1956

March 20

BIDI SUPPLY CO.

v.

THE UNION OF INDIA AND OTHERS.

[S. R. DAS, C.J., VIVIAN BOSE, BHAGWATI, JAGANNADHADAS and B. P. SINHA, JJ.]

Constitution of India, Art. 14—Indian Income Tax Act, 1922 (XI of 1922), ss. 5(7-A), 64(5)(b) as amended by Indian Income Tax (Amendment) Act, 1940 (Act XL of 1940)—Whether ultra vires *the Constitution—Transfer, Order of—By Central Board of Revenue under s. 5(7-A)—Transferring assessment proceeding of petitioner from Calcutta to Ranchi—Without notice to petitioner and without giving it opportunity to make representation against such decision—Constitutionality of—Assessee, rights of—Under s. 64 of the Act.*

The petitioner—a registered firm—has its head-office in Calcutta where its books of account are kept and maintained and where it has its banking account, the members of the firm being citizens of India. Since its inception the firm has all along been assessed to income-tax by the Income-Tax Officer, District III, Calcutta. The assessments for the years 1948-49 and 1949-50 were made by the Income Tax Officer, District III, Calcutta. Notices under s. 22(2) of the Income Tax Act were issued to the petitioner by the Income-Tax Officer, District III, Calcutta to submit returns for the years 1950-51, 1951-52, 1952-53, 1953-54 and 1954-55. The Income Tax Officer, District III, Calcutta made assessment for the year 1950-51 on 18-12-1954 being satisfied that the principal place of business of the petitioner was in Calcutta.

On the 25th January 1955 the petitioner received a letter from the Income-Tax Officer, District III, Calcutta that in pursuance to orders dated 13th December 1954 under s. 5(7-A) of the Income-Tax Act its assessment records were transferred from that office to the Income Tax Officer, Special Circle, Ranchi with whom the petitioner was to correspond in future regarding its assessment proceedings. The order stated that the Central Board of Revenue "hereby transfers the case of" the petitioner. The petitioner had no previous notice of the intention of the Income-Tax authorities to transfer the assessment proceedings from Calcutta to Ranchi nor had it an opportunity to make any representation against such decision. When called upon to submit its return for the assessment year 1955-56 the petitioner by an application under Art. 32 of the Constitution contended that sub-section (7-A) of s. 5 of the Indian Incom-Tax Act, 1922 and the order of transfer made thereunder were unconstitutional in that they infringed the fundamental rights guaranteed to the petitioner under Arts. 14, 19(1)(g) and 31 of the Constitution. S. 64 of the Indian Income-Tax Act makes provisions for determining the place of assessment. Sub-section (1) of that section provides

1956

Bidi Supply Co.
v.
The Union of India and others

that where an assessee carried on a business, profession or vocation at any place he shall be assessed by the Income-Tax Officer of that area in which that place is situate or where the business, profession, or vocation is carried on at more than one place by the Income-Tax Officer of the area in which the principal place of business, profession or vocation is situate. In all other cases, according to sub-section (2), an assessee shall be assessed by the Income-Tax Officer of the area in which he resides. If any question arises as to the place of assessment such question shall be decided, after giving the assessee an opportunity to represent his views, by the Commissioner or Commissioners concerned or in case of disagreement between them by the Board of Revenue. The section is imperative in terms and gives a valuable right to the assessee.

By amending the Indian Income-Tax Act 1922 by the Indian Income-Tax (Amendment) Act, 1940 (Act XL of 1940) by adding to clause (b) of sub-section (5) of s. 64 the words "in consequence of any transfer made under sub-section (7-A) of s. 5" and by adding sub-section (7-A) to s. 5 the benefit conferred by the provisions of sub-section (1) and sub-section (2) of s. 64 is taken away and is to be deemed not to have existed at any time as regards the assessee with regard to whom a transfer is made under sub-section (7-A) of s. 5.

Held that as under s. 22(2) of the Act, the notice and the return are to be confined to a particular assessment year, sub-section (7-A) of s. 5 contemplates the transfer of such a "case" i.e. the assessment case for a particular year. The provision that such a transfer may be made "at any stage of the proceedings" obviously postulates proceedings actually pending and "stage" refers to a point in between the commencement and ending of those proceedings. Further the transfer contemplated by the sub-section is the transfer of a particular case actually pending before an Income-Tax Officer of one place to the Income-Tax Officer of another place.

