JAIGOBIND SINGH AND OTHERS

v.

LACHMI NARAIN RAM AND OTHERS.

1940.

Jan. 23; *Mar.* 18.

[SIR MAURICE GWYER, C. J., SIR SHAH SULAIMAN AND SIR SRINIVASA VARADACHARIAR, JJ.]

Federal Court—Practice—Bihar Money-Lenders Act, 1938 (*Bihar Act No. III of* 1938), *s.* 12—*Discretion of High Court—Interference with—Bihar Money-Lenders* (*Regulation of Transactions*) *Act*, 1939 (*Bihar Act No. VII of* 1939), *ss.* 7, 8, 9—*Power to reopen settled accounts—Matter of discretion—Interest* pendente lite—*Power to reduce contract rate —"loan"—Pre-existing liability and later transaction.*

The Federal Court will not interfere with the exercise of its discretion by a High Court, unless it appears that the High Court did not apply its mind at all to the question before it, or acted capriciously or in disregard of some legal principle, or was influenced by some extraneous considerations wrong in law. The Federal Court will not substitute its own discretion for that of a High Court : *Rehmat-un-nissa Begam* v. *Price*, (1917) L. R. 45 Ind. Ap. 61, applied.

The use of the word "may" in the opening words of s. 12 of the Bihar Money-Lenders Act, 1938, [now s. 8 of the Bihar Money-Lenders (Regulation of Transactions) Act, 1939] indicates that the Court is to consider the circumstances of each case and then decide whether it should or should not exercise all or any of the three powers mentioned in the section.

Per SULAIMAN J.—The amended O. XXXIV, r. 11, of the Code of Civil Procedure gives a discretion to the Court, so far as interest *pendente lite* and subsequent interest are concerned, and it is no longer obligatory on courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there is no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918 (Act No. X of 1918).

Per VARADACHARIAR J.—Where the parties settle accounts in respect of a pre-existing liability and agree that money borrowed under a later transaction, even from the same creditor, should be applied in discharge of that liability, the later transaction is in law to be regarded as a loan by itself, though cash did not actually pass by way of lending and repayment : see observations of Greer L. J. in *B. S. Lyle Ld.* v. *Chappell*, [1932] 1 K. B. 691.

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APPEAL from the High Court at Patna.

The appeal arose out of a suit filed in the Court of the Subordinate Judge, First Court, Gaya, for the enforcement of two simple mortgage deeds, dated the 4th October 1923 and 24th April 1930, for Rs. 2,500 and Rs. 1,800, respectively, carrying interest at Re. 1-1-0 per cent. per mensem, compounded every year. The suit was contested on the grounds that the mortgages were invalid for want of legal necessity and that the rate of interest was excessive, but the Subordinate Judge decreed it. An appeal was then filed in the Patna High Court and among other contentions the appellants urged that s. 11 of the Bihar Act III of 1938 should be made applicable to the case and further that in any event under s. 12 of that Act the accounts should be re-opened and relief given to the appellants. Relying on an earlier decision of their own, the High Court found s. 11 of the Bihar Act to be void and refused to reopen the accounts under s. 12. They dismissed the appeal, but granted a certificate under s. 205 of the Constitution Act that the case involved a substantial question of law as to the interpretation of that Act.

Raghbir Singh (*A. C. S. Chari*, *Sarju Prasad* and *Rameshwar Misra* with him) for the appellants.

Rajkishore Prasad for the respondents.

The arguments appear sufficiently from the judgments.

Cur. adv. vult.

SULAIMAN J.—This appeal arises out of a suit brought to enforce two simple mortgage deeds, dated 4th October 1923, and 24th April 1930, for Rs. 2,500 and Rs. 1,800, respectively, carrying interest at Re. 1-1-0 per cent. per mensem, compounded every year. Most of the points which arise in this case are fully covered by our decision in *Surendra Prasad Narain Singh* v. *Sri Gajadhar Prasad Sahu Trust Estate*(1) decided today. It is, therefore, necessary to deal with only the new points which have been

(1) *Antea*, p. 39.

raised in this appeal and which deal principally with the liability for interest. On behalf of the appellants it has been argued that the findings of the courts below as regards legal necessity for the rate of interest, are inadequate. In the first place, strictly speaking, this is not a constitutional ground at all, and as the appellants neither appealed for, nor obtained, the certificate referred to in O. XLV, r. 2, of the Civil Procedure Code, they are not entitled to argue it as of right. This Court may, however, grant leave under s. 205 (2) of the Act. In the second place there are, at any rate by implication, concurrent findings of both the courts that there was legal necessity for the rate of interest agreed upon.

