

(1971) 09 AHC CK 0020

In the Allahabad High Court

Case No : Civil Misc. Writ No's. 2200, 3113, 3193, 3411 and 3493 of 1968

Prakash Pottery Industries, Chunar

APPELLANT

Vs

The District Magistrate, Mirzapur and Others

RESPONDENT

Date of Decision : 16-09-1971

Acts Referred:

Constitution of India, 1950 — Article 14

Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 — Section 3, 3(1)

Citation : AIR 1972 All 97 : (1971) 41 AWR 676

Hon'ble Judges : R.S. Pathak, J;H.N. Seth, J;B.N. Lokur, J

Bench : Full Bench

Advocate : S.K. Suri, for the Appellant; V.P. Misra and Standing Counsel, for the Respondent

Final Decision : Disposed Of

Judgement

Pathak, J.—The petitioner, M/s. Prakash Pottery Industries, obtained a loan from the Uttar Pradesh Government for developing its pottery industry. A deed of agreement dated March 5, 1966, was executed between the petitioner and the State Government. It required the petitioner to apply the loan for purchasing machines for its pottery industry within a period of one year, and provided for repayment of the loan with interest in installments. Then followed the provisions:

"10. If any of the installments aforesaid shall be in arrears in whole or in part, the whole sum, then remaining due to the creditor under the deed on account of principal and interest shall thereupon become payable at once and the borrower will be liable to pay the same.

11. For the consideration aforesaid and in further pursuance of the aforesaid agreement the borrower hereby grant and transfer by way of simple mortgage to the creditor, all that property described in the schedule hereto to the intent that the said property hereby mortgaged shall remain and be charged by way of simple mortgage as security for the repayment to the creditor of the said principal money and interest in accordance with the covenants herein contained.

12.

13. It is hereby agreed and declared that in case of default in payment of installments of loan and its interest, interest at the rate of 8 per cent, per annum shall be payable, on the such outstanding sum as may become due under the covenants hereinbefore contained, or in case of breach of any of the conditions by the borrower herein contained the creditor may realise the sum to be declared by the said District Magistrate as then due to him on account of this loan as arrears of land revenue by sale of the property hereby given in security without the intervention of Court or any other property of the borrower or in addition, or in the alternative, forthwith enforce against the said property hereby mortgaged or any part thereof all or any of the remedies of the holder of a simple mortgage."

2. It appears that on the ground that the petitioner had failed to comply with the terms of the agreement proceedings for recovery of the amount as an arrear of land revenue were initiated, and on February 14, 1968, the Tehsildar attached the mortgaged property. Thereafter on May 27, 1968, the property was sold by auction. Before the sale could be confirmed, the petitioner filed the present writ petition. It was amended subsequently, and in its present form it prays for the quashing of the notice of demand, the attachment and other consequential proceedings.

3. The petitioners in the connected writ petitions are also persons who took loans from the Uttar Pradesh Government by way of financial assistance in connection with the industries carried on by them. They executed similar agreements. The amounts due from them are also sought to be recovered as an arrear of land revenue

4. The several writ petitions came on for hearing before a learned single Judge of this Court. It was contended by the petitioners before him that Section 3(1)(c) of the Public Moneys (Recovery of Dues) Act, 1965, with reference to which recovery proceedings were being taken, contravened Article 14 of the Constitution and was, therefore, ultra vires. Reliance was placed on Deep Chand Agarwal v. Director of Industries 1969 AWR 689 decided by a Division Bench of this Court. The learned single Judge, however, expressed the view that the decision called for reconsideration and referred the following question to a larger Bench:

"Does Section 3 (1) (c) of the Public Moneys (Recovery of Dues) Act, 1965 violate Article 14 of the Constitution ?"

5. The petitions were then listed before a Division Bench, and it has referred the question to a Full Bench.

6. The Public Moneys (Recovery of Dues) Act, 1965 as its long title shows, provides for the speedy recovery of certain classes of dues payable to the State or the Uttar Pradesh Financial Corporation. Section 1 sets out the short title and extent of operation, and Section 2 defines certain expressions used in the Act.

Section 3 as originally enacted provided:

"3. Recovery of certain dues as arrears of land revenue,--(1) Where any person is party--

(a) to any agreement relating to a loan, advance or grant given to him by the State Government or the Corporation by way of financial assistance, or

(b) to any agreement relating to a guarantee given by the State Government or the Corporation in respect of a loan raised by an industrial concern, or

(c) to any agreement providing that any money payable thereunder to the State Government shall be recoverable as arrears of land revenue, and such person

(i) makes any default in repayment of the loan or advance or any installment thereof, or

(ii) having become liable under the conditions of the grant to refund the grant or any portion thereof, makes any default in repayment of such grant or portion or installment thereof, or

(iii) otherwise fails to comply with the terms of the agreement,--

then, in the case of the State Government, such officer as may be authorised in this behalf by the State Government by notification in the official Gazette, and in the case of the Corporation, the Managing Director thereof, may, without prejudice to any other mode of recovery under any other law for the time being in force, send a certificate to the Collector, mentioning the sum due from such person and requesting that such sum together with costs of the proceedings be recovered as if it were an arrear of land revenue.

2. The Collector on receiving the certificate shall proceed to recover the amount stated therein as an arrear of land revenue."

7. The learned Single Judge, who referred the question in the first instance, had had occasion to consider it in Tandon Sugar Works, Shahjahanpur Vs. Uttar Pradesh Financial Corporation, Kanpur and Others, and had held in favour of the constitutional validity of Section 3 (1) (c) of the Act. He was of the view that the observations in the majority judgment of the Supreme Court in Seth Banarsi Das Vs. The Cane Commissioner and Another, were attracted rather than the decision of that Court in Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another, . He observed:

"In my opinion the principle enunciated in the case of Banarsi Das would be applicable to Clause (c) of subsection (1) of Section 3 of the Public Moneys (Recovery of Dues) Act, 1965. Under that Clause where any person is party to any agreement providing that any money payable thereunder to the State Government shall be recoverable as arrears of land revenue and such person makes default in payment, the money could be recovered as arrears of land revenue. Thus, the procedure provided in Clause (c) is available only against

such debtor who have agreed that the money payable may be recovered as arrears of land revenue. The other general remedy by way of a suit or other remedies specifically provided in the U. P. Financial Corporation Act are available against everybody, but this special remedy would be available only as against debtors with whom there is an express agreement. The election that the loan may be recovered as arrears of land revenue under this Act is not dependent upon the will or whim of the Corporation, but would be available only if the parties have voluntarily agreed to it. One of the two factors which according to the Supreme Court had to co-exist, namely that the authority has been conferred an arbitrary power to pick and choose, will not be there."

