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It may further be argued that the effect of the surrender coupled with the death of Rakhma was that the estate vested in the defendant as an estate of inheritance. The general rule is that adoption by a widow cannot divest any estate of inheritance unless the estate is at the time of adoption vested in the adopting widow: *Krishnarav Trimbak Hasabnis v. Shankarav Vinayak Hasabnis*⁽¹⁾.

On these grounds I am of opinion that the plaintiff is not entitled to succeed. I would, therefore, reverse the decree and dismiss the suit with costs throughout.

Decree reversed.

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⁽¹⁾ (1891) 17 Bom. 164.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr Justice Crump.

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January 23.

HANMANT ANANT HASABNIS (ORIGINAL PLAINTIFF), APPELLANT v. SHIOU SHAMBHU GATADA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Civil Procedure Code (Act V of 1908), sections 47, 48—Indian Limitation Act (IX of 1908), Article 181—Decree for redemption—Redemption allowed on payment of mortgage amount—Payment of money into Court 33 years after decree—Application for execution—Application to be treated as a suit.

In 1886, the plaintiff obtained a redemption decree which entitled him to obtain possession of the mortgaged property on paying off the mortgage amount. The plaintiff applied in 1919 to execute the decree: he paid the amount into Court and prayed that his application be treated as a suit under section 47 of the Civil Procedure Code:—

Held, that the decree of 1886 did not put an end to the mortgage, the relationship of mortgagor and mortgagee still continuing to exist between the parties, and only the mortgage amount, which had previously been in dispute, being settled.

Held, therefore, that even assuming that the application to execute the decree was barred under section 48 of the Civil Procedure Code, it was still

* Second Appeal No. 101 of 1922.

open to the Court, under section 47 of the Code, to treat the application as a suit for redemption, the plaintiff's right to redeem not being barred.

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Ramji v. Pandharinath⁽¹⁾, followed.

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Maruti v. Krishna⁽²⁾, dissented from.

SECOND appeal from the decision of W. Baker, District Judge of Satara, confirming the decree passed by G. M. Kharkar, Subordinate Judge at Islampur.

The plaintiff obtained in 1886 a redemption decree which entitled him to recover possession of the mortgaged property in the month of Chaitra of any year provided he paid Rs. 55 to the defendant. Nothing was done till 1919, when the plaintiff paid the amount into Court and applied to execute the decree.

The lower Courts dismissed the application on the ground that it was barred by time.

The plaintiff appealed to the High Court.

A. G. Desai, for the appellant.

H. G. Kulkarni, for the respondents.

MACLEOD, C. J. :—A decree was passed in August 1886 in a suit between the respective predecessors of the parties in which a consent decree was taken in the following words :—

"The plaintiff do pay to the defendants Nos. 2 and 3 Rs. 55 (in words fifty-five rupees) in respect of the debt on mortgage in the month of Chaitra of any year and the plaintiff do obtain possession of the lands in suit considering the same to have been redeemed from the mortgage. It should be understood that the plaintiff is not entitled to take possession of the lands in dispute in any other month except the month of Chaitra."

The plaintiff is now seeking to execute that decree and was met by the contention that execution was barred by limitation. The trial Court, relying upon the decision in *Maruti v. Krishna*⁽²⁾, held that the application was time-barred, and disallowed the plaintiff's application to treat the Darkhast as a suit under

⁽¹⁾ (1918) 43 Bom. 334.

⁽²⁾ (1899) 23 Bom. 592.

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section 47, Civil Procedure Code, as the relationship of mortgagor and mortgagee no longer existed.

This decision was confirmed in appeal by the District Judge. It seems that the decision of the Full Bench in *Ramji v. Pandharinath*⁽¹⁾ was not considered. I do not think that the effect of the decree of 1886 was to put an end to the mortgage, and that is the real test. The relationship of mortgagor and mortgagee still continued to exist between the parties, only the mortgage amount which had previously been in dispute was settled, and it was directed that if the plaintiff paid that amount in Chaitra of any following year, the defendants should give back possession. If the plaintiff did not choose to pay the mortgage amount, then he had no right to apply for possession. It was really a preliminary decree. It is quite true that in *Maruti v. Krishna*⁽²⁾, the Court considered that when "the words of the decree were vague and indefinite, and were to be considered as really mentioning no time for payment, the decree...[should] be taken as operating from its date, and to be enforceable only within three years from that time, unless kept alive by application for execution made according to law within the prescribed periods".

With all respect I cannot agree with that decision. Under Article 181 three years are prescribed as the period of limitation for applications for which no period of limitation is provided elsewhere in the Schedule, or by section 48 of the Code of Civil Procedure of 1908, and time begins to run from the time when the right to apply accrued. The plaintiff could apply for the assistance of the Court after he had offered to pay Rs. 55 and the defendants refused to give him possession of the land. Until he paid the money he was not

(1) (1918) 43 Bom. 334.

(2) (1899) 23 Bom. 592.

entitled to possession, and until possession was asked for and refused he had no right to apply to the Court. If he had not tendered the money, he could make no application to the Court for assistance, and it is difficult to see what sort of application the plaintiff could have made to the Court from time to time. If as a matter of fact he was not prepared to pay the amount mentioned in the decree, he could only say to the Court: "I am not ready to pay the amount, I want the time extended". The Court would reply "there is no time mentioned for the payment of the amount, therefore there is no necessity for you to make an application to extend time which has not expired". But in any event as the relationship of mortgagor and mortgagee continued after the decree of 1886 was passed, it cannot be said there was anything in that decree which could be considered as barring the plaintiff's right to redeem. He would then come under Article 148 which prescribes sixty years as the period of limitation for the redemption of a mortgage, and if his right of redemption is not barred, then under the decision in *Ramji v. Pandharinath*⁽¹⁾, he can bring another suit for redemption. Therefore, even supposing we are prepared to hold that the Darkhast is barred under section 48 of the Civil Procedure Code, then it is still open to the Court under section 47, Civil Procedure Code, to treat the Darkhast application as a suit for redemption. That seems to us a perfectly right course to take. On that ground, we think the appeal must be allowed, and the plaintiff-appellant must be allowed to redeem the mortgaged property. The plaintiff to pay costs in the trial Court. He will get his costs in this Court and in the lower appellate Court.

Appeal allowed.

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