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porting the wall, and will not entitle the other tenant-in-common to maintain an action, of course still less an injunction. I am not now speaking of a case of danger, which is not, as I understand, the case here. That being so, it appears to me that at common law there would have been no right of action as far as the wall is concerned."

Therefore this appeal, No. 261 of 1900, must be allowed and the decree of the lower Court reversed. The result is that this suit will be dismissed with costs throughout. As the defendant has offered to abide by any terms that may be imposed with a view to insuring that the drain shall not be a nuisance, the following undertaking by him will be embodied in the decree:—There must be an undertaking on the part of Mohanchand to construct and use the drain so as not to create a nuisance, and there will be a reference to the lower Court to determine the character, material, level and slope of the drain, and its course and outlet, and generally so as to secure the above object. Liberty to apply to this Court if necessary.

Appeal No. 262 follows the result of the former: the decrees of the lower Court will be reversed and the injunction awarded. The respondent must pay the costs throughout.

Decrees reversed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

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 September 18.

TUKARAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v.
 ANANTBHAT (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sec. 257A—Decree—Mortgage—Amount of decree included in the mortgage—Agreement to give time—Satisfaction.

The agreement to which the first paragraph of section 257A of the Civil Procedure Code (Act XIV of 1882) relates is one which suspends and does not destroy the rights of execution consequent on a decree.

Where a mortgage-bond was given for an amount which included a sum due under a decree, and made the whole amount payable in instalments, it was con-

* Second Appeal, No. 306 of 1900.

tended, under section 257A of the Civil Procedure Code (Act XIV of 1882), that the bond was void to the extent of the sum due under the decree, being an agreement to give time for the satisfaction of a judgment-debt, and that in respect of that sum no suit would lie.

Held, that the suit was maintainable. The mortgage-bond did not suspend the right to execute the decree, but it put an end to the remedy on the decree and substituted the mortgage-bond. It was the actual and present satisfaction of the judgment, and therefore was not an agreement to give time for the satisfaction of a judgment-debt and did not fall within section 257A of the Civil Procedure Code.

SECOND appeal from the decision of R. Knight, District Judge of Sátára, modifying the decree of Ráo Sáheb B. Y. Gupte, Subordinate Judge of Wái.

The plaintiff sued to recover a mortgage-debt of Rs. 500 and interest from the defendants.

The following is the material portion of the mortgage-bond :—

“Bond dated the 27th August, 1894 (11th Shráwan Vadya, Shake 1816), for Rs. 500 is passed by the debtor Tukaram and surety Lakshman valad Govinda, to the following effect :—I have borrowed Rs. 450 from you to pay my creditors and for domestic expenses. The rate of interest is 12 annas per cent. per month till repayment. The time for repayment is the end of Margashirsha of the current year. In addition to the abovenamed sum I have borrowed from you Rs. 50, in all Rs. 500. The rate of interest is 12 annas per cent. per month till repayment. The time for repayment is the end of this Margashirsha. I shall repay Rs. 100 and interest on the whole sum then. Afterwards from Shake 1817 to Shake 1824 for eight years I shall pay every year by the end of Margashirsha Rs. 50 out of the principle, together with interest on the whole. I shall thus satisfy your whole claim with interest by punctual payments every year. In case of default in any year, you should wait till there is a second default on my part. If I fail to pay the sum due on account of the two overdue instalments with interest, I shall not plead the time which is yet to run and pay the whole sum due to you at once. I shall take receipt for the same on the bond &c. &c.”

The defendants admitted the execution of the mortgage, but pleaded that of the Rs. 500 stated to be the consideration for the mortgage Rs. 308 was a sum due by defendants Nos. 1 and 2 to the plaintiff under a decree obtained by him against them in suit No. 153 of 1893, and that the mortgage was therefore an adjustment of that decree, and not having been sanctioned or certified to the Court was void to the extent of the judgment-debt.

The Subordinate Judge relying on the decision of the Full

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Bench in *Heera Nema v. Pestonji*⁽¹⁾ found that the mortgage-bond sued on was void to the extent of the judgment-debt, namely Rs. 308, inasmuch as the satisfaction of the decree had neither been duly certified to the Court nor had sanction been obtained under section 257A of the Civil Procedure Code (Act XIV of 1882). He therefore passed a decree directing the defendants to pay to the plaintiff only Rs. 114-15-9 with interest within six months from the date of the decree.

