Madras High Court
Rainbow Trading Co. By Its ... vs Assistant Collector Of Customs, ... on 30 October, 1962
Author: Anantanaiayanan
Bench: S R Iyer, Anantanarayanan
JUDGMENT Anantanaiayanan, J.

1. In many contexts, a balance has been struck between the protection to the individual, and the paramount need of society to reach at the offender, and to strike down the crime or the transgression of law. It cannot be claimed, for a moment, that there is any basic maxim of jurisprudence that the protection must be extended to every person compulsorily examined by a competent authority in every kind of proceeding, including quasi-judicial proceedings, like those under Section 171-A of the Sea Customs Act, the main purpose of which is to obtain information of transgression of the law in this' respect, by the interrogation of those who are likely to be acquainted with the true state of affairs, and, this primarily, in order to take adequate departmental action or administrative action thereon. In such a, context, it cannot be claimed that because witnesses in judicial proceedings have the benefit of the protection under the proviso to Section 132 of the Evidence Act, persons summoned and examined under Section 171-A of the Sea Customs Act are entitled to the same protection, and that the failure to extend the protection to them amounts to a hostile discrimination. (History of the principle traced.) Case law fully discussed.

S. Ramachandra Iyer, C.J.

1. This appeal, filed against the judgment of Balakrishna Ayyar, J., raises a question as to the constitutional validity of Section 171-A of the Sea Customs Act. That provision has been challenged as void before us on the ground that it contravenes Articles 14 and 20 (3) of the Constitution. But the objection to the validity of the section under the first head, namely, that it denies equal protection of laws to persons similarly situate, was not taken before the learned Judge; nor even in the grounds of appeal before us. But in view of importance of the matter and as the learned Advocate-General had no objection to the question being raised at this stage, we have allowed learned Counsel for the appellant to argue that point.

2. We shall now set out the circumstances which have necessitated the appellant to call to his aid the Fundamental Eights declared under Articles 14 and 20 (3).

3. The appellant is a merchant at Madras trading under the name of Rainbow Trading Company, who for the purposes of his business, imports electrical goods from foreign countries.

4. Import trade is now regulated and coa-trolled by the provisions of the Import and Export Control Act, 1947, the rules under which make it obligatory on the importer to obtain a suitable licence for the purpose and to conform to the conditions prescribed therein. Section 3 (2) of the Import and Export Control Act provides that importation of goods contrary to the restrictions imposed thereunder would be deemed so done under the Sea Customs Act and attract the procedure and penalties under the latter. Section 5 makes the contravention of an order made or breach of the conditions of the licence punishable. The Rules framed under the Act prohibit the licensee from

importing any goods except of the description contained in the licence. The control imposed by the Act is in respect of all articles. All importable articles are classified under various heads in what is commonly known as the Red Book or The Import Control Policy Book and separate licences are issued in respect of them with reference to their classification. The holder of a licence for the import of one article coming under a particular classification cannot import another which is outside the class for which the licence is issued. For example, the licence issued to the appellant in the instant case authorised him to import what are called "decorative electric bulbs". Under that licence he cannot import cycle dynamo bulbs or torch bulbs, although all of them might be of the same size, voltage etc., as the latter two categories come under a different classification. If one however does it, it will be a case of smuggling. The classification of goods and the restriction on issue of licence to particular classes or the limitation of import in any class or quantity of goods have been designed with a view to enable the State to regulate the import of foreign goods in the best interests of the country, its economic progress and industrial expansion. Unlicensed import which will include a case of import of one type of goods under a licence permitting a different type, would obviously tend to bring about the very mischief which the Import and Export Control Act is intended to check.

5. To resume the narrative of facts, in July 1957, a steam ship S. S. Nachisan Maru discharged seventy-five packages of electric bulbs at the Madras harbour. All the packages were marked "Rainbow, Madras" a part of the appellant's trade name. The appellant and eleven others filed bills of entry for clearing the goods through the same clearing agent. The bills of entry disclosed the contents of the packages as "decorative bulbs" for which the appellant and the others held the licence. The former claimed 20 out of the 75 packages as belonging to him. Some of the twenty packages were examined by the Customs authorities and it was found that they contained "cycle dynamo bulbs" which were different from "decorative bulbs" the import of which alone was covered by the licence. The Department finding that there had been an import of electric bulbs without a valid licence, issued a notice to the appellant on 25-7-1957 calling upon him to show cause why action should not be taken against him and the goods confiscated under Section 167 (8) of the Sea Customs Act. The appellant denied that the bulbs were cycle dynamo bulbs but on the contrary conformed to the bulbs permitted by the licence.

At that stage the Department proceeded to examine the remaining packages; the contents of those packages revealed that there were torch bulbs for the import of which also a licence different from the one held by the twelve importers was necessary. If what the Department found were correct, there must have been a systematic attempt on the part of the importers to import one class of goods under a licence issued for a different class. At any rate, in that view, the bills of entry filed by the importers disclosed a misdeclaration of the goods. The Customs Department therefore issued a notice on 3-2-1958 to the appellant and the others to show cause why action should not be taken against them under the appropriate provisions of the Sea Customs Act. The appellant denied knowledge of the contents of the packages. The other persons who filed bills of entry gave likewise evasive replies. Curiously enough, none of the other importers ever came forward to identify the packages as theirs.

6. The Assistant Collector of Customs thereupon issued summons under Section 171-A of the Sea Customs Act to the appellant calling upon him to give evidence and produce relevant documents

relative to the import of the goods in question. The appellant declined to give evidence and justified his action by giving several reasons, the soundness of which does not call for examination now. The Department then issued a warning to the appellant reminding him that failure to comply with summons would entail a prosecution under Section 228 of the Indian Penal- Code. The appellant filed an appeal to the Collector of Customs against the direction to appear and failing there, a revision petition to the Central Government. There too his attempt to avoid giving of evidence met with no success.

7. On 10-1-1959 the Assistant Collector of Customs, Madras, issued fresh summons under Section 171-A of the Sea Customs Act directing the appellant to appear and give evidence and produce the relevant documents on the day specified there. The appellant thereupon filed an application, out of which this appeal arises, for the issue of a writ of prohibition against the Assistant Collector of Customs, to prevent him from enforcing his attendance. The main ground taken in support of the petition is that Section 171-A of the Sea Customs Act in so far as it compels a person to give evidence which might incriminate that person, would be void in law as offending Article 20 (3) of the Constitution. According to the appellant, the summons to compel him to give evidence was issued at a time when he was himself threatened with a prosecution and with proceedings for confiscation of goods, and he should be deemed to be accused of an offence and therefore entitled, to the protection guaranteed under Article 20 (3) of the Constitution. When the petition was pending before Balakrishna Ayyar, J., the Assistant Collector of Customs filed a memorandum withdrawing that portion of the notice dated 3-2-1958 which stated.

You are also called upon to explain why we cannot move for prosecution to be launched against you under clause 81 of Section 167 of the Sea Customs Act.

The learned Judge who thought that if that sentence in the notice had remained, it would have been possible to argue that the appellant was in the position of an accused person, held that on the deletion of that sentence he could no longer be held to be accused of any offence. Referring and adopting his own judgment in a similar case in Sankarlal v. Collector of Central Excise, Madras , the learned Judge held that Article 20 (3) of the Constitution would not apply to the case and that the summons issued were in accordance with law and that the appellant was bound to appear and give evidence. This however was made subject to certain directions contained in Sankerlal's case, , the relevant portion of which we give below:

Except in those cases where the identity of the offender is at once known, various processes occur between the stage when an offence is committed and the stage when the offender is placed before the criminal Court to be dealt with according to law. The residents of the locality where the crime has been committed or those who are believed or alleged to have been in the vicinity of the scene when it was committed, may have to be examined. At this stage no one is an accused person in any sense of the term. The circle of enquiry would in time become smaller and the stage would be reached when there is a certain amount of suspicion against various persons. Even now it would be correct to say that there is no accused person. Then the final stage is reached when the investigating authority considers that a particular person has committed the offence and decides to proceed against him in a criminal Court. It is at this stage that a person really becomes accused of an offence

... If the stage is reached when a person can be properly said to be an accused person, and thereafter he is compelled to answer questions and the material obtained thereby sought to be used against him, Article 20 (3) of the Constitution would come into play and the Court can apart from all statutory provisions refuse to look at the material obtained by contravening the Constitution. That would be a case where, if there were no special statutory authority in that behalf, Courts would be entitled to fall fack upon their inherent power to prevent an abuse of the process of the law. This will involve nothing more than a logical extension of the principle embodied in Section 132 of the Evidence Act.

