1951 SCC OnLine Cal 124 : AIR 1952 Cal 150 (FB) : 1952 Cri LJ 450

In the High Court of Calcutta[†]

(BEFORE HARRIES, C.J. AND CHAKRAVARTTI, DAS, BANERJEE AND S.R. DAS GUPTA, JJ.)

Anwar Ali Sarkar ... Petitioner;

Versus

The State of West Bengal ... Opposite Party.

Civil Revn. Petn. Case Nos. 942 and 1113 of 1951

Decided on August 28, 1951

The Judgment of the Court was delivered by

HARRIES, C.J.:— These are two petitions for the issue of writs of certiorari to quash proceedings which have taken place and which are taking place before a Special Judge at Ali-pore under the West Bengal Special Courts Act of 1950. The two petitions came before Bose J. for hearing. In the view of the learned Judge the petitions raised points of great importance and difficulty and he accordingly referred them to the Chief Justice for decision by a larger Bench. This Bench of five Judges has been constituted to hear and decide the petitions.

2. Civil Rule No. 942 of 1951 has been preferred by one Anwar Ali Sarkar who with forty-nine other persons was tried by a Special Judge appointed under the West Bengal Special Courts Act of 1950 (Act X of 1950) upon charges of murder, conspiracy to murder, to commit grievous hurt with deadly weapons, and to commit mischief. There were also charges under the Explosive Substances Act and a charge under S. 201 of the Penal Code, 1860 in respect of causing the disapperance of evidence of murder. The charges arose out of an incident which occurred at the factory of Messrs Jes-sop & Co. Ltd. at Dum Dum on February 26, 1949. In the course of that incident it is said that Anwarali Sarkar and his forty-nine co-accused attacked the officials of Messrs Jessop and Company's factory, battered them to death, and threw their corpses into blazing furnaces. During the course of investigation of these offences Anwarali Sarkar and his co-accused were arrested and a case was registered against them at the Dum Dum Police Station, being Case No. 26 of February 26, 1949.

3. On August 17, 1949 an Ordinance known, as the West Bengal Special Courts Ordinance was promulgated under Section 88 of the Government of India Act and it would appear that the petitioner and his co-accused or most of them were arrested after the promulgation of this Ordinance.

4. On October 28, 1949 the Government under the provisions of the West Bengal Special Courts Ordinance appointed Sri S.N. Guha Roy, then Sessions Judge of Alipore, as a Special Judge with powers to try cases under the said Ordinance. This notification was duly published in the official gazette on November 3, 1949.

5. On January 25, 1950 the Government issued a further notification under the said Ordinance directing that the case of Anwarali Sarkar and his forty-nine co-accused be tried by Sri S.N. Guha Roy as Special Judge under the terms of that Ordinance. On January 26, 1950, namely, the day upon which the Constitution of India came into

force, this notification was published in the official gazette.

6. This Ordinance was superseded or March 15, 1950 by the West Bengal Special Courts Act of 1950 which received the assent of the President of the Republic on that date. The provisions of this Act were similar to those of the Ordinance and these provisions will be discussed in detail hereafter.

7. On April 2, 1950, a formal complaint was made by an Additional Superintendent of Police, one Sri J.N. Gupta to the Special Judge Sri S.N. Guha Roy. The learned Judge took cognizance of the cases and in due course Anwarali Sarkar and his co-accused were tried on the charges which I have already mentioned and on March 31, 1950 they were convicted and sentenced, the sentences varying with the gravity of their respective offences. A number were sentenced to transportation for life and a Rule has since been issued by this Court upon a number of the ac-cussed at the instance of the Government of the State of West Bengal to show cause why the sentences of transportation for life should not be enhanced to sentences of death.

8. On May 1, 1951 Bose J. issued a Rule upon the Government of the State of West Bengal to show cause why a writ of certiorari should not be issued to quash these proceedings, convictions and sentences. Bose J. as I have said referred this case together with the connected case for decision by a larger Bench.

9. Civil Rule No. 1113 of 1951 is a petition by one Gajen Mali for the issue of a writ of certiorari for quashing certain criminal proceedings now pending against him and others before a Special Judge appointed under the West Bengal Special Courts Act of 1950.

10. Gajen Mali and others are now standing their trial before one Sri M.M. Bhatta charyya in a number of cases involving conspiracy to murder, attempted murder, dacoity with murder and other charges involving violence. These cases were referred to the Special Judge by a Government Notification dated November 7, 1950 which was published in the Calcutta Gazette of November 23, 1950. In due course complaints were made and the cases are now proceeding against Gajen Mali and others before this learned Special Judge. The petition preferred prays for a writ of certiorari to quash these proceedings.

11. In both the petitions it is contended that the West Bengal Special Courts Act of 1950 and in particular S. 5 thereof, is ultra vires the Constitution. Therefore it is said that the proceedings culminating in the conviction and sentence of Anwarali Sarkar and each of his co-accused are wholly null and void and of no effect as the Special Judge had no jurisdiction whatsoever to hear, and determine those cases. Similarly it is contended that the proceedings which are now pending and are being heard against Gajen Mali are likewise wholly without jurisdiction and therefore writs of certiorai should be issued in both the cases to quash, in the first case, the proceedings which have culminated in convictions and sentences, and in the other case to quash the proceedings now continuing against Gajen Mali.

12. The Special Courts Act was passed after the Constitution of India came into force. It is true that in the case of Anwarali Sarkar the notification directing the case to be tried by Shri S.N. Guha Roy was actually made on the day before the Constitution came into force though it was not published until January 26, 1950 which was the first day in the existence of the Indian Republic. The complaint which was made to Sri S.N. Guha Roy was made in April 1950, a considerable time after the Constitution came

into force and it is conceded by the State that the provisions of the Constitution of India which came into force on January 26, 1950, applies to these cases. If the Special Judge in each of the cases was appointed and empowered to hear these cases under provisions of a statute which are ultra vires then clearly the whole proceedings were and are without jurisdiction and must be quashed.

13. To appreciate the points in issue it will be necessary to consider in some detail the provisions of the West Bengal Special Courts Act of 1950. The Act is entitled "An Act to provide for the speedier trial of certain offences" and then follows the preamble which is in these terms:

"Whereas it is expedient to provide for the speedier trial of certain offences:

It is hereby enacted as follows:"

14. By S. 1 the Act is made to extend to the whole of West Bengal and is to come into force on the date on which the West Bengal Special Courts Ordinance of 1949 ceased to operate and we are informed that date was March 13, 1950.

15. Section 3 of the Act empowers the State Government, by a Notification in the official gazette to constitute special courts of criminal jurisdiction for such areas and to sit at such places as may be specified in the notification and more than one Special Court may be constituted for the same area or to sit at the same place.

16. Section 4 empowers the State Government to appoint special judges to preside over such Special Courts and the classifications for such appointments are set out in the section.

17. Then follows S. 5 which is the section, which has been mainly the subject-matter of attack in this case. It will I think be convenient to set out the terms of this section in extenso.

"1. A Special Court shall try such offences or classes of offences or cases or classes of cases, as the State Government may, by general or special order in writing, direct.

2. No direction shall be made under, sub-section (1) for the trial of an offence for which an accused person was being tried at the commencement of this Act before any Court but, save as aforesaid, such direction may be made in respect of an offence, whether such offence was committed before or after the commencement of this Act."

18. It will be seen that powers were given to a Special Court to try any offence or case which the State Government by general or special order in writing so directed. The only exception is that no direction could be given in respect of a case pending before one of the ordinary criminal courts at the date this Act came into force. It will be necessary to consider the terms of this section in considerable detail later in the judgment.

19. Section 6 deals with the procedure to be followed in the Special Courts. Cognizance of the offences may be taken without the accused being committed to the Court of the Special Judge for the trial and whatever be the nature of the case the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by Magistrates is to be followed.

20. Section 7 provides that the State Government may at any stage of the proceedings before a Special Court transfer a case to another Special Court and it is provided that notwithstanding anything to the contrary contained in the Code of Criminal Procedure a Special Court to which a case is transferred shall not be bound to resummon or rehear any witnesses unless it is satisfied that such a course is necessary in the interests of justice.

21. Section 8 deals with the power to refuse to summon witnesses and by S. 9 it is provided that a Special Court shall not be bound to adjourn a trial for any purpose

unless such-adjournment is, in its opinion, necessary in the interests of justice. Further a Special Court shall not be required to adjourn proceedings for the purposes of securing the attendance of a legal practitioner, if, in its opinion, such adjournment would cause unreasonable delay.

22. Section 10 empowers the Special Judge to exclude the public or any particular person from the court room if he thinks fit.

23. Section 11 deals with the powers of Special Courts to deal with refractory accused and it is expressly provided that where an accused

person by his voluntary act renders himself incapable of appearing before the court, or resists his production before it, or behaves before it in a persistently disorderly manner, the Court may proceed with the trial in the absence of such accused and proceedings there rafter will be perfectly valid.

24. Section 12 empowers the Special Court to pass any sentence authorised by law and if it passes a sentence of death the provisions of Ch. XXVII of the Code should apply.

25. Section 13 provides that if in any trial toy a Special Court it is found that the accused person has committed any offence whether such offence is or is not an offence directed under S. 5 of the Act to be tried by the Special Court, the Special Court may convict such person of such offence and pass an appropriate sentence.

26. Section 15 provides appeals by both the convicted persons and the State Government to the High Court and such appeals will lie on matters of fact as well as on matters of law.

27. Section 16 ousts the ordinary jurisdiction of this Court. It provides that there shall be no appeal from any order or sentence of a Special Court save as provided by S. 15 and subject to the Constitution of India, no Court shall have authority to revise any order or sentence of a Special Court or to transfer any case from a Special Court or to make any order under S. 491 of the Code, or have any jurisdiction of any kind in respect of any proceedings of a Special Court or in respect of any directions made under this Act.

28. Section 19 provides:

> "Any order, direction or appointment made, any notification issued, any Special Court constituted, any proceeding commenced, any action taken or anything whatsoever done in exercise of any power conferred by or under the West Bengal Special Courts Ordinance, 1949, shall, on the said Ordinance ceasing to operate, be deemed to have been made, issued, constituted, commenced, taken or done, in exercise of the powers conferred by or under this Act as if this Act had commenced on the 17th day of August, 1949", which was the date when the Ordinance came into force."

29. The Ordinance and later the Act appear to have been enacted to deal with cases requring speedier trials. Special Courts presided over by Special Judges having particular qualifications were created and these are empowered to try all cases coming within the purview of S. 5 of the Act.

30. The trials, though they may be of cases exclusively triable by a Court of Session, are to be conducted under the procedure prescribed for the trial of warrant cases by magistrates and except that an appeal from a conviction and sentence to the High Court is provided for, no other form of interference with the orders of a Special Court is permissible. Further the Special Court is given a power which the ordinary

Courts of the land do not possess. By S. 13 of the Act if at any trial a Special Court finds that a accused person has committed any offence, it can convict him of that offence, though it might not be an offence which the Court was directed to try by a notification made under S. 5. From the terms of S. 13 it is clear that the offence need not be a lesser offence. All Courts may convict an accused of a lesser offence than the one with which he is charged if that offence is disclosed by the facts upon which the prosecution based a charge of a major offence. The Special Court however may convict the accused of any offence which is disclosed and proved in the course of the trial and there can be no doubt that the Special Judge has far greater powers under this section than is possessed by any Judge sitting in a court governed by the Code of Criminal Procedure.

