
(1970) 10 BOM CK 0007

In the Bombay High Court

Case No : Criminal Revision Applplication No's. 687 and 774 of 1970

Jayantilal Kalidas Mehta

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 15-10-1970

Acts Referred:

Army Act, 1950 — Section 102, 103, 120, 124, 125
Constitution of India, 1950 — Article 14, 19, 31, 33
Customs Act, 1962 — Section 11, 110, 111, 112, 113
Land Acquisition Act, 1894 — Section 23
Penal Code, 1860 (IPC) — Section 120B, 177, 417

Citation : (1972) 74 BOMLR 391

Hon'ble Judges : Nathwani, J;Chitale, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Chitale, J.—Criminal Revision Application No. 687 of 1970 is preferred by accused No. 1 Jayantilal Kalidas Mehta, and accused No. 2, Bharatkumar Jayantilal, against the order passed by the learned Presidency Magistrate, 28th Court, Esplanade, Greater Bombay, on June 30, 1970, pro proceeding to frame charges against the two accused.

2. On March 27, 1968, the Assistant Collector of Customs, New Customs House, Bombay, lodged the complaint, out of which this revision application arises, in the Court of the Magistrate mentioned above against the two accused and one more person, alleging offences u/s 120-B, Indian Penal Code, Section 135 of the Customs Act, 1962, Section 5 of the Imports and Exports (Control) Act, 1947, Section 23 of the Foreign Exchange Regulation Act, 1947 and Section 417, Indian Penal Code. Subsequently, on July 6, 1968, another complaint was filed against the same persons by the Director of Enforcement alleging offences under Sections 23 and 23B of the Foreign Exchange Regulation Act, 1947. As the same set of facts gave rise to the two complaints, they were amalgamated and numbered as Criminal Case No. 59/CW of 1968. Thereafter some evidence led by

the Assistant Collector of Customs was recorded. On November 27, 1969 the prosecution submitted that on the evidence led, it had made out a prima facie case and requested the Court to frame charges, conceding, however, that in view of the Supreme Court decision in *Rayala Corporation v. Director of Enforcement* A.I.R [1970] S.C. 494, no charge u/s 23 or Section 23B of the Foreign Exchange Regulation Act could be framed at that stage, inasmuch as the Director of Enforcement had not arrived at the conclusion required by Section 23D of the said Act. On behalf of the accused, it was urged that no charge can be framed even u/s 135 of the Customs Act, inasmuch as Section 135 was ultra vires as it contravenes Article 14 of the Constitution of India. The then trial Magistrate made a reference to this Court observing as follows:

...In my opinion this question will have to be now considered afresh in the light of this latest pronouncement of the Supreme Court in the *Rayala Corporation*. The learned Magistrate thereupon submitted a reference for consideration of Honourable High Court u/s 432, Criminal Procedure Code... (Ch. 3/p. bk.)

3. By the same order the learned Magistrate discharged accused No. 3, who was prosecuted along with the petitioners, there being no evidence against him. That reference, Criminal Reference No. 25 of 1970 came up before Wagle and Nathwani JJ. The Reference was found to be defective, inasmuch as provisions of Section 432(1), Criminal Procedure Code were not complied with. The Reference was, therefore, rejected without expressing, any opinion on the contentions raised by the petitioners. Thereafter, in June 1970 the case came up for hearing again before Mr. B.L. Gadkari, Presidency Magistrate. With regard to the constitutional question raised by the petitioners, the only order passed by the learned Magistrate reads thus:

Heard both sides. There appears to be no reason to hold the impugned legislation to be ultra vires though no doubt the point raised is important and interacting. Hence charges to be framed separately. (p. 8/p. bk.)

4. It is against this order that the present revision application is preferred.

5. The petitioners contend that Sections 135 and 137 of the Customs Act are ultra vires in view of Article 14 of the Constitution of India. These sections confer on the Collector of Customs unguided, uncontrolled and arbitrary powers to determine whether a particular person would be dealt with only departmentally or will also be prosecuted in a Court of law. There are no guidelines provided in the Act itself for regulating the exercise of the above discretion conferred on the Collector. Thus, the Customs Act enables the Collector of Customs in exercise of his discretion to treat different persons alleged to have committed same or similar offences differently; hence Sections 135 and 137 of the Customs Act are ultra vires in view of Article 14 of the Constitution.

6. Mr. Sorabji, who appears for the petitioners, formulated his point thus:- (1) Customs Act, 1962, provides for two alternative punishments, which are different from one another, one of them more serious or drastic than the other, for the

same offence. The two punishments are (i) adjudication proceedings resulting into penalty u/s 112 read with Section 111 of the Customs Act, and (ii) sentence after a criminal trial u/s 135 of the said Act. On the same facts, either only adjudication proceedings can be held or resort can be had to both adjudication proceedings and prosecution u/s 135. Choice or selection of the proceedings to be adopted against a person alleged to have violated Section 111, is by the Customs Act left to the unguided, uncontrolled and arbitrary discretion of the Customs authorities. The Customs Act does not provide any criteria, nor any guidelines to control or guide the exercise of the said discretion. Guidelines must have relevance and bearing on the question of selection of the proceedings by the Customs authorities whether they should adopt only adjudication proceedings or both adjudication proceedings and prosecution. Guidelines must be clear and definite, they must not be latent, nor hidden in the crevices of the statute. Although Section 137 of the Customs Act provides for a sanction to prosecute, there is no statutory obligation on the Collector of Customs to hold an inquiry first and find out whether penalty imposed was inadequate punishment, hence criminal prosecution was called for. There is no provision in the Customs Act corresponding to Section 23D of the Foreign Exchange Regulation Act, 1947 (hereinafter referred to as the Exchange Act). The status or position of the officer who is empowered to grant sanction under the Customs Act may be a safe-guard against the abuse of power to grant sanction, but this safe-guard cannot furnish guidelines or criteria for the exercise of the discretion conferred by Sections 135 and 137 of the Customs Act, if such guidelines or criteria do not exist in the provisions of the Act itself.

7. Reliance is placed on the decision of the Supreme Court in *Rayala Corporation v. Director Enforcement*. In that case, on March 16, 1963 notice was first issued to the two accused to show cause why adjudication proceedings, as contemplated by Section 23D of the Exchange Act should not be held against them, in respect of a sum of Sw. Krs. 155801.41 for contravention of Sections 4(1), 4(3), 5(1)(a) and 9 of the said Act, The notice further states that it was decided, to launch a prosecution in respect of Sw. Krs. 88913-09. The next day, i.e. on March 17, 1968, complaint was filed against both the accused for contravention of provisions of Sections 4(1), 5(1)(e) and 9 of the Exchange Act punishable u/s 23 (1)(b) of the said Act. The contention raised by Mr. A.K. Sen, who appeared for the two accused before the Supreme Court, is thus summarised by the Supreme Court (p. 498):

...The argument of Mr. Sen is that this section lays down no principles at all for determining when the person concerned should be proceeded against u/s 23(1) (a) and when u/s 23 (1)(b), and it would appear that it is left to the arbitrary discretion of the Director of Enforcement to decide which proceedings should be taken. The liability of a person for more or less severe punishment for the same act at the sole discretion and arbitrary choice of the Director of Enforcement, it is urged, denies equality before law guaranteed under Article 14 of the Constitution.

With regard to the above contention, the Supreme Court observed (p. 498):

The submission made would have carried great force with us but for our view that the effect of Section 23D of the Act is that the choice in respect of the proceeding to be taken u/s 23(1)(a) or Section 23(1)(b) has not been left to the unguided and arbitrary discretion of the Director of Enforcement, but is governed by principles indicated by that section....

In our opinion, these two Sections 23(1) and 23D(1) must be read together, so that the procedure laid down in Section 23D(1) is to be followed in all cases in which proceedings are intended to be taken u/s 23(1). The effect of this interpretation is that, whenever there is any contravention of any section or rule mentioned in Section 23(1), the Director of Enforcement must first proceed under the principal clause of Section 23D(1) and initiate proceedings for adjudication of penalty. He cannot at that stage, at his discretion, choose to file a complaint in a court for prosecution of the person concerned for the offence u/s 23(1)(b). The Director of Enforcement can only file a complaint by acting in accordance with the proviso to Section 23D(1), which clearly lays down that the complaint is only to be filed in those cases where, at any stage of the inquiry, the Director of Enforcement comes to the opinion that, having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate. Until this requirement is satisfied, he cannot make a complaint to the Court for prosecution of the person concerned u/s 23(1)(b). The choice of proceeding to be taken against the person, who is liable for action for contravention u/s 23(1), is, thus, not left entirely to the discretion of the Director of Enforcement, but the criterion for making the choice is laid down in the proviso to Section 23D(1).