On appeal by the plaintiff the Judge held the bond to be valid, because, although it had the effect of giving time to discharge the judgment-debt, it was not an agreement to give time and it did not provide for the payment of any sum in excess of that due under the decree. He therefore modified the decree of the Subordinate Judge by adding to the sum found payable to the plaintiff by defendants Rs. 308 together with interest at 9 per cent. from the date of the bond to the date of the suit.

Defendants preferred a second appeal.

Mahadev V. Bhat for the appellants (defendants):—The terms of the bond clearly show that it gives time for the satisfaction of the judgment-debt. In consideration of the decree-holder getting a substantial security for the debt due under the decree, he by the bond allowed the judgment-debtors to pay off by instalments the debt which was payable at once. The bond provides that the first instalment of one hundred rupees shall be paid six months after date and that the balance shall be paid by annual instalments of fifty rupees each in eight years. Thus the debtor gets time for eight years and the decree-holder gets the security of land. This was a private arrangement not sanctioned by the Court. The object of section 257A of the Civil Procedure Code was to protect the judgment-debtor from undue influence—*Kesu v. Genu*,⁽²⁾ or to afford protection to the parties against unfair arrangements and to avoid inconvenience and delay in the execution of decrees—*Hukum Chund v. Takarunnessa Bibi*,⁽³⁾ The mortgage-bond here frustrates the object of the section. The current of authorities in this Presidency is different from that

(1) (1898) 22 Bom. 693.

(2) (1898) 23 Bom. 502.

(3) (1889) 16 Cal. 504.

of the other Presidencies. This Court has consistently held that section 257A does not relate exclusively to agreements to extend time for enforcing the decree, but is applicable to all agreements—*Swamirav v. Kashinath*⁽¹⁾; *Madhavrav v. Chilu*⁽²⁾; *Pandurang v. Narayan*⁽³⁾; *Ganesh v. Abdullabeg*⁽⁴⁾; *Davlatsing v. Pandu*⁽⁵⁾; *Bank of Bengal v. Vyabhoy*⁽⁶⁾; *Jhabar Mahomed v. Modan Sonahar*⁽⁷⁾; *Krishna v. Vasudev*⁽⁸⁾; *Vishnu v. Hur Patel*⁽⁹⁾; and *Heera Nema v. Pestonji*.⁽¹⁰⁾

Purushottam P. Khare for the respondent (plaintiff):—The mortgage-bond is not an agreement to give time to the judgment-debtor. It is in full satisfaction of the judgment-debt and in fact extinguishes that debt. A suit will lie to enforce such a contract—*Narayan v. Baba*.⁽¹¹⁾

The Full Bench ruling in *Heera Nema v. Pestonji*⁽¹²⁾ did not touch the present point, as the agreement in that case contained a stipulation to make payments in excess of the amount allowed by the decree. The rulings of the other High Courts support our contention.

The jural relation created by the decree is put an end to by the mortgage-bond. It cannot be said of such a bond that it is an agreement to give time. No sanction of the Court was therefore necessary.

JENKINS, C.J.:—On the 27th of August, 1894, the three defendants executed in the plaintiff's favour a mortgage-bond for Rs. 500. Of this amount Rs. 308 was due from the first and second defendants to the plaintiff under a decree, and the sole point for our determination is whether this sum is recoverable in this suit. The Subordinate Judge of Wai has held that it cannot be recovered; but this decision was reversed on appeal by the District Judge of Sátara. It is from this decree that the present appeal has been preferred.

(1) (1890) 15 Bom. 419.

(2) (1881) P. J. 315.

(3) (1884) 8 Bom. 300.

(4) (1884) 8 Bom. 538.

(5) (1884) 9 Bom. 176.

(6) (1891) 16 Bom. 618.

(7) (1885) 11 Cal. 671.

(8) (1896) 21 Bom. 808.

(9) (1888) 12 Bom. 499.

(10) (1898) 22 Bom. 693.

(11) (1883) P. J. 340.

(12) (1898) 22 Bom. 693.

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The solution of the question depends on section 257A of the Civil Procedure Code, which is in these terms:—

“Every agreement to give time for the satisfaction of a judgment-debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable.

“Every agreement for the satisfaction of a judgment-debt which provides for the payment, directly or indirectly, of any sum in excess of the sum due or to accrue due under the decree, shall be void unless it is made with the like sanction.

“Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment-debt, and the surplus, if any, shall be recoverable by the judgment-debtor.”

