

CASE NO.:
Appeal (crl.) 1058 of 2003

PETITIONER:
Smt. Heena Kausar

RESPONDENT:
Competent Authority

DATE OF JUDGMENT: 24/04/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T
REPORTABLE

CRIMINAL APPEAL NO.1058 OF 2003

S.B. Sinha, J.

1. Validity of the proviso appended to Section 68C of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) is in question in this appeal which arises out of a judgment and order dated 27.11.2002 passed by a Division Bench of the High Court of Judicature at Bombay.

2. The basic fact of the matter is not in dispute.

3. Appellant herein is wife of one Iqbal Mohammed Memon. An order of detention was passed against him under the provisions of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (PINDPS Act) by the State of Maharashtra. Allegedly, both the appellant and her husband left India in or about the year 1991. Appellant has not yet come back to India. Her husband admittedly had not been taken incustody pursuant to the order of detention. Admittedly again, Appellant has several properties in her name. A proceeding was initiated against her in terms of Chapter V-A of the Act, wherefor, she was served with a show cause notice dated 9.5.1995 asking her to furnish the proof and/or source of income and/or the channels from which the assets being Flat Nos.501 and 502A along with stilt parking No.19 in Milton Apartments at Juhu Tara Road, Santacruz (W) had been acquired as also to show cause why the said properties should not be held to be "illegally acquired properties" and forfeited by the Central Government under the Act.

4. An appeal thereagainst was preferred before the Appellate Tribunal. By an order dated 10.2.1999, the properties were directed to be confiscated. A writ petition was filed by her before the Bombay High Court which was marked as Writ Petition No.1867 of 1999. The said writ petition was dismissed by a judgment and order dated 15.12.1999 insofar as the order of confiscation of flat No.501 and 502 and stilt parking in Milton Apartments were concerned. However, in regard to the confiscation of three bank accounts, the matter was remitted to the Appellate Tribunal for its decision.

5. Proviso appended to Section 68-C prior to its amendment stood as follows :

"Provided that no property shall be forfeited under this Chapter, if such property was acquired by a person to whom this Act applies before a period of six years from the date on which he was charged for an offence relating to illicit traffic."

Section 68-C, after the amendment, reads as under :

"Section 68C - Prohibition of holding illegally acquired property\027(1) As from the commencement of this Chapter, it shall not be

lawful for any person to whom this Chapter applies to hold any illegally acquired property either by himself or through any other person on his behalf.

(2) Where any person holds any illegally acquired property in contravention of the provisions of sub-section (1), such property shall be liable to be forfeited to the Central Government in accordance with the provisions of this Chapter:

Provided that no property shall be forfeited under this Chapter if such property was acquired, by a person to whom this Act applies, before a period of six years from the date he was arrested or against whom a warrant or authorisation of arrest has been issued for the commission of an offence punishable under this Act or from the date the order or detention was issued, as the case may be."

Indisputably, the Act was amended by Act No.9 of 2001 with effect from 2.10.2001.

6. An application purported to be for rectification having regard to the said amendment, was filed by the appellant before the Appellate Tribunal, inter alia, praying therein for setting aside its order dated 15.2.1999 as also the order of the competent authority dated 20.10.1997.

7. In the said purported application for rectification, the appellant raised the following contentions :

1. That prior to coming into force of the said Act, the Competent Authority had no jurisdiction to initiate any proceeding under the said Act against a citizen of India who had been residing out of the country.

2. That the proviso, as it stood prior to amendment, was ultra vires Article 14 of the Constitution of India.

The said application was dismissed by the Appellate Tribunal by an order dated 20.6.2002. A writ petition was filed thereagainst before the Bombay High Court which was marked as writ petition No.1283 of 2002.

By reason of the impugned judgment, the said writ petition has been dismissed.

8. Mr. Raju Ramachandran, learned senior counsel appearing on behalf of the appellant, at the outset, did not press the first contention raised before the Appellate Authority as also before the High Court.

