

Reference has also been made to numerous decisions in the Court of the Agent to the Governor in Kathiawar on appeal from the Courts of States which do not possess final jurisdiction, and also in the Courts of Junaghad. They are of no value except to show that it has always been taken for granted that Halai Memons in Kathiawar are governed by Hindu law in matters of inheritance and succession, while the chief question in dispute was whether they were also governed by the Hindu law of partition and the joint family.

I agree that the appeal succeeds and the plaintiff's suit must be dismissed.

Solicitors for appellants: Messrs. *Wadia, Gandhi & Co.*

Solicitors for first respondent: Messrs. *Payne & Co.*

Solicitors for respondents Nos. 2 and 3: Messrs. *Little & Co.*

Solicitors for respondent No. 4: Messrs. *Surveyor & Co.*

Appeal allowed.

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Shah, on difference between Mr. Justice Heaton and Mr. Justice Pratt.

VASUDEV VISHNU HASABNIS (ORIGINAL DEFENDANT NO. 1, JUDGMENT-DEBTOR), APPELLANT *v.* GOPAL PARASHRAM KULKARNI (ASSIGNEE OF ORIGINAL PLAINTIFF, * DECREE-HOLDER) RESPONDENT.*

Indian Limitation Act (IX of 1908), Articles 181, 182—Redemption of mortgage—Decree for redemption—Application for time to pay the mortgage amount into Court and recover possession—Limitation—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15B.

* Second Appeal No. 358 of 1917.

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On the 17th January 1907, the plaintiff obtained a decree in a redemption suit brought under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. The decree remained unexecuted. In 1915, the rights under the decree were assigned by the plaintiff to the respondent, who applied to the Court on the 27th September 1915 to be allowed to pay the mortgage amount into Court and get possession of the property under the decree. The lower Courts held the application was in time and ordered warrant for possession to issue. On appeal to the High Court, Heaton and Pratt, JJ., having differed in opinion, referred the following point of law to a third Judge :—

“Is the application or is it not time-barred under Article 181 of the Schedule to the Limitation Act, the application being regarded as one to extend time for the payment of the mortgage debt ?”

Held, by Shah, J. (agreeing with Heaton, J., but differing from Pratt, J.), that, treating the application as one to extend time for the payment of mortgage debt it was barred under Article 181 of the Limitation Act.

Held, further, by Shah, J., that even if the application were treated as one not merely for the extension of time for the payment of the mortgage debt but for the recovery of possession of the property, as in terms it purported to be, it was an application for the execution of the decree and as such it was time-barred under Article 182 of the Limitation Act.

SECOND appeal from the decision of W. Baker, District Judge of Satara, confirming the order passed by A. R. Gupte, Subordinate Judge at Islampur.

Execution proceedings.

On the 17th January 1907, one Bapu obtained a redemption decree against the defendant, under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. The decree ran as follows :—

“The plaintiff do within six months from this day pay a sum of Rs. 391-13, namely, three hundred and ninety-one rupees and annas thirteen and the defendant No. 1's costs of the suit to the defendant No. 1 and recover possession of the property in suit. In the event of the plaintiff failing to pay the moneys as stated above, the defendant No. 1 may apply for obtaining relief under section 15 B of the Dekkhan Agriculturists' Relief Act....The defendant No. 1 do take in lieu of interest the income of the said land until the mortgaged property in suit is redeemed.”

Neither party took any proceedings under the decree.

On the 19th July 1915, Bapu assigned his rights to Gopal, who applied to the Court on the 27th September 1915, for permission to pay the mortgage amount into Court and recover possession of the property.

The first Court was of opinion that the right to redeem was not lost to the mortgagor; and that the applicant was not prevented by limitation from applying for possession. The Court, therefore, ordered possession warrant to be issued in favour of the applicant.

This order was confirmed by the lower appellate Court.

Defendant No. 1 appealed to the High Court.

The appeal was heard by Heaton and Pratt, JJ., on the 17th December 1918, when their Lordships having differed in opinion on a point of law, delivered the following judgments :—

HEATON, J. :—The application with which we are here concerned comes within the words of Article 181 of the Schedule to the Limitation Act. The right to apply to pay the mortgage money accrued at the latest on the last day for payment allowed by the decree and this was 17th July 1907. The present application was presented in 1915 much more than three years later and so is time-barred. That is how the matter appears to me.

