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yielding an annual income of Rs. 4,000. But Jadu Charan was incompetent to give effect to the decree unless the Commissioner sanctioned a transfer or charge under section 12A."

It is not clear how far this view is based on the learned Judge's opinion as to the 1909 grant, but, in any event, their Lordships are clearly of opinion that the learned Subordinate Judge was right on this point, and that the decision in the suit as to the construction of section 12A is *res judicata* as to the validity of the grant of 1920 which was made in fulfilment of the obligations of that decision.

Their Lordships are therefore of opinion that, in view of the decision in the suit of 1917, it is not open to the respondent to challenge the validity of the grants of 1909 and 1920, and that they are binding on him, and they will, accordingly humbly advise His Majesty that the appeal should be allowed, that the judgment and decree of the High Court should be set aside and that the judgment and decree of the Additional Subordinate Judge of Hazaribagh should be restored. The respondent will pay to the appellant his costs of this appeal and in the High Court.

Solicitors for the appellant:—*W. W. Box & Co.*

Solicitor for the respondent:—*The Solicitor, India Office.*

PRIVY COUNCIL.

THAKURAIN KUSUM KUMARI

v.

DEBI PROSAD DHANDHANIA.

On Appeal from the High Court at Patna.

Sonthal Parganas Settlement Regulation, 1872 (III of 1872), section 6—Interest pendente lite and interest on decree—Code of Civil Procedure, 1908 (Act V of 1908), section 34 and Order XXXIV, rule 4(I)—subsequent interest, meaning of.

*Present: Lord Alness, Lord Roche and Sir George Lowndes.

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In a mortgage suit, governed by the Sonthal Parganas Settlement Regulation, up to the date fixed for redemption, the matter between the parties is one of their contract and the amount recoverable is limited to twice the amount of the principal.

When once a decree has been passed the loan or debt, as a subject of enforcement, no longer exists. It is merged in the decree and the allowance of interest on the decree is not the allowance of interest on the loan or debt.

Section 34 of the Code of Civil Procedure, 1908, applies to mortgage suits.

Subsequent interest in Order XXXIV, rule 4(1), of the Code of Civil Procedure as in force on the 20th June, 1927, means interest on the decretal amount. The amendment by Act XXI of 1929 only gives effect to the judicial decisions.

Maharaja of Bharatpur v. Rani Kanno Dei(1), *Sundar Koer v. Rai Sham Krishen*(2) and *Sourendra Mohan Sinha v. Hari Prasad Sinha*(3), referred to.

Judgment of the High Court(4), affirmed.

Appeal (no. 70 of 1933) by Special Leave from a judgment of the High Court (April 9, 1930) which affirmed a judgment of the First Subordinate Judge of Bhagalpur (June 20, 1927).

The suit was for the enforcement of a mortgage bond dated the 27th February, 1911, and was instituted on the 8th July, 1924.

As the mortgage comprised lands in the Sonthal Parganas, the suit was instituted before the Settlement Officer and was, with the concurrence of the Deputy Commissioner, transferred for disposal to the Subordinate Judge of Bhagalpur.

The Subordinate Judge found that, throughout the series of transactions which culminated in the

(1) (1900) I. L. R. 23 All. 181; I. R. 28 I. A. 25.

(2) (1906) I. L. R. 34 Cal. 150; L. R. 34 I. A. 9.

(3) (1925) I. L. R. 5 Pat. 135; L. R. 52 I. A. 418.

(4) (1930) I. L. R. 10 Pat. 63.

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mortgage debt in the suit, the mortgagees had advanced Rs. 3,34,153-2-9 and that the amount of interest to which they were entitled must be limited to that sum. He deducted from the resultant total of Rs. 6,68,306-5-6. Rs. 2,65,710-14-9 which had been paid from time to time by the mortgagors and gave a decree for Rs. 4,02,595-6-9 to be paid within six months from the date of decree, the decretal amount to carry interest at 6 per cent per annum from the expiry of the 6 months until realization. On appeal, the High Court affirmed the decree.

1935, November 11, 12.—*Dunne, K. C.* and *Pringle*, for the appellant.

