The State Of Tamil Nadu Food, Civil ... vs National South Indian River ... on 23 November, 2021

Author: D.Y. Chandrachud

Bench: As Bopanna, Dhananjaya Y Chandrachud

Re

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 6764 of 2021

State of Tamil Nadu & Anr. …Appellan

Versus

National South Indian River Interlinking Agriculturist Association …Responde

JUDGMENT

Dr. Dhananjaya Y Chandrachud,J.

1 A Division Bench of the Madras High Court at the Madurai Bench allowed the writ petition filed by the Respondent under Article 226 of the Constitution for quashing G.O Ms. No. 50 which granted loan waiver to small and marginal farmers. The High Court held the grant of loan waivers only to small and marginal farmers to be arbitrary and directed the appellant to grant the same benefit to all farmers irrespective of the extent of landholding.

2 The Government of Tamil Nadu issued G.O Ms. No. 50 dated 13 May 2016 (“Scheme”) granting a waiver of outstanding crop loans, medium term (agriculture) loans and long term (farm sector) loans issued to small and marginal farmers. G.O Ms. No. 59 dated 28 June 2016 was issued providing guidelines for the implementation of G.O Ms. No. 50. The guidelines provide that for the classification of farmers as small and marginal, the extent of landholding as mentioned in the landholding register and loan register at the time of sanction of the agricultural loan shall be taken

into consideration. As for the definition of 'small farmer' and 'marginal farmer', it provides that 'small farmer' means a farmer who holds land of 2.5 acres to 5 acres and 'marginal farmer' means a farmer who holds land upto 2.5 acres. Subsequently, a circular was issued by the Registrar of Cooperative Societies on 1 July 2016 providing further guidelines for implementation of the scheme.

3 The respondent challenged the scheme as unconstitutional for violation of Article 14 of the Constitution, and sought a direction to provide loan waiver for all farmers irrespective of the extent of landholding. The High Court allowed the writ petition holding that the exclusion of 'other farmers' – those who hold land exceeding 5 acres – from the land waiver scheme is discriminatory and violative of Article 14. It directed that the scheme be extended to all farmers including farmers whose landholding exceeds 5 acres. The High Court was aided by the following reasons to arrive at this conclusion:

> (i) Courts can exercise judicial review in the realm of policy to determine if it conforms to the requirements of Article 14 of the Constitution as held by the this Court in Union of India v. Dinesh Engineering Corporation1, Om Kumar v. Union of India2);
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> (ii) The All India Anna Dravida Munnetra Kazhagam ("AIADMK") made an electoral promise to implement the scheme if voted to power. In the counter (2001) 8 SCC 491 (2002) 2 SCC 386 filed by the respondents, it is stated that small and marginal farmers constitute a class in themselves since they require more assistance because of their meagre income and resources. There is no indication of this reasoning in the file. The AIADMK introduced the scheme after being voted to power in pursuance of the election promise, without taking into consideration relevant factors warranting such a classification;
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> (iii) The contention of the State that the objective of the scheme is to cover a maximum number of beneficiaries with a minimum outlay of funds cannot be accepted. When the overall objective of the Government is to obviate the suffering of the farmers, classification based on the extent of holding is not intelligible;
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> (iv) Farmers who apply for an agricultural loan are not required to disclose all their landholdings. It would be sufficient for securing a loan if a farmer only mentions the total extent of land for which the loan is sought. Similarly, if a farmer has land in more than one village, the loan application would only mention the extent of land that falls within the specific bank's jurisdiction.

Therefore, the reliance on the total landholding mentioned in the 'landholding register' at the time of sanction of the agricultural loan for classifying farmers as 'marginal farmers' and 'small farmers' is irrational; and

(v) The irrational method of classification leads to over-inclusiveness and under-inclusiveness.

4 Notice was issued by this Court on 3 July 2017 and the judgment of the High Court was stayed. By an order dated 18 September 2019, a two-judge Bench consisting of Justices R Banumathi and A.S Bopanna observed that it is open to the Government of Tamil Nadu to grant any other 'limited benefits' to other categories of farmers.

5 In pursuance of the above directions, the State of Tami Nadu has produced on record GO (MS) 15 and 16 dated 8 February 2021 by which the Government has waived off crop loans of Rs. 12,110.74 crore outstanding as on 31 January 2021 availed by 16,43,346 farmers from cooperative banks. 6 The appellant has made the following submissions:

> (i) The court can interfere with the policy of the government only when the action is unconstitutional or contrary to statutory provisions;
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> (ii) The scheme was formulated after studying the financial capacity of the State;
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> (iii) There is an intelligible differentia in providing loan waiver only to small and marginal farmers since they are the most affected class; and
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> (iv) The underlying policy of the Government is to maximize the beneficiaries with an efficient use of funds. Even if farmers with larger landholdings suffered losses, it is a fiscal policy decision of the State to only extend the scheme to small and marginal farmers.

