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

SILVA, Appellant, *and* WICKREMESINGHE, Respondent.

100—D. C. Matara, 6,787.

Decree—Agreement between judgment-creditor and debtor—Application to have adjustment of decree recorded—Application for writ—Civil Procedure Code, s.s. 344 and 349.

Where an agreement is entered into between the judgment-creditor and the judgment-debtor, which is intended to govern the liability of the latter under the decree and to have effect on the time and manner of its enforcement,—

Held (on an application for writ by the judgment-creditor), that the terms of the agreement should be considered by the executing Court under section 344 of the Civil Procedure Code, apart from the question whether it amounts to an adjustment of the decree within the meaning of section 349 or not.

THIS was an action on a mortgage bond which was signed by the 1st and 5th defendants as principals and the 6th defendant as surety. Decree was entered and at the sale plaintiff's son-in-law became the purchaser. A balance was outstanding and the plaintiff and the 6th defendant reached an agreement, the terms of which were recorded in Court and which are fully set out in the judgment. Subsequently, a memorandum of agreement was signed outside Court by the plaintiff and the 6th defendant. Thereafter two applications were made to Court (1) by plaintiff for writ and (2) by the 6th defendant to have adjustment of decree recorded as certified. The former was allowed and the latter dismissed. 6th defendant appealed.

H. V. Perera, K.C. (with him *S. J. V. Chelvanayagam* and *S. W. Jayasuriya*), for 6th defendant, appellant.—The question here is whether a party who had made an agreement regarding a mortgage decree may recede from that agreement. An agreement relating to a decree is valid unless it extinguishes the decree. The right to contract is not taken away by a rule in the Civil Procedure Code. There may be a contract, not amounting to an " adjustment ", which must be given effect to in execution proceedings under section 344 of the Civil Procedure Code. The corresponding section in the Indian Code is section 47. The Privy Council, in the Indian case reported in (1939) *A.I.R. at p. 80*, held that the terms of an agreement between a judgment-creditor and a judgment-debtor must be considered by the execution Court under

section 47 of the Indian Code. The local decision (*Hunter v. Silva*[1]) was given before the Privy Council judgment in the Indian case became available. Even if the Judge was right in holding that there had been no "adjustment" which could be recorded under section 349, he should have considered, under section 344, whether the plaintiff's right to execution was affected by the agreement.

N. Nadarajah, K.C. (with him *G. P. J. Kurukulasuriya* and *G. P. A. Silva*), for plaintiff, respondent.—If the agreement when recorded is still executory, there being no adequate provision for default, then it is not effective. In the Privy Council decision only a specific instance—viz., the granting of further time for payment in consideration of a higher rate of interest—was considered. It is not every decree which could be superseded—*Ponnamperuma v. Wickremanayake*[2]; *(1930) A. I. R. (Madras) 410*; *(1925) A. I. R. (Madras) 206*; varying the mode of enforcement or the time of enforcement is not an "adjustment of the decree"—*Chettinad Corporation v. Raman Chettiar*[3]; *Caruppen Chetty v. Abeyratne*[4]. A promise to pay alone without proof of satisfaction is also not sufficient—*Muttiah Chetty v. Ibrahim Saibo*[5].

H. V. Perera, K.C., replied.

Cur. adv. vult.

February 12, 1943. HEARNE J.—

The plaintiff filed an action on a bond "which was signed by 1st to 5th defendants as principals and the 6th defendant as surety". Decree was entered and at the mortgage sale the plaintiff's son-in-law became the purchaser. A large balance was still outstanding and the plaintiff and the 6th defendant reached an agreement, the terms of which were recorded in Court—X 10 dated August 14, 1936—which reads as follows:—

(1) The plaintiff undertakes to obtain a retransfer of the two properties sold under the mortgage decree in this case in favour of the 6th defendant, the vendor not warranting and defending title.
(2) The 6th defendant undertakes to mortgage the said two properties together with all the buildings and his rights in the residing land free from the existing lease and other encumbrances, if any, created by the 6th defendant.
(3) The expenses involved in the said retransfer and mortgage are to be borne by the 6th defendant.
(4) The mortgage of the 3 lands aforesaid is to secure the Rs. 2,000 together with interest at the rate of 15 per cent. per annum on the said Rs. 2,000. Interest is to be paid half yearly and in default of payment of any half yearly payment of interest, the mortgagee is at liberty to put the bond in suit, interest to run from the date of retransfer.
(5) If the interest is paid regularly the mortgagee agrees not to put the bond in suit for 18 months from this date.
(6) On execution and registration of the said mortgage in favour of the plaintiff. the satisfaction of decree in this case is to be entered.

[1] *(1939) 41 N. L. R. 110.*
[2] *(1942) 43 N. L. R. 97.*
[3] *(1937) 10 C. L. W. 58.*
[4] *(1929) 30 N. L. R. 444.*
[5] *(1904) 3 Bal. Rep. 142.*

Subsequently, on June 15, 1937, a Memorandum of Agreement" (A) was signed outside Court by the plaintiff and the 6th defendant.

In March, 1941, two applications were dealt with: (1) an application by the plaintiff for writ and (2) an application by the 6th defendant to have "adjustment of the decree arrived at on August 14, 1936 (X 10), recorded as certified". The former was allowed and the latter dismissed. The 6th defendant now appeals.

