APPELLATE CIVIL.

14 January, 20.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

JAWAHIR MAL AND OTHERS (PLAINTIFFS) v. INDOMATI AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), sections 58 and 100—Construction of document—Mortgage—Charge.

A deed commenced by reciting that the executant had borrowed a certain sum of money from certain persons, and then proceeded to refer to a certain share in a property, and finally there was a clause by which the executant undertook that until repayment of the amount he would not transfer the property by sale, mortgage, gift or in any other way, but there was in no part of the document any expression conveying the idea of mortgage or hypothecation, nor was there any reference to any right of sale in the property.

Held by RICHARDS, C. J., that it was the intention of the parties to make the property mentioned therein security for the loan and interest and that the document created a charge within the meaning of section 100 of the Transfer of Property Act, 1882. But as there was no transfer of any interest, for the purposes of securing the loan in the property mentioned in the deed, it was not a simple mortgage within the meaning of section 58.

Per BANERJI, J., *contra*. The intention was that the persons who had lent the money should have a right to realize their money from the property by causing it to be sold. The document was therefore a simple mortgage within the meaning of section 58 of the Transfer of Property Act. *Martin* v. *Pursram* (1) referred to.

THIS was a suit for sale upon a document which the plaintiffs put forward as a mortgage.

One Chaudhri Raj Kumar borrowed money in 1884 and executed a document, the following clauses of which are material.

'(1) I have borrowed the sum of Rs. 1,000, half of which is Rs. 500, out of 20 biswas *zamindari* in Kankauli, pargana Bhojpur,—a one-third *zamindari* share is owned by me—from Lalas Baldeo Das and Shiv Dat Rai—and have brought it to my use.

(2) I will not transfer this property by way of sale, mortgage or gift, etc., so long as I do not repay this loan and if I do the transfer shall be void.'

Raj Kumar died, and a suit was instituted on the 6th of August, 1910, for sale by the representatives of the creditor against his heirs and subsequent transferees of the property. The defence, so far as is material for this report, was that the document created no hypothecation or pledge of the property and that there was no mortgage which could be enforced. The suit having been brought

* First Appeal No. 69 of 1912 from a decree of Gauri Shankar, Subordinate Judge of Farrukhabad, dated the 7th of November, 1911.

(1) N.-W. P., H. C. R., 1867, p. 124.

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more than twelve years after the execution of the deed was barred by limitation. The plaintiffs alleged that section 31 of the Limitation Act, 1908, had extended the period of limitation to the 1st of August, 1910, and the suit was thus within time. The court below held that the transaction did not amount to a mortgage, but at the best created a charge, and that section 31 of the Limitation Act had not extended the period of limitation in favour of a charge-holder. It, therefore, dismissed the suit. The plaintiffs appealed to the High Court.

Munshi *Gulzari Lal* (with him Babu *Lalit Mohan Banerij*), for the plaintiffs :—

A mortgage creates a right in favour of the mortgagee to sell the property and this power may be given by implication. The deed in question does not expressly give such a power, but the debtor promises not to transfer the property so long as the debt is not paid. It is, therefore, a simple mortgage as defined in clause *(b)* of section 58 of the Transfer of Property Act. In the case of a simple mortgage there need not be any transfer of proprietary rights ; *Sri Raja Papamma Rao* v. *Sri Vira Pratapa H. V. Ramachandra Razu* (1). In the document in suit the property is secured for payment of a debt, and I submit it was not necessary to add a further stipulation that an interest in the property was transferred. There is a creation of right to have the property sold and it amounted to a mortgage. *See* the dissentient judgement of MAHMOOD, J., in *Gopal Pandey* v. *Parsotam Das* (2). No particular words are necessary to create a mortgage. Intention to secure the property is enough ; *Martin* v. *Pursram* (3), *Kishan Lal* v. *Ganga Ram* (4).

A distinction has been drawn between a charge and a mortgage.

A simple mortgage has to satisfy two requirements :—

(1) There must be a covenant to repay, and (2) an express or implied covenant that in the event of non-payment the mortgagee may have a power to sell the property through the court ; *Shib Lal* v. *Ganga Prasad* (5), *Sheoratan Kuar* v. *Mahipal Kuar* (6), *Govinda Chandra Pal* v. *Dwarka Nath Pal* (7).

