1936 *Present :* **Moseley J. and Fernando A.J.**

FERNANDO *v.* KURERA *et al.*

73—D. C. Chilaw, 8,683.

Decree—Action on summary procedure—Judgment entered by default—Agreement entered into before judgment—Application to certify payment—Scope of section 344 of Civil Procedure Code.

Where, in an action on a promissory note by way of summary procedure after judgment had been entered against one of the defendants by default, it was agreed between the plaintiff and that defendant that on the payment of a certain sum of money and interest the plaintiff should discharge him from further liability on the note and levy the balance due from the other defendants,—

***Held,* that it was competent to the Court under section 344 of the Civil Procedure Code to inquire whether any payment was made in pursuance of such an agreement and to stay execution against the defendant.**

***Kuppe Kanny v. Caliappa Pillai* (*19 N. L. R. 353*) followed.**

THIS was an action by way of summary procedure brought by the plaintiff to recover a sum of money due on a promissory note from the defendants of whom the respondent was the sixth. Although summons was served on November 3, 1928, on the respondent, he did not apply for leave to appear and defend. However, the action could not proceed as some of the other defendants had died. On September 26, 1935, the respondent moved that a sum of Rs. 1,140 paid by him to the plaintiff be certified of record.

The Court held that although no formal decree had been entered against the respondent, the case had been concluded as between him and the plaintiff and directed that decree be entered against the respondent with liberty to him to move under section 349 of the Civil Procedure Code to have the payment certified. When the application to certify payment was made the plaintiff-appellant contended that the section applied to an adjustment made before decree. It was argued for the respondent that he was entitled to make his application under section 344 of the Civil Procedure Code.

The learned District Judge upheld the respondent's contention and fixed the matter for inquiry. The plaintiff appealed.

J. R. Jayawardene, for plaintiff, appellant.—This appeal involves a consideration of sections 344 and 349 of the Civil Procedure Code.

Section 349 would not apply as the alleged payments were made before decree had been entered. See *Kuppe Kanny v. Caliappa Pillai*[1]. Section 344 cannot be availed of by the defendant, as that section only contemplates questions relating to the execution of the decree. The Court has no authority to inquire into payments made before the passing of the decree under that section. It was possible for the defendant either to contest the action, prove the payments and ask the Court for a judgment and decree in his favour ; or if the other party agreed, to apply under section 408 of the Civil Procedure Code for a decree in terms of a mutual

[1] *19 N. L. R. 253.*

adjustment. He failed in an application under section 408 but did not contest the action, though he had an opportunity of doing so. His application now is an attempt to attack a valid decree obtained by us, on the ground of an adjustment prior to the decree. His application is premature. The action has not reached the stage of execution. Plaintiff has a decree in his favour, but he has not sought to execute it. Section 344 refers to "questions relating to the execution of the decree". When the plaintiff seeks to execute his decree—he may never do so—it will be time then for an application under section 344.

In any case section 344 would not help the defendant. The learned Judge relied on the case of *Kuppe Kanny v. Caliappa Pillai* (*supra*). This case was considered in the later case of *Velu Pillai v. Sundarampandianpulle* [1]. De Sampayo J. after considering Indian authorities says that the previous case is not a sufficient authority for the proposition that an agreement entered into before the decree, and not embodied in the decree, can be given effect to on an application under section 344. He says that the later Indian decisions—vide *Benode Lal Pakrashi v. Brajendra Kumar Saha* [2] and *Hassan Ali v. Gauzi Ali Mir* [3]—express a sounder view as regards the scope of the section in question, than the case of *Laldas Narandas v. Kishordas Devidas* [4], which was followed by him in *Kuppe Kanny v. Caliappa Pillai* (*supra*). Section 344 does not refer to agreements which seek to attack the decree itself. The Court, once the decree is passed, is *functus*, see *Pauluz v. Perera* [5]. Arrangements made in a pre-decretal era can be proved under section 408 and the party can contest the case and ask for judgment in terms of facts proved. Later Indian cases support my contention, see *Butchiar Chetty v. Tayar Rao Naidu* [6] and *Chittambaram v. Krishna Vaithiar* [7].

H. V. Perera, for sixth defendant, respondent.—The defendant did not file answer nor contest the case, therefore the plaintiff became entitled to judgment. In an action by way of summary procedure under section 704, the plaintiff became entitled to a decree when the defendant did not appear or defend the action and did not obtain leave to defend the action. There was no contentious matter after that. My submission is that the alleged agreement was carried out and monies paid by us after the plaintiff became entitled to a decree. The learned Judge himself says that although no formal judgment had been entered against him, the case was practically concluded between the plaintiff and the sixth defendant, before the alleged payments were made. Therefore it is possible for the Court to give the defendant relief under section 349, and certify payment of sums paid after the plaintiff became entitled to judgment. Though the section refers to "money payable under a decree" it would apply even when the plaintiff is entitled to judgment and there is only a formal act to perform. In any case section 344 would apply as the adjustments do not seek to attack the decree but seeks to limit the execution of the decree to a certain sum as between these two parties only.