It is not suggested that the case falls within the second paragraph of the section; what is urged is, that in respect of the Rs. 308 there is an agreement to give time for the satisfaction of a judgment-debt. It becomes necessary, therefore, to examine the mortgage-bond, so as to learn its precise force. It is in these terms:—

“Bond dated the 27th August, 1894 (11th of Shrāwan Vadya, Shake 1816) for Rs. 500 is passed by the debtor Tukaram and surety Lakshman valad Govinda to the following effect:—I have borrowed Rs. 450 from you to pay my creditors and for domestic expenses. The rate of interest is 12 annas per cent. per month till repayment. The time for repayment is the end of Margashirsha of the current year. In addition to the abovenamed sum I have borrowed from you Rs. 50, in all Rs. 500. The rate of interest is 12 annas per cent. per month till repayment. The time for repayment is the end of this Margashirsha. I shall repay Rs. 100 and interest on the whole sum then. Afterwards from Shake 1817 to Shake 1824 for eight years I shall pay every year by the end of Margashirsha Rs. 50 out of the principal, together with interest on the whole. I shall thus satisfy your whole claim with interest by punctual payments every year. In case of default in any year, you should wait till there is a second default on my part. If I fail to pay the sum due on account of the two overdue instalments with interest, I shall not plead the time which is yet to run and pay the whole sum due to you at once. I shall take receipt for the same on the bond &c. &c.”

Now from a perusal of this document it appears to us clear, that according to its true construction it does not purport to suspend temporarily the right to execute the decree, but to put an end to the remedy on the decree, and to replace it with the

mortgage-bond. Can it then be said that this is an agreement to give time for the satisfaction of the judgment-debt? If we look to the Code alone, we should say clearly not; the mortgage-bond is itself the actual and present satisfaction of the judgment, and if this be so, it necessarily follows it is not an agreement to give time for the satisfaction of a judgment, for such an agreement *ex vi termini* implies that there has been no actual satisfaction, but merely a stipulation for a future satisfaction. In other words the agreement, to which the first para. of section 257A relates, is one which suspends and does not destroy the rights of execution consequent on the decree.

But then it is said that the cases forbid our placing such a construction on the words of the section; we will therefore examine them to see whether such is their effect. The first case to which we will refer is that of *Madhavrao Anant v. Chilu*, not to be found in the authorized reports, but only in the Printed Judgments for 1881 at p. 315. For this reason, and also because it is the foundation on which the whole structure of the case law in this Presidency is built, we refer to the case at length. The judgment is as follows:—

“This is not a suit upon a decree or for execution thereof, but upon a new contract whereby the debtor was bound to pay interest on moneys, the greater part, but not the whole, of which consisted of the amount of a decree, and the creditor, instead of being entitled to immediate execution of his decree, was debarred from taking any proceedings in that respect during the currency of the bond, which was dated 4th Bhadrava Vād, Shaka 1799, and was not payable until the end of Phalgun in the same year, *i.e.* the plaintiff by taking the bond contracted, in consideration of certain interest, to forbear for a period exceeding six months by some days. Such a contract was valid until section 257(a) of the present Civil Procedure Code was passed. It is not retrospective, and is therefore not applicable to this case. It is new legislation and not contained within section 2 of Act XXIII of 1861.”

Clearly then this case is not decisive of the present.

The next case is *Pandurang v. Narayan*,⁽¹⁾ and there no doubt, as here, there was an agreement that the judgment-debtor should execute to the judgment-creditor a bond in satisfaction of the judgment-debt. The compromise or adjustment of the decree

(1) (1884) 8 Bom. 300.

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was not certified to the Court, and when a suit was subsequently brought on it, the High Court held, in affirmation of the Subordinate Judge's decree, that the adjustment of the decree not having been certified to the Court, was not binding on the plaintiff, and therefore constituted no valid consideration. This case, however, though it bears a close resemblance to the present, is absolutely no authority. It was decided prior to the enactment of the last clause of section 258 in its present form, and at a time when the doctrine of this Court was that the section was not, as it now indisputably is, confined in its operation to proceedings in execution. The decision, in truth, rested not on section 257A, but on this view of section 258 in its old shape. The inapplicability of *Ganesh v. Abdullabeg* at page 538 of the same volume is manifest; because it was held that the agreement was void under the second clause of section 257A of the Code of Civil Procedure; whereas *ex concessis* that clause does not apply here. It is in this case that *Madhavray v. Chilu* makes its first appearance in the authorized reports.

Davlatsing v. Pandu⁽¹⁾ was the next case cited, but is distinguishable, as the vice of the agreement was that it provided for the payment of interest not allowed by the decree, so that it clearly fell under the second clause. *Bank of Bengal v. Vyabhog*⁽²⁾ turned on the fact that there was a specific agreement "to postpone the execution of the decree," and liberty was reserved to the Bank in default "to forthwith execute the said decree." The decree was suspended, not satisfied, and as a consequence the case clearly fell within the exact terms of the section.

