that the applicants were debtors and that their debts did not exceed Rs. 15,000. We consider that the procedure adopted by the Chairman is wholly irregular. If anybody had a grievance, it is the creditors. But we see no reason why the debtors should not have led all the evidence that they had in their possession to prove their contention that the relationship of a debtor and creditor still continued to subsist in spite of the fact that in 1933 possession of the land was handed over to the creditors. We think there is no reliable evidence on which the finding of the learned Chairman could be sustained and we are of the opinion that the view taken by the learned District Judge that the finding of the learned Chairman was wrong is fully justified.

Under these circumstances, we see no occasion to interfere with the order passed by the learned District Judge. Accordingly, we reject this application and discharge the rule with costs.

Rule discharged.

K. B. S.

ORIGINAL CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Bhagwati.

DHANRAJ MILLS, LTD., APPELLANTS (ORIGINAL PETITIONERS) *v.* B. K. KOCHER AND OTHERS, RESPONDENTS.*

Cotton Control Order, 1949—Import Trade Control Order, 1948—Allocation of imported cotton—Unfair discrimination by Textile Commissioner—Constitution of India Arts. 14 and 226—Dishonest exercise of discretion by officer cannot be challenged by a petition under Art. 226 as being contrary to Art. 14.

Article 14 of the Constitution ensures to all persons residing in India equality before the law and equal protection of the laws and there is a prohibition against the State preventing it from denying to any person equality before the law and equal protection of the laws.

If, therefore, a law is so passed as to make discrimination or deny its application equally to all subjects, such a law can be challenged under art. 226 as offending against art. 14 of the Constitution.

Further, if the law itself permits discrimination in its application or is found to be unfair and unequal in its actual administration or if it

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* O. C. J. App. No. 14 of 1951:
Miscellaneous Appln. No. 346 of 1950.

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requires its officers as a policy of administration that they should exercise the discretion unfairly or unequally, then in such cases administrative orders may also be challenged under art. 226 as being in contravention of art. 14. But if the law is perfectly valid and does not offend against art. 14, it cannot be challenged by a petition under s. 226 merely because it is administered unfairly or unequally by an officer. A specific *mala fide* act of an officer cannot be challenged by a petition under art. 226 as being in contravention of art. 14. The officer in acting contrary to art. 14 is really acting contrary to the law and not in conformity with or in consonance with the law. If the officer excercises the discretion vested in him dishonestly, arbitrarily or capriciously instead of exercising if *bona fide*, he acts contrary to law and in such a case protection cannot be sought by a subject under art. 14 or art. 226 though the Court is not powerless to give the subject protection against a dishonest officer by some other appropriate remedy.

Held, that as the petitioners had failed to show either that the law with regard to control of imported cotton was discriminatory or did not give equal protection to all the subjects the petition was not maintainable.

Held, also that the case was governed by the Import Trade Control Order, 1948 and not by the Cotton Control Order of 1949 and the petitioners had no absolute right to claim any particular allottment of cotton but had to accept whatever quantity of imported cotton was given to them and, therefore, this petition was misconceived.

Yick v. *Hopkins*[1] and *Tarrance* v. *Horida*[2], distinguished.

The petitioners carried on business of manufacturing cotton piece goods and for this purpose used important foreign cotton of two varieties namely Kampala and Tanganyika. In 1943 the Government of India imposed a control on the sale of imported cotton and the mills using such cotton were given quotas from time to time.

The petitioners complained that although they were entitled to receive certain quantity of the imported cotton, for their mills they were allotted less and there was unfair discrimination against the petitioners.

The petitioners therefore filed this petition against the Deputy Chief Controller of Imports, the Textile Commissioner and the Union of India praying for a writ of mandamus or any appropriate order or direction under art. 226 of the Constitution.

TENDOLKAR J. before whom the petition came up for hearing dismissed it.

The petitioners therefore appealed.

[1] (1885) 118 U. S. R. 220. [2] (1902) 183 U. S. R. 572.

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D. N. Pritt K. C. (of the English Bar) with *S. A. Desai*, appeared for the petitioners.

