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case there are no such new facts. *Humphries* v. *Humphries*[1] shows that in English law this equitable principle is well recognised, and I can see no adequate reason for confining it to suits and not allowing it to be raised in suitable cases in execution or other miscellaneous proceedings. On the other hand I quite agree with the rulings already referred to that great caution should be used in applying it, and that generally speaking the mere fact that an objection has not been raised at one stage of execution proceedings is not a sufficient ground for holding that the objection is barred at another stage. But the present case is, in my opinion, clearly one where the principle can be properly applied.

Therefore, the lower Court was wrong in holding that there had been no previous adjudication on this point, and that the plea of limitation could now be raised. I agree with the order proposed by the learned Chief Justice.

I also agree as to the desirability of amending Order XXI, Rule 89, and Rule 16 of the rules regarding execution of decrees by a Collector.

Decree reversed.

J. G. R.

[1] [1910] 1 K. B. 796 ; on appeal [1910] 2 K. B. 531.

APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Fawcett.

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June 25.

HANAMGOWDA SHIDGOWDA PATIL (ORIGINAL PLAINTIFF), APPELLANT v. IRGOWDA SHIVGOWDA PATIL (ORIGINAL DEFENDANT), RESPONDENT*.

Indian Limitation Act (IX of 1908), Schedule I, Articles 91 and 144—Mortgage with possession by a Hindu widow—Sale of equity of redemption —Subsequent adoption by widow—Redemption of mortgage by purchaser of the equity of redemption—Suit by adopted son to recover property—Adverse possession.

* First Appeal No. 269 of 1922.

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Certain property inherited by a Hindu widow from her husband was mortgaged by her with possession in May 1900. Six months later she sold it to her son-in-law, the defendant, for Rs. 1,500, Rs. 1,200 of which were to be paid by the latter to the mortgagee in satisfaction of the mortgage. The balance of Rs. 300 remained in fact unpaid. The widow adopted the plaintiff in 1907 and died shortly afterwards. The defendant paid off the mortgage and obtained possession of the property in March 1908. The plaintiff sued in December 1919 to recover possession of the property.

Held, that the suit was not barred under Article 91 of the Indian Limitation Act, 1908, inasmuch as it was not essential for the plaintiff to set aside the sale.

Per SHAH, Ag. C. J. :—"It may be taken as established...that in the case of a reversioner it is not essential for him to set aside any alienation by the widow.... It is true that the case of an adopted son, with which we are concerned now, stands on a different footing in this sense that the rights of the adopted son come into existence as soon as he is adopted by the widow, and the rights of the widow as the heir of her husband come to an end on adoption, while, in the case of a reversioner, his rights come into existence on the death of the widow. Subject to that important difference, there is no essential difference between the position of the adopted son seeking to enforce his rights with reference to the property alienated by the widow before the adoption and that of the reversioner seeking to enforce his rights with regard to property alienated by the widow before her death."

Moro Narayan Joshi v. *Balaji Raghunath*[1] and *Ramakrishna* v. *Tripurabai*[2], referred to and relied on.

Held, further, that the suit was not barred under Article 144, inasmuch as the adverse possession of the equity of redemption by the defendant did not commence till March 1908, when he paid off the mortgage and took possession of the property, there having been no overt act on his part prior to that date to show that he was in possession of the equity of redemption.

Held, therefore, that the plaintiff was entitled to recover possession of the property on payment to the defendant of the amount spent by the latter in paying off the mortgage.

APPEAL from the decision of V. V. Kamat, First Class Subordinate Judge at Belgaum.

One Nilava, a Hindu widow, mortgaged with possession certain property, which she had inherited from her husband, to Gadgil for Rs. 1,200, on May 22, 1900. On November 17, 1900, she sold the property for

[1] (1894) 19 Bom. 809 [2] (1908) 33 Bom. 88.