7 The respondents have made the following submissions:

> (i) Farmers who hold more than five acres of land contribute more to the GDP and food security of the country. The small and marginal farmers do not contribute to the betterment of food security as their scale of production is minimal;
>
> (ii) The court can interfere with a policy decision if the policy is arbitrary; and
>
> (iii) The State has failed to prove that small and marginal farmers constitute a class in itself, particularly because the farmers holding larger landholdings are better contributors and have suffered greater losses.

8 Three issues fall for consideration. They are as follows:

> (i) Whether the court can exercise its powers of judicial review since the scheme is a policy decision of the government;
>
> (ii) Whether the extension of the scheme only to 'small farmers' and 'marginal farmers' is arbitrary and violative of Article 14 of the Indian Constitution;

and

(iii) Whether the scheme is under-inclusive and over-inclusive. 9 The State of Tamil Nadu has raised a preliminary contention that the Court cannot review the scheme since it is a fiscal policy decision of the State. Before we proceed with the arguments on Article 14, it is imperative that we discuss the law down by this Court relating to the ambit and extent of judicial review of policy. An examination of this issue must begin with the primary question of the meaning of the phrase 'policy'. A policy is the reasoning and object that guides the decision of the authority, which in our case is the State of Tamil Nadu. Statutes, notifications, ordinances, or Government orders are means for the implementation of the policy of the State. Therefore, it is not possible to completely appreciate the law without reference to the policy behind the law. The judicially evolved two-pronged test to determine the validity of the law vis-à-vis Article 14 of the Indian Constitution, refers to the objective of the law because the 'policy' behind the law is never completely insulated from judicial attention. 10 However, it is settled law that the Court cannot interfere with the soundness and wisdom of a policy. A policy is subject to judicial review on the limited grounds of compliance with the fundamental rights and other provisions of the Constitution.3 It is also settled that the Courts would show a higher degree of deference to matters concerning economic policy, compared to other matters of civil and political rights. In RK Garg v. Union of India4, this Court decided on the constitutional validity of the Special Bearer Bonds (Immunities and Exemptions) Act 1981. The challenge to the statute was on the principal ground that it was violative of Article 14 of the Indian Constitution. Rejecting the challenge, the Constitution Bench observed that laws relating to economic activities must be viewed with greater latitude and deference when compared to laws relating to civil rights such as freedom of speech:

> "8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud [351 US 457 : 1 L Ed 2d 1485 (1957)] where Frankfurter, J., said in his inimitable style:
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> "In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all Asif Hammed v. State of Jammu & Kashmir, 1989 Supp (2) SCC 364 ; Sitaram Sugar Co Ltd. v. Union of India, (1990) 3 SCC 223; Khoday Distilleries Ltd. v. State of Karnataka,(1996) 10 SCC 304; Balco Employees Union v. Union of India, (2002) 2 SCC 333; State of Orissa v. Gopinath Dash, (2005) 13 SCC (1981) 4 SCC 675 has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the

> uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

11 The respondent has placed reliance on BALCO Employees Union v.

Union of India5. A Constitution Bench considered a challenge to the decision of the Union of India to disinvest and transfer 51% shares of Bharat Aluminum Company Limited. Rejecting the challenge, it was observed that that the wisdom of economic policies is not subject to judicial review:

> "92. In a democracy it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se interfered with by the Court.
>
> 93. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts. Here the policy was tested and the motion defeated in the Lok Sabha on 1-3-2001."

12 Economic policies broadly comprise of policies on taxation, expenditure, and allocation. The State and its agencies often endeavor to make economically feasible decisions. The implementation of every policy of the State involves expenditure. Merely because the policy involves the expenditure of funds, it (2002) 2 SCC 333 cannot be termed as an economic policy. The core feature of the policy and the targeted area needs to be determined to identify the nature of the policy. The impugned loan waiver scheme is, in essence, a social policy in pursuance of the Directive Principles of State Policy, introduced with an object to eliminate inequality in status, income, and facilities.