It is suggested that this application was made during the pendency of a suit and being appropriate to what was in progress or pending is not affected by any bar of limitation. The right to apply was in fact a recurring right. As I understand the matter there was not a pending suit. No doubt the suit might in a sense be regarded as pending so long as only a preliminary decree had been passed and a final decree was still

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possible. But even before the end of 1910, three years after the date fixed for payment, a final decree had become impossible, an application for a final decree having become time-barred to both parties. Therefore, as it seems to me, there was not a pending suit and the application we have here to deal with was time-barred.

My learned brother is not of this opinion. I concur with him that we may fairly treat the application as one for extension of time and that if it is not time-barred the order should be as he suggests.

We both agree that if the application is time-barred the matter should be remanded so that the Court below may consider whether the application should be treated as a suit under section 47, Clause (2), of the Civil Procedure Code.

The point of law we refer to a third Judge (section 98) is this:—

Is the application or is it not time-barred under Article 181 of the Schedule to the Limitation Act, the application being regarded as one to extend time for the payment of the mortgage debt?

PRATT, J.:—The plaintiff in this suit was the mortgagor and obtained a redemption decree against the defendant, his mortgagee, under section 15B of the Dekkhan Agriculturists' Relief Act on the 17th January 1907. He failed to pay within the time limited by the decree but as the mortgagee made no application for sale of the mortgaged property the equity of redemption remained with the plaintiff. In 1915 he assigned that equity to the present respondent who paid the decretal sum into Court and applied for possession.

The Subordinate Judge awarded possession but gave no reasons for his order. In first appeal the District Judge confirmed the order mainly on the ground that

it had been decided in the case of *Balaji v. Datto*⁽¹⁾ that the Court had power under section 15B to allow payment of instalments at any time irrespective of limitation and that therefore it was competent to the Court to allow payment at any time in one lump sum.

The reasoning of the District Judge is of course unsound, for the dictum of Chandavarkar, J., in *Balaji v. Datto*⁽¹⁾ assumed that there was an execution proceeding pending.

In my opinion the application should have been treated as one made for enlargement of time to be followed by an order for execution of the decree as was done in the case of *Ishwar Lingó v. Gopal Jivaji*⁽²⁾.

Mr. Coyaji contends that the application for enlargement of time is itself an application for execution and is therefore barred by Article 182 and refers to the case of *Amlook Chand Parrack v. Sarat Chunder Mukerjee*⁽³⁾. In that case it was held that an application for an order absolute under section 89 of the Transfer of Property Act was an application to enforce the decree made under section 88 and therefore fell within the scope of Article 183. But the learned Chief Justice was careful to point out that under the present Civil Procedure Code applications for a decree absolute, though applications under the Civil Procedure Code, are not applications for execution but are governed by Article 181. Of course it may be contended that applications for an order absolute under section 15 B are applications for execution as the decree under section 15 B of the Dekkhan Agriculturists' Relief Act is a final decree. In my opinion the question turns upon the form of the decree. The final

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order for realization may be embodied in the preliminary order for payment under section 15 B (3) or substituted for it under section 15 B (4) and then the decree is final. If not, the decree is preliminary. Section 15 B is supplemental to the general law and the order for sale in section 15 B (2) should now, I think, be construed as equivalent to a decree for sale.

But, however that may be, it seems to me quite clear that applications to enlarge the time limited in the decree are not applications for execution, for their purpose is not to enforce the decree but to modify it. Nor do I think such an application is governed by Article 181 or is subject to the law of limitation. The right to apply for enlargement of time accrues from day to day so long as the equity of redemption remains with the applicant: *Nandram v. Babaji*⁽¹⁾.

The lower Court was therefore competent to make the order appealed against but as it has not considered whether the time for payment should be enlarged, this should now be done.

The lower appellate Court should consider, after taking or directing to be taken by the Subordinate Judge such evidence as the parties may adduce, whether there is good cause shown for enlarging the time fixed by the decree; and if so, whether the appellant should be put to terms—and if so, whether the application may, under section 47 (2), Civil Procedure Code, be treated as a suit.

I would reverse the decree of the lower appellate Court and remand the application for disposal in accordance with this judgment.

Owing to the above difference in opinion, the case was heard by Shah, J., under the provisions of section 98 of the Civil Procedure Code.

