

APPELLATE CIVIL.

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

UDAYANA PILLAI (PLAINTIFF), APPELLANT,

v.

SENTHIVELU PILLAI AND ANOTHER (DEFENDANTS Nos. 1
AND 2), RESPONDENTS.*

1896.
July 17, 30.

Usufructuary mortgage—Personal covenant to pay—Limitation Act—Act XV of 1877.

Where a usufructuary mortgage contains a personal undertaking to pay the amount secured thereby, the limitation applicable to a suit brought on the mortgage is governed by article 147, Limitation Act XV of 1877. *Sivakami Ammal v. Gopala Sarundram Ayyar* (1) followed.

SECOND APPEAL against the decree of J. W. Dumergue, District Judge of Madura, in appeal suit No. 67 of 1894, reversing the decree of S. Authinarayana Ayyar in original suit No. 1636 of 1892.

The facts of this case were as follows:—

In this case the plaintiff sued on a mortgage deed to recover Rs. 200 being the principal, and Rs. 100 being damages from the defendants and by sale of the mortgaged property.

According to the plaint, the father of the first and second defendants executed a registered mortgage deed in favour of the plaintiff's father on the 8th October 1867. From that time until fasli 1298 (1888–89) the plaintiff's father and then the plaintiff were in possession and enjoyment of the mortgaged land. In fasli 1299 (1889–90) the first and second defendants agreed to cultivate the land themselves and to pay half varam to the plaintiff, but failed to do so from fasli 1299 to fasli 1301. The third and fourth defendants, being the cousins, and the fifth defendant, being the uncle of the first and second defendants' father, were impleaded as members of a joint family and liable for the debt.

The District Munsif exonerated the third, fourth and fifth defendants and their share of the property and found that there had been no such agreement in 1839 with the first and second defendants as alleged by the plaintiff. In the result he gave the

* Second Appeal No. 664 of 1895,

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plaintiff a decree for the recovery of the mortgage amount from the share of the mortgaged property belonging to the father of the first and second defendants in their hands, and, in case of failure of payment within six months, by sale of that share, but disallowed the plaintiff's claim to damages. The first and second defendants appealed to the District Court and the plaintiff filed a memorandum of objections against such part of the decree as found that plaintiff had no enjoyment of the plaintiff property within twelve years prior to the suit, and that there was no such letting as is alleged to the first and second defendants in 1889 and refused damages.

On the hearing of the appeal the only point raised had reference to the question of limitation, and it was contended that the District Munsif was wrong in holding that the suit was governed by article 147 and not by article 132 of the Limitation Act of 1877, and on this point the Lower Appellate Court reversed the decree of the District Munsif and dismissed the suit with costs.

The plaintiff appealed to the High Court.

Krishnasami Ayyar for appellant.

Sankaran Nayar for respondents.

JUDGMENT.—Plaintiff sued for recovery of Rs. 200 alleged to be due under an instrument of mortgage (exhibit A) by sale of the mortgaged property.

The District Munsif decreed for plaintiff, but the District Judge reversed the decree and dismissed the suit on the ground that exhibit A evidenced a usufructuary mortgage, pure and simple, containing no covenant to repay the mortgage money, but with an express contract that plaintiff's only remedy should be to remain in possession if defendants failed to repay the mortgage money.

Against this decree the plaintiff instituted this second appeal on the ground that the District Judge misconstrued exhibit A.

We think the appeal is well founded. Exhibit A is dated 8th October 1867. By it the defendant's father mortgaged certain lands for Rs. 200 to the plaintiff, and the contract between the parties is expressed as follows :—

“ In lieu of interest on this sum of Rs. 200, you will, for three
“ years from this year, raise any crops you like, including summer
“ and season crops, pay Government assessment and enjoy the said
“ lands. On the expiry of the term, I shall pay the said Rs. 200
“ and redeem the lands. If they are not redeemed in that manner,

“you will, till payment of the amount, enjoy them as under mortgage as mentioned above.”

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We think that these words contain a covenant to repay the mortgage money on a certain date, viz., on the 8th October 1870. If the words “on the expiry of the term, I shall pay the said Rs. 200 and redeem the lands” stood alone, there could be no question as to their meaning and effect, but the District Judge considers that the succeeding words indicate that the only covenant was that, in the event of non-payment, the plaintiff should continue to enjoy the lands. We do not think that this was the intention of the parties or is the true construction of the words. If that were the intention of the parties, it would have been easy to have stated it in appropriate language without the express contract, “on the expiry of the term I shall pay the said Rs. 200.” This express contract is not, as the District Judge supposes, nullified by the words that follow it.

These latter words, no doubt, contain an agreement that until payment the plaintiff shall remain in enjoyment of the land, but they do not say or imply that this shall be the plaintiff's only remedy in case of non-payment. They, as well as the previous covenant, are for the benefit and protection of the mortgagee (plaintiff), but to give them the meaning suggested by the District Judge would be to nullify the previous express covenant to repay on a certain date and deprive the plaintiff of the benefit intended to be secured to him by those words.

The case is very similar to that decided lately by the Full Bench in *Sivakami Ammal v. Gopala Savundram Ayyan*(1). There the agreement was “I shall pay you the said mortgage amount” on a certain date in 1883, and a further clause provided “If I fail to pay you” on the said date, “you shall receive” it on the corresponding date “of whatever year I may pay it.” The Full Bench held that the document clearly contained a covenant to pay and that a suit for sale therefore lay.

In the present case we are of opinion that exhibit A contains not merely a usufructuary mortgage, but such a mortgage with an express covenant to repay the mortgage money on a certain date now long since past.

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The contention of the respondents that the suit is barred under article 132 of schedule 2 of the Indian Limitation Act is untenable. The article applicable is No. 147, and the time allowed for sale is sixty years.

In the result we must reverse the decree of the District Judge and restore that of the District Munsif. The plaintiff must have his proper costs in all Courts.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

1896.
July 20, 21.

BALAJI RAU (PLAINTIFF No. 1), APPELLANT,

v.

SITHABHOY AND OTHERS (DEFENDANTS AND PLAINTIFF
No. 2), RESPONDENTS.*

*Civil Procedure Code, s. 560—No application for rehearing—s. 584 (e)—
Power of High Court to interfere.*

Where an appeal was heard *ex parte* by a Lower Appellate Court and the decree of the Court of First Instance reversed in the absence of the respondent, on whom notice of appeal had not been duly served and who was not aware of the proceedings till after the time for applying for a rehearing under s. 560 and Limitation Act, sched. II, art. 169 had expired :

Held, that the High Court in second appeal had power to interfere under s. 584 (e), Civil Procedure Code.

SECOND APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of North Arcot, in appeal suit No. 278 of 1893, reversing the decree of T. A. Krishnasami Ayyar, District Munsif of Arni, in original suit No. 283 of 1892.

The facts of the case were as follows :—

The suit was instituted by plaintiff No. 1 alone against the defendants who are respectively his maternal grandmother, mother, and maternal grandfather's brother for a declaration of his rever-
sionary title to the plaint properties which belonged to his maternal grandfather deceased.

* Second Appeal No. 688 of 1895.