The decision in Northern India Caterers (P) Ltd. (supra) was distinguished on the ground that it was concerned with recovery of State property while the U. P. Public Moneys (Recovery of Dues) Act was concerned with the recovery of State revenues. A special appeal against the judgment and order of the learned Single Judge was summarily dismissed by a Division Bench of this Court on February 27, 1968.

8. Thereafter, in Deep Chand Agarwal 1969 All WR 689 (supra), a Division Bench of this Court at Lucknow which apparently was not aware of the summary dismissal of the special appeal, considered the decision of the learned Single Judge and pointed out:

"..... the abovementioned reasoning ignores the fact that among the debtors who enter into an agreement as envisaged by Section 3 (1) (c) of the Act it is for the authority concerned to choose without any guidance furnished by the Act in matter of making that choice as to whether it would proceed under the provisions of the Act against one of such debtors and adopt ordinary mode of recovery provided under any other law for the time being in force against the other or others of such debtors..... In our view this aspect of the matter escaped the notice of the learned Judge when he on the basis of the reasoning noted above came to the conclusion that Section 3 (1) (c) of the Act was not violative of Article 14 of the Constitution."

The learned Judges examined several decisions on the application of Article 14, and came to the conclusion that the observations of the Supreme Court in Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another, fully applied to the case before them and, therefore, Section 3 of the Act violated Article 14 of the Constitution.

9. The Public Moneys (Recovery of Dues) Act, 1965 was amended in 1970 by the State Legislature. It seems to me desirable to consider the question referred in the light of the unamended Act first. That, as will appear from what follows, is necessary for examining the legal effect of the amendments, made.

10. We have before us a number of agreements creating a simple mortgage in respect of a loan advanced, and providing for the recovery of the loan as an arrear of land revenue by sale of the property given in security without the

intervention of the Court or of any other property of the borrower and in addition, or in the alternative, for the enforcement against the mortgaged property of all or any of the remedies of the holder of a mortgage. Section 3 (1) (c) of the Act, as originally enacted, provides that in cases where a person is party to an agreement providing that money payable thereunder to the State Government shall be recoverable as an arrear of land revenue, then on default by such person a certificate may be sent to the Collector by an officer authorised by the State Government, requesting that the sum specified therein be recovered as if it were an arrear of land revenue. Section 3 (1) (c) also declares that this shall be without prejudice to any other mode of recovery under any other law for the time being in force. The petitioners point out that the said Section 3 (1) (c) specifically contemplates that any one of several remedies may be adopted for recovering the sum due, the remedies provided Under the ordinary law or the remedy specifically prescribed by Section 3 (1) (c). It is contended that as between persons who have entered into an agreement providing for recovery as an arrear of land revenue the executive has been allowed the widest discretion to apply the remedy prescribed by Section 3 (1) (c) against one such person and the remedies under the ordinary law against others. It is urged that there is nothing either in the nature of the legislation or its provisions to bind the executive by any clear or definite norm. The recovery of the sum due as an arrears of land revenue is, it is said, more drastic and prejudicial than the recovery, for example, by way of suit. Consequently, the equal protection of the law as guaranteed by Article 14 of the Constitution is violated. For the respondents, the State of Uttar Pradesh and its officers, it is urged that there is no discrimination because the recovery as an arrear of land revenue is being applied with the consent of the petitioners, who are parties to an agreement expressly providing for recovery in that mode, and that in any event the Preamble and the provisions of the Act afford a guiding principle in the matter.

11. What are the remedies open to the State Government for recovering the sum due from the petitioners ? It may proceed by way of a suit for sale of the mortgaged property, a suit such as is contemplated by Rules 4 and 5 of Order 34 of the Code of Civil Procedure. Alternatively, it may exercise its right to sell the property u/s 69 of the Transfer of Property Act without the intervention of the Court. Those are remedies available under the ordinary law. Instead of adopting either of them, the State Government may prefer to recover the sum as an arrear of land Revenue by virtue of Section 3(1)(c). Can it be said that the latter remedy is more drastic and prejudicial than the remedies afforded by the ordinary law?

12. In a suit for sale of the mortgaged property the defendant is entitled to file a written statement asserting that the amount of the loan has been fully repaid or that the amount due is smaller than the amount claimed by the plaintiff. The defendant may also plead the bar of limitation. If the plaintiff succeeds, then under Rule 4 of Order 34 the Court must pass a preliminary decree ordering an account of what is due to the plaintiff, declaring the amount so due and directing

the defendant to pay in court that amount on or before a specified date. It will further direct that in default of the defendant's paying the amount the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property be sold and the sale proceeds be applied in payment of the amount due. Where the defendant makes payment into Court of the amount found due, then under Rule 5 the Court passed a final decree restoring the mortgaged property and the relevant documents to the defendant. Where such payment has not been made, the Court passes a final decree directing the mortgaged property to be sold so that the sale proceeds may be applied in payment of the amount due. In the event that the Court passes a decree against him, the defendant can go all the way up to the High Court by appeal or revision and in certain cases even by appeal to the Supreme Court.

