CALCUTTA HIGH COURT

Messrs. Seorajuddin

Vs.

Union of India

C.R. 2183 (W) & 2184 (W) of 1966

(R.N. Dutt, Sarma Sarkar, on a difference, S.P. Mitra, JJ.)

16.09.1971

JUDGMENT

R.N. Dutt, Sarma Sarkar, J.

1. These are two several Rules under article 228 read with Articles 226 and 227 of the, Constitution issued on two composite applications. In both the applications the petitioners are the same. They were on trial before the Chief Presidency Magistrate of Calcutta in two separate cases being Cases Nos. 1998 and 1999 of 1963. The respondents Nos. 6 to 8 in Rule No. 2183 are also the accused in Case No. 1998. Similarly the respondents Nos. 5 and 6 in Rule No. 2184 are also the accused in Case No. 1999. The petitioners in both the Rules are alleged to have committed offences under section 120B of the Indian Penal Code read with Sections 12(1), 12(2) and 22 of the Foreign Exchange Regulation Act, 1947 and under Section 23 (1A) of the Act for violation of the provisions of sections 12(1), 12(2) and 22 of the Act. When the matter was pending before the Magistrate for consideration of charge, the petitioners obtained the present Rules. The rules are in similar terms and consist of two parts. The first part directs the Union of India to show cause why criminal cases Nos. 1998 and 1999 should not be transferred to this Court so that they may be tried by this Court or the constitutional questions therein involved may be determined by this Court and thereafter the cases retransferred to the Chief Presidency Magistrate for trial. The second part directs the Union of India to show cause why a Writ in the nature of certiorari should not be issued setting aside or quashing criminal proceedings pending against the petitioners.

2. These Rules were issued on the 25th August, 1966. A Division Bench of this Court by consent of parties ordered on April 17, 1967, that the criminal cases pending before the Chief Presidency Magistrate be withdrawn from that Court and transferred to this Court as they involve substantial questions as to interpretation of the Constitution.

3. The Rules were pending before the Bench presided over by the learned Chief Justice. They were assigned on May 19, 1970 to a Bench comprised of R. N. Dutt, J. and Sarma Sarkar J., under Rule 14A(2) of Part I of Chapter 2, of the Appellate Side Rules. Before this Bench a constitutional question has been raised on behalf of the petitioners. The question is whether 23 (1A) of the Foreign Exchange Regulations Act is ultra vires Article 14 of the Constitution. On this question the learned Judges have differed. R. N. Dutta, J, is of opinion that Section 23 (1A) is not valid as it is violative of Article 14 of the Constitution and the petitioners cannot be tried under that section and, as such, the proceedings pending against them in respect of the alleged offences must be quashed. Sarma Sarkar, J. is of the view that Section 23 (1A) does not violate the provisions of Article 14 and the Rules should be discharged. The difference of opinion between the two learned Judges has now been assigned to me under clause 36 of the Letters Patent.

4. At the outset, it would be convenient to refer to some of the relevant provisions of Section 23 of the Act. These provisions are as follows:

> Section 23(1). "If any person contravenes the provisions of Section 4, Section 5, Section 9, Section 10, Sub-Section (2) of Section 12, Section 17, Section 18A or Section 18B or of any Rule, direction or order made thereunder, he shall
> (A) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner hereinafter provided, or
> (b) upon conviction by a Court be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.
> (1A) If any person contravenes any of the provisions of this Act or of any Rule, direction, order made thereunder, for the contravention of which no penalty is expressly provided, he shall upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine or with, both.

5. The crux of the controversy, in the instant case is that the above provisions have prescribed two different procedures for dealing with contraventions of the various provisions of the Act. Persons contravening Sections 4, 5, 9, 10, 12(2), 17, 18A, or 18B may either be punished with penalty adjudged by the Director of Enforcement or be punishable by a Court upon conviction; but persons contravening any other provision of the Act can only be punishable upon conviction by a Court. The question is whether by reason of these two different procedures prescribed by the Act the provisions of Article 14 of the Constitution have been violated and if so, whether section 23 (1A) is ultra vires the said Article. According to R. N. Dutt J. Section 23 (1A) is ultra vires. According to Sarma Sarkar, J. it is not ultra vires.