Accordingly such an omnibus wholesale order of transfer dated 13th December 1954 as was made in the present case is not contemplated by the sub-section and therefore the impugned order of transfer which was expressed in general terms without any reference to any particular case and without any limitation as to time was beyond the competence of the Central Board of Revenue and the petitioner was still entitled to the benefit of the provisions of sub-sections (1) and (2) of s. 64.

The impugned order is discriminatory against the petitioner and violates the fundamental right guaranteed to it by Art. 14 of the Constitution in-as-much as the income-tax authorities by an executive order unsupported by law picked out the present petitioner and transferred all his cases by an omnibus order unlimited in point of time, which order is calculated to inflict considerable inconvenience and harassment on the petitioner.

BOSE J. Section 5(7-A) of the Indian Income-Tax Act is *ultra vires* Art. 14 of the Constitution and so is s. 64(5)(b) in so far as it

makes an order under s. 5(7-A) as it now exists, inviolate.

The power of transfer can only be conferred if it is hedged round with reasonable restrictions, the absence or existence of which can in the last instance be determined by the courts; and the exercise of the power must be in conformity with the rules of natural justice, that is to say, the parties affected must be heard when that is reasonably possible, and the reasons for the order must be reduced, however briefly, to writing so that men may know that the powers conferred on these quasi judicial bodies are being justly and properly exercised.

Chiranjit Lal Chowdhury v. *The Union of India* ([1950] S.C.R. 860), *Budhan Chowdhry and others* v. *The State of Bihar* ([1955] 1 S.C.R. 1045), *Dayaldas Kushiram* v. *Commissioner of Income-Tax Central* (I.L.R. [1940] Bom. 650; [1940] 8 I.T.R. 139), *Eshugbai Eleko's case* (L.R. [1931] A.C. 662), *The State of West Bengal* v. *Anwar Ali Sarkar* ([1952] S.C.R. 284), *Ram Prasad Narayan Sahi and Another* v. *The State of Bihar and Others* ([1953] S.C.R. 1129), *Bowman's case* ([1917] A.C. 406), *Coal Control case* ([1954] S.C.R. 803), *State of Madras* v. *V. G. Row* ([1952] S.C.R. 597), and *Liversidge* v. *Sir John Anderson* ([1942] A.C. 206), referred to.

ORIGINAL JURISDICTION: Petition No. 271 of 1955.

Under article 32 of the Constitution for the enforcement of fundamental rights.

S. C. Isaacs (*D. N. Mukerji*, with him) for the petitioner.

M. C. Setalvad, *Attorney-General for India*, (*B. Sen* and *R. H. Dhebar*, with him) for the respondents.

1956. March 20.

DAS C.J.—This is an application under article 32 of the Constitution praying for an appropriate writ and order restraining the Income-tax Officer, Special Circle, Ranchi (respondent No. 3) from taking up and proceeding with the assessment of the petitioner to income-tax and other ancillary reliefs. The facts shortly are as follows:—

The petitioner is a firm carrying on business as manufacturer and seller of Bidi. In 1948 it was registered as a firm under the Indian Partnership Act. It has its head office in Calcutta, where its books of account are said to be kept and maintained and

1956

Bidi Supply Co.
v.
The Union of India and others

Das C.J.

where it is said to have its banking account. It has its factories near Chakradharpur in the State of Bihar but it has no banking account there. The members of the firm are citizens of India.

It is said that since its inception the firm has all along been assessed to income-tax by the Income-tax Officer, District III, Calcutta. Thus assessments for the years 1948-49 and 1949-50 were made by the Income-tax Officer, District III, Calcutta. Notices under section 22(2) of the Income-tax Act were issued to the petitioner on different dates by the Income-tax Officer, District III, Calcutta, calling upon the petitioner to submit returns for the assessment years 1950-51, 1951-52, 1952-53, 1953-54 and 1954-55, the notice for the last mentioned year being dated 23rd August 1954. In compliance with these notices the petitioner duly submitted its returns for those respective years to the Income-tax Officer, District III, Calcutta. In the course of assessment proceedings for the year 1950-51 a question was raised regarding the location of the principal place of business of the petitioner. Eventually the income-tax authorities seem to have been satisfied that it was in Calcutta and on 18th December 1954 the Income-tax Officer, District III, Calcutta, made assessment for the year 1950-51. On the 25th January, 1955 the petitioner received a letter from the Income-tax Officer, District III, Calcutta informing it "that in pursuance to orders under section 5(7-A) of the Income-tax Act your assessment records are transferred from this office to the Income-tax Officer, Special Circle, Ranchi with whom you may correspond in future regarding your assessment proceedings". The order referred to in the above communication was as follows:—

No. 55(70)IT/54.
Central Board of Revenue.
New Delhi, dated the 13th December, 1954.