13 In Subramaniam Balaji v. State of TN6, the scheme of gifts in the State of Tamil Nadu was under challenge. One of the arguments was that the distribution of color television sets, laptops and mixer-grinders violates Article 14 of the Constitution as unequals are treated equally since the gifts were distributed irrespective of the income level. The contention was rejected on the ground that the distribution of the gifts relates to the implementation of the Directive Principles of State Policy. It was held that the Article 14 principle would only be applicable when state action imposes a burden on the citizens:

> "78. With regard to the contention that distribution of State largesse in the form of colour TVs, laptops, mixer-grinders, etc. violates Article 14 of the Constitution as the unequals are treated equally. Before we venture to answer this question, we must recall that these measures relate to implementation of the Directive Principles of

> State Policy. Therefore, the principle of not to treat unequals as equal has no applicability as far as State largesse is concerned. This principle applies only where the law or the State action imposes some burden on the citizen either financial or otherwise. Besides, while implementing the directive principles, it is for the Government concerned to take into account its financial resources and the need of the people. There cannot be a straitjacket formula. If certain benefits are restricted to a particular class that can obviously be on account of the limited resources of the State. All welfare measures cannot at one go be made available to all the citizens. The State can gradually extend the benefit and this principle has been recognised by this Court in several judgments." (emphasis supplied) (2013) 9 SCC 659 The loan waiver scheme is also in pursuance of the Directive Principles of State Policy. In view of the observations in Subramaniam Balaji (supra), the scheme cannot be held to breach Article 14 since it does not impose a burden but affords a benefit. We, however, deem it imperative to determine if the scheme violates the fundamental rights, in particular Article 14 of the Indian Constitution.

14 The equality code in Article 14 of the Indian Constitution prescribes substantive and not formal equality. It is now a settled position that classification per se is not discriminatory and violative of Article 14. Article 14 only forbids class legislation and not reasonable classification. A classification is reasonable, when the twin tests as laid down by Justice SR Das in State of W.B v. Anwar Ali Sarkar7 are fulfilled:

> (i) The classification must be based on an intelligible differentia which distinguishes persons or things that are grouped, from others left out of the group; and
>
> (ii) The differentia must have a rational relationship to the object sought to be achieved by the statute.

15 Justice Das in Anwar Ali Sarkar (supra) held that there must be some yardstick to differentiate the class included and the others excluded from the group. The differentia used for the classification in the scheme is the total extent of landholding by every individual. Therefore, there is a yardstick used for constituting the class for the purpose of the scheme.

1952 SCR 284 16 The appellant contended that the objectives of the scheme are thus:

> (i) Small and Medium farmers are the main producers of food, inspite of their limited access to technology, credit, and capital;
>
> (ii) Small and marginal farmers constitute 85% of the crop loan beneficiaries.

The objective of the State is to cover maximum beneficiaries with minimum funds. The scheme has been framed after considering vital parameters such as budgetary allocation, revenue mobilization and the position of the farmers vis-à-vis their landholding; and

(iii) The small and marginal farmers constitute the poor and downtrodden class of farmers. Therefore, they have suffered greater harm due to floods and the impact of climate change.

17 Therefore, the reasons that seem to have guided the State of Tamil Nadu for the formulation of this scheme are two- fold: (i) The small and marginal farmers have faced greater harm due to the erratic climate conditions in view of the limited technology and capital that they possess; and (ii) The state seeks to provide maximum benefits with the minimum fund.

18 In the counter affidavit before the High Court, the state averred that by waiving Rs. 5780 Crore worth of crop loans, the number of small and marginal farmers who would be benefitted would be 16,94,145. On the other hand, waiving the crop loan of Rs 1980 Crore that the other farmers held would only benefit 3,01,926 of them. These figures buttress the argument of the State that providing the benefit of the scheme only to marginal and small farmers leads to maximum utility for minimum investment. However, this cannot be the objective of a scheme introduced by the State. Every scheme which involves monetary or material disbursement aims at providing maximum benefit with minimum expenditure.

Classification cannot thus be tested on the fiscal objective that guides every scheme.

19 The purpose of providing a waiver of agricultural loans for farmers is to uplift the distressed farmers, who have been facing the brunt of the erratic weather conditions, low produce, and fall in the prices because of the market conditions. The objective of promoting the welfare of the farmers as a class to secure economic and social justice is well recognized by Article 38. It needs to be determined if the classification based on the extent of landholding has a rational nexus to the object sought to be achieved.

