105. Before a decree is finally made, the Subordinate Judge will be asked to return a finding upon the 9th issue and upon the issue whether any and what properties, not being endowments of the Mutts at Tiruppanandal and Benares and of the charities or their accretions managed by the tambirans at those stations, have been held by the Tambirans of Tiruppanandal on their own account; costs will be provided for in the final decree. The finding called for will be returned within three months from the receipt of this order, when ten days will be allowed for filing objections.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

RANGASÁMI (DEFENDANT), APPELLANT,

and

MUTTUKUMARAPPA (PLAINTIFF), RESPONDENT.*

1886. July 21. 1887. January 18. July 18.

Limitation Act (Act XV of 1877), sch. II, arts. 132, 147—Transfer of Property Act—Act IV of 1882, ss. 58, 100—Hypothecation bond.

The period of limitation for suits upon hypothecation bonds, which contain no power of sale, or effect no transfer of property, executed before the Transfer of Property Act came into operation, is twelve years under sch. II, art. 132, of the Limitation Act of 1877—*Alíba* v. *Nanu* (I.L.R., 9 Mad., 218) followed.

Per MUTTUSÁMI AYYAR, J.—"The transaction in suit appears to be of the kind described in s. 100 of the Transfer of Property Act, which defines how a charge is created;" but "it seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages."

SECOND appeal from the decree of J. Hope, District Judge of South Arcot, in appeal suit, No. 73 of 1884, reversing the decree of C. Sury Ayyar, District Múnsif of Cuddalore, in original suit No. 734 of 1883.

This was a suit to recover principal and interest due on a hypothecation bond, dated 1st June 1862, of which the terms are set out *infra* in the judgment of Kernan, J.

---

* Second Appeal, No. 918 of 1884.

RANGASÁMI v. MUTTU-KUMARAPPA.

The defendant pleaded that the suit was barred by limitation under art. 132, sch. II, of the Limitation Act of 1877.

The District Múnsif held that that article governed the case and accordingly dismissed the suit. His decree was, however, reversed by the District Judge on the ground that art. 147 and not art. 132 was applicable.

The defendant preferred this second appeal.

This second appeal came on for hearing before Collins, C.J., and Muttusámi Ayyar, J., who referred to the Full Bench the question whether twelve or sixty years is the period of limitation for suits brought on hypothecation bonds executed before the Transfer of Property Act, 1882, came into force.

Rámachandra Ráu Saheb for appellant.

Mr. *Subramanyam* for respondent.

The arguments adduced on this second appeal appear sufficiently for the purposes of this report from the judgments of the Court.

The Full Bench (Collins, C.J., Kernan, Muttusámi Ayyar, Brandt, and Parker, JJ.) delivered the following judgments:—

KERNAN, J.—The question for determination appears to me to be whether the document sued on, dated the 1st of June 1862, is to be held a mortgage within art. 147, sch. II, of the Limitation Act of 1877, or a charge on land under art. 132. If it is held to be merely a charge, then the suit is barred by limitation. If it is held to be a mortgage, then the suit is not barred.

The following is a copy of the instrument:—

"Deed of hypothecation of brick-built house, house-ground, and backyard executed on 20th Vayyasi of the year Dhatu, corresponding to 1st June 1862, to Mulligramampattu Vydialinga Reddi, residing in Tiruppapur in Cuddalore district, by us both, viz., (i) Kanakammal and (ii) Ranganayaki Ammal, widows of the deceased Virasami Naiker, residing in the said village.

"Having pledged to you this day, owing to our necessity, the brick-built house belonging to our deceased husband, Virasami Naiker, in the said village and bounded as follows: north of the northern car street, east of Alappakkattan's house, south of Puduteru, and west of the goldsmith Virabadran's house, the amount (we have borrowed) is Rs. 99¾, made up of Rs. 60, the principal of the hypothecation bond executed by our husband, Virasami Naiker, on 21st Vayyasi of Siddardhi (2nd June 1859) for Rs. 60,

and interest thereon up to date, viz., Rs. 21½ as per settlement made touching the said document, and Rs. 18¼ received by us in cash this day for our food expenses. We bind ourselves to pay you the said ninety-nine and three-quarters of rupees, together with interest accruing thereon at 1 per cent. per mensem, within seven years from this date and take back the hypothecation bond.

