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the Statute for a further purpose, as that of giving judgment, you cannot now have it." Erle, J., says "the repealed Statute is, with regard to any further operation, as if it had never existed. It gave a form of proceeding which has been followed in this indictment; and the defendants were not liable except under the Statute. Between the indictment and the judgment this Statute is repealed. To say that the proceedings may nevertheless be followed up contravenes the sense of the word 'repeal'."

Under these circumstances it is not necessary to decide the question raised in the second ground of the rule herein.

We are of opinion therefore that the decree of the Mámlatdár was wrong and must be reversed with costs.

Rule made absolute.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell, Acting Chief Justice, and Mr. Justice Heaton.

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BHAGABAI, WIFE OF BIHARILAL MARWADI (ORIGINAL DEFENDANT), APPELLANT, *v.* NARAYAN GOPAL (ORIGINAL PLAINTIFF), RESPONDENT, AND NARAYAN GOPAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* BHAGABAI, WIFE OF BIHARILAL MARWADI.*

Civil Procedure Code (Act XIV of 1882), section 257A—Contract Act (IX of 1872), sections 2, clause (g), 23 and 24—Mortgage-bond—Consideration made up of several items—Decretal debt one of the items—Sanction of the Court not obtained—Effect on the bond.

N. G. sued to redeem a mortgage. The consideration for the mortgage consisted *inter alia* of an amount due under a decree. The decree did not provide for interest, whereas interest was chargeable on the decretal amount included in the mortgage. The lower appellate Court held that as the agreement had not been sanctioned under section 257A of the Civil Procedure Code (Act XIV of 1882) the whole mortgage bond was void.

Held, reversing the decree of the lower Court, that though the provision in the mortgage bond regarding the decretal amount could not be enforced, the remaining provisions were good and enforceable at law.

* Cross Second Appeals Nos. 361 and 373 of 1906.

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Cross second appeals from the decision of E. M. Pratt, District Judge of Khándesh, reversing the decree of R. B. Chitale, Subordinate Judge of Yával.

The plaintiff sued to redeem three fields which were mortgaged to the defendant under a registered mortgage-deed, dated the 13th March 1898. The mortgage was a usufructuary one and the consideration of it, namely, Rs. 2,500, was made up as follows:—

Rs.	a.	p.	
443	13	9	due under a decree obtained by the defendant in respect of the arrears of an instalment-bond.
294	0	0	due on the said instalment-bond.
684	0	0	borrowed to pay off a decretal debt due to another person.
874	0	0	borrowed to pay off a creditor.
25	0	0	borrowed to purchase the stamp paper on which the mortgage-bond was written.
179	0	0	borrowed to pay off a creditor.
0	2	3	taken in cash.
2,500	0	0	

The plaint alleged that, as the consideration of the bond included a decretal debt for which the sanction of the Court was not obtained, the bond was void and that the defendant was asked to give up possession of the property on receipt of whatever might be found due to him, but he refused to do so, hence the suit.

The defendant replied that Rs. 3,582-2-0 with further interest were due to him under the bond.

The Subordinate Judge found that the mortgage-bond was void so far as the decretal amount of Rs. 443-13-9 was concerned and passed a decree directing the plaintiff to redeem the mortgaged property on payment of Rs. 3,267-9-0 to the defendant within one year from the date of the decree.

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On appeal by the plaintiff the District Judge found that the mortgage-bond was void. He therefore dismissed the suit with costs.

The parties preferred cross second appeals; that preferred by the defendant was Second Appeal No. 361 of 1906 and that preferred by the plaintiff was Second Appeal No. 373 of 1906.

Second Appeal No. 361 of 1906.

Dixit, Dhanjishah and Sundardas, D. A. Khare and *V. V. Ranade* appeared for the appellant (defendant).

N. M. Samarth appeared for the respondent (plaintiff).

Second Appeal No. 373 of 1906.

N. M. Samarth with *M. V. Bhat* appeared for the appellant (plaintiff).

D. A. Khare appeared for the respondent (defendant).

The following authorities were referred to during arguments:—Civil Procedure Code, section 257A; Contract Act, sections 23, 24, 27, 28; *Raichand Motichand* v. *Naran Bhikha*(1), *Davlatsing* v. *Pandu*(2), *Govind Krishna* v. *Sakharam Narayan*(3), *Heera Nema* v. *Pestonji*(4), *Tukaram* v. *Anantbhat*(5), *Bhagchand* v. *Radhakisan*(6), *Dhanram Ragho* v. *Ganpat Sadashiv*(7), *Bank of Bengal* v. *Vyabhoy Gangji*(8).

RUSSELL, Ag. C. J. :—In this suit Narayan Gopal sued Bhagabai, wife of Biharilal, to redeem the property in dispute from the defendant on payment of whatever might be found due after accounts were taken by setting off profits against the interest.

The plaintiff stated that part of the consideration, *viz.*, Rs. 443-12-9, having been decreed, but the leave of the Court not having been obtained, so much of the mortgage-bond was void.