6. Mr. Sankar Banerjee, Learned Counsel for the Union of India, has argued that the Act as

originally enacted, was a temporary statute. The Act, came into force in March, 1947 and sub-section (4) of Section 1 provided that it would remain in force till the 31st December, 1957. In the original Act there was no provision for adjudication by the Director of Enforcement. All cases of contraventions were to be tried by Criminal Courts. In 1957, the Act was amended. In the statements of objects and reasons it was stated that owing to the experience gathered during the operation of the Act since March, 1947, it was necessary to amend the Act and to make it permanent. In 1957, Section 23 was also amended by introducing the procedure for adjudication for contravention of Sections 4, 5, 9 and 12(2) or any rule, direction or order made thereunder. Section 23(1A) was introduced by which contraventions of other provisions of the Act except Section 19(1) were to be tried by the Criminal Court. Moreover, Section 23-D was introduced whereby the Director of Enforcement was empowered to send the case to the Criminal Court after an enquiry, In 1964, says Mr. Banerjee, Section 23 was further amended by adding Section 10, 17, 18A, and 18B to those which were already there, in section 23(1) and which could be adjudicated in the first instance by the Director. According to Mr. Banerjee, the offences for contravention of the provisions of Sections 4, 5, 9, 10, 12(2), 17, 18A, and 18B are entirely different and separate from offences created for contraventions of the provisions of Sections 8, 13, 13A, 14, 15, 16, 18 and 22. Learned Counsel submits that the purpose of Section 23D (which gives power to the Director of Enforcement to adjudicate) is not merely to give an opportunity to the party to show whether his case should go to the Criminal Court. It is a protection given to him in order that he may not be penalized both by adjudication and by the Criminal Court. It is to be noted that under the adjudication proceedings a penalty of three times the value of the foreign exchange in respect whereof the contravention has taken place may be imposed. If on the top of that the offender is convicted by a Criminal Court, a fine of an unlimited amount may also be imposed; vide sub-sections (1) and (2) of Section 23.

7. Counsel for the Union of India then proceeded to make his comments on sections 8, 9, 13, 13A, 15, 16 and 18 in support of his contention that the two sets of offences above mentioned are different and separate. In other words, there is a rational basis for classification of offences made in Section 23(1) and Section 23 (1A) and there is a nexus between this classification and the object of the Act which is "to regulate certain payments, dealings in foreign exchange and securities and the import and export of currency and bullion" in the economic and financial interests of India.

8. Section 8, argues Mr. Banerjee, deals with 'smuggling' which has notoriety in foreign exchange and customs matters causing a huge drainage of our foreign reserve. It imposes restrictions on import and export of certain currency and bullion. It has been included in section 23 (1A) and the contravention can be tried only by a Criminal Court.

9. Section 9 provides for making it obligatory on every person resident in India who owns foreign exchange to sell it to the Reserve Bank or to such persons authorized by the Reserve Bank at such rate which, in the opinion of the Central Government, is not less than the market

rate of foreign exchange and also to transfer the right to receive foreign exchange to the Reserve Bank. This provision is clearly made for acquisition of foreign exchange by India needed in our country.

10. Mr. Banerjee's contention is that a contravention of Section 8 is different in nature from a contravention of section 9. Section 8 is far more serious than section 9. By prescribing two different procedures for these two different types of contraventions therefore, the legislature, submits Mr. Banerjee, has not violated the provisions of Article 14 of the Constitution.

11. Similarly, says Counsel for the Union of India, Section 13 deals with restrictions on the export of securities in order to prevent export of capital and also to control foreign exchange investment in the country. The said provision will also prevent Indian capital from being controlled by foreigners. Section 13 has been placed in Section 23(1A).
12. Section 15 imposes restrictions on the negotiation of bearer securities and the Central Government has been empowered to prohibit further issue of such securities. Section 15 is also included amongst offences under Section 23(1A).

13. Then again, both section 13A and Sections 16 deal with restrictions and control of foreign exchange securities. They have both been included amongst offences envisaged by Section 23(1A).

14. Reference has also been made by Mr. Banerjee to Section 18. It contains special provisions relating to Companies and its contravention is tried under Section 23 (1A).
15. Learned Counsel's argument is that the violation of the sections referred to above, namely sections 8, 13, 13A, 15, 16 and 18 are totally different from violations of the provisions of Sections 4, 5, 9, 10, 12(2), 17, 18A and 18B which are more or less offences committed by individuals for which individual penalty in an adjudication proceeding was considered to be adequate. The Parliament seems to be of opinion, says Mr. Banerjee, that the offences contemplated by section 23 (1A) are such that the Criminal Courts must try them in order that a deterrent effect may be created on persons who are prone to commit such offences. Moreover, Section 23(1) read with Section 23D gives discretion to the Director to send a case to the Criminal Court if the offence committed be so grave that the penalty which the Director may impose, was not adequate. A discretion is also given to the Director to see if there is sufficient legal evidence to other cases he might adjudicate himself as he is not bound by the provisions of the Evidence Act. Mr. Banerjee contends that the problems of foreign exchange have their own peculiarities. And from experience gathered from time to time Parliament should have power to make classification of offences for trial by one procedure or other having regard to the needs of the situation.

16. Broadly speaking, therefore, the argument on behalf of the Union of India is that the offence covered by section 23(1) and those covered by section 23 (1A) are widely disparate and there is a

rational basis for this differentiation.

17. Learned Counsel for the Union has relied on a few decisions in support of his argument. In the case of *Kedar Nath Bajoria v. State of West Bengal*[1], the Supreme Court dealt with some of the provisions of the West Bengal Criminal Law Amendment (Special Courts) Act of 1949. In paragraph 9 of the judgment at page 407 the Supreme Court points out the distinctions between those cases where the legislature itself makes a complete classification of persons or things and applies to them the law which it enacts, and others where the legislature merely lays down the law to be applied to persons or things answering a given description or exhibiting certain common characteristics, but being unable to make a precise and complete classification, leaves it to an administrative authority to make a selective application of the law to persons or things within the defined group, while laying down the standards or at least indicating in clear terms the underlying policy and purpose,.....in accordance with, and in fulfillment of which, the administrative authority is expected to select the persons or things to be brought under the operation of law. According to the Supreme Court, both these two types of legislations may be valid. Mr. Banerjee's contention is that in the instant case a complete classification has been made by Parliament and Parliament has indicated now each class

[1] A.I.R. 1953 S.C. 404

of offences is to be dealt with under the Act. There is no dispute as to the general propositions of Mr. Banerjee. The question is whether the classification in the present case has been made according to law.

