

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Heaton.

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October 17. GOKALDAS KALA THAKAR (ORIGINAL DEFENDANT), APPELLANT, v.
GOVIND VISHVANATH APTE (ORIGINAL PLAINTIFF), RESPON-
DENT.*

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15B (1) —
Decree on mortgage—Direction to pay interest—Application to cancel
direction.*

A decree on a mortgage was passed by the First Class Subordinate Judge of Thána. The decree contained a direction for the payment of interest. After the decree was passed the Dekkhan Agriculturists' Relief Act (XVII of 1879) was made applicable to the Thána District. Subsequently in an execution proceeding under the decree the judgment-debtor, who was found to be an agriculturist, contended that the direction for the payment of interest in the decree should be cancelled under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15B.

Held, that the section 15B does not empower the Court to cancel a direction for payment of interest contained in a decree. The interest is as much payable under the decree as the principal, and the section does not say that the Court may direct that any amount payable under the decree shall not be payable; it merely empowers the Court to modify, in the particular manner there described, the terms of the payment.

SECOND appeal from the decision of C. C. Dutt, Joint Judge of Thána, confirming the order of Gulabdas Laldas, First Class Subordinate Judge, in a regular *darkhast*.

* Second Appeal No. 381 of 1907.

(1) Section 15B of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is as follows:—

15B. (1) The Court may in its discretion in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section 3, clause (g) or clause (2), or in the course of any proceedings under a decree for redemption, foreclosure or sale passed in any such suit, whether before or after this Act comes into force, direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest, and, where the mortgagee is in possession, as to the appropriation of the profits and according therefore, as it thinks fit.

(2)	*	*	*	*
(3)	*	*	*	*
(4)	*	*	*	*

The plaintiff had advanced Rs. 3,300 to the defendant on the mortgage of certain lands. The mortgage was without possession. Afterwards the parties appointed an arbitrator to take account of the mortgage transaction and to pass an award. The arbitrator having made the award, the plaintiff on the 26th March 1905 presented it to the Court of the First Class Subordinate Judge of Thána for being filed in Court and applied to have a decree passed in its terms. The Court accordingly passed a decree on the 30th March 1905 in the following terms:—

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It is ordered that the award, Exhibit 3, passed by the arbitrator's Court be filed and it is further ordered in pursuance of the said award, Exhibit 3, that the defendant do pay to the plaintiff within six months from this day the sum of Rs. 3,443-8-0, being the sum awarded to him in the arbitrator's award, together with interest on the principal sum of Rs. 3,300 out of the said sum of Rs. 3,443-8-0 from the 26th of March 1905, at the rate of Rs. 21 in lump sum per mensem. If the defendant fails to pay accordingly, the plaintiff shall recover, by sale of the mortgaged property referred to in the decree, the said sum of Rs. 3,443-8-0 together with compound interest on the principal sum of Rs. 3,300 out of Rs. 3,443-8-0 from the 26th of March 1905 until payment at the rate of Rs. 21 in lump sum for one month (interest being calculated) with twelve monthly rests and together with the costs of execution. In case of deficiency, (the amount due) may be recovered from the other property belonging to the defendant and from the defendant. Parties to bear their own costs of the suit.

After the above decree was passed the Dekkhan Agriculturists' Relief Act (XVII of 1879) was made applicable to the Thána District and the plaintiff thereafter presented an application to the Subordinate Judge, praying that his said decree *nisi* be made absolute and the decretal debt amounting to Rs. 3,579-8-7 together with further interest on Rs. 3,300 at 9 per centum compound interest be ordered to be recovered from the sale of the mortgaged properties and other properties of the defendant. A notice was issued to the defendant to show cause why the plaintiff's application should not be granted, and the defendant in response put in a written statement in which he stated that he was an agriculturist, that under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the history of the dealings from the commencement should be inquired into and the amount properly due be ascertained anew and

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The Subordinate Judge found that the defendant was an agriculturist within the meaning of section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), that it was not open to him to ask that the decretal amount be ascertained again after an inquiry into the history of the past dealings and that he should be directed to pay the debt by instalments. The Subordinate Judge, therefore, passed the following order:—

The defendant should pay up the decretal amount with interest under the terms of the decree in two equal instalments payable on 10th January 1907 and on the corresponding date of 1908, that in default of the first instalment the whole amount then due should be recoverable at once by the sale of the mortgaged properties and the deficiency if any from the defendant's other property.

The following are extracts from the Subordinate Judge's judgment:—

He (defendant), however, cannot ask the Court to go behind the decree, re-open the accounts of dealings and to fix again the amount of his liability under the mortgage. The contractual relations between him and the decree-holder on the foot of the mortgage-deed having been converted into those of a judgment-debtor and a judgment-creditor the mortgage has merged into a Court's decree (I. L. R. 7 Bom. 330).

In like manner it is not competent to the Court to make any alteration in the terms of the decree except as to the time and mode of payment for which an express authority is to be found in section 15B of the Act. The prayer that the interest at the compound rate on the sum of Rs. 3,300 from the date of the decree till satisfaction should be stopped is, therefore, not one that could be entertained.

