Present : Shaw A.C.J. and De Sampayo J.

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KUPPE KANNY *v.* CALIAPPA PILLAI.

295—D. C., Colombo, 44,377

Agreement before judgment as to amount due and execution—Decree entered without embodying the agreement—May agreement be proved after decree—Adjustment of decree—Civil Procedure Code, ss. 344, 349.

The Court when asked to execute a decree may properly have regard to any agreement between the parties touching the satisfaction of a decree to be subsequently entered, and if the terms of the agreement so required, refuse execution.

Plaintiff instituted this action against defendant for the recovery of Rs. 2,463. Before judgment the parties came to an amicable agreement, whereby they settled the amount payable by the defendant to the plaintiff to be Rs. 550, of which a sum of Rs. 220 was then paid, and the balance Rs. 330 was agreed to be paid on April 15, subject to the condition that if the balance was not duly paid, the whole amount that might be decreed should be paid to the plaintiff. The terms of this agreement were not embodied in the decree. Before April 15 a third party seized the debt due by the defendant to the plaintiff by a prohibitory notice. The defendant on April 14 tendered the Rs. 330 into Court, though in consequence of the routine of business in the Court it was not deposited in the Kachcheri till a few days later. Defendant applied that a complete adjustment and satisfaction of the decree might be entered

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on the record. Plaintiff applied for execution of decree (for the full amount decreed less Rs. 220). The District Judge certified payment of Rs. 550, and allowed execution to issue for the balance.

Held, that in the circumstances of this case plaintiff was not entitled to further execution of the decree. In view of the seizure of money in the hands of the defendant, the payment into Court for the benefit of the plaintiff amounted to payment to plaintiff.

Section 349, Civil Procedure Code, contemplates cases of payment or adjustment of decree after it has been passed. But section 344 empowers the Court to take into consideration the agreement between the parties and refuse execution.

THE facts are fully set out in the judgment.

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

Arulanandan, for plaintiff, respondent.

Cur. adv. vult.

September 20, 1916. DE SAMPAYO J.—

In this case a point of civil procedure has arisen out of the following state of facts. The plaintiff on February 12, 1916, instituted this action against the defendant for the recovery of Rs. 2,463 as principal and interest due on three promissory notes, and judgment as prayed was entered in favour of the plaintiff on April 7. It appears, however, that between the date of institution of action and the date of decree, that is to say, on March 11, the parties came to an amicable agreement, whereby they settled the amount payable by the defendant to the plaintiff to be Rs. 550, of which Rs. 220 was then paid, and the balance Rs. 330 was agreed to be paid on April 15, subject to the condition that if that balance was not duly paid, the whole amount that might be decreed and the costs in the case should be paid to the plaintiff by the defendant. The terms of this agreement were not put forward or embodied in the decree when decree came to be entered, nor was any credit given for the sum of Rs. 220 already paid under the agreement. Before April 15, when the balance Rs. 330 was to be paid, a third party seized the debt due by the defendant to plaintiff by a prohibitory notice, under section 229 of the Civil Procedure Code, in execution of a judgment obtained by him against the plaintiff. Thereupon the defendant on April 14 tendered the Rs. 330 into Court (though in consequence of the routine of business in the Court it was not deposited in the Kachcheri till a few days later), and applied that a complete adjustment and satisfaction of the decree might be entered on the record. Notice of this application was issued to the plaintiff for May 16. In the meantime, on April 19 the plaintiff applied for execution of the decree, the form of application stating, under the head " Adjustment made, if any," that Rs. 220 had been paid, and that " it was settled that Rs. 330 was to be paid on April 15, and if

not, the whole amount should be recovered." From this it is apparent that the plaintiff recognized the existence of an agreement for adjusting the decree on the above terms, but that his standpoint was that the condition of payment of Rs. 330 on April 15 had not been fulfilled, and he was, therefore, entitled to execute the whole decree, save the Rs. 220 already paid. In view of the seizure of the money in the hands of the defendant, I am not inclined to regard the payment into Court for the benefit of the plaintiff as not amounting to payment to plaintiff, and as not satisfying the condition of the agreement. Counsel for the plaintiff informed us that the judgment under which that seizure took place was obtained by fraud, to which the defendant was a party, and had subsequently been set aside, and he desired us to give the plaintiff an opportunity of showing these facts in order to avoid the effect of the payment into Court. But it appears that the judgment had been set aside at the time when the present matter came for consideration, but those facts were not put before the District Court, nor has any affidavit been submitted to us in support of them. I do not think, therefore, that we can accede to the request of counsel. Moreover, the objection based on the alleged non-payment before April 15 was not persisted in, and was practically abandoned on June 6, when both the defendant's application for entering satisfaction and the plaintiff's application for writ of execution were taken up, and an entirely new objection was raised and was upheld by the District Judge. For it was then contended that the adjustment could not be certified, inasmuch as the agreement was entered into before the date of the decree, and that the decree must be executed as it stood. I think that, so far as section 349 is concerned, the order appealed from is right. For it is clear to my mind that the section contemplates cases of payment or adjustment of a decree after it has been passed. In this connection it was argued by Mr. A. St. V. Jayewardene that, as the payment of the Rs. 330 was made after the decree, though in pursuance of the prior agreement, it was an adjustment of the decree. The payment of the Rs. 330 itself may be certified under section 349, and it has been so certified by the order appealed from. What is sought to be done, however, is to have certified the rest of the compromise as a complete satisfaction of the decree, and I do not think the defendant is entitled to such an order under section 349.

But there is another matter which remains to be considered. For, although section 349 may not be applicable to the circumstances of the case, it does not follow that the plaintiff is entitled to the part of the order which has allowed his application to execute the decree by issue of writ for recovery of the balance amount of the decree. Section 344 of the Civil Procedure Code empowers the Court executing the decree to determine all questions relating to the execution of the decree. That section corresponds to section 244 of the Indian Procedure Code of 1882. In view of the decision in

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Prosunno Coomar v. Haridas,[1] where the Privy Council observed that the provisions of the section should not receive a narrow construction, it has been held by the Courts in India, after an examination of all the previous cases on the subject, that the Court when asked to execute a decree would properly have regard to any agreement between the parties touching the satisfaction of a decree to be subsequently entered, and that, if the terms of such agreement so required, the Court would refuse execution. See the Full Bench case of *Laldas Narandas v. Kishordas Devidas*.[2] It is true that to the words " relating to the execution of the decree " in the Indian section the amending Act of 1888 added the words " or to the stay of execution." But the amendment makes no material difference, as it was evidently intended to render the matter more clear, and the reasoning in the decision above referred to is as much applicable to our section 344 as to the Indian section as amended. In this case I think the Court, in view of the facts and the equitable considerations arising therefrom, should have disallowed the plaintiff's application for further execution of the decree.

I would, therefore, set aside the order of the District Judge, so far as it allowed the plaintiff's application for issue of writ of execution. As the defendant's contention in the Court below was entirely based on section 349, I think there should be no order for costs.

SHAW A.C.J.—I agree.

Set aside.

[1] *L. R. 19 I A 166.*

[2] *(1896) I. L. R. 22 Bom. 463.*