The above - quoted observations make it clear that the Supreme Court came to the conclusion that the proviso to Section 23D(1) furnished the criterion or the guideline for exercise of discretion conferred on the Director of Enforcement by Section 28. It is urged by Mr. Sorabji for the petitioners that but for the proviso to Section 23D(1) the Supreme Court would have held Section 23(1)(b) ultra vires. Mr. Sorabji further relies on the following observations (p. 499):

...Parliament must be credited with the knowledge that, if provision is made for two alternative punishments for the same act one differing from the other without any limitations, such a provision would be void under Article 14 of the Constitution; and that is the reason why Parliament simultaneously introduced the procedure to be adopted u/s 23D(1) in the course of which the Director of Enforcement is to decide whether a complaint is to be made in Court and under what circumstances he can do so.

Relying on these observations, it is urged that there is no provision in the Customs Act, corresponding to the proviso to Section 23D(1) of the Exchange Act to regulate or guide the exercise of discretion conferred by Sections 135 and 137 of the Customs Act, hence those sections must be held to be ultra vires on the

principle laid down in the above-mentioned Supreme Court case.

8. The above Supreme Court decision refers to an earlier decision of the Supreme Court viz. Shanti Prasad Jain Vs. The Director of Enforcement, , which also considered the validity of Section 23 of the Exchange Act. The earlier decision also held Section 23 valid on the same ground, but there was no elaborate discussion as in the later case viz. Rayala Corporation. v. Director of Enforcement.

9. Mr. Sorabji referred to State of Orissa v. Dhirendranath Dass AIR [1961] S.C. 1715. In that case there were two types of rules, which are referred to by the Supreme Court as "Tribunal Rules" and "Service Rules". The service rules were more beneficial to an employee against whom departmental proceedings were started, inasmuch as those rules provides to the employee concerned not only an opportunity of being heard, but also a right of appeal, while under the Tribunal rules no appeal was provided for. The Supreme Court observed that although the Tribunal rules did contemplate an inquiry by a person not connected with the department of the public servant concerned and those rules also required consultation with the Public Services Commission, those compensatory safeguards did not make the procedure prescribed by the Tribunal rules any the less discriminatory, as those rules i.e. the Tribunal rules conferred on the State Government unfettered discretion to direct an inquiry against a non-gazetted public servant either under the Tribunal rules or under the Service rules. The Supreme Court with reference to the two types of rules observed (p. 1717):

...If against two public servants similarly circumstanced, enquiries may be directed according to procedures substantially different at the discretion of the Executive authority, exercise whereof is not governed by any principles having any rational relation to the purpose to be achieved by the enquiry, the order selecting a prejudicial procedure, out of the two open for selection, is hit by Article 14 of the Constitution.

10. Mr. Sorabji next referred to Ram Dial and Others Vs. The State of Punjab, . In this case, validity of Section 14 of the Punjab Municipalities Act was challenged. Section 14(e) of the Punjab Municipalities Act provided that the State Government may direct that seat of any specified member, whether elected or appointed, shall be vacated for any reason affecting public interest. u/s 14(e) there was no provision for giving notice to the member concerned before directing him to vacate the seat. As against this, Section 16 of the same Act empowers the State Government to remove any member of a Municipality for reasons mentioned in Clauses (a) to (g) of Section 16(1) and the proviso to Section 16(1) requires that the member concerned shall be given an opportunity of tendering an explanation in writing before directing his removal. With reference to these provisions, the Supreme Court observed (p. 1521):

...There is no doubt that the removal contemplated in Section 16(1) for reasons in Clauses (a) to (g) thereof, as their content show, is in the public interest and

the proviso to Section 16(1) provides for a hearing in the manner indicated therein. On the other hand Section 14(e) which also provides for removal in the public interest makes no provision for hearing the member to be removed. Even if Section 14(e) is wider than Section 16(1), there is no doubt that all the reasons given in Clauses (a) to (g) are in the public interest and, therefore, even if the State Government intends to remove a person for any reasons given in Clauses (a) to (g) it can take action u/s 14(e) and thus circumvent the provisions contained in the proviso to Section 16(1) for hearing. Thus there is no doubt that Section 14(e) which entirely covers Section 16(1) is more drastic than Section 16(1) and unlike Section 16(1) makes no provision for even calling upon the member concerned to explain. In this view of the matter it is clear that for the same reasons the State Government may take action u/s 16(1) in which case it will have to give notice to the member concerned and take his explanation as provided in the proviso to Section 16(1), on the other hand it may choose to take action u/s 14(e) in which case it need not give any notice to the member and ask for an explanation from him. This is obviously discriminatory and, therefore, this part of Section 14(e) must be struck down as it is hit by Article 14 of the Constitution....

In the present case, however, Section 16 (1) which deals with removal of a member for reasons given in Clauses (a) to (g) is completely covered by Section 14(e) which deals with vacation of a seat in the public interest, and it is open to the State Government either to proceed under one provision or the other for exactly the same reason. One of the provisions provides for notice and hearing while the other does not and is, therefore, more drastic and arbitrary. In these circumstances there is in our opinion a clear discrimination in view of Article 14 and the State Government cannot take advantage of the decision in *Radeshym Khare and Another Vs. The State of Madhya Pradesh and Others*, .

11. Justice Mudholkar after referring to the provisions of the two Sections 14 and 16 observed (p. 1522):

...There is no guidance in the Act for determining what matters, though not in public interest, may yet be capable of being deemed to be in the public interest by the State Government. In the circumstances it must be held that the power which (sic) conferred upon the State Government being unguided is unconstitutional.

12. Mr. Sorabji next refers to *Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another*, . In this case, the validity of Section 5 of the Punjab Public Premises and Land (Eviction and Rent Recovery) Act was challenged. The contention raised was that the provisions of the said Act, particularly Section 5, conferred on the Collector unfettered discretion whether to proceed against a person unlawfully or unauthorisedly occupying public premises by an ordinary suit or by a pro proceeding under the special Act, viz. Punjab Public Premises and Land (Eviction and Rent Recovery) Act, hence Section 5 was invalid in view of Article 14 of the Constitution. Observations in para. 12 of the

judgment are material (p. 1587):

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

13. Mr. Sorabji then referred to *Balammal and Others Vs. State of Madras and Others*, . In this case the validity of Clause (6)(2) of the Schedule read with Section 73 of Madras City Improvement Trust Act was challenged on the ground that it deprived the owner of the property sought to be acquired by the State Government of 15 per cent, solatium of the market value available under the Land Acquisition Act, even though both the Acts, viz. the Land Acquisition Act and the Madras City Improvement Trust Act were simultaneously in force. This contention was upheld by the Supreme Court. The material observations in para. 7 of the judgment are as follows (p. 1428):

...If the State had acquired the lands for improvement of the town under the Land Acquisition Act, the acquiring authority was bound to award in addition to the market value 15 per cent solatium u/s 23(2) of the Land Acquisition Act. But by acquiring the lands under the Land Acquisition Act as modified by the Schedule to the Madras City Improvement Trust Act 37 of 1950 for the Improvement Trust which also is a public purpose, the owners are, it is claimed, deprived of the right to the statutory addition. An owner of land is ordinarily entitled to receive the solatium in addition to the market value, for compulsory acquisition of his land if it is acquired under the Land Acquisition Act, but not if it is acquired under the Madras City Improvement Trust Act. A clear case of discrimination which infringes the guarantee of equal protection of the law arises and the provision which is more prejudicial to the owners of the lands which are compulsorily acquired must on the decision of this court, be deemed invalid.

