WRITS : MODE OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS

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Introduction

There has been tremendous expansion in the administrative process. This is natural in a welfare state as a welfare state is basically an administrative state. So expansion in the administrative power is a consequence of the concept of welfare state. All legal power, according to H.W.R. Wade, 'as opposed to duty, is inevitably discretionary to a greater or lesser extent…' Therefore, in order to maintain rule of law it is absolutely necessary to control this discretionary element in the administrative power. Justice Douglas of the U.S. Supreme Court has rightly remarked that it is the majesty of the administrative law that it has been able to control absolute discretion on the part of the government or any ruler or official because absolute

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discretion is a ruthless master. It is more destructive of freedom than any of man's inventions.

Therefore, the judicial control over the administrative action becomes imperative. There are two types of remedies against the administrative wrongs – private law remedy of suit and judicial review through writs. Civil law remedy could be effective if the procedure is simple cheap and expeditious, which is not so in India. Therefore, this remedy is not effective against the administration. There is tremendous scope for this remedy in administrative matters since it lies at the door-step of a litigant. It is the public law remedy of judicial review through writs which is very effective and expeditious, though it is costly as only High Courts and the Supreme Court have the power to issue these writs.

The power of judicial review is a supervisory power and not a normal appellate power against the decisions of administrative authorities. The recurring theme of the apex court's decision relating to nature and scope of judicial review is that it is limited to consideration of legality of decision making process and not legality of order per se. That mere possibility of another view cannot be a ground of interference.

Powers of the Supreme Court

The Power of judicial review is a constitutional power since it is the Constitution which invests these powers in the Supreme Court and the High Courts in the States. So far the Supreme

Court is concerned the relevant Articles are 32 with Articles 12 and 13 and Article 136. Article 32 empowers the Supreme Court to issue directions, orders or writs (which are specifically mentioned therein) for the enforcement of fundamental rights. What is unique about Article 32 is that the right to move the Supreme Court under this Article is itself a Fundamental Right. Thus the Supreme Court is made guarantor or protector of the fundamental rights. Dr. Ambedkar called it the soul of the Constitution. The Supreme Court has further expanded the scope of this Article even in cases where no fundamental right is involved. In *Jhumman Singh v. CBI* [1], it was held that where a person manipulated facts in order to get a decree by a court to defeat the ends of justice, in such a situation petition was held to be maintainable under Article 32. Though Article 32 is called cornerstone of the democratic edifice, it becomes inconvenient for the Supreme Court to entertain petitions under original jurisdiction since it could overload the court. Therefore, sometimes the Supreme Court suggests that the petitioner should first approach the High Court under Article 226 before coming to the Supreme Court under Article 32.

Article 136-A Special Power of Judicial Review

Under Article 136, the Supreme Court may grant special leave to appeal against any decision of a Tribunal. What is a Tribunal is not defined, but the Supreme Court has interpreted

1. 1995 (3) SCC 420. Also see M.C.Mehta v. Union of India, A.I.R 1987, SC 965

it in a liberal way. A tribunal is a body or authority which is vested, with judicial power to adjudicate on question' of law or fact, affecting the rights of citizens in a judicial manner. Such authorities or bodies must have been constituted by the state and vested with judicial as distinguished from administrative or executive functions.

Article 136 does not confer a right of appeal as such but a discretionary power on the Supreme Court to grant special leave to appeal. The Supreme Court has held that even in cases where special leave is granted, the discretionary power continues to remain with the court even at the stage when the appeal comes up for hearing. Generally, the court does not, grant special leave to appeal, unless it is shown that exceptional and special circumstance exist, that substantial and grave injustice has been done and the case in question presents sufficient gravity to warrant a review of the decision appealed against. It confers a very wide discretion on the Supreme Court to be exercised for satisfying the demands of justice.

In *Bharat Coking Coal Co. v. Karam Chand Thapar* [2], the Supreme Court held, Article 136 "has been engrafted by the founding fathers of the Constitution for the purpose of avoiding mischief of injustice on the wrong assumption of law. The justice delivery system of the country prompts this court to interfere under Article 136 of the Constitution when the need of the society stands established and the judgment, if left outstanding, would

2. 2003(1)SCC 6.

not only create prejudice but would have otherwise adverse effect upon the society."

Powers of the High Courts

Article 226 clause (1) empowers the High Courts in the States or Union Territories to issue to any person or authority including any Government within their territories, directions, orders or writs for the enforcement of the fundamental rights or for any other purpose.