"Thus we have executed the deed of hypothecation of house of our own accord.

\+ Mark of KANAKAMMAL.
\+ ,, RANGANAYAKI AMMAL.

Witnesses.

(Signed) K. RAGHAVULU NAIKER—I know.
(,,) KANDAMPALAYEM MUDDUKRISHNA PILLAI of the said place—I know.
(,,) V. NARAYANA PILLAI, writer hereof."

Possession of the land was retained by the borrower and never delivered to the lender. The terms of the instrument appear to me to do no more than create a charge or security for the debt on the land. In order to have effect given to the contract for a charge, the lender was entitled to file his suit praying to have the lands declared well charged with the debt and interest and to have the interest of the borrower in the land sold and the debt paid out of the produce of the sale. The right of sale in such cases, and in cases where land was expressly pledged or hypothecated, has been admitted always without question in this Presidency long before any legislation in respect to limitation was introduced. Such right is constantly enforced, and also the corresponding right of the borrower to enforce redemption by suit. After the Limitation Act XIV of 1859 came into force, it was held that such security or hypothecation bonds created an interest in immovable property under s. 12 of that Act, to which the period of twelve years was applicable—*Chetti Gaundan* v. *Sundaram Pillai*(1).

In that case it was however decided that the contract was not one of mortgage, but that it was one of hypothecation, the thing pledged, land, remaining with the pledgor subject to the creditor's claim. The court pointed out that, in the case of a mortgage, the mortgagee of land had the absolute property in the land on the debtor failing to perform the condition of payment of the money secured by the mortgage, subject however to redemption.

(1) 2 M.H.C.R., 51.

RANGASÁMI v. MUTTU-KUMARAPPA.

In that case the instrument ran as follows, viz., "mortgage deed executed to Chetti Gaundan by us," giving the names, and states that the lands described there are thereby mortgaged. It then stated the amount to be paid and the time of payment and provided that if payment was not so made, the land should be sold to Chetti Gaundan for that amount. The form of the instrument in that case is a good representation of the ordinary hypothecation instrument when possession is not given to the pledgee. Such instruments have never been treated by any of the courts in this Presidency as mortgages, and the case in *Chetti Gaundan* v. *Sundaram Pillai*(1) has been always acknowledged as explaining an essential difference between a mere pledge or hypothecation of land and a mortgage of land.

The term mortgage not being defined in the Limitation Acts must be held to have been used in those Acts as bearing the meaning ordinarily attached to it by the course and practice of law. In Coke on Littleton, s. 332, it is stated: "If a feoffment (conveyance) be made on condition that if the feoffor pay to the feoffee at a certain day, of say £40 money, that then the feoffor may re-enter (on the lands): in this case the feoffor is called tenant in mortgage, which is as much to say in French as *mortgagor* and in Latin *mortuum vadium*." In the note to s. 332, after referring to the origin of the term mortgage, it is said: "now it is so called mortgage, for the reason given by Littleton, and also to distinguish it from that which is called *vivum vadium*, '*quia nunquam moritur*.' As if a man borrow £100 of another and make an estate of lands unto him until he hath received the said sum of the issues and profits of the land—so as in that case, neither money nor land dieth or is lost and therefore it is called *vivum vadium*."

In Coke on Littleton, s. 333, it is stated: "as a man may make a feoffment in mortgage, so a man may make a gift in tayle in mortgage, and a lease for term of life, and for term of years in mortgage"—see Coote on Mortgages, 4th edition, pp. 1 to 10, which refers to Bacon's Abridgment and many other authors on the subject of mortgage; Blackstone, vol. 2, pp. 157-8; and various books of Precedents in conveyancing.

