APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, and Mr. Justice Kemball.

HARI MÁHÁDA'JI SA'VARKA'R AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* BA'LAMBHAT RAGHUNA'TH KHA'RE (ORIGINAL PLAINTIFF), RESPONDENT.*

1884 *November* 25.

Mortgage—Redemption—Tacking—Interest—Regulation V of 1827, *Secs.* 11 *and* 12—*Act XXVIII of* 1855—*Act XIV of* 1870—*Act I of* 1868—*Dámdupat.*

The mortgagor of an estate gave to the mortgagee, subsequently to the date of the mortgage, two successive money bonds in each of which it was stipulated that, if the amount were not paid on the due date, it should take priority of the amount due under the mortgage, and that redemption of the mortgage should not be claimed until the bond had been satisfied. The assignee of the equity of redemption sued for possession of the estate on payment merely of the mortgage money.

Held, that the two subsequent bonds did not create a further charge on the mortgaged premises, although they would prevent the original mortgagor from redeeming without paying their amounts.

Held, also, that section 12 of Regulation V of 1827 is not in force. That section was repealed by Act XXVIII of 1855, sec. 1, and although the latter section was repealed by Act XIV of 1870, the former was not restored, there being no express provision in Act XIV of 1870 to revive it, as required by the General Clauses Act, I of 1868, sec. 3. The question of the period for which interest was to be allowed was, therefore, to be determined by Act XV of 1877, the Act in force at the date of the institution of this suit, article 132 of which applied: but as the rule of *dam-dupat* is not affected by Limitation Acts, the defendants could not be allowed, as interest, more than the amount of the principal on which it was to be paid.

THIS was a second appeal from the decision of L. G. Fernandes, First Class Subordinate Judge, with appellate powers, of Ratnágiri, confirming the decree of Ráv Sáheb Pándurang Dhonddev Gadgil, Subordinate Judge (Second Class) of Sangameshvar.

The plaintiff Bálambhat sued for redemption of a third of the *dhára* in the *khoti* village of Kolavle, alleging that it had been mortgaged by one Vináyak Janárdan to the defendant's father in 1849 for Rs. 152, of which Rs. 102 was to bear interest at 12 per cent., and that after Vináyak's death he (the plaintiff) had purchased the equity of redemption from Vináyak's undivided brother Náro. The defendants pleaded that, besides the mortgage bond sued upon, there were two other bonds (exhibits 42 and 43) subsequently executed in their father's favour by Vináyak,

* Second Appeal, 542 of 1883.

1884

HARI MÁHÁDÁJI SÁVARKÁR v. BÁLAMBHAT RÁGHUNÁTH KHÁRE.

which created a further charge upon the property in dispute, and that the plaintiff was not entitled to redeem without paying off the charges created by the subsequent bonds.

Both the bonds—which, according to the defendants' allegation created a further charge—contained the following stipulation :—

"If I (the debtor) fail to pay the amount (of this loan) within the stipulated period, I shall pay the same before I shall pay off the mortgage money which I have previously borrowed from you on the security of my *dhára* lands, and *then* I shall pay off the amount of the mortgage, and redeem my lands."

The lower Courts held that the two bonds (exhibits 42 and 43) did not create a further charge on the property in dispute, and decreed redemption on payment of the principal sum due on the mortgage, together with six years' arrears of interest.

The defendants appealed to the High Court.

M. C. Apte for the appellants.—The two bonds, exhibits 42 and 43, create a charge on the property, if not expressly, at least by implication. Both stipulate that redemption of the mortgage shall be postponed till the amount of those bonds is paid off. If this stipulation is binding on the original mortgagor, it is equally binding on the assignee of the equity of redemption. In *Náráyan* v. *Ráoji*[1] this Court held that such a stipulation "limits" the mortgagor's interest in the sense in which that term is used in the Registration Act. If so, it also "limits" or affects the mortgagee's interest, and it does so by creating a further charge. The lower Court ought to have awarded interest on the *damdupat* principle.

The mortgagee ought to have been allowed the costs of the suit, as usual in redemption suits.

