1939 *Present :* **Soertsz A.C.J. and de Kretser J.**

HUNTER *et al. v.* DE SILVA.

132—D. C. Colombo, 45,279.

Decree—Subsequent agreement to pay higher rate of interest—Application to alter decree and certify adjustment—Civil Procedure Code, s. 349.

Where after decree was entered in an action the defendants entered into an agreement with the plaintiffs to pay a rate of interest higher than that given by the decree and where the plaintiffs applied to have the decree altered and the adjustment certified under section 349 of the Civil Procedure Code,—

Held, that the decree could not be altered to give effect to the agreement.

The agreement may go beyond the terms of the decree but the Court will recognize and certify only so much of the agreement as adjusts the decree in whole or in part.

APPEAL from an order of the District Judge of Colombo.

H. V. Perera, K.C. (with him *E. B. Wikremanayake*), for defendants, appellants.

N. Nadarajah (with him *Nadesan* and *Manikavasagar*), for plaintiffs, respondents.

Cur. adv. vult.

June 7, 1939. DE KRETSER J.—

On September 16, 1931, decree was entered in favour of the plaintiffs for the payment of Rs. 10,800 with interest at 18 per cent. per annum on Rs. 10,000 from date of action to date of decree, with further interest on the aggregate amount at 9 per cent. till payment in full.

In October, 1931, the plaintiffs applied for execution; but on November 20, plaintiff's Proctor filed a paper signed by the defendants, and moved that the same be embodied in the decree.

The Court minuted "Note and File". The paper is signed by all three defendants, and is to this effect:—"We consent to pay interest at the rate referred to in the mortgage bond No. 197 filed of record, from the date of decree till payment in full, in lieu of the rate of 9 per cent. provided for in the decree".

On September 20, 1937, the plaintiffs moved that the rate of interest specified in the decree be altered to 12 per cent. The Court refused the application. The plaintiffs then moved to certify of record the adjustment of the decree in accordance with the motion referred to, and moved that the commission be reissued.

The defendants objected to this application and moved that the matter be fixed for inquiry. The District Judge, after inquiry, made order allowing the application and, certifying of record the adjustment of the decree, ordered that commission be reissued for the recovery of the balance due in accordance with the adjustment and in terms of the plaintiffs' application.

The defendants thereupon deposited a sum of Rs. 5,000 which is admitted to be due on account of principal, and appealed against the order certifying the adjustment in the way in which it has been certified.

The main contention for the appellants was that any agreement which added to the decree and increased the liability of the defendants was not an adjustment within the terms of section 349 of the Civil Procedure Code.

It became apparent during the argument that the plaintiffs were really seeking that a new decree should be entered; in effect they were asking for an amendment of the decree.

It was also apparent that though the defendants conceded that the agreement was valid, they nevertheless hoped that if they succeeded in opposing the application they would be able to bring into an accounting the excess of interest which they had been paying.

In my opinion both these positions are unsound. When a decree is adjusted, section 349 does not contemplate that the original decree shall be superseded. It does not contemplate the entering of any decree based on the agreement. The entering of decrees based on agreements is dealt with in section 408, where the Court is expressly required to pass a decree in accordance with the agreement or compromise, and we have the very important qualification that the passing of the decree will be only so far as it relates to the action. We have here an indication that an action may be adjusted by an agreement which goes beyond the scope of the action. I see no reason why, when an action has proceeded to the stage where a decree has been entered, thereafter the agreement should be limited by the terms of the decree. In my opinion the agreement may go beyond the terms of the decree; but the Court will recognize and certify only so much of the agreement as adjusts the decree in whole or in part.

For example, if the defendants had agreed to pay more than the principal sum of the decree for some valid reason and the Court was informed of the agreement, the Court would recognize that the decree had been satisfied to the extent of the amount decreed, and would not concern itself with the excess.

Similarly, where a defendant had obtained time by agreeing to pay a higher rate of interest and had paid that higher rate, then the Court would recognize that payment of the interest under the decree had been satisfied up to the time when the last payment was made, and would not concern itself with what had been paid in excess by way of interest on a private agreement between the parties which would be perfectly valid and binding on them although it would not be binding on the Court.

To allow an arrangement between the parties to supersede the decree already entered would be to detract from the sanctity which attaches to a decree of Court.

We have repeatedly held that parties cannot by consent vary the terms of a decree, nor can the Court itself vary its decree except in certain circumstances set out in the Code.

The provision in section 349 is intended to enable the Court to see that its decree is not abused. And the precaution which the legislature has taken is to provide means whereby one or other or both parties will inform the Court of any private arrangement between them. There is nothing to prevent parties from abandoning the decree and suing on the private agreement, but the agreement not being made part of the decree cannot be executed as part of the decree, and the agreement not being embodied in the decree is no part of it.

In Broughton's work on the Indian Civil Procedure Code he refers to two authorities, viz., *Krishna Kamal Singh v. Hiru Sirdar*[1] and *Madhub Chunder Dhundput v. Madhub Lall Khan*[2]; neither of which unfortunately is available to me. He quotes both these cases in support of the proposition I have just stated.