14. Reliance is also placed on the *Deputy Commissioner and Collector, Kamrup and Others Vs. Durga Nath Sarma*, . In this case, the provisions of the Assam Acquisition of Land for Flood Control and Prevention of Erosion Act were challenged on the ground that the provisions of the Act offended Articles 14 and 31(2) of the Constitution. With regard to the challenge under Article 14 of the Constitution, the Supreme Court in para. 18 of the judgment observes (p. 404):

...The Land Acquisition Act, 1894 is in force in the State of Assam and under it private property may be acquired for any public purpose on payment of market value of the land at the date of the publication of the notification u/s 4(1). Section 17 of the Act makes special provision for the speedy acquisition of waste or arable land in cases of emergency. While that Act is in force in the State of Assam, the State Legislature passed Act No. 6 of 1955 providing for speedy acquisition of land for the public purpose of carrying out works or other development measures in connection with flood control or prevention of erosion on payment of compensation assessed on the basis of a multiple of the annual land revenue. The result is that in the State of Assam some land may be taken under Assam Act No. 6 of 1955 for the purpose of works and other measure in connection with flood control and prevention of erosion on payment of nominal compensation while an adjoining land may be taken for other public purposes under the Land Acquisition Act on payment of adequate compensation. The question is whether this differential treatment of land acquired under the two Acts is permissible under Article 14. The constitutional guarantee of Article 14 requires that all persons shall be treated alike in like circumstances and conditions. The Article permits reasonable classification and differential treatment based on substantial differences having reasonable relation to the objects sought to be achieved. It is not possible to hold that the differential treatment of the lands acquired under the Land Acquisition Act, 1894 and those acquired under Assam Act No. 6 of 1955 has any reasonable relation to the object of acquisition by the State. In our opinion, the classification of land required for works and other measures in connection with flood control and prevention of erosion and land required for other public purposes has no reasonable relation to the object sought to be achieved, viz., acquisition of the land by the State. In either case, the owner loses his land and in his place, the State becomes the owner. There is unjust discrimination between owners of land similarly situated by the mere accident of some land being required for purposes mentioned in Assam Act No. 6 of 1955 and some land being required for other purposes. We hold that Assam Act No. 6 of 1965 is violative of Article 14.

It is, however, important to note that the Supreme Court did not decide whether the impugned Act was invalid on the ground that the State may acquire lands at its option under the impugned Act or under the Land Acquisition Act. (See para. 19) of the judgment.)

15. Reference was also made to *LaLa Hari Chand Sarda Vs. Mizo District Council and Another*, . In this case, the validity of Section 8 of Lushai Hills District (Trading by non-Tribals) Regulation (2 of 1953) was challenged mainly on the ground that it violated the provisions of Article 19. Mr. Sorabji relies on this decision to contend that the policy underlying a statute, which is not clearly disclosed by the provisions thereof, does not provide the necessary criteria or guidelines for exercise of discretion conferred by the provisions of the statute. The observations relied upon are (p. 832):

...These observations were made in connection with a pre - Constitution enactment. Even then Subba Rao J. (as he then was) with whom Sinha C.J. agreed uttered, a note of caution saying that it was not the function of the court to search for an undisclosed policy in the crevices of the statute, for by doing so "this Court will not only be finding an excuse to resuscitate an invalid law but also be encouraging the making of laws by appropriate authorities in derogation of fundamental rights." Even according to the majority decision, there must be disclosed in the statute apparently or otherwise, a policy guiding the exercise of power conferred thereunder by the concerned authority.... Though a legislative policy may be expressed in a statute it must provide a suitable machinery for implementing that policy in such a manner that such implementation does not result in undue or excessive hardship and arbitrariness.... As already stated, the Regulation contains no principle or criterion on which the Executive Committee should grant or refuse to grant a licence or its renewal. It does not provide any machinery under which an applicant can show cause why his application for a licence or its renewal should not be rejected.... Equally does it not show any guiding criterion on which the Committee should decide to grant or refuse a licence or its renewal.

16. Reference was also made to *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, . In this case, the validity of Sections 4 and 5 of the Punjab General Sales Tax Act (46 of 1948) was challenged. The contention raised was that Section 5 of the Act conferred on the State Government uncontrolled power to levy tax, no guidelines were provided for fixing rates of taxation and on these grounds the delegation of authority to fix rates of tax by the Legislature to the State Government was challenged. While considering the question to what extent such delegation is permissible under the Constitution, the Supreme Court observes (p. 1901):

...The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its functions in favour of another. But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or

latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature.

These observations are relied upon to contend that it is not the function of the Court to discover policy or guidelines if they are not disclosed by the provisions of the statute.

17. Reference was also made to *Grand Cinema v. E. Tax Officer* A.I.R.[1969] P&H 98. In this case, it was contended that although u/s 14A and Section 15(1) of Punjab Entertainments Duty Act (16 of 1955) the offences and penalties are the same, the penalty u/s 14A was imposed by the authority prescribed by the Act, while u/s 15(1) trial would be held by a Magistrate, neither the Act nor the rules thereunder provided any criteria or guidelines for exercise of the discretion as to which of the two modes should be adopted by the executive authority. The Punjab High Court followed *Shri A.C. Aggarwal, Sub-divisional Magistrate, Delhi and Another Vs. Mst. Ram Kali, etc.,*, and held that Section 14A of the impugned Act was invalid, inasmuch as the provisions of the Act did not provide any criteria or guidelines to indicate what cases would be governed by each of the two sections.

18. Relying on these decisions, Mr. Sorabji submits that there being no provisions in the Customs Act or the rules thereunder to indicate the type of cases in which criminal prosecution shall be resorted to u/s 135 read with Section 137 of the Customs Act, the two Sections 185 and 137 - should be held to be invalid in view of Article 14 of the Constitution in the absence of any guidelines for the exercise of the discretion conferred by the said sections. Mr. Sorabji further submits that the practice actually followed by the Customs Department in exercising the discretion conferred by the said sections, even assuming it to be good, cannot supplement the requirements of a valid law. In support of this contention, reliance is placed on the observations in para. 33 of the judgment of the Supreme Court in *Collector of Customs v. Sampathu Chetty* AIR [1962] S.C. 404. The relevant observations are as follows (p. 332):

...The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements.

19. As against this, Mr. Khandalawala for respondent No. 2, the Assistant Collector of Customs, submits that it is not necessary to have in the statute express provisions furnishing specifically guidelines for the exercise of discretion conferred by a statute, the guidelines can be ascertained from (i) the scheme and policy of the statute, as indicated by the various provisions thereof, (ii) the aim and object of the statute, particularly disclosed by the preamble thereof. He further submits that even the legislative history with the historical background can be taken into account while ascertaining the guidelines. It is further urged that the safeguard of sanction provided by Section 137 of the Customs Act by a highly responsible officer like the Collector of Customs is also an indication as to the manner in which the remedy of criminal prosecution is to be resorted to. Mr. Khandalawala submits that while issuing sanction the Collector of Customs is bound to take into account the aim and object of the Customs Act, as amended, with the legislative history and back-ground thereof, the policy underlying the provisions of the Act and he is bound to exercise his discretion in a manner consistent with the aim and policy of the Act. Mr. Khandalawala points out that prior to 1955 the Sea Customs Act, which was then in force, provided merely for confiscation and penalty, but there was no provision for a criminal prosecution. He submits that confiscation and penalty were found inadequate to check smuggling effectively, hence by the Amending Act of 1955 the powers of the Customs Officers with regard to investigation were considerably enhanced and additional remedy by way of criminal prosecution was also introduced.

20. Mr. Khandalawala invited our attention to the statement of objects and reasons and the notes on the various clauses of the bill to amend the Sea Customs Act, 1878, (subsequently enacted as Sea Customs (Amendment) Act, 1955 - Act 121 of 1955), as they appear at pages 635 to 637 of the Gazette of India Extraordinary, 1954, Part II, Section 2. The statement of objects and reasons and the notes on the various clauses of the said bill make it abundantly clear that the Legislature thought it necessary (i) to place certain existing practices on a statutory basis, (ii) to confer additional powers with regard to investigation on the Customs Officers in order to check smuggling effectively and (iii) to provide by way of a more effective mode of checking smuggling criminal prosecution in addition to confiscation and penalty. As already pointed out, under the Sea Customs Act, 1878, prior to the amending Act of 1955, no criminal prosecution was provided for in cases of smuggling. The amending Act of 1955 introduced item No. 81 in Section 167 of Sea Customs Act of 1878. That item reads thus:

_____ Section of this act to which Penalties.
Offences offence has reference _____

_____ 81. If any
person knowingly, and with intent to defraud General Such person shall the
Government of any duty payable thereon, or to evade any on conviction be
prohibition or restriction for the time being in force under or by fore a Magistrate

virtue of this Act with respect thereto acquires possession of, be liable to im- or is in any way concerned in carrying, removing, depositing, presentment for harbouring, keeping or concealing or in any manner dealing with any term not ex- any goods which have been unlawfully removed from a ware- proceeding two years, house or which are chargeable with a duty which has not been or to fine, or to paid or with respect to the importation or exportation of which both. any prohibition or restriction is for the time being in force as aforesaid; or if any person is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any such prohibition or restriction as aforesaid or of any provision of this Act applicable to these goods. _____

_____ This item makes it clear that intentional import of prohibited goods and the import of goods with intent to defraud the Government of any duty payable thereon were made punishable. The Amending Act also introduced Section 187A, which reads thus:

187A. No Court shall take cognizance of any offence relating to smuggling of goods punishable under item 81 of the Schedule to Section 167, except upon complaint in writing, made by the Chief Customs-officer or any other officer of Customs not lower in rank than an Assistant Collector of Customs....

