Present : Wood Renton C.J. and De Sampayo J. **1917.**

NAINA *v.* SEDEMBRAM.

85—D. C. Colombo, 45,538.

Adjustment of decree—Payment of a portion in pursuance of adjustment —Agreement to accept the balance in monthly instalments—Action for damages for wrongful seizure—Civil Procedure Code, ss. 349, 224, 225.

A judgment creditor sued out execution for the entire decree and seized property of the debtor, concealing from the Court the fact of an adjustment of the decree, whereby he agreed to accept an immediate payment of Rs. 2,000 and the balance by equal monthly instalments. The Rs. 2,000 were paid in pursuance of the agreement. Neither the payment nor adjustment was certified when execution was issued ; but they were certified later. Under the adjustment the creditor was not entitled to apply for execution at the time he did apply.

Held, that the creditor was liable in damages for wrongful seizure. The certification of the adjustment and the payment of the first instalment related back to the date on which the adjustment and payment were made.

To procure, to the prejudice of any one, maliciously and either by *expressio falsi* or *suppressio veri* the issue of legal process, which was perfectly justifiable on the materials before the Court, is an actionable wrong.

THE facts are set out in the judgment.

A. St. V. Jayewardene, for defendant, appellant.

Bawa, K.C., and *Bartholomeusz*, for plaintiff, respondent.

Cur. adv. vult.

1917.

Naina v. Sedembram

September 28, 1917. Wood Renton C.J.—

This case raises an interesting point of law. The defendan obtained judgment against the plaintiff in 40—D. C. Colombc No. 42,619, and decree was entered up in his favour on Novembe 17, 1915, the plaintiff being allowed time to pay the claim and cost till January 15, 1916. On the latter date the parties came to a adjustment of the litigation. It was agreed that the plaintiff shoul make an immediate payment of Rs. 2,000 to the defendant, an that the defendant should accept payment of the balance due i equal monthly instalments. In pursuance of this agreement, th plaintiff on January 15, 1916, paid, and the defendant accepted the first instalment of Rs. 2,000. Neither this payment nor th adjustment itself was at the time certified to the Court either by th decree-holder or by the judgment-debtor in compliance with th provisions of section 349 of the Civil Procedure Code. On January 17 the defendant applied to the District Court for execution of th entire decree entered up in his favour in the case, making no mentio in his application of the adjustment arrived at on January 15, 1916 or of the payment of the first of the stipulated instalments by th judgment-debtor on the same day. Execution was allowed, and on January 24 the Fiscal, at the defendant's request, seized i execution of the decree eight boats belonging to the plaintiff in th harbour of Colombo, as well as a sum of Rs. 10,000 deposited by him with Messrs. Shaw, Wallace & Co. as security for the due performance of the contract. On January 26 the plaintiff moved to have the adjustment of the decree in the case certified in terms of section 349 of the Civil Procedure Code. The District Judge, after inquiry, ordered this to be done, and his decision on the point was subsequently affirmed in appeal. The plaintiff now sues the defendant for damages, alleging that, as a result of the seizure above mentioned, he had forfeited his contract with Messrs. Shaw, Wallace & Co., and had lost the profits on his boats for a period of several days. The defendant in his answer pleaded that the plaintiff's action must fail, inasmuch as the alleged adjustment of the decree had not been certified under section 349 of the Code of Civil Procedure at the time when execution was applied for and issued. The learned District Judge has over-ruled this contention, and the defendant appeals.

In my opinion the ddecision of the District Judge is perfectly correct. He held incidentally, and I agree with him, that the certification of the adjustment of January 15, 1916, and the payment of the first instalment under it, related back to the date on which the adjustment and the payment were made. It is well settled as a rule of evidence—see, for example, *Pitcha Tamby v. Mahamadu Khan* [1]—that the effect of section 349 of the Civil Procedure Code is to render the certificate of adjustment or payment

[1] *(1891) 9 S. C. C. 187.*

the sole admissible evidence of satisfaction of the decree. But, in my opinion, we are here by no means exclusively concerned with section 349 of the Civil Procedure Code. Section 224 (*e*) makes it incumbent upon a decree-holder, who is applying for execution, to incorporate in his application an answer to the question "whether any and what adjustment of the matter in dispute has been made between the parties subsequently to the decree." It will be observed that this section speaks of the making of the adjustment, not of its certification. It results by necessary implication from the provisions of section 225 that, if such an adjustment as had been reached, and such a payment as had been made, in the present case had been brought to the notice of the District Court on January 17, 1916, execution for the whole amount of the decree would not have been allowed. Now, under section 349 it was the duty primarily of the decree-holder, that is to say, of the defendant in this action, to certify the adjustment and the payment to the Court. By his failure to do so he secured the issue of process, which would otherwise have been withheld, and I can see no reason either in law or in common sense why his conduct should not be held to be actionable, if the plaintiff can prove as a fact that it has caused legal damage to himself. The case of *In re Medai Kaliani Anni*, [1] to which the defendant's counsel referred us, itself shows that, in such circumstances as we have here to deal with, a breach by a decree-holder of his statutory duty to certify an adjustment or payment is a good foundation for an action by the judgment-debtor, if damage can be alleged and proved. The position is in no way modified by the fact that under section 349 of the Civil Procedure Code the judgment-debtor himself can certify the adjustment or the payment of the amount in dispute. The obligation rests, in the first instance, on the decree-holder, and in the present case the wrong was done before the judgment-debtor had any reasonable opportunity of preventing it. In this connection I may refer to the decision of the Court of Appeal in England in the case of *Clissold v. Cratchley*,[2] which shows that to procure maliciously and either by *expressio falsi* or *suppressio veri* the issue of legal process, which was perfectly justifiable on the materials before the Court, is an actionable wrong.

