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SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, WEST BENGAL

v.

GIRISH KUMAR NAVALAKHA & ORS.

March 3, 1975

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[A. N. RAY, C.J., K. K. MATHEW, V. R. KRISHNA IYER AND A. C. GUPTA, JJ.]

Constitution of India, 1950, *Art.* 14—*Purpose of challenged classification in doubt—Concept of 'purpose' and 'similar situations', when can be resorted to—Legislature if can be given benefit of doubt about its purpose.*

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Constitution of India, 1950, *Art.* 14—*Under-inclusive classification, meaning of—Under-inclusive classification, when permissible.*

Foreign Exchange Regulation Act, 1947, *Section* 23—*Two different procedures for dealing with persons contravening the Act—Benefit of inquiry by Director of Enforcement not available to persons dealt with under s.* 23(*1A*)—*Classification, if unreasonable.*

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The respondents were tried for having committed offences under s. 4(3), 20(3) and 22 of the Foreign Exchange Regulation Act, 1947 read with s. 120-B of the Indian Penal Code and s. 23 of the Act. The Court discharged the respondents in view of the decision of the High Court of Calcutta in *M/s Serajuddin & Co. and Ors.* v. *Union of India and Ors.* Civil Rules Nos. 2183 (W) of 1966 and cases Nos. 1998 and 1999 of 1963 decided on 16-9-1971, holding that s. 23(AI) was violative of Art. 14 of the Constitution. The appellant filed a revision petition against the order, before the High Court. The High Court concurred with the decision of the trial Court and dismissed the revision. This appeal, by special leave, is against that order dismissing the revision,

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It was contended for the respondents that s. 23 provides for two different procedures for dealing with contravention of the provisions of the Act. That is to say, persons who have contravened the provisions specified in s. 23(1)(a) and are found guilty by the Director of Enforcement need not face prosecution in a criminal court if the Director is of opinion that the penalty he is empowered to impose would be adequate punishment, whereas, the persons alleged to contravene the other provisions of the Act have necessarily to face prosecution in criminal court without being given the benefit of an inquiry by the Director of Enforcement and the opportunity to the delinquents to convince him that imposition of penalty by him would be adequate punishment even if they are found guilty. The classification made in s. 23(1) is under-inclusive and is, therefore, unreasonable.

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Allowing the appeal,

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HELD : (i) When the purpose of a challenged classification is in doubt, the courts attribute to the classification the purpose thought to be most probable. Instead of asking what purpose or purposes the statute and other materials reflect, the court may ask what constitutionally permissible objective this statute and other relevant materials could plausibly be construed to reflect. The latter approach is the proper one in economic regulation cases. The decisions dealing with economic regulation indicate that courts have used the concept of 'purpose' and 'similar situations' in a manner which give considerable leeway to the legislature. This approach of judicial restraint and presumption of constitutionality requires that the legislature is given the benefit of doubt about its purpose. [805H-806C]

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(ii) Often times the courts hold that under-inclusion does not deny the equal protection of laws under Article 14. In strict theory, this involves an

A abandonment of the principle that classification must include all who are similarly situated with respect to the purpose. This under-inclusion is often explained by saying that the legislature is free to remedy parts of a mischief or to recognize degrees of evil and strike at the harm where it thinks it most acute. There are two main considerations to justify an under-inclusive classification. First, administrative necessity. Second, the legislature might not be fully convinced that the particular policy which it adopts will be fully successful or wise. Thus to demand application of the policy to all whom it B might logically encompass would restrict the opportunity of a state to make experiment. These techniques would show that some sacrifice of absolute equality may be required in order that the legal system may preserve the flexibility to evolve new solutions to social and economic problems. [806E; H-807B]

Missouri K. and T. Rly. v. *May*, (1903) 194 U.S. 267 at p. 269 and *Gujarat* v. *Ambica Mills* A.I.R. 1974 S.C. 1300 referred to.

C (iii) The experience of the Government was that persons contravening the provisions of the Act specified in s. 23(1)(a) invariably escaped without punishment: firstly because, successful prosecution of these offences in many cases was not possible for want of legal evidence; secondly because, the criminal courts were not equipped with the training, expertize and experience necessary to deal with the intricate and ingenious methods adopted by the persons contravening them. The Government, therefore, thought that imposition of penalty by departmental adjudication would prove a more effective means of D checking these types of foreign-exchange offences as against the previous system of prosecution of all offences on the basis of the strict standard of proof required for criminal prosecution—which proof was, by and large, so much within the special knowledge of the offender and so much out of the reach of the department. [808D-F]

The basis of classification was that in cases where there was likelihood of getting sufficiently unimpeachable evidence as, for instance, in cases involving contravention of sections 14, 13(2), 15, 18 etc., where the Reserve Bank of E India as a specialized agency comes into the picture and be in possession of relevant materials, those cases were left to be dealt with under s. 23(1A) by criminal courts. The classification made in s. 23(1A) is, therefore, not discriminatory. [808H;-809E]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 203 of 1973.

