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

## VELUPILLAI v. SUNDARAPANDIANPULLE et al.

228—D. C. Colombo, 52,018.

Adjustment of decree—Agreement before decree—Decree silent as to agreement—Civil Procedure Code, s. 344.

An agreement entered into by the parties to an action before the decree and not embodied in the decree cannot be given effect to on an application by the judgment-debtor under section 344 of the Civil Procedure Code for adjustment of the decree. *Kuppe Kanny v. Caliappa Pillai*<sup>1</sup> referred to.

THE facts appear from the judgment.

A. St. V. Jayewardene, for plaintiff, appellant.—*Kuppe Kanny v. Caliappa Pillai*,<sup>1</sup> on which the District Judge relies, it is respectfully submitted, has been wrongly decreed. *Laldas Narandas v. Kishordas Devidas*,<sup>2</sup> on which the Supreme Court based its judgment in (1916) 19 N. L. R. 253, had at that time been dissented from by the High Court of Calcutta in *Benode Lal Pakrashi v. Brajendra Kumar Saha*<sup>3</sup> and *Hassen Ali v. Gauzi Ali Mir*.<sup>4</sup> These later decisions it is submitted, express a sounder view than that of 22 Bom. 463, and explain its true scope and effect. The learned District Judge himself ventured to double the judgment in (1916) 19 N. L. R. 253, but felt bound to follow it, as the facts of the present case, in his opinion, were on all fours with those of the case in (1916) 19 N. L. R. 253. Any agreement affecting the decree entered into prior to, and not embodied in, the decree cannot be looked at, much less given effect to. Otherwise decrees will lose all their force and validity. It will open a wide door to fraud.

*Tisseverasinghe*, for respondents.—The facts in this case cannot be distinguished from those in (1916) 19 N. L. R. 253. That judgment therefore, is binding on this Court as at present constituted. The fact that this Court having come to a certain decision supported it by a judgment of an Indian High Court, which had been dissented from by later judgments of another High Court, does not affect the judgment of the Supreme Court. That judgment stands till it is over-ruled by a Full Bench of this Court. The agreement found by the District Judge and given effect to does not vary or in any way affect the decree, for the respondents' case is that the decree has been rightly entered, and is

<sup>1</sup> (1916) 19 N. L. R. 253.<sup>2</sup> (1902) I. L. R. 29 Cal. 810.<sup>3</sup> (1896) I. L. R. 22 Bom. 463.<sup>4</sup> (1903) I. L. R. 31 Cal. 179.

in fact part of the agreement found by the District Judge. The other part of the agreement now in question is confined to the satisfaction of that decree. The Court can and should take notice of an agreement relating to the satisfaction of a decree, although that agreement had been prior to, and not embodied in, the decree. There is the authority, not of an Indian High Court, but of the Privy Council for that proposition, *Prosunno Coomar v. Kasidas*.<sup>1</sup> To execute the decree as it stands in the face of the agreement is fraud, and the Court is bound to inquire into it and give effect to the real intention of the parties. If it is fraud, then ordinarily the remedy of the respondents is an action. But section 344 bars such an action, and the only course open to him is an inquiry under this section. The case in (1916) 19 N. L. R. 253 has, it is submitted, been rightly decided.

*A. St. V. Jayewardene*, in reply.

November 4, 1919. ENNIS A.C.J.—

This is an appeal from an order granting an application under section 344 of the Civil Procedure Code to have an adjustment on an agreement of a decree in the following circumstances:—By consent a judgment was entered on April 11, 1919, for the plaintiff for Rs. 1,750 and interest from December 19, 1918, till payment. Writ issued for the full amount. On application by the plaintiff for execution, the defendants asserted that prior to the decree the plaintiff entered into an agreement to accept Rs. 500 in full satisfaction.

The terms of this agreement were not embodied in the decree, but the learned Judge, after inquiry, found that such an agreement had been entered, and on the authority of the case of *Kuppe Kanny v. Caliappa Pillai* <sup>2</sup> he directed the writ to be recalled upon Rs. 500 being paid into Court, and satisfaction of the decree to be entered in favour of the first, second, third, and eighth defendants. The appeal is from this order.

