

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909.

September 14.

VINAYAK VAMAN PARANJPE (ORIGINAL PLAINTIFF), APPELLANT, v.
ANANDA VALAD RAMJI (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act (XV of 1877), Article 179, clause 4—Decree—Execution—Step-in-aid of execution—Applications for execution presented by assignee of decree-holder—Dismissal of the application for non-production of assignment deed.

A decree was passed on the 12th October 1894 and an application to execute it was made by the decree-holder on the 16th August 1897. The process fee not having been paid the application was struck off. The second application to execute the decree was presented on the 16th August 1900 by the assignee of the decree-holder; but as he did not produce the assignment the application was struck off on the 27th October 1900. The third application was presented by a *mukhtyar* of the assignee on the 11th August 1903; but as neither the assignment nor the *mukhtyarnama* was produced it was struck off on the 9th October 1903. The same *mukhtyar* presented a fourth application on the 19th December 1905. A notice was issued to the judgment-debtor under section 248 of the Civil Procedure Code (Act XIV of 1882) and the application was disposed of, the decree-holder agreeing to accept a payment of Rs. 45 from the judgment-debtor. On the 11th December 1906, the fifth application to execute the decree was filed. The lower Courts holding that the second and third applications could not be regarded as applications for execution made in accordance with law, dismissed the fifth application as barred by the law of limitation:—

Held, that the present application was not barred, for the non-production of the *mukhtyarnama* and the assignment did not prove that they did not exist in fact.

Abdul Majid v. Muhammad Faizullah(1), followed.

SECOND appeal from the decision of F. J. Varley, District Judge of Ahmednagar, confirming the decree passed by G. B. Laghate, Subordinate Judge of Shevgaon.

Proceedings in execution.

On the 12th October 1894 a decree was passed against the defendant Chima Ramji for Rs. 200, which was made payable in four yearly instalments of Rs. 50 each.

* Second Appeal No. 46 of 1909.

(1) (1890) 13 All. 89.

The first application to execute this decree was presented by the decree-holder on the 16th August 1897. Process fee not having been paid the *darkhast* was struck off.

The decree was then assigned to the appellant, who applied to execute it on the 16th August 1900. The deed of assignment was not produced; and the application was struck off on the 27th October 1900.

The third application to execute the decree was filed on the 11th August 1903, by a *mukhtyar* of the appellant. This *darkhast* also was struck off as the assignment and the *mukhtyar-nama* was not produced.

On the 19th December 1905 the fourth application was presented. Notice was thereupon issued to the judgment-debtor under section 248 of the Civil Procedure Code of 1882. The decree-holder agreed to receive Rs. 45 from the judgment-debtor; and the application was accordingly disposed of.

On the 11th December 1906, the present application to execute the decree was filed.

The Subordinate Judge dismissed the application as barred by the law of limitation. His reasons were expressed as follows:—

We have to see whether there is any *darkhast* presented by the right party, between the second *darkhast* of 16th August 1900 and the present *darkhast* of 11th December 1906. The answer is that there is no *darkhast* presented in accordance with law, in this intervening time.

The *darkhast* of 11th August 1903 was not presented by the right party. Therefore the last preceding *darkhast*, although entertained and ordered to be proceeded with, was barred by limitation counted from the *darkhast* of 1900, in which also the right to apply does not appear to have been proved, the *darkhast* of 1903 being not one in accordance with law. If the last preceding *darkhast* is barred for the above reasons, the *darkhast* under consideration is also barred.

I therefore hold that the present application is barred by limitation under article 179 of the second schedule of the Limitation Act.

On appeal, the District Judge arrived at the same conclusion. The grounds of his decision were expressed as follows:—

The cases quoted by appellant's pleader (*Dalichand Bhudar v. Bai Shivkor*⁽¹⁾ and *Nepal Chandra Sadookhan v. Amrita Lall Sadookhan*⁽²⁾)

(1) (1890) 15 Bom. 242.

(2) (1899) 26 Cal. 888.

1909.

VINAYAK
VAMAN
v.
ANANDA
VALAD
RAMJI.

1909.