20 One of us (Dr DY Chandrachud) in Navtej Singh Johar v. Union of India8 accentuated the inadequacies of the two-pronged test which seeks to elevate form over substance. The over-emphasis on the 'objective' of the law, instead of its 'effect' – particularly when the objective is ostensible – was observed not to further the true meaning of the equality clauses under the Indian Constitution. The traditional two- pronged classification test needs to be expanded for the Courts to undertake a substantive review of Article 14 violations, away from the formalistic tendency that the twin test leans towards. Within the broad parameters of the two-pronged test, we find it imperative to undertake a much more substantive review by focusing on the multi axle operation of equality and non- discrimination.

21 The State of Tamil Nadu in the counter filed before the High Court states that the classification was required since the small and marginal farmers suffer a (2018) 10 SCC 1 greater degree of harm because of their limited capacity and aid. It is judicially recognized that the legislature is free to recognize degrees of harm and may confine its restrictions or benefits to those cases where the need is the clearest.9 In State of Maharashtra v. Indian Hotel and Restaurants Association10, Section 33-A(1) of the Bombay Police Act which prohibited dance performances in eating houses, permit rooms, or beer bars, and Section 33-B which allowed such dances in establishments with restricted entry or three starred or above hotels was under challenge. The State contended that the degree of

harm in the class which is covered by Section 33 A(1) is greater. It was held by the two- Judge Bench that the State must have sufficient material to reach the conclusion or a general consensus is to be shared by the majority of the population to base its decisions on classification based on the degrees of harm. We are unable to accept that degrees of harm could be recognized based on the general consensus of the majority of the population. As held in Navtej Singh Johar (supra), the law or the scheme of the Government cannot be tested on the anvil of majoritarian morality but only on constitutional morality. However, the claims made by the State cannot be accepted without putting it to the test of reason through the submission of cogent material. A lesser degree of burden would substantially weaken the rights protection.11 22 It has been submitted that the consumption expenditure of marginal and small farmers exceeds their estimated income by a substantial margin, and the deficits are covered by borrowings. The fact that 16,94,145 small and marginal Ram Krishna Dalmia v. SR Tendolkar, AIR 1958 SC 538; Mohd. Hanif Quareshi v. State of Bihar, AIR 1958 SC 731; Binoy Viswam v. Union of India, (2017) 7 SCC 59.

(2013) 8 SCC 519 Aparna Chandra, 'Proportionality in India: A Bridge to Nowhere' (2020) Oxford Human Rights Journal farmers have availed of agricultural loans as compared to 3,01,926 farmers belonging to the 'other category' testifies that the small and marginal farmers have a significant capital deficit when compared to the rest of the farmers. A huge capital deficit, combined with a reduction in the agricultural income due to water scarcity and crop inundation due to floods has led to financial distress. Small and marginal farmers are resource deficient; they do not have borewells to overcome the drought. These farmers are usually dependent on large farms to access land, water, inputs, credit, technology, and markets. It was found that almost 40% of the irrigated land of large farmers was from canals, while less than 25% of the land of small and marginal farmers was irrigated by canals or borewells and they often resort to renting water from larger landholdings. The output of produce in a small and marginal farm, for instance, paddy would not be sufficient even to feed the small farmer's family. Thus, a majority of them purchase grains at a subsidized rate from the Public Distribution System (since these farmers fall below the poverty line) so they can sell their produce.12 23 The Situation Assessment of Agricultural Households and Land and Holdings of Households in Rural India, 201913 undertakes an extensive discussion on the Average Monthly Income per Agricultural Household. The report depicts that India's small and marginal farmers have essentially become wage earners. For instance, the average monthly income of an agricultural household possessing less than 0.01 hectares of land (0.02 acres) from crop production is Rs. 1,435 and from wages is Rs. 6,435. When compared to an Parijat Gosh, Farmers Protest: Why are small and marginal farmers protesting against the farm acts?, (December 11, 2020) https://en.gaonconnection.com/farmers-protests-why-are-small-and-marginal-farmers-protesting-against-the-farm-acts/ https://www.mospi.gov.in/documents/213904/301563//Report_587m1631267040957.pdf/3793650e-8cf1-7872-ae90-51470c8d211c agricultural household that possesses 2-4 hectares of land (4.94- 9.88 acres), the income from crop production is Rs. 7,945 and the income from wages is 3,548. A comparative graph of the figures is as under. The x-axis indicates the percentage of income from farm produce, wages, and other sources. The y-axis indicates the land held by the farmers (in hectares):

Income distribution 10.00+ 4.01-10.00 2.01-4.00 1.01-2.00 0.40-1.00 0.01-0.40 <0.01 0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100% Income from farm