In this appeal against that judgment, the validity of Section 171-A of the Sea Customs Act was challenged as contravening both Article 20 (3) and' Article 14.

8. Before we deal with the two points that arise for consideration, it is necessary to set out Section 171-A of the Sea Customs Act. The section was introduced into the said enactment by Act XXI of 1955.

171-A (I) -- Any officer of Customs duly empowered in the prevention of smuggling shall have power to summon any person whose attendance, he considers necessary either to give evidence to produce a document or any other thing in any enquiry which such officer is making in connection with smuggling of any goods.

2. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of tie-person summoned.

3. All persons so summoned shall be bound. to attend either in person or by an authorised agent, as such officer may direct; and all persons-so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such-documents and other things as may be required:

Provided that the exemption under Section. 132 of the Code of Civil Procedure, 1908, shall be applicable to any requisition for attendance under this section.

4. Every such enquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the-Indian Penal Code.

This provision occurs in Chapter XVII of the Act, which deals with procedure relating to offences etc. Sections 169 and 170 relate to the power of search over a person who had landed and of vessels, conveyances etc., for ascertaining whether any breach of the law relating to Customs is being committed. Section 172 empowers the Magistrate to issue a warrant authorising the Customs official to search any place to see whether any prohibited goods are secreted and the succeeding sections relate to the arrest of the offender and of producing him before the Magistrate, of seizure of articles etc. Sections 182 to 185 confer powers in the Customs authorities to inflict departmental punishments, like confiscation of goods brought in contravention of Customs Laws, and the

imposing of a penalty. Section 186 enacts that the imposition of such punishments (being in their nature distinct from punishment for a criminal' offence) will not prevent a prosecution for the offence disclosed. Thus, from the setting it will-appear that Section 171-A is enacted to facilitate an enquiry to find out whether an offence had been or is being committed. It may lead to a prosecution before the criminal Court, if an offence is disclosed or the Customs authorities might consider ; it sufficient to impose an administrative penalty without prosecuting the offender.

9. It is argued for the appellant that as Section 171-A authorises the Customs authorities to compel a person suspected of the offence of smuggling, to give evidence against himself, the guarantee contained in Article 20 (3) of the Constitution would stand violated. According to learned Counsel appearing for the appellant, the constitutional provision should, in the light of a similar one in America, be construed to protect every person against being compelled to furnish-evidence that could be used against him, and any statutory provision which would empower an authority to nullify that protection should be regarded as void. The vice of compelled testimony it-is argued is its potentiality of being used against the person giving it; it would therefore make no difference with respect to the nature or character of the proceedings in which such testimony is sought and obtained. Section 171-A of the Sea Customs Act in effect compels even a person who has committed the offence of smuggling, if summoned, to depose against himself, as failure to do so will entail prosecution. In the words of the learned Counsel, the person summoned will be faced with a cruel dilemma, namely, whether he should give evidence against himself and expose himself to prosecution for the offence committed by obeying the summons, or refuse to speak at all or fail to speak the truth, in which event he would be prosecuted under the appropriate provisions of the Indian Penal Code.

10. Article 20 (3) states that no person accused of any offence shall be compelled to be a witness against himself. The marginal note to Article 20 gives its purport as protection in respect of conviction for offences. It is also evident from the setting in which sub-clause (3) to Article 20 occurs that the provisions of the Constitution intended it only as a protection to the accused in relation to criminal offences in respect of which proceedings have been instituted. Sub-clause (3) corresponds to the Vth Amendment of the American Constitution which says:

No person shall be compelled in any criminal case to be a witness against himself." and also to the rule in English law regarding testimonial compulsion. The Supreme Court examined in detail the scope of the Constitutional protection against self-incrimination in M. P. Sharma v. Sattish Chandra . In that case the Registrar of Joint Stock Companies filed "information with the Police to the effect that the accused had committed certain offence under the Indian Penal Code. The complaint also stated that to determine the extent of fraud committed it was necessary to seize the books of certain concerns in which the person charged was interested. On the basis of this information an application was made to the District Magistrate for the issue of a search warrant. The war-rants that were issued were challenged under Article 32 of the Constitution before the Supreme Court on the ground inter alia that Article 20 (3) of the Constitution was contravened in that the person charged with the offence was compelled to produce documentary evidence in his possession which would incriminate him. It was held that the search and seizure complained of in that case did not come within the ambit of protection guaranteed by Article 20 (3), The judgment in that case also

considered how far the English rule against testimonial compulsion can be said to be adopted in this country and stated:

Broadly stated the guarantee in Article 20 (3) is against testimonial compulsion. It is sug-gested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in Article 20 (3) is 'to be a witness'. A person can be a witness not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see Section 119 of the Evidence Act) or the like. 'To be a witness' is nothing more than to furnish evidence and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes ... Indeed every positive volitional act which furnishes evidence is testimony and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the Court room. The phrase used in Article 20 (3) is 'to be a witness' and not to appear as a witness. It follows that the protection afforded to an accused in so fat as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution.

It will have to be remembered that in that case a first information report had been lodged with the Police charging the person concerned with certain offences under the Penal Code. An information having been thus laid, the Police was bound in case there was, in their opinion, sufficient evidence, to send the case to the Magistrate. They would have had no option to let off the accused. It can therefore be said that the laying of an Information against a person with the police will normally lead to a prosecution. But the same cannot be said of smuggling offences. An investigation by the Customs authorities need not necessarily end in prosecution, even if there are ample materials to sustain a prosecution. The Cusoms Officer is not a police officer. He is primarily concerned with the prevention or evasion of Customs Laws. With that view, the Collector of Customs is given authority to impose departmental punishments like confiscation of goods and the imposition of a penalty. As we shall show presently, these proceedings are not criminal prosecutions. After an investigation it would be open to the Customs authorities to impose on the delinquent only a departmental punishment; they are not obliged to prosecute. It cannot therefore be said that an investigation by the Customs authorities into a smuggling offence would normally lead to a prosecution in a criminal Court, though if the authority so chooses, such proceedings can be initiated; but even that can only be by the authority specified in Section 187-A.

11. The main purpose of an examination under Section 171-A is to gather information with respect to smuggling offences. At that stage nobody is in the position of an accused; or charged with an offence. It may be that somebody is suspected Of the offence. The person to whom summons is issued is thought of only as a person who can give information; he is not a witness in the sense of

deposing against anybody. It is however in-, evitable that if as a result of the compelled testimony obtained by the machinery provided under the section, the complicity of the witness to an offence is brought out, there would be a possibility of his being exposed to a departmental punishment as well as a criminal prosecution. In other words, it is by a fortuitous operations of the rule that a person guilty of the offence is exposed to the risk of giving evidence against himself; but at the same time we cannot ignore the fact that the real purpose of Section 171-A is to obtain information from persons capable of giving it regardless of the fact whether such person will be a mere witness or also an offender to any offence that the enquiry might reveal. But an enquiry under Section 171-A is not a judicial one: it is one in the course of investigation of evasion of Customs and Import Laws, It is true that a power to compel disclosure by a person of the offence committed by him is liable to misuse or even of abuse by which an individual might suffer; but that is perhaps inevitable in a case where interest of society outweigh personal inconvenience.

12. Balakrishna Ayyar, J., has observed in :

On the one hand we must resolutely set our faces against the methods and techniques evolved by the Star-Chamber-methods which would rapidly enable a Police State to be built up. On the other hand, society must be protected, and, this can be done only by tracking down offenders and punishing them according to law. 'This can-not be done if persons likely to have relevant information cannot be questioned and compelled to answer. To carry immunity from being questioned beyond a certain limit would be to make the country safe for lawless elements.

