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We vary the decree of the lower Appellate Court by ordering that on failure to pay the amount within two months the decreed debt, Rs. 182, be recovered by sale of the mortgaged property described in the plaint, and the balance, if any, from the estate of the deceased Dayal Lakshmidas. In other respects the decree of the lower Appellate Court is confirmed. The costs throughout will be borne by the respondent.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Aston.

1902.
October 15.

DHANRAM RAGHO (ORIGINAL PLAINTIFF), APPELLANT, v. GANPAT SADASHIV AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), section 257A—Decree—Satisfaction of decree by a mortgage without sanction of Court—Mortgage bond void.

The plaintiff was the holder of a decree against the defendant for Rs. 2,370. On the 28th November, 1895, the plaintiff advanced to the defendant Rs. 59, and in consideration of this advance and of the amount already due by the defendant to the plaintiff under the decree, the defendant mortgaged certain property to the plaintiff. The mortgage bond provided for payment of interest on the mortgage debt at the rate of 10½ per cent. per annum. The plaintiff subsequently sued on the mortgage to recover the principal and interest.

Held (dismissing the plaintiff's suit), that the mortgage was void under section 257A of the Civil Procedure Code (XIV of 1882), no sanction having been obtained.

Heera Nema v. Pestonji Dossabhoj (1) followed.

SECOND appeal from the decision of Thakurdas Mathuradas, District Judge of Dhulia, confirming the decree passed by Ráo Sáheb K. R. Natu, Subordinate Judge at Yával.

The plaintiff was the holder of a decree against defendants for Rs. 2,370-7-3. On 28th November, 1895, the plaintiff advanced to the defendants a sum of Rs. 59-8-9, and in consideration of this advance and of the amount due by them on the decree, the defendants mortgaged certain property to the plaintiff. The mortgage

* Second Appeal No. 550 of 1901.

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debt was made repayable with interest at the rate of 14 annas per cent. per mensem (i. e., 10½ per cent. per annum).

The plaintiff now sued on the mortgage to recover the principal and Rs. 870 interest.

The defendants pleaded that the mortgage was void under section 257A of the Civil Procedure Code, having been made in satisfaction of a decree and without the sanction of the Court.

The Subordinate Judge dismissed the suit, relying upon the case of *Heera v. Pestonji*.⁽¹⁾

On appeal, the District Judge confirmed this decree on the following grounds :

The Subordinate Judge held on the authority of *Heera v. Pestonji* (I. L. R. 22 Bom. 693) that as the bond was taken without the sanction of the Court which passed the decrees above referred to, it was void under section 257A, Civil Procedure Code.

The plaintiff relies upon the case of *Tukaram v. Anantbhat* (I. L. R. 25 Bom. 252), a ruling passed since the disposal of this case by the Subordinate Judge, and urges that the mortgage bond is valid.

The defendants state that as the mortgage bond in suit is for the satisfaction of judgment-debts, and as it provides for the payment of a sum (in the form of interest from the date of the bond) in excess of the sums due under the decrees, it is void, since it was neither passed nor accepted with the sanction of the Court passing the decrees; and my attention is asked to *Davlatasing v. Pandu* (I. L. R. 9 Bom. 176). It is urged that the case of *Davlatasing* and the Full Bench ruling in the case of *Heera* govern this case, it being also pointed out that in the case of *Tukaram* there was no suggestion that the case fell within the second paragraph of the section, while in the present case the point is especially urged.

It must be considered that the bond provides for the payment of a larger sum of money than that due under the decrees, since it imposes upon the judgment-debtor the liability of paying interest at the rate of 14 annas per cent. per month, or Rs. 10½ per cent. per annum.

I am of opinion, therefore, that the case falls within, and ought to be governed by, the Full Bench ruling in the case of *Heera* so long as that ruling stands. I am bound to follow it, especially as the authority of that ruling is affirmed by the High Court in the case of *Tukaram*.

Plaintiff appealed to the High Court.

Scott (Advocate General) (with *C. A. Rele*) for the appellant (plaintiff) :—The mortgage bond is not void under section 257A of the Civil Procedure Code (Act XIV of 1882). It is not

(1) (1898) 22 Bom. 693.

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an agreement for the satisfaction of judgment-debt, but it is the actual and present satisfaction: *Tukaram v. Anantbhat*.⁽¹⁾ The section does not apply to agreements which operate to extinguish the decree. The decretal debt was converted by the mortgage into a secured debt, and an additional advance is also made. The decree was thus merged in the mortgage. The mortgage bond includes nothing more than the amount of the decree plus Rs. 59 paid in cash. The original rate of interest was 15 per cent. per annum, while that in the mortgage bond is only 10½ per cent. The rate in the bond is reasonable, and we are entitled to receive interest under the bond, although the decree did not provide for payment of interest till the date of the payment of the decretal amount. It cannot therefore be contended that this is an agreement to pay a sum which is in excess of the decretal amount.