The amount decreed includes interest equal to the principal. The award of interest on the amount decreed is in contravention of the Regulation, for the result would be granting interest exceeding the principal. Further there was no provision in the Code of Civil Procedure then in force for the granting of interest on the aggregate amount. The Board held that it could be granted on general provisions and the Indian Legislature gave effect to the decisions by the Amending Act (Act XXI) of 1929. Section 34 of the Code is not applicable to mortgages, but assuming it is applicable, still the interest must not exceed the principal for the statutory bar in the Regulation is definite, *Rani Keshorati Kumari v. Kumar Satya Niranjani*⁽¹⁾ which decides that interest cannot be awarded on interest deals with only one clause of section 6 of the Regulation. It does not deal with the question of interest exceeding the principal.

Reference was made to the following cases:
Maharaja of Bharatpur v. Rani Kanno Dei⁽²⁾,
Rani Sundar Koer v. Rai Sham Krishen⁽³⁾, *Sourendra*

(1) (1918) Pat. Cas. (C. W. N.) 305.

(2) (1900) I. L. R. 23 All. 181; L. R. 28 I. A. 35.

(3) (1906) I. L. R. 34 Cal. 150; L. R. 34 I. A. 9.

Mohan Sinha v. Hari Prasad(¹), on appeal from *Hari Prasad Singh v. Sourendra Mohan Sinha*(²), *Jaganath Prasad Singh v. Surajmal Jalal*(³), *Manohar Das Mahanta v. Hazarimall*(⁴).

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De Grayther, K. C. and Hyam, for the respondents: The practice has been in every mortgage decree to grant interest on the aggregate. The rule in section 34 of the Code of Civil Procedure has been in operation since 1861. During the whole of the time the Transfer of Property Act has been in force it has invariably been held that the Court can grant interest on the aggregate. (Reference was made to section 88 of the Transfer of Property Act.) There is no authority against it. The present section in the Code gives legislative authority to the decisions of the Courts. The express point was raised and decided in *Maharaja of Bharatpur v. Rani Kanno Dei*(⁵). Interest *pendente lite* is in the Court's discretion. Section 6 of the Regulation provides for contractual relations only and does not touch the Court's discretion. The statutory powers given by section 34 of the Code cannot be restricted by implication. If the Regulation and the Code cannot be reconciled, the latter prevails. Under the ordinary Hindu law of *Damdupat*, the cases expressly lay down that, when you come to the decree, interest to that time must not exceed the principal. Interest may be awarded on the aggregate: *Hari Lall Mullick v. Dhawlat Roy*(⁶). This is analogous to the rule under the Regulation. Under the Regulation, once the amount of principal is equalled by the interest, the interest must cease. If double at the institution of the suit, it ceases. Otherwise it runs till it is double. But the effect of the Regulation is spent on making the decree. Under

(1) (1925) I. L. R. 5 Pat. 135; L. R. 52 I. A. 418.

(2) (1922) I. L. R. 1 Pat. 506.

(3) (1926) I. L. R. 54 Cal. 161; L. R. 54 I. A. 1.

(4) (1931) I. L. R. 59 Cal. 463; L. R. 58 I. A. 341, 348.

(5) (1900) I. L. R. 28 All. 181; L. R. 28 I. A. 35.

(6) (1906) I. L. R. 33 Cal. 1269, 1276.

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section 34 of the Code interest *pendente lite* is in the discretion of the Court and not dependent on the contract. The discretion of the Court is not limited by the contract. The object of the Regulation is protection between the lender and the borrower. There is no question of protection after the matter is brought into Court. In one sense it may be that subsequent interest is compound interest, but it is not really so. The compound interest in the Regulation means compound interest under the contract. Section 6 of the Regulation is applicable only to the question of moneys due, i.e., at the time of the institution of the suit. The granting of interest *pendente lite* and on the decree is a matter of relief which the Court considers after having found, in accordance with the law applicable, what is due. It is granted on the equitable principle that when the defendant keeps the plaintiff out of the use of his money he must pay damages.

The following cases were referred to: *Umes Chunder Sircar v. Musammat Zahoor Fatima*(¹), *Orde v. Skinner*(²), *Maha Prasad v. Ramani Mohan Singh*(³), *Sourendra Mohan Sinha v. Hari Prasad Singh*(⁴), *Sundar Koer v. Rai Sham Krishen*(⁵), *Rameswar Koer v. Syed Nawab Mehdi Hossein Khan*(⁶), *Raja Gokuldas v. Seth Gasiram*(⁷) and *Lala Chhajmal Das v. Brijbhukan Lal*(⁸).