ORDER.

No. 87. Under sub-section (7-A) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922) the Central Board of Revenue hereby transfers

the case of Biri Supply Company, 3/1, Madan Street, Calcutta from the Income-tax Officer, District III(1) Calcutta to the Income-tax Officer, Special Circle, Ranchi.

Sd. (K. B. Deb),
Under Secretary,
Central Board of Revenue.

It is alleged and not denied by the respondent that the petitioner had no previous notice of the intention of the Income-tax authorities to transfer the assessment proceedings from Calcutta to Ranchi nor had it any opportunity to make any representation against such decision. Thereafter on the 2nd May 1955 the Income-tax Officer, Special Circle, Ranchi called upon the petitioner to submit its return for the assessment year 1955-56. It is then that the present petition was filed under article 32 of the Constitution challenging the validity of the Order of transfer dated the 13th December 1954 and the law under which such order was purported to have been made. The contention is that sub-section (7-A) of section 5 of the Indian Income-tax Act, 1922 and the said Order of transfer made thereunder are unconstitutional in that they infringe the fundamental rights guaranteed to the petitioner by articles 14, 19(1)(g) and 31 of the Constitution.

Article 14 of the Constitution enjoins that the State shall not deny to any person equality before the law or the equal protection of the laws within the territories of India. The expression "the State" used in Part III of the Constitution which deals with fundamental rights includes, unless the context otherwise requires, the Government and Parliament of India and the Government and the legislatures of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. The scope and effect of article 14, in so far as it protects all persons against discriminatory and hostile legislation, have been discussed and explained by this court in a series of cases beginning with *Chiranjit Lal Chowdhury* v. *The Union*

1956

Bidi Supply Co.
v.
The Union of India and others

Das C.J.

of India(1) and ending with *Budhan Chowdhry and others* v. *The State of Bihar*(2). In the last mentioned case a Full Bench of this court summarised the result of the earlier decisions on this point in the words following:—

"It is now well-established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass 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 others left out of the group and (2) that 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 occupations 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".

We have, therefore, to approach the problem posed before us bearing in mind the above principles laid down by this court in so far as they may be applicable to the facts of the present case.

Turning now to the Indian Income-tax Act, 1922 we find that section 64 makes provision for determining the place of assessment. By sub-section (1), where an assessee carries on a business, profession or vocation at any place, he shall be assessed by the Income-tax Officer of that area in which that place is situate or where the business, profession, or vocation is carried on at more than one place by the Income-tax Officer of the area in which the principal place of business, profession or vocation is situate. In all other cases, according to sub-section (2), an assessee shall be assessed by the Income-tax Officer of the area in in which he resides. If any question arises as to the

(1) [1950] S.C.R. 869. (2) [1955] 1 S.C.R. 1045.

place of assessment such question shall be decided, after giving the assessee an opportunity to represent his views by the Commissioner or Commissioners concerned or in case of disagreement between them by the Board of Revenue (sub-section (3)). It is quite clear from the aforesaid provisions of section 64 that the Legislature considered the question of the place of assessment to be of some importance to the assessee.

The provisions of section 64 of the Indian Income-tax Act, 1922 came up for discussion before the Bombay High Court in *Dayaldas Kushiram* v. *Commissioner of Income-tax, Central*(1). At pages 657 to 658 Beaumont, C.J. observed as follows:

"In my opinion section 64 was intended to ensure that as far as practicable an assessee should be assessed locally, and the area to which an Income-tax Officer is appointed must, so far as the exigencies of tax collection allow, bear some reasonable relation to the place where the assessee carried on business or resides. There is no evidence that there was any difficulty in restricting the area to which the Income-tax Officer, Section II (Central), was appointed to something much narrower than the Bombay Presidency, Sind and Baluchistan. Therefore, in my opinion, Income-tax Officer, Section II (Central), is not the Income-tax Officer of the area in which the applicant's place of business is situate, and as there is such an officer in existence, namely, the Officer of Ward C, Section II, in my opinion, it is only the latter officer who can assess the assessee".

Kania, J. (as he then was) said at pages 660-661:

"A plain reading of the section shows that the same is imperative in terms. It also gives to the assessee a valuable right. He is entitled to tell the taxing authorities that he shall not be called upon to attend at different places and thus upset his business".

