

GUJARAT HIGH COURT

Ramanlal Nagardas

Vs.

M.S. Palnitkar

Special Civil Appln. No. 242 of 1960

(Desai, C.J. and Bhagwati, J.)

08.11.1960

JUDGMENT

Bhagwati, J.

1. This petition, raises an interesting question regarding the validity of State action in entrusting wholesale distribution of sugar which is an essential commodity under the Essential Commodities Act, 1955, only to Co-operative Societies and excluding other dealers holding licenses like the Co-operative Societies from such distribution. This action of the State has been challenged by the petitioners as violative of their fundamental rights under Article 14 of the Constitution of India and the short question that arises is how far it can meet the challenge of Article 14. In order to appreciate the contentions which have been urged on behalf of the parties, it is necessary to set out the facts in some detail.

2. The petitioners carry on business as partners in the firm name of "Sheth Ramanlal Nagardas" at Kalol in the Mehsana District. The petitioners' firm has been carrying on business as wholesale sugar dealers since the last twelve years and maintains a godown and an office for the purpose of carrying on the said business. The petitioners' firm used to purchase sugar of different qualities from various sugar factories outside the Mehsana District and import such sugar in the Mehsana District and sell the same to retail sugar dealers in the Mehsana District. The said business has been the main source of income of the petitioners.

3. An act called the "Essential Commodities Act, 1955" was passed by the Parliament to provide, in the interests of the general public, for the control of the production, supply and distribution of and trade and commerce in, certain commodities which were considered essential commodities. The said Act came into force on 1-4-1955. In exercise of the powers conferred on it by Section 3 of the said Act, the Central Government made an order called "The Sugar (Control) Order, 1955" and the said order was notified in the Official Gazette on 27-8-1955. The said Order will

hereinafter be referred to by us as "The Central Order". The distribution, sale and price of sugar was controlled by the Central Government under the provisions of the Central Order. We shall examine the provisions of the Central Order a little later. But in the meantime suffice it to say that the petitioners' firm continued to carry on its business as wholesale dealers in sugar even after the making of the Central Order. Under Section 5 of the said Act, the Central Government was empowered to delegate its power of making orders under Section 3 of the said Act to the State Government and in exercise of its said power, the Central Government by a notification dated 15-11-1958 directed that the powers conferred on it by Section 3(1) of the said Act to make orders to provide for matters specified in clauses (a), (b), (d), (e), (f), (h), (i) and (j) of Sub-Section (2) thereof, shall, in relation to foodstuffs, be exercisable also by a State Government subject to certain conditions. The Government of Bombay thereafter in exercise of the powers conferred by clauses (d), (h) (i) and (j) of Sub-Section (2) of Section 3, read with the said notification dated 15-11-1958 and with the prior concurrence of the Central Government, made an order called the Bombay Sugar Dealers' Licensing Order, 1959, (hereinafter referred to by us as "The Bombay Order"). The Bombay Order extended to the whole State of Bombay and came into force on 1-6-1959. The Bombay Order defined a "dealer" and provided that no person shall carry on the business as a dealer except under and In accordance with the terms and conditions of a license issued in that behalf by the Licensing Authority. Various provisions were made in the Bombay Order regarding licenses to be issued by the Licensing Authority. The Collector of Mehsana District who is the first respondent before us was appointed as the licensing authority for the Mehsana District Under the provisions of the Bombay Order. Since the petitioners' firm was covered by the definitions of "dealer" contained in the Bombay Order, the petitioners' firm made an application for a license to the prescribed form and the Collector after making the necessary inquiries, issued a license to the petitioners' firm on 24-6-1959. The said license was valid for the period from 24-6-1959 to 31-12-1959. Since the period of the said license was due to expire on 31-12-1959, the petitioners' firm applied for a renewal of the said license and the Collector renewed the said license for the period from 1-1-1960 to 31-12-1960 by an endorsement made on the said license on 31-12-1959. The petitioners' firm has thus a license under the provisions of the Bombay Order which entitles the petitioners' firm to carry on the business of purchase and sale of sugar and storage of sugar for sale. It is an admitted position that the petitioners' firm has not committed any breach of the conditions of the said license nor has it violated any of the provisions of the Bombay Order.

4. It appears that under clause (6) of the Central Order, the State of Bombay was allotted its quota of sugar by the Central Government and the State Government divided the said quota amongst the districts. The Mehsana District accordingly had its quota of sugar and the State Government and the Collector were entitled to direct the distribution and sale of sugar of the said quota. What the Collector did was that after the coming into force of the Bombay Order, he issued licenses under the provisions of the Bombay Order to a large number of dealers who satisfied the requirements of the Bombay Order and advised all the license-holders to form an Association and entrusted the distribution of sugar of the quota for the Mehsana District to the Association

formed of the license-holders. The license-holders being members of the Association, purchased sugar at the controlled rate as authorized by the Collector and sold the same at controlled price to the retail dealers and owners of hotels according to the permits issued by the Taluka Mamlatdars. The work of distribution of sugar was thus carried on by the petitioners and other license-holders as members of the Association during the months of September, October, November and December 1959 to the entire satisfaction of the Collector and the public.

