FEDERAL HIGH COURT

Lachmeshwar Prasad Shukul

Vs

Keshwar Lal Chaudhuri

(Gwyer, C.J., Sulaiman and Yaradachariar, JJ.)

06.12.1940

JUDGMENT

Gwyer, C.J.

1. In this case I find myself entirely in agreement with the judgment to be delivered by my brother Varadachariar, which I have had an opportunity of reading. I do not think it necessary therefore to deliver a judgment of my own; but, with regard to the question whether the Court is entitled to take into account legislative changes since the decision under appeal was given, I desire to point out that the rule adopted by the Supreme Court of the United States is the same as that which I think commends itself to all three members of this Court. In *Patterson v. State of Alabama*[1] Hughes C. J., said:

> We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.

2. This view of its powers was re-affirmed by the Court in a case decided as recently as March last:*Minnesota v. National Tea Company* [2]

Sulaiman, J. - 3. The facts of the case are given in the judgment of my brother. I propose to consider separately a few points of law that have created difficulties. As would appear from the orders passed by the Federal. Court in this case on 5th March 1940 (formerly case No. 14 of 1939, reported in 3 FLJ 15,Lachmeshwar Prasad v, Girdhari Lal ('40) 27 AIR 1940 F C 26: the High Court after granting a certificate Under Section 205(1) of the Act (Government of India Act, 1935), declined to extend the time for making the deposit, required by Order 45, Rule 7, Civil Procedure Code(Civil Procedure Code, 1908), and therefore did not admit the appeal. The appellants were, however, excused by this Court from compliance with so much of Order 10, F.C.R. (Federal Court Rules) as required them to get the record prepared and printed in the High Court, and to lodge their petition of appeal within sixty days of the admission of the appeal by the High Court.

4. The Bihar Money-Lenders Act (3 of 1938) (read with Act 5 of 1938) was repealed and replaced by Act 7 of 1939, which came into force in May of that year. Although the High Court did not declare the appeal admitted, the appellants lodged their petition of appeal in December 1939, urging inter alia that Section 11 of the old Act was not void and that in any case Section 7 of the new Bihar Act was applicable. They also raised a number of other grounds relating to the merits of the case. The plaintiffs filed a cross-appeal, which they have withdrawn. "Without rearguing the point, Sir B. L. Mitter, the Advocate-General of India, has "formally" objected to the appeal.

> 4. Competency of the appeal The difficulty to be considered arises out of Rule 17, which has been added to Order 45, Civil Procedure Code, by the Adaptation Order [Government of India (Adaptation of Indian Laws) Order 1937]. The powers of the Judicial Committee are very wide, and the full and unqualified exercise of His Majesty's pleasure in receiving appeals to His Majesty in Council is expressly saved by Section 112(1)(a), Civil Procedure Code The Federal Court has no power to entertain an appeal by giving a special leave. Section 205 of the Act specifies the case when an appeal would lie to this Court. Section 293 of the Act provides for adaptations and modifications of existing Indian laws by an Order in Council. The Adaptation Order has, with a few modifications, made Order 45, Civil Procedure Code, applicable to Federal Court appeals.

5. As Under Section 109, Civil Procedure Code the right to appeal to His Majesty in Council can be modified only by an Order in Council, such an order was issued on 17th April 1920, and deals with the procedure to be followed in the Indian High Courts, while the Judicial Committee Rules, dated 2nd May 1925, deal with the practice in the Privy Council, as saved by Section 112(1)(b), Civil Procedure Code Under Section 214(1) of the Act, the Federal Court has. been given power to make rules for regulating generally "the practice and procedure of the Court," and even Under Section 109, read with Section 111(A), Civil Procedure Code, it may, in cases to which that section relates, have power to make rules; but, so far, it has not made any express rules amending Order 45, Civil Procedure Code On the other hand, in deference to the Adaptation Order, assuming it to be intra vires, the Federal Court also has by its own Order 9, Rule 1, made Order.45, Civil Procedure Code, as modified and adapted, applicable to appeals to it. This Order 9, Federal Court Rules, governs the procedure when the matter is still before the High Court. Order 10, Federal Court Rules, which begins with the heading "Procedure after admission of appeal" deals really with the "practice and procedure" of the Federal Court. Rule 3 states that the petition of appeal is to be lodged in the Federal Court after "the admission of the appeal by the High Court appealed from.

6. One result of Rule 17 having been added to Order 45, Civil Procedure Code, by the Adaptation Order is that when the only ground of appeal stated in the petition is a constitutional one, even then like proceedings, except the security for costs, are to be had thereon as if a certificate Under Order 45, Rule 3 had been granted. The deposit of the amounts required to defray the expenses of translating, transcribing, indexing and transmitting a copy of the record, and also of the amounts required to defray the expenses of printing such copy within the prescribed time, still remains necessary Under Rule 7. A necessary consequence is that Under Rule 8, the High Court, after the deposit has been made to its satisfaction, has to "declare the appeal admitted," and then "give notice thereof to the respondents," and to transmit the record to

the Federal Court. The proceedings must be deemed to be pending in the Court, so long as there is a mere application for leave to appeal, even though the certificate required by Section 205 of the Act has been granted. But as soon as the required amounts have been deposited to the satisfaction of the Court, and the Court has declared the appeal "admitted," the matter becomes open to the Federal Court. Indeed, the record is transmitted only after such admission of the appeal.