31. The main contention of the petitioners in these cases was that the Act and particularly S. 5 of the Act were ultra vires the Constitution of India in that they offended against the provisions of Article 14 of the Constitution. Article 14 is in these terms:

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

32. It is urged that by reason of S. 5 of this Act the State Government can by a notification deprive a citizen of his rights in a serious case to be tried by a Sessions Judge and jury and deprive him of his right to have a preliminary enquiry before a committing magistrate before trial in the Court of session.

33. Sub-s. (1) of S. 5 of the Act empowers the Special Court to try all kinds of offences or cases which the State Government may, by general or special order in writing, direct it to try. It may try cases exclusively triable by a court of session and cases triable by a magistrate as warrant cases. A number of the charges in the two cases now before us were exclusively triable in a Court of session, though some of them could have been tried, if not regarded as very serious cases, by a magistrate as warrant cases. What is contended by the petitioners in these cases is that the notifications made by Government directing these particular cases to be tried by special courts have deprived the petitioners of their right to have a preliminary enquiry before a committing Magistrate and, if committed for trial, to be tried by a Sessions Judge sitting with a jury. The notifications have, it is contended, deprived these petitioners of a most valuable right, namely, their right to be tried by their peers or equals, that is by nine persons of the State of West Bengal sitting as a jury.

34. Further it is said that even if the cases which the special courts were directed to try were cases triable by a magistrate as warrant cases, nevertheless the notifications have deprived the petitioners of valuable rights. For example, S. 13 empowers a court to convict an accused for any offence, if such offence could be proved during the course of the trial, though such offence is not the subject matter of the charge and the special court was never directed to hear such a case. Further the offence apparently need not be a minor offence and there seems to be nothing in S. 13 to prevent a Special Judge from convicting an accused person of an offence more serious than the one with which he is charged, provided the facts as established in the Special Court make out such an offence. There can be no doubt that the provisions of S. 13 give a special court far wider powers than a magistrate has, or indeed a Sessions Judge in the Court of Session has in a criminal trial. A Sessions Judge or a Magistrate can convict an accused person of an offence other than the one with which he is

charged. But such an offence must be an offence less serious than the one with which

he is charged and must be one arising out of the facts as alleged and proved by the prosecution of the major charge.

35. Section 15 gives an accused person and the State Government a right of appeal to the High Court in all cases whereas in warrant cases triable by a magistrate there is an appeal in the first place to the Court of the Sessions Judge and the orders of the latter may be revised by this Court under Section 439 of the Cr PC. In short, under this Act a person accused of an offence triable by a magistrate as a warrant case would, if tried by a special court, be deprived of one opportunity to challenge the decision. Under the Code of Criminal Procedure he would first have a right of appeal to the Sessions Judge and then a right of revision. But in place of those two opportunities to challenge a conviction and sentence he is given only one, namely, a right of appeal direct to the High Court. Further an accused person would be deprived of a right both of appeal and revision in cases tried by an Assistant Sessions Judge, where the sentence was less than four years' rigorous imprisonment. It can be said that an appeal to the High Court is preferable to an appeal to a Sessions Judge. But it cannot be overlooked that the orders of the Sessions Judge are also subject to challenge, namely, by way of revision and under this Act the accused in such cases has only one opportunity to challenge a conviction, whereas under the ordinary law he would have two such opportunities.

36. Again under S. 16 of the Act the accused person is deprived of his right to move this Court in revision. All orders made by Magistrates or Sessions Judges may be challenged in the High Court under S. 439 of the Code of Criminal Procedure. Applications are frequently made to quash proceedings under S. 439 or to set aside orders made in the course of a criminal trial. No such applications can be made where the trial takes place before a Special Court and thus it is said the accused person has been deprived of very valuable rights.

37. There can I think be no question that a right to be tried by the jury is regarded in this country, and indeed in most civilized countries, as one of the most valuable rights of a citizen. The right to be tried by a jury has been described as one of the bulwarks of freedom and such a right was undoubtedly particularly valuable when there was a risk of unjust and oppressive proceedings being brought by an Executive Government. The Special Courts Act deprives an accused person of his right to be tried by a jury and that it is said offends against Article 14 of the Constitution of India.

38. Further it is said that the Act deprives an accused person of other valuable rights which I have already indicated, whether such accused person is tried of an offence exclusively triable in the sessions or one triable by a magistrate as a warrant case.

39. It is to be observed that the Constitution of India does not guarantee that accused persons in this country will be tried by a jury when charged with serious or indeed any offences.

40. The right of trial by a jury is dealt with in S. 269 of the Code of Criminal Procedure which is in these terms:

> "1. The State Government may, by order in the Official Gazette direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may revoke or alter such order."

41. Sub-sections (2) and (3) provide that in certain cases the trial will be by special jury and further that when the accused is charged at the same trial with several offences some of which are and some of which are not triable by a jury, he shall be tried for such offences as are triable by a jury by the jury and in respect of the other offences by the Court of Session with the aid of jurors sitting as assessors.

42. It will be seen therefore that an accused person in this country has no

inalienable right to be tried by a jury. He has such a right under S. 269(1) of the Code of Criminal Procedure if the State Government has directed the trial of such offences as those with which he is charged before a Sessions Judge sitting with jury.

43. In this State notifications have been issued directing a large number of serious crimes to be tried by a Sessions Judge sitting with a jury. The crime of murder is triable by a Judge and jury and so is the crime of conspiracy to commit murder. As I have said earlier a number of the charges in both these cases were, as the law stands at present in the State, triable only by a Sessions Judge and a jury. S. 269(1) however expressly provides that the State Government may revoke or alter any order directing any offence or classes of offences to be triable by a jury and that is what has been done in these cases by Section 5 of the West Bengal Special Courts Act, 1950. The fact that the State Government are empowered by S. 269(1) of the Code of Criminal Procedure to revoke a previous notification however does not conclude the matter because the question arises if it does so, whether it has discriminated between the persons in this State.

44. By the express terms of sub-s. (1) of Section 5 of the West Bengal Special Courts Act the State Government by general or special order may direct that any offences or classes of offences must be tried by a Special Court. It appears to me that a notification directing that persons charged, for example, with murder or with offences against the person or with offences against the State, should be tried by a Special Court, could not possibly be regarded as discriminatory and contrary to the provisions of Article 14 of the Constitution. Such a notification, if applicable to the whole of the State of West Bengal, would apply to all persons within the confines of that State and all would be liable to be tried by a Special Court if they were unfortunately to be charged with one of the offences falling within such a notification. Further, it appears to me that for reasons which will appear later, there would be no discrimination even if Government directed that certain offences or classes of offences triable within certain areas should be triable by a Special Judge only.

45. Whether an order could be made under S. 5(1) directing certain offences or classes of offences triable within a certain district or

area of the State to be triable only in a Special Court is by no means clear. The Act applies to the whole of West Bengal and there is nothing in sub-s. (1) of S. 5 which expressly empowers the State to direct that offences triable in certain areas only should be triable in a particular manner. However it is unnecessary to consider this question because it does not arise in this case. The sub-section then provides that the State Government may by general or special order in writing direct any cases or classes of cases to be tried by a Special Court, and considerable argument took place before us upon the meaning of the word “cases” as used in this sub-section. The word “cases” is frequently used as synonymous with the word “offences”. A phrase frequently used is “non-cognizable cases” which is practically synonymous with the phrase “non-cognizable offences”. In this sub-section however it appears to me that the word “cases” is used to mean something different from the word “offences”. The use of the word “cases” implies that the law has been set in motion against persons in respect of an offence or offences, in other words cases have been commenced in respect of the commission of an offence or offences. If A is alleged to have committed an offence it cannot be said that there is a case until A has by some appropriate act of the authorities been connected with the offence. When the perpetrator of the offence is unknown and no step has been taken by the authorities, it cannot I think be said that

there is a case in respect of that offence. When the authorities however have taken steps against the alleged perpetrator of the offence, whether known or unknown, it may I think be rightly said that there is a case in connection with the offence, a case against a person known or unknown has been started and it appears to be that it is in that sense that the word "cases" is used in this sub-section.

46. The sub-section, as I have said, empowers the State Government by a general or special order to direct a Special Court to try any cases or classes of cases included in its direction. It has been hotly contended that the power given to the State Government to direct any cases to be tried by a Special Court is clearly discriminatory as it empowers the State to deprive one accused person of the right to trial by jury and other rights under the Code of Criminal Procedure, whereas another person charged with a similar offence need not be so deprived. The section leaves it entirely to the discretion of the State Government whether it will direct any particular case to be tried by a Special Court. It may so direct in the case of A and make no directions in the case of B. Therefore it is said that there is clearly discrimination against A and A is deprived of equality before the law and the equal protection of the laws of India. By the act of the State Government it is said that B is allowed to retain the protection given to accused persons by the ordinary law, whereas A is deprived of such protection. That being so, it is said that Section 5(1) of the West Bengal Special Courts Act of 1959 is clearly discriminatory in that it allows the State Government to direct any particular case to be tried by a Special Court.

47. The sub-section also allows the State Govt. to direct any class or classes of cases to be tried by a Special Court and for reasons which I shall shortly discuss it does not appear to me that this power involves any discrimination so as to make it ultra vires Article 14 of the Constitution of India. The whole argument in this case has been directed to the power given to the State Government to direct cases, as opposed to classes of cases, to be tried by a Special Court. The provision contained in Article 14 of the Constitution is popularly described as a provision directed against discrimination. The State cannot deny to any person equality before the law or the equal protection of the laws within the territories of the Republic of India. The words "the State shall not deny equal protection of the laws within the territory of India" have been borrowed from the Fourteenth Amendment of the American Constitution and recent authority of the Supreme Court of this country referred to the words "shall not deny to any person equality before the law" as giving persons much the same rights as the words "shall not deny equal protection of the laws of this country".

48. In the United States of America the words contained in the Fourteenth Amendment gave rise to great difficulties. If these words in Article 14 are construed literally it would be practically impossible for the State to effect any legislation benefiting any particular class or affecting the interests of any other class. Benefits to a class can often only be conferred by depriving another class or classes of rights and if the words of this Article were too literally construed all such legislation might be held to be ultra vires the Constitution because it would deny persons equality before the law and the equal protection of the law. This was realised by the courts of America at a very early stage. Weaver in this book "*Constitutional Law and its Administration*" at page 392 observes:

> "The equality of rights is a principle of republicanism. Every republican government is in duty bound to protect all of its citizens in the enjoyment of this principle, if within its power. The principle is indigenous to America and first found expression in the Declaration of Independence.
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> Under the Constitution, this duty was assumed by the States, and under the provisions of the Fourteenth Amendment it remained there. The amendment provided that "No state — shall — deny any person within its jurisdiction the equal

protection of the laws" * * * *

The guiding principle of this guaranty is that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. It has been said that 'the equal protection of the laws is a pledge of the protection of equal laws'."