⁽¹⁾(1897) 22 Bom. 771.

Coyajee, with *S. Y. Abhyankar*, for the appellant :—
The decree in this case is passed under section 15B of the Dekkhan Agriculturists' Relief Act. It is complete in itself and capable of being executed: see *Kashinath Vinayak v. Rama Daji* ⁽¹⁾. It should, therefore, have been executed within three years of its date.

Even if the decree were outside the Dekkhan Agriculturists' Relief Act, then it would be governed by section 89 of the Transfer of Property Act and Article 182 of the Indian Limitation Act would apply: *Amlook Chand Parrack v. Sarat Chunder Mukerjee* ⁽²⁾ affirmed in *Munna Lal Parruck v. Sarat Chunder Mukerji* ⁽³⁾; *Bhagawan v. Ganu* ⁽⁴⁾; *Ganu v. Narayan* ⁽⁵⁾; *Abdul Majid v. Jawahir Lal* ⁽⁶⁾; *Batuk Nath v. Munni Dei* ⁽⁷⁾; *Mancherji Thakordas* ⁽⁸⁾; and *Balaji v. Datto* ⁽⁹⁾.

If the present application be regarded as an application under the Civil Procedure Code of 1908, Order XXXIV, Rule 8, then it falls under Article 181 of the Indian Limitation Act: see *Datto Atmaram v. Shankar Dattatraya* ⁽¹⁰⁾.

Mr. Justice Pratt refers to two cases. In *Ishwar Lingo v. Gopal Jivaji* ⁽¹¹⁾ the application having been within three years, the case has no bearing on the present case. The second case (*Nandram v. Babaji* ⁽¹²⁾) has no bearing on the point arising in the present case.

It is difficult to realise how the right to apply is a daily accruing right. In that view even an application for execution of a decree is a daily accruing right.

⁽¹⁾ (1916) 40 Bom. 492.

⁽²⁾ (1911) 38 Cal. 913.

⁽³⁾ (1914) L. R. 42 I. A. 88.

⁽⁴⁾ (1899) 23 Bom. 644 at p. 650.

⁽⁵⁾ (1903) 5 Bom. L. R. 540.

⁽⁶⁾ (1914) 36 All. 350 at p. 353.

⁽⁷⁾ (1914) L. R. 41 I. A. 104.

⁽⁸⁾ (1906) 31 Bom. 120.

⁽⁹⁾ (1907) 9 Bom. L.R. 1026.

⁽¹⁰⁾ (1913) 38 Bom. 32.

⁽¹¹⁾ (1903) 28 Bom. 102.

⁽¹²⁾ (1897) 22 Bom. 771.

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The theory of continuous accrual derives no support either from the Limitation Act or from the decided cases.

The present case is very similiar to *Etyati Pooparambil Bava v. Matalakat Krishna Menon*⁽¹⁾.

K. H. Kelkar, for the respondent:—The whole question is to be answered with reference to the particular terms of the decree. It purports to be passed under section 15 B of the Dekkhan Agriculturists' Relief Act. Under the decree the mortgagee was entitled to apply for sale or to remain in possession and enjoy the usufruct in lieu of interest. The mortgagee has continued in possession and not applied for sale. Therefore the relationship of mortgagor and mortgagee subsists between the parties and the mortgagor has the right to make payment and apply for possession at any time within sixty years either from the date of the decree or the date of the mortgage.

Even if Article 181 of the Limitation Act applied, the right to apply accrued on the day the payment was made.

Even assuming Article 182 applied under the peculiar terms of the decree the mortgagor was entitled to execute the decree on payment as long as his right was not extinguished. The decree becomes capable of execution only on payment of the mortgage debt. The decree in this case allowed six months' period for payment.

The present application is, therefore, in the first instance for modification of the decree by extending the time and then for execution.

Such an application is not governed by any period of limitation: see *Madhabmani Dasi v. Lambert*⁽²⁾ and *Muhammad Masihullah Khan v. Jarao Bai*⁽³⁾.

⁽¹⁾ (1904) 28 Mad. 211.

⁽²⁾ (1910) 37 Cal. 796.

⁽³⁾ (1915) 37 All. 226.

[SHAH J.:—Is that argument not rejected by Sir Lawrence Jenkins in *Amlook Chand Parrack's case*⁽¹⁾ and also in *Datto Atmaram v. Shankar Dattatraya*⁽²⁾.]

