1891

QUEEN-EMPRESS v. ABÁJI RAMCHANDRA

place "a rough sketch to serve as practice for a finished forgery, but which has not been used and which could not be used in its present form," and in another, "a tracing or attempt to portray a pedigree". Such a document apparently would not come under the description of either section 466 or 467. With respect to the description of the other documents he is silent, and yet, unless they are found to fall within the description mentioned in either section 466 or section 467, the conviction under section 474 is illegal, and unless they fall within the description mentioned in section 467, the sentence is illegal. It is impossible to accept the verdict of the jury given after such an imperfect summing up and such a deficient and wrong direction as to the elements necessary to constitute the offence in respect of which they were to deliver their verdict. They have evidently convicted the accused of offences under sections 474 and 475 on the direction of the Judge that, if they found that the papers were in the possession of the accused, they must find him guilty. Such a direction was palpably wrong, for possession alone would not constitute an offence under either of the said sections. I concur in reversing the conviction and sentence and ordering a fresh trial.

Conviction reversed and new trial ordered.

NOTE.—The accused was acquitted by an unanimous verdict of the jury on his third trial.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

1891. *February* 23.

HANMANT RAMCHANDRA DESHPANDE (ORIGINAL PLAINTIFF), APPELLANT, *v.* BABAJI ABAJI DESHPANDE (ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage—Assignment or appropriation of rents till payment of debt—Intention to appropriate rents as distinguished from the lands—"Aivaj" (money)—Usufructuary mortgage—Right to take kabulayats from tenants and to make

Second Appeal No. 904 of 1889.

1891.

HANMANT RAMCHANDRA DESHPANDE v. BABAJI ABAJI DESHPANDE.

recoveries—Possession, article 144, *schedule II of the Limitation Act XV of* 1877—*Adverse possession—Account—The Dekkhan Agriculturists' Relief Act XVII of* 1879, *section* 3, *clause (j).*

Where under an instrument a debtor allotted to his creditor his "aivaj" on account of Deshpande Hak and Inámi recoverable from the villages and undertook not to meddle till the "aivaj" was paid, and the instrument did not describe the lands mentioned therein by metes and bounds, but only as being in the occupation of certain persons paying so much rent, and contained a clause that the "aivaj" of 63 rupees (the sum total of rents) had been allotted and that the creditor might take kabuláyats from the occupants and make the recoveries,

Held, that the term "aivaj," although capable of meaning property generally, must from the context of the document mean monies or sums.

Held, further, that the language of the instrument showed a clear intention to appropriate rents as distinguished from the lands themselves.

Held, also, that even if the transaction were regarded as a mortgage, it could only be a usufructuary mortgage, which would confer no right to have the property sold.

Article 144, schedule II, of the Limitation Act (XV of 1877) applies to the creditor's right of possession, and the defendant not being in adverse possession for 12 years prior to the institution of the suit, his claim was held not barred.

It being obligatory upon the lower Court to take accounts in the mode directed in the Dekkhan Agriculturists' Relief Act (XVII of 1879), which requires annual rests, and that not having been done, the decree was reversed and the case sent back to the lower Court to take accounts according to the Act.

THIS was a second appeal from the decision of Ráo Bahádur Narhar Gadadhar Phadake, First Class Subordinate Judge with Appellate Powers at Sátára.

The plaintiff sued the defendant on the following bond, dated the 20th December, 1864:—

Shri (*i.e.* Prosperity &c.)

Debt-bond dated the 7th of Márgashirsh Vadya in Shake 1786, the cyclical name of the year being Raktáksh. On this day the bond is given in writing to the creditor named Rajashri (*i. e.* the respected) Ráojipant Dádá Deshpándé of the town of Shirále, by the debtor named Bábáji Abáji Deshpándé of pargana Shirále, petá aforesaid. The Christian year 1864. I give this bond in writing as follows:—There is a former amount of debt due to you by me, in respect whereof a settlement having been made now, the amount is fixed at Rs. 600 (six hundred) of the Company's currency. I will continue to pay interest thereon at the rate of 0-10-0 (ten annas) per cent. per month. I will continue to pay the same year after year by (making up) the account. For this, the *aivaj* (amount) of my

1891.

