Rayala Corporation (P) Ltd. & Ors vs Director Of Enforcement, New Delhi on 23 July, 1969

Equivalent citations: 1970 AIR 494, 1970 SCR (1) 639

Author: Vishishtha Bhargava

Bench: Vishishtha Bhargava, J.M. Shelat, C.A. Vaidyialingam, K.S. Hegde, A.N. Grover

PETITIONER:
RAYALA CORPORATION (P) LTD. & ORS.

Vs.

RESPONDENT:
DIRECTOR OF ENFORCEMENT, NEW DELHI

DATE OF JUDGMENT:
23/07/1969

BENCH:
BHARGAVA, VISHISHTHA
BENCH:
BHARGAVA, VISHISHTHA
SHELAT, J.M.
VAIDYIALINGAM, C.A.
HEGDE, K.S.
GROVER, A.N.

CITATION:
1970 AIR 494 1970 SCR (1) 639
1969 SCC (2) 412
CITATOR INFO :
R 1970 SC 549 (3,6,20,24,28)
RF 1971 SC1511 (6)
R 1979 SC1588 (14)

ACT:
Foreign Exchange Regulation Act (7 of 1947), and Foreign Exchange Regulation (Amendment) Act (39 of 1957), ss.'4(1), 23(1) and 23D(1) --Section 23(1)(b), if ultra vires Art. 14-- Scope of proviso to s. 23(D)(1)Defence of India Rules, 1962 R. 132A--Omission by Notification-If prosecution permissible for offence committed when Rule was in existence.

HEADNOTE:

The premises of the first appellant were raided by the Enforcement Directorate and certain records were seized. The second appellant was the first appellant's managing director. Thereafter, on 25th August 1967, notice was issued by the respondent to the two appellants to show cause within fourteen days why adjudication proceedings should not be instituted against them under s. 23D(1) of the Foreign Exchange Regulation Act, 1947, for violation of ss. 4 and 9 of the Act, on the allegation that 2,44,713.70 Swedish Kronars had been deposited by them in a bank account in Sweden instead of surrendering the foreign exchange to an authorised dealer as required by the Act. After investigation, on 4th November 1967, another notice was issued to the second appellant stating that out of the total sum mentioned, he had acquired, during 1963 to 1965, Sw. Kr. 88,913.09, that he held the amount in a bank in Sweden instead of offering it to the Reserve Bank of India and thereby contravened ss. 4(1) and 9 of the Act, and asking him to show if he had any special exemption for acquiring the foreign exchange. A similar show cause notice was issued to the first appellant in. respect of the same amount on 20th January 1968. On 16th March 1968, in supersession of the show cause notice dated 25th August 1967, a further notice was addressed to both the appellants to show cause within 14 days why adjudication proceedings under s. 23D of the Act should not be held against them in respect of the balance of Sw. Kr. 1,55,801.41 and added that it had since been decided to launch a prosecution in respect of the Sw. Kr. 88,913.09 and on the 17th March 1968 a complaint was filed against both the 'appellants in the Chief Presidency Magistrate's Court for contravention of ss. 4(1), 5(1)(e) and 9 of the Act, punishable under s.. 23(1)(b) of Act, and for violation rule 132A(2) of the Defence of India Rules, 1962, punishable under rule 132A(4). Thereupon, the appellants fried 'applications in the High Court under s. 561A, Criminal Procedure Code, for quashing the proceedings in the Magistrate's court, but the applications were dismissed.

In appeal to this Court, it was contended that: (1) The punishment under s. 23(1)(b) is severer and heavier than the penalty to which a person is made liable if adjudication proceedings are taken under s. 23(1)(a), but the section lays down no principles at all for determining when the person concerned should be proceeded against,under s. 23(1)(a) and when under s. 23(1)(b) and has left it to the arbitrary discretion of the respondent 'and hence violates Aft. 14 of Constitution; (2) Even if s. 23(1)(b) is not void the respondent did not act in 'accordance with the

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requirements of the proviso to s. 23D(1)which lays down that a con plaint may be made at any stage of the enquiry, but

only if, having regarto the circumstances of the case, the Director of Enforcement finds the the penalty which 'he is empowered to impose under s. 23(1)(a) would not be adequate; and (3) Since the Notification issued by the Ministry of Home Affairs dated 30th March 1965 provided that R. 132A shall be omitted except 'as respects things done or omitted to be done under that Rule, a prosecution in respect of an offence punishable under that Rule could not be instituted on 17th March 1968 when that Rule had ceased to exist even though it might be in respect of an offence committed earlier during the period that the rule was in force.