5. Sometime in the beginning of January 1960 the Association learnt that the Collector had issued orders to entrust the wholesale distribution of sugar only to Co-operative Societies and that sugar of the entire quota for the Mehsana District would be allotted only to Co-operative Societies for distribution to the retail dealers and owners of hotels. The Association accordingly addressed a letter to the Collector on 5-1-1960 pointing out the inequity or such action on the part of the Collector and requested the Collector to continue the wholesale distribution of sugar through the Association as was being done until then. The Association also requested the Collector that if it was decided not to continue the wholesale distribution of sugar through the Association, the Collector should intimate to the Association the reasons for the same. The Collector by his letter in reply of the same date stated that since it had been decided as Government policy to entrust wholesale distribution of sugar to Co-operative Societies, nothing could be done in the matter. The Association thereupon sent a telegram to the Minister concerned with this particular matter requesting the Minister to do justice in the matter of wholesale distribution of sugar, but the Association received a letter from the Assistant Director of Civil Supplies stating that the Government did not consider it necessary to interfere in the matter. The Association thereupon filed an appeal before the State Government purporting to be under clause (8) of the Bombay Order, but the said appeal was also rejected and the Association was informed by a letter dated 24-2-1960 that the Government saw no reason to interfere with the decision of the Collector contained in his letter dated 5-1-1960. The result is that though the petitioners' firm has a license under the Bombay Order valid up to 31-12-1960, the petitioners' firm cannot carry on the business of purchase and sale of sugar inasmuch as the State has now decided as a matter of policy that wholesale distribution of sugar should be carried out only through Co-operative Societies and the petitioners' firm has, therefore, no sugar which it can sell. It is against this action of the State that the petitioners have filed this petition.

6. In opposition to the rule, the Collector made a short affidavit denying the various contentions raised on behalf of the petitioners in the petition. When the petition reached hearing before us, Mr. S.N. Patel, the learned advocate for the petitioners, applied for leave to amend the petition. By the amendment, the petitioners sought to raise the contention that the action of the State Government and the Collector in entrusting wholesale distribution of sugar to Co-operative Societies only to the exclusion of other license-holders was "arbitrary, discriminatory, unreasonable and in contravention of the provisions of Article 14". Another contention sought to be raised by the amendment was that the said action could only be taken by the State Government by means of an order passed under Section 3 and notified under Sub-Section (5) of

Section 3 of the said Act and that since there was no order made by the State; Government under Section 3 and notified under Sub-Section (5) of Section 3, laying down the policy of entrusting wholesale distribution of sugar to Co-operative Societies only to the exclusion of other license-holders, the action of the State Government was invalid and so also was the order of the Collector contained in his letter dated 5-1-1960. The amendment was not opposed by the learned Advocate General who appeared on behalf of the State and the Collector and since the questions raised by the amendment were pure questions of law, we allowed the amendment. A further affidavit was thereafter put in by the Collector. We shall presently refer to that affidavit in greater detail.

7. Before we proceed to examine the arguments urged on behalf of the parties, it would be convenient at this stage to set out the relevant provisions of law which have a bearing on the determination of the questions raised before us. The preamble of the said Act is in the following terms :

"An Act to provide, in the interests of the general public, for the control of the production, supply and distribution of and trade and commerce in, certain commodities".

Sub-Sections (1), (2) and (5) of Section 3 of the said Act provide as follows :

"3. Powers to control production, supply, distribution, etc., of essential commodities : (1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by Sub-Section (1), an order made there under may provide -

(a) for regulating by licenses, permits or otherwise the production or manufacture of any essential, commodity;

(b) for bringing under cultivation any waste or arable land, whether appurtenant to a building or not for the growing thereon of food-crops generally or of specified food-crops and for otherwise maintaining or increasing the cultivation of food-crops generally, or of specified food-crops;

(c) for controlling the price at which any essential commodity may be bought or sold;

(d) for regulating by licenses, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity;

(e) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale;

(f) for requiring any person holding in stock any essential commodity to sell the whole or a specified part of the stock to such person or class of persons and in such circumstances

as may be specified in the order;

(g) for regulating or prohibiting any class of commercial or financial transactions relating to foodstuffs or cotton textiles which, in the opinion of the authority making the order, are, or, if unregulated, are likely to be, detrimental to the public interest;

(h) for collecting any information or statistics-with a view to regulating or prohibiting any of the aforesaid matters;

(i) for requiring persons engaged in the production, supply or distribution of, or trade and commerce in, any essential commodity to maintain and produce for inspection such books, accounts and records relating to their business and to furnish such information relating thereto, as may be specified in the order;

(j) for any incidental and supplementary matters, including in particular the entering and search of premises, vehicles, vessels and aircraft, the seizure by a person authorised to make such search of any articles in respect of which such person has reason to believe that a contravention of the order has been, is being, or is about to be committed, the grant or issue of licenses, permits or other documents and the charging of fees therefor.

* * * *

(5) An order made under this section shall, -

(a) in the case of an order of a general nature or affecting a class of persons, be notified in the Official Gazette; and

(b) in the case of an order directed to a specified individual be served on such individual -

(i) by delivering or tendering it to that individual, or

(ii) if it cannot be so delivered or tendered, by affixing it on the outer door or some other conspicuous part of the premises in which that individual lives and a written report thereof shall be prepared and witnessed by two persons living in the neighborhood".