The Subordinate Judge directed redemption on payment of a certain sum.

(1) (1904) 28 Bom. 310.
(2) (1884) 9 Bom. 176.
(3) (1904) 28 Bom. 383.
(4) (1898) 22 Bom. 693.
(5) (1900) 25 Bom. 252.
(6) (1903) 28 Bom. 62.
(7) (1902) 27 Bom. 96.
(8) (1891) 16 Bom. 618.

The lower appellate Court, however, reversed his decree and dismissed the plaintiff's suit with costs throughout upon the ground that the mortgage in question was void.

Two appeals were filed against that decree, one, *viz.*, 361 of 1906, by the defendant, on the ground (*inter alia*) that the mortgage was not void; the other, No. 373 of 1906, by the plaintiff, on the ground that the mortgage-bond having been held to be void he ought to have been put in possession of the property.

First, as to defendant's Appeal 361 of 1906. The mortgage-bond in question bears date the 13th March 1898. The following is an abstract of it:—

The debtor passes this possessory mortgage-deed to the creditor. The debtor owes the following debts to the creditor:— (1) Rs. 443-12-9 overdue in instalment under an instalment-bond of the Samvat 1949, for which the creditor filed a suit against the debtor in the Yával Court, No 570 of 1896, and got a decree; (2) Rs. 294 the remaining instalments due on the said bond; (3) Rs. 684 borrowed to pay off decretal debt to another person in respect of which Darkhast 231 of 1896 had been filed; (4) Rs 874 borrowed to pay off another decretal debt under Darkhast 1320 of 1890; (5) Rs. 25 for purchasing the stamp for the present deed; (6) Rs. 179 to be paid to Ghanasham Khushaldas; (7) Re. 0-2-3 taken in cash this day: total Rs. 2,500, as to which interest agreed is Re. 1 per month. Payment of the aforesaid amount and interest to be made on the 1st Mágh Shud, Fasli 1308. In default interest to be paid as above. In consideration of the above sum mortgage with possession of the immoveable property described. From the date of the mortgage, property to be in possession of the creditor. If default in payment be made the property to be sold and sale proceeds credited in debtor's favour. If sale proceeds insufficient, the debtor to pay balance personally. Profits realized from the fields to be utilized first in reduction of interest and the balance that may remain to be credited in reduction of the principal.

The lower appellate Court held that, inasmuch as the said decree for Rs 443-12-9 had not been sanctioned under section 257A of the Civil Procedure Code, the whole mortgage was void.

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Section 257A of the Civil Procedure Code is as follows:—

"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."

In my opinion the section provides for two distinct matters: first, "every agreement to give time for satisfaction of a judgment-debt shall be void unless it is made for consideration and with the sanction of a Court," etc.; and secondly, "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."

In the present case, I do not think that the agreement can in any view of it be construed as giving time for the satisfaction of a judgment-debt, and in fact this was conceded in the arguments before us. To my mind it is plain that the parties to this document intended not to suspend the right to execute the decree but to put an end to the remedy on the decree and substitute the mortgage-bond. If this be so, then the first part of section 257A does not apply to the case: *Tukaram* v. *Anantbhat* [1].

Then the question is: Does it fall within the second part of the section?

It is impossible to say that this mortgage-bond is not an agreement for the satisfaction of a judgment-debt.

The decree, it is admitted, did not provide for interest. The mortgage-bond, however, does provide for interest on the decretal amount, and, therefore, provides for the payment of a sum in excess of the sum due under the decree, and to this extent

(1) (1900) 25 Bom. 252.

the mortgage-bond is void. But is it wholly void or only void *qua* the decretal amount and the interest thereon? "*A contract void in itself can have no valid beginning**": Chelmsford, L. C., in *Oakes* v. *Turquand*[1].

Section 24 of the Contract Act says: "If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void." And by section 23 it is provided: "The consideration or object of an agreement is lawful, unless it is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law. In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void." For it must be remembered that it is well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. The test is whether a distinct consideration which is wholly lawful can be found for the promise called in question. "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good": per Willes, J., in *Pickering* v. *Ilfracombe Railway Co.*[2]

Section 257A, it must be remembered, does not make the agreements therein illegal, in the sense of prohibited by law. It only prevents such agreements being enforced in a Court of law: see *Bank of Bengal* v. *Vyabhoy Gangji*.[3]

Now, it appears to me that looking at the terms of the bond, set out above, there are several and distinct promises made for one and the same lawful consideration, and if the law will not enforce the promise as to the Rs. 443-12-9 and interest thereon, still it can and will enforce the promises for payment of the other sums therein mentioned.

* These words are not in italics in the original judgment from which the passage is quoted. [Ed.]

(1) (1867) L. R. 2 H. L. 325 at p. 346. (2) (1868) L. R. 3 C. P. 235 at p. 250.
(3) (1891) 16 Bom. 618.

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This being so, it appears to me that so much of the mortgage-bond is good and enforceable by law, and, therefore, the decree of the lower appellate Court must be reversed.