HELD: (1) The choice whether the proceeding be taken under s. 23(1)(a) or 23(1)(b) against the person who is liable for action for contravention under s. 23(1), is not left entirely to the discretion of the Director of Enforcement but the criterion for making the choice is indicated in the proviso to s. 23D(1). [648 A-B]

The Foreign Exchange Regulation (Amendment) Act, 1957, amended s. 23(1) and at the same also, introduced s. 23D. The intention of the Legislature from such simultaneous amendment was that the two sections are to be read together. While providing for alternative proceedings under s. 23(1)(a) and s. 23(1)(b), the Legislature ensured that the procedure laid down in s. 23D(1) was to be followed in all cases in which proceedings are intended to be taken under s. 23 (1). Thus, whenever there is any contravention of any section or rule mentioned in s. 23 (1) the Director of Enforcement must first proceed under the principal clause of s. 23D(1) and initiate proceedings for adjudication of penalty. He cannot at that stage, in his discretion, choose to file a complaint in a court for prosecution of the person concerned for the offence under s. 23(1)(b). Though the Legislature has not used in either of the sub-sections specific words excluding the filing of a complaint before proceedings for adjudication are taken under s. 23D(1), it must be presumed that Parliament knew that if provision was made for two alternative punishments for the same act, one differing from the other, and without any limitations, such a provision would be void under Art. 14. In view of the principle that an interpretation which would save a section should be preferred ss. 23(1) and 23D(1) must be interpreted to mean that the Director of Enforcement must first initiate proceedings under the principal clause of s. 23D(1) for adjudication of penalty and that he is empowered to file a complaint in court for the offence under s. 23(1)(b) only when at any stage of the adjudication enquiry,, he 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. [647 D, F--H; 648 E--H; 649 A--C]

Shanti Prasad Jain v. The Director of Enforcement,. [1963] 2 S.C.R. 297;. followed.

(2) When such a safeguard is provided by the Legislature it is necessary that the authority, which takes the steps of

instituting against that person proceedings, in which, a severer punishment can be awarded, complies strictly with all the conditions laid down by law, that is, the Director could file a complaint for prosecution in court only if, having regard to the circumstances of the case, he finds that the. penalty that he is empowered to impose in the adjudication proceedings would not be adequate. [650 G-H] .

In the present case, the enquiry had been instituted by the issue of the show cause notice dated 25th August 1967. But it does not appear on

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the record that even after the issue of that notice, any such material came .before the respondent which could be relevant for forming an opinion that the penalty which he. was empowered to impose for the contravention in respect Sw. Krs. 88,913.09 would not be adequate. No doubt some investigation was made, but the investigation would not be part of the enquiry which had to be held in accordance with the Act and the Adjudication Proceedings and Appeal Rules, 1957. Neither of the appellants had shown cause in pursuance of the notice and there was no consideration, of such cause to decide whether adjudication proceedings should be held or not. Nor were any statements taken or recorded during an enquiry under s. 23D(1). Whatever statements were recorded were in the course. of investigation and not in the course of an enquiry under s. 23D(1). Therefore, the complaint must be held to have been filed without satisfying the requirements and conditions of the proviso to s. 23D(1) of the Act, and in .so far as it related to the contravention of the provisions of ss. 4(1), 5(1)(e) and 9 of the Act, punishable under s. 23(1)(b), it must be held invalid. [651 D-E; 652 C-D, F-G; 653 B-D]

(3) The language used in the Notification of 30th March 1965 only affords protection to action already taken while the rule was in force, but cannot justify initiation of a new proceeding which will not be a thing done or omitted to be done under the rule but, a new act of initiating, a proceeding after the rule had ceased to exist. The offence alleged against the appellants is in respect of acts done by them which cannot be held to be acts under that rule. Unlike case of Wicks v. Director of Public Prosecutions, [1947] A.C. 362, where an express provision was made. that the operation of the Emergency Powers (Defence) Act, 1939 (a temporary Act) was not to be affected by its expiry as respects things, previously done or omitted to, be done, in. the present case, the operation of r. 132A of the Defence of India Rules has not been continued after its omission. Section 6 of the General Clauses Act, 1897, also could not be invoked,. because, the section does not apply to temporary statutes, or rules and omissions. It only applies to repeals to. Central Acts. Further, the Notification of the Ministry of Home Affairs omitting R. 132A, did not make

any such provision similar to that contained in s. 6 of the General Clauses Act. Moreover, though s. 4(1) of the Foreign Exchange Regulation Act was amended simultaneously with the omission of the r. 132A, the Legislature did not make any provision that an offence previously committed, under r. 132A would continue to remain punishable as an offence of contravention of s. 4(1) of the Act nor was any provision made permitting operation of r. 132A itself to permit institution of prosecutions in respect of such offences. Consequently, after the omission of r. 132A the complaint is, incompetent even in respect of the offence under Rule 132A(4). [654 A--D; 655 F H; 656 B--C, E--F; 657 A F]

S. Krishnan & Ors. v. The State of Madras, [1951] S.C.R. 621, applied.

State of M.P.v. Hiralal Sutwala, A.I.R. 1959 M.P. 93, 1. K. Gas: Plant Manufacturing Co. Ramput v. The King Emperor, [1947] F.C.R. 141, distinguished.

Seth Jugmendar Das v. State, A.I.R. 1951 All. 703, referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeals Nos. 18 and 19 of 1969.

Appeal from the judgment and order dated October 16, 1968' of the Madras High Court in Criminal Misc. Petition No. 980 of 1968.

A.K. Sen, N.C. Raghavachari, W.S. Sitaram and R. Gopalakrishnan, for the appellants.

S.T. Desai, B.D. Sharma and S. P. Nayar., for the respondent.

P.R. Gokulakrishnan, Advocate-General, Tamil Nadu and V. Rangam, for the intervener.