Mr. M. L. Maneksha with *G. N. Joshi* and *M. P. Laud*, appeared for the respondents.

CHAGLA C. J. The petition from which this appeal arises is an entirely hopeless one and Mr. Pritt with all his ingenuity has tried to make it as presentable as possible. The petitioners are the Dhanraj Mills and they used in their mills imported foreign cotton of two varieties, Kampala and Tanganyka. A control has been imposed by the Government of India on the sale of cotton and mills can only receive cotton as permitted by the various Control Orders issued from time to time by the Government of India. The grievance made by the petitioner in his petition is that he was allocated by respondent No. 1, who is the Deputy Chief Controller, certain bales of cotton of the Kampala and Tanganyika varieties for the years 1948-49. This allocation was made on the basis of the consumption of the mills of this cotton for a period of three years ending with December 1942. The petitioner applied for allocation of these two varieties of cotton to respondent No. 1 also for the years 1949-50 and, without going into figures, broadly the petitioner's contention is that he has been allocated cotton of the Kampala and Tanganyika varieties which is less than what he applied for and to which he was entitled. His further contention is that respondent No. 1 reserved for the use of the Government of India more cotton of the Tanganyika variety than of the Kampala variety. As it happens, the petitioner used more cotton of the Tanganyika variety than of the Kampala variety and, therefore, his share of the Tanganyika cotton was less than what he applied for. His further grievance is that even with regard to the Tanganyika variety he has received less than he was entitled to according to his quota, even on the assumption that the reservation made of the Tanganyika variety by respondent No. 1 was a proper reservation. He has also made an allegation, not very clearly, nor very explicitly, but still the suggestion is there that respondent No. 1 has been advised in making the allocation by a committee called the Indian Cotton Import Advisory Committee and the majority of the members of this Committee are consumers of Kampala cotton and, therefore, it was to their advantage that there should be more reservation of the Tanganyika variety rather than of the Kampala variety. On these facts the petitioner asked for a writ in the nature of mandamus against the respondents, and in the

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alternative any appropriate order or direction under art. 226 of the Constitution.

Mr. Pritt, who opened the appeal before us, argued it on the assumption that all the facts pleaded in the petition had been established. We asked him to argue as if he was arguing on a demurrer because we felt that it would be difficult for Mr. Pritt to substantiate his case that even if all the facts alleged by him had been established he was entitled to any relief on this petition. In opening the appeal Mr. Pritt drew our attention to the Cotton Control Order of 1949 issued by the Central Government in exercise of the powers conferred upon it by s. 3 of the Essential Supplies (Temporary Powers) Act of 1946, and he relied on cl. 14 of that Order which provides that the Textile Commissioner may, with a view to securing a proper distribution of cotton or with a view to securing compliance with this Order, direct any person holding a stock of cotton or any class of such persons to sell to such person or persons such quantities of such description of cotton as the Textile Commissioner may specify, and the rather seemingly attractive argument advanced by Mr. Pritt was that the expression "may" in cl. 14 should be read as "must", that there was a statutory obligation upon the Textile Commissioner to allocate to the petitioner certain bales of cotton according to his requirements, and the Textile Commissioner having failed to discharge his statutory obligation, the Court was entitled to issue a writ of mandamus against the Textile Commissioner ordering him to allocate certain bales of cotton to the petitioner. In the alternative Mr. Pritt contended that even if no obligation could be spelt out in the language used in cl. 14, there was an obligation upon the Textile Commissioner to act in conformity with art. 14, of the Constitution, and inasmuch as the allocation made by him constituted an unfair discrimination against the petitioner, his order was contrary to art. 14, the petitioner's fundamental right was violated, and he was entitled to come to this Court.