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Rs. 1,560 to her son-in-law (defendant). Rs. 1,200 out of the consideration was to be expended by the defendant in paying off the mortgage. The balance of Rs. 300 was to be paid to Nilava but was not in fact paid to her.

Nilava adopted the plaintiff in November 1907 and died in the following month.

The defendant duly paid off the mortgage and obtained possession of the property on March 25, 1908.

On December 22, 1919, the plaintiff sued to recover possession of the property. The suit was filed in the Athni Court, but the plaint was returned for presentation in the proper Court. The plaint was thereafter on November 17, 1920 filed in the Court of the First Class Subordinate Judge at Belgaum.

The suit was dismissed by the trial Judge on the ground that it was barred by Article 91 of the Indian Limitation Act, 1908.

The plaintiff appealed to the High Court.

Coyajee, with *Nilkant Atmaram*, for the appellant.

G. N. Thakor, with *H. B. Gumaste*, for the respondent.

SHAH, Ag. C. J. :—The facts necessary to understand the points arising in this appeal may be briefly stated. One Shidgauda died in 1894-95 leaving a widow Nilava. On May 22, 1900 she mortgaged the two raytava lands which are now in suit with possession to one Shankar Vishnu Gadgil for Rs. 1,200. The consideration was made up of certain debts of her husband to be satisfied and Rs. 528-5-0 taken in cash by Nilava at the time for her maintenance, and for the satisfaction of miscellaneous debts incurred by her and her husband. Six months after that, i.e., in November 1900, Nilava sold the property in suit to the present defendant for Rs. 1,500, Rs. 1,200 out of which were in respect of the

mortgage just referred to, and Rs. 300 were stated to have been taken in cash to meet the expenses of household affairs in those days of famine and to pay off other debts. The defendant was the son-in-law of Nilava. In November 1907 the plaintiff was adopted by Nilava, and Nilava died in December 1907. On March 25, 1908, defendant paid off the mortgage of May 22, 1900, and obtained possession of the property. It is found that Rs. 1,100 were paid in fact to satisfy that mortgage.

On December 22, 1919, the plaintiff filed a suit in the Athni Court for setting aside the sale-deed passed by Nilava in favour of the defendant, and to recover possession of the plaint lands with mesne profits; but it was found that that Court had no jurisdiction to entertain the suit with the result that the plaint was returned for presentation to the proper Court. The suit was then filed on November 17, 1920, in the Court of the First Class Subordinate Judge at Belgaum. The defendant pleaded that both these alienations, one by way of mortgage and the other by way of sale, were for legal necessity, and that in any case the plaintiff's claim was time-barred.

The learned trial Judge examined the evidence relating to the alleged necessity for these alienations, and he came to the conclusion that the sale to the defendant was not proved to be for legal necessity. He was not satisfied that Rs. 300, said to have been paid in cash, were in fact paid. But he held that the transaction was not a nominal and colourable transaction, and he also held it proved that the defendant had actually paid in March 1908, Rs. 1,100 to the mortgagee for the satisfaction of the mortgage of May 22, 1900. The learned Judge, however, came to the conclusion that the plaintiff's claim was time-barred. He held it to be time-barred on the ground that it was essential for the

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plaintiff to set aside the sale-deed in favour of the defendant, and that Article 91 of the Indian Limitation Act, Schedule I, would apply to such a claim. He found, however, as a fact that the defendant obtained possession of the property in March 1908. He also found that the time taken up by the plaintiff in prosecuting his remedy in the Athni Court should be excluded, and he expressed the opinion that if Article 91 were not applicable, the plaintiff's claim would be in time as being within twelve years from the date when the defendant's possession became adverse to the plaintiff deducting the time occupied in the Athni Court. In the result, though he found that the defendant had paid off the mortgage, and that the plaintiff was otherwise entitled to the relief subject to the payment of Rs. 1,100, he dismissed the plaintiff's suit on the ground of limitation.