Bhargava, J. These appeals, by certificate, challenge a .common Order of the High Court of Madras dismissing applications under section 561A of the Code of Criminal Procedure presented by the appellants in the two appeals for quashing proceedings being taken against them in the Court of the Chief Presidency Magistrate, Madras, on the basis of a complaint filed on 17th March; 1968 by the respondent, the Director of Enforcement, New Delhi. The Rayala Corporation Private Ltd., appellant in Criminal Appeal No. 18 of 1969, was accused No. 1 in the complaint, while one M.R. Pratap, Managing Director of .accused No. 1, appellant in Criminal Appeal No. 19/1969 was accused No. 2. The circumstances under which the complaint was filed may be briefly stated.

The premises of accused No. 1 were raided by the Enforcement Directorate on the 20th and 21st December, 1966 and certain records were seized from the control of the Manager. Some enquiries were made subsequently and, thereafter, on the 25th August, 1967, a notice was issued by the

respondent to the two accused to show cause why adjudication proceedings should not be instituted against them for violation of sections 4 and 9 of the Foreign Exchange Regulation Act VII of 1947 (hereinafter referred to as "the Act") on the allegation that a total sum of 2,44,713.70 Swedish Kronars had been deposited in a Bank account in Sweden in the name of accused No. 2 at the instance of accused No. 1 which had acquired the foreign exchange and had failed to surrender it to. an authorised dealer as required under the provisions of the Act. They were called upon to show cause in writing within 14 days of the receipt of the notice. Thereafter, some correspondence went on between the respondent and the two accused and, later, on 4th November, 1967, another notice was issued by the respondent addressed to accused No. 2 alone stating that accused No. 2 had acquired a sum of Sw. Krs. 88,913.09 during the. period 1963 to 1965 in Stockholm, was holding that sum in a bank account, and did not offer or cause it to be offered to the Reserve Bank of India on behalf of the Central Government, so that he had contravened the provisions of s. 4(1) and s. 9 of the Act, and affording to him. an opportunity under s. 23(3) of the Act of showing, within 15 days from the receipt of the notice, that he had permission or special exemp-

tion from the Reserve Bank of India in his favour for acquiring this amount of foreign exchange ,and for not surrendering the amount in accordance with law. A similar show cause notice was issued to accused No. 1 in respect of the same amount on 20th January, 1968, mentioning the deposit in favour of accused No. 2 and failure of accused No. 1 to surrender the amount, and giving an opportunity to accused No. 1 to produce the permission or special exemption from the Reserve Bank of India. On the 16th March, 1968, another notice was issued addressed to both the accused to show cause in writing. within 14 days of the receipt of the notice why adjudication proceedings as contemplated in s. 23-D of the Act should not be held against them in respect of a sum of Sw. Krs. 1,55,801.41 which were held in a bank account in Stockholm in the name of accused No. 2 and in respect of which both the accused had contravened the provisions of ss. 4(3), 4(1), 5(1)(e) and 9 of the Act. The notice mentioned that it was being issued in supersession of the first show cause notice dated 25th August, 1967, ,and added that it had since been decided to launch a prosecution in respect of Sw. Krs. 88,913.09. The latter amount was the amount in respect of which the two notices of 4th November, 1967 and 20th January, 1968 were issued to the two accused, while this notice of 16th March, 1968 for adjudication proceedings related to the balance of the amount arrived at by deducting this sum from the original total sum of Sw. Krs. 2,44,71-3.70. The next day, on 17th March, 1968, a complaint was filed against both the accused in the Court of the Chief PresidenCy Magistrate, Madras, for contravention of the provisions of ss. 4(1), 5(1) (e) and 9 of the Act punishable under s. 23 (1) (b) of the Act. In addition, the complaint also charged both the accused with violation of Rule 132-A(2) of the Defence of India. Rules (hereinafter referred to as "the D.I. Rs.") Which was punishable under Rule 132-A(4) of the said Rules. Thereupon, both the accused moved the High Court for quashing the proceedings sought to be taken against them on the basis of this complaint. Those applications having been dismissed, the appellants have come up in these appeals challenging the order of the High Court dismissing their applications and praying for quashing of the proceedings being taken on the basis of that complaint.

In these appeals. Mr. A.K. Sen, appearing on behalf of the appellants, has raised three points. In respect of the prosecution for violation of ss. 4(1), 5(1)(e) and 9. of the Act punishable under s. 23 (1) (b) of the Act, the principal ground raised is that s. 23(1)(b) of the Act is ultra rites Article 14 of the

Constitution inasmuch as it provides for a punishment heavier and severer than the punishment or penalty provided for the same acts under s. 23(1)(a) of the Act. In the alternative, the second point taken is that, even if s. 23 (1) (b) is not void, the complaint in respect of the offences punishable under that section has not been filed properly in accordance with the proviso to s. 23-D (1) of the Act, so that proceedings cannot be competently taken on the basis of that complaint. The third point raised relates to the charge of violation of R. 132-A(2) of the D.I. Rs. punishable under R. 132-A(4) of those Rules and is to the effect that R. 132-A of the D.I. Rs. was omitted by a notification of the Ministry of Home Affairs dated 30th March, 1965 and, consequently, a prosecution in respect of an offence punishable under that Rule could not be instituted on 17th March, 1968 when that Rule had ceased to exist. On these three grounds, the order quashing the proceedings being taken on the complaint in respect of all the offences mentioned in it has been sought in these appeals.