We were preparing ourselves to answer these ingenious arguments, when Mr. Maneksha drew our attention to the fact that this particular Order on which Mr. Pritt relied had no application whatever to the facts set out in the petition or the grievance made by the petitioner in his petition. It appears that the allocation that has been made from time to time of East African cotton in favour of the petitioner has not been done under cl. 14 of this order at all. It is perfectly true that the Textile Commissioner has power under this Order to allocate

cotton both of the indigenous variety and of foreign variety, but in fact the Textile Commissioner has not been exercising his powers under this clause in respect of imported cotton. With regard to imported cotton, the control is exercised under a different piece of legislation altogether. We have on the statute book Act XVIII of 1947, and s. 3 of that Act provides that the Central Government may, by order published in the official Gazette, make provision for prohibiting, restricting or otherwise controlling, in all cases or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the Order, and among other things import and export of goods of any specified description; and exercising their power under this section the Central Government have promulgated an Order which is known as Import Trade Control Order, on March 6, 1948 and this order provides that any officer issuing a license under cls. (*viii*) to (*xiv*) of the Notification of the Government of India dated July 1, 1943, may issue the same subject to one or more of the conditions stated below, and one of the conditions is that goods covered by the license shall not be disposed of or otherwise dealt with without the written permission of the licensing authority or any person duly authorised by it. Turning to the Notification of July 1, 1943, that was a Notification issued under the Defence of India Rules and that prohibited the bringing into British India by sea, land or air from any place outside India of any goods of the description specified in the schedule in that Order, and when we turn to the schedule we find that raw cotton was one of the articles which was so prohibited. It is respondent No. 1 who, acting under this Import Trade Control Order of March 6, 1948, issues licenses to various persons in Bombay permitting them to import raw cotton from East Africa, and one of the conditions that he imposes upon the persons to whom he issues licenses is that they will not dispose of or otherwise deal with the cotton imported by them without his written permission. He, therefore, directs these license holders to sell the cotton imported by them to various mills specified by him. Having ascertained from the petitioner what his requirements were from year to year and taking into consideration the requirements of different mills in Bombay, respondent No. 1 then calls upon various license holders to sell cotton to different mills. Therefore, what the petitioner chooses to call an allocation under cl. 14 of the Cotton Control Order is in reality not an allocation made by the Textile Commissioner at all, but is the privilege given to him to purchase from the license holders cotton permitted by

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respondent No. 1. If these be the true facts and if this be the law which is applicable to the facts of the case, it is difficult to understand how the petitioner can make any grievance of the fact that respondent No. 1 has not asked a particular license holder to sell a particular quantity of cotton to the petitioner. It is not suggested that there is any statutory obligation upon respondent No. 1 to insist upon any particular license holder to sell any particular quantity of cotton to the petitioner. Not only is there no statutory obligation upon respondent No. 1, but there is not even any right in the petitioner to insist upon obtaining any particular quantity from respondent No. 1 or from anyone else. In this connection it may be desirable to see the form of the bond which the petitioner has to sign when he makes an application for the allocation of certain quantity of cotton which he has to state as his requirement. In this form of the bond he agrees and undertakes to accept any allottment of African cotton that may be made to him up to the quantity specified by the petitioner. Therefore, the obligation upon the petitioner is to accept any quantity given to him by respondent No. 1. Only the top limit is laid down which is his requirement. There is no obligation upon him to accept anything more than what he has himself asked for. But there is no bottom limit laid down in the allocation which respondent No. 1 might make in his favour. He must accept whatever is allotted to him. Therefore this letter of undertaking signed by the petitioner makes it clear that it is left entirely to the discretion of respondent No. 1 to allot to him such cotton as he thinks proper. This letter also clearly shows that there is no right in the petitioner to insist upon obtaining the full quota as asked for by him when he made his application setting out his requirement.

With regard to art. 14 of the Constitution, although Mr. Pritt has argued it on the basis that the Cotton Control Order applies, it would not be fair to him not to deal with this point because we have now found that some other piece of legislation applies to the facts of this case, and therefore we shall very briefly deal with the argument advanced by Mr. Pritt. Article 14 ensures to all persons residing in India equality before the law and equal protection of the laws within the territory of India, and there is a prohibition against the State preventing them from denying to any person equality before the law and the equal protection of the laws. It is not suggested by Mr. Pritt that the law enacted by the Union Government is not a law

