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A's goods in reduction of the debt. The delivery of the goods operates as a part-payment."

Secondly, the Judge asks the question as to the particular payments made in the case before him. This, however, is a question of fact to which we can give no definite answer. It depends entirely upon the understanding or agreement between the parties, and the Judge must himself find what that was. All we can say is that if the goods in question were delivered by the defendant and taken by the plaintiff in payment either of principal or of interest as such, there would be a good payment made either of principal or of interest as the case may be.

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## APPELLATE CIVIL.

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*Before Mr. Justice Parsons and Mr. Justice Ranade.*

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March 21.

BHIKANBHAI (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* HIRAJI RAMDINSHET MARWADI (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Lease—Condition—Breach of condition—Illegal contract—Contract Act (IX of 1872), Sec. 23—Tolls Act (Bom. Act III of 1875), Sec. 10<sup>(1)</sup>—Amending Act (Bombay Act V of 1881), Sec. 2.*

Under section 10 of the Tolls Act (Bombay Act III of 1875) Government leased to plaintiff the levy of tolls on certain conditions. One of the conditions was that plaintiff should not sublet the tolls without the permission of the Collector previously obtained. One of the clauses of the lease provided that for a breach of any of the conditions of the lease, the Collector might impose a fine of rupees two hundred. The plaintiff sublet the toll to the defendants without the permission of the Collector, and sued to recover a certain amount which the defendants promised to pay for the sublease. The defendants contended that the contravention of the condition of the lease was illegal and opposed to public

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\* Second Appeal, No. 698 of 1899.

(1) Section 10 of the Tolls Act (Bom. Act III of 1875)—

10. It shall be lawful for the Government to lease the levy of tolls at such rates not exceeding the rates mentioned in the schedule annexed to this Act, upon any public road or bridge by public auction or private contract from year to year or for a longer period not exceeding seven years on such terms and conditions as the Government may deem desirable : provided that the lessee shall give security for the due fulfilment of such conditions, and that all sums payable under the terms and conditions of the lease shall be recoverable as a demand for the land revenue under the law for the time being in force so far as applicable.

policy ; that, therefore, the contract was void under section 23 of the Contract Act (IX of 1872), and that the plaintiff was not entitled to recover the amount.

*Held*, that the plaintiff was entitled to succeed. The agreement to sublet was not illegal or opposed to public policy merely because it was forbidden under a pecuniary penalty by conditions in the lease to the plaintiff. The penal consequences of the breach were limited to the specific penalty and did not make the contract void.

SECOND appeal from the decision of J. B. Alcock, District Judge of Násik, reversing the decree of Ráo Sáheb D. G. Gharpure, Joint Subordinate Judge.

The plaintiff, who had farmed certain tolls from Government, sublet two of them to the defendants and sued to recover Rs. 1,359-7-6 on account of the subletting.

The defendants answered that the plaintiff could not under the terms of his lease sublet the tolls without the previous sanction of the Collector in that behalf and that on the breach of any of the conditions of the lease the Collector was empowered under clause 20 of the lease to levy a fine of two hundred rupees from the lessee. They, therefore, contended that the transaction in dispute was illegal and void, being opposed to public policy, and that the plaintiff was not entitled to recover anything on account of it.

The following is the translation of clause 20 of the lease referred to in the written statement :—

“20. If I, or any of my servants, or sublessees (if there be a sublease) act in contravention of the Tolls Act that may be in force, or of any of the conditions of this lease, then the Collector has the authority to levy from me a fine of rupees two hundred for each of such offences, and if I do not pay the fine forthwith, he has the authority to recover it in any manner as provided for in the aforesaid clauses.”

The Subordinate Judge found that the alleged agreement between the plaintiff and the defendants was proved, and that it was illegal and void. He, therefore, dismissed the suit.

On appeal by the plaintiff the Judge reversed the decree and allowed the claim to the extent of Rs. 1,351-6-0, which was the amount claimed in appeal.

Defendant No. 1 preferred a second appeal.

