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save as provided by section 152 or on review. It is clear that section 151 cannot confer jurisdiction on the Court to do what is prohibited by positive law. Section 152 refers merely to clerical or arithmetical errors and it is of no assistance in the present case. In my opinion, therefore, the learned Subordinate Judge had no jurisdiction to alter the order of his predecessor in the way he has done.

ROSS, J.

It was further argued however, on behalf of the opposite party, that inasmuch as there are now added plaintiffs who have taken a transfer of part of the property, the nature of the suit has been altered and the Court is entitled to consider whether the purchaser-plaintiffs are in possession, and if they are not, to demand an *ad valorem* court-fee. In my opinion the devolution of interest pending the suit can make no difference in the court-fee to be paid. These plaintiffs come in in the interest of their vendor, the original plaintiff, and their position is identical with his.

I would, therefore, allow this application and set aside the order of the Subordinate Judge. The petitioner is entitled to his costs.

DAS, J.—I agree.

Application allowed.

APPELLATE CIVIL.

Before Jwala Prasad and Kulwant Sahay, J.J.

DEVENDRA NATH GHOSH

v.

SAMBHU NATH PANDEY.*

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March, 28.

Contract Act, 1872 (*Act II of* 1872), *section* 74—*Amending Act*, 1899 (*Act VI of* 1899)—*Mining lease executed in* 1895—*stipulation for payment of royalty in four* kists *and*

* Appeal from Original Decree No. 23 of 1921, from a decision of Babu Brajendra Kumar Ghosh, Subordinate Judge of Dhanbad, dated the 14th August, 1920.

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interest on default—further provision for increased rate of interest on default in four successive kists.

A lease of a coal mine executed in 1895 provided (*i*) for the payment by the lessee of a minimum royalty of Rs. 1,750 *per annum* in four *kists*, (*ii*) for the payment of interest at 1 *per cent. per mensem* in case of default on the payment of any *kist* and (*iii*) for the payment of interest at the rate of Rs. 3/2 *per cent. per mensem* in case of default in the payment of four consecutive *kists*. *Held*, that the stipulation for increased interest on default in the payment of four *kists* was a stipulation by way of penalty within the meaning of section 74 of the Contract Act, 1872. The High Court, however, allowed the claim for interest at the enhanced rate as being reasonable compensation for breach of contract committed by the lessor.

The *Explanation* and *Illustration D*, added to section 74 of the Act of 1872 by the amending Act of 1899, did not purport to make a change in the law as enacted in 1872 but only to explain and illustrate it in order to remove certain doubts as to the true construction of the original section.

Muthukrishna Iyer v. *Sankaralingam Pillai*(1), followed.

Appeal by the defendants.

This appeal arose out of a decision of the Subordinate Judge of Dhanbad, dated the 14th August, 1920, in an action to recover royalty and commission due from *Magh* 1319 to *Pous* 1325, *B.S.*, in respect of coal-fields in *mauza* Tentulia, covering an area of 175 *bighas*. This property belonged to the plaintiffs and defendants 5 to 9, the plaintiffs having a six-annas share therein. Defendant No. 1 was the representative of the lessee of the said property, and defendants 2 to 4 were sub-lessees under defendant No. 1. This appeal was preferred by defendants 2 to 4, and the only question involved in it was as to the rate of interest which the plaintiffs were entitled to obtain from the defendants. This point was covered by issue No. 3 framed in the Court below and

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was decided against the defendants. The plaintiffs claimed the interest at the rate mentioned in paragraphs 11 and 13 of the *kabuliyat* (*Exhibit 5*). Those paragraphs were as follows:

11. "That whether the said coal is raised and sold or not, I shall have to pay the sum of Rs. 1,750 as annual minimum royalty. I shall pay the said minimum royalty and commission equally in four *kists* of the year, *i.e.*, in the months of *Asar*, *Aswin*, *Pous* and *Chaitra*. If I make default in payment of *kists*, I shall pay interest thereon at 1 *per cent. per mensem.*, and if I do not pay the minimum royalty of any year for four *kists* successively I shall pay interest thereafter at Rs. 3-2-0 *per cent.*"