In Watkins' Conveyancing by Mansfield, chap. 19, on Equity of Redemption, it is said mortgages are of two kinds—first, when a man borrows money of another and *grants him an estate* to hold

(1) 2 M.H.C.R., 51.

until the rents and profits shall repay the sum borrowed, this is usually called a Welsh mortgage; but the most usual and common form of the mortgage is, secondly, when a man borrows of another a specific sum and *grants him an estate for the whole or part of his interest* as in fee or for term of years on condition that if the mortgagor shall repay the mortgage money on a certain day named in the deed, then the mortgagor may re-enter on the estate, or, as is now more usual, that the mortgagor shall re-convey the estate.

It is, therefore, quite clear that an essential of a mortgage (except an equitable mortgage) always has been that some interest of the mortgagor in the lands shall be transferred by the mortgage to the mortgagee.

In this case no interest in the land was transferred. When the amount secured by a mortgage is not paid on the day named in the mortgage, the estate of the mortgagee became absolute at law, subject, of course, to be redeemed in equity by the mortgagor. But it is open to the mortgagee to file a suit in equity against the mortgagor, either for foreclosure or sale. The decree for foreclosure directed an account to be taken of what was due on the mortgage, and, on payment of that sum and costs within a time fixed, that the plaintiff should re-convey the estate, but in default of such payment the mortgagor should stand barred and foreclosed from all right, title, interest, and equity of redemption in the mortgaged premises—see 1 Seton on Decrees, p. 364. This right of foreclosure was attached to a mortgage as above described alone, and not to a security on the land which was a mere charge thereon not secured by transfer of any interest in the land.

Article 147 of sch. II of the Limitation Act, 1877, refers to a mortgage and to suits for foreclosure, and in my judgment does not include a charge such as that created by the instrument sued on in this case which creates merely a charge on the land. Other cases are, I believe, awaiting the decision of this case, the facts of which show that there was a mere pledge of the lands without possession and without any transfer of any interest of the mortgagor. To such cases in my judgment art. 147 does not apply. Article 132 applies to this case and to all cases of mere hypothecation of the land without possession and without any transfer of any interest of the mortgagor therein.

RANGASÁMI v. MUTTU-KUMARAPPA.

The Transfer of Property Act, 1882, does not apply to the instrument sued on in this case, and I have not, therefore, referred to that Act. I may, however, say that the definition of mortgage given by s. 58 is in accord with the meaning of the term mortgage, as expressed on the authorities I have above referred to. The term mortgage has not, as I am informed by one of the Court interpreters, any corresponding vernacular term denoting a *transfer* of land as security. The vernacular word used, as I am informed, means literally only "security bond or pledge of land." Transfers of land are of course made by natives as security, but they are mortgages.

I am unable to agree with the decision of the Allahabad High Court in *Shib Lal* v. *Ganga Prasad*(1). I cannot see that the instrument sued on was a transfer of any interest of the pledgor in property to the pledgee as security. It was not, therefore, a mortgage.

I agree with the conclusion arrived at by the Bombay High Court in *Lallubhái* v. *Náran*(2).

MUTTUSÁMI AYYAR, J.—The suit, which is the subject of this second appeal, was brought by the respondent upon a "hypothecation bond" executed on the 1st June 1862 for Rs. 99-12-0. The document is termed a hypothecation bond; it stipulates for repayment of the debt in seven years and secures the debt on the property hypothecated. The appellant pleaded *inter alia* limitation in bar of the claim. The District Múnsif upheld the contention on the ground that art. 132 and not art. 147 was applicable to the case. On appeal, the District Judge considered the art. 147 and not art. 132 was the one that applied. He observed "the suits contemplated by that article, viz., suits for foreclosure or sale are not such as can be brought by a mortgagee in possession, but only by simple and conditional mortgagees. This is the law as announced by the Transfer of Property Act, s. 67, and although this enactment is subsequent to the Limitation Act XV of 1877, I consider that it must be held to explain anything that is doubtful in the latter as to the matter at issue." The question referred to the Full Bench is whether twelve or sixty years is the period of limitation for suits brought upon hypothe-

(1) I.L.R., 6 All., 551. (2) I.L.R., 6 Bom., 719.

cation bonds executed before the Transfer of Property Act came into force.