It is further pointed out that Sections 170A and 178A were also introduced by the Amending Act Section 170A conferred power on the Customs Officers to X-ray the body of a person reasonably suspected to have secreted dutiable or prohibited goods in his body under the order of a Magistrate to that effect. Resistance to such an order is also made an offence u/s 134 of the Customs Act, 1962. Section 178A of the Sea Customs Act (Amended) placed the burden of proof on the person from whom goods are seized to establish that the goods are not smuggled goods. This section was made applicable to certain goods specified in Section 178A(2) and to any other goods which the Central Government may by Notification specify in this behalf. Reference was also made to Section 171 (introduced by amending Act of 1957) and Section 171A (introduced by amending Act of 1955) which conferred additional powers with regard to investigation on the Customs officers. Relying on these provisions of the Amending Act, it is urged that the provisions of the Sea Customs Act of 1878 prior to amendment of 1955 were not effective in checking smuggling, hence additional powers with regard to investigation and additional punishment by way of criminal prosecution were introduced by the Amending Act of 1955. Mr. Khandalawala submits that this legislative history makes it clear that the remedy of criminal prosecution is to be resorted to only in more serious cases, where confiscation and penalty would be found to be inadequate punishment. The fact that additional powers with regard to investigation were conferred on the Customs Officers would merely indicate that more drastic powers were necessary to check smuggling effectively. That would have no direct bearing on the question of providing guidelines for exercise of the discretion in question. The fact that the remedy by way of criminal prosecution was introduced by the

Amending Act, however, clearly shows that it was provided, as the Legislature found that in more serious cases punishment by way of confiscation and penalty is inadequate to meet the growing evil of smuggling effectively. There can hardly be any doubt that the amending Act of 1955 introduced criminal prosecution, as the punishments already provided viz. confiscation and penalty were not effective so as to check smuggling effectively. If so, it is in our opinion obvious that the policy underlying the provisions of the Act as amended is that criminal prosecution should be resorted to not in each and every case, but only in serious cases. It is urged that the task of putting an effective check on smuggling is very difficult and complex. The Legislature found that new methods of smuggling are being adopted day by day, smuggling was not only not effectively checked, but its extent was on the increase, various extremely complicated cases of smuggling including international rackets arose and the problems of Customs Officers dealing with such cases were so complex that implementation of the policy of the Customs Act, including exercise of discretion in certain matters, had to be left to high responsible officers of the Customs department by the Legislature. A statute cannot be struck down merely because it leaves discretion in certain matters relating to implementation of the aim and policy of the statute to the executive, provided the policy underlying the statute is clear on the provisions of the statute and there are reasonably sufficient safeguards provided against the abuse of discretion vested in the executive authority. It is further submitted that a statute cannot be struck down merely because abuse of discretion is possible. It is further pointed out that there is no vice of discrimination as contemplated by Article 14 in the sections the validity of which is challenged. Relying on this, it is urged that this is not a case where vice of discrimination is in the statute itself and the provisions of the Customs Act, considered with the legislative history and background thereof and its preamble, furnish sufficient criteria or guidelines for exercise of the discretion conferred by Section 135 read with Section 137 of the Customs Act. Reference was made to *Gopal Mayaji v. T.C. Sheth* (1959) 62 Bom. L.R. 486, and it was pointed out that Sections 112 and 135 of the Customs Act, 1962, remove the defect in item 81 of Section 167 of the Sea Customs Act brought out by the decision in *Gopal Mayaji v. T.C. Sheth*. This clarifies the intention of the Legislature and the policy underlying the Act.

In support of this contention, Mr. Khandalawala relies on *Ram Sarup Vs. The Union of India (UOI) and Another*, . The contention raised before the Supreme Court in that case is thus summarised:

...The contention for the petitioner is that such persons are subject to be tried for civil offences i.e., offences which are triable by a criminal Court according to Section 3(ii) of the Act, both by the Court-Martial and the ordinary Criminal Courts, that Section 125 of the Act gives a discretion to certain officers specified in the section to decide whether any particular accused be tried by a Court-Martial or by a Criminal Court, that there is nothing in the Act to guide such officers in the exercise of their discretion and that therefore discrimination between different persons guilty of the same offence is likely to take place

inasmuch as a particular officer may decide to have one accused tried by a Court-Martial and another person, accused of the same offence tried by a Criminal Court, the procedures in such trials being different.

The Supreme Court after considering the provisions of the Army Act noted that trial by an ordinary Criminal Court would be more beneficial to the accused than one by Court-Martial. The Supreme Court after referring to Sections 69, 71, 72, 102, 103, 120 and 126 of the Army Act and Section 549 of Criminal Procedure Code with the rules framed thereunder came to the conclusion that the discretion to be exercised u/s 125 of the Army Act cannot be said to be unguided by any policy laid down by the Act, or uncontrolled by any other authority. Mr. Khandalawala relied particularly on the observations in para. 22 of the judgment, which are as follows (p. 253):

In short, it is clear that there could be a variety of circumstances which may influence the decision as to whether the offender be tried by a Court-Martial or by an ordinary Criminal Court, and therefore it becomes inevitable that the discretion to make the choice as to which Court should try the accused be left to responsible military officers under whom the accused be serving. These officers are to be guided by considerations of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence is committed.

It was also pointed out that u/s 126 the exercise of the discretion by the military officer was controlled by the Government. Mr. Sorabji for the petitioners, however, points out that Article 33 of the Constitution makes all the difference, so far as the army is concerned and he seeks to distinguish the above decision on that ground. In support of this submission, reliance is placed on the following observations (p. 251):

...We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to affect the fundamental right under Part III of the Constitution, that provision does not, on that account, become void, as it must be taken that Parliament has thereby, in the exercise of its power under Art, 33 of the Constitution, made the requisite modification to affect the respective fundamental right.

It is, however, important to note that in spite of the above observations the Supreme Court did proceed to consider in detail whether the provisions of Section 125 of the Army Act were discriminatory and infringe the provisions of Article 14 of the Constitution, although the view expressed and the observations made by the Supreme Court in this respect may be said to be obiter. There is no doubt whatever that the Supreme Court has expressed its considered opinion on the question whether Section 125 of the Army Act is discriminatory and infringes the provisions of Article 14 of the Constitution. Mr Khandalawala is justified in relying on this decision in support of his contention that even though there may be no express provisions in the statute expressly and specifically providing

guidelines for exercise of the particular discretion, such guidelines can be ascertained or inferred from the various provisions of the statute. In this respect, observations in para. 22 of the judgment, which are quoted above, are material. The Supreme Court points out that the provisions of the Army Act indicate a variety of circumstances which may influence the exercise of discretion conferred by Section 125 of the said Act, hence it became inevitable that exercise of that discretion wets left to responsible military officers without providing specific guidelines. So also, the observations in para. 97 of the judgment indicate that the policy of the Act, as indicated by the various provisions thereof, is material while considering such a question. Mr. Sorabji refers to Sections 2, 70 to 72 and 124 to 126 of the Army Act and submits that these provisions clearly furnish guidelines in the case of the Army Act, while, according to Mr. Sorabji, no such provisions furnishing guidelines are there in the Customs Act. We shall consider this contention later on.

21. Mr. Khandalawala refers to T.S. Baliah Vs. T.S. Rengachari, . The contention raised in this ease was that it was open to the Income Tax Officer to prosecute the appellant either u/s 177, Indian Penal Code or u/s 52 of the Income Tax Act, 1922, and the choice of prosecution was left to the arbitrary and unguided discretion of the Income Tax Officer, which resulted into a violation of the right guaranteed under Article 14 of the Constitution. The Supreme Court negated this contention observing as follows (p 706):

...We do not consider there is any substance in this argument. The offence provided for in Section 52 of the 1922 Act is an offence specially constituted and the prosecution for that offence requires the sanction of the Inspecting Assistant Commissioner. No prosecution also can take place if penalty has been imposed u/s 28 of the 1922 Act. The institution of a complaint u/s 52 of the 1922 Act is therefore circumscribed by sufficient safeguards and we do not consider that there is any violation. of the guarantee under Article 14 of the Constitution.

22. Mr. Sorabji for the petitioners points out that under the Income Tax Act of 1922 no prosecution could be launched if penalty was imposed u/s 28 of the said Act, but there is no such provision in the Customs Act. Although this distinction is there, it is clear that before imposing penalty the Act conferred on Income Tax Officer full discretion to decide as to whether criminal prosecution should be resorted to or not. It is also important to note that the above - quoted observations of the Supreme Court make it clear that sanction to prosecute was considered to be one of the sufficient safeguards against unguided exercise of discretion.

