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that the *shevaks* had no right to erect shops there, and compelled them to remove such shops, and ruled that the ground should remain in the possession of the idol; and we also gather from that decree, as did the Acting Joint Judge (Mr. Izon), in the present case, that the Munsiff was of opinion that the portion of the court-yard in question should remain open and unincumbered by any shops, booths, or other similar erections, and the decree of the Munsiff was affirmed on appeal and again on special appeal (see Ex. Nos. 18, 4 and 5). Under these last mentioned circumstances, we do not think it would be proper or desirable to remand the case, even at the request of the trustee, Tambekar, for the purpose of making such an inquiry as above indicated. Upon these grounds, we affirm the decree of the Acting Joint Judge (Mr. Izon), but direct that the parties respectively shall bear their own costs of this appeal.

12 B. 326.

[326] APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

BALKRISHNA INDRABHAU (*Original Plaintiff*), Appellant v.
ABAJI BIN BAHIRJI MORE (*Original Defendant*), Respondent.*
[2nd June, 1887.]

Dekkhan Agriculturists' Relief Acts (XVII of 1879), s. 20, and Act XXII of 1882, s. 15 B—Decree—Payment of decree by instalments—Default—Whole sum payable on default—No second order for instalments—Acquiescence—Effect of taking out of Court instalments paid in under second order.

Section 15 B of the Dekkhan Agriculturists' Relief Act (XXII of 1882) allows the Court to order payment of a decree by instalments either in its decree or in the course of the execution. But it does not authorize a variation of any order once so made. Nor does s. 20 of Act XVII of 1879 authorize a series of instalment-orders each one varying from the preceding.

A decree was made payable by instalments, with a proviso that in default of payment of any one instalment, the whole amount remaining due should be recoverable at once. The judgment-debtor made default. Thereupon the decree-holder sought to recover the whole amount of the decree. The judgment-debtor then applied for a fresh order for payment by instalments. The Court of first instance refused, but the Subordinate Judge in appeal granted the application. The judgment-debtor paid into Court the amount of instalments which had become due under the second order. The decree-holder took out the money so paid in.

Held, that the Subordinate Judge in appeal had no power to make a fresh order for payment by instalments varying the original order.

Held, also, that the judgment-creditor by taking out the money paid into Court by the judgment-debtor as instalments due under the second order for instalments did not bind himself to abide by that order.

[R.. 22 B., 221.]

SECOND appeal from the decree of Rao Bahadur C. N. Bhat, First Class Subordinate Judge. A. P., of Satara, in appeal No. 113 of 1885.

The appellant Balkrishna Indrabhau obtained a decree against Abaji bin Bahirji More on 11th October 1882. On Abaji's application it was ordered that the amount of the decree should be paid by annual instalments of Rs. 200 each, and that in default of payment of any one instalment, the whole sum remaining due should be recoverable at once. Abaji made default, and thereupon the appellant sought to recover the whole amount due under the decree.

[327] Abaji then made a fresh application under s. 15B of the Dekkhan Agriculturists' Act (XXII of 1882) for an order directing payment by instalments. This application was refused by the Court of first

* Second Appeal, No. 838 of 1885.

instance, but on appeal the First Class Subordinate Judge ordered that he should pay within a fortnight the amount of instalments which had become overdue, and pay the remaining amount by yearly instalments of Rs. 200 each.

Against this order the decree-holder appealed to the High Court. He however took out the money which the judgment-debtor had paid into Court on account of the instalments which had become due under the varying order.

Branson (with him *Mahadev C. Apte*), for appellant:—Section 15B of the Dekkhan Agriculturists' Relief Act (XXII of 1882) does not authorize a Court to make a series of orders for payment by instalments. He referred to *Datto Narayan v. Balwant Narayan*(1).

M. B. Chaulal, for respondent:—Section 15B of Act XXII of 1882 allows a Court to vary an order for payment by instalments. Section 20 of Act XVII of 1879 enables a Court to fix instalments. There is nothing in the Act to prevent a Court's exercising this power more than once. The decree-holder has, moreover, acquiesced in the order of the lower appellate Court, by taking out all the moneys which have been paid into Court on account of the instalments fixed.

JUDGMENT.

