Privy Council Appeal No. 136 *of* 1924.

Patna Appeals Nos. 24 *and* 25 *of* 1922.

Sourendra Mohan Sinha and others - - - - - *Appellants*

v.

Hari Prasad Sinha and others - - - - - *Respondents*

Hari Prasad Sinha and others - - - - - *Appellants*

v.

Sourendra Mohan Sinha and others - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DATED THE 21ST JULY, 1925.

Present at the Hearing:

LORD SHAW.
LORD CARSON.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

These are two consolidated appeals from a decree of the 12th April, 1922, of the High Court at Patna, which varied a decree of the 17th June, 1918, of the Subordinate Judge of Bhagalpur.

The suit in which these consolidated appeals have arisen was instituted in the Court of the Subordinate Judge of Bhagalpur on the 5th February, 1915. The plaintiffs claimed Rs. 11,81,811 principal and interest alleged to be then due under a mortgage bond of the 21st December, 1896, for Rs. 3,50,000, of which Rs. 1,36,142 were advanced in cash, the balance being money alleged to be due under a previous bond of the 3rd October, 1883, and for moneys advanced at various times, and for interest

at various rates. The bond in suit provided that the principal sum of Rs. 3,50,000 was to carry 7½ per centum compound interest with yearly rests. The principal was repayable in the month of Phagon, 1310 Fasli, the last day of which month was the 14th March, A.D. 1903. The bond was executed by all the adult male members of the joint family, the members of which family lived in the Sonthal Parganas, and was also executed by them on behalf of all the minor members of the joint family as their guardians. It was intended that the bond should bind all the members of the joint family and the property mentioned in the bond. All the defendants, except as later in this paragraph is mentioned, are members of the joint family. The joint family is governed by the school of Hindu law of the Mithila. The grantee of the bond, who was the mortgagee, was Surja Narain Singh, Bahadur, of the District of Bhagalpur, by profession a pleader, who had occasionally acted for the joint family, and knew its financial position; he died long before this suit was brought, and the plaintiffs are his representatives and are the persons in whom are vested his rights under the bond. The defendant, Dwarka Prasad Singh, was by birth a member of the joint family. Since the bond was made he was adopted into another family. The other defendants, who are not members of the joint family, claim through the joint family. The executants of the bond, in addition to granting the rights of a mortgagee to Surja Narain Singh, declared by the bond that they should jointly and severally pay the principal and interest, simple and compound, for which the bond was given.

A previous suit on the same mortgage bond of the 21st December, 1896, had been brought in the Court of the Subordinate Judge of Bhagalpur on the 20th June, 1904, by the then representatives in interest of Surja Narain Singh, the deceased mortgagee, against the then members of the joint family and others who claimed title through members of that family. That suit of 1904 came on appeal to His Majesty in Council and was dismissed by His Majesty in Council acting upon and adopting the advice tendered to His Majesty in a judgment of the Board which was delivered on the 19th May, 1914, by Lord Moulton. In considering the advice which it will be the duty of their Lordships to tender to His Majesty in these consolidated appeals, it will be necessary to refer at some length to the judgment of the Board of the 19th May, 1914. That judgment of the Board is reported in 41 I.A. 197.

In each of the suits the main claim was for a decree which might be executed by a sale of the mortgaged property on default of payment by the mortgagors of the amount decreed to be due under the mortgage bond. In each of the suits there was a claim for such other relief as the plaintiffs might be entitled to, which would include a decree on the personal liability under the mortgage bond of the persons who might be the mortgagors. The property

mortgaged was the joint property of the joint family, the greater part of which was situate within the Sonthal Parganas. That joint property extended from the Sonthal Parganas into the district of Bhagalpur, and the smaller part of the joint property thus happened to be situate within the local limits of the ordinary jurisdiction of the Subordinate Judge of Bhagalpur. The mortgage bond was executed in Bhagalpur and was registered in the Bhagalpur Registry.

The mortgage bond has been translated. and to that translation their Lordships will refer. By their bond the mortgagors declared that they would repay to the mortgagee the said sum of Rs. 3,500,000 in the month of Phagon, 1310 Fasli, and further declared that they should pay interest on the Rs. 3,500,000 at the rate of $7\frac{1}{2}$ per centum per annum on the 1st Phagon, 1304 Fasli, and thereafter every year on the 1st Phagon, and that if they should fail to pay such interest the interest should be treated as principal, and interest on interest should be charged at $7\frac{1}{2}$ per centum per annum and converted into principal after the 1st of Phagon, and the compound interest should be paid by them to the mortgagee, and that even after the expiry of the due date of payment (the 1st of Phagon, 1310 Fasli) they should pay such compound interest, and that "the rates and stipulations as regards interest should in no case be reduced and changed either before or after a decree is passed."