23. Reliance is also placed on the decision of the Supreme Court in Matajog Dobey Vs. H.C. Bhari, . This decision is relied upon to point out that a discretionary power is not necessarily discriminatory power and abuse of such power is not to be easily assumed where the discretion is vested in the Government, and not in a minor official (see para. 15 of the judgment).

24. Reliance is also placed on the decision of Kedar Nath Bajoria Vs. The State of West Bengal, . In this case, validity of Section 4 of West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949) was challenged on the ground that it was discriminatory, as it conferred unfettered discretion on the Provincial Government to choose any particular case against a person alleged to have committed an offence falling under any of the specified categories for allotment to the Special Court to be tried under the special procedure, while other offenders of the same category may be left to be tried by ordinary Courts. With regard to this contention, the Supreme Court observes (p. 407):

The argument overlooks the distinction 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 to 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 denned group, while laying down the standards or at least indicating in clear terms the underlying policy and purpose, in accordance with, and in fulfilment of, which the administrative authority is expected to select the persons or things to be brought under the operation of law.

By way of illustration the Supreme Court referred to the Preventive Detention Act, and those provisions of Criminal Procedure Code which provide immunity from prosecution without sanction by the Government for offences by public servants in relation to their official acts and further observed (p. 407):

...It is not, therefore, correct to say that Section 4 of the Act offends against Article 14 of the Constitution merely because the Government is not compellable to allot "all" cases of offences set out in the schedule to Special Judges but is vested with a discretion in the matter.

The following observations of Mukherjea J. in Kathi Raning Rawat Vs. The State of Saurashtra, were quoted with approval (p. 408):

A Statute will not necessarily be condemned as discriminatory, because it does not make the classification itself but, as an effective way of carrying out its policy, vests the authority to do it in certain officers or administrative bodies.... In my opinion, if the legislative policy is clear and definite and, as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation... In such cases, the power given to the executive body would import a duty on it to classify the subject-matter of legislation in accordance with the objective indicated in the statute... The descretion that is conferred on official agencies in such circumstances is not an unguided discretion; it has to be exercised 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 would have to be tested.

After referring to the above observations, the Supreme Court held that the provisions of the impugned Act provided sufficient indication of the policy to guide the executive i.e. the Government in selecting offences or classes of offences or classes of cases for reference to Special Courts. It is thus clear that if the policy of a statute as disclosed by the provisions thereof indicates the manner in which discretion conferred by the statute should be exercised, that would be enough, even if there are no express provisions setting out specifically the guidelines for exercise of the discretion.

25. Reference was also made to *Kangshari Haldar and Another Vs. The State of West Bengal*, . In para. 4 of its judgment the Supreme Court observes (p. 459):

...Thus the enunciation of the principles which flow from the fundamental rights enshrined in Article 14 now presents no difficulty; it is, however, in the application of the said principles that difficulties often arise. In applying the said principles, to the different sets of facts presented by different cases emphasis may shift and the approach may not always be identical; but it is inevitable that the final decision about the vires of any impugned provision must depend upon the decision which the court reaches having regard to the facts and circumstances of each case, the general scheme of the impugned Act and the nature and effect of the provisions, the vires of which are under examination.

The Supreme Court found that the procedure prescribed for trial by the West Bengal Tribunals of Criminal Jurisdiction Act was more prejudicial to the accused than that under the Criminal Procedure Code, but the discrimination resulting from this difference did not amount to one contemplated by Article 14 of the Constitution. The following observations in para. 19 of the judgment are relied upon by Mr. Khandalawala (p. 464):

...In considering the validity of the impugned statute on the ground that it violates Article 14 it would first be necessary to ascertain the policy underlying the statute and the object intended to be achieved by it. In this process the preamble of the Act and its material provisions can and must be considered. Having thus ascertained the policy and the object of the Act the Court should apply the dual test in examining its validity: Is the classification rational and based on intelligible differentia; and, has the basis of differentiation any rational nexus with its avowed policy and object? If both these tests are satisfied the statutes must be held to be valid; and in such a case the consideration as to whether the same result could not have been better achieved by adopting a different classification would be foreign to the scope of the judicial enquiry. If either of the two tests is not satisfied the statute must be struck down as violative of Article 14.

These observations are relied upon to contend that the policy underlying the statute and the object intended to be achieved by that statute are to be

considered while considering whether a particular provision of a statute violates Article 14 and in this process reference to the preamble also is necessary. Although the above-quoted observations are with reference to classification made by a statute, there seems to be no reason why the same should not apply to a case like the one before us.

26. Reference was also made to *Kathi Raning v. State of Saurashtra*, We have already pointed out the observations from this case relied upon by Mr. Khandalawala while referring to *Kedar Nath v. State of West Bengal*. We need not discuss the same further.

27. Reliance is placed on *Pannalal Binjraj Vs. Union of India (UOI)*, to contend that where the cases arising under a particular statute are of various types, they cannot be similar to one another and complications are introduced by widespread activities to be dealt with by the statute and by the very nature of the subject-matter dealt with by the Act, if the statute confers certain discretion on some officer or appropriate authority and leaves it to such officer or authority to determine how that discretion should be exercised, such statute cannot be held to be invalid on the ground that it infringes Article 14 of the Constitution, merely because there is a possibility of abuse of the discretion conferred by the statute. It is urged that if in the case of such a statute there is abuse in exercise of the discretion in a particular case, the particular executive act will be struck down, and not the statute itself. It is also important to note that the Supreme Court emphasised the broad distinction between the discretion to be exercised with regard to a fundamental right under the Constitution and that with regard to some other right conferred by a statute. The following observations are important (p. 410):

...In other words, the discretion vested has to be looked at from two points of view, viz. (1) does it admit of the possibility of any real and substantial discrimination, and (2) does it impinge on a fundamental right guaranteed by the Constitution. Article 14 can be invoked only when both those conditions are satisfied. Applying this test, it is clear that the discretion which is vested in the Commissioner of Income tax or the Central Board of Revenue, as the case may be, u/s 5(7-A) is not at all. Discriminatory.

In the above - mentioned case the Supreme Court examined the various provisions of the Income Tax Act, 1922 and observed (p. 408):

Nevertheless this power which is given to the Commissioner of Income Tax and the Central Board of Revenue has to be exercised in a manner which is not discriminatory. No rules or directions having been laid down in regard to the exercise of that power in particular cases, the appropriate authority has to determine what are the proper cases in which such power should be exercised having regard to the object of the Act and the ends to be achieved. The cases of the assesses which come for assessment before the Income Tax authorities are of various types and no one case is similar to another. There are complications

introduced by the very nature of the business which is carried on by the assesses and there may be, in particular cases, such wide - spread activities and large ramifications or inter-related transactions as might require for the convenient and efficient assessment of Income Tax the transfer of such cases from one Income Tax Officer to another. In such cases the Commissioner of Income Tax or the Central Board of Revenue, as the case may be, has to exercise its discretion with due regard to the exigencies of tax collection.

It is urged that the reasoning disclosed by these observations would apply with equal force to the provisions of the Customs Act, 1062. We find that there is considerable force in this contention.

28. The following observations in para. 29 of the judgment are also material (p. 408):

It may also be remembered that this power is vested not in minor officials but in top - ranking authorities like the Commissioner of Income Tax and the Central Board of Revenue who act on the information supplied to them by the Income Tax Officers concerned. This power is discretionary and not necessarily discriminatory and abuse of power cannot be easily assumed where the discretion is vested in such high officials.

Mr. Sorabji invited our attention to the observations in para. 32 of the judgment. We do not think that these observations in any way help the present petitioners. On the other hand these observations emphasise that the discrimination complained of must be in relation to a fundamental right and that small difference arising out of the operation of a statute would not amount to discrimination contemplated by Article 14 of the Constitution.

29. Mr. Khandalawala further relies on *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, . In this case the Supreme Court after considering all previous decisions under Article 14 set out the principles laid down by these decisions (see para. 11 at p. 547). The Supreme Court further observed (p. 548):

A close perusal of the decisions of this Court in which the above principles have been enunciated and applied by this Court will also show that a statute which may come up for consideration on a question of its validity under Article 14 of the Constitution may be placed in one or other of the following five classes:

(v) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held by this Court, e.g. in *Kathi Raning v. State of Saurashtra* that in such a case the executive action but not the statute should be condemned as unconstitutional.