which gives equal protection to all the subjects or that the law as such unfairly discriminates between one section of the public and another or one class of subjects and another. The grievance of Mr. Pritt, if any, is that in the administration of the law in this particular case the allocation has been made in a manner which has unfairly discriminated against his client. This raises a rather important question as to whether art. 14 as it is enacted applies to administrative orders. There can be no doubt that if a law is so passed as to make discrimination or deny its application equally to all subjects, such a law can be challenged under art. 226 as offending against art. 14 of the Constitution. But the matter is not free from doubt when we come to executive or administrative orders. Can a subject say that although the law is perfectly valid it does not offend against art. 14 of the Constitution, but an officer in administering the law is acting contrary to the provisions or the principle underlying art. 14, Mr. Pritt says that if discretion is vested in an officer by a statute, in the exercise of that discretion he must act in conformity with art. 14. If an officer is given the discretion to issue licenses, in issuing licenses he cannot 'discriminate between one section of the public and another. If he does so, his order is liable to be challenged under art. 226.

Now, a clear distinction must be borne in mind between the law and the administration of the law. If the law itself permits discrimination, even though the law may appear to be fair and undiscriminatory, the Court may interfere and say we are more concerned with how the law actually works rather than how it appears in black and white in the statute book. One may even have a case where in exercising the discretion vested in officers under the statute the state may, as a policy of administration, require its officers to exercise the discretion unfairly and unequally. We can imagine that even in such a case the Court may interfere and say that although administrative orders are being challenged, the administrative orders suggest behind them a policy of the State of discrimination. But to our mind the position is different when a subject comes to the Court and challenges a specific act of an individual officer as being in contravention of art. 14. The Officer in acting contrary to art. 14 is really acting contrary to the law and not in conformity with or in consonance with the law. When the law invests an officer with a discretion, the law assumes that the officer will exercise the discretion *bona fide* and not dishonestly, arbitrarily or capriciously, and if he exercises the

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discretion dishonestly, arbitrarily or capriciously, he is really going contrary to the law. In such a case the subject comes to Court not for protection under art. 14, but for protection against the dishonest, arbitrary or capricious act of the officer. The court is not powerless to give the subject protection against a dishonest officer, but that protection cannot be sought under art. 14 or under art. 226. We are only concerned in this case with the question as to whether the petitioner has a right to maintain a petition against, what he chooses to call, a dishonest exercise of his discretion by an officer. There is no suggestion here that the State as a policy has laid down that licenses should be issued or quotas should be allotted not in a fair manner but in order to benefit a particular class of citizens. As we said and as we repeat, the only charge, and even that is not properly or fully laid, is against respondent No. 1 that he in exercising the discretion to allot has been swayed by certain unfair considerations.

The authorities on which Mr. Pritt has relied do not really support his contention that a specific *mala fide* act of an officer can be challenged by a petition in support of the fundamental right guaranteed to the citizen under art. 14. He has relied on two or three American cases, and the leading case on which he has laid considerable emphasis is the case of *Yick Wo* v. *Hopkins*.[1] When we look at that case we find that what was challenged in that case was not any administrative or executive order, but an ordinance passed by the City of San Francisco which required all persons desiring to establish laundaries in frame houses to obtain the consent of certain municipal officials and it was found that in giving consent the municipal officials had acted unfairly and that the policy of the administration was directed exclusively against a particular class of persons, viz., the Chinese. On those facts the Supreme Court held that though a law be fair on its face and impartial in appearance, yet, if it is administered by public authority with an evil eye and unequal hand, so as practically to make illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. Therefore here we have a case where although the law superficially seemed to be fair and equal, in its actual administration it was found to be unfair and unequal. The other case is the case of *Tarrance* v. *Florida*.[2] That was a case where a coloured person went in.