The mortgage bond also contained, amongst others, the following agreements by the mortgagors :—

"6. We do declare that we shall be jointly and severally bound to pay the principal, interest, compound interest as well as costs incurred in court or privately, by the said Rai Bahadur. for realisation of the debt.

"7. For payment of the principal, interest, compound interest and costs referred to above, we the executants have mortgaged and hypothecated the properties mentioned in Schedule No. 2 of this deed to the said Rai Bahadur subject to the mortage lien created under the bond dated the 11th Assin, 1299 F. This is the first mortage, and in support of continuation of the mortgage, the said bond has been left with the said Rai Bahadur and the amount due on the said bond has been included in this bond. Save and except the amount due under this bond there is nothing due by us to the said Rai Bahadur. If we do not pay the money due to the said Rai Bahadur as stipulated in this bond, he shall be at liberty to bring a suit and to realise his dues together with costs, if any, by sale of all or any of the mortgaged properties or any portion thereof or from our person or other properties. We the executants shall not put forward any plea that the mortgaged properties should be sold first and after that the amount with cost be realised from our person and other properties. The said Rai Bahadur shall be at liberty to bring the mortgaged properties to sale first or last.

"8. If the interest be not paid as stipulated in this bond, the said Rai Bahadur shall be competent to bring a suit and to realise the interest and compound interest by sale of all or any of the mortgaged properties or any portion thereof of from our person or other properties. The mortgaged properties which will be sold for realisation of the interest will be sold free of encumbrances of the balance of the loan and future interest and the same will be considered to have been sold. If there be any surplus sale proceeds after satisfaction of the interest and compound interest for which a suit might

have been brought, the same shall be taken by the said Rai Bahadur towards payment of his (principal) dues. We the executants or any other person shall have no right to the said surplus sale proceeds. By the stipulations contained in this paragraph the said Rai Bahadur shall not be bound to sue for interest and compound interest (alone) but shall be at liberty to sue for the interest and compound interest or to sue for the same along with his suit for the principal, when he will be entitled to do so."

Clause 16 of the bond is as follows :—

"16. This loan has been taken at Bhagalpur. The said Rai Bahadur shall be at liberty to bring suit in the Court of District Bhagalpur and to realise his entire dues or the interest by sale of the mortgaged properties. We the executants shall raise no objection as to the suit being tried in the Court of District Bhagalpur. If we do so the same shall not be entertainable. Some of the Mauzas, *i.e.*, the mortgaged properties No. 1, mentioned in Schedule No. 2, lie in the District of Bhagalpur, and some in the District of Sonthal Parganas."

The Sonthal Parganas were in 1872 and are still a backward district, and the Government of India considered that the inhabitants of the Sonthal Parganas and their properties in the Sonthal Parganas required some protection from the operations of money-lenders beyond the protection which was afforded by the law generally then in force in India, and enacted The Sonthal Parganas Regulation No. III of 1872 (known as the Sonthal Parganas Settlement Regulation), which came into force on the 1st May, 1872, and so far as it was material was in force until Regulation No. V of 1893, and the Sonthal Parganas Settlement (Amendment) Regulation, 1908 (III of 1908) were, as later is mentioned, enacted.

Section 5 of Regulation No. III of 1872 was as follows :—

"5. Till such time as a settlement of the whole or any part of the Sonthal Parganas shall be made under the rules hereinafter provided, and the said settlement shall be declared by a notification in the Calcutta Gazette to have been completed and concluded, no suit shall lie in any Court established under the said Act 6 of 1871 in regard to any land or any interest in or arising out of any land, or for the rent or profits of any land, or regarding any village-head-ship or other office connected with the land, except as hereinafter provided ; but such suits shall be heard and determined by the officers appointed by the Lieutenant-Governor of Bengal under Section 2 of the said Act 37 of 1855, or by the Settlement-officers hereinafter mentioned according as the said Lieutenant-Governor shall from time to time direct."

Section 6 of Regulation III. of 1872, as amended by Regulation V. of 1893, was and is as follows :—

"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 2 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.

"(1) Explanation.—The expression 'intermediate adjustment of account' in clause (a) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when, without the passing of fresh consideration, the original claim is increased by such renewal.

"(1) Illustration.—A bond is given for Rs. 75, of which Rs. 25 are interest. Unless the obligee can prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75, Rs. 50 only will bear interest, and the limit of the claim on the bond will be Rs. 100."

