
(1968) 10 MAD CK 0026
In the Madras High Court

M.R. Pratap and Another

APPELLANT

Vs

The Director of Enforcement

RESPONDENT

Date of Decision : 16-10-1968

Acts Referred:

Citation : (1969) CriLJ 1582

Hon'ble Judges : Krishnaswamy Reddy, J

Bench : Single Bench

Judgement

Krishnaswamy Reddy, J.—These two petitions have been filed to quash the proceedings in C. C. No. 8736 of 1968 on the file of the Chief

Presidency Magistrate, Edmore, Madras, u/s 561-A, Criminal P.C. on the ground that the complaint against the petitioners for the alleged offence

mentioned therein is untenable.

2. The Director of Enforcement filed a complaint against the Royal Corporation Private Ltd., the petitioner in Crl. M. P. 980 of 1968 and Sri M.

R. Prate, Managing Director of the said concern, the petitioner in Crl. M. P. No. 978 of 1968, alleging that they had committed offences

punishable u/s 23(1)(b) read with Sections 4(8), 4(1) 9 and 5(1)(e) of the Foreign Exchange Regulations Act (hereinafter called the "Act") and

Rule 132-A (2) of the Defence of India Bales. The complaint was taken on file by the Chief Presidency Magistrate, Madras, against the two

petitioners and process was issued to them to appear before the Court.

3. The brief facts of the prosecution as disclosed in the complaint are these : The Rayala Corporation Private Ltd., is carrying on business at No.

25 A, Mount Road. Madras in the manufacture of Halda typewriters out of materials imported from firms abroad, among which one is Associated

Swedish Steels AB, Stockholm, Sweden. The materials were imported directly from 1963 onwards. Sri Pratap is the Managing Director of the company and is in charge and responsible to the company for the conduct of the business of the company. On certain information received by the Assistant Director of Enforcement, Madras, that Sri Pratap, the Managing Director of Rayala Corporation Private Ltd., has been acquiring foreign exchange illicitly by arranging imports of raw materials at over invoiced prices and the foreign exchange proceeds retained abroad by him in a Swedish Bank, they searched the office premises and seized certain documents and the investigation disclosed that the Bayala Corporation Private Ltd., which was permitted to acquire foreign exchange for the import of raw materisls from abroad had utilised the foreign exchange for a purpose other than the one for which it was granted and that the Managing Director Sri Pratap had acquired without the previous or the general permission of the Reserve Bank of India surreptitiously to the extent of 88,913.09 years, between 21-12-1968 and 5-1-1965 and had failed to offer them for sale in the Reserve Bank of India or to an authorised dealer within one month from the date of such acquisition.

4. It may also be necessary to note certain undisputed facts preceding the filing of the complaint for the purpose of appreciating the contentions

raised by the learned Counsel for the petitioners. After investigation, the Director of Enforcement issued a show cause notice on 25.8-1987 to

both the petitioners as to why adjudication proceedings as contemplated u/s 23-D of the Act should not be held against them in respect of

2,44,713 07 Sw. Krs. for having contravened the provisions of Sections 4(1):and 9 of the Act. After having issued notice for holding adjudication

proceedings, the Director of Enforcement issued a notice to Sri Pratap, Managing Director alone u/s 23(3) of the Act asking him whether he had

permission or special exemption for acquiring the foreign exchange in a sum of 88913-09 Sw. Krs. during the period 1963-1965 in Stockholm.

On 20-1-1968 a similar notice u/s 28(3) of the Act was issued to both the petitioners. In the meanwhile, on 25-10-1967 it appears that a writ

petition was filed questioning the validity of adjudication proceedings taken by the Director of Enforcement in respect of a sum of 2,44,713 Sw.

Kra. mainly on the ground that after the amendment in 1957, Section 28(1)(a) ceased to be a civil proceeding and has become a criminal

proceeding. On 16-3-1968, deducting 88918.09 6w. Krs. from 2,44,713-07 Sw. Kra. in respect of which a notice was issued, another notice

was issued u/s 23-D to both the petitioners as to why adjudication proceedings should not be taken in respect of 1,55,801-41 Sw. Krs. It is not

necessary for the present purpose to note the replies sent by the petitioners to these notices.

5. It is made clear in the course of the arguments that the truth or otherwise of the allegations made in the complaint and the possible defence open

to the petitioners to repudiate the said allegations need not be considered.

6. The learned Counsel, Mr. V. K. Thiruvengkatachari appearing for the petitioners raised several contentions that the prosecution of the petitioners

for any one of the offences mentioned in the complaint cannot be sustained and they are substantially these:

1. The prosecution under any of the provisions of the Act will not lie as the discretion given to the Director of Enforcement to choose between

adjudication and prosecution in Section 23(1), Clauses (a) and (b) is ultra vires being an unguided and arbitrary one by reason of the fact that the

adjudication provided u/s 23(1)(a) has become a criminal proceeding by virtue of Section 28(F) and the proviso u/s 28(d)(1) under which the

Director of Enforcement can drop the adjudication proceedings and institute prosecution in a criminal Court. Therefore, the provisions relating to

both adjudication and prosecution, namely, Clauses (a) and (b) of Section 23(1) are void, as both relate to criminal proceedings where an

unguided discretion is given to the Director of Enforcement. (2) The prosecution under B. 182.A (2) of the Defence of India Rules is untenable as

the rules have been revoked under S. O. No. 1087 dated 80.3.1965 with effect from 1.4.1965 and the Defence of India (Amendment) Rules,

1965 which came into force on 1.4-1965, will not save the prosecutions in respect of offences committed during the period when E. 132A (2)

was in force, subsequent to the revocation of the said rule. (8) The prosecution u/s 4(1) of the Act will not lie, as acquiring foreign exchange is

made an offence under that clause by Act 55 of 1964 with effect from 1-4-1965 as the offence alleged to have been committed by the petitioner?

was before 1-4-1965; and (4) the prosecution against the Rayala Corporation Private Ltd., u/s 9 of the Act is illegal as the allegation of acquiring

foreign exchange is made against Sri Pratap, the Managing Director alone.