49. At page 407 the learned author dealing with "Equal Protection in Legal Proceedings" observes:

"The equal protection of the laws in legal proceedings is secured when the laws of the state operate on all persons alike and do not subject the individual to an arbitrary exercise of the powers of the Government; when its courts are open to every one on the same terms; when it assures to everyone the same rules of evidence and modes of procedure; when it secures to all persons their civil rights; and when, in the administration of criminal justice, no different or higher punishment is imposed

upon one than is prescribed for all under like offences. This means that all litigants similarly situated may appeal to the Courts both for relief and for defence under like conditions and with like protection and without discrimination."

50. It will be seen therefore that in the American view equal protection of the laws means that the guarantee does not secure to all persons in the United States the same law protection and remedies. It means that all litigants similarly situated have the same rights for relief and for defence and have the like protection of the laws. This equality applies only to all persons similarly situated and the courts in America have permitted classification of persons and legislation for particular classes. At page 397 of Weaver's Constitutional Law it is observed:

"Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons, arbitrarily selected from a large number of persons, all of whom stand the same relation to the privilege granted and between whom and the persons not so favoured no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privilege. It is not the purpose of the equal protection clause to take from the states the rights or the power to classify the subjects of legislation, or to classify persons and objects to accomplish such a result.

'Under our constitutional system, the states, in determining the reach and scope of particular legislation, need not provide abstract symmentry' observed Justice Douglas, discussing this clause, "They may mark and set apart the classes and types of problems according to the needs and as dictated and suggested by experience". Classification is an inherent power of legislation, limited only by the Constitution and the judicial constructions thereunder.

A classification must not be arbitrary, artificial or evasive and there must be a reasonable, natural and substantial distinction in the nature of the class or classes upon which the law operates. In respect to such distinctions, a legislative body has a wide discretion and an act will not be held invalid unless the classification is clearly unreasonable and arbitrary. That the law will work a hardship is not enough. Many laws have that effect and the greater part of all legislation is discriminatory in the extent to which it operates, the manner in which it applies or the objects sought to be attained by it. To justify the interposition of the authority of the state in enacting regulatory measures, it must appear that the interests of the public

generally, as distinguished from those of a particular class, require such interference.

What classification is reasonable, natural or substantial rests in the discretion of the legislative body in the first instance and it is the province of the Courts to adjudicate when it should be classed as arbitrary, artificial or evasive."

51. It will be seen therefore that the Courts in America have always permitted classification of persons or objects and persons in different classes may well have different and unequal rights before the law and may have unequal protection of the law. What the American Courts have held is that the Fourteenth Amendment means that equal protection of the laws cannot be denied to persons similarly situated or circumstanced. Persons in the same class, if the creation of such a class is justified by reason, are entitled to a similar protection. The amendment does not mean that all persons in a State are entitled to equal protection.

52. The meaning of Article 14 of the Constitution was recently considered by the Supreme Court in the case of '*Charanjit Lal* v. *The Union of India*', (1950) SCR 869. In that case an Act had been passed called the Sholapur Spinning and Weaving Company (Emergency Provisions) Act of 1950 the net result of which was that the Managing Agents of the said company were dismissed, the directors holding office at the time automatically vacated their office, the Government was authorised to appoint new directors, the rights of the shareholders of the company were curtailed in the matters of voting, appointment of directors, passing of resolutions and applying for winding up, and power was also given to the Government to further modify the Indian Companies Act in its application to the company; and in accordance with the provisions of the Act new directors were appointed by the Government. A share-holder of the company made an application under Article 32 of the Constitution for a declaration that the Act was void and for enforcement of his fundamental rights by a writ of mandamus against the Central Government, the Government of Bombay and the directors restraining them from exercising any powers under the Act and from interfering with the management of the company, on the ground that the Act was not within the legislative competence of the Parliament and infringed the petitioner's fundamental rights guaranteed by Articles 19(1)(f), 31 and 14 of the Constitution' and was consequently void under Article 13.

53. By a majority the Supreme Court held that the impugned Act was not discriminatory and did not offend against the provisions of Article 14 of the Constitution of India.

54. The Act applied in terms only to one company concerned in the manufacture of cotton goods. The management of that company was taken over and the old management completely superseded. The contention was that the Act clearly discriminated between that particular company and other companies concerned with the manufacture of cotton goods and therefore the Sholapur Spinning and Weaving-Company had been denied equality before the law and equal protection of the law.

55. Dealing with this aspect of the case Kania, C.J. and Fazl Ali and Mukherjea JJ. (Patanjali Sastri and Das JJ. dissenting) held that though the legislature had proceeded against one company only and its share-holders inasmuch as even one corporation or a group of persons could be taken to be a class by itself for the purposes of legislation, provided there was sufficient basis or reason for it and there was a strong presumption in favour of the constitutionality of an enactment, the burden was on the petitioner to prove that there were also other companies similarly situated and this company alone had been discriminated against, and as he had failed to discharge this burden the impugned Act could not be held

to have denied to the petitioner the right to equal protection of the laws referred to in Article 14 and the petitioner was not therefore entitled to any relief.

56. There can be no doubt that the American Courts had held that a single individual or a company or corporation which is a person in the eye of the law, can be treated as a class if such person or corporation is unique or, as it is commonly said, a class in himself or itself. If there are circumstances surrounding or affecting an individual or corporation different from the circumstances affecting and surrounding others, or if that individual or corporation is in a position different from that of others, such individual or corporation may have to be treated as something apart from others and placed in a class by himself or itself. If that can be done legislation may be directed towards such person or corporation solely and that would not amount to discrimination. An individual or corporation cannot be selected arbitrarily and treated as a class by himself or itself, but if there are sound reasons for differentiating between that person or corporation and others such person or corporation may well be treated as something apart from others and forming a class by himself or itself.

57. Dealing with this aspect of the case Fazl Ali J. at page 877 of the report observed:

> "The only serious point, which in my opinion, arises in the case is whether Article 14 of the Constitution is in any way infringed by the impugned Act. This Article corresponds to the equal protection clause of the Fourteenth Amendment of the Constitution of the United States of America, which declares that 'no State shall deny to any person within its jurisdiction the equal protection of the laws'. Professor Willis dealing with this clause sums, up the law as prevailing in the United States in regard to it in these words:
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> > 'Meaning and effect of the guaranty — The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. The inhibition of the amendment……was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. It does not take from the states the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarly, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis.'
>
> Having summed up the law in this way, the same learned author adds: 'Many different classifications of persons have been upheld as constitutional. A law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it'. There can be no doubt that Article 14 provides one of the most valuable and important guarantees in the Constitution which should not be allowed to be whittled down, and, while accepting the statement of Professor Willis as a correct exposition of the principles underlying this guarantee, I wish to lay particular emphasis on the principle enunciated by him that any classification which

is arbitrary and which is made without any basis is no classification and a proper classification must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed".

58. At page 879 the learned Judge dealt with, the onus of proof in these words:

"A clear enunciation of this latter doctrine is to be found in '*Middleton* v. *Texas Power and Light Co.*', (1919) 249 US 152 at p. 157, in which the relevant passage runs as follows:

> 'It must be presumed that a legislature-understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The onus is therefore on the petitioner to show that the legislation which is impugned is arbitrary and unreasonable and there are other companies in the country which should have been subjected to the same disabilities, because the reasons which led the Legislature to impose State control upon the Sholapur company are equally applicable to them".

59. At page 910 Mukherjea J. observed:

"Article 14 of the Constitution, it may be noted, corresponds to the equal protections clause in the Fourteenth Amendment of the American Constitution which declares that 'no State shall deny to any person within its jurisdiction the equal protection of the laws'. We have been referred in course of the arguments on this point by the learned Counsel on both sides to quite a number of cases decided by the American Supreme Court, where questions turning upon the construction of the 'equal protection' clause in the American Constitution came up for consideration. A detailed examination of these reports is neither necessary nor profitable for our present purpose but we think we can cull a few general principles from some of the pronouncements of the American Judges which might appear to us to be consonant with reason and help us in determining the true meaning: and scope of Article 14 of our Constitution".

* * *

It must be admitted that the guarantee against the denial of equal protection of the laws does not mean that identically the same rules of law should be made applicable to all persons within the territory of India in spite of differences of circumstances and conditions. As has been said by the Supreme-Court of America, 'equal protection of law

is a pledge of the protection of equal laws', and this means 'subjection to equal laws applying alike to all in the same situation'. In other words, there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the same..... There can certainly be a law applying to one person or to one group of persons and it cannot be held to be unconstitutional if it is not discriminatory in its character. It would be bad law 'if it arbitrarily selects one individual or a class of individuals, one corporation or a class of corporations and visits a penalty upon them, which is not imposed upon others guilty of like delinquency'. The legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection; but classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made; and classification made without any substantial basis should be

regarded as invalid".

60. It is to be observed that the learned Judges who dissented, namely, Patanjali Sastri, J. and Das, J., agreed that the principles enunciated by the American Courts would apply with equal force to Article 14 of the Constitution of India. The difference of opinion was not so much on the principles to be applied as to the effect of the application of such principles.

61. I think it is clear from the case of '*Charanjitlal* v. *Union of India*', (1950 S.C.R. 869) that the State Government of West Bengal could create classes if the creation of such classes was not arbitrary but based on sound grounds and reasons connected with any legislation proposed or any object to be attained. But the question arises whether the State Government have not in fact exceeded these powers by enacting Section 5 of the West Bengal Special Courts Act of 1950.

62. As I have said earlier I do not think it can be contended for the reasons which I have just given that the State Government could not by a general or special order direct certain offences or classes of offences committed within the territories of West Bengal to be tried by a Special Court. Such a direction would not be discriminatory. It would apply to all in the State of West Bengal who might be charged with the particular offence or an offence forming one of a class of offences which had been notified. In fact it was not contended that if the State Government had by notification directed any particular offences or classes of offences to be tried by a Special Judge such would have offended against Article 14 of the Constitution.

63. For the same reasons I think that the power given to the State Government by this section to declare by general or special order that certain classes of cases should be tried by a special court, could also not be regarded as discriminatory if there was good reason for classification of such cases and treating the cases and the persons charged in such cases differently from other cases and persons charged therein. For example, an order might direct that all cases of murder or of dacoity or of fraud on banks should be tried in a certain way. Making such cases into a separate class for the purposes of trial would I think in the circumstances existing at present in the State of West Bengal not be arbitrary. Such are cases requiring speedy trial and are often long and complicated cases, and cases like bank fraud cases are both long and complicated and extremely difficult for a jury to understand. That being so, the State Government could classify cases, and direct that cases of a certain class or classes should be tried by a Special Judge. A power to direct a certain class or classes of cases to be tried by a jury is expressly given to the State Government by S. 269(1) of the Code of Criminal Procedure. So also is the power to revoke such an order. The power-given to the State Government in Section 5 of the West Bengal Special Courts Act, 1950 is to a large extent a power to revoke notifications made under S. 269(1) of the Code. The matter need not be pursued further because as I have said, it is not contended that the State Government could not classify offences and persons charged in respect of such offences provided, that the classification was not arbitrary, but based on sound reasons making the classification a reasonable one in all the circumstances and making it reasonable to treat such cases and persons charged therein differently from other cases and other accused persons in the State.

64. The difficulty arises however because this section empowers the State Government by general or special order to direct any cases, to be tried by a special court. The plural includes the singular and this sub-section undoubtedly gave the State Government a right to direct that any particular case or cases be-tried in a different way from that in which they would be ordinarily tried. That, it is said, is clear discrimination.