(1) (1896) I. L. R., 19 Mad., 249.
(2) (1882) I. L. R., 5 All., 121 at 138.
(3) N.-W.P., H. C. Rep., 1867, 124.
(4) (1890) I. L. R., 13 All., 28.
(5) (1884) I. L. R., 6 All., 551.
(6) (1884) I. L. R., 7 All., 258.
(7) (1908) I. L. R., 35 Calc., 837.

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I submit that the transaction in this case amounts to a mortgage, and the suit, therefore, is not barred by limitation, having been brought within the time extended by section 31 of the Limitation Act.

Dr. *Satish Chandra Banerji*, for the respondents :—

The only question is about the proper construction to be placed on the so-called mortgage-deed. There are no words assigning any right to the mortgagee, and unless there is a transfer of an interest in the property there can be no mortgage. The document must be construed as it stands, no words can be added to it. If there was a mistake, the plaintiff's obvious remedy was to get it rectified or reformed. The Transfer of Property Act has now laid down that there can be no mortgage unless an interest is *transferred* in favour of the mortgagee by way of security for purposes defined. There is a distinction between an English mortgage and a simple mortgage, inasmuch as the English mortgagee can sell without the help of the court, whereas the simple mortgagee has to ask the court's help, but a transfer of an interest is necessary in both cases. The interest transferred is the right to sell with or without the assistance of the court.

There is a substantial difference between a simple mortgage and a charge *e. g.*, a charge cannot be created for a future loan or to provide for a future contingency; *Madho Misser* v. *Sidh Binaik Upadhya* (1), *Harjas Rai* v. *Nawrang* (2). In the N.-W. P. H. C. Reports case the Judges spoke of a hypothecation, which means a pledge and not a mortgage strictly so called. Here at the most there is a charge which does not amount to a mortgage. The Transfer of Property Act was drafted by English lawyers who had English notions. A charge has been held in England to be different from a mortgage, inasmuch as in the former case there is no transfer of any property, but only a particular fund is indicated out of which the money is payable; *Rubbinson* v. *Hale* (3), *Tancreed* v. *Delagoa Bay* and *East Africa Ry. Co.* (4). The only case in which the distinction between a mortgage and a charge has been considered with reference to the provisions of the Transfer of Property Act is *Govinda Chandra Pal* v. *Dwarka Nath Pal* (5).

(1) (1887) I. L. R., 14 Calc., 687. (3) (1884) 12Q. B. D., 347 (350).
(2) (1906) 3A. L. J., 220. (4) (1889) 23Q. B. D., 239 (242).
(5) (1908) I. L. R., 35 Calc., 837 (843).

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In the cases cited by the appellants, words like *arh* or *mushtaghrak* were to be found, which would show the intention of parties was to create something more than a mortgage. In certain cases in this Court even words like *arh* and *mushtaghrak* have been held to mean a charge only ; *Moti Begam* v. *Har Prasad* (1), *Masuma Khatun* v. *Tahira Khatun* (2). Further, a mere stipulation not to transfer property till the money is paid does not amount to even a charge; *Bhupal* v. *Jag Ram* (3). Even a general reference to property has been held to make a good mortgage, see *e g.*, *Ramsidh Pande* v. *Balgobind* (4).

Munshi *Gulzari Lal*, in reply :—

The practice of this Court has always been to treat such documents as mortgages.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs sought to recover a sum of Rs. 6,000 upon foot of a document, dated the 12th of May, 1884. Rs. 7,294 is said to be due, but only Rs. 6,000 is claimed. Extracts of material parts of the document have been set forth in the judgement of the learned Subordinate Judge. The document itself is somewhat incorrectly translated at page 4 of the appellant's book. It commences by reciting that the executant had borrowed Rs. 1,000, and then proceeds to refer to certain property. Then there is a covenant to repay the amount with interest at the rate of 2 per cent. per mensem in 7 months, and that if the executant failed to pay the amount at the stipulated period, then, in future, interest should be paid at the rate of 2 per cent. per mensem. Finally, there is a clause in which the executant undertakes that until repayment of the amount he will not transfer the property by sale, mortgage, gift or in any other way. There is in no part of the document any use of the word "hypothecate" or anything equivalent thereto, but it is quite possible that there was an accidental omission to insert some such word. The defendants pleaded a number of defences, including a plea that the document was not sufficient to constitute a hypothecation of the property. There was another plea that the property had been purchased by the contesting defendants at sale on a foot of a prior mortgage.