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*Macpherson* with *Sadashiv R. Bakhle* for the appellant (defendant No. 1):—The agreement under which the plaintiff sublet the lease to the defendants was illegal as being against the express terms of the lease granted to the plaintiff. It is true that no penalties are prescribed under the Act for such subletting. But section 10 having been added to Bombay Act III of 1875 by section 2 of Bombay Act V of 1881, which enabled the Collector to impose any conditions he liked in the lease granted under the Act, the conditions thus acquire a statutory importance. They are conditions imposed under the express power granted to the Collector by the Act. A subletting, therefore, would be bad as being expressly forbidden by law. Such an agreement would also be void under section 23 of the Contract Act.

*Robertson* with *Daji A. Khare*, for the respondent (plaintiff):—The conditions imposed by the lease are not statutory conditions. There is a penalty provided by the conditions, but it is for the Collector to decide whether he would enforce it. In this matter the Collector was approached, but he did not enforce the penalty. The condition imposed by the lease is really for the purpose of facilitating the collection of revenue. If the Legislature had intended to make such subletting illegal and void, it would have done so by an express provision in the Act as we find in the A'bkári and Opium Acts. The observations on page 281, Pollock on Contracts, 6th Ed., hold good in this case. The object in imposing the condition was not to provide for the maintenance of public order or morals; and, therefore, unless expressly forbidden by the Legislature the condition would not be void—*Gangadhar v. Damodar* (1).

PARSONS, J.:—Section 10, which is added to Bombay Act III of 1875 by section 2 of Bombay Act V of 1881, provides that Government may lease the levy of tolls on such terms and conditions as the Government may deem desirable. One of the conditions on which the Government let the toll in question to the plaintiff was that he should not sublet it without the permission of the Collector previously obtained. Clause 20 of the lease also provided that for a breach of any of the conditions in the lease

(1) (1896) 21 Bom., 522.

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the Collector might impose a fine of Rs. 200. We have not to consider the legality of this provision. The argument is that the contravention of the condition is illegal and opposed to public policy, and that, therefore, the contract by which the plaintiff sublet to the defendant is void under section 23 of the Contract Act, and the plaintiff cannot recover the amount which the defendant promised to pay for the sublease. It is admitted that the defendant collected the tolls for the year for which the contract was made, and that there was no breach on the part of the plaintiff or interference on the part of the Collector. This being so, we think that the plaintiff is entitled to succeed. The Court cannot regard the object of the agreement to sublease as immoral or opposed to public policy merely because it is forbidden under a pecuniary penalty by conditions in the lease to the plaintiff. We think we ought to limit the penal consequences of the breach to the specific penalty and not to hold the contract void. "When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in course of such business or profession (e) are void, if it appears by the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed; (f) are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, *e. g.* the convenient collection of the revenue;" Pollock on Contract, 6th Ed., p. 281. In our opinion, this case falls within the latter class, because the statute itself does not forbid or attach a penalty to the transaction of subletting, but merely gives power to impose a condition under which it can be forbidden should the Collector see fit to do so for what can be only purely administration purposes. The Act imposing tolls is an Act passed for the benefit of the revenue and not an Act for the protection of public morals such as the A'bkári and Opium Acts are in this country and the Licensing Acts are in England, and to which different considerations apply.

We confirm the decree with costs.

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RANADE, J. :—In this appeal the only point of law raised relates to the question whether the agreement on which plaintiff-respondent relies, is void under section 10 of the Bombay Tolls Act V of 1881, and section 23 of the Contract Act. The respondent-plaintiff brought the suit on a *kháta* passed by the appellant-defendant and two others. The execution of the *kháta* was admitted by the defendants Nos. 1 and 2, but they pleaded that it was passed as a security for the proper management of two toll *nákas* which were entrusted to them by the respondent-plaintiff as his servants, and that as they paid over all the money that they received they were not liable to make any repayment, as they had not borrowed any sums from the plaintiff. The respondent-plaintiff in reply admitted that no money had been advanced by him, and that the *kháta* had been passed as consideration for his making over to the defendants two of the toll *nákas* for which he had contracted with Government in 1897. On this statement of the plaintiff-respondent, the defendants raised the contention that the agreement about subletting was illegal and void under the Tolls Act. The Court of first instance upheld that contention and dismissed the claim. In appeal, the District Judge held that the agreement was not void, and awarded the claim. The Tolls Act III of 1875 was amended by Act V of 1881, which empowered Government to lease the levy of tolls to any person provided that the lessee shall give security for the due fulfilment of the conditions laid down by Government, and section 11 provides that “such lessee and persons employed by him as his agents shall be deemed to be persons appointed to collect tolls.” There is nothing in the Act which permits or forbids subletting, but the lessee can employ persons as his agents for collecting tolls. In the conditions which the lessee had signed, Exhibit 23, there is a clause that the lessee would not sublet without the permission of the Collector previously obtained, and Exhibit 65 shows that this permission to sublet under clause 14 was refused. *Rája chitties* were, however, granted to the appellant describing him as having been employed by respondent as his servant in charge of tolls (Exhibits 25 and 29). The question for consideration, therefore, is whether the plaintiff-respondent was debarred