On these grounds I would dismiss the appeal, with costs.

DE SAMPAYO J.—

I am of the same opinion. The adjustment of the decree in D. C. Colombo, No. 42,619, arrived at between the plaintiff and the defendant, has, since the events which gave rise to this action, been duly certified and recorded under section 349 of the Civil Procedure Code, and there is therefore nothing in the way of its recognition for the purposes of this action.

[1] *(1907) I. L. R. 30 Mad. 545.*

[2] *(1910) 2 K. B. 244.*

1917.

DE SAMPAYO J.

Naina v. Sedembram

It is contended, however, that as the adjustment had not been certified at the date of the issue of execution the issue of process was lawful, and its execution, therefore, constituted no actionable wrong. I think this argument is fallacious. The process and its execution were no doubt lawful in the sense that the Court had jurisdiction to issue the process, and that the Fiscal had lawful authority to execute it, but whether the application for the process on the part of the defendant was not wrongful is a different question altogether. Moreover, as the learned District Judge has rightly observed, section 349 of the Code provides only for a special method of proof, and when that requirement has been satisfied, the payment or adjustment will be efficacious as from the beginning, and consequently any execution in contravention of such payment or adjustment will necessarily be unjustified, though it may have been taken out prior to the certification. It is also said that in any event the plaintiff's remedy is an action for breach of agreement, and not one for damages for wrongful issue of execution, and Mr. Jayewardene, for the defendant, has cited certain Indian decisions, but I do not think any of them is an authority for the proposition that the form of action in the present case is not available. *Poromanand Khasnabish v. Khepoo Paramanich*[1] was chiefly concerned, not with the form of action, but with the question whether a separate action would lie. Moreover, it appears to me that the action in that case was for damages consequent on the wrongful execution of a decree which had been satisfied. In *Krishnasami Ayyangar v. Ranga Ayyangar* [2] a decree for partition had been adjusted by an agreement that the plaintiff should get some specific land in respect of his share, and the action was for the land, or in the alternative for damages for breach of the agreement. The Court held that the claim for damages was maintainable, but the claim for the land was not, which is a different thing from holding that an action founded on tort was not maintainable if the necessary facts existed. A similar remark applies to *Periatambi Udayan v. Vellaya Goundan.*[3] The case *In the Matter of Medai Kaliani Anni,*[4] which has also been cited, appears to me an authority against the defendant rather than for him. It is true that the action was for recovery of the money paid in pursuance of an adjustment, but the claim was resisted only on the ground that, the decree not having yet been executed, there was no cause of action. The Court, however, held that the law cast on the decree-holder the duty of certifying any payment made out of Court in satisfaction of the decree, and that if he failed to do so there was a breach of duty, for which an action would at once lie. The last Indian case above cited appears to me to indicate the true principle on which an action of this kind is founded. Section 349 of our Code also casts the duty of certifying payments or adjustments primarily

[1] *(1884) I. L. R. 10 Cal. 354.*
[2] *(1896) I. L. R. 20 Mad. 369.*
[3] *(1897) I. L. R. 21 Mad. 409.*
[4] *(1907) I. L. R. 30 Mad. 545.*

on the judgment-creditor. The judgment-debtor may also apply to Court, but that is for his protection only, and not as a matter of duty, whereas the judgment-creditor has a statutory duty towards the judgment-debtor. If the judgment-creditor, having received the money due, or having entered into terms of adjustment of the decree, intentionally omits to perform that duty and takes out execution to the prejudice of the judgment-debtor, I cannot conceive that any law will hold him free from liability. In my opinion there is not much doubt about the law on this point. In addition to *In the Matter of Medai Kaliani Anni* (*supra*), I may refer to the Indian case *Ramayyar v. Ramayyar*,[1] in which it was held that the proviso in question did not stand in the way of the judgment-debtor in proving the fact of concealment from the Court of the fact of an adjustment, and the fraudulent conduct of the judgment-creditor in obtaining the execution of the decree notwithstanding the adjustment. Our Common law is equally in favour of an action for malicious issue of a civil process. *Maasdorp, vol. IV., p. 80*, says: "With regard to malicious proceedings, whether civil or criminal, it may be laid down generally that when a person sets the law in motion, and damage to another person ensues therefrom, he will be liable in damages, if it can be shown that in doing so he acted maliciously and without reason and probable cause." See also *ibid., p. 86*. In this connection malice includes recklessness and intentional disregard of duty. The English law on this subject is well stated in *Clissold v. Cratchley*,[2] to which my Lord the Chief Justice referred in the course of the argument. There the amount of the judgment had been paid to the country solicitor, but without the knowledge of the plaintiff or his solicitor in London, and certain property having been seized under a *fieri facias* the action was brought to recover damages for improperly levying execution, and in the alternative for trespass. The Court of Appeal held that the claim on the latter cause of action was good, but that the first cause of action must fail because malice was absent. In the present case the circumstances amply show that the defendant sued out execution against the plaintiff, deliberately concealing from the Court the fact of the adjustment and the actual receipt of money as an instalment in pursuance of the adjustment, and that he thereby acted maliciously in the above sense.

I agree that this appeal should be dismissed, with costs.

Appeal dismissed.

[1] *(1897) I. L. R. 21 Mad. 356.*

[2] *(1910) 2 K. B. 244.*