[1] (1885) 118 U. S. R. 220. [2] (1902) 188 U. S. R. 572.

appeal to the Supreme Court against his conviction for murder alleging that negroes were discriminated against in the selection of grand and petit jurors, and the Supreme Court took the view that if that fact had been established the negroes would have been denied the protection of equality of law under the provision of the American Constitution corresponding to art. 14. It is true that in a sense what was challenged here was not any law but the administrative action on the part of the County Commissioners in the State of Florida who prevented negroes from being empannelled as jurors. But the case is clearly distinguishable because it was not on a petition for a writ that the aggrieved party went to the Supreme Court. The aggrieved party went to the Supreme Court in appeal against a conviction alleging that he did not get a fair trial because his right to have a jury in which negroes were represented was denied to him, and even here the judgment of the Supreme Court suggests that before the appellant could succeed the Court would have to be satisfied that it was the policy of the State of Florida to prevent negroes from acting on the jury.

Therefore, as the petitioner has failed to show either that the law with regard to control of imported cotton is discriminatory or does not give equal protection to all the subjects, his petition must fail to the extent that he attempts to come under art. 14 of the Constitution. The petition must equally fail even if he succeeds in establishing that respondent No. 1, in the orders that he has issued, has acted *mala fide* or capriciously or arbitrarily. There is no suggestion that in doing so respondent No. 1 was carrying out any policy of the administration or there came any orders from the State that he should act *mala fide*, arbitrarily or capriciously. The very fact that the allegation is made that he acted *mala fide*, clearly suggests that the petitioner realised that his conduct was not in conformity with the law under which he was acting. When one acts *mala fide*, obviously one acts contrary to the manner in which the law expects one to act. We have not thought it necessary to go into the facts of this petition because the view taken by us is that even if the facts alleged in the petition had been established by the petitioner, he would not be entitled to the relief he seeks on the petition. That was the view taken by the learned Judge below, Mr. Justice Tendolkar, who dismissed the petition, and we are in agreement with the decision he came to.

The result is that the appeal fails and must be dismissed with costs.

Attorneys for appellants: *Dastur & Co.*

Attorneys for respondents: *M. V. Jayakar.*

Appeal dismissed.

A. J. P.

ORIGINAL CIVIL

1951 March 16

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Bhagwati.

JAMES CHADWICK & BROS., LTD. APPELLANTS *v.* THE NATIONAL SEWING THREAD CO., LTD., RESPONDENTS.*

Trade Marks Act (V of 1940), ss. 8, 10, 76—High Court Rules, r. 617—Letters Patent cl. 15—Government of India Act 1915 (5 and 6 Geo. V c. 61) ss. 106, 108—Government of India Act 1935 (26 Geo. V c. 2) s. 223—Constitution of India arts. 225, 367—Interpretation Act, (1889), s. 38—General Clauses Act (X of 1897), s. 8—Appeal to the High Court under the Trade Marks Act—Appeal heard by the sitting Judge in Chambers—Second Appeal to Division Bench competent—Trade mark sought to be registered should not be such as is likely to deceive or cause confusion—The distinguishing or essential feature of the trade-mark should be found out and comparison made.

It is well-established that when a statute directs that an appeal shall lie to a court already established, then that appeal is regulated by the practice and procedure of that Court.

The practice and procedure of the High Court provides that from the decision of a single judge on the original side, there shall lie an appeal to a Division Bench.

Rule 617 of the High Court Rules provides that all appeals under the Trade Marks Act shall be presented to the Sitting Judge in Chambers. Such an appeal is, therefore, governed by the practice and procedure of the High Court and a second appeal is competent.

In making rule 617 the High Court was exercising its power conferred upon it by art. 225 of the Constitution to regulate its own procedure and to decide whether work of the High Court should be disposed of by Judges sitting singly or in Division Benches.

Although the Legislature did not expressly amend cl. 15 of the Letters Patent, still by reason of s. 38 of the Interpretation Act, the amendment must be deemed to have been made so as to substitute s. 223 of the Government of India Act 1935 for s. 108 of the Government of India Act 1915 in cl. 15. Similarly, under the Constitution art. 367 provides that for the interpretation of the Constitution s. 8 of the General Clauses Act should be resorted to. S. 8 is in terms identical with s. 38 of the Interpretation Act and so when the Government of India Act 1935 was replaced by the Constitution, any reference to s. 223 of the Act of 1935

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* O. C. J. App. No. 95 of 1950. Miscellaneous Petition No. 2 of 1950.