Section 5 of the said Act runs as under :

5. Delegation of powers : The Central Government may, by notified order, direct that the power to make orders under Section 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by -

(a) such officer or authority subordinate to the Central Government, or

(b) such State Government or such officer or authority subordinate to a State Government, as may be specified in the direction. Clauses 2(a), (3), (5), (6), (7) and (10) of the Central Order run as follows :

"2. Definitions : In this order unless the context otherwise requires -

(a) "dealer" means a person carrying on the business of purchasing, selling, or distributing sugar;"

* * * *

"3. Powers to regulate production and movement of sugar : The Central Government may by order published in the Official Gazette -

- (a) direct that no sugar shall be manufactured from sugarcane except under and in accordance with the conditions specified in a license issued in this behalf;
- (b) prohibit or restrict the despatch of sugar from or to any State or arty area therein".

* * * *

"5. Power to fix sugar price : (1) The Central Government may from time to time, by notification in the Official Gazette, fix the price or the maximum price at which any sugar may be sold or delivered and different prices may be fixed for different areas, factories or different types of grades of sugar. Such price or maximum price shall be fixed with due regard to the price or minimum price fixed for sugar-cane, manufacturing cost, taxes, reasonable margin of profit for producer and/or trade and any incidental charges.

(2) Where the price or the maximum price has been so fixed, no person shall sell or purchase or agree to sell or purchase any sugar at a price in excess of that fixed under sub-clause (i) :

Provided that the price at which sugar may be sold for delivery otherwise than at ex-factory price shall not exceed the price or the minimum price, as the case may be, fixed under sub-clause (i) for sale at ex-factory price plus such charges, in respect of transport to or in specified areas and other incidental charges as approved by the Central Government".

"6. Powers to allot quotas of sugar : The Central Government may, from time to time, by order -

(i) allot quotas of sugar to any specified State or area,

(ii) issue directions to any producer or dealer to supply sugar of such type or grade, in such quantities to such areas or markets or to such persons or organisations and at such prices, as may be specified in the order :

Provided that where the price or maximum price of any sugar has been fixed under sub-clause (i) of clause 5 the Central Government shall in respect of such sugar specify in the order the price or the maximum price, as fixed".

"7. Power to issue directions to producers and dealers : The Central Government may, from time to time, by general or special order issue to any producer or dealer or any class of producers, or dealers such directions regarding the production, maintenance of stocks, sale, price, grading, packing, marking, weighment, disposal, delivery and distribution of sugar as it may deem fit".

* * * *

10. Delegation of powers : The Central Government may, by notification in the Official Gazette, direct that all or any powers conferred upon it by this order shall, subject to such restrictions, exceptions and conditions, if any, as may be specified in the direction, be exercisable also by –

(a) any officer or authority of the Central Government;

(b) a State Government or any officer or authority of a State Government."

Clauses 2(a) and 3 of the Bombay Order are as follows :-

"2. Definitions : In this Order, unless the context otherwise requires,

(a) "dealer" means any person engaged in the business of purchase, sale or storage for sale, of sugar in quantities exceeding 137 maunds at any one time, but does not include an industrial undertaking which is engaged in the manufacture or production of sugar and which is registered or licensed under the Industries (Development and Regulation) Act, 1951."

* * * *

"3. Licensing of dealers : (1) No person shall carry on business as a dealer except under and in accordance with the terms and conditions of a license issued in this behalf by the licensing authority.

(2) A separate license shall be necessary for each place of business.

Explanation : For the purpose of this clause, any person who stores sugar in quantity exceeding 137 maunds at any one time, shall, unless the contrary is proved, be deemed to store sugar for the purpose of sale."

Our attention has also been drawn by the learned Advocate General to an order dated 29th August 1959 made by the Central Government which runs as follows :

"In exercise of the powers conferred by clause 10 of the Sugar (Control) Order 1955, the Central Government hereby directs that the powers conferred on it under clause 7 of the said Order in so far as they relate to the sale of sugar released to sugar factories in the State of Bombay shall also be exercisable by the Government of Bombay and the Collectors and the Additional Collectors of Districts in the State of Bombay".

8. Though several contentions have been raised in the petition, Mr. S.N. Patel, the learned advocate for the petitioners, has pressed only two contentions before us. The first contention urged on behalf of the petitioners is that the State Government is no doubt entitled to put reasonable restrictions on the petitioners' right to carry on business as dealers in sugar; but that can be done only by an order made under Section 3 (2)(d) and published under Section 3 (5) of the said Act. Without passing such an order, the State Government cannot put any restrictions on the petitioners' right to carry on their business as such dealers. It has been argued by Mr. S.N. Patel that when there are specific provisions of law in the shape of Section 3 (2)(d) and Section 3 (5), the State Government has no authority to issue directions except in accordance with the said provisions of law and that any directions to the Collector in the matter of regulation of distribution of sugar must be by way of an order made under Section 3 (2)(d) and published under Section 3 (5) of the said Act and cannot be merely by way of a policy. It has, therefore, been contended that the petitioners are entitled to a direction to the State Government that in the matter of putting restrictions on the petitioners' right to carry on business as dealers in sugar, the State Government should act only in accordance with the provisions of law and not in the manner

in which it has done. The short answer to this contention is that a Writ of mandamus cannot issue in such general form and that any relief to be granted by the Court must be specific and must be qua the petitioner. It is only when any right of the petitioner is infringed by an action of the State which is not in accordance with law, that the petitioner can ask the Court to issue an appropriate writ against the State. In his anxiety to attack the order of the Collector contained in the letter dated 5th January 1960, Mr. S.N. Patel has argued that the State Government can regulate wholesale distribution of sugar only by making an appropriate order under Section 3 (2)(d) and publishing it under Section 3 (5) of the said Act. But if that is the correct legal position, the petitioners would equally have no right to have the sugar distributed through the Association since no order regulating wholesale distribution of sugar has been made by the State Government under Section 3 (2)(d) of the said Act and in that event the petitioners cannot complain of any infraction of their right so as to entitle them to relief under Article 226 of the Constitution. This argument urged on behalf of the petitioners must, therefore, be negated.