It will be noticed from the above passages that the learned judges treated the provisions of section 64 more as a question of right than as a matter of convenience only. It was for the above decision that the

(1) I.L.R. [1940] Bom. 650; [1940] 8 I.T.R. 139.

1956

Bidi Supply Co. v. The Union of India and others

Das C.J.

Indian Income-tax Act, 1922 was amended by the Indian Income-tax (Amendment) Act, 1940 (Act XL of 1940), by adding to clause (b) of sub-section (5) of section 64 the words "in consequence of any transfer made under sub-section (7-A) of section 5" and by adding sub-section (7-A) to section 5. The relevant portion of sub-section (5) of section 64 so amended reads as under:—

"(5) The provisions of sub-section (1) and sub-section (2) shall not apply and shall be deemed never, at any time to have applied to any assessee—

(a) .....

.....

(b) where by any direction given or any distribution or allocation of work made by the Commissioner of Income-tax under sub-section (5) of section 5, or in consequence of any transfer made under sub-section (7-A) of section 5, a particular Income-tax Officer has been charged with the function of assessing that assessee, or

(c) .....

....."

It is thus clear from this amendment that the benefit conferred by the provisions of sub-section (1) and sub-section (2) are taken away and is to be deemed and not to have existed at any time as regards the assessee with regard to whom a transfer order is made under sub-section (7-A) of section 5. In order, however, to deprive a particular assessee of the benefits of sub-sections (1) and (2) of section 64, there must be a valid order under section 5(7-A) and he will lose the benefit only to the extent to which that right is taken away by a valid order made under sub-section (7-A) of section 5. This takes us to the new sub-section (7-A) of section 5.

Sub-section (7-A) of section 5 runs as follows:—

"(7-A) The Commissioner of Income-tax may transfer any case from one Income-tax Officer subordinate to him to another, and the Central Board of Revenue may transfer any case from any one Income-tax Officer to another. Such transfer may be made at any stage of the proceedings, and shall not render

necessary the reissue of any notice already issued by the Income-tax Officer from whom the case is transferred".

The sub-section in terms makes provisions for the transfer of a "case". Under the Indian Income-tax Act, 1922 a case is started when the Income-tax Officer issues a notice under section 22(2) of the Act calling upon the assessee to file his return of his total income and total world income during the previous year and then the assessee submits his return in the prescribed form. It is quite clear from the section that the notice and the return are to be confined to a particular assessment year and the sub-section contemplates the transfer of such a "case", i.e., the assessment case for a particular year. The provision that such a transfer may be made "at any stage of the proceedings" obviously postulates proceedings actually pending and "stage" refers to a point in between the commencement and ending of those proceedings. Further the provision that such transfer shall not render necessary the reissue of notice already issued by the Income-tax Officer from whom the case is transferred quite clearly indicates that the transfer contemplated by the sub-section is the transfer of a particular case actually pending before an Income-Tax Officer of one place to the Income-Tax Officer of another place. The fact that in this case the Income-tax Officer, Special Circle, Ranchi issued fresh notice under section 22(2) quite clearly shows that he did not understand that any particular pending case of this assessee had been transferred to him. Evidently he thought that the assessment of the petitioner's income, generally and as a whole, had been transferred to him and that it was, therefore, for him to initiate a case, i.e., assessment proceedings for a particular year. In our judgment such an omnibus wholesale order of transfer is not contemplated by the sub-section. It is implicit in the sub-section that the Commissioner of Income-Tax or the Central Board of Revenue, as the case may be, should before making an order of transfer of any case apply his or its mind to the necessity or desirability of the transfer

1956

Bidi Supply Co.
v.
The Union of India and others

Das C.J.

of that particular case. The fact that it is necessary or desirable to transfer a case of assessment of a particular assessee for any particular year does not necessarily indicate that it is equally necessary or dēsirable to transfer another assessment case of that assessee for any other assessment year. We are accordingly of the opinion that the impugned order of transfer, which was expressed in general terms without any reference to any particular case and without any limitation as to time, was beyond the competence of the Central Board of Revenue. We did not understand the learned Attorney-General to contend that such was not the correct interpretation of the sub-section.