WEST, J:—In the present case the Court in decreeing payment of a debt secured on immoveable property granted to the judgment-debtor the indulgence of paying by annual instalments. Afterwards in the course of the proceedings in execution and after a default had been made whereby the whole sum decreed had become due, the judgment-debtor sought a new order for instalments. The Subordinate Judge in the Court of first instance refused it, but the Subordinate Judge in appeal has allowed it. The latter order cannot be sustained.

Section 15B of the Dekkhan 'Agriculturists' Relief Act XXII of 1882 allows the Court to order payment by instalments either in [328] its decree or in the course of the execution, but it does not authorise a variation of any order once so made. If this could be done, the decree would be subject to indefinite variation. It has been contended before us that such variation, in order to adapt execution to the means of the debtor, is a necessary corollary from the terms of the section; but however logical the deduction might be, the Legislature has not thought fit to draw it. Section 20 of Act XVII of 1879 provides for instalment orders in ordinary cases, but it has not been held that it authorises a series of instalment orders each one varying from the preceding.

The instalments directed by the Subordinate Judge in his varying order were paid into Court by the judgment-debtor. He had even paid in some instalments, it is said, before the order was made. The judgment creditor took these moneys out, and it is urged that he thereby bound himself to abide by the second instalment order. But the whole amount of the decree having become due to the creditor on the first default, he was quite justified in taking all that was placed at his disposal towards the discharge of the debt due to him. No condition was annexed to the tender or lodgment of the sums in Court; they were paid in and were taken out simply subject to the rights and duties of the parties as they might subsist. The judgment-debtor could not, by merely complying with or anticipating a wrong order, convert it a right one or take advantage of it as such,

(1) Printed Judgments for 1885, p. 248.

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and the judgment-creditor did not, by taking part of what was due to him as he could get it, forfeit or postpone his right to the residue.

We therefore reverse the decree in appeal and restore that of the Court of first instance with all costs on the respondent.

Decree reversed.

12 B. 329.

[329] APPELLATE CIVIL.

Before Mr. Justice Nanabhai Haridas and Mr. Justice Jardine.

GOPAL ANANT (*Original Defendant*), Appellant v. NARAYAN
GANESH (*Original Plaintiff*), Respondent.*
[2nd February, 1888.]

Hindu Law—Adoption by an unmarried man.

Adoption by an unmarried man is not invalid.

SECOND appeal from a decision of F. C. O. Beaman, Acting Assistant Judge of Satara.

This was a suit brought by the plaintiff to have it declared that he was the adopted son of one Ganesh, who was a vatandar kulkarni of the village of Angapur in the Satara District, and that as such he was entitled to a one-half share in the vatan.

The defendants, who were co-sharers with Ganesh, denied the fact of the plaintiff's adoption, and also contended that Ganesh being an unmarried man could not adopt.

The Court of first instance rejected the plaintiff's suit on the ground that the fact of adoption was not proved.

The plaintiff appealed to the Assistant Judge, who reversed the lower Court's decision with the following remarks:—

"I consider it constructively certain that the plaintiff was adopted in proper form and given in adoption by his natural father. We are in no doubt as to the intention of the adopter; we have on the record a letter written by him to the Deshpande concordantly with customary usage stating that the adoption took place on a certain date. * * *"

Defendant Gopal preferred a second appeal to the High Court.

Ganesh Ramchandra Kirloskar, for the appellant:—Ganesh, the adoptive father of the plaintiff, being unmarried could not effect a valid adoption. The Hindu law permits adoption when the possibility of issue is extinct, and until a man marries he cannot be said to be hopeless of issue. A Grihasta, *i.e.*, a married man, alone can adopt. Reference was made to West and Buhler, pp. 918 and 919, 905; Steel (new ed.), 182; *Ibid.*, p. 43, ch. IV and V, pl. 36; Vy. Mayukha, sl. 45 and 70.

[330] *Shamrav Vithal*, for the respondent:—The Hindu law does not prohibit adoption by an unmarried man. The only condition is that the adopter should be without a son. A bachelor is capable of adopting: see Mayne's Hindu Law, s. 96. Marriage is a mere Sanskar. A Brahmachari can adopt, see West and Buhler, 943, 3rd Ed. A sonless man (Aputra) includes an unmarried man: Strange's Hindu Law, pp. 65-66.

* Second Appeal, No. 557 of 1885.