Appeal by special leave from the Judgment and Order dated the F 14th March, 1973 of the Calcutta High Court in Criminal Revision No. 613 of 1972.

L. N. Sinha, Solicitor-General, G. L. Sanghi and *Girish Chandra* for the Appellant.

A. K. Sen, Mrs. Liela Seth and *U. K. Khaitan* for the Respondents.

The Judgment of the Court was delivered by

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MATHEW, J. The respondents were tried before the Presidency Magistrate, 11th Court for having committed offences under sections 4(3), 20(3) and 22 of the Foreign Exchange Regulation Act, 1947 (hereinafter called 'the Act') read with s. 120-B of the Indian Penal Code and s. 23 of the Act. The Court discharged the respondents in view of the decision of the High Court of Calcutta in *M/s. Serajuddin* H *& Co. and Others* v. *Union of India and Others*(1) holding that s.

(1) Civil Rules Nos. 2183 (W), 2184 (W) of 1966 and cases Nos. 1998 and 1999 of 1963 decided on 16-9-1971.

23(1A) was violative of Article 14 of the Constitution. The appellant filed a revision petition against the order, before the High Court. The Court concurred with the decision of the trial Court and dismissed the revision. This appeal, by special leave, is against that order.

The question for consideration is whether s. 23(1A) of the Act violates Article 14 of the Constitution.

Section 23(1) as it originally stood in the Act provided that whoever contravenes any of the provisions of the Act or of any rule, direction or order made thereunder shall be punishable with imprisonment for a term which may extend to two years or with fine or with both, and any Court trying any such contravention may, if it thinks fit and in addition to any sentence which it may impose for such contravention, direct that any currency, security, gold or silver or goods or other property in respect of which the contravention has taken place shall be confiscated. Section 23 was amended in 1950 and 1952. We are not concerned with those amendments. In 1957, the section was further amended by the Foreign Exchange Regulation (Amendment) Act, 1957 (Act No. 39 of 1957). This amendment provided for departmental adjudication in respect of contravention of certain provisions of the Act. The section as amended read as under :

> "23(1) If any person contravenes the provisions of s. 4, s. 5, s. 9 or sub-section (2) of s. 12 or of any rule, direction or order made thereunder, he shall—
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> (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,
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> (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,
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> (1A) Whoever contravenes—
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> (a) any of the provisions of this Act or of any rule, direction or order made thereunder, other than those referred to in sub-section (1) of this section and s. 19 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.
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> (b) any direction or order made under s. 19 shall, upon conviction by a Court, be punishable with fine which may extend to two thousand rupees."

By s. 23D it was provided that the Director of Enforcement shall for the purpose of adjudicating under clause (a) of sub-section (1) of s. 23

A hold an inquiry after notice to the person proceeded against and impose a penalty, but if at any stage of the inquiry he is of opinion that having regard to the circumstances of the case, the penalty he is empowered to impose would not be adequate, he shall, instead of imposing a penalty, file a complaint in writing to the Court.

B The argument of the respondents was that s. 23 provides for two different procedures for dealing with contravention of the provisions of the Act; that while persons contravening the provisions of the Act specified in s. 23(1)(a) have to be dealt with by the Director of Enforcement in the first instance and need face trial in criminal court only if he is of opinion that having regard to circumstances of the case the penalty he is empowered to impose would not be adequate, the persons contravening the other provisions of the Act are liable to be prosecuted in the C first instance in criminal court without an injury by the Director of Enforcement which would give them the possibility to escape prosecution in a criminal court. In other words the argument was that persons who have contravened the provisions specified in s. 23(1)(a) and are found guilty by the Director of Enforcement need not face prosecution in a criminal court if the Director is of opinion that the penalty he is empowered to impose would be adequate punishment, whereas, the per- D sons alleged to contravene the other provisions of the Act have necessarily to face prosecution in criminal court without being given the benefit of an inquiry by the Director of Enforcement and the opportunity to the delinquents to convince him that imposition of penalty by him would be adequate punishment even if they are found guilty.

The question, therefore, is whether persons contravening the provi- E sions specified in s. 23(1)(a) are similarly situated with persons contravening the other provisions of the Act with respect to the purpose or object of the Act or whether by reason of the nature of the offences resulting from the contravention of the provisions specified in s. 23(1)-(a) the persons contravening them form a class by themselves distinct from the persons contravening the other provisions of the Act and therefore the legislative judgment to deal with them under a different F procedure was justified with reference to the ultimate purpose of the Act.