HANMANT RAMCHANDRA DESHPANDE v. BABAJI ABAJI DESHPANDE.

own Deshpánde Hak (*i. e.* right) and the Inám in different villages has been assigned (to you). The same is as mentioned below :—

6 (In Mouje) Upavale.
12 In Mouje Khungáv, on account of Inám ; cultivator Vánu Sashyá.
6 In Mouje Rile, on account of Inám ; cultivator Krishnaji Patil.
39 In Mouje Punvat : 28 on account of Inám (and) 11 on account of Hakk.
6 From Bábáji Yádav on account of Inám.
5 (From) the cultivator Mahadu Patil, on account of Hakk.
28 (From the) cultivator.....on account of Inám.
—
— 39
63

In all the *aivaj* (amount) of sixty-three rupees has been assigned (to you). In respect of the same, you are to take kabuláyats from the different tenants and receive the rents from them. Out of the same, you are to receive the interest every year and pay the balance towards the Inám chauthái. If a balance remain after (paying) these two items, you are to receive the same in part payment of the *aivaj* (principal amount) or towards the (satisfaction of the) debt payable (to you) by instalments. Unless the abovementioned *aivaj* (principal amount), together with interest is paid off, I will not interfere. I have duly given this bond in writing. The lunar date aforesaid. The handwriting of Vishnu Sakhárám * * * .

Besides what is mentioned above, (I) formerly received (½ khándi, *i.e.*) ten maunds of Bhát as principal, which together with (½ khandi, *i.e.*) ten maunds on account of increase thereon up to this day amounts to twenty maunds in all. The amount fixed in respect of the same is Rs. 100 (one hundred) of the Company's currency. I will pay interest on this, year after year, at the rate of 0-10-0 (ten annas) per cent. per month by (making up) the account. I will not make default in this. This is duly given in writing. The above mentioned Rs. 600, and Rs. 100 on account of grain, making in all (Rupees 700 hundred). The handwriting of Vishnu Sakhárám * * *.

THE plaintiff contended that the above document was a mortgage of the lands mentioned in it, and he prayed for possession or sale. The plaint was filed on the 25th November, 1886.

The defendants contended that there was no mortgage and that the suit was barred.

The Subordinate Judge held that the transaction was a mortgage and passed a decree for the plaintiff.

The defendants appealed to the District Court and the plaintiff filed objections under section 561 of the Code of Civil Procedure (Act XIV of 1882). The District Court amended the decree of the Subordinate Judge with respect to the amount and

the rate of interest, and awarded to the plaintiff Rs. 312 with interest at 7½ per cent. per annum.

Against the decree of the District Court the plaintiff appealed to the High Court, and the defendants presented cross objections under the above section of the Civil Procedure Code.

Shivrám Vitthal Bhándárkar, for the respondents, in support of his cross objections:—The appellant's claim is barred by limitation. There is no mortgage here. The word "mortgage" does not occur in the document. In all the decided cases in which the transactions have been held to be mortgages, either the word "mortgage" or some other equivalent expression appears in the documents. *Tukárám* v. *Khandoji*[1], *Sangáppa* v. *Basáppa*[2], *Motirám* v. *Vitáji*[3], *Bulákhi Ganushet* v. *Tukárámbhat*[4], *Firm known as Nánáji Mádhav* v. *Pándu*[5], *Báváji* v. *Tátya*[6]. In the present case what was assigned to the plaintiff was the income of the lands and nothing more. There is merely a charge given upon the property and not a mortgage. The suit is, therefore, barred. The plaintiff admits that he received nothing on account since the year 1879.

At the most the deed creates a usufructuary mortgage. The plaintiff, therefore, is not entitled to sell the lands for the recovery of his money.

