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aside. But there is nothing in section 283 which affords support to this argument, And, on the other hand, the High Court of Madras has in *Kolasherri Illath Nárâinan* v. *Kolasherri Illath Nilakandan*(1) held that the order cannot properly be set aside at all; while the High Court of Calcutta has decided, as we have already pointed out, that, except as regards limitation, the plaintiff may proceed to enforce his rights as if the proceedings in execution had never been taken.

On the whole, therefore, we have come to the conclusion that this rule should be made absolute, and the orders of the Courts below discharged. The costs must be costs in the cause, as the original rejection of the plaint was the act of the Court itself, without the defendant being heard.

Rule made absolute.

(1) I. L. R., 4 Mad., 131.

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August 14.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

BANK OF BENGAL, PLAINTIFFS, *v.* WYA'BHOY GA'NGJI, DEFENDANT.*

Small Cause Courts Act (XV of 1882) Sec. 69—Requisition for reference must be made before judgment delivered—Civil Procedure Code (XIV of 1882), Sec. 257 A—Agreement to give time for the satisfaction of a judgment debt—Agreement void if not sanctioned by the Court—"Void", i.e. not enforceable—Agreement not illegal.

A party requiring a Judge of the Small Cause Court to make a reference to the High Court under Section 69 of the Small Cause Courts Act (XV of 1882) must do so before the Judge has delivered his judgment.

Section 257 A of the Civil Procedure Code, when it provides that "every agreement to give time for the satisfaction of a judgment debt shall be void" unless made for consideration and with the sanction of the Court, &c., does not make such agreements illegal, in the sense of prohibited by law. It only prevents such agreements being enforced in a Court of law.

Where such an agreement to give time, never sanctioned by the Court as required by section 257 A, formed part of the consideration for a bond, and had actually been enjoyed by the obligee of the bond,

* Small Cause Court Suit No. 7843 of 1891.

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Held that such consideration, not being in its nature illegal, and not having as a fact failed, there was no reason why the obligor should not enforce the terms of the bond.

CASE stated for the opinion of the High Court, under section 69 of the Presidency Small Cause Courts Act XV of 1882, by W. E. Hart, Chief Judge.

"1. This was an action on a bond, dated 24th June, 1890, executed by the defendant as surety, with others as principals, to recover the amount of three instalments, of Rs. 250 each, due on the 15th of January, February and March, respectively, together with interest on each instalment, amounting in all to Rs. 6-1-6. The bond runs as follows:—

"'This indenture made the 24th day of June, 1890, between Kuramalibhoy Jusub, of Bombay, Khoja inhabitant, merchant, Jáfferbhoy Purdhan, also of Bombay, Khoja inhabitant, merchant, and Jusubbhoy Dádur, also of Bombay, Khoja inhabitant, merchant, of the first part, Vyábhoy Gángji, also of Bombay, Khoja inhabitant, merchant, of the second part, and the Bank of Bengal carrying on business in Elphinstone Circle within the Fort of Bombay (hereinafter called "the said Bank") of the third part. Whereas the said parties hereto of the first part are jointly and severally indebted to the said Bank in the sum of Rs. 15,000 in respect of certain *hundis* which they have negotiated with the said Bank, and whereas the said Bank on the 25th day of January, 1890, obtained a decree in the High Court of Judicature at Bombay for Rs. 3,033-0-8 and costs against the said Kuramalibhoy Jusub and Jáfferbhoy Purdhan, being a part of the said sum of Rs. 15,000, and have applied to the said Kuramalibhoy Jusub, Jáfferbhoy Purdhan, and Jusubbhoy Dádur to pay to them, the said Bank, the balance of the said sum of Rs. 15,000, namely, the sum of Rs. 11,966-15-4, which, however, they are unable to do at present; and whereas in consideration of the said Bank's agreeing to postpone the execution of the said decree, and on their consenting to accept the sum of Rs. 5,000 in full discharge of the amount of Rs. 3,033-0-8 due under the said decree and of the said sum of Rs. 11,966-15-4, being the balance of the said sum of Rs. 15,000, upon the terms and conditions hereinafter appearing, and upon the said Vyábhoy Gángji agree-

