
(1947) 06 CAL CK 0014
In the Calcutta High Court

Nanilal Roy and Others

APPELLANT

Vs

Raja Gopal Lal Roy and Others

RESPONDENT

Date of Decision : 24-06-1947

Acts Referred:

Bengal Money Lenders Act, 1940 — Section 36

Citation : AIR 1948 Cal 154

Judgement

1. The defendant, Raja Gopal Lal Roy (hereafter called the borrower) borrowed from Nandalal Roy and Pulin Krishna Roy (they or the legal representatives are hereafter called the lenders) certain sums of money on three promissory notes dated (a) 25-9-1927, (b) 24-1-1928 and (c) 12-2-1928. On 4-10-1930 he executed three promissory notes: (d) one for Rs. 30,760 in favour of Nandalal and Pulin Krishna Roy: (e) another for Rs. 5500 in favour of Nandalal Roy and (f) the third also for Rs. 5500 in favour of Pulin Krishna Roy. Interest at the rate of 12 per cent, per annum was payable on all these three promissory notes. It is admitted by the lenders that no cash payment was made in respect of the promissory note (d). The principal, Rs. 30,760 mentioned in that promissory note represented the principal and interest due up to 3-8-1930 on the three earlier promissory notes (a), (b) and (c), but the other two promissory notes (e) and (f) represented cash transactions. The borrower executed two other promissory notes in favour of the heirs of Nandalal Roy, who had died on 5-8-1930, and Pulin Krishna, namely: (g) one on 6-9-1930 for Rs. 6250 and (h) another on 15-10-1930 for Rs. 12,200. These promissory notes also provided for interest at 12 per cent, per annum. They also represented cash transactions. On 15-10-1930 he deposited the title deeds of his zemindary, Pergunah Manthana with the lenders as security for the moneys due on the promissory notes (d) to (h). He was not the sole owner of that zemindary, for being a person governed by the Mitakshara School of Hindu Law and that being his ancestral property his two sons Kumar Bhairab Lal Roy and Girindra Lal Roy (since deceased) were joint owners with him. He executed three more promissory notes in favour of lenders stipulating to pay interest at the rate of 12 per cent, per annum. They are: (i)

one for Rs. 4800 executed on 28-10-1930, (j) another for Rs. 6200 executed on 3-11-1930 and (k) the third for Rs. 3250 executed on 12-11-1930. They also represented cash transactions. But whether the whole of the sums mentioned as principal in the promissory notes (e) to (k) had been actually advanced to him or portions had been kept back by the lenders or paid back by the borrower as capitalist's commission, and if so, what is the effect, are points in controversy before us.

2. On 15-11-1930, he executed a mortgage in favour of the lenders for the sum of Rs. 1,00,000 hypothecating the aforesaid zemindary and a piece of vacant land, 48 square feet in area, situate in Calcutta, which he had purchased on that very day. He purported to mortgage the properties as Karta of a joint Mitakshara family consisting of himself and his two minor sons. He stipulated to pay interest on the said sum of Rs. 1,00,000 at the rate of 9 1/2 per cent, per annum with half yearly rests. The mortgage instrument recited the loans on the aforesaid promissory notes (a) to (k) and the borrower made the statement that they had been taken either for payment of antecedent debts or for legal necessity. The instrument further recited that the lenders had demanded payment from him of the sums due on the promissory notes marked (d), (e) and (f) above and that he had agreed to borrow from the lenders Rs. 66,979-10-6 for repaying the loans due on these promissory notes and other creditors of his. According to the mortgage instrument the principal of Rs. 1,00,000 to secure which the mortgage was executed, was made up of the said sum of Rs. 66,979-10-6 which the lenders are said to have advanced to the borrower to enable him to repay the loans due on the aforesaid three promissory notes and loans due to other creditors of his and the balance of Rs. 33,020-5-6 represented Rs. 320-5-6, being the interest due up to the date of the mortgage instrument on the five promissory notes marked (g) to (k), and the amount of the principal of the promissory notes marked (g) to (k). Thus only a portion out of the sum of Rs. 66,979-10-6 was actually paid in cash to the borrower. The mortgage was thus taken to secure the loans already due to the lenders on promissory notes and to secure a further loan of a comparatively small amount advanced to the borrower in cash on the date of the mortgage to enable him to pay his other creditors. The lenders instituted the suit on this mortgage on 20-3-1933 making the borrower and his two minor sons parties defendants. On 22-6-1933 they had a receiver appointed in respect of the zemindary mortgaged. The preliminary and the final mortgage-decrees were passed on 8-1-1934 and 4-6-1935 respectively. Thereafter on 16-7-1936 the borrower and his sons were declared wards of Court and the Court of Wards took possession from the receiver on 5-3-1937 on the basis of a consent order made by this Court on 14-12-1936. It is admitted that the Court of Wards had paid the lenders the sum of Rs. 78,999-5-4 up to 19-12-1940 from the time it took possession. On 4-7-1941 the Manager of the Court of Wards representing the borrower and his minor son Bhairab Lal Roy, Girindralal having died in the meantime, made this application u/s 36, Bengal Money-lenders Act (10 [x] of 1940, hereafter called the Act), which had come