To appreciate the first point raised before us and to. deal with it properly, we may reproduce below the provisions of s. 23 and s. 23-D(1) of the Act :--

> "23. Penalty and procedure.--(1) If any person contravenes the provisions of section 4, section 5, section 9, section 10, sub- section. (2) of section 12, section 18, section 18A or section 18B 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
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> (b) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.
>
> (IA) If any person contravenes any of the provisions of this Act, or of any rule, direction or order made thereunder, for the contravention of which no penalty is expressly provided, he shall, upon conviction by a court be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.
>
> (lB) Any Court trying a contravention under sub-section (1) or sub-section (IA) and the authority adjudging any contravention under clause (a) of sub- section (1) may, if it thinks fit, and in addition to any sentence or penalty which it may impose for such contravention, direct that any currency, security, gold or silver, or goods or any other money or property, In respect of which the contravention has taken place, shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the person committing the contravention or any part thereof shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

Explanation. For the purposes of this sub-section, property in respect of which contravention has taken place shall include deposits in a bank, where the said property is converted into such deposits.

(2) Notwithstanding anything, contained in section 32 of the Code of Criminal Procedure, 1898 (Act 5 of 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 (aa) of any offence punishable under sub-

section (2) of section 191,--

(i) where the offence is alleged to have been committed by an officer of Enforcement not lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Central Government;

(ii) Where the offence is alleged to have been committed by a Officer of Enforcement lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Director of Enforcement, or;

(b) of any offence punishable under sub-

section (IA) of this section or section 23F, except upon complaint in writing made by the Director of Enforcement or any officer authorised in this behalf by the Central Government or the Reserve Bank by a general or special order;

Provided that where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder 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 had such permission.

(4) Nothing in the first proviso to section 188 of the Code of Criminal Procedure, 1898 (Act 5 of 1898), shall apply to any offence punishable under this section."

23D. Power to adjudicate.--(1) For the purpose of adjudging under' clause (a) of sub-section (1) of section 23 whether any person has committed 'a contravention, the Director of Enforcement shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity of being heard and if, on such inquiry, 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 inquiry, 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."

A plain reading of s. 23 (1) of the Act shows that under this sub-section provision is made for action being taken against any per-son who contravenes the provisions. of ss. 4, 5, 9, 10, 12(2), 18,18A or 18B or of any rule, direction or order made thereunder;and cls. (a) and (b) indicate the two different proceedings that can be taken for such contravention. Under cl. (a), the person is liable to a penalty only, and that penalty cannot exceed three times the value of the foreign exchange in respect of which the contravention has taken place, or Rs. 5,000/-, whichever is more.This penalty can be imposed by an adjudication made by the Director of Enforcement in the manner provided in s. 23D of the Act. The alternative punishment that is provided in cl. (b) is to be imposed upon conviction by a Court when the Court can sentence the person to imprisonment for a term which may extend to two years, or with fine, or with both. Clearly, the punishment provided under s.. 23 (1)(b) is severer and heavier than the penalty to which the person is made liable if proceedings are taken under s. 23(1)(a) instead of prosecuting him in a Court under s. 23 (1)(b). The argument of Mr. Sen is that this section lays down no principles at all, for determining when the per-son concerned should be proceeded 'against under s. 23(1)(a) and when under 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 Art. 14 of the Constitution.

The submission made would have carried great force with us but for our view that the effect of s. 23D of the Act is that the choice in respect of the proceeding to be taken under s. 23(1)(a) or s,. 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 this connection, it is pertinent to note that s. 23 (1) of the Act 'as origin.ally enacted in 1947 did not provide for alternative punishment for the same contravention and contained only one single provision under which any person contravening any of the provisions of the Act or of any rule, direction or order made thereunder was punishable with imprisonment for a term which could extend to two, years or with fine or with bOth, with the additional clause that any Court trying any such contravention might, if it thought fit and in addition to any sentence which it might impose for such contravention, direct that any currency, security, gold or silver, or goods or other property in respect of which the contravention has taken place shall be confiscated. No question of the applicability of Art. 14 of the Constitution could, therefore, 'arise while the provision stood as originally enacted.

Parliament, by Foreign Exchange Regulation (Amendment) Act XXXIX of 1957, amended s. 23(1) and, at the same time, also introduced s. 23D in the Act. It was by this amendment that two alternative proceedings for the same contravention were

provided in s. 23 (1). In thus introducing two different proceedings, Parliament put in the forefront proceedings for penalty to be taken by the Director of Enforcement by taking up adjudication, while the punishment to be awarded by the Court upon conviction, was mentioned as the second type of proceeding that could be resorted to. Section 23D(1) is also divisible into two parts. The first part lays down what the Director of Enforcement has to do in order to adjudge penalty under s. 23 (1) (a), and the second part, contained in the proviso, gives the power to the Director of Enforcement to file a complaint instead of imposing a penalty himself. In our opinion, these two ss. 23(D and 23D(1) must be read together, so that the procedure laid down in s. 23D(1) is to be followed in all cases in which proceedings are intended to be taken under s. 23 (1). The effect of this interpretation is that, whenever there is any contravention of any section or rule mentioned in s. 23(1), the Director of Enforcement must first proceed trader the principal clause of s. 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 under s.

