APPELLATE CIVIL.

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

VENKATESH SHETTI BIN SANTYA' SHETTI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* NA'RA'YAN SHETTI BIN TAMÁNA SHETTI AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

1890. *August* 11.

Bonds creating interest in land, construction of—Mortgage—Limitation Act (XV of 1877). Sch. II, Art. 147—Charge on immoveable property.

Bonds by which the property mentioned therein is declared to be a security for a loan, have been always regarded in the Bombay Presidency as creating the relationship of a mortgagor and mortgagee, and fall under article 147 of Schedule II of the Limitation Act (XV of 1877).

THIS was a second appeal from the decision of Gilmour McCorkell, District Judge of Kánara.

The plaintiff sued the defendants to recover money due to him under two bonds passed in his favour by one Tamána, the manager of the defendant's family, in the years 1858 and 1866. The bond of the year 1858 was for Rs. 400 and was registered. The suit was filed in the year 1885.

The Subordinate Judge found that only one of the bonds produced by the plaintiff, namely, that of the year 1858, was proved. The Subordinate Judge applied article 132, Schedule II of the Limitation Act (XV of 1877) to the plaintiff's claim, and held, as the plaintiff failed to prove any payment made to him by the defendants within twelve years prior to the institution of the suit, the claim was time-barred, and dismissed the suit.

The plaintiff appealed to the District Court. The District Judge held that both the bonds produced by the plaintiff were proved, but confirmed the decree of the Subordinate Judge, on the ground of limitation. The District Judge held that article 132 and not article 147 of the Limitation Act was applicable to the claim, and relied, in support of his decision, on the rulings in *Alibá* v. *Nánu* (1) and *Khemji Bhagvándás Gujar* v. *Ráma*.(2)

Against the decree of the District Court, the plaintiff appealed to the High Court. In the High Court, the point whether the bond dated 1858 was a mortgage transaction or not, was argued,

* Second Appeal, No. 564 of 1889.

(1) I. L. R., 9 Mad., 218. (2) I. L. R., 10 Bom., 519.

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in order to determine what article of the Limitation Act governed the plaintiff's claim.

The bond ran as follows:—

"The deed of mortgage of land without possession executed on the 1st of the dark half of the moon in the month of *Margáshir* of the cyclical year *Kalitakshi*, corresponding to 1858 A. D., and *Fasli* year 1268, by Tamána, son of Báb Shetti, living in Gudeangadi, to Venkatesh Shetti, son of Rámkrishna Santáya, living in Gudbále, is as follows:—

"This itself is a memorandum (to show) that I have received the sum of Rs. 400 or 100 pagodas (in words, one hundred pagodas) which I have taken from you to-day in cash to pay off the debt which has fallen to my share. For this money there are lands which we hold as proprietors in the village of Holangdde, (namely) Bollna Parambhátta's Warga Muli No. 55 bearing an assessment of Rs. 28, Barsagani Ganpayabhatta's Warga Muli No. 3 bearing an assessment of Rs. 5-4-0, Irána Kuppa's Warga Muli No. 52 bearing an assessment of Rs. 6-4-0, Bili Parmaya Hegade's Warga Muli No. 59 bearing an assessment of Rs. 8-4-10 and the Muli No. 40 bearing an assessment of Rs. 4-10-8 and obtained from Bhikya Baba,—the lands bearing the total assessment of Rs. 52-7-6; from these lands the three-fourths share which belongs to my younger brother Jattaya and my elder brother Ganpaya's sons Lakshman and Manju, and my elder brother Parameshra Shetti's adopted son Pandu being deducted, the remaining one (fourth) share belonging to me bearing the assessment of Rs. 13-1-10½, consisting of rice land, gajni (salt-water land called *khár*) land and also garden land I have given to you in mortgage without possession. Therefore, I will enjoy the aforesaid lands myself and will pay every year interest in due time on the aforesaid amount, which comes to Rs. 30 at the settled rate of 3 *hágás* per pagoda per annum and obtain a receipt for the payment made. I will pay you the aforesaid principal in one lump whenever you demand it, and redeem this mortgage without possession; and the sum of Rs. 150 together with its interest due from me in respect of a former document having been allotted to the share of your sharer, I have executed this document besides that. To this effect the deed of mortgage of land without possession is passed in writing.

Signature of Tamána.

(Registrar's endorsement.)"