into force on 1-9-1940. This application is in essence an application in the mortgage suit made u/s 36, Sub-section (6), Clause (a)(ii) of the Act. There is no question that the applicants are entitled to relief under the Act, even if it required re-opening of the transactions represented by promissory notes, if they are otherwise entitled as the Act is not ultra vires the Bengal Legislature: Prafulla Kumar Mukherjee v. Bank of Commerce, Ltd. 34 AIR 1947 P.C. 60 and Bank of Commerce, Khulna Ltd. v. Amulya Krishna 34 AIR 1947 P.C. 66.

3. In Janaki Nath Roy v. Arun Chandra Sinha O.S. Suit No. 1214 of 1934 decided on 11th June last, we have held that the phrase "date of the suit" occurring in proviso (i) to Section 36, Sub-section (1) of the Act, means the date when the lender filed his suit to recover the loan, where the borrower seeks relief by an application made u/s 36, Sub-section (6), Clause (a)(ii) Prima facie, therefore, all the transactions beginning from the promissory note (a) are liable to be reopened. But the applicants do not claim to reopen the transactions, which are barred twelve years of his application, that is to say, the promissory notes (a), (b) and (c). The lenders are entitled to get interest at the rate mentioned in Section 30, Sub-section (1), Clause (c) of the Act on the principal of the loan and that they are only entitled to get a decree for a sum of money which, together with any amount already paid to them, does not exceed twice the principal of the loans. As interest up to this date would exceed the principal of the loans even if calculated at the rate mentioned in Section 30 (1)(c), the only relevant question before us is what sums are to be taken to be the principal of the loans, and that, would depend upon two questions (a) whether all or any of the transactions represented by the promissory notes (d) to (k) and the mortgage of 15th November 1930 can in law be reopened, and (b) what were the sums actually advanced by the lenders to the borrower?whether amounts mentioned in those documents as principal or something else.

4. It has been held in a number of decisions of this Court that if a transaction cannot be reopened, the sum treated as principal in that transaction must be treated as the "principal of the loan", even if only a part thereof represented actual advance by the lender to the borrower and the rest represented capitalised interest on previous loans, but where the transaction can be reopened otherwise, the principal would be what was actually advanced. There is no dispute between the parties on the question as to whether the transaction represented by the mortgage of 15th November 1930 can be reopened, nor can there be any doubt on that question It can be reopened and has to be reopened for giving relief to the borrower. The sum of Rs. 1,00,000 treated as principal in the mortgage instrument is made up of, (1) the principal of the five promissory notes (g) to (k), that is to say those executed on 6th september 1930 and four subsequent dates; (ii) the sum of Rs. 320-5-6 which represented the interest then due on the aforesaid five promissory notes, (g) to (k); (iii) the amount which was necessary to discharge the three promissory notes (d), (e) and (f), that is to say, those executed on 4th August 1930 for the sums of Rs. 30 760, Rs. 5,500 and Rs. 5,500. Admittedly this amount included the arrears of interest

