MANU/BH/0097/1944

Equivalent Citation: AIR1944Pat303

IN THE HIGH COURT OF PATNA
FULL BENCH

Decided On: 03.05.1944

Appellants: **Deo Nandan Prosad**
Vs.
Respondent: **Ram Prasad**

Hon'ble Judges/Coram:
Herbert Ribton Meredith, Chatterji and Sinha, JJ.

JUDGMENT

Herbert Ribton Meredith, J.

1. These three cases all raise questions with regard to the Bihar Money-Lenders Act, and it is convenient to dispose of them together. The only one which involves any real difficulty is Civil Revision No. 631 of 1940, and I, therefore, take it first. On 3rd April 1940, the petitioner instituted a Small Cause Court Suit (No. 13 of 1940) in the Court of the First Subordinate Judge, Monghyr, claiming a sum of Rs. 383-12-0, on the basis of a promissory note, dated 9th Chait 1344 Fasli (corresponding to 4th April 1937), for Rs. 280, with interest at the rate of 1 per cent, per month, besides costs and pendente lite interest. The defendant admitted the execution of the note, but contended that it was executed for previous dues, which included interest at high rates, and prayed for re-opening the accounts, and also pleaded certain payments. The petitioner produced his account books, which were accepted by the Court, and showed that the hand-note in suit was a renewal of a previous hand-note, after crediting certain payments made by the defendant, which in terms, was a renewal of an earlier hand-note, and so on - back to the first hand-note which was executed by the defendant on 12th Jeth 1335 Fasli, on receipt of Rs. 400. The Small Cause Court Judge held that the rate of interest was not exorbitant, and could not be touched. He, however, found that the repayments credited in the account book of the plaintiff came in all to Rs. 594-9-1½ and being of opinion that the plaintiff could not under Section 7, Bihar Money-Lenders Act, recover more than double the amount originally advanced he decreed the suit for Rs. 205-6-10½ only, that is to say, for less than the principal of the last hand-note. This application for revision has been preferred under Section 25, Provincial Small Cause Courts Act, on the ground that the learned Judge was not entitled to apply the Bihar Money-Lenders Act so as to give the plaintiff a decree for a sum smaller than that due for principal and interest on the tenor of the promissory note. It is necessary, in the first place, to notice that what the learned Judge has done, if permissible at all under the Money-Lenders Act, involves the application not only of Section 7 of the Act, but also of Section 8; because he has not only applied the rule of damdupat incorporated in Section 7, but he has also for that purpose re-opened the whole account as provided by Section 8, and has gone behind the hand-note in suit, as he has applied the rule of damdupat not upon the final hand-note but upon the original loan, and so has given a decree for a sum less than even the principal of the hand-note in suit without the calculation of any interest thereon. Section 32, Negotiable Instruments Act (26 of 1881), provides that:

> In the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity, of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note, or acceptance respectively, and the acceptor of the bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand. In default of such payment as aforesaid, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default." Section 79 of the same Act provides: "When interest at a specified rate is expressly made payable on a promissory 'note or bill of exchange interest shall be calculated at the rate specified, on the amount of the principal money due thereon, from the date of the instrument, until tender or realisation of such amount or until such date after the institution of a suit to recover such amount as the Court directs.

4. What the Judge has done conflicts with the provisions of both these sections. He has not given the plaintiff a decree for his full principal, much less has he allowed any interest on the sum due under the hand note in suit. He has in short followed the provisions of Sections 8 and 7, Money-Lenders Act, in preference to those of Sections 32 and 79, Negotiable Instruments Act, and only by ignoring the latter. The question is could he legally do so? If the Bihar Money Lenders Act could not operate to repeal pro tan to these provisions of the Negotiable Instruments Act, it is obvious that he could not.