Sir Lawrence Jenkins refers simply to *Madhabmani Dasi's case*⁽³⁾ but does not discuss it.

(*Coyajee* refers to *Bisseswar Sonamut v. Jasoda Lal Chowdhry*⁽⁴⁾.)

This is a peculiar decree and not an executable decree as it is; a further step is necessary.

[SHAH J.:—If it is not an executable decree then it will be governed by Article 181. When do you say the right to apply accrued?]

My right to apply accrued on payment. Even under Article 182 the right to execute the decree for possession arose only when payment was made. I also contend that the mortgage does not come to an end till redemption, sale, or dismissal. The *lis* is pending till then, and any application made during the pendency of the *lis* is not governed by any Article of the Limitation Act: see *Madhabmani Dasi v. Lambert*; ⁽⁵⁾ *Muhammad Masihullah Khan v. Jarao Bai*⁽⁶⁾ and also *Bhugwan Das Khettry v. Nilkanta Ganguli*⁽⁷⁾.

Coyajee, in reply:—An application for enlargement of time is an application under the Civil Procedure Code (Order XXXIV, Rule 8), and time is therefore governed by Article 181. The case of *Muhammad Masihullah Khan v. Jarao Bai* is not applicable because the question therein was under Order XXII, Rule 10. The ruling in *Madhabmani Dasi v. Lambert*⁽⁸⁾ is no longer good law in view of the Privy Council decision in *Amlook Chand Parrack v. Sarat Chunder Mukerjee*⁽¹⁾.

(1) (1911) 38 Cal. 913.

(2) (1913) 38 Bom. 32.

(3) (1910) 37 Cal. 796.

(4) (1913) 40 Cal. 704 at p. 709.

(5) (1915) 37 All. 226.

(6) (1904) 9 C. W. N. 171.

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SHAH, J.:—In this appeal in consequence of the difference of opinion between the learned Judges who heard the appeal the following question has been referred to me under section 98 of the Code of Civil Procedure:—

“Is the application or is it not time-barred under Article 181 of the schedule to the Limitation Act, the application being regarded as one to extend time for the payment of the mortgage debt?”

The few facts connected with this question are these: On the 17th of January 1907, the plaintiff obtained a decree in a redemption suit in these terms: “The plaintiff do within six months from this day pay a sum of Rs. 391-13-0 and the defendant No. 1’s costs of the suit to the defendant No. 1 and recover possession of the property in suit. In the event of the plaintiff failing to pay the moneys as stated above, the defendant No. 1 may apply for obtaining relief under section 15 B of the Dekkhan Agriculturists’ Relief Act.....The defendant No. 1 do take in lieu of interest the income of the said land until the mortgaged property in suit is redeemed.” Neither party took any steps to execute this decree which was passed under section 15 B of the Dekkhan Agriculturists’ Relief Act. In 1915 the rights under the decree were assigned to the present respondent, who as representing the plaintiff made an application on the 27th of September 1915 requesting the Court to allow him to pay the money which the plaintiff was required to pay and to get possession of the property under the decree. The trial Court allowed this application. The lower appellate Court confirmed that order, and in the appeal here in consequence of the difference of opinion, to which I have adverted, the question stated above has been referred to me.

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On a consideration of the arguments urged on either side and the reasons set forth in favour of either view in the differing judgments, I am of opinion that treating the application as one to extend time for the payment of the mortgage debt it is barred under Article 181 of the Limitation Act.

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In 1907 when this decree was passed under the Dekkhan Agriculturists' Relief Act, it was a decree capable of execution. It is not necessary, for the purposes of this reference to express any opinion as to whether it was a decree which required to be made absolute by any further application either under the provisions of the Transfer of Property Act then in force, or, after the Civil Procedure Code of 1908 came into force, under the corresponding provisions of the Code.