65. It was contended that a particular case may be so unusual and outstanding and may have such features as to place it in a class by itself and to place the persons

charged in such a case in a class by themselves. That I think may well be so. But that does not solve the difficulty. It must be remembered that in the case of '*Charanjitlal* v. *Union of India*' (1950 S.C.R. 869) the impugned Act dealt with a particular company by name and if sub-s. (1) of Section 5 of the West Bengal Special Courts Act of 1950 dealt with one particular case and empowered the State Government to direct such a case to be tried in a particular way then the principles enunciated in *Chiranjitlal Chowdhury's case* might well apply. However, what sub-s. (1) of S. 5 of this Act does is to empower the State Government to direct any cases to be tried by a special court and there is nothing in the section limiting that right to cases involving unusual features or involving difficulties and complications not usually found in the ordinary criminal cases in this State. The word "cases" as I have already said, includes an individual case and of course includes a number of cases. These cases need not be of the same class and there is nothing in the section to suggest that they need have any common features. The use of the word "cases" empowers the State Government to direct a special court to try any particular case which it desires and in exercising the power so given by the sub-section there is nothing to prevent the State Government selecting any case whatsoever, whether the

duration of such a case is likely to be long or not, or whether the case is of complexity or not, or whether it is a case likely to arouse sectional feeling or not. There is nothing in the sub-section which places any limit on the powers of the State Government in exercising its discretion in directing trial of a case in a particular way. It seems to me, on the plain words of this sub-section, that the State Government could direct a murder case arising out of some fracas in Calcutta to be tried by a special court and allow another case of murder arising out of the same fracas to be tried in the ordinary course by a High Court Judge sitting with a jury in the High Court Sessions, or a Sessions Judge sitting with a jury at Alipore. If, for example, two separate cases of murder arise out of the same disturbance of fracas, I think it can be said with justice that the accused are very similarly situated or circumstanced; yet one accused person might find himself tried by a special court, if Government so directed, while another accused might find himself tried under the provisions of the Code of Criminal Procedure. In fact there is nothing in the sub-section which would prevent Government from directing that some of the persons concerned in the same incident should be tried in a special court and the others tried by the ordinary courts of the land. The case of Anwarali Sarkar and others arises out of a well-known incident at Dum Dum and Messrs Jessop's Factory. Fifty people were tried by the special court and others were said to be absconding. It is now admitted by the State that some of the alleged absconders have recently been arrested and I can see nothing in sub-s. (1) of Section 5 of the West Bengal Special Courts Act which compels the Government to direct the trial of these absconders before a special court. The Government are not bound to make an order and if no order is made directing the trial of those absconders, if they are ever tried, before a special Court they would in the ordinary course of events be tried by a Sessions Judge at Alipore.

66. It appears, to me that unless this power to direct any case or cases to be tried by a special court means a power to direct any case or cases which form in itself or themselves a class or classes, then such a power is discriminatory.

67. The Advocate General strongly contended that we should construe the word "cases" in this sub-section as meaning "cases requiring speedy trial" and he urged that cases requiring speedy trial could well be regarded as forming classes in

themselves. He relied upon the title of the Act, which as I have said is an Act to provide for the speedier trial of certain offences, and upon the preamble of the Act wherein it is recited that "It is expedient to provide for the speedier trial of certain offences". He urged with his usual ability that the word "cases" must be construed in the light of the preamble and the title of the Act and must be read as meaning "cases requiring a speedier trial".

68. There can be no doubt that where there is an ambiguity the preamble of an Act may be looked at to solve, if possible, the ambiguity. Where a word or words or a sentence in an Act is capable of two meanings then a meaning consonant with the preamble should be preferred. On the other hand, the preamble of an Act cannot be used to cut down the scope and plain meaning of a provision in an Act. The preamble may show the motive for enacting a piece of legislation. But it does not by any means follow that in enacting the legislation the legislature did not go further than giving merely effect to the motive.

69. At page 48 of Maxwell on *Interpretation of Statutes*, 9th Ed. it is observed.

> "But the preamble cannot either restrict or extend the enacting part, when the language and the object and scope of the Act are not open to doubt. It is not unusual to find that the enacting part is not exactly co-extensive with the preamble. In many Acts of Parliament, although a particular mischief is recited, the legislative provisions extend beyond it. The preamble is often no more than a recital of some of the inconveniences, and does not exclude any others for which a remedy is given by the statute. The evil recited is but the motive for legislation; the remedy may both consistently and wisely be extended beyond the cure of that evil, and if on a review of the whole Act a wider intention than that expressed in the preamble appears to be the real one, effect is to be given to it notwithstanding the less extensive import of the preamble.
>
> And generally, although in cases where the meaning of words in a statute is absolutely clear the Court has no right to go beyond them, when the words are capable of one meaning, and at the same time of a more extended meaning, and at the same time of a more extended meaning, the Court will look to the object and policy of the Act to see what meaning they ought to have. Thus, 4 & 5 Ph. & Mc. 8 made the abduction of all girls under sixteen penal, though the preamble referred only to heiresses and other girls with fortunes".

70. That was a clear case where provisions dealing with abduction of girls were not limited to the abduction of girls who were heiresses or possessed fortunes, though the preamble of the statute suggested that such was intended to be the subject matter of the legislation.

71. It appears to me that to give effect to the Advocate General's contention we would have to read into this sub-section words that are not there, and materially to cut down the meaning of the word "cases". The word "cases" standing by itself covers all kinds of cases, whereas the Advocate-General has urged us to hold that it must be construed as meaning only cases requiring speedier trial.

72. The learned Advocate-General further urges us to hold that we should construe the word "cases" as meaning cases having unique features or features distinguishing them from the ordinary ciriminal cases of the State whether serious or otherwise. If we could give the word "cases" such a meaning then we could hold that sub-section only empowered the State to direct a special Court to try cases which formed classes in themselves, and to try the individuals connected with such cases who themselves formed a class clearly distinct from other accused persons in fee State. Again I find it impossible to cut down the plain meaning of the word "cases" as used in this section. It appears to me that sub-s. (1) of S. 5 was clearly intended to empower the State Government to direct the trial by a special court of

any case or cases which it thought proper such a court should try. Its power is not limited in any way and it could direct the trial of cases requiring speedier trial or of cases which it thought a jury would find it difficult to understand or in which it thought a jury might be prejudiced against the accused. Indeed it could direct the trial of any case for any reasons which it thought fit to give effect to. Of course a State Government could direct the trial of a particular case for dishonest reasons. For example, a Government might think that a Special Judge would be more amenable and more likely to find for the prosecution than an independent Sessions Judge sitting with a jury. However no such suggestion has been made against the Government in these cases.

73. Section 5(1) of this Act as framed is liable to abuse. But we must not, readily assume, that powers given under this section would be abused. The section as framed might open the door to abuse. But I do not hold that this section is discriminatory merely because it could, if the Government so wished, be abused. It appears to me that even if Government act quite honestly and honourably, the section allows discrimination. It allows the Government to direct one particular case to be tried in a certain manner whilst other cases presenting precisely similar features could be tried according to the ordinary law of the land. There is nothing in the sub-section which compels the State Government once it has made an order directing a particular case to be tried by the Special Judge, to direct that all similar cases or all cases which could be classified with that particular case, should also be tried by a Special Judge. The section leaves it entirely to the discretion of the State Government as to how any particular case is to be tried.

74. The result is that the State Government are empowered by this section to deprive any particular accused charged in any particular case of his right to a preliminary enquiry and a trial by jury if the case is one exclusively triable by a court of sessions. It also empowers the State Government to deprive an accused in a warrant case triable by a magistrate of very valuable rights which are given to him by the Code of Criminal Procedure. A person charged with an offence triable by a magistrate as a warrant case, who is directed to be tried by a Special Judge, might find himself convicted of some quite different offence by reason of Section 13 of the West Bengal Special Courts Act, though such a conviction would not be possible under the Code of Criminal Procedure. Further, once such a person was before a Special Court, all the rights of the accused to move the sessions court or this court by way of revision would have been taken away. It seems to me that this section clearly discriminates between persons similarly situated or equally circumstanced and therefore offends against Article 14 of the Constitution in so far as it empowers a State Government to direct the trial of any case by a special court.

75. The powers given by the sub-section could be confined to cases having some unique or unusual features or to lengthy or complicated cases, but such need not be so confined. The powers under the sub-section could be exercised as not to involve discrimination, but they also could in my view be exercised in a manner invoking discrimination. When an Act gives powers which may and can offend against a provision or provisions of the Constitution such an Act is ultra vires though it could be administered so as not to offend against the Constitution. This question has been recently discussed by the Supreme Court in two cases.

76. In the case of *Romesh Thappar* v. *The State of Madras*' (1950) S.C.R. 594, Patanjali Sastri J. observed at page 603:

> "Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, Clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent".

77. Again in *Chintaman Rao* v. *State of Madhya Pradesh* (1950) S.C.R. 759, Mahajan J. observed at page 765:

> "These provisions of the statute, in our opinion, cannot be said to amount to reasonable restrictions on the right of the applicants and that being so, the statute is not in conformity with the provisions of Part III of the Constitution. The law even to the extent that it could be said to authorize the imposition of restriction in regard to agricultural labour cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void."

78. The word "cases" in Section 5, sub-s. (1) of the impugned Act is wide enough to cover cases where there might not be discrimination and where there might be such discrimination. The possibility of the provision in this impugned sub-section being applied for purposes not authorised by the Constitution is present and cannot be ignored. The powers can and may dishonestly or quite honestly be used in a manner contrary to Article 14 of the Constitution and the sub-section in so far as it gives the State Government the power to direct the trial of cp pes by a Special Judge is wholly void. What effect this finding has on the remainder of the sub-section is not relevant to these cases and need not therefore be considered.

79. The High Court of Hyderabad in the case of '*Abdur Rahim* v. *Joseph A. Pinto*." A.I.R.(38) 1951 Hyd 11, have held that a provision similar in terms to sub-s. (1) of Section 5 of the impugned Act is intra vires the Constitution. From the judgments in that case it would appear that the accused had not been deprived of their right to trial by jury and the Court appears to have thought that the rights of an accused person before a Special Court were not really less than his rights before one of the

ordinary Courts of the State. The Court does not appear to have thought that depriving an accused person inter alia of his right to a preliminary enquiry before a committing Magistrate was a serious deprivation. Opinions might well differ on that matter, but as the right to trial by jury was not involved the case is clearly distinguishable from the present case.

80. The High Court of Mysore in the case of '*Pailwan Abdul Khader* v. *State of Mysore*,' A.I.R.(38) 1951 Mysore 72, has taken a view similar to that of the High Court of Hyderabad but from the only report of this case placed before us which was incomplete it is impossible to say whether the case was similar in essential features to the cases which we are called upon to decide.

81. Lastly, it was contended on behalf of the State that the notifications in this case were not special order in writing directing a special Court to try any particular case or cases. It was urged that the notifications were notification that the special Court should try certain classes of cases. But it appears to me that on the plain terms of the notifications, they are notifications directing the trial of particular cases by the special tribunal. The words of the notification in the case of *The King* v. *Anwarali Sarkar* are in these terms:

> "In exercise of the power conferred by sub-s. (1) of S. 5 of the West Bengal Special Courts Ordinance 1949 (West Bengal Ordinance III of 1949) the Governor is pleased by this order to direct that the cases specified in the schedule annexed hereto shall be tried by the Special Court constituted by Judicial Department Notification No. 5694 J. dated the 24th October, 1949, under S. 3 of the said Ordinance.
>
> Home (Political) Department Notification No. 6548 P. dated Calcutta, the 3rd November, 1949 is hereby rescinded."