But expediency or even policy may not be always appropriate while considering the constitutional validity of a statutory provision. The only question to be considered now is as to the content of the constitutional protection and whether Section 171-A impinges to any extent its ambit. It can be taken as settled that the guarantee given by Article 20 (3) (and we agree with respect with Balakrishna Ayyar, J., on that point) can only be in relation to a proceeding in a criminal Court, and obviously to a person accused of an offence; it cannot extend to mere witnesses and to persons from whom information is sought to be obtained.

13. We shall therefore consider (r) whether at the stage at which the Customs authorities exercise their power under Section 171-A, the person to whom summons is issued, (even assuming that he is suspected of or guilty of the offence) can be said to be accused of an offence; (2) whether from the nature of the protection given one can say, it can at all be said to apply to an enquiry tinder Section 171-A.

14. It must be remembered that the protection against self-incrimination in England and America is much wider than in this country. There, .the rule applies to Civil and Revenue proceedings as well, and further is not confined to the accused person but on the other hand extends to witnesses. Rupert Cross in his book on Evidence states at page 227:

We have seen that the privilege against self-incrimination in the narrow sense of the word originated in the unpopularity of the procedure is the Star-Chamber under which those who were charged with an offence were interrogated on oath. This contributed to the rule that the accused

could not testify in a criminal case, and the idea that none could be obliged to jeopardise his life or liberty by answering questions on oath came to be applied to all witnesses in all proceedings in the course of the 17th century. The rule extends beyond the answers that would directly criminate the witness to those which might be used as a step towards obtaining evidence against him." The rule is therefore one of gradual development from a protection given to an accused person to others. Again, the protection is not confined in England to the criminal cases; a witness cannot be obliged to answer a question if such answer would expose him to a penalty. The learned author treats that rule as originating in a doctrine, that equity would not assist a common informer by making an order for discovery in his favour. The rule against testimonial compulsion in a criminal case had therefore a different origin from a similar rule which gave protection against a penalty.

15. The rule in America is contained in the Fifth Amendment to its Constitution. As stated by Brandeis, J., in Mc Carthy v. Arndstein (1924) 69 Law Ed 158, it runs:

The Government insists broadly that the constitutional privilege against self-incrimination does not apply to any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is a party defendant. It protects likewise the owner of the goods which may be forfeited in a penal proceeding.

16. Rottschaefer in his book on American Constitutional Law, referring to the Fifth Amendment (p. 800) says:

The object of the provision was to insure a person against being compelled in any manner or at any time to give testimony that might expose him for prosecution for crime. The test of his right to assert his privilege is not the character of the proceedings in which it is sought to compel him to give such testimony but the fact that its assertion is for the purpose of protecting him against being forced to do that against the compulsory doing of which the Constitution protects him. It protects mm not merely in criminal proceedings against himself but also when he is a witness in proceedings or investigations of any character whatever ... The privilege may thus wear a double aspect, depending on the character of the proceeding in which it is invoked. If it is a criminal proceeding against the. party invoking it, the privilege is that of not being compelled to take the witness stand or to answer any question at all. If it is a proceeding of a civil nature, an investigation of some character or a criminal proceeding against some one other than himself, he may be required to testify but has the privilege of refusing to answer any question the answer to which might incriminate him." It will be seen that the immunity of an accused to answer an incriminating question is different in its underlying principle from the case of a privilege of a witness. In our country while the immunity of the accused against self-incrimination is guaranteed, there is no such protection given to a mere witness. Under Section 132 of the Indian Evidence Act a witness is not excused from answering questions (relevant of course) at a judicial trial, although by his answer he might incriminate himself. The proviso to that section however enacts that his answers cannot be proved against him in any criminal proceeding. Thus there is no privilege given to the witness not to answer a question,

the answer to which might incriminate him; but as we shall show in the subsequent portions of this judgment, the proviso merely offers an inducement or encouragement to a witness to testify freely; for without such an assurance witnesses might not come forward to speak the truth. If therefore the Legislature considers that with regard to particular class of witnesses, offenders or offences, such protection should not be given, it cannot be held (apart from the contention that it would offend Article 14) to be violative of the Constitution. The rule under the English and American Law conferring privilege to witnesses against answering questions that might lead to the imposition of a penalty will not also apply to this country.

17. The constitutional guarantee against testimonial compulsion is as we said to the person accused of an offence. Article 367 makes the provisions of the General Clauses Act, 1897 appli cable to the interpretation of the Constitution. Under Section 3 (38) of that enactment the word "offence" is defined as meaning an act or omission made punishable by any law for the time being in force. As we pointed out before, certain violations of law under the Import and Export Control Act and the Sea Customs Act do not merely expose the culprit to departmental penalties but are also punishable as offences by the ordinary Courts. An investigation conducted by the Customs authorities may stop with the confiscation of smuggled goods: even a penalty may be imposed. There may thus be no occasion for a prosecution. It cannot be said, as we said before that such investigations would even normally lead to a prosecution. If the Customs authorities decide only to take administrative action against the culprit, does it amount to a punishment for an offence? In Helvering v. Mitchell (1937) 82 Law Ed 917, Brandeis, J., referring to the penalty imposed by the Legislature to tax evaders said :

They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the tax-payers' fraud ... The sanction of fine and imprisonment for wilful attempts in any manner to evade or defeat any income-tax introduced into the Act under the heading "penalties" is obviously a criminal one. The sanction of fifty per centum addition "if any part of any deficiency "is due to fraud with intent to evade tax", introduced into the Act under the heading "Additions to the tax" was clearly intended as a civil one.

The distinction between a civil and criminal sanction imposed by the same enactment has been recognised by the Supreme Court of India in two. cases. Maqbool Hussain v. State of Bombay and Thomas Dana v. State of Punjab . In the former case it was observed:, "We are of opinion that the Sea Customs Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a Court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy. It therefore follows that when the Customs authorities confiscated the goods in question neither the proceedings taken before the Sea Customs authorities constituted a prosecution of the appellant nor did the order of confiscation constituted a punishment inflicted by a Court or judicial tribunal on the appellant."

18. These observations which in our opinion are decisive of the character of proceeding before the Customs authorities, have been distinguished by a bench of the Calcutta High Court in Collector of Customs v. Calcutta Motor and Cycle Co. on the narrow ground that the Supreme Court were then

primarily concerned with Article 20 (2) and not Article 20 (3). We are unable, with great respect, to make any such distinction. Indeed if we may say so with respect, the matter is put beyond doubt in very clear language an Thomas Dana's case, . Considering the distinction between the imposition of a penalty by the Customs authorities and the punishment in a criminal Court, it was observed:

It is true that the petitioners were dealt with by the Collector of Central Excise and Land Customs for the offence of smuggling were found 'guilty' and a deterrent 'punishment' was imposed upon them but as he had not been vested with the powers of a magistrate or a criminal Court, his proceedings against the petitioners, were in the nature of revenue proceedings with a view to-detecting infringement of the provisions of the Sea Customs Act and imposing penalties when it was found that they had been guilty of those infringements. Those penalties the Collector had been empowered to impose in order not only to prevent a recurrence of such infringements but also to recoup the loss of revenue resulting from such infringements.

In our Court the distinction between the two types of punishments was taken as a settled one in Sivagaminatha Moopar and Sons v. Income-tax Officer ILR (1956) Mad 415 : (S) AIR 1956 Mad.

19. It would follow from the above that the proceedings under Section 171-A need not necessarily be in relation to any criminal prosecution or even be an essential preliminary, to such prosecution. The Customs authorities have their own duties to perform, to check evasion, to discover illegal imports, to give deterrent administrative punishment to the smuggler to make it not worth while for him to smuggle. All these require the obtaining of information. The nature of the protection given under Article 20 (3) itself will show that it cannot apply to an enquiry in pursuance of the summons under Section 171-A of the Sea Customs Act for as we stated earlier, the protection against self-incrimination is only to an accused person. That protection as available in this country is more or less the same as under the English law. In Blunt v. Park Lane Hotel, Ltd. 1942-2 KB 253 Goddard, L, J., stated the rule in England as The rule is that no one is bound to answer any question if the answer thereto would 'in the opinion of the Judge' have a tendency to expose the deponent to any criminal charge, penalty or forfeiture 'which the Judge regards' as reasonably likely to be preferred or sued for." (Italics (here in) is ours).

