1943 *Present:* **Soertsz and Hearne JJ.**

CHARTERED BANK, LTD., Appellants, *and* DE FONSEKA, *et al.*, Respondents.

25—26—D. C. (Inty.) Colombo 54,335 with 64—65 D. C. (Inty.) Colombo 54,335.

Adjustment of decree—Money due under hypothecary decree—Sale of lands under decree—Negotiations for payment of balance due—Failure to pay balance on due date—No certifiable adjustment—Notice of order for sale to judgment-debtor unnecessary—Civil Procedure Code, ss. 347 and 349.

The plaintiff-Bank obtained a hypothecary decree against the 1st defendant for a sum of two million odd rupees due on a primary mortgage. The decree directed that, in default of the payment of this sum, the mortgaged lands should be sold by an auctioneer.

By October 13, 1938, the plaintiff had recovered in three instalments a sum of Rs. 793,910.85 and had certified these payments of record.

Thereafter, on February 17, 1941, after certain negotiations had taken place between the defendant and the Bank, the latter agreed to accept a sum of Rs. 8¾ lakhs in satisfaction of the balance claim provided among other conditions, that the amount should be paid in certain instalments before certain dates, the arrangement being that the amount should be paid on or before June 15, 1941.

Two months after the final date fixed for the payment of the money, the Proctors of the plaintiff submitted a motion, acknowledging payment of a further sum of Rs. 120,000 and asking for execution of the decree to recover the balance still due.

Thereupon, the defendant moved that the decree had been adjusted so as to limit his liability under it to 8¾ lakhs and that the adjustment be certified under section 349 of the Civil Procedure Code and that the order for sale be stayed.

Held, that there was no certifiable adjustment of the decree within the meaning of the section.

All that had taken place between the 1st defendant and the plaintiff at the end of the course of negotiations was that the plaintiff had offered, to take 8¾ lakhs in full satisfaction of his decree and that the defendant on his part accepted that offer by agreeing to perform the conditions upon which it was made to defendant. But when the defendant failed to perform the most important one—the payment of 8¾ lakhs—the offer lapsed and there was no adjustment.

Held, further, that where a hypothecary decree is entered directing that the mortgaged property be sold by a named auctioneer, no order for sale with notice to the judgment-debtor under section 347 of the Civil Procedure Code is necessary.

Perera v. Jones et al (*41 N. L. R. 193*) followed.

Held, also, that there is no requirement of law or of procedure that the order sent to the auctioneer authorising him to sell should be signed by the District Judge or by a particular officer of his Court.

APPEAL from an order of the District Judge of Colombo.

R. L. Pereira, K.C. (with him *C. E. S. Perera, G. P. J. Kurukulasuriya* and *Dodwell Gunawardana*), for the first defendant, appellant, in No. 25 and the petitioner, appellant, in No. 64 and the petitioner, respondent, in No. 65.

H. V. Perera, K.C. (with him *N. K. Choksy*), for the plaintiff, respondent, in No. 25, and the plaintiff, appellant, in No. 26 and the plaintiff, respondent, in Nos. 64 and 65.

E. F. N. Gratiaen (with him *S. Nadesan* and *T. K. Curtis*), for the second petitioner, respondent, in No. 26 and the third defendant, respondent, in No. 64 and the petitioner, appellant, in No. 65.

S. Nadesan for the fourth respondent in Nos. 26, 64, and 65.

C. J. Ranatunga for the fourteenth and fifteenth defendants, respondents, in Nos. 26, 64. and 65.

A. C. Nadarajah for the nineteenth, twentieth, twenty-first and twenty-second defendants, respondents, in Nos. 24, 64, and 65.

L. A. Rajapakse (with him *Kingsley Herat*), for the eighth defendant, respondent, in Nos. 26, 64 and 65.

N. M. de Silva (with him *E. A. G. de Silva*), for the ninth, tenth, eleventh, and seventeenth defendants, respondents, in Nos. 25, 64 and 65

L. A. Rajapakse (with him *F. W. Obeyesekere*), for the sixth and fifteenth defendants, respondents. in Nos. 26, 64 and 65.

Cur. adv. vult.

November 26, 1943. SOERTSZ J.—

There are four appeals before us. In order of date, the earliest is the appeal by the first defendant from an order made against him refusing his application for the stay of the sale of certain lands of his then due to be held in pursuance of an order issued by the Court to the auctioneer named in the decree. The respondent to that appeal is the plaintiff-Bank, the decree holders. The second appeal is also by the first defendant and it is preferred against an order refusing to set aside the sales that took place after the application to stay the sales had been rejected. The respondents to it are the plaintiff-Bank and certain parties interested as puisne encumbrancers and purchasers in execution. The third appeal is taken by the plaintiff-Bank from an order certifying an adjustment of the decree under section 349, on an application made by the first defendant to have it certified. The respondents are the first defendant and the other respondents named in the first defendant's second appeal. The fourth appeal is by the Bank of Chettinad against the order made by the Judge on an application made by that Bank for certification of the alleged adjustment and against the order for costs made against them. The respondents are the other parties concerned in the second and third appeals. In addition to these appeals, there are cross-objections taken by the first defendant under section 772 of the Civil Procedure Code to the order against which the plaintiff has appealed, the first defendant being dissatisfied with the terms in which the adjustment is recorded as certified.