82. Then follows a schedule. The case is described as *The King* v. *Anwarali Sarkar* and forty nine other named persons, and at the end of the list of names appear the words:

> "Being case No. 26, dated 26-2-49 of Dum Dum Police Station under Sections 302, 201, 326, 307, 435, 427, 147, 148, 149/302, 326, 435, 427 and Ss. 120, 342, 120B/302, 326, 435, of the Penal Code, 1860 and Sections 3, 4, 5 and 6 of the Explosive Substance Act (VI of 1908) and Section 19(f) of the Indian Arms Act (XI of 1878)."

83. The notification also included other cases being cases Nos. 27, 28 and 29 of the Dum Dum Police Station and cases Nos. 6 and 7 of Basirhat Police Station.

84. These were all undoubtedly cases arising out of the incident at Dum Dum Jessop's factory and Basirhat. But the notification is not a notification that a certain class of cases would be tried by a Special Court, but that these particular cases should be tried by such Court.

85. Similarly, in the case of *Gajen Mali* the notification recites that in the exercise of the powers conferred by sub-s. (1) of Section 5 of the West Bengal Special Courts Act the cases mentioned in the schedule were to be tried by a special Court. Then follows particulars of six cases which apparently arose out of the same incident. Again the notification in terms directs the trial of particular cases and not the trial of any class of case or cases arising out of any particular incident.

86. As I have said earlier the case of *Anwarali Sarkar* and others arose out of the Dum Dum and Jessop's Factory incident, whereas the case of Gajen Mali arose out of an incident at Kakdwip. Had the notifications been to the effect that all cases connected with the Dum Dum Jessop's Factory and Basirhat incident or the Kakdwip incident or incidents should be tried by a special Court very different considerations would have applied. But the terms of the notification are clear. Specific cases and not a class of case or cases are directed to be tried. The notifications are clearly made under the powers given to Government by sub-s. (1) of Section 5 of the West Bengal Special Courts Act to direct the trial of cases which must mean any cases whether they belong to the same or different classes, or whether they can be said to belong to any class at all or not.

87. If the notifications in question were notifications directing classes of cases to be tried by a Special Court then absconders in these particular cases and persons charged in other cases connected with these incidents would be tried by a Special Court without further notification. The terms of the notifications under consideration however would not require such cases to be tried by a Special Court. To ensure such a trial other notifications under the sub-section would be necessary.

88. In my view, sub-s, (1) of Section 5 of the West Bengal Special Courts Act of 1950 offends against Article 14 of the Constitution in so far as it empowers the State Government to direct any case to be tried by a special Court, and as the notifications in question were made under that power, I am bound to hold that the power given in the section and the notifications made under the power so given are ultra vires the Article 14 of the Constitution and therefore the Special Court had no jurisdiction to try Anwarali Sarkar and the forty-nine co-accused persons and to convict and sentence them; and has no power to continue with the trial of Gajen Mali and his co-accused in the Kakdwip case.

89. That being so both these petitions must be allowed. In the case of *Anwarali Sarkar* and others the proceedings, convictions and sentences must be quashed; and in the case of *Gajen Mali* the proceedings now pending before the Special Court must also be quashed. The accused persons are entitled to be tried in accordance with law and we direct that they be retained in custody pending such further proceedings as the State Government may be advised to pursue.

90. The Rule in each case is made absolute. No order as to costs.

CHAKRAVARTTI, J.: These two cases have caused me great anxiety, but having given them the best consideration I can, I have felt constrained to agree with my Lord the Chief Justice in the conclusion arrived at by him. In view of the importance of the question, however, and the effect which our decision is likely to have, I would take the liberty of stating my reasons.

91. The point raised by the two Rules is common and the fact that the trial has been concluded in one case while in the other it is proceeding, makes no difference, save as respects one matter to which I shall presently

refer. There is however, one other feature in the case of *Anwarli Sarkar* which requires notice. In that case, the notification appointing the Special Judge and the notification directing the particular case to be tried by him had both been issued before the Constitution came into force. The notifications were issued under the West Bengal Special Courts Ordinance, 1949 which was practically in the same terms as the present Act and there could be no question of the Ordinance being 'ultra vires' the Government of India Act, 1935. It might therefore seem that since the proceedings were commenced under the authority of a law which was a good law at the time, they might validly be continued and completed, even if the law authorising them was repugnant to the Constitution, because in respect of the guarantees of the fundamental rights and their effect on the existing laws, the Constitution operates only prospectively, as the Supreme Court has ruled. It does not, for example, bar the continuation of a prosecution which was commenced before it came into force, although the law creating the offence charged may be, so far as it creates the offence, void and inoperative at the present time, because it makes an offence of what is now an exercise of a fundamental right '*Keshavan Madhavan Menon* v. *The State of Bombay*', (1951) SCR 228. But the law concerned in the present case was only an Ordinance and therefore a temporary law which expired with the expiry of six weeks from the commencement of the next sitting of the Legislature. It contained no saving clause regarding pending proceedings. We were informed that the actual date on which the Ordinance expired was the 15th March, 1950, the date on which the Act came into force. It is doubtful whether on the day the Constitution came into force, any proceeding was pending at all, because the complaint before the Special Judge on which he took cognizance of the case was not filed till the 2nd April, 1950. But even

assuming that the direction for the trial of the Petitioner under the provisions of the Ordinance and the assignment of his case to the Special Judge were pending, it is obvious that no proceedings could be held or continued before the Special Judge after the 15th March, 1950, except under the authority of the impugned Act. The Legislature itself recognised that position, for it enacted by S. 19 of the Act that any order made, notification issued or Special Court constituted under the Ordinance would be deemed to have been made, issued and constituted under the Act, "as if this Act had commenced on the 17th day of August, 1949", the date on which the Ordinance had been brought into force. It will thus be seen that after the 15th March, 1950, even the notifications in the present case were to depend for their authority and validity on the validity of the Act and it need hardly be pointed out that it was under the provisions of the Act that the whole of the enquiry and trial beginning from the initiation of the proceedings by complaint upto the conviction and sentence, was held. The provision contained in S. 19 of the Act that in respect of acts done under the Ordinance, it shall be deemed to have commenced on the 17th August, 1949, cannot have the effect of making the Act itself an "existing law" at the date of the Constitution and validating the proceedings in the present case on the footing that they were pending as proceedings under that law — for, after the Constitution has come into force, no Act of an Indian Legislature can acquire immunity against the Constitution, even as respects pending proceedings, by giving retrospective operation to itself. The clear position is that upto the 15th March, 1950, whatever proceedings there were, were proceedings under the Ordinance, that thereafter the Ordinance ceased to operate with nothing left of it to apply even to pending proceedings and that all subsequent proceedings were under the impugned Act. The case thus falls within the exception recognised in '*Kesnavan Madhavan Menon* v. *The State of Bombay*', and the fact that the notifications had been issued before the Constitution came into force, does not exclude the Constitution and does not make the proceedings valid by the validity of the Ordinance. The trial and conviction of the Petitioner can therefore be held to have been valid only if the Act is valid and the Act will be valid only if it does not contravene the Constitution.

92. The case of *Anwarali Sarkar* differs from the other case also in respect that before he moved this Court, he had already been convicted and sentenced. He has asked for relief by way of a writ of 'certiorari' and a question arises as to whether the writ lies after judgment for the purpose of quashing a conviction. It is stated in Halsbury's laws of England, Vol. 9, p. 853, that "where an indictment has been tried and judgment pronounced, certiorari to quash will not be granted", and it is added that "there is no reported case in which an indictment has in fact been quashed on 'certiorari' after judgment." But there appears to be a distinction between quashing an indictment and quashing the whole proceedings for want of jurisdiction and in the latter type of case, the writ would seem to lie even after the determination, as stated at pp. 887-889 of the same volume of Halsbury's book. This jurisdiction, however, is only procedural jurisdiction or jurisdiction in respect of the particular case in a tribunal otherwise competent, for, when there was a total lack of authority in the person or persons who tried a case, the proceedings were not merely voidable but wholly void and in such cases no 'certiorari' would lie. It cannot possibly be said that the Special Judge in the present case was a mere usurper of authority or a pretender, because Section 3 of the Act, providing for the constitution of Special Courts, is not in itself 'ultra vires', nor is S. 5 wholly so in any view of its provisions. The fact that the trial has been concluded does not therefore seem to be a bar to the quashing of the conviction on 'certiorari' in the present case. In any event, Article 226 of Constitution speaks not of the English writs, but of writs "in the nature of" those writs and consequently there is no reason why the High Courts in India should always confine

themselves strictly to the Crown Side Practice in England. There is, however, a further complication in the present case, because the Act provides for an appeal to this Court and the Petitioner has in fact preferred an appeal which is pending. It is true that the appeal is also under the impugned Act, but there can be no question of validity of S. 15 which gives the right of appeal. There is thus a valid appeal pending. Whether this Court can or at least ought to quash a conviction on certiorari when there

is an appeal pending before it against the same conviction, appears to me to be, a matter of some difficulty, but the practical importance of that question in the present case is slight, because we have, in any event, to examine the validity of the Act in the other Rule and if in that case we hold the relevant provisions to be void, it will amount to our declaring all proceedings and convictions thereunder to be without jurisdiction and bad. Thereafter, the quashing of the conviction of the petitioner Anwarali Sarkar will be only a formal matter. Nor will the Bench dealing with the appeal be placed in an anomalous position, for the Petitioner, being released by us, will have no occasion to proceed with his appeal.

93. Turning now to the main question raised by these Rules, occasion for complaint against discrimination between one accused and an other by means of special laws arose frequently during the pre-Constitution days, but ultimately the complaint always failed. Section 5, for example, of Ordinance II (2) of 1942, which was practically identical with S. 5 of the Act impugned before us, was declared by the Federal Court in the case of '*King Emperor* v. *Benoari Lal*', 6 FLJ 79 : (47 Cal WN (FC) 41, to be invalid, but the Privy Council reversed the decision '*Emperor* v. *Benorilal Sarma*', 72 Ind App 57 (PC). Their Lordships pointed out that in the view of the majority of the Judges of the Federal Court,

> "The most serious defect in the impugned Ordinance was the power it conferred to discriminate between one accused and another by directing trial in different Courts."

94. And observed that view appeared to be "based on the conception that there is something underlying the written Constitution of India" which forbade such discrimination. It was held that no such constitutional limitation existed. A limitation, however, has now been imposed on the law-making bodies by Article 14 of the Constitution of India and the particular reason which enabled the Privy Council to hold S. 5 of Ordinance II(2) of 1942 and provisions of a like character to be valid, has disappeared.