In appeal it has been urged on behalf of the appellant that the lower Court is not right in its view that Article 91 is applicable to this case, and that it is essential for the plaintiff before he can get this relief to set aside the sale in favour of the defendant. It is urged that it is open to him to claim possession of the property without setting aside the sale, treating the sale as not being operative against him. It is also contended that if that view is accepted, the conclusion of the lower Court is right that otherwise the claim is in time. On behalf of the respondent it is contended that the right of the adopted son came into existence on the date of the adoption, and that it was necessary for him to sue the defendant within twelve years from that date, as he must be treated immediately on adoption to be in adverse possession of the equity of redemption against him. It is urged that the lower Court's view that the adverse possession commenced really when the defendant got possession from the mortgagee on March 25, 1908, is not correct, and that the period of

limitation really commenced to run against the plaintiff from the date of the adoption. If that view is accepted the plaintiff's claim having been brought more than twelve years after that date, (even excluding the time occupied in the Athni Court) it is barred. It is not seriously contended on his behalf that Article 91 would apply. Further it is urged that the lower Court's finding as to the receipt of cash consideration of Rs. 300 is not right.

As regards this question of fact, in spite of the argument of the respondent to the contray, we are satisfied that the view taken by the lower Court is right, and it is not satisfactorily proved in the case that there was any necessity to execute this sale-deed at the time. The mortgage was effected only a few months before, and there could have been no pressure because there was a condition in the mortgage that the money was to be paid in two years. The evidence as to the payment of Rs. 300 has been properly appreciated by the learned Judge ; and no good reason is shown for holding that the view taken by the lower Court on this point is not right.

We, therefore, accept the facts found by the lower Court. The sale-deed remained practically a paper transaction from 1900 up to the time the defendant paid off the mortgage in March 1908 and obtained possession from the mortgagee. It has been pointed out to us that in the revenue year 1907-08 an entry was made in the Record of Rights that there was a sale in favour of the defendant. That, however, does not alter the position, that so far as the outward appearances went, beyond taking the document in 1900 the defendant who was the son-in-law of Nilava did nothing to show that he was asserting his right under the sale-deed. The first tangible act on his part, of which we have

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evidence on this record, is the payment made by him to the mortgagee in March 1908, and the recovery of possession of the lands from the mortgagee at that time.

The first point to be considered is whether the lower Court's view that it was essential for the plaintiff to set aside the sale under Article 91 is correct. We are of opinion that the view of the lower Court is not right, and is not supported by any authority. So far as we can see it is opposed to the decisions of this Court to which we shall presently refer. It may be taken as established, and there is ample authority for the proposition, that in the case of a reversioner it is not essential for him to set aside any alienation by the widow, but that he could sue to enforce his right as a reversioner without setting aside the alienation within the period prescribed by the Indian Limitation Act after the death of the widow. That position is supported by the decisions in *Harihar Ojha* v. *Dasarathi Misra*[1], *Rakhmabai* v. *Keshav*[2] and *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[3]. That is not in dispute. But the learned Judge apparently is of opinion that the case of a reversioner stands on a different footing from that of an adopted son. It is true that the case of an adopted son, with which we are concerned now, stands on a different footing in this sense that the rights of the adopted son come into existence as soon as he is adopted by the widow, and the rights of the widow as the heir of her husband come to an end on adoption, while in the case of a reversioner his rights come into existence on the death of the widow. Subject to that important difference, there is no essential difference between the position of the adopted son seeking to enforce his rights with reference to the property alienated by the widow before the adoption

[1] (1905) 33 Cal. 257.

[2] (1906) 31 Bom. 1.