As has been mentioned, the previous suit on the mortgage in question which came before the Board in 1914 was instituted in the Court of the Subordinate Judge of Bhagalpur, on the 20th June, 1904, and he tried the suit and made his decree therein on the 12th February, 1906. No notification that the settlement mentioned in Section 5 of Regulation III of 1872, had been completed and concluded was ever made in the *Calcutta Gazette*. In the suit of 1904, the two material issues to be determined were: (*a*) whether the Bhagalpur Court had jurisdiction in the suit, and (*b*) whether the mortgagees were precluded by Section 6 of Bengal Regulation III of 1872, as amended in 1893, from recovering compound interest or interest exceeding in amount the principal advanced. The Subordinate Judge, by his judgment delivered on 12th February, 1906, found all the issues in favour of the mortgagees, and made a decree under Section 86 of the Transfer of Property Act, 1882 (Act IV. of 1882) for payment and for sale in the event of non-payment. From that decree the mortgagors appealed to the High Court at Calcutta, but at the hearing of that appeal the arguments were confined to issue (*b*). That appeal was heard by Harrington and Mukharji, JJ., who dismissed the appeal, holding themselves bound by some unreported decision of their Court to the effect that the words in Section 6 of Regulation III. of 1872—" The Court having jurisdiction in the Sonthal Parganus "—meant a Court situate in that district and constituted under the Regulation, and did not include a Court situated outside, but exercising jurisdiction to order the sale of mortgaged property situated within that district. From that decree of the High Court there was the appeal to His Majesty in Council, which was before the Board in 1914. It appears that there were also then two other appeals to His Majesty in Council, one of which was from a decree of the High Court which reversed a decree of the Subordinate Judge with regard to the amount of interest recoverable under the decree of the Subordinate Judge as drawn up. Such was the position of the suit when the appeal to His Majesty in Council came before the Board in 1914.

The appeal to His Majesty in Council was elaborately and exhaustively argued by the learned Counsel for the parties, and the carefully considered judgment of the Board was delivered by Lord Moulton. Much of that judgment related to the history of legislation, which had ceased to apply to the Sonthal Parganas.

and to which their Lordships need not now refer. In referring to that judgment of the Board, their references are to those portions of the judgment which express the decision of the Board on questions of law which are material to the right understanding of the appeal which was before the Board. If it be the fact that some of that was *obiter*, as the High Court at Patna thought, it is not to be assumed that any of the conclusions expressed in the judgment were unsound.

In the judgment which was delivered by Lord Moulton, their Lordships then constituting the Board having mentioned that the jurisdiction of a Judge of the Courts established under the Bengal United Provinces and Assam Civil Courts Act, 1887, or its predecessor, the Bengal Civil Courts Act, 1871, extended to "suits of which the value exceeds Rs. 1,000, and which are not "excluded from his cognizance by the Sonthal Parganas Settlement Regulation, or by any other law for the time being in force," said that:

"they were clearly of opinion that these words of exclusion refer to Section 5 of the Regulation of 1872, which excluded from the cognizance of any such Court suits relating to land, the settlement of which had not been finished and duly notified, and placed them exclusively in the hands of settlement officers or officers appointed by the Lieutenant-Governor of Bengal under Section 2 of the Regulation of 1855. This exclusive jurisdiction is therefore maintained, and suits in regard to land which is not in districts that have been notified as being completely settled are not within the cognizance of the ordinary Courts, no matter what may be the value of the matter in dispute. It is not necessary for the purposes of this Appeal to examine further into the jurisdiction of Courts established under these provisions, because the Court of Bhagalpur, in which the present action was brought, is not one of such Courts."

Later in the judgment the Board said:

"The information supplied to their Lordships by the parties as to the notifications appearing in the *Calcutta Gazette* show conclusively that, although portions of the lands mortgaged had been settled, and notification had been duly made that such settlement had been completed, at dates prior to the institution of the suit, other portions were not settled. It is clear, therefore, that the suit came within the provisions of Section 5 of the Sonthal Parganas Settlement Regulation, 1872, relating to the exclusive jurisdiction of officers appointed by the Lieutenant-Governor of Bengal, or by settlement officers, inasmuch as it related to land which had not been settled, or the settlement of which had not been declared by a notification in the *Calcutta Gazette* to have been completed and concluded. The Court of Bhagalpur had, therefore, no jurisdiction to entertain the suit, and this appeal should be allowed."

"Reliance was placed by counsel for the respondents on the stipulation in the bond that the mortgagees might enforce it in the Court of Bhagalpur. Their Lordships are of opinion that this has no effect. The Court had no jurisdiction to entertain the suit which, beyond question, was a suit in regard to land in the Sonthal Parganas, and that being so the parties could not give it the necessary jurisdiction by consent. To do so would be to nullify the express prohibition of Section 5 of the Sonthal Parganas Regulation, 1872, which was binding on any Court having jurisdiction in the Sonthal Parganas in the exercise of that jurisdiction."