20. Whether an answer to a particular question will incriminate the person deposing cannot therefore, be decided by the witness; it should be so in the opinion of the Judge. That rule cannot therefore apply where there is no judicial proceeding. That the American law is the same can be seen from Rottscnaefer's American Constitutional Law where the learned author referring to Mason v. United States (1916) 61 Law Ed 1198 observes:

"It is the general rule that the final decision on whether the answers to a given question will tend to incriminate a witness is to be made by the Court and not the witness.

It is argued that if it were to be recognised that there is no prohibition against compelled testimony in proceedings under the Customs Act, the guarantee under Article 20 (3) itself, would become illusory as the confession can be obtained first under Section 171-A of the Sea Customs Act and then used for a prosecution. We cannot agree that it would be so. If for example a smuggler gives himself

away during an examination under Section 171-A, that evidence will nevertheless constitute a compelled testimony and can neither be relied on nor used against him in any criminal prosecution, as Article 20 (3) will prevent it from being so used. So much can be taken as settled by . Therefore any incriminating answers which a person examined under Section 171-A may give, can only be used for the purpose of the departmental punishment and not for a prosecution in a criminal Court. In that case as well as in the more recent case in State of Bombay v. Kathi Kalu it has been expressly held that the protection guaranteed under Article 20(3) would comprehend both oral and written statements. A record of evidence of a person obtained under Section 171-A of the Sea Customs Act cannot be used against him at trial if he were to be charged in the criminal Court.

21. There are several enactments of the Central Legislature which contemplate quasi judicial enquiries but do not give any protection to the person called upon to give evidence against self-incrimination. We shall have to give some of them when we consider the applicability of Article 14. It will be interesting to note that even in England where the rule against self-incrimination is much wider than here, there are statutes which take away that privilege. In Re, Atherton, 1912-2 KB 251 a debtor adjudged bankrupt was under remand on a criminal charge. In the public examination in bankruptcy proceedings, questions were put to him the answers to which might tend to incriminate him. Section 17 of the Bankruptcy Act, 1883 made it obligatory on him to answer all questions touching his conduct, dealings and property. It was held that it was merely a rule of convenience which established a practice of not pressing questions relating to offences but that did not prohibit the Official Receiver from putting the questions. This view was accepted in Re, Paget; Ex parte, Official Receiver, 1927-2 Ch 85 where Lord Hansworth. M, R., emphasised the nature of the jurisdiction regarding enquiries as one for the protection of the public which compelled a full and searching examination and that the mere fact that the answers might cause the bankrupt personal inconvenience or possibly incriminate him must not stand in the way of such a full examination.

22. But there is no constitutional guarantee in England as in this country, and legislation there is not subject to any fundamental rights. But as we have shown before the fundamental right guaranteed under Article 20 (3) can have no relation to proceedings under Section 171-A of the Sea Customs Act.

23. For the reasons stated by us in the foregoing paragraphs we are unable with respect to share the view taken in . On the other hand we agree with Balakrishna Iyer, J.'s view in that Section 171-A is not violative of Article 20 (3). At the same time we should not be understood as agreeing with the learned Judge that the department will be precluded from putting questions to a person after he could be said to be in the position of an accused person at their enquiry. For one thing it will be very difficult to say when that stage can be said to be reached. Secondly the department cannot be prevented from putting all relevant questions for the purpose of investigation and for deciding those matters exclusively entrusted to them under the Sea Customs Act.

24. Learned Counsel for the appellant then contended that Section 171-A would in relation to any proceeding under Import and Export Control Act, contravene the provisions of Article 20 (3) as the person who commits a breach of its provisions or the conditions imposed by a licence would ipso

facto be guilty of an offence and that once proceedings are set afoot, it should be deemed really to be an investigation into an offence. In other words the departmental offence cannot be isolated from the criminal one in a case under the Import and Export Control Act. Section 5 of that enactment which imposes a penalty for offences under that enactment clearly says that the punishment thereunder will be in addition to confiscation of penalty under the provisions of Sea Customs Act which is attracted by virtue of Section 3 (2). The Customs authorities therefore have the competence to inflict a civil penalty and the principles we have discussed above will therefore, apply to contravention of the regulations imposed by the Import and Export Control Act as well.

25. We shall now proceed to the next ground urged regarding the invalidity of the power conferred by Section 171-A. The challenge to the validity of the power conferred by Section 171-A is that it contravenes Article 14 of the Constitution by discriminating against one class of offenders from another. It is put thus: - A witness in a judicial proceeding obtains an immunity from prosecution if he were by his answers to incriminate himself (see Section 132 of the Evidence Act) while a person who is compelled to give evidence in response to a summons under Section 171-A of the Sea Customs Act, is guaranteed no such immunity. There is therefore, a discrimination between one class of offenders, i. e., those that commit the offences of smuggling and those guilty of offences under other laws. There can be no rational distinction between the two classes of offences as there can be more heinous offences under the Penal Code than smuggling a single article like a watch, etc. Then again there can be no difference between a judicial and a quasi-judicial enquiry (it is assumed that proceedings under Section 171-A is a quasi-judicial one) as the mischief of procuring compelled testimony is common to both.

26. In this connection learned Counsel referred to the protection afforded under the Code of Criminal Procedure to an accused under Sections 342 and 342-A whereunder the accused does not render himself to any punishment by refusal to answer questions) and to a witness during police investigation under Section 162 of the Criminal Procedure Code and during trial by Section 132 of the Indian Evidence Act. Such protection, he said is inherent in any civilised system of jurisprudence and is but a kind of liberty which every man should have. There being no such privilege or protection under Section 171-A it should be regarded as discriminatory. Further the witness has no choice; a refusal or failure to speak the truth will entail a punishment (Secs. 174 and 179 I. P. C). Speaking the truth would inevitably lead him to the dock, where he can be convicted out of his own mouth by reason of his confession, "the queen of testimony".

27. We have earlier pointed out that an incriminating answer obtained from a person in an examination under Section 171-A cannot be used in any subsequent criminal prosecution lodged against him and there will therefore, be no danger of such answers being used to convict him in a Court. Therefore for all practical purposes there will be no discrimination between the two kinds of offenders. But the contention does raise an important question under Article 14 in that the benefit- or statutory assurance which a witness obtains with respect to a judicial trial is not given to one examined under Section 171-A of the Sea Customs Act.

28. Article 14 guarantees equal laws for all citizens similarly placed.

29. Interpreting the XlVth amendment to the American Constitution Mathews, J., stated in Yick Wo v. Hopkins (1885-86) 30 Law Ed 220:

These provisions are universal in their application to all persons within the territorial jurisdiction without regard to any differences of race, of colour or of nationality and the equal protection of law is a pledge of the protection of equal laws.

But this rule does not prevent reasonable classification being made subjecting one class to certain burdens while not imposing such burdens on others or conferring advantages on a specified class while not so conferring on others. But in all those cases the classification should have a just relation to the object sought to be achieved by the legislation.

30. Article 14 has been the subject-matter of detailed consideration in a number of decisions of the Supreme Court. In State of West Bengal v. Anwar Ali Sarcar Mukherjea, J., said:

It can be taken as well settled that the principle underlying the guarantee under 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 the difference of circumstances. It only means that the 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. This brings in the question of classification. As there is no infringement of the 'equal protection rule if the law deals alike with all persons of a certain class the Legislature has no doubt right to classify the persons and placing those whose conditions are substantially similar under the same rule of law, while applying different rules to persons differently situated. It is said that the entire problem under the equal protection clause is one of classification or of drawing lines. In making the classification, the Legislature cannot certainly be expected to provide "abstract symmetry". It can make and set apart classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even "degrees of evil" but the classification should never be arbitrary, or evasive. It must rest always upon real and substantial distinction bearing a reasonable and just relation to the thing in respect to which the classification is made and classification made without any reasonable basis should be regarded as invalid.