The preamble provides the key to the general purpose of the Act. That purpose is the regulation of certain payments, dealings in foreign exchange and securities and the import and export of currency and bullion in the economic and financial interest of India. The general G purpose or object of the Act given in the preamble may not show the specific purpose of the classification made in s. 23(1)(a) and s. 23(1A). The Court has therefore to ascribe a purpose to the statutory classification and coordinate the purpose with the more general purpose of the Act and with other relevant Acts and public policies. For achieving this the Court may not only consider the language of s. 23 but also H other public knowledge about the evil sought to be remedied, the prior law, the statement of the purpose of the change in the prior law and the internal legislative history. When the purpose of a challenged classification is in doubt, the courts attribute to the classification the purpose

thought to be most probable. Instead of asking what purpose or purposes the statute and other materials reflect, the court may ask what constitutionally permissible objective this statute and other relevant materials could plausibly be construed to reflect. The latter approach is the proper one in economic regulation cases. The decisions dealing with economic regulation indicate that courts have used the concept of 'purpose' and 'similar situations' in a manner which give considerable leeway to the legislature. This approach of judicial restraint and presumption of constitutionality requires that the legislature is given the benefit of doubt about its purpose. How far a court will go in attributing a purpose which though perhaps not the most probable is at least conceivable and which would allow the classification to stand depends to a certain extent upon its imaginative power and its devotion to the theory of judicial restraint.

At this stage, it is necessary to sharpen the focus to understand the real grievance of the respondents. As already indicated, their submission is that since they are similarly situated with persons contravening the provisions of the Act specified in s. 23 (1) (a), they should have been included in that class and dealt with by the Director Enforcement in the first instance so that they might also have the benefit of inquiry by him with the possible advantage of escaping with penalty even if they are found guilty of the offences. Their grievance therefore is that the classification made in s. 23 (1) is under-inclusive and is, therefore, unreasonable.

Often times the courts hold that under-inclusion does not deny the equal protection of laws under Article 14. In strict theory, this involves an abandonment of the principle that classification must include all who are similarly situated with respect to the purpose. This under inclusion is often explained by saying that the legislature is free to remedy parts of a mischief or to recognize degrees of evil and strike at the harm where it thinks it most acute.

The Courts have recognised the very real difficulties under which legislatures operate—difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to re-shape— and they have refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration. Mr. Justice Holmes, in urging tolerance of under-inclusive classifications, stated that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched. *See Missouri K. and T. Rly.* v. *May*(1). What, then, are the fair reasons for non-extension? What should a court do when it is faced with a law making an under-inclusive classification in areas relating to economic and tax matters?

There are two main considerations to justify an under-inclusive classification. First, administrative necessity. Second, the legislature might not be fully convinced that the particular policy which it adopts

(1) (1903) 193 U. S. 267 at p. 269.

A will be fully successful or wise. Thus to demand application of the policy to all whom it might logically encompass would restrict the opportunity of a state to make experiment. These techniques would show that some sacrifice of absolute equality may be required in order that the legal system may preserve the flexibility to evolve new solutions to social and economic problems. The gradual and piece-meal change is often regarded as desirable and legitimate though in principle
B it is achieved at the cost of some equality. It would seem that in fiscal and regulatory matters the court not only entertains a greater presumption of constitutionality but also places the burden on the party challenging its validity to show that it has no reasonable basis for making the classification. This was the approach of this Court in *State of Gujarat* v. *Ambica Mills*(1). The Court said :

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> "The piecemeal approach to a general problem permitted by under-inclusive classifications, appears justified when it is considered that legislative dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur, what evasions might develop, what new evils might be generated in the attempt. Administrative
D expedients must be forged and tested. Legislators, recognizing these factors, may wish to proceed cautiously, and courts must allow them to do so (37 California Rev. 341)."

The background of the amendment of s. 23 of the Act will be relevant for appreciating the reason for making the distinction between the two classes of contraventions. From April, 1949 to Dece-
E mber, 1952, the Reserve Bank was handling all cases including those relating to unauthorized import, export of gold and silver. The Bank had an enforcement section. In 1952, the Central Government authorised the Customs and Central Excise officers to investigate and prosecute cases if import or export of gold and silver in contravention of the provisions relating to them. In May, 1956, the Central Govern-
F ment took over the work relating to enforcement, i.e., the residuary work done by the Reserve Bank other than those entrusted to Customs Department. A Directorate of Enforcement was set up in May, 1956 with the idea that there should be a specialized agency to deal with specified categories of offences. Between April, 1949 and April 1956, when the duty of enforcement was with the Reserve Bank, the Bank had completed investigation in about 200 cases but prosecutions could be launched in respect of 66 cases only and out of these 60
G cases ended in convictions. No prosecution could be launched in respect of other cases in view of the fact that evidence legally necessary to secure conviction in a court was not forthcoming. When the work was transferred to the Enforcement Directorate of the Ministry of Finance, its experience was also similar. From May, 1956 till about 1957, the Directorate had handled 832 cases. But prosecutions could be launched only in respect of 32 cases. This was due to the
H fact that legal evidence necessary for establishing the cases beyond

