(1911) 03 AHC CK 0018

In the Allahabad High Court

Muhammad Hussain and Others — APPELLANT

Vs

Vinayak Rao and Another — RESPONDENT

Date of Decision : 07-03-1911

Acts Referred:

Citation : 9 Ind. Cas. 828

Hon'ble Judges : John Stanley, C.J;Banerji, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This was a suit of a somewhat extraordinary nature. The plaintiff alleges that he executed a bond in favour of the defendant on the 26th of July 1891, but he states that this bond was fictitious and that "it is barred by Article 132, Act XV of 1877 and IX of 1903." The relief sought is that "it may be declared that the bond, dated the 26th of July 1891, is barred by limitation and ineffectual as against the plaintiff." What the plaintiff means by saying that the bond is barred by limitation it is difficult to understand. Apparently, he means that a claim upon this document if brought would be time barred. The Court below has dismissed the suit and we think rightly. It is also found that it creates a mortgage and that a suit for enforcement of the mortgage would not be time-barred if instituted at the date of the tiling of the present suit.

2. It is contended before us that the document created merely a charge and is not a mortgage. By the document certain immovable property is made security for the debt and it is stated that the said property was "hypothecated." As observed by Mr. Justice Mahmood in the case of Kishanlal v. Ganga Ram 13 A. 28 "hypo the cation and simple mortgage in these Provinces have always been understood to import the right of the mortgagee to bring the property to sale for the satisfaction of his claim, and no express words conferring such power are insisted upon as necessary to create such power." The same view was expressed in the Full Bench case of Shib Lal v. Ganga Prasad 6 A. 551. In that case Straight, Offg. C.J., and Brodhurst and Duthoit J.J., observed,--"An hypothecation

of immovable property for money borrowed in the absence of anything to SHOW the contrary, is only in name but not in its incidents, different from what is known as a simple mortgage." The document in this case clearly, therefore, is a simple mortgage, and if a claim had been brought on the basis of it at the date of the institution of this suit it would not have been time-barred. The present suit, therefore, was bound to fail and this appeal is without force. We dismiss it with costs including fees on the higher scale.