31. In Budhan Choudhry v, State of Bihar, Das, C. J., observes:

In order, however, to base the test of permissible classification two conditions must be fulfilled namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those left out of that group and (2) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupation or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but

also by a law of procedure." That eminent Chief Justice analysed and elucidated the principles which should guide the Courta in the application of Article 14 in a later case in Ramkrishna Dalmia v. S.R. Tendolkar where he laid down that if a particular legislation is impugned as discriminatory it has to be seen (1) whether there is a differentiation or discrimination under the statute (2) if that be so, is it due to classification (3) whether such classification is a legislative act and (4) if the classification is a reasonable one having regard to the object which the Legislature had in view.

32. The powers of the Union Legislature in the matter of control and regulation of imports and levy of duties thereon are specified inter alia under items 41, 83 and 93 of Schedule VII list. The Sea Customs Act will come under those items. Section 171-A of the Sea Customs Act is intended to apply to investigations under that enactment, and there is no differentiation or discrimination under that section or under any other provision of the Sea Customs Act, between one person and another.

33. What is, however, contended is that the effect of Section 171-A will be to impose a risk or burden on a person to be examined thereunder, while there is no such risk to the class of witnesses who come to depose before the ordinary Court Conversely the benefit or immunity from a risk granted to a witness under the proviso to Section 132 of the Evidence Act is not being available to those examined under Section 171-A of the Sea Customs Act: it should therefore be held that there is a discrimination. Equal application of laws, it is said requires that a person to be accused for a smuggling offence should be entitled to the same protection or privileges as would be accorded to an offender under the ordinary law.

34. We would however, like to point out that there is an underlying misconception in the argument. The smuggler if he is tried before the criminal Court will undoubtedly be entitled to the same privileges as any other criminal. The question is whether he should have the same privilege in a quasi judicial enquiry or investigation. Great reliance is placed in support of the argument on the decision of the Supreme Court in where a West Bengal enactment with a view to provide for a speedier trial of certain offences laid down a special procedure for trial before special Courts, the prescribed procedure being disadvantageous from the point of view of the accused. The Act did neither classify nor provide for the classification of the cases to be tried by the special Courts but left it. to the arbitrary discretion of the executive to pick and choose cases and place them before such Courts. It was held that the relevant provision in the impugned enactment was void as it violated Article 14. As it will be seen the enactment in that case singled out certain persons for a discriminatory treatment on no rational classification. There is no such discriminatory treatment by the impugned section. No special procedure has been enacted for an accused under the Sea Customs Act out of the ordinary. Section 171-A relates to persons who have information about smuggling offences. It is not primarily concerned with the persons guilty of offences, though it may happen that may also be summoned. Smuggling offences are committed secretly, often by persons of douce respectability and it will not always be easy to find out a smuggler, who will always keep behind and do organised smuggling. Secondly the offences are such that interests of the society require that; they should be traced and brought to book. The devious ways by which a smuggler does his business might not be easy of detection. As Sinha, C. J., has observed in it is as much necessary to protect . an accused person against being compelled to incriminate himself, as to arm the agents of law and the law Courts with legitimate powers to bring the offenders to justice. Furthermore, a person

summoned is not an accused person and may not even turn out to be one--although there will be a possibility of his turning out to be so. In the latter case, justice to him is secured by Article 20 (3),

35. A provision of the kind contained in Section 171-A of the Sea Customs Act is not peculiar to that enactment. Section 11 (3) of the Industrial Disputes Act contains an almost identical provision. Section 33 (3) of the Insurance Act confers a power of full examination on oath of any manager, managing director or other officer of an insurer in relation to his business. Sections 240, 477 and 498 of the Companies Act contain similar powers. So also Sections 45-G (6) and (7) of the Banking Companies Act which goes further and provides for the record of evidence with due formality and which it says could be used against the deponent in any civil or criminal proceeding. To none of these cases does Section 132 of the Evidence Act apply. We have earlier referred to the judgment of the English Courts in 1912-2 KB 251 and 1927-2 Ch 85 under the English Bankruptcy Act which corresponds to Section 27 (6) of the Presidency-Towns Insolvency Act, where the Master of the Rolls (in the latter case) pointed out that the rule against self-incrimination was a rule of convenience which must give way where public interests are concerned. That would mean that a statute can validly abridge the privilege given to the witness subject, of course, to the constitutional safeguards. Analysing the principles laid down in the decisions of the Supreme Court relative to the matter now set down for consideration, we have to consider:

1. Is there a discrimination under Section 171-A of the Sea Customs Act;

2. If there is one, is it referable to a classification and whether such classification is made by the Legislature;

3. Even so, is such classification reasonable and bears a just relation to the object of the statutory provision.

36. Learned' counsel for the appellant has contended that there is a differentiation in between an offender under the ordinary law and one under the Sea Customs Act and that such a differentiation is without justification, It is argued that the availability of protection under Section 132 of the Evidence Act and the non-availability of the same under Section 171-A of the Sea Customs Act would be enough to constitute a discrimination. To appreciate whether the contention is right or wrong it is necessary first to consider the purport and nature of the proviso to Section 132 of the Evidence Act, In The Queen v. Gopal Doss ILR 3 Mad 371 (FB), Chief Justice Turner after examining the difference between the English law of privileges of a witness and the Indian law as enacted in Section 133 of the Evidence Act ob-served at page 280:

The Indian Act gives the Judge no option to disallow a question as to matter relevant to the matter in issue. It gives him an option to compel or excuse an answer to a question as to a matter which is material to the suit only so far as it affects the credit of the witness. But in as much as no alteration of the law was attainable where the witness voluntarily gave it, the law relating to answers so given was left unaltered. The end desired, the production of evidence from unwilling witnesses, was sought by depriving them of the privilege they had before enjoyed of claiming excuse; but while subjecting them to compulsion the Legislature in order to remove any inducement to falsehood

declared that the evidence so obtained should not be used against them except for the purpose in the Act declared. The object of the law was to secure evidence which therefore could not have been obtained and it was not its object to 'afford any additional protection to persons who by an infraction of the criminal law had exposed themselves to penalties.' (Italics here in ours).

Thus Section 132 of the Evidence Act adopted the method of offering an inducement to achieve the end, namely of getting evidence. Section 171-A has adopted a differential method for securing the same end by imposing a criminal sanction against falsehood. There was no protection therefore in one case which is denied in the other. If the Legislature is competent to remove the fear of prosecution to secure evidence at a judicial trial it will have an equal power to withdraw such inducements in other types of enquiries."

37. Learned Counsel for the appellant has contended that as Section 171-A is designed to secure evidence, the rule of procedure to be adopted should be the same as in a judicial trial. He referred in this connection to Surajmal Mohta and Co. v. Visvanatha Sastri . That was a case where Section 5 (4) of the Taxation of Income (Investigation Commission) Act came up for consideration. By that provision such of those evaders of income-tax who in the opinion of the Government evaded to a substantial extent, were put up before the Commission for which a more stringent procedure was prescribed, while the other tax evaders similarly situate would be liable to be proceeded against under Section 34 of the Indian Income-tax Act. The section was struck down as discriminatory. Mahajan, C. J., observed:

It is well settled that in its application to legal proceedings Article 14 secures to everyone the same rules of evidence and modes of procedure; in other words the same rule must exist for all in similar circumstances. It is also well settled that this principle does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position.

These observations can in our opinion have no application to a case where there is no legal proceeding. Further the purpose of Section 171-A is different from a prosecution. As we said earlier, at the stage at which Section 171-A is invoked, there are no proceedings directed against any person; a person who has knowledge or in possession of materials relative to a smuggling offence is alone examined and there can obviously be no comparison between such an investigation and a legal trial to which section 132 of the Evidence Act will apply. In our opinion there is really no substantial difference in the treatment under the law between a witness in a judicial proceeding and one who is summoned under Section 171-A. Both are compelled to answer questions the answer to which might incriminate them. Article 20 (3) will protect both of them in case they are charged with a criminal offence. There is no doubt a difference in the method adopted for securing full and true disclosure of facts. That cannot mean that there is a differentiation.

38. One can even say that there is justification for Section 171-A being what it is. Persons who can give evidence about smuggling must be few, most of them might perhaps be participants. If a statutory guarantee were to be given to them that they will not be prosecuted (which is different from saying that their compelled testimony will not be used against them) no offenders can be

brought to justice.