9. Mr. S.N. Patel is however, on stronger ground when he contends that the action of the State in entrusting wholesale distribution of sugar to Co-operative Societies to the exclusion of other license-holders as a matter of policy is violative of the fundamental rights guaranteed under Article 14 of the Constitution. It has been argued by Mr. S.N. Patel that under the provisions of various orders made under Section 3 of the said Act, the State Government is entitled to regulate the distribution of the quota of sugar for the Mehsana District and that for the purpose of regulating such distribution, the State Government is no doubt entitled to make a classification amongst dealers in sugar, but that classification must be fair and reasonable bearing a just and rational relation to the object sought to be achieved by the said Act. It has been urged that the action of the State Government in entrusting wholesale distribution of sugar to Co-operative Societies to the exclusion of other license-holders as a matter of policy is discriminatory between license-holders who are Co-operative Societies and those who are not. According to Mr. S.N. Patel, the classification made by the State for the purpose of wholesale distribution of sugar is not based on any real and substantial distinction bearing a just and rational relation to the object sought to be achieved by the said Act and is arbitrary and unreasonable and cannot stand the test of permissible classification laid down in Article 14 and that the action of the State culminating in the order of the Collector dated 5th January 1960 should, therefore, be struck down by the court.

10. The answer given by the learned Advocate General to this challenge of Article 14 is three-fold. Firstly, it has been argued by the learned Advocate General that though the order of the Collector dated 5th January 1960 is confined only to the Mehsana District and by the said order wholesale distribution, of sugar of the quota for the Mehsana District alone has been entrusted to Co-operative Societies to the exclusion of other license-holders in the Mehsana District, the validity of the said order must be judged not by examining it as an isolated order operative in the Mehsana District but in the context of the policy laid down by the State for all the districts of entrusting wholesale distribution of sugar to Co-operative Societies to the exclusion of other

license-holders wherever there are efficient Co-operative Societies. The order dated 5th January 1960 having been made by the Collector in pursuance of the said policy, it is the said policy which must satisfy the test of Article 14 and it is the contention of the learned Advocate General that the classification made by the State in laying down the said policy is based on real and substantial distinction having a just and rational relation to the object sought to be achieved by the said Act and there is nothing arbitrary or unreasonable about it. For the purpose of his argument, the learned Advocate General has relied on the following passages from the affidavit of the Collector :

"To put the distribution of sugar on more satisfactory basis and to promote and encourage the work of Co-operative societies, the State Government had issued the directives that wherever the cooperative societies can handle the work of distribution of sugar efficiently, the same should be given to them. In this respect Mehsana District is progressive and in Taluka towns etc., the co-operative societies work efficiently and in order to promote the work of Co-operative Societies and to encourage them and to see that the distribution of sugar is made more satisfactorily, this work is given to them."

"There is intelligent differentia for discrimination and reasonable classification. It is submitted that the distribution of sugar through Co-operative Societies is proper and legal and will benefit the object of the Essential Commodities Act....."

The second answer given by the learned Advocate General is that the action of the State complained of by the petitioners is an executive action in administration of the law and that even if any discrimination is made by the said action, it cannot be challenged as violative of Article 14 of the Constitution unless it is shown that such discrimination is intentional and purposeful. In support of this argument the learned Advocate General has relied on two decisions - one being a decision of the Supreme Court of the United States in the case of *Snowden v. Hughes*, reported in *United States Supreme Court Reports*¹, and the other being a decision of the Division Bench of the Bombay High Court in the case of

¹(1944) 88 Law Ed. 497

*Bhikusa v. Sangamner Bidi Kamgar Union*², The learned Advocate General has contended that in the present case there is nothing to show that the discrimination made by the action of the State was intentional and purposeful and that the challenge of Article 14 must, therefore, fail. Lastly, the learned Advocate General has urged that the promotion of Co-operative movement is one of the directive principles of State policy embodied in the Constitution and that any legislation or executive or administrative action which recognizes and gives effect to this directive principle cannot be regarded as unconstitutional.

11. These contentions raise a constitutional issue of some importance. Co-operative movement is growing in this country and the question which arises in this petition is bound to arise frequently in other businesses, avocations and commercial or profit-making activities. Can the State make a classification of dealers into those who are Co-operative Societies and those who are not and

entrust wholesale distribution of an essential commodity like sugar only to those who are Co-operative Societies to the exclusion of others ? In other words, can the State prefer Co-operative Societies to other dealers in the matter of wholesale distribution of an essential commodity like sugar so that the business in such essential commodity can be carried on only by Co-operative Societies and not by other dealers who would be denied the right to carry on such business ? The question is whether such an action on the part of the State offends the equal protection clause contained in Article 14 of the Constitution. It is to this question that we shall now address ourselves.

