

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

1894.
March 12.

NA'NCHAND (ORIGINAL PLAINTIFF), APPELLANT, v. VITHU (ORIGINAL DEFENDANT), RESPONDENT.*

Decree—Execution—Application for execution of decree—Dismissal of the first application—Appeal from decree—Decree confirmed on appeal—Application for execution of appellate decree—Appellate decree is the decree to be executed—Former dismissal of application for execution of original decree does not bar execution of appellate decree—Res judicata—Limitation—Second application for execution.

Where the High Court confirms, on appeal, the decree of a Subordinate Court, such confirmation has the same effect as an order of reversal would have had, in so far as it leaves the decree of the High Court as the only decree which exists for the purpose of execution, and the decree of the lower Court becomes incorporated with it.

On 23rd July, 1888, plaintiff obtained a decree for the redemption of certain lands, on payment within three months of the amount due to the mortgagee, which was to be ascertained in execution proceedings. Against this decree the defendant appealed to the High Court.

Pending the appeal, the plaintiff presented a *darkhást* for execution on the 4th October, 1888. This *darkhást* was dismissed, as the plaintiff failed to produce a copy of the mortgage-bond within the time allowed by the Court. The three months allowed by the decree for payment expired on the 23rd October, 1888.

On 11th February, 1890, the High Court confirmed the decree, and on 11th April, 1890, plaintiff presented a fresh *darkhást* for execution. Both the lower Courts dismissed this *darkhást* on the ground that the dismissal of the first *darkhást* operated as *res judicata*.

Held, that the plaintiff was entitled to execute the decree; and that his second *darkhást* was not barred either by limitation or on the principle of *res judicata*.

THIS was an appeal from the decision of Ráo Bahádur R. D. Páranjape, First Class Subordinate Judge of Ahmednagar (with appellate powers), in Appeal No. 54 of 1891.

On 23rd July, 1888, the plaintiff (mortgagor) obtained a decree for redemption of certain lands on payment to defendant No. 3 of what might be due to him under his mortgage-bond. The decree directed that the amount due to defendant No. 3 should be ascertained at the time of execution and that the lands should be redeemed within three months. It also provided that if the lands were not redeemed within three months, the plaintiff's right of redemption would be for ever foreclosed.

*Second Appeal, No. 794 of 1892.

On the 4th October, 1888, the plaintiff presented his first *darkhást* for execution (No. 440 of 1888). On receiving the *darkhást* the Court fixed a day for taking evidence and for ascertaining the amount of the mortgage-debt.

On the 6th September, 1889, the Court dismissed the *darkhást* for the following reasons:—

“A copy of the mortgage-bond is not produced, though two adjournments were given on the applications of Wáman Trimbak. Without the mortgage-bond the Court is unable to make up the account of the mortgage-debt. So the *darkhást* is dismissed.”

In the meantime the mortgagee (defendant No. 3) had preferred an appeal to the High Court against the original decree of the 23rd July, 1888. The High Court confirmed the decree with costs on 11th February, 1890.

Thereupon the plaintiff applied by *darkhást* No. 129 of 1890 on the 11th April, 1890, for execution of the appellate decree of the High Court.

This *darkhást* was rejected by both the lower Courts on the ground that it was barred by the dismissal of the first *darkhást* on the principle of *res judicata*.

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

Dhondu M. Sanzgiri for appellant:—The decree which we now seek to enforce is the decree of the High Court and not that of the lower Court. The High Court's decree is the only decree capable of execution—*Sákhachand v. Velchand*⁽¹⁾; *Shivlál v. Jumaklál*⁽²⁾; *Muhammad Sulaimán Khán v. Muhammad Yár Khán*⁽³⁾; *Daulat v. Bhukandás*⁽⁴⁾. Limitation counts from the date of the High Court's decree. Our *darkhást* is, therefore, not time-barred. The lower Courts wrongly held that the order dismissing the first *darkhást* operates as *res judicata*. That *darkhást* was not disposed of on the merits. It was an application for execution of the first Court's decree. The present is an application for execution of the High Court's decree. It is, therefore, not barred

(1) I. L. R., 18 Bom., 203.

(2) I. L. R., 18 Bom., 542.

(3) I. L. R., 11 All., 267.

