

as such in any of the sacred texts. We are, however, of opinion that this argument goes beyond the principles on which *Lallubhai v. Mankuwarbhai*⁽¹⁾ was decided; see pp. 422 and 446 of the Report. We, therefore, confirm the decree with costs.

1894.

VENILAL
v.
PARJARAM.

Decree confirmed.

(1) I. L. R., 2 Bom., 388 at p. 445.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

SHIVRAM CHINTAMAN (ORIGINAL PLAINTIFF), APPELLANT, v.
SARASVATIBA'I (ORIGINAL DEFENDANT), RESPONDENT.*

1894.

December 3.

Execution—Decree—Application for execution—Obstruction—Suit to remove obstruction under Section 331 of Civil Procedure Code (Act XIV of 1882)—Failure of such suit—Subsequent application for execution of original decree—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 178, 179—Time occupied in suit under Section 331 not excluded where such suit fails.

On the 7th March, 1889, a decree-holder presented a *darkhást* for execution of a decree which awarded him possession of certain immoveable property. This *darkhást* was opposed by a third party, who was in possession of the property.

The decree-holder thereupon applied to the Court to have the obstruction removed. This application was registered under section 331 of the Code of Civil Procedure (Act XIV of 1882), as a suit between the decree-holder as plaintiff and the party who offered the obstruction as a defendant.

On the 22nd January, 1891, the decree-holder withdrew this latter suit. Thereupon his *darkhást* of the 7th March, 1889, was struck off the file. On the 12th November, 1892, he presented a second *darkhást* for execution.

Held, that the second *darkhást* was barred by limitation. The decree-holder having failed to remove the obstruction under section 331 of the Code of Civil Procedure, the second *darkhást* could not be treated as a continuance or revival of the first.

Kalydnbhai v. Ghanashámlal⁽¹⁾ and *Chintaman v. Bálshástri*⁽²⁾ distinguished.

APPEAL from the decision of Ráo Bahádur N. N. Nánávati, First Class Subordinate Judge of Poona, in *darkhást* No. 655 of 1893.

* Appeal No. 149 of 1894.

(1) I. L. R., 5 Bom., 29.

(2) I. L. R., 16 Bom., 294.

1894.

SHIVRÁM
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SARASVATI-
SÁI.

On the 2nd December, 1888, the plaintiff obtained a decree against one Sarasvatibái for possession of certain immoveable property.

On 7th March, 1889, the plaintiff applied for execution of the decree. This application was opposed by the Názir of the District Court, who was in possession of the property as a receiver.

The plaintiff applied to the Court to have the obstruction removed.

Thereupon the Názir's claim was registered under section 331 of the Code of Civil Procedure (Act XIV of 1882) as a suit between the decree-holder as plaintiff and the Názir as defendant.

On the 22nd January, 1891, the decree-holder withdrew this latter suit, with liberty to bring a fresh suit.

On the 24th January, 1891, the *darkhást* of the 7th March, 1889, the proceedings on which had in the meantime been kept in suspense, was struck off the file, on the ground that as the suit under section 331 of the Code of Civil Procedure (Act XIV of 1882) had been withdrawn, the *darkhást* had come to an end.

On the 12th November, 1892, the plaintiff presented a fresh *darkhást* for execution. The plaintiff afterwards withdrew from this *darkhást*, with liberty to file a fresh *darkhást*.

On the 2nd November, 1893, the plaintiff again applied for execution. This application was rejected by the Subordinate Judge as barred by limitation, on the ground that the second *darkhást* of the 12th November, 1892, having been presented more than three years after the date of the first *darkhást* (7th March, 1889,) was time-barred, and consequently the present *darkhást* was also barred by limitation.

Against this decision the decree-holder appealed to the High Court.

Shivram V. Bhandárkar for appellant :—The second *darkhást* was a continuance of the first. The proceedings under the first *darkhást* had remained in suspense pending the suit under section 331 of the Code of Civil Procedure. When the decree-holder withdrew

that suit, he was not allowed to proceed with his *darkhást*. The Court struck it off the file. The decree-holder was, therefore, obliged to present a fresh *darkhást*. This *darkhást* should be treated as a continuation of the first. The proceedings taken in the suit under section 331 of the Code of Civil Procedure were steps in aid of execution within the meaning of article 179, clause 4 of the Limitation Act. Refers to *Bechárám Dutta v. Abdul Wahed*⁽¹⁾; *Gobind Pershad v. Bung Lal*⁽²⁾; *Shurat Cluunder Sen v. Abdool Káyr*⁽³⁾; *Chandra Prodhan v. Gopi Mohun Shaha*⁽⁴⁾; *Kallyánbhui v. Ghanashámlál*⁽⁵⁾; *Chintáman v. Balshástri*⁽⁶⁾; *Rám Nárdyan Rái v. Bakhtu Kuár*⁽⁷⁾; *Táráchand v. Káshináth*⁽⁸⁾; *Vellaya v. Jaganátha*⁽⁹⁾. At any rate, the later *darkhást* should be regarded as a revival of the first *darkhást*, and so article 178 of Act XV of 1877 would apply.

