

The duties which are imposed upon Collectors by Government Resolution under section 93 of the Code are duties of a very special nature, the discharge of which often requires serious consideration, and we have not been referred to any authority to justify the argument that where these duties are imposed upon the Collector they may be discharged by his subordinate.

Objection was taken on behalf of the defendants to the suit as not having been authorized by the proper officer. The District Judge, however, came to the conclusion that because Mr. Wiles as Assistant Collector was discharging the functions of the Collector under the provisions of section 11 of the Land Revenue Code in revenue matters, he was, therefore, entitled to discharge his functions with reference to suits filed under section 92 of the Civil Procedure Code.

In our opinion this is an erroneous view, and the learned Judge, in entertaining the suit in face of the objection, acted illegally in the exercise of his jurisdiction. We accordingly order the Judge to reject the plaint under rule 11, order 7, of the Civil Procedure Code. The opponents must pay the costs of this application.

Plaint ordered to be rejected.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

BALKRISHNA WAMNAJI GAVANKAR (ORIGINAL DECREE-HOLDER),
APPELLANT, *v.* SHIVA CHIMA MHATRA AND OTHERS (ORIGINAL
JUDGMENT-DEBTORS), RESPONDENTS.*

1911.
February 13.

Decree—Execution—Successive applications to execute decree—First darkhast made during the pendency of the previous darkhast—Decision on the first darkhast does not operate as res judicata if a new darkhast filed within time of the disposal of the previous darkhast.

A decree obtained in 1898 was, after three intermediate applications to execute it, sought to be executed in 1903. This application was ordered by

* Second Appeal No. 962 of 1909.

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the Subordinate Judge to be proceeded with: and his order was confirmed on appeal by the District Judge on the 2nd August 1905. In the meanwhile, in 1904, the decree-holder filed another *darkhast* to execute the decree; but it was rejected by the Subordinate Judge as barred by limitation. This order was not appealed against. The present *darkhast*, filed in 1907, was held to be barred by *res judicata* in virtue of the decision on the *darkhast* of 1904. On appeal:—

Held, reversing the decision, that the right of the decree-holder to proceed in execution on the strength of the appellate Court's order in his favour could not be affected by the order of the Subordinate Judge passed in the *darkhast* of 1904, because the latter was the order of a lower Court and it was passed in a *darkhast* which could not have legal validity so long as the *darkhast* of 1903 was kept alive by proper proceedings.

SECOND appeal from the decision of F. X. DeSouza, District Judge of Thana, confirming the order passed by D. D. Cooper, Subordinate Judge of Bassein.

Execution proceedings.

The decree under execution was passed on the 22nd March 1898. By 1901 three applications were made by the decree-holder to execute it. A fourth application (*darkhast*) to execute the decree was presented in 1903. The Subordinate Judge found the *darkhast* in order and ordered execution to proceed. This order was, on appeal, confirmed by the District Judge on the 2nd August 1903. On the 10th October 1903 the decree-holder took some steps in the *darkhast*. In the meanwhile, in 1904, the decree-holder filed a fifth *darkhast* to execute the decree. It was rejected by the Subordinate Judge on the 15th June 1905 as having been beyond time. This order was not appealed from. In 1907 the present *darkhast* was filed. The Subordinate Judge rejected it on the ground that it was barred by *res judicata* in virtue of the decision in the *darkhast* of 1904. On appeal, the District Judge confirmed the order. The decree-holder appealed to the High Court.

D. A. Khare and B. V. Desai, for the appellant.

G. S. Rao and J. R. Dhurandhar, for the respondents.

CHANDAVARKAR, J. :—The present *darkhast* of 1907 has been held by both the Courts below to be barred as *res judicata* by the order of the Subordinate Judge holding the previous

darkhast No. 460 of 1904 to be time-barred. But though that might be so, if this latter *darkhast* and the order thereon by the Subordinate Judge had stood alone, we have here the fact that at the time of that *darkhast* and the order, there was an appeal pending in the District Court against the order in the decree-holder's favour directing execution to proceed in *darkhast* No. 5 of 1903. That was an appeal preferred by the judgment-debtor and the appeal Court upheld the order in the decree-holder's favour on the 2nd of August 1905. The decree-holder had under that appellate decree a right subsisting on that date to proceed in execution under that *darkhast* of 1903, and as a matter of fact he did apply to the Court on the 10th of October 1906. That was an application to take a step-in-aid of execution according to law and it was made within three years immediately preceding the date of the present *darkhast* of 1907. The right of the decree-holder to proceed in execution on the strength of the appellate Court's order in his favour could not be affected by the order of the Subordinate Judge's Court passed in the *darkhast* of 1904, because the latter was the order of a lower Court and it was passed in a *darkhast* which could not have legal validity so long as the *darkhast* of 1903 was kept alive by proper proceedings. Therefore, the order appealed against is set aside and the Subordinate Judge is directed to allow execution in the *darkhast* of 1907. The respondent must pay to the appellant the costs throughout of this *darkhast*.

Order set aside.

R. R.

1911.

BALKRISHNA
WAMNAJI
&
SHIVA
CHINA.