39. In the view we have taken namely, that there is substantially no difference in. the treatment of the witnesses, the consideration of the other questions, whether the difference is reasonable and due to a classification do not arise. But we shall however, out of deference to learned Counsel who argued the case and for the sake of completeness deal with those matters as well.

40. Learned Counsel for the appellant has contended that Section 171-A does not attempt any classification and in the absence of it, it will not be open to this Court to find any, and that therefore the question of reasonableness (which would arise only on there being a classification) need not be considered: even if one were to find such a classification on a conjectural basis, it should be regarded as unreasonable, for the simple reason that it is conjectural.

41. The first part of the contention is undoubtedly supported by authority. In Gulf Colorado and Santa Fe Rly., Co. v. W. H. Ellis (1897) 41 Law Ed 666 a statute imposed, additional costs in a litigation on a railway corporation it they failed to settle a claim against them, while other corporations were immune. Brewer, J., said :

While good faith and knowledge of existing conditions on the part of the Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand in no manner restraining the state action." Again in Hartford Steam Boiler Inspection and Insurance Co. v. W. B. Harrison (1936) 81 Law Ed 1223 it has been laid down that discriminations are not to be supported by mere fanciful conjecture and cannot stand as reasonable if they offend the plain standards of common sense. In the judgment in Chandrasekhara Aiyar, J., stated that the policy or idea behind the classification,should at least be adumbrated it not stated, so that the Court which has to decide on the constitutionality might be seized of something on which it could base its view about the propriety of the enactment from the standpoint of discrimination or equal protection.

42. But we have already pointed out that Section 171-A on its terms does not discriminate; the persons dealt with by it are those in possession of information or materials regarding smuggling. All of them are treated alike. The discrimination suggested is by reason of an alleged protection under a different law of procedure. Now, the preamble to the Sea Customs Act and its provisions sufficiently indicate the class of persons to whom Section 171-A should apply. In it is stated;

A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classifications of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the Court.

43. The Sea Customs Act into which Section 171-A is introduced by an amending legislation in the year 1955, has been enacted to consolidate the law relating to the levy of customs duties. It contains several provisions to prevent evasion of duties. Evasion and prevention of evasion are undoubtedly

special subjects. The bases of classification under Article 14 being unlimited, the persons who are in possession of information in regard to such matters can be properly said to form a distinct class, than those who have knowledge of other offences, particularly when the former matter is, as it should be, regarded, one of national importance. There is, therefore, a proper and reasonable classification.

44. Recently the Supreme Court published a list of names of touts under a particular rule. That rule was challenged as contravening Article 14 in Re, Sant Ram . Sinha, C. J., said:

All persons who frequent the precincts of this Court shall be dealt with under same rules if and when the occasion arises. All persons who are included in the list of touts under Rule 24 will be liable to be dealt with in the same way irrespective of any other consideration. Hence there is no room for any discrimination so far as the precincts of this Court are concerned.

45. So too it should be in the case of persons who know something about smuggling offences.

46. Having ascertained the existence of the classification the next step is to find out whether it is reasonable and aimed at the purpose of the statute. On that question it will be useful to refer to the following instructive passage in Wills 'Constitutional Law of United States' dealing with the question of classification for police power;

It is a matter for judicial determination but in determining the question of reasonableness the Courts must find some economic, political or other social interest to be secured and some relation to the classification to the objects sought to be accomplished. In doing this, the Court may consider matters of common knowledge, matters of common report, history of the times and to sustain it they will assume every state of facts which can be conceived of as existing at the time of the legislation. The fact that only one person or on object or one business or one locality is affected is not proof of denial, of the equal protection of laws.

47. There can be little doubt that having regard to the difficulties attendant on tracing a smuggler, the power to obtain compelled testimony from anyone who is in possession of the relevant information has a just relation to the object of the enactment namely to prevent and check evasion of customs laws.

48. In C. I. Emden v. State of U.P. a case of discrimination with respect to a presumption under the law arose. Under S. 4 of the Prevention of Corruption Act, the statute raises a presumption against a public servant charged with corruption while under the general law of evidence the presumption ii quite the other way. Upholding the validity of the provision in the light of Article 14 Gajendragad-kar, J. said:

It is based on an intelligible differentia and there can be no difficulty in distinguishing the class of persons covered by the impugned section from other classes of persons who are accused of committing the other offences. The Legislature presumably realised that experience in Courts showed how difficult it is to bring home to the accused persons the charge of bribery; evidence

which is and can be generally adduced in such cases ia support of the charge is apt to be treated as tainted and so it is not easy to establish charges of bribery beyond reasonable doubt. Legislature felt that the evil of corruption amongst public servants posed a serious problem and had to be effectively roote out in the interests of clean and efficient administration.... The object which the Legislature thus wanted to achieve is the eradication of corruption from amongst public servants and between the said object and the intelligible differentia on which the classification is based there is a rational and direct relation.

49. These observations apply with particular appropriateness to the present case. Smugglers should be tracked and punished. Smuggling should be made unprofitable to the offender. In many cases nobody but the smuggler himself might know of how it is being done. To give immunity from prosecution to such a person will defeat the very object of the law. The differentia in the classification is between those who have information with respect to smuggling offences and others. It is intelligible and there is a just relation between the object of the Legislature and the classification. We have, therefore, no hesitation in holding that the impugned provision of law is reasonable and perfectly valid.

50. The appeal fails and is dismissed with costs.

Anantanarayanan, J.

51. I have had the great advantage of study of the judgment of My Lord the Chief Justice. With respect, I find myself in entire agreement with him upon the conclusions to be reached with regard to the two main grounds (those relating to the alleged contravention of Article 14 and of Article 20(3) of the Constitution), upon which the writ appeal has been argued and pressed before us. It might appear superfluous that I should separately record the grounds of my concurrence. But I have been impelled to do so, both on account of the constitutional importance of the issues involved, and from regard for the subtle and complex arguments elaborated before us by the learned Counsel or the appellant (Sri Venkatasubramanya Ayyar) and the learned Advocate-General for the State.

52. The facts have been set forth in the judgment of My Lord, The Chief Justice, in every relevant particular; that enables me to pursue the reasoning, in the light of the facts of the instant case, without recapitulation. Further, I propose largely to confine myself, in this judgment, to the ground that Section 171-A of the Sea Customs Act is violative of Article 14 of the Constitution. It appears to me that the argument, as based upon Article 20(3), is within a relatively brief compass, and admits of a relatively simple answer. Even with regard to the history of the doctrine of protection from the compulsion to answer incriminating questions, particularly in the United Kingdom, it appears to me that that history has a deeper and more profound relevance to the argument as based upon Article 14, than the argument which impinges upon the protection against testimonial compulsion enacted in Article 20(3). The reasoning for this will be manifest, as I proceed further. At this juncture, it may be best to develop the argument, as based on Article 14, in the manner of the learned Counsel for the appellant (Sri Venkatasubramania Ayyar) and with specific emphasis upon the citations of authority placed by him before us.

53. For, in order to enable us to arrive at a truly satisfactory solution of this problem, it is essential to express in fullest scope the force and subtlety of this argument. I may point out here that the two issues on this aspect are really exclusive and alternative in character; the second issue arises only where the first is concluded in favour of the appellant. The first issue is whether we have here a true instance of a discrimination, or a denial of the protection of equal laws to persons in a certain situation, where others similarly situated have obtained that protection or it has been recognised in their favour. It is only if such a discrimination is found to exist, though it might be by implication or a failure to enact a safeguard rather than a positive act of discrimination, that the further question will arise whether the discrimination could be referred to a classification by the Legislature, which classification satisfies the test of reasonableness, and just relationship to the object of the statute.

54. The argument of the learned Counsel on this aspect, largely proceeded upon an elaboration of the case-law with regard to equal protection of law, both in the United States of America and in this country; the attempt was to show that, initially, the discrimination was fought in the Courts-of the United States of America on the basis of the Fourteenth Amendment, without reference even-to the exceptional principle of reasonable classification. Thus, a very early decision like Barbier v. Connolly (1883-84) 28 Law Ed 923 concentrated upon the need that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights...that no impediments should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences." The judgment of Justice Matthews in (1885-86) 30 Law Ed 220 is notable for the dictum that "equal protection of the laws is a pledge of the protection of equal laws". The adjective 'equal' thus-suffered a transposition from 'protection' which it originally governed to "laws", and it was recognised that the doctrine restrains legislative action as-much as executive power. The argument is that this inequality might be manifest from the enactment itself, or might be evident only from a comparison of the enactment with the rest of the corpus-of law applicable to those similarly situated.