7. To appreciate the contentions raised by the learned Counsel, it may be necessary to note the various provisions of the Act and the offences

under which the complaint was taken on file.

23(1). If any person contravenes the provisions of Section 4, Section 5. Section 9, Section 10, Sub-section (2) of Section 12, Section 17, Section

18.A or Section 18-B or of any rule, direction or order made thereunder, he shall-

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or

five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner hereinafter provided; or

(b) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(1A)....(1-B)....

(2) Notwithstanding anything contained in Section 32, Criminal P.C. 1898 it shall be lawful for any Magistrate of the first class, specially

empowered in this behalf by the State Government, and for any Presidency Magistrate to pass a sentence of fine exceeding two thousand rupees,

on any person convicted of an offence punishable under this section.

(3) No Court shall take cognizance-

(a) of any offence punishable under Sub-section (1) except upon complaint in writing made by the Director of Enforcement, or

(a)....

(b)....

Provided that where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made hereunder which

prohibits the doing of an Act without permission, no such complaint shall be made unless the person accused of the offence has been given an

opportunity of showing that he by-such permission....

8. Section 23(1-A), (1-B) and (3)(a), (as) and (b) are omitted as not relevant for the present discussion.

9. In the present case, we are concerned with the contravention of the provisions of Sections 4(1), 4 (3), 5(1)(e) and 9 of the Act. It may,

therefore, be necessary to note the contents of these provisions.

10. Section 4 (1) of the Act is as follows:

Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no

person resident in India other than authorised dealer shall outside India, buy or otherwise acquire or borrow from, or sell or otherwise transfer or

lend to, or exchange with, any person not being an authorised dealer, any foreign exchange.

11. The words "otherwise acquire" were introduced by Act 55 of 1964, which came into force on 1-4.1965.

12. Section 4 (8) of the Act is as follows:

Where any foreign exchange is acquired by any person other than an authorised dealer for any particular purpose, or where any person has been

permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose

or, as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so

acquired cannot be so used or, as the case may be, the conditions cannot be complied with; the said person shall without delay sell the foreign

exchange to an authorised dealer.

13. Section 5(1)(e) of the Act is as follows:

5(1) Save as may be provided in and in accordance with any general or special exemption from the provisions of this sub-section which may be

granted conditionally or un. conditionally by the Reserve Bank, no person in, of resident in, India shall -

(a) make any payment to or for the credit of any person as consideration for or in association with-

(i) the receipt by any person of a payment or the acquisition by any person of property outside : India:

(ii) the creation or transfer in favour of any person of a right whether actual or contingent to receive a payment or acquire property outside India;....

14. Section 9 of the Act is as follows:

The Central Government may, by notification in the Official Gazette, order any person in. or resident in India -

(a) who owns or holds such foreign exchange as may be specified in the notification, to offer it, or cause it to be offered for sale to the Reserve

Bank on behalf of the Central Government or to such person, as the Reserve Bank may authorise for the purpose, at such price as the Central

Government may fix, being a price which is in the opinion of the Central Government, not less than the market rate of the foreign exchange when it

is offered for sale:

(b) Who is entitled to assign any right to receive such foreign exchange as may be specified in the notification, to transfer that right to the Reserve

Bank on behalf of the Central Government on payment of such consideration therefor, as the Central Government may fix:

Provided that the Central Government may by the said notification or another order, exempt any persons or class of persons from the operation of

such order:

Provided further that nothing in this Election shall apply to any foreign exchange acquired by a person from an authorised dealer and retained by

him with the permission of the Reserve Bank for any purpose.

15. Notification No. F. I(67)-EC/67 dated 25th September 1958, as amended upto 14th March 1963, provides that "every person in, or resident,

in India who owns or holds or who may hereafter own or held any foreign exchange, whether in India or abroad expressed in the currency

specified in the Schedule annexed to this order shall before the expiration of one month from the date of this order, or, in the case of a person who

hereafter owns or holds such foreign exchange, within one month of the date of his so owning or holding, offer the same or cause it to be offered

for sale to an authorised dealer, being a person authorised by the Reserve Bank for the purpose, against payment in rupees, at the rate for the time

being authorised by the Reserve Bank in pursuance of Sub-section (2) of Section 4 of the said Act for conversion into Indian currency of the

foreign currency in which such foreign exchange is expressed.

16. The proviso is omitted as not relevant.

17. Barring the provision "otherwise acquire any foreign exchange by an unauthorised dealer" introduced in Section 4 (1) of the Act. the other

provisions mentioned above were in force during the time the contravention of such provisions was alleged to have been committed by the

petitioners.

18. It is seen from Section 28(1)(a) and (b) of the Act that the Director of Enforcement, if he is of opinion that the person has contravened any of the provisions mentioned therein, can either adjudge the matter himself in accordance with Section 23(1)(a) or he may file it complaint in a Criminal Court, if he so desires. In adjudication proceedings, the Director of Enforcement can levy a penalty not exceeding three times of the value of the foreign exchange or Es. 5,000 whichever is more. The competent Criminal Court in respect of the same matter on a complaint laid by the Director of Enforcement can convict a person who contravenes the provisions and sentence him to a term of imprisonment or fine. The condition precedent for instituting prosecution is a service of a notice as required u/s 28(8) of the Act asking the person accused of an offence to show whether he had permission for doing an act prohibiting such doing without permission. If the Director of Enforcement decides to initiate adjudication proceedings, he had to follow the procedure provided u/s 23-D and the rules framed there under.