12. The provisions of Article 14 have come up for discussion in a number of cases before the Supreme Court and it would be futile to enter upon any lengthy discussion as to the meaning, scope and effect of that Article. That Article aims at striking down hostile discrimination or oppression or inequality. As the guarantee implied in the equal protection clause applies to all persons similarly situated, it is certainly open to the legislature to classify persons and things to achieve particular legislative objects but such selection or differentiation must not be arbitrary and should rest upon a rational basis having regard to the object which the legislature has in view. Classification in itself is not enough for the simple reason that anything can be classified and every discriminatory action must necessarily fall into some category of classification, for classification is nothing more than dividing off one group of things from another. It is only when a difference or distinction is made in a given case that the question regarding the application of Article 14 can arise. Now if the State is permitted to make classification in any manner it likes, it would invest the State with an arbitrary power to discriminate as it pleases and that would completely destroy the guarantee contained in Article 14. A rule has, therefore, been evolved which permits the State to make classification for the purpose of achieving particular legislative objects but requires that the classification must satisfy two conditions namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the legislation. All persons are not by nature, attainment or circumstances equal and the varying needs of different classes of persons require different treatment and the laws enacted by the legislature cannot, therefore, have universal application and may be confined in their application to particular classes of persons for the purpose of

²⁶¹ Bom LR 764 : AIR 1960 Bom 299

achieving particular ends. The equal protection clause has been construed as a guarantee against discrimination amongst equals only and not as taking away from the State the power to classify persons or things for the purpose of legislation. The classification may be made on different bases but it must not be arbitrary, artificial or evasive and it must rest always upon real and substantial distinction bearing a reasonable and just relation to the thing in respect of which the classification is made. This rule may be put in another way in the language of Ivor Jennings :

"Among equals the law shall be equal and shall be equally administered and that like shall be treated alike".

To summarise the principles underlying Article 14, we cannot do better than quote the classic passage from the judgment of the Supreme Court in the case of *Budhan Choudhry v. The State of Bihar, reported in*³ It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) 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 (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; 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. It is also well-established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure". We may also mention that the inhibition of Article 14 applies not only to legislation but also to executive action. The language of the Article is that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". The "State" includes the Government and Parliament of India and the Government and Legislature of each of the States. It is, therefore, clear that the fundamental right guaranteed by the equal protection clause is available not only against legislative action but is also available against executive action. As observed by Weaver on Constitutional Law

"the equal protection clause can be invoked not merely where discrimination appears on the express terms of the statute itself, but also when it is the result of improper or prejudiced execution of the law".

The law may lay down a policy and as an effective method of carrying out that policy, a discretion may be vested in the executive to make a classification for the purpose of administering the law. In such cases the power given to the executive would import a duty on it to classify the subject-matter of the legislation in accordance with the objective indicated in the statute. The discretion has to be exercised by the executive in conformity with the policy to effectuate which the discretion is given and it is in relation to that objective that the propriety of the classification has to be tested. If the executive proceeds to classify persons or things on a basis which has no rational relation to the objective of the legislature, its action can certainly be struck down as offending against the equal protection clause. In cases like this, it is not the law which is bad but it is the

³(1955) 1 SCR 1045 : AIR 1955 SC 191

unconstitutional administration of the law which is bad and requires to be annulled. To quote from the judgment of the Supreme Court of America in *Yick Wo v. Peter Hopkins reported in U.S. Supreme Court Reports*⁴,

"Though a law be fair on its face and impartial in operation, yet, if it is administered by public authority with an evil and an unequal hand so as practically to make illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

13. It is in the light of these principles that we must judge whether the action of the State in the present case can successfully encounter the challenge of Article 14. Those principles are, as pointed out above, well settled but difficulty often arises, to quote the words of my Lord the Chief Justice in *Radheshyam v. Union of India*⁵, "in their application to the facts and circumstances relevant in examination of the legislation which is challenged and in determining on which side of the line of demarcation indicated by those principles the case can be said to fall". That difficulty is inherent in the very nature of the principles embodied in the equal protection clause. In a majority of cases which come before the Court it is almost impossible to pin down the thought to any precise analysis of facts in order to see whether the test formulated by the authorities is satisfied or not. As observed by Patanjali Sastri C.J. in the *State of West Bengal v. Anwar Ali Sarkar*⁶, the reported decisions :

"underline the futility of wordy formulation of so called 'tests' in solving problems presented by concrete cases".

There are, however, some cases where the discrimination is so arbitrary and artificial and so unrelated to the object of the legislation that the Court can at once come to the conclusion that the State action involving such discrimination must be struck down as violative of the equal protection clause. In our opinion, this is one of those cases.

14. Before we proceed to examine the arguments, we may point out that the learned Advocate General has produced before us some orders made under the provisions of the said Act to which we have already made reference, but he is not in a position to state whether these are the only orders or whether there are any other orders relating to this matter. He has regretted his inability to make any definite statement on this point. By reason of the recent bifurcation of the State of Bombay into the States of Maharashtra and Gujarat, it has not, been possible for the Officers of the State instructing; him to find out whether there are any other Orders dealing with this subject matter. He has, however, stated before us that the State Government is regulating the distribution of the quota of sugar for the State under the provisions of various Orders made under the said Act and the arguments before us have proceeded on the footing that it is in the exercise of its powers to regulate the distribution of the quota of sugar for the State under the provisions of various Orders made under the said Act, that the State Government has decided, as a matter of policy, to entrust wholesale distribution of sugar to Co-operative Societies to the