18. The next case cited on behalf of the Union of India was the case of *Shanti Prasad Jain v. The Director of Enforcement Foreign Exchange Regulation Act, reported in*[2] In this case the constitutionality of sections 23(1) (a) and 23D of the Act was challenged. The Supreme Court has held that Section 23(1) (a) does not offend Article 14 and the power of transfer under Section 23D is not unguided or arbitrary. It is obvious that the points which have arisen for consideration in this case, did not arise in the case of Shanti Prasad Jain. There the Supreme Court was invited to decide whether the legislature was competent to prescribe a procedure for trial of offences under the Foreign Exchange Regulation Act different from the procedure laid down by the Code of Criminal Procedure. The Court has expressed the view that foreign exchange has features and problems peculiarly of its own, and it forms a class by itself. A law which prescribes a special procedure for investigation of breaches of Foreign Exchange Regulations will, therefore, be not hit by Article 14 as it is based on a classification which has a just and reasonable relation to the object of the legislation. The Supreme Court says that the vires of Section 23(1) (a) of the Act is not open to attack on the ground that it is governed by a procedure different from that prescribed by the Code of Criminal Procedure. As there is no difference in the legal position by reason of the fact that Section 23D provides for transfer by the Director of Enforcement of cases which he can try, to the Court, Section 23D confers authority on the very officer who has power to try and dispose of a case to send it on for trial to a Court, and that too, only when he considers that a more severe punishment than what he is authorized to impose, should be awarded. In a judicial

system in which there is a hierarchy of Courts or Tribunals, presided over by Magistrates or officers belonging to different classes, and there is a devolution of powers among them graded according to their class, a provision such as in Section 23D is necessary for proper administration of justice. Thus, the power conferred on the Director of Enforcement under Section 23D to transfer cases to a Court is not unguided or arbitrary. It is clear, therefore, that this case does not solve the problems raised in the instant petition.

19. My attention was also drawn by Mr. Banerjee to the case of *Collector of Customs, Madras v. Nathela Sampathu Chetty, reported in*[3] In paragraph 36 of the judgment at page 333 the Supreme Court has made various observations about the offence of 'smuggling'. The Supreme Court is of opinion that if for the purpose of prevention and eradication of 'smuggling' the Parliament enacts a law which operates somewhat harshly on a small section of the public, taken in conjunction with the position that without a law in that form and with that amplitude 'smuggling' might not be possible of being effectively checked, the law cannot be held to be violative of the freedom guaranteed by Article 19 (1) (g) as imposing an unreasonable restraint. The Supreme Court says that it is beyond controversy that the restrictions are in the "interest of the general public". The social good to be achieved by the legislation is not so disproportionately small that on balance it could be said that it has proceeded beyond the limits of reasonableness. Acts innocent in themselves may be prohibited and the restrictions in that regard would be reasonable, if the same were necessary to secure the

[2] A.I.R. 1962 S.C. 1764

[3] A.I.R. 1962 S.C. 316

efficient endorsement of valid provisions. The inclusion of a reasonable margin to ensure effective enforcement will not stamp a law otherwise valid as within legislative competence with the character of unconstitutionality as being unreasonable.

20. Mr. Banerjee's contention is that in the Act we are now considering the offence of 'smuggling' as provided for in section 8 is to be tried in accordance with the harsher procedure laid down in section 23 (IA). 'Smuggling', says Mr. Banerjee, is having a corrosive effect in our economy and if the legislature chooses to lay down any law for dealing severely with that offence, the Courts should not strike down such a law. I have to observe that the Supreme Court was considering the provisions of Section 178A of the Sea Customs Act which place the burden of proving that any of the goods mentioned in the Section and reasonably believes to be smuggled are not really so on the person from whose possession they were seized. There are similar provisions in section 24 of the Foreign Exchange Regulations Act as well; but the distinguishing feature is that the offence of 'smuggling' is provided for not only by section 8 of the Act but also by various other sections with respect to different types of goods. In fact, the Foreign Exchange Regulation Act has been enacted to prevent 'smuggling' of foreign exchange in any shape or form. That is why, it is not possible to treat any of these relevant sections differently from the other sections dealing with similar offences. The preamble to the Act speaks of dealing on (a) foreign exchange, (b) securities and (c) import and export of (i) currency and (ii) bullion. Reference was also made to the case of the *State of Maharashtra v. Maver Bans George*[4]*,* but I do not think it would be

relevant for the points to be decided in this application. It deals with the question, inter-alia, of whether mens rea is an essential ingredient of an offence under Section 23 (1) (a) read with Section 8(1).