23(1)(b). The Director of Enforcement can only file a complaint by acting Ll4Sup./69--12 in accordance with the proviso to S. 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 under s. 23 (1) (b). The choice of the proceeding to be taken against the person, who is liable for action for contravention under 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 s. 23D(1). It cannot possibly be contended, and no attempt was made by Mr. Sen to contend, that, if we accept this interpretation that the right of the Director of Enforcement to make a complaint to the Court for the offence under s. 23 (1) (b) can be exercised only in those cases where in accordance with the proviso, he comes to the opinion that the penalty which he is empowered to impose would not be adequate, the validity of S. 23 (1) (b) of the Act can still be challenged. In this connection, it was urged before us that the language of the principal clause of s. 23D(1) taken together with the language of the proviso does not justify an interpretation that a complaint for an offence under S. 23 (1) (b) cannot be made by the Director of Enforcement except in accordance with the proviso, particularly because the principal clause of S. 23D(1) merely lays down the procedure that has to be adopted by the Director Of Enforcement when proceeding under S. 23 (1) (a), and contains no. words indicating that such a proceeding must invariably be resorted to by him whenever he gets information of a contravention mentioned in s. 23(1). The language does not contain any ,words creating a bar to his proceeding to file a complaint straightaway instead of taking proceedings for adjudication under S. 23D(1). It is true that neither in S. 23(1) itself nor in S. 23D(1) has the Legislature used specific words excluding the filing of a complaint before proceedings for -adjudication are taken under S. 23D(1). If any such words had been used, no such controversy could have been raised as has been put forward before us in these appeals. We have, however, to gather the intention of the Legislature from the enactment as a whole. In this connection, significance -attaches to the fact that S. 23D(1) was introduced simultaneously

with the provision made for alternative proceedings under S. 23 (1) in its two cls. (a) and (b). It appears to be obvious that the Legislature adopted this course so as to ensure that all proceedings under S. 23(1) are taken in the manner laid down in S. 23D(1). 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 Art. 14 of the Constitution; and that is the reason why Parliament simultaneously introduced the procedure to be adopted under 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. We have also to keep in view the general principle of interpretation that, if a particular interpretation will enure to the validity of a law, that interpretation must be preferred. In these circumstances, we have no hesitation in holding that, whenever there is a contravention by .any person which is made punishable under either cl. (a)or cl. (b) of s. 23(1), the Director of Enforcement must first initiate proceedings under the principal clause of s..23D(1) and he is empowered to file a complaint in Court only when he finds that he is required to do so in accordance with the proviso. It is by resorting to the proviso only that he can place that person in greater jeopardy of being liable to a more severe punishment under s. 23(1)(b) of the Act. The view we have taken is in line with the decision of this Court in Shanti Prasad Jain v. The Director of Enforcement(1), where this Court considered the validity of s. 23(1)(a) and s. 23D which were challenged on the ground of two alternative procedures being applicable for awarding punishment for the same act. The Court noticed the position in the following words :--

> "It will be seen that when there is a contravention of s. 4 (1), action with respect to it is to be taken in the first instance by the Director of Enforcement. He may either adjudge the matter himself in accordance with s. 23(1)(a), or he may send it on to a Court if he considers that a more severe penalty than he can impose is called for. Now, the contention of the appellant is that when the case is. transferred to a Court, it will be tried in accordance with the procedure prescribed by the Criminal Procedure Code, but that when the Director himself tries it, he will follow the procedure prescribed therefor under the Rules framed under the Act, and that when the law provides for the same offence being tried under two procedures, which are substantially different, and it is left to the discretion of an executive officer whether the trial should take place under the one or the other of them, there is clear' discrimination, and Art. 14 is contravened. Therefore, s. 23(1)(a) must, it is argued, be struck down as unconstitutional and the imposition of fine on the appellant under that section set aside as illegal."

(1)" [1963] 2 S.C.R. 297.

The Court then distinguished the provisions of the Act with the law considered in the case of State of West Bengal v. Anwar A1i(1) and held -.-

> "Section 23D 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."

On this view about the effect of S. 23D, the Court gave the decision that the power conferred on the Director of Enforcement under S. 23D to transfer cases to a Court is not unguided and arbitrary, and does not offend Art. 14 of the Constitution; and s. 23 (1) (a) cannot be assailed as unconstitutional. In that case, the argument was that s. 23(1)(a) should be struck down, because the procedure prescribed by it permitted proceedings to be taken by the Director of Enforcement himself which procedure did not confer the same rights on the defence as the procedure prescribed for trial if the Director of Enforcement filed a complaint for the offence under s. 23 (1) (b). In the case before us, it is s. 23(1)(b) which is challenged and on a slightly different ground that it provides for a higher punishment than that provided by S. 23 (1) (a). The answer to both the questions is found in the view taken by us in the present case as well as by this Court in the case of Shanti Prasad Jain(2) that the Director of Enforcement, though he has power to try the case under S. 23 (1) (a), can only send the case to the Court if he considers that a severer punishment than what he is authorised to impose should be awarded. The Court in that case also thus accepted the principle that S. 23D limits entirely the procedure the Director of Enforcement has to observe when deciding whether the punishment should be under s. 23 (1)

(a) or under S. 23 (1) (b).

