

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice and U San Maung, J.

M. E. O. KHAN (APPELLANT)

v.

M. H. ISMAIL (RESPONDENT).*

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1948

July 1.

Code of Civil Procedure, s. 148—Whether applies to time for doing an act fixed by a decree—Decree originally made not objected to—Whether can be challenged in execution.

A decree for ejection passed on 20th December 1946 was later under s. 14 (3) of the Urban Rent Control Act altered. This alteration was embodied in a fresh decree. The effect of such alteration was that the decree was to stand unexecuted so long as the judgment-debtor paid regularly in advance rent due by the 5th of each month. In appeal the order was confirmed. The judgment-debtor made default in respect of rent for December 1947. Upon application by decree-holder execution by way of ejection was granted. It was contended that the Lower Court should have extended the time provided in the decree and that there could be no perpetual order for ejection.

Held on appeal: That s. 148 of the Code of Civil Procedure does not apply where time is allowed by a decree.

Hukam Chand and others v. Hayat and others, (1912) Punjab Record, Volume 47, 343; *Dharmaraja Ayyar and another v. K. G. Srinivasa Mudaliar and four others*, 39 Mad. 876; *Maslahuddin v. Ram Kishen and another*, A.I.R. (1928) Oadh 32; *Kshetra Mohan Ghose and another v. Gour Mohan Kapali*, 147 I.C. 1025, followed.

Held further: That it was not open in the execution stage to question the validity of the order. If the judgment-debtor had any objection he should have filed cross-objections in the main appeal.

Kyaw Htoon for the appellant.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Civil Regular No. 1176 of 1946 of the Rangoon City Civil Court the respondent M. H. Ismail sued the appellant M. E. O. Khan for his ejection in respect of two rooms in house No. 290/292, Mogul Street, Rangoon, and a decree for ejection

* Civil Misc. Appeal No. 7 of 1948 against the order of the City Civil Court, Rangoon, in Civil Execution No. 815 of 1947, dated the 19th February 1948.

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was passed on the 20th December, 1946, by the then Chief Judge of the City Civil Court (U Myint Thein). On the 8th August, 1947, his successor (Mr. Rajagopaul), acting under the powers conferred upon the Court by sub-section (3) of section 14 of the Urban Rent Control Act, 1946, as substituted by Burma Act No. XXVI of 1947, altered the order dated the 20th December, 1946, in the following terms :

“On the J/D paying to the D/H or depositing in Court within ten days from the date of this order the sum of Rs. 800 said to be due by way of rent for the period February to May 1946 and the costs of the suit in C.R. 1176 of 1946 the order for ejectment passed on 20-12-46 shall stand unexecutable for so long as the J/D continues to pay regularly in advance by the 5th of each month the rent due for the use of the suit rooms, the rent to commence from the date on which occupation is restored to him by virtue of this order.”

The judgment-debtor mentioned in the above order is the appellant M. E. O. Khan and the decree-holder the respondent M. H. Ismail. On an appeal being preferred to this Court against the order of the Chief Judge of the City Civil Court, dated the 8th August, 1947, by M. H. Ismail who felt aggrieved thereby, the appeal was dismissed and the order of the Chief Judge of the City Civil Court confirmed by a Bench, of which we were members. No cross-objection was taken by M. E. O. Khan against the manner in which the order for his ejectment was altered in the manner set out above. In the meantime the appellant M. E. O. Khan made a default in respect of the rent payable for December, 1947. Accordingly, on the 13th December, 1947, an application was made by the respondent M. H. Ismail for the execution of the decree for ejectment. On a notice being issued to the appellant, a written objection was filed on his behalf on the 2nd January, 1948. Therein, the appellant explained

that his failure to deposit the rent on the due date was because he had been in police custody since November, 1947, that therefore he should be given a chance to pay the rent due for the months of December and January, 1948, by the 20th January, 1948, and that upon this payment being made, the execution proceedings against him be closed. The appellant's objection was overruled by the learned Chief Judge of the City Civil Court by a diary order, dated the 2nd January, 1948, which reads :

"It is clear from the objections filed that the rent for December has not been paid as required by the order of the 8th of August 1947. It is understood that the decision in Civil Regular No. 1176 of 1946 is now the subject matter of an appeal, but no stay of execution has been applied for or obtained from the High Court.