The judgment of the Board also dealt with the question of the right of the mortgagees to claim compound interest. That question was also before the Board in one of the other appeals as to which the Board had to tender advice to His Majesty, and their Lordships held that

"Apart from the question of jurisdiction, any Court dealing with the subject-matter of the suit would be bound to give full force and effect to the provisions of Section 6 of the Sonthal Parganas Settlement Regulation, 1872, relating to usury, and therefore to have refused to decree any compound interest arising from any intermediate adjustment of interest, or an amount of total interest exceeding the principal of the original debt or loan."

The plaintiffs in the suit of 1904 did not specifically ask the Subordinate Judge of Bhagalpur, or the High Court or the Board to grant them a decree for money in their general claim for further relief on the personal undertaking in the mortgage bond of the mortgagors to pay the debt and interest.

Their Lordships in considering the present consolidated appeals will, where necessary, follow and apply the judgment of the Board which was delivered by Lord Moulton in the previous suit, but the question as to the jurisdiction of the Court of the Subordinate Judge of Bhagalpur to entertain the present suit depends on circumstances which did not exist when the previous suit was instituted on the 20th June, 1904.

By Regulation III of 1908, Sections 5 and 5A were substituted for Section 5 of Regulation III of 1872. Section 5 which was substituted for Section 5 of the Regulation of 1872 is as follows:—

"5. (1) From the date on which, under Section 9, the Lieutenant-Governor declares, by a notification in the *Calcutta Gazette*, that a settlement shall be made of the whole or any part of the Sonthal Parganas, until the date on which such settlement is declared, by a like notification, to have been completed, no suit shall lie in any Civil Court, established under the Bengal, Agra and Assam Civil Courts Act, 1887, in regard to:—

(*a*) any land or any interest in, or arising out of, land, or

(*b*) the rents or profits of any land, or

(*c*) any village headship or other office connected with any land,

in the area covered by such first-mentioned notification; nor shall any Civil Court proceed with the hearing of any such suit which may be pending before it.

"(2) Between the dates referred to in sub-section (1), all suits of the nature therein described shall be filed before or transferred to an officer appointed by the Lieutenant-Governor under Section 2 of the Sonthal Parganas Act, 1855, or Section 10 of this Regulation, according as the Lieutenant-Governor may from time to time direct; and such officer shall hear and, even though during the hearing the settlement may be declared to have been completed, determine them."

Section 5A does not bear on this question of jurisdiction, and need not be considered.

Their Lordships agree with the High Court that the effect of Section 5 of Regulation III of 1908, which replaced Section 5 of the Regulation of 1872, has been to exclude for the future after

that substitution the jurisdiction of the Civil Courts to try cases relating to any lands in the Sonthal Parganas only during such period as that land should be under settlement, the period being reckoned from the time when the land is notified as under settlement to the time when the settlement is completed. The mortgagors were the appellants in the appeal before the High Court, and the High Court found on the evidence that the appellants in the appeal before the High Court had failed to prove that at any time the mortgaged property was notified for settlement and not notified as settled and that the defence that the Subordinate Judge of Bhagalpur had no jurisdiction to entertain the present suit failed. In their Lordships' opinion it is not shown that on the facts before the High Court the High Court came to a wrong conclusion that the Subordinate Judge of Bhagalpur had jurisdiction to entertain this suit, which was instituted on the 5th February, 1915. But in entertaining this suit the Subordinate Judge was a Court having jurisdiction in the Sonthal Parganas within the meaning of Section 6 of the Regulation III of 1872, as amended in 1893.

As the mortgage was made in Bhagalpur and some part of the mortgage lands are within the local limits of the jurisdiction of the Court of the Subordinate Judge of Bhagalpur, and as the jurisdiction of the Court of the Subordinate Judge to entertain the suit on the mortgage was not on the facts of the case, which were accepted by the High Court as proved, not excluded by the substituted Section 5 of the Regulation of 1872, their Lordships' accepting the findings on that question of the High Court as correct, hold that the Subordinate Judge of Bhagalpur had jurisdiction to entertain the present suit, which was instituted on the 5th February, 1915. In entertaining the suit the Subordinate Judge was a Court having jurisdiction in the Sonthal Parganas within the meaning of Section 6 of Regulation III of 1872, as amended by Regulation V of 1893, and was bound in making a decree in favour of the mortgagees to comply with that section, which limited his powers. Issue 11, as amended by the Subordinate Judge, was "Are the plaintiffs (the mortgagees) entitled to (a decree for) compound interest or to one (a decree for interest) exceeding the principal (amount lent) ?" The Subordinate Judge in this suit made a decree for the plaintiffs which included interest, both simple and compound,. and such interest exceeded the amount of the original debt or loan. His decree in favour of the plaintiffs was for Rs. 15,27,997.8.3 in respect of the mortgage debt and interest thereon, and for Rs. 44,164 as a personal decree in respect of the declaration in the mortgage bond that the mortgagees would personally pay the Rs. 3,50,000, which included Rs. 12,968.11.3, which he held was not secured on the mortgaged property. From that decree the mortgagees and other defendants affected by it appealed to the High Court, not only as to the interest which had been allowed, but also as to the personal decree.

