
(1912) 05 MAD CK 0010
In the Madras High Court

Rama Brahmam and Others		APPELLANT
	Vs	
Venkatanarasu Puntulul and Others		RESPONDENT

Date of Decision : 01-05-1912

Acts Referred:

Limitation Act, 1908 — Section 31

Citation : (1912) 23 MLJ 131

Judgement

1. The question raised in the Second Appeal is whether this is a suit for sale by a mortgagee within the meaning of that term as used in Section 31

of the Indian Limitation Act 1908, which gives mortgagees in the Presidencies of Madras and Bombay and the United Provinces and certain other

territories mentioned in the second schedule among other things a further term of two years from the passing of the Act in which to sue. The reason

for this legislation is, as is well-known, that many mortgagees had been misled by the decisions of the Courts as to the effect of the construction of

Article 147 in the Limitation Act of 1877 into believing that the period of limitation for suits on their mortgagees, was sixty years under Article 147,

whereas according to the decision of the Privy Council in Vasudeva Mudaliar v. Srinivarsa Pillai ILR (1907) M. 426 it was only twelve years

under Article 132. The lower courts have decided that the instrument sued on is not a mortgage but a charge on the authority of Aliba v. Nanu ILR

(1886) M. 218 and Rangasami v. Muthukumarappa ILR (1887) M. 511 and that consequently the plaintiff is not mortgagee within the meaning of

Section 31 and as such entitled to sue within two years from the passing of the Act. These cases proceeded on the erroneous view that Article 147

and not Article 132 was the article applicable in the case of all suits on mortgages, but limited the effect of this ruling by putting a restrictive

construction on the word "mortgages" and holding that mere hypothecations or simple mortgages were only charges and that suits on them were accordingly governed by Article 132. It cannot, however, be said that the tests suggested in those cases for distinguishing a mortgage from a charge, as, whether there was an express power of sale and whether there was an express transfer of interest were accepted even by the other courts which took the same view of Article 147; and we see no reason for thinking that the legislature used the word "mortgage" in the very restricted meaning put upon it by the Madras High Court in these cases.

2. The distinction between a mortgage and a charge has been discussed in a recent case *Balasubramania Nadar v. Sivaguru Nadar* (1909) 21

M.L.J. 562--Ed. in this Court but without reference to the above decisions. The tests suggested in argument were that a mortgage must be erected

by act of parties, must be for a debt, must be of specific property and must involve a covenant to pay. Krishnasawmi Aiyar, J. in discussing the

question rejected the two tests laid down in the two cases which the lower courts have followed--that there must be a formal transfer of interest

and express power of sale--and held that a covenant to pay is an essential element of a simple mortgage. The deed in the present case is described

by a term which is translated "mortgaged" but is explained as meaning "pledged." It is created by act of parties, is of specific Immovable property,

is for a debt and contains a covenant to pay. It further entitles the mortgagee to such possessions as the case admits of, viz., receipt of the rents and

profits during the continuance of the mortgage. We think there can be no doubt at all that this instrument is a mortgage and that the plaintiff is a

mortgagee within the meaning of Section 31 of the Indian Limitation Act and entitled to sue.

3. As the District Munsif has returned the finding on all the issues, we merely set aside the decree of the Lower Appellate Court and remand the

case to the Lower Appellate Court for disposal according to law. Costs will abide the result.