Suraj Prakash Sawhney *versus* Bhagat Ram and another

with the order made by the Tribunal for construction of the intervening wall in order to escape eviction from shop No. 3853. The parties, in the circumstances, shall bear their own costs of the three appeals.

Khanna, J.

K. S. K.

CIVIL MISCELLANEOUS

Before Inder Dev Dua and R. S. Narula, JJ.

NAND LAL NIRULA,—*Petitioner*

versus

STATE OF PUNJAB AND OTHERS,—*Respondents*

Civil Writ No. 2318 of 1964

1966

January 20th.

Punjab State Aid to Industries Act (V of 1935)—Ss. 23, 24, 25 and 35—Industries Department—Whether can take proceedings under section 23, 24 and 25 for recovery of money—Whether can also take resort to section 35—Prescribed rate of interest of 10 per cent in case of default—Whether penal and can be recovered by the State Government—Contract Act (IX of 1872)—S. 74—Principles of—Whether applicable.

Held, that the word "notwithstanding" used in section 35 of the Punjab State Aid to Industries Act, 1935, means "In spite of", "despite" or "without prevention or obstruction from or by". Construed in this sense, section 35 would mean that despite or in spite of anything contained in sections 23, 24 and 25, the State Government would be entitled to recover the amount payable to it under the Act as arrears of land revenue. In other words, nothing contained in sections 23, 24 and 25 of the Act would prevent or obstruct the exercise of the power conferred on the State Government by section 35. To put it still more plainly, it would seem to connote that the provisions of sections 23, 24 and 25 would not serve as an impediment to the method of recovery as contained in section 35. The statutory object and purpose suggests that the power conferred by section 35 has been deliberately reserved to the State Government for realising the loan advanced by it to a citizen in the form of aid for industrial purposes and to decline this power would be supportable neither on consideration of justice and equity nor on any sound principle of law.

Held, that in enacting section 74 of the Contract Act the Indian Legislature has departed from the English Common Law and that it

has attempted to eliminate the distinction between the stipulations providing for payment of liquidated damages and those in the nature of penalty. The Indian Law seems to simplify the position by providing a uniform principle applicable to all stipulations whether naming an amount to be paid in case of breach or by way of penalty. The Court has apparently jurisdiction in assessing damages for breach of contract to award such compensation as it deems reasonable, having regard to all the circumstances of the case, but subject to the limit of the penalty stipulated. The word 'reasonable' would seem to imply a duty to award compensation in accordance with the settled principles. A stipulation to pay increased interest in the case of breach if such increased interest is payable from the date of agreement or from a date prior to the default will be by way of penalty, by reason of its oppressive character, for it apparently operates in *terrorem* over the promisor. If, however, the increased interest is payable from the date of the breach, then the stipulation may or may not be by way of penalty, depending on all the facts and circumstances of the case. But the provisions of section 74 of the Contract Act cannot affect the provisions of any other Statute, Act or Regulation, not expressly repealed by that Act.

Held, that the rate of 10 per cent by way of interest payable in case of default by the borrower is not unreasonable or penal and can be recovered by the State Government. This rate has been prescribed in Form 'F', which is a part of the statutory rules validly framed by the State Government under the rule-making power conferred on it by section 46 of the Punjab State Aid to Industries Act, 1935, and is, therefore, not affected or controlled by section 74 of the Indian Contract Act.

Case referred by the Hon'ble Mr. Justice Inder Dev Dua on 4th November, 1965 to a larger Bench for decision of an important question of Law involved in the case. The case was finally decided by the Hon'ble Mr. Justice Inder Dev Dua and the Hon'ble Mr. Justice R. S. Narula on 20th January, 1966.

Petition under Articles 226 and 227 of the Constitution of India, praying that a writ of Certiorari, Mandamus *or any other appropriate writ, order or direction quashing the order of the respondents for recovering the amount of loans as well as penal interest as arrears of land revenue be issued against the respondents.*

H. L. SIBAL AND J. S. CHAWLA, ADVOCATES, for the Petitioner.

M. R. AGNIHOTRI FOR THE ADVOCATE-GENERAL, for the Respondents.

JUDGMENT

Dua, J.

