

We reverse the decree of the lower Court dismiss the suit and the counter-claim with costs.

Attorneys for the appellant: *Messrs. Mulla and Mulla.*

Attorneys for the respondents: *Messrs. Tyabji Dahyabhai & Co.*

Decree reversed.

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

CHATRU VALAD ABAJI PATIL (ORIGINAL DEFENDANT No. 2), APPELLANT, v.
KONDAJI VITHAL PATIL (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), section 257A—Decree—Satisfaction—Decree not carrying interest—Mortgage passed in satisfaction of decretal debt made payable in instalments—Interest payable on failure to pay instalments—Covenant for interest can be severed from the covenant as to repayment of principal—Agreement not void so far as concerned principal.

The plaintiff obtained a decree against the defendant for Rs. 800 without interest, but with costs which amounted to Rs. 89-12-0. In satisfaction of the decretal debt and in consideration of a cash advance of Rs. 10-4-0, the defendant passed a mortgage-deed for Rs. 900 in favour of the plaintiff. The amount of Rs. 900 was repayable in nine annual instalments of Rs. 100 each. On failure to pay any one instalment interest was to be charged at the rate of 1½ per cent. per mensem; and the whole amount became payable on failure to pay any two instalments. None of the instalments having been paid, the plaintiff sued to recover Rs. 900 principal and Rs. 900 as interest. The lower Courts held that the mortgage-deed contravened the provisions of section 257A of the Civil Procedure Code (Act XIV of 1882) but they passed a decree for Rs. 900 in plaintiff's favour, as the covenant to pay interest was quite distinct and severable from the covenant to pay principal. The defendant having appealed:—

Held, confirming the decree, that the primary and main agreement was to pay a sum of money which was not in excess of the decretal amount, and that it was only on failure to fulfill that agreement that interest was to be charged,

* Second Appeal No. 833 of 1912.

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that is, it was only something which came into operation when there was a breach of the agreement; and that the primary agreement was therefore not void under section 257A of the Civil Procedure Code, 1882.

Bhagchand v. Radhakisan⁽¹⁾, followed.

SECOND appeal from the decision of G. R. Datar, Additional First Class Subordinate Judge at Nasik, confirming the decree passed by M. N. Choksi, Subordinate Judge at Malegaon.

Suit to recover money due on mortgage.

The plaintiff obtained a decree against the defendant for Rs. 800 and Rs. 89-12-0 were awarded for costs. Interest was not allowed by the decree. The defendant was an agriculturist.

On the 21st October 1895, the defendant passed a deed of mortgage in favour of the plaintiff for Rs. 900. The consideration was made up of Rs. 889-12-0 (the decretal amount) and Rs. 10-4-0 (received in cash). The mortgage amount was made repayable in nine annual instalments of Rs. 100 each. The material portion of the deed ran as follows:—

“I shall pay off all the money at the stated period, in nine years from the aforesaid date: the instalment shall be paid every year by me: in case of default in payment of the instalment, I shall be paying interest at the rate of 1¼ per cent. per mensem; in case of default of two instalments, I shall pay off all your abovementioned money; and shall not put forth any such excuse as that of the period having not expired or any such other excuse.”

None of the instalments were paid in time or at all.

On the 6th August 1910, the plaintiff sued to recover the amount of Rs. 900 the principal secured by the mortgage and Rs. 900 by way of interest.

The Subordinate Judge held that so far as the principal amount secured by the mortgage was concerned, the deed did not contravene the provisions of section 257A of the Civil Procedure Code (Act XIV of 1882). He held that the agreement to pay interest was quite

⁽¹⁾ (1903) 28 Bom. 62.

separable and disallowed. He passed a decree awarding the principal amount and costs, and made the amount payable in annual instalments of Rs. 150 each.

This decree was confirmed on appeal by the lower appellate Court.

The defendant appealed to the High Court.

Bhandarkar, with *A. G. Desai*, for the appellant :—The mortgage-deed is passed in excess of the amount due under the decree and it provides for interest, which is not provided for in the decree. It therefore offends against the provisions of section 257A of the Civil Procedure Code (Act XIV of 1882) and is void. See *Heera Nema v. Pestonji*⁽¹⁾ and *Bhagabai v. Narayan*⁽²⁾. The agreement to pay interest is one with the agreement to repay principal and cannot be separated. The case of *Bhagchand v. Radhakisan*⁽³⁾ is in conflict with the case of *Heera Nema v. Pestonji Dossabhoy*⁽¹⁾ and with *Bhagabai v. Narayan*⁽²⁾. See *Davlatsing v. Pandu*⁽⁴⁾.

