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ADMINISTRATIVE LAW

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I INTRODUCTION

THE ANNUAL survey of 2012 on the administrative law[1] had revealed certain interesting facets of the decisions of the Indian judiciary. The court had not shied away from taking a stern view of the non performance of the statutory obligations of the executive.[2] The court had shown a reluctance to interfere with the decisions taken by administrative authorities[3] or even regulatory bodies.[4] This is consistent with the pattern which the services of the past few years have revealed. Though the court has laid great stress on the importance of the principles of natural justice[5] but at the same time it has not easily permitted defaulting parties to hide behind the cloth of technicalities.[6] The court emphasized on the importance of the statutory authorities to record reasons in their decisions. The principle of bias has been expounded to new heights.[7]

In this year also the apex court has decided cases mostly on the same areas as were decided last year. This survey has covered the cases in the area of administrative action, administrative and regulatory bodies, delegated legislation, judicial review and natural justice.

II ADMINISTRATIVE ACTION

Primacy of rules over executive order/instructions

In *State of U.P.* v. *Dayanand Chakrawarty*[8] which involved the issue of prescribing two different ages of superannuation under regulations 3 and 4 of

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1 See SS Jaswal, "Administrative Law" XLVIII *ASIL* 1 (2012).

2 *K.B. Nagur* v. *Union of India*, (2012) 4 SCC 483.

3 *Heinz India (P) Ltd.* v. *State of U.P* (2012) 5 SCC 443; *Tejas Constructions & Infrastructure (P) Ltd.* v. *Municipal Council, Sendhwa* , (2012) 6 SCC 464.

4 *Avishek Goenka* v. *Union of India* , (2012) 5 SCC 275

5 *Ravi Yashwant Bhoir* v. *Collector* , (2012) 4 SCC 407

6 *Krishi Utpadan Mandi Samiti* v. *Ved Ram*, (2012) 4 SCC 496.

7 *N.K. Bajpai* v. *Union of India*, (2012) 4 SCC 653.

8 (2013) 7 SCC 595.

Uttar Pradesh Jal Nigam Employees (Retirement on Attaining Age of Superannuation) Regulations, 2005 (hereinafter referred to as '2005 Regulations') for the employees similarly situated, including members of the same service, solely on the basis of their source of entry in the service, the apex court declared the 2005 regulations unconstitutional and *ultra vires* article 14 of the Constitution of India. While declaring the 2005 regulations unconstitutional the court gave primacy to the statutory regulation 31 of the Uttar Pradesh Jal Nigam Services of Engineers (Public Health Branch) Regulations, 1978 Special Regulation (hereinafter referred to as '1978 Regulations') framed under section 97(2)(c) of the Uttar Pradesh Water Supply and Sewarage Act, 1975 (hereinafter referred to as '1975 Act') over state government order which had prescribed a uniform age of superannuation at 58 years for employees working in government companies and government corporations. The court while giving primacy to regulation over executive order held thus:[9]

> The State Government's Order dated 29-6 2009 prescribing a uniform age of superannuation at 58 years for the employees working in the government companies and government corporations cannot prevail over statutory Regulation 31 framed by the Nigam under Section 97(2)(C) of the Act, 1975 with the previous approval of the State Government. Therefore, the employees of the Nigam shall not be guided by the State Government's Order dated 29-6- 2009 but will continue in the services up to the age of 60 years, in view of Regulation 31, having not yet amended or repealed.

The court also held that the enactment of regulation 4 of 2005 regulations shall not affect the regulation 31 of 1978 regulations until and unless it is expressly repealed. The court gave primacy to the special regulation 31 of 1978 regulations and opined thus:[10]

> Regulation 31 of the 'Uttar Pradesh Jal Nigam Services of Engineers (Public Health Branch) Regulations, 1978' Special Regulation; it will not be affected by later Regulation 4 of the Uttar Pradesh Jal Nigam (Retirement on attaining age of Superannuation) Regulations, 2005, in absence of express repeal of Special Regulation. By implication it cannot be inferred that the Regulation 31 stands repealed in view of subsequent Regulations, 2005. Even if it is treated that both the General Regulation 4 of Regulations, 2005 and Special Regulation 31 of Regulations, 1978 co-exist, one which is advantageous i.e. Regulation 31 shall be applicable to the members of the same service.

The employees of Uttar Pradesh Jal Nigam shall be guided by regulation 31 of the 1978 Regulations and would continue in service up to the age of 60 years.

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9 *Id.* at 611.
10 *Ibid.*

In *S. Sivaguru* v. *State of Tamil Nadu*[11] the respondents challenged clauses 4 and 5 of para 6 of the GOMs No. 382 issued by the government of Tamil Nadu on 12-10-2007. The court affirmed the impugned judgement of the high court and held that clauses 4 and 5 of para 6 of the GOMs. No. 382 dated 12-10-2007 is in violation of articles 14 and 16 of the Constitution of India and hence unconstitutional. The court further held that the GOMs No. 320 issued by the government of Tamil Nadu only integrated Tamil Nadu Multipurpose Health Workers Scheme with Leprosy Eradication Scheme and did not amend the Tamil Nadu Health Workers Rules, 1989 (hereinafter referred to as '1989 Rules'), notified under the proviso of article 309 of Constitution of India and contained in GOMs. No. 1507 issued by the government of Tamil Nadu on 16-08-1989. The GOMs. No. 320 was supplementary to the 1989 Rules and did not supplant them. In this regard the court reached the following conclusion:[12]

> The aforesaid G.O. Ms. No. 320 dated 27th June, 1997 did not bring about an amendment in the Statutory Services Rules contained in G.O. Ms. No. 1507 dated 16th August, 1989. The G.O. Ms. was supplementary to the aforesaid Rules and did not supplant the same.

Within a period of 3 months Supreme Court in *State of Jharkhand* v. *Jitendra Kumar Srivastava*[13] had again held that the statutory rules framed under an Act shall have primacy over executive instruction. However the court made executive instructions applicable where statutory rules are silent. The issue which arose before the court in this case was as to whether, in the absence of any provision in pension rules, the state government can withhold a part of pension and/or gratuity during the pendency of departmental/criminal proceedings? In this case the appellant witheld the 10% of the pension amount, leave encashment and gratuity of the respondent public servant against whom disciplinary proceedings were pending when he retired from service after attaining the age of superannuation. The appellant approached Supreme Court against the judgment of the division bench of the Jharkhand High Court which held that the state government had no powers to withhold pension in absence of specific rules under the Bihar Pension Rules, 1950. Supreme Court dismissed the appeal and held that the executive instructions issued by the appellant to withhold the part of pension, leave encashment and gratuity do not have statutory character and therefore cannot be used to deprive the respondent public servant from his right to receive pension, leave encashment and gratuity. The court further observed that a person cannot be deprived of his pension without the authority of law, which is the Constitutional mandate enshrined under article 300-A of the Constitution. While holding that executive instructions cannot be termed as 'law' within the meaning of article 300-A the court made the following observation:[14]

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11 (2013) 7 SCC 335.
12 *Id.* at 367.
13 (2013) 12 SCC 210.
14 *Id.* at 221.