In (1897) 41 Law Ed 666 we find the emergence of the doctrine that classification is permissible to-relieve a law from the charge of denial of equal protection, but this must not be arbitrary but has-to be based upon a difference which has a just and proper relation to the attempted classification. In this regard, while good faith and the knowledge of existing conditions on the part of the legislature might be presumed, yet that presumption cannot be carried so far as to result in a speculative inference by Courts of "some undisclosed and unknown reason for subjecting certain individuals or Corporations to hostile and discriminating legislation". This, in sum and substance, rendered the protection of the Fourteenth Amendment "a mere? rope of sand, and in no manner restraining State actions". This metaphor recurs, and it has been recognised by citations in . Thus, it is a symbol of an application of the principle of protection of equal laws in such a manner as to constitute a mere semblance, but not the reality and substance of protection; precisely as a rope of sand cannot bind or restrain, though it has the appearance of a rope.

55. Reference was then made to the decisions, in F. S. Royster Guano Co. v. Commonwealth of Virginia (1919) 64 Law Ed 989, Mayflower Farms v. Ten Eyck (1935) 80 Law Ed 675, and (1936) 81 Law Ed 1223. In (1935) 80 Law Ed. 675, the Judges observed that where reasonable classification was not apparent, and was not made evident, the Courts had "no right to conjure up possible situations which might justify discrimination". In (1936) 81 Law Ed 1223 the Judges said:

Discriminations are not to be supported by fanciful conjecture.... They cannot stand as reasonable if they offend the plain standards of common sense.

These dicta have been recognised in this country by the leading decision in . It does not matter whether the inequality or discrimination was intended by the legislature, or not, if it is established; the tact that it might be due to inadvertence is also immaterial. As far as this country is concerned, the further decisions of the Supreme Court which are significant on this aspect are: Kedar Nath v. State of West Bengal and . The relevant criteria have been culled and set forth in the judgment of My Lord the Chief Justice; it is sufficient that I refer to them with the utmost brevity. The' classification must be based upon an intelligible differentiation, which must itself have a rational relationship to the object of the statute. If this is conceded or established, the classification might be founded upon various bases, geographical, occupational or otherwise directional. A nexus must exist between the bases of the classification, and the object of the enactment. I might add that, as pointed out in , legislative technique does not invariably or necessarily require that the statute should formulate the classification, or basis of differentiation, in relation to its object. This may well be gathered from the entire surrounding circumstances, and the intendment of the statute itself.

56. Against this background of principles, Sri Venkatasubramania Ayyar forcefully argued that (1) the failure of the Legislature to write into Section 171-A of the Sea Customs Act, the protection afforded to witnesses by Section 130 of the Indian Evidence Act, and more significantly, by the proviso to Section 132 of the Indian Evidence Act, perpetrated, by necessary implication, a discrimination that is hostile and unjustified. It was of no consequence whether the Legislature was conscious of the discrimination arising from the lacuna in respect of protection, and still enacted Section 171-A of the Sea Customs Act as it stands, or was not even conscious of the discrimination, and it has resulted from inadvertence. So long as it exists, and so long as no reasonable classification can be spelt out of the circumstances of the enactment of the section, and the policy of the Act itself as a whole, the Court cannot conjecture and supply a classification.

It was in this context that learned Counsel stressed two features of Section 171-A of the Sea Customs Act. Firstly, it invoked, or incorporated by reference, both Sections 228 and 193 of the Indian Penal Code, and hence the persons summoned under this section were subject to those disabilities, but destitute of the protection afforded by the proviso to Section 132 of the Indian Evidence Act, Secondly, protection has been afforded elsewhere to persons similarly situated, such as under Sections 342 and 342-A of the Code of Criminal Procedure with regard to an accused, Section 162 of the Code of Criminal Procedure with regard to witnesses interrogated during Police investigation, and, of course,, Section 132 of the Indian Evidence Act itself with regard to witnesses examined during a trial. .For these reasons, the discrimination, though it is so by implication rather than by positive enactment, indisputably appears from Section 171-A of the Sea Customs Act itself. It cannot

be related to any reasonable classification, since it is difficult to argue that any classification was at all intended by the Legislature. Even if it had been intended, it does not satisfy the tests of reasonableness, and a just relationship to the object of the statute. I shall return later to this argument. I shall now turn to the first aspect which, as-I have stated, excludes any argument based on Article 14 of the Constitution unless it is concluded) in favour of the appellant, and this is whether we have here an instance, intentional or otherwise, express or implied, of a hostile discrimination at all.

57. It is here that it seems to me that the-history of the doctrine of protection against compulsion to answer incriminating questions becomes, significant, even more than in the context of any discussion upon Article 20(3) of the Constitution. As far as the United Kingdom is concerned, the following dictum occurs in Wigmore on Evidence-(Third Edition, Vol. VIII, Section 2250):

The history of the privilege against self-incrimination has something more than the ordinary interest of a rule of Evidence... the woof of its long; story is woven across a tangled warp....

There were two distinct and parallel lines of development, the first being the history of the opposition to the ex officio oath of the Ecclesiastical Courts; the second, of the opposition to the criminating question in the Common Law Courts. As stressed by My Lord the Chief Justice, in one relevant passage, as far as civil matters are concerned, the rule partly originated in the equity doctrine that a common informer will not be assisted by an order for discovery in his favour. The unpopularity of the 'Star-Chamber' jurisdiction and methods of interrogation, had also a great deal to do with the growth of the theory. But what is very significant and interesting is that, from very early stages, there were also voices raised in protest against any absolute formulation of the doctrine, as that would deny and frustrate the ends of justice in the detection and punishment of offences, or of anti-social conduct. It is strictly pertinent to cite here a reference from the great: levels of English literature. In the 1603 edition of Hamlet, the King addresses the following speech in Act III, Scene 3:

...But it's not so above;

There is no shuffling; there the action lies-In his true nature and we ourselves compelled Even to the teeth and forehead of our faults,-To give in evidence.

Students of legal history have seen in this allusion an undeniable protest with regard to the extension of the protection against compulsory disclosure.

58. Even in modern times, the voices of protest have continued, and it is indeed difficult to find any basis in any system of jurisprudence for the view that there should be an unqualified and absolute protection afforded, to all persons, against being compelled to answer questions which might tend to incriminate. Indeed, with regard to the Fifth Amendment, which corresponds to our Article 20(3), the privilege has been termed by a Committee as "a hiding place of crime". It is noteworthy that the maxim nemo tenetur order seipsum which underlies the doctrine, has been. received by high authority with misgivings, if pressed in an unqualified form. Wigmore (Section 2251) observes that

this was termed by a wit as "Justice tampered with mercy". Jessell, M. R. stated in Ex parte, Reynolds, (1882) 15 Cox. C. C. 108, that the law had probably gone "even too far in that direction". An authoritative pronouncement of great interest in the United States of America is that of Justice Cardozo in Palko v. Connecticut (1937) 302 US 319 : 82 Law Ed 288 to this effect:

Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit and who would limit its scope or destroy it altogether...

Justice ... would not perish if the accused were subject to a duty to respond to orderly inquiry.

59. When we look at the actual embodiments of this principle in the United Kingdom, where it has received far more pervasive recognition than in this country, we are startled to find that there are notable exceptions to this rule, and that the deceptions are by no means confined to a particular, category of cases. I shall content myself with setting forth here a condensation of the instances and of the case-law, more elaborately to be found both in Wigmore and Phipson on the Law of Evidence (9th Edition). Firstly, under the Criminal Evidence Act, 1898, a person charged and being a witness in pursuance of this Act, may be asked any question in cross-examination, notwithstanding that it would tend to criminate him with respect to the offence charged. A limited protection is afforded, mot compelling the witness to answer questions tending to show that he had committed other offences. Next, under the Bankruptcy Act, 1914, Sections 15(1) and (8), a debtor may not merely be compelled to produce books of account and documents, but he cannot refuse to answer questions touching his conduct, dealings or property on the ground of self-crimination. The relevant authorities are 1912-2 KB 251; (1927) 2 Ch 85; Re, Jawett, 1929) 1 Ch 108. The answer may even be used as evidence in subsequent criminal proceedings: Re A Solicitor (1890) 25 QBD 17. Again, the Bankruptcy Act, 1890, repealed so much of Section 85 of the Larceny Act, 1861, as relieved a witness compulsorily examined in bankruptcy from liability to conviction for certain misdemeanors; and substituted a narrower protection.

