1897.

In re Maháráná Shri Jaswat-sangji.

of Wadhela. It was on the same footing that the two tálukdárs fought the previous suit in respect of the removal of a dam higher up the river which the Návda Tálukdár had placed, and in which case this Court upheld the applicant's right to the unrestricted flow of water at all seasons into the channel of Wadhela. The present obstruction is in one sense the result of the full execution of that decree, the digging in the channel and the filling up of the bed of the river being intended to ensure a permanent flow of water in the channel.

It is thus clear that the obstruction is not a public nuisance and is not an invasion of a public right. The dispute is really, as before, between two neighbours, owners of private property, on the bank of the river. The Magistrate had thus no jurisdiction to proceed under section 133, but ought to have referred the parties to the remedy of a civil suit.

APPELLATE CIVIL.

1897.
December 8.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

LAKSHMIBAI and another (original Defendants), Appellants, *v.* RAJAJI bin DAJI (original Plaintiff), Respondent.*

Hindu law—Adoption—Specifying a child for adoption does not necessarily prevent the adoption of another if the one specified die or be refused.

Where a husband authorizing an adoption specifies the child he wishes to be taken, but that child dies or is refused by his parents, the authority given warrants (at least in Bombay) the adoption of another child. The presumption is that the husband desired an adoption, and by specifying the object merely indicated a preference.

Second appeal from the decision of Ráo Bahádur Chunilal D. Kavishankar, additional First Class Subordinate Judge of Sátára with appellate powers.

One Bhau bin Bhagoji Patil died on 26th March, 1890, leaving two widows named Tanu, the next friend of the plaintiff (a minor), and Lakshmibai (defendant No. 1). Tanu was the senior widow. The plaintiff alleged that on the 9th June, 1893, he was adopted by Tanu, and sued for a declaration of his status as such.

* Second Appeal, No. 502 of 1897.

1897.

LAKSHMIBAI v. RAJAJI.

Evidence was given that the deceased Bhagoji had directed Tanu to adopt one Bala, who was the son of his sister Goju, or had at all events indicated a preference for that child, but that, as Goju refused to give her son in adoption, Tanu had adopted the plaintiff. The defendants disputed the validity of the plaintiff's adoption.

Both the lower Courts held that the plaintiff's adoption was valid, and that he was entitled to the declaration prayed for.

The defendants preferred a second appeal.

Lang (Advocate General) with *Vishnu K. Bhatavdeker* appeared for the appellants (defendants).

Inverarity with *Mahadeo V. Bhat* appeared for the respondent (plaintiff).

The following authorities were cited:—*Ramchandra* v. *Bapu*(1); *Bayabai* v. *Bala*(2); West and Bühler, p. 965.

FARRAN, C. J.:—We think that the passage cited from West and Bühler, Volume II, page 965, correctly lays down the law for this Presidency. "It is common for a husband authorizing an adoption to specify the child he wishes to be taken. Should that child die, or be refused by his parents, the authority would still be held, at least in Bombay, to warrant the adoption of another child, unless indeed he had said 'such a child and no other.' The presumption is that he desired an adoption, and by specifying the object merely indicated a preference." It is, we think, borne out by the ruling in *Ramchandra Baji* v. *Bapu Khandu*(1). Westropp, C. J., thus states the law:—"Lalitabai could not have lawfully adopted Shivaji or any person other than Pudaji, *so long as Pudaji lived and were willing to be adopted*—for there could not be any consent on the part of Bhavanji to such an adoption implied in derogation of his express direction in favour of Pudaji."

It is not, however, actually necessary that we should decide the question in this case, for the Subordinate Judge, A. P., has found as a fact that the deceased Bhau did not so much direct that Bala, his sister's son, should be adopted, as indicate a pre-

(1) P. J., 1877, p. 42. (2) 7 Bom. H. C. Rep., App., 1.

1897.

LAKSHMIBAI v. RAJAJI.

ference for that boy, and in the absence of any objection raised by the appellants to the plaintiff's adoption on this ground, and having regard to the vagueness of the language used by Tanu and the other circumstances stated by the Subordinate Judge, A. P., we cannot say that his inference from the language used is incorrect. It is found as a fact, independently of the objection that the indicated boy was the sister's son of Bhau, that the mother of Bala refused to give him in adoption. Decree confirmed with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy,

1897. *December* 13.

JEDDI SUBRAYA VENKATESH SHANBHOG (ORIGINAL OPPONENT AND PLAINTIFF), APPELLANT, *v.* RAMRAO RAMCHANDRA MURDESHVAR (ORIGINAL PETITIONER AND DEFENDANT), RESPONDENT.*

Limitation Act (*XV of* 1877), *Sch. II, Art.* 179—*Decree partly in favour of plaintiff and partly in favour of defendant—Application for execution by one party does not prevent limitation running against the other—Civil Procedure Code* (*Act XIV of* 1882), *Sec.* 583.

A. obtained a decree against B. for possession and for Rs. 27 mesne profits. In execution he got possession. On appeal, however, the decree was reversed so far as it ordered possession to be given to him, and the amount of mesne profits awarded to him was reduced to Rs. 13-8-0. The appellate decree was passed on the 6th June, 1889.

On the 18th December, 1891, the defendant B applied to be restored to possession. That application was dropped, and on the 24th September, 1895, he made a second application. There had been nothing done in the interval except that in 1892 and again in 1894 the plaintiff had applied for execution in respect of the Rs. 13-8-0 awarded to him. The lower Courts were of opinion that the application in 1895 by the defendant was not barred by limitation by reason of the plaintiff's applications in 1892 and 1894, which they held to be an acknowledgment by the plaintiff of the defendant's right to execute his part of the decree.

Held (reversing the order of the lower Court) that the defendant's application was barred by limitation. The plaintiff's application in 1892 and 1894 did not operate as an acknowledgment so as to prevent limitation.

* Second Appeal, No. 988 of 1897.