then due on these three promissory notes; and (iv) what was actually advanced in cash to the borrower on that date to enable him to pay his other creditors. Rs. 320-5-6 cannot be treated as principal for the purpose of Section 30 (1)(a) of the Act, for it was not actual advance. The only question raised on this document is whether the amount falling within item No. (iii) can be treated as principal of the loan. The learned counsel for the lenders contends that that sum is to be taken as principal. To support his contention, he relied upon the statement in the mortgage instrument to the effect that this sum was taken by the borrower on the date of the mortgage instrument as a loan from the lenders to repay his previous debts and submits that the fact that those debts were due to the lenders themselves on previous transactions does not make any difference. The money so taken must be treated as an actual advance within the meaning of Section 2 (16) of the Act. For this purpose, he relies upon the observations of Greer L.J. in *B.S. Lyle, Ltd. v. Chappell* (1932) 1 K.B. 691 at pp. 704 and 705; of Lord Fairfield in *AIR 1940 60 (Privy Council)* and of Varadachariar J. in *Juggannath Roy and Another Vs. Madan Mohan Burman and Another*, . Before we take up this question of law, we think it desirable to review the evidence relating to this transaction and to record our findings thereon.

5. None of the parties have adduced any oral or documentary evidence. The matter rests on affidavits.

6. Paragraphs 4 and 10 of the affidavit of Beni Madhav Roy affirmed on 14th July 1941 and filed on behalf of the lenders and paras 5 and 7 of the affidavit of Jyotirmdra Nath Roy affirmed on 16th July 1941 and filed on behalf of the borrower are relevant to this question. At the end of para. 5, Jyotirindra Nath Roy stated categorically that the promissory note for Rs. 30,760 dated 4th August 1930 and the two promissory notes for Rs. 5,500 each of the selfsame date were not returned to Raja Gopal Lal Roy. This fact has not been denied by the lenders. We believe the statements made by Jyotirindra Nath Roy in preference to those made by Beni Madhav Roy. The object of the mortgage was to secure all those loans and the recital of payment of those loans with the money said to have been advanced by the lenders on the date of the mortgage is a colourable one.

7. But even if the matter has to be decided on the assumption that the said recitals were true, we cannot accept the contention of the lenders. Section 36 (1) (a) and (b) read with proviso (i) empowers the Court to reopen transactions, agreements and adjustments, and to take accounts over again in terms of the Act if those transactions, etc. are within 12 years of the date of the suit, even when the transactions and agreements purport to close previous dealings between the parties and to create new obligations, and the very object of the Act would be defeated unless the substance and not the form be taken into account. For if the form is held to be the determining factor in the matter of the exercise of the powers conferred on the Court by Section 36 (1) which are intended for the relief of borrowers, it would be giving ample scope to the lender to evade

those beneficial provisions of the statute by having suitably framed recitals.

8. The cases cited on behalf of the lenders are not helpful, for the questions at issue in those cases were entirely different. Those cases had nothing to do with the question of reopening of transactions, agreements and adjustments.

9. In *B.S. Lyle, Ltd. v. Chappell* (1932) 1 K.B. 691 the question was whether a memorandum of a new agreement between the lender and the borrower dated 27th October 1930 was a good memorandum in view of the provisions of Section 6 Money-lenders Act 1927 (17 and 18 Geo. V. ch. 21). The borrower had borrowed ₹150 from the lender at a very exorbitant rate of interest on a promissory note dated 25th April 1930 and the memorandum in question recited that the borrower had agreed, to borrow ₹200 from the lender for repaying the previous loan and had authorised the lender to allocate the whole of the said sum of ₹200 in settlement of the promissory note dated 25th April 1930. A promissory note for ₹300 (₹200 being principal and ₹100 as interest calculated up to the agreed date for repayment in full at the rate of 85.2 per cent, per annum) was executed by the borrower on the same date. The lender gave a cheque of ₹200 to the borrower which the latter endorsed back to the lender with the authority to allocate it to his dues on the promissory note of 15th April 1930. The relevant portions of Section 6 which came up for consideration are in the following terms:

(1) No contract for the repayment by a borrower of money lent to him... after the commencement of this Act... and no security given by the borrower... in respect of any such contract shall be enforceable unless a note or memorandum in writing of the contract be made and signed personally by the borrower... and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be.

(2) The note or memorandum as aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan expressed in terms of a rate per cent per annum... etc.

We have underlined (here italicized) the portions which came up for consideration in that case.