19. Section 28-D (1) of the Act is as follows:-

For the purpose of adjudging under Clause (a) of and Section (1) of Section 23 whether any person has committed a contravention, the Director of Enforcement shall hold an enquiry in the prescribed manner after giving that person a reasonable opportunity of being heard and if, on such enquiry he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of the said Section 23:

Provided that if, at any stage of the enquiry, the Director of Enforcement is of opinion that having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate, he shall, instead of imposing any penalty himself, make a complaint in writing to the Court. (2)....(8)....

20. Clauses (2) and (3) are omitted as not relevant.

21. Rule 8 of the Adjudication Proceedings and Appeal Rules, 1967 provides as follows: -

8. Adjudication proceedings - (1) In holding an enquiry under Clauses (1) of Section 28-D of the Act for the purpose of adjudging under Clause

(a) of Sub-section (1) of Section 23, whether any person has committed

contravention, the Director shall, in the first instance, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why adjudication proceedings should not be held against him.

(2) Every notice under Sub-section (1) to any such person shall indicate the nature of the offence alleged to have been committed by him.

(3) If after considering the cause, if any, shown by such person the Director is of opinion that adjudication proceedings should be held, he shall fix

a date for the appearance of that person either personally or through his lawyer or other authorised representative....

22. Clauses 4 to 7 of Rule 3 are omitted as not necessary.

23. After penalty is levied, if the person liable to pay penalty failed to pay, he may be convicted by a Criminal Court u/s 23-F of the Act, which

runs as follows: -

If any person fails to pay the penalty imposed by the Director of Enforcement or the Appellate Board or the High Court, or fails to comply with

any of their directions or order, he shall, on conviction before a Court, be punishable with imprisonment for a term which may extend to two years,

or with fine, or with both.

This section had been introduced by the Amendment Act of 1957.

24. From the foregoing provisions, namely, Sections 28(1)(a) and (b) 23-D (1) and proviso and 23F, it appears to be clear that the Director of

Enforcement can file complaints in Criminal Court in three Bigas:

(1) Before the adjudication proceedings are instituted:

(2) After instituting adjudication proceedings, if in the course of enquiry, the Director finds that the penalty to be levied by him would be

inadequate; and

(3) After penalty is levied when the person liable to pay penalty fails to pay.

25. It may also be necessary to note in this context that Sub-section (1), (1-A) and (1B) had been substituted by the Amendment Act 89 of 1957

for the original subs (1). The original subs. (1), before amendment, provided only prosecution for contravention of any of the provisions under the

Act. The adjudication proceedings and levy of penalty provided u/s 23-D of the Act, analogous to the provisions u/s 167(8) of the Sea Customs

Act were introduced by the Amendment, in 1957. After amendment, the Act has introduced two different proceedings for punishing a person

contravening the provisions, namely (1) by levying a penalty on adjudication, and (2) by securing conviction of a person in a Criminal Court by

imposing sentence of imprisonment or fine, in other words, apparently a civil and a criminal proceeding.

26. It has been decided in *Thomas Dana v. State of Punjab* AIR 1959 SC 875 in dealing with Sections 167(8) and 167(81) of the See us. Toms

Act that the adjudication proceedings resulting in levying of penalty are not criminal proceedings and that imposition of penalty is different from the

sentence of imprisonment or fine, the punishment which can be imposed by a criminal Court. It has been farther held in that decision that the

Collector had been empowered to impose the penalties in order not only to prevent a recurrence of such infringements, but also to recoup the loss

of revenue resulting from such infringements and that a person may be guilty of certain acts which expose him to a criminal prosecution for a

criminal offence, to a penalty under the law intended to collect the maximum revenue under the Taxing law, and/or at the same time, make him

liable to damages intorts.

27. The Supreme Court again in *Tukaram G. Gaokar Vs. R.N. Shukla and Others*, in dealing with Sections 112(b) and 185(b) of the Sea

Customs Act 1962, observed that the Sea Customs Act contemplates parallel proceedings in respect of the same matter and that one proceeding

is different from the other.

28. A Bench of this Court in *Sivagaminatha Muppanar & Sons v. I.T.O. II Circle Madurai* 1955 2 Mad LJ 47? : A I R 1956 Mad I held that the

proceedings to a levy of penalty u/s 28 of the Income Tax Act is a civil proceeding and the proceeding under Sections 51 to 58 of the said Act to

enforce tax law is a criminal proceeding and that the invocation of one does not exclude resort to the other.

29. The learned Counsel for the petitioner contends that it might be true in applying the principles of the decisions mentioned above, the

proceedings mentioned in Sections 23(1)(a) and (b) of the Act are two different proceedings. But he would contend that by virtue of Section 28-

F, which makes a mere non-payment or failure to pay penalty an offence without

mens rea the nature and character of the proceedings provided under Sections 28(1)(a) and 28D are changed. It is contended that a provision like Section 28F is not to be found anywhere in any special enactment and even under the Tax laws, the offences are created with the necessary mens rea. It is further contended that mere failure to pay penalty will lead to a conviction and therefore, such a conviction is a direct outcome of the proceeding under Sections 28(1)(a) and 23-D which, though appears to be a civil proceeding, in Act is criminal. It may, therefore, be necessary to consider whether the adjudication proceeding by virtue of Sections 28F and 28D proviso can be deemed to be a criminal proceeding. The learned Counsel in support of his contention, relied upon the following two decisions In re, Clifford and O'Sullivan (1921) 2 AC 570 and Anand v. Secretary of State (1942) 2 All E E 881. In the former what a criminal proceeding is stated in the following terms:

...In order that a matter may be a criminal cause or matter it must, I think, fulfil two conditions which are connected by and implied in the word

"criminal". It must involve the consideration of some charge of crime that is to easy, of an offence against the public law (Imperial dictionary tit.

