

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Aston.*

GOVIND KRISHNA GUJAR (ORIGINAL PLAINTIFF), APPELLANT, v.  
SAKHARAM NARAYAN AND ANOTHER (ORIGINAL DEFENDANTS), RES-  
PONDENTS.\*

1904,  
February 22.

*Civil Procedure Code (Act XIV of 1882), section 257A.—Decree—Satisfaction—Sanction of the Court—Hindu Law—Father's debts—Son's liability to pay.*

The plaintiff obtained a decree against N. for Rs. 350. In satisfaction of this decree, N. and his son A., who were living as members of a joint Hindu family, passed two bonds, the one for Rs. 251 and the other for Rs. 99. Both the bonds provided for the payment of interest and on sanction of the Court was obtained to this arrangement :

*Held*, (1) that the whole agreement was void, as the provision regarding interest carried the sum beyond the decretal amount. The consideration for each bond was the payment of principal with interest, and it existed from the very commencement and formed the basis of the whole contract ;

(2) that the bonds were void against N. as well as against A., since N. and his son A. being members of a joint Hindu family the son was as much liable as his father under the decree.

*PER CURIAM* :—“ The true test, it appears to us, of the application of section 257A is—is it a judgment-debt as to the person executing the agreement, in the sense that it is binding upon him as if he were bound by the decree.”

Under Hindu Law the pious obligation of a son to pay his father's debts exists whether the father is living or dead. The mere fact that a father is alive when the decree against him is sought to be executed does not absolve the son from his liability and entitle him to say that satisfaction of the decree shall not be obtained by selling his interest in the family property. When, however, the decretal debt is tainted by illegality or immorality, the son can contend that the decree is not binding upon him and establish the contention in a separate suit.

SECOND APPEAL from the decision of H. S. Phadnis, Assistant Judge at Thána, confirming the decree passed by G. K. Kale, Joint Subordinate Judge at Mahád.

The plaintiff obtained a decree for Rs. 350 against one Narayan in Suit No. 1463 of 1886. On the 3rd March, 1887, Narayan and his son Anandrao, who were living as members of a joint Hindu family, satisfied this decree by passing two mortgage-bonds, one for Rs. 251 and the other for Rs. 99. The bonds provided

1904.

GOVIND  
v.  
SAKHARAM.

for interest. No sanction of the Court under section 257A of the Civil Procedure Code (Act XIV of 1882) was taken to this arrangement.

In 1902, the plaintiff sued on one of the bonds (for Rs. 99), and claimed to recover the amount with interest.

The defendants contended that the bond was void inasmuch as no sanction of the Court was taken under section 257A of the Civil Procedure Code (Act XIV of 1882).

The lower Courts dismissed the suit holding that the bond sued upon was void under section 257A of the Civil Procedure Code (Act XIV of 1882).

The plaintiff appealed to the High Court.

*S. S. Patkar*, for the appellant:—Anandrao, one of the executors of the mortgage-deed sued upon, was not a party to the decree and therefore the bond is not void under section 257A of the Civil Procedure Code (Act XIV of 1882): see *Kesu v. Genu* <sup>(1)</sup>; *Harakchand v. Totaram* <sup>(2)</sup>; *Ramji Pandu v. Mahomed, Walli* <sup>(3)</sup>; *Yella Chetti v. Muvvisami Reddi* <sup>(4)</sup>; *Ramji v. Mahomed* <sup>(5)</sup>; *Adveppa v. Ahmed Sahab*. <sup>(6)</sup> The object of section 257A is to protect judgment-debtors from undue pressure. Anandrao not being a judgment-debtor, the bond is enforceable at least against Anandrao. Clause 3 of the section, “the surplus if any shall be recoverable by the judgment-debtor,” shows that the section applies only to persons who are judgment-debtors. The bond though jointly passed by Anandrao and Narayan is for the purposes of the suit joint and several: section 43 of the Indian Contract Act (IX of 1872). The bond is therefore enforceable against Anandrao. Secondly, the agreement to pay the principal in the bond in suit is separable from the agreement to pay interest and therefore section 257A would not vitiate the agreement to pay the principal: *Bhagechand v. Radhakisan*. <sup>(7)</sup>

*P. P. Khare*, for the respondent:—Anandrao lived jointly with his father and therefore the bond is void under section 257A

(1) (1898) 23 Bom. 102.