Income from wages Others

24 The report also tabulates the total amount of outstanding loans held by each category of farmers. The computation shows that households that have lands less than 0.01 hectare, use 93.1% of the agricultural loans for a non- agricultural purpose. In sharp contrast, a household that owns 10 hectares of land only uses 17.1 percentage of the agricultural loan for non-agricultural purposes. This depicts the poverty that envelops the class of small and marginal farmers. The percentage distribution of the indebted agricultural households depicts that 27% of the households that hold between 0.01- .040 hectares of land; 34% of those who hold between 0.40-1 hectares and 20% of those who hold between 1-2 acres, are indebted. On the other hand, only 4.5% of those who hold 4-10 hectares and 0.6% of those who hold 10 plus hectares are indebted.

Extracted below is the graph for percentage distribution of indebted agricultural households:

Percentage Distribution of Indebted Agricultural Households < 0.01 0.40 - 1.00 1.01 - 2.00 2.01 - 4.00 4.01 - 10.00 10.00 +

25 In view of the discussion above, the application of the impugned scheme to only the small and the marginal farmers is justified for two reasons: (i) A climate crisis such as drought and flood causes large scale damages to small holdings as compared to the large holdings due to the absence of capital and technology; and

(ii) The small and marginal farmers belong to the economically weaker section of society. Therefore, the loan waiver scheme in effect targets the economically weaker section of the rural population. The scheme is introduced with an endeavor to bring substantive equality in society by using affirmative action to uplift the socially and economically weaker sections. Due to the distinct degree of harm suffered by the small and marginal farmers as compared to other farmers, it is justifiable that the benefit of the scheme is only provided to a specified class as small and marginal farmers constitute a class in themselves. Therefore, the classification based on the extent of landholding is not arbitrary since owing to the inherent disadvantaged status of the small and marginal farmers, the impact of climate change or other external forces is unequal.

26 The High Court in the impugned judgment has observed that the scheme is both under-inclusive and over-inclusive since the total extent of land held by a person is calculated based on the information in the landholding register which permits discrepancies. It also held the scheme to be under-inclusive for not extending the benefit to 'other farmers' or the 'large farmers'. The meaning and ambit of under-inclusiveness and over-inclusiveness has been discussed in an erudite exposition by Justice K K Mathew, writing for a Constitution Bench in State of Gujarat v. Ambica Mills14 :

> "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. 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 — difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to re-shape — and it has refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration. (1974) 4 SCC 656 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.

[Missouri, K&T Rly v. May, 194 US 267, 269] 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?" 27 Ambica Mills (supra) justified under-inclusiveness on the grounds of recognition of degrees of harm, administrative convenience, and legislative experimentation. Reference was made to Justice Oliver Wendell Holmes's observation in Missouri, K& T Rly v. May15, that "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", to state that the judiciary must exercise self-restraint in such cases. In NP Basheer v. State of Kerala16, a two judge Bench of this Court held that if the extent of over-inclusiveness and under-inclusiveness is marginal, then it could not be held to be violative of Article 14 of the Constitution. 28 The determination of whether the classification is under-inclusive is closely related to the test that is undertaken by the Court while determining the relationship of the means to the end. This Court follows the two-pronged test to determine if there has been a violation of Article 14. The test requires the court to determine if there is a rational nexus with the object sought to be achieved. Justice P N Bhagwati (as the learned Chief Justice then was) in EP Royappa v.

194 US 267, 269 2004 (2) SCR 224 State of Tamil Nadu17 held that arbitrariness of State action is sufficient to constitute a violation of Article 14. Thus, it came to be recognized that the equality doctrine as envisaged in the Constitution not only guarantees against comparative unreasonableness but also non-comparative unreasonableness.18 This Court in Modern Dental College and Research Centre v. State of MP19, invoked the proportionality test while testing the validity of the statute and