DUA, J.—This case has been placed before us in pursuance of my order of reference, dated 4th November, 1965, which may be read as a part of this order. Since all the relevant facts have been stated in that order, they need not be repeated.

The learned counsel for the petitioner has tried to raise the following three points before us:—

(1) That if the Industries Department elects to proceed, and does proceed, against the petitioner under sections 23, 24 and 25 of the Punjab State Aid to Industries Act, No. V of 1935 (hereinafter called the Act), then it has no power to seek to recover the money due by having resort to section 35 of the Act.

(2) That the rate of interest at 10 per cent chargeable in the event of default of payment of the amount is penal and the order of the department cannot be considered to be final because it is always for the Court to determine as to whether the rate of interest is penal or reasonable, and

(3) that section 35 of the Act is hit by Article 14 of the Constitution.

Before proceeding to deal with these three arguments, it may be pointed out that after canvassing the first two points, learned counsel for the petitioner dropped point No. 3 on the ground that a Full Bench of this Court has in *Harish Chand* v. *The Collector of Amritsar, etc.* (1), repelled a similar challenge to section 35 of the Act. The third point accordingly does not arise for consideration by us.

Dealing with the first contention, the Act was brought on the statute book in January, 1936, prior to the Constitution, and indeed, prior to the independence of the country. It was enacted, as the Preamble tells us, "further to improve and regulate the giving of State aid for industrial purposes". The previous sanction of the then Governor-General, as required under section 80-A and of

(1) I.L.R. 1958 Punj. 1390=1958 P.L.R. 620.

the Governor under section 80-C of the Government of India Act, was obtained. The word "borrower" has been defined to mean an individual, company or association or body of individuals, whether incorporated or not, to whom or to which State aid has been granted under the Act. Chapter III headed "General Provisions regarding the giving of State Aid" begins with section 17, which provides for the forms of State aid. According to this section, the forms of State aid may include, among others, the grant of a loan. We are not concerned with the other forms. Chapter IV containing the provisions regulating the giving of State aid otherwise than the supply of machinery : on the hire-purchase system, contains, *inter alia*, sections 23 to 25 and section 35. These three sections had better be reproduced in *ex tenso* :—

"23. (1) When any loan or instalment or interest thereon falls due and is not paid on or before the due date or when a loan has been declared immediately repayable under section 27, the officer empowered by the State Government in this behalf may cause to be served on the borrower a notice in the prescribed manner calling upon him to pay the sums due within such time as may be fixed therein.

(2) Such notice shall contain an intimation that in case of default the said officer will issue a declaration in the prescribed form showing the amount of the debt due and the property mentioned in the deed as liable to satisfy the same.

24. (1) If within the time so fixed the sums due are not paid, the officer empowered under section 23 may issue the declaration as described in sub-section (2) of the same section, and such declaration shall be published in the Official Gazette.

(2) Such declaration shall be conclusive evidence of its contents, and shall not be called into question in any Court by the borrower, his heirs, legal representatives or assigns, or by any member of his family if he belongs to a Joint Hindu Family nor shall any right, principle or rule arising from or under the personal or

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customary law applicable to the said persons or any of them, nor anything contained in the Punjab Alienation of Land Act, 1900, affect the validity or effectiveness of a mortgage executed or of a declaration published under this Act, or the procedure therein provided for enforcement thereof.

(3) Such declaration may be produced by the said officer, or by such other person as he may either generaly or specially appoint in this behalf before the principal civil Court of original jurisdiction within the local limits of whose jurisdiction any of the property liable for the debt due is situate in the same manner as a decree of which execution is sought.

25. When declaration has been received by a civil Court under section 24, the Court shall immediately attach the property mentioned in the declaration and shall pass an order directing that, unless the amount mentioned in the declaration is paid within such time, not exceeding two months, as the Court may consider reasonable, it may be recovered by sale of the property mentioned in the declaration as if it were a decree for the payment of money passed by the said Court in the exercise of its ordinary civil jurisdiction.

35. Notwithstanding anything contained in sections 23, 24 and 25, any amount payable to the State Government under this Act or by virtue of any contract entered into under this Act including interest and costs, if any, may, with the previous sanction of the State Government, be recoverable as arrears of land revenue."