"crime" and "criminal") and that charge must have been preferred or be about to be preferred before some Court or judicial tribunal having or

claiming jurisdiction to impose punishment for the offence or alleged offence, if these conditions are fulfilled, the matter may be criminal, even

though it is held that no crime has been committed, or that the tribunal has no jurisdiction to deal with it...but there must be at least a charge of

crime (in the wide sense of the word) and a claim to criminal jurisdiction.

30. In the latter case, at page 885, it is held as follows:

It is the nature and character of the proceeding in which habeas corpus is sought which provide the test. If the matter is one the direct outcome of

which may be trial of the applicant and his possible punishment for an alleged offence by a Court claiming jurisdiction to do so, the matter is

criminal. This is the true effect of the "two conditions"" formulated by Viscount Cave-In re, Clifford and O'Sullivan 1921 2. A. C. 570.

31. The learned Counsel laid much emphasis on the second sentence and contended that the present outcome of the proceedings under Sections

28(1)(a) and 23-D of the Act is a Criminal trial provided u/s 28 F with a possible

punishment for the alleged offence of failure to pay penalty by a criminal Court. This he urges, on the main ground that Section 23-F does not create a separate and independent offence, but is the outcome of the adjudication proceedings resulting in penalty and that, therefore the said proceedings are criminal in nature. So far as the earlier decision is concerned, it lays down general principles as to when a cause or matter can be considered to be criminal. In my opinion, this decision does not give us much assistance in answering the question raised by the learned Counsel. So far as the latter decision is concerned, to appreciate the significance of the passage extracted above in that decision, it may be necessary to note the relevant facts of that case.

32. The brief facts of the said case are these: Amand, the appellant, was a Netherlands subject and had lived in England for about 14 years. By a royal decree dated 8-8-1940, the Queen of the Netherlands imposed an obligation on all Netherlands born between certain dates and resident in Great Britain, to register for military service with the Netherlands Forces. The appellant received a notice under this decree ordering him to report to a Netherlands Army camp. The appellant complied with the notice under protest and served with the Netherlands Army in England for sometime and he went on a week's leave. He did not return to service upon the expiration of the leave in spite of reminders sent to him. by the British Police Officers to return to camp. He did not do so. Subsequently, he was arrested and detained by the British Police. He was taken before the Chief Metropolitan Magistrate, who released him on bail, on being informed that an application has been made on the previous day for a writ of habeas corpus before a Divisional Court. That application was ultimately dismissed. The appellant surrendered to his bail and made a new application for a writ of habeas corpus on which it was ordered that notice of the application should be served upon the Home Secretary and the Netherlands Minister of Defence, and the appellant was again released on bail. Ultimately the Divisional Court dismissed the application. Against that order, an appeal was filed. Then the question that arose was whether the judgment of the Divisional Court, refusing a writ of habeas corpus was a judgment in a "criminal cause or matter". It may be relevant; to note here that by Section 12 of the Army Act, "'desertion'" and by Section 15

absence without leave"" are declared to be offences under military law. Amand was arrested for absence without leave and not for complying with the request made by the authorities to return to duty.

33. It is, therefore, clear from this decision and the passages extracted above that the arrest of Amand was in respect of an offence, though he was not charged with an offence as such at the time of the arrest but that was a matter which ultimately was likely to lead to a trial and a possible punishment for an alleged offence by a criminal Court. The "matter" referred to in the passage is the arrest of Amand for his having failed to return to duty. The nature and the character in which habeas corpus was sought in that case, was the arrest of the appellant for not returning to duty, which itself is an offence and as such, it partakes a criminal feature in it.

34. Even in the former decision 1921 2 AC 570, what was emphasised is that there must be at least a charge of crime and a claim to criminal jurisdiction even though the crime has not been committed or the Tribunal has no jurisdiction to deal with it; and the two conditions imposed are that it must involve an offence against the public law and that the charge was about to be preferred before a Court having criminal jurisdiction to impose punishment for the offence or alleged offence. Can it be said applying this principle that Section 28(1)(a) involve consideration of charge Of crime? I am of the view that Section 28(1)(a) is concerned with levy of penalty in an adjudication proceeding in respect of an alleged contravention of any of the provisions mentioned therein and in no sense, it can be said that this clause considers some charge of crime, that is to say, an offence against the public law. It provides one mode of punishment, namely, levy of penalty. If penalty is paid, the matter ends there. If penalty is not paid, the prosecution will lie u/s 28-F. Section 28-F creates an offence in respect of failure of payment of penalty as offences are created under Sections 28(1-B) and 23(1-A). It is true that mere failure to pay penalty is made an offence u/s 23F, which appears to be an extraordinary and drastic change not known to the criminal jurisprudence. It also appears that in no other Act, fiscal, revenue or otherwise, a provision similar to Section 28F of the Act is found or introduced. It may be said that this drastic provision has been introduced considering certain special features and problems affecting the economy of the country.

35. Whether Section 28F can stand as it is in the Statute, is not a question raised in this case. It may be that this provision which makes mere

failure to pay a penalty an offence without mens rea, bad: but we are not concerned with it in these petitions. The intention of the Legislature is

clear that a new offence has been introduced u/s 28F probably considering the gravity of the offences committed in respect of foreign exchange. I

am, therefore, of the view that the nature and the characteristic of proceedings provided under Sections 28(1)(a) and 28-D are civil proceedings

and that their nature and character were not changed by virtue of the introduction of Section 28F of the Act and Section 28(1)(a) does not

become a criminal proceeding.

36. It has been further contended, taking into consideration the provision u/s 28-D(1) that in the course of the enquiry, at any stage, if the Director

is of opinion that the penalty to be imposed is inadequate, he can make a complaint in writing to the criminal Court and that, therefore, the enquiry

does not remain as civil enquiry as the ultimate result of such enquiry is not only to levy a penalty but also a prosecution and, therefore, the entire

enquiry must be deemed to be criminal.