The case on which perhaps the greatest stress was laid in the argument before us is *Swamirao v. Kashinath*,⁽³⁾ not so much for what it decides as for what it suggests. The following question was, under section 617 of the Code of Civil Procedure, submitted for the decision of the High Court:—"Whether under the present state of the law a suit based on a private agreement made out of Court in satisfaction or adjustment of a decree without the sanction of the Court which made the decree should be admitted?" Sir Charles Sargent, C.J., in delivering judgment, said:—

(1) (1884) 9 Bom. 176.

(2) (1891) 16 Bom. 613.

(1890) 15 Bom. 419.

“With respect to section 257A, the concluding clause of section 258 as amended has no direct bearing on it, as it relates to a different subject-matter; and the question still remains whether section 257A relates exclusively to agreements to extend the time for enforcing decree by execution, as ruled by the Calcutta High Court in *Jhabar Mahomed v. Modan Sonahar*,⁽¹⁾ or is applicable to all agreements according to the view taken by Westropp, C.J., and Kembal, J., in *Madhavrao Anant v. Chilu*,⁽²⁾ and which was followed in *Ganesk Shivram v. Abdullabey*,⁽³⁾ *Pandurang Ramchandra v. Narayan*,⁽⁴⁾ and *Davlatsing v. Pandu*.⁽⁵⁾ The Subordinate Judge should follow the rulings of this Court.”

Now it is to be noticed that the Court had not the benefit of an argument before it, and but for this it is impossible to suppose that those circumstances which served to differentiate *Madhavrao's* case and the other cited authorities would not have been brought to the attention of the Court. But, however that may be, it is clear that the learned Judges did not intend to go beyond the cited cases, and, as we have already shown, none of them are on all fours with the present.

The next case that calls for notice is *Krishna v. Vasudev*,⁽⁶⁾ the actual decision in which is not an authority in favour of the appellants, for it was held that the requirements of section 257A had been satisfied. Sir Charles Farran, C.J., however, at page 819 says:—

“It remains to consider the objections to the mortgages founded upon the provisions of section 257A of the Civil Procedure Code, which are common to both appeals. The adjustment of the decree by the bonds having been certified to the Court, no difficulty arises on that score, nor could any arise since the alteration in the wording of section 258 of the Civil Procedure Code—*Swamirao v. Kashinath*.⁽⁷⁾ The provisions of section 257A occasion some difficulty. A long series of decisions in this Court has interpreted the section as applicable to agreements which operate to extinguish the original decree. They are all (except *Vishnu v. Hur Patel* ⁽⁸⁾) mentioned in *Swamirao v. Kashinath* (*supra*) and are not dissented from in *Bank of Bengal v. Vyabhoj Gangji*,⁽⁹⁾ though in the former of these cases Sargent, C.J., speaks somewhat hesitatingly as to their binding force since the Legislature has declared its purpose by the alteration made in the 258th section of the Civil Procedure Code. The Calcutta High Court, on the other hand, in *Jhabar Mahomed v. Modan Sonahar*,⁽¹⁰⁾

(1) (1885) 11 Cal. 671.

(2) (1881) P. J. 315.

(3) (1884) 8 Bom. 538.

(4) (1884) 8 Bom. 300.

(5) (1884) 9 Bom. 176.

(6) (1896) 21 Bom. 808.

(7) (1890) 15 Bom. 419.

(8) (1888) 12 Bom. 499.

(9) (1891) 16 Bom. 618.

(10) (1885) 11 Cal. 671.

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after a consideration of the Bombay authorities, has, agreeing with the Allahabad High Court, held that the provisions of section 257A are only intended to prevent any binding agreement between judgment-debtors and judgment-creditors for extending the time for enforcing decrees by execution without consideration and without the sanction of the Court, a ruling which would equally apply to agreements falling within the 2nd clause of the section and which has been so applied in *Hukum Chand v. Taharunnessa Bibi*.⁽¹⁾ These rulings have been followed in the Madras High Court—*Sellumayyan v. Muthan*⁽²⁾ and *Fuji v. Annai*.⁽³⁾ There is thus a consensus of opinion in all the other High Courts that the Legislature in framing the Code of Civil Procedure did not intend to effect, and did not, therefore, effect any change in the substantive law relating to the consideration for agreements, an opinion which by the alteration of section 258 the Legislature would seem to countenance. When it again comes before this Court it may be proper to refer it for consideration to a Full Bench. The question is of the highest importance, and it is one upon which it is desirable that there should be uniformity in the law."