(1) (1912) 11 A. L. J., 570.
(2) (1913) 11 A. L. J., 560.
(3) (1879) I. L. R., 2 All., 449.
(4) (1886) I. L. R., 9 All., 158.

None of these matters have been gone into by the court below, which held the document was not a mortgage, and that, therefore, the suit was barred by limitation, even if the document was sufficient to operate as a charge within the meaning of section 100 of the Transfer of Property Act.

As already pointed out, the document was executed on the 12th of May, 1884. No step of any kind has been taken on foot of the document until the institution of the present suit, and while the court below has not gone into the question of the priority of the claim of the answering defendants there can be no doubt they purchased at auction sale, and the plaintiffs have waited until the debt (if not discharged) has become greater than the value of the property. In my opinion, having regard to the words used in the document, we ought to hold that it was the intention of the parties to the deed to make the property therein mentioned security for a loan of Rs. 1,000 and interest. The important question is whether or not it constituted a "mortgage." If the document is not a mortgage within the meaning of section 58 of the Transfer of Property Act, then the present suit is barred, and I confess I have not much sympathy with the plaintiffs, who did not institute their suit until the very last day of limitation, taking advantage of the period of grace allowed by the Limitation Act of 1908. I have already pointed out that, whether by accident or otherwise, there is an absence of any word equivalent to the word "hypothecate" or "mortgage." There is also no reference to any right of sale in the mortgagee. There is merely the mention of the property, a covenant to pay the principal, and a covenant not to alienate the property so long as the principal and interest remain unpaid. Section 58 of the Transfer of Property Act defines a mortgage as being "a transfer of an interest in specific immovable property for the purpose of securing the payment of money, etc." "Mortgagor" is defined as being the person who so transfers an interest, and "mortgagee" is defined as being the person to whom that interest is transferred. Clause *(b)* defines a simple mortgage in the following words:—"Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees expressly or impliedly, that in the event of his failure to pay according to the contract, the mortgagee shall

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have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee." It seems to me that the meaning of the expression "mortgagor" and "mortgagee" in clause *(b)* of section 58 must be in accordance with the definition of "mortgagor" and "mortgagee" given in the very same section of the Act. Now I consider in the present case that there was no "transfer of any interest" for the purpose of securing the loan by Chaudhri Raj Kumar, the executant of the document sued upon in the property mentioned in the deed. If this be so, the persons in whose favour the document was executed and their representatives are not "simple mortgagees" and the document sued on is not a "mortgage" within the meaning of clause *(b)* of section 58. Section 100 of the Transfer of Property Act provides as follows: "Where immovable property of one person is by 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 latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 and all the provisions hereinbefore contained 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 such charge." I am quite prepared to hold from consideration of the terms of the document itself that the parties did intend to make the property security for the payment of Rs. 1,000, and interest, and if they had brought their suit within twelve years from the money becoming due, I would be prepared to hold that the plaintiffs were entitled to recover the amount by sale of the property if there was no other defence.

This was all that was held in the case of *Martin* v. *Pursram* (1), which is no authority as to what constitutes a simple mortgage as defined by section 58 of the Transfer of Property Act.

It is said that the making of the property liable for the loan is "a transfer of an interest." I cannot follow the reasoning. No

(1) N.-W. P., H. C. Rep., 1867, p. 124.

doubt the making of the property liable for the loan creates an interest in the person in whose favour the document is made, but it is not "a transfer of an interest for the purpose of securing the payment." The transfer of the interest is one thing, the purpose for which the transfer is made is another. The absolute owner of property may transfer his interest for the purpose of securing a loan, so also may the owner of a lease-hold interest transfer that interest, or the owner of either of such interest may transfer a right to possession. In all such cases there is a "transfer of an interest." If the mere intention of making the property security for a loan is the "transfer" of an interest then a charge under section 100 is the transfer of an interest also. No doubt section 58 is very confusing. The terms of clause *(a)* seem to point to the fact that the draftsman had the idea of an English mortgage in his mind; and yet we have in the same section a simple mortgage defined by clause *(b)*, and an English mortgage defined by clause *(e)*. It must be admitted also that for many years in these Provinces documents which commenced with words "I hypothecate" or words equivalent thereto, have been regarded as mortgages. In the present case, however, these words are entirely absent, not only from the operative part but also from the description given of the document itself at the conclusion.