The plaintiff's Cross Appeal No. 373 of 1906 must be dismissed.

The case must be remanded to the lower appellate Court to take the proper accounts between the parties upon the basis of this judgment.

Costs of this appeal and in the Courts below to abide the result of the taking of the account.

HEATON, J.:—The plaintiff owed the defendant a judgment-debt of Rs. 442-9-0 not bearing interest, which, with other debts, was incorporated in a mortgage, the total mortgage-debt being Rs. 2,500, the whole of which bore interest. It is admitted that the agreement to incorporate the judgment-debt in the mortgage-debt is one for which the sanction of the Court should have been obtained (*see* section 257A, Civil Procedure Code), except that Mr. Khare, for the mortgagee, contended that no such sanction would be needed if the mortgage extinguished or paid off the decree as he maintained it did. It was admitted that the sanction of the Court was not obtained; and that looking at the affair as a payment or adjustment of the decree it should also have been, but was not, certified to the Court (see section 258).

The plaintiff has now brought a suit to redeem the mortgage. The question therefore arises: What effect have sections 257A and 258 on the mortgage? The following possible solutions of the question have been suggested in the course of the argument:—

(1) That only interest on Rs. 442-9-0 must be excluded in making up the mortgage amount.

(2) That principal amounting to Rs. 442-9-0 and interest thereon must be excluded.

(3) That nothing at all must be excluded.

(4) That the mortgage-deed is wholly void and inoperative in law.

The number of decided cases referred to was large, and it was contended that they are such as to give support, amongst them, to each one of the four suggested solutions. That being so, it

will be a gain in time, labour and lucidity to consider the words of the written law and refer to the previously decided cases as sparingly as possible.

It was contended that the mortgage was not merely intended to but did extinguish the decretal debt. This it certainly did not do, for it is admitted that after the mortgage was completed the mortgagee could have executed the decree. The debtor was barred, once 90 days had passed (see Article 173A in the Limitation Act), by the provisions of section 258 from setting up the mortgage as satisfaction of the decree. It follows that, whether the second clause of section 257A does or does not cover the case of an agreement extinguishing a judgment-debt, it does cover the present agreement.

Consequently, the agreement to substitute a mortgage-debt for the judgment-debt is void; that is, the agreement is not enforceable by law (see Contract Act, section 2, clause (*g*)). No Court will take cognizance of the agreement. This view is correct at least in the Courts of this Presidency as will be evident from a perusal of the lucid and convincing reasoning of Sir Charles Farran in the case of *Heera Nema* v. *Pestonji*.[1]

Therefore there must be omitted from the principal of the mortgage-debt the sum of Rs. 443-13-9, as this sum was included, though the actual amount of the judgment-debt seems to have been Rs. 442-9-0.

The next question is whether the agreement was unlawful and, if so, whether the whole mortgage is void. The District Judge thinks it is. But it seems to me he is not right in that view. "Unlawful" is defined in section 23 of the Contract Act, and, in my opinion, the agreement under consideration cannot be brought within that definition. It is not forbidden by law to make an agreement to substitute a mortgage for a judgment-debt. If the sanction of the Court is obtained, the law actually approves such an agreement. If such sanction is not obtained, the law takes no notice of it. Nor is the agreement of such a nature that if permitted it would defeat the provisions of the law. Agreements of this nature are permitted and enforceable by law.

(1) (1898) 22 Bom. 693.

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if sanctioned. There is no other part of the definition of "unlawful" which could possibly cover this case. A similar result was arrived at by Sir Charles Sargent in the case of *The Bank of Bengal* v. *Vyabhoy Gangji*.[1]

For these reasons I hold that the only effect on the mortgage is that the principal mortgage-debt must be taken to be Rs. 2,500 *minus* 443-13-9 = Rs. 2,056-2-3 and interest allowed on that sum only. The lower appellate Court has wrongly decided the matter on a preliminary point.

For these reasons I agree with the order proposed by the learned Acting Chief Justice.

Decree reversed and case sent back.

G. B. R.

(1) (1891) 16 Bom. 618.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1907. *July* 30.

HARI NARAYAN JOG (ORIGINAL PLAINTIFF), APPELLANT, *v.* VITAI KOM NARU PASALE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Mitakshara—Mayukha—Succession—Co-widows' interest in the property of their deceased husband—Right of assigning her share—Partition—Alienation of her share—Valid during her life-time—Survivorship.

It is the right of each of the co-widows to enjoy her deceased husband's property by partition *inter se*, both under the Mitakshara and the Mayukha. She can, therefore, assign her share to anyone she chooses; and if she has already obtained her share by partition, she can alienate that share. But in either case the assignment or alienation cannot take effect or have validity beyond her life-time. It is good as long as she lives: and, on her death, her interest in the property ceases and the share goes to the surviving co-widow or co-widows as the case may be.

SECOND appeal from the decision of G. French, Assistant Judge of Satara, confirming the decree passed by S. N. Sathaye, Subordinate Judge at Vita.

* Second Appeal No. 43 of 1905.