[3] (1907) 34 Cal. 329.

and that of the reversioner seeking to enforce his rights with regard to property alienated by the widow before her death. The decisions of this Court in *Moro Narayan Joshi* v. *Balaji Raghunath* [1] and *Ramakrishna* v. *Tripurabai* [2] make this position clear. Though these decisions do not directly deal with the question as to whether it is essential for the adopted son to set aside a deed or not, it seems to us that it is necessarily involved in the decision in *Moro Narayan Joshi* v. *Balaji Raghunath* [1] where it was held that to a suit by the adopted son Article 140 or 144 would apply. The leaning of the Court was distinctly in favour of applying Article 144 to a suit by the adopted son. But it was not suggested in that case that Article 91 would apply, and though on the facts of that case it may be said that it made no difference whether Article 91 would apply or Article 144 or 140 would apply, it seems to us to be a fair inference from the judgments in that case that Article 91 would have no application. Besides there is no reason why the adopted son should be required to set aside the deed any more than a reversioner. It is clear, therefore, that the view taken by the lower Court as to the application of Article 91 and as to the necessity on the part of the adopted son to set aside the sale is not right.

The real answer which the respondent has attempted to offer in support of the decree of the lower Court on the question of limitation is not that it is essential for the adopted son to set aside the sale, but that in fact the suit has not been brought within twelve years from the date on which his rights accrued. His rights accrued in November 1907, and the suit in the Athni Court was filed in December 1919. It is urged that the claim is beyond time on that ground, as ever since the date of the sale deed the equity of redemption

[1] (1894) 19 Bom. 809.

[2] (1908) 33 Bom. 88.

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was vested in the defendant, and he was in possession and enjoyment of the equity of redemption as from that date. The rights of the adopted son accrued on his adoption, and applying Article 144 to his claim we have to consider whether his present claim is in time. In substance this is a suit for possession of immoveable property, and by way of reply it is urged that the defend ant has been in adverse possession of the equity of redemption for over twelve years. It is always a difficult thing to determine as to when the adverse enjoyment of the right of the equity of redemption commences when the actual possession of the property is with the mortgagee as in the present case. In a case of this kind, unless we have some clear indication in the shape of an overt act on the part of the alienee to indicate that he was asserting his rights under the sale deed, it is difficult to say that he was in possession of that right. Taking the situation as it was in November 1907 when the plaintiff was adopted, it appears that shortly after that the widow died; and we find that the defendant paid off the mortgage and took possession of the mortgage lands in March 1908. That was the first overt act, so far as this record can show, on the part of the defendant, when he really came into possession of his rights under the sale-deed. As against this, it is urged that at least as regards the equity of redemption, he must be taken to have been in adverse possession since November 1907. The interval is very short and, as we have said, there was no clear indication by any overt act on the part of the defendant that at that date he was actually in possession of this intangible right against the adopted son. The first indication that we have after the adoption of any assertion on the part of the defendant of his right to this property is when he took possession of the property in March 1908. In the circumstances of this case, it seems to us that the lower

Court was right in its conclusion that the adverse possession of the defendant really commenced in March 1908 when he took possession of the mortgaged property. This conclusion appears to work out a just result namely that the defendant who has paid the mortgage amount to the mortgagee will be able to recover his mortgage amount and the property will go to the rightful owner, the adopted son.

We, therefore, reverse the decree of the lower Court and pass a decree in favour of the plaintiff, directing that he should pay Rs. 1,100 to the defendant within six months, and on his paying that sum the defendant should hand over possession of the properties in suit free from all incumbrances. The plaintiff to pay half the costs of the defendant in the lower Court, and to get the costs of the appeal here from the defendant. If such payment is not made in six months, the plaintiff shall be debarred from all right to possession of the property on the decree being made final.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Fawcett.

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June 27.

LAXMAN BABURAO SONAR AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* RAMCHANDRA RAJARAM SONAR (ORIGINAL PLAINTIFF), RESPONDENT*.

Civil Procedure Code (Act V of 1908), Schedule II, Paras. 11, 16—Special Case—Statement permitted only on question of law—Award—Pronouncement of judgment thereon—Indian Limitation Act (IX of 1908), Schedule I, Article 158.

The scope of the special case contemplated under Para. 11 of the Second Schedule, Civil Procedure Code, 1908, is limited to questions of law.

*Appeal from Order No. 10 of 1922.