Whether it was a decree *nisi* which required to be made absolute or not, it was a decree capable of execution; and any application to execute it would be governed by Article 182. If the application of the 27th September 1915, be treated as an application, not merely for the extension of time for the payment of the mortgage debt but for the recovery of possession of the property, as in terms it purports to be, it is an application for the execution of the decree and as such it is time-barred under Article 182. But treating it as an application for the enlargement of time only, as stated in the question formulated for decision, I do not see how it can be held that there is no period of limitation applicable to it. Article 181 refers to applications for which no period of limitation is provided elsewhere in the first Schedule of the Limitation Act or by section 48 of the Code of Civil Procedure. An application for the extension of time for the payment of the mortgage debt under a redemption decree, if not treated as an application for the execution of the decree, would clearly fall under Article 181. It is an application

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for the exercise of powers referred to in the Code, and there is no other period of limitation prescribed for such an application on the assumption that it is not an application for the execution of the decree. The application would be time-barred, if it were not made within three years from the date on which the right to apply accrued. In the present case the right to apply for the extension of time accrued on the date of the decree or at the latest on the expiry of the period of six months fixed for the payment of the debt under the decree.

It is urged that the right to apply for the extension of time accrues from day to day so long as the right to redeem subsists, and that in effect there is no period of limitation applicable to an application for the extension of time. It is further urged that such an application is really an application for a modification and not for the execution of the decree. These contentions have been accepted by my brother Pratt. With great deference, I am unable to accept them.

As regards the first contention I do not think that the right to apply can be treated as a right accruing from day to day. The Court has the power to enlarge the time fixed under the decree for the payment of the mortgage debt; but it has no power to enlarge the time prescribed by the Limitation Act. By treating the right to apply for the extension of time as a right accruing from day to day, the Court would in effect be allowing the plaintiff to do that indirectly, which he could not do directly. That is though his application for execution is time-barred, he could get over it by applying merely for extension of time long after the execution is time-barred. In effect the argument involves the result that there is practically no period of limitation governing the execution of an executable

decree, so long as the right to redeem is not extinguished. I am of opinion that an argument involving such a result ought to be negatived.

As to the second contention that the application is not to execute but to modify the decree, I doubt whether it has any practical importance in this case, as the question for decision apparently proceeds on the assumption that it is not an application for execution of the decree. If it were an application for execution it would be clearly barred under Article 182. But apart from this consideration, it seems to me to be in substance a part of the execution proceedings. The plaintiff cannot recover possession under the decree without paying the amount within the time fixed by the decree or within such further time as the Court may allow under the provisions of the Code; and an application to extend the time is really an application to take a necessary preliminary step by way of execution when the payment is not made within the time fixed by the decree. For the purposes of limitation it may not be governed by Article 182; that question does not directly arise in this case. But it would be and ought to be governed by Article 181. It seems to me that the provisions of the Limitation Act as well as the provisions of the Code relating to mortgage decrees can be given due effect without leading to any anomalous result by holding that an application to extend time is governed by Article 181.

It will appear from the observations in *Amlook Chand Parrack v. Sarat Chunder Mukerjee*⁽¹⁾ and the decision in *Datto Atmaram v. Shankar Dattatraya*⁽²⁾ that an application for a decree absolute under Order XXXIV is governed by Article 181. The contention that there is no period of limitation for an

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⁽¹⁾ (1911) 38 Cal. 913 at pp. 921-923.

⁽²⁾ (1913) 38 Bom. 52.

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application by the mortgagor to extend time for the payment of the mortgage debt, does not appear to me to be reconcilable with the view taken in the said cases.

It is needless to refer to other cases cited at the bar. I may mention that there is nothing, in my opinion, in *Nandram v. Babaji*⁽¹⁾ and *Ishwar Lingo v. Gopal Jivaji*⁽²⁾, which can be construed as being in conflict with my conclusion. The point, that I have to decide, did not arise in these cases.

I, therefore, agree with my brother Heaton that the application is time-barred.

As to the final order to be made, it appears that both the learned Judges agree, as stated in the judgment of Heaton J., that if the application is time-barred the matter should be remanded so that the Court below may consider whether the application should be treated as a suit under section 47, Clause (2), of the Civil Procedure Code. The parties have raised no objection to the proposed order; and there has been no argument before me on the point. Under the circumstances that must be the final order. I express no opinion as to the propriety of such an order. I desire to make it clear that I express no opinion as to whether under the circumstances a second suit for redemption can lie.

The result is that the orders of the lower Courts are set aside and the matter is remanded so that the Court below may consider whether the application should be treated as a suit under section 47, Clause (2), of the Civil Procedure Code.

The plaintiff should pay the costs throughout up to date.

Order set aside.

R. R.

⁽¹⁾ (1897) 22 Bom. 771.

⁽²⁾ (1903) 28 Bom. 102.