APPELLATE CIVIL.

Before Sir L. A. Kershaw, Kt., Chief Justice, and Mr. Justice Fulton.

1898.
November 17.

KESU SHIVARAM MARWADI, PLAINTIFF, *v.* GENU BABAJI POWAR, DEFENDANT.*

Civil Procedure Code (Act XIV of 1882), Sec. 257A—Execution of decree—Agreement between a judgment-creditor and a person other than the judgment-debtor—Postponement of execution.

The provisions of section 257A of the Civil Procedure Code (Act XIV of 1882) do not include within their scope an agreement between a judgment-creditor and a person other than the judgment-debtor, whereby such person, in consideration of the postponement of the execution of the decree against the judgment-debtor, undertakes to pay to the judgment-creditor a certain sum of money. Such agreements are, therefore, enforceable although made without the sanction of the Court.

REFERENCE by Ráo Sáheb Raghavendra Ramchandra Gangoli, Subordinate Judge of Khed in the Poona District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

Kesu Shivram obtained a decree against Krishnaji bin Hari and applied to the Subordinate Judge for execution. When the bailiff of the Court went to attach Krishnaji's property, one Genu Babaji, at Krishnaji's request, gave a "*havala*" or oral undertaking to Kesu Shivram (the judgment-creditor) that he would pay him Rs. 10 within six months from the 4th August, 1891, in consideration of his not attaching the property (and the property accordingly was not then attached).

This undertaking was not brought to the notice of the Court, nor was it sanctioned by it.

Genu failed to pay the Rs. 10 and Kesu brought this suit against him to recover it with interest from the 4th February, 1892, up to the 1st March, 1898.

The Subordinate Judge on the authority of *Vishnu* v. *Hur Patel*(1) held that the *havala* was an agreement to give time for the satisfaction of the decree, and having been made without the sanction of the Court which passed the decree was void under section 257A of the Code of Civil Procedure (Act XIV of 1882).

*Civil Reference, No. 8 of 1898.

(1) (1888) 12 Bom., 499.

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It was contended on behalf of the plaintiff that section 257A applied only to agreements between the parties to the suit or decree, and not to this case in which the agreement was made with a third person. The Subordinate Judge, having regard to the fact that the rulings in *Ramji* v. *Mahomed*[1], *Swamirao* v. *Kashinath*[2] and *Bank of Bengal* v. *Vyabhoy Gangji*[3] not being expressly dissented from in *Heera Nema* v. *Pestonji*[4], referred the following points to the High Court for decision :—

"1. Is the *havala* or oral agreement in this case enforceable under section 257A of the Code of Civil Procedure, having regard to the recent ruling of the Honourable High Court of Bombay in *Heera Nema* v. *Pestonji*[5] ?

"2. Is the plaintiff entitled to claim interest by way of damages for breach of any such agreement ?

"3. Is an agreement made by a third person at the request of a judgment-debtor for satisfaction of a judgment-debt enforceable, when, in pursuance of such agreement, time is given to such third person to pay the whole or any part of the judgment-debt ?

"4. Is it necessary to bring any such agreement within the purview of the first part of section 257A that it should provide better terms for the decree-holder than the decree gives him ?"

The opinion of the Subordinate Judge on the above points was in the negative.

Balaji A. Bhagavat (*amicus curiæ*) for the plaintiff:—Section 257A applies only to agreements between parties to a suit or decree—*Ramji* v. *Mahomed Walli*[6]; *Harakchand* v. *Totaram*[7]. The agreement here is not between judgment-creditor and judgment-debtor, but between the judgment-creditor and a third person. It does not, therefore, fall within the purview of section 257A. The section is not applicable to third parties, because it relates to proceedings in execution. Where third parties are concerned, the Legislature has made a distinct provision. To allow third parties to certify, would amount to add-

(1) (1889) 13 Bom., 671.
(2) (1890) 15 Bom., 419.
(3) (1891) 16 Bom., 618.
(4) (1898) 22 Bom., 693.
(5) (1898) 22 Bom., 693.
(6) (1889) 13 Bom., 671.
(7) P. J., 1889, p. 377.

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ing them as parties to a decree. The last clause of the section assumes that the judgment-debtor must always be a party to the agreement. It provides that the surplus, if any, should be recovered by the judgment-debtor. This shows that a third person can neither come in under the section, nor can be affected by it.

Chintamani A. Rele (*amicus curiæ*) for the defendant:—The wording of the section is general. It says "every agreement to give time, &c." It, therefore, includes an agreement between a judgment-creditor and a third person. It should not be limited in application to agreements between judgment-creditors and judgment-debtors only—*Vishnu* v. *Hur Patel*(1); *Heera Nema* v. *Pestonji Dossabhoy*(2).

The section is not limited in its application to execution proceedings only: it is applied to suits also. The object of the section is to avoid delay in execution of decrees and to afford protection to judgment-debtors. Both the objects would be defeated if the agreement in question is held enforceable. A judgment-debtor, instead of being protected from pressure, will be oppressed both by the judgment-creditor and the third person.