Article 132 prescribes twelve years from the date when the money sued for becomes due for a suit to enforce payment of money charged upon immovable property. Article 147 prescribes sixty years for a suit by a mortgagee for foreclosure or sale. Article 148 prescribes sixty years for a suit against a mortgagee to redeem or recover possession of immovable property mortgaged. The substantial question then for consideration is whether the hypothecation bond in suit operated to create only a charge on immovable property or a simple mortgage within the meaning of the Transfer of Property Act, s. 58, cl. 6.

The transaction is, I think, clearly not a simple mortgage as defined in s. 58 of that Act. There is neither the transfer of property mentioned in that section, nor a special agreement whereby the creditor acquires a power to sell the hypothecated property on default of payment according to the contract. On the other hand the transaction in suit appears to be of the kind described in s. 100, which defines how a charge is created. It was argued that the courts used to sell the hypothecated property at the instance of the creditor, and that a power to sell on default might be taken to be inherent in every contract of hypothecation made prior to 1882; but it must be remembered that the power contemplated by Transfer of Property Act, s. 58, cl. 6, is a power to sell otherwise than through the intervention of a court of justice, and that if the court directs a sale in the case of a hypothecation bond, it is for the reason that it is the only mode in which the amount charged on immovable property can be realized.

It is true that, under the Transfer of Property Act, simple mortgages operate to create for the mortgagor a right to redeem, and for the mortgagee a right to ask for an order for sale, and that a suit by the one to redeem and a suit by the other to sell are governed by arts. 148 and 147 respectively; but the Act has no retrospective operation and prior transactions must be interpreted according to the intention of the parties at the time they were concluded. It is also true that we must look to the law in force at the date of the suit for the remedy that is available, but it is necessary that the right in respect of which the remedy is prescribed must exist as an incident of the particular transaction

RANGASÁMI v. MUTTU-KUMARAPPA.

which it is sought to enforce. It seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages.

As observed in Macpherson on Mortgages, the earlier regulations in this Presidency did not profess to introduce new principles of law, and may, therefore, be presumed to be an embodiment of the law which was found to prevail in this country when they were passed. It is stated in Strange's Hindu Law, vol. I, p. 288, that hypothecation was a transaction long known in this country under the name of Drishtabandaka. According to the decisions in *Kadarsa Rautan* v. *Raviah Bibi*(1), *Golla Chinna Guruvuppa Naidu* v. *Kali Appiah Naidu*(2), *Sadagopa Chariyar* v. *Ruthna Mudali*(3), the transaction was held to create a lien or charge on the property hypothecated, and the remedy was considered to be a decree for the sale unless the debt was satisfied within a given time. The question was considered by Mr. Justice Parker and myself in *Aliba* v. *Nanu*(4), and I still adhere to the opinion which was then expressed, viz., that it is art. 132 that governs suits like the one before us.

THE CHIEF JUSTICE.—I concur.

BRANDT, J.—The instrument, which we have to consider is styled an "adaimana pattiram," a pledge-bond or security bond; it bears date the 1st June 1862 and recites the advance of a sum of money in the year 1860 to the deceased husband of the executant, and the pledge of certain immovable property as security for that loan, and declares that, in consideration of the amount then due on settlement of accounts on the footing of that debt and of a further advance, the executant covenants to pay the principal and interest at a rate stated within seven years, and concludes with a clause to the effect that on payment of the principal sum and interest the debtor shall receive back the instrument.

The question to be determined is whether this instrument creates a charge only on the land pledged as distinguished from a mortgage in the sense in which those words are used in the Limitation Act of 1877, in which case the suit as a suit to enforce

(1) 2 Mad. H.C.R., 103.
(2) 4 Mad. H.C.R., 434.
(3) 5 Mad. H.C.R., 457.
(4) I.L.R., 9 Mad., 218.

payment of money charged on immovable property is barred under art. 132, sch. II, of the Act; or is it a suit by a mortgagee for sale to which art. 147 applies?