5. The same question, so far as Section 8 of the Act is concerned, came before a Division Bench of this Court to which I was a party, in Sagarmal v. Bhuthu Ram A.I.R. 1941 Pat. 99. The decision of the Court was that nothing in Section 8, Money-Lenders Act, can debar the holder or the holder in due course of a promissory note, who sues upon that note from recovering the full amount of principal and interest due according to the apparent tenor of the note. If this decision is correct, it is equally applicable to Section 7. In the course of my judgment in that case I expressed the view, as I was bound to do having regard to the Full Bench decision of this Court in Sadanand Jha v. Aman Khan A.I.R. 1939 Pat. 55, that the so-called "pith and substance" doctrine was not applicable in the interpretation of Section 100, Government of India Act, 1935. This question came before the Federal Court in Subrahmanyan v Muthuswami Goundan MANU/FE/0004/1940 and it was held that the reasoning in Sagarmal v. Bhuthu Ram A.I.R. 1941 Pat. 99 was incorrect in this respect, and the pith and substance argument was applicable.

6. No opinion was, however, expressed with regard to the actual decision in Sagarmal v. Bhuthu Ram A.I.R. 1941 Pat. 99, except by Sulaiman J. who was of opinion that it was correct. The other two learned Judges, Gwyer C.J. and Varadachariar J. left the question open as they decided the case before them upon the ground that the liability with which they were concerned had merged in a decree before the Madras Agriculturists Relief Act (4 of 1938) had come into force, and there was in the case no question of any liability upon a promissory note at the time when the provisions of the Madras Agriculturists Relief Act were applied. Similar questions with regard to the Bengal Money-Lenders Act (10 of 1940) again came before the Federal Court in Bank of Commerce Ltd. Khulna v. Amolya Krishna MANU/FE/0012/1943, but the case was decided upon the same ground as in the case from Madras, and the actual point decided in Sagarmal v. Bhuthu Ram A.I.R. 1941 Pat. 99 was again left open. The position is, therefore, that Sagarmal v. Bhuthu Ram A.I.R. 1941 Pat. 99 so far as its actual decision is concerned has never been overruled. On the other hand it has been expressly followed by another Division

Bench of the Patna High Court in Lal Singh v. Ramnarain Ram MANU/BH/0152/1941 : AIR1942Pat138 . Nevertheless, as a Full Bench we are not bound by the decision in Sagarmal v. Bhuthu Ram A.I.R. 1941 Pat. 99 and it is therefore necessary to examine the question afresh.

If as we must now do, we apply the pith and substance principle, we have to look for the true nature and character of the Money-lenders Act, that is to say, the real primary intention of the Legislature in enacting it. There can be no doubt, in my judgment, that the real intention was merely to regulate the proceedings of money-lenders and to give relief to their debtors within the province, and it was only incidentally that trespass was made into the field of negotiable instruments. Item 27 of the Provincial Legislative List is: "Trade and commerce within the province, markets and fairs, money-lending and money-lenders." It is not, therefore, difficult to arrive at the conclusion that the Act as a whole was within the competence of the Provincial Legislature, and is not, therefore, invalid. The question remains, however, whether the provisions of the Act whatever their object can override and nullify conflicting provisions of the Negotiable Instruments Act, as Sections 7 and 8, if applied as they have been applied by the Judge in the present case, unquestionably do. Sagarmal Marwari's case A.I.R. 1941 Pat. 99 was decided upon the principle of ultra vires, but in view of what the Federal Court has held in Bank of Commerce Ltd. Khulna, we now have to decide the question upon the principle of repugnancy. In so far as the Negotiable Instruments Act is legislation within List I, the provisions of Section 107(1), Government of India Act, are, in my judgment, upon their terms inapplicable. Nevertheless upon general principles, in interpreting Section 100, if the pith and substance principle be applied, the doctrine must be applied in its entirety, and in its entirety it involves also the subsidiary principle of the "occupied field." One Legislature may trespass incidentally into the field of another, but only if the field is vacant. It cannot in doing so oust a law of the superior Legislature which is already in possession. It needs no lengthy or involved argument to show that this must be so. Mutually conflicting laws cannot exist side by side in the same territory and be simultaneously applied by the Courts. (That would be a wholly impossible state of affairs. One 'must give way to the other. If the Courts tried to apply both, then their decisions would be illegal either with regard to the provisions of the one or with regard to the provisions of the other. Section 100, Government of India Act, was, in my opinion, so drafted as to prevent the possibility of this deadlock arising. That is the implication of the use of the word "not with standing" in Sub-sections (1) and (2) of Section 100, Government of India Act, and of the use of the words "subject to" in Sub-section (3). The provision seems to me complete and, therefore, I think no separate provision for repugnancy was deemed necessary, except with regard to matters falling within the Concurrent List, where legislation by both Legislatures was possible. That is my reading of Section 107. I think in Section 107, Sub-section (1) the words "with respect to one of the matters enumerated in the Concurrent Legislative List" govern the words "provision of a Federal Law which the Federal Legislature is competent to enact" as well as the words "any provision of an existing Indian Law."