We do not consider it necessary, for the purpose of this case, to pause to consider whether the constitutionality of sub-section (7-A) of section 5 can be supported on the principle of any reasonable classification laid down by this court or whether the Act lays down any principle for guiding or regulating the exercise of discretion by the Commissioner or Board of Revenue or whether the sub-section confers an unguided and arbitrary power on those authorities to pick and choose individual assessee and place that assessee at a disadvantage in comparison with other assessees. It is enough for the purpose of this case to say that the omnibus order made in this case is not contemplated or sanctioned by sub-section (7-A) and that, therefore, the petitioner is still entitled to the benefit of the provisions of sub-sections (1) and (2) of section 64. All assessees are entitled to the benefit of those provisions except where a particular case or cases of a particular assessee for a particular year or years is or are transferred under sub-section (7-A) of section 5, assuming that section to be valid and if a particular case or cases is or are transferred his right under section 64 still remains as regards his other case or cases. As said by Lord Atkin in *Eshugbai Eleko's case*(1) the executive can only act in pursuance of the powers given to it by law and it cannot interfere with the liberty, property

(1) L.R. [1931] A.C. 662, 670.

and rights of the subject except on the condition that it can support the legality of its action before the court. Here there was no such order of transfer as is contemplated or sanctioned by sub-section (7-A) of section 5 and, therefore, the present assessee still has the right, along with all other Bidi merchants carrying on business in Calcutta, to have his assessment proceedings before the Income-tax Officer of the area in which his place of business is situate. The income-tax authorities have by an executive order, unsupported by law, picked out this petitioner and transferred all his cases by an omnibus order unlimited in point of time. This order is calculated to inflict considerable inconvenience and harassment on the petitioner. Its books of account will have to be produced before the Income-tax Officer, Special Circle, Ranchi—a place hundreds of miles from Calcutta, which is its place of business. Its partners or principal officers will have to be away from the head office for a considerable period neglecting the main business of the firm. There may be no suitable place where they can put up during that period. There will certainly be extra expenditure to be incurred by it by way of railway fare, freight and hotel expenses. Therefore the reality of the discrimination cannot be gainsaid. In the circumstances this substantial discrimination has been inflicted on the petitioner by an executive fiat which is not founded on any law and no question of reasonable classification for purposes of legislation can arise. Here "the State" which includes its Income-tax department has by an illegal order denied to the petitioner, as compared with other Bidi merchants who are similarly situate, equality before the law or the equal protection of the laws and the petitioner can legitimately complain of an infraction of his fundamental right under article 14 of the Constitution.

It has further been urged that this order indirectly affects the petitioner's fundamental right under article 19(1)(f) and article 31. There can be no gainsaying the fact that the order purports to deprive the petitioner of its right under section 64 to which

1956

Bidi Supply Co.
v.
The Union of India and others

Das C.J.

it would otherwise be entitled. The order of transfer is certainly calculated to inflict considerable inconvenience and harassment to the petitioner as hereinbefore mentioned. But in the view we have taken on the construction of sub-section (7-A) of section 5 and the petitioner's rights under article 14, it is not necessary for us, on this occasion, to express any opinion on the contention that the inconvenience and harassment referred to above constitute an imposition of such an interference as amounts to an unwarranted restriction on the petitioner's rights under article 19(1)(g) or a violation of his rights under article 31.

For the reasons stated above this petition must be allowed. Accordingly the impugned order is set aside and an injunction is issued in terms of prayer (c) of the petition. The petitioner is entitled to the costs of this application.

BOSE J.—I agree with my Lord the Chief Justice that this petition should be allowed but for different reasons. In my opinion, sections 5(7-A) and 64(5)(b) of the Indian Income-tax Act are themselves *ultra vires* article 14 of the Constitution and not merely the order of the Central Board of Revenue.

The only question is whether these sections contravene article 14. Despite the constant endeavour of Judges to define the limits of this law, I am unable to deduce any clear cut principle from the oft-repeated formula of classification. As I have said in another case, even the learned Judges who propound that theory and endeavour to work it out are driven to concede that classification in itself is not enough for the simple reason that anything can be classified and every discriminatory action must of necessity fall into some category of classification, for classification is nothing more than dividing off one group of things from another; and unless some difference or distinction is made in a given case no question under article 14 can arise. It is just a question of framing a set of rules.

It is elementary that no two things are exactly

alike and it is equally obvious many things have features that are common. Once the lines of demarcation are fixed, the resultant grouping is capable of objective determination but the fixing of the lines is necessarily arbitrary and to say that governments and legislatures may classify is to invest them with a naked and arbitrary power to discriminate as they please. Faced with the inexorable logic of this position, the learned Judges who apply this test are forced to hedge it round with conditions which, to my mind, add nothing to the clarity of the law. I will pass over the limitations with which the classification test is now judicially surrounded, namely that it must be "reasonable", it must not be "discriminatory" or "arbitrary", it must not be "hostile"; there must be no "*substantial* discrimination" and so forth, and will proceed at once to a rule that is supposed to set the matter at rest. The rule is taken from the American decisions and was stated thus in *The State of West Bengal* v. *Anwar Ali Sarkar*(1):

"In order to pass the test, two conditions must be fulfilled, namely (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act".