(1) A.I.R. 1974 S.C. 1300.

doubt in a court of law was not forthcoming partly because it was difficult to secure cooperation of the foreign collaborators in getting the incriminating documents against the suspects and partly because the banks in foreign countries were under no obligation to furnish statements of accounts maintained by the suspects in them. Faced with this difficulty, the Government had to consider other ways of enforcing the provisions of the Act more effectively. The Government, after considering the pros and cons decided to provide for departmental enquiry and adjudication of contravention of certain provisions of the Act by an authority specially constituted for that purpose. In the statement of Objects and Reasons to the Foreign Exchange Regulation Bill, 1957, it was stated :

> "....The most important of these amendments is the one providing for departmental inquiry and adjudication of foreign exchange offences by an authority constituted by Government on the Sea Customs Act."

In short, the reason for the amendments made in 1957 was the experience gained in the working of the Act till then. That experience was that persons contravening the provision of the Act specified in s. 23 (1) (a) invariably escaped without punishment : firstly because, successful prosecution of these offences in many cases was not possible for want of legal evidence; secondly because, the criminal courts were not equipped with the training, expertize and experience necessary to deal with the intricate and ingenious methods adopted by the persons contravening them.

The Government therefore thought that imposition of penalty by departmental adjudication would prove a more effective means of checking these types of foreign-exchange offences as against the previous system of prosecution of all offences on the basis of the strict standard of proof required for criminal prosection—which proof was by and large, so much within the special knowledge of the offender and so much out of the reach of the department. It may be noted that after the amendment in 1957, further amendments of s. 23 were made in 1964 whereby sections 10, 17, 18(A) and 18(B) were also brought within the purview of s. 23(1)(a). The introduction of these sections within s. 23(1)(a) was the result of further experience gained during the succeeding years. It was only on the basis of the experience gained by the working of the Act that a decision could be taken about the classification of offences in respect of which a trial by a court would be expedient and those in respect of which summary procedure visualized by s. 23(1) (a) might be necessary.

Generally speaking, therefore, the basis of the classification was that in cases where there was likelihood of getting sufficiently unimpeachable evidence as, for instance, in cases involving contravention of sections 14, 13(2), 15 18, etc., where the Reserve Bank of India as a specialized agency comes into the picture and be in possession of relevant materials, those cases were left to be dealt with under s. 23(1A) by criminal courts.

A In paragraph 17 of the affidavit of Shri M. L. Sharma, Under Secretary, Ministry of Finance, Department of Economic Affairs, filed with the permission of this Court, the reasons why the legislature selected the contravention of certain provisions of the Act for being dealt with by the criminal courts in the first instance have been fully stated. According to that affidavit, broadly speaking, the classes of B offences which have been brought under sections 23(1) and 23A are what may be termed as 'primary' offences and those brought under s.23(1A) may be termed as 'secondary' offences. Primary offences are those which need detection and action at executive or field level by the concerned specialized agency. There is greater need for taking deterrent measures in respect of these offences. It is not a question of the seriousness or gravity of the offences. Both primary and C secondary offences may be grave or serious and involve large amounts. But the difference is that primary offences are distinguished by the volume and areas of incidence and may need greater deterrence which sometimes may lie in large pecuniary penalty and sometimes in criminal punishment by way of imprisonment. A delinquent who has become an insolvent may not feel any deterrent effect however large the pecuniary penalty may be and such a case may call for a sentence of imprisonment. In respect of secondary offences there are already D built-in institutional checks laid down by the Reserve Bank or other Government agencies. As indicated above, where contraventions do take place in regard to other sections, there would normally be adequate or reasonable documentary evidence, etc., and these will facilitate prosecution in courts of law.

We do not think that there is any merit in the contention that the E classification made in s.23(1A) is discriminatory. Even according to the respondents, it is the classification made in s.23(1)(a) which is under inclusive and is, therefore, unreasonable. If this Court were to declare that the classification made in s. 23 (1) (a) is under inclusive and therefore unreasonable, the result would be that contraventions of the provisions specified in s. 23(1)(a) would also fall within s. 23(1A) and would have to be dealt with by the Criminal Court—a con- F summation which the respondents devotedly want to avoid.

We do not think that the High Court was right in holding that s. 23(1A) was bad. We set aside the order of the High Court and allow the appeal.

Appeal allowed.

V.M.K.