13. "That I shall pay after every six months the commission, which will be due within the year, according to the account given in the above paragraph 10, *i.e.*, I shall pay the commission which will be due from *Baisakh* to *Aswin*, within the month of *Kartic* thereafter and the commission which will be due from *Kartic* to *Chaitra*, within the month of *Baisakh* of the next year. At the time of thus paying the total amount of commission, I shall pay the remaining amount, after crediting the amount, which will be paid up to that time on account of royalty. If I do not regularly pay the said excess amount of commission, I shall pay interest at Re. 1 *per cent. per mensem*; and if I do not pay the amount of commission due for any year within the month of *Baisakh* of the next year, I shall pay interest on the said unpaid amount at Rs. 3-2-0, *per cent. per mensem.*"

The appellants contended that the enhanced rate of Rs. 3-2-0 *per cent. per mensem*, mentioned in these clauses, was penal and that the plaintiffs were not entitled to the said rate. This contention was based upon section 74 of the Contract Act. That section says:

74. "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party, complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for."

The following *Explanation* was added to that section by the Amending Act VI of 1899:

"A stipulation for increased interest from the date of default may be a stipulation by way of penalty."

The amending Act also added *Illustration D* which runs as follows:

"*A* gives *B* a bond for the re-payment of Rs. 1,000 with interest at 12 *per cent.*, at the end of six months, with a stipulation that in case

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of default, interest shall be payable at the rate of 75 *per cent.*, from the date of default. This is a stipulation by way of penalty, and *B* is only entitled to recover from *A* such compensation as the Court considers reasonable."

The trial Court held that the stipulation for interest at the enhanced rate was not a penalty.

Sultan Ahmed (with him *Saroshi Charan Mitter*, *Baikuntha Nath Mitter* and *Abani Bhusan Mukerji*), for the appellants.

Susil Madhab Mullick and *Norendra Nath Sen*, for the respondents.

JWALA PRASAD AND KULWANT SAHAY, J.J. (after stating the facts, as set out above, proceeded as follows) :—

The question as to whether an increased rate of interest after a default made in the payment at the original rate of interest is or is not a penalty has been the subject of various decisions. The Full Bench decision of the Madras High Court in *Muthukrishna Iyer* v. *Sankaralingam Pillai* (1) has summarised the authorities upon the point and has come to the conclusion that even when no interest is payable until default but interest at an exorbitant rate is payable from the date of default, the Court has power under section 74 of the Contract Act IX of 1872 as amended, to treat the latter stipulation as a penalty and award reasonable compensation in lieu of such excessive interest.

Now, interest is payable by way of damage for the loss sustained to the party who advances money to another. This damage may be the subject of an agreement between the parties and at the time when the contract of loan is entered into the parties may fix a consolidated sum or merely a certain percentage on the amount advanced to be paid by the debtor as compensation to the lender on account of his being out of pocket with respect to the sum advanced by him

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as a loan. The latter way of fixing compensation is commonly known as interest on the loan. This is enforceable in law as an agreement between the parties; but over and above this in order to ensure payment of the loan at an appointed time the parties may further agree that an additional sum by way of penalty or an increased rate of interest over and above that originally fixed would be payable by the defaulting debtor in case of breach of the contract to pay at the appointed time. The enhanced rate of interest may be chargeable either from the time the breach is committed or from any prior period. This kind of stipulation is said to be penal, and the creditor cannot, as a matter of right, enforce it in law. Section 74 in such a case gives power to the Court to interfere with the contract entered into between the parties, by empowering the Court to vary the amount fixed or the increased rate of interest by allowing only reasonable compensation. The section, as it originally stood in the Act of 1876, gave rise to doubt as to the applicability of the section when the amount of compensation is not named in the contract at a fixed sum but an increased rate of interest on the loan. One view was that the section would apply inasmuch as the enhanced rate of interest can be resolved into a fixed sum by a mere arithmetical calculation and thus become a fixed sum named in the contract at the time the agreement is sought to be enforced. Again, doubts were entertained as to whether the section would apply only when the increased rate of interest is payable from a date prior to the date of default or also when the increased rate of interest is payable only from the date of default, and not from a time anterior thereto. There was no serious doubt entertained as to the former stipulation being penal, and the *Explanation* and *Illustration D* were added in 1899 to make it clear that the latter class of stipulation also is penal. These do not purport to make a new change in the law as enunciated in the section as it stood in 1872, but only explain and illustrate it so as to remove the doubt entertained in some quarters. As a matter of fact, the provision in

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the main section is wide enough to cover the case contemplated in the *Explanation* and *Illustration D*— not only the enhanced rate of interest becomes by a mere arithmetical calculation a fixed sum at the time the contract is sought to be enforced, and thus become the "amount to be paid in case of such breach", but that such a stipulation would clearly come in the words in the section or if the contract contains any other stipulation by way of penalty.