The trial court dealt with the question of legal necessity under issue No. 4, relating to the legal necessity for the debt, without expressly considering whether legal necessity for the rate of interest also had been established. It considered the rate of interest under issue No. 5, relating to the question of its being excessive and penal. The finding was against the defendants. The High Court also did not consider this matter under the head legal necessity, but considered it under the head rate of interest. As regards the first mortgage deed, it was pointed out that the earlier mortgage deed and bonds carried compound interest at Re. 1-8-0 per cent. per mensem, with yearly rests. There was only one earlier promissory note for Rs. 50 carrying simple interest at Re. 1-8-0 per cent. per mensem. In the opinion of the High Court the fresh transaction at compound interest, at Re. 1-1-0 per cent. per mensem with yearly rests, was quite a prudent one. It was further pointed out that in the plaint the plaintiffs had claimed compound interest at the rate of Re. 1 per cent. per mensem. As regards the second mortgage, the High Court pointed out that the plaintiffs' evidence showed that the usual rate of interest had varied from 1 to 2 per cent. per mensem, compoundable every year, which received support from the earlier transactions, and that there was no reliable evidence on the defendants' side to prove that such compound interest was excessive. No doubt, strictly speaking, the courts when dealing with the question

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of legal necessity should have recorded an express finding that there was legal necessity not only for the amounts borrowed, but also for the rate of interest agreed upon. The burden did not in the first instance lie on the defendants to show that the rate of interest was necessarily excessive. But presumably the case was not argued before the High Court from this standpoint, and in any case it appears that the High Court was satisfied that the first transaction was quite prudent and, therefore, the second transaction also, which involved the same rate of interest, was equally good. The trend of the High Court's opinion seems to be that there was legal necessity for the rate of interest agreed upon.

It is pointed out on behalf of the appellants that the original amount of the first mortgage deed, which had also included interest for a previous period, was only for Rs. 2,500, while the plaintiffs claimed over Rs. 11,000 at the date of the suit. Similarly they were claiming about double the amount on the second deed. The trial court had no occasion at all to consider the re-opening of the transaction under the old s. 12, as the Act came into force after the case was decided by it. It is, therefore, contended that the High Court was wrong in not applying s. 12 of the old Money-Lenders Act on the ground that it had "a complete discretion". It is argued that discretion is not arbitrary but must be exercised judicially. The High Court has, however, said that upon the facts of this case there is nothing which would justify the Court, in the exercise of its discretion, in re-opening the accounts. It, therefore, appears that the High Court did consider this point but did not think it fit to re-open the transaction. The grounds which might have influenced the High Court were probably those discussed earlier when considering the rate of interest. When the question was one of a discretion of the High Court, we cannot in appeal interfere with the way in which the discretion was exercised or not exercised, unless it appears that the High Court did not apply its mind at all to the question, or acted capriciously or in disregard of any legal principle, or was influenced by some extraneous considerations wrong in law. If there can be no legal objection to

the way in which discretion has or has not been exercised by the High Court, then we would not in appeal substitute our own discretion for that of the High Court. [See *Rehmat-un-Nissa Begam* v. *Price*(1)].

It is then argued that the High Court had really no discretion in the matter and should have acted under the old s. 12 to which s. 8 of the new Act applies. It is argued that the word "may" in the opening portion of the section has the meaning of the word "shall", and that the Court has the option of exercising all or any of the three powers mentioned therein but has no power not to exercise any of the three powers at all. This contention cannot be accepted. While the word "may" occurs in the opening portion of the section, the word "shall" occurs in the Proviso, and these two words must have distinct meanings. It also appears that the Legislature has advisedly used the word "may" in some ss. like 10 and 11, while it has deliberately used the word "shall" in ss. like 4, 5, 6 and 7 and also 13 and 14. The policy of the Act clearly appears to be to prohibit rate of interest in excess of 9 per cent. per annum for secured loan advanced after the Act came into force (s. 5) and to prohibit compound interest altogether for loans advanced after the Act (s. 6). On the other hand, as regards previous loans, s. 7 creates a bar against interest exceeding the principal, and s. 8 gives a discretion to the Court to give other reliefs according to circumstances. Obviously, by the use of the word "may" it is intended that the Court should consider the circumstances of each case and then decide whether it should or should not exercise all or any of the three powers mentioned in the section. Had the intention been as contended for on behalf of the appellants, the language would have been "the court shall exercise all or any of the following powers". The use of the word "may" indicates that the Court is not bound to exercise at least one of the powers, and may well not exercise any of the powers at all. The language as it stands can mean only this, that the Court has the discretion to exercise all or any or none of the specified powers.

(1) (1917) L. R. 5 Ind. Ap. 61.