21. Lastly, I was invited on behalf of the Union of India to consider the Supreme Court's recent decision in *Manharlal Bhogilal Shah v. State of Maharashtra, reported in*[5] The appellant in this case contended that the offence of smuggling of goods and in particular the acts with which he had been charged could be dealt with by the Customs Authorities by proceeding under Section 167 (8) of the Sea Customs Act. 1878 as well as in the alternative or in addition thereto by instituting a prosecution in a Criminal Court by filing a complaint under Section 187-A, read with section 167(81) of the Act. The former can result only in the imposition of a fiscal penalty exceeding three times the value of the goods and confiscation of the goods themselves. The latter can result in a sentence of imprisonment up to two years or fine or both. Thus it has been left to the unfettered and unguided discretion of the Customs Authorities to proceed against certain persons under section 167(8) and others under Section 167(81) or under both the sections. In a large number of cases no criminal prosecutions were filed at all and proceedings under section 167(8) alone were taken which resulted in imposition of penalties. This, according to the appellant, led to discrimination and resulted in discrimination. The Supreme Court has held that while deciding whether a complaint should be instituted for an offence which is covered both by items (8) and (81) under section 167 a Customs Officer must take into account the enormity and magnitude of the contravention and the evidence which is available. It is possible that in certain cases the evidence may not be sufficient for taking the matter to a criminal court and in view of the entire facts a complaint may not be lodged for an offence under item (81) but in all cases the Customs Officers have to act in

[4] A.I.R.1965 S.C. 722

[5](1971) 2 SCC 119

a reasonable and bonafide manner and they cannot just discriminate between similar cases according to their whims and fancy. It has to be borne in mind that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the Government and not in a minor official. The Supreme Court has held further that it cannot be said that any unguided discretion or power has been conferred on the nature which would come within the inhibition of Article 14.

22. As I have said, in the instant case, the difficulty is that the offence of 'smuggling' in some form or other is committed by the accused not merely under section 8 but also under various other provisions, as we shall see later, of the Foreign Exchange Regulation Act, 1947. It is becoming difficult to distinguish one class of 'smuggling' from another class to justify different procedures for trials. Moreover upon consideration of the various provisions of the statute, it does not appear that, the enormity and magnitude of contravention are relevant considerations for upholding the classifications made.

23. These are all the arguments advanced before me on behalf of the Union of India. Before proceeding any further it would be convenient to discuss some of the pronouncements of the Supreme Court on Article 14. In (6) *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar*[6], we have a summary of the law on the subject after taking into consideration the Supreme Court's decisions reported in A.I.R. 1951 S.C. 41, A.I.R. 1951 S.C. 318, A.I.R. 1952 S.C. 75, : A.I.R. 1952 S.C. 123 , A.I.R. 1952 S.C. 235, A.I.R. 1956 S.C. 156,: A.I.R. 1953 S.C. 287 and A.I.R. 1955 S.C. 191. The Supreme Court is of the view that article 14 of the Constitution forbids class legislation but it does not forbid reasonable classification for the purpose of legislation. And to pass the test of permissible classification two conditions have to be fulfilled. The first condition is that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group. And the second condition is that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on several basis namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the act under consideration. Moreover article 14 condemns discrimination not only by a substantive law but also by a law of procedure. The Supreme Court points out that a few other principles have also to be borne in mind in this connection. These principles are as follows :

1. A law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself.
2. There is always presumption in favour of the constitutionality of enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.
3. It must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to

[6] A.I.R. 1958 S.C. 538

problems made manifest by experience and that its discriminations are based on adequate grounds.
4. The legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.
5. In order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report and the history of the time and may assume every state of fact which can be conceived to be existing at the time of legislation.
6. And while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons

for subjecting certain individuals or corporation to hostile or discriminating legislation.

24. Broadly speaking, therefore, when a legislation is challenged on the ground that it contravenes Article 14 of the Constitution, the Court presumes to start with, that it is valid but if the Court finds either on the face of the law or the surrounding circumstances the classification is not reasonable, the Court would declare the legislation as reasonable depends on (a) an intelligible differentia distinguishing persons or things grouped together from others left out of the group and (b) a nexus between the classification and the object of the Act.

25. In some of the subsequent decisions the Supreme Court has more or less reiterated these views. For instance, in the case of (7) *Rayala Corporation Private Ltd. v. The Director of Enforcement, New Delhi*[4], the Supreme Court has considered the provisions of section 23 (i) (b), Section 23(1) (a) and 23-D of the Foreign Exchange Regulation Act, 1947, and has held that section 23 (1) (b) does not violate Article 14 of the Constitution. Again in its latest pronouncement in (8) *R.C. Cooper v. Union of India*[5], (paragraph 79) Shah J. has said "Provided the classification is based on some intelligible ground, the courts will not strike down that classification, because in the view of the Court it should have proceeded on some other ground or should have included in the class selected for special treatment some other persons, objects or transactions which are not included by the legislature. The legislature is free to recognise the degree of harm and to restrict the operation of a law only to those cases where the need is the clearest. The legislature need not extend the regulation of a law to all cases it may possibly reach, and may make a classification to be valid must, however, disclose a rational nexus with the object sought to be achieved by the law which makes the classification. Validity of a classification will be upheld if that test is independently satisfied. The Court in examining the validity of a statute challenged as infringing, the equality clause makes an assumption that there is a reasonable classification and that the classification has a rational relation to the object sought to be achieved by the statute".

