

(1967) 04 GUJ CK 0009
In the Gujarat High Court
Case No : Second Appeal No. 189 of 1961

Union of India (UOI)

APPELLANT

Vs

Lalji Bhimji

RESPONDENT

Date of Decision : 25-04-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 10, Order 21 Rule 11, Order 21 Rule 11(2), Order 21 Rule 12, Order 21 Rule 13
Limitation Act, 1963 — Article 182 , 182(5)

Citation : AIR 1969 Guj 55

Hon'ble Judges : N.G. Shelat, J

Bench : Single Bench

Advocate : R.H. Daru and B.J. Shelat, for the Appellant; R.C. Mankad, for the Respondent

Final Decision : Allowed

Judgement

N.G. Shelat, J.—One Nanubhai Harjiyan as the manager and co-sharer of a Hindu undivided family firm running in the name of Messrs Lalji

Bhimji, at Amreli, filed a Regular Civil Suit No. 55 of 1947-48 in the Civil Court of the then State of Baroda, against the Governor General-in-

Council of the Indian Dominion as the owner of the Bengal-Assam Railway for recovering an amount of Rs. 8500 in all on the basis of total loss of

a consignment booked at Sialda Railway Station of Calcutta in favour of the plaintiff-firm to be delivered at Amreli. The summons was issued on

the defendant as described in the plaint and since there was no appearance, the suit proceeded ex parte. A decree for the sum of Rs. 8500

together with running interest at 3% on Rs. 5,141 and odd and costs of the suit came to be passed against the defendant on 13-11-1938. The

plaintiff-firm thereafter filed a Regular Darkhast No. 65 of 1951 in the Court of

the Civil Judge (J. D.) at Amreli -- it being the successor Court of the original trial Court on the merger of the State of Baroda with the Indian Union. That was filed on 13-11-48 for recovering the amount due under the decree by calling upon the judgment-debtor to pay the amount failing which to recover the same by attachment and sale of the movable property of the judgment-debtor. In that Darkhast a notice under Order 21, Rule 22 of the CPC was issued against the judgment-debtor and though served no one appeared on behalf of the judgment-debtor. From the endorsement on that Darkhast it further appears that the amount was not paid though the judgment-debtor was directed to pay up the amount, Thereafter since the Court found that the property sought to be attached was not mentioned by the decree-holder in his Darkhast, the Darkhast came to be dismissed directing the costs to be paid by the judgment-debtor. That order is dated 8-1-52. Thereafter another Darkhast No. 92 of 1953 was filed by the decree-holder in the same Court against the judgment-debtor on 11-11-53 and that came to be disposed of on 29-12-54.

2. The same Nanubhai Harjivan has then filed Regular Darkhast No. 82 of 1955 against the judgment-debtor in the Court of the Civil Judge at Amreli for recovering the amount due under the decree by attachment and sale of the property. He has therein stated that the original joint Hindu family firm running in the name of Messrs. Lalji Bhimji of which he happened to be the manager, has been changed into a partnership firm and that he has been the manager and partner of the said firm. It is that way that he has filed the Darkhast on behalf of the partnership firm running in the name of Lalji Bhimji. So far as the judgment-debtor is concerned, it has been stated that all the rights and liabilities of the Bengal Assam Railway have now merged in the Union of India and that, therefore, a notice may be issued to the Union of India calling upon the same to pay up the amount and on its failure to do so, to recover the amount by attachment and sale of the property found at the Railway Station of Amreli including the cash amount found there. The amount claimed in the Darkhast is Rs. 10,789-6-6. It has been signed by one Kakubhai Kanji, the holder of power of attorney for one Kanji Lalji a partner in the firm of Messrs. Lalji Bhimji and also by Nanubhai Harjivandas in his personal capacity. After the Darkhast was filed on 30-4-55, an order for issuing notice to the judgment-