Mr. Khandalawala submits that the Customs Act, 1962 falls within the fifth category mentioned above. Mr. Sorabji on the other hand contends that if the test laid down in case (iii) is applied, since the provisions of the Customs Act lay down no principles, nor policy for the guidance of exercise of the discretion conferred by Sections 135 and 137, these sections should be held to be invalid as violating Article 14 of the Constitution. Mr. Sorabji further points out that this principle was reiterated and applied in *Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc.*, ; see observations at page 633, paras. 112 and 113. Mr Sorabji further refers to *State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others*, ; observations at the end of para. 23 of the judgment at p. 1469 are relied upon. In that case on consideration of the provisions of the impugned Act, the Supreme Court came to the conclusion that "the whole imposition of assessment was left to the arbitrary discretion of the officers not named in the Act without giving any remedy to the assesses to question the correctness of any of the important stages of assessment". Relying on these observations, Mr. Sorabji contends that if there are no guidelines in the statute, it enables the executive authority to discriminate, hence vice is inherent in such a statute even though it is not apparent in the provisions impugned.

30. Reference was also made to *P.J. Irani Vs. The State of Madras*, . Observations in paras. 11 and 12 of the judgment are relied upon by Mr. Khandalawala. Relevant observations are (p. 1737):

Though the enactment thus conferred these rights on tenants, it was possible that the statutory protection could either have caused great hardship to a landlord or was the subject of abuse by the tenant himself. It was not possible for the statute itself to contemplate every such contingency and make specific provision therefore in the enactment. It was for this reason that a power of exemption in general terms was conferred on the State Government which however could be used not for the purpose of discriminating between tenant and tenant, but in order to further the policy and purpose of the Act which was, in the context of the present eases, to prevent unreasonable eviction of tenants. The learned Judges of the High Court, therefore, held that while Section 13 of the Act was constitutionally valid, any individual order of exemption passed by the Government could be the subject of judicial review by the Courts for finding out whether (a) it was discriminatory so as to offend Article 14 of the Constitution, (b) the order was made on grounds which were germane or relevant to the policy and purpose of the Act, and (c) it was not otherwise mala fide.

The view thus expressed by the Madras High Court was fully approved by the Supreme Court; see para. 12. So also the following observations from *Sardar Inder Singh Vs. The State of Rajasthan*, were quoted with approval:

...It is argued that that section does not lay down the principles on which exemption could be granted, and that the decision of the matter is left to the unfettered and uncanalised discretion of the Government, and is therefore repugnant to Article 14. It is true that that section does not itself indicate the

grounds on which exemption could be granted, but the preamble to the Ordinance sets out with sufficient clearness the policy of the legislature; and as that governs Section 15 of the Ordinance, the decision of the Government thereunder cannot be said to be unguided. Vide *Harishankar Bagla and Another Vs. The State of Madhya Pradesh*, .

31. Mr. Sorabji relies on the observations in para. 14 of the judgment in *S.G. Jaisinghani Vs. Union of India (UOI) and Others*, , which are as follows:

In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and Such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey - "Law of the Constitution" - Tenth Edn., Introduction ex). "Law has read edits finest moments", stated Douglas J. in *United States v. Wunderlich* (1951) 342 U.S. 98 when "it has freed man from the unlimited discretion of some ruler.... Where discretion is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the ease of *Rex v. Wilkes* (1770) 4 burr. 2528 at p. 2539, means "sound discretion guided by law. It must be governed by rule, not by humour; it must not, be arbitrary, vague, and fanciful".

32. During arguments reference was also made to *Sadrudin Suleman Jhaveri Vs. J.H. Patwardhan and Others*, . Observations in para. 40 of the judgment relied upon are as follows (p. 239):

We are however unable to accept this argument for a discretion given under a law, however wide it may be, cannot necessarily be equated with discrimination, and in so far as there is a possibility of the misuse of a discretion the normal presumption of law is that the authority invested with a discretionary power will act fairly and honestly and not abuse it. If it does however abuse it in a given case, that is an indication of human frailty rather than of the power being discriminatory. The distinction has been drawn in a number of cases, but the most authoritative of these statements is to be found in the decision of the Supreme Court in *Pannalal Binraj Vs. Union of india (UOI)*, .

33. The principles laid down by the above decisions are:- (1) Discretion conferred by a statute must not in effect confer arbitrary power on the executive in the absence of any guidance as to how that discretion should be exercised. Sound discretion is one which is guided by law, by rule not by humour, it must not be arbitrary, vague and fanciful.

(2) A statute which confers discretion on the executive must furnish criteria or guidelines for exercise of that discretion. Without such criteria or guidelines if the discretion in effect confers arbitrary power, the statute will be hit by Article 14 of the Constitution.

(3) The criteria or guidelines may be furnished by express provisions in the statute concerned or by the aims and objects of the statute and the policy and scheme of the statute as disclosed by the various provisions thereof. Preamble to the statute may indicate the purpose and policy of the statute.

(4) Where the subject-matter dealt with by a statute relates to wide-spread activity of a complex nature, giving rise to various cases of different types, posing various problems, the Legislature may leave discretion to responsible officers of the executive to select persons or objects for the application of particular provisions of the statute. This will not render the statute invalid, if the statute provides either expressly or impliedly sufficient guidance for exercise of the discretion.

(5) Discretionary power conferred by a statute, though wide, is not necessarily discriminatory.

(6) Mere possibility of abuse of a discretionary power will not invalidate a statute.

(7) Provision for sanction is one of the safeguards to control arbitrary exercise of power.

(8) If discretion is conferred on high officials, in the absence of evidence of mala fides, it can be considered as a safe-guard against arbitrary exercise of discretion.

(9) It is not the function of the Court to strive to find out the policy of the statute from its crevices, if it cannot be reasonably ascertained from the purpose and provisions of the statute.

34. Applying the above principles we have to consider how for the contentions advanced by Mr. Sorabji for the petitioners are correct.

35. Vice of discrimination is not there in the impugned sections themselves. The only material contention advanced by Mr. Sorabji for the petitioners is that in the Customs Act there are no express provisions, like Section 23D of the Foreign Exchange Regulation Act, furnishing guidelines for exercise of the discretion conferred by Section 137 read with Section 135 of the Customs Act, nor can such guidelines be ascertained from the provisions of that Act, with the result that vice of discrimination is inherent in the statute itself and it thus confers arbitrary power to sanction or not to sanction prosecution against one, but not the other or others from persons who have committed same or similar offences under the Customs Act, hence Sections 135 and 137 violate Article 14 of the Constitution. It is further urged that if there are no express guidelines and cannot be reasonably ascertained from the provisions of the Customs Act, the mere fact that these sections confer discretion on high and responsible Customs Officers or

that in fact - in actual practice - the discretion is not abused, will not validate the said section. We have to consider how far this contention is correct.

36. It is not urged by Mr. Khandalawala for respondent No. 2 that in the Customs Act there are express provisions similar to Section 23D of the Foreign Exchange Act furnishing guidelines. He, however, submits that taking into account the legislative history and back-ground of the Customs Act, the aims and objects sought to be achieved by that Act, its preamble, the purpose and policy of the Act disclosed by the various provisions thereof and particularly the provision for sanction to prosecute, it is clear that there are sufficient guidelines for exercise of the discretion conferred by the impugned sections and the Act provides sufficient safeguards against the arbitrary or discriminatory exercise of the discretion. He further submits that the mere possibility of abuse in exercise of the said discretion will not be a ground to strike down the impugned sections. In our opinion, there is considerable force in the submissions made by Mr. Khandalawala.

37. It is not disputed by Mr. Sorabji that even if there are no express provisions furnishing guidelines, if necessary guidelines can be reasonably ascertained from the provisions of the Act, that would be enough to hold the impugned sections valid. His contention, however, is that the provisions of the Customs Act do not furnish necessary guidelines and the Court will not be justified in trying to hunt them out from the crevices of the statute.

38. Mr. Khandalawala's contentions mentioned above are supported by the decisions of the Supreme Court in *Matajog Dobey v. H.C. Bhari*, *Kedar Nath v. State of West Bengal*, *Kathi Raning v. State of Saurashtra*, *Inder Singh v. The State of Rajasthan*, and *Kangshari Halidar v. State of West Bengal*. Decision in *Matajog*'s case makes it clear that a discretionary power is not necessarily discriminatory power. The other decisions clearly lay down that while considering the objection under Article 14 of the Constitution the purpose and policy of the statute will have to be taken into account to find out whether the discretion conferred by the statute furnishes arbitrary power to discriminate. We may particularly invite attention to the observations at pages 407 and 408 in *Kedar Nath v. State of West Bengal* and those at p. 464 in *Kangshari Halidar v. State of West Bengal*, quoted above.