26. Our task in this application, therefore, is to find out whether the classification of offences made in section 23(1) and 23 (1A) is based on some intelligible ground and

[4] A.I.R. 1970 S.C. 494

[5] A.I.R. 1970 S.C. 654 at page 662

whether such classification has a rational nexus with the object the Act seeks to achieve.
With this end in view, we have to scrutinize the preamble and other relevant provisions of the statute.

27. The Foreign Exchange Regulation Act is stated to be, as we have seen "An Act to regulate certain payments, dealings in foreign exchange and securities and the import and export of currency and bullion".
The preamble runs thus:

Whereas it is expedient in the economic and financial interests of India to provide for the

regulation of certain payments, dealings in foreign exchange and securities and the import and export of currency and bullion;....

28. This is the purpose or object of the Act. We have now to examine whether the classification made in sections 23(1) and 23 (1A) is based on any real and substantial distinction having a just and reasonable relation to these objects. If the grouping has been made arbitrarily without any rational or substantial basis, the Court would be constrained to strike it down.

29. Let us begin with an analysis of some of the sections of the Act. Section 2(b) defines "Currency" which includes all coins, currency notes, bank notes, postal notes, postal orders, money orders, cheques, drafts, traveller's cheques, letter of credit, bills of exchange and promissory notes. Section 2(f) new paragraph defines "Gold" which includes gold in the form of coin, whether legal tender or not or in the form of bullion of ingot, whether refined or not and jewellery or articles made wholly or mainly of gold.

30. Section 2(c) defines "Foreign Currency" which means any currency other than Indian Currency.

31. Now Section 4 of the Act imposes restrictions on dealings in foreign exchange; section 5 imposes restrictions on payments and section 8 imposes restrictions on import and export of certain currency and bullion. Generally speaking, by section 4, a person in India is prohibited from acquiring foreign coin or currency note from a person outside India or selling or transferring in any manner any foreign exchange to a person outside India without the permission of the Reserve Bank of India. If this acquisition or transfer from or to a person outside India is done clandestinely without obtaining the Reserve Bank's sanction or permission, it is an offence under Section 4. Similarly, Section 5 deals with payments to a person outside India or receiving payments from such a person. The offences under Sections 4 and 5 are interlinked offences and the Act seeks to regulate payments, dealings in foreign exchange and import and export of currency and bullion.

32. Let us now compare the provisions of Sections 4 and 5 with those of Section 8. This section prohibits a person from bringing into or sending into India any gold or silver or any currency notes or bank notes or coins whether Indian or foreign. A person is also prohibited from taking out or sending out of India any gold, jewellery, or precious stones or Indian currency or foreign exchange. It is obvious that such bringing in or sending out may be by way of a purchase or sale or exchange or just a transfer of possession without the requisite permission. In a given case Sections 4 and 5 on the one hand and section 8 on the other may coalesce or co-exist. In other words, for the same act or acts a person may be charged both under sections 4 or 5 and under section 8 as the same act may constitute an offence under both the sections. These sections generally speaking, are intended to restrict the sending of Indian or foreign currency out of India and the bringing in of foreign currency from abroad in consonance with the objects of the Act.

But offences under Sections 4 and 5 are to be dealt with under that section 23(1) and those under section 8 under Section 23 (1A).

33. The argument on behalf of the Union of India is that Section 8 deals with 'smuggling' and had therefore, to be treated differently. 'Smuggling' has not been defined in the Foreign Exchange Regulation Act; but it has been defined in a statute Pari Materia namely re Customs Act Section 2(39) of the Act says. "'Smuggling' in relation to any goods means any act or omission which will render such goods liable to confiscation under Section 111 or Section 113". Therefore the word 'smuggling' has no more sinister implication than any act or omission which renders the property liable to confiscation for contravention of a law. So far as the Customs Act is concerned the violations are enumerated in sections 111 and 113 which provide respectively for "confiscation of improperly imported goods etc" and "confiscation of goods attempted to be improperly exported etc." The adjudication proceedings are held under Chapter XIV. The prosecutions take place under Chapter XVI. Indeed, Chapter XIV of the Customs Act is the Chapter for confiscating of goods and conveyances and imposition of penalties. Now, with regard to the Foreign Exchange Regulation Act, Section 23 provides both for adjudication and prosecution. It provides also for confiscation of the currency, security, gold or silver or goods or any other money or property, in respect whereof the contravention has taken place : vide Sec. 23 (1B).

34. The position, therefore, is that whether a person is prosecuted under section 23(1) or under Section 23 (1A) for all violations of the Foreign Exchange Regulation Act one of the penalties provided for is confiscation in addition to any sentence or penalty that may be imposed either under Section 23(1) or under Section 23 (1A). This shows that every contravention of the Foreign Exchange Regulation Act irrespective of the Sections contravened whether covered by Section 23(1) (a) or section 23 (1A) constitutes smuggling in law. In fact, all the relevant provisions of the Foreign Exchange Regulation Act seek to regulate and control the bringing in or sending out or dealing in all the known forms of foreign exchange, securities, currencies, coins, bullions etc. And all evasions and contraventions thereof constitute 'smuggling'.