Dáji Abáji Khare for the appellant:—The bond expressly refers to lands and the tenants in whose holding the lands are, and stipulates for an attornment by those tenants to the creditor. It is true that the word "mortgage" is not used, but the document is to be construed with reference to its terms, the conduct and the intention of the parties and the surrounding circumstances. The debtor states in detail what he had assigned. The expression in the document is *rupayanchá aivaj lávun dilá áhe.*

We contend that the expression means "property yielding so much is assigned." The meaning of the word "*aivaj*" is "estate, property in general." In the document the amount of money is mentioned in the margin against each item and the

(1) 6 Bom. H. C. R., O. C. J., 134.
(2) 7 Bom. H. C. R., A. C. J., 1.
I. L. R., 13 Bom. 90 (Full Bench).
(4) I. L. R., 14 Bom., 377.
(5) P. J. for 1891, p. 16.
(6) P. J., for 1891, p. 35.

1891.

HANMANT RAMCHANDRA DESHPANDE v. BABAJI ABAJI DESHPANDE.

items contain the names of the tenants in whose holding the lands are. If the lands themselves had not been mortgaged, then the stipulation in the document as to the attornment of the tenants would be meaningless. The deed mentions that Deshpande Hak and Ináms in different villages have been assigned, but the Haks and Ináms lost their purely monetary character when the service ceased, and, in lieu of money, lands were given to the Hakdárs and Inámdárs. The words "Deshpánde Hak" and "Ináms" in the document mean "lands on account of the Deshpánde Hak and Ináms." If only the income of the land had been assigned for the payment of the debt, the document would have contained an expression to that effect.

In neither of the lower Courts was objection taken to the sale of the lands, nor does the respondents' memorandum of cross objections in this Court raise that point. We submit that the document in suit is a mortgage and that the plaintiff has a right to sell the lands for the recovery of his money.

His claim to possession is not barred, because he has brought this suit within 12 years from the date on which his cause of action arose, viz., in the year 1879. Even supposing that it was the Hak that was assigned to him, still a Hak is an immoveable property and is governed by the limitation of 12 years.

SARGENT, J.:—The Courts below have construed the document in question as a mortgage of the lands held by the defendant in respect of his Hak and Inám in the occupation of the persons named in the document, and directed that the plaintiff should obtain the sum found due to him from the lands in default of payment. The defendant, on the other hand, contends that it is not a mortgage but amounts only to an assignment or appropriation of the rents only until the debt is paid, and that the suit is barred, but in any case the lands cannot be sold.

We think the language of the instrument shows a clear intention to appropriate the rents as distinguished from the lands themselves. Reading the sentence as a whole, in which the defendant applies or allots his *aivaj* on account of Deshpánde Hak and Inámi recoverable from the villages, the term *aivaj* although capable of meaning property generally, must from the

context mean in the present case monies or sums as translated by the Interpreter. This is confirmed by the defendant undertaking further on in the document not to meddle until the *aivaj* is paid, where *aivaj* can only mean money. Again, the lands are not described by metes and bounds, but only as being in the occupation of certain persons paying so much rent, and finally it is said "that the *aivaj* of 63 rupees (the sum total of rents) has been allotted, and you may take kabuláyats from the occupants and make the recoveries". If this be so, it matters very little whether the instrument be regarded as a mortgage, or as an agreement to satisfy the debt by receipt of the rents.

Even if regarded as a mortgage it could only be as a usufructuary mortgage, which would confer no right to have the property sold. In either view of the instrument the plaintiff would be entitled to be put into possession of the lands. The lands were in the occupation of tenants, and it is expressly provided that the plaintiff may accept kabuláyats and make recoveries, or in other words take possession, that being the only manner in which there can be possession of lands so circumstanced. The clause of the statute of limitations applicable to this right of possession would, therefore, be clause 144, and as the defendant was not in adverse possession before 1879, the right is not barred.

As to the account taken by the Courts below no objection has been taken in the appeal to its being taken under the Agriculturists' Relief Act as not falling under clause (*g*) of section 3, and it remains only to consider whether it was properly taken. It was obligatory on the Subordinate Judge to take the account in the mode directed by the Dekkhan Agriculturists' Relief Act which requires annual rests. This he has not done.

We must, therefore, reverse the decree of the lower Appellate Court and remand the case for the Subordinate Judge to take the account according to the Act, the principal sum being taken to be Rs. 300 and the interest with which the account starts being taken as Rs. 300. Respondents' cross objections disallowed with costs. Appellant to have the costs of this appeal.

Decree reversed.