10. The lender brought a suit on the promissory note dated 22nd October 1930 and *Swift J.*, dismissed the suit on the ground that there was no sufficient memoranda within the meaning of Section 6, The only question before the Court of Appeal was whether the memorandum of agreement of 22nd October 1930 had complied with the provisions of Section 6. The Court of Appeal reversed *Swift J.*, and held that the memorandum was in order. *Scrutton L.J.* held that the phrase "before the money was lent" occurring in Sub-section (1) cannot be taken to refer to the original loan, the money lent on 25th April 1930, observing thus:

As to the first point, I find it difficult to believe that Parliament intended to render renewals of loans or of securities for them on altered times impossible by requiring that a memorandum of the alteration should be signed before the original loan was made. In my opinion where the time for payment of the original loan has expired without complete payment and the time for payment is extended or altered, there is a fresh loan, and it is sufficient if the memorandum of the altered terms precedes the commencement of the extended period. The draftsmanship of Section 6 might be better, but I cannot think that Parliament intended to render renewals impossible.

After reviewing cases decided on bills of sale he held that the memorandum of agreement had satisfied Sub-section (2) of Section 6, "for an agreement to borrow is a description which properly includes an agreement to borrow on fresh terms in order to payoff an old loan." He accordingly repelled the contention of the borrower that Sub-section (2) had not been complied with because the memorandum had not set out the details of the loan of 25-4 1930. According to him the loan mentioned in that sub-section did not mean the original loan but the loan evidenced by the promissory note of 22-10-1930: Greer L.J. also referred to some of the decisions given in cases on bills of sale and remarked that the question in those cases (namely, whether a statement in a bill of sale that the money was paid is a true statement or not, when the bill of sale holder retained a portion of the money professed to be advanced to the grantor of the bill of sale for payment to him of a sum due from the grantor) was entirely different from the question as to whether a memorandum of contract was a sufficient memorandum within the meaning of Section 6, Money-lenders Act, 1927 and stated that he was referring to them only for the general rule laid down in those cases that.

where a transaction resolves itself into paying money by A to B and then handing it back by B to A. if the parties meet together and agree to set off one demand against the other, they need go through the form and ceremony of handing the money backwards and forwards.

He quoted this passage for repelling the contention of the borrower a case which found favour with Swift J. that the handing over the cheque for ₹200 to him, by the lender, and having it endorsed back to him was intended by the lender to deceive the Court. He further held that the document of 22-10-1930 signed by the defendant was a sufficient memorandum of a contract within the meaning of Section 6, dissenting from the view expressed by Charles J to the effect that unless the money was actually handed over by the lender to the borrower it could not be said that any note or memorandum was signed before the money was lent. He thought that money is lent within the meaning of Section 6 of that Statute (17 and 18 Geo V, ch. 21) if it is applied by the lender to the purpose of the borrower in any way which the borrower authorises. The Court of Appeal having found that the memorandum was not hit by Section 6 remanded the case to the trial Judge in order that the other matters raised in defence might be

investigated. One of such matters raised in defence was whether the transaction was harsh and unconscionable within the meaning of Section 1, Money-lenders Act of 1900.

11. We have indicated the purpose for which Greer L.J. had made the observations on which the counsel for the lenders relies, and that the question in that case was entirely different from the question before us. Section 6 of the Statute 17 and 18 Geo. V, ch. 21, is not *pari materia* with Section 36, Sub-section (1) cls. (a)(b), Bengal Money-lenders Act. In these circumstances we hold that the decision in *B.S. Lyle, Ltd. v. Chappell* (1932) 1 K.B. 691 is not helpful for the decision of the question before us. In AIR 1940 60 (Privy Council) the Usurious Loans Statute of the Federal Malay States came up for consideration. That Statute provided that where the Court had reason to believe that, (a) the interest was excessive and the transaction was substantially unfair the Court may reopen transactions and take an account between the parties and relieve the borrower of all liability in respect of excessive interest, and notwithstanding any agreement purporting to close previous dealings and to create a new obligation, reopen any account already taken between them and relieve the debtor of all liability in respect of any excessive interest. The powers are similar to the powers given to the Court u/s 36, Sub-section (1), cls. (a) to (c), Bengal Money-lenders Act. The difference between that Statute and the Bengal Act, is that whereas the latter has fixed a statutory rate of interest, the former had not, and left it to the Court to decide what in a particular case is to be regarded as reasonable rate of interest to allow to the lender. This material difference must in our judgment be kept in view in considering the applicability of the observations made in that case to the point at issue in the case before us which we are now considering. In that case interest charged in all the transactions of loan was 24 per cent, and such interest charged at that rate was on each transaction capitalised and made payable by monthly instalments. The trial Judge held that the interest so charged was not in the circumstances of the case excessive and the transactions were not unfair between the parties. The Court of Appeal of the State of Johore reversed the decision of the trial Judge, holding that the interest charged was excessive and usurious. It reopened all the transactions and accounts as from 18-6-1927, and decreed that the lender was to recover what had been actually advanced with simple interest at the rate of 15 per cent, per annum. That part of the decree which had directed the transactions and accounts to be reopened and which had directed fresh accounts to be taken on the basis of the actual advances was affirmed by the Judicial Committee: Lord Fairfield (who formerly was Greer L.J.) delivering the judgment. At p. 72 of the Madras Law Journal Report the observations made by Greer L.J. in his judgment in *B.S. Lyle, Ltd. v. Chappell* (1932) 1 K.B. 691 to the effect that.

