

1954

Present: Swan, J., and Sansoni, J.

PIYARATNE THERO, Appellant, and RAHIM, Respondent

*S. C. 140—D. C. Kandy 324/ M. S.**Execution—Decree to pay money—“Subsequent order directing the payment of money to be made at a specified date”—Civil Procedure Code. s. 337 (1) (b).*

Judgment was entered in 1939 for the payment of a sum of Rs. 696. In 1940 an application for execution was made and, on writ being issued, a sum of Rs. 80 only was recovered. In 1943 a subsequent application for execution was made and on February 7, 1944, the Court allowed the defendant to pay the decreed amount in monthly instalments of Rs. 20 and ordered that in case of default the writ could be reissued. Plaintiff applied for execution several times thereafter but nothing was recovered from the defendant. On July 17, 1953, a similar application was made by the plaintiff and, on being noticed, the defendant objected to the reissue of the writ on the ground that over 10 years had expired since the date of the decree.

Held, that the order of February 7, 1944, was not a "subsequent order directing the payment of money to be made at a specified date" within the meaning of section 337 (1) (b) of the Civil Procedure Code. At most it amounted to a concession granted to the defendant as to the manner of settling the amount he had been decreed to pay. The application of July 17, 1953, was therefore time-barred and should be refused.

Muthu Ramen Chetty v. Mohammodu (1919) 21 N. L. R. 97, followed.

Meenatchi Atchy v. Palaniappa Chettiar (1941) 42 N. L. R. 333, distinguished.

APPPEAL from a judgment of the District Court, Kandy.

P. Somatilakum, for the defendant appellant.

M. Rafeek, for the plaintiff respondent.

Cur. adv. vult.

November 30, 1954. SANSONI, J.—

In this case a judgment by default was entered against the defendant on 27th November, 1939, for the payment of a sum of Rs. 696 with further interest and costs. On an application for execution made in 1940, writ was issued and a sum of Rs. 80 was recovered from the defendant on that occasion. In 1943 a subsequent application for execution was made and the defendant was noticed. Eventually on 7th February, 1944, the Court allowed the defendant to pay the decreed amount in monthly instalments of Rs. 20 commencing from 1st November, 1944, and ordered that in case of default, the writ may be reissued. The defendant apparently made default in paying the instalments and the plaintiff applied for execution several times thereafter but nothing was recovered from the defendant. On 17th July, 1953, a similar application was made by the plaintiff and on being noticed the defendant objected to the reissue of the writ on the ground that over 10 years had expired since the date of the decree.

After hearing Counsel appearing for the parties the learned Additional District Judge allowed the plaintiff's application on the ground that 10 years had not elapsed since 7th February, 1944, when the Court made order allowing the defendant to pay the decreed amount in monthly instalments.

The defendant has appealed and it is necessary to consider whether the order of 7th February, 1944, is a "subsequent order directing the payment of money to be made at a specified date" within the meaning of section 337 (1) (b) of the Civil Procedure Code, for if it is the period of 10 years within which a subsequent application for writ may be granted commences to run only from the date of default in making the payment. It seems to me that the matter is concluded by the judgment of Schneider, A. J., and de Sampayo, J., in *Muthu Ramen Chetty v. Mohammodu*¹. In that case a mortgage decree was entered in 1902. In 1911

¹ (1919) 21 N. L. R. 97.

an application for execution was made and on 2nd November, 1911, the defendant consented to the issue of writ and writ was issued. In 1917 the plaintiff applied to issue writ and it was objected that ten years had expired from the date of the decree. The District Judge however allowed the application on the ground that the period of ten years should be reckoned from the order of 2nd November, 1911, and not from the date of the decree of 1902 because the order was a "subsequent order" such as is contemplated by section 337 (1) (b). Schneider, A. J., in setting aside the order of the District Judge said: "The subsequent order contemplated in section 337 (b) is one which may be made under the provisions of sections 320, 322, 334 and 335 of the Code, for the recovery by execution of a sum of money as damages in default of compliance with the substantial decree, either to deliver movable property or to do or abstain from doing some specified act". Following that decision I would hold that the order of 7th February, 1944, is not a "subsequent order". At most it amounts to a concession granted to the defendant as to the manner of settling the amount he had been decreed to pay.

It cannot be contended that the decree of 27th November, 1939, was superseded by a new decree on 7th February, 1944. Such a position arose in *Meenatchi Atchy v. Palaniappa Cheltiar*¹ but the facts of that case are widely different from those of the present case, for they clearly indicated that the parties substituted a new decree for the decree originally entered: they even specifically agreed that the date of the decree was to be reckoned as from the date of the new decree. The plaintiff's Proctor does not seem to have taken the view that a new decree came into being on 7th February, 1944, because in the application for execution the date of the decree sought to be executed appeared as 27th November, 1939. The order of 7th February, 1944, is nothing more than an intermediate arrangement for the payment of the original decree. Although Keeneman, J., in his judgment in *Meenatchy Atchy v. Palaniappa Cheltiar* (supra) said that the agreement on which the new decree was entered in that case could be regarded as a "subsequent order" within section 337 (1) (b), I think that ruling must be considered in the light of that agreement. The learned Judge makes no reference to the judgment in *Muttu Ramen Chetty v. Mohammadu* (supra) and if there is any conflict between the judgments on the meaning of the words "subsequent order" I would follow the judgment of Schneider, A. J., which, as far as I know, has never been dissented from.

For these reasons it seems clear that the application for execution made by the plaintiff on 17th July, 1953, was time-barred and should have been refused. This appeal is therefore allowed with costs.

SWAN, J.—I agree.

Appeal allowed.

¹ (1941) 42 N. L. R. 353.