13. The power of sale referred to in Section 69 of the Transfer of Property Act is distinct from the power of a simple mortgagee to cause the mortgaged property to be sold by decree of the Court. Where the power of sale is exercised u/s 69, it is imperative that the State Government, before exercising such power, should serve on the debtor a notice in writing requiring payment of the principal money. It is only if thereafter default is made in payment of the money for three months or some interest under the mortgage amounting at least to Rs. 500 is in arrears and remains unpaid for three months after becoming due that the power of sale may be exercised. In *Babamiya Mohidin Shakkar Vs. Jehangir Dinshaw Belgaumwalla*, these conditions have been regarded as mandatory and they cannot be varied even by agreement. To the same effect is the view taken in *Madras Deposit and Benefit Society v. Passanha* ILR (1888) Mad 201 and in *Kamalambal Vs. M. Purushotam Naidu*,

14. Where recovery of the sum due is sought u/s 3 (1) (c) of the Public Moneys (Recovery of Dues) Act as if it were an arrear of land revenue, the procedure is more stringent and prejudicial to the debtor. The rights available to a debtor in a suit for sale of the mortgaged property or upon exercise of the power of sale u/s 69 of the Transfer of Property Act are not available here. They are valuable rights, and afford remedies and relief to the debtor which cannot be claimed by him when the sum is recovered as an arrear of land revenue. Recovery of the sum as an arrear of land revenue does not necessarily contemplate an adjudication as to whether the debt is due, whether it has been repaid in full or in part, nor can the bar of limitation be pleaded, there is no right of appeal or revision to a Court. And the creditor is not bound to wait for a period of three months after service of notice on the debtor for payment of the money.

15. I am also unable to see any substance in the contention of the respondents that unlike a suit for sale of mortgaged property or the power of sale u/s 69 of the Transfer of Property Act all that is sold when recovery is effected as if the sum due were an arrear of land revenue is merely the defaulter's interest in the mortgaged property.

16. It has been vehemently contended for the petitioners that Section 3 (1) (c)

will be availed of only in the case of admitted or undisputed dues while the case of dues disputed bona fide will be left to the remedies prescribed by the ordinary law. To my mind, Section 3 (1) (c) does not expressly or by necessary implication limit its application to admitted or undisputed dues alone. There is nothing to prevent its application also to the recovery of dues disputed bona fide. Had the Act contained such a limitation the charge of discrimination would have been considered weakened. On the contrary, an unfettered, discretion has been conferred upon the executive in the matter. In some of the petitions before us, the agreement contains an arbitration Clause and it might be possible to say that following the terms of the agreement the Government in the case of bona fide dispute, must first seek its determination by resort to arbitration, and if the arbitration award declares that an amount is due the State Government may proceed to recover it as an arrear of land revenue. There is no corresponding provision in the Act itself.

17. It appears to be well settled that where a special law enacts a stringent procedure for dealing with - a specific situation, but leaves it to the executive in its unfettered discretion to apply the stringent procedure against one person while leaving others to be governed by the ordinary procedure under the general law, the special law violates Article 14. The Supreme Court has in numerous cases struck down legislation which conferred an absolute discretion upon the executive to select for arbitrary treatment one from many persons similarly situated. The law laid down in *The State of West Bengal Vs. Anwar Ali Sarkar*, *Suraj Mall Mohta and Co. Vs. A.V. Visvanatha Sastri and Another*, and *Shree Meenakshi Mills Ltd., Madurai Vs. Sri A.V. Visvanatha Sastri and Another*, is as valid today as when it was laid down. Where the exercise of discretion is subject to controlling considerations, specifically set out in the statute or which can clearly and definitely be spelt out from the legislative policy expressed in the statute, the legislation cannot be said to violate Article 14. In *Kedar Nath Bajoria Vs. The State of West Bengal*, the Supreme Court expounded this principle in some detail. But while doing so, it commented upon the necessity of the legislation laying down definite standards or indicating in clear terms the underlying policy and principles in accordance with which the administrative authority was expected to apply the law to select persons or things. This was emphasised by the Supreme Court in *Gopal Narain Vs. State of Uttar Pradesh and Another*, when it observed:

".....what can be posited is that the policy must appear clearly either expressly or by necessary implication from the provisions of the statute itself."

I have already pointed out that there is no specific provision in the Act itself guarding against discrimination as between persons falling in the group defined by Section 3 (1) (c). Can it be said that controlling norm can be spelt out from the policy of the Act ? In my opinion, it cannot. The legislative policy embodied in the Act and expressed in its long title is the speedy, recovery of certain classes of dues payable to the State. The speedy recovery of such dues specifies the object

of the legislation, but as a statement of policy controlling the discretion of the executive it is vague and wholly insufficient. It leaves to the absolute discretion of the executive to which persons in the group defined by Section 3 (1) (c) the drastic procedure will be applied and to whom it will not. Speedy recovery can be contemplated in respect of disputed as well as undisputed dues. In *Anwar Ali (supra)* the West Bengal Special Courts Act, 1950 laid down a procedure providing for the "speedier trial" of certain offences which procedure was prejudicial to the accused in comparison with that available under the general law. It was pointed out by the Supreme Court that while the speedier trial of an offence may be the reason and motive for the legislation it was too vague, uncertain and illusory a criteria to form the basis of a valid and reasonable classification. It was open to the executive to proceed against persons accused of the same offence under two different procedures, the one more drastic than the other. It would perhaps be pertinent to quote the observation of Mr. Justice Douglas of the U. S. Supreme Court in his Tagore Law Lectures "From Marshall to Mukherjea":

"A prosecutor, who may choose the procedure he prefers, can put one citizen at a disadvantage that the others, who allegedly committed the same crime, do not suffer. That power is a device that can cloak the most invidious discrimination....."

Once special procedures are allowed for select cases, as the prosecutor alone may determine, we adopt a formula as dangerous as some of those used when the Star Chamber flourished in England."

18. I shall now refer to some cases decided by the Supreme Court and relied upon by the respondents where, it is urged the policy of the Act has been held to afford guidance to the executive in exercising its discretion.

19. In *Biswambhar Singh and Others Vs. The State of Orissa and Another*, the Supreme Court upheld the validity of Sections 3 and 4 of the Orissa Estates Abolition Act, 1951 against the charge that they violated Article 14 by referring to the policy enunciated in the long title and the two preambles to the Act. They clearly indicated, the Supreme Court pointed out, that the object and purpose of the Act was to abolish all the rights, title and interest in land of intermediaries by whatever name known, and the discretion vested in the State Government u/s 3 or 4 had to be exercised in the light of that policy. It could not be said to be an absolute or unfettered discretion because sooner or later all estates had perforce to be abolished. The facts of that case are wholly distinguishable. There was only one course open to the State Government to adopt in respect of all intermediaries. There was no choice before it in the matter.