39. While ascertaining the purpose and policy of the statute, it would certainly be relevant to take the legislative history and background into account. As already mentioned above, prior to the Amendment Act of 1955 there was no provision for criminal prosecution in the Sea Customs Act. It was introduced for the first time by the Amendment Act of 1955. The preamble to the Sea Customs Act, 1878, reads:

An Act to consolidate and amend the law relating to the levy of sea Customs-duties.

This preamble makes it clear that the purpose of the Act is to levy sea customs-

duties and to collect them. It follows as a corollary that checking the evasion of customs-duties would also be a subject-matter to be dealt with by the Act. The Act contains various provisions for investigation into the cases of smuggling to evade customs-duties, and provides for confiscation and penalty as punishment for smuggling. Since smuggling could not be effectively checked, the Amendment Act of 1955 introduced criminal prosecution as an additional measure for checking smuggling effectively. This is obvious. In para. 15 above, we have referred to the statement of objects and reasons and the notes on the various clauses of the bill, which subsequently became the Sea Customs (Amendment) Act, 1955. The statement of objects and reasons makes it clear that the Legislature thought it necessary (i) to place certain existing practices on a statutory basis; (ii) to confer additional powers with regard to investigation on the Customs Officers in order to check smuggling effectively; and (iii) to provide by way of a more effective mode of checking smuggling criminal prosecution in addition to confiscation and penalty. Item 81 was added to Section 167 of the Sea Customs Act, which we have quoted above ad verbatim. This item makes it clear that the intentional import of prohibited goods and the import of goods with intent to defraud the Government of any duty payable thereon were made punishable by resorting to criminal prosecution. Section 187 of the Sea Customs Act, as amended in 1955, provided that no cognizance of the offence relating to smuggling of goods could be taken, except upon a complaint in writing, by the Chief Customs Officer or any other officer of customs not lower in rank than an Assistant Collector of Customs. Section 170A conferred on the Customs Office the power to X-ray the body of a person reasonably suspected to have secreted dutiable or prohibited goods in his body under the order of a Magistrate to that effect. By further amendment in 1962 resistance to such an order was made punishable. Section 178A introduced by the Amendment Act of 1955 placed the burden of proof on the person from whom goods are seized to establish that the goods are not smuggled goods. Sub-section (2) of Section 178A empowered the Central Government to make Section 178A(1) applicable to other articles, in addition to those already mentioned in Section 178A(2), by a notification to that effect. Section 171 (introduced by the Amending Act of 1957) and Section 171A (introduced by the Amending Act of 1955) conferred on the Customs Officers additional powers with regard to investigation. This legislative history and background does, in our opinion, make it clear that the purpose of the Act was to levy customs duties, collect the same and check smuggling. Since punishment by way of confiscation and penalty was found inadequate to check smuggling effectively, more serious punishment by way of criminal prosecution was introduced. This itself furnishes a guideline that criminal prosecution is to be resorted to only in serious cases, particularly in cases where there are reasonable grounds to believe that the offender or offenders concerned are habitual offenders and carry on smuggling on a large scale. This is also clear from the fact that even under the Sea Customs Act, as amended by Act of 1955, an offender could be prosecuted only on a complaint filed by a responsible Customs Officer named in Section 187 of that Act. Section 137 of the Customs Act of 1962 furnishes a

better safe-guard against indiscriminate prosecution of smugglers by providing for a sanction by a high and responsible Customs Officer.

40. It is urged by Mr. Sorabji for the petitioners that the Act does not provide for any inquiry before granting sanction u/s 137 of the Act, nor does it provide for an opportunity to the person concerned to show cause why sanction should not be granted. It is true that Section 137 itself does not contain any provision in this respect. In this respect provisions of Chapter XIV of the Act are material. These provisions make it clear that ample opportunity is given to the person concerned to show cause why confiscation of seized goods should not be ordered. Opportunity is also given to show cause why the proposed penalty should not be imposed. In view of this, we do not think that principles of natural justice are violated merely because Section 137 does not contain a specific provision in this respect. Under the Customs Act, 1962, once the Customs Officer concerned comes to the conclusion that particular goods are liable to confiscation, he has to adjudge confiscation and penalty, apart from the question of the extent thereof, u/s 122 and this he can do only after giving to the person concerned the opportunity contemplated by Section 124.

41. Here we may refer to Section 110 of the Customs Act, 1962, which provides for seizure of goods liable to confiscation under the Act. Sub-section (2) of Section 110 provides that if notice u/s 124(a) is not given within six months of the seizure of the goods, such goods shall be returned to the person from whose possession they were seized. Section 111 enumerates imported goods which are liable to confiscation. Section 112 lays down the penalty that maybe imposed on goods liable to confiscation u/s 111. Section 113 enumerates goods attempted to be improperly exported, which are liable to confiscation, and Section 114 provides for penalty which may be imposed in respect of such goods. Section 122 provides for adjudication in every case in which anything is liable to confiscation or any person is liable to penalty under Chapter XIV of the Act. Section 123 places the burden of proof to establish that the seized goods mentioned in that section are not smuggled goods on the person from whose possession they were seized. Considering Sections 110 and 124 together, there can be no doubt that a person on whom notice u/s 124 is served can show that the goods seized are not goods liable to confiscation, if so the question of penalty does not arise. Clause (b) of Section 124 does confer this right on the person whose goods are seized. Considering the provisions of Chapter XIV of the Customs Act, 1962, as a whole, it is clear that the Customs Officer concerned has first to determine that the goods in question are smuggled goods liable to confiscation and then decide what punishment should be imposed. It is at this stage that the Customs Officer concerned has to decide whether punishment by way of confiscation and penalty would be adequate or whether the particular case calls for a more drastic mode of punishment by way of criminal prosecution and sanction u/s 137 should be granted or obtained. It may be that in some cases the Customs Officer concerned may find that imposing penalty would be futile and would hardly serve as punishment, as nothing can be recovered from the person concerned and in such

cases even without imposing penalty the Customs Officer concerned may on considering the nature of the offence think it expedient to sanction prosecution or to get sanction from the sanctioning authority. Although there are no express provisions in the Act laying down at what stage and in what cases sanction to prosecute should be given, taking into account the legislative history, the purpose of the Act and the scheme and policy of the Act, as disclosed by the various provisions thereof, particularly Chapter XIV, it is clear that criminal prosecution is to be resorted to in serious cases where confiscation and penalty would not be adequate or effective punishment. Sanctioning authority mentioned in Section 137 is bound to take into account all these factors while deciding whether sanction should be granted or not. We may also refer to Section 125 of the Customs Act, 1962, where in minor cases option to pay fine in lieu of confiscation is provided for. Section 128 of the same Act provides for appeal. Section 130 confers revisional power on the Central Board of Revenue. Section 131 confers on the Central Government power to modify or annul orders passed under Sections 128 and 130. These provisions clearly indicate that there is sufficient safeguard for persons who are suspected to have committed offences of smuggling and there is at several stages application of mind by responsible Customs Officers and high authorities to ascertain the nature and gravity of the offence. It is with reference to these proceedings that exercise of the discretion conferred by Section 137 read with Section 135 is to be considered, although the sanctioning authority need not wait until the remedies by way of appeal and revision are exhausted. It is important to note that Section 135 begins with the expression "Without prejudice to any action that may be taken under this Act". This expression clearly indicates that punishment by resorting to criminal prosecution is clearly contemplated as an additional remedy to check smuggling effectively and in view of the policy disclosed by the various provisions of the Act, it is clear that this remedy is to be resorted to only in serious cases or in cases where punishment by way of penalty would be ineffective, after consideration of the facts of each case. Section 137 authorises the Collector of Customs to sanction prosecution in respect of offences under Sections 132, 133, 134 and 135 of the Act and without such sanction no Court shall take cognisance of any offence under any of the above mentioned sections. This provision of sanction by a responsible officer is clearly a safe-guard against indiscriminate use of the remedy by way of criminal prosecution. Our attention is invited to Section 152(b), which allows delegation of the powers of the Collector of Customs to a Deputy Collector of Customs or Assistant Collector of Customs, and it is urged that sanction could be issued even by officers lower in grade than the Collector of Customs. In our opinion, this by itself will not be a ground affecting the validity of Section 137 and Section 135 so long as there is sufficient indication in the provisions of the Act itself as to how the discretion conferred by Section 137 should be exercised.