> It hardly needs to be emphasized that the executive instructions are not having statutory character and, therefore, cannot be termed as "law" within the meaning of aforesaid Article 300A. On the basis of such a circular, which is not having force of law, the Appellant cannot withhold-even a part of pension or gratuity. As we noticed above, so far as statutory rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these rules, the position would have been different.

Interpretation of internal aids

Supreme Court in *Aresh* v. *Tehsildar*[15] dealt with the issue of interpretation of internal aids like illustration, example *etc*. contained in government order government circular. In this case the appellant landlord challenged the judgement passed by the division bench of the High Court of Karnataka in *Aresh* v.*Tehsildar* [16] wherein the court had rejected the prayer for interest on amount of compensation *w.e.f.* 1-03-1984 and thereby affirmed the order passed by learned single judge but held that the appellant landlord is entitled for interest *w.e.f.* 1-03-1984. It is a noticeable point that while rejecting the prayer for interest on amount of compensation the high court had relied upon the government circular no. ND 171: LRM 86 dated 24-11-1986 which provides that interest has to be paid on the amount paid through the national savings certificate and, therefore, no interest is payable to the appellant who received the amount of compensation in cash. It must be noted further that the abovementioned government circular was issued to clarify the substantive provision of "mode of calculations" as prescribed under section 51 of the Karnataka Land Reforms Act, 1961. The apex court framed the following issue to decide the petition challenging the judgement and order of the high court:[17]

> Whether with respect to the delayed payment of the principal amount, the appellant is entitled for any interest towards the amount paid in cash and thereby the Circular dated 24-11-1986, contrary to such extent is liable to be set aside?

The court while allowing the appeal set aside the impugned order passed by the single judge and the division bench of the Karnataka High Court and answered the issue framed by it in positive. It held that the appellant is entitled for interest *w.e.f.* 1-03-1974 @ 5.5% till the total amount is paid to him. The court relied upon the decision of *Satinder Singh* v. *Umrao Singh*,[18] which laid down the general rule regarding the payment of interest to the seller or tenant on purchase or compensation amount in cases of sale, acquisition *etc*. of immovable property and the specific clarification made vide government circular dated 24-11-1986. While relying upon the government circular the court pointed out that the illustration cited in the

15 (2013) 4 SCC 349.
16 (2013) 4 SCC 349.
17 *Supra* note 15 at 351.
18 AIR 1961 SC 908.

government circular is contrary to the main text of the government circular and, therefore, the clarification will prevail over the illustration. While giving primacy to the clarification of the substantive law/provision contained in the government circular over illustrations, the court made the following observation:[19]

> There is no ambiguity in the clarification made by circular dated 24-11-1986, but the example cited therein is not only confusing but also contradictory to the main clarification. The example cited in the circular is merely an illustration. If the illustration is conflicting with the clarification of the substantive law/provision or if the illustration is vague, the clarification will prevail over the illustration. In such case, a person who is entitled for the interest as per the clarification aforesaid cannot be deprived of or denied his right relying on the illustration.

Non-application of mind by those lower in executive hierarchy

In *Surinder Singh Brar* v. *Union of India*[20] the Supreme Court highlighted a very unfortunate trend of bureaucratic despotism and resultant non-application of mind by those lower in executive hierarchy. It would be appropriate to quote the following observation made by the apex court in connection with the trend of bureaucratic despotism and resultant non-application of mind by the junior officers:[21]

> The reason why the LAO did not apply his mind to the objections filed by the appellants and other landowners is obvious. He was a minion in the hierarchy of the administration of the Union Territory of Chandigarh and could not have even thought of making recommendations contrary to what was contained in the letter sent by the Administrator to Surinder Singh Brar. If he had shown the courage of acting independently and made recommendation against the acquisition of land, he would have surely been shifted from that post and his career would have been jeopardized. In the system of governance which we have today, junior officers in the administration cannot even think of, what to say of, acting against the wishes/dictates of their superiors. One who violates this unwritten code of conduct does so at his own peril and is described as a foolhardy. Even those constituting higher strata of services follow the path of least resistance and find it most convenient to tow the line of their superiors.

Statutory authority shall not act with pre-conceived notion

Discretionary power implies freedom of choice available to a competent authority to decide whether to act or not. The apex court has again held that legal concept of discretion implies power to make choice between alternative courses

19 *Supra* note 15 at 358.
20 (2013) 1 SCC 403.
21 *Id.* at 451.

of action.[22] In *State of Madhya Pradesh* v. *Sanjay Nagayach* [23] the Supreme Court has discussed the manner of exercising discretionary power by a statutory authority and the prevailing ills exercising such powers under extraneous influence and under dictation. In this case the court explained the scope of second and third proviso to section 53(1) of M.P. Cooperative Societies Act, 1960, which provides that before passing the final order of supersession the joint registrar has to comply with the provision of sub-section (2) of section 53 of the 1960 Act and no order shall be passed without previous consultation with Reserve Bank of India. The court had also taken a strong stand against the mushrooming of cases in various courts challenging orders of supersession of elected boards/ committees and had also issued general guidelines to check such administrative actions. The court had also noted that in this case the opinion of the joint registrar to supersede the board of directors was not based upon an objective criterion and was influenced by some external agency. The court opined thus:[24]

> The Registrar/Joint Registrar, while exercising powers of supersession has to form an opinion and that opinion must be based on some objective criteria, which has nexus with the final decision. A statutory authority shall not act with pre-conceived notion and shall not speak his masters' voice, because the formation of opinion must be his own, not somebody else in power, to achieve some ulterior motive. There may be situations where the Registrar/Joint Registrar are expected to act in the best interest of the society and its members, but in such situations, they have to act bona fide and within the four corners of the statute. In our view, the impugned order will not fall in that category.

The court had also taken notice of the fact that the joint registrar had overlooked binding judicial precedents and the *ratio decidendi* dealing with the issue of supersession of board of directors by a statutory authority. The court thus held:[25]

Registrar/Joint Registrar is bound to follow the judicial precedents. Ratio decidendi has the force of law and is binding on all statutory authorities when they deal with similar issues. The Madhya Pradesh High Court in several judgments has explained the scope of the second proviso to Section 53(1) of the Act. We fail to see why the Joint Registrar has overlooked those binding judicial precedents and the ratio decidendi. Judicial rulings and the principles are meant to be followed by the statutory authorities while deciding similar issues based on the legal principles settled by judicial rulings. Joint Registrar, while passing the impugned order, has overlooked those binding judicial precedents.

