

ABDUL KADER whether this matter was in controversy between them or not.
 v.
 AISHAMMA. The suit was decided *ex parte* as far as plaintiff was concerned.

It is not necessary, however, to make any enquiry upon this point. No evidence was adduced by the fifth defendant in the suit, and as formal evidence was offered on plaintiff's behalf, it would be of no use to ask for a finding upon the second issue in the absence of evidence.

The second appeal, therefore, fails and we dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1899.
 July 19, 20.

AMMANNA AND OTHERS (DEFENDANTS), APPELLANTS,

v.

GURUMURTHI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, arts. 144, 147—Suit for foreclosure or sale—Transfer of Property Act—Act IV of 1882, ss. 58 (e), 67, 87—Mortgage by conditional sale—Decree for foreclosure and possession—Succession Certificate Act—Act VII of 1889.

On 28th March 1871, the defendant's father borrowed a sum of money from the plaintiff's father and placed him in possession of certain land under an instrument of mortgage, which provided for the application of the usufruct in liquidation of the interest and then in reduction of the principal; the instrument also contained a covenant for the repayment, in four years, of the balance that might then be due by the mortgagor and a stipulation that, on default, the mortgagor was to surrender the property to the mortgagee as if it had been sold to him.

In 1874, the mortgagor resumed possession without discharging the mortgage debt. The mortgagee having died, his sons, on 14th April 1888, filed the present suit on the mortgage and prayed for a decree for foreclosure or sale. During the pendency of the suit the Succession Certificate Act of 1889 came into operation, but the plaintiffs obtained no certificate under it:

Held, (1) that the suit was not barred by limitation, and the plaintiffs were entitled to a decree for foreclosure with a direction that possession be delivered to them;

(2) that the plaintiffs were not precluded from obtaining a decree by reason of their not having obtained a certificate under the above-mentioned Act.

SECOND APPEAL against the decree of S. Manavalayya, Subordinate Judge of Coacanada, in appeal suit No. 118 of 1889, reversing

* Second Appeal No. 920 of 1891.

the decree of K. Murtirazu, District Munsif of Peddapore, in Original Suit No. 158 of 1888.

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The facts of the case are stated above sufficiently for the purposes of this report.

The District Munsif dismissed the suit holding that nothing was due under the mortgage.

The Subordinate Judge, on appeal, held that Rs. 750 was due, and reversed the decree, observing, as to the plea of limitation raised by the defendants:—"The bond sued on is admittedly one of mortgage by conditional sale. As such it entitles plaintiffs to sue for foreclosure at any time within sixty years from the date of the mortgage. Plaintiffs sue for foreclosure. The bond is dated 28th March 1871. The suit was brought on 14th April 1888. Plaintiffs were within time."

The defendants preferred this second appeal.

Ramachandra Rau Saheb for appellants.

Venkataramayya Chetti for respondents.

JUDGMENT.—On the 28th March 1871, appellants' father executed a mortgage in favour of respondents' father. The instrument of mortgage, exhibit A, purported to place the mortgaged property in the mortgagee's possession, and provided for the usufruct being applied first in liquidation of the stipulated interest and then in reduction of the principal debt. It contained also a covenant to repay the balance within four years and then proceeded to state that in default of payment on the due date, the mortgagor was to give up the mortgaged property to the mortgagee, as if it was sold to him. The plaint stated that though the mortgagor placed the mortgagee in possession, yet the former unlawfully resumed possession in 1874 without repaying the mortgage debt, and prayed for a decree either for sale or foreclosure. It was contended on appellants' behalf that the mortgage debt was discharged, and that the suit was barred by limitation. On appeal, the Subordinate Judge at Cocanada found that the debt was not paid off, and passed a decree for foreclosure, observing that the suit was not barred by limitation. Hence this appeal.