No doubt it is said that "a long series of decisions has interpreted the section as applicable to agreements which operate to extinguish the original decree:" this, however, was, in the view their Lordships took, an expression of opinion not necessary for the decision of the case, and we have shown that the authorities (other than *Vishnu v. Hur Patel*⁽⁴⁾ to which we will later refer) do not support the proposition.

Another case pressed on us was *Herra Nema v. Pestonji*,⁽⁵⁾ heard by a Full Bench of the Court. It is important to observe what precisely were the questions to which the attention of the Court was directed, and what were the facts under which they arose. A suit had been brought in the Small Cause Court on a promissory note, which was given together with certain cash payments in settlement of a decree. The decree was satisfied and handed over to the defendants, but the compromise was not sanctioned by the Court. The promissory note carried interest at 3 per cent. per mensem. The Chief Judge of the Small Cause Court feeling doubts as to the law referred the following questions to this Court :—I. Whether the promissory note falls within the provision of section 257A of the Code of Civil Procedure? II. If it does, whether it is void and unenforceable by

(1) (1889) 16 Cal. 501.

(3) (1893) 17 Mad. 332.

(2) (1888) 12 Mad. 61.

(4) (1888) 12 Bom. 490.

(5) (1898) 22 Bom. 693.

reason of the provisions of the section? Now we imagine there could be no doubt as to the answer to these questions. The agreement for the satisfaction of the judgment-debt in imposing a liability to pay 3 per cent. per mensem, or 36 per cent. per annum, clearly provided for the payment of a sum in excess of the sum to accrue due under the decree, and so we find Sir Charles Farran says: "In this view it is unnecessary to consider the argument of Mr. Scott that the agreement was also an agreement to give time for the satisfaction of the judgment-debt." In fact it is conceded that there is nothing to be found in Sir Charles Farran's judgment to support the present appellants, but reliance is placed on what are said to be certain *obiter dicta* in the judgment of Mr. Justice Candy. We think an effect is sought to be extracted from the learned Judge's remarks beyond the scope of his intentions.

We have now dealt with all the cited cases, and it only remains for us to consider *Vishnu v. Hur Patel* ⁽¹⁾ which demands close examination, as it bears a resemblance, but only superficial we think, to the present. A money-decree was passed, and in execution of it property was attached. A havala was given by five persons other than the defendant, this havala being an oral undertaking to pay the amount of the decree. The exact form of the havala does not appear, but from the first question framed by the District Judge, obviously with great care and precision, it appears that the havala did not supersede the decree, which still remained enforceable. Subsequently the defendant and two others executed a bond to the plaintiff, reciting the havala and the payment thereunder, and agreeing to pay the amount of the decree with interest. On these facts the District Judge submitted the points set out at page 500 of the report, which merit close attention. The decision of this Court was pronounced by Nanabhai Haridas, J., who held (i) that the havala was void by reason of para. 1 of section 257A; (ii) that, therefore, there was no consideration for the bond; and (iii) that if the bond was an agreement for satisfaction of the decree, it was void under para. 2 of section 257A.

(1) (1888) 12 Bom. 499.

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With the 3rd of these grounds we have, for reasons we have already indicated, no concern. So that we limit ourselves to an examination of the 1st and 2nd grounds, which in fact are one branch of the *ratio decidendi*.

Now it is to be noted on what ground it was that the learned Judges held that the bond—and it was as to that alone they were consulted—was void. It was not because the bond offended the provisions of para. 1 of section 257A, but because the *havala*, which was its consideration, was in contravention of them. But, as we have already pointed out, the *havala* did not supersede the decree: therefore an opinion expressed as to its void quality throws no light on the present case, where, as we have already held, we are concerned with a bond which according to its construction was a satisfaction of the decree. We are not concerned to consider how far the Court was right in holding that the *havala*, to which the defendant was not a party, was void: suffice it that the learned Judges did so hold, and as a result decided that there was no consideration for the bond.

We have now dealt with all the cases, and none of them appear to us to govern this case. We at one time were in doubt as to whether it could be said there was no consideration for the bond, inasmuch as it was not certified under section 258, but we think there is no sound foundation for this doubt. In the first place it overlooks the change in the last clause in the section, and in the next place it would be contrary to the fact to hold that there was no consideration. We therefore think that the District Judge was right, so that his decree must be confirmed and this appeal dismissed with costs.

Decree confirmed.