However, we consider that, in this case, there is considerable force in the second point urged by Mr. Sen on behalf of the appellants that the respondent, in filing the complaint on 17th March, 1968, did not act in accordance with the requirements of the proviso to s. 23D(1). We have held above that the proviso to S. 23D(1) lays down the only manner in which the Director of Enforcement can make a complaint and this provision has been laid down as a safeguard to ensure that a person, who is being proceeded against for a contravention under S. 23(1), is not put in danger of higher and severer punishment at the choice and sweet-will of the Director of Enforcement. When such a safeguard is provided by legislature, it is necessary that the authority, which takes the step of instituting against that person proceedings in which a severer punishment can be awarded, complies strictly (1) [1952] S.C.R. 284.

(2) [19631 2 S.C.R. 297.

with all the conditions laid down by law to be satisfied by him before instituting that proceeding. in the present case, therefore, we have to see whether the requirements of the proviso to s. 23D(1) were satisfied at the stage when the respondent filed the impugned complaint on 17th March, 1968.

The proviso 'to s. 23D(1) lays down that the complaint may be made at any stage of the enquiry but only if, having regard to the circumstances, of the case, the Director of Enforcement finds that the penalty which he is empowered to impose would not be adequate. It was urged by Mr. Sen that, in this case, the complaint was not filed as a result of the enquiry under the principal clause of s. 23D(1) at all and, in any case, there was no material before the respondent on which he could have formed the opinion that the penalty which he was empowered to impose would not be adequate in respect of the stun of Sw. Krs. 88,913.09 which, it was alleged, had been acquired by the two accused during the period 1963 to 1965 and kept in deposit against law. Arguments at some length were advanced before us on the question as to what should be the stage of the enquiry at which the

Director of Enforcement should form his opinion and will be entitled to file the complaint in Court. It appears to us that it is not necessary in this case to go into that question. It is true that the enquiry in this case under s. 23D(1) had been instituted by the issue of the show cause notice dated 25th August, 1967, that being the notice mentioned in Rule 3 (1) of the Adjudication Proceedings and Appeal Rules, 1957. On the record, however, does not appear that, even after the issue of that notice, any such material came before the respondent which could be relevant for forming an opinion that the penalty which he was empowered to impose for the contravention in respect of the sum of Sw. Krs. 88,913.09 would not be adequate. The respondent, in the case of accused No. 2, appears to have formed 'a prima. facie opinion that a complaint should be made against him in Court when he issued the notice on 4th November, 1967 under the proviso to s. 23(3) of the Act, and a similar opinion in respect of accused No. 1 when he issued the notice on 20th January, 1968 under the same proviso. There is, however, no information on the record to indicate that, by the time these notices were issued, any material had appeared before the respondent in the course of the enquiry initiated by him through the notice dated 25th August, 1967 which could lead to the opinion being formed by the respondent that he will not be in a position to impose adequate penalty by continuing the ,adjudication proceedings. Even subsequently, when one of the accused replied to the notice, there does not appear to have been brought before the respondent any such relevant material. Mr. S.T. Desai on behalf of the respondent drew our attention to para. 3(E) of the petition presented by accused No. 1 for certificate under Art. 132(1) and Art. 134(1)(c) of the Constitution in this case which contains the following pleading :

> "In this case, having issued show cause notice dated 25-8-67 in respect of the subject matter of the pending prosecution and having taken various acts, taking statements, taking recorded statements, investigations, the respondent did not hold an enquiry for the purpose of his forming an opinion that the accused is guilty of violations and that the penalty is not adequate and as such, the prosecution filed in C.C. 8756 of 68 is liable to be quashed on this ground."

Relying on this pleading, Mr. Desai urged that it amounts to a admission by accused No. 1 that, during enquiry, various statements were taken and recorded and investigations made, so that we should not hold that there was no material on the basis of which the respondent could' have formed the opinion that it was a fit case for making a complaint. The pleading does not show that any statements were taken or recorded during the course to the enquiry held under s. 23D(1) of the Act in the manner laid down by the Adjudication Proceedings and Appeal Rules, 1953 Under those Rules, after a notice is issued, the Director of Enforcement is required to consider the cause shown by such person in response to the notice and, if he is of the opinion that adjudication proceedings should be held, he has to fix a date for the appearance of that person either personally or through his lawyer or other authorised representative. Subsequently, he has to explain that the person proceeded against or his lawyer or authorised representative the offence alleged to have been committed by such person indicating the provisions of the Act or of the rules, directions or orders made thereunder in respect of which contravention is alleged to have taken place, and then he has to give an opportunity to such person to produce such documents or evidence a he may consider relevant to the inquiry. It is on the conclusion of such an inquiry that the Director can impose a penalty under s. 23(1)(a). In the present case, there is no material at all show that any proceedings