20. The next case in *Niemia Textile Finishing Mills Ltd. v. Second Punjab Tribunal*. Section 10: AIR 1957 SC 329 of the Industrial Disputes Act, 1947 empowers the Government to refer an industrial dispute to a Board of Conciliation for promoting a settlement or to a Court of Enquiry for enquiry on any matter appearing to be

connected with or relevant to the industrial dispute or to refer that dispute to a Tribunal for adjudication. Section 19(3) declares that an award will remain in operation for a period of one year but the Government can either reduce that period or extend it. The petitioner contended that Section 10 violated Article 14 inasmuch as the Government had been vested with the discretion in one case to refer the industrial dispute to a Court of Enquiry and in another case to refer it to the Industrial Tribunal, the procedure and the consequences of the decision in the case of the Industrial Tribunal being more onerous and prejudicial than in the case of the Court of Enquiry. Section 19 was also challenged as violating Article 14 on the ground that the Government enjoyed an unfettered discretion to determine the period of the award. The submission did not find favour with the Supreme Court. It pointed out that the discretion had to be exercised in accordance with the criteria found within the terms of the Act itself. The various authorities were set up with particular ends in view and the achievement of the particular ends guided the discretion of the Government in the matter. The preamble to the Act as well as several provisions in it sufficiently indicated how the discretion was to be exercised both in the matter of referring an industrial dispute and in determining the period of duration of an award. The decision proceeded upon the discovery of clear and definite criteria afforded by the preamble and provisions of the Act. And, it is important to note, that the discretion was vested in the Government itself and not in any undetermined officer authorised by it.

21. In *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, Section 3 of the Commissions of "Enquiry Act, 1952 was assailed as violating Article 14. Section 3 empowered the Government to appoint a Commission of Enquiry for the purpose of making an enquiry into any definite matter of public importance. It was urged that the Government enjoyed an unfettered discretion. The contention was repelled on the ground that the discretion had to be guided by the policy laid down, namely that the executive action of setting up a Commission of Enquiry must conform to the conditions of the section, that is to say that there must exist a definite matter of public importance into which an enquiry, in the opinion of the Government, was necessary or was required by resolution in that behalf passed by the House of the People or the Legislative Assembly of the State. In that case also, it will be noticed that the discretion was to be exercised by the Government and not by any subordinate authority.

22. There is then the case of *Ram Sarup Vs. The Union of India (UOI) and Another*, . The validity of Section 125 of the Army Act, 1950 was challenged on the ground that it infringed Article 14. The Supreme Court rejected the contention, pointing out that its provisions applied to all persons who were subject to the Act and that those persons formed a distinct class. The submission that it was left to the unguided discretion of the officer mentioned in that section to decide whether the accused person would be tried by a Court Martial or by a Criminal Court was met by the observation that the exigencies of army service, maintenance of discipline in the Army, a speedier trial, the nature of the offence

and the person against whom an offence was committed were clear and definite considerations indicating how the discretion should be exercised. Further, the decision of the relevant military officer did not decide the matter finally. Section 126 empowered the Criminal Court having jurisdiction to try an offender to require the military officer to deliver the offender to the Magistrate to proceed against according to law or to postpone proceedings pending reference to the Central Government if that Criminal Court was of opinion that the proceeding be instituted before it in respect of that offence. When such a request was made, the military officer had either to comply with it or to make a reference to the Central Government, whose orders were final with respect to the venue of the trial. The discretion exercised by the military officer was, therefore, subject to the control of the Central Government.

23. Finally, we have been referred to Jagdish Pandey Vs. The Chancellor University of Bihar and Another, . Section 4 of the Bihar State Universities (University of Bihar, Bhagalpur and Ranchi) (Amendment) Act, 1962 provided that notwithstanding previous statutes on the subject every appointment, dismissal, removal termination of service or reduction in rank of any teacher of a college, not belonging to the State Government, affiliated to the University made on or after November 27, 1961 and before March 1, 1962 would be subject to an order of the Chancellor of the University passed on the recommendation of the University Service Commission. It was contended that this provision contravened Article 14. It was urged that the dates mentioned in the section were completely arbitrary. The Supreme Court held that the reason for the two dates appeared to be that a Bill for the establishment of a Commission which would have the effect of curtailing the powers of the Governing Body of the affiliated colleges was on the anvil of the Legislature, that the Report of the Joint Select Committee was made on November 27, 1961 and Section 48-A of the Bihar State Universities Act was put into force from March 1, 1962. During the period intervening between the two dates several irregularities had been brought to the notice of the Government as to appointments, dismissals, and other action taken during that period, and this had led to the enactment of Section 4 by the Legislature. The further submission that Section 4 conferred and uncanceled power on the Chancellor was rejected on the ground that if Section 4 was read down it was clear that the Chancellor was given power to scrutinise the appointments, dismissals etc. for the purpose of satisfying himself that these appointments, dismissals etc. were in accordance with the Universities Act and the statutes, ordinances, regulations or rules made thereunder. If the appointments, dismissals etc. were in accordance with the Universities Act the Chancellor would uphold them and if they were not the Chancellor would pass such orders as he deemed fit. It is pertinent to note that the authority was vested in the Chancellor, and that the nature of his power and the limitations to which it was subject were clearly indicated by the need to correct the situation which had arisen between the two dates mentioned in the section.

24. In my opinion, the aforesaid cases fell to be decided on their own facts, and

beyond the general principle laid down there I find it difficult to accept that the decision taken in those cases should govern the petitions before us.