The Full Bench case of *Heera Nema v. Pestonji Dossabhoy*⁽²⁾ relied on by the lower Court is distinguishable. That was a suit brought on a promissory note, and not on a mortgage bond. The promissory note was renewed from time to time by adding interest to it as the same accrued due, and the rate of interest was 36 per cent. per annum, while in the present case it is only 10½ per cent. We also rely on *Swamirao v. Kashinath*⁽³⁾ and *Ghanasham v. Kashiram*.⁽⁴⁾

Vicaji (with him *N. V. Gokhale*) for respondents (defendants):—The mortgage bond is clearly an agreement to pay a sum in excess of the decretal debt, and the sanction of the Court not having been obtained, it falls within section 257A, clause 2, of the Civil Procedure Code (Act XIV of 1882). The case of *Heera Nema v. Pestonji Dossabhoy*⁽²⁾ is on all fours with the present case: there is no difference between a promissory note and a mortgage bond given in extinguishment of the decretal debts. The authority of that decision has been affirmed in *Tukaram v. Anantbhat*.⁽¹⁾

The decree in this case did not provide for the payment of interest, but the mortgage bond does. The mortgage is therefore

(1) (1900) 25 Bom. 252.

(2) (1898) 22 Bom. 693.

(3) (1890) 15 Bom. 419.

(4) (1891) 16 Bom. 589.

in excess of the sum due under the decree. The case of *Tukaram v. Anantbhat* ⁽¹⁾ is distinguishable. In that case there was no excess according to the finding of the lower Appellate Court, and the only question raised on the facts found was whether the mortgage bond was an agreement to give time for the satisfaction of the judgment-debt, under clause 1 of section 257A of the Civil Procedure Code (Act XIV of 1882). The Court had only to consider whether that clause applied or did not, while in the present case the question is whether section 257A, clause 2, applies.

CROWE, J.:—This is a suit to recover Rs. 3,300 due on a mortgage bond dated the 28th December, 1895. The contention of the defendant was that the mortgage deed was illegal under the provisions of section 257A of the Code of Civil Procedure. The Court of first instance held that objection good and rejected the claim. The lower Appellate Court on the same ground, after referring to the reported cases, confirmed the decree of the lower Court and rejected the appeal.

In the appeal before us the learned Advocate General has pleaded that the mortgage bond was not an agreement for the satisfaction of the judgment-debt within the terms of section 257A, and he has relied on the ruling of the learned Chief Justice in the case of *Tukaram v. Anantbhat*.⁽¹⁾ The present case can be distinguished from the case quoted above in one respect, namely, that in that case it was found that it was not an agreement to give time and that it did not provide for payment of any sum in excess of that due under the decree. In the course of his judgment the learned Chief Justice referred to the various decided cases and commented on them. In construing the case of *Heera Nema v. Pestonji*,⁽²⁾ decided by a Full Bench of this Court, he remarked that in that case 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, as interest clearly provided for the payment of a sum in excess of the sum accrued due under the decree.

The Full Bench case of *Heera Nema v. Pestonji*⁽²⁾ has been relied on by the respondent; and we think that the present case can

(1) (1900) 25 Bom. 252.

(2) (1898) 22 Bom. 693.

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rightly be decided in accordance with the ruling of the Full Bench in that case. The amount due under the decree was a sum of Rs. 2,370-7-3. The mortgage-deed shows that a further sum of Rs. 59-8-9 is alleged to have been paid in cash, and the bond is passed for the sum of Rs. 2,430, carrying interest at the rate of 14 annas per cent. per mensem. It seems to us, therefore, that this case is practically on all fours with the Full Bench case, and, therefore, we should follow that decision in holding that the agreement in this case does fall within the purview of paragraph 2 of section 257A, and that it is, therefore, void.

For these reasons we affirm the decree of the Court below, and reject the appeal with costs.

Decree confirmed.

ORIGINAL CIVIL.

Before Mr. Justice Russel.

1902.

November 27.

BOMANJI JAMSETJI MISTRI AND BAI NAWAJBAI, A MINOR, BY HER FATHER AND NEXT FRIEND, THE SAID BOMANJI MISTRI (PLAINTIFFS),
v. NUSSERWANJI RUSTOMJI MISTRI (DEFENDANT).*

Practice—Costs, security for—Civil Procedure Code (XIV of 1882), section 380—Two plaintiffs, father and daughter—Suit for damages for breach of promise to marry.

A Parsi father and daughter (plaintiffs 1 and 2) sued for Rs. 10,000 as damages for the defendant's breach of his promise to marry the daughter (plaintiff 2). The defendant alleged that the suit was really a suit for the benefit of the father, who sought to make money out of his daughter's betrothal: that he (the father) was an undischarged insolvent and not in a position to pay costs if he lost the suit, and that the second plaintiff (the daughter) had no property in India. The defendant took out a summons under section 380 of the Civil Procedure Code, requiring the plaintiffs to give security for costs. The Court ordered that security for costs should be given.

IN Chambers. Summons taken out by defendant under section 380 of the Civil Procedure Code (XIV of 1882) calling on plaintiffs to give security for costs.

* Suit No. 390 of 1902.