35. Now section 178A of the Sea Customs Act corresponding to section 123 of the Customs Act enacted a special Rule of Evidence in relation to certain specified goods. And when the question of virus of such a rule was raised, the Supreme Court, as we had seen earlier in this judgment, overruled the contention on the ground that 'smuggling' in those goods was rampant and the section itself disclosed a well-known classification of goods based on an intelligible differentia. The Supreme Court, was of the view that the Rule of Evidence in Section 178A of the Sea Customs Act and' Section 123 of the Customs Act was not a departure from the general law of evidence as stated in section 106 of the Evidence Act which prescribed that when any fact was specially within the knowledge of any person the burden of proving that fact was upon him.

36. These considerations, however, do not apply to the present case. In the Customs Act the special Rule of Evidence was made applicable to only one class of goods viz., "Smuggled

goods". It was not applicable to all goods in relation to which contraventions of the Customs Act might occur. But section 24 of the Foreign Exchange Regulation Act enacts that this special Rule of Evidence is applicable to all provisions of the statute which prohibit a person from doing an act without permission. This prohibition falls within both the groups of sections punishable under Section 23(1) (a) and (b) as well under Sec. 23 (1A). Therefore the reasons for upholding the validity of Section 178A of the Sea Customs Act do not apply to section 23 (1A) of the Foreign Exchange Regulation Act.

37. Let us take another example. Section 12(1) falls within Section 23 (1A) and Section 12(2) within Section 23(1). Both are intended to serve the same purpose, namely to secure repatriation of the full value in Foreign Exchange. The effect of Section 12(1) read with Section 22 is that a declaration which does not fully or correctly specify that (notified) goods exported offends against the provisions of Section 12(1). The purpose is to see that the full export value of the goods has been paid for or will be paid within the prescribed period in the prescribed manner.

38. Section 12(2) applies when an exporter in India does or refrains from doing something which has effect of securing that (a) the sale of (notified) goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade or (b) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods.

39. It is apparent that there is no rational basis for treating Section 12(1) differently from Section 12(2).

40. Let us take section 13 which deals with regulation of export and transfer of securities. It prohibits the taking or sending of any security to any place outside India or transferring any security to a person outside India or acquisition or disposal of any foreign security without the permission general or special of the Reserve Bank of India.

41. The purpose seems to be to preserve rupee resources against foreign exchange. Foreign security and foreign exchange have been treated at par in the Act. Currency includes Government Promissory Notes : Vide section 2(b). Security includes Government Promissory Notes and means money invested in share, stocks, debentures, national savings, Unit Trust etc., vide Section 2(k).

42. Now Section 4 restricts dealings in Foreign Exchange. And Section 13 restricts dealing in securities -- Indian or foreign. Moreover, "foreign security" means any security created or issued elsewhere than in India, and any security the principle of or interest on which is payable in any foreign currency elsewhere than in India : vide Section 2(e). In these premises there appears to be no rational basis for treating acquisition or disposal of foreign currency differently from those of foreign security.

43. Then again, section 9 is a corollary to Section 4. A person cannot own or hold any foreign exchange without the permission of the Reserve Bank; vide section 4. A person holding foreign exchange with the Reserve Bank's permission may be required under Section 9 to offer it, or cause it to be offered for sale to the Reserve Bank on behalf of the Central Government or to such person as the Reserve Bank may authorise for the purpose. All these provisions are consistent with the scheme of regulating dealings in foreign exchange. For the same reason in Section 7 the Central Government is authorised, inter alia, to direct payments due to persons resident in any territory to be made only into a special account. The purpose of Section 7 and section 9 appears to be the same. A violation of an order to sell foreign exchange to the Reserve Bank does not differ in content or effect from a violation of an order to make payment of foreign currency to a special account. And there is no reason why an alleged offence in relation to Section 7 should be tried under the procedure laid down in section 23 (1A) and that in relation to Section 9 under Section 23(1).

44. Let us take the case of section 5. Under this section payment, for instance, to a person resident outside India cannot be made save as may be provided in and in accordance with any general or special exemption which may be granted conditionally or unconditionally by the Reserve Bank. Then comes section 6 which deals with an exempted person under Section 5 and provides, inter alia, that where the exemption is made subject to the condition that the payment is to be made to a blocked account then payment can be made only to that account in the name of the person resident outside India in such manner as the Reserve Bank may by general or special order direct. The object of both the provisions is to control and regulate payment to person outside India. A person who pays to a person outside India without the Reserve Bank's permission commits an offence under Section 5. An exempted person under section 5 who pays to a person outside India except through a blocked account; commits an offence under Section 6. It cannot be said that one of the offences is more serious than the other; but contravention of section 5 is tried under Section 23(1) and contravention of Section 6 is tried under Section 23 (1A).

45. Let us go on to section 18. It contains certain provisions as to companies. The purpose is to control the earnings of foreign companies. The Central Government may direct such companies, inter-alia, to sell foreign exchange to an authorized dealer. Now, an ordinary person may be required to sell foreign exchange to an authorized dealer under section 4 or to the Central Government under Section 9. It cannot be urged that one group of offences are in the nature of offences in personam and the other offences in rem. Indeed, all offences against the Foreign Exchange Regulation Act are offences against the economic and financial interests of India. The offender may be natural person or a juridical person as mens rea is not an essential ingredient of such offences. But whether the offence is committed by a natural or a juridical person the adverse effect on the country's economy would be the same. In these circumstances, it is difficult to appreciate why an offence under Section 4 or 9 would be tried under Section 23(1) and an

offence under Section 18 under 23 (1A).