VINAYAK
VAMAN
v.
ANANDA
VALAD
RAMJI.

presuppose that the Court was moved by an authorised person. It is admitted that no *mukhtyarpatra* was filed in the *darkhast* No. 3, and the previous assignment has not been proved under section 232, Civil Procedure Code. It is contended that it is open to the transferee to prove that he is entitled under his assignment (*Balkishen Das v. Bedmati Koer*⁽¹⁾) at any stage, but the facts in this case appear to have been materially different. If no *mukhtyarpatra* was filed in *darkhast* No. 483 of 1903, it is impossible to hold that it was an application in accordance with law. Nor has any authority been cited to show that a Court is precluded from giving effect to a defect of this nature at any time, and that it is bound to notice only the *darkhast* before it.

The plaintiff appealed to the High Court.

P. P. Khare, for the appellant:—The lower Courts have held that the second and the third applications were not made in accordance with law, simply because the assignment and the *mukhtyarnama* were not produced. In this they were wrong. See *Abdul Majid v. Muhammad Faizullah*⁽²⁾ and *Abdul Kureem v. Chukhun*⁽³⁾.

D. W. Pilgamkar, for the respondent:—The intervening applications Nos. 2 and 3 are not made in accordance with law. The deed of assignment and the *mukhtyarnama* not having been proved, the applications cannot be regarded as having been presented by a proper person. See *Balkishen Das v. Bedmati Koer*⁽¹⁾, *Hafizuddin Chowdhry v. Abdool Aziz*⁽⁴⁾; and *Chattar v. Newal Singh*⁽⁵⁾.

The case of *Abdul Majid v. Muhammad Faizullah*⁽²⁾ does not apply because here the finding of fact is that the assignment and the *mukhtyarnama* were not proved.

CHANDAVARKAR, J.:—The facts material for the purposes of the points of law raised in this second appeal are shortly these. A decree was obtained on the 12th October 1894, by the assignor of the present appellant. On the 16th August 1897 the first *darkhast* for its execution was presented by the decree-holder himself. But as the process fee was not paid, it was struck off. The second *darkhast* was presented on the 16th August 1900 by the present appellant, but it was struck off on the 27th October 1900 on the

(1) (1892) 20 Cal. 388.

(3) (1879) 5 C. L. R. 253.

(2) (1890) 13 All. 89.

(4) (1893) 20 Cal. 755.

(5) (1889) 12 All. 64.

ground that the assignment, not having been produced, was not proved. On the 11th August 1903, a person calling himself the *mukhtyar* of the assignee presented the third *darkhast*. But as neither the *mukhtyarnama* nor the deed of assignment was produced it was struck off on the 9th October 1903. The fourth *darkhast* was presented by the same *mukhtyar* on the 19th December 1905. A notice was issued to the judgment-debtor under section 248 of the Civil Procedure Code then in force. He not having appeared, the *darkhast* was disposed of.

Both the Courts below have held that the present *darkhast* is barred by the law of limitation; because the second and the third *darkhasts* cannot be regarded as applications for execution made in accordance with law. We cannot agree with that view. These two *darkhasts* were disallowed, not because the persons who made those applications were not competent to make them, but merely because they did not produce evidence to satisfy the Court that there was an assignment and that there was a *mukhtyarnama*. But from the non-production of these it does not follow that the assignment and the *mukhtyarnama* did not exist in fact then. It has been held in *Abdul Majid v. Muhammad Faizullah*⁽¹⁾, under similar circumstances, that the application of a party for the execution of a decree is a step-in-aid of it, though he fails to produce evidence to show that he had a right to execution. See also *Abdul Kureem v. Okhkhun*⁽²⁾. Neither of the lower Courts has found in the present case whether the assignee was in fact an assignee, at the date of his application and was competent to make it, nor has it decided whether the *mukhtyar* of the assignee was *mukhtyar* in fact on the 11th of August 1903 when the third *darkhast* was presented.

We, therefore, reverse the decree of the Court below and send back the *darkhast* to be dealt with according to law with reference to the observations herein. Costs to abide the result.

Decree reversed.

R. R.

(1) (1893) 13 All. 69.

(2) (1879) 5 C. L. R. 253.

1909.

VINAYAK
VAMAN
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VALAD
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