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ing to join them the said Kuramalibhoy Jusub, Jáfferbhoy Purdhan and Jusubbhoy Dádur as security for the payment of the sum of Rs. 4,000, being the balance of the said sum of Rs. 5,000 after deducting the sum of Rs. 1,000 paid to the said Bank on the execution of these presents as hereinafter appearing in sixteen equal monthly instalments of Rs. 250 each, which the said Vyábhoy Gángji has agreed to do, as is testified by his being a party to and signing these presents; Now this indenture witnesseth that in consideration of the payment to the said Bank by the said parties hereto of the first part of the sum of Rs. 1,000 on or before the execution of these presents, the receipt whereof the said Bank do hereby acknowledge, and in consideration of the premises they the said Kuramalibhoy Jusub, Jáfferbhoy Purdhan and Jusubbhoy Dádur do hereby jointly and severally covenant and agree with the said Bank that they the said Kuramalibhoy Jusub, Jáfferbhoy Purdhan and Jusubbhoy Dádur will on the fifteenth day of every calendar month pay to the said Bank the sum of Rs. 250 until the said sum of Rs. 4,000 shall be fully paid; and that, if default shall be made in payment of any one of the said instalments by the said Kuramalibhoy Jusub, Jáfferbhoy Purdhan, and Jusubbhoy Dádur, he the said Vyábhoy Gángji will, on demand being made by the said Bank, pay the amount of such instalment aforesaid to the said Bank, and it is hereby agreed that, in case the said Vyábhoy Gángji fail to pay any such instalment as aforesaid upon a demand being made to him in that behalf, or in the case of the death of the said Vyábhoy Gángji during the continuance of these presents, then and in either of such cases the said Bank shall be at liberty to forthwith execute the said decree and to sue for and recover from the said Kuramalibhoy Jusub, Jáfferbhoy Purdhan and Jusubbhoy Dádur the full amount of the said sum of Rs. 11,966-15-4 after giving credit for the said sum of Rs. 1,000 and any other sum which may have been recovered by the said Bank in the same manner as if these presents had not been entered into. In witness whereof, &c.'

"2. From this it will be seen that the bond was executed for the purpose of securing to the Bank the payment, by monthly

instalments of Rs. 250, of the sum of Rs. 4,000 as a balance of a sum of Rs. 5,000, (of which Rs. 1,000 had been paid before the execution of the bond) for which the Bank had agreed to compromise their claim against the principals of Rs. 15,000 made up in part of a decree for Rs. 3,033-0-8, the execution of which the Bank agreed to postpone, and in part of the amount of certain outstanding *hundis* aggregating Rs. 11,966-15-4.

"3. The only defence raised before me was that the bond was void under sections 23, 24 and 25 of the Indian Contract Act IX of 1872, for illegality, by reason of the consideration for it on the part of the Bank being in contravention of sections 257 and 257 A of the Civil Procedure Code.

"4. It was not contended on behalf of the plaintiff that the bond was not for an illegal consideration so far as it related to the amount due in respect of the decree, but it was suggested that I should calculate how much of the Rs. 5,000—for which the total claim of the Bank was compromised—should be taken to have been in respect of the *hundis*, and apportion accordingly the sum claimed on account of the instalments between the legal and the illegal portions of the consideration.

"5. I was of opinion that it was not possible to separate the two so as to determine what was due in respect of each, and accordingly dismissed the suit with costs, Rs. 34.

"6. I was then requested by the plaintiffs' attorney, under section 69 of the Presidency Small Causes Courts Act, to make my judgment contingent on the opinion of the High Court on the question whether the illegal portion of the consideration for the bond is separable from the legal.

"7. To this question he also then requested me to add a second, *viz.*, whether the defendant by having executed the bond was not estopped from denying its legality, which had not been suggested at the hearing, nor considered or decided by me.

"8. On the following day the plaintiff's attorney made an *ex-parte* application to me to add to these two questions a third, *viz.*, whether the bond is in contravention of sections 257 and 257 A of the Civil Procedure Code, and for an illegal consideration, so far as it relates to the amount due in respect of the decree.

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"9. This I at the time refused to do, first, because he had allowed the case to be decided on the assumption that the bond was illegal so far as it related to the decree, and, secondly, because his present application was too late.

"10. On consideration, however, it appears to me doubtful whether he is not entitled to require a reference on this question, as much as on either of the other two; and, as it is the main question involved in the suit, I have thought it best to include it, subject to his right to require me to make the reference.

"11. At the same time I submit also for the opinion of their Lordships the following two questions in regard to this case:—

"(*a*) Is the plaintiffs' attorney entitled to require the reference of any and which of the three questions above stated under section 69 of the Presidency Small Cause Courts Act, he not having made requisition for such reference until after judgment had been delivered?