7. The reasoning which I have applied is so clearly and forcibly set out by Sulaiman J. in Subrahmanyan v. Muthuswami Goundan MANU/FE/0004/1940 that it is as unnecessary as it would be presumptuous for me to deal with the question at length in words of my own. It is better simply to quote from the judgment of that learned Judge in support of my conclusion. Upon the question of conflict the learned Judge quotes Section 79, Negotiable Instruments Act, and says: "Parties cannot even contract out of their statutory rights. Thus, in the case of a promissory note or bill of

exchange, interest has to be calculated till at least the institution of the suit, at the rate specified therein. Any provincial law providing that the interest prior to the suit should be curtailed or out down, is prima facie in conflict with it. It will be trenching upon a field already occupied by Section 79." He says further: "The effect of Section 292, Government of India Act, is not only to ensure that the existing Indian laws were not repealed, but actually to continue them in force until altered, repealed or amended by a competent Legislature. And a Provincial Legislature is not competent to alter, repeal or amend any law with respect to matters falling in List 1. It follows that a provincial legislation cannot nullify any such law." With regard to the Madras Act, and his words are equally applicable to the Bihar Act, he says: "The Negotiable Instruments Act draws no distinction between the original promise and the holder in due course. The special hardship that would be inflicted on the latter is not at all taken into account in the (Madras) Act and the special protection given to bona fide holders in due course by the Negotiable Instruments Act read with the Usurious Loans Act is (by the Money-Lenders Act) destroyed." Having held that there is an undoubted trespass on a field already occupied by an existing Indian law with respect to negotiable instruments, the learned Judge says: "Section 107(1) as it stands does not apply to the case where there is repugnancy between a provincial law enacted after the Act came into force and an existing Indian law made prior to the Act but falling within List 1." The learned Judge goes on to deal with the doctrine of the unoccupied field. He says: "The doctrine which has been evolved with regard to the Canadian cases is that if the encroachment is merely incidental, then there is no defect so long as the trespass is upon an unoccupied field. Engrafted upon the doctrine of incidental encroachment there is the further doctrine of unoccupied field." He proceeds to quote from Attorney-General of Ontario v. Attorney-General for the Dominion of Canada 1894 A.C. 189 and Grand Trunk Railway of Canada v. Attorney-General of Canada 1907 A.C. 65 , the latter quotation being "first that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, and second that if the field is not clear and in such a domain the two legislations meet then the Dominion legislation roust prevail." He goes on to quote from Attorney-General for Canada v. Attorney-General for British Columbia 1930 A.C. 111 and Trustees of Northern Irrigation District v. Independent Order of Foresters 1940 A.C. 513 and says:

> No Canadian case has been cited before us in which although the subject of legislation was substantially within Section 92, it not only incidentally encroached upon a subject mentioned in Section 91, but at the same time actually clashed with an existing Dominion legislation. The principles laid down by their Lordships have gone only so far as to permit an incidental encroachment provided the Dominion field is unoccupied. In no case so far decided have their Lordships tolerated a trespass as well as a clash. If a clash with the Dominion legislation were also allowed, then a Provincial Legislature would be in a position, though indirectly, to nullify the Dominion legislation, even inside the field exclusively open to the Dominion, which would make the position intolerable. It seems to me that the principle of interpretation laid down by their Lordships in the Canadian cases cannot be brushed aside by simply saying that they relate to a different constitution. Those principles are not only of the greatest weight but must be a guide to us even in interpreting the Indian constitution...it would be dangerous to import only a part of the doctrine and exclude another part. Partial application may frustrate the very object for which the rule of law was deduced. The two doctrines of incidental encroachment and unoccupied field are closely related. I would go further and say they are indissolubly