In the circumstances, in view of the admitted default the decree-holder is entitled to have his decree executed.

The application is granted."

A warrant for ejectment returnable on the 2nd February, 1948, was then issued. In the meantime the appellant filed another application for permission to continue paying into Court the rents as ordered on the 8th August, 1947, and to recall the ejectment warrant. This application was objected to by the respondent and on the 19th February, 1948, the application was dismissed by the learned Chief Judge of the City Civil Court (U Si Bu). The present appeal by M. E. O. Khan is against the order of U Si Bu, dated the 19th February, 1948.

The first contention raised by the learned Advocate for the appellant is that the Chief Judge of the City Civil Court should have granted to the appellant enlargement of time for the payment of the rent due and that he was wrong in making an order that the execution should proceed. In support of his contention

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the learned Advocate relies upon section 148 of the Civil Procedure Code, which enacts that where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired. However, there is ample authority for the proposition that this section does not apply where time is allowed for doing an act by a decree in a suit. In the case of *Hukam Chand and others v. Hayat and others* (1) it was held by the learned Chief Judge of the Chief Court of Punjab that the general provisions of section 148 of the Civil Procedure Code, 1908, relate only to proceedings antecedent to the passing of a final decree and are not intended to give a Court power to alter the terms of a decree already passed, that the period fixed in a decree for the payment of a certain sum of money consequently cannot be extended under this section, that the Court passing the decree was *functus officio* as an original Court and that the general rule is that no executing Court can vary a decree except by consent of parties. In *Dharmaraja Ayyar and another v. K. G. Srinivasa Mudaliar and four others* (2) a Bench of the Madras High Court held that section 148 of the Civil Procedure Code does not enable a Court to extend time for doing acts allowed by a decree. Similarly, in *MasJahuddin v. Ram Kishen and another* (3) a Bench of the Chief Court of Oudh held that the jurisdiction with which a Court is invested by the provisions of section 148 of the Civil Procedure Code in the matter of enlargement of time is restricted to cases where time for doing an act is fixed by the Court, otherwise than by its

(1) (1912) 47 P.R. 343 (Civil Judgts. 99). (2) 39 Mad 876.

(3) A.I.R. (1928) Oudh at p. 32.

decree in a suit. In *Kshetra Mohan Ghose and another v. Gour Mohan Kapali* (1) a Bench of the Calcutta High Court held that where the Court makes an order in a decree that unless certain payment be made within a fixed date, the case would stand dismissed, it is not open to the Court to vacate the order and extend time for payment. Therefore, the learned Chief Judge of the City Civil Court (Mr. Rajagopaul) had no other option than to pass the order which he did on the 2nd January, 1948, that the application for execution be granted, and his successor (U Si Bu) had no other option than to pass the order dated the 19th February, 1948, dismissing the appellant's application to recall the ejectment warrant and to allow the appellant to continue paying into Court the rents as ordered on the 8th August, 1947.

A further contention raised by the learned Advocate for the appellant is that the order of the learned Chief Judge of the City Civil Court dated the 8th August, 1947, in which he altered the order dated the 20th December, 1947, in the manner already set out above, is bad in law as it is tantamount to making a perpetual order for ejectment of the appellant. However, it is not open to the appellant at this stage to question the validity of the order dated the 8th August, 1947. If he had any objection to the form or to the substance of that order he should have filed a cross-objection when the respondent M. H. Ismail filed the appeal which was dealt with by this Court in Civil Miscellaneous Appeal No. 47 of 1947.

In the result the appeal fails and must be dismissed. As the learned Advocate for the respondent has not appeared before us to argue this appeal, we shall make no order as to costs.

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