debtor was issued. The Western Railway Administration through its advocate then appeared before the Court and filed his objections at Ex. 8 in that Darkhast. He inter alia contended that the decree under execution was in favour of M/s. Lalji Bhimji, a joint Hindu family firm and the firm executing the decree of Lalji Bhimji is a partnership firm and that way is a separate legal entity; that, therefore, the firm executing the decree cannot be said to be the decree-holder as such entitled to execute the decree; that the execution application is barred by limitation under Article 182 of the Indian Limitation Act as the previous execution applications No. 65/51 and No. 02/53 were not in accordance with law; that there was no legal entity like the General Secretary, Union of India, Western Railway Board, New Delhi and such a person is not competent to receive notice of execution according to law; that the decree being against a railway administration of Union of India owning a particular railway administration, a notice should be served on the General Manager of the said Railway Administration and as there is no such proper service, the execution application is liable to be dismissed, that the decree under execution has been obtained by fraud on the Court and that it was void and was not executable; that the decree under execution is without jurisdiction as it was passed without service of the summons on the defendant and in the result, the execution application should be dismissed with costs. The trial Court rejected all the contentions raised on behalf of the Western Railway and directed the Darkhast to proceed further.

3. Feeling dissatisfied with that order passed on 7-8-59 by Mr. I.C. Sheth, Civil Judge (S. D.) Amreli -- the opponent filed Civil Appeal No. 35 of 1959 in the Court of the District Judge at Amreli. Along with the appeal, an application Ex. 4 was presented to the Court for staying the execution proceedings taken out against the judgment-debtor. An interim stay was issued and it was to remain in effect till 15-12-59 during which time the appellant was required to deposit the decretal amount with costs and interest up-to-date in the District Court at Amreli. Instead of depositing amount in Court, the appellant through mistake of the pay-clerk sent a cheque to the respondent for the sum of Rs. 10918-91nP. with a covering letter on 8-12-59. One Balubhai Kanji, one of the partners of the firm, has made an affidavit Ex. 18 stating that a cheque was received in

satisfaction of the decretal dues and the payment has been appropriated towards the same and the receipt was sent to the railway administration.

That payment is said to have been received in the month of December 1959. Sometime after i.e. on 22-8-1960, the learned advocate appearing

for the appellant, gave an application Ex. 15 stating inter alia that the cheque for the decretal amount was sent to the opposite side through the

mistake of a clerk of the railway administration instead of depositing the amount in Court and that the respondent should be called upon to have the

amount deposited in Court u/s 144 or u/s 151 of the Civil Procedure Code.

4. This application was heard along with the appeal. The learned District Judge found that the Court was not competent to direct the respondent to

deposit the amount in Court which came to be realized by him; that it is not a fit case for calling for any such amount from the respondent; that the

appeal does not survive in view of the respondent having recovered the amount in the execution proceedings from the appellant; that the decree

passed in the suit was not a nullity as alleged; that the execution proceeding can proceed against the Union of India as owning the Western Railway

Administration; that the execution application is not barred by limitation as alleged and that in the result, he dismissed the appeal directing parties to

bear their own costs. Feeling dissatisfied with that order passed on 11th November 1960 by Mr. M.D. Manek, District Judge, Amreli, the original

opponent has come in appeal before this Court.

5. Mr. Daru, the learned advocate appearing for the appellant, has raised four contentions before this Court. The first is that the present

Darkhastdar who had taken out the execution proceedings against the appellant in pursuance of a decree passed in Civil Suit No. 55/47-48 is not

the decree-holder entitled to execute the same. (2) The present execution application is barred by Article 182 of the Indian Limitation Act

inasmuch as the earlier Darkhast No. 65 of 1951 was not in accordance with law and that way cannot serve as a step in aid of execution so as to

keep alive the decree. (3) The execution taken out against the Western Railway cannot lie inasmuch as the decree was passed against the Bengal

Assam Railway and that way quite a different entity in law. (4) Since the amount has been paid under a mistaken belief to the Darkhastdar so as to

have the Darkhast stayed as per the order passed by the District Court, it should

be called back by the Court and have the same made available

provided he is found to be the proper person entitled to recover the same under the decree.

6. I have already set out hereabove that the original Civil Suit No. 55/47-48 was filed in the Civil Court of the then State of Baroda by a joint

Hindu family firm running in the name of M/s. Lalji Bhimji through its manager and a co-sharer one Shri Nanubhai Harjivan of Amreli. An ex parte

decree was passed against the defendant in that suit on 13-11-38. As to the various allegations about the manner in which the ex parte decree was

obtained, we are not concerned in this appeal. The executing Court has obviously to execute the decree as it stands unless it is set aside. The

contention of Mr. Daru is that the original decree-holder alone is entitled to file the execution application and that unless it is shown that the decree

has been assigned in favour of some other person or has gone to some other person by operation of law, no other person can execute the same.

