

1936

LALA
RAMJI
LAL
v.
THE
SECRETARY
OF STATE
FOR
INDIA IN
COUNCIL

King, C.J.
and Zail
Hasan, J.

The learned Judge of the Court below has relied on section 53A of the Transfer of Property Act but apart from the fact that it is doubtful if that section can apply to a case in which only rent is claimed after the house has been vacated, we are of opinion that section 53-A was not intended to be given retrospective effect. That section is inapplicable for the further reason that we have held that the tenancy in the present case was from month to month. We therefore think that the applicant is entitled to rent from the 7th to the 30th of April, 1931.

As regards the claim for damages, etc. we think the learned Judge would have exercised a better discretion if he had allowed the applicant opportunity to produce his witnesses. It was not through any fault of the plaintiff that his witnesses were not present on the date of the hearing. The summonses were returned unserved not because of the time for service being short but because the witnesses could not be found.

We allow this application and decree the plaintiff's suit with costs for Rs.360 rent from the 7th to the 30th of April, 1931. We send back the case to the Court below for determination of the other portions of the claim after giving the parties opportunity to produce evidence about them.

Application allowed.

APPELLATE CIVIL

Before Sir C. M. King, Knight, Chief Judge

HAKIM NIHAL HUSAIN (DECREE-HOLDER-APPELLANT) v.
SYED AHMAD (JUDGMENT-DEBTOR-RESPONDENT)*

Civil Procedure Code (Act V of 1908), section 48(1)(b)—“Subsequent Order”, meaning of—Jurisdiction—Order by executing Court directing payment of decretal sum by instalments, whether “subsequent order” within section 48.

*Execution of Decree Appeal No. 1 of 1936 against the order of Pandit Damodar Rao Kelkar, District Judge of Sitapur, dated the 2nd of October, 1935, upholding the order of Saiyid Qadir Hasan, Subordinate Judge of Sitapur, dated the 3rd of August, 1935.

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The "subsequent order" under section 48(1)(b), C. P. C., must be an order made by the Court which passed the decree and not an order made in the course of execution. An executing Court as such, has, therefore, no power to make an order which would operate as a "subsequent order" within the meaning of section 48(1)(b), C. P. C., directing payment of the decretal amount on certain dates. *Gobardhan Das v. Dau Dayal* (1), followed. *D. S. Apte v. Tirmal Hanmant Savnur* (2), and *H. Fielding v. Firm Janki Das & Sons*, (3) referred to.

Mr. *Habib Ali Khan*, for the appellant.

Mr. *Akhlaque Husain*, for the respondent.

KING, C.J.:—This appeal arises out of an order passed by a Court executing a decree, holding that under section 48 of the Code of Civil Procedure the decree could not be executed.

The decree was passed on the 7th of August, 1911. The present application for execution was made on the 7th of July, 1935. This is evidently far more than twelve years from the date of the passing of the decree but it is pleaded that a fresh period of twelve years for executing the decree has been given by the passing of a "subsequent order" within the meaning of section 48, sub-section 1(b). On the 23rd of March, 1925, the parties entered into a compromise to the effect that the decretal amount should be paid by instalments. Annual instalments were fixed to be paid on the 23rd of March, 1936, and on the same date in the two following years.

The Court passed an order that the parties were bound by the compromise. It is argued that this order amounts to a subsequent order directing the payment of money at recurring periods within the meaning of section 48, sub-section 1(b) and that therefore a fresh period of twelve years runs from the date of that order.

It is argued for the judgment-debtor that the order in question cannot be held to be a "subsequent order" within the meaning of section 48 because it was not passed by the Court which passed the decree but by the executing Court.

(1) (1932) I.L.R., 54 All., 573.

(2) (1925) Bom., 503.

(3) (1926) Lah., 465.

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King, C.J.

There is undoubtedly a conflict of judicial opinion as to whether an order passed by an executing Court regarding the realisation of a decretal sum by means of instalments amounts to a subsequent order within the meaning of section 48. The appellant has relied upon the rulings in *D. S. Apte v. Tirmal Hanmat Sawnur* (1), and *H. Fielding v. Firm Janki Das and Sons* (2), besides other rulings to the same effect.

For the respondent great reliance is placed upon the Full Bench ruling of the Allahabad High Court in *Gobardhan Das v. Dau Dayal* (3). In that case it was clearly held by two of the learned Judges that an executing Court as such has no power to make an order which would operate as a "subsequent order" within the meaning of section 48, sub-section 1(b) of the Code of Civil Procedure, directing payment of the decretal amount on a certain date or on certain dates. The subsequent order must be an order made by the Court which passed the decree and not an order made in the course of execution. There are also other authorities to the same effect. In view of the conflict of judicial opinion I prefer to follow the Full Bench ruling of the Allahabad High Court as the question was very fully argued in that case. In accordance with that ruling the order passed by the execution Court on the 23rd of March, 1935, cannot be held to be a subsequent order within the meaning of section 48, sub-section (b).

It is further argued that the Court below was wrong in holding that the plea of the bar of limitation was not barred by the principle of *res judicata*. It is unnecessary to consider this point at length as the learned Advocate for the appellant has been unable to refer me to any order which raises the bar of *res judicata* by holding that the bar of limitation does not apply. I think there is no force in this contention. In my opinion the Court below has correctly decided the point at issue and I dismiss the appeal with costs.

Appeal dismissed.

(1) (1925) Bom., 503.

(2) (1926) Lah., 465.

(2) (1932) I.L.R., 54 All., 573.