Náráyan Ganesh Chandávárkar for the appellant.—The lower Courts wrongly held the suit to be time-barred. The bond was registered, and the transaction evidenced by it is a mortgage transaction. The period of limitation is sixty years and not twelve years; and article 147 applies, and not article 132 of the Limitation Act. The lower Courts were wrong in applying the latter article. The document begins with the words "the deed of mortgage of land without possession," and such trans-

actions have been held to be mortgages—*Tukárám Vithoji* v. *Khandoji Malhári*[1]; *Onkár Rámshet* v. *Firm known as Govardhan Purshottamdás*[2]; *Motirám* v. *Vitái*[3]; *Parmaya* v. *Sonde Shrinivasápa*[4]; *Sheoratan Kuar* v. *Mahipal Kuar*[5]; *Mánekji Frámji* v. *Rastamji Naservánji*.[6]

Shámráv Vitthal for the respondent.—The mere description with which the document starts cannot make it a mortgage transaction—*Onkár Rámshet* v. *Firm known as Govardhan Purshottamdás*.[7] In the bond there is a clear provision that the executant thereof is to remain in possession. The nature of a transaction must be determined by the language of the document, the intention of the parties and the surrounding circumstances. In the present Limitation Act (XV of 1877) there are separate articles prescribing the period of limitation for a charge and a mortgage transaction. In the former Limitation Act (XIV of 1859) there were no separate provisions of this kind, and, therefore, the decisions arrived at under that Act will not be applicable now. The bond in dispute creates a mere charge on immoveable property. To constitute a mortgage there must be power of sale reserved to the mortgagee or some clause as to foreclosure in the deed—*Gopál Sitárám Gune* v. *Desai*.[8] The Full Bench ruling, *Motirám* v. *Vitái*,[9] only indicates the line as to how such documents should be construed.

SARGENT, C. J.—The bond in this case is almost identical in form with that in *Tukárám Vithoji* v. *Khandoji Malhári*,[10] where Couch, C. J., speaks of it both as an instrument creating an interest in land and as a form of mortgage in constant use. In *Mahbleshvarbhat* v. *Ratnábái*[11] the mortgage was an hypothecation bond. It is so described in the plaint, and we are informed by Mr. Náráyan Chandávárkar, who was pleader in the case, that the instrument gave no right of possession to the mortgagee, and the Court, consisting of West and Nánábhái Haridás, JJ., held

(1) 6 Bom. H. C. Rep., O. C. J., 134.
(2) I. L. R., 14 Bom, 578.
(3) I. L. R., 13 Bom., 90.
(4) I. L. R., 4 Bom., 459.
(5) I. L. R., 7 All., 258.
(6) I. L. R., 14 Bom., 269.
(7) I. L. R., 14 Bom., 578.
(8) I. L. R., 6 Bom., 674.
(9) I. L. R., 13 Bom., 90.
(10) 6 Bom. H. C. Rep., O. C. J., 134.
(11) P. J. for 1884, p. 29.

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that article 147 of Limitation Act must be applicable to it. In *Parmaya* v. *Sonde Shrinivasápa* (1) Westropp, C. J., speaks of these instruments, which it appears are in common use in Kánara, as mortgages. In *Motirám* v. *Vitái* (2) Sargent, C. J., and Nánábhái Haridás, J., expressed the opinion, although not necessary for the decision of the case, that bonds by which the property is merely declared to be a security for a loan have been always regarded in this Presidency as creating the relationship of mortgagor and mortgagee, and fall under article 147, and this view was adopted by Scott and Telang, JJ., in *Onkár Rámshet* v. *Firm known as Govardhan Purshottamdás*.(3)

It must be admitted that Birdwood and Jardine, JJ., in *Khemji Bhagvándás Gujar* v. *Rámá* (4) expressed the opinion that there is only a mortgage where there is a transfer of interest in immoveable property as provided by section 58 of the Transfer of Property Act; but whether such be the correct view of that Act, as to which we express no opinion, we think that all the authorities in this Presidency point to such instruments being regarded as mortgages; and if so, there can be no reason why they should not fall under article 147.

We must, therefore, reverse the decree of the Court below and send back the case to be disposed of on the merits, so far as the same have not been already adjudicated on. Appellant to have his costs of this appeal.

Decree reversed.

(1) I. L. R., 4 Bom., 459.
(2) I. L. R., 13 Bom., 90.
(3) I. L. R., 14 Bom., 578.
(4) I. L. R., 10 Bom., 519.

APPELLATE CIVIL.

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

1890. *August* 18.

LAKSHUMAN GIRIRA'YA NA'IK, (ORIGINAL DEFENDANT), APPELLANT, *v.* MA'DHAVKRISHNA SHENVI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage by three sharers—Partition of equity of redemption—Redemption by two sharers—Excess payment—Suit for redemption by the third sharer—Set off.

Three undivided brothers, Janga, Rámá and Náráin, mortgaged certain land to the defendant. They afterwards separated and partitioned their property

* Second Appeal, No. 481 of 1889.