section shall be deemed to authorize a simple mortgagee as such to institute a suit for foreclosure or an usufructuary mortgagee as such to institute a suit for foreclosure or sale or a mortgagee by conditional sale as such to institute a suit for sale. It is provided

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by s. 100 that all the provisions as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having a charge. Section 69 specifies the cases in which alone a power to sell without the intervention of the Court may validly be conferred upon the mortgagee by the instrument of mortgage.

Having regard to these provisions the substantial question is whether the hypothecation, which is the subject of the present suit, is a simple mortgage within the meaning of Act IV of 1882, and whether that Act has application to mortgages which were executed prior to the 1st July 1882 when it came into force. The mode in which this Act affects the Act of Limitation is by creating new rights and liabilities in the mortgagor and in the mortgagee, and I do not think that such rights and liabilities can have retrospective operation.

Prior to Act IV of 1882, the obligor had only the rights of an ordinary debtor under a hypothecation deed. On the one hand he had no right of redemption, whilst on the other the obligee had no power of sale as inherent in the contract. If the Courts ordered a sale, they did so as it was the only mode in which a charge could be enforced. There is no doubt that Act IV of 1882 affects the Act of Limitation as to mortgages executed subsequently to July 1882, but as already remarked, it does so by creating new rights and liabilities in the obligor and obligee with reference to those mortgages.

In this view it seems to me that Act IV of 1882 could have no retrospective operation, and I hold therefore that the claim for the sale of the hypothecated property was one to enforce a charge, that it falls under art. 132, and that the hypothecation on which it is based does not possess the properties with which mortgages executed subsequent to 4th July 1882 are invested by Act IV of 1882.

I am also of opinion that the decree of the Lower Appellate Court must be set aside and the appeal remanded for decision upon the question whether the acknowledgment, referred to in paragraph 7 of the District Munsif's judgment is true, and, if it is found to be true, upon the merits. The costs will abide and follow the result.

PARKER, J.—This is a suit by a simple mortgagee to enforce payment of a debt by the sale of the property hypothecated. The deed was executed in May 1870, the debt being payable in April 1871. The suit was brought on 22nd March 1884, and if art. 132

sch. II of the Limitation Act applies, it would be barred unless an acknowledgment alleged to have been made by defendant's father on 24th March 1872 is genuine. The District Munsif found that the acknowledgment was not genuine; and held that the suit was barred under art. 132.

On appeal the District Judge has held on the strength of *Shib Lal v. Ganga Prasad*, (1) that the suit is governed by art. 147 and not art. 132, and that the time of limitation is sixty years.

If this decision be held correct, the introduction of art. 147 into the present Limitation Act made a change in the law of very serious importance. *From 1793 to 1877 twelve years was the period of limitation for suits of this character, and it would be indeed strange if we should find, while the English Real Property Act of 1874 reduced the period from twenty to twelve years within the United Kingdom, that the Indian legislature extended it from twelve to sixty years in 1877 for British India. We do not find however that the other High Courts in India have adopted the same construction as Allahabad. The doubt caused by the introduction of art. 147 was discussed by the Bombay High Court in *Lallu Bhai v. Naran*, (2) and the learned Judges came to the conclusion, in a case similar to the present, that money lent on mortgage was, in ordinary legal phraseology, money charged on immovable property, and that art. 132 would govern the suit.

This decision was assented to, with the same hesitation, by this Court in *Davani Ammal v. Ratna Chetti*. (3)

Mahammad Zaki v. Chatku (4) was referred to as being somewhat at variance with the Full Bench decision in *Shib Lal v. Ganga Prasad*, (1) but on reading the former case it would appear that the Court held that the unsatisfied balance was a debt charged upon immovable property in contradistinction to a mortgage and hence that art. 132 applied.

Although the words "by a mortgagee for foreclosure or sale" would under the definition of "mortgagee" given in the Transfer of Property Act, 1882, s. 58, include an hypothecatee, it must be remembered that there was no such definition of the term "mortgagee" in 1877 when the present Limitation Act was passed. For some eighty years previous to 1877 an hypothecatee (or simple mortgagee as now defined) had always been regarded as

(1) I.L.R., 6 All., 551.

(2) I.L.R., 6 Bom., 719.

(3) I.L.R., 6 Mad., 417.

(4) I.L.R., 7 All., 120.

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one who had a *charge* upon immovable property, and the "mortgagee" who according to the old law could be sued within sixty years of the mortgage was the party in possession. An extended technical definition given to the term "mortgagee" by legislation subsequent to 1877 will not also extend the period during which one who was not technically a mortgagee at the time of the passing of that Act can sue to enforce a claim.

No sufficient ground has, to my mind, been shown to impugn the decision of the Division Bench of this Court in *Davani Ammal v. Ratna Chetti*,⁽¹⁾ and I am fortified in this conclusion by the fact that the Bombay High Court has arrived at a similar opinion.

With all deference, therefore, to the ruling of the learned Judges of the Allahabad High Court, I would reverse the decree of the Lower Appellate Court and remand the appeal for a decision upon the other points which arise. The costs to abide and follow the result.

APPELLATE CRIMINAL.

Before Mr. Justice Brandt and Mr. Justice Parker.

QUEEN-EMPRESS

against

VIRAN AND OTHERS.*

1886.
Feb. 12, 17.

Criminal Procedure Code, ss. 164, 364, 533—Evidence Act, ss. 65, 80—Confessions—Improper examination of accused person by Magistrate—Record rejected.

The Deputy Magistrate of Malabar, purporting to act under the provisions of the Mapilla Act (Madras Act XX of 1859), recorded a statement in the nature of a confession made by V, who was under arrest on suspicion of being concerned in a Mapilla outrage. This statement, which was made in Malayalam, was recorded in English in the form of a narrative and was signed by the Magistrate only.

The same Magistrate shortly afterwards, purporting to act under the Code of Criminal Procedure, before any evidence was recorded against V, examined him as to this statement which was read over and translated to him. In answer to questions, V admitted that he had made it voluntarily.

This examination was recorded according to the provisions of s. 364 of the Code of Criminal Procedure. After other evidence was recorded, V retracted his statement. He was committed to the Sessions, tried and convicted mainly on his own recorded statement and examination.

(1) I.L.R., 6 Mad. 417.

Referred Trial 61 of 1865.