Mukherjea, J. (as he then was) said at page 321 *ibid* that

"the classification should never be arbitrary, artificial 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".

In another case, *Ram Prasad Narayan Sahi and Another* v. *The State of Bihar and Others*(2), the same learned Judge said at page 1139—

"but such selection or differentiation must not be arbitrary and should rest upon a rational basis, having regard to the object which the legislature has in view".

(1) [1952] S.C.R. 284, 334.

(2) [1953] S.C.R. 1129.

1956

Bidi Supply Co. v. The Union of India and others

Bose J.

Ivor Jennings puts it another way:

"Among equals the law shall be equal and shall be equally administered and that like shall be treated alike".

With the utmost respect all this seems to me to break down on a precise analysis, for even among equals a large discretion is left to judges in the matter of punishment, and to the police and to the State whether to prosecute or not and to a host of officials whether to grant or withhold a permit or a licence. In the end, having talked learnedly round and around the article we are no wiser than when we started and in the end come back to its simple phrasing—

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

The truth is that it is impossible to be precise, for we are dealing with intangibles and though the results are clear it is impossible to pin the thought down to any precise analysis. Article 14 sets out, to my mind, an attitude of mind, a way of life, rather than a precise rule of law. It embodies a general awareness in the consciousness of the people at large of something that exists and which is very real but which cannot be pinned down to any precise analysis of fact save to say in a given case that it falls this side of the line or that, and because of that decisions on the same point will vary as conditions vary, one conclusion in one part of the country and another somewhere else; one decision today and another tomorrow when the basis of society has altered and the structure of current social thinking is different. It is not the law that alters but the changing conditions of the times and article 14 narrows down to a question of fact which must be determined by the highest Judges in the land as each case arises. (See on this point Lord Sumner's line of reasoning in *Bowman's case*(1)). Always there is in these cases a clash of conflicting claims and it is the core of the judicial process to arrive at an accommodation between them. Anybody can decide a question if only a single principle

(1) [1917] A.C. 406, 466, 467.

is in issue. The heart of the difficulty is that there is hardly any question that comes before the Courts that does not entail more than one so-called principle. As Judge Leonard Hand of the United States Court of Appeals said of the American Constitution—

"The words a judge must construe are empty vessels into which he can pour anything he will".

These rules are useful guides in some cases but they do not, in my opinion, go to the root of the matter; nor am I alone in so thinking though my approach is more direct and fundamental than is usual. Patanjali Sastri, C.J. said in *The State of West Bengal* v. *Anwar Ali Sarkar*(1) that the reported decisions

"underline the futility of wordy formulation of so-called 'tests' in solving problems presented by concrete cases".

I endeavoured to point out in my judgment in *Anwar Ali Sarkar's case*(1) at page 361 that one can conceive of classifications that conform to all these rules and yet which are bad: classifications made in the utmost good faith; classifications that are scientific and rational, that will have direct and reasonable relation to the object sought to be achieved and yet which are bad because despite all that the object itself cannot be allowed on the ground that it offends article 14. In such a case, the object itself must be struck down and not the mere classification which, after all, is only a means of attaining the end desired; and that, in my judgment, is precisely the point here. It is the very point that Fazl Ali J. made in *Anwar Ali Sarkar's case*(1) at pages 309-310:

"It was suggested that the reply to this query is that the Act itself being general and applicable to all persons and to all offences, cannot be said to discriminate in favour of or against any particular case or classes of persons or cases, and if any charge of discrimination can be levelled at all, it can be levelled only against the act of the executive authority if the Act is misused. This kind of argument however does not appear to me to solve the difficulty. The result of accepting it would be that even where discrimina-

(1) [1952] S.C.R. 284, 297.

1956

Bidi Supply Co. v. The Union of India and others

Bose J.

tion is quite evident one cannot challenge the Act simply because it is couched in general terms; and one cannot also challenge the act of the executive authority whose duty it is to administer the Act, because that authority will say:—I am not to blame as I am acting under the Act. It is clear that if the argument were to be accepted, article 14 could be easily defeated. I think the fallacy of the argument lies in overlooking the fact that the 'insidious discrimination complained of is incorporated in the Act itself', it being so drafted that whenever any discrimination is made such discrimination would be ultimately traceable to it".