The personal covenant to pay may be left out of consideration, the only relief sought being the realization of the money claimed by sale of the land.

It has been held by a Divisional Bench of this court in *Aliba* v. *Nanu*(1) that a suit of this nature does not fall under art. 147 but under art. 132. It is in consequence of one of the learned Judges who decided that case having seen reason to doubt the conclusion arrived at that this reference is made.

The question appears to me also to be not free from doubt, and I was inclined to take the opposite view; having, however, had the advantage of seeing the judgments written by my learned colleagues Kernan and Mattusámi Ayyar, JJ., and having further discussed the matter with them, I am content to accept the conclusion arrived at by them on the grounds on which their decision is based.

I adhere to my opinion that, for the purpose of determining whether instruments of the character under consideration constitute charges only, as distinguished from mortgages within the meaning of the Limitation Act, regard cannot properly be had to the definitions of a charge and a mortgage in the Transfer of Property Act, which was passed five years later than the Limitation Act; nor to the fact that art. 147 in the latter Act may possibly have been inserted in view to the intended enactment of the Transfer of Property Act; and that the law of limitation previously in force in respect of mortgages, and changes in that law in English Acts do not afford a basis for determination of the question; but these are not the grounds on which the conclusions arrived at, and which I am prepared to accept, are based.

Obligations of the character now under consideration were entered into, and recognized and enforced by the courts in this Presidency for a long series of years prior to 1877, and in the absence of any express provision in the Limitation Act of 1859 for suits to enforce a sale—the relief which was afforded to the creditor by the courts *Chetti Gaundan* v. *Sundaram Pillay*(2)—they were dealt with under the general twelve years' rule, the distinction between a transaction by way of mortgage and an

(1) I.L.R., 9 Mad., 218. (2) 2 M.H.C.R., 51.

RANGASÁMI v. MUTTU-KUMARAPPA.

hypothecation being clearly distinguished on the principle enunciated by Holloway, J., in the case last above cited; and although the courts in a suit for that purpose would make a decree for the sale of the pledgor's interest in the land and for payment of the debt out of the proceeds, this was done irrespective of any condition for sale contained or implied in the contract, and an implied contract for such sale cannot, as I am now satisfied to hold, be inferred from the fact that such contracts may have been entered into by the parties with a knowledge of or even with reference to the usual practice of the courts in the case of suits brought for the recovery of money under such contracts, and there is not any such transfer of property or of an interest in property as to constitute the transaction a mortgage as distinguished from a charge in the nature of a pledge or hypothecation not being a mortgage.

PARKER, J.— I have nothing to add to the opinion I have already expressed in *Aliba* v. *Nanu*(1). I am of opinion that the instrument creates a charge and that art. 132 is applicable.

The second appeal was accordingly allowed and the decree of the District Múnsif restored.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1887. March 11. April 18.

THANGAMMÁL (PLAINTIFF), PETITIONER,

and

THYYAMUTHU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 622—Small Cause suit to recover money paid by the plaintiff in discharge of a decree-debt against him and the defendants—Jurisdiction of Court to go into facts of former suit.

A sued four persons, against whom, together with A, a money decree had been passed in a previous suit, to recover a proportionate part of a sum paid by A in discharge of the decree-debt. Two of the defendants pleaded that they had not appeared in the former suit, and have been unnecessarily brought on to the record by A:

Held, that the Court had jurisdiction to inquire into the circumstances of the previous suit. *Suput Singh* v. *Imrit Tewari*, I.L.R., 5 Cal., 720, followed.

PETITION under s. 622 of the Code of Civil Procedure praying the High Court to revise the decree of T. Kanagasabai Mudaliar,

(1) I.L.R., 9 Mad., 218.

* Civil Revision Petition No. 107 of 1886.