[1] *21 N. L. R. 236.*
[2] *(1902) I. L. R. 29 Cal. 810.*
[3] *(1903) I. L. R. 31 Cal. 179.*
[4] *(1896) I. L. R. 22 Bom. 463.*
[5] *34 N. L. R. 437.*
[6] *54 Madras 184.*
[7] *40 Madras 233.*

J. R. Jayawardene, in repiy.—Under section 704 the plaintiff cannot demand but has a right to move for judgment against a defaulting defendant. The plaintiff is not by right entitled to demand entry of judgment in his favour (*Ulaganathan Chetty v. Vavana et al.*[1]). It will be an abuse of language to say that section 349 when it refers to "money payable under a decree" also means "money payable under a judgment which may be entered if the plaintiff applies for it, which he cannot demand from Court". The defendant cannot come in both under section 349 and section 344. The existence of section 349 shows that section 344 does not apply to monies paid in satisfaction of a decree. Money paid before decree must be proved and the decree entered accordingly.

Cur. adv. vult.

December 11, 1936. FERNANDO A.J.—

The plaintiff-appellant filed this action on October 16, 1928, under chapter 53 of the Civil Procedure Code against six defendants of whom the respondent was the sixth. Summons was served on the respondent, on November 3, 1928, but he did not take steps to obtain leave to appear and defend, and filed no answer. Section 704 of the Civil Procedure Code would then apply, and the plaintiff would be entitled to judgment against him at the end of the period spcified in the summons.

Some of the other defendants died soon afterwards, and the plaintiff could not for some time proceed with the action. On March 6, 1935, plaintiff moved to revoke the proxy already given by him, and thereafter appointed another Proctor and took steps to continue the action. On June 18, 1935, the sixth defendant moved that the action be ordered to abate, but that application was refused, and he then applied on September 26, 1935, that a sum of Rs. 1,140 paid by him be certified of record. On that application, the learned District Judge ordered the matter to be mentioned on October, which was the date fixed for the trial as between the plaintiff and the other defendants.

The learned District Judge considered the application of the sixth defendant as falling under section 408 of the Civil Procedure Code, but it was argued for the plaintiff that the respondent could not proceed under that section, inasmuch as, although a formal decree had not been entered, the case as against the sixth defendant had been concluded when the sixth defendant failed to file answer, and it was further pointed out that on November 19, 1928, the sixth defendant had admitted the endorsement of the promissory note sued upon, and had admitted receipt of the consideration on the note. The learned District Judge held that although no formal judgment had been entered against him, the case was practically concluded between the plaintiff and the sixth defendant. He also held on the authority of *Ramiya v. Meera Lebbe*[2], that the Court could only act upon a settlement which is stated to Court by both parties. For these reasons, he ordered decree to be entered against the sixth defendant with liberty to him to take the necessary steps under section 349 of the Civil Procedure Code to have any payment made by him certified of record.

[1] *3 N. L. R. 52.*

[2] *26 N. L. R. 126.*

This order was made on October 14, 1935, and on the following day, Proctors for the sixth defendant filed petition and affidavit and moved for a notice on the plaintiff to show cause why satisfaction of the decree should not be entered. This application was clearly made in accordance with section 349 of the Civil Procedure Code. The inquiry into this application came up on March 9, 1936, before another Judge of the District Court. It was then contended for the appellant that the payment referred to by the sixth defendant was made not after decree had been entered, but before, and the District Judge held that section 349 empowered the Court to take cognizance of a payment or adjustment of the decree only if such payment or adjustment is made after the decree has been entered, and he relied on the case of *Kuppe Kanny v. Caliappa Pillai*. It appears to have been argued on this behalf that although section 349 did not apply, the sixth defendant was entitled to move under section 344 of the Civil Procedure Code, and the learned District Judge on the authority of *Kuppe Kanny v. Caliappa* fixed the matter for inquiry on the facts. The plaintiff appeals against this order, and the main contention put forward on his behalf at the appeal was that section 344 only contemplated questions relating to the execution of the decree, and that the Court had no power to inquire into payments or adjustments made before the passing of the decree.