The appeal was heard by Sir Dawson Miller, C.J., and Mr. Justice Bucknill. These learned judges carefully considered the facts of the case and applied Section 6 of Regulation III of 1872 as amended in 1893. They disallowed all the compound interest on the actual debts, and thereby reduced the amount of Rs. 15,27,997 to Rs. 3,88,673, and similarly reduced the amount of the personal decree from Rs. 44,164 to Rs. 23,181. Assuming that Section 6 of Regulation III of 1872, as amended in 1893, applied, it is not disputed that those reductions were correctly arrived at by the High Court. In their Lordships' opinion Section 6 of Regulation III of 1872, as amended, applied.

It was also contended in the appeal to the High Court that some of the money claimed, Rs. 12,968.11.3, as a debt was not advanced for a necessity of the joint family and was not an antecedent debt for which the joint family properly was liable under the mortgage bond. As to that Rs. 12,968.11.3 the High Court agreed with the Subordinate that the mortgaged property was not liable in respect of it, and that it might be recovered under a personal decree, but the High Court, by disallowing compound interest on it, reduced the personal decree which had been made from Rs. 44,164 to Rs. 23,181.

The High Court allowed no interest on the principal loan, as the interest which had been paid or was included in the Rs. 3,50,000 amounted to more than the money lent or advanced, and made a decree for the plaintiffs for Rs. 3,90,157, and decreed that the mortgaged property or a sufficient part of it should be sold if that amount should not be paid on or before the 11th October, 1922, and if paid on or before the 11th October, 1922, the plaintiffs should deliver up to the defendants or to such persons as they should appoint all documents in their possession, or power, relating to the mortgaged properties, and should, if so required, retransfer the same to the defendant free from the mortgage and from all incumbrances created by the plaintiffs or any person claiming under them. And further ordered and decreed that the plaintiffs should realise from the persons and properties of the defendants 1 to 5 the sum of Rs. 23,270 on their personal liability, and also ordered and decreed that the plaintiffs, respondents in the appeal to the High Court, should pay to the defendants the sum of Rs. 6,012 being the proportionate costs incurred by the defendants in the High Court.

From that decree of the High Court these consolidated appeals have been brought. The reasons alleged by the plaintiffs in their case are, so far as it is necessary to refer to them, that Section 6 of the Regulation III of 1872, as amended in 1893, does not apply; that the payments already made in respect of interest ought not to have been deducted from the sum of Rs. 3,50,000, and that in any case the High Court should have allowed interest at Rs. 6 per centum from the date of the institution of the suit. The reasons alleged by the defendants in their

case are, so far as it is necessary to refer to them, that the claim for a personal decree is barred; that the mortgage bond did not bind the joint family except for the debts which the High Court found to have been contracted for necessity; and that under the Mithila School of Law the joint family could not be bound by any debt which was not originally contracted by a common ancestor of all its members, and that in such a family a descendant is not liable for any debt for which his ancestor was liable jointly with another person.

As to the contention on behalf of the plaintiffs that Section 6 of the Regulation III of 1872, as amended in 1893, does not apply and that payments already made in respect of interest ought not to have been deducted from the sum of Rs. 3,50,000. Their Lordships hold that in entertaining this suit the Subordinate Judge of Bhagalpur was a Court "having jurisdiction in the Sonthal Parganas," and they agree with the Board in the 1904 suit that any Court would be bound to give full force and effect to the provisions of Section 6 of Regulation III of 1872, amended in 1893.

Section 6 of Regulation III of 1872 as amended by Regulation I of 1908 was very carefully considered in the High Court at Calcutta in 1905 in *Ram Chandra Marwari v. Rani Keshobati Kumari*, 1 Cal. L.J., 182, in which case Maclean C.J. and Pargiter J. held that Section 6, Regulation III of 1872, as amended by Regulation V of 1908, does not authorise any court to decree as interest a larger sum of money than would, together with prior payments if any, equal the original loan or debt. In that case Ghose J., differing, held that all that a Court has to see to when a suit is instituted, is that the interest claimed in the suit does not exceed the limit prescribed in the section.