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22 *State of Kerala* v.*Kandath Distilleries,* (2013) 6 SCC 573.
23 (2013) 7 SCC 25.
24 *Id.* at 43.
25 *Id.* at 44.

Public accountability and transparency

In *Sant Longowal Institute of Engineering and Technology* v. *Suresh Chandra Verma* [26] the respondent was working as lecturer in mechanical engineering in appellant institute was granted three years study leave to pursue Ph.D. The respondent had executed the necessary bond for the same. On the completion of three years period, the respondent was asked to produce the completion certificate of Ph.D which the respondent could not produce. Hence, the appellant institute demanded the refund of the amount of Rs/- 12, 32,126 paid to him during the period of study for pursuing Ph.D as per the terms and conditions of bond executed by the respondent. The respondent filed a writ petition in the Punjab and Haryana High Court. The court while allowing the petition quashed the demand notice and had also ordered refund of the amount already recovered with interest from the respondent. Aggrieved by the same the appellant preferred a letters patent appeal before division bench of the high court. The court dismissed the appeal stating that the bond does not contain any express term that the respondent had to complete the Ph.D within three years and that the only condition was that the respondent had to serve for a period of six years after rejoining service on the expiry of the study leave.[27] The apex court partly allowed the appeal and held that considering the facts and circumstances of the case and considering that the bond executed by the respondent is found to be vague, there is no reason for the appellant institute to recover the balance amount of Rs. 6,50,000 from the respondent but the amount already recovered shall not be refunded, since the public interest had definitely suffered due to non-obtaining of Ph.D by the respondent after availing of the entire salary and other benefits. The court further held that public money cannot be spent unless there is corresponding benefit to the taxpayer. In this connection it is pertinent to mention the following observation of the court:[28]

> The purpose of granting study leave with salary and other benefits is for the interest of the institution and also the person concerned so that once he comes back and joins the institute the students will be benefited by the knowledge and the expertise acquired by the person on the expenses of the institute. A candidate who avails of leave and takes no interest to complete to complete the course and does not furnish the certificate to that effect is doing a disservice to the institute as well as the students of the institute. In other words, such a person only enjoys the period of study leave without doing any work at the institute and, at the same time enjoys the salary and other benefits, which is evidentially is not in public interest. Public money cannot be spent unless there is a mutual benefit. Further, if the period of study leave

26 (2013) 10 SCC 411.
27 *Ibid*
28 *Id.* at 419-20.

> was not extended and no decision was taken on his representation, he could have raised his grievances at the appropriate forum.

The power exercisable by the court while permitting or refusing transfer is 'judicial' and not 'ministerial'

In *State of Maharashtra* v. *Saeed Sohail Sheikh*[29] the debate before the court was about the nature of power exercisable by the court while permitting or refusing transfer of under trial prisoners from one jail to another jail. The court held that the power exercisable by the court while permitting or refusing transfer of under trial prisoner from one jail to another is 'judicial' and not 'ministerial'. The court reached the above mentioned conclusion on the basis of following observation:[30]

> Exercise of ministerial power is out of place in situations where quality of life or the liberty of a citizen is affected; no matter he/she is under a sentence of imprisonment or is facing a criminal charge in an on-going trial. That transfer of an undertrial to a distant prison may adversely affect his right to defend himself but also isolate him from the society of his friends and relatives is settled by the decision of this court in *Sunil Batra* v. *Delhi Administration.*[31]

The court has also discussed various judgements delivered by the Supreme Court in which the court had laid down several principles on which distinction between the judicial and ministerial functions is based. Applying these principles to the facts of the case the court upheld the impugned judgement of the high court in which it had declared the transfer of under trial prisoners from one jail to another jail to be void and directed the retransfer of the under trials to the jail from where they were transferred. It has also held that the trial court has committed a mistake by treating the matter to be administrative and accordingly permitting the transfer without issuing notice to the under trials or passing an appropriate order in the matter. It is pertinent to mention the following observation of made by the court:[32]

> Applying the above principles to the case at hand and keeping in view the fact that any order that the court may make on a request for transfer of a prisoner is bound to affect him prejudicially, we cannot but hold that it is obligatory for the court to apply its mind fairly and objectively to the circumstances in which the transfer is being prayed for and take a considered view having regard to the objections which the prisoner may have to offer. There is in that process of determination and decision-making an implicit duty to act fairly, objectively or in other words to act judicially. It follows that any order of transfer passed in any such proceedings can be nothing but a judicial order or at least a quasi-judicial one.

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29 AIR 2013 SC 168.
30 *Id.* at 176.
31 AIR 1980 SC 1579.
32 *Supra* note 29 at 179.

Judicial review of administrative action

In *Rashmi Metaliks Ltd.* v. *Kolkata Metropolitan Development Authority,*[33] subject matter of judicial review of administrative action was in question. In this case the high court has concluded that the appellant company had failed to comprehensively correspond to the essential terms of the tender and, therefore, its offer contained in the tender was ineligible for consideration. The order must be examined with reference to grounds set out in the order itself on which it is based and not with reference to any fresh ground brought out subsequently. Ground not adopted or expressed in the impugned administrative order cannot be sought to be raised to justify its validity. Order of tendering authority of respondent is qualifying tender submitted by appellant by mentioning only one of the two grounds regarding non-compliance with essential terms of tender. Validity of this order was challenged by appellant in writ petition before high court. Single judge of the high court dismissed writ petition on basis of ground stated in the order, considering it unnecessary to analyze the other ground. The division bench of high court in appeal upheld decision of single judge justifying order by a cryptic judgment. In appeal before the apex court, the court held that no reasons having been given by division bench of high court for its decision, respondent cannot be permitted to go beyond the stand taken in its order and raise contention relating to the other ground also to justify the order.

This ground should have been articulated at the very inception itself, and now it is not forensically fair or permissible for the authority or any of the respondents to adopt this ground for the first time in this second salvo of litigation by way of a side wind. The impugned judgment is indubitably a cryptic one and does not contain the reasons on which the decision is predicated. Since reasons are not contained in the impugned judgment itself, it must be set aside on the short ground that a party cannot be permitted to travel beyond the stand adopted and expressed by it in its earlier decision.[34]

While deciding the correctness of this impugned order the apex court observed that impugned order must be examined with reference to grounds set out in the order itself on which it is based and not with reference to any fresh ground brought out subsequently. Ground not adopted or expressed in the impugned administrative order cannot be sought to be raised to justify its validity. Therefore, in the above case the respondents were not permitted to go beyond the stand taken it their order and raise contention relating to the other ground to justify the order.