were taken in the manner indicate by the Rules referred to above. There does not appear to has been any cause shown by either of the two accused, or consideration of such cause by the respondent to decide whether adjudication proceedings should be held. It is true that there is some material to indicate that, after the issue of notice dated 25-8-1967, some investigations were carried on by the respondent; but these investigations would not be part of the inquiry which had to be held in accordance with Adjudication Proceedings and Appeal Rules, 1957. It appears that, at one stage, before the complaint was filed, a writ petition was moved under Art. 226 of the Constitution in the High Court of Madras praying for the quashing of the notice dated 25th August, 1967. The order made' by the High Court on one of the interim applications in connection with that notice shows that, while that writ petition was pending, some investigations were permitted by the Court, but further penal proceedings in pursuance of that notice were restrained. This clearly indicates that whatever statements were recorded by the respondent as mentioned in the petition of accused No. 1 referred to above must have been in the course of investigation and not in the course of the inquiry under s. 23D (1) of the Act. The record before us, therefore, does not show that any material at all was available to the respondent in the course of the enquiry under s. 23D(1) on the basis of which he could have formed an opinion that it was a fit case for making a complaint on the ground that he would not be able to impose adequate penalty. The complaint has, therefore, to be held to have been filed without satisfying the requirements and conditions of the proviso to. s. 23D(1) of the Act and is in violation of the safeguard provided by the Legislature for such contingencies. The complaint, insofar as it related to the contravention by the accused of provisions of ss. 4 (1), 5 (1) (e) and 9 of the Act punishable under s. 23(1)(13) is concerned, is invalid and proceedings being taken in pursuance of it must be quashed.

There remains for consideration the question whether proceedings could be validly continued on the complaint in respect of the charge under R. 132A(4) of the D.I.Rs. against the two accused. The two relevant clauses of Rule 132A are as follows:

> "132A. (2) No person other than an authorised dealer shall buy or otherwise acquire or borrow from, of sell or otherwise transfer or lend to, or exchange with, any person not being an authorised dealer, 'any foreign exchange.
>
> . . . . . .
>
> (4) If any person contravenes any of the provisions this rule, he shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both; and any court trying such contravention may direct that the foreign exchange in respect of which the court is satisfied that this rule has been contravened, shall be forfeited to the Central Government."

The charge in the complaint against the two accused was that they had acquired foreign exchange to the extent of Sw. Krs. 88,913.09 in violation of the prohibition contained in R. I32A(2) during the period when this Rule was in force, so that they became liable to punishment under R.132A(4). Rule 132-A as a whole ceased to be in existence as a result of the notification issued by the Ministry of Home Affairs on 30th March, 1955, by which the Defence of India (Amendment) Rules, 1965 were

promulgated. Clause 2 of these Amendment Rules reads as under :--

> "In the Defence of India Rules, 1962, rule 132A (relating to prohibition of dealings in foreign exchange) shall be omitted except as respects things done or omitted to be done under that rule."

The argument of Mr. Sen was that, even if there was a contravention of R. 132A(2) by the accused when that Rule was in force, the act of contravention cannot be held to be a "thing done or omitted to be done under that rule," so that, after that rule has been omitted, no prosecution in respect of that contravention can be instituted. He conceded the .possibility that, if a prosecution had ,already been started while R. 132A was in force, that prosecution might have been competently continued. Once the Rule was omitted altogether, no new proceeding by way of prosecution could be initiated even though it might be in respect of an offence committed earlier during the period that the rule was in force. We are inclined to agree with the submission of Mr. Sen that the language contained in' el. 2 of the Defence of India (Amendment) Rules, 1965 can only afford protection to action already taken while the rule was in force, but cannot justify initiation of a new proceeding which will not be a thing done or omitted to be done under the rule but a new act of initiating a proceeding after the rule had ceased to exist. On this interpretation, the complaint made for the offence under R. 132A(4) of the D.I. Rs., after 1st April, 1965 when the rule was omitted, has to be held invalid.

This view of ours is in line with the general principle enunciated by. this Court in the case of S. Krishnan and Others' v. The State of Madras(1), relating to .temporary enactments, in, the following words :--

> "The general rule in regard to a temporary statute is that, in the absence of special provision to the contrary, proceedings which are being taken against a person under it will ipso facto terminate as soon as the statute expires."

Mention may also be made to a decision of a learned single Judge of the Allahabad High Court in Seth Jugmendar Das and Others v. State(2), where a similar view was taken when considering the effect of the repeal of the Defence of India Act, 1939, and the (1) [1951] S.C.R. 621. (2) A.I.R. 1951 All. 703.

Ordinance No. XII of 1946 which had amended s. 1 (4) of that Act.

On the other hand, Mr. Desai on behalf of the respondent relied on a decision of the Privy Council in Wicks v. Director of Public Prosecutions(1). In that case, the appellant, whose case came up before the Privy Council, was convicted for contravention of Regulation 2A of the Defence (General) Regulations framed under the Emergency Powers (Defence) Act, 1939 as applied to British subjects abroad by s. 3 (1)(b) of the said Act. It was held that, at the date when the acts, which were the subjectmatter of the charge, were committed, the regulation in question was in force, so that, if the appellant had been prosecuted immediately afterwards, the validity of his conviction could not be open to any challenge at all. But the Act of 1939 was a temporary Act, and after various extensions it expired on February 24, 1945. The trial of the accused took place only in May 1946, and he was