Reference at the bar has also been made to sections 21 and 22. Section 21 dealing with security for repayment of loan lays down, *inter alia,* that on the acceptance of an application for a loan, the applicant shall execute deed in the prescribed form undertaking to apply the loan to the purpose for which, and to fulfil the conditions on which, the loan is granted, rendering himself and such property as

may have been specified in the deed as security, including machinery purchased or any building constructed with the aid of the loan, and in the event of such property being found insufficient, rendering the whole of his property, liable for repayment of the loan with interest and costs, if any, incurred by the State Government in making or recovering the loan. According to section 22, the loan together with interest due thereon, if any, is to be repayable either in a lump sum or by instalments, as may be provided for in the deed executed by the borrower under section 21. Section 46 of the Act empowers the State Government after previous publication to make rule consistent with the Act for carrying out all or any of its purposes, with certain specified matters being stated, by way of illustration, in sub-section (2) for the regulation or determination of which rules may be framed. These matters have been particularly specified without prejudice to the generality of the power under sub-section (1). Rule 4 of the Punjab State Aid to Industries Rules, 1936, provides for an application for a loan to be submitted to the Director of Industries, Punjab, on the prescribed form "A" appended to the Rules and Rule 6, *inter alia,* lays down that the form of deed to be executed for a loan against the mortgage of immovable property shall be in form "B". Form "F" and form "N" which, so far as relevant for us, are identical for all practical purposes, contain the stipulation of payment of interest at 10 per cent in case of default in repayment of the loan as promised. These forms, it may be pointed out, are part of the Rules in the form of Schedule II. The submission eloquently pressed with force by Shri Sibal is that the words "notwithstanding anything contained in sections 23, 24 and 25" occurring in section 35 exclude resort to section 35 if the department has proceeded to give notice under section 23 and has secured a declaration under section 24. It is common case of the parties that execution of the declaration from the Court has not been sought under section 25 in the present case. Support for this submission has been sought from some observations of the Supreme Court in the judgment reported as *Dinabandhu Sahu* v. *Jadumoni Mangarai* (2). That case related to an election matter under the Representation of the People Act No. 43 of 1951. The defeated candidate in an election to the

(2) A.I.R. 1954 S.C. 411.

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Legislative Assembly, Orissa, presented an election petition under section 81 of the R.P. Act of 1951 sending the petition through post on 3rd April, 1952, which reached the Election Commission at Delhi, on 5th April, 1952. The last date for presenting the petition was 4th April, 1952. On 2nd July, 1952, the Election Commission passed an order condoning the delay in the presentation of the petition in exercise of the power conferred on it by the proviso to section 85. Before the Election Tribunal, the successful candidate relying on section 90(4) of the R.P. Act, 1951, again raised the question of time-bar in presenting the election petition with the Election Commission. Section 90 (4) of R.P. Act, 1951, according to Shri Sibal, is framed in terms identical with section 35 of the Act. I may here read that sub-section:—

> "(4) Notwithstanding anything contained in section 85, the Tribunal may dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117."

The submission of the returned candidate was repelled by the Supreme Court with the following observations:—

> "The policy underlying the provision (S. 85) is to treat the question of delay as one between the Election Commission and the petitioner and to make the decision of the Election Commission on the question final and not open to question at any later stage of the proceedings. Under section 90(4) of the Act, when the petition does not comply with the requirements of section 81, section 83, or section 117, the Election Tribunal has a discretion either to dismiss it or not, 'notwithstanding anything contained in section 85'. The scope of the power conferred on the Election Tribunal under section 90(4) is that it overrides the power conferred on the Election Commission under section 85 to dismiss the petition.
>
> It does not extend further and include a power in the Election Tribunal to review any order passed by the Election Commission under section 85 of

the Act. The words of section 90(4) are, it should be marked, 'notwithstanding anything contained in section 85' and not 'notwithstanding anything contained in section 85 or any order passed thereunder'. An order of the Election Commission under section 85 dismissing a petition as barred will, under the scheme of the Act, be final, and the same result must follow under section 90(4) when the order is one excusing the delay."