95. The question before us concerns the validity or otherwise of the proceedings taken and had against the petitioners under the West Bengal Special Courts Act, 1950. The result of such action by the State against them has been that one of them has been tried and the other is being tried, not by the Court which would ordinarily try him but by a special Court and not under the procedure prescribed by the general law of the country, but by a special procedure. The petitioners contend that the special procedure places an accused person at a considerable disadvantage as compared with a person, charged with the same offences, who is tried under the general law and that, therefore, the person who is subjected to the special procedure is discriminated against. They accordingly contend that the special Act, in so far as it authorises such discrimination, is void under Article 13(2) of the Constitution, in as much as it contravenes Article 14 by withdrawing, in the case of particular persons selected by the Executive a large part of the protection with which the general law of the country surrounds persons called upon to answer for alleged crimes.

96. It will be useful at this stage to analyse the broad contention of the petitioners and reduce it to the narrow point which really requires to be decided in these cases. But in order that I may do so, it is necessary to see first what Article 14 of the Constitution in fact guarantees. The matter has been discussed at great length by my Lord the Chief Justice and I shall merely take the results of the discussion. Article 14, like the Fourteenth Amendment of the American Constitution to which it corresponds, does not guarantee absolute equality of laws to all subjects of the State, irrespective of any differences that may exist between them. It only guarantees equality as between persons, similarly circumstanced, and to them also it guarantees not identical laws, but laws of the same or a similar nature. The substance of the guarantee may therefore be expressed by saying that equals shall have the protection of equal laws. It follows that for purposes of legislation, the State is entitled to sort out equals from among its subjects, in other words to classify them, and if it enacts a law applicable only to a particular class, such law will not be invalid merely by reason of the fact that a uniform law is not being applied to all subjects of the State. There will be no discrimination in such a case, because the persons subjected to the special law are not equals of the rest of the subjects to whom it is not applied, but form a class by themselves. Even an individual may form a class in this sense, so as to be a proper subject of special legislation applicable to him alone, if he is a unique person with none among the rest of the subjects similarly circumstanced and if some special legislation is considered necessary to meet his exceptional case. Where such class legislation is enacted, Article 14 does not operate to invalidate it on the ground that it applies to some only of the subjects of the State and not to all, and the only operation of the Article in each cases will be to invalidate the law, if it discriminate even as between persons who are subjected to it. But the main object of Article 14 is to guard, on the one hand, against undue favour and, on the other, against hostile discrimination. A classification for the purposes of a special law must not, therefore, be arbitrary, but

> "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed."

97. Where the classification made rests on no such basis, the special law made for the so-called class will be invalid. These propositions are based on principles laid down in American decisions on the Fourteenth Amendment which have been accepted by the Supreme Court in the case of '*Charanjit Lal* v. *The Union of India*', (1950) SCR 869, and Prohibition case from Bombay (not yet reported) as applicable to Article 14 of the Constitution of India.

98. I may add, however, that besides the guarantee of "equal protection of the laws", drawn from the American Constitution, Article 14 contains another guarantee which is of "equality before the law" and which appears to have been drawn from the common law of England. But it does not appear that for practical purposes, the additional phrase adds anything to the guarantee contained in the other expression. One guarantees equality of status

before the law, while the other guarantees equal security under it and both are aimed at attaining the common object that all shall stand before the law on equal terms. But "equality before the law" is also equality of equals: Article 14 does not declare that persons not in fact equal shall nevertheless be treated as equal in law or that circumstances not in fact the same shall nevertheless be regarded by law as so. Such limitation of equality to equals is essential for good Government. The administration of

a country does not present only problems common to all the subjects or to all parts of the State, but also presents special difficulties and often makes the attainment of special ends necessary. The enactment and application of special laws of limited application to meet such cases, does not offend against the principle of equality, but is itself an equalising operation in that it meets exceptions with exceptions and removes any special advantage or disadvantage that may be found to exist or to have arisen, by means of special laws. Under a Constitution like the Indian Constitution, by which access to the ordinary Courts is not guaranteed, a legitimate occasion for enacting a special law and setting up Special Courts thereby will be when, by reason of some special circumstances, the machinery of the existing Courts is found to have become inadequate for the trial of offences of certain kinds or when certain crimes are found to have been committed in such exceptional circumstances or in so exceptional a manner or by offenders of such exceptional character that they cannot be classed with ordinary instances of the same offences and a trial of the offenders by a Special Court under a special procedure is necessitated by the special facts. But even in such cases, the justification of the special law must always be some reasonable basis of distinction in the case of the persons subjected to it or the offences brought under its purview and the strictest, care must be taken so to express the law as would exclude the possibility of its application to cause not within the special class to which its application would be justified.

99. It will now be possible to see more clearly what precise question is raised by the contention of the petitioners that the proceedings taken against them are bad, because the Act authorising those proceedings offends against Article 14 of the Constitution. Broadly speaking, the position to which they have been subjected is that the State Government directed their cases to be tried by a special Judge and thereupon one of them has been tried and the other is being tried by that Judge under the provisions of the special Act. The direction was given or continued under S. 5 of the Act and it is clear that in order to determine whether the Act is obnoxious to the Constitution, it is only that section that we need mainly examine. The rest of the sections merely lays down the procedure to be followed by the special Court, the powers the Special Court may exercise and he rights and remedies which the accused will have. It is true that those provisions differ materially from the provisions contained in the general law, but there can be no separate question as to their being themselves void or ‘ultra vires’, because if the enactment of a special law for a particular class of persons or cases is justified, there can be no further objection to the contents of that law that they are not in accord with the general law of the country. Indeed, the difference exhibited by the contents of such a special Act is only evidence of the discrimination upon which the attack against its validity is based. Reference to sections other than S. 5 of the Act impugned before us is therefore relevant only for the purpose of ascertaining whether the position of a person tried under the Act differs from that of one tried under the Code of Criminal Procedure and if it does, the nature and extent of the difference. If the position does not differ, the Act cannot be bad, for it merely repeats the provisions of the Code in another form. If it does differ to a material extent,……..then the question is whether the provision made in the Act for its application, to particular persons or cases, with the results of excluding some of the benefits of the Code, rests on any justifiable basis of classification or any basis at all. The real provision to be examined in that case is S. 5 which provides for bringing the Act into operation and under which the cases or offences to which it will be applied is to be determined by the State Government.

100. As pointed out by my Lord the Chief Justice, the Act curtails the rights of accused persons in several important respects and places them in greater jeopardy than persons tried under the Code. It abridges rights of appeal and revision exposes

the accused to the risk of conviction for a major offence, though charged only with a minor one and in the case of offence triable by jury, deprives them of the right of such trial. It is true that the Constitution does not guarantee a right of trial by jury, nor does the Code itself do so for the latter by S. 269(1), only empowers the State Government to direct that the trial of all offences or any particular class of offences before any Court of Session in any District shall be by jury and at the same time empowers the Government to revoke or alter such order. But while the Government may not direct a jury trial in a particular District in any case at all and may, if it has directed such trial, revoke the order in respect of particular offences or classes of offences, it does not appear that it can revoke the order in respect of particular cases or particular accused persons, while the order remains in force in the District in respect of all other cases, involving the same offences. Section 5 of the impugned Act authorises the trial by a special Court of "such offences or classes of offences or cases or classes of cases" as the State Government may direct. In so far as trial under the Act may be directed of "offences" or "classes of offences" with the result of abolishing the trial of those offences by jury the order will be which could be made under the Code itself and there will obviously be no discrimination against anyone. But if the Act be applied to "cases" or even "classes of cases", while in respect of offences involved in those cases, the system of trial by jury remains in force in the District, as in the present cases, there will obviously be differential treatment and the order will be one which the Government could not made under the Code. It is true that the possibility that an order at variance with the Code may be made under a special law is recognised by the Code itself, for it provides by S. 1(2) that nothing contained in it shall affect "any special jurisdiction or power conferred, or any special form of procedure prescribed, by any

other law for the time being in force". But that only takes us back to the basic question, for, now that the Constitution has come into force, any special law, if it is 'prima facie' discriminatory, must justify itself by showing that in fact there is no discrimination and that the persons to whom it is applicable, form a class, standing apart from others by reason of a real and substantial distinction and that such distinction is pertinent to the subject-matter of the legislation.

101. If the Act, as has been shown, treats the persons subjected to it differently from others who may be tried for the same offences under the general law, it must be seen whether the provision for its applicability rests on or indicates any reasonable basis of classification. The relevant provision is S. 5 which lays down that

> "A special Court shall try such offences or classes of offences or cases or classes of cases, as the State Government may, by general or special order in writing, direct."

102. It will be seen that the question whether the Act is discriminatory and as such offends against Article 14 of the Constitution is one of some special difficulty, because, by itself, the Act applies to none. It is not an Act of the kind which the Supreme Court had to deal with in '*Charanjit Lal* v. *Union of India*', (1950) SCR 869, where the Act concerned applied directly and of its own force to a particular Mill Company. Nor is it an Act of the kind which fell to be considered in the Prohibition case from Bombay, which also had a direct application, at least in the main. The present Act is a piece of conditional legislation, providing for a variety of like purposes for which it may be applied, but the application of which for one or other of the purpose and the occasion on which it may be applied, are left entirely to the discretion of the State Government.

Such being the structure of the Act, it is clear that while, on the one hand, there is none to which the Act applies of its own force, it may, on the other hand, come to apply, by directions of the State Government, not to one single class but to a number of classes or even to individuals. The question whether the Act offends against Article 14 of the Constitution must therefore be judged by reference to the different cases in which the Act may possibly be applied and it is clear that the question is not a single question, but as many questions as there are alternatives in the section. It is quite possible that in the case of some of the purposes for which the Act may be applied, its application will involve no differential treatment of anyone at all, and consequently no question of any violation of the equality clause in the Constitution will arise. In other case, differential treatment may be involved, but the persons affected may be distinctive class to whom a special law may justly be applied. In still other cases, there may be differential treatment and also discrimination that cannot be justified. Consequently, when the Act is impugned in any particular case, it cannot be necessary to consider all the parts of S. 5, but only that part under which the State Government has in that case acted. The direction in both the cases before us was a direction for the trial of certain specified cases, including the cases of the Petitioners the Petitioners are affected only by that direction and consequently, it seems to me, the question whether the Act in its application to “offence or “classes of offences” or “classes of cases” would be ultra vires, does not strictly arise.

103. My Lord the Chief Justice has held that the Act, as far as it authorises its own application to “offences” or “classes of offences” or “classes of cases” is not obnoxious to Article 14 of the Constitution. I respectfully agree. In the first two cases there will be no differential treatment of anyone, for all persons charged with the offences concerned will be similarly treated, all being subjected to the Act. In the third case which, I believe, contemplates cases distinguished by the nature of the issues involved or the form of the commission of the crime, such as bank fraud cases or black -marketing cases, there will be differential treatment, but the application of the special law will be valid by reason of the persons affected forming a special class, marked out by a real distinction of a nature which calls for a special mode and forum of trial. The real question in these cases, however, and indeed the only question, is whether the Act, in its application to “cases”, is valid.