The learned counsel, however, would submit that a classification made in a statute by way of under inclusion would not validate the proviso to Section 68E of the Act as it stood prior to 2001 insofar as there did not exist any valid or cogent reason for not providing the period of limitation of six years in respect of a person who was charged for commission of an offence relating to illicit traffic vis-à-vis a person who is sought to be detained under a preventive detention.

9. The learned counsel would submit that the show cause notice did not contain any reason which was required to be recorded in terms of Section 68E read with Section 68H of the NDPS Act, and, thus, the impugned judgment cannot be sustained.

Admittedly, the order of the Appellate Authority was the subject matter of the writ petition. The contentions raised herein were not raised before the said Authority or before the High Court.. The order of the High Court dated 15.12.1999 attained finality.

The flats in question stood forfeited to the State Government. The said proceedings cannot be permitted to be reopened.

10. Only because in relation to the bank accounts, the matter was remanded, during pendency whereof, the proviso appended to Section 68C was inserted, the same by itself, in our opinion, would not give rise to another cause of action so as to enable the appellant to raise the contentions which he could and ought to have raised in the earlier proceedings.

The principle of 'Constructive Res Judicata', it is trite, applies also to a writ proceeding. Furthermore, admittedly such a contention has not been raised even in the second writ application. The documents which were

necessary to be taken into consideration for determining the said question are also not before us. We, therefore, are of the opinion that it is not possible for us to go into the said question.

11. The 'Proviso' appended to Section 68C was in the statute book since 1989. Appellant's husband was served with an order of detention as far back as in the year 1994. The notice under Section 68D of the Act was issued in the year 1995.

12. Only because at a later stage, a period of limitation was prescribed for initiation of proceedings for forfeiture of the properties, the same, in our opinion, by itself would not be sufficient to arrive at a conclusion that the same attracts the wrath of Article 14 of the Constitution of India.

13. It is now well settled that validity of a statute can be upheld if there exists a valid and reasonable classification therefor, being based upon the substantial distinction bearing a reasonable and just relation with the object sought to be attained.

14. In this regard, we may notice some well settled legal principles. A law may be constitutional even though it affects an individual. There exists a presumption in favour of the constitutionality of an enactment. The burden of proof that the legislation is unconstitutional is upon the person who attacks it, save and except the cases where, inter alia, arbitrariness appears on the face of the statute and the burden of proof in regard to constitutionality of the statute is on the State. The principle of equality would not mean that every law must have universal application for all persons who, by nature, attainment or circumstances, are in the same position.

15. A law is amended by the Parliament having regard to its experience. It is a matter of legislative policy and for that purpose mere inequality cannot be the sole factor for determining the constitutionality of the impugned provision.

16. Whereas Article 14 forbids classification, it is trite, it does not forbid reasonable classification. {See M.P. Rural Agriculture Extension Officers Association v. State of M.P. & Anr. [(2004) 4 SCC 646]; and State of Bihar & Ors. v. Bihar State +2 Lecturers Associations & Ors. [(2007) 7 SCALE 697]}.

17. This court in State of West Bengal v. Anwar Ali Sarkar [AIR 1952 SC 75] as also Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar & Ors. [1959 SCR 279], categorically laid down the twin test of classification. The classification, however, should be based on reasonable and rational differentia and should not be arbitrary.

18. It is not a case where validity of the statute itself is in question. Ordinarily, a statute providing for 'under inclusion' would not be held to be attracting the wrath of Article 14. A Constitution Bench of this Court held so in State of Gujarat & Anr. v. Shri Ambika Mills Ltd. & Anr. [(1974) 4 SCC 656], in the following words:

"54. A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is: what does the phrase "similarly situated" mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good.

55. A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under-inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification

is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring about his downfall employed such a classification.

