

taken may not cover the case of a dumb person without proof of his being "incapable of conducting the family affairs," could hardly be preferred to his statement of the law on the same point, at page 44.

On the best consideration that I can give to the point, I do not think that a person having a grandson who is subject to the defect of dumbness from his birth as in the present case can correctly be described as sonless so as to make an adoption by him during the life-time of the grandson valid. I base this conclusion upon the Mitakshara and the Vyavahara Mayukha and next upon the Dattaka Mimamsa and the Dattaka Chandrika as I understand them. I hold, therefore, that the adoption of the plaintiff was invalid. I would allow this appeal and dismiss the plaintiff's suit with costs throughout.

MACLEOD, C. J. :—I concur.

Appeal allowed.

R. R.

APPELLATE CIVIL.

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

NARSINHA GOPAL AND ANOTHER (ORIGINAL JUDGMENT-DEBTORS),
APPELLANTS v. BALVANT MADHAV VADGAONKAR (ORIGINAL
DECREE-HOLDER), RESPONDENT*.

1921.

October 3.

Instalment decree—Failure to pay two instalments—Whole decree can be executed—Relief against the clause—Court of Equity.

The amount due under a decree was made payable in instalments, and it was provided that on failure to pay two instalments, the whole amount then due could be recovered with interest by sale of certain property over which a charge was declared. The first instalment which became due on the 10th

* Second Appeal No. 294 of 1921.

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May 1918 was paid on the 19th April 1919. The second instalment which became due on the 30th April 1919 was not paid. On the 9th April 1920 the judgment-debtors applied to the Court for extension of time for payment; but the application was dismissed on the 8th June 1920, on which date the amount of the second instalment was paid into Court. In the meantime, the third instalment became due on the 18th April 1920. The decree-holder, who did not accept payment of the second instalment, applied to the Court on the 4th August 1920, to recover the balance due under the decree by sale of the property:—

Held, that as a Court of Equity the Court had wide powers to do what seemed to it just; and that there was no injustice in putting the decree-holder exactly in the same position as if no default had been committed, since the decree-holder had the security of the property for the balance of the decretal amount and interest was running on that amount.

SECOND appeal from the decision of C. E. Palmer, District Judge of Sholapur, dismissing the appeal summarily against the order passed by D. G. Kamerkar, Subordinate Judge at Madha.

Execution proceedings.

The decree under execution was passed on the 22nd February 1917, on an award, which directed that the decretal amount was to be paid in eight equal annual instalments with interest. It was also directed that on failure to pay any two instalments, the plaintiff was at liberty to recover the whole amount then due with interest by sale of certain property, over which the decree had created a charge.

On the 10th May 1918 the first instalment became due. It was paid on the 19th April 1919 and accepted by the plaintiff.

The second instalment became due on the 30th April 1919. On the 9th April 1920 the defendants applied to the Court asking for time to pay it. The application was dismissed by the Court on the 8th June 1920, on which day the amount of the second instalment was paid up in Court.

In the meantime, the third instalment fell due on the 15th April 1920. It was not paid.

The plaintiff declined to accept the amount of the second instalment; and applied, on the 4th August 1920, to execute the decree by sale of the property.

The executing Court ordered execution to proceed, for the following reasons:—

“The Court had no power to grant the time *suo motu*, and by no stretch of reasoning can the period between the date of that application and the date of the final order be construed as an extension of the date of the third and critical instalment. It was defendant's business to have applied and tried his luck far earlier and got the necessary time or the rejection of his application before the third and critical instalment fell due.”

An appeal against the order was summarily dismissed by the District Judge.

The judgment-debtors appealed to the High Court.

C. H. Patwardhan, for the appellant.

G. P. Murdeshwar, for the respondent.

MACLEOD, C. J.:—This is an appeal against the decision of the District Judge of Sholapur upholding the order of the Subordinate Judge directing that the Darkhast taken out by the plaintiff should proceed.

The parties were partners in a banking shop which was not successful and so the partnership account had been made up and a balance was found due against the defendants. The plaintiff filed a Suit No. 51 of 1915 on his partnership claim and a decree was passed in his favour on an award. The decree was passed on the 22nd February 1917 directing that the decretal amount should be paid in eight equal instalments of Rs. 371-9-4 and interest according to the balance due at the time when any one instalment was paid. The decree also directed that in default of payment of any two instalments, the plaintiff should recover the whole amount

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then due by the sale of the property mentioned through the Court. It appears that in the plaint the plaintiff asked for a charge in respect of the amount due on certain immoveable property, although it is difficult to see what was the basis of the claim. However, he got a declaration in the decree that he was entitled to that charge.

There can be no doubt that the defendants got into arrears before paying the first instalment which fell due on 10th May 1918. It was not paid until 19th April 1919. The second instalment which was due on 30th April 1919 and the third instalment which was due on the 18th April 1920 were not paid. The defendants having made no further payments were in default of two instalments. Before 18th April 1920, they asked the Court to extend the time. That application was not heard until June 1920 when it was rejected. Then the defendants made payment of the second instalment which ought to have been paid on the 30th April 1919, and, on the 6th May 1921, they paid the instalment which ought to have been paid on the 18th April 1920. Therefore, the defendants cannot escape the consequences of their default except by appealing to our sense of equity.

From the record we cannot say whether the default was due to circumstances beyond their control or whether it was due to their culpable neglect in not making payment within due time of the first instalment. But we cannot agree with the argument of the plaintiff that in cases of default, we have no power whatever to relieve a party from the consequences of his default. As a Court of Equity we have wide powers to do what seems to us just. There is no injustice in putting the plaintiff exactly in the same position as if no default had been committed. The plaintiff has the security of the property for the balance

of the decretal amount and interest is running on that amount. Therefore he loses nothing of what he would have got if the defendants had done what they had been ordered to do. We, therefore, allow the appeal on these terms:—

The defendants should pay the costs of the Darkhast throughout and the instalment (including interest) which fell due in April or May 1920 within two months from the time the proceedings reach the lower Court. In default of payment the Darkhast should proceed.

Appeal allowed.

R. R.

APPELLATE CIVIL.

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

RAMCHANDRA VENKATESH SHOLAPUR (ORIGINAL DECREE-HOLDER)
 APPLICANT *v.* SHRINIWAS KRISHNA KULKARNI (ORIGINAL JUDG-
 MENT-DEBTOR), OPPONENT^o.

Civil Procedure Code (Act V of 1908), section 11—Res judicata—Decree—Execution—First Darkhast dismissed as barred by limitation—Second Darkhast sought to be brought within time by acknowledgment—Decision on first Darkhast does not operate as res judicata.

The applicant obtained a decree in 1913, which he sought to execute first in 1915 and again in 1919. The second application to execute the decree was rejected as barred by limitation. The applicant relied on an acknowledgment, dated 19th June 1917 and applied on the 19th June 1920, to execute the decree. The executing Court dismissed the application on the ground that the decision in the *Darkhast* of 1919 operated as *res judicata* in the present *Darkhast*. The applicant having applied:—

Held, the decision in the earlier *Darkhast* did not operate as *res judicata* in the present one.

Mahadeo v. Trimbakbhat⁽¹⁾, followed.

^o Civil Extraordinary Application No. 45 of 1921.

⁽¹⁾(1918) 21 Bom. L. R. 344.

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