7. Order 45, Civil Procedure Code, itself shows the distinction between the two stagesbefore and after the admission of the appeal. Before the admission, the Court may revoke the security and make further directions thereon (Rule 9). But after the admission, if the security appears inadequate or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, the Court may order the appellant to furnish further security, or make further payments (Rule 10), but if he fails, it can only stay proceedings and await the order of the Federal Court. This obviously implies that after the admission . of the appeal, it has passed out of the absolute control of the High Court. Rule 13(1) also speaks of the grant of a certificate for the "admission" of an appeal.

8. This interpretation of Order 45, Rule 8, Civil Procedure Code, is borne in mind in the Order in Council, dated 17th April 1920, which maintains the same distinction between the two stages Under Rule 8, an appellant who has obtained the certificate may at any time "prior to the making of an order admitting the appeal" withdraw the appeal. Rule 9 also refers to a case where the appellant fails to apply with due diligence "for an order admitting the appeal." Rules 10, 11 and 12 relate to an appellant "whose appeal has been admitted." Rule 13 refers to a period between "the admission of the appeal" and the dispatch of the record, and in case of delay to "the appeal not being effectually prosecuted.

9. Similarly, the Judicial Committee Rules, 1925, maintain the same distinction. Rule 11 makes it incumbent on the appellant to take steps for the transmission of the record "as soon as the appeal has been admitted," requires the High Court Registrar to certify to the Registrar of the Privy Council that the respondent has received notice or is aware of "the order of the Court appealed from admitting the appeal," and in case of failure, it is the Registrar of the Privy Council who calls for an explanation, and the appellant may have to show cause before the Privy Council. Under Rule 29 the petition of appeal is to be lodged after the arrival of the record in England. Rule 30 requires that the petition of appeal should recite the principal steps in the proceedings "down to the admission of the appeal." Under Rule 32, even if the appeal is desired to be withdrawn before the lodging of the petition of appeal, notice has to be given to the Registrar of the Privy Council and not direct to the Registrar of the High Court. Rule 43 also shows that the admission of the appeal is regarded as a crucial stage. As already pointed out Order 10, Federal Court Rules, also was intended to apply to the stage after the admission of the appeal and Rule 3 requires the lodging of the petition of appeal after the "admission" of the appeal by the High Court.

10. It would therefore appear that the admission of the appeal by the High Court is its final judicial act, after which it must give notice of the appeal to the respondent. When the High Court has to be satisfied as to the sufficiency of the security, and that applies to all cases Under Order 45, Civil Procedure Code, I am unable to hold that the declaration that the appeal is admitted is a mere ministerial or administrative act, and not a judicial one. Barring cases, in which special

leave may be granted by the Privy Council, it would be impossible for an appellant to go straight to the Privy Council, without his appeal having been admitted by the High Court. As there can be no question of any special leave for appeal being granted by the Federal Court, it would seem that so long as Order 45, Rule 8, Civil Procedure Code, remains applicable, an appellant cannot come to this Court without his appeal having been admitted by the High Court.

11. Under Order 37, Rule 1 (which is based on Rule 83 of the Judicial Committee Rules) we undoubtedly have full power to excuse compliance with any of the rules of the Federal Court, but this power is with reference to the rules made by the Federal Court itself, as indicated by the expression "these rules." Such a power cannot extend to excusing compliance with the rules of the Code of Civil Procedure, in particular Order 45, which have been made applicable to Federal Court appeals, not only by our own Order 9, Rule 1., but also by the Adaptation of Indian Laws Order. No doubt, Under Order 37, Rule 1, the Federal Court may give such directions in matters of practice and procedure as it shall consider just and expedient: but it is extremely doubtful whether such "directions" can be in supersession of Order 45, Civil Procedure Code, in the absence of any rules amending it, so as to dispense with the necessity of the High Court directing the appeal to be admitted.

12. In the case before us, the Federal Court excused the appellants from complying with the requirements of Order 10, Rules 1, 2 and 3, Federal Court Rules, which would mean condoning the delay caused by them, exempting them from getting the record printed and removing the time limit for lodging the appeal. But Rules l, 2 and 3 of order 10 were intended to apply and do in fact apply to the stage after the appeal has been admitted, as is also apparent from the heading of that order. The effect of excusing the appellants from complying with these rules would not be to excuse them from complying with the rules of Order 45, Civil Procedure Code, which contemplate the admission of the appeal by the High Court before the record is transmitted to this Court, and the petition of appeal is lodged here. In my order dated 5th March 1940, I had said:

> There was no absolute necessity to make the whole of order 45, Civil Procedure Code, applicable to Federal Court appeals, even where the only ground taken wore a constitutional one.