As to the contention on behalf of the plaintiffs that the High Court should have allowed interest from the date of the institution of the suit. Under the circumstances of this case, as will presently appear, that contention must be limited to the sum of Rs. 3,88,673. That Rs. 3,88,673 was the total sum which the High Court rightly found to be allowable in respect of the principal loan. The question as to whether interest should be allowed from the institution of the suit was considered by the High Court. The Subordinate Judge who tried the suit by his decree of the 17th June, 1918, decreed interest from the institution of the suit only on the amount of the personal decree and ordered that an account should be taken of the mortgage debt due under the mortgage bond. The taking of such an account was necessary in order to complete the decree of the Trial Judge for execution. The account was taken by his successor in the office of Subordinate Judge of Bhagalpur who had not tried the suit, but in making the final order as to the account which he made on the 14th May, 1919, he did not confine himself to making an order for the amount which on taking the account he found to be due as the mortgage debt.

which would complete the decree of 17th June, 1918, of the Trial Judge, but proceeded to award interest from the date of the suit on the amount of the mortgage debt. That as appears to their Lordships was not within the scope of his powers. He was not a Judge sitting in review or in appeal. He had to take the decree of the 17th June, 1918, as it had been drawn up. He had not power to alter it. His duty was to take the account which it directed to be taken. He had power, if necessary, to order who should be liable, and to what extent, for the costs of taking the account. The allowance of interest post the date of the institution of a suitis by Section 34 of the Code of Civil Procedure, 1908 (Act V of 1908), within the discretion of the Court, and as a rule the Board has not interfered with the exercise of a discretion vested in a High Court. That the High Court carefully considered whether interest should or should not be allowed by the High Court post the date of the institution of this suit is apparent from the following passage in the judgment of the Chief Justice. He said :—

> "It is not very clear why the learned Judge awarded interest only upon the amount of the personal decree and not on the amount of the mortgagee decree, but there is no cross-appeal on this question. I think there is much to be said for the argument that the Southal Parganas Regulation applies only to the interest to be decreed under the bond, and does not limit the powers of a court under Section 34 of the Civil Procedure Code to award interest on the decretal amount until realization. But it has been held in this court in *Rani Keshobati Kumari against Kumar Satya Niranjan Chakraverty*, C.W.N. 1918 Patna, 305, that interest under the Code should not be awarded upon the decretal amount in so far as it includes interest on the principal debt or loan, but only upon the amount of the principal debt itself, as to do so would contravene the provisions of the Regulation relating to compound interest. The principle underlying this decision applies equally where the amount decreed as interest already equals the sum advanced. Although I have some doubt as to the propriety of the decision mentioned, I am not prepared to differ from the conclusion there arrived at, and I think we should follow that decision."

Their Lordships have not before them a report of the decision of the Patna High Court to which the Chief Justice referred. But it is not necessary or advisable to consider whether the discretion of the High Court on that question of post institution of the suit interest was wisely exercised or not in respect of the amount decreed on the principal sum secured by the mortgage bond.

As to the contention on behalf of the defendants that the claim for a personal decree is barred it is necessary to consider whether the plaintiffs could have made a claim for a personal decree in the suit of 1904. Each of the suits was brought on the same mortgage bond. In the suit of 1904, as in this suit, a decree for sale of the mortgaged property was the principal relief claimed. In the suit of 1904 a decree under Section 90 of the Transfer of Property Act, 1882 (Art. IV of 1882), was also claimed as a relief, and "such other reliefs as may under the circumstances of the case be deemed proper may be granted,"

the last mentioned claim is generally known as claim for general relief. In the present suit the fifth claim for relief is "That such other relief or reliefs as may under the circumstances of the case be deemed proper may be granted to the plaintiffs." It was under the fifth claim for relief that the personal decree was granted by the Subordinate Judge. Although in the suit of 1904 the Subordinate Judge had no power to make a decree for sale of the mortgaged property, he could have made, and the High Court in Appeal could have made, a personal decree, and the Board could have advised His Majesty that the plaintiffs were entitled to a personal decree, the plaintiffs omitted to make any specific claim for a personal decree.

The contention that the claim for a personal relief is barred arises under Section 11 of the Code of Civil Procedure, 1908 (Act V of 1908), by which it is enacted that :—

> "11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.
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> . . . .
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> "*Explanation IV.*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It is the policy of the Code of Civil Procedure, 1908, as it was the policy of the Code of Civil Procedure, 1882, that parties should not have the right to split up a cause of action against defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit. In their Lordships' opinion the right to the personal decree in this suit was barred by Section 11 of Act V of 1908, and this suit must be dismissed so far as any claim for a personal decree is concerned.