Under the Gaming Houses Acts, 1845 and 1854, the Land Registration Act, 1925, the Representation of the People Act, 1949, the Election Com-missioners Act, 1949, the Explosive Substances Act, 1883, the Merchandise Marks Act, 1887, under relevant sections which need not be particularised fere, witnesses may also be compelled to answer criminating questions, subject to varying degrees of statutory protection from the consequences. With regard to questions as to adultery in divorce cases, this forms a separate and elaborate branch of the case-law. In other words, we may look in vain as far as the corpus of the law in the United Kingdom is concerned, for an application of the principle in any absolute and unqualified manner, in many contexts, a balance has been struck between the protection to the individual, and the paramount need of society, to reach at the offender, and to strike down the crime or the transgression of law. It cannot be claimed, for a moment, that there is any basic maxim of jurisprudence that the protection must be extended to every person compulsorily examined by a competent authority in every kind of proceedings, including quasi-judicial proceedings, like those under Section 171-A of -the Sea Customs Act, the main purpose of which is to obtain information of transgressions of the law in this respect, by the interrogation of those who are likely to be acquainted with the true state of affairs, and, this primarily, in order to take adequate departmental action or administrative action thereon. As My

Lord the Chief Justice has stressed, the further consequence of a criminal prosecution may or may not eventuate, and it is no inevitable or logical component of the objects of the section.

60. In such a context, can it be claimed that because witnesses in judicial proceedings have the benefit of the protection under the proviso to Section 132 of the Indian Evidence Act, persons summoned and examined under Section 171-A of the Sea Customs Act are entitled to the same protection, and that the failure to extend the protection to them amounts to a hostile discrimination? As i the learned Advocate-General has pointed out, this is by no means the only kind of quasi-judicial proceeding with regard to which the Legislature has enacted no kind or degree of protection against the compulsion to answer incriminating questions. There are relevant sections of the Industrial Disputes Act, the Insurance Act and the Banking Companies Act, in this country, which I need not extract here. Indeed it seems to me that the case with regard to Section 171-A of the Sea Customs Act is even stronger, upon the argument of the absence of any hostile discrimination, than in several of the instances of legislation furnished by the learned Advocate General. For, in this section, what is primarily provided for is a procedure to summon persons likely to possess relevant information which will aid the officer in the prevention of smuggling, or to summon persons to produce relevant documents. There is no necessary or logical inference that all such persons, who really form a class of persons possessing such documents or such information as may throw light upon suspected criminal offences are persons with a guilty conscience, or are persons concerned in the offences themselves. Conceivably many may be innocent and to them the obligation may involve no disability whatever precisely as conceivably, some of such persons might be suspects with good cause. But I am unable to see how the section itself can be tested against one kind of hypothetical instance, rather than another. In brief, therefore, upon this aspect of the matter, it appears to be at least very doubtful to me, if we have here a true case of hostile discrimination perpetrated by the Legislature, whether with intention or through inadvertence.

61. These considerations are strengthened by the history of the proviso to Section 132 of the Indian Evidence Act, through the enactment of Section 32 of Act II of 1853, and as set forth and expounded by Turner, C. J., in ILR 3 Mad 271 (FB). As has been shown by My Lord the Chief Justice, it is very clear that the object of the enactment of the proviso was not to whittle down the privilege in order to trap an offender, but to secure evidence, which would further the administration of justice, by the expedient of an inducement. The argument that we have here some kind of discrimination against smugglers, as compared with other offenders of the law, appears to me to be wide of the mark if there is a discrimination at all surely it is with regard to persons who have the relevant knowledge or documents in their possession, whether they are innocent or justifiably suspected of smuggling offences, as compared with these who do not possess any such material evidence and do not have any such information.

62. If we assume that, by implication, a discrimination has arisen, can it be justified? Even here applying the relevant tests as expounded in the decisions to which I have referred, I am unable to see how section 171-A of the Sea Customs Act can be held violative of Article 14 of the Constitution. The first branch of this argument is that the Legislature never intended any classification, and that the Courts cannot conjecture a classification, or provide one for the Legislature, where it was not conscious of making a discrimination. But it appears to me that learned Counsel for the appellant

(Sri Venkatasubramanya Ayyar) was here involved in something like an inconsistency or logical fallacy. If the discrimination, in relation to per-sons similarly situated and the corpus of pre-existing law was so plain, evident and indisputable as urged by him, then it could hardly be pleaded with consistency, that the Legislature was not aware of the pre-existing corpus of law, or the perpetration of such a discrimination. If we must hold that the Legislature was aware, we must then look for a reasonable basis of classification in the circumstances and the scope of the section itself in relation to the objects intendment and policy of the Sea Customs Act as a whole. On this analysis, I think that we are both able to perceive a reasonable basis of classification, and a nexus between that segregation and the objects of the Act as a whole. in other words if the concerned authorities should be enabled to effectively prevent or deal with smuggling, which is anti-social and which injures the national interest they should be properly clothed with powers of enquiry and detection. For Such a purpose it is just to make a classification of those who might have the requisite knowledge or information or documents which might lead to the detection of such crimes and to render them compellable in respect of answers or the production of such documents. It cannot be a valid objection to such an argument that this class of persons might include those justifiably suspected of participation in smuggling, and that such persons might run the risk of being ultimately involved in a criminal prosecution by not being afforded the protection of the proviso to Section 132 of the Indian Evidence Act

63. There are two definite answers to this argument. Firstly the proceedings under Section 171-A of the Sea Customs Act are not comparable to judicial proceedings and do not resemble judicial proceedings at all; they are broad enquiries for the prevention or detection of offences and no more. Secondly as stressed by their Lordships of the Supreme Court in and and on the principle of observations of Brandeis, J. in (1937) 82 L. Ed. 917. the Sea Customs authorities have several administrative powers and functions to perform in this respect including even the confiscation of goods and the levy of penalty which are intended to safeguard the revenue and reimburse the Government, and which are not, essentially powers of criminal prosecution at all or even a decision to launch a prosecution.

64. I would therefore answer the issues with (regard to the alleged violation of Article 14 by the 1 enactment of Section 171-A of the Sea Customs Act, against the appellant and for the State.

65. With regard to the argument based upon Article 20(3) of the Constitution, I find that I have Very little to say in view of the analysis appearing in the judgment of My Lord the Chief Justice and the conclusions expressed therein with which I, entirely and respectfully concur. Very briefly 1 stated, Sharma's Case, is authority upon two matters. Firstly, the phrase "to be a witness" cannot be limited to the mere rendering of oral evidence, but is- a wider term which would include the production of documents, or any positive volitional Act which amounts to testimony. Secondly the protection is available to any person against whom a formal accusation relating to the commission of an offence has been levelled which, in the normal course might result in prosecution. In the instant case, it cannot be, said that the protection can be invoke to justify the appellant in declining to appear before the authorities, at the stage of the enquiry itself and to state facts within his knowledge. Is other words it is distinctly at a premature stage that the protection has been claimed for the appellant. Of course, it is a heavy and true objection that the testimony thus compelled in the guise

of proceedings under Section 171-A of the Sea Customs Act, might be later utilised to prosecute the appellant, and thus effectively divest him of the protection of Article 20(3) by taking two steps instead of one. The answer to this objection has been clearly demonstrated, if I may say so with respect, by my Lord, the Chief Justice; such compelled testimony cannot be later relied on or used in a criminal prosecution as at that stage the protection of Article 20(3) will be available to the appellant. This fully disposes of the argument or objection upon this ground.

66. I therefore concur that the appeal fails and has to be dismissed with costs.