The power of judicial review of the High Court under Article 226 is wider than that of the Supreme Court under Article 32 of the Constitution. The expression 'for any other purpose' enables the High Court to exercise their power of judicial review for the enforcement of ordinary legal rights which are not fundamental rights. High Court can issue a writ to a person or authority not only when it is within the territorial jurisdiction of the court but also when it is outside its jurisdiction provided the cause of action wholly or partly arises within its territorial jurisdiction. This power of the High Court under Article 226 is concurrent with the power of the Supreme Court under Article 32 of the Constitution.

Article 227 clause (1) confers the power of 'superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. However, this power does not extend, like Article 136, over any court or tribunal constituted under any law relating to the Armed Forces.

This power is in addition to the power conferred upon the High Court under Article 226 which is of a judicial nature. Is this power of superintendence, administrative or judicial? Under the Government of India Act, 1935 this power extended only to the courts and was of administrative nature only. Under the Constitution it is extended to the tribunals and section 224 clause (2) of the Government Of India Act, 1935, which made it of administrative nature, was not retained in Article 227. Therefore, the power of superintendence under Article 227 is of an administrative as well as judicial nature. The parameters of this power are well settled and it is exercised on the same grounds as the power of judicial review. They are:

(i) It can be exercised even in those cases where no appeal or revision lies to the High Court;

(ii) The power should not ordinarily be exercised if any other remedy is available even if it involved inconvenience or delay.

(iii)The power is available where there is want or excess of jurisdiction, failure to exercise jurisdiction violation of principles of natural justice and error of law apparent on the face of the record;

(iv) In the exercise of this power the High Court does not act as appellate tribunal.

(v) It does not invest the High Court with an unlimited prerogative to interfere in cases where wrong decisions have been arrived at by judicial or quasi-judicial tribunals on

questions of law or fact. There has to be grave miscarriage of justice or flagrant violation of law calling for interference.

Tribunal under Article 227 has the same meaning as under Article 136 for the Supreme Court. In *Surya Dev Rai v. Ram Chander Rai*[3], the Supreme Court held that the purpose underlying vesting of this jurisdiction under Article 227 is "paving the path of justice and removing its obstacles therein."

Thus a very wide discretionary power is provided to the High Courts under articles 226 and 227. However, it must be exercised according to the principles of judicial review.

REMEDIES OF JUDICIAL REVIEW

Writs

The Supreme Court under Article 32 and the High Courts under Article 226 are vested with the powers to issue directions, orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, which ever may be appropriate in the case. A brief explanation of these remedies is appropriate here.

(i) Writ of Certiorari

The term of the old writ was that of a royal demand to be informed (certiorari) of some matter, and in early times it was used for many different purposes. It became a general remedy

3. A.I.R 2003 SC 3044; Also see Shiv Shakti Cooperative Housing Society, Nagpur v. M.S Swaraj Developers A.I.R 2003 SC 2434.

to bring up for review in the court of Kings Bench any decision or order of an inferior tribunal or administrative body. In the modern times the scope of certiorari was laid down in the Electricity Commissioner's case by Lord Atkin which is classical and approved in many English and Indian decisions. Lord Atkin said:

Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority, they are subjected to the controlling jurisdiction of the Kings Bench Division exercised in these writs.

According to the above statement the conditions are –

(i) body of persons having legal authority to determine question;

(ii) the determination must affect the rights of subjects;

(iii) having the duty to act judicially;

(iv) act in excess of their legal authority.

The most controversial condition was the requirement of acting judicially. It was interpreted as an additional requirement apart from affecting the rights by Lord Hewert in R. v. Legislative Com [4]. etc. This was confirmed by the Privy Council in *Nakkuda Ali case*[5]. Our courts also adopted this interpretation. In England this confusion was cleared by Lord Reid in the landmark decision of *Ridge v. Baldwin*[6]. Lord Reid reinterpreted Atkin LJ's words about the duty to act judicially. Accordingly it was not additional

4. 1928 (1) KB 411.
5. 1951 AC 66.
6. 1964 AC 40.

condition but a qualification of the earlier condition. Therefore, acting judicially means acting fairly where the determination affects a person's rights. This interpretation has extended the writ to administrative actions also which of course affect his rights.

In *A.K.Kraipak v. Union of India*[7], the Supreme Court accepted Lord Reid's interpretation and held that distinction between quasi-judicial and administrative has become thin but it is not completely obliterated for other purposes. Therefore, since Kraipak a new trend has emerged in the expanding horizon of the writ of certiorari in India to control the administrative actions. It applies not only to legal authority but also to any agency or instrumentality of the state who acts arbitrarily in violation of law or Constitution. The broad grounds for issuing the writ are:

(i) Lack or excess of jurisdiction

(ii) Violation of the principles of natural justice.

(iii) Error of law apparent on the face of the records.