As to the contention on behalf of the defendants that the bond did not bind the joint family except for the debts which the High Court found to have been contracted for necessity, the Board may observe that in an appeal from the decree of a High Court in a suit which involved, as this did, as will presently appear from a passage which their Lordships will quote from Mr. Justice Bucknill's judgment, a prolonged examination of numerous items of advances and loans and of the evidence relating to them by a High Court, those who impugn before their Lordships the findings of fact by the High Court upon which it based its decree must draw the attention of their Lordships to the material evidence which they suggest that the High Court misunderstood or failed to appreciate, and on which they contend that their Lordships should come to a conclusion different from that at which the High Court arrived. This has not been done by either side in this case, owing most probably to the fact that

it was not possible to do it. Neither side has drawn their Lordships' attention to any material evidence from which the High Court drew a conclusion of fact which their Lordships would not have drawn.

These consolidated appeals are appeals from a decree of the High Court which examined laboriously the many advances for the aggregate of which that Court made its decree. These advances were made over a series of years beginning in 1883, and extending down to 1896, and were made to one or other of the principal adult members of the joint family, and it has not been suggested that any one of those advances was made for immoral purposes, or were secret advances and made without the knowledge of the other members of the family, who were adults at the time. The members of the family were not sufficiently provident always to live within their means, and debts were incurred which it was necessary in the interests of the joint family should be discharged. Their Lordships may quote a paragraph from the judgment of Mr. Justice Bucknill in this suit which illustrates the difficulty of the enquiry as to the loans which are included in the aggregate sum. Mr. Justice Bucknill said :—

> "(4) A question as to the non-existence of legal necessity or family benefit for a large portion of the loan in question. This contention involved before the Subordinate Judge a very careful consideration of the elements of which the loan was in fact composed ; and it has also been the subject of laborious enquiry and research before this Court. In cases such as these, where, in order to find the actual origin of portions, very often small and very often numerous, of what is a large aggregate sum of money one has to try to trace it back for a great many years, it is frequently almost impossible to deal with each individual item in any very satisfactory manner, and, indeed, it is probably doubtful if it is right or necessary so to do. The Subordinate Judge took the broad view that, in the main, old loans contracted for the purpose of paying off earlier debts of a composite character should be regarded as carrying their own burden of proof that they fell, roughly speaking, within the confines of what may properly be regarded as legal necessity or family benefit."

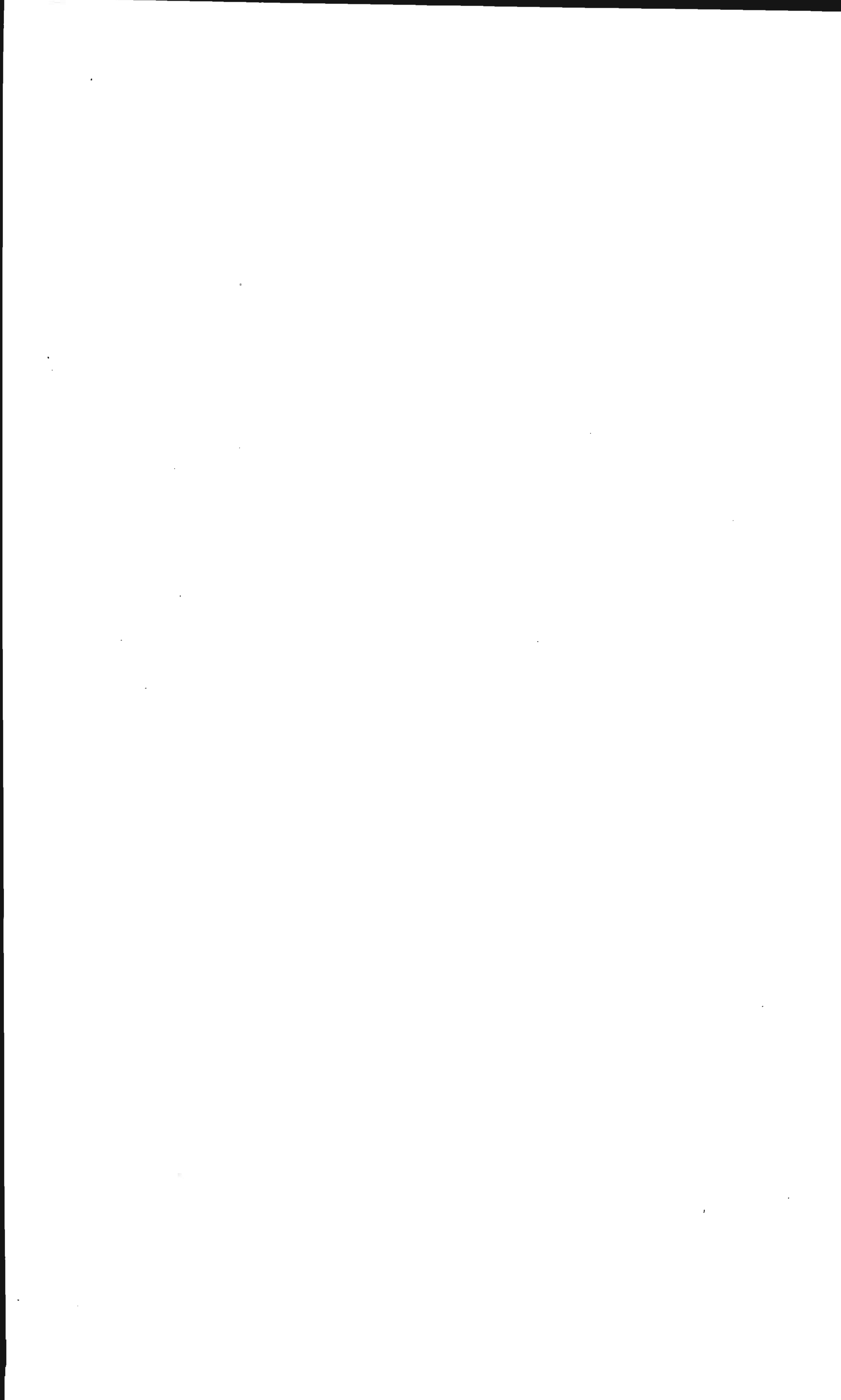
From an examination of such of the evidence as has been brought to their Lordships' attention their Lordships accept the conclusion of the High Court that these advances were for the necessary purposes of the joint family.