Nor, in the past, has this Court hesitated to strike down the Act or Order itself when it confers unrestricted power as here. That was what happened in the *Coal Control Case*(1); the Order itself was struck down and not the executive action taken by virtue of the unrestricted powers conferred by that law. See page 813 where it was said—

"The Order commits to the unrestrained will of a single individual the power to grant, withhold or cancel licences in any way he chooses and there is nothing in the Order which would ensure a proper execution of the power or operate as a check upon injustice that might result from improper execution of the same".

So also in the *State of Madras* v. *V. G. Row*(2). It is true that these were cases under article 19 and not 14 of the Constitution but the principle is the same. I need not multiply instances.

What is the position here? Here is an Act that fixes a certain venue for assessment in section 64. That is the normal law of the land for these purposes. The language in sub-sections (1) and (2) is mandatory: "he *shall* be assessed". If there is doubt or dispute about the correct venue, it can only be decided after hearing the party concerned. Then come the provisions for transfer.

Now it is, I think, necessary that there should be powers of transfer and the mere conferral of such

(1) [1954] S.C.R. 803. (2) [1952] S.C.R. 597.

powers would not offend article 14. But, put at its lowest, it is anomalous that when similar powers are conferred on the High Courts and even on this Court under, for example, the Code of Criminal Procedure, they should be hedged round with limitations, whereas, when it comes to a Commissioner of Income-tax or the Central Board of Revenue, no limitations whatever are placed upon them. Section 526 of the Criminal Procedure Code confers only limited powers of transfer on the High Court and article 136 empowers this Court to intervene should those powers be exceeded by the High Court and should this Court in its discretion feel that that has led, or is likely to lead, to hardship and injustice or to a miscarriage of justice; and in the case of this Court a right to transfer is conferred under section 527 only when that is "expedient in the interests of justice". Section 24 of the Civil Procedure Code is wider but that was a law made before the Constitution and, in any case, such an order would be open to review by this Court and in a suitable case, should the High Court act arbitrarily or along non-judicial lines, such as directing a transfer without recording reasons and without hearing the parties concerned when it is possible to afford them a hearing, the matter would be set right here. There is a big difference between investing a judicial authority with such powers and other non-judicial bodies because judges must act in accordance with a recognised procedure and obey the laws of natural justice unless there is *express* indication to the contrary in the statute.

What is the position here? There is no hearing, no reasons are recorded: just peremptory orders transferring the case from one place to another without any warning; and the power given by the Act is to transfer from one end of India to the other; nor is that power unused. We have before us in this Court a case pending in which a transfer has been ordered from Calcutta in West Bengal to Ambala in the Punjab.

After all, for whose benefit was the Constitution enacted? What was the point of making all this

1956

Bidi Supply Co.
v.
The Union of India and others

Bose J.

pother about fundamental rights? I am clear that the Constitution is not for the exclusive benefit of governments and States; it is not only for lawyers and politicians and officials and those highly placed. It also exists for the common man, for the poor and the humble, for those who have businesses at stake, for the "butcher, the baker and the candlestick maker". It lays down for this land "a rule of law" as understood in the free democracies of the world. It constitutes India into a Sovereign *Democratic* Republic and guarantees in every page rights and freedom to the *individual* side by side and consistent with the overriding power of the State to act for the common good of all.

I make no apology for turning to older democracies and drawing inspiration from them, for though our law is an amalgam drawn from many sources, its firmest foundations are rooted in the freedoms of other lands where men are free in the democratic sense of the term. England has no fundamental rights as such and its Parliament is supreme but the liberty of the subject is guarded there as jealously as the supremacy of Parliament.

The heart and core of a democracy lies in the judicial process, and that means independent and fearless judges free from executive control brought up in judicial traditions and trained to judicial ways of working and thinking. The main bulwarks of liberty and freedom lie there and it is clear to me that uncontrolled powers of discrimination in matters that seriously affect the lives and properties of people cannot be left to executive or quasi executive bodies even if they exercise quasi judicial functions because they are then invested with an authority that even Parliament does not possess. Under the Constitution, Acts of Parliament are subject to judicial review particularly when they are said to infringe fundamental rights, therefore, if under the Constitution Parliament itself has not uncontrolled freedom of action, it is evident that it cannot invest lesser authorities with that power. If the legislature itself had done here what the Central Board of Revenue

has done and had passed an Act in the bald terms of the order made here transferring the case of this petitioner, picked out from others in a like situation, from one State to another, or from one end of India to the other, without specifying any object and without giving any reason, it would, in my judgment, have been bad. I am unable to see how the position is bettered because the Central Board of Revenue has done this and not Parliament.