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A further point has been urged on behalf of the respondents that the new s. 7 is *ultra vires* of the Provincial Legislature. The argument is as follows :—Quite apart from any question of repugnancy, which is cured by the assent of the Governor-General, s. 7 has been enacted to reduce interest on all loans including loans based on a document. Now a loan based on cheques, bills of exchange, promissory notes and other like instruments, would be a loan based on a document within the meaning of the section and would be governed by the prohibition contained in it. But "cheques, bills of exchange, promissory notes and other like instruments" fall under List I, entry No. 28, of the Seventh Schedule of the Government of India Act, 1935, and are within the exclusive powers of the Federal Legislature. By virtue of s. 100, read with s. 316, it follows that the power of the Provincial Legislatures to make enactments in respect of these documents is wholly excluded. If the provisions of s. 7 would be void in such particular cases, then the whole section must be deemed to be altogether void.

Although one of the previous debts had in part been based on a promissory note, the present suit is based on a mortgage deed and not on a promissory note and the field is therefore, apparently, clear. The period of limitation being short, s. 7 would rarely apply to suits on promissory notes. It is accordingly unnecessary to consider the objection in detail in this case, particularly as the point does not directly arise, nor has it been fully argued before us. Even the Full Bench case of the Madras High Court, *Mada Nagaratnam* v. *Puvvada Seshayya*(1), was not cited at the Bar.

Lastly, a question has been raised whether we are bound to allow the contractual rate of interest *pendente lite*. Prior to 1929 the position was that there was the general s. 34 of the Civil Procedure Code, under which in a decree for payment of money the court had full discretion to order interest at such rate as it deemed reasonable to be paid on the principal sum adjudged from the date of the suit onwards. Then there were rr. 2 and 4, of O. XXXIV, which

(1) (1939) I. M. L. J. 272.

applied to a mortgage suit, and the court had to order an account to be taken of what was due to the plaintiff at the date of such decree for principal "and interest on the mortgage". According to s. 57 (*a*) of the Transfer of Property Act, 1882(1), mortgage money also included the interest on the principal secured by the mortgage. The special provision in O. XXXIV had to be applied in preference to the general provision in s. 34. Till the period for redemption expired the matter was considered to remain in contract and the interest had to be paid at the rate specified in the contract. [See *Jagannath Prosad Singh Chowdhury* v. *Surajmul Jalal*(2)].

By Act XXI of 1929, O. XXXIV was amended, and a new r. 11 was inserted, which deals specially with interest, and provides that the court "may" order payment of interest to the mortgagee up to the date fixed for payment at the rate payable on the principal. It follows that this special provision, which removes any conflict that there might have been between s. 34 and O. XXXIV, rr. 2 and 4, gives a certain amount of discretion to the court, so far as interest *pendente lite* and subsequent interest are concerned. It is no longer obligatory on the courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918(3). See *Sripat Singh* v. *Naresh Chandra Bose*(4), although in this case when considering Order XXXIV, r. 2, the Privy Council case of *Jagannath Prosad Singh Chowdhury* v. *Surajmul Jalal*, was overlooked. In *Jagdish Jha* v. *Aman Khan*(5), interest after the institution of the suit was ordered by this Court to be paid at the rate of 6 per cent. per annum on the principal amount till the date fixed for payment. In my opinion the view then taken as to the power of a court to reduce interest *pendente lite* was not contrary to law.

The Bihar Legislature, as shown by the Preamble of Act III of 1938, in order to give relief to debtors

(1) Act No. IV of 1882. (2) A. I. R. 1927 P. C. 1.
(3) Act No. X of 1918. (4) A. I. R 1932 Pat. 332, at p. 334.
(5) *Ante*, p. 7.

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has inaugurated a new policy by regulating money-lending transactions. Section 6 makes any contract for the payment of compound interest after the Act came into force altogether void. Section 7 disallows interest up to suit in excess of the amount of the principal. Section 8 gives power to the court to re-open the whole transaction and give relief in respect of interest in excess of 9 per cent. simple per annum in the case of a secured loan notwithstanding any contract to the contrary. The power of the court to reduce interest in Bihar has, therefore, become much wider than that under the Usurious Loans Act. It may not be quite in harmony with these new provisions to go back to the old practice or the old standard of high rates of interest, which were freely allowed. It may even be contrary to the spirit of the Bihar Act now to allow compound interest at a high contractual rate not only during the pendency of the suit but even up to six months after the preliminary decree to be passed hereafter.