13. I would now go further and say, with the utmost respect, that it was a mistake to make the whole of Order 45 applicable to a case where a certificate Under Section 205(1) of the Act has been granted. Order 45 has not been made applicable to appeals which lie independently of Section 109, for instance an appeal by special leave to the Priyy Council. In the same way it should not have been applied to a case where there is a statutory right of appeal Under Section 205 of the Act. Cases where an appeal would lie by virtue of Section 109, Civil Procedure Code, would be different, because that section itself confers such a right of appeal "subject to the provisions hereinafter contained", including order 45. In such cases the right of appeal can be exercised only in accordance with the procedure prescribed in that order. It is most unfortunate that appellants, who have a statutory right to come up to the Federal Court Under Section 205 of the Act, and quite independently of Section 109 of the Code, should be hampered by the rules laid down in Order 45, Civil P. C, which had been meant for different classes of appeals altogether.

14. Applicability of the new ActAs regards our applying the Bihar Money-Lenders Act (7 of

1939), Sir B.L. Mitter, the Advocate General of India, objects that we have no power to apply it at all. His contention is that the new Act affected the respondents' vested rights, obtained under the High Court's decree, and they should not be adversely affected. He has further urged that Section 7 applies only when the High Court is hearing an appeal or revision from an inferior Court. He sought to distinguish the Privy Council case in *K.C. Mukherjee v. Mt. Ram Ratan Kuer*[3] relied on in the judgments delivered in *Shyamakant Lal v. Rambhajan Singh*[4] His argument is that in the Privy Council case the new Act was retrospective, because, even as regards past transfers, it had provided that "every person claiming an interest as landlord . . . .shall be deemed to have given his consent, etc.". No doubt the Act had a retrospective action, but the absolute and irrebuttable presumption of consent would be drawn by Courts after the coming into force of the Act. Nevertheless, their Lordships took that Act into account, regarding the suit as still pending. In *Shyamakant Lal v. Rambhajan Singh ('39) 26 AIR 1939 PC 74* (Supra)I had pointed out in my judgment that it was a converse case where a new Act, passed during the pendency of the Privy Council appeal, had taken away the appellant's rights, which he was proposing to enforce. It was also pointed out that in England where appeals are by way of "re-hearing", an appellate Court grants relief according to the new law which has come into force in the meantime, even though the judgment of the inferior Court had been correct according to the law as it then stood:*Quilter v. Mapleson*[5] see also *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board*[6] where it was reaffirmed that an appeal to the Court of appeal is by way of rehearing, and the Court may make such order as the Judge of the first instance could have made if: the case had been heard by him at the date on which the appeal was heard.

15. It was in that view that I had preferred to base my judgment first on the ground that Section 16 of the old Bihar Money-Lenders Act, which had been impugned, was in fact not void, and that the High Court's view on that point was, in my opinion, not correct. Dr. Asthana, the Advocate-General off the United Provinces, on the other hand has urged that we are bound to apply Section 7 of the new Bihar Act, which has replaced the old Section 11. The decree of the High Court is not yet final, as an appeal is pending before us. The adjudication of the rights of the parties as made by the High Court is not yet final. If we allow the appeal on any of the other grounds, we would be bound to remit the case to the High Court, in which event the High Court would be bound to comply with the provisions of Section 7 of the new Bihar Act. When the case goes back, the proceedings before the High Court would still be in appeal from an inferior Court, even though the case has been remitted by the Federal Court. Although the provision "no Court shall... pass a decree, etc," does affect the powers of a Court and so would not be binding on the Federal Court, this Court does not in fact pass any decree. As we would have to declare the judgment which should be substituted for the previous judgment of the High Court, we shall have to take into account the provisions of Section 7 and declare what the new judgment of that High Court should be in accordance with the Bihar Act in force. If, however, we dismiss the appeal such a contingency would not arise.

16. Appeals to the Federal Court are governed by Sections 205 and 209, Government of India Act. As I said in *Shyamakant Lal v. Rambhajan Singh ('39) 26 AIR 1939 PC 74 on p. 204(Supra)*, we are not bound to apply the new Act; at the same time it is equally clear that we are not debarred from applying it. My Lord the Chief Justice and my brother held that the passing of the new Act had made it unnecessary to consider the validity of the old Act. Since then, this Court has consistently applied the new Bihar Act without going into the question whether the corresponding provisions of the old Act were void or not *Ramnandan Prasad v.*

Madhawanand Ramji Jagdish Jha v. Aman Khan[8]*Surendra Prasad v. Gajdhar Prasad* [9]*Jai Gobind Singh v. Lachmi Narain Ram*[10] *Birendra Prasad v. Surendra Prasad* [11]and *Subhanand v. Apurba Krishna* [12]In the last mentioned case the Advocate-General of India had appeared for the respondents. The present case is now the very last case of this kind in which such a question can arise. Unless a manifest error of law was made, it would not now be proper to depart from the practice so far adopted.

