

1908
March 26.

Before Mr. Justice Aikman and Mr. Justice Karamat Hussain.
HAKIM SINGH AND ANOTHER (JUDGMENT DEBTORS) v. RAM SINGH
(DECREE-HOLDER).*

Act No. IV of 1882 (*Transfer of Property Act*), sections 88 and 89—*Civil Procedure Code*, section 250—*Execution of decrees*—*Alleged payment out of Court not certified.*

Applications for an order absolute for sale under section 89 of the *Transfer of Property Act*, 1882, are applications for the execution of the decree under section 88 of the Act. *Oudh Behari Lal v. Nageshar Lal* (1) and *Mallikarjunadu Setti v. Lingamurti Pantulu* (2) referred to. To such applications section 258 of the *Code of Civil Procedure* is applicable and bars the recognition of payments made out of court in pursuance of the decree unless such payments are certified to the court in the manner prescribed by that section. *Vaidhnadasamy Ayyar v. Somasundram Pillai* (3) followed. *Mullikarjuna Sastri v. Narasimha Rao* (4) and *Halem Ali Khundkar v. Abdul Ghaffur Khan* (5) dissented from.

IN this case the re-pondent obtained a decree under section 88 of the *Transfer of Property Act* against the appellants directing them to pay a sum of money, and in default ordering that the property mortgaged to the respondent should be sold. The respondent applied for an order absolute under section 89 of the Act. The judgment-debtors pleaded that they had paid a certain sum to the decree-holder out of Court. This was denied by the decree-holder. The Court of first instance (Munsif of Farrukhabad) found the payment proved and made an order absolute for sale to recover the balance due after deduction of the amount paid out of the Court. The decree-holder appealed. He pleaded that no payment had been made to him out of Court and further that it was not open to the Court, having regard to the provisions of section 258 of the *Code of Civil Procedure*, to recognise the payment out of Court. Without going into the first plea the learned District Judge sustained the second plea. The judgment-debtor appealed to the High Court.

Munshi *Gulzari Lal*, for the appellant.

Mr. M. L. *Agarwala* and Babu *Damodar Das*, for the respondent.

* Second Appeal No. 627 of 1907, from a decree of Muhammad Ishaq Khan, District Judge of Farrukhabad, dated the 12th of March, 1907, reversing a decree of Shekhar Nath Banerji, Munsif of Farrukhabad, dated the 17th of November, 1906.

(1) (1890) I. L. R., 13 All., 278. (3) (1905) I. L. R., 28 Mad., 473.
(2) (1902) I. L. R., 25 Mad., 244. (4) (1901) I. L. R., 24 Mad., 412.
(5) (1903) 8 C. W. N., 102.

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AIKMAN and KARAMAT HUSEIN, JJ.—The respondent obtained a decree under section 88 of the Transfer of Property Act against the appellants directing them to pay a sum of money, and in default ordering that the property mortgaged to the respondent should be sold. The respondent applied for an order absolute under section 89 of the Act. The judgment-debtors pleaded that they had paid a certain sum to the decree-holder out of Court. This was denied by the decree-holder. The Court of first instance found the payment proved and made an order absolute for sale to recover the balance due after deduction of the amount paid out of the Court. The decree-holder appealed. He pleaded that no payment had been made to him out of Court and further that it was not open to the Court, having regard to the provisions of section 258 of the Code of Civil Procedure to recognise the payment out of Court. Without going into the first plea the learned District Judge sustained the second plea. The judgment-debtors come here in second appeal. For the appellants it is argued that the provisions of section 258 have no application to the case. Reliance is placed upon a decision of the Madras High Court, *viz.*, *Mallikarjuna Sastri v. Narasimha Rao* (1) and on a decision of the Calcutta High Court in *Hatem Ali Khundkar v. Abdul Ghaffar Khan* (2). The former of these decisions has been overruled by a full Bench of the Madras High Court in *Vaidhinasamy Ayyar v. Somasundram Pillai* (3). The latter case undoubtedly supports the appellants, but, with all deference to the learned Judges who decided it, we are unable to agree with them. The Full Bench case of the Madras High Court is in point, and is against the appellants. We agree with the view taken in that case. We hold that the money alleged by the judgment-debtors to have been paid out of Court was "money payable under a decree" within the meaning of section 258 of the Code of Civil Procedure. If it was paid out of Court and the decree-holder did not certify the payment, the judgment-debtor ought to have taken prompt steps within the time allowed by the Limitation Act to have the payment recorded as certified but they failed to do so. It has been held by this Court in

(1) (1901) I. L. R., 24 Mad., 412. (2) (1903) 8 C. W. N., 102.

(3) (1905) I. L. R., 28 Mad., 473.

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Oudh Behari Lal v. Nageshar Lal (1) and also by the Madras High Court in *Malikarjunadu Setti v. Lingamurti Pantulu* (2) that applications for an order absolute are applications for the execution of the decree under section 88. We are of opinion that the learned Judge was right in holding that the Court was precluded by the last paragraph of section 258 of the Code of Civil Procedure from recognising the alleged payment out of Court. If the view taken by the Calcutta High Court were adopted, it seems to us that the execution of a decree might be delayed by repeated pleas of payment out of Court, and that the Court might have to try what would really be a series of different suits arising out of the original decree. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Aikman.

MOHIB-ULLAH (OBJECTOR) v. ABDUL KHALIK AND OTHERS
(DECREE-HOLDERS).*

Muhammadan law—Gift—Hiba bil mushaa—Possession.

Held that what is known to Muhammadan law as a *hiba bil mushaa*, or gift of an undivided joint property, is a valid gift if the donee obtains possession. *Muhammad Muntaz Ahmad v. Zubaida Jan* (3) referred to.

In this case the holders of a decree against one Wali Muhammad attached in execution thereof a certain house as belonging to their judgment-debtor. This house had belonged to Ghazi the father of Wali Muhammad. By a deed of gift executed on the 6th of April, 1906, Ghazi gave the house to his daughters-in-law Musammât Haliman and Musammât Ayesha in equal shares. Ayesha died, and her interest in the house devolved upon her son Mohib-ullah. Haliman and Mohib-ullah objected to the attachment of the house by the decree-holders. The Court of first instance (Munsif of Allahabad) disallowed Haliman's objection, but sustained that of Mohib-ullah upon the ground that Ayesha had taken possession of her share of the house. The decree-holders appealed, and the lower appellate Court

* Second Appeal No. 982 of 1907, from a decree of Udit Narain Singh, Officiating Subordinate Judge of Allahabad, dated the 9th of July 1907, reversing a decree of Mohan Lal, Munsif of Allahabad, dated the 21st of November 1906.

(1) (1890) I. L. R., 13 All., 278. (2) (1902) I. L. R., 25 Mad., 244.

(3) (1889) I. L. R., 11 All., 460.