25. It is then contended for the respondents that the discretion u/s 3 (1) (c) is that of an officer authorised by the State Government, and the State Government can be trusted to appoint an officer who would not exercise his discretion arbitrarily. It is pointed out that in *Pannalal Binjraj Vs. Union of India* (UOI), the Supreme Court upheld the validity of legislation conferring a discretionary power on executive officers. Now, it is important to remember that in that case the power was vested, as the Supreme Court pointed out, "not in minor officials but in top ranking authorities like the Commissioner of Income Tax and the Central Board of Revenue", and it observed that although the power was discretionary it is not necessarily discriminatory and abuse of power cannot be easily assumed where the discretion was vested in such high officials. It may be pointed out that, unlike the present case, the Court was concerned merely with the power of transferring an Income Tax case from one Income Tax Officer to another, a power which brought about only a minor deviation from the general rule applicable to assesseees. A case in point is *Dwarka Prasad Laxmi Narain Vs. The State of Uttar Pradesh and Others*, where Clause 4 (3) of the U. P. Coal Control Order, 1953 was held invalid by the Supreme Court on the ground that the power to grant or refuse licences thereunder "could be exercised by any person to whom the State Coal Controller may choose to delegate the same, and the choice can be made in favour of any and every person."

Reliance is placed by the respondents on *Virendra Vs. The State of Punjab and Another*, . The case was concerned with the validity of Section 2 (1) of the Punjab Special Powers (Press) Act, 1956 under which the State Government, or any authority so authorised in this behalf, could by written order prohibit the printing or publication of any matter. It will be noticed that the exercise of the power was closely hedged by the strict limitation that the authority must be satisfied that such action was necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony affecting or likely to affect public order. Further, the order was not to remain in force for more than two months. A safeguard was provided against arbitrariness by enabling a person against whom the order was made to make a representation to the State Government against it. Significantly the Supreme Court distinguished its earlier decision in *Dwarka Prasad Laxmi Narain* (Supra) on the ground that the U. P. Coal Control Order prescribed no principles and gave no guidance in the matter to the exercise of the power conferred under the Control Order. The Supreme Court specifically referred to the limitations contained in the relevant sections of the Punjab Act before it controlling the exercise of power by the State Government or the authority authorised by it.

26. It seems to me that a challenge on the basis of Article 14 that the legislation confers a discretionary power upon the executive has been repelled by the Supreme Court in those cases where the discretion has been vested in the

Government or in a high official determined by the legislation or specifically authorised by the Government in that behalf. At the same time, in all those cases there was a clearly defined policy or standards and norms of sufficient definition guiding the exercise of the discretion. In the absence of such guidelines, even the most impartial and conscientious Government officer will not know how to conduct his discretionary power so as to be within the limits of the legislation. Under our Constitution all power is limited, and legislation conferring power must clearly define its limits. As I pointed out in *Kripa Ram Gupta Vs. R.K. Talwar and Others*, .

"The presumption that the authority will act in accordance with the rules of law can be sustained only if there are rules of law to guide him."

27. The Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1959 provided an additional remedy to the State Government for the summary eviction of unauthorised occupants of public premises. The Objects and Reasons for the enactment of the Act stated that there was no provision in the Land Revenue Act or in any other Act providing for summary removal of unauthorised encroachment on or occupation of Government and Nazul properties and for recovery of rent, and the only procedure available to the Government was to sue the party concerned in the Civil Court which was a cumbersome procedure involving delay and, therefore, it was necessary to provide a speedy machinery. The preamble to the Act declared that the Act was passed to provide for the eviction of unauthorised occupants from public premises. Section 4 of the Act empowered the Collector to issue notice to a person who, he thought, was in unauthorised occupation of public premises to show cause why he should not be evicted. The notice was to specify the grounds on which the eviction was proposed. The Collector, after considering the cause shown and the evidence produced by such person and after giving him a reasonable opportunity of being heard, could, if he was satisfied that the public premises were in unauthorised occupation, make an order of eviction. An appeal was provided against the order to the Commissioner. In *Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another*, the Supreme Court by majority held that the enactment of that Act resulted in an additional remedy being made available to the Government which it thought was speedier than the one by way of suit under the ordinary law of eviction. The majority judgment then observed:

"Assuming that persons in occupation of Government properties and premises form a class by themselves as against tenants and occupiers of private owned properties and that such classification is justified on the ground that they require a differential treatment in public interest, those who fall under that classification are entitled to equal treatment among themselves. If the ordinary law of the land and the special law provide two different and alternative procedures, one more prejudicial than the other, discrimination must result if it is left to the will of the authority to exercise the more prejudicial against some and not against the rest. The procedure u/s 5 is obviously more drastic and prejudicial than

the one under the CPC where the litigant can get the benefit of a trial by an ordinary court dealing with the ordinary law of the land with the right of appeal, revision, etc., as against the person who is proceeded against u/s 5 of the Act as his case would be disposed of by an executive officer of the Government, whose decision rests on his mere satisfaction, subject no doubt to an appeal but before another executive officer, viz., the Commissioner. There can be no doubt that Section 5 confers an additional remedy over and above the remedy by way of suit and that by providing two alternative remedies to the Government and in leaving it to the unguided discretion of the Collector to resort to one or the other and to pick and choose some of those in occupation of public properties and premises for the application of the more drastic procedure u/s 5, that section has lent itself open to the charge of discrimination and as being violative of Article 14."

From a perusal of the judgment it will be noticed that the Supreme Court took into account the Objects and Reasons for enacting the Act and also the contents of the Preamble, but did not consider them sufficient to lend assistance on the question of unconstitutional discrimination.

28. There has been considerable argument on whether the principle laid down by the Supreme Court in *Seth Banarsi Das Vs. The Cane Commissioner and Another*, can be applied in the cases before us. To appreciate what was laid down by the Supreme Court, it is necessary to refer to the statutory provisions considered there. Rule 23 of the U. P. Sugar Factories Control Rules, 1938 provided that a dispute touching an agreement between the occupier or a manager of a factory and a cane grower or a cane growers' co-operative society concerning the supply of cane would be referred to the Cane Commissioner for decision or, if he so directs, to arbitration, and that no suit would lie in a Civil or revenue court in respect of such dispute. It further provided that if the Cane Commissioner directed the reference of a claim to arbitration it would be referred to a sole arbitrator acceptable to the parties concerned, and failing agreement as to the sole arbitrator the dispute would be referred to a Board of Arbitration consisting of one representative of each party and an umpire acceptable to both representatives. If the representatives were unable to elect the umpire the Cane Commissioner would himself act as an umpire or would nominate one. It was contended before the Supreme Court that Rule 23 provided for two different types of procedure to be followed at the option of the Cane Commissioner and as framed it allowed the Cane Commissioner to discriminate between one party and another thereby offending Article 14. *Hidavatullah, J.*, who delivered the majority judgment, observed :