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N. G. Chandávarkar for respondent:—The second *darkhást* having been presented more than three years after the date of the first, was clearly time-barred, and so no right to revive the first *darkhást* was left. What was the legal effect of the suit under section 331 of the Code of Civil Procedure? If the decree-holder had succeeded in removing the Názir's obstruction, then, no doubt, the time occupied in that suit would have been excluded. But the obstruction was not removed. The withdrawal of the suit filed under section 331 left matters precisely where they were before that suit. The Názir held as a trustee for the rightful owner. The latter can, therefore, take advantage of the Názir's proceedings—*Sanganabasaga v. Nagalingaya*⁽¹⁰⁾. The cases cited show that the proceedings under the first *darkhást* can go on only if the obstruction is removed. Here it was not. The cases, therefore, do not apply. I rely on *Unnoda Persad Roy v. Sheikh Koorpan Ally*⁽¹¹⁾; *Nilmoney Singh v. Rámjeebun*⁽¹²⁾; *Krishnáji v. Anandráo*⁽¹³⁾.

(1) I. L. R., 11 Cal., 55.

(2) I. L. R., 21 Cal., 23.

(3) 23 W. R., 327.

(4) I. L. R., 14 Cal., 385.

(5) I. L. R., 5 Bom., 29.

(6) I. L. R., 16 Bom., 294.

(7) I. L. R., 16 All., 75.

(8) I. L. R., 10 Bom., 62.

(9) I. L. R., 7 Mad., 307.

(10) P. J. for 1878, p. 173.

(11) I. L. R., 3 Cal., 518.

(12) 8 C. L. R., 335.

(13) I. L. R., 7 Bom., 293.

1894.

SHIVRÁM
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JARDINE, J.:—On the 7th March, 1889, the plaintiff (now appellant) applied for execution of the decree against the property. The Názir as receiver of an estate objected to give possession; and on the 8th April, 1889, the plaintiff applied to the Court to remove the obstruction. Under section 331 of the Code of Civil Procedure (Act XIV of 1882), the Nazir's claim was registered as if the decree-holder had sued. On the 22nd January, 1891, the plaintiff withdrew this suit, with liberty to bring a fresh suit. In this interval the proceedings on the *darkhást* of the 7th March, 1889, had remained in suspense; and on the 24th January, 1891, it was struck off, on the ground that, as the suit based on the Názir's claim had been withdrawn, the *darkhást* had come to an end. On the 12th November, 1892, the plaintiff made a fresh *darkhást*.

In the matter of appeal before us the question is, whether the Subordinate Judge was right in holding that this second *darkhást* was barred by limitation—*Unoda v. Sheikh Koorpan*⁽¹⁾. Mr. Shivráam has urged that it was presented within the periods allowed by articles 178 and 179 of Schedule II of the Limitation Act. The cases cited nearly all bear upon article 179, clause 4. He claims that the time occupied in the suit under section 331 of the Code should be excluded; or that the second *darkhást* should be treated as a revival of the first, as in *Kalyánbhai v. Ghanashámlál*⁽²⁾, *Chandra Prodhan v. Gopi*⁽³⁾, *Chintáman v. Bálshástrí*⁽⁴⁾, which last case is relied upon as being similar to the present.

With regard to these and other cited authorities, we must remark that they apply to proceedings in execution, held in suspense pending other proceedings, such as suits under section 331, until the decree-holder has succeeded in removing the obstacle. None has been shown where when the decree-holder has not succeeded, but failed to remove it, the second *darkhást* has been treated as a revival or legal continuance of the first. We must make this distinction, which is made also in *Ragunandun v. Bhugoo*⁽⁵⁾.

(1) I. L. R., 3 Cal., 518.

(2) I. L. R., 5 Bom., 29.

(3) I. L. R., 14 Cal., 335.

(4) I. L. R., 16 Bom., 294.

(5) I. L. R., 17 Cal., 268.

It is unnecessary to consider whether in no circumstances the time taken up by an unsuccessful suit should be deducted or the subsequent second *darkhást* treated as a revival. The suit in the present case having been withdrawn by the plaintiff, the assignee of the decree-holder, cannot be treated as a step in aid of the execution. We confirm the decree with costs.

Decree confirmed.

1894.

SHIVRA'M
CHINTA'MAN
v.
SARASVATI-
BAI.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

DWA'RKANA'TH APPA'JI (ORIGINAL PLAINTIFF), APPELLANT, v. A'NAND-
RA'O RA'MCHANDRA (ORIGINAL DEFENDANT), RESPONDENT.*

1894.

December 3.

*Limitation Act (XV of 1877), Art. 179, Cl. 4—“Step in aid of execution”—
Payment of deficient court fee—Execution of decree.*

An application for execution of a decree was presented on 17th July, 1890. A notice under section 248 of the Code of the Civil Procedure (Act XIV of 1882) was issued on 18th July, 1890. The process fee for service of the notice being deficient, the decree-holder paid the deficiency on 29th August, 1890. On the 22nd August, 1893, the decree-holder presented a fresh application for execution.

Held, that the second application for execution was time-barred. The payment of the additional court fee was not “a step in aid of execution of a decree” within the meaning of clause 4, article 179 of Schedule II of the Limitation Act (XV of 1877).

SECOND appeal from the decision of H. F. Aston, District Judge of Thána, in Appeal No. 367 of 1893.

The plaintiff having obtained a decree, applied for execution on 17th July, 1890. Thereupon a notice was issued under section 248 of the Code of Civil Procedure (Act XIV of 1882) on the 18th July, 1890. A process fee of annas 8, instead of Rs. 2, was levied by mistake on the notice in question in the first instance. When the mistake was found out, the decree-holders were required by the Court to make good the deficiency. The deficient court fee was paid on 29th August, 1890, but the notice under section 248 of the Code of Civil Procedure had already been issued and served on the judgment-debtor.

* Second Appeal, No. 401 of 1894.