56. The first question, therefore, is, whether the exclusion of establishments carrying on business or trade and employing less than 50 persons makes the classification under-inclusive, when it is seen that all factories employing 10 or 20 persons, as the case may be, have been included and that the purpose of the law is to get in unpaid accumulations for the welfare of the labour. Since the classification does not include all who are similarly situated with respect to the purpose of the law, the classification might appear, at first blush, to be unreasonable. But the Court has recognised the very real difficulties under which legislatures operate \027 difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to re-shape \027 and it has refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration. Mr. Justice Holmes, in urging tolerance of under-inclusive classifications, stated that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched. What, then, are the fair reasons for non-extension? What should a court do when it is faced with a law making an under-inclusive classification in areas relating to economic and tax matters? Should it, by its judgment, force the legislature to choose between inaction or perfection?"

The said ratio was followed by this Court in *The Superintendent and Remembrancer of Legal Affairs, West Bengal v. Girish Kumar Navalakha and Ors.* [(1975) 4 SCC 754, holding:

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

It was furthermore held :

"10. There are two main considerations to justify an under-inclusive classification. First, administrative necessity. Second, the legislature might not be fully convinced that the particular policy which it adopts will be fully successful or wise. Thus to demand application of the policy to

all whom it might logically encompass would restrict the opportunity of a State to make experiment. These techniques would show that some sacrifice of absolute equality may be required in order that the legal system may preserve the flexibility to evolve new solutions to social and economic problems. The gradual and piecemeal change is often regarded as desirable and legitimate though in principle it is achieved at the cost of some equality. It would seem that in fiscal and regulatory matters the court not only entertains a greater presumption of constitutionality but also places the burden on the party challenging its validity to show that it has no reasonable basis for making the classification."

19. The statute deals with an economic aspect of the matter. The purported object for which such a statute has been enacted must be noticed in interpreting the provisions thereof. The nexus of huge amount of money generated by drug trafficking and the purpose for which they are spent is well known. Harsh laws, not only for punishing the drug traffickers but also for preventive detention, if the conditions therefor are satisfied, were made. Necessity was felt for introduction of strict measures so that money earned from the drug trafficking by the persons concerned may not continue to be invested, inter alia, by purchasing moveable or immoveable properties not only in his own name but also in the names of his near relatives. This case, itself throws sufficient light as to why the Parliament thought it fit to exclude the applicability of the provisions of the period of limitation in the matter of initiation of proceedings for forfeiture of properties.

20. The Union of India and the State of Maharashtra have not been able to serve even the order of detention upon the husband of the appellant. There may be a large number of other cases of that nature. A person might have committed only one time offence, another not only may be an offender but also might have been indulging in drug trafficking for a long time. Whereas in the former an order of preventive detention may not be necessary, in case of the latter, it may be found to be necessary. The distinction although appears to be fine, but real.

21. This Court in *Re : The Special Courts Bill, 1978* [(1979) 1 SCC 380, held that the offences which were emergency related form a class of offences, stating :

"72. As long back as in 1960, it was said by this Court in *Kangsari Halder* that the propositions applicable to cases arising under Article 14 "have been repeated so many times during the past few years that they now sound almost platitudinous". What was considered to be platitudinous some 18 years ago has, in the natural course of events, become even more platitudinous today, especially in view of the avalanche of cases which have flooded this Court. Many a learned Judge of this Court has said that it is not in the formulation of principles under Article 14 but in their application to concrete cases that difficulties generally arise. But, considering that we are sitting in a larger Bench than some which decided similar cases under Article 14, and in view of the peculiar importance of the questions arising in this reference, though the questions themselves are not without a precedent, we propose, though undoubtedly at the cost of some repetition, to state the propositions which emerge from the judgments of this Court insofar as they are relevant to the decision of the points which arise for our consideration. Those propositions may be stated

thus:

The Court noticed as many as thirteen propositions, some of which are:

"(2) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

(3) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

(4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

XXX

XXX

XXX

(11) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different

from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality."

22. In view of the settled legal position as noticed above, we are of the opinion that no case has been made out for us to invoke Article 14 of the Constitution of India so as to hold that the proviso amended in the year 2001 shall also apply to the present category of cases. Accordingly, the appeal is dismissed with costs. Counsel's fee assessed to Rs.50,000/- (Rupees fifty thousand only)

JUDIS