I quote Mukherjea J. (as he then was) in a case which is not in point here but in a passage whose language seems apt to the present position. The quotation is from *Ram Prasad Narayan Sahi* v. *The State of Bihar*(1):

"It is impossible to conceive of a worse form of discrimination than the one which differentiates a particular individual from all his fellow subjects and visits him with a disability which is not imposed upon anybody else and against which even the right of complaint is taken away"

and again,

"It is true that the presumption is in favour of the constitutionality of a legislative enactment and it has to be presumed that a Legislature understands and correctly appreciates the needs of its own people. But when on the face of a statute there is no classification at all, and no attempt has been made to select any individual or group with reference to any differentiating attribute peculiar to that individual or group and not possessed by others, this presumption is of little or no assistance".

In the case of *Liversidge* v. *Sir John Anderson*(2) the learned Law Lords were at great pains to see whether the British Parliament had in fact left the matter under consideration there to the subjective satisfaction of a Secretary of State. There was no doubt that the British Parliament could do so because it is supreme and its action is not fettered by a written constitution, but the encroachment on the liberty of the subject was so great that the House of Lords was reluctant to reach the conclusion which it ulti-

(1) [1953] S.C.R. 1129, 1143. (2) [1942] A.C. 206.

1956

Bidi Supply Co.
v.
The Union of India and others

Bose J.

mately did by a majority, that that had in fact been done; and one of the learned Law Lords, Lord Atkin, read a powerful dissenting opinion. One of his criticisms at page 226 was that the order of detention was made

"by an executive minister and not by any kind of judicial officer; it is not made after any inquiry as to facts to which the subject is party, it cannot be reversed on any appeal.....It is an absolute power which, so far as I know, has never been given before to the executive".

In my opinion, that is the very point here. In England the power can be conferred but, because it so vitally affects the liberty of the subject, the judges there fight against any interpretation that would lead to that conclusion and in the end reach it only when compelled to do so for overwhelming reasons. In India the fundamental freedoms conferred by the Constitution are guarded with equally jealous care and it seems to me that the whole point of having this Chapter on Fundamental Rights is to ensure that the very things that the English judges fight against in their courts will not happen here.

In England the task of the judges is to see whether their Parliament has conferred those wide powers; in India our task is to see whether the *Constitution* has done so. In England the conferral of those powers is never conceded unless Parliament uses clear, express and unambiguous words. In our Constitution I find an absence of any such clarity; on the contrary, the whole trend of the Constitution points the other way.

If an executive authority or a quasi judicial body, or even Parliament itself, were to be given the right to determine these matters to their subjective satisfaction, there would be no point in these fundamental rights, for the courts would then be powerless to interfere and determine whether those rights have been infringed. The whole point of the chapter is to place a limitation on the powers of all these bodies, including Parliament, save in its constituent capacity. Therefore, no power resting on the subjective satis-

faction of any of these bodies can ever be conferred; the satisfaction must always be objective in the sense in which Lord Atkin explained so that its exercise is open to judicial review.

In my opinion, the power of transfer can only be conferred if it is hedged round with reasonable restrictions, the absence or existence of which can in the last instance be determined by the courts; and the exercise of the power must be in conformity with the rules of natural justice, that is to say, the parties affected must be heard when that is reasonably possible, and the reasons for the order must be reduced, however briefly, to writing so that men may know that the powers conferred on these quasi judicial bodies are being justly and properly exercised.

In a democracy functioning under the Rule of Law it is not enough to do justice or to do the right thing; justice must be seen to be done and a satisfaction and sense of security engendered in the minds of the people at large in place of a vague uneasiness that Star Chambers are arising in this land. We have received a rich heritage from a very variegated past. But it is a treasure which can only be kept at the cost of ceaseless and watchful guarding. There is no room for complacency, for in the absence of constant vigilance we run the risk of losing it. "It *can* happen here."

I would hold for these reasons, and in particular for the reason given by Fazl Ali J. in the passage from one of his judgments quoted above, that section 5(7-A) is *ultra vires* article 14 of the Constitution and so is section 64(5)(b) in so far as it makes an order under section 5(7-A) as it now exists, inviolate.

I would allow the petition.