Ganpat Sádashiv Ráv for the respondent.—Both the bonds, exhibits 42 and 43, are simple money bonds. It has been held by this Court that a stipulation, like the one contained in these bonds, postponing redemption, does not create a lien on the property—*Ráma* v. *Martand*[2] and *Náráyan* v. *Ráoji*[1]. The

(1) Printed Judgments for 1884, p. 254. (2) *Infra*, p. 236.

mortgage-bond having been passed in 1849, the lower Courts were right in awarding only six years' interest under sections 11 and 12 of Regulation V of 1827—*Vithal* v. *Daud*[1] and *Náráyan* v. *Satváji*.[2] Sections 11 and 12 of the Regulation are, indeed, repealed by the schedule to Act XXVIII of 1855. But that schedule being repealed by Act XIV of 1870, those sections are revived.

M. C. Apte in reply.—Act XIV of 1870 in repealing Schedule I of Act XXVIII of 1885 contains no express provision to restore sections 11 and 12 of Regulation V of 1827, and, therefore, according to section 3 of the General Clauses Act I of 1868, section 12 of that Regulation is not restored. The rule of *damdupat* is not affected by Limitation Acts, as held in *Ganpat Pándurang* v. *Adarji Dádábhai*[3].

SARGENT, C. J.—We agree with the Subordinate Judge, that the language of the bonds (exhibits 42 and 43) does not create a further charge on the mortgaged premises, although it would prevent the original mortgagor, who passed the bonds, from redeeming without paying their amounts. This is in accordance with the construction placed by the Court in *Ráma* v. *Martand*[4] on similar language.

As to the number of years of interest which the mortgagee can claim, we think that the Subordinate Judge was wrong in considering that section 12, Regulation V of 1827, was applicable. That section was repealed by section 1 of Act XXVIII of 1855; and, although the latter section was repealed by Act XIV of 1870, still section 12 of Regulation V was not restored, there being no express provision in Act XIV of 1870, which revived it, as required by section 3 of Act I of 1868. The question, therefore, has to be determined by the Limitation Act XV of 1877, which was in force when the suit was brought. And by article 132 of that Act, money due on immoveable property is not barred before the expiration of twelve years. However, it has been decided that the rule of *damdupat* is not affected by the Acts of Limitation—*Ganpat Pándurang* v. *Adarji Dádábhai*[3]. The defendants cannot.

(1) 6 Bom. H. C. Rep., A. C. J., 90.
(2) 9 Bom. H. C. Rep., 88.
(3) I. L. R., 3 Bom., 312.
(4) *See infra*, p. 236.

1884

HARI MÁHÁDÁJI SAVARKÁR v. BÁLAMBHAT RÁGHUNÁTH KHÁRE.

therefore, be allowed more than Rs. 102 for interest, that being the amount of the principal sum on which it was agreed to be paid.

It has been contended before us that the defendants ought to have their costs of suit according to the well-established rule; but here the defendants denied the plaintiff's right to redeem without payment of what was due on two other instruments, which, in our opinion, was a sufficient ground for departing from the rule.

We must, therefore, vary the decree by allowing the defendant Rs. 254-7-0 instead of Rs. 225-7-0 in respect of principal and interest, and confirm it in all other respects. Parties to pay their own costs of this appeal.

Decree varied.

NOTE.—The following is the judgment in *Ráma* v. *Martand* above referred to:—

MELVILL, J.—The sole question in the case is as to the construction to be put on the mortgage-bond (exhibit 108). If it can be held to be intelligibly expressed that the land, which it is now sought to redeem, was given as security by way of mortgage for the payment, not only of the money lent at the time, but of sums previously due and payable, and also for the repayment of money to be thereafter lent, advanced, or paid—conditions common enough in mortgage-bonds in England—then it is clear that the plaintiffs can only redeem, (there being no other objection on the score of stamp or registration) on payment of all the moneys so secured. But, if it does not appear on the bond that such was intended, it is, we think, equally clear that equity will not allow the right to redeem to be clogged by any such bye-agreement to postpone the redemption to the payment of all debts due and payable by the mortgagee to the mortgagor. Both the lower Courts, we understand, have found that the land was not intended as security for the prior and subsequent debts. The Subordinate Judge speaks of the agreement as to these debts as "a simple statement in the bond that the existing debts should be paid before the mortgage one," and the District Judge apparently takes a similar view, though he speaks of the stipulation as being "a charge virtually on the land". Objection has been taken in the memorandum of cross appeal by the mortgagee, that the District Judge "misread and misunderstood exhibit 108.' The wording is certainly obscure, but we see no reason for holding that it has been misconstrued in the lower Courts. For these reasons we reverse the decree of the District Court, and restore that of the Subordinate Judge. Costs of appeal and second appeal on defendant.