In my opinion the case of *Kuppe Kanny v. Caliappa Pillai* 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. The circumstances of that case were special. The plaintiff there, in his application under the head of "adjustment (of decree), if any," set out an agreement to accept a definite sum in satisfaction if paid before a certain date. It appears that the sum had been paid into Court in the case before that date although the plaintiff was unaware of it when he applied after the date. The judgment dealt with the question of law, but the decision was arrived at expressly in the circumstances of the case. The agreement there was entered into before the decree,

<sup>1</sup> L. R. 19 I. A. 166.

<sup>2</sup> (1916) 19 N. L. R. 253.

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and was not embodied in its terms, but the plaintiff appears to have undertaken, after the decree, to abide by it; in fact, took out writ because he was unaware that the agreement had been complied with by the defendant. The application itself gave rise to the inference that there had been an adjustment after the decree. On the law the Indian case of *Laldas Narandas v. Kishordas Devidas*<sup>1</sup> was discussed. That case decided that the Court, on an application to execute a decree, could go into an inquiry as to the existence and validity of an agreement entered into before the decree relating to the satisfaction of the decree to be entered after the decree, and there can be no doubt that section 344 is wide enough to admit of such an inquiry, as was indicated by the Privy Council in the case of *Prosunno Coomar v. Kasidas*,<sup>2</sup> but there is involved also the question as to the effect which can be given to such an agreement. In *Kuppe Kanny v. Caliappa Pillai* the agreement before decree appears to have been carried forward by the act of the plaintiff himself and ratified after the decree, but in the present case there is no such circumstance, the plaintiff refused to accept any composition in satisfaction after the decree. By the term of section 344 the existence of a decree is a preliminary to any action under the section and no agreement prior to the decree which is inconsistent with it can ordinarily be given effect to on an application in execution. This principle was enunciated in the Indian case of *Benode Lal Pakrashi v. Brajendra Kumar Saha*.<sup>3</sup>

In *Laldas Narandas v. Kishordas Devidas* the prior agreement was as to costs, and effected the manner of the execution of the decree as to costs, and was inconsistent with the decree.

I would accordingly allow the appeal, with costs, in both Courts, and send the case back for further proceedings in execution.

DE SAMPAYO J.—

The District Judge had to consider the question whether an adjustment of the decree on the basis of an agreement between the parties prior to the decree could be certified under section 344 of the Civil Procedure Code. In allowing the application for that purpose the District Judge relied on *Kuppe Kanny v. Caliappa Pillai*.<sup>4</sup> The decision in that case depended largely on its special circumstances. In my judgment in that case, dealing with the construction of section 344, I referred to the Indian case *Laldas Narandas v. Kishordas Devidas*.<sup>1</sup> The later Indian decisions were not cited to me, nor was I aware of the existence of any. Mr. A. St. V. Jayewardene has now referred us to *Benode Lal Pakrashi v. Brajendra Kumar Saha*<sup>3</sup> and *Hassan Ali v. Gauzi Ali Mir*,<sup>5</sup> in which, in the first place, it was pointed out that in the Bombay case the

<sup>1</sup> (1896) I. L. R. 22 Bom. 463.

<sup>2</sup> L. R. 19 I. A. 166.

<sup>3</sup> (1902) I. L. R. 29 Cal. 810

<sup>4</sup> (1916) 19 N. L. R. 253.

<sup>5</sup> (1903) I. L. R. 31 Cal. 179.

Court was merely concerned with the question whether the existence and validity of an agreement between the parties before an arbitration decree was made ought to be determined in execution of the decree under the provisions of section 244 of the Indian Code of Civil Procedure (corresponding to our section 344) or in a separate suit, and not with the question whether such an agreement could be given effect to at all; and, in the second place, the decision, so far as it intended to hold that the Court could under section 244 go into the question of a bargain anterior to the decree and not inserted in the decree, was dissented from. I think that these later Indian decisions express a sounder view as regards the scope of the provision in question, and that *Kuppe Kanny v. Caliappa Pillai* (*supra*) should not be regarded as an authority for the order which the District Judge made in this case.

I agree that this appeal should be allowed.

*Appeal allowed.*

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J.

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