37. In this case, according to the learned Counsel the complaint was filed subsequent to the issue of show cause notice which is a part of the

enquiry contemplated under E. 8(1) of the Adjudication Proceeding? and Appeal Rules and as such, the complaint must be deemed to have been

filed as contemplated u/s 28D (1) proviso. I am unable to see as to how the proceedings become criminal by virtue of proviso to Section 28-D (1)

as it only provides for institution of a complaint, if the director is of opinion that the penalty to be imposed will be inadequate taking into

consideration the circumstances of the particular Case. It is clear as already noted, that the Director is empowered to exercise his option of filing a

complaint in a criminal Court at any stage of the proceedings. So far as the present discussion is concerned, it does not make any difference,

whether the complaint is instituted before the enquiry or in the course of the enquiry, to make the proceedings criminal. It is further contended by

the learned Counsel that the procedure provided under Sections 28(1)(a) and 28-D is not a procedure established by law as it is neither a civil

procedure nor a criminal procedure.

38. In Shanti Prasad Jain Vs. The Director of Enforcement, the vires of Section 28(1)(a) is questioned. The Supreme Court made the following observations at page 1768:

A law which prescribes a special procedure for investigation of breaches of foreign exchange regulations will therefore be not bit by Article 14 as it is based on a classification which has a just and reasonable relation to the object of the legislation. The vires of Section 28(1)(a) is accordingly not open to attack on the ground that it is governed by a procedure different from that prescribed by the Criminal Procedure Code. That indeed is not controverted by the appellant. That being so, does it make any difference in the legal position that Section 23D provides for transfer by the Director of Enforcement of cases which he can try, to the court? We have not here, as in The State of West Bengal Vs. Anwar Ali Sarkar, a law which confers on an officer an absolute discretion to send a case for trial either to a court or to a magistrate, empowered to try cases under a special procedure. Section 28-D confers authority on the very officer who has power to try and dispose of a case to send it on for trial to a court, and that too only when he considers that a more severe punishment than what he is authorised to impose, should be awarded. In a judicial system, in which there is hierarchy of courts or Tribunals, presided over by Magistrates or officers belonging to different classes, and there is a devolution of powers among them graded according to their class, a provision such as Section 23-D is necessary for proper administration of justice.... In our view the power conferred on the Director of Enforcement u/s 23-D to transfer cases to a court is not unguided or arbitrary, and does not offend Article 14 and Section 23(1)(a) cannot be assailed as unconstitutional.

39. I am bound by these observations.

40. It is also contended by the learned Counsel that the proceedings of the Director of Enforcement must be deemed to be in violation of Article 20(8) of the Constitution as he is empowered in the course of the investigation, to compel the accused to give statements and that such statements could be used against him. This point came into consideration in C. A. 1597 of 1967 : AIR 1968 SC 1050 by the Supreme Court, but was left open. I am also of the view that this will not arise in this case at this stage as it is not shown that the accused is likely to be compelled to give

evidence against himself.

41. In the result, I find that Section 23(1)(a) or Section 23-D are not criminal proceedings by virtue of Section 23-F or Section 23-D (1) proviso

and that they remain as civil proceedings and as such, the question of arbitrary discrimination between two criminal proceedings under Sections

23(1)(a) and 23(1)(b), does not arise. The learned Counsel for the respondent contended that even conceding that Sections 23(1)(a) and 28(1)(b)

are criminal proceedings, it cannot be and that the discrimination between these two provisions is arbitrary as the power to exercise the option

under these two sections was conferred on the higher authority and relied upon the decisions in *F.N. Roy Vs. Collector of Customs, Calcutta*, and

Pannalal Binjraj Vs. Union of India (UOI), . The substance of these decisions is that the possibility of discriminatory treatment cannot invalidate the

legislation, but what will be struck down is not the provision which invests the authorities with the power when such powers are invested with the

higher authorities, but the abuse of power itself. We are not concerned with this point on the view that I have taken, namely, that Sections 23(1)(a)

and 23-D are civil proceedings.

42. It is also contended that violation of Rules in the course of the investigation and enquiry of the Director preceding prosecution will lead to

prejudice and injustice to the accused and that when such violations are brought to the notice of this Court, the court should take into consideration

such violations and prohibit the officer concerned from committing such acts. On the present limited materials placed before me, I am unable to

consider this position. The petitioner would be at liberty to raise this point at the appropriate stage.

43. The next point is whether the prosecution u/s 132A (2) of the Defence of India Rules is saved after its expiry. These rules were framed under

the Defence of India Act, 1962. The Defence of India Act came into force on 12-12-1962. This Act was enacted as a result of proclamation by

the President of India on a grave emergency under Clause (1) of Article 352 of the Constitution to provide for special measures to ensure the

public safety and interest, the defence of India and civil defence and for the trial of certain offences and for matters connected therewith. By virtue

of the rule making power provided u/s 88 of the Defence of India Act, Rule 132A

has been framed prohibiting dealings in foreign exchange by

Defence of India Amendment Rules, 1964 which came into force on 21-1. 1964. Rule 132A, Clause (2) provides as follows-

No person other than an authorised dealer shall buy or otherwise acquire or borrow from, or sell or otherwise transfer or lend to, or exchange

with, any person not being an authorised dealer, any foreign exchange;

and Clause (4) provides punishment for the contravention of the rule with imprisonment for a term which may extend to two years, or with fine, or

with both. This is a self-contained rule.

44. The Defence of India Act is a temporary enactment. Section 1(3) of the Defence of India Act states that the Act shall remain in force during

the period of operation of the Proclamation of Emergency issued on 26th October, 1962 and for a period of six months thereafter. Under Sub-

clauses (a), (b), (c) and (d) of Section 1(8) savings are provided which are analogous to Section 6 of the General Clauses Act with the omission of

Clause (a) in Section 6. The Proclamation of Emergency was revoked on 10-1-1968. The Defence of India Act expired by efflux of time, six

months thereafter, namely, on 9-7-1968. Section 6 of the General Clauses Act will not apply to the Defence of India Act as it is a temporary Act

and its expiry is by efflux of time. Therefore, the savings are provided u/s 1(3) of the Defence of India Act itself.