17. Interpretation of Section 7 of the Bihar Act It has been urged on behalf of the appellants that Under Section 7 of the new Bihar Act, the decree for interest should not exceed the amount of the loan advanced, and that the amount of the loan advanced should be taken to be that amount which has been found to have been for legal necessity. Reliance has been placed by the learned counsel for them on the case in *Birendra Prasad v. Surendra Prasad*[13] But in that case the mortgage deed had been executed by two persons, Birendra and Debindra, part of the mortgage money having gone into the pocket of Debindra alone. The plaintiffs released Debindra and his sons from all liability and sued to enforce the mortgage against the half share of Birendra and his sons. They had claimed only one-sixth share of the total amount, because the plaintiffs had inherited only two-sixth share in the mortgage deed, the rest having gone to the defendants. The integrity of the mortgage had been broken, and the plaintiffs had discharged one of the mortgagors, and splitting up the liability, were suing the other for his share only. It was not even known how much interest had already been realized from the exempted mortgagor Debindra. It was in these circumstances that the liability of the contesting defendants was considered separately, and it was remarked at p. 57:

> It could not have been the intention of the Legislature that if there are several executant who have borrowed various sums and the creditors sues one of them for his separate share only, having already realized the balance from the others, then the maximum prescribed for the amount of interest to be decreed against him is not to exceed the aggregate of the various sums borrowed by him as well as all the other pro forma defendants, who are not really being sued.

18. That ruling cannot apply to the present case, where the defendants, namely the mortgagor, his sons and grandsons, are sued as representing one family, and there is one debt for which the claim is brought. There is no question of distinct and separate interests of the various defendants. The amount had been advanced to the father alone but is effective for creating a charge against the whole family in respect of a part of the amount only. In such a case the words "the amount of the loan advanced" or ' the amount of the loan mentioned in such document" must obviously mean the whole amount which passed, as that was the loan. The fact that a part of it is not effective to create a charge on the family property is a different matter. Dr. Asthana has abandoned all the other grounds except the last one relating to ₹ 4805. He has argued that he is entitled to urge this ground Under Section 205(2) of the Act, and in the alternative has asked for leave to urge it. But again as I pointed out to him there is a difficulty in his way.

19. Necessity of a further certificate Section 205(1), Government of India Act, gives jurisdiction to this Court to hear appeals, if the High Court certifies that the case involves a constitutional question. No appeal lies at all, if no such certificate is given. Under Sub-section (2) where such certificate is given, any party may appeal to the Federal Court,

(i) on the ground that any such question has been wrongly decided, and

(ii) on any ground on which that party could have appealed without special leave to His Majesty in Council, if no such certificate had been given, and

(iii) with the leave of the Federal Court on any other ground.

20. In such an event no direct appeal lies to His Majesty in Council either with or without special leave. The word "ground" has been used at three places in Sub-section (2). According to the ordinary rule of interpretation, each ought to have, as far as possible, the same meaning at all the three places in the same sub-section. Now the word "ground" in the first category obviously means ground of objection or point in the appeal. The word "ground" in the third category also obviously has the same meaning, that is to say, ground of objection or point. It follows that ordinarily the interpretation of the word "ground" in the second category should be the same so as to mean a ground of objection. This would make the second category read as 'on any ground of objection on which that party could have appealed to His Majesty in Council'. In the Code of Civil Procedure, there is a clear distinction between a case in which there is a right of appeal and the grounds which can be taken when an appeal lies. Sections 109 to 111, Civil Procedure Code, deal with the cases in which appeals "lie" to His Majesty in Council, and not with the grounds which can be taken when an appeal has lain. On the other hand, Order45, Rule 3, Civil Procedure Code, refers to the "grounds" of appeal which must be stated in the petition for leave to appeal to His Majesty in Council. If the word "ground" in the second category were to mean ground of objection, then that would entitle an appellant, once an appeal has come to the Federal Court on account of the certificate on a constitutional question, to raise all grounds of objection which he could have raised in an ordinary appeal to His Majesty in Council. He would be entitled to urge these as of right without being hampered by the provisions of Order 45, Civil Procedure Code

21. On the other hand, it is probable that the intention of Parliament was to allow an appeal on a certificate as to the constitutional question, and then to allow an appeal on other points, only in those "cases" in which an appeal would lie to His Majesty in Council. If this was the intention of Parliament, then the word "ground" has been somewhat unhappily used and the words "on any ground on which" should be treated as being equivalent to "in any case in which". There is no doubt, however, that the Adaptation of Indian Laws Order (1937) has accepted this second interpretation of the word "ground" in the second category. Sections 109, 110 and 111, Civil Procedure Code (with Section 111A added) have been adapted and made expressly applicable to Federal Court appeals. Even Order 45, Civil Procedure Code, with a few modifications, has been made applicable to them. Rule 17, which has been added to Order 45, makes the provisions of the order, which are ordinarily applicable to the case of a certificate Under Section 110, Civil Procedure Code, apply even to the case where the only ground taken is a constitutional one.

22. Now an examination of Rules 1 to 14 of Order 45 of the Code shows that if an appellant also wishes to take some grounds other than the constitutional one, he must state the grounds of appeal and pray for the certificate either that as regards the amount or value and nature, the case fulfils the requirements of Section 110, or that it is otherwise a fit one for appeal to His Majesty in Council" (Order 45, Rule 3). The necessary result is that in such a case the certificate granted by the High Court Under Section 205(1) of the Act will not be sufficient, but the appellant must in addition obtain the further certificate required by Rule 3. It follows that if an appellant wishes

to take such other grounds in the appeal, he can raise them under the second category only if the value is ₹ 10,000 and upwards and, where there is an affirmance of the first Court's decision, the appeal involves some substantial question of law, or the High Court certifies that the case is otherwise a fit one for appeal to the Federal Court. The whole of the procedure prescribed in Order 45, Civil Procedure Code, including that for furnishing security for costs, would apply to the application praying for such a certificate, even though a certificate Under Section 205(1) of the Act has already been granted. In this view, it would not be proper to allow an appellant to evade these provisions by simply obtaining a certificate Under Section 205(1) of the Act, and then asking for leave to raise all the other grounds by bringing them within the third category. This last category refers to "other" grounds, which must mean other than those mentioned in the first and second categories. In view of the cumulative sense of the conjunction 'and' which has been used instead of 'or' in the alternative sense, the position of the respondent who files a cross-appeal direct, in the Federal Court is still more difficult. It is however not absolutely necessary to settle the interpretation of the word "ground" finally, because I agree with my brother that on the merits the defendants' plea must fail even if we hear it. I concur in the order proposed.