Convicted and sentenced to four years' penal servitude on May 28. In these circumstances, the question raised in the appeal was: "Is a man entitled to be acquitted when he is proved to have broken a Defence Regulation at a time when that regulation was in operation, because his trial and conviction take place after the regulation expired ?" The Privy Council took notice of sub- s. (3) of section 11 of the Emergency Powers (Defence) Act, 1939 which laid down that "the expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done". It was argued before the Privy Council that the phrase "things previously done" does not cover offences previously committed. This argument was rejected by Viscount Simon on behalf of the Privy Council and it was held that the appellant in that cane could be convicted in respect of the offence which he had committed when the regulation was in force. That case, however,is distinguishable from the case before us inasmuch as, in that case, the saving provision laid down that the operation of that Act itself was not to be affected by the expiry as respects things previously done or omitted to be done. The Act could, therefore, be held to be in operation in respect of acts already committed, so that the conviction could be validly made even after the expiry of the Act in respect of an offence committed before the expiry. In the case before us, the operation of R. 132A of the D.I. Rs. has not been continued after its omission. The language used in the notification only affords protection to things already done under the rule, so that it cannot permit further application of that rule by instituting a new prosecution in respect of something already done. The offence alleged against the accused in the present case is in respect of acts done by them which cannot be held to be acts under that rule. The difference in the language thus makes (1) [1947] A.C. 362.

it clear that the principle enunciated by the Privy Council in the case cited above cannot apply to the notification with which we are concerned.

Reference was next made to a decision of the Madhya Pradesh High Court in State of Madhya Pradesh v. Hiralal Sutwala(1), but, there again, the accused was sought to be prosecuted for 'an offence punishable under an Act on the repeal of which section 6 of the General Clauses Act had been made applicable. In the case before us, s. 6 of the General Clauses Act cannot obviously apply on the omission of R. 132A of the D.I.Rs. for the two obvious reasons that s. 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or Regulation and not of a Rule. If s. 6 of the General Clauses Act had been applied no doubt this complaint 'against the two accused for the offence punishable under R. 132A of the D.I.Rs. could have been instituted even after the repeal of that rule.

The last case relied upon is 1. K. Gas Plant Manufacturing Co., (Rampur) Ltd. and Others v. The King Emperor(2). In that case, the Federal Court had to deal with the effect of sub-s. (4) of section 1 of the Defence of India Act, 1939 and the Ordinance No. XII of 1946 which were also considered by the Allahabad High Court in the case of Seth Jugmendar Das & Ors.(2). After quoting the amended sub-s. (4) of s. 1 of the Defence of India Act, the Court held :-

> "The express insertion of these saving clauses was no doubt due to a belated realisation that the provisions of s. 6 of the General Clauses Act (X of 1897) apply only to repealed statutes and not to expiring statutes, and that the general rule in regard to the expiration of a temporary statute is that unless it contains some special

provision to the contrary, after a temporary Act has expired, no proceedings can be taken upon it and it ceases to have any further effect.

Therefore, offences committed against temporary Acts must be prosecuted and punished before the Act expires and as soon as the Act expires any proceedings which are being taken against a person will ipso facto terminate."

The Court cited. with approval the decision in the case of Wicks v. Director of Public Prosecutions(4), and held that, in view s. 1 (4) of the Defence of India Act, 1939, as amended by Ordinance No. XII of 1946, the prosecution for a conviction for an offence committed when the Defence of India Act was in force, was valid even after the Defence of India Act had ceased to be in force. That case is, however, distinguishable from the case (1) A.I.R. 1959 M.P. 93. (2) [1947] F.C.R. 141. (3) A.I.R. 1951 All. 703. (4) (1947) A.C. 362.

before us in two respects. In that case, the prosecution had been started before the Defence of India Act ceased to be in force and, secondly, the language introduced in the amended sub-s. (4) of s. 1 of the Act had the effect of making applicable the principles laid down in s. 6 of the General Clauses Act, so that a legal proceeding could be instituted even after the repeal of the Act in respect of an offence committed during the time when the Act was in force. As we have indicated earlier, the notification of the Ministry of Home Affairs omitting R. 132A of the D.I.Rs. did not make any such provision similar to, that contained ms. 6 of the General Clauses Act. Consequently, it is clear that, after the omission of R. 132A of the D.I.Rs., no prosecution could be instituted even in respect of an act which was an offence when that Rule was in force. ' In this connection, Mr. Desai pointed out to us that, simultaneously with the omission of R. 132A of the D.I.Rs., s. 4(2) of the Act was amended so as to bring the prohibition contained in R. 132A(2) under s. 4(1) of the Act. He urged that, from this simultaneous action taken, it should be presumed that there was no intention of the Legislature that acts, which were offences punishable under R. 132A of the D.I.Rs., should go unpunished after the omission of that rule. It, however, appears that when s. 4(1) of the Act was amended, the Legislature did not make any provision that an offence previously committed under R. 132A of the D.I.Rs. would continue to remain punishable as an offence of contravention of s. 4 (1) of the Act, nor was any provision made ' permitting operation of R. 132A itself so as to permit institution of prosecutions in respect of such offences. The consequence is that the present complaint is incompetent even in respect of the offence under R. 132A(4). This is the reason why we hold that this was an appropriate case where the High Court should have allowed the applications under s. 561A of the Code of Criminal Procedure and should have quashed the proceedings on this complaint.

Consequently, as already directed by our short order dated 2nd May, 1969, the appeals are allowed, the order of the High Court rejecting the applications under s. 561A of the Code of Criminal Procedure is set aside, and the proceedings for the prosecution of the appellants are quashed.

V.P.S. Appeals allowed.