

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Handley.*

GOMAJI (PLAINTIFF), APPELLANT,

*v.*

SUBBARAYAPPA AND ANOTHER (DEFENDANTS), RESPONDENTS.\*

*Transfer of Property Act—Act IV of 1882, s. 58—Unregistered mortgage—  
Personal covenant to pay.*

An unregistered mortgage-deed executed in 1885 contained a personal covenant by the mortgagors to pay the debt secured thereby :

*Held*, the mortgagee was entitled to sue on the covenant and obtain a personal decree against the mortgagors.

SECOND APPEAL against the decree of W. C. Holmes, Acting District Judge of Bellary, in appeal suit No. 42 of 1890, reversing the decree of W. Gopalachariar, District Munsif of Bellary, in original suit No. 115 of 1888.

Suit to recover principal and interest due on the following instrument executed by defendants Nos. 1 and 2 in favor of the plaintiff and not registered :—

“Mortgage-deed executed jointly by Subbarayappa, son of Bysani Narayanappa, and Seenappa, son of Polepally Dasappa, Komaties, living by trade, and residing in Brucepettah, Bellary, to Gomaji Garu, son of Marwadi Fitajee, living by trade, and residing in Brucepettah, Bellary, on the 3rd of Aswija Bahula of the year Parthiva, corresponding to 26th October 1885, is as follows :—

“After deducting the cash paid on settling to-day the account of principal and also interest relating to the pro-note written and executed in your name, by both of us together, on the 13th Chaitra Sudham of the year Tharana, we having become indebted in a remainder of Rs. 600, in words six hundred only, have executed this deed in your name. Therefore, the description of the immoveable property—

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“Having mortgaged as security for your amount three immoveable properties in all, we have made over to you the

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“ sale and mortgage-deed connected therewith. Having settled  
“ interest for the said amount at Rs. 1½ per cent. per mensem,  
“ of us he that is present will pay the principal and also interest  
“—your principal and interest—on your demand. When you so  
“ demand, if there should be any obstruction on your part, with-  
“ out paying the principal and interest, you are at liberty to sell  
“ according to your pleasure the mortgaged properties and to  
“ receive the proceeds, and to recover the remaining debt-amount  
“ from our other real and personal properties and from us. Till  
“ your amount is liquidated, we will have no right to make a gift  
“ of, or to sell or to mortgage, &c., the mortgaged properties. If  
“ payment of any kind whatever not mentioned in this deed  
“ should be pleaded as having been made, a Court of Justice  
“ should not accept our word.”

The District Munsif passed a personal decree for the money claimed, holding that such a decree was not precluded by the want of registration, on a consideration of *Striveshathri Ayyengar v. Sankara Ayan*(1), *Venkatroyudu v. Papi*(2), *Mattongeney Dossee v. Ramnarain Sadkhan*(3), and *Ulfatummissa Elahijan Bibi v. Hosain Khan*(4).

The District Judge, on appeal, reversed this decree.

The plaintiff preferred this second appeal.

*Rama Rau* for appellant.

*Parthasaradhi Ayyangar* and *Rangaachariar* for respondent.

JUDGMENT.—In our opinion, the judgment of the District Judge is clearly wrong. By the terms of the instrument sued on, the defendants covenanted to pay the money, and, at the same time, the plaintiff was empowered to sell the property and realize the amount. Had the document been registered, it would have been competent to the plaintiff either to proceed on the covenant or to sue for sale of the mortgaged property. The decision in *Mattongeney Dossee v. Ramnarain Sadkhan*(3) is distinguishable.

We must reverse the decree of the District Judge and remand the appeal for disposal on the merits. The respondents must pay the costs of this appeal. Other costs to be provided for in the revised decree.

(1) 7 M.H.C.R., 296.

(3) I.L.R., 4 Cal., 83.

(2) I.L.R., 8 Mad., 182.

(4) I.L.R., 9 Cal., 520.