(4) (1882) 6 Mad. 101.

(2) (1889) P. J. p. 377.

(5) (1889) P. J. p. 90.

(3) (1889) 13 Bom. 671.

(6) (1891) P. J. p. 40.

(7) (1903) 28 Bom. 62; 5 Bom. L. R. 672.

1904.

---

 GOVIND  
 v.  
 SAKHARAM.

of the Civil Procedure Code (Act XIV of 1882). There cannot be contribution between Anandrao and his father. Secondly, a decree against the father is binding against the son unless the debt is proved to be for illegal and immoral purpose; and therefore section 257A would apply to a bond passed by the son. The agreement to pay the principal is not separable from the agreement to pay interest. The bond is not enforceable even against Anandrao.

*S. S. Patkar*, in reply :—Under section 43 of the Indian Contract Act (IX of 1872), a joint bond is joint and several. The rule in *King v. Hoare* <sup>(1)</sup> and *Kendall v. Hamilton* <sup>(2)</sup> is no longer applicable in India : *Muhammad Askari v. Radhe Ram Singh* <sup>(3)</sup> ; *Motilal Bechardass v. Ghellabhai Hariram* <sup>(4)</sup> ; *Dick v. Dhunji Saitka*. <sup>(5)</sup> Section 257A of the Civil Procedure Code (Act XIV of 1882) must be strictly construed. It applies only to persons who are parties to the decree. Anandrao not being a party to the decree the bond is enforceable against him. It has been held in *Harakehand v. Totaram* <sup>(6)</sup> that whether the son was or was not a co-parcener with his father at Hindu Law, he not being a party to the suit against the father, the bond on which the suit is brought is not void under section 257A of the Civil Procedure Code (Act XIV of 1882). The bond is therefore enforceable against Anandrao.

CHANDAVARKAR, J.:—This second appeal arises out of a suit brought by the appellant, Govind Krishna Gujar, to recover a certain amount on a mortgage-deed executed on the 2nd of March, 1887, by Narayan Bhivrao and his son Anandrao. Both the executants of the deed having died, the suit was brought against Sakharam and Sitaram, sons of the deceased Narayan, and against Chandri, widow of the deceased Anandrao. The execution of the deed and its consideration, and the circumstances which led to its execution were admitted by the defendants at the trial before the Subordinate Judge in whose Court the suit was filed and

(1) (1844) 13 M. and W. 404.

(2) (1879) 4 App. Cas. 504.

(3) (1900) 22 All. 307.

(4) (1892) 17 Bom. 6 at p. 11.

(5) (1901) 25 Bom. 378 ; 3 Bom. L. R.

234.

(6) (1889) P. J. p. 377.

1904.

GOVIND  
v.  
SAKHARAM.

the only question argued in this second appeal is whether the deed is void under the second clause of section 257A of the Code of Civil Procedure.

That question arises under the following circumstances.

The appellant, Govind Krishna Gujar, obtained a decree against Narayan for Rs. 350. In satisfaction of that decree both Narayan and his son Anandrao executed two bonds, one of which is the mortgage deed now in dispute, and is for Rs. 90, and the other is for Rs. 251. No sanction of the Court was obtained for such satisfaction, and as the mortgage deed provided for the payment of interest, both the Courts below have held that it falls within the class of transactions struck at by the second paragraph of section 257A of the Code of Civil Procedure.