"(*b*) Within what time is a party entitled to require a reference under section 69 of the Presidency Small Cause Courts Act?

"12. The plaintiffs have paid into the Court, to abide the result of this reference, the amount of costs awarded to the defendant and the sum of Rs. 50 for the costs of the reference."

Inverarity for the plaintiff:—First, as to the preliminary points referred by the Chief Judge on his own account by paragraph 11 of the case:—Mr. Hart simply dismissed the suit with costs; he gave no judgment, *i. e.* statement of the grounds of his decree—Civil Procedure Code, section 2. Consequently it was impossible to ask for a case to be stated earlier than Mr. Bayley asked for it on the first two points referred. And, as for the third point asked for by Mr. Bayley on the next day, he was in time for that too, since no judgment had even then been delivered.

[SARGENT, C. J.:—We think a liberal construction must be placed upon this section 69 of the Small Cause Courts Act. Mr. Hart, it is not disputed, delivered no formal judgment, such as is contemplated by the Code, and that being so, we think Mr. Bayley was in time in asking for these points to be reserved.]

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On the merits:—The bond is not within section 257 A. That is a section in an Act dealing with procedure, and not with substantive rights. It occurs in a chapter dealing exclusively with execution proceedings. There was no agreement for a sum in excess of the judgment. This section does not apply where there are, as here, other considerations than the judgment-debt. The consideration for the bond was not a giving of time for the satisfaction of a judgment-debt, but the substitution of a new liability altogether for an old one—the old one being partly made up of a judgment-debt. He cited *Pándurang Rámchandra* v. *Náráyan*(1); *Ganesh Shivrám* v. *Abdullábeg*(2); *Jhaber Mahomed* v. *Modan Sonahár*(3); *Hukum Chand Oswál* v. *Taharunnessa Bibi*(4); *Sellamayyan* v. *Muthan*(5); *Bái Shri Majirájbái* v. *Narotam Hargovan Rámghulám* v. *Jánki Rái*(7); *Davlatsing* v. *Pándu*(8); *Vishnu Vishwanáth* v. *Hur Patel*(9). Section 257 A does not apply to a surety—*Yella* v. *Munisámi*(10). That section does not make the agreement void, so far as the surety is concerned. It is void only in the sense that that part of the consideration could not be given legal effect to: there is no illegality in it. But there is other consideration in the bond; and even this consideration—if giving time was the consideration—has actually been enjoyed.

Lang (Acting Advocate General) for the defendants:—This is an agreement to give time so far as the amount of the decree is concerned. The Bank is not bound by that agreement. They can execute the decree—*Davlatsing* v. *Pándu*. That agreement is void; that is, it is an agreement "forbidden by law"—section 23, Contract Act. It tends also to "defeat the provisions of the law," as contained in section 257 A—*Hukum Chand Oswál* v. *Taharunnessa Bibi*; Contract Act, section 24. This part of the consideration is inseparable from the rest; therefore this agreement, as a whole, is void and illegal, and cannot be enforced.

(1) I. L. R., 8 Bom., 300.
(2) I. L. R., 8 Bom., 538.
(3) I. L. R., 11 Calc., 671.
(4) I. L. R., 16 Calc., 504.
(5) I. L. R., 12 Mad., 61.
(6) I. L. R., 13 Bom., 672.
(7) I. L. R., 7 All., 124.
(8) I. L. R., 9 Bom., 176.
(9) I. L. R., 12 Bom., 499.
(10) I. L. R., 6 Mad., 101.

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SARGENT, C. J. :—In answer to the questions submitted to us by the Chief Judge marked (*a*) and (*b*), paragraph 11 of the case, we must reply that the language of section 69 of the Small Cause Courts Act XV of 1882 shows that the party requiring the Judge to make the reference to the High Court must do so before the Judge has delivered his judgment, as it gives the Judge the option, on being so required, either of postponing his judgment or delivering it contingent on the opinion of the High Court.

In this case the Judge had dismissed the suit with costs before he was asked to refer any of the questions to this Court, and, therefore, *primâ facie* all the questions were referred after the time contemplated by the section. It would appear, however, from what has been stated to us, and without any dissent on the part of the defendant, that in this case only a decree was passed dismissing the suit, without any formal judgment being delivered *stating* the grounds of the decision, the Judge having already, in the course of the argument, expressed an opinion on the legal aspect of the case; and it was urged that, under the circumstances, there had been no formal judgment delivered, as contemplated by the section, when the applications to the Judge to refer the questions now referred to us were made, and, therefore, that such applications were not open to the objection that they were made too late.