The permission to pay up the decretal debt in instalment is not beyond the Court's authority under the Act.

On appeal by the plaintiff the joint Judge found that the defendant was not an agriculturist and, in reversing the order of the Subordinate Judge, cancelled the order for instalments and directed that the *darkhast* proceedings should go on according to law. The reasons assigned by the Joint Judge for holding that the defendant was not an agriculturist were as follows:—

Defendant's own witness says that defendant's income from agriculture is at the most Rs. 400.

His decretal debts amount to about Rs. 7,000 to Rs. 8,000.

Besides, there are outstandings worth about Rs. 800 to Rs. 900. From this it is clear that the income from money-lending must exceed Rs. 400 and probably even Rs. 600.

Defendant is a Thákar by caste and has formerly always described himself as a trader. This would seem to confirm the conclusion that he is more a money-lender than a cultivator.

On second appeal by the defendant the High Court reversed the decree of the Joint Judge and sent back the case "in order that it may be decided on the evidence on the record."

On the remand the Joint Judge found that the defendant was an agriculturist and confirmed the order of the First Class Subordinate Judge.

The defendant preferred a second appeal.

P. B. Shingne, for the appellant (defendant):—Under section 15B of the Dekkhan Agriculturists' Relief Act it is competent to a Court to see whether the interest allowed by the original decree which is sought to be executed is proper or not. The decision in *Nathu Laxman v. Vasir*⁽¹⁾ supports this contention. If it were otherwise great injustice would be the result; see section 71A of the Act.

Section 15B of the Act applies even though the decree was based upon an award.

G. K. Dandekar for the respondent (plaintiff) was not called upon.

JENKINS, C. J.:—This appeal arises out of the proceedings in execution of a decree passed under section 522 of the Civil Procedure Code in accordance with an award filed under section 526.

After the decree was passed the Dekkhan Agriculturists' Relief Act became applicable in the district and it is argued that the Court executing that decree can, not only prescribe instalments, but also modify the provision as to payment of interest contained in the decree by directing that interest should cease to run.

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'The decree, though passed under the chapter of the Code which relates to references to arbitration, is in effect for sale. There fore it is contended it comes within section 15B of the Dekkhan Agriculturists' Relief Act.

But the decree for sale to which that section applies must have been passed in a suit of the description mentioned in section 3, clause (y) or clause (z), and it certainly is a question whether an application under section 525 of the Civil Procedure Code is a suit of that description.

That, however, is a point on which it is unnecessary now to express a decided opinion, because there is another ground on which the appellant must fail.

In the first place, the Court undoubtedly has exercised a discretion in this matter and we can see no reason for interfering with that discretion in second appeal. And in the next place, we are unable to come to the conclusion that section 15B allows the Court to cancel a direction for payment of interest contained in the decree.

It is to be noticed that what that section says is that the Court in the course of any proceedings under a decree for sale may direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest as it thinks fit. But the interest is as much payable under the decree as the principal, and the section does not say that the Court may direct that any amount payable under the decree shall not be payable; it merely empowers the Court to modify, in the particular manner there described, the terms of the payment.

It is suggested that the decision in *Nathu Laxman v. Vazir*⁽¹⁾ shows that the Court has power to cancel a direction for payment of interest contained in the decree, but that clearly is not so.

The case was not argued on that footing and the only point considered by the Court was as to whether, as had been argued, it was compulsory on the Court to award interest by reason of

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the words "on such terms as to the payment of interest as it thinks fit." That is a different question from the one with which we are now dealing.

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The result is that the decree must be confirmed with costs.

Decree confirmed.

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APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

BAI HIRAKORE, WIDOW OF THAKARDAS JECHAND (ORIGINAL DEFENDANT), APPELLANT, v. TRIKAMDAS HIRACHAND (ORIGINAL PLAINTIFF), RESPONDENT.* 1907
November 13.

Partition Act (IV of 1893), section 2—Decree for partition—Partition of a house in two divisions—The mode of division found inexpedient in execution of the decree—Power of Court to order sale of the house and to divide the sale-proceeds.

A decree for partition of a house ordered its division into two equal moieties. In execution of the decree this mode of division was found inexpedient, and the Court, therefore, ordered the house to be sold and the sale-proceeds to be equally divided between the parties under section 2 of the Partition Act (IV of 1893). On appeal—

Held, that the order was right, for section 2 of the Partition Act (IV of 1893) applies, not only where the Court has to pass a decree in a suit for partition, but also where, after the Court has passed such a decree directing the partition to be effected in a particular mode, it is found that that mode is impracticable or inexpedient and one of the parties asks the Court to modify the decree by passing an order under this section.

Kadir Bacha Saheb v. Abdul Rahiman Saheb (1) and *Hiramoni Dassi v. Radha Churn Kar* (2) followed.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Surat, confirming the order passed by J. E. Modi, First Class Subordinate Judge of Surat.

Proceedings in execution.

* Second Appeal No. 681 of 1906.

(1) (1901) 24 Mad. 639.

(2) I (899) 5 Cal. W. N., 128.