"At first sight, it does look as if the Cane Commissioner can pick and choose between two disputes of like nature, keeping one to himself and sending another for decision by a sole arbitrator or Board of arbitrators. But the purport of the first Sub-rule is that an arbitration can be with the permission of the Cane Commissioner and parties cannot go to arbitration without the permission of the

Cane Commissioner. The rest of the rule shows that there can be no arbitration without the consent of the parties. If the reference to arbitration is purely on a voluntary basis then there can be no complaint that two different procedures are provided for the solution of the same kind of disputes. If the parties cannot be compelled to go to arbitration and refuse to go to arbitration then the Cane Commissioner must decide the dispute himself. If this view was correct then there is but one mode of deciding disputes, namely, by the Cane Commissioner and an alternative mode, no doubt, under the direction of the Cane Commissioner but only if the parties agree, by arbitration."

It is clear that what the learned Judges had in mind was that resort to arbitration was a matter resting entirely on agreement between the parties, and that if the parties did not agree, there was only one mode open for deciding the dispute and that was by the Cane Commissioner himself. It was pointed out;

"The Cane Commissioner has the power to direct that the dispute be referred to arbitration but the rules show that there can be no arbitration unless the parties themselves agree. If it is to a sole arbitrator then the sole arbitrator must be acceptable to the parties concerned. If parties do not agree about the sole arbitrator the arbitration is by a Board of arbitrators consisting of one representative of each party and an umpire acceptable to both representatives. The Rule stops short of providing what is to happen if a party does not appoint his representative and the Arbitration Act furnishes no answer because it is inconsistent with the Rule. It is, therefore, obvious that the arbitration must be with the consent of the parties and they must express this consent either by selecting an agreed sole arbitrator or by appointing their representative on the Board. This choice is entirely theirs. If the parties do not agree thus far there can be no arbitration at all and the case must be disposed of by the Cane Commissioner himself. Where there are two procedures one for every one and the other if the disputants voluntarily agree to follow it, there can be no discrimination because discrimination can only be found to exist if the election is with someone else who can exercise his will arbitrarily."

The implication of the sentence underlined by me has been the cause of much debate, and learned counsel are unable to agree as to what it means. It seems to me that the learned Judges intended to say that the right to choose between the two remedies, that is between a decision by the Cane Commissioner and a decision by arbitration, lay entirely with the parties. If the parties agreed, which was a matter between the parties themselves, the dispute could be decided by reference to arbitration. If they did not agree, the dispute fell to be decided by the Cane Commissioner. The right to elect the remedy lay with the parties themselves. The right to elect did not lie with any external authority.

29. Considering the terms of the statute before us, it is clear that the right to elect whether recovery of the sum due should be effected by recourse to the ordinary law or by recourse to the drastic procedure has not been left to the will of the debtors. It is true that in their respective agreements they agreed that the

recovery of the sum due may be effected by recourse to recovery proceedings relating to arrears of land revenue. But that merely provided an additional remedy to the State Government. That was not an agreement evidencing any election by them in favour of one recovery procedure or the other. That must be clearly understood. It is the power to elect between two recovery procedures which affords scope for discrimination, and that power has been vested by Section 3 (1) (c) of the Act in an officer authorised by the State Government, Nowhere, in my opinion, is there any provision, either in the agreement or in the Act, conferring upon the debtor the power to choose between the two remedies. It is a power to be exercised by the State Government or an officer authorised by it, and open to the arbitrary exercise of their will.

30. In my opinion, the principle laid down in *Seth Banarsi Das Vs. The Cane Commissioner and Another*,) cannot be applied to the case before us. On the contrary, the basis of the decision in *Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another*, seems attracted.

31. It has been urged that *Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another*, was concerned with the expeditious recovery of State property and not with the expeditious recovery of State revenues, and that a distinction should be maintained between the two in deciding the cases before us. I am unable to appreciate any such distinction. The decision in *Northern India Caterers (P.) Ltd. (Supra)* did not turn upon it, and indeed I am not satisfied that the decision in the present cases should. We are then referred to *Purshottam Govindji Halai Vs. Shree B.M. Desai, Additional Collector of Bombay and Others*, *The Collector of Malabar, Kozhikode and Another Vs. Erimmal Ebrahim Hajee*, ; *Manna Lal and Another Vs. Collector of Jhalawar and Others*, and *Lachhman Das on Behalf of Firm Tilak Ram Ram Bux Vs. State of Punjab and Others*, which were concerned with the speedy recovery of State revenues, and it is pointed out that recourse to the speedy procedure was upheld by the Supreme Court. It seems to me that the decision of the Supreme Court in each of those cases turned entirely on different considerations.

32. In *Purshottam Govindji Halai Vs. Shree B.M. Desai, Additional Collector of Bombay and Others*, the petitioner contended that Section 46 (2) of the Indian Income Tax Act, 1922 contravened Article 14 of the Constitution because it provided for two different and alternative methods of recovery of tax dues and clothed the Collector with the power to apply either of the two methods, that is to issue a warrant of arrest u/s 13 of the Bombay City Land Revenue Act, 1886 against one defaulter and detain him for a period longer than six months and on the other hand to proceed against another defaulter under the CPC and arrest and detain him for the maximum period of six months. The Supreme Court pointed out that on a proper reading of Section 46 (2) that Sub-section does not prescribe two alternative modes of procedure at all, and that what the Sub-section directs the Collector to do "is to proceed to recover the certified amount as if it were an arrear of land revenue, that is to say he has to adopt the

procedure prescribed by the appropriate law of his State for the recovery of land revenue and that in thus proceeding he has under the proviso all the power a Civil Court has under the Code. The subsection does not prescribe two separate procedures." Plainly, the Supreme Court took the view that the powers under the CPC conferred upon the Collector were to be employed for the purpose of and, in aid of, the proceeding initiated by him for recovery of the amount due as an arrear of land revenue. No question arose of the Collector choosing one procedure in preference to another.