III ADMINISTRATIVE AND REGULATORY BODIES

In selection process there is a need for intellectual objectively and industry

In global economy the trust on regulators has been accentuated. Credibility of governance to a greater extent depends on the functioning of such regulatory bodies. These bodies are created by statutory enactments. These enactments also provides for the process of selection for appointment to various offices under

33 (2013) 10 SCC 95.

34 *Id.* at 104.

these regulatory bodies. If selection to the offices under these bodies is in total consonance with the statutory provisions then it inspires public confidence and helps in systematic growth of economy. This year in *Rajesh Awasthi* v. *Nand Lal Jaiswal* [35] Supreme Court has strongly emphasized upon the need of transparency, industry and intellectual objectivity in the selection process adopted for appointment to various offices in the regulatory body. In this case the selection of the appellant as the chairperson of the U.P. State Electricity Regulatory Commission was challenged by respondent no.1 by filing a writ petition seeking issuance of the writ of *quo warranto* for non-compliance with section 85(5) of the Electricity Act, 2003 and 1999 Rules by the selection committee. It must be noted that committee has forwarded the names of the two persons to the government, with an asterisk against the name of the appellant stating that if he was appointed, the government would ensure first that the provisions of section 85(5) were complied with. The high court allowed the writ petition, issued the writ of *quo warranto* and quashed the appointment of appellant declaring the same as illegal and void. The appellant filed a civil appeal before the Supreme Court challenging the impugned judgement of the high court. Dismissing the appeal the court upheld the impugned judgement of the high court and opined thus: [36]

> We are clear in our mind about the language used in Sub-section (5) of Section 85 of the Act, which calls for no interpretation. Words are crystal clear, unambiguous and when read literally, we have no doubt that the powers conferred under Sub-section (5) of Section 85 of the Act has to be exercised by the Selection Committee and the Committee alone and not by the Government. Some of the words used in sub-section (5) of section 85 are of considerable importance, hence, we give some emphasis to those words such as "*before recommending*", "*the Selection Committee shall satisfy*" and "itself". The Legislature has emphasized the fact that 'the Selection Committee itself has to satisfy', meaning thereby, it is not the satisfaction of the government what is envisaged in sub-section (5) of section 85 of the Act, but the satisfaction of the Selection Committee. The question as to whether the persons who have been named in the panel have got any financial or other interest which is likely to affect prejudicially his functions as Chairperson, is a matter which depends upon the satisfaction of the Selection Committee and that satisfaction has to be arrived at before recommending any person for appointment as Chairperson to the State Government. The government could exercise its powers only after getting the recommendations of the Selection Committee after due compliance of sub-section (5) of section 85 of the Act. The Selection Committee has given a complete go-by to that provision and entrusted that function to the State Government which is legally impermissible.

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35 (2013) 1 SCC 501.
36 *Id.* at 513.

> The State Government also, without application of mind and overlooking that statutory provision, appointed the appellant.

The court further held that keeping in view the objects and reasons and preamble of the Act and the functions of the commission, it can be stated with certitude that no latitude can be given and laxity can have no allowance when there is total violation of the statutory provision pertaining to selection. It has been said long back "a society is well governed when the people who are in the helm of affairs obey the command of the law". But, in the case at hand the selection committee has failed to obey the mandate of the law as a consequence of which the appellant has been selected and, therefore, in the ultimate eventuate the selection becomes unsustainable. The court also made a very important observation on the standards of selection process that must be adopted by the selection committee while forwarding the names to the government for final appointment in the following words: [37]

> In many an enactment the legislature has created regulatory bodies. No one can be oblivious of the fact that in a global economy the trust on the regulators has been accentuated. Credibility of governance to a great extent depends on the functioning of such regulatory bodies and, therefore, their selection has to be in total consonance with the statutory provisions. The same inspires public confidence and helps in systematic growth of economy. Trust in such institutions helps in progress and distrust corrodes it like an incurable malignancy. Progress is achieved when there is good governance and good governance depends on how law is implemented. Keeping in view the objects and reasons and preamble of the Act and the functions of the Commission, it can be stated with certitude that no latitude can be given and laxity can have no allowance when there is total violation of the statutory provision pertaining to selection. It has been said long back "a society is well governed when the people who are in the helm of affairs obey the command of the law". But, in the case at hand the Selection Committee has failed to obey the mandate of the law as a consequence of which the appellant has been selected and, therefore, in the ultimate eventuate the selection becomes unsustainable.

It is manifest in the selection of the appellant that there is absence of "intellectual objectivity" in the decision making process. It is to be kept in mind a constructive intellect brings in good rationale and reflects conscious exercise of conferred power. A selection process of this nature has to reflect a combined effect of intellect and industry. It is because when there is a combination of the two, the recommendations as used in the provision not only serves the purpose of a "lamp in the study" but also as a "light house" which is shining, clear and transparent.

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37 *Id.* at 523.

Thus, the selection of the appellant as chairperson is incurably vitiated and Supreme Court rightly upheld the high court's decision of setting it aside.

Quasi- judicial proceedings

In *Union of India* v. *Sanjay Jethi* [38] the apex court held that in quasi-judicial proceedings, the authority deciding a dispute has to be free from bias, without conscious or unconscious prejudice to either of the contesting parties. Bias is also seen as an extension of the principles of natural justice that no man should be a judge in his own cause. Being a state of mind, a bias is sometimes impossible to determine. In this case a complaint was made by one of the officers alleging irregularity in hiring of the civil hired transport which were used for the purpose of supply of ordinance stores to units spread over the country by respondent no.1 who holds the rank of Colonel in the Army. A court of inquiry (hereinafter as "COI") was convened against the respondent no.1 and it recommended for taking appropriate disciplinary action against him and some other officers. Respondent no.1 challenged the proceedings of COI by filing an application before Armed Forces Tribunal, Regional Bench in Mumbai (hereinafter as "Tribunal"), alleging that he had been deprived of right of cross examination. Tribunal admitted his application and directed the authority to convene an additional COI. The additional COI also recommended for taking appropriate disciplinary action against respondent no.1 and some other officers. Respondent no.1 filed an application before the tribunal under section 14 of the Armed Forces Tribunal Act, 2007 for quashing of additional COI as there has been infraction of rule 180. Accepting the contention of the respondents the tribunal held that the decision taken by additional COI was in violation of the provisions contained in rule 180 and set aside the same. Aggrieved by the decision of the tribunal, the appellant challenged the same by filing an appeal before the apex court. Dismissing the appeal, the apex court held that the tribunal was justified in holding that constitution of COI which consisted of two technical members and the presiding officer was vitiated.