rules that sought to regulate admission, fees and provided reservations for postgraduate courses in private educational institutions. In Subramanian Swamy v. Union of India20, the Court used the proportionality test to determine if the offence of criminal defamation prescribed under Sections 499 and 500 of the IPC violates the freedom of speech and expression under Section 19(1)(a). In Justice Puttaswamy (9J) v. Union of India21, a nine judge Bench of this Court held that the right to privacy is a fundamental right. The proportionality standard was used in the context of determining the limits that could be imposed on the right to privacy. The Constitution Bench then dealt with the proportionality test in Justice Puttaswamy (Retd.) v. Union of India22, to determine if the Aadhar scheme violated the right to privacy of an individual. Our Courts have used the proportionality standard to determine non-classificatory arbitrariness, and have used the twin test to determine if the classification is arbitrary. (1974) 4 SCC 3 See Tarunabh Khaitan, 'Equality: Legislative Review under Article 14' in Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta (eds), The Oxford Handbook of the Indian Constitution (Oxford University Press 2016) (2016) 7 SCC 353 (2016) 7 SCC 221 (2017) 10 SCC 1 (2019) 1 SCC 1 29 In Anuj Garg v. Hotel Association of India23, the Court decided the constitutional validity of Section 30 of the Punjab Excise Act 1914 prohibiting employment of "any man under the age of twenty-five years" or "any women" in the premises where liquor or intoxicating drugs are consumed. This classificatory provision was challenged for violation of Articles 19(1)(g), 14, and 15 of the Indian Constitution. It was held that the law in effect perpetuates the oppression of women. In determining the validity of the provision, the Court applied the proportionality standard:

> "50. The test to review such a protective discrimination statute would entail a two-pronged scrutiny:
>
> (a) the legislative interference (induced by sex discriminatory legalisation in the instant case) should be justified in principle,
>
> (b) the same should be proportionate in measure."

30 Article 15(1) of the Indian Constitution specifically states that the State shall not discriminate on the grounds of 'religion, race, caste, sex, place of birth or any of them'. Since the 'protective discrimination' in Anuj Garg (supra) was based on one of the grounds in Article 15, the Court thought it fit to test its constitutionality on a higher degree of scrutiny. A similar line of reasoning was taken up by Justice Indu Malhotra in Navtej Singh Johar (supra) where she held that Section 377 IPC does not fulfil the rational nexus test because the "legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia". 31 While non-classification arbitrariness is tested based on the proportionality test, where the means are required to be proportional to the object, classification arbitrariness is tested on the rational nexus test, where it is sufficient if the means (2008) 3 SCC 1 share a 'nexus' with the object. The degree of proof under the test would impact the judgment of this Court on whether the law is under-inclusive or over-inclusive. A statute is 'under-inclusive' if it fails to regulate all actors who are part of the problem. It is 'over-inclusive' if it regulates actors who are not a part of the problem that the statute seeks to address. The determination of under-inclusiveness and over-inclusiveness, and degree of deference to it is dependent on the relationship

prong ('rational nexus' or 'proportional') of the test. 32 The nexus test, unlike the proportionality test, is not tailored to narrow down the means or to find the best means to achieve the object. It is sufficient if the means have a 'rational nexus' to the object. Therefore, the courts show a greater degree of deference to cases where the rational nexus test is applied. A greater degree of deference is shown to classification because the legislature can classify based on the degrees of harm to further the principle of substantive equality, and such classification does not require mathematical precision. The Indian Courts do not apply the proportionality standard to classificatory provisions. Though the two-judge Bench in Anuj Garg (supra) articulated the proportionality standard for protective discrimination on the grounds in Article 15; and Justice Malhotra in Navtej Singh Johar (supra) held that less deference must be allowed when the classification is based on the 'innate and core trait' of an individual, this is not the case to delve into it. Since the classification in the impugned scheme is based neither on the grounds in Article 15 nor on the 'innate and core trait' of an individual, it cannot be struck down on the alleged grounds of under-inclusiveness and over-inclusiveness.

33 The Scheme in issue was introduced in pursuance of an electoral promise made by the then party in power in Tamil Nadu. The High Court seems to have been of the view that because the scheme was in pursuance of an electoral promise, it is constitutionally suspect. This view was made on an assumption that no study must have been conducted before the electoral promise was made. It is settled law that a scheme cannot be held to be constitutionally suspect merely because it was based on an electoral promise.24 A scheme can be held suspect only within the contours of the Constitution, irrespective of the intent with which the scheme was introduced. The scheme propounded by the State of Tamil Nadu passes muster against the constitutional challenge. The High Court has erred in holding otherwise. During the pendency of the proceedings the State has granted a broader coverage, based on its assessment of the situation. 34 For the reasons indicated above, the appeal is allowed and the judgment of the Madras High Court at the Madurai Bench dated 4 April 2017 is set aside. 35 All pending application(s) are disposed of.

. . . . . J. [Dr Dhananjaya Y Chandrachud]
.....J. [AS Bopanna] New Delhi;

November 23, 2021 Subramaniam Balaji (n 6)