Mr. Perera referred me to *Chitaley* and *Sarkar* on the Indian Civil Procedure Code and to a case reported in *I. L. R. 24 Madras, p. 1.* I

[1] *4 B. L. R., F. B., 101.*

[2] *14 B. L. R. 285.*

have referred to *Chitaley, Sarkar* and *Ameer Ali,* also to the case cited by him. I can find nothing in them opposed to the view I am now taking.

From the fact that an adjustment in full extinguishes the decree one does not get the corollary that the adjustment must be equal to the decree. For an agreement that covers more than the decree also can extinguish the decree.

The real point is whether the adjustment takes the place of the decree, and whether in effect the decree is amended. In my opinion the decree remains unaffected by the adjustment except in so far as the execution of it is concerned.

Mr. Nadarajah quoted a case of the *Bristol Hotel Co., Ltd. v. Power*[1]. In that case the judgment-creditor entered into an agreement with the judgment-debtor to receive payment of the judgment debt by monthly instalments, and the Court held that he could not go back on his original decree. With all respect, this seems to me not to conflict with what I have stated for the agreement extinguished the decree. Withers J. went on to say that the judgment-creditor must either sue the debtor on the agreement, or if he wishes to execute it as a decree he must have it certified of record as an adjustment under section 349. This opinion was *obiter.* I quite agree with the first part,—that the creditor can sue on the agreement,—but I do not agree with the second part which suggests that if certified the agreement might be executed as a decree. As a matter of fact, the agreement had not been certified, but once it was admitted by the creditor and the Court made aware of its existence and the adjustment brought to its notice, the further certification thereof was within the powers of the Court. The opinion of Withers J. appears to have been given without any argument on the point. With all respect, I am unable to follow it.

Mr. Nadarajah also referred me to a case reported in the *A. I. R. (1925) Oudh 364.* In that case apparently execution was taken out on the subsequent agreement on the footing that it was an adjustment of the decree duly certified by the Court but the grounds on which this was allowed are not stated, and in the absence of any reasoning I must decline to follow that judgment.

Mr. Nadarajah then referred me to a case reported in *A. I. R. (1914) Calcutta 697.* In that case it had been found that an oral agreement had been entered into to give the judgment-debtor time to pay, and it was sought to certify the agreement. The Subordinate Judge refused the application on three grounds, viz., (1) that the sanction of the Court had not been obtained; (2) that oral evidence was inadmissible; (3) that there was no consideration for the agreement.

The High Court pointed out that the first ground was bad inasmuch as section 257A of the old Code had been omitted from the existing Code and therefore such agreements were tested as to their legality like other agreements and if valid could be given effect to. They held that oral evidence was admissible and that the agreement would be void if there had been no consideration, and they sent the case back for inquiry. Mr. Nadarajah argues that they would not have sent the case back if they

[1] *3 S. C. R. 168.*

thought that such an agreement could not be given effect to. I am averse from imputing to a Court a decision thus inferentially deduced and which they could have stated quite simply and clearly if their minds had been directed to the question, but assuming that the inference is correct and that the agreement might be given effect to in the case, all that happens is that the operation of the decree, execution thereof, is affected and no new decree is entered. There was nothing to compel the judgment-creditor to execute his decree at once, and if the Court admitted an agreement to defer execution it might see that he did not execute his decree contrary to the agreement. That would not be a variation of the decree at all but of the rights flowing from the decree.

In my opinion, therefore, the agreement now relied upon has been properly recorded and may be certified. All payments made under it of interest will be recognized up to 9 per cent. The final result is that plaintiff can issue writ to recover the principal sum remaining unpaid and interest at 9 per centum per annum from the date of the last payment of interest under the agreement, and he cannot issue writ on the footing of the agreement. Neither can defendant recover interest already paid under a valid agreement.

Both parties were wrong in the attitude they adopted, and there will be no costs either in this Court or in the Court below.

SOERTSZ A.C.J.—

I agree, but I wish to say that, in my view, section 349 of the Civil Procedure Code itself, considered apart from the cases to which we were referred, disposes of the difficulties that seem to arise in this case. In the first instance, the duty of certifying any adjustment is imposed on the judgment-creditor and he is required to certify any adjustment *made to his satisfaction.* In this case, there was such an adjustment, when the judgment-creditor and judgment-debtor entered into an agreement that was quite valid, and was to the effect that interest should be paid at 12 per cent. instead of at the 9 per cent. rate allowed in the decree. The result was that the additional 3 per cent. was paid on the agreement, but so far as the decree was concerned, it was adjusted just as if the 12 per cent. paid on the agreement was no more than the 9 per cent. due on the decree. The additional 3 per cent. was consideration given by the debtor for the extension of time he obtained. It was not paid under the decree. It had no bearing on the decree itself. Consequently, those additional payments cannot be taken into account when the amounts still due on the decree is to be ascertained. That is so far as the judgment-debtor is concerned.

In regard to the judgment-creditor, his application to have the rate of interest provided in the decree at 9 per cent. altered to 12 per cent. on the ground that the judgment-debtor agreed to that alteration, cannot be entertained at all. That is not an adjustment of the decree. It is an attempt to substitute a decree of the parties in place of the decree entered by Court. It cannot be tolerated. The judgment-debtor must proceed on his agreement if he wishes to recover anything due to him outside the decree.

Decree varied.