> connected. We cannot import the doctrine of incidental encroachment in favour of the Provinces, and refuse to import the doctrine of unoccupied field which is in favour of the Centre. The two must go hand in hand. In my opinion the Provincial Act being repugnant to the existing Indian law relating to promissory notes, which is exclusively a Federal subject, is void to that extent." It would seem, therefore, that no provisions of the Money-Lenders Act can override conflicting provisions of the Negotiable Instruments Act, at least where the latter Act is dealing with subjects comprised within list I, and item 28 of List I is "Cheques, bills of exchange, promissory notes" and other like instruments. Is there any escape from this conclusion? The Calcutta High Court has, in a recent case, Bank of Commerce Limited v. Kunja Bihari Kar MANU/WB/0050/1944 : AIR1944Cal196 sought an escape from the difficulty by regarding both the Money-Lenders Act and the conflicting portions of the Negotiable Instruments Act as legislation within the field of contract, and so holding that the Provincial legislation" having received the assent of the Governor-General, which is the case in the Bihar Act also, will prevail under the provisions of Section 107(2), Government of India Act, and legislation with respect to matters coming in entry 28 of list I means legislation with respect to the negotiable aspect of the instruments mentioned therein. Other aspects of those instruments do not come under that entry.

8. As undoubtedly the Courts should endeavour to reconcile conflicting legislation if there is any conceivable way of doing so, I have most anxiously considered the question whether an escape is to be found on these lines. The Calcutta case did not go so far as to apply the reasoning to the rights of holders of promissory notes in due course. It was applied only to the maker of the note and the original payee, and the other question was left open. The Negotiable Instruments Act in its true nature and character is legislation outside the field of contract. It deals primarily with rights and liabilities independent of consideration and so of contract. Incidentally, however, just as the Money-Lenders Act travels outside the field of contract into that of negotiable instruments, so does the Negotiable Instruments Act incidentally invade the field of contract. Section 43 of the Act affords an excellent example of its connection with both subjects.

9. That section runs:

> A negotiable instrument made, drawn, accepted, endorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without endorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto." (I omit the exceptions.)

Here we see the two fields clearly distinguished. The one field is that of parties in immediate relationship, -and that is the field of contract. The liability seems to be purely contractual, because if consideration is wanting or fails, there is no liability. The other field embraces the rights of parties not in immediate relationship, and here rights and liabilities are created by the Act, which must be independent of contract because they are independent of consideration. There are other sections which also clearly indicate that they are dealing with liabilities independently of contract, for example, Section 36, which makes every party to a negotiable instrument liable

thereon to a holder in the due course until the instrument is duly satisfied, also Section 120, which provides that "No maker oÂ£ a promissory note, and no drawer oÂ£ a bill of exchange or cheque, and no acceptor of a bill of exchange for the honour of the drawer shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn." On the other hand, there are sections which clearly go to indicate the other aspect of the Act. Such a section is Section 44, which runs: "When the consideration for which a person signed a promissory note, bill of exchange or cheque consisted of money, and was originally absent in part or has subsequently failed in part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionally reduced.

Explanation.--The drawer of a bill of exchange stands in immediate relation with the acceptor. The maker of a promissory note, bill of exchange or cheque stands in immediate relation with the payee and the endorser with his endorsee. Other signers may by agreement stand in immediate relation with a holder.