⁴(1886) 30 Law Ed. 220

⁶(1952) S.C.R. 284

⁵62 Bom LR 11 : AIR 1960 Bom 353

exclusion of other license-holders wherever there are efficient Co-operative Societies and it is in execution of that policy that the Collector has made the order contained in his letter dated 5th January 1960. The argument of the learned Advocate General is that the action of the State in entrusting as a matter of policy wholesale distribution of sugar to Co-operative Societies to the exclusion of other license-holders is no doubt in exercise of its powers under the provisions of various orders made under the said Act and is not immune from the challenge of Article 14 but the said action successfully encounters that challenge inasmuch as the classification made by it is based on an intelligible differentia bearing a just and rational relation to the object sought to be achieved by the law under which it has been taken, namely, the provisions of the said Act. If the argument of the learned Advocate General is correct, the challenge of Article 14 must fail. It is this argument that we must, therefore, now proceed to examine.

15. The State action complained of by the petitioners in this case makes a classification between license-holders who are Co-operative Societies and those who are not and discriminates in favor of license-holders who are Co-operative Societies in the matter of wholesale distribution of sugar. Whether this classification can stand the test of Article 14 must depend on various factors such as the background against which the State action has been taken, the nature and character of the commodity and business sought to be regulated by such action and the object which the legislature had in view in enacting the said Act in the execution or administration of which the classification has been made. When we turn to the provisions of the said Act we find that the ambit and character of the said Act is such that the Legislature can do no more than lay down the legislative policy and leave it to the executive to work out the details of that policy within the framework to be found in the four corners of the said Act, for the executive would be in a better position to judge the needs and exigencies of the situation. The preamble and the body of the sections clearly formulate the legislative policy and the details of that policy are left to be worked out by delegating them to the Central Government or the State Government or other subordinate officers or authorities within the framework of that policy. The Legislature has in the preamble and the body of the Sections declared the policy of the law and the legal principle which is to guide and control the executive is the exercise of its powers under the provisions of the said Act or any Orders made under the said Act. That principle is the maintenance or increase in supply of essential commodities and securing their equitable distribution and availability at fair prices. This is the objective indicated in the said Act and whenever the executive is exercise of its powers under the provisions of the said Act or any orders made under the said Act makes a classification, the propriety of the classification must be tested in relation to that objective. Whatever is done by the executive in pursuance of or in exercise of its powers under the provisions of the said Act or any Order made under the said Act is ultimately traceable to the said Act and must derive its sustenance and force from the said Act and must, therefore, be in conformity with the legislative policy or principle or objective formulated in the said Act. The classification made by the State in the present case must, therefore, in order to successfully meet the challenge of Article 14, bear a just and rational relation to the object sought to be achieved by the said Act, namely, the maintenance or increase in supply of essential commodities and

securing their equitable distribution and availability at fair prices. The position which obtained when the State decided as a matter of policy to entrust wholesale distribution of sugar to Co-operative Societies to the exclusion of other license-holders was that by reason of the provisions of the Bombay Order no wholesale dealer who was engaged in the business of purchase, sale or storage for sale of sugar in quantities exceeding 137 maunds at any one time could carry on business as a dealer except and in accordance with a license issued in that behalf by the Collector who was the licensing authority. There was no obligation on the Collector to issue licenses to all wholesale dealers who are covered by the definition of 'dealer' contained in clause 2(a). The issue of licenses was discretionary though the discretion of the Collector was controlled by the policy or object of the said Act mentioned above and the Collector was bound to exercise his discretion in conformity with the said policy or object. The Collector in the exercise of his discretion issued licenses to several wholesale dealers some of whom were Co-operative Societies and some were not. We must assume that these licenses were issued in conformity with the policy or object of maintaining or increasing supplies of sugar which is an essential commodity and for securing its equitable distribution and availability at fair prices and the issue of these licenses subserved that policy or object. As a matter of fact the license of the petitioners was renewed for the period 1st January 1960 to 31st December 1960 and the renewal was granted by the Collector on 31st December 1959 only a few days before the State decided to entrust wholesale distribution of sugar to Co-operative Societies to the exclusion of other license-holders. It would thus appear that the policy or object of maintaining or increasing supplies of sugar and securing its equitable distribution and availability at fair prices did not require that the licenses to be issued under the Bombay Order should be confined only to Co-operative Societies and the same could be achieved by the issue of licenses to these dealers even though some of them were not Co-operative Societies. In this context it is rather difficult to appreciate how it can be said that the same policy or object required that wholesale distribution of sugar should be entrusted only to Co-operative Societies to the exclusion of other license-holders. We have referred to this aspect of the matter for the purpose of emphasizing the argument that the classification of license-holders into those who are Co-operative Societies and those who are not is totally unrelated to the policy or object of the said Act. It is really difficult to see how the policy or object of maintaining or increasing supplies of sugar and securing its equitable distribution and availability at fair prices can be served better by entrusting wholesale distribution of sugar to Co-operative Societies in preference to other license-holders. The very fact that licenses have been given to the other license-holders shows that they are considered fit to carry on business as wholesale dealers in sugar and permitting them to carry on the said business is in conformity with their said policy or object. Besides, the form of the license which is prescribed under the Bombay Order and which is Exhibit A to the petition clearly shows that the license holders have to maintain a register of daily accounts for each variety of sugar showing correctly various particulars regarding opening stock, receipts, deliveries and closing stock and the accounts have to be completed on each day. The license-holders are also required to submit to the licensing-authority in the prescribed form a true return of stocks, receipts and deliveries of each variety of sugar for every fortnight and the licensing-authority or any officer authorized by the State Government is entitled at all reasonable