It was urged before us that the deed in question was not wholly void but void only as to the agreement contained in it to pay interest; that it was valid as to the amount of the principal mentioned in it, which was not in excess of but was less than the decretal amount. But we think that the promise to pay the principal and the promise to pay future interest thereon are part and parcel of one and the same agreement and cannot be separated one from the other. The decision in *Bhagchand v. Radhikisan Mohanlal*<sup>(1)</sup> which was cited in support of his contention by the learned pleader for the appellant turned upon the construction of a bond, where there were two distinct agreements, by one of which the executant promised to pay in satisfaction of a decree obtained against him a sum which was not in excess of the decretal amount within three months from the date of the bond; by the other agreement in the bond he promised to pay interest if the principal should remain unpaid within the three months. Under those circumstances this Court held that the agreement to pay interest was *conditional* and did not form part of the other absolute agreement to pay the principal within three months. Such is not the case here. The consideration for the bond is the payment of the principal with interest and that consideration existed from the very commencement. As it formed the basis of the whole contract, it cannot be said that the agreement to pay interest stands apart

(1) (1903) 28 Bom. 62; 5 Bom. L. R. 372.

so as to be separable from the agreement to repay the principal. There was in fact no agreement to repay the principal alone.

But the more important question in the case is whether the deed is void not only as against Narayan, against whom the decree had been obtained, but also as against his son, Anandrao, who joined in the execution of the deed. We will first consider the case as if Narayan and Anandrao were not father and son and members of a joint Hindu family. Had Anandrao executed the deed without Narayan joining him, the deed would have been perfectly valid and stood unaffected by the second paragraph of section 257A, according to the decision of this Court in *Kesu v. Genu*.<sup>(1)</sup> Does the fact, then, that Anandrao joined Narayan in the execution of the deed make any difference as to his liability? We do not think it does. According to section 43 of the Contract Act, "when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise." There is no express agreement in the deed before us binding the mortgagee to enforce the mortgage against both the executants of the mortgage deed jointly and not severally and we must take it that the mortgagee is entitled to treat at his option their liabilities as several or joint. In other words, having regard to section 43 of the Contract Act, we must treat the deed before us as containing an agreement binding on Anandrao and creating a liability against him and as containing another agreement by Narayan creating a separate liability as against him. The deed is void as to the latter but valid as to the former. Because a deed is void as to one of the parties, it does not necessarily follow that it is void as to the rest. For instance, when two persons, one of whom is *sui juris* and the other a minor, contract a debt and execute a bond, it does not follow that because the bond is void as against the minor, it is void as against the other person also.

The process of reasoning on this point by which the Assistant Judge, Mr. Phadnis, agreeing with the Subordinate Judge, has held the deed to be void as to both the executants, is not quite intelligible. He thinks that the decision in *Kesu v. Genu*<sup>(1)</sup>

1904.

---

GOVIND  
v.  
SAKHARAM.

(1) (1898) 23 Bm. 502.

1904.

GOVIND  
v.  
SAKHARAIL.

is inapplicable here, because "in this bond there is not even a single expression or clause to indicate or suggest that either of the executants undertook any several liability irrespective of the other." The deed before us is perfectly clear. Narayan and Anandrao jointly promised to pay the amount and mortgaged their property. In such a case, the Contract Act says that it is at the option of the mortgagee to treat the liability as several, unless there is any express agreement between the parties to treat the liability as joint and joint only. The argument of the Assistant Judge that if the mortgagee were allowed to enforce the deed as against one of the executants, it would "necessitate qualifying the rule about contribution which is so absolutely and peremptorily worded in the section" appears to us to be altogether beside the question. Had Anandrao executed a separate bond in satisfaction of Narayan's debt, and had the decree-holder of Narayan enforced payment from Anandrao under the bond, there is no question Anandrao could have sued to recover the amount from Narayan as for money paid for the latter. What difference can it make in point of law because Anandrao has not executed a separate agreement but has joined Narayan in executing one? The question of contribution arises between Anandrao and Narayan and is apart from what is struck at by the provisions of section 257A of the Civil Procedure Code.