10. Section 32 appears at first sight to create a liability independent of contract, but it must obviously be read subject to Sections 43 and 44. Where the parties are in immediate relationship, contractual considerations come in to modify the liability. I cannot agree with the broad statement in the Calcutta case that interest on promissory notes is a matter relating to contract, and comes under the Concurrent Legislative List. I think that broad statement needs to be qualified by the addition "as between parties in immediate relationship." In the other aspect it seems to me Sections 79 and 80 create liabilities independent of contract even though dealing with interest. Nevertheless, I find myself in agreement with. the Calcutta view to this extent that portions of the Negotiable Instruments Act are legislation within the field of contract, and so far as these portions are concerned I see no reason why Section 107(2), Government of India Act should not be applicable. Money-lending is a branch of the law of contract. The Provincial law, therefore, besides being upon a subject exclusively reserved to the Provincial Legislature, is also "with respect to one of the matters enumerated in the Concurrent Legislative List." In that aspect it contains provisions "repugnant to the provisions of an existing Indian law with respect to that matter," the existing Indian law with respect to that matter being the provisions of the Negotiable Instruments Act, which invade the field of contract. If this reasoning is correct, then under Section 107(2) the assent of the Governor-General has the result of making the Provincial law prevail in its own province, unless and until the Federal Legislature enacts further legislation with respect to the same matter. My conclusion is that although nothing in the Money-Lenders Act can override the provisions of the Negotiable Instruments Act so far as the latter relates to rights and liabilities independent of contract, provisions in the Money-Lenders Act affecting contractual rights will override such provisions of the Negotiable Instruments Act as also deal with contractual rights. That part of the Negotiable Instruments Act which can be affected is the part dealing with rights and liabilities as between parties in immediate relationship. It seems to me highly undesirable that Provincial Legislature should be enabled to interfere in any way with the law relating to negotiable instruments, the free negotiability of which is of the utmost importance for the commercial welfare of the country. That is essentially not a Provincial matter. A negotiable instrument made by a Calcutta merchant may be negotiated and even sued upon in Bombay. If the law is to be different in each province, the position would soon become so chaotic as to hamper seriously the activities of the business community.

11. Here again I cannot do better than quote from Sulaiman J. in Subrahmanyan v

Muthuswami Goundan A.I.R. 1941 F.C. 47 He says:

> Being of all India importance there was a special reason for assigning negotiable instruments to the Federal Legislature. A uniformity of practice as regards these for the whole of India is necessary, As they can be freely negotiated, they can circulate from province to province, and after successive endorsements can even be sued upon in provinces other than those in which they were executed. As they pass from hand to hand, holders in due course have to be protected. They are allowed to presume that the consideration evidenced by such instruments is due in full. Holders in due course cannot be expected to inquire and ascertain whether the original maker had been an agriculturist or not (I would add "or under the provisions of which Provincial Money-Lenders Act the liability-might have to be determined"); and it would be grossly unfair to such holders, if after having paid almost full consideration for such instruments, they were confronted in a suit brought upon them with a Provincial law that cuts down interest which accrued even prior to the passing of that Act.

12. If, however, only the rights of parties in immediate relationship are affected, these serious consequences do not, I think, follow. Negotiable instruments even under the Negotiable Instruments Act may have their value affected as between immediate parties by contracts between them (see Section 32), or by questions of consideration (Sections 43 and 44). Therefore, if the Money-lenders Act affects the Negotiable Instruments Act only to the extent I have indicated, there is no drastic alteration in the position and nothing which seems likely to me to be really repugnant to the intentions of the Legislature in framing the scheme of the Government of India Act. The conflict can thus be partially resolved. I must concede that there is one unsatisfactory inspect of this solution. If the Money-lenders Act cannot, as I hold, affect the rights under the Act of parties; who are not in immediate relationship, for example, the maker and the holder in due course, then the money-lender can easily defeat the Act simply by endorsing the promissory note over to a friend. It will be difficult to defeat him on the ground that the transaction is benami. Under Section 8 the holder of a promissory note is the person entitled in his own name, and no person can sue on a negotiable instrument, unless he is named therein as payee, or unless he becomes entitled to it as endorsee, or bearer. A benamidar, who is the holder in his own name is the person entitled to sue: Ghanshyam Das v. Rahgo Sahu MANU/BH/0304/1936 : AIR1937Pat100 and Peary Pasi v. Gauri LalA.I.R. 1934 Pat. 382. Moreover, since the promissory note once endorsed could no longer be defeated under the Money-lenders Act, it would pay the money-lender to make a bona iide endorsement of the note at a discount, when no question of benami could arise; and still the Money-lenders Act would cease to avail the debtor. However, the question before us must be decided upon legal considerations, not upon any considerations of expediency, and if I have made observations on such questions it is only because I think it may be useful to make the implications of the decision clear. The conclusion I have arrived at is at variance with that in Sagarmal v. Bhuthu Ram A.I.R. 1941 Pat. 99, but it is, I think, the logical result of the decision of the Federal Court: that the pith and substance principle is applicable in construing the provisions of Section 100, Government of India Act, 1935.