times to inspect the stocks and accounts of the license-holders as also to take samples of sugar for examination, The license-holders are also required to issue to every customer a correct receipt or invoice, as the case may be, giving their own names, address and license number, the name and address and license number (if any) of the customer, the date of the transaction, the quantity sold, price per maund and the total amount charged and to keep a duplicate of the same to be available for inspection on demand by the licensing-authority or any officer authorized in that behalf. The license-holders are also bound to comply with any direction which may be given to them by the State Government or the licensing-authority in regard to the purchase, sale or storage for sale of sugar and in regard to the language in which the register, returns, receipts or invoices should be written and the authentication and maintenance of the register of daily accounts. We have been informed by Mr. S.N. Patel and it has not been disputed by the learned Advocate General that the Central Government has in exercise of its powers under Clause (5) of the Central Order fixed the price for sale of sugar and no wholesale dealer can sell sugar except at the price so fixed. It is also stated in the petition and it has not been denied by the State and the Collector that the license-holders are required to sell sugar to retail dealers and owners of hotels in accordance with the permits issued by the Taluka Mamlatdars. The license-holders have thus no choice either in the matter of the price or in the matter of persons to whom they might sell sugar. It will thus be seen that there is rigid control not only on the price but also on the distribution and sale of sugar. Having regard to this position, can it be said that the policy or object of maintaining or increasing supplies of sugar and securing its equitable distribution and availability at fair prices would be secured better or more satisfactorily by entrusting wholesale distribution of sugar to Co-operative Societies in preference to other license-holders ? It is at every stage that the business of the license-holders in sugar is controlled. The license-holders, can purchase only such quota of sugar as is allotted to them for distribution by the Collector. The price at which the license-holders can purchase sugar is also controlled. The license-holders can sell sugar only to such retail dealers and owners of hotels as may be directed by the State Government or the Collector and that too at the controlled price. The license-holders have also to keep regular accounts which are to be available for inspection and regular returns have to be furnished to the Collector. This being the mode of business, it cannot possibly be said that wholesale distribution of sugar through Co-operative Societies in preference to other license-holders would serve the policy or object of the said Act better or more effectively. The classification of license-holders into those who are Co-operative Societies and those who are not for the purpose of wholesale distribution of sugar in these circumstances is totally unrelated to the policy or object of the said Act. There is absolutely no nexus between the basis of classification and the policy or object of the said Act. The classification, has been sought to be justified in the affidavit in reply filed by the Collector and two grounds have been urged in support of the classification. It is well settled that the basis of classification need not appear on the face of the law itself and may be gathered from any extraneous materials and it is permissible to the Court to find the basis from, the affidavit made by the State or its officers. From the affidavit we find that the State has decided to entrust wholesale distribution of sugar to Co-operative Societies to the exclusion of other license-holders in order "to put the distribution of sugar on more satisfactory basis and to promote and encourage

the work of Co-operative Societies". Now it is obvious that promotion and encouragement of the work of Co-operative Societies can afford no reasonable basis for classification. It would have no nexus with the policy or object of the said Act which is to maintain or increase supplies of sugar and to secure its equitable distribution and availability at fair prices. The second ground namely, putting distribution of sugar on more satisfactory basis may appear at first blush to afford a reasonable basis for classification. But when we examine it more closely, we find that the same cannot be accepted. Beyond using a vague and indefinite formula, the State has not indicated to the Court as to how and in what manner the wholesale distribution of sugar through the Association formed of the license-holders was unsatisfactory and how and in what way it will be put on mere satisfactory basis if it is entrusted only to Co-operative Societies to the exclusion of other license-holders. The State has not placed any facts before us on the basis of which it can be said that wholesale distribution of sugar would be put on more satisfactory basis by entrusting it to Co-operative Societies in preference to other license-holders. We on our part find it impossible to accept this ground which has been put forward by the State in such a vague and any fashion. Having regard to the various facts and I circumstances mentioned above, it is difficult to see how wholesale distribution of sugar can be put on more satisfactory basis by entrusting it to Cooperative Societies and denying it to other license-holders. The learned Advocate General has not been able to point out to us anything which would show that wholesale distribution of sugar can be carried out more satisfactorily through Co-operative Societies than through other dealers. He has, in our opinion, rightly conceded that there is nothing in the Co-operative Societies Act or in any other law which can lead us to the conclusion that by reason of anything therein contained, Co-operative Societies are better suited or equipped than other license-holders in relation to the business of wholesale-dealers in sugar. It is impossible to conceive of any facts or matters on the basis of which it can be said that wholesale distribution of sugar can be carried out better and more satisfactorily by Cooperative Societies than by other license-holders, particularly having regard to the rigidly controlled mode of business. It is not enough for the State to allege that it is in order to put wholesale distribution of sugar on a more satisfactory basis that the State has decided to entrust wholesale distribution of sugar to Co-operative Societies to the exclusion of other license-holders and the State cannot get rid of the challenge of Article 14 by merely making such a vague and indefinite statement which, apart from the infirmity that it is not supported by any facts, we find impossible to accept. It is no doubt true that the presumption is in favour of the constitutionality of a legislative enactment and it has to be presumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems manifest by experience and that its discriminations are based on adequate grounds. It is equally true as observed by a Division Bench of the Bombay High Court in the case of *Ramakrishna Dalmia v. Mr. Justice S.R. Tendolkar*, reported in⁷ that this presumption applies equally to executive or administrative action taken in pursuance of law. But when we find that there is no convincing or satisfactory reason on which the basis of classification can be justified and that out of two grounds put forward by the State as forming the basis of classification, one ground is utterly vague, nebulous, unsupported by facts and obviously incorrect and unjustified and cannot, having regard to the facts and circumstances, form the basis of classification while

