(1912) 05 MAD CK 0007

In the Madras High Court

Rama Brahmam and Others APPELLANT

Vs

Venkatanarsu Puntulu and Others RESPONDENT

Date of Decision : 01-05-1912

Acts Referred:
Limitation Act, 1908 — Section 31

Citation : 16 Ind. Cas. 209

Hon'ble Judges : Wallis, J;Ayling, J

Bench : Division Bench

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 mortgages was sixty years

under Article 147, whereas, according to the decision of the Privy Council in Vasudeva Mudaliar v. Srinivasa Pillai 6 C.L.J. 379 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 9 M.k 218 and Rangasami v. Muttukumarappa 10 M.k 509 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 oases 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 Balasubramaniah Nadar v. Sivaguru Asari 21 M.L.J. 562

in this Court but without reference to the above decisions. The tests suggested in argument were that a mortgage must be created 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 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 possession as the case admits of, viz., receipt of the rents and profits daring 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.

4. The document was as follows:

The amount due to you on taking accounts is Rs. 230. Interest thereon shall be at one per cent, per month. For this principal and interest, I have mortgaged to you my inam land in the village of X. I have now leased out the said land to tenants for five years at Rs. 36 per year which I have

arranged that they shall pay you direct and made them give you agreements. After that I shall lease out to others and make them pay you the annual

kist. Should any obstruction be Caused to the payment of kist by the ryots I shall myself be liable therefor and keep the said land under mortgage

until the debt is discharged and I shall be liable to the said terms and act accordingly.