46. In the instant case there is no affidavit by the Union of India indicating the basis of classification. On examining, however, some of the provisions of the Act, we find that two different procedures for trial have been prescribed for similar offences which the law does not permit in *Kathi Ranning v. State of Saurashtra*[6], at page 123 B. K. Mukherjee J. has observed ".....it is an essential principle underlying the equal protection clause that

[6] AIR (1952) S.C. 123

all persons similarly circumstanced shall be treated alike both in the privileges conferred and liabilities imposed."

47. We may now examine the proposition whether the intention of the legislature was to make some offences compoundable and some offences non-compoundable and that was why, the discrimination was made. It seems to me that no offence under the Foreign Exchange Regulation Act is compoundable. This is a term of art and not a term of law. Section 345 (7) of the Criminal Procedure Code expressly provides that no offence shall be compounded except as provided by that section.

48. A clearly discernible legislative policy of classification can be discovered in the case of offences made compoundable under the Penal Code. There are about 400 offences under the Penal Code. And only about 40 of them have been carefully selected to form the classes of compoundable offences. The primary reason for this differentiation appears to be that offences which are of a minor nature and which affect a person as distinguished from the State, community or section of the community have been made compoundable by the aggrieved person. Of these minor offences those which are less serious have been allowed to be compounded without the leave of the Court and those which are more serious can be compounded only with leave. Under Section 345 of the Code of Criminal Procedure the person who has been personally affected by the commission of the offence has been given the power to forgive and to settle and to compound. The chapters in the Indian Penal Code dealing with offences against the State (Chapter VI), offences relating to the army, navy and Air-force (Chapter VII), offences against public tranquillity (Chapter VIII), offences by or relating to public servants (Chapter IX), offences relating to elections (Chapter IXA), contempts of the lawful authorities of public servants (Chapter X) and offences against public justice (Chapter XI) are all non-compoundable. It is indeed, interesting that Chapter XV deals with offences relating to religion : there are live sections in this chapter being Sections 295, 295A, 296, 297, and 298. But only one of the Sections has been made compoundable. That Section is Section 298 and offence is "Uttering words etc. with deliberate intent to wound the religious feelings of any person". This is an offence which affects a person as distinguished from a class or a community or the public and has been made compoundable by that person.

49. Then, Section 345(2) of the Code of Criminal Procedure deals with offences against

individuals of somewhat graver nature, e.g. Section 323 of the Indian Penal Code, (causing hurt) is in Section 345(1) of the Criminal Procedure Code; but Section 324 of the Indian Penal Code (voluntarily causing hurt by dangerous weapons or means) is in Section 345 (2) of the Criminal Procedure Code and Section 342 of the Indian Penal Code (wrongfully restraining or confining any person) is in Section 345 (1) of the Criminal Procedure Code; but Section 343 of the Indian. Penal Code (wrongfully confining a person for three days or more) is in Section 345(2) of the Criminal Procedure Code. The offences under Section 345 (1) of the Code of Criminal Procedure, as I have stated, are compoundable without the leave of the Court whereas the offences under Section 345(2) are compoundable with the permission of the Court.

50. Similarly, theft or misappropriation where value of property stolen is small has been made compoundable but grave and serious offences which though they may affect an individual create an evil impact on society have not been made compoundable, e.g. Sections 379 of the Indian Penal Code (theft, where the value of property stolen does not exceed Rs. 250.00) is compoundable; but not compoundable at all. Numerous such illustrations can be cited to show the basis of classification but it is unnecessary to do so.

51. Then again, some offences may be punishable with same punishment though by reasons of the nature of the offence one is compoundable but the other is not, e.g. section 494 of the Penal Code (marrying again during the life time of a husband or wife) shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and Section 496 (marriage ceremony fraudulently gone through without lawful marriage) shall also be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Section 494 is compoundable but Section 396 is not compoundable; and the reason for the classification appears to be that an offence under Section 496 is an offence amounting to a fraud upon the society. It is, no doubt, an exception illustration; but we do find a demarcating line--reasonable classification having a rational nexus with the object of the procedural law, viz. regulating trial of offences.

52. Moreover, Section 345(7) of the Code of Criminal Procedure, as we have observed, clearly lays down that no offence shall be compounded except as provided by that section. In other words, some of the offences punishable under the Indian Penal Code are compoundable; but offences punishable under other laws, according to this subsection, are not compoundable at all. That is why in some special laws the revenue authorities have been specifically empowered in adjudication or assessment proceedings, to compound in lieu of penalty which they can impose, e.g. Section 279(2) of the Income Tax Act, 1961.

53. Now Section 23D, of the Foreign Exchange Regulation Act provides for imposition of penalty by the Director of Enforcement and not for any compounding in lieu of penalty. In other words, levying of penalty in an adjudication proceeding is not compounding an offence.