(4) I. L. R., 11 Bom., 172.

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by the first *darbhást*. Refers to *Rupchand v. Shams-ul-Jehan*⁽¹⁾ and *Patloji v. Ganu*⁽²⁾.

Mahádev C. Apté for respondent :—The question in the present case is not whether the appellant could have executed the High Court's decree, but whether he could ignore and disregard the execution proceedings taken under his first *darbhást*. Pending the appeal to the High Court, execution of the first Court's decree had not been stayed. The decree-holder applied for execution of the decree, and failed. He cannot re-open the same matter by presenting another application. The order passed on the first *darbhást* operates as *res judicata*—*Mungul Pershad Dikhit v. Grija Kant*⁽³⁾; *Baron Forester v. The Secretary of State for India*⁽⁴⁾; *Sheik Budan v. Ramchandra*⁽⁵⁾. The High Court decree can only give a fresh starting point about costs. Except on the question of costs awarded by the High Court, the present *darbhást* is barred.

RA'NADE, J.:—In this case, both the lower Courts appear to have assumed that the appellant plaintiff's *darbhást* No. 440 of 1888, and his present *darbhást* No. 129 of 1890, related to the execution of the same decree, and that in consequence the order of dismissal passed on the *darbhást* of 1888 operated as *res judicata*, and barred the entertainment of the present *darbhást* proceedings. The fact, however, appears to be that the decree sought to be executed in 1888 was the decree of the District Court in Appeal No. 68 of 1887; while the present execution proceedings relate to the decree of the High Court which was passed subsequently to the disposal of the first *darbhást*. This point was brought to the notice of the lower appellate Court, but was passed over by it, presumably because the High Court confirmed the decree of the District Court. Such confirmation, however, it has been ruled, has the same effect as an order of reversal would have had, in so far as it leaves the decree of the High Court as the only decree which exists for the purpose of execution, and the decree of the lower Court becomes incorporated with it. See *Sákhachand v. Velchand*⁽⁶⁾ and *Muhammad Sulaimán Khán v. Muhammad Yar Khán* (7).

(1) I. L. R., 11 All., 346.

(4) L. R. 4 I. A., 137.

(2) I. L. R., 15 Bom., 370.

(5) I. L. R., 11 Bom., 537.

(3) L. R., 8 I. A., 123.

(6) I. L. R., 18 Bom., 203.

(7) I. L. R., 11 All., 267.

The respondents' pleader admitted the correctness of this view, but urged that as the two *darkhást*s of 1888 and 1890 covered the same ground of relief, the dismissal of the first *darkhást* barred the entertainment of the second *darkhást*, except in the matter of the costs. We cannot accept this contention of the respondents. Apparently the first *darkhást* was not proceeded with, because the respondents in the decree of the District Court had preferred a second appeal from that decree. Both parties must be held equally bound or equally benefited by the result of this second appeal, and if the original respondents would have become entitled to execute the decree of the High Court in case it had reversed the decision of the lower Courts, we do not see any reason which prevents the present appellant from claiming his right to execute the decree of the High Court in his favour. The proceedings of 1888 had no reference to that decree, and the order of dismissal passed thereon had, therefore, no operation as regards the appellant's right to seek execution of the decree in his favour. If the appellant has a right to execute this decree, there is admittedly no room for the objection about limitation.

We accordingly reverse the order of dismissal passed by the lower appellate Court, and direct the Court of the Subordinate Judge at Párner to proceed with the execution of the High Court's decree. All costs on respondents.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

KESHAVLA'L BECHAR (ORIGINAL DEFENDANT), APPELLANT, v. PITA'M-BERDA'S TRIBHUVANDA'S (ORIGINAL PLAINTIFF), RESPONDENT.*

1894.
March 12.

Decree—Execution—Limitation Act (XV of 1877), Art. 179, Cl. 4—Step in aid of execution—Civil Procedure Code (Act XIV of 1882), Sec. 230—Application for execution.

A obtained a decree against B upon an award, which directed that the sum of Rs. 1,840 awarded to A should be recovered with interest by attachment of the mortgaged property and not by sale, except in case of its being held that the property was not liable to attachment.

* Second Appeal, No. 532 of 1893.