Yaradachariar, J.

23. The present case is one of a number which have lately come before this Court from Patna and in which questions have been raised under the Money-Lenders Acts passed in Bihar in 1938 and 1939. In a mortgagee's suit for recovery of money by sale of the mortgaged property, the principal defendants (defendants 1 to 6 raised contentions questioning the validity and binding character of the mortgages sued on and also sought to have the rate of interest reduced. The suit comprised claims on two mortgage bonds, one dated 12th December 1918, for ₹ 45,000, and the other dated 17th October 1919, for ₹ 15,000, which had been executed by defendant 1 for himself and as guardian of his sons, defendants 2 and 3, who were then minors. The amounts had been borrowed partly to discharge antecedent debts and partly to meet future expenses; and the bonds whereby the joint family property was given as security provided for payment of compound interest at 12 per cent. per annum with annual rests. Defendants 4 to 6 are the minor sons of defendant 2.

24. The trial Court found that the bonds were supported by consideration to the full extent stated; but as it held that portions of the debts had not been borrowed or used for purposes binding on the joint family, it passed a mortgage decree for ₹ 27,287-4-0 only on the first bond and ₹ 5000 on the second. The Court held that the stipulated interest was not "hard, unconscionable or penal", and accordingly awarded to the plaintiffs compound interest at 12 per cent. per annum with annual rests. There was an appeal and cross appeal to the High Court, which increased the principal amount recoverable under the first bond by ₹ 7305-11-6 and made a slight reduction in the sum due under the second bond. The claim for compound interest was disallowed, and simple interest only awarded at 12 per cent, per annum up to the date fixed for payment in the decree of the trial Court. The Court declined to award interest on a sum of ₹ 2000 out of the sum due under the first bond.

25. Among the contentions raised on behalf of the defendants before the High Court, there was one based on Section 11, Bihar Money-Lenders Act (3 of 1938) which had been enacted during

the pendency of the appeal. The High Court held that section to be void Under Section 107, Constitution Act, and granted a certificate Under Section 205(1) of the Act. Defendant 1 died during the pendency of the suit and the present appeal has been preferred by defendants 2 to 6. The plaintiffs filed some cross-objections, but withdrew them before the appeal came on for hearing. It only remains to add that soon after the decision of the High Court in the present case, the Bihar Legislature repealed the Money-Lenders Act of 1938 and substantially re-enacted it as Act No. 7 of 1939, taking certain precautions which were required to obviate the objections to the validity of the earlier Act.

26. In view of the earlier decisions of this Court in similar cases, counsel for the appellants rightly assumed that his clients would be held entitled to the benefit of Section 7 of the new Act of 1939, though it had been enacted only after the date of the decision of the High Court in this ease ; and, on that assumtion, he raised a contention as to the manner in which the maximum amount of interest for which his clients could be held liable should be fixed in the particular circumstances of the case. Counsel for the respondents recognized that the decisions of this Court entitled the appellants to claim the benefit of the Act of 1939, but he was permitted to re-argue the question as he suggested that certain relevant considerations had not been urged or dealt with on previous occasions. It, however, seems to me that the considerations now urged by him have in substance been taken into account in the earlier cases, though the language employed might not have stated them in the particular form in which he now put them.

27. The respondents' argument was founded on the theory that when hearing an appeal this Court was only concerned to see whether or not the judgment of the High Court was in conformity with the law as it stood at the time that that judgment was given; and it was contended that as the Act of 1939 had not been enacted at the time when the High Court decided the present case, this Court was not competent to give relief to the appellants in terms of Section 7 of the new Act. Counsel for the respondents laid stress upon the language of Section 7 of the Act of 1939, the words being "no Court shall . . . . pass a decree, etc.," though he recognized that the section has in terms been made applicable to appeals in suits brought before the commencement of the Act and that the decree in appeal yet remained to be passed in this Court; but he insisted that the pendency of the appeal in this Court was of no consequence and that the material date was the date of the High Court's decree; because an Act passed by the Bihar Legislature could not directly operate to take away the powers of this Court. This line of argument seems to rest on more than one erroneous assumption.