it ought not to make any difference to the validity of a transaction by way of a renewal of a loan whether the parties go through the form of payment by the borrower of the whole amount due and a re-lending of the same amount by the money-lender, or the transaction is carried out without any such payment by

treating the amount of principal and interest still due as a debt acknowledged by the borrower together with an undertaking by the borrower to pay the amount of the agreed debt

were quoted with approval. But this approval had nothing to do with the question of reopening of transactions and accounts between the parties, for the Judicial Committee of the Privy Council maintained the decree of the Court of appeal of the State of Johore in this respect but not on this ground. That passage in Greer L.J.'s judgment was quoted for the purpose of modifying the decree of the Court of appeal on the question of compound interest. The rate of 15 per cent, directed to be paid by the Court of appeal of Johore was maintained but simple interest was changed to compound interest. The Usurious Loans Statute of Johore did not stand in the way of awarding any reasonable interest, no rate being fixed as in the Bengal Act, and the award of compound interest by itself cannot be unreasonable, for ultimately it rests upon the default of the borrower in not paying interest as and when it fell due. In *Jadu Nath Vs. Jagat Prasanna*, which was a case relating to reopening of transactions, AIR 1940 60 (Privy Council) was distinguished in a similar manner. That case is also not helpful. In *Jaigobind Singh v. Lachmi Narain Ram* 27 AIR 1940 P.C. 20 three questions were raised before the Federal Court, namely: (1) Whether Section 7, Bihar Moneylenders (Regulation of Transactions) Act of 1939 was ultra vires; (2) Whether the Court could allow pendente lite interest in a suit to enforce a mortgage at a rate different from the contract rate; and (3) Whether the Court was bound to reopen transactions and accounts or had a discretion in the matter.

12. Sulaiman J. held that Section 7 was not wholly ultra vires, and could be applied in the suit before them as the loan which was sought to be enforced was not a loan on a promissory note but on a mortgage. On the second point he held that pendente lite interest in a mortgage suit can be awarded at a lesser rate than that provided for in the contract and on the third point he held that on the language of the Statute the Court was not bound but only had a discretion in the matter of reopening transactions and accounts. On all these points the Chief Justice and Varadachariar J agreed. But Varada chariar J. made some observations in respect of one of the two mortgage bonds (ex. v) sought to be enforced in the suit. The amount of Rs. 2500 was stated in the mortgage instrument to be the principal. That amount was made up of a sum of Rs. 1500 which the mortgagee actually advanced to the mortgagor at the time of this mortgage and the balance was retained by him and was treated as payment of some antecedent debts which the mortgagor owed to him. The advocate for the mortgagor contended that the accounts in respect of those antecedent debts were to be reopened and the interest had to be limited in terms of Section 7 on the basis of the principal due on those antecedent debts. Varada chariar J. overruled that contention by holding that when the loan was on a document under the very terms of Section 7 interest was claimable by the lender for the period preceding the institution of the suit up to the amount of loan mentioned " in the document," and the "loan document" must be taken to be Ex. V (the