13. The result is that in the present case, where the suit is between parties in immediate contractual relationship, the provisions of Sections 7 and 8 will override those of Sections 32 and 79, Negotiable Instruments Act. There still remains to consider whether what the learned judge has done was permissible under those

sections of the Money-Lenders Act. I have already indicated that what the learned Subordinate Judge has done involves the application not only of Section 7, but also Section 8. Let us, therefore, consider Section 8. The first thing to be noticed is that the sections permissive, not mandatory. It provides that the Court may exercise certain powers, not that it shall do so. Before applying Section 8, the learned Judge should, therefore, have first considered whether the circumstances of the case were such as to justify its application, and he should have given his reasons or applying the section. It should not be applied arbitrarily, and need not be applied in all cases. The section applies only in the case of suits brought by the money-lender in respect of a loan advanced before the commencement of the Act. So far as this goes, it was applicable to the case before us, as even the final promissory note was executed in 1937, before the commencement of the Act. It was open to the Court under Clause (b) to re-open the account between the parties notwithstanding the execution of the handnote of 1937 'purporting to close previous dealings and creating a new obligation, and having done so it was open to the Court to relieve the debtor of all liability in respect of interest in excess of 12 per centum simple per annum, the loan being an unsecured one. Having regard to the nature of the provisions the word "loan" in the section must be used, I consider, with respect to the-original loan, and not the final transaction, and the-original loan in the present case was Rs. 400. The proper course in applying the section, therefore, will be to take the principal as Rs. 400, calculate interest at 12 per cent, per annum simple on that sum up to the date of the suit, and give a decree for the amount left unpaid as so ascertained, if anything is still found due. If, however, and only if, on making this calculation, it is found that the interest already paid exceeds the interest so calculated, then the creditor cannot be called to repay any amount so paid in excess, nor can the amount of the principal of the loan be reduced; that is to say, the decree must in any event include the principal sum of Rs. 400, unless it is found that anything has already been repaid towards principal. So much for Section 8, and having applied it in this way, if the Judge considers the case one where it should be applied, then the Court must next consider whether any further reduction is necessary under Section 7. Section 7, unlike Section 8, is a mandatory section. It debars the Court absolutely from making a decree for an amount of interest for the period preceding the institution of the suit which together with the interest already paid would amount to more than the loan advanced, or if the loan is based on a document, as in the present case, the amount of loan mentioned in or evidenced by such document.

14. The question is how the expression "the amount of loan mentioned in or evidenced by such document" is to be interpreted; whether as referring to the original document for Rs. 400, or the final document for Rs. 280. I have come to the conclusion that the section must relate to the document upon which the suit is based that is the final hand-note of 1937. The section speaks of a suit brought by a money-lender in respect of a loan advanced before or after the commencement of the Act, and then goes on to speak of the loan being based on a document. Therefore, the reference must be to the loan upon which the suit was brought. It might at first sight be thought that the suit though brought upon the promissory note of 1937 was actually in respect of the original loan of Rs. 400 advanced in 1928. But if we refer to the definition of "loan," I think it is clear that this is not so. The handnote for Rs. 280, executed on 4th April 1937, which was the handnote in suit, must be regarded as a loan for the purposes of the Act. It would follow that the loan in respect of which the suit was brought must be regarded as a loan of Rs. 280 advanced on 4th April 1937. The effect of the application of Section 7, therefore, will be that the amount which can be decreed by way of interest in respect of the period subsequent to 4th April 1937, cannot exceed Rs. 280 less the interest, if any, already paid with respect