Accepting the respondent plea of bias against the technical members and the presiding officer of the additional COI, the court opined thus: [39]

> We find that the Technical Members of the COI had compiled documents, adopted the methodology, made observations, drawn inferences and expressed the view and, above all, prepared the report which has been brought on record as a document. To say, they had not played any role would tantamount to blinking at reality. Their inclusion as Technical Members is not legally permissible. Even applying the rigorous substantive test, we find that a case of prejudice comes into full play in the case at hand.

While sustaining the verdict delivered by the tribunal, the court found fault in the approach of Tribunal for not evaluating the necessitous facts and made the following observation: [40]

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38 2013 (13) SCALE 82.
39 *Id.* at 103.
40 *Id.* at 105.

> The Preamble of the Armed Forces Tribunal Act, 2007 provides for adjudication and trial of justice and compliance in respect of many a matter. It has been conferred powers to deal with the cases with promptitude. But promptitude does not ostracise or drive away the opposite exposition of facts and necessary ratiocination. A seemly depiction of factual score, succinct analysis of facts and law, pertinent and cogent reasoning in support of the view expressed having due regard to the rational methodology in our considered opinion are imperative. *We have said so as we find that the Tribunal by the impugned order has not adverted to the necessitous fact* (emphasis supplied)

Jurisdiction

In *Ranjit Kumar Murmu* v. *Lachmi Narayana Bhomroj* [41] appellant withdrew writ petition before high court with liberty to move departmentally. Consequently, he filed an appeal before principle secretary and Commissioner, Food and Supplies Department against the order of district magistrate which is not the competent authority under the control order. The court held that the permission to withdraw with liberty to move competent authority does not confer jurisdiction upon any authority that otherwise is not so empowered under the statute and hence the order of the principle secretary was rightly set aside by the high court.

IV DELEGATED LEGISLATION

Interpretation of subordinate/delegated legislation

In *Rohitash Kumar* v. *Om Prakash Sharma* [42] Supreme Court held that where language is plain and hence allows only one meaning, same has to be given effect to even if it causes hardship or possible injustice *i.e.*, hardship caused to an individual, cannot be a ground for not giving effective and grammatical meaning to every word of the provision, if the language used therein is unequivocal. The court further held that administrative interpretation may often provide guidelines for interpreting a particular rule or executive instruction and same may be accepted unless, of course it is found in violation of rule itself. However, if the language of the statute is plain and unambiguous then such rule must give way to the plain and unambiguous rule.

Rule making power under the statute

If the parent Act requires that a subordinate/delegated legislation must be laid before Parliament then non-compliance with such requirement shall make the delegated legislation *ultra vires*. In *Association of Management of Private Colleges* v. *All India Council for Technical Education* [43] where the respondent in the year 2000 made an amendment in the 1994 regulations framed under All India Council for Technical Education (AICTE) through which sub-regulation (2) was deleted

41 AIR 2013 SCC1624.
42 AIR 2013 SC 30.
43 (2013) 8 SCC 271.

and the MBA or MCA courses were added in regulation 8(c) enabling the AICTE to prescribe the land and deposit requirements even in respect of arts and science colleges having MBA or MCA courses. Appellant challenged the validity of aforesaid amendment before Supreme Court. The court declared the aforesaid amendment *ultra vires* and opined thus: [44]

> Not placing the amended Regulations on the floor of the Houses of Parliament as required under Section 24 of the AICTE Act vitiates the amended Regulations in law and hence the submissions made on behalf of the Appellants in this regard deserve to be accepted.

The position of law is well settled by the apex court that if the statute prescribes a particular procedure to do an act in a particular way, that act must be done in that manner; otherwise it is not at all done. In the case of *Babu Verghese* v. *Bar Council of Kerala*, [45] after referring to court's earlier decisions and Privy Council and Chancellor's Court, it was held as under: [46]

> It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in *Taylor* v. *Taylor* [47] which was followed byLord Roche in *Nazir Ahmad* v. *King Emperor* [48] who stated as under: Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.

This rule has since been approved by this court in *Rao Shiv Bahadur Singh* v. *State of Vindhya Pradesh.*[49] and again in *Deep Chand* v. *State of Rajasthan.*[50] These cases were considered by a three-Judge Bench of this Court in *State of U.P.* v. *Singhara Singh* [51] and the rule laid down in *Nazir Ahmad case* [52] was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law.

Therefore, not placing the amended regulations on the floor of the Houses of Parliament as required under section 24 of the AICTE Act, 1987 vitiates the amended Regulations in law and hence the submissions made on behalf of the appellants in this regard deserve to be accepted.

In *State of Jammu and Kashmir* v. *Lakhwinder Kumar,*[53] it was alleged that a Kashmiri teenager lost his life by the bullet of Lakhwinder Kumar, a constable of the border security force (Force). He allegedly fired at the instigation of R.K.

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44 *Id.* 290.
45 (1999 (3) SCC 422.
46 *Id*. at 432.
47 (1875) 1 Ch D 426.
48 (1935-360) 63 IA 327: (1936) 44 LW 583.
49 AIR 1954 SC 322: 1954 Cri LJ 910.
50 AIR 1961 SC 1527: (1961) 2 Cri LJ 705.
51 AIR 1964 SC 358: (1964) 1 Cri LJ 263 (2).
52 (1935-360) 63 IA 327: (1936) 44 LW 583.
53 (2013) 6 SCC 333.

Birdi, commandant of the 68th battalion of the force. R.K. Birdi had gone for annual medical examination at composite hospital. While on way back to the force headquarters, they got stuck in a traffic jam, this led to a verbal duel with some boys. The verbal duel took an ugly turn and the force personnel started chasing the boys. It is alleged that at the instigation of R.K. Birdi, constable Lakhwinder Kumar fired twice and one of the rounds hit one boy who died of the fire arm injury instantaneously. This incident led to registration of FIR. It is relevant here to state that the commandant of the force handed over the investigation to the police. During the course of investigation, both R.K. Birdi and Lakhwinder Kumar were arrested. On completion of investigation, the police submitted the charge-sheet against both the accused for commission of offence under sections 302,109 and 201 of the IPC before the chief judicial magistrate, whereupon an application was filed on behalf of the force seeking time to exercise option for trial of the accused by security force court. Accordingly, an application was filed by the deputy inspector general, station headquarters, Border Security Force, Srinagar before the Chief Judicial Magistrate, Srinagar *inter alia* stating that the criminal case is pending against both of them and they are serving under his command and both of them are in judicial custody. In exercise of his discretion under section 80 of the Border Security Force Act, 1968, he institute proceeding against them before the security force court. In the aforesaid premise it was requested to stay the proceeding and to forward the accused persons along with all connected documents and exhibits for trial before the security force court. This application was filed in the light of the provisions of section 549 of the Cr.P.C 1989, as in force in the State of Jammu & Kashmir. It was further stated that the outcome of the trial of the accused shall be intimated to the court as required under rule 7 of the Jammu & Kashmir Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1983. The prayer of the force was opposed by the State of Jammu & Kashmir and the deceased's uncle. The chief judicial magistrate allowed the application filed by the commandant and handed over the accused together with the charge-sheet and other materials collected by the investigating agency for trying the accused by the security force court.