The present Darkhast is undisputedly filed, as I said above, by the partnership firm running in the name of Lalji Bhimji through one Kakubhai Kanji,

the holder of power of attorney of one Kanji Lalji -- a partner of that firm, and by Nanubhai Harjivandas in his personal capacity. It has been

stated in the Darkhast application that the original joint Hindu family firm running in the name of M/s. Lalji Bhimji has been subsequently converted

into a partnership firm running in the same name of Lalji Bhimji in Amreli. On the face of it it appears clear that the present Darkhast is not filed by

the original decree-holder but by the firm, constituted under the provisions of the Indian Partnership Act and by one Nanubhai Harjivandas in his

individual capacity. The contention of Mr. Mankad, the learned advocate for the respondent, is that the same person, namely, Nanubhai

Harjivandas who has filed this Darkhast was described as a manager and co-partner of the joint Hindu family firm running in the name of Lalji

Bhimji and that, therefore, there is nothing wrong when he files the Darkhast particularly when the members of the private partnership firm are the

same as the members of the joint Hindu family firm. It appears that in the trial Court an attempt was made to produce the partnership deed, but

that does not seem to have been proved and was even wrongly referred to in the order of the trial Court. That was not sought to be relied upon in

the first appellate Court and also in this Court. The question therefore that arises to be considered is as to whether the decree-holder in the suit is

the same person recognised in law who has come forward to execute that decree in this Darkhasti proceedings. A joint Hindu family firm is a firm

not governed by the provisions of the Partnership Act, but by the normal personal law governing the Hindus. Both the firms, even if sharers are the

same, stand on a different footing -- each governed by different law. The incidents are different and one cannot be called the same as the other

firm. It is clear, there-fore, that the firm which has filed the present Darkhast is not the same as described in the suit in which that decree came to

be passed.

7. Section 2, Clause (3) defines the term ""decree-holder"" as meaning any person in whose favour a decree has been passed or an order capable of

execution has been made. In the present case, the decree-holder was then the joint family firm of Lalji Bhimji. By reason of the joint family firm

converting into a partnership firm, it cannot necessarily be said that the joint family firm came to an end. Thus the Darkhast cannot be said to have

been filed by the decree-holder as such as contemplated in Section 2(3) of the Civil Procedure Code. Besides, Nanubhai Harjivandas was not a

decree-holder in his individual capacity, and he has been described in that suit as a manager and a co-sharer of the joint Hindu family firm running

in the name of Messrs. Lalji Bhimji. He has not filed this Darkhast as one managing that joint family firm. On the other hand. Nanubhai Harjivandas

has signed the Darkhast application in his individual capacity and that he has no authority to do so. Thus, neither of the two persons who have filed

this Darkhast can be said to be the decree-holders u/s 2(3) of the CPC so as to entitle them or any of them to file the Darkhast under Order 21,

Rule 10 of the Civil Procedure Code. As provided therein, the holder of the decree is entitled to apply to a Court for executing the same. None of

them, therefore, can be said to be persons entitled to file the execution application in pursuance of a decree obtained by the original joint Hindu

family firm running in the name of Messrs. Lalji Bhimji of Amreli.

8. In Kirtilal Jivabhai Vs. Chunilal Manilal, , it was held that it is only a decree-holder who can ordinarily apply for execution of the decree. Then if

there are more than one decree-holders, under Order 21, Rule 15 it is competent

to one of the joint decree-holders to apply for execution. If the decree is transferred either by assignment in writ-ins or by operation of law, the transferee can also apply for execution under Order 21, Rule 16.