33. A similar contention was raised in *The Collector of Malabar, Kozhikode and Another Vs. Erimmal Ebrahim Hajee*, , and was repelled by the Supreme Court for the same reason.

34. In *Manna Lal and Another Vs. Collector of Jhalawar and Others*, the question was whether the Raiasthan Public Demands Recovery Act, 1952 offended Article 14 as it enabled the moneys due to the Government in respect of its trading activities to be recovered by way of a public demand. It was urged that the Act made an invidious distinction between other bankers and the Government as a banker in respect of the recovery of moneys due. The Supreme Court negatived the contention, observing:

"It seems to us that the Government, even as a banker, can be legitimately put in a separate class. The dues of the Government of a State are the dues of the entire people of the State. This being the position, a law giving special facility for the recovery of such dues cannot, in any event, be said to offend Article 14 of the Constitution."

35. In the last case, that is to say, *Lachhman Das on Behalf of Firm Tilak Ram Ram Bux Vs. State of Punjab and Others*, , the contention that the Patiala Recovery of State Dues Act contravened Article 14 because it enabled the recovery of amount due to the bank from its customers as arrears of revenue was rejected on the ground that the Patiala State Bank constituted a class by itself.

36. The last two decisions would be relevant if the petitioners had contended that the recovery of amounts due under an agreement with the State Government could not be placed on a separate footing from those due under an agreement between private parties. But that is not the contention before us.

37. At this stage, I may refer to the Full Bench decision of this Court in *Raja Ram Verma Vs. State of U.P. and Others*, It was held that the U. P. Public Land (Eviction and Recovery of Rent and Damages) Act, 1959 offended Article 14 of the Constitution inasmuch as it discriminated among persons in occupation of Government land inter se by leaving it to the unguided and unfettered choice of the State to take ordinary legal proceedings in the civil or revenue court against some of them and to resort to some more drastic provisions of the Act against others. It will be noticed that the learned Judges proceeded on the principle laid down by the Supreme Court in *Northern India Caterers Private Ltd. and Another*

Vs. State of Punjab and Another,

38. In my opinion, Section 3 (1) (c) of the U. P. Public Moneys (Recovery of Dues) Act, 1965 violates Article 14 of the Constitution. The State Legislature enacted the Uttar Pradesh Recovery of Taxes and Other Public Moneys (Amendment and Validation) Act, 1970. The Amendment Act (as I shall call it for convenience) attempts to remove the defects which were pointed out in the principal Act. Section 2 of the Amendment Act provides:

"2. Section 3 of the Public Moneys (Recovery of Dues) Act, 1965 is, with effect from December 4, 1965 is, repealed and re-enacted with the modification that--

(i) in Sub-section (1), the words "without prejudice to any other mode of recovery under any other law for the time being in force" shall be omitted;

(ii) after Sub-section (2), the following Sub-section shall be Inserted, namely:--

(3) No suit for the recovery of any sum due as aforesaid shall lie in the Civil Court against any person referred to in Sub-section (1):--

Provided that nothing in this section shall

(a) be construed to bar a suit or affect any other right or remedy against such person or any other person in respect of a mortgage, charge or pledge in favour of the State Government, the Corporation, a Government Company, the State Bank of India or any other scheduled bank; or

(b) be construed to bar a suit or affect any other right or remedy against any other person in respect of a contract of indemnity or guarantee entered into in relation to an agreement referred to in Sub-section (1)."

Section 3 of the Amendment Act does not apply to the dues mentioned in the principal Act. Section 4 of the Amendment Act declares that any thing done or any action taken for recovering the sum referred to in Section 3 of the principal Act as an arrear of land revenue shall be deemed always to have been done or taken under and by virtue of the provisions of the principal Act as re-enacted by Section 2 of the Amendment Act, and to be and always to have been as valid as if the provisions of the Amendment Act were in force at all material times. It is a validating provision.

39. The petitioners say that the principal Act being violative of Article 14 of the Constitution was a nullity and void ab initio, and no amendment of such a statute can be effected. The respondents point out that Section 3 of the principal Act has been repealed and re-enacted and, therefore, the objection is without substance. It may be assumed that Section 2 of the Amendment Act effects a fresh enactment of Section 3 of the principal Act, in a modified form with the intention of avoiding the violation of Article 14. Two questions arise. One is whether the fresh enactment of Section 3 alone of the principal Act can be considered as legislation complete and effective in itself. The other is whether the new Section 3 can be still said to offend Article 14.

40. Considering the first of these two questions first, there is no doubt that the grounds upon which Section 3 (1) (c) have been assailed as void apply equally to Clauses (a) and (b) of Section 3 (1). The same alternative is open to the State Government in respect of agreements covered by those Clauses also. In the result, the entire Section 3 of the principal Act must be considered void. As Section 3 is the only operative provision of the principal Act, the entire Act must be treated as void. If that be so, the re-enactment of Section 3 by the Amendment Act will not suffice. Because in that event, all that we have is Section 3. If the principal Act is void, it is void ab initio and in law one must consider that none of those provisions, including Sections 1 and 2, ever formed part of the statute book.

41. The respondents say, that there is a distinction between statutes which are ultra vires because they are beyond the legislative competence of the Legislature and statutes which are ultra vires merely because they infringe some other provision of the Constitution. It is urged that the former class of statutes alone are void ab initio and must be ignored for all purposes while in the latter class of statutes they are merely unenforceable and that disability is removed upon a proper amendment of the law. This distinction, it seems to me, cannot be accepted under our Constitution. Article 13(2) clearly prohibits the State Government from making any law which takes away or abridges the fundamental rights, and it declares that a law made in contravention of that Clause shall to the extent of the contravention be void. From time to time, the Supreme Court has been called upon to decide cases in which the validity of pre-Constitution and post-Constitution laws was assailed. In the case of pre-constitution laws it has consistently taken the position that they are not void ab initio but are rendered void only with effect from the commencement of the Constitution. They are not obliterated from the statutes book for all times or for all purposes or for all people. See *Purshottam Govindji Halai Vs. Shree B.M. Desai, Additional Collector of Bombay and Others*, If at any subsequent point of time the inconsistent provision is amended so as to remove its inconsistency with the fundamental rights, the amended provision cannot be challenged on the ground that the provision had suffered death at the commencement of the Constitution and could not be revived by the amendment. All acts done under the law since the amendment would be valid notwithstanding the fact of inconsistency before the amendment. If the Constitution itself is amended subsequently so as to remove the repugnancy, the impugned law would become free from blemish from the date of the amendment of the Constitution. In regard to post-Constitution laws, which infringe the fundamental rights, the Supreme Court has invariably held them to be void ab initio. In *Saghir Ahmad Vs. The State of U.P. and Others*, the Supreme Court approved of the dictum found in *Cooley's Constitutional Limitations*, Vol. 1, page 384 that,

"a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted, no applied this to a violation of the fundamental rights.