But it is further urged—and that is also the reasoning of the Assistant Judge—that as Anandrao was Narayan's son and as both formed members of a joint family, it must be inferred that Anandrao was a judgment-debtor in the decree obtained against Narayan. This raises the question whether Anandrao can be regarded as having been a party to the suit as his father Narayan was. For the purposes of that question we must bear in mind the facts found in this case by the learned Assistant Judge—*viz.*, that both the father and the son were joint, and that the decretal debt of Rs. 350, which subsequently merged in the mortgage deed for Rs. 99 and the bond for Rs. 251, being not tainted either by illegality or immorality, was binding on the son, Anandrao. It follows from these facts that after he had obtained his decree against Narayan, the present plaintiff could have executed it

1904.

---

 GOVIND  
 SAKHARAY.

against both by bringing to sale the interest of Anandrao as well as of Narayan in the family property. Anandrao could have, in that case, objected to the sale by a separate suit but in such a suit he would have been defeated and it would have been held that the decretal debt was binding upon him, and that his interest in the family property was as much liable to satisfy the decree as his father's. In other words, where a decree is obtained against a Hindu father in a joint family for a debt which it is the pious obligation, according to Hindu law, of his son who is joint with him, to pay, the son is also liable for the purposes of the execution of the decree against the family property. In this state of things he is in fact regarded in law as a party to the decree, though his name is not formally on the record. This is the principle to be gathered from the reasoning of the decision of the Privy Council in *Girdharee Lall v. Kantoo Lall* <sup>(1)</sup> where their Lordships said:—"If the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, were liable for the payment of the father's debts." That is also the principle of the decisions of this Court in *Umed Hathising v. Goman Bhaiji* <sup>(2)</sup> and *Jagabhai Lalubhai v. Bhukandas Jaggivandas*.<sup>(3)</sup> In the former, following the latter, Sargent, C. J., held that "it being distinctly established by the Privy Council's decisions that the creditor can attach and sell the entirety of the estate in execution of a money decree against the father," the obligation of the son to satisfy his father's debts "is within the scope of the decree against the father." No doubt in each of these two cases the father against whom the decree had been obtained was dead when execution was sought against the sons; but the ground of the decision in each case is what we must look to, and that ground was that, if the decretal debt is not tainted by illegality or immorality, the sons are within the scope of the decree and it can be executed as to them as if they were parties to it. The law is now well established that under the Hindu law, the pious obligation of a son to pay his father's debts exists whether the father is alive or dead. The mere fact that the father is

(1) (1874) 1 I. A. 321 at p. 334.

(2) (1895) 20 Bom. 385 at p. 388.

(3) (1886) 11 Bom. 37.

1904.

GOVIND  
v.  
SAKHARAM.

alive when the decree against him is sought to be executed does not absolve the son from his liability and entitle him to say that satisfaction of the decree shall not be obtained by selling his interest in the family property. The son can no doubt contend that the decree is not binding upon him and seek to establish that contention in a separate suit. But such a separate suit is allowed only on the hypothesis that the decretal debt is tainted by illegality or immorality and is, therefore, not binding upon him. But if it is otherwise, the suit fails and its failure means that he is bound by the decree. This view is in accordance also with the decision of the Madras High Court in *Kunhali Beari v. Keshava Shanbaga* <sup>(1)</sup>, where the decision of this Court in *Jayabhai v. Bhukan'tas* <sup>(2)</sup> was cited with approval as "an authority for the view that, as between the father and son, the father is the representative of his branch of the family, that, as against the son, he has a disposing power in regard to the share of the family property belonging to that branch, and that the son can only invalidate the sale in execution by showing that it was on account of an obligation to which he was not subject under Hindu law." In that case it was further said:—"As to the contention that the son was not a party to the suit or the decree, the answer is, all the sons can claim is that not being parties to the sale or execution proceedings, they ought not to be debarred from trying the fact or the nature of the debt in a suit of their own, and it will avail them nothing unless they can prove that the debt was not such as to justify the sale."<sup>(3)</sup>

From these considerations we think it follows that, though the decree obtained by the present plaintiff which led to the execution of the mortgage deed in dispute was *formally* against Narayan alone, his son Anandrao must be treated as if he was a party to it, having regard to the fact that the decretal debt was binding upon him and that the decree could have been executed by a sale of the whole family property including his right, title, and interest. If, then, Anandrao was substantially, though not formally, a party to the decree, the mortgage deed executed by him required the sanction of the Court under the second para-

(1) (1887) 11 Mad. 64 at p. 68.