The facts from which these copious tears flow are these:—On March 1, 1935, the plaintiff-Bank obtained a hypothecary decree against the first defendant for a sum of Rs. 2,860,347.31 due to them on a primary mortgage. The decree directed that this sum be paid forthwith or, in default, that the mortgaged lands be sold by an auctioneer, a Mr. Meaden. By October 17, 1938, the Bank had recovered in three instalments a sum of Rs. 793,910.85 and had certified these payments of record. Thereafter, in some connected case pending between the Bank and the first defendant, the latter had preferred an appeal to His Majesty in Council, and, on a joint motion made by both parties to the District Judge of Colombo, execution of the decree in the present case had been stayed to await the decision of that appeal. There was a third case pending between them also in the District Court of Colombo.

In this state of things, an Advocate of this Court, apparently a friend of the first defendant, attempted the role of the *Deus ex Machina* to terminate this prolific litigation and bring about a happy ending. On December 16, 1940, he wrote letter A 12 making "a firm offer" of 8 lakhs in full satisfaction of what was then due to the Bank on the decree. An interview followed and the offer was raised to 8¾ lakhs. By their letter A 19 of February 17, 1941, the Bank's Proctors stated that the Bank would accept that amount in satisfaction, provided the first defendant withdrew the appeal before the Privy Council and the action in the District Court, and also recanted all allegations that he had made against the Bank and their lawyers. They also stipulated that the sum of 8¾ lakhs should be paid in certain instalments before certain named dates. But, in regard to this, the final arrangement was that that amount should be paid on or before June 15, 1941. The first defendant, accordingly, withdrew his appeal, his action and his words but unfortunately, he failed to pay the money. Then, exactly two months after the final date fixed for the payment of the money, the Bank's Proctors submitted a motion, acknowledging payment of a further sum of Rs. 120,000, and asking for execution of their decree to recover the balance still due. They obtained an order for the sale of the other lands executable under the decree. Thereupon, the first defendant came forward saying that the decree had been adjusted so as to limit his liability under it to 8¾ lakhs, and asking that this adjustment be certified under section 349 of the Civil Procedure Code, and that the sale order be stayed. The application for the stay of the sale was peremptorily refused. In regard to the certification of the alleged adjustment, the trial Judge made a curious order with which neither party appears to be satisfied. He said "the adjustment would appear to have become ineffectual because it has not been given effect to within the stipulated time. It is now, if I may say so, spent ammunition. But Mr. Amerasekera argues that time is not the essence of the adjustment and, as long as there is an adjustment of which information is given to Court by petition by the judgment-debtor, the Court shall record the same . . . . . that it would be time enough to consider the legal effect of the certified adjustment if and when effect is sought to be given to it by someone interested in the matter. I do not wish to be understood as agreeing with Mr. Amerasekera in his submission that time is not the

essence of the adjustment but with regard to the remainder of his submission I am unable to say that I disagree with him.''

Consequent on the refusal to stay sale, the first defendant and the Bank of Chettinad who occupy the position of secondary mortgagees, asked that the sale that had taken place be set aside.

The questions that then arise for our decision are: (*a*) Was there such an adjustment in this case as was certifiable under section 349 of the Code? (*b*) Were the sales illegal and liable to be set aside? The first of these questions depends for its answer upon the correct interpretation of section 349. The relevant part of it provides that (1) " If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, he shall certify such payment or adjustment to the Court whose duty it is to execute the decree. (2) The judgment-debtor may also by petition inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause . . . . why such payment or adjustment should not be recorded as certified. And if after due service of such notice the decree-holder fails to appear on the day fixed, or having appeared fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly ''.

In this instance, the question of certification arises under part 2 of section 349 on a motion presented by the judgment-debtor. I am of opinion that on the facts before us. there was no certifiable adjustment at all. All that had taken place between the first defendant and the plaintiff at the end of their course of negotiations was that the plaintiff had offered to take $8\frac{3}{4}$ lakhs in full satisfaction of his decree if the first defendant, on his part, accepted that offer by performing the conditions upon which it was made to depend. But, when the first defendant satisfied only some of these conditions and failed to perform the most important one—the payment of the $8\frac{3}{4}$ lakhs—the offer lapsed and there was no adjustment. This is not a case of completed contract by which the judgment-debtor promises to do something on a future date, and the decree-holder accepts it as an immediate adjustment in entire or partial satisfaction of the decree, but rather, a case of negotiations which failed to achieve the end the parties had in view.