Aggrieved by the order deceased's uncle and the State of Jammu & Kashmir filed separate revision applications before the high court. Both the applications were heard together by the high court and dismissed order. It is against this order the State of Jammu & Kashmir and deceased's uncle preferred separate special leave petitions (SPL) under article 136 of the Constitution of India.

Section 47 of the Border Security Force Act, 1968 bars trial of a person subject to the Act by a security force court who has committed an offence of murder or of culpable homicide not amounting to murder or rape in relation to a person not subject to the Act. However, this bar will not operate if the person subject to the Act has committed the offence while on active duty. In other words, if a member of the force commits offence of the nature specified above and the victim of crime is a civilian member, he cannot be tried by a Security Force Court but this bar will not operate if the offence has been committed while on active duty.

The central government by notification dated 8th of August, 2007 in exercise of the powers conferred under section 2(1)(a) of the Act, had made a declaration that the duty of every personnel serving in the state as mentioned in the said notification for the period 1.7. 2007 to 30.6.2010 shall be 'active duty'.

In the apex court held that:[54]

> It is well settled that legislature has authority to define a word even artificially and while doing so, it may either be restrictive of its ordinary meaning or it may be extensive of the same. When the legislature uses the expression "means" in the definition clause, the definition is prima facie restrictive and exhaustive. However, use of the expression "includes" in the definition clause makes it extensive. In our opinion, the use of the expression "includes" enlarges the meaning of the word "active duty" and, therefore, it shall not only mean the duty specified in the section but those duty also as declared by the Central Government in the Official Gazette. The notification so issued by the Central Government states that "duty of every person" of the Force "serving in the State" of Jammu and Kashmir "with effect from the 1st of July, 2007 to 30th of June, 2010 as active duty". The notification does not make any reference to the nature of duty, but lays emphasis at the place where the members of the Force are serving, to come within the definition of 'active duty'. In view of the aforesaid, there is no escape from the conclusion that the accused persons were on active duty at the time of commission of the offence.

Primacy of parent statute

A delegated legislation operates within scope of the parent Act. It cannot amend or enlarge scope of substantive provisions of the parent Act. In *Tata Sky Ltd.* v. *State of M.P.* [55] where the issue before the Supreme Court was whether provisions of Madhya Pradesh Entertainment Duty and Advertisements Tax Act, 1936 have necessary expanse and flexibility to include direct to home (hereinafter a 'DTH') as an entertainment chargeable to tax and that whether notification 05.05.08 in any manner extended scope of chargeability under Act? The court while allowing appeal held that the 1936 Act cannot be extended to cover DTH operations being carried out by the appellants. The machinery for collection of duty provided under the 1936 Act has no application to DTH. It is well settled that if the collection machinery provided under the Act is such that it cannot be applied to an event, it follows that the event is beyond the charge created by the taxing statute.[56] As regards notification dated 05.05.08, the court opined that a notification issued in exercise of powers under Act cannot amend Act nor enlarge either the

54 *Id.* at 339.

55 (2013) 4 SCC 656.

56 See: *Commissioner of Income Tax* v. *B.C. Srinivasa Setty*, (1981) 2 SCC 460; *Commissioner of Income-Tax Ernakulam, Kerala* v. *Official Liquidator; Palai Central Bank Ltd*. (1985) 1 SCC 45 (at 50-51), *PNB Finance Limited* v. *Commissioner of Income Tax I, New Delhi* (2008) 13 SCC 94 (para 21 and 24 at 100 to 101).

charging section or amend provision of collection under section 4 of Act read with 1942 Rules. In the opinion of the court as the 1936 Act does not cover DTH operations, it need not deal regarding legislative competence of state legislature to impose tax on DTH operation as it was a notified service chargeable to service tax under Finance Act, 1994.

Therefore, a notification issued in exercise of powers under the Act cannot amend the Act. Moreover, the notification merely prescribes the rate of entertainment duty at 20 percent in respect of every payment for admission to an entertainment other than cinema, video cassette recorder and cable service.

V JUDICIAL REVIEW

Scope of judicial review

Scope of judicial review was discussed by the apex court in *Nirmala J. Jhala* v. *State of Gujarat.*[57] Reference of the previous cases[58] were made where the court said that it is settled legal proposition that judicial review is not akin to adjudication on merit by re-appreciating the evidence as an appellate authority. The only consideration the court/tribunal has in its judicial review is to consider whether the conclusion is based on evidence on record and supports the finding or whether the conclusion is based on no evidence. The adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the court in writ proceedings.

While dealing with the issue of scope of judicial review, earlier the court *in Zora Singh* v. *J.M. Tandon*[59] has held:[60]

> …(T)he principle that if some of the reasons relied on by a Tribunal for its conclusion turn out to be extraneous or otherwise unsustainable, its decision would be vitiated, applies to cases in which the conclusion is arrived at not on assessment of objective facts or evidence, but on subjective satisfaction. The reason is that whereas in cases where the decision is based on subjective satisfaction *if some of the reasons turn out to be irrelevant or invalid, it would be impossible for a superior Court to find out which of the reasons, relevant or irrelevant, valid or invalid, had brought about such satisfaction.* But in a case where the conclusion is based on objective facts and evidence, such a difficulty would not arise. If it is found that there was legal evidence before the Tribunal, even if some of it was irrelevant, a superior Court would not interfere *if the finding can be sustained on the rest of the evidence. The reason is that in a writ petition for certiorari the superior Court*

57 (2013) 4 SCC 301.

58 *State of T.N.* v. *S. Subramanian*, AIR 1996 SC 1232; *R.S. Saini* v. *State of Punjab*, (1999) 8 SCC 90; and *Government of Andhra Pradesh* v. *Mohd. Nasrullah Khan*, AIR 2006 SC 1214.

59 AIR 1971 SC 1537.

60 *Id* at 1540.