Of course, whether the court would or would not give relief in respect of interest in excess of nine per centum simple per annum, and if so to what extent, will depend on the special circumstances of each case. The opinion of the High Court on such a matter must carry weight, where, being conscious of its discretionary power under s. 8, it has considered the case not to be a fit one for the exercise of such power. Just as in *Subhanand Chowdhary* v. *Apurba Krishna Mitra*(1), decided today, the *pendente lite* interest should be reduced to 12 per cent. per annum, simple.

VARADACHARIAR J.—I wish to add a few words, with reference to the argument urged on behalf of the appellants as to the manner in which s. 7 of Bihar Act VII of 1939 should be applied to one of the loans sought to be recovered in this case. The appellants also sought to invoke the aid of s. 8 of that Act, with a view to reopen the settlement of accounts made at the time of the execution of the mortgage bond, Exhibit V. But, as held by the High Court, that section only gives a discretionary power and we have not been shown sufficient reason for interfering with the refusal of the High Court to exercise that power in

(1) *Antea*, p. 31.

the circumstances of this case. It is true that in the particular paragraph dealing with this question, the learned Judges have not assigned their reasons; but the reasons are fairly gatherable from the rest of the judgment.

The suit comprised claims under two mortgage bonds, Exhibit V, dated 4th October 1923, and Exhibit V(a), dated 24th April 1930. The interest due under Exhibit V(a) up to the date of the institution of the suit did not amount to a sum equal to the principal amount of the bond; no question therefore arises under s. 7 of Bihar Act VII of 1939 in respect of that bond. The earlier bond, Exhibit V, had been executed to secure repayment of a sum of Rs. 2,500 and it provided for the payment of compound interest with annual rests at Rs. 1-1-0 per cent. per mensem. This amount of Rs. 2,500 was made up of a sum of Rs. 1,500 received in cash to pay off another creditor of the mortgagors and a sum of Rs. 1,000 treated as paid to the mortgagees themselves in discharge of antecedent debts due to them from the mortgagors. The bond gave particulars of the antecedent debts; and after reciting that the amount due up to that date for principal and interest in respect of those debts was Rs. 1,047, it provided for the payment of Rs. 1,000 out of the mortgage loan towards that amount.

With reference to Exhibit V, the learned counsel for the appellants contended that, even under s. 7 of Act VII of 1939, the Court must re-open the account in respect of the antecedent debts referred to in Exhibit V and limit the interest claimable by the plaintiffs up to the date of the suit, in respect of this portion of the mortgage debt, to the amount of principal due under the antecedent transactions. I am unable to accede to this contention. The case is certainly one of a "loan based on a document"; and under the concluding words of s. 7, interest is in such a case claimable up to the "amount of loan mentioned in the document". The loan document must in this case be taken to be Exhibit V and not the earlier documents referred to in it, because the definition of "loan" in s. 2(f) includes a "transaction on a bond executed in respect of past liability". How exactly this definition and the provision of s. 7 are to be

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applied to ordinary cases of "renewals", it is not necessary for the purposes of this case to decide. Where, however, as in the present case, the parties settle accounts in respect of a pre-existing liability and agree that money borrowed under a later transaction, even from the same creditor, should be applied in discharge of that pre-existing liability, it seems to me that the later transaction should in law be regarded as a loan by itself, though cash did not actually pass between the parties by way of lending and repayment [see observations of Greer, L. J., as he then was, in *B. S. Lyle Ld.* v. *Chappell*(1), referred to with approval by the Judicial Committee in *Chethambaram Chettiar* v. *Loo Thon Poo*(2)].

The appeal is allowed and the decree of the courts below modified to this extent, *viz.*, that the interest payable to the plaintiffs up to the date of the institution of the suit in respect of Exhibit V will be limited to Rs. 2,500. The question of interest *pendente lite* has been dealt with in *Subhanand Chowdhary* v. *Apurba Krishna Mitra*(3). On both the bonds, the principal amounts will carry simple interest at 12 per cent. per annum from the date of the institution of the suit to the date fixed for payment in the revised decree to be passed by the High Court. After that date, there will be interest at 6 per cent. per annum on the aggregate amount of principal, interest and costs up to date of realisation. The case will be remitted to the High Court for a revised decree being passed on the above basis. The plaintiffs-respondents will retain the costs awarded to them by the decrees of the High Court and of the trial Court. There will be no order as to costs in this Court.

The appellants' learned counsel applied for an order under s. 10 of the Bihar Act of 1939 permitting payment by instalments. The appellants will be at liberty to make the application before the High Court which has to pass the decree.

GWYER C. J.—I concur and have nothing to add.

Case remitted to High Court.

Agent for Appellants : *T. K. Prasad.*
Agent for Respondents : *Tarachand Brijmohanlal.*

(1) [1932] 1. K. B. 691. (2) (1940) I. M. L. J. 68, at p. 72. *Antea*, p. 31.