

APPELLATE CIVIL.

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

GULAPPA BIN RUDRAPPA ERSHETTI (ORIGINAL PLAINTIFF), APPELLANT
v. ERAVA KOM BASANGOUDA PATIL AND OTHERS (ORIGINAL DEFEND-
ANTS), RESPONDENTS*.

1921

June 28.

*Indian Limitation Act (IX of 1908), Schedule I, Article 182, clause 5—Step-
in-aid of execution—An application for making a decree final, whether step-
in-aid of execution.*

On the 25th February 1904, a decree was passed in a mortgage suit giving six months time for payment. On the 12th June 1907, an application for execution was filed in which an order for sale of property was made but the Darkhast was eventually dismissed. On the 13th June 1910 another Darkhast was presented for sale of the property, but it was dismissed on the ground that the plaintiff had not applied for a final decree as required by the New Code of Civil Procedure, 1908. The plaintiff accordingly applied on the 7th October 1912, for a final decree, but the application was dismissed for non-payment of process fees. A similar application was made on the 7th November 1913, but was subsequently withdrawn. The present Darkhast was filed on the 7th September 1915. A question of limitation having arisen,

Held, that the above Darkhasts of 7th October 1912 and 7th November 1913, in which the plaintiff applied for a final decree, were steps-in-aid of execution.

SECOND appeal against the decision of L. S. Coutinho, Assistant Judge of Dharwar, confirming the decree passed by Sheshgirrao, R., Subordinate Judge at Hubli.

The facts material for the purposes of this report are sufficiently stated in the learned Chief Justice's judgment.

S. B. Jathar, for the appellant.

S. R. Parulekar for *A. G. Desai*, for respondent No. 2.

MACLEOD, C. J. :—The plaintiff applied for execution of the decree in Suit No. 261 of 1903, which was passed

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on the 25th February 1904 in a mortgage suit giving the usual six months time for payment under section 88 of the Transfer of Property Act. The present Darkhast was filed on the 7th September 1915 ; and the decision now appealed from was dated 10th July 1920. At that time the decision in *Desaiappa v. Dundappa*⁽¹⁾ had not been reported. There was, therefore, some excuse for the order dismissing the Darkhast.

The plaintiff sought for execution of his decree by a Darkhast filed on the 12th June 1907. Notice was issued to the defendants. On their failure to appear, an order absolute for sale was made on the 2nd October 1907, but as the plaintiff took no further steps in paying necessary fees, the Darkhast was eventually dismissed. Before the present Civil Procedure Code came into force, the proper procedure in the case of a decree under section 88 of the Transfer of Property Act was to apply for execution, and not to apply for a final decree. But if time be taken to run against the decree-holder from the date of the decree, and not from the end of the six months, the period allowed for payment, then that Darkhast was presented more than three years after the decree. But no objection was taken by the Court, and an order was made on the Darkhast that the property should be sold.

Then on the 13th June 1910, the plaintiff filed a Darkhast praying for the sale of the property, but that Darkhast was dismissed on the ground that the New Code of Civil Procedure required that the preliminary decree in a mortgage suit should be made final, and the plaintiff had not applied for a final decree. That clearly was a wrong decision. But the plaintiff was entitled to accept the order of the Court, and accordingly, on the 7th October 1912, he applied for a

(1) (1919) 44 Bom. 227.

final decree, but that application was dismissed for non-payment of process fees. He made a similar application on the 7th November 1913, but withdrew from it before any notice of it was served on the defendants. Another Darkhast was filed on the 26th February 1915 which was again dismissed for non-payment of process. Then this Darkhast was filed on the 7th September 1915.

The only question which, so far as I can see, now arises is, whether the Darkhasts of October 1912 and November 1913 in which the plaintiff applied for a final decree were steps-in-aid of execution. I fail entirely to see why the Court should not consider that these were steps-in-aid, for the plaintiff was endeavouring to get an order which he had been told to get when the previous Darkhast was dismissed. It is to my mind perfectly clear, and follows from the decision in *Desaiappa v. Dundappa*⁽¹⁾, that a Darkhast which is accepted by the Court, although it is out of time, starts a fresh period of limitation. The appeal, therefore, must be allowed and the Darkhast must proceed with costs throughout.

SHAH, J. :—I agree. I desire to add a word with reference to the argument urged by Mr. Parulekar that the order on the application of the 13th June 1910 is final and binding on the parties. But the order from its very nature was operative only as regards that Darkhast, as the Darkhast was dismissed on the ground that an application for making the decree final was necessary. The point now is not whether it is necessary that the decree which was passed prior to the Code of 1908 requires to be made final or not, but whether the execution of that decree is time-barred. Even though that order may be taken to be final so far as it affected the Darkhast

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then under consideration, it has no effect, so far as I can see, upon the question whether the present Darkhast is time-barred or not. For the purpose of determining that question, it is clear that all the previous applications have to be considered. They were steps-in-aid of execution. The Darkhast of 12th June 1907 was held by the Court then to have been made in time: and after that adjudication it is not open to the Court now to consider the question whether it was in time or not.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

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

1922.

June 30.

VALLABHDAS NARAYANJI AND AMRITLAL AMERCHAND (ORIGINAL CLAIMANTS), APPELLANTS v. THE SPECIAL LAND ACQUISITION OFFICER-FOR RAILWAYS AND ANOTHER (ORIGINAL OPPONENT AND COUNTER CLAIMANT), RESPONDENTS*.

Land Acquisition—Khoti village—Warkas and Bhati lands—Villager—Claimants, enclosing Bhati lands and treating them as if they belonged to them—Interest acquired in the lands—Compensation—Apportionment—Proportion of one to the Khot and two to the Occupants.

Two villages of Kanjur and Vikbroli were granted to the Khot of Powai under a perpetual lease, dated July 7th 1835. Certain Bhati lands (waste lands producing grass) in those villages were acquired by Government for Railway purposes under Land Acquisition Act, 1894. The Khot claimed the whole of the compensation but the villagers claimed that they had acquired a substantial interest in the Bhati lands by long and continued user thereof adversely to the Khot. The evidence showed that the Bhati lands had been enclosed; that they had been sold by registered sale deeds; that they had passed from hand to hand under these sale deeds and that the Khot was perfectly aware that the villagers were thus dealing with them.

* First Appeal No. 125 of 1917.

(with First Appeals Nos. 117 to 123 of 1917, Nos. 126 to 128 of 1917, Nos. 20 to 106 of 1920 and Nos. 372, 373 of 1920).