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from suing on his agreement of sub-lease by reason of the breach of the condition contained in Exhibit 23 even though there was no provision in the Act against subletting, and no penalty was prescribed in the conditions against breach of the same.

As a general rule, the law does not forbid things in express terms, but imposes penalties for doing them, and the imposition of such penalties implies prohibition, and an agreement to do a thing so prohibited is unlawful under section 23 of the Contract Act. This was the principle laid down in *Gosvami Shri Purushotamji Maharaj v. B. Robb* <sup>(1)</sup>, where the case was of an agreement to pay a cess prohibited by law. As no penalty was imposed by the Act, the agreement to pay the cess was held not to be illegal, but, at the same time, the Court held that it could not be enforced, as it provided for the collection of a cess declared illegal. In *Raghunath v. Nathu* <sup>(2)</sup>, the agreement was of a sub-lease granted without the permission of the Collector under the Opium Act. That case must be distinguished from the present, because under the Opium Act, section 4, the selling of opium by persons not licensed was expressly forbidden, and it was, therefore, held that the agreement was one forbidden by law and, therefore, void. No such provision is found in the Tolls Act, and the case more nearly resembles the ruling in *Gangadhar v. Damodar* <sup>(3)</sup>, where the agreement was entered into by defendant by subletting a public works contract for a consideration of getting 10 per cent. profits. Such a contract was distinguished from contracts of subletting in the matter of excise licenses, which were intended to be held by law by the licensee himself. See also *Judoonath Shaha v. Nobin Chunder* <sup>(4)</sup>. The nearest case in point is *Gauri Shankar v. Mumtaz Ali Khan* <sup>(5)</sup>, where the contract was of a partnership in the lease of a ferry. Such a partnership was held to be legal, as there was nothing in the Act itself which prohibited such arrangements, and the object was not fraudulent, nor did it result in any injury to person or property, and there was nothing immoral or opposed to public policy, such as was the case in *Hari Balkrishna v. Naro Moreshvar* <sup>(6)</sup>;

(1) (1884) 8 Bom., 398.

(4) (1874) 21 Cal. W. R., 289.

(2) (1894) 19 Bom., 626.

(5) (1879) 2 All., 411.

(3) (1896) 21 Bom., 522.

(6) (1893) 18 Bom., 342.

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*Sharoda Pershad Roy v. Bholanath* <sup>(1)</sup>; *Doorga Singh v. Sheo Pershad Singh* <sup>(2)</sup>. The District Judge must, therefore, be held to have correctly decided the point of law raised in this appeal. As no penalties are prescribed under the Act, the agreement does not *prima facie* fall under the 1st clause of section 23. It does not come under the 2nd clause also, as it does not defeat the provision of any law—*Debi Prasad v. Rup Ram* <sup>(3)</sup>; *Hormasji Motabhai v. Pestanji Dhanjibhai* <sup>(4)</sup>; *Raghunath v. Nathu* <sup>(5)</sup>. The Act itself permits the employment of persons other than the lessee as agents. There is nothing fraudulent or immoral or opposed to public policy in such an agreement. I would, therefore, dismiss the appeal with costs.

*Decree confirmed.*

(1) (1869) 11 Cal. W. R., 441.

(3) (1888) 10 All., 577.

(2) (1889) 16 Calc., 194.

(4) (1887) 12 Bom., 422.

(5) (1894) 19 Bom., 626.