28. The question whether Section 7 of the Act of 1939 is or is not one of which even this Court is bound to take notice is not free from difficulty. Under the Constitution Act, a Provincial Legislature is precluded from dealing with the jurisdiction and powers of the Federal Court, but in deciding a question of this kind, one must look at the substance of the impugned provision and not merely at its form. If Section 7 of the Act of 1939 is to be regarded as a provision regulating the substantive rights of parties, by fixing the maximum amount of interest which a creditor is entitled to claim from his debtor up to the date of the institution of the suit, can it be described as one dealing with "the jurisdiction or powers" of the Court merely because it takes the form of a direction to the Court? The section might equally well have enacted that no money-lender shall be entitled to recover more than a certain sum by way of interest, and it would then be difficult to say that it was legislation which interfered with the jurisdiction or powers of this Court. Is the provision to be held to be valid or invalid according as it is couched in one form or in the other

when the substantial effect of both forms is the same?

29. It does not however seem to be necessary for the purpose of this case to express a final opinion on the question just discussed, because, even assuming that this Court is not directly bound by the provisions of the Bihar Act, the appellants will still be entitled to claim that this Court is bound to pronounce the judgment which the High Court would have pronounced, if it were hearing the appeal at this moment. There can be no doubt that if the High Court at Patna had now to deal with this case, it would have to govern itself by the provisions of Section 7 of the Act of 1939. Sir Brojendra Mitter argued that before the passing of the Act of 1939, the decree of the High Court in the present case had become final, and that the High Court would Under Section 209, Constitution Act, have to deal with the present case again only if this Court allowed the appeal, but that there was no justification for this Court allowing the appeal, unless it could say that the decision of the High Court was incorrect even according to the law as it stood at the time when the decision was given. I am unable to agree that that is the correct position.

30. Once the decree of the High Court had been appealed against, the matter became sub judice again and thereafter this Court had seisin of the whole ease, though for certain purposes, e.g., execution, the decree was regarded as final and the Courts below retained jurisdiction. In *Subhanand v. Apurba Krishna ('40) 27 AIR 1940 FC 7* (supra) this Court has held that the mere fact that the particular statute in respect of which the constitutional question was originally raised had been since repealed will not put an end to the appeal; and, except on the hypothesis that this Court is only a Court of error, its power to do justice between the parties cannot be restricted to cases in which it is able to hold that the lower Court has gone wrong in its law. The contention that the power of a Court of appeal is so limited was distinctly negatived in *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board* [14]and *Quilter v. Mapleson (1882) 9 QBD 672* which are referred to in the judgment in *Shyamakant Lal v. Rambhajan Singh ('39) 26 AIR 1939 PC 74(Supra)* As stated in *Shyamakant Lal v. Rambhajan Singh ('39) 26 AIR 1939 PC 74(supra)* there is no reason to suppose that the powers of this Court when acting as a Court of appeal are less extensive than those of the High Courts when hearing an appeal; and it has been a principle of legislation in British India at least from 1861 that a Court of appeal shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Civil Procedure Code on Courts of original jurisdiction: see Act No. 23 of 1861, Section 37; Act No. 10 of 1877, Section 582; Act No. 14 of 1882, Section 582; and Act No. 5 of 1908, Section 107(2). The very words of Order 58, Rule 5 of the Rules of the Supreme Court, on which Bowen L.J. laid stress in *Quilter v. Mapleson (1882) 9 QBD 672 at p. 678* (supra)and Lord Gorell in *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board (1912) 1912 A C 788(supra) at p. 801*, namely that the Court of appeal has power to make such further or other order as the case may require, have been reproduced in Order 41, Rule 33, Civil Procedure Code of 1908; and even before the enactment of that Code, the position was explained by Bhashyam Iyengar J., in *Kristnama Chariac v. Mangammal ('02) 26 Mad 91 at pp. 95, 96* in language which makes it clear that the hearing of an appeal is under the processual law of this country in the nature of a re-hearing. The Indian Codes have from 1859 conferred upon a Court of appeal the power given by Order 58, Rule 4, Supreme Court Rules to allow further evidence to be adduced; and though the English rule does not in terms impose the same limitations on this power as the Indian Codes do, these limitations are implied in the reference to "special grounds" in the English rule and have in effect been insisted on even in England as a matter of practice: see *Nash v. Rochford*[15] In view of these provisions, it seems to me to make no difference that it is not

explicitly stated in the Indian statutes (as in Order 58, Supreme Court Rules that an appeal is by way of re-hearing. It is also on the theory of, an appeal being in the nature of a re-hearing that the Courts in this country have in numerous cases recognized that in moulding the relief to be granted in a ease on appeal, the Court of appeal is entitled to take into account, even facts and events which have come into existence after the decree appealed against. I may also refer to *Kanaiayya v. Janardhana Padhi* [16]where the law on the point is fully discussed.

31. The practice of the Judicial Committee in this respect does not appear to have been uniform. In *Ponnamma v. Arumogam (1905) 1905 A C 383* Lord Davey, delivering the judgment of the Board, observed that:

> Their Lordships have only to say whether that judgment (the judgment of the Supreme Court of Ceylon) was right when it was given.

32. After referring to *Quilter v. Mapleson (1882) 9 QBD 672(supra)* his Lordship added at p. 390:

> Without limiting the extent of His Majesty's prerogative their Lordships can safely say that it is not the practice of this Board to entertain any other appeal than one strictly so called, in which the question is whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it.