45. Rule 132A has been revoked on 30-3. 1965 before the expiry of the Defence of India Act, by the Defence of India Amendment Rules, 1965

which came into force on 1.4. 1965. It is provided under Rule 2 of the Defence of India Amendment Rules, 1965, as follows:

In the Defence of India Rules, 1962, rule 182A (relating to prohibition of dealings in foreign exchange) shall be omitted except as respects things

done or omitted to be done under that rule.

What is saved after revocation of Rule 182A is only in respect of those things done or omitted to be done under the rule "revoked." We have

already noted that the alleged offences by the petitioners were committed between 21-12-1968 and 5-1.1965 when Rule 182A was in force

excepting the transaction dated 21.12-1968 since Rule 182A came into force on 21-1.1964.

46. Sri Thiruvengkatachari, the learned Counsel for the petitioner, argues that the

words "except as respects things done or omitted to be done" will not include prosecutions, but these words are used in the limited sense giving protection for things done or omitted to be done in consequence of any legislative or executive action contravening Article 19 of the Constitution during the period of emergency. He further contends that if the intention of the Legislature is to provide for the inclusion of prosecution, it could have done so specifically by either reproducing the provisions of Section 6 of the General Clauses Act or Section 1(3) of the Defence of India Act. Section 8 of the General Clauses Act will not apply to this because it is a temporary Act. Section 1(S) of the Defence of India Act will not apply since the Defence of India Act did not expire on 31-3-1965 when Rule 182A has been revoked. Therefore according to the learned Counsel, the leaving that is provided under the Amendment rule itself revoking Rule 132A has alone to be taken into consideration. It is argued that if it was the intention to include prosecution, it could have been specifically provided. In the absence of such a clear and specific provision, it will be reasonable to infer that it is not a case where the continuous operation was intended. Prima facie, his argument seems to have some substance and therefore, it requires consideration as to what exactly the words "except as respects things done or omitted to be done" mean. In this context, it would be significant to note that revoking Rule 132-A simultaneously by Foreign Exchange Regulation (Amendment) Act, 1964 which came into force on 1-4-1965, acquiring foreign exchange is prohibited u/s 4 (1) of the Foreign Exchange Regulation Act. The intention of the Legislature appears to be that the prohibition enforced under Rule 132.A is continued without break by bringing each prohibition u/s 4 (1) of the Act. If subsequent to the revocation of Rule 132.A, acquiring foreign exchange is not made an offence, it would be reasonable to infer that after the revocation, the legislature would not have thought of prosecuting those persons of what they had done during the period when they were not offences. It is true that u/s 6 of the General Clauses Act, and Section 1(8) of the Defence of India Act, there is a special saving in respect of prosecution. But it cannot be inferred straightway if the same words are not repeated specifically that the intention of the legislature is to exclude it.

47. The words "things done or omitted to be done" are so comprehensive that

it can include anything done by any person under any circumstances unless the contrary intention appears in the background of a particular matter. If as already stated, "acquiring foreign exchange" is not made an offence subsequent to the revocation of Rule 132-A, it will be fairly legitimate to infer that the intention in using the words "things done or omitted to be done" was not to include prosecutions. But the case is different here, since acquiring foreign exchange is prohibited u/s 4 (1) of the Act by the amendment in 1964.

48. It appears that the words "except as respects things done or omitted to be done" found in Article 358 of the Constitution are literally carried over in Clause 2 of the Defence of India Rules, 1965. As the Defence of India Act itself has been enacted in consequence of the proclamation of emergency and that Rule 132-A has been made under the Defence of India Act itself and Article 858 suspends the provisions of Article 19 during such emergency, the saving provided in the said Article has been reproduced in the said rule. It may, therefore, be necessary, to consider what is meant by the words used in Article 858 than to consider Section 6 of the General Clauses Act or Section 1(3) of the Defence of India Act where we do not find the exact words used in Article 358 which have been re-introduced in the Defence of India Amendment Rules of 1965.

49. The learned Counsel, relying upon the decision in *Makhan Singh v. State of Punjab* AIR 1964 S0 881 contended that a limited meaning should be given to the words "things done or omitted to be done" In discussing the effect of Article 358 after the Proclamation of Emergency ceases, the Supreme Court observed as follows:

As soon as the Proclamation ceases to operate the legislative enactments passed and the executive Actions taken during the course of the said emergency shall be inoperative to the extent to which they conflict with the rights guaranteed under Act. 19 because as soon as the emergency is lifted, Article 19 which was suspended during the emergency is automatically revived and begins to operate. Article 858. however, makes it clear that things done or omitted to be done during the emergency cannot be challenged even after the emergency is over. In other words, the suspension of Article 19 is complete during the period in question and legislative and executive action which contravenes Article 19 cannot be

questioned even after the emergency is over.

50. In that case, the Supreme Court was concerned in answering a question whether the action taken by the executive authority in detaining a

person when Article 19 was suspended, could be challenged after the pro. Collimation ceased and Article 19 automatically revived. Therefore, in

the circumstances of that case, it cannot be said that the Supreme Court gave a limited meaning to the words "things done or omitted to be done."

They were not invited to consider the exact import of those words in that case.

51. In *E. v. Wicks* (1946) 2 All E. Rule 529 the Court of Criminal Appeal was concerned in considering Section 11(8) of the Emergency Powers

(Defence) Act 1939 in respect of the words "'the expiry of this Act shall not affect the operation thereof as respects things previously done or

omitted to be done'" used in that section in relation to a prosecution and conviction subsequent to the expiry of the Emergency Powers (Defence)

Act, 1989.