104. No useful purpose will be served by my repeating the reasons which my Lord the Chief Justice has given in support of his conclusion that the Act, so far as it authorises its application ‘cases’ is void. They have ultimately constrained me to agree with him and I would only indicate the difficulty I have felt in arriving at a concurrence. But before I do so, I might deal with one or two additional points which were raised in the course of the argument. The learned Advocate-General contended at one stage that the equality before the law or the equal protection of the laws contemplated by Article 14 was only equality as between persons affected by a particular statute. The test, he said, of whether a particular Act offended against Article 14 was whether all persons, subjected to the Act, were treated alike by it and so, in the present cases, the test would be whether after the accused persons got before the Special Judge, they were treated differently from their co-accused in the same cases or it might be from the accused in other cases, assigned to the Judge under the Act. I am entirely unable to assent to that proposition. When an Act is impugned on the ground that it is discriminatory, the complaint is that it consigns the persons subjected to it to a position different from the position of those to whom it does not apply and it is such inequality of treatment that Article 14 forbids, except in cases where it can be shown that the persons affected by the Act form a distinctive class who have deserved the Act by reason of circumstances peculiar to them. Whether a Special Act discriminates even as between persons subjected to it is a further question. I do not know whether the contention of the learned Advocate-

General was based on a passage which is to be found in all books on the American Constitution and which is to the following effect: “It (i.e. the Fourteenth Amendment) merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.” The passage comes from the judgment in *Hayes* v. *Missouri* (1887) 120 U.S. 68, but it will be noticed that it speaks of. “such legislation” and the sentences preceding

the passage make it clear that the legislation referred to is legislation which is validly limited as respects territory or the objects to which it is addressed so as not to offend the Fourteenth Amendment by reason of such limitation. What is meant is that the equality clause ??? not mean that an Act cannot tee limited as to its objects or as to the area where it will apply for such limitation rests on a valid basis of classification which involves no discrimination. With respect to such Acts of valid limited operation, the only question is whether it discriminates as between the persons subjected to them. The passage is thus concerned with what I called a further question.

105. My Lord the Chief Justice has pointed out why it is not possible to accept the learned Advocate-General's contention that S. 5 of the Act should be read along with the preamble and that the word “cases” should be construed as contemplating cases of which a speedier trial is necessary or desirable. The section is completely free of any limitation of any kind. It is clear that if the Government made an order under the section in respect of a case about which there could not be any question of a speedy trial and the accused contended that the order was not warranted by the section because no speedy trial was required, he could not possibly succeed. I would add that even if the qualification contended for were imported the objection of unconstitutionality would not still be removed, because necessity of a speedy trial is too vague and uncertain a criterion to form the basis of a valid classification, and I am not sure that it would at all be a reasonable basis.

106. There can be no doubt that the notification in the present case were issued under that part of S. 5 which authorises the Government to direct the trial by special court of “cases”. The section uses the expressions “offences”, “classes of offences”, “classes of cases” and “cases”. It is clear that “cases” contemplate something different from what are contemplated by the other three expressions and in the particular context, the word can only mean individual cases in which proceedings have been commenced against suspected offenders, known or unknown. It may conduce to clearity if we remember that as regards the point whether the proceedings taken against the Petitioners are void, three questions arise viz., (1) whether the section is ultra vires the Constitution, (2) whether the notifications are ultra vires the section and (3) whether both are intra vires. If the first question could be answered in the negative, the Act would be saved, even if the answer to the second question was in the affirmative, for the case would be one, not of the invalidity of the Act but of its abuse. But the first Question cannot be answered in the negative. The section does not qualify the word “cases” in any way, nor does it furnish any principle by which the application of the section in respect of individual cases is to be regulated. It leaves the discretion of the State Government absolutely unfettered. Under the cover of the word “cases”, the Government can direct any case of any kind to be tried by a Special Court and may even, as my lord has pointed out, direct the case of one person to be tried by a Special Court, while leaving another person, charged with the same offence arising out of the same incident to be tried in the normal way: It cannot possibly be said that

this provision, affecting persons whose cases may be directed to be tried by a Special Court to the deprivation of them of several valuable rights, rests on any reasonable basis of classification or that there is any room for classification in it at all. It is wholly arbitrary. It is true that in practice the application of this part of the section may be limited to proper cases and it may be applied in fact only in respect of cases which are exceptional in character and so form classes by themselves. Indeed, the application in the present cases can well be said to have been wholly proper. But the expectation that the good sense of the Government will always confine them to such use of the section as is constitutionally permissible cannot be sufficient to validate it. As the possibility of unconstitutional use remains, that part of S. 5 which is concerned with 'cases' must be held to be wholly unconstitutional and void on the principle laid down by the Supreme Court in *Romesh Thappar* v. *The State of Madras*, (1950) S.C.R. 594 and *Chintaman Rao* v. *The State of Madhya Pradesh*, (1950) S.C.R. 759. Reference may also be made to the American case of *Thornhill* v. *Alabama*', (1940) 310 U.S. 88.

107. I may pause here for a moment to consider a possible argument that on the principle above stated, even that part of the Act which provides for its application to "classes of cases" must be invalid, because the Act itself lays down no criteria by which to determine or mark off classes and therefore the State Government may apply it arbitrarily to so-called classes which are no classes at all. In my opinion, it is sufficient for the validity of the Act that it mentions classes. Thereby it enjoins that there must be classification, which means proper classification. So much being provided in the Act, the Government is put under a restraint against arbitrary application and the standard by which the classification must be made may be drawn from the general principle that it must be based on a real distinction and must bear a just relation to the end to which the Act is applied. The question in any particular case of application of this Act to a class will therefore be not a question of its validity in regard to "classes", but a question of the legality of its use in the particular case.

108. In the course of the argument, reliance was placed by the learned Advocate-General on two decisions, one of the Hyderabad High Court and another of the Mysore High Court, by which Acts constituting Special Courts, which contained provisions practically identical with S. 5, were held to be valid. In the Hyderabad case, *Abdur Rahum* v. *Joseph A. Pinto*, AIR (38) 1951 Hyd. 11, the Court appears to have proceeded largely on the ground that the Special Act did not prescribe a procedure substantially different from the normal procedure and that such of its provisions as were invalid, were severable and might be deleted, in which case the provision authorising the trial of particular cases under the Act would no longer be objectionable. All I need say with respect is that such a method of dealing with the question is not very helpful. Of the Mysore Case, *Abdul Khader* v. *The State of Mysore*, AIR (38) 1951 Mysore 72, only one of the judgments had been published at the time of the argument, but since then the second judgment and practically the whole of the third

have been published. The Bench was constituted of three Judges and it appears that one of them strongly dissented from the view taken by his colleagues. The real question there was different. The Act concerned was a Mysore Act of 1942, practically in the same terms as Ordinance II of 1942, and not only was it an existing law at the time the Constitution came into force but the proceedings against the accused persons had also been commenced before the Constitution and concluded and what was pending at the date of the Constitution was only a review by a Judge of the High Court which was obligatory under S. 7 of the Act. Besides, it was as long ago as in 1942 that

the Act was applied to the town of Sira where the alleged offences were committed and the notification under which the Petitioners were tried by a Special Judge for offences committed in the course of certain communal disturbances, was a notification applying to all persons connected with all offences arising out of those disturbances. On those facts, one of the Judges held the trials to have been valid on the short ground that the Constitution did not apply. The other learned Judge who held in favour of the validity of the trials, pointed out that actually there had been no discriminatory application of the Act, since it had been applied to persons concerned in a particular outbreak of lawlessness and applied to all of them. But it must be added that the learned Judge also discussed the general question of the validity of the Act with the aid of numerous citations from the decisions of American Courts. He proceeded mainly on the due process clause and quoted authorities to show that maintenance of uniform procedure for all parts of the State or of the same procedure for all time and provision of a right of appeal were not necessary elements of due process. If I may say so with respect, the question under Article 14 which is very different from that under Article 21, dots not seem to have been properly considered from the proper point of view.

109. If S. 5 of the impugned Act, so far as it authorises its application to “cases” is void, the notifications which were under that part of S. 5 were without effect and the proceedings held against the petitioners before the Special Court under the authority of those notifications must be held to be and to have been without jurisdiction. It is this part or the case which has caused me great hesitation and anxiety. The notification by which the case of *Anwarali Sarkar* was directed to be tried by the Special Court did net relate merely to that case, but covered five more cases, in each of which the accused were several in number. In *Anwarali's case* itself, there were 49 other accused. All these cases related to the armed raid on the premises of Jessop and Co., in the course of which crimes of the utmost brutality were committed on a large scale and to incidents following the raid. There can be no question at all that the cases were of a very exceptional character and although the offences committed were technically offences defined in the Penal Code, 1860, the Indian Arms Act and the High Explosives Act, it would be futile to contend that, the offenders in these causes were of the same class as ordinary criminal's, committing the same offences or that the acts which constituted the offences were of the ordinary type. Similarly, the notification relating to *Gajen Mali's case* covered six cases, in three of which he figures as an accused and all these cases-again have arisen out of serious disturbances, which, according to the prosecution, partook of the nature of an organised revolt. In these cases also, the accused are several in number. Judging by the allegations and allegations are all chat need be considered in judging the validity of the initial act of referring the cases to a Special Court it seems to me that these cases we unquestionably marked by very exceptional features which could form a reasonable basis for classifying them off into a separate group and for assigning them for trial to a Spacial Court. If the notifications had been so worded as to make them referable to the provision for “classes of cases” in S. 5 no objection to the validity of the assignment to the Special Court could be taken. Lcoked at broadly and from a plain man's point of view, it would seem to be almost ridiculous that simply because the notifications were unskillfully drawn up and so expressed as to be limited to the individual cases, the trials should be held to be void, although in fact the cases were of such a nature that they might justly be treated as a separate class and although, if only they were so treated as a matter of form, there would be ample authority in the very same section for assigning them to the Special Court for trial under the Special Act. If only the notifications had stated that all cases arising out of the raid on the premises of Jessop & Co., or out of the dis urbane at Kakdwip during certain specified months would be tried by the Special Court, illegality would have been avoided. While

these considerations do make it appear that a decision against the validity of the trials, resting not so much on the validity of the Act as on the validity of the notifications would be ??? range, what has finally weighed with me against them is that in script law there is no answer to the charge of invalidity, however slight and avoidable the constitutional defect might have been and that in matters of enforcing the Constitution, there can be no compromise with deviations. If, in cases of infringement of the Constitution, the courts were to apply the principle of substantial compliance where the actual infringement has been negligible or technical, the judicial sanction behind the command of the Constitution to follow and observe it would be greatly relaxed, with disastrous results, and the constitutional guarantees would lose a great deal of their efficacy. As Bradley. J. observed in he case of *Boyd* v. *The United States* (1886) 116 U.S. 616, "illegitimate and unconstitutional practices ??? their first footing in that way, namely by silent approaches and slight deviations from the legal modes of procedure" and it is of the highest importance that such deviations should be curbed, whenever and wherever found. S. 5 of the impugned Act, in so far as it provides for the assignment to Special Courts of "cases", is clearly void, as it is a threat to the due observance of the equality clause of the Constitution in all cases and therefore anything purported to have been done under the void provision must be held to be also void, although if done differently, the same act might be constitutional.

110. In the result, I agree with my Loni the Chief Justice in the view taken by him and in the order proposed.

DAS, J.: I agree with my Lord the Chief Justice.

BANERJEE, J.: I agree with my Lord the Chief Justice.

S.R. DAS GUPTA, J.: In these petitions two questions arise for our decision: (1) whether the West Bengal Special Courts Act 1950 is ultra vires the Constitution of India being inconsistent with or in derogation of the fundamental rights guaranteed by Article 14 of the Constitution. (2) Whether by the notification dated 28-1-50 published in the Official Gazette the Government has denied the petitioner equality before the law and whether the said notification offends the provisions of Article 14 of the Constitution and is invalid.