We have already expressed our opinion that the plaintiff is entitled, in strict right, to insist on this view of what occurred at the trial.

Proceeding, then, to the consideration of these questions we observe that the consideration for the bond passed by the defendant to the Bank of Bengal is the promise on the part of the Bank to postpone execution of the decree of 25th January, 1890, for Rs. 3,033-0-8 and costs, and their consenting to accept Rs. 5,000 in full discharge of that sum and also of the sum of Rs. 11,966-15-4 due to the Bank in respect of certain *hundis*. Since the amendment of section 258 by the Act VII of 1888 no difficulty can arise from the adjustment of the two debts not having been sanctioned by the Court; but it is contended that the agreement to postpone execution of the decree without the sanction of the Court was

illegal by section 257 A, Civil Procedure Code, and, therefore, that, by section 24 of the Contract Act, the bond was void. Section 257 A says: "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." That section has been, by a series of authorities in this Court, held applicable to a bond of this nature, and not to be confined to proceedings in execution; in that respect differing, no doubt, from the ruling of the Calcutta High Court—*Jhaber Mahomed* v. *Modan Sonahár*[1]; but, we think, there is no sufficient reason for construing the expression "void" in the section as equivalent to illegal, in the sense of prohibited by law. The object of the section as a whole would appear, as stated in *Hukum Chand Oswál* v. *Taharunnessa Bibi*[2], to be "to avoid inconvenience and delay in executing the decree", and also, we would suggest, to afford some protection to the parties against unfair arrangements. This object, however, will be adequately insured by holding that such agreements cannot be enforced unless made with the sanction of the Court. In other words, the consideration for the bond, so far as it consists of an agreement to stay execution, is only illegal in the sense—as Bramwell, B., expresses it in *Cowan* v. *Milbourn*[3]—that it is not capable of being the foundation of any legal right.

The result is as stated by Anson on the Law of Contracts (5th Ed.), p. 206, that the consideration for the bond fails, in the eye of the law, so far as it depends on the promise of the Bank not to execute the decree. The Bank has, nevertheless, as a fact, performed that part of the agreement, and the question for consideration is whether, under these circumstances, the Bank could now sue the principal debtors, for whom the defendant is a surety, for the due payment of the instalment.

We think that, on principle, the question must be answered in the affirmative. The contract between them was not invalidated in its formation by the legal failure of part of the consideration;

(1) I. L. R., 11 Calc., 671. (2) I. L. R, 16 Calc., at p. 507.
(3) L. R., 2 Exch., 233.

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and no part of the consideration has failed in point of fact, so as to give the debtors a counter claim of any description.

The third question should, therefore, be answered in the negative so far as the right to sue on the bond is concerned, and it becomes unnecessary to consider the first two questions.

Attorneys for the plaintiff:—Messrs. *Crawford, Burder & Co.*

Attorneys for the defendants:—Messrs. *Payne, Gilbert and Sayáni.*

ORIGINAL CIVIL.

Before Mr. Justice Parsons.

1892
July 4, 14.

TRICUMDA'SS MULJI AND ANOTHER, PLAINTIFFS, *v.* KHIMJI VULLABHDA'SS AND OTHERS, DEFENDANTS.*

Civil Procedure Code (XIV of 1882), Sec. 539—Public charitable trust—No consent of Advocate-General—Suit not maintainable.

Two out of five trustees appointed by a will to administer a public charitable trust brought this suit against the remaining three trustees praying (i) that the first defendant might be ordered to account for a specific sum of money of which it was alleged he had committed a breach of trust, (ii) that the first defendant might be removed from the office of trustee and some other person appointed in his stead, and (iii) for such other or further relief as the nature of the case might require. The consent in writing of the Advocate-General to the institution of the suit under section 539 of the Civil Procedure Code (XIV of 1882) had not been obtained.

Held, that the suit was one which fell within the purview of section 539, and consequently, in the absence of such consent, was not maintainable.

THIS suit was brought by the plaintiffs, two of the trustees of the estate of one Kánji Khetsey, deceased, under his will, against Khimji Vullabhdáss and two others, the remaining trustees of that estate, claiming from the first defendant, Khimji, an account in respect of two notes of four per cent. Government paper of the value of Rs. 500 each, which the plaintiffs alleged had been received by him as one of the trustees of the said will, and had been converted by him to his own use, and praying that the said Khimji might be removed from his office of trustee of the said estate and that some fit and proper person might be

* Suit No. 578 of 1891.