The last ground 'error of law apparent on the face' has become redundant in English law since the decision of the House of Lords in Anisminic Ltd. v. Foreign Compensation Commissioner[8], where the Court (Lord Reid), brought all errors of law under the jurisdictional law. This position is now confirmed after some controversy in the earlier stages after the

7. AIR 1970 SC 150.
8. 1969 (2AC) 147.

decision in the Anisminic case. In India, our courts are still hesitant in this regard. The ground of 'error of law apparent on the face' is still being employed for certiorari. It is hoped that our courts will also follow the broad principle of 'jurisdiction law' as laid down in Anisminic case.

Thus the writ of certiorari is an important remedy to quash a decision of any court, tribunal or administrative authority if it acted ultra vires their powers.

(ii) Writ of Prohibition

In the same manner Electricity Commission case[9] Lord Atkin LJ said:

"I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters, which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction."

In *Hari Vishnu Kamath v. S. Ahmad Ishaque*[10], the Supreme Court said: Both the writs of prohibition and certiorari have for their object the restraining of inferior courts from exceeding their jurisdiction and they could be issued not merely to court but to authorities exercising judicial or quasi-judicial functions.

Since these decisions the scope of prohibition has expanded

9. 1924 (1KB) 171.
10. A.I.R 1955 SC 233.

and it lies against the administrative authorities also. Lord Denning said, "It is available to prohibit administrative authorities from exceeding their powers or misusing them. In particular, it can prohibit a licensing authority. from making rules or granting licenses which permit conduct which is contrary to law" [11]. In India, prohibition is issued to protect the individual from arbitrary administrative actions.

It is an efficacious and speedy remedy where a person does not desire any other relief except to stop the administrative agency. An alternative remedy does not bar the issue of this writ. It can be issued even when the matter is decided to stop the authority from enforcing its decision. If the lack of jurisdiction is patent, the writ is issued as a writ of right.

(iii) Writ of Mandamus

The prerogative remedy of mandamus has long provided the normal means enforcing the performance of public duties by public authorities of all kinds. While certiorari and prohibition deal with wrongful action, mandamus deals with wrongful inaction. These prerogative remedies, thus, together cover the field of governmental powers and duties.

Mandamus is issued only when a legal duty is imposed on a public authority in the performance of which the petitioner has a legal right [12]. Mandamus would also lie when there is a failure to perform a mandatory duty. The petitioner must show that he

11. RV.G.L.C Ex.t.Blackburn 1976 1WLR 550.
12. G.B Reddy v. ICR Institute 2003, SC 1764.

has made a demand to enforce that duty and the demand was refused.

Mandamus will not lie when the duty is merely discretionary. In *State of M.P. v. Mandawara* [13], the Supreme Court held that granting of Dearness Allowance is discretionary for the Government and it cannot be compelled by mandamus to grant the same. However, the court may issue a writ of mandamus where the public authority has failed to exercise or has wrongfully exercised discretion conferred on it by a statute or has exercised such discretion mala fide or on irrelevant considerations.

The writ of mandamus is issued against any court, tribunal or administrative authority. The Supreme Court has developed a new concept of continuing Mandamus by issuing directions from time to time and keep the matter pending, requiring the agencies to report the progress of investigation so that monitoring by the court could ensure continuance of the investigation [14].

(iv) Writ of Habeas Corpus

It is a process by which a person, who is confined without legal justification may secure a release from his confinement. The writ is an order issued by the High Court calling upon the person by whom a prisoner is alleged to be kept in confinement to bring him before the Court to let the Court know on what ground the prisoner is confined. However, the production of the body

13. A.I.R 1954 SC 93.
14. Vinnet Narayan v. Union of India A.I.R 1998 SC 2684.

of the person alleged to be unlawfully detained is not essential in modern times[15].

The rule of standing is relaxed in habeas corpus petition which can be made by any person on behalf of the prisoners but not an utter stranger. Application for habeas corpus has to be accompanied by an affidavit stating the nature and circumstances of the restraint. If the court is satisfied that there is prima facie case, it issues a *rule nisi* requiring the opposite party to show cause, on a day specified, why an order granting the writ should not be made. After hearing the parties, the court may make the *rule nisi* absolute or it may discharge it as the case may be.

The writ of habeas corpus has assumed great importance in the administrative process as wide powers of detention are conferred on the administrative authorities in the modern times. The fundamental right to personal liberty as a human right has further enhanced the importance of this remedy. The grounds of habeas corpus are the same grounds of judicial review based on ultra vires doctrine. So if the detention powers are used mala fide or based on irrelevant or extraneous considerations or are used in violation of statutory provisions, the writ of habeas corpus will issue to quash such a detention. There is no need for a separate certiorari.