mortgage instrument) and not the earlier documents referred to in it, because the definition of "loan" as given in Section 2 (f) of the Act included a "transaction of a bond executed in respect of past liability." This was his decision on the point so raised, but he went on to observe how exactly the definition of a loan as given in the Act and the provisions of Section 7 are to be applied to ordinary cases of renewal was a matter which required no decision in the case before them, for the retention of Rs. 1000 by the lender for repayment of his dues on antecedent debts could be treated as a loan by itself though cash did not actually pass and in support quoted *B.S. Lyle, Ltd. v. Chappell* (1932) 1 K.B. 691 and AIR 1940 60 (Privy Council) ?cases which we have already discussed and distinguished. He used the observations made in those two cases for determining what is to be considered to be "the loan document" for the purpose of giving effect to the last part of Section 7 of the Bihar Act. This part of the judgment is on a statutory provision (Section 7 of the Bihar Act), which is not *pari materia* with the provisions of Section 36, Sub-section (1) of the Bengal Act: We accordingly hold that the transaction represented by the mortgage of 15-11-1930, can be wholly reopened. On the basis of this reopening the principal of the loan must be taken to be only what was actually advanced in cash to the borrower on that date, and subject to what follows, only the principals of the promissory notes (e) to (k), that is of the two promissory notes each for the sum of Rs. 5500 executed on 4-8-1930, of the promissory notes for Rs. 6250 executed on 6-9-1930, for Rs. 12,200 executed on 15-10-1930, for Rs. 4800 executed on 28-10-1980, for Rs. 6200 executed on 3-11-1930 and for Rs. 8250 executed on 12-11-1930, but not the sum of Rs. 80,760 mentioned in the promissory note dated 4-8-1930, for that sum of money cannot be taken to be a part of the principal of the mortgage, for the transaction represented by that promissory note has also to be reopened. That sum admittedly, represents the principal, as recited in the promissory notes (a) to (c), namely, these executed on 25-9-1927, and on 24th January and 12-2-1928 plus arrears of interest due on those loans up to 3-8-1930. Only the principal of those three promissory notes can be treated as principal for the purpose of the computation to be made u/s 30, Sub-section (1), Clause (a) of the Act. We have already said that the transactions represented by the promissory notes (a) to (c) are not to be reopened, and, therefore, what are stated to be the principals in those promissory notes have to be taken as principals.

13. The next question is whether, the principal of the loan is to be taken to be the sum total of the principals mentioned in the promissory notes (a) to (c) and (e) to (k), or less by the amounts which may have been held back by the lenders or paid to them by the borrower on account of capitalist's commissions. The learned counsel appearing for the lenders contends that we cannot disallow capitalist's commission as Section 33 of the Act has no retrospective operation. To support his contention he relies upon the decision of our brother Sen J., in *Juggannath Roy and Another Vs. Madan Mohan Burman and Another*, . That judgment has been affirmed by a Division Bench in appeal from original decree

No. 1 of 1942. That case is no doubt an authority for the proposition that Section 83 of the Act, has no retrospective operation. But in our judgment the borrower has not to invoke the aid of that section for asking the Court to disallow what has been deducted or paid on account of capitalist's commission. In *Kumar Pramatha Nath Roy v. Pasumati Nath* ("43) A.F.O.D No. 154 of 1943, a Division Bench of this Court in which one of us was a member this point was considered. The question there was exactly the question before us, namely, for the purpose of determining the principal of a loan advanced before the Act for the purpose of Section 30 of the Act whether capitalist's commission is to be deducted from the amount mentioned as principal in the document. In dealing with the case *Juggannath Roy and Another Vs. Madan Mohan Burman and Another*, the following observations were made:

But the question as to what is to be regarded as the principal of the loan was neither mooted nor discussed in that case. The ease was not approached from the angle from which we are approaching the case. What is after all capitalist's commission? It is a commission taken by the capitalist for lending his own money to the borrower. In effect it is a device to bring back to him a part of the principal and that under a name. In case coming under the Bengal Money-lenders Act, it is the duty of the Court to find out what is the "principal of the loan" and the definition given in the Act of the words " principal of the loan" is the "amount actually advanced." If in a case the lender hands over a particular sum of money to the borrowed" and takes back a portion thereof either at the same time or later on, the actual advance for the purpose of the definition must not be what was given in the form of an advance in the first instance but the net balance which remains with the borrower... For the purpose of considering what is the principal of the loan all devices and contrivances adopted by the lender with a view to getting back a part of the advance must be ripped open and the matter must be looked at in its bare nudity.