The ratio of this decision not only does not help the petitioner, but as I construe it, it runs counter to the submission pressed on his behalf. As the passage quoted above shows, section 90(4), Representation of the People Act, 1951, as it stood at the time of the controversy in *Dinabandhu Sahu's case*, overrode the provisions of section 85 and not any order passed by the Election Commission under powers conferred on it by section 85. It was on this account held that an order passed by the Election Commission under section 85 was binding on the Election Tribunal and was not open to review by it. The words "notwithstanding anything contained in section 85" in section 90(4) were not construed to mean that the provisions of section 85 were intended to override section 90(4). The conclusion was just the contrary. In other words, the conclusion was that section 90(4) overrode the provisions of section 85. It was only an order passed under section 85 which excluded the exercise of the powers conferred on the Election Tribunal by section 90(4). Had no order been passed, then it is crystal clear that the Election Tribunal would have been fully competent to deal with the matter under section 90(4) notwithstanding the fact that under section 85 the Election Commission was also invested with the power to deal with the question of delay. The word "notwithstanding", as used in section 35 of the Act, seems to me to mean "in spite of", "despite" or "without prevention or obstruction from or by". Construed in this sense, section 35 would mean that despite or in spite of anything contained in sections 23, 24 and 25, the State Government would be entitled to recover the amount payable to it under the Act as arrears of land revenue. In other words, nothing contained in sections 23, 24 and 25 of the Act would prevent or obstruct the exercise of the power conferred on the State Government by section 35. To put it

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still more plainly, it would seem to connote that the provisions of sections 23, 24 and 25 would not serve as an impediment to the method of recovery as contained in section 35. I am wholly unable to construe the phraseology of section 35 to mean, as is contended, that the moment the powers conferred by sections 23, 24 and 25 are sought to be invoked by the State Government, section 35 disappears from the picture and becomes for all practical purposes non-existent, depriving the State Government of the method of recovery described therein. Neither the purpose, object and scheme of the Act, nor any other principle of law brought to our notice seems to justify this construction. On the other hand, the statutory object and purpose suggests that the power conferred by section 35 has been deliberately reserved to the State Government for realising the loan advanced by it to a citizen in the form of aid for industrial purposes; and to decline this power on the construction pressed before us on behalf of the petitioner, would be supportable neither on considerations of justice and equity nor on any sound principle of law. Indeed the suggested construction may well hamper liberal and equitable working of the Act in the wider interest of the community in general for whose benefit the Act has been enacted. To obstruct unduly the recovery from the citizen, in accordance with the agreed terms, of the aid given to him by the State, at the time of need, for industrial purposes, would clearly tend to handicap the State in advancing further loan to other citizens for similar purposes under the Act by restricting its financial resources; and this, in my view, may tend to obstruct rather than promote the effective working of the Act. It may be borne in mind that there is no order made under section 23 to 25 of the Act which is made final and which runs contrary to any order that may be made under section 35. It may be recalled that in the *case* of *Dinabandhu Sahu* the Election Commission had condoned the delay in presenting the election petition within the prescribed period; and the contention that notwithstanding this final order the Election Tribunal had the power to make an order to the contrary holding the election petition to be barred by limitation, was repelled by the Supreme Court. In my opinion it was apparently on the analogy of the general doctrine of *res judicata* or the rule of conclusiveness of judgments that the final order of the Election Commission under section 85 of Act 43 of 1951 was held to be immune from re-consideration by the Election Tribunal,

under section 90(4) of that Act, there being nothing in this sub-section conferring on the Election Tribunal an overriding power in respect of orders made by the Election Commission under re-section 85. I, therefore, feel little hesitation in repelling this contention in support of the petition.

The next challenge is directed against the levy of 10 per cent interest in case of default. It is strongly argued on behalf of the petitioner that the question whether a higher rate of interest payable in the event of default is penal in a given case and what should be the fair and reasonable rate of interest is a matter for a Court of law and justice to determine, and the State cannot use coercive process to realise interest at the rate of 10 per cent merely because it constitutes a term of the agreement. Reliance for this submission is placed on section 74 of the Indian Contract Act.