54. The point is that in the Criminal Procedure Code lesser or minor offences are compoundable either with or without the leave of the Court but major or graver offences are not compoundable. There is a rational basis for this classification; but none of the offences under the Foreign Exchange Regulation Act is compoundable at all. From this point of view one cannot say that one offence is graver than another offence. It is also difficult to accept the argument that the offences for which no adjudication by the Director of Enforcement has been provided for are graver offences. One of the safest yardsticks of measuring whether one offence is graver than another is the quantum of sentence that is imposed; but it appears that all the offences under the Foreign Exchange Regulation Act are punishable with the same sentence, namely, (a) fine or imprisonment and (b) in appropriate case, confiscation. We cannot, therefore, say that one offence under the Foreign Exchange Regulation Act is a minor offence and another offence is a major offence.

55. We may draw some inspiration from Section 238 of the Criminal Procedure Code as to what is minor offence. It provides, inter alia, that where a person is charged with an offence consisting of several particulars, as combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it, e.g. A is charged, under Section 325 of the Indian Penal Code with causing grievous hurt he proves that he acted on grave and sudden provocation he may be convicted under Section 335 of the Indian Penal Code with causing grievous hurt he proves that he acted on grave and sudden provocation he may be convicted under Section 335 instead of Section 325; in other words, he was charged for voluntarily causing grievous hurt for which the punishment was imprisonment of either description for a term which may extend to seven years and also a fine; but he is convicted of voluntarily causing grievous hurt on provocation for which the punishment is imprisonment of either description for a term which may extend to four years or a fine which may extend to Rs. 2000.00 or with both.

56. Now, if one applies the test either of the quantum of sentence or the test laid down in section 238 of the Criminal Procedure Code, one cannot say that the offence referred to in section 23(1) are minor in relation to those falling within section 23 (1A).

57. Let us now examine whether an analysis of the provisions of Section 23(1) and those of 23D would show that the offences included in these Sections are minor offences. The effect of the two Sections read together is that in regard to some of the offences under the Foreign Exchange Regulation Act pre-trial inquiry has been provided for. New Chapter XVIII of Part VI of the Criminal Procedure Code also provides for inquiry into cases triable by the Court of Session or the High Court. This is a pre-trial inquiry for offences which are considered to be more serious but in cases of more serious offences there is no justification for allowing offenders to escape with monetary punishment alone. The purpose of a pre-trial inquiry for graver offences is obviously to give the accused an opportunity of preparing his defense as he is acquainted

beforehand with the entire evidence that the prosecution wants to adduce against him. This is an advantage which the accused in a warrant case does not enjoy. This analogy of the Criminal Procedure Code does not apply to Section 23(1) and Section 23(1A) of the Foreign Exchange Regulation Act. Mr. Banerjee has not also invoked this analogy; but I only want to point out that, going through the provisions of the Criminal Procedure Code, one can easily determine why some offences are tried by the procedure of warrant cases and the others are not. It is not possible to adduce any such conclusion with regard to the relevant provisions of the Foreign Exchange Regulation Act. All offences under this Act, it appears, affect adversely the economic and financial interests of the country and there is no reason why one set of offences would be tried under Section 23(1) and another set under Section 23 (1A). Let us assume that one of the objects of Section 23(1) is to provide for compensation for the Government's loss of revenue. But the assumption would be fallacious because loss of revenue is caused not merely by contraventions of the sections enumerated in Section 23(1) but also by contraventions of the other sections of the statute which come under Section 23 (1A).

58. Lastly, let us take the contention that the legislature thought that for minor offences a penalty in fine or confiscation ought to be sufficient in some cases which is why, the Director of Enforcement has been given the power to inflict that punishment in regard to some of the offences under Section 23(1) and then let off the accused. This contention I am unable to accept. As I have repeatedly said all the offences under the Foreign Exchange Regulation Act have, when committed an adverse effect on India's economic and financial interests. If the legislature had provided that in respect of all the offences the Director of Enforcement upon an inquiry would have the right to inflict the penalty; but if at any stage of the inquiry the Director finds that, having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate, he shall, instead of imposing the penalty himself, make a complaint in writing to the Court, there would have been no violation at all of Article 14 of the Constitution. In fact the Supreme Court in the *Rayala Corporation's case*[7] has held that Sections 23(1) (a) and 23(1)(b) read with 23D do not violate article 14. The discrimination, it seems, has been created by introducing Section 23(1A). The legislature's selection of certain violations and the provisions that these violations would go straight to the Court appear to be unjustified. The very fact that if and when the Director of Enforcement files a complaint before the Court, the contraventions are treated with equal gravity and are liable to the same punishment that is the same term of imprisonment, fine and confiscation and subject to the same procedure of trial shows that there is no reasonable ground for herding together some of the Sections of the statute and providing that violations thereof would first be dealt with by the Director of Enforcement and then, if necessary, by the Courts which try the other offences under the Foreign Exchange Regulation Act. The classification is not based, in my opinion, upon real and substantial distinction and there is no rational nexus between this distinction and the object of the Act. The principal object is to preserve the rupee resources of the country against Foreign Exchange. One cannot say that for some of the offences damaging the country's economic and financial interests, there would be no provisions either for a pre-trial inquiry or for the recovery of compensation

whereas in respect of other offences that procedure has to be resorted to. I, therefore, agree with R. N. Dutt J. that Section 23 (1A) of the Foreign Exchange Regulation Act is ultra vires the provisions of Article 14 of the Constitution. The matter would now go to the Division Bench for final disposal.

[7] A.I.R. 1970 S.C. 494