The facts of that case are these: The appellant in that case was convicted on an indictment which charged him with doing acts likely to assist the

enemy with intent to assist the enemy contrary to the Defence (General) Regulations, 1939 and the Emergency Powers (Defence) Act, 1939. The

acts with which the appellant was charged were alleged to have been committed between April 1948 and January 1944 and the trial took place on

May 27 and 28, 1946. The Emergency Powers (Defence) Act 1939 expired on 24-2-1946. The trial of the appellant was, therefore, subsequent to

the expiry of the Emergency (Powers) Defence Act. Section 11(S) of the Act, as already noted, provided the saving clause that the expiry of the

Act shall not affect the operation as respects things done or omitted to be done. It was argued on behalf of the appellant that the words of Section

11(8) were insufficient to carry the consequences that would have ensued had the section contained some such provision as is contained in Section

88 of the Interpretation Act, 1889. In the absence of similar provisions in Section 11(3) as found in the Interpretation Act, it was contended that

Section 11(8) should be read as referring only to things done and completed while the Act was in force and not to give a comprehensive meaning

to it. It was contended by the Crown contra that even after the expiry of the Act, the Act would survive in respect of things done or omitted to be

done before the Act expired and that effect is given by a short clause as found in Section 11(8) to what in another Act is achieved by language

more comprehensive. After having considered the arguments on both sides, Ford Goddard C.J. observed as follows:

Thus, it will be seen that in these Acts (the Acts referred to were the Supplies and Services (Transitional Powers) Act, 1945 and the Interagency

Powers (Transitional Provisions) Act, 1946) far more elaborate provisions have been made as to their expiry than are contained in the sub-section

of the 1989 Act which we are considering. It is a sound rule of construction that when there are different statutes in parameters, though made at

different times or even expired, and not referring to each other, they shall be taken and construed together as one system and as explanatory of

each other...Conversely, if the legislature uses different word in several statutes prima facie the inference is that a different meaning is intended....

But that is not to say that because more precise or more elaborate language is used in a later Act the language of a former Act, elliptical though it

be, is not to receive its ordinary meaning. Had the words of the sub-section been: "The expiry of this Act shall not affect anything previously done

or omitted to be done thereunder" there would have been greater, it may be irresistible, force in the appellant's contention. Such words would

indicate more than a confirmation of Acts or a ratification of or excuse for omissions that had already taken place. Here, however, the provision is

that the Act is to operate after its expiry as respects previous Acts or omissions.... It is clear that Parliament intends that the regulations should

continue to operate in respect of the matters referred to as though they had not expired In our opinion, therefore. we are bound to construe the

sub-section as meaning that the expiration of the Act is not to affect the liability or punishment incurred under the enactment or the prosecution of

legal proceedings for the purpose of inflicting that punishment.... In our opinion, giving the words of the sub-section their natural meaning, there is

neither doubt nor ambiguity, and the result would appear to be both just and reasonable.

52. The learned Counsel for the petitioner submits that the words found in Section 11(3) are different from the words found in the rule, with which

we are concerned and that in this decision, the prosecution was already instituted before the Act expired whereas, in the present case, the

prosecution itself was instituted subsequent to the expiry of the rules.

53. I am unable to see any difference as suggested by the learned Counsel. By virtue of the Defence of India Amendment Rules, 1965, Rule 182A

relating to prohibition of dealings in foreign exchange is omitted except as respects things done or omitted to be done under that rule. It, therefore,

implies that the expiry of Rule 182-A does not affect the operation of that rule as respects things done or omitted to be done. It may be that in that

case the prosecution was instituted before the Act expired. But it is made clear in that decision that the expiration of the Act did not affect the

liability or punishment incurred under the enactment or the prosecution of legal proceedings for the purpose of inflicting the punishment. In other

words, the prosecution of legal proceedings may be instituted even after the expiry in respect of things done or omitted to be done.

54. On appeal by Wicks against the decision of the Court of Appeal to the House of Lords, the House of Lords in *Wicks v. D. P. P.* (1947) 1 All

E R 205, confirmed the decision in (1946) 2 All EE 529. In the said decision. Viscount Simon in his speech stated as follows:

It is pointed out that Section 38(2) of the Interpretation Act, 1889, does not apply to the case of a statute or a regulation which has the power of a

statute when it expires by effluxion of time. The sub-section is addressed to Acts which have been repealed, and not to Acts which expire owing

to their purely temporary validity. It is, I apprehend with this distinction in mind, which is certainly well-known to the authorities who frame

statutes, that the draughtsman inserted the words used in B. 11 of the Emergency Powers (Defence) Act, 1939, Section 11 begins with the words:

"Subject to the provisions of this section"; which warn anybody that the provisions which follow are not absolute but are subject to qualifications. It

is." therefore, not the case that, at the date chosen, the Act expires in every sense. There is a qualification. Without discussing whether the

intermediate words are qualifications, Sub-section (3), in my opinion, is plainly a qualification. It begins with the phrase "the expiry of this Act"-a

noun which corresponds with the verb "expire"- "shall not affect the operation thereof as respects things previously done or omitted to be done."

Counsel for the appellant, have therefore, been driven to argue ingeniously, but to admit candidly, that the contention which they are putting

forward is that the phrase "thing previously done" does not cover offences previously committed. In my opinion, that view cannot be correct. It is

clear that Parliament did not intend Sub-section (3) to expire with the rest of the Act, and that its presence in the statute preserves the right to

prosecute after the date of expiry.

55. The learned Counsel for the petitioner attempted to distinguish this case with the one under discussion by pointing out that the words "'subject

to the provisions of this section'" found in Section 11(3) of the Emergency Powers (Defence) Act, 1939 are absent in the Defence of India

Amendment Rules, 1965 and that, therefore, the qualification provided under the former Act cannot be read into the latter. I am unable to agree

with this contention. The principle in that decision is that when a temporary Act expires by efflux of time and if certain things are saved, the Act

does not expire absolutely and completely. The saving itself is a qualification that the Act would expire subject to the savings provided.