Then it has been observed that whether the decree-holder applies under Order 21, Rule 10, or under Order 21, Rule 15, the executing Court can only execute the decree provided his name appears as a decree-holder on the face of the decree itself. The executing Court cannot look to anything outside or beyond the decree in order to satisfy itself that the person who is applying for execution is the decree-holder. The very definition of "decree-holder" contained in Section 2. Sub-clause (3) of the Code, makes this clear. It is no doubt true that a person can become a transferee of the decree by operation of law; and if there are other coparceners in whose favour also the decree becomes transferred, then he may apply as one of the assignees under Order 21, Rule 16, read with Order 21, Rule 15. But for any such person to execute the decree, the procedure laid down has got to be followed. No such attempt is made to show that the decree has been assigned in favour of the present Darkhastdars so as to entitle them to file the Darkhast under Order 21 Rule 16 of the Civil Procedure Code. It appears, therefore, clear that the present Darkhastdars or any of them are not the same decree-holders under the decree passed in Suit No. 55/47-48 which is sought to be executed against the judgment-debtor of that suit. The learned District Judge has passed over that point by characterising the same being of technical importance particularly as in his view the full amount is paid up, the question such as the one would lose its significance. However technical the contention may appear, it does touch the root of the matter particularly when altogether a different entity in law has come forward to execute the decree in place of some other persons entitled to execute the same. It makes no difference whether they remain the same persons as such in a different form viz. in the partnership firm so far as the judgment-debtor is concerned. The mere fact that the amount has been paid during the pendency of the appeal would not come in the way of having to decide this question which, in my opinion, goes to the root of the matter. The Darkhastdars are, therefore, not entitled to execute the decree in the manner they have done against the judgment-debtor.

9. The next question that arises to be considered is as to whether the Regular Darkhast No. 65/51 was one which served as a step in aid of execution of the decree or order as contemplated in Art. 182 Clause (5) of the Indian Limitation Act. If that Darkhast can be found to be one filed in accordance with law, the present Darkhast would be obviously in time and over which there is no dispute. Article 182 provides for a period of limitation as three years for the execution of a decree or order of a Civil Court and as contemplated in Clause (5) of column 3 of Article 182 the period of three years would run from the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree or order. In other words, if Darkhast No. 65 of 1951 was one which was in accordance with law, the period of three years would commence from the date of the order passed in that Darkhast. The contention made out by Mr. Daru, however, is that it was not filed in accordance with law inasmuch as it did not comply with the provisions contained in Order 21, Rule 12 of the CPC viz., by not annexing to the application an inventory of the property to be attached, containing a reasonably accurate description of the same. In support thereof he invited a reference to the case of Sakkargauda Basanqauda v. Bhimappa Hanmappa. 32 Bom LR 1368 : (AIR 1931 Bom 128) . In that case, the decree-holder applied to execute his decree obtained in November 1912, relying on his immediately preceding application. No. 168 of 1964, having been one made in accordance with law, to bring his last application in time. The original Court rejected the application as time-barred. The appellate Court held that this was not so, and directed the execution to proceed further. In appeal before the High Court of Bombay the question arose as to whether failure to comply with the provisions of Order 21, Rule 14, imparted to the application No. 168 of 1924 the character of being ""not in accordance with law"" or not. The defect pointed out before the High Court was that ""there was actually no description of what was sought to be attached or sold, the reference to it being that, "" it was described overleaf, ""which it was not."" It was then observed that looking to the provisions of Rules 11 to 17 of Order 21 of the Civil Procedure Code, the defect, when pointed out, not having been remedied within the time allowed, the application continued to be not in accordance with law. It was a case where the property sought to be

attached and sold was an Immovable property and defect was one under Rule 13 of Order 21 of the Civil Procedure Code. The observations as I

just stated above related to the defect even contemplated under Rules 11 to 17 of Order 21 of the CPC and if that defect is not remedied within

the time allowed by the Court, such an application cannot be said to be in accordance with law within the meaning of Article 182 of the Limitation

Act. In the present case, however, the argument is that this Darkhast was dismissed by the Court since the decree-holder failed to supply a list of

the moveable properties which were to be attached and sold in satisfaction of the decree. It was, therefore, said that there was non-compliance of

Rule 12 of Order 21 of the CPC and on that account the Darkhast was not one which was filed in accordance with law as contemplated under