of that period. The decree then would have to satisfy this condition, besides satisfying the condition imposed by Section 8, and the decree to be passed will be for the lesser of the two sums, whichever it may be, after applying the provisions of both sections. The learned Subordinate Judge, as I have said, does not appear to have applied his mind to the question whether Section 8 should be invoked at all, and he has applied neither Section 8 nor Section 7 in the manner which I have indicated. I would, therefore, set aside his decree, and remand the case for disposal in the light of the above observations. Having regard to all the circumstances I would make no order for costs. I now turn to Civil Revision No. 233 of 1941. In this case the opposite party obtained an ex parte decree on the basis of a handnote, dated 23rd July 1936, for Rs. 4006-11-0 with interest. They took out execution of this decree in Execution Case No. 233 of 1940 in the Court of the Subordinate Judge, First Court, Gaya, for a sum of Rs. 5500. The petitioners applied under Section 11, Money-lenders Act, for allowing payment by instalments. The learned Subordinate Judge simply said: "The decree is baaed on a handnote which is nothing else than a promissory note. So the Money-lenders Article 1 has no application. The prayer for instalments is accordingly rejected." Here he is plainly wrong. The Moneylenders Act as a whole is valid legislation. The fact that the suit was upon a promissory note affords No. reason for not applying any provision of the Act which does not conflict with the provisions of the Negotiable Instruments Act. Allowing instalments does not prevent the holder of a promissory note from recovering the full sum due under its terms, in execution of his decree, if the decree so provides. On the contrary, it might, in certain circumstances, aid him in the eventual realisation of his full decretal amount. Section 11, Moneylenders Act, merely deals with procedure in execution. It does not enable the Court to go behind the promissory note, or to go behind or scale down the decree. There is nothing here which could be held invalid by reason of any conflict with the provisions of the Negotiable Instruments Act. The learned Subordinate Judge has refused upon untenable grounds to exercise his jurisdiction under the Money-lenders Act.' I would accordingly allow this application with costs, set aside the order of the Court below, and direct the learned Subordinate Judge to hear the application on the merits.

15. There remains Miscellaneous Appeal No. 162 of 1941. In this case the learned Subordinate Judge rejected an application under Section 13, Money-lenders Act, as being not maintainable, because the decree under execution was based on a handnote. An appeal was preferred to the learned District Judge of Bhagalpur who took the same view and dismissed it. The prayer made by the appellant was that the value of the property might be assessed and that only that portion of it might be put up to sale which was deemed sufficient to satisfy the decree under execution. The view taken by the Courts below was, in my opinion, wrong. The observations which I have made with regard to Civil Revn. No. 233 are equally applicable here. Upon this point I have already said all that it seems to me necessary to say in Lal Bahadur v. Bishwanath Prasad MANU/BH/0184/1941 : AIR1942Pat237 . I there said: "There is no foundation at all for the view that valuation of the property under the Money-lenders Act cannot, be fixed in execution cases relating to decrees, upon promissory notes. The reference made by the learned Munsif to the recent ruling of this High Court is (apparently to the decision in Sagarmal v. Bhuthu Ram A.I.R. 1941 Pat. 99 the decision had nothing to do with the provisions of Section 13, Money-lenders Act. Section 13, Money-lenders Act, has nothing to do with promissory notes. It relates to procedure in execution of decrees. There is nothing in the section which any one could (possibly contend conflicted in any way with the provisions of the Negotiable Instruments Act, or affect in any way any provision of law relating to promissory notes. It does not enable the Court to interfere in any way with liabilities under

promissory notes, or to go behind the decrees obtained upon promissory notes." This is a second appeal. The question arises whether any second appeal lies against an order under Section 13. As I said in Lal Bahadur v. Bishwanath Prasad MANU/BH/0184/1941 : AIR1942Pat237 , it is unnecessary to decide this question, because, assuming, without deciding, that no second appeal lies, there has clearly been a refusal by the Courts below to exercise jurisdiction. The appeal may, therefore, be treated as an application in revision, and as such there is certainly ground for interference. I would accordingly in this case also set aside the decision of the Courts below, and direct the learned Subordinate Judge to consider the application upon the merits. As the appeal has not been opposed, no order for costs is necessary.

Chatterji, J.

16. I agree.

Sinha, J.

I agree.