It is undoubtedly true that in enacting section 74 of the Contract Act the Indian Legislature has departed from the English Common Law and that it has attempted to eliminate the distinction between the stipulations providing for payment of liquidated damages and those in the nature of penalty. The Indian Law seems to simplify the position by providing a uniform principle applicable to all stipulations whether naming an amount to be paid in case of breach or by way of penalty. The Court has apparently jurisdiction in assessing damages for breach of contract to award such compensation as it deems reasonable, having regard to all the circumstances of the case, but subject to the limit of the penalty stipulated. The word 'reasonable' would seem to imply a duty to award compensation in accordance with the settled principles. Coming to the question of stipulation to pay increased interest in the case of breach, it appears to me that if such increased interest is payable from the date of agreement or from a date prior to the default, then there may be little difficulty in holding the stipulation to be by way of penalty, by reason of its oppressive character, for it apparently operates *in terrorem* over the promisor. If, however, the increased interest is payable from the date of the breach, then the stipulation may or may not be by way of penalty, depending on all the facts and circumstances of the case. This indeed is also clear from the Explanation to section 74. This

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Explanation not only does not preclude the Court from holding such a stipulation not to amount to a penalty, but its language seems to me to suggest that such a stipulation may be by way of penalty only if there be some special circumstances, for instance, something unconscionable or unreasonable about the agreement or about the increased rate of interest. If the provision for increased rate of interest might well have been intended to be a part of the primary contract between the parties, then it may not easily be considered to be by way of penalty. In the case in hand it may be remembered that the State Government is advancing loans under the Statute in order to encourage the development of industries in the Punjab and the rate of interest charged is fairly low. The considerations of public policy demand that such loans be repaid strictly as agreed, so that other deserving claimants may get similar timely aid to effectuate the statutory purpose. Keeping in view all the circumstances, the rate of 10 per cent by way of interest does not seem to me to be unreasonable.

But there is still another answer to the petitioner's challenge. The Indian Contract Act which is enacted to define and amend certain parts of the law relating to contracts, expressly provides that nothing contained therein is to affect the provisions of any other Statute, Act or Regulation not expressly repealed, nor any incident of any contract not inconsistent with the provisions of that Act. Now, the rate of interest in the present case is fixed in Form F, which is a part of the statutory rules validly framed by the State Government under the rule-making power conferred on it by section 46 of the Act. The rate of interest has also been inserted in this form under this rule-making power. I am, therefore, inclined to hold that the increased rate of interest must be deemed to have been fixed in pursuance of a statutory power and, therefore, not effected or controlled by section 74 of the Indian Contract Act. In any event it is scarcely appropriate for this Court to go into this somewhat complex question in the present proceedings which are, after all, both summary and discretionary.

Incidentally it may be observed that although I have dealt with the point raised independently, our attention has also been drawn by the learned counsel for the respondent to a recent Single Bench decision by Gurdev

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Singh, J. in *Shiv Kumar Chopra* v. *State of Punjab*, C.W. 2573 of 1964 decided on the 18th August, 1965 in which a somewhat similar writ petition was also dismissed largely on somewhat identical grounds. No cogent criticism has been levelled on behalf of the petitioner against the ratio of that decision.

In the result this petition fails and is dismissed, but without costs.

Narula, J.

NARULA, J.—I concur with every word of the order passed by my esteemed and learned brother, Dua, J.

In our view, about the non-applicability of section 74 of the Contract Act to the terms of an agreement under a statute, we are also supported by the judgment of D. K. Mahajan, J., dated February 17, 1965 in C.W. No. 792-D of 1963, *Balwant Singh* v. *Union of India and others* (3).

B. R. T.

CIVIL MISCELLANEOUS

Before Inder Dev Dua and R. S. Narula, JJ.

KARAM CHAND,—*Petitioner*

versus

UNION OF INDIA AND ANOTHER,—*Respondents.*

Civil Writ No. 1385 of 1962

1966

January 27th.

Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954)—S. 24(1)—"At any time"—Meaning of— Chief Settlement Commissioner exercising jurisdiction under the section after undue delay—Whether should state grounds of justification for interference in his order—Fixation of the value of the evacuee property before transfer—Whether can be interfered with after transfer.

Held, that it is no doubt true that power is vested in the Chief Settlement Commissioner by section 24(1) of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, to set aside or vary any order passed by any of the authorities named in that sub-section at any time if the Chief Settlement Commissioner is not satisfied

(3) 1965 D.L.T. 120.