Therefore the contention that the *Explanation* and the *Illustration* referred to above do not apply to the present case, inasmuch as the *kabuliyat* in question (*Exhibit 5*) is dated 19th April, 1895, that is to say, much anterior to the amending Act of 1899, has no force in it. No doubt, upon a plain construction of the clauses in the aforesaid *kabuliyat* it will be manifest that the primary contract is to pay interest at 1 *per cent. per mensem*. It is only in case of default for successive four *kists* in a year that an increased rate of interest, namely, Rs. 3-2-0, from the date of default is payable. This increased rate of interest is to come into operation only when a breach will be committed by the debtor in the primary agreement adverted to above. Therefore, to my mind, it appears that the primary contract between the parties is to pay interest at the rate of 1 *per cent. per mensem* and the secondary contract, depending upon certain events, is at an enhanced rate of Rs. 3-2-0 *per cent. per mensem*. Section 74 does not make a distinction between a primary and a secondary contract, but such a distinction seems to have been maintained and recognized in the various cases referred to in *Muthukrishna Iyer* v. *Sankaralingam Pillai* (1). Under the section, a stipulation for an increased rate of interest from the date of default may be a stipulation by way of penalty irrespective of whether the stipulation happens to be the primary or the secondary contract. I have already observed that this *Explanation* was added in order to remove any doubt as to the increased rate of interest

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from the date of default being not considered as a penal clause, for an increased rate of interest prior to the date of default was unquestionably always deemed to be a penalty. I have therefore no doubt in my mind that the increased rate of interest, *i.e.*, Rs. 3-2-0 *per cent. per mensem*, stipulated for in clauses 11 and 13 of the *kabuliyat* is a penal clause. The view is supported by the authorities, both English and Indian, referred to in detail by the Full Bench of the Madras High Court in the case of *Muthukrishna Iyer* v. *Sankaralingam Pillai* (1). Upon a true construction of the section I have also arrived at the same conclusion, *viz.*, that a stipulation as to increased rate of interest such as the one we are considering is a penal one. But that does not determine the question in hand. The section in the *Explanation* does not straight away disallow all stipulations for compensation in the shape of fixed amount or an increased rate of interest agreed upon to be payable in case of breach of contract. The section only makes such stipulations penal and empowers the Court to rip up the agreement between the parties and to award such compensation as the Courts consider reasonable in the circumstances of the case, not exceeding the increased rate of interest agreed to between the parties. The contract between the parties fixes the limit beyond which no compensation can be allowed. But the Court has power to reduce the compensation mentioned in the agreement of the parties. We are relieved in this case from considering the question further from any other point of view. There is no suggestion that the contract was arrived at on account of undue influence, coercion or compulsion, misunderstanding or misrepresentation. It is admitted that the contract was willingly entered into between the parties. The simple question therefore is whether in this record there is sufficient material for us to hold that the compensation named in the written agreement of the parties, namely, the enhanced rate of interest of Rs. 3-2-0 *per cent. per mensem*, from the

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date of default is not a reasonable compensation. The parties have left the point altogether in the dark; no evidence of what is the prevailing rate of interest in contracts of this kind has been adduced, nor has any evidence been given as to what is the reasonable compensation ordinarily allowed in the vicinity in respect of defaults committed by a debtor in not punctually paying the amounts of rents and royalties mentioned in the lease. We cannot, therefore, in this case regard the plaintiffs' claim for increased rate of interest as unreasonable compensation for breach of the contract committed by the lessor.

[The remainder of the judgment is not material to this report. The terms on which the appeal was eventually disposed of, were settled by consent of the parties].

REFERENCE UNDER THE INCOME-TAX ACT.

Before Dawson Miller, C. J. and Foster, J.

SACHCHIDANANDA SINHA.

v.

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COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. *

Income-tax Act, 1922 (Act XI of 1922), section 33 "reasonable opportunity".

Where an order is made by the Commissioner under section 33 of the Income-tax Act, 1922, in circumstances where he is really exercising the duties of the income-tax officer under section 23(2) and is, in effect, calling upon the assessee to give evidence to support the original return made by him, sufficient time should be given to the assessee to afford him a reasonable opportunity of placing his case before the Commissioner. In the present case a week's time was held to be insufficient.

* Miscellaneous Judicial Case No. 37 of 1924.