33. In the recent case of *Mukherjee v. Ram Ratan* it would appear from the report of the arguments in *K.C. Mukherjee v. Mt. Ram Ratan Kuer ('36) 23 AIR 1936 PC 49(supra)* that *Quilter v. Mapleson (1882) 9 QBD 672(Supra)* was referred to, and it was observed by Lord Thankerton in the course of the argument that the duty of a Court is to administer the law of the land at the date when the Court is administering it. This adds significance to the fact that their Lordships in that case did not deal with the judgment of the Patna High Court on its merits, but dismissed the appeal on the strength of a provision contained in an enactment which was passed only during the pendency of the appeal before His Majesty in Council. In these circumstances I am of opinion that we should follow the law as laid down in the latter case.

34. If this Court is entitled to act as a Court of appeal in the sense above explained, Sir Brojendra Mitter did not, in view of the decisions in *Quilter v. Mapleson (1882) 9 QBD 672(Supra)* and *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board (1912) 1912 A C 788(Supra)* contend that the appellants were not entitled to claim the benefit of Section 7 of the Act of 1939. It is therefore unnecessary to consider the contention which he raised as to the precise character in which the High Court acts when it passes a decree in terms of a declaration made by this Court Under Section 209, Constitution Act.

35. Counsel for the appellants argued that in determining the extent of their liability for interest Under Section 7 of the Act, the maximum payable up to the date of the institution of the suit must be held to be only the sums of ₹ 34,492-11-6 and ₹ 4949-8-0, that is, the sums which have been held to be the debts binding on the joint family out of the sums borrowed under the mortgage bonds. This contention is in my opinion untenable. Section 7 of the Act mentions three limits: (1) the amount of loan advanced (2) the amount of loan mentioned in the document and (3) the amount of loan evidenced by such document. It is not necessary for the purpose of this

case to consider what is to happen when the amounts calculated on these several cases differ; for it has been found in this case that in respect of both the bonds, the full amounts specified therein, viz., ₹ 45,000 and ₹ 15,000, had in fact been advanced or were otherwise due. It is again unnecessary to consider the situation which might arise if it should be found that part of a loan had been advanced for "illegal" or "immoral" purposes in the sense in which those expressions are used in the general law of contracts. The finding in the present case that out of the sums due under the bonds only ₹ 34,492-11-6 and ₹ 4949-8-0 respectively were binding on the joint family does not imply that as between the lender and the borrower there was not a valid contract of loan under which the whole amount could have been recovered from the borrower by having recourse to his separate properties, and, if only effective steps had been taken during his lifetime, even from his share in the joint family property. The appellants are no doubt entitled to rely on the rules of the Hindu law and to limit their liability to the binding portion of the debt; but on that portion interest will be calculated in accordance with the terms of the contract, except where the Court finds reason to reduce the contract rate. If and so far as the appellants claim the benefit of Section 7 of the Act of 1939, the limitation on the amount of interest can only be imposed in terms of the section and not by reading into it any rule derived from the personal law of the parties.

36. Dr. Asthana suggested that his contention received some support from the decision of this Court in *Birendra Prasad v. Surendra Prasad*[16] but the facts of that case were quite different. Though, the mortgage bond executed by defendants 1 and 4 in that case purported to be for a sum of ₹ 1,00,000, it was found that consideration must have passed to the two brothers jointly only to the extent of Rupees 75,000, the balance of ₹ 25,000 having gone, if at all, to the exclusive benefit of defendant 4. The plaintiffs settled their claim against defendant 4 and sued defendant 1 and his sons for recovery of a sixth share of the debt which they alleged was due from them. There was in the judgments of the Courts below some reference to family benefit, but that was apparently in connexion with a plea of defendant 1 that he had been duped into joining in the execution of the mortgage bond without receiving "any benefit there under. The question of "family benefit" under the Hindu law rules relating to joint family transactions did not arise in the case, since defendant 1 was a party to the document, and it was found that his sons had not been born at the date of the suit transaction. On these findings, this Court held that as the plaintiffs had themselves split up the liability of the parties, the case must be dealt with as one in which the loan duo to the plaintiffs from defendant 1 and his sons was only ₹ 12,500, i. e., one-sixth of ₹ 79,000. The decision did not purport to deal with a ease where out of the amount found to have been advanced to the particular debtor only a smaller sum was held to have been required for family necessity, so as to make that sum alone recoverable from out of the joint family property of the borrower and his sons.

37. Out of the items of principal allowed by the High Court in plaintiffs' favour, on their memorandum of objections, exception was taken by the appellants here to the allowance of the sum of ₹ 4805-11-6, a portion of the consideration of the first mortgage bond. They alleged that that sum was utilized for the satisfaction of an earlier mortgage for ₹ 6000, and that a portion of the consideration of this earlier bond was in its turn utilized for the satisfaction of a debt due to

the plaintiffs under three hand-notes executed by defendant 1. The trial Court had disallowed this item on the ground that the moneys borrowed had been taken by defendant 1 for the purposes of an unnecessary and improper litigation, and that the debt was to that extent an "avyavaharika" debt for which the family property could not be held liable. The High Court reversed this finding, on the ground that the onus was on the defendants to prove how much of the moneys borrowed under these documents had been used for that litigation and that they had adduced no satisfactory reasons. Dr. Asthana contended that in coming to this conclusion the High Court had overlooked an admission made by plaintiff 3 in the witness box to the following effect:

> It has been correctly put down in the bond for ₹ 6000 that the three hand-notes mentioned in it were for the expenses of the case.