42. As already pointed out, the expression in Section 135, viz. "without prejudice to any action that may be taken under this Act", clearly indicates that remedy by

way of criminal prosecution is an additional remedy to be resorted to only if any further action besides the one already taken or to be taken is called for. There is no reason to assume that the sanctioning authority mentioned in Section 137 will ignore this aspect merely because there is no express provision to the effect that criminal prosecution is to be resorted to only in serious cases where confiscation and penalty may not be found to be adequate or effective punishment. It is urged on behalf of the petitioners that the discretion conferred by Section 137 is absolutely unfettered and criminal prosecution may be sanctioned against one offender but not against another, even though the latter may be guilty of the same or similar offence or offences. This contention is based on the assumption that abuse of power to sanction is likely. This would, however, as laid down by the Supreme Court, be no ground to strike down the provision for sanction. The contention contemplates abuse of the power to grant sanction in an individual case, if so, the individual act can be challenged on the ground of mala fides and can be struck down on that ground.

43. It is a matter of common knowledge that the, evil of smuggling has been on the increase, various new and more intelligent methods of smuggling are detected by the Customs Officer day by day, that is why the Legislature thought it fit to confer wide powers of investigation on the Customs Officers to check smuggling more effectively. Power to X-ray the body of a person reasonably suspected to have secreted smuggled goods in his or her body and also the power to arrange to take out such goods is a typical instance. Offences under the Customs Act are of various types, diverse in character, with widely varying degrees of seriousness, the modus operandi of committing these offences is complex, and it is not unreasonable that the Legislature thought it fit to leave it to high and responsible Customs Officers to decide whether a particular offence deserves criminal prosecution, as punishment by way of confiscation and penalty would not be adequate or effective. It is true that there is no express provision in the Customs Act which specifically lays down that criminal prosecution should not be sanctioned unless punishment by way of confiscation and penalty is found to be either ineffective or inadequate on taking into account the nature and gravity of the offence disclosed by the facts of a particular case. All the same, the scheme of the Customs Act, as disclosed by its provisions, makes it clear that it must be so. In the first place, the provisions of the Act with regard to adjudication proceedings indicate that the Customs Officers must first give the persons concerned or the owner of the goods in question an opportunity to show that they (goods) are not smuggled goods. There is really no occasion to sanction prosecution unless this is done. If in a particular case prosecution is sanctioned before giving the owner or the person concerned the opportunity mentioned above, that would be a case of improper or mala fide exercise of the discretion, and the particular sanction can be challenged on the ground of mala fides. Sanctioning authority cannot grant sanction without giving the person concerned or the owner of the goods in question the opportunity mentioned above, merely because there is no express provision in the Act against adopting

such a course, for the obvious reason that the scheme of the Act disclosed by its provisions makes it abundantly clear that unless the Customs Officers, after hearing the person concerned or the owner of the goods in question, get it confirmed that the goods in question are smuggled goods, the question of punishment or its adequacy cannot arise. After it is definitely ascertained on inquiry contemplated by the provisions of Chapter XIV of the Act- particularly Section 124. -that the goods in question are smuggled goods, the Customs Officers are required to consider the question of punishment, confiscation and penalty - adjudication proceedings for which are obligatory - are to be adjudged and in the case of grave offences action u/s 137 read with Section 135 is to be resorted to. In our opinion, one of the purposes of the Act, viz. prevention of smuggling - see Section 11(2)(c), considered with the policy and scheme of the Customs Act, 1962 as disclosed by its provisions furnishes enough guidelines for exercise of the discretion conferred by Section 137 read with Section 135 of the Act. Mere possibility of abuse in exercise of that discretion would not render the said sections invalid.

44. Clauses (c), (f), (j) and (k) of Section 11(2) of the Customs Act, 1962, were relied upon as furnishing guidelines. Although the purposes mentioned by these clauses are to be considered with the provisions of the Act to ascertain whether there are enough guidelines for exercise of the discretion in question, these purposes by themselves cannot furnish guidelines.

45. Provision as to sanction u/s 137 of the Customs Act, 1962 is itself a safeguard against indiscriminate prosecution. In effect, the contention of the petitioners is that in the absence of express provisions furnishing guidelines, power to sanction prosecution is likely to be abused by resorting to discrimination. Mere possibility of abuse of power would not be a ground to hold Sections 135 and 137 of the Customs Act, 1962, invalid. For reasons indicated above, we are unable to accept the contention that the Act furnishes no criteria or guidelines for exercise of the discretion conferred by Section 137 read with Section 135 of the Customs Act, 1962. In our opinion, the legislative history and back-ground of the statute in question, its purpose, its scheme and policy as disclosed by the various provisions thereof furnish enough guide-lines and the impugned sections do not confer unguided, unfettered discretion so as to violate Article 14 of the Constitution. In our opinion, those guide-lines are apparent from the purposes and policy of the Customs Act, 1962, as disclosed by the provisions thereof, and one need not go to the crevices, if any, of the Act to find out these guidelines.

46. Before parting with the case, we would like to observe that there is ample rule-making power conferred on the Central Government by the Customs Act, 1962, particularly Section 156, and it would certainly be desirable to frame rules clarifying in general the considerations which in view of the purposes and policy of the Act should weigh with the sanctioning authority while granting sanction u/s 137 of the Act. We are making these observations not because these principles

are not clear, nor unknown to the officers who are empowered to grant sanction, but only to allay the apprehension in the minds of the citizens - apprehension of the type entertained by the present petitioners.

47. For the reasons mentioned above, we discharge the rule and direct that the trial should be proceeded with as expeditiously as possible.

48. For the same reasons, we discharge the rule in Criminal Application No. 774 of 1970, and direct that the trial should be proceeded with as expeditiously as possible.

Nathwani, J.

49. I agree with the order passed by my learned brother. I, however, wish to add a few words, as I have, with respect, not been able to agree with the observations made by him to the effect that the Customs Officers must first give to the person concerned or the owner of the goods in question an opportunity to show that they are not smuggled goods and there is really no occasion to sanction prosecution unless this is done.

50. Relevant provisions of the Act are cited in the judgment. Chapter XIV deals with confiscation of goods and conveyances and imposition of penalties. Section 124 requires a show-cause notice to be issued to the owner of the goods in question before an order confiscating the same can be made. Section 127, which is the last section in Chapter XIV, reads thus:

127. The award of any confiscation or penalty under this Act by an officer of customs shall not prevent the infliction of any punishment to which the person affected thereby is liable under the provisions of Chapter XVI of this Act or under any other law.

51. Next Chapter containing Sections 128 to 131 provides for appeals and revisions, and then Chapter XVI, which includes Sections 135 and 137, deals with offences and prosecutions. Section 135 provides that without prejudice to any action that may be taken under the Act, if any person has committed an offence specified therein, he shall be liable to punishment in the manner mentioned therein. Section 137 bars a Court from taking cognizance of any offence except with the previous sanction of the Collector of Customs.

52. Now, there is no express provision in the Act which requires the goods to be confiscated u/s 124 as smuggled goods before sanction for criminal prosecution can be granted by the Collector of Customs u/s 137. It is, therefore, to be seen whether relevant provisions of the Act, even by necessary implication, require an adjudication of confiscation of goods before issuing the requisite sanction for prosecution. It appears to my mind that neither Section 127, nor the opening words of Section 135, nor Section 124 read with Section 110(2), on a proper construction thereof, even impliedly requires confiscation of goods or imposition of penalty before criminal prosecution is sanctioned by the Customs Officer. However desirable such a course may be, I find it difficult to spell out such a

meaning from the reading of the said sections. Section 127 and the opening words of Section 135 show that the power to prosecute may be exercised after the confiscation of goods and imposition of penalty and in this way criminal prosecution is an additional remedy for effectively preventing smuggling of goods, but these provisions do not make an adjudication of confiscation or imposition of penalty a condition precedent before exercise of discretion by the Customs Officer concerned to grant sanction u/s 137 and thus the remedy u/s 135 may be in the alternative to the confiscation of goods or imposition of penalty.

53. Thus, while a prosecution u/s 135 is meant to effectively check smuggling by imposing severe punishment and is to be resorted to in serious cases when the confiscation and penalty proceedings will not be adequate or effective, it is not, necessary that the grant of sanction u/s 137 must be preceded by an adjudication of confiscation of the smuggled goods. It remains to be stated that powers of investigation under Chapter XIII are very wide and as a result of investigation carried out thereunder the Customs Officer concerned may have, before or even without adjudicating confiscation of goods, sufficient information in his possession to enable him to determine in the light of the guide lines indicated in the judgment that a prosecution is necessary and then if he himself is authorised to sanction it u/s 137 he may do so but if he is not so authorised, he may ask the Customs Officer concerned for giving such sanction on the strength of the material collected during the course of investigation. Rules discharged.

Chitale, J.

54. On behalf of the petitioners application for leave to appeal to Supreme Court was made orally. Advocate for the respondents was present. We grant certificate under Article 134(1)(c) of the Constitution in both the cases.