It is first urged that the suit is governed by article 144 of the second schedule of the Act of Limitations. The transaction evidenced by document A is a mortgage by way of conditional sale as defined in section 58, clause (c) of Act IV of 1882, and the plaint prays also for a decree for foreclosure. The suit is there-

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fore governed by article 147, and not barred by limitation. It is true that the plaintiff alleges that the mortgagee was dispossessed in 1874, while the suit was instituted in 1888. But it must be remembered that the suit was brought to recover possession, not on the footing of the usufructuary mortgage, but by reason of the foreclosure decree which is claimed under section 67 of Act IV of 1882. It is not necessary that the plaintiff should be in possession of the mortgaged property when he claims a decree for foreclosure. Though a mortgage by conditional sale is generally accompanied by transfer of possession, yet it is not always the case. It is also clear from section 87 that a decree for foreclosure may contain a direction for delivery of possession when necessary. The contention, therefore, that respondents lost their right to claim foreclosure by not recovering back possession on the footing of the usufructuary mortgage within 12 years from the date of dispossession cannot be supported.

It is next contended that the respondents are not entitled to obtain a decree without producing a certificate as required by Act VII of 1889. We are unable to accede to this contention either, as the suit was instituted before Act VII of 1889 came into force. The general rule, as stated in *Wright v. Hale*(1) and in *Kimbray v. Draper*(2) is that when an enactment takes away a vested right, it does not apply to existing rights, but when it deals with procedure or regulates practice only it applies to all actions pending as well as future. In C. M. P. 416 of 1889, it was held that the Act did not apply to an application to execute a decree which was pending at the date of the passing of the Act(3). In the case before us the plaintiffs had a vested right to a decision in the suit already instituted by them in accordance with the law as it existed when the suit was instituted, and that right would certainly be curtailed if the Act subsequently passed were applied to it. We may also observe that the decree appealed against is for foreclosure of the mortgage and *not* one for the payment of a debt. The suit would be barred if it were regarded as one to recover the debt, and the direction to pay in six months contained in the decree is given not to fix a personal liability for the debt, but to enable the defendants to save their right of

(1) 6 H. & N., 227.

(2) L.R., 3 Q.B., 160.

(3) See *Rama Rau v. Chellayamma*, I.L.R., 14 Mad., 458 [Reporter's note].

redemption and to prevent its extinction by foreclosure. This second appeal cannot be supported and we dismiss it with costs.

AMMANNA
*
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APPELLATE CIVIL.

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

SAMINATHA (DEFENDANT), APPELLANT,

v.

PURUSHOTTAMA (PLAINTIFF), RESPONDENT.*

1892.
March 21.
April 6.

Religious institution—Debt contracted by one claiming to be in possession as head of the institution—“de facto” manager, power of—Cost of defending ejection suit.

Suit on a bond in which the obligor was described as the head of a mutt and the debt thereby secured was stated to have been incurred “for the reasonable expenses of the suit which was being proceeded with, and for the good of the mutt and for the said mutt’s own expenses.” The debt had been contracted by one who was in possession of the mutt under a claim that he was the duly-constituted head of the institution, for the purposes of defending a suit brought by the head of another religious institution to eject him and to establish certain rights over the mutt. A decree for ejection was obtained, but some of the pretensions of the plaintiff were successfully resisted. The present defendant was a receiver of the properties of the mutt appointed by the Court in the course of that litigation:

Held, that the bond was not enforceable against the property of the mutt.

APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in original suit No. 44 of 1889.

Suit to recover principal and interest due on a bond, dated 7th December 1886, and executed by Kandasami Tambiran in favour of the plaintiff’s uncle whom he had since succeeded as managing member of his family. When the loan secured by this bond was contracted, one Kumarasami Tambiran was in possession of the Tirupanandal mutt, of which he claimed to be the head. The money was borrowed by him for the purposes of a suit then pending, in which the Pandara Sannadhi of the Dharmapuram Adhinam, sought to eject him on the ground that he was not the rightful head of the mutt. The High Court on appeal passed a decree for ejection as prayed, but certain rights which the plaintiff claimed to possess in respect of the mutt were negatived. The

* Appeal No. 108 of 1891.