The writ of habeas corpus is issued against any order of detention by any authority including the Speaker of Parliament or State Assemblies [16]. However, no writ of habeas corpus will

15. Kanu Sanyal v. D.M Darjelling A.I.R 1973 SC 2684.
16. Ganpati v. Masi Nafisul Hasan A.I.R 1954 SC 636.

lie in regard to a person who is undergoing imprisonment on a sentence of a court in a criminal trial even on the ground of erroneousness of conviction [17].

Before Constitution (44th Amendment) Act, 1978, enforcement of the writ of habeas Corpus was liable to be suspended. The Supreme Court in the habeas corpus case[18] held that no person could have any locus standi to move the court to challenge the legality of an order of his detention on any grounds. This was challenged on limited grounds before this decision. This was the most unfortunate decision of the apex court. It utterly failed to protect the life and liberty of the people when it was most needed. Therefore, by the 44th amendment, now the enforcement of the writ of habeas corpus cannot be suspended during Emergency under Article 352.

The scope of the writ has been further expanded by the Supreme Court by prohibiting torture or inhuman treatment while in detention in a prison by the prison authorities. In this respect the law is more advance in India than prevailing in England where detention conditions cannot be challenged by habeas corpus.

(v) Writ of Quo Warranto

The writ of quo warranto is issued against the holder of a public office calling upon him to show with what authority he holds that office. It is issued against the usurper of an office.

17. Janardan Reddy v. State of Hyderabad A.I.R 1951 SC 217.
18. ADM Jabalpur v. Shivkant Shukla.

The object is to confer jurisdiction upon the judiciary to control the executive action in making appointments to public offices and also to protect the public from usurpers of public offices.

The law of standing is relaxed so that any member of the public can challenge the action by this writ [19].

The following conditions apply:

(i) The office in question must be a public office.

(ii) The office must be substantive in character.

(iii) The holder must not be legally qualified to hold the office or to remain in the office .

(iv) The person must be holding the office when the writ is heard.

The writ will not lie in respect of an office of a private nature. The writ is discretionary in nature and the court may refuse to grant it.

What are the consequences of granting of the writ? Will the actions of usurper become null and void *ab initio*? It will depend upon the nature of disqualification. If the disqualification is of technical nature, the acts will not be null and void and the principle of de facto office will be applied to save such actions. However, where defect in the qualification is fatal, then everything done by him will be null and void. The benefit of the colour of office will not be available.

19. S.N Srivistav v. State of U.P A.I.R 2003 All 259.

(vi) Directions and Orders

The powers conferred by Articles 32 and 226 are very wide. Supreme Court observed that, "In view of the express provision in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English Law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges…., so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matters of granting such writs in English law [20]." This is the meaning of the wide phraseology 'the writs in the nature of' should be understood. The courts have been very liberal in this regard. It is the duty of the court to provide appropriate remedy to the petitioner. A petition will not be thrown out on procedural and technical defects. However, broad principles must be followed. Apart from these writs, the court can issue any directions or orders to supplement the writs, for examples, declaratory orders or injunctions in the same petitions. In fact declaratory orders are the appropriate remedy for setting aside an ultra vires rule or legislative measure and not the writ of certiorari which is appropriate for quashing a determination or decision of a body or authority. In Prabodh Verma v. State of U.P., the Supreme Court deprecated the slipshod drafting of a writ petition asking for certiorari to quash a legislative measure. Proper pleading rules must be followed since ill-drafted pleading results in wastage of precious time of

20. T.C Bassapa v. T. Nagappa A.I.R 1954 SC 440.

the court.[21]

The power of issuing directions or orders is frequently used to provide relief to the parties and monitor the implementation of the decision of the court[22].

Conclusion

The objective of the judicial review is to enforce the rule of law which is the basis of constitutional and administrative law. The power of judicial review in India is rooted in the Constitution. This is expressly conferred on the Supreme Court and the High Courts under Articles 32,136 and 226,227 respectively.

The power of judicial review is exercised through writs. The five writs are specifically mentioned in Articles 32 and 226. Our courts are not bound by the technicalities of the English practice; only broad principles should be observed in their application. The scope of these writs has expanded in recent times. It is now available in administrative actions also.

The courts can supplement these writs with any other orders and directions depending upon the facts and circumstances of the case. For example, it can grant injunction or stay order or declaration in suitable cases.

21. (1984) 4SCC 251.
22. See B.K Basu v. State of West Bengal A.I.R 1997 SC 610, Vishakha v. State of Rajasthan 1997 SC 3011.

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9. *Supreme Court Cases*