> *does not sit in appeal, but exercises only supervisory jurisdiction, and therefore, does not enter into the question of sufficiency of evidence*.(emphasis added)

The decisions referred above highlights clearly, the parameter of the court's power of judicial review of administrative action or decision. An order can be set aside if it is based on extraneous grounds, or when there are no grounds at all for passing it or when the grounds are such that, no one can reasonably arrive at the opinion. The court does not sit as a court of appeal but, it merely reviews the manner in which the decision was made. The court will not normally exercise its power of judicial review unless it is found that formation of belief by the statutory authority suffers from *malafides*, dishonest/corrupt practice. In other words, the authority must act in good faith. Neither the question as to whether there was sufficient evidence before the authority can be raised/examined, nor the question of re-appreciating the evidence to examine the correctness of the order under challenge. If there are sufficient grounds for passing an order, then even if one of them is found to be correct, and on its basis the order impugned can be passed, there is no occasion for the court to interfere. The jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. This apart, even when some defect is found in the decision - making process, the court must exercise its discretionary power with great caution keeping in mind the larger public interest and only when it comes to the conclusion that overwhelming public interest requires interference, the court should intervene.[61]

Subject matter of judicial review

The court can exercise the power of judicial review if there is a manifest error in the exercise of power or the exercise of power is manifestly arbitrary or if the power is exercised on the basis of facts which do not exist and which are patently erroneous. Such exercise of power would stand vitiated. The court may be justified in exercising the power of judicial review if the impugned order suffers from *malafide*, dishonest or corrupt practices, for the reason, that the order had been passed by the authority beyond the limits conferred upon the authority by the legislature. Thus, the court has to be satisfied that the order had been passed by the authority only on the grounds of illegality, irrationality and procedural impropriety before it interferes. The court does not have the expertise to correct the administrative decision. Therefore, the court itself may be fallible and interfering with the order of the authority may impose heavy administrative burden on the state or may lead to unbudgeted expenditure. The Supreme Court in its various earlier decisions[62] has settled various parameters of the court's power of judicial review of administrative or executive action.[63] An important observation which

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61 *Supra* note 56 at 312.

62 *Tata Cellular* v. *Union of India,* AIR 1996 SC 11; *People's Union for Civil Liberties* v. *Union of India,* AIR 2004 SC 456; *and State of N.C.T. of Delhi* v. *Sanjeev alias Bittoo,* AIR 2005 SC 2080.

was re-iterated in this regard was that judicial review is not akin to adjudication on merit by re-appreciating evidence as an appellate authority. As the scope of judicial review is limited to the process of making the decisions and not against the decision itself, therefore, the court is precluded from arriving on its own independent finding.[64]

University Grants Commission v. *Neha Anil Bobde* [65] was another important case decided by the apex court highlighting what is excluded from the subject-matter of judicial review. The question before the court was to examine whether the University Grant Commission (UGC) has got the power to fix the final qualifying criteria, for those who have obtained minimum marks for all the papers, before the final declaration of the results of the National Eligibility Test (NET). The court shall not generally sit in appeal over the opinion expressed by expert academic bodies and normally it is wise and safe for the courts to leave the decision of academic experts who are more familiar with the problem they face, than the courts generally are. UGC as an expert body has been entrusted with the duty to take steps as it may think fit for the determination and maintenance of standards of teaching, examination and research in the University. The Supreme Court, relying on the settled position of law[66] that in academic matters, unless, there is a clear violation of statutory provisions, the regulations or the notification issued, the court should not interfere as academic matters fall within the domain of experts, reversed the decision of the division bench of the Bombay High and upheld the power of the UGC to fix the final qualifying criteria.

Non-compliance with statutory provisions

In *Rajesh Awasthi* case, [67] while deciding the validity of the appointment of the appellant as chairperson of the State Electricity Regulatory Commission the Supreme Court relied on the settled principle of law that non-compliance with statutory provisions incurably vitiates decision making process. The apex court held that the question as to whether persons named in panel list had any financial or other interest likely to affect prejudicially their functions as chairperson depended on satisfaction of selection committee and that satisfaction had to be arrived at in terms of section 85(5) of the Electricity Act, 2003 before recommending any person for appointment. Abdication of that function by selection committee in favour of state government is impermissible. It not only tantamount to breach of rule of law but also creates a dent in basic index of law. Non-compliance of mandatory requirements results in nullification of the process of selection unless it is shown that performance of that requirement was impossible or it could be statutorily waived.

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63 *S.R. Tewari* v. *Union of India* (2013) 6 SCC 602; *Kalinga Mining Corporation* v. *Union of India* (2013) 5 SCC 252.

64 In *S.R. Tewari* at 612.

65 2013(11) SCALE 93.

66 *University of Mysore* v. *C.D. Govinda Rao*, AIR 1965 SC 491; *Tariq Islam* v. *Aligarh Muslim University* (2001) 8 SCC 546 and *Rajbir Singh Dala*l v. *Chaudhary Devi Lal University* (2008) 9 SCC 284.

67 *Supra* note 35.

However, it should be borne in mind that mere non-mentioning of the provisions of law does not render an order illegal.[68]

No intervention in policy matter

In administrative law, the rule is that there should be no judicial intervention (review) in relation to just policies framed by the government.[69] A policy decision/ matter can be challenged only on the ground of it arbitrary, unreasonable or capricious.[70]

An important policy matter which reached Supreme Court was in relation to scheme of compassionate appointment in central government. The object of such schemes, in general, is to provide a source of employment to the dependent family members of the government servant dying in harness or one who has retired on medical grounds. In *Director General of Posts* v. *K Chandrashekar Rao*,[71] the Department of Personnel and Training (DoPT), Ministry of Personnel, Public Grievances and Pension, Government of India, had issued a circular on 09.10.98 declaring its policy in the form of a scheme for compassionate appointment under the central government. The scheme stipulated that the compassionate appointment could be made up to a maximum of five per cent of the vacancies falling under Direct Recruitment Quota (DR Quota) in group 'C' or 'D' post. On 16.05.01, the DoPT issued an office memorandum (OM), which did not refer to the circular of 1998, but in view of the policy of the Government of India it provided that fresh recruitment should be limited to 1per cent of the total strength of civilian staff. As about three per cent of the staff retired every year, this will reduce the manpower by two per cent *per annum* achieving a deduction of 10 per cent in five years as envisaged in the government policy. Under clause 2.2 of this memorandum, it was further stated that while preparing the annual recruitment plans, the concerned screening committees would ensure that direct recruitment does not in any case exceed 1 per cent of the sanctioned strength of the department and accordingly direct recruitment would be limited to 1/3rd of the direct recruitment vacancies arising in the year subject to further restriction that this will not exceed 1 per cent of the total sanctioned strength of the department. By an OM issued on 4-7-2002, the DoPT in essence reiterated the applicability of the OM dated 16-5-2001 to the scheme of compassionate appointment. OM dated 14-6- 2006, noticed that as an effect of OM dated 16.05.01 (recruitment does not exceed per cent of the total sanctioned strength of the department), there had been a continuous reduction in the number of vacancies for direct recruitment, thus, very few vacancies or, in fact, no vacancies were available for compassionate appointment. In light of this, the earlier instructions including the instructions dated 09.10.98 stood modified to the extent mentioned therein. In relation to 1998 scheme floated by the government the Supreme Court, rightly held, that the state has to abide by the scheme it floated for compassionate appointment as the OMs dated 16.05.01 and 04.07.02 did not state that the restrictions sought to be imposed were applicable

68 *Ropan Sahoo* v. *Ananda Kumar Sharma* 2013 (1) SCALE 687.