14. We follow that decision and hold that the principal of the loan is to be taken to the sum total of the principals recited in the promissory notes (a) to (c) and (e) to (k) less what was charged as capitalist's commission at each of those transactions. The lenders will get a decree for twice the said amount less what has been paid to them from time to time by the borrower or on his behalf.

15. We set aside the preliminary and final mortgage decrees dated respectively 8-1-1934 and 4-6-1935 and direct the Registrar to take accounts in the manner indicated above. That is to say the principal of the loan would be taken to be the sum total of (a) the amounts mentioned as principal in the promissory notes dated 25-9-1927 and 24th January and 12-2-1928; no enquiry is to be made as to whether capitalist's commission was deducted, or paid at those three transactions; (b) the amounts mentioned as principal in the two promissory notes dated 4-8-1930, each for Rs. 5500, the amounts mentioned as principal in the promissory notes dated 6th September, 13th October, 28th October, 3rd November and 12-11-1930, less the amounts deducted by the lenders or paid by

the borrower to the lenders as capitalist's commission on each and every one of those transactions; and (c) what was actually advanced in cash to the borrower on 15-11-1930 less what was deducted or paid as capitalist's commission on this occasion.

16. He is to take into account the payments made by the receiver to the lenders and other payments made before and after suit. The sum of Rs. 78,999-5-4 is to be taken to be amount paid to the lenders after 5-3-1937 and up to December 1940.

17. The new preliminary mortgage decree would be against both Raja Gopal Lal Roy and Kumar Bhairab Lal Roy and would be for twice the amount of what will be found to be the principal of the loan in accordance with the aforesaid directions less what may be found to have been paid to the lenders by or on behalf of the borrower. To that amount must be added Rs. 4588-8-11 paid by the lenders for revenue with 8 per cent simple interest calculated up to this day, as also the costs of the mortgage suit including costs of the final decree dated 4-6-1935, also the costs awarded by the order dated 14-12-1936 and the costs of the lenders for to-day's hearing as on an application less the costs of this application (except for to-day's hearing) which we allow to the defendant applicants? certified for two counsel. The Registrar would cause the promissory notes dated 25-9-1927 and 24th January and 12th February 1928 to be produced before him. If not produced he would take such evidence as would be admissible to find out the principal mentioned in those three promissory notes. He would also be at liberty to take evidence for the purpose of finding if capitalist's commission had been taken on the transactions we have mentioned above and, if so, for finding the amount thereof.

18. As we have set aside the preliminary and final decrees passed on the dates abovementioned the agreement between the parties mentioned in the order dated 14-12-1936 and printed at pp. 42 to 45 of the paper book falls through. We formally set aside that order, except the portion relating to costs.

19. Two affidavits have been placed before us today in order to enable us to consider the number of the instalments viz. of Sachindra Lal Roy, manager appointed by the Court of Wards of the Tajhat Wards Estate, affirmed on 30-6-1947, and the affidavit of Mohendra Kumar Roy affirmed on 20-6-1947. Very valuable materials have been furnished by the annexure to the affidavit of Sachindra Lal Roy, as also in some of the paragraphs of that affidavit. It appears that the gross income of the estate is two lakhs and ninety thousand rupees. The debts amount to a little over sixteen lakhs. In respect of many of those debts arrangements have already been made for paying in instalments. The revenue and cesses amount to about one lakh and thirty thousand rupees each year. The establishment and litigation come up to a little more than a lakh of rupees. The Raja is paid an allowance of only one thousand a month besides the expenses of a motor car and the pay of his servants and durwans. Details have been given of the receipts and disbursements for the Bengali Year 1352 in the annexure which

is the return made by the Court of Wards, Tajhat Estate, to the Board of Revenue. It shows that after all the expenses and meeting the liabilities and other debts by instalments, there is a surplus of Rs. 9858 5-2. That amount is what would be available for the payment of the instalments in this case.

20. Taking into account the necessary fluctuations in the income and the expenditure, we grant ten annual instalments for the repayment of the monies that may be found due and for which a new preliminary decree is to be passed.

21. The first of such instalments is to be made within six months from the date of the Registrar's report and the succeeding nine instalments within the corresponding dates of the succeeding nine years. In default of payment of any one instalment the lenders will have the right to apply for a final decree.

22. Costs of the discharged guardian ad litem are to be taxed as between attorney and client.