Now in *Kuppe Kanny v. Caliappa*, this Court held that a Court when asked to execute a decree may properly have regard to any agreement between the parties touching the satisfaction of the decree to be entered, and that the Court had the right to refuse execution if the terms of the agreement so required. De Sampayo J. in his judgment referred to the *Indian case of Laldas Narandas v. Kishordas Devidas*[2], where the question came up before a Bench of four Judges. In that case, the appellant Laldas pleaded that there was an agreement entered into between himself and the respondents to the effect that they would not hold him responsible for costs of the decree about to be entered, but that they would recover the same from Shankar Lal who was also a defendant in the action. The question that came before the Court was whether the existence and validity of the agreement relied on by Laldas ought to be determined in execution proceedings under section 244 of the Indian Civil Procedure Code (which is practically in the same terms as section 344 of our Code), or in a separate suit. The finding of the Court was that as the agreement relied on by the appellant was pleaded by him in order to stay execution of the decree in regard to costs as against him, the inquiry fell within the terms of section 244 and Ranade J. said that the appellant had a right to require the executing Court to investigate the matter and that there was nothing like going behind the decree in such an inquiry. All the Judges agreed, that the existence and the validity of such an agreement ought to be determined in execution and not by separate suit.

The question dealt with in the judgment in *Kuppe Kanny v. Caliappa Pillai* (*supra*) appears to have come up again before this Court in *Velu Pillai v. Sundarampandianpulle*[3] before Ennis A.C.J. and De Sampayo J.

[1] *19 N. L. R. 253.*

[2] *21 N. L. R. 236.*

[3] *(1896) I. L. R. 22 Bom. 463.*

and there it was held that *Kuppe Kanny v. Caliappa Pillai* was not a sufficient authority for the proposition that an agreement entered into before the decree, and not embodied in the decree, can be given effect to on an application under section 344. Ennis A.C.J. appears to have come to that conclusion because he thought that the existence of a decree was a preliminary to any proceeding under section 344, and that no agreement prior to the decree which is inconsistent with it can be given effect to on an application in execution. He differentiates between *Benode Lal v. Brajendra* [1], and the case of *Laldas Narandas v. Kishordas Devidas* (*supra*) by saying that the latter case referred to an agreement as to costs which would affect the manner of the execution of the decree, and which was not inconsistent with the decree. De Sampayo J. referring to the same case of *Benode Lal v. Brajendra* and the case of *Hassan Ali v. Gauzi Ali* [2], thought that these later Indian decisions expressed a sounder view as regards the scope of section 244 of the Indian Civil Procedure Code. With the greatest respect, I would venture to state that I cannot see any difference between an agreement which affects the question of costs embodied in a decree and an agreement which affects some other portion of the decree. It seems to me that an order as to costs if embodied in the decree is a portion of that decree just as much as any other order embodied in it, and I can see no difference in principle between an application to certify payment as to costs ordered by the decree and an application to enter satisfaction of any other portion of the decree, where the application in either case is based on an arrangement entered into before the decree is entered. The judgment of De Sampayo J. however, raises the question whether the previous case of *Kuppe Kanny v. Caliappa Pillai* (*supra*) had been properly decided, and on this question the Indian authorities must be examined with greater detail.

The earliest Indian decision to which reference is necessary is the case of *Prosums Kumar v. Kalidas* [3], where their Lordships of the Privy Council stated that they were glad to find that the Courts in India had not placed any narrow construction on the language of section 244, and I think this observation should be borne in mind in any attempt to construe the provisions of the section. I have already referred to the Full Bench decision in *Laldas Narandas v. Kishordas Devidas* (*supra*). In the case of *Benode Lal v. Brajendra* (*supra*) the judgment-debtor pleaded that, before the decree in question was passed, it had been agreed between the parties that the decree-holder would not enforce one of the instalments provided in the decree in the event of the judgment-debtor paying up the first nine instalments in due time. He also pleaded that three years before the entering of the decree he had paid a sum of Rs. 2,500 to the decree-holder on account of the claim, and that therefore the decree-holder was not entitled to execute the decree for the full amount of the last instalment. The Court held that if the agreement was given effect to, it would have the effect of nullifying the decree, and differentiated that case from the case of *Laldas Narandas v. Kishordas Devidas* (*supra*), on the ground that the question raised in that case was whether the existence and validity of the