Article 182 of the Indian Limitation Act. It may be said at the outset that it is not the order passed in the Darkhast that matters, as it may well

happen that the Darkhast may be in accordance with law, but for some other reason, say for want of prosecution or the like, the Darkhast is not

proceeded with and it came to be dismissed. It may as well be a case where Darkhast may not be in accordance with law, in other words not

complying with any of the Rules such as Rules 11 to 14 of Order 21 of the CPC and the Darkhast has come to be disposed of for non-compliance

thereof. In Shankar Hari Vs. Damodar Vyankaji, , it was held as under:--

The expression ""in accordance with law"" in Article 182(5) does not imply that the application must be successful. It may be in accordance with

law for the purpose of Article 182(5) and yet the applicant may not be entitled to any relief on account of circumstances other than there being any

defect in the application it-self. A valid application made in accord- ance with law cannot cease to be in accordance with law by any subsequent

default on the part of the applicant, Hence, an application under Order 21, Rule 15 (1) or Rule 16 is in accordance with law and a step in aid of

execution and is sufficient by itself to keep the decree alive irrespective of whether an order under Rule 15(2) is passed or not or notices under

Rule 16 proviso are issued or not.

What is, therefore, essential for us is to see whether the Darkhast filed by the decree-holder was in accordance with law as contemplated under

Article 182(5) of the Indian Limitation Act. In that Darkhast the prayers made

were to ask the Court to serve a notice on the Government to make payment u/s 82 of the CPC and on its failure to do so, to recover the amount by attachment and sale of the movable property of the judgment-debtor. Unfortunately the entire record of the proceeding is not before us. But it appears that those Darkhast applications were produced as Exs. 43-C and 43-D before the trial Court. The trial Court had directed a notice to be issued against the judgment-debtor as required under Order 21, Rule 22 of the CPC and then again a notice to pay the amount as required by Section 82 of the Code. The judgment-debtor remained absent though served with both the notices. As observed by the learned District Judge, it was mentioned in the execution application by the decree-holder that the decretal amount should be given to him by calling for the said amount after serving a notice on the Government of India, as the Bengal-Assam Railway belonged to the said Government, and if the amount was not realised after service of such a notice, he should be granted a warrant for attaching the moveables of the judgment-debtor. The amount was not paid even after service of the notice contemplated by Section 82 of the CPC and there arose the question of issuing the warrant for attachment of the moveables. The executing Court found that the property sought to be attached was not mentioned in the execution proceeding and consequently it dismissed the same. It is on that account viz., by reason of the dismissal of the Darkhast on the ground that the decree-holder had not set out the description of the moveable property sought to be attached, that it is said that he did not comply with Rule 12 of Order 21 and, therefore, it was not a Darkhast filed in accordance with law as contemplated under Article 182(5) of the Indian Limitation Act. As I said above, it is not the order that matters, but one has to see as to the application itself whether it was in accordance with law as contemplated under Article 182(5) of the Indian Limitation Act. Order 21, Rule 11 Sub-rule (2) provides as under :--

11(2). Save as otherwise provided by Sub-rule (1), every application for the execution of a decree shall be in writing, and shall contain in a tabular form the following particulars, namely:--

(i) the mode in which the assistance of the Court is required, whether -

(i) * * * * *

(ii) by the attachment and sale, or by the sale without attachment, of any property;

* * * * *

So far as Rule 11 is concerned, the Darkhast was quite in order inasmuch as all that was required to be stated was stated in the Darkhast

application including the mode in which the assistance of the Court was required, viz., by attachment and sale of the moveable property of the

judgment-debtor. Then comes Rule 12 which says that where an application is made for the attachment of any movable property belonging to a

judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing

a reasonably accurate description of the same. Now if we analyse the section, it appears that the decree is required to give a reasonably accurate

description of the property to be attached if that property is to be attached while in possession of the person other than the judgment-debtor. That

person may no doubt be an agent of the judgment-debtor or that he may be holding on account of the judgment-debtor. It is only then that the list

of the property has to be attached with the application itself. In the present case it is not shown that it was to be attached from altogether some

other person who was holding on account of the judgment-debtor. Thus, when the moveable property in the possession of the judgment-debtor

was sought to be attached, no such specific description of the property was essential to be given so that it can be said that non-compliance thereof

would render the application invalid in the sense that it was not in accordance with law as contemplated under Article 182(5) of the Indian

Limitation Act.