The importance of the distinction between a mortgage under section 58 and a charge under section 100 created by act of parties has ceased to be of any importance since the decision of their Lordships of the Privy Council, in which it was held that a suit for sale on a simple mortgage must be brought within twelve years. This ruling, if I may say so with great respect, has been and will be of the utmost benefit to the people of these Provinces. It was perhaps equitable having regard to the previous decisions of this Court as to the time within which suits on mortgages might be brought, to allow the period of grace provided for by the Limitation Act of 1908, though I fear that the latter enactment has led to the bringing forward of very numerous bogus claims.

On the whole I am of opinion that the decision of the court below was correct and ought to be affirmed.

BANERJI, J.—The question in this case is whether the document upon which the suit has been brought is a simple mortgage or not

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within the meaning of the Transfer of Property Act. In deciding this question we should, I think, keep out of consideration the fact that the suit is one to enforce a stale claim. The decision of the point at issue depends upon the construction of the document which is the foundation of the plaintiff's claim. That document is most inartistically drawn. The opening portion of it is meaningless unless we assume that the person who engrossed the document omitted to insert the word "mortgage" or "hypothecate" before the description of the property mentioned therein. Otherwise, the opening clause of the document is not only ungrammatical but unmeaning. Indeed the translator of this court, who has translated the document, has inserted the words "and have hypothecated to the aforesaid persons" in order to give some meaning to the clause. In construing a document of this kind we should look to the intention of the parties, and if that intention can be gathered from the document itself, it is our duty to give effect to it. It has been held that the mere fact of the omission of the word "mortgage" or of a clause giving the mortgagee the right to bring to sale the property which was made security for the debt is not sufficient to take the document out of the category of an hypothecation. In the case of *Martin* v. *Pursram* (1) a document very similar to the one before us was held to create a hypothecation, and in a number of cases decided both before and after the Transfer of Property Act by this Court, a document which creates a hypothecation of immovable property has been construed to be a simple mortgage. The Transfer of Property Act, it has been repeatedly held, has only codified what was before its enactment the law of mortgage in this country. Section 58, no doubt, provides that a mortgage is a transfer of an interest in specific immovable property for the purposes of securing the payment of money advanced and for the other purposes mentioned in the section. A hypothecation or pledge of specific immovable property is in my opinion a transfer of an interest in the property hypothecated or pledged. It is a conveyance of a portion of the borrower's interest to the lender, because by virtue of it he is entitled to bring to sale the property which is made security for the debt. Every document by which specific immovable property is made security for

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the repayment of a debt carves out in favour of the mortgagee a portion of the borrower's interest in the property and is thus a transfer and a simple mortgage within the meaning of section 58. In this country there can be no transfer of interest in the same way in which in the case of a mortgage in England the property mortgaged is conveyed to the mortgagee. In the present instance the intention, it seems to me, was clear that the person who had lent the money would have a right to realize his money from the property by causing it to be sold. Otherwise the provision in it forbidding a transfer of the property until the debt was repaid would be unmeaning. I hold that the document in this case was intended to be and is a simple mortgage within the meaning of the Transfer of Property Act; and, therefore, it cannot be a charge within the meaning of section 100 of that Act. A charge under that section arises only when the transaction does not amount to a mortgage. In my opinion the view taken by the court below is not correct, and the case ought to be remanded to that court for trial on the merits.

BY THE COURT:—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

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February, 5.

Before Mr. Justice Ryves and Mr. Justice Piggott.

JAGARNATH SAHU v. PARMESHWAR NARAIN.*

Criminal Procedure Code, section 133—Jurisdiction—Channel which may be lawfully used by the public—Field over which water from other fields at a higher level flows.

Held that a field, which is on a lower level than the adjoining fields and over which the surplus water of those adjoining fields used to flow into a tank, even if it could be described as a channel, is not such a channel as had been or could lawfully be used by the public, and action cannot be taken under section 133 of the Code of Criminal Procedure, for the removal of any obstruction from it.

Jhunnu Singh v. *Mata Autar* (1) and *In re Maharana Shri Jaswatsangji Fatesangji*, (2) referred to. *Emperor* v. *Bharosa Pathak* (3) and *Zaffer Nawab* v. *Emperor* (4) distinguished.

* Criminal Revision No. 1083 of 1913 from an order of Suraj Nath Singh, Magistrate, first class, of Deoria, dated the 27th of October, 1913.

(1) Weekly Notes, 1906, p. 190. (3) (1912) I. L. R., 34 All., 345.

(2) (1897) I. L. R., 22 Bom., 988. (4) (1904) I. L. R., 32 Calc., 930.