It is stated that, on this interpretation, the first defendant receives no consideration in return for the surrender of his appeal and of his action. I do not think that is quite true. He obtained an extension of time. The fact that, in the end, that extension yielded no material benefit is his misfortune and not the plaintiff's fault.

All the talk there was in the course of the argument about time not being of the essence of the contract appears to me to be entirely beside the point in a case like this where there was no concluded contract, it having failed owing to the inability of the offeree to comply with a condition precedent, within the time he and the offeror agreed upon.

Mr. Gratiaen and Mr. Nadesan, although appearing for third parties wept, the latter with some appearance of sincerity over the inability of a debtor, in this view of section 349, to certify an arrangement like this for, they said, that that would mean that although, under the

agreement, the debtor was given time to pay, nevertheless, the creditor would be able to take out writ during that period, for a Court may not recognize any uncertified arrangement. But, in reality, the debtor is not in as hard a case as that. There is section 344 to which he could resort if the decree-holder were to attempt to break faith.

The next question is whether the sales that took place after August, 1941, all or any of them, are liable to be set aside on the ground that they were illegally held in that they were held—so it was contended—without a proper order sanctioning them. The absence of such an order was urged on the grounds that (*a*) on a correct interpretation, the order made by the judge on the motion of August 15, 1941, means that the Judge directed *notice* to issue on the judgment-debtor to show cause against sale being ordered, and not that he allowed the *order for sale* to be sent to the auctioneer. (*b*) If, however, the correct meaning of that order is that he directed an order for sale, it was not competent for the Judge to make such an order without notice to the judgment-debtor. (*c*) The order for sale was, in any event, not properly authenticated and communicated to the auctioneer in that it was not signed by the Judge but by someone purporting to act as the clerk of the Court by order of the Judge.

After careful consideration of the motion paper, the minute of it made on the journal, and the evidence of Mr. Ludovici, I am quite satisfied that the trial Judge has interpreted the order correctly as meaning that by it the Court allowed an order of sale to issue without notice. The journal shows that the order was made after Mr. Ludovici had seen the Judge in Chambers to support his submission that, in the circumstances of this case, no notice was necessary as a preliminary step. If the Judge had not accepted that submission, it is not at all likely that he would have made his order with the one word "allowed". He would, in that event, surely have made it clear that notice should issue in the first instance. Be that as it may, I am of opinion that, in a case involving a hypothecary decree, directing that the mortgaged property be sold by a named auctioneer, no order for sale with notice to the judgment-debtor under- section 347 of the Civil Procedure Code is necessary. I had occasion to give my reasons for that view in *Perera v. Jones et al.*[1] and I adhere to that view. In the result, therefore, even if we assume that the order of the Judge was intended to direct notice to issue in the first instance, the failure to issue it was only a non compliance with a direction of the Court and, as such, not an irregularity that had the effect of vitiating the sales.

In regard to the appeal of the Bank of Chettinad, who stand in the place of secondary mortgagees, and who also have taken the objection that the sales are bad for want of notice to them, all I need say is that they have no voice whatever in the matter. They are not judgment-debtors and were not entitled to be noticed.

As regards the objection that the order to the auctioneer was not authenticated and communicated to him properly, assuming that to be so, it is again a mere irregularity and cannot be said to invalidate the sales which ultimately rested on the direction given in the decree itself. But,

[1] *41 N. L. R. 193.*

there is evidence on the record to show, and we were also informed from the Bar that, for over two years, it has been the practice in the District Court of Colombo for communications of this kind to be made to the auctioneer through an officer of the Court. As far as I am aware, there is no requirement of law or of procedure that the order sent to the auctioneer authorising him to sell should be signed by the District Judge or by any particular officer of his Court. It is not disputed that, in fact, this order was signed by a clerk of the Court in obedience to the direction of the Court.

It would, indeed, be deplorable to all but judgment-debtors if judicial sales were liable to be set aside on grounds like these, and if the public should come to regard participation in these sales as "*periculosae plenum opus aleae*".

It is clear that the first defendant has subjected the record of this case to a microscopic examination in search of flaws in a desperate attempt to have the sales set aside and so to retrieve his fortunes. One cannot help sharing his regret that he just failed to have his lands sold in the abnormally inflated market for land that exists to-day, but there are the rights and dues of others to be considered.

I allow the appeal of the plaintiff and set aside the order of certification made by the District Judge. I dismiss both the appeals and the cross-objections of the first defendant as well as the appeal of the Bank of Chettinad. In regard to costs, I think a fair order would be to direct that costs as of one inquiry and of one appeal be paid to the plaintiff in the proportion of half by the first defendant and half by the second and fourth defendants between them. The first and second defendants will also pay, each Rs. 500 as the costs here and below of the purchasers who were represented by Counsel at the hearing before us.

HEARNE J.—I agree.

Plaintiff's appeal allowed.

First defendant's appeal and cross-objections dismissed.