[1] *29 Calcutta 810.*

[2] *(1903) I. L. R. 31 Cal. 179.*

[3] *19 Calcutta 684.*

agreement ought to be determined under section 244 or in a separate suit, and not whether an agreement entered into before the decree was made could be given effect to. The other case cited to De Sampayo J. was the case of *Hassan Ali v. Gauzi Ali* (*supra*), and the Court there held that cases can only be inquired into under section 244 when the existence of a decree which is susceptible and capable of execution is conceded, and the section did not apply to a case when the object was to impugn the decree itself, and the learned Judges thought that the case of *Laldas Narandas v. Kishordas Devidas* did not apply to such a case. We have been referred by Counsel, who argued the question before us very fully, to the cases of *Chittambaram v. Krishna Vaithiar*[1], and *Butchiar Chetty v. Tayar Rao Naidu*[2] the former being a decision of the full Bench of the Madras High Court. Referring to section 47 of the new code of the Civil Procedure in India, Abdul Rahim C.J. remarked that the language of section 244 was perhaps not so comprehensive as that of section 47, and he preferred to follow the long course of decisions in Madras where it had been held that an agreement made before the passing of a decree was a matter to be inquired into and decided by the executing Court. Seshagiri Ayyar J. referred to the fact that for over 20 years the Madras Court had adopted the principle that agreements like the one in question could be pleaded in execution proceedings, and referred to the case of *Laldas Narandas v. Kishordas Devidas* (*supra*) as adopting the same principle, and he also referred to certain judgments of the High Court of Allahabad. Philips J. differed from the rest of the Court, but the judgment of the Full Bench must be taken to be the judgment of the majority.

The position was considered again in the later case of *Butchiar Chetty v. Tayar Rao Naidu* (*supra*), where all the authorities were considered. Pakenham Walsh J. in that case stated that the agreement in the case of *Laldas Narandas v. Kishordas Devidas* (*supra*), was an agreement that as between the two defendants costs could be recovered from one of them, and remarked that the matter in question there may be held to be one of execution though in fact the result might be to alter the decree with regards to costs recoverable from the defendants. He refers to the case of *Velu Thevan v. Krishnasamy*[3], where it was held that an agreement prior to the decree not to execute the decree that might be passed against one judgment-debtor, and to realize the whole amount from the other could be pleaded in execution, and he observes that the matter does arise in execution although the effect of the arrangement may be to alter the decree. He next cited *Arumugam v. Krishnasamy*[4], where the arrangement was that the decree which might be passed should be inexecutable in part, and where it was held that such an arrangement could not be enforced in execution, and cited a passage from the judgment of Seshagiri Ayyar J. where he says, " that an attack against the decree as having been obtained by fraud by one of the parties is not within the principle of *Chittambaram v. Krishnasamy Vaithiar*" (*supra*). He then proceeds to discuss the cases in which it had been held that an agreement which directly strikes at the decree itself cannot be pleaded in execution, and cites

[1] *40 Madras 233.*

[2] *54 Madras 184.*

[3] *48 Madras Law Journal 277.*

[4] *43 Madras 725.*

the judgment in *Mulla Ramazan v. Maung Poking*[1], where the judgment-debtor pleaded that in consideration of his confessing judgment for the full amount of Rs. 2,000 the decree-holder agreed to accept Rs 1,000 only, and the argument was that the decree could be executed to the extent of Rs. 1,000 only.

After considering all the authorities, Pakeham Walsh J. was of opinion that the Full Bench case of *Chittambaram v. Krishnasamy Vaithiar* (*supra*) only covered agreements which relate to execution, and not to agreements attacking the decree itself. For that reason he came to the conclusion that the judgment-debtor in *Butchir Chetty v. Tayar Rao Naidu* (*supra*) was not entitled to credit in certain sums which he had paid before the execution of the decree.

I would venture with all respect to agree with the reasoning in this case and to hold that under our law it is open to a party under section 344 to prove an agreement entered into between the parties previous to the decree relating to the execution of the decree, whereas it is not open to him to prove any agreement the effect of which would be to attack the decree itself, and it follows that the case of *Kuppe Kanny v. Caliappa Pillai* (*supra*) had been rightly decided. The facts in the Full Bench case of *Laldas Narandas v. Kishordas Devidas* (*supra*) relied on by De Sampayo J. appear to me to be exactly parallel to the facts of the present case, and the affidavit of the sixth defendant dated September 24, 1935, sets out the agreement in these words, " it was agreed between me and the plaintiff that on payment of Rs. 1,000 and interest up to the date of payment, the plaintiffs should discharge me from any liability on this note, and proceed to levy any balance of the amount from the other defendants." This agreement does not seek to attack the decree itself, but only limits the execution of that decree to a certain sum as between the plaintiff and the sixth defendant, and does not interfere with the execution of the decree as against the other defendants. I come to the conclusion, therefore, that under section 344 of our Civil Procedure Code, it is open to the sixth defendant-respondent to plead such an agreement, and to ask the Court to inquire into the question whether there was such an agreement between the parties, whether any payments were made in pursuance of such an agreement, and to stay execution as against the respondent if the facts are found in his favour.

The order made by the learned District Judge fixing the matter for inquiry was therefore right, and the appeal of the plaintiff must be dismissed with costs.

MOSELEY J.—I agree.

Appeal dismissed.

[1] *4 Rangoon 118.*