

APPELLATE CIVIL.

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

DESAIPPA BIN KHALILAPPA DESAI (ORIGINAL PLAINTIFF) APPELLANT
v. DUNDAPPA BIN MALKAPPA (ORIGINAL DEFENDANT), RESPONDENT.*

1919.

September 4.

Decree—Execution—Application for execution time-barred—Subsequent application to execute the decree—Application allowed—Order not reversed in appeal—Further application presented in time—Application not barred.

A decree was passed on 18th February 1899. The first Darkhast was presented on 20th March 1907; second on 31st March 1910 and a third on 12th September 1910, when the defendant appeared and contended that the Darkhast of 31st March 1910 was barred. The Court decided that the Darkhast of 12th September 1910 was in time and directed that the money due should be paid by instalments. On 26th March 1913, Rs. 220 were paid to plaintiff. The last Darkhast was filed on 19th November 1915 to recover the balance due. The lower appellate Court dismissed the Darkhast as time-barred on the ground that the decree was dead on 31st March 1910 and even though the further Darkhast was admitted thereafter, that would not have the effect of reviving the decree. On appeal to the High Court,

Held, that the Darkhast was within time as the order made on the Darkhast of 12th September 1910, not having been reversed on appeal, was valid.

Mungul Perchad Dicht v. Girja Kant Lahiri Chowdhry⁽¹⁾, relied on.

SECOND appeal against the decision of A. C. Wild, District Judge of Bijapur, reversing the decree passed by V. V. Phadke, Subordinate Judge at Muldebihal.

Proceedings in execution.

A decree was passed on the 18th February 1899 for Rs. 376 and costs in favour of the plaintiff.

On the 20th March 1907, the first Darkhast was presented. It was dismissed for non-production of a succession certificate.

The second Darkhast No. 119 of 1910 was filed on the 31st March 1910. It was disposed of on the 8th September 1910, because the succession certificate was not duly corrected by the Court.

* Second Appeal No. 212 of 1918.

⁽¹⁾ (1881) L. R. 8 I. A. 123.

1919.

DESAPPA
v.
DUNDAPPA.

The third Darkhast No. 323 of 1910 was presented on the 12th September 1910. The defendant then appeared and contended that the Darkhast No. 119 of 1910 was time-barred; and that he being an agriculturist, instalments should be awarded if the Darkhast was in time. The Court, without deciding the question of limitation, directed that the money due should be paid by instalments, the first instalment to be paid on the 15th April 1912.

On the 26th March 1913, Rs. 220 were paid to plaintiff.

The present Darkhast was filed on the 19th November 1915 to recover Rs. 270-3-6, the balance due under the decree.

The Subordinate Judge held that the Darkhast was in time and directed execution to proceed on the ground that the limitation period began to run from the date of the decree as amended by the order in Darkhast No. 323 of 1910.

On appeal, the District Judge reversed the decree and dismissed the Darkhast holding that the original decree was dead on the 31st March 1910 and no proceedings taken under Darkhast No. 323 of 1910 could revive it in an amended form: *Shumbhoonath Shaha v. Guruchurn Lahiri*⁽¹⁾.

The plaintiff appealed to the High Court.

Y. N. Nadkarni, for the appellant:—I submit that the executing Court cannot go behind the order passed in the previous Darkhast of 12th September 1910. In that Darkhast the judgment-debtor took the point of limitation but as the execution was allowed, it is to be presumed that the objection on the ground of limitation was overruled. If he was aggrieved by that decision he ought to have appealed against that order. The order, however, not being appealed against was final

⁽¹⁾ (1880) 5 Cal. 894.

and could not be challenged in the present Darkhast : *Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry*⁽¹⁾. Moreover, in the present case the judgment-debtor has acted upon the decree inasmuch as he has made some payment subsequent to that order. He is, therefore, also estopped from disputing the validity of that order in the present application.

H. B. Gumaste, for the respondent :—The Darkhast of 12th September 1910 being presented more than three years after the previous Darkhast, the decree at that date ought to be considered as dead and no subsequent application can revive it. Any order to the contrary by the executing Court is *ultra vires*.

MACLEOD, C. J. :—In this case a decree was passed on the 18th February 1899 for Rs. 376 and costs in favour of the plaintiff. The first Darkhast presented to the Court was dismissed for non-production of a succession certificate on the 20th March 1907. Thereafter a Darkhast was filed on the 31st March 1910 which was disposed of on the 8th September 1910; and then another Darkhast was presented on the 12th September 1910. The defendant then appeared and contended that the Darkhast of the 31st March 1910 was barred. Apparently the Court decided that the Darkhast of the 12th September 1910 was in time, and directed that the money due should be paid by instalments, the first instalment to be paid on the 15th April 1912. On the 26th March 1913, Rs. 220 were paid to plaintiff. The present Darkhast was filed on the 19th November 1915, to recover the balance due under the decree of Rs. 270-3-6.

The first Court directed execution to proceed. The lower appellate Court reversed the order of the lower Court, and dismissed the Darkhast with costs, on the

(1) (1831) L. R. 8 J. A. 123.

1919.

DESAIPTA
v.
DUNDAPPA.

ground, as I take it, that the decree was dead on the 31st March 1910, and even although the further Darkhast was admitted thereafter, that would not have the effect of reviving the decree, so that the Court was entitled to consider the question in the present Darkhast, and come to the conclusion that no Darkhast ought to have been admitted after the 31st March 1910. But we have been referred by the appellant's pleader to the case of *Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry*⁽¹⁾, which was a case very similar to the present case. There a decree was passed in 1851, and thereafter, there were many applications and proceedings to enforce or keep in force the decree. An application was admitted on the 5th September 1874, although the previous application was dated the 7th August 1871, and, therefore, the last application was admitted more than three years after the previous one. It was held by the lower Court that a decree once being dead no proceedings by means of an application out of time could revive it, but their Lordships of the Privy Council considered that that was not a correct argument, and held that the order, although it may have been erroneously made, was nevertheless valid, unless reversed upon appeal. The result is that we must consider the order made on the Darkhast of the 12th September 1910 as valid, as it was not reversed on appeal, and therefore, the present Darkhast is within time as the last instalment was paid by the defendant on the 26th March 1913. We, therefore, reverse the decree of the lower appellate Court and restore that of the trial Court, and direct that execution do proceed as prayed for. The respondent must pay the costs of the Darkhast throughout.

Decree reversed.

J. G. R.

⁽¹⁾ (1881) L. R. 8 I. A. 123.