56. The decision in J.K. Gas Plant Mfg. Co. v Emperor AIR1947 FC 88 is on all ours with the present case in which it was held that the words

except as respects things done or emitted to be done'" in Sub-section (4) of Section 102 of the Constitution Act as amended by India (Central

Government and Legislature) Act, 1946 would include prosecution also. In this decision, the principle laid down in 1947 1 All E E 205 was

followed. The Federal Court observed that there can be no difference between the provision in Section 11(3) of the English Act and Section

102(4), as amended of the Constitution Act.

57. The relevant facts in this case are these : The accused in that case were prosecuted in respect of certain acts alleged to have been committed

by them during the month of November 1943 in contravention of the provisions of Clauses 5 and 8, Iron and Steel (Control of Distribution) Order,

1941. This contravention was alleged to constitute offences punishable under certain provisions of the Defence of India Rules and the Special

Tribunal constituted for the specific purpose of trying the offences under the Defence of India Rules framed charges against the accused on 14-10-

1946. Thereupon the accused filed an application in revision before the High Court of Judicature at Bombay, raising certain points touching the

jurisdiction of the Special Tribunal to try the aforesaid offences. The High Court

die-missed the application and on a certificate granted by the High Court, the Federal Court heard the matter. The accused contended that the trial of the offences by the Special Tribunal could not be continued after 30-9-1946 as the Iron and Steel (Control and Production and Distribution) Order, 1941 expired by that time. The Distribution Order was made under Sub-rule (2) of Rule 81 of the rules made under the Defence of India Act, 1939. The Defence of India Act was enacted pursuant to the powers conferred by Section 102 of the Constitution Act, after the Proclamation of Emergency of 3-9-1939. By subs. (4) of Section 1 of the Defence of India Act, it was provided that the Act should be in force during the continuation of the Second World War and for a period of six months thereafter. The Proclamation was revoked on 1-4-1946. The Defence of India Act therefore expired on 80.9.1946 and with it all rules and orders made hereunder. But the Defense of India Act being a temporary Act as Section 6, General Clauses Act would not apply in respect of savings, by Ordinance 12 of 1946 promulgated on 80-8-1946, Sub-section (4) of Section 1, Defence of India Act, 1989, was amended with the saving provisions substantially analogue to the provision u/s 6 of the General Clauses Act. It was found that the savings provided under Sub-section (4) of Section 1 of the Defence of India Act would not apply to the order in question as it dealt with a provincial subject and that, therefore, Sub-section (4) of Section 102 of the Constitution Act would apply, The effect of Sub-section (4) of Section 102 is that any provision of the Defence of India Act purporting to deal with provincial subjects has to cease to have effect on 80-9-1946, except as things done or omitted to be done before that date. It was contended on behalf of the appellants that the scope of these words was only to protect or indemnify officials in respect of acts or omissions on their part and the words do not authorise a continuation of the prosecution. After incorporating the speech of Viscount Simon in 1947 1 All E. R. 205 the Federal Court observed that it was difficult to see why these words ""except as respects thing done or omitted to be done"" should be given such a restricted meaning. It was held that the words will save prosecutions. The words found in Section 102(4) are the same as the words found in Article 358 of the Constitution of India and, therefore. I am of the view that the interpretation given by

the Federal Court in respect of the words. as respects things done or omitted to be done, as found in the Defence of India Amendment Rules,

1965 has to be accepted and I am bound by it. The learned Counsel painted out that that was a case where the prosecution was already launched

before the Act expired. In my view, the does not make any difference.

58. In State of Madhya Pradesh Vs. Hiralal Sutwala, , Hidayatullah C.J. as he then was following the decision of the Federal Court; in A I R 1947

PC 88 in interpreting the phrase "things done or omitted to be done held that it was sufficiently wide enough to continue a prosecution not

completed under a temporary Act and that it includes a reference to pending proceedings including prosecutions not completed or about to be

commenced. I respectfully agree with the decision in this case. In the result, on this point I find that the prosecution of the petitioners under Rule

132-A (2) and (4) is saved and the complaint in respect of the said offence is in order.

59. In respect of the third point, namely, whether the prosecution of the petitioners u/s 4 (1) of the Act is untenable, I find the same in favour of the

petitioners. We have already noted that u/s 4 (1) of the Act "acquiring foreign exchange" is made an offence by the Amendment Act 55 of 1964

which came into effect from 1-4-1965. The offence, in the complaint, was alleged to have been committed before 1-4-1965 when Section 4 (1) in

respect of this offence was not in force. The enquiry u/s 4 (1) of the Act has to be dropped by the lower Court. In respect of the other offences

namely, Sections 4 (3), 5(1)(e) and 9, read with Section 23(1)(b) are concerned, it is not disputed that they were in force during the time the

offences were alleged to have been committed.

60. Regarding the last point whether the prosecution against the Rayala Corporation Private Ltd., u/s 9 of the Act is illegal, it will be premature at

this stage to answer this point. This may very much depend upon the materials which may be made available by both the prosecution and the

defence. This is left open.

61. In the result I find that the enquiry u/s 4 (1) of the Act against both the petitioners have to be dropped. The learned Magistrate may proceed

with the enquiry in respect of the other offences and dispose it of according to law. In the course of the enquiry it is open to the petitioners to raise

any point as may be advised excepting those points raised and determined in these petitions. I make it clear that in disposing of these two petitions,

at the instance of both parties, I have avoided going into the truth or otherwise of the facts alleged in the complaint. I have also not considered

whether on the allegations made in the complaint, the offences mentioned therein are made out. It is for the trial Court to enquire into the allegations

made in the complaint and come to its own conclusion whether the offences as alleged in the complaint are made out after giving opportunity to

both the parties.

62. The petitions are dismissed with the above observations.