Dunne, K. C., replied.

The judgment of their Lordships was delivered by—

SIR GEORGE LOWNDES.—The suit out of which these consolidated appeals arise was filed before the Settlement Officer of the Sonthal Parganas praying

(1) (1890) I. L. R. 18 Cal. 164; L. R. 17 I. A. 201.

(2) (1880) I. L. R. 3 All. 91; L. R. 7 I. A. 196.

(3) (1914) I. L. R. 42 Cal. 116; L. R. 41 I. A. 197.

(4) (1925) I. L. R. 5 Pat. 135; L. R. 52 I. A. 418.

(5) (1906) I. L. R. 34 Cal. 150; L. R. 34 I. A. 9.

(6) (1898) I. L. R. 26 Cal. 39; L. R. 25 I. A. 179.

(7) (1907) I. L. R. 35 Cal. 221; L. R. 35 I. A. 28.

(8) (1895) I. L. R. 17 All. 511; L. R. 22 I. A. 190.

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for the enforcement of a mortgage dated the 27th February, 1911. The plaintiffs were in effect the mortgagees, and the principal defendant the representative of the mortgagor. A number of other parties were joined as interested, or possibly interested, in the mortgage, but none of them seem to have taken part in the proceedings in India nor are they represented before the Board.

The suit was duly transferred for trial to the Court of the Subordinate Judge of Bhagalpur, who passed a preliminary mortgage decree dated the 20th June, 1927, in the usual form. He assessed the mortgage debt including costs payable at the expiry of six months from the above date at Rs. 4,12,662-13-0, and allowed the mortgagees further interest on this sum at the rate of six per cent per annum until realisation.

It is not disputed that the suit fell to be determined in accordance with the provisions of section 6 of the Sonthal Parganas Settlement Regulation 3 of 1872 which restricts the allowance of interest in such cases. The section, upon the construction of which the decision of these appeals mainly turns, is as follows:—

"6. All Courts having jurisdiction in the Sonthal Parganas shall observe the following rules relating to usury, namely:—

- (a) interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than two *per cent per mensem*, notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed;
- (b) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan."

The learned Subordinate Judge applying these provisions found that the original advances by the mortgagees totalled Rs. 3,34,153-2-9, and that the interest recoverable must, therefore, be limited to that amount. From the resultant total he deducted repayments made from time to time by the representative

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of the mortgagor which left Rs. 4,02,595-6-9 still due, and which, with the costs allowed, made up the sum first above stated—to be referred to hereafter for convenience as the decretal amount.

This decree was confirmed on appeal by the Patna High Court. Leave to appeal to His Majesty in Council was refused, but special leave was granted in England to both parties by an Order in Council dated the 17th March, 1932, the appeals to be confined to questions relating to interest after the date of the institution of the suit.

On this matter both parties have grievances which are embodied in the present appeals. The principal defendant in the suit, the representative of the mortgagor, complains of the allowance of interest on the decretal amount at 6 per cent until realisation. The plaintiffs, the mortgagees, while seeking to uphold this part of the decree, complain that they have not been allowed interest *pendente lite*, i.e., between the dates of institution and final decree. These are the only points upon which their Lordships' judgment is sought.

The matter is dealt with by the learned Subordinate Judge in the following terms :—

“ Then there remains only one matter more for my consideration and that is :—Whether this court ought to and can allow interest after the date of the decree and also *pendente lite*. As regards *pendente lite* interest the matter lies within the domain of contract and so I think section 6 is applicable and more than double cannot be allowed in respect of all claims up to the time of grace fixed by the court. But after that the matter comes to the domain of judgment and section 6 has no application and the court has power under section 34 of the Civil Procedure Code to allow interest on the decretal amount at 6 per cent per annum.”

The High Court on appeal came to the same conclusion. Jwala Prasad, J., by whom the judgment of the Court was delivered, said :—

“ It is well considered that the rule of Damdupat ” (in which term he obviously included the provisions of section 6 of the Regulation) “ applies only during the contractual relation of debtor and

creditor. It does not apply when the contractual relation has come to an end by reason of a decree..... In mortgage suits the contract is effective until the expiry of the period of grace and it is only after that date that the matter passes from the domain of contract to the domain of judgment.....the effect of the rule of Damdupat is exhausted when the matter passes into the domain of judgment; and there is no reason why interest at the court rate should not be decreed on the amount due under the mortgage from the expiry of the date of grace."