The last clause of the section should be read with the second clause and not with the first clause, because the first clause deals only with agreements to give time for the satisfaction of the judgment-debt, while the second and third clauses deal with agreements for the satisfaction of a judgment-debt.

The following authorities were also cited in argument:—*Adveappa* v. *Ahmed Saheb*(3); *Hukum Chand* v. *Taharunnessa Bibi*(4); *Dan Bahadur* v. *Anandi Prasad*(5).

PER CURIAM.—The principal question involved in this reference is whether the provisions of section 257A of the Civil Procedure Code include within their scope an agreement between a judgment-creditor and a person other than the judgment-debtor, whereby such person, in consideration of the postponement of execution of the decree against the judgment-debtor, undertakes to pay to the judgment-creditor a certain sum of money. In coming

(1) (1888) 12 Bom., 499.
(2) (1898) 22 Bom., 693.
(3) P. J., 1891, p. 40.
(4) (1889) 16 Calc., 504.
(5) (1896) 18 All., 435.

to a decision on this point, we have experienced considerable difficulty. Had the matter been *res integra*, the objections to limiting the meaning of the words "every agreement to give time for the satisfaction of a judgment-debtor" so as to exclude agreements of the kind above described, might have seemed insuperable, for it might fairly have been contended that such transactions came within the terms of the section and that it was by no means certain that they did not fall equally within its intention. But the case of *Harakchand* v. *Totaram*(1) is an express authority for holding that where one of the parties to the agreement is not a party to the decree, section 257A cannot be applied. The decision in *Vishnu* v. *Hur Patel*(2) leads, it is true, to a contrary conclusion, but with this exception the tendency of all the cases on the subject, to which we have been referred, supports the dictum in *Ramji* v. *Mahomed Walli*(3) that section 257A applies only between the parties to the decree.

In these circumstances we do not feel that we should be justified in departing from the current of decisions expressing the views of a series of Judges during a considerable period. Transactions may have been entered into on the faith of these decisions, and we think it would be unfortunate if we were compelled now to hold that they were wrong. But this seems unnecessary. The last clause of the section which assumes that the judgment-debtor must always be a party to the agreement, indicates the class of agreement to which the section refers. One of the objects of the section probably was to protect the judgment-debtor from undue pressure, but it seems less likely that such pressure could be successfully exerted on persons not subject to the decree. We must, therefore, answer the first question in the affirmative, holding that the *havala* or oral agreement in this case is enforceable notwithstanding the provisions of section 257A of the Civil Procedure Code.

The second question does not admit of a categorical answer. There being no agreement to pay interest, and no demand of payment apparently having been made in writing under Act XXXII of 1839, no interest is due. If the plaintiff proves

(1) P. J., 1889, p. 377. (2) (1888) 12 Bom., 499.
(3) (1889) 13 Bom., 671.

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damages for breach of contract, such compensation as appears just can be awarded.

The third and fourth questions do not appear necessary for the determination of this suit.

Order accordingly.

APPELLATE CIVIL.

Before Sir L. A. Kershaw, Kt., Chief Justice, and Mr. Justice Fulton.

1898.
November 22.

NARAYAN HARI DEVAL AND OTHERS (ORIGINAL DEFENDANTS), APPLICANTS, v. KESHAV SHIVRAM DEVAL (ORIGINAL PLAINTIFF), OPPONENT.*

Water—Water-course—Riparian owners, rights of—Mámlatdár—Jurisdiction—Mámlatdárs' Act (Bom. Act III of 1876), Sec. 4.

The law as to riparian owners is the same in India as in England, and is stated in illustration (*h*) of section 7 of the Easements Act (V of 1882). Each proprietor has a right to a reasonable use of the water as it passes his land, but, in the absence of some special custom, he has no right to dam it back, or exhaust it, so as to deprive other riparian owners of like use.

What would constitute an unreasonable diversion of water such as to disturb the use of the lower riparian owners, is a question of fact which the Legislature has given a Mámlatdár jurisdiction to decide.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Ráo Sáheb M. S. Vinekar, Mámlatdár of Alibág in the Thána District, in a summary suit under the Mámlatdárs' Act (Bom. Act III of 1876).

Suit for injunction. The plaintiff alleged that he was entitled to the use of water which flowed to his rice land through a natural water-course and that the defendants had dug a trench by means of which they diverted the water to their own land.

The defendants pleaded that the plaintiff had no right to the water, and they denied that the Mámlatdár had jurisdiction to hear the suit.

The Mámlatdár found that the plaintiff had enjoyed the use of water flowing through the water-course as alleged; that the defendants had obstructed him in such enjoyment; and that their obstruction had commenced within six months before the suit was filed. He, therefore, allowed the claim and granted the injunction.

* Application, No. 168 under extraordinary jurisdiction.