As to the remaining contention on behalf of the defendants based on what is said to be the law of the Mithila School that no member of a Hindu joint family subject to the law of the Mithila School is bound to pay the debt of an ancestor which was contracted jointly by the ancestor with another member of the joint family. That proposition thus broadly stated is a wide one, and would apply in the case of a son or a grandson of the ancestor who was under a pious duty to pay the debt of his father or his grandfather whether he was or was not in possession of assets which had come down to him from his father or his grand-

father. That is a startling proposition. The Law of the Mithila School is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila school has departed from the law of the Mitakshara. Assuming that it was a debt which, if contracted by the father or grandfather alone, it was the pious duty of the son or of the grandson, to pay it is difficult to understand on what principal of the law of the Mithila school it was not a debt which it was the pious duty of the son or grandson to pay if it were contracted jointly with another who was a member of the joint family.

Assuming that the Chief Justice was correct in stating in his judgment that Vivada Chintamani is an authority which is binding upon those who are governed by the Mithila school of Hindu law, the passages which have been cited as from it to their Lordships as appearing in the Tagore Translation at pages 34 and 35 seem to relate only to debts contracted by the ancestor with a stranger. From the judgment of the Chief Justice it appears, as was the fact, that the debt which was challenged in his Court on the authority of the Vivada Chintamani was a debt which was charged by the bond on the joint property of the family by each of the heads of the then four branches of the joint family, and all the other defendants, who were members of the joint family, were their sons or grandsons, and he observed that there was under circumstances no reason why the charges should not be held as binding upon the property in suit. With that observation of the Chief Justice, which, in their opinion, was consistent not only with commonsense, but with the law which the High Court in the appeal was administering in the suit, their Lordships agree. The Chief Justice referred *Bhagput Pershad Singh v. Girja Koer* (I.L.R. 15 Cal. 717), which may have come from the Mithila Country.

Their Lordships will therefore humbly advise His Majesty—(1) that the appeal of the plaintiffs ought to be dismissed and the appeal of the defendants allowed in part and the decree of the High Court of Judicature at Patna dated the 12th April 1922, set aside so far as it was a personal decree against the defendants and in other respects except as to costs affirmed; (2) that the decree of the Court of the Subordinate Judge at Bhagalpur, dated the 17th June 1918 for the sale of the mortgaged property and for costs ought to stand except that so far as it was a personal decree against the defendants it should be set aside; (3) that neither side ought to be allowed any costs of the appeals in the said High Court and that any costs paid under the decree of that Court ought to be returned; (4) that the time within which the defendants ought to pay into Court the sum of Rs. 3,88,673 in respect of the mortgage debt and interest ought to be extended until the expiry of eight months from the date of the receipt by the High Court of His Majesty's Order in Council herein; and (5) that there ought to be paid by the plaintiffs to the defendants their costs of these appeals.



In the Privy Council.

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