In his order the Judge held that X 10 had been superseded by A and that this in itself was fatal to the 6th defendant's application. He also held, on the authority of two Indian cases, that an adjustment which does not extinguish a decree in whole or in part does not come within section 349 of the Civil Procedure Code. Having eliminated X 10 or, alternatively, having found against the 6th defendant on the basis of X 10, he allowed the plaintiff's application.

Independently of whether the terms of a bargain between a judgment-creditor and a judgment-debtor amounts to an adjustment, the terms of the bargain require to be considered by the executing Court 'under section 47 of the Indian Code". This view rests upon the authority of the Privy Council in a case to which I shall presently refer. Section 47 corresponds with section 344 of our Code. Even, therefore, if the Judge was right in holding that there had been no adjustment which could be recorded under section 349 of the Civil Procedure Code, it was still necessary for him to consider under section 344 of the Civil Procedure Code whether the plaintiff's right to execution was controlled and if so to what extent and in what manner, by X 10 or by A, if A had superseded X 10.

Counsel for the respondent (plaintiff) argued that if A was legally effective (it was not notarially executed) it merely ousted X 10 but did not supersede it in the sense that it did not take its place, so that it did not fall for consideration itself. I am unable to follow this argument. Alternatively, he appeared to rest his client's case on X 10 for he, thereafter, referred exclusively to the terms of that document and ignored those of A. A., in point of fact, is more favourable to the appellant than X 10. It is, however, on X 10 that he relied and it is, in reference to it, that this appeal is being decided.

Before dealing with its terms it will be convenient to refer to the case decided by the Privy Council. It is reported in *(1939) A. I. R. (P. C.) at page 80.*

One of the questions decided was that where in consideration of the judgment-debtor agreeing to pay a higher rate of interest than was provided for in the decree, the judgment-creditor gives the judgment-debtor time to pay the judgment debt, "such a bargain has its effect upon the parties' rights under the decree and the executing Court under section 47 has jurisdiction to ascertain its legal effect and to order accordingly". It was expressly said that "it may or may not be that any and every bargain which would interfere with the right of the decree holder to have execution according to the tenor of the decree comes under the term adjustment". For the purpose of deciding the case it was considered unnecessary to pronounce on that. The underlying principle on which it was decided was that the Code contains "no restriction of the parties'

liberty of contract with reference to their rights and obligations under the decree, and if they do contract upon terms which have reference to the execution, discharge or satisfaction of the decree, the provisions of section 47 involve that questions relating to such terms may fall to be determined by the executing Court". In another passage it was stated that "if an agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under section 47". And again 'Their Lordships see nothing in the Code requiring them to hold that had the judgment-debtor paid the agreed instalments punctually (*i.e.*, with interest at the higher rate) the appellants could have executed the decree for the whole sum outstanding, contrary to the terms of the compromise".

It may well be argued that, as X 10 remained executory, nothing had been done either by the plaintiff or 6th defendant—it was not an agreement which extinguished the decree but, on the contrary, was only one which would have extinguished the decree if carried into effect. That, however, does not mean that the plaintiff's application automatically succeeded. As I have said it remained to be considered under section 344 and in the light of the terms of X 10.

In my opinion, X 10 was intended to govern the liability of the 6th defendant under the decree and to have effect upon the time and manner of its enforcement. As to the manner of enforcement it was intended that, upon the transfer to the 6th defendant of the two properties purchased by the plaintiff's son-in-law, the 6th defendant was to mortgage to the plaintiff these properties and his rights in his own residing land "free from the existing lease, &c.", for Rs. 2,000, on which interest at 15 per cent. per annum was payable. He was to register the mortgage and with the Rs. 2,000 obtained he was to discharge the balance of the debt under the decree. As to the time of payment it was intended, as I construe X 10, that the 6th defendant was to effect the mortgage referred to and pay the Rs. 2,000 concurrently with the "transfer" to him by the plaintiff's son-in-law "of the two mortgaged premises". I do not think it was intended that he was free to choose his own time after "the transfer".

It was argued by Counsel for the respondent that X 10 provided for "the satisfaction of the decree to be entered" on the execution and registration of the mortgage in favour of the plaintiff. It did not provide for the eventuality of non-execution and non-registration. As neither had taken place when the plaintiff's application for writ was before the Court, it must necessarily be allowed.

This argument implies, and on it being put to Counsel for the respondent (plaintiff) he admitted it did imply, that even if the plaintiff was in default in regard to what he undertook to do, even if his position was that he had changed his mind, he was entitled to proceed to execution.

To this I cannot accede. It would mean that the Court would be setting the seal of approval on unconscionable conduct, it would be allowing the plaintiff to break faith merely because it suited his purpose or for no reason at all.

The Judge has not pronounced on the facts, and I would, in these circumstances, make the following order. If, on a review of the evidence

or of any further evidence he may desire to take in consequence of the view regarding the law which I have stated, he is of the opinion that the deadlock in carrying through the terms of X 10 was due to the plaintiff's default, he should hold that he was not, on the application before the Court, entitled to writ. If, however, he is of the opinion that, although the plaintiff had not done what he had undertaken to do, he was legally justified, by reason of what the 6th defendant had done or had not done, or otherwise in repudiating X 10, then he should allow the application.

The appeal is allowed and the costs of appeal will abide the result. All costs in the lower Court, prior and subsequent to this order, will be in the discretion of the Judge.

KEUNEMAN J.—I agree.

Appeal allowed.