the other ground is totally unrelated to the policy or object of the said Act in the execution or administration of which the classification has been made, this presumption is of little or no assistance. To rely on this presumption in a case is this for the purpose of upholding the validity of the State action would be to make the equal protection clause "a mere rope of sand". We are, therefore, of the opinion that the classification made by the State is not based on any real and substantial distinction bearing a just and rational relation to the object sought to be achieved by the said Act and the action of the State in entrusting wholesale distribution of sugar to Co-operative Societies to the exclusion of other license-holders of lends against the equal protection clause.

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16. So far as the second argument of the learned Advocate General is concerned, we agree with him that the action of the State complained of by the petitioners is an executive action in administration of law and that it is not, therefore, enough to show that the discrimination made by the said action cannot be justified on any reasonable principle of classification but it must also be shown that such discrimination is intentional and purposeful. But there our agreement ends. We cannot accept his contention that in the present case there is nothing to show that the discrimination made by the action of the State is intentional or purposeful. The words "intentional or purposeful" have been used in relation to discrimination to distinguish it from discrimination which may arise as a result of erroneous or mistaken performance of a statutory duty on the part of the executive. To quote from the judgment of the Supreme Court of the United States in (1944) 88 Law Ed. 497.

"the talk in some of the cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance, a departure from a norm must be rooted in design and not derived merely from error or fallible judgment". The discrimination which results from executive action must, therefore, be deliberate and "rooted in design" and must not be the result of mere erroneous or mistaken performance of a statutory duty. As pointed out in that case "the Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of a State". In a particular case the unlawful administration of a statute by the executive may result in its unequal application to those who are entitled to be treated alike but that does not amount to a denial of the equal protection clause unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, or it may be shown by extrinsic evidence showing a discriminatory design to favour one individual or class over another. If, therefore, in any particular case it is found that the executive action which resulted in inequality of treatment was merely the result of an erroneous or mistaken performance of statutory duty on the part of the executive and that in taking such action there was no desire or design to prefer one individual or class over another, such action cannot be challenged under the equal protection clause. If, however, it is found that in taking the action the executive was guided by a desire or

design to prefer one individual or class over another, the discrimination would be intentional and purposeful and if the reasons for making the discrimination are not valid in the sense that the discrimination cannot be justified on any reasonable principle of classification, the discrimination would be liable to be struck down as violative of the provisions of Article 14. There is no dispute about this principle and we do not see how can there be any about its application to the facts of the present case. Here we have an avowed policy of the State to prefer Co-operative Societies to other license-holders in the matter of wholesale distribution of sugar. It is not any erroneous or mistaken performance of any statutory duty on the part of the State or the Collector which has incidentally resulted in the preferment of Co-operative Societies over other license-holders. The decision of the State to entrust wholesale distribution of sugar to Co-operative Societies to the exclusion of other license-holders is deliberate and "rooted in design" and the intention and purpose is that Cooperative Societies should be preferred to other license-holders in the matter of wholesale distribution of sugar. It may be that the State believes that it is entitled to discriminate in the manner it has done and that its discrimination can be justified as based on adequate grounds; but that is beside the point. Whatever the State may believe, the State has come forward with a definite policy which it seeks to justify and it is impossible to contend that in this there is no element of intentional or purposeful discrimination. The discrimination made by the State is obviously intentional and purposeful and if it cannot be justified on any reasonable principle of classification - and we have already held that it cannot be so justified - it must be struck down as violative of the provisions of Article 14. This argument of the learned Advocate General must also, therefore, fail.

17. The last argument of the learned Advocate General was that the promotion of Co-operative movement is one of the directive principles of State policy embodied in the Constitution and that any legislation or executive or administrative action which recognizes and gives effect to this directive principle cannot be considered unconstitutional. The Advocate General, however, found it difficult to sustain this argument and frankly stated to the Court that if the action of the State offended against the equal protection clause, it could not be saved by resort to the directive principles of State policy. It is elementary "that the chapter of Fundamental Rights is sacrosanct and cannot be abridged by any Legislative or Executive Act or order, except to the extent provided in the appropriate article in Part III. The directive principles of State policy must conform to and run as subsidiary to the Chapter of Fundamental Rights." If, therefore, the action of the State is violative of the provisions of Article 14, it cannot be saved by any directive principles of State policy. This argument of the learned Advocate General must also, therefore, be rejected.

18. In the result the petition succeeds and an order will issue declaring as void and setting aside the decision of the State Government to entrust wholesale distribution of sugar to Co-operative Societies to the exclusion of other license-holders, the Order of the Collector dated 5th January

1960 and the Order of the State Government dated 24th February 1960 and restraining the State Government and the Collector from enforcing or taking any steps or proceeding in enforcement of the said Orders. The respondents will pay the costs of the petitioners. The advocate's fee will be fixed at Rs. 300/-.

Petition allowed.