The Court held that the subsequent amendment of the Constitution could not be invoked to validate an earlier legislation which was unconstitutional when it was passed. In *Deep Chand Vs. The State of Uttar Pradesh and Others*, the Supreme Court, referring to the first two Clauses of Article 13, observed:

"Under Clause (1), a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III; whereas, no post-Constitution law can be made contravening the provisions of Part III, and therefore the law, to that extent, though made, is a nullity from its inception."

The point was brought out clearly by a unanimous Bench of the Supreme Court in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, and the distinction sought to be drawn between statutes contravening the fundamental rights and statutes enacted without legislative competence was rejected. It was observed:

"The legislative power of Parliament and the Legislatures of States under Article 245 is subject to the other provisions of the Constitution and therefore subject to Article 13(2), which specifically prohibits the State from making any law taking away or abridging the fundamental rights. Therefore, it seems to us that the prohibition contained in Article 13(2) makes the State as much incompetent to make a law taking away or abridging the fundamental rights as it would be where law is made against the distribution of powers contained in the Seventh Schedule to the Constitution between Parliament and the Legislature of a State".

It was also explained:

"Further, Article 13(2) provides that the law shall be void to the extent of the contravention. Now contravention in the context takes place only once when the law is made, for the contravention is of the prohibition to make any law which takes away or abridges the fundamental rightsTherefore, where there is a question of a post-Constitutional law, there is a prohibition against the State from taking away or abridging fundamental rights and there is a further provision that if the prohibition is contravened the law shall be void to the extent of the contravention. In view of this clear provision, it must be held that unlike a law covered by Article 13(1) which was valid when made, the law made in contravention of the prohibition contained in Article 13(2) is a still-born law either wholly or partially depending upon the extent of the contravention. Such a law is dead from the beginning and there can be no question of its revival under the doctrine of eclipse."

The Supreme Court considered the consequences of an amendment on pre-Constitution and post-Constitution laws in the light of Clauses (1) and (2) of Article 13, and said:

"By the first Clause the Constitution recognises the existence of certain operating laws and they are declared void, to the extent of their inconsistency with fundamental rights. Had there been no such declaration, these laws would have

continued to operate. Therefore in the case of the pre-Constitution laws what an amendment in the Constitution does is to remove the shadow cast on it by this declaration. The law thus revives. However, in the case of the second Clause, applicable to post-Constitution laws, the Constitution does not recognise their existence, having been made in defiance of a prohibition to make them. Such defiance makes the law enacted void. In their case, therefore, there can be no revival by an amendment of the Constitution, though the bar to make the law is removed, so far as the period after the amendment is concerned All post-Constitution laws which contravene the mandatory injunction contained in the first part of Article 13(2) are void, as void as are the laws passed without legislative competence, and the doctrine of eclipse does not apply to them."

A different view may be possible in cases where the infringement alleged is of some other provision of the Constitution. For example, in *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, the Supreme Court by majority held that a statute contravening Article 286(2) of the Constitution was unenforceable, and if the prohibition restricting its enforceability was removed subsequently the statute would become effective without re-enactment. It does not appear that the Supreme Court followed that view in respect of violation of the fundamental rights.

42. In the result, the Public Moneys (Recovery of Dues) Act, 1965 must be considered a nullity at its inception. The Act could be brought into force again only by re-enactment of the entire Act in such modified form as would not offend Article 14. But what the Amendment Act has done is to re-enact Section 3 only. And Section 3 by itself is not a complete and self-sufficing legislation. For example, the expressions "Corporation" and "State Government" are not defined. They are not defined either in the U. P. General Clauses Act. In the circumstances, the application of Section 3 will not be free from difficulty. It seems to me doubtful whether the re-enactment of Section 3 alone can be said to result in a complete and effective statute.

43. The further contention of the petitioners, and one of some importance, is that even if the principal Act be considered in its amended form, the re-enacted Section 3 still suffers from the vice of discrimination. It is pointed out that while the new subsection (3) of Section 3 declares that no suit for the recovery of any sum mentioned in Sub-section (1) shall lie in a Civil Court the proviso thereto expressly declares that nothing in Section 3 "shall be construed to bar a suit or affect any other right or remedy against such person or any other person in respect of a mortgage, charge or pledge in favour of the State Government". It seems to me that the petitioners are right. What has been barred by the new Sub-section (3) is a suit for recovery of money, that is, for a simple money decree. A suit for sale of mortgaged property can be described as "a suit in respect of a mortgage" and the power of sale u/s 69 of the Transfer of Property Act is "a right or remedy in respect of mortgage". Both these are saved by the proviso to the new Sub-section (3). In accordance with the view

I have already expressed earlier, both remedies are more favourable to the debtor and less stringent than if the sum is recovered as an arrear of land revenue. The door to unconstitutional discrimination continues to remain open, because the State Government can still proceed by way of a suit for sale of the mortgaged property or exercise the power of sale u/s 69 of the Transfer of Property Act in one case, while in another it can pursue the drastic procedure of recovery as an arrear of land revenue.

44. In my judgment despite the amendment of Section 3 by the Amendment Act of 1970, Section 3 (1) (c) of the Public Moneys (Recovery of Dues) Act, 1965 continues to violate Article 14 of the Constitution and is, therefore, ultra vires.

45. Accordingly, I answer the question referred in the affirmative.

46. The petitions will now be listed before the learned single Judge for decision.

B.N. Lokur, J.

47. I agree.

H.N. Seth, J.

48. I agree.