10. Apart from that position, if we turn to the second part of Clause (5) of Article 182, it contemplates ""...or to take some step in aid of

execution of the decree or order."" If any such application were found to be an application for taking some step in aid of execution, it can as well

serve the purpose and extend the period of limitation by three years from the date of the order passed in the proceeding. In the present case, in the

application there was a two-fold prayer as already set out hereabove. The decree- holder wanted the Court to issue a notice to the judgment-

debtor for paying up the amount before his application can be proceeded for executing the warrant under Order 21, Rule 43 of the CPC that may have to be issued against the moveable property of the judgment-debtor for realising his amount. That notice u/s 82 of the CPC was issued against the judgment-debtor and no amount was paid in pursuance thereof. The judgment-debtor did not also appear either in pursuance of that notice, or in pursuance of a notice issued under Order 21, Rule 22 of the CPC whereby it was called upon to show cause why the decree should not be executed against it. When such is the position, it can be easily said that it was a step towards the relief which the decree-holder sought for by actually executing the warrant of attachment of the moveable property which may be issued after the judgment-debtor failed to comply with the notices issued against it. Such an application, therefore, is in itself a step in aid towards the execution of a decree for which the decree-holder moved the Court. If the judgment-debtor does not remain present and the Darkhast ultimately comes to be dismissed for the reason that he did not supply the details of the description of the moveable property sought to be attached, it cannot take away the effect of the validity of the application for execution filed by the decree-holder so as to serve as a step-in-aid of execution and thereby save the period of limitation under Article 182(5) of the Indian Limitation Act. In my view, therefore, the learned District Judge was quite right in saying that the Darkhast No. 65/51 was in accordance with law and that it was a step-in-aid of execution and consequently the period of limitation would begin to run from the date of the order passed on 8-1-53 in that Darkhast. The mere fact that it came to be dismissed on some such ground and that the order remained without being appealed against, cannot help the opponent to say that it was not in accordance with law or that it did not serve as a step in aid of execution within the meaning of Article 182(5) of the Indian Limitation Act.

11. The third point raised by Mr. Daru was that the person against whom the decree was sought to be executed was altogether a different person from the one --the judgment-debtor -- in the decree and that, therefore, the execution proceeding taken out against the appellant was bad in law.

In view of my finding that the respondent had no right to execute the decree -- he being not the decree-holder as such, this question would not

survive. Apart from that position, one thing is clear that the Union of India is the sole proprietor of different railways running in different parts of the country. It is indeed true, as pointed out by Mr. Daru, that there are different units and all accounts have to be kept separate in respect of those units much though the overall control is of the Union Government as one entity. But when the appellant has chosen to appear and resist the execution itself and even gone to the length, of paying the amount, though no doubt with the purpose of staying the execution proceedings, it can be said that he did not resist the execution on that ground as such and consequently the execution application filed against the Union of India through Western India Railway cannot be said to be bad in law in the peculiar circumstances of this case.

12. The last point raised by Mr. Daru was to request the Court to exercise inherent powers u/s 151 of the CPC calling upon the respondent to return or deposit the amount in Court and it can only be directed to take the amount provided his Darkhast was held to be valid in law. Ordinarily no doubt if the amount was deposited in Court, this Court would have been justified in exercising those powers and direct the respondent to deposit the amount in Court. But in the present case, the amount has been paid though no doubt out of some mistake, to the respondent out of Court, and consequently the Court would have no control over such a person when he was paid the amount rightly or wrongly believing him to be a person entitled to get under the decree passed against the judgment-debtor. It is again clear that Section 144 of the CPC will not apply and it would not be so very proper to apply the provisions contained in Section 151 when we have definite provision for restitution of any such amount u/s 144 of the Civil Procedure Code. At any rate, as I said above, the Court has no control over the person who is said to be a wrong person having received the amount and when that is so, this Court would not be justified in passing an order of directing any such person to deposit the amount in Court, for, after all, the Court can always consider to pass an order which would be effective and not an order which cannot be complied with or in other words be ineffective in the circumstances of the case. I do not, therefore, think that any such order can be passed in this proceeding and the learned District Judge was, therefore, right in not exercising his powers u/s 151 of the CPC for directing the respondent to

deposit the amount in Court. Since, however, the appellant succeeds on the first point viz. that the respondent was not entitled to file the Darkhast,

it is liable to be dismissed. It may well be open for the appellant to recover the amount by taking any other recourse in accordance with law, from

the respondent.

13. In the result, therefore, the appeal is allowed, and the order passed by the trial Court and confirmed by the first appellate Court shall be set

aside. The Darkhast shall stand dismissed. The respondent shall pay the costs of the appellant and bear his own.