111. There can be little doubt that the persons tried under the said Act are in many respects denied the advantages of a trial under the Code of Criminal Procedure and are subject to a special kind of procedure laid down under the Act. For instance, the effect of S. 6 of the Act is that offences which are triable by a Court of Session with the aid of a jury are to be tried by the Special Court without a jury and without the accused being committed to it for trial and the Special Court shall follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by a Magistrate. Again, because of S. 7(2) of the Act the accused when his case is transferred to another Special Court cannot have the benefit of a de novo trial which he would have had if he had been tried under the Code of Criminal Procedure. Although under the procedure laid down in the Code for the trial of warrant cases the Magistrate would be bound to adjourn a case after charge is framed, under S. 9 of the Act the Special Court shall not be bound to adjourn a trial for any purpose unless in its opinion it is necessary in the interests of justice. Again, under S. 13 of the Act the Special Court may if it finds in the course of the trial that the accused has committed any offence, convict such person of such offence. Thus S. 13 of the Act gives the

Special Court a wider power than what a Magistrate trying warrant cases has under the Code of Criminal Procedure. A Magistrate trying a warrant case under the Code can convict a person if a lesser offence than the one with which he has been charged has been made out but under the Act in question the Special Court may convict the accused person of any offence whether lesser or greater than that with which he has been charged. Thus there can be no doubt that the Act makes a discrimination with regard to the persons to be tried under the Act. But then, this fact alone would not make the Act ultra vires the Constitution. What has to be considered is, who are the persons meant to be affected by the Act. It is now well established on the authority of the decisions of the Supreme Court of India that if the Act in question is meant to affect a claps of persons similarly circumstanced and if it deals equally with the members of such a class then the Act cannot be held to be void on the ground that it has no application to other persons. Mukherjea, J. in the course of his judgment in the case of '*Charainjital* v. *The Union of India*', 1950 SCR 869 at p. 911 observed as follows:

> "It must be admitted that the guarantee against the denial of equal protection of the laws does not mean that identically the same rules of law should be made applicable to all persons within the territory of India inspite of differences and circumstances and conditions. As has been said by the Supreme Court of America, "equal protection of law is a pledge of the protection of laws" and this means "subjection to equal laws applying, alike to all in the same situation". In other words, there should be no discrimination, between one person and another if as regards, the subject-matter of the legislation their position is the same".

112. But at the same time it has also been held in the said case of '*Chiranjitlal Chowdhury* v. *The Union of India*', that although the legislature may select a class of persons as the subject of a particular law such selection must not be arbitrary but must always rest upon some real and substantial distinction. Mukherjea J., in the course of his judgment in the said case further observed as follows:

> "The legislature undoubtedly has a wild field of choice in determining and classifying the subject of its laws and if the law deals alike with all of a certain class it is normally not obnoxious to the charge of denial of equal protection but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made and classification made without any substantial basis should be regarded as invalid".

113. The question to be decided in this case is whether, judged by these ???, the West Bengal Special Courts Act can be said to be inconsistent with Article 14 of the Constitution of India. In order to determine the said question, we have to consider mainly the effect of S. 5 of the Act.

114. Section 5 of the Act provides as follows:

> "5(1) A Special Court shall try such offences; or classes of offences or cases or classes of cases as the State Government may by general or special order in writing, direct.
>
> (2) No direction shall be made under sub-section (1) for the trial of an offence for which an accused person was being tried at the commencement of this Act before any Court but, save as aforesaid, such direction, may be made in respect of an offence, whether such offence was committed before or after the commencement of this Act.".

115. In the first place it appears that S. 5 of the Act authorises the State Government to direct not only "offences" or "classes of offences" or "classes of cases" but also "eases" to be tried by the Special Court. The only limitation on such authority of the State Government is that no such direction shall be given for the trial of an

offence for which the accused person was being tried after commencement of this Act before any Court. Thus the use of the word “cases” as distinct from “classes of cases” indicates that the Act is directed not only against “classes of cases” but also against individual “cases”. In the second place S. 5 lays down no principle on which selection of “offences” or “classes of offences” or “cases” or “classes of cases” should be made by the State Government. All that the Act has done is to leave in the hands of the State Government a power to discriminate, without laying down any principle on which such discrimination is to be made. If for instance, the State Government arbitrarily decides and directs a

particular ‘case’ or ‘class of cases’ to be tried by the Special Court it would be well within its powers under the Act to do so. In other words, there is no substantial basis or any basis at all on which classification of “cases” contemplated by the Act should be made. The Act in ques ion gives to the State Government power to decide, without laying down any principle whatsoever on which such decision is to be made, as to what particular cases, or classes of cases or offences or classes of offences are to be tried by the Special Court. Such an Act in my opinion on the principles laid down in the judgment of Mukherjea J. as aforesaid must be held to be void.

116. Mr. Advocate-General appearing on behalf of the State contended before us that the Act has laid down a substantial basis on which such classification should be made. He drew our attention to the preamble of the Act which runs as follows: “An Act to provide for the speedier trial of certain offences”.

117. Mr. Advocate General contended before us that the necessity for a speedier trial forms the basis on which such classification should be made. In other words, he con ended that the clashes of cases which require speedier trial are to be directed by the State Government to be tried by the Special Court.

118. I am unable to accept Mr. Advocate Generals contention. When there are clear words used in a section the preamble cannot be referred to for the purpose of construing it. In other words, the preamble cannot control or limit the plain meaning of a section. In this case the result of reference to the preamble for he purpose of construing the meaning of S. 5 of the Act would be to import something in the section which is not there. Whereas the plain meaning of S. 5 is that the Special Court shall try those “offences” or “classes of offences” or “cases” or “classes of cases” which the State Government may by order in writing direct, the application of the preamble to the section would result in putting a limitation on the power of the State Government and enable it to direct only such “offences” or “classes of offences” or “cases” or “classes of cases” “which require speedier trial” — words which are not in the section itself and which will have to be imported into it. This in my opinion cannot be done. Apart from this the effect of Mr. Advocate General's contention would be to restrict the provisions of S. 5 to only one class of cases, that is, the class of cases which require speedier trial. If that was so, then there was no point in adding the words “classes of cases” in a section; because, in that case there would be no other class except one, that is, the class which require speedier trial. There is oven a stronger reason for my not accepting this contention of Mr. Advocate-General. A class must be a well defined class. Fazl Ali, J. while summarises the principles laid down in the case of ‘Chiranjitlal Chowdhury’, in a later case decided by the Supreme Court observed as follows:

> “If the law deals equally with members of a well-defined class it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to the other persons.”

119. A classification sought to be made on the expedient of speedier trial is not a well-defined classification. It is too indefinite and there can hardly be any definite, objective test to determine it. The contention of Mr. Advocate General must therefore fail.

120. The next question which arises for our consideration is whether by the notification dated 26-1-50 published in the Official Gazette the Government has made a discrimination and has denied the petitioner equality before the law or equal protection of the laws. This question would arise for our consideration only on one or other of the two assumptions namely (1) the Act is intra vires; (2) although a part of the Act may be ultra vires the rest is valid. With regard to the second alternative it has been contended before us that even if we hold that the Act cannot authorise the State Government to direct individual cases to be tried by a Special Court that does not mean that the rest of the Act is also ultra vires. In other words, what is contended is that if from S. 5 of the Act the word “cases” and even the word “offences” are deleted the section as it would stand after such deletion would be perfectly valid and not open to the charge of denial of equality before the law. Because the section as it would then stand, would authorise the State Government to direct only “classes of cases” or “classes of offences” to be tried by the Special Court and there is nothing to prevent the State Government from classifying persons similarly circumstanced and subject all of them to a particular law. There may be some force in this contention but at the same time we must not forget the other test laid down in the judgment of Mukherjea, J. in ‘*Chiranjitlal's case*’ and explained by Fazl Ali, J. in a subsequent case, namely that “such classification should never be arbitrary” but “must always rest upon some real and substantial distinction beaning a reasonable and just relation to the things in respect to which the classification is made, and classification made without any substantial” basis should be regarded as invalid.” As I have already indicated the Act lays down no principle on which selection of “classes of offences” or “classes of cases” should be made by the State Government. The State Government may even arbitrarily determine the classes of cases to be tried by the Special Court and if it does so its action will be well within its powers conferred by the Act. The Act indicates no basis whatsoever on which such classification should be made. I am of opinion that the whole Act is ultra vires the Constitution and deletion of the word “cases” from S. 5 would not save the rest of the Act from being invalid.

121. Even assuming that the Act without the word “cases” in S. 5 would be a valid Act and is “not open to the charge of denial of equal protection” even then the question which remains to be decided is whether the particular notification issued by the Government of West Bengal published in the Official Gazette on 26-1-50 offends the provisions of Article 14 of the Constitution and denies the persons affected by its equality before the law. The said notification is arts with the following words:

> “In exercise of the powers conferred by sub-S. (1) of S. 5 of the Wist Bengal Special Courts Ordinance 1949 (West Bengal Ordinance III (3) of 1949) the Governor is pleased by this order to direct that the cases specified in the Schedule annexed hereto shall be tried by the Special Court constituted by

Judicial Department Notification No. 5694, J. dated 24th October, 1949, under S. 3 of the said Ordinance.”

122. Then follows in the said notification a schedule which comprise of two (serially numbered) cases. The case No. 1 is a case between the King and fifty accused persons

of whom the petitioner before us is one. The case No. 2 is a case between the King and thirty-four accused persons. The accused persons in Case No. 1 have been charged under various sections of the Penal Code, 1860, of the Explosive Substances Act and of the Arms Act and so have the accused persons in Case No. 2. Some but not all the sections with which the accused persons are charged are common to both the cases. It is contended on behalf of the State that by the said notification a class of cases have been directed to be tried by the Special Court. I am unable to accept that contention. In my opinion what the said notification has done is to direct individual cases and not a "class" or "classes of cases" to be tried by the Special Courts. There is no indication that they have been so directed to be tried by the Special Court because they form a class. A classification is always made on some common basis or principle applicable to all the members thereof. No such basis or principle has been indicated in the said notification for which these cases can be said to form a class and for which they have been directed to be tried by the Special Court. If for instance, it is notified that all persons involved in a particular riot would be tried by the Special Court then there is a classification and the basis of such classification is participation in the riot and that fact distinguishes members of that class from all other persons and in such a case the notification if it makes no distinction amongst the members of that class would be valid. But if on the other hand the cases of certain named persons, even though they may be involved in a particular riot are directed to be tried by the Special Court can it then be said that a class of cases has been directed to be tried by the Special Court? In my opinion what have been referred in such a case are the individual cases and not a "class" or "classes of capes". If for instance, to put one simple test, during the trial of the persons named in the notification it transpires that certain other persons are also involved in the commission of the very offence for which the persons named in the notification are being tried can such other persons on the strength of the notification be tried by the Special Court? Obviously not. In my opinion, therefore, on any view of the matter the petitioners are entitled to succeed. In my opinion the Act and the notification both offend the provisions of Article 14 of the Constitution and are invalid. BY THE COURT: We grant a certificate that this case involves a substantial question of law as to the interpretation of the Constitution under Article 132(1) of the Constitution of India.

R.G.D.

123. *Order accordingly*.

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† Full Bench