Thakore, with *K. H. Kelkar*, for the respondent :—The principal amount secured by the mortgage is not in excess of the decretal amount for Rs. 10-4-0 are found to have been paid in cash. The agreement to pay interest is quite distinct and severable from the agreement to repay principal and may be discarded. The agreement to repay the principal is not affected by the provisions of section 257A of the Civil Procedure Code (Act XIV of 1882). See *Raichand v. Naran*⁽⁵⁾ and *Govind v. Sakharam*⁽⁶⁾. The cases cited by the appellant commented on.

HEATON, J. :—This is a case under the Dekkhan Agriculturists' Relief Act and it involves the construction of the terms of section 257A of the old Civil

(1) (1898) 22 Bom. 693.

(2) (1907) 31 Bom. 552.

(3) (1903) 28 Bom. 62.

(4) (1884) 9 Bom. 176.

(5) (1904) 28 Bom. 310.

(6) (1904) 28 Bom. 383.

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Procedure Code. The mortgage-bond, with which we are concerned, as found by the Courts below, is for the payment of Rs. 900. Of this Rs. 889-12-0 was on account of a decretal debt and Rs. 10-4-0 was for fresh consideration, and the agreement was not made with the sanction of the Court. Therefore, if it offends against the provisions of section 257A, it is void.

Both the lower Courts have found this agreement is not void. The words of the agreement itself are these :—

“Altogether Rs. 900, as mentioned above, I shall pay off all the money at the stated period in nine years from the aforesaid date. The instalments shall be paid every year by me. In case of default in payment of the instalment, I shall pay interest at the rate of $1\frac{1}{4}$ per cent. a month.”

The decree made no provision as to payment of interest, and therefore if the mortgage-bond is in fact an agreement to pay the decretal debt with interest, it does offend against the provisions of section 257A. Had there been no authorities bearing on the meaning of section 257A, I should be disposed to go contrary to the views expressed by the lower Courts here; but there is an authority and that is the case of *Bhagchand v. Radhakisan*⁽¹⁾ as explained in the case of *Govind v. Sakharam*⁽²⁾. That authority, although as I say I might if the matter were open decide differently, is absolutely intelligible and appears to me to be based on this principle. In that case, as in this, the primary and main agreement was to pay a sum of money which was not in excess of the decretal amount, and it was only on failure to fulfil this agreement that any interest would be charged, *i. e.*, the provision to pay interest is not a part of the agreement for the satisfaction of the decretal debt; it is only something which comes into operation when there is a breach of that agreement. Therefore the primary and main agreement is not void. I can find nothing in this application of the

(1) (1903) 28 Bom. 62.

(2) (1904) 28 Bom. 383.

law which conflicts with the Full Bench decision in *Heera Nema's case*⁽¹⁾ or in the case to which I myself was a party, that is, *Bhagabai v. Narayan*⁽²⁾. It may be that the reasoning adopted is rather fine and makes distinctions which a more robust or plain reading of the section would ignore, but these distinctions have been made in the past, and it appears to me to be better to follow them at least to the extent of the reasoning which leads to the result arrived at in the case of *Bhagchand v. Radhakisan*⁽³⁾, especially, as to do so, it seems to me, does not work any injustice and does not militate against what after all is the main purpose of section 257A.

For these reasons, though I confess not without hesitation, I would confirm the decree of the lower Court and dismiss the appeal with costs.

SHAH, J. :—I concur. Having regard to the terms of the bond in this case I am of opinion that the present case is governed by the ruling in *Bhagchand v. Radhakisan*⁽³⁾. After considering the cases cited at the bar, I have come to the conclusion that there is no conflict between the ruling which I have referred to and the cases of *Heera Nema v. Pestonji*⁽¹⁾ and *Bhagabai v. Narayan*⁽²⁾. The *ratio decidendi* in *Bhagchand's case* as explained by the learned Judge, who decided that case, in the subsequent case of *Govind v. Sakharam*⁽⁴⁾ is quite clear; and I am not able to see anything in the words of section 257A or in any of the cases cited to us which can justify the argument that the ruling tends to defeat the object of section 257A.

Appeal dismissed.

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(1) (1898) 22 Bom. 693.

(3) (1903) 28 Bom. 62.

(2) (1907) 31 Bom. 552.

(4) (1904) 28 Bom. 383.

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