In their Lordships' opinion the view taken by the Courts in India upon both questions is correct.

Mr. Dunne for the mortgagor appellant contended that section 34 of the Civil Procedure Code upon which the Subordinate Judge relied had no application to mortgage decrees which were dealt with under Order XXXIV of the 1st Schedule to that Act; and that at the date of the Subordinate Judge's decree there was no provision in this rule for the granting of interest upon the decretal amount, though such a provision now appears there by a subsequent amendment of the Act. Their Lordships, however, think it clear from the judgment of the Board in *Sourendra Mohan Sinha v. Hari Prasad*⁽¹⁾, that section 34 does apply, and that it authorizes the allowance complained of. Nor can their Lordships agree that Order XXXIV in the Schedule in any way excludes the discretion of the Court to allow interest on the decree. Order XXXIV, rule 4(1), as in force at the date of the decree provided *inter alia* for the payment of "subsequent interest" out of the sale proceeds, and it would seem that the only "subsequent interest" could be interest on the decretal amount if awarded under section 34. Their Lordships also agree with the note to Order XXXIV, rule 11, in the latest edition of Sir Dinshah Mulla's Code which states that the present rule specifically allowing "subsequent interest up to the date of realisation" only gives effect to previous judicial decisions. This their Lordships think to be clear on reference to the

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(1) (1925) I. L. R. 5 Pat. 185; L. R. 52 I. A. 418.

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judgments of the Board in *Maharaja of Bharatpur v. Rani Kanno Dei*(¹) and *Sundar Koer v. Rai Sham Krishen*(²).

It was also contended that the allowance of interest on the decretal amount contravened the provisions of the Regulation of 1872 in that by it the mortgagees got more interest than the Regulation allowed. Their Lordships cannot accept this contention. Section 6 of the Regulation only lays down that in a case such as the present the interest decreed *on the loan or debt* is not to exceed the principal. When once a decree has been passed the loan or debt as the subject of enforcement no longer exists; it is in effect merged in the decree, and the allowance of interest on the decree is not the allowance of additional interest on the loan or debt. That this is the effect of the decree is clear on the judgment of the Board in the case last cited where Lord Davey says (page 21):—

“ [Their Lordships] think that the scheme and intention of the Transfer of Property Act (now the corresponding provisions of the Civil Procedure Code) was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest, and costs due on a fixed day; and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree.”

Their Lordships also think that the passage quoted above from Lord Davey's judgment is decisive of the mortgagees' appeal. Up to the date fixed for redemption the matter between the parties is one of their contract, and what the Court has to consider is how much does the law allow them to recover under it. This is determined by the Regulation and is limited

(1) (1900) I. L. R. 23 All. 181; L. R. 28 I. A. 35.

(2) (1906) I. L. R. 34 Cal. 150; L. R. 34 I. A. 9.

to twice the amount of the principal. If that limit had been reached before the institution of the suit no further interest could be allowed between that date and the date fixed for redemption.

A number of other authorities were referred to in the argument, but their Lordships do not think that they throw any doubt on the correctness of the judgments delivered in India, and that a further discussion of them is unnecessary.

For the reasons above stated their Lordships will humbly advise His Majesty that both these appeals should be dismissed. There will be no order as to costs.

Solicitors for the appellant:—*Watkins and Hunter.*

Solicitors for the respondents:—*Clarke, Rawlins and Company.*

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APPELLATE CIVIL.

Before Fazl Ali and Luby, JJ.

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Contribution—joint tort-feasors—liability arising out of joint wrong—right of suit—Equity—pro forma defendant, who did not contest whether liable to contribute—whether appellate court can pass a decree against a defendant who was successful in the trial court and who was not made a party in the memorandum of appeal—Code of Civil Procedure (1908) (Act V of 1908), section 151, Order XLI, rules 20 and 33—Limitation Act, 1908 (Act IX of 1908), section 5.

* Appeals from Appellate Decree nos. 887, 1207, 1072 and 1043 of 1932, from a decision of Mr. S. P. Chatterji, District Judge of Shahabad, dated the 19th May, 1932, modifying a decision of Mr. Muhammad Shamsuddin, Additional Subordinate Judge of Shahabad, dated the 22nd August 1930.