(2) (1886) 11 Bom. 37.

(3) (1887) *Ibid* p. 76.

graph of section 257A of the Code of Civil Procedure. The object of that section, as was said by this Court in *Bank of Bengal v. Vyabhoj Gangji* (1), was "to afford some protection to the parties against unfair arrangements," and "that object will be adequately ensured by holding that such agreements cannot be enforced unless made with the sanction of the Court." That being the mischief which the Legislature intended to strike at and the true reason of the remedy provided, we must construe the section in such a way as shall suppress the mischief and advance the remedy. Persons who have nothing to do with a decree, who are not affected by it and are in no way bound by it, cannot fall within the mischief struck at by the section. But the same consideration cannot apply where a person is substantially bound by the decree, though not *pro forma* a party to it. In his case, there is as much the fear of being subjected to illegal pressure as there is in the case of the person who is the judgment-debtor named in the decree. In the case of a total stranger to the decree, who enters into an agreement for the satisfaction of a judgment debt, due from another person, the agreement cannot be said to be one in satisfaction of "a judgment debt." As to such stranger, it is a contractual liability not merged in a decree. The true test, it appears to us, of the application of section 257A is—is it a judgment debt as to the person executing the agreement in the sense that it is binding upon him as if he were bound by the decree? In an ordinary case, where A and B are jointly indebted to C, and C obtains a decree against and enforces payment of the whole debt from A alone, the decree is not *under any circumstances* binding upon B; and C cannot execute the decree by bringing to sale B's property. Moreover, if A has satisfied the decree, he can seek contribution from B. But if A and B happen to be father and son in a joint Hindu family, the legal consequences of the decree are different, provided the decretal debt is of a nature binding, according to Hindu law, on the son. In such a case if C execute the decree against A alone, A cannot seek contribution from B; if C execute the decree against the interest of B in the family property, B cannot seek contribution from his father A—and

1904.

---

 GOVIND  
 v.  
 SAKHARAM.

(1) (1891) 16 Bom. 618 at p. 625.

1904.

GOVIND  
 2  
 SAKHARAM.

that because it is not a joint debt of the father and the son in the ordinary sense—but a debt giving rise to a liability specially created by the Hindu law, according to which, while union continues, one coparcener cannot claim contribution from another in respect of a single payment. In other words, the moment there is a decree against the father for a debt not tainted by illegality or immorality, there is “a judgment debt” binding on the son also and it is none the less “a judgment debt” because the law of procedure allows the son to question the binding character of the debt in a separate suit. Judged by this test, the mortgage bond in dispute must be held to be void as against Anandrao also, as no sanction of the Court was obtained. As against this view, Mr. Patkar has cited *Harakchand v. Totaram* <sup>(1)</sup>, where Jardine and Candy, JJ., held that “whether the son was or was not a coparcener with his father at Hindu law, he not being a party to the suit against his father, the bond on which the present suit is brought is not void under section 257A.” That decision has not gone into the authorized reports and it merely follows, as is explicitly stated in the judgment, the decisions in *Ramji v. Mahomed Walli* <sup>(2)</sup> and *Yella Chetti v. Munisami Reddi* <sup>(3)</sup>. But on examination of these two latter cases we find that they do not support the decision in *Harakchand v. Totaram* <sup>(1)</sup>. Both in *Ramji v. Mahomed Walli* <sup>(2)</sup> and *Yella Chetti v. Munisami Reddi* <sup>(3)</sup> the father and the son were Mahomedans, there was no question about a coparcenary and all that was held was that section 257A applied only to parties to the decree. The decision in *Harakchand v. Totaram* <sup>(1)</sup>, being based on a misapprehension of the decisions which it follows, we are not bound by it. We confirm the decree with costs.

*Decree confirmed.*

(1) (1889) P. J. p. 377.

(2) (1889) 13 Bom. 671.

(3) (1882) 6 Mad. 101.