38. This general statement carries the case no further than the recitals in the bond for ₹ 6000, because the witness only affirmed the correctness of those recitals, and as pointed out in the judgment of the High Court, the bond recites not only the expenses of the litigation, but also payment of Government revenue and other family expenses as purposes for which moneys were borrowed under the three hand-notes. These debts must be treated as "antecedent debts" at the date of the mortgage for ₹ 6000, and a fortiori so on the date of the mortgage for ₹ 45,000, and a mortgage of the family property to secure their repayment was prima facie valid. If the sons and grandsons desired to escape liability for these debts, the onus lay upon them to prove that they were "avyavaharika" debts.

39. On the conclusions above stated, no interference with the decree of the High Court will be necessary so far as the claim under the second mortgage bond is concerned, because the interest calculated in accordance with the decree of the High Court on the sum of ₹ 4949-8-0 for which alone the appellants have been held liable under this bond will not at the date of the institution of the suit exceed ₹ 15,000, the amount mentioned in the bond. As regards the first mortgage bond, the amount recoverable by the plaintiffs must be calculated on the footing that only a sum of ₹ 45,000 was due for interest on 16th April 1932, the date of the plaint. The appeal is to this extent allowed and the case will be remitted to the High Court with a direction to pass a revised decree on the above basis.

40. It remains to advert to two points of pro-cessual law arising out of certain defects in the steps taken by the appellants to bring the appeal before this Court. The first relates to the need for a separate certificate Under Order 45, Rule 3, Civil P. C., before a party can raise before this Court any question besides the one covered by the certificate Under Section 205(1), Constitution Act. As the appellant have failed on the merits in respect of the question of fact sought to be raised by them, it is unnecessary to express any opinion in this case on this point of processual law. The other question relates to the effect of the absence of an order by the High Court (Under Order 45, Rule 8, Civil Procedure Code) declaring the appeal admitted. My learned brother has discussed this point at some length; but as no arguments bearing on this question were advanced at the Bar, I shall content myself with a few observations.

41. Though the scheme of Order 45 implies that, till the High Court makes the order Under Rule

8, it still retains a measure of control over the proceedings, it does not appear to me that such an order is a condition precedent to the exercise of jurisdiction by this Court. The collocation of para (a) of Rule 8 of Order 45 with paras (b), (c) and (d), which relate to notice to the respondents, transmission of the records and the delivery of a copy of the records to the respondents, is not without significance ; and it certainly cannot be said that the steps contemplated by paras, (b), (c) and (d) of the rule are so vital as to affect the jurisdiction of this Court. In the present case, the High Court has, since the order of this Court on 5th March 1939 enabled the appellants to have the records printed at Patna and have transmitted them to this Court; and presumably copies have been given to the other side in due course. The requirements of paras, (c) and (d) of Rule 8 have thus been complied with, and there seems to be no obstacle in the way of this Court in disposing of the appeal in due course.

42. It may be a difficult question on the rules as they stand what the position would be if security for costs was not given by the appellants in a case where such security is necessary under the rules. It is certainly doubtful if this Court has power to dispense with the giving of security in such a case. But the rules as to payment of printing deposit, transmission charges, etc., stand on a different footing, and if this Court has, as it has already held, power to dispense with or give special directions as to printing and production of the records before this Court, it-would be illogical to insist that the High Court must pass an order under para, (a) of Rule 8 of Order 45 which can be passed only on com. pliance with the directions originally given by the High Court, which ex hypothesi have become inoperative because of this Court's directions in the matter. This Court was careful only to excuse the appellants from the operation of the rule of this Court which fixes 60 days from the date of the admission of the appeal by the High Court as the period during which the appellants should lodge their petition of appeal in this Court and gave them liberty to furnish copies of the record to this Court on their own responsibility. The Court then observed that these particular provisions in Order 45 were only procedural provisions and that it was not necessary to hold that non-compliance with them in the High Court ousted the jurisdiction of this Court when a certificate Under Section 205(1), Constitution Act, had once been given. I see no reason now to think otherwise and I am of opinion that as between the parties to these proceedings, the view already expressed by the Court is binding. As the appellants have only partly succeeded in their appeal with regard to the interest and have failed in their appeal with regard to the principal, there need be no-order as to costs in this Courts.

Cases Referred.

1(1934) 294 U S 600 at p. 607
(1940) 309 US 551 at p. 555
3('36) 23 AIR 1936 PC 49
4('39) 26 AIR 1939 PC 74
5(1882) 9 QBD 672
6(1912) 1912 A C 788
7('40) 27 AIR 1940 FC 1 at p. 6
8,('40) 27 AIR 1940 PC 3 at p. 8
9('40) 24 AIR 1940 FC 10
10('40) 27 AIR 1940 PG 20
11('40) 27 AIR 1940 FC 19
12('40) 27 AIR 1940 FC 7
13('40) 27 AIR 1940 FC 19
14(1912) 1912 A C 788
15(1917) 1 KB 384

16('10) 36 Mad 439 at pp. 441 444
17('40) 27 AIR 1940 FC 19