69 *See Deptt. of Atomic Energy* v. *M. K. Bawane*, (2013) 8 SCC 777.

70 See *supra* note 11.

71 (2013) 3 SCC 310.

retrospectively or retroactively, therefore, OMs were to operate prospectively. Also, no data or material was placed before the Supreme Court to support the contention that under the effect of the instructions of the year 1998, these persons were appointed in excess of the posts provided under the scheme, In fact it was not disputed that the appointments of the respondent and others were made on the basis of the vacancies existing against the year 2000 when the instructions of 1998 were in operation, free of any restriction. Therefore, the rights of all the respondents' appointed from 2001-2003 were "settled"[72] and cannot be "tampered with."[73]

This case presented before the Supreme Court classic conflict of welfare schemes by the government versus financial burden on the government. Supreme Court acknowledges this fact in stating:[74]

> [I]t is clear that where on the one hand, the State has formulated a welfare scheme for compassionate appointments, there on the other, because of limitations of its financial resources it decided to take economic measures by reducing the extent of appointment by direct recruitment from the financial year 2001-2002.

The Supreme Court, in deciding this SPL, did not approve the decision of the tribunal, upheld by the high court that that the OM dated 16.05.01 frustrated the very object of the scheme for compassionate appointment and on that ground alone; it was liable to be declared invalid. The Supreme Court held that formulation of a welfare scheme and funding the same are the matters that fall within the domain of the government and being matters of policy do not call for any judicial interference.[75]The state can frame its policy, where it is for economic reasons; least such decisions would be open to judicial review to that extent.[76] In the present case, there were some ambiguity created by issuance of OMs dated 16.05.01 and 14.06.06 and the enforcement of the former *vide* OM dated 04.07.02 in relation to the implementation of compassionate appointment scheme of 1998. In this context Supreme Court observed that it is not only desirable but necessary that the competent authority should issue comprehensive guidelines squarely covering the issue, but they cannot tamper with the existing rights of the appointees.[77]

VI NATURAL JUSTICE

Right to hearing

The well settled legal position, reiterated over number of cases, is that rules of natural justice are neither rigid, immutable or embodied rules capable of being

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72 *Id.* at 320.
73 *Ibid.*
74 *Id.* at 319.
75 *Supra* note 11.
76 *Ibid.*
77 Supreme Court cited its earlier decisions in *Union of India* v. *K.P. Tiwari*, (2003) 9 SCC 129 and *Balbir Kaur* v. *Steel Authority of India Ltd.*, (2000) 6 SCC 493 in support of stating that the existing status of the appointees should not be disturbed.

put in a straitjacket nor apply universally to all kind of domestic tribunals and enquiries. The horizon of natural justice is constantly expanding. Adherence to the principles of natural justice has been held to be mandatory for tribunals, commissions and even courts particularly in relation to class of administrative matters. In *Manohar* v. *State of Maharashtra*,[78] right to hearing was said to have implied applicability to a provision of law silent in this regard. The impugned provision, section 20 (2) of Right to Information Act, 2005, dealt with the power to recommend disciplinary action against the erring public information officer. The conspicuous absence of the expression "right to hearing" (natural justice) in the impugned provision was contrasted with section 20 (1), the proviso to which explicitly mentions the requirement of reasonable opportunity of hearing to the person to be penalized. This conspicuous absence of specific mandate in relation to right to hearing was relied upon by the respondents to justify non-granting of right to hearing to appellant.

Supreme Court ruled that requirements of natural justice have to be read into relevant provision even if there is no specific mandate to this effect in that provision. The rationale behind it was that the information commission performs adjudicatory functions deciding rights and obligations of contesting parties.[79]

It is well settled that unless a statutory provision, either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences which obviously cover infraction of property, personal rights and material deprivations for the party affected. The principle holds good irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial. It is equally trite that the concept of natural justice can neither be put in a straitjacket nor is it a general rule of universal application. In *Nirma Industries Ltd*. v. *Securities & Exchange Board of India*,[80] the court reiterated that the burden of prove prejudice caused by non-grant of opportunity of hearing lies on a person challenging order concerned on the ground that it is causing civil consequences.

Natural justice when available

In *A.S. Motors (P) Ltd.* v. *Union of India.*[81] In this case National Highway Authority of India Ltd. (NHAI) invited tenders for award of a contract for collection of fee for the use of National Highway no. 3 on Morena - Gwalior section. It was allotted in appellant's favour. However, subsequently certain violations were noticed by the NHAI including complaints to the effect that the appellant was collecting excess fee from vehicles passing through toll plaza. This resulted in the termination

78 *Ibid.* (2012) 13 SCC 14.

79 *Namit Sharma* v. *Union of India* (2013) 1 SCC (L&S) 244 referred and followed to highlight the requirement of adherence to principles of natural justice in adjudicatory process.

80 (2013) 8 SCC 20.

81 (2013) 10 SCC 114.

of the collection contract by the competent authority in terms of a letter dated 27.07.06 and forfeiture of the performance security of Rs.2,20,00,125/-. The termination of the contract was once quashed by the high court whereupon the same was terminated for a second time after a show cause notice and a personal hearing to the appellant in compliance with the direction issued by the high court. Aggrieved by the fresh termination of the contract as also the forfeiture ordered by the competent authority, the appellant filed write petition before the High Court of Madhya Pradesh. The high court held that the termination of the contract and the forfeiture of the performance security for the breaches committed by the appellant were perfectly justified in the light of the report submitted by the agency deployed by the respondent to collect material regarding overcharging of fee and other violations committed by the appellant. The writ appeal filed against this order before a division bench of the high court was dismissed. Thereafter, the appellant moved to the Supreme Court.

Supreme Court found no merit in the argument of the appellant that termination of the contract between the parties was legally bad because the principles of natural justice requiring a fair hearing to the appellant were not complied. It upheld the decision of the high court whereby it rejected the contention that the appellant should have been given right to cross examination in view of the fact that nature of inquiry was primarily in the realm of contract, aimed at finding out whether appellant had committed had committed any violation of contractual stipulations between the parties. It was further held that absence of any allegation of *mala fides* against those taking action or agency that had collected the information establishing the breaches, as also failure of the appellant to disclose any prejudice, all indicate that procedure adopted by respondent was fair and in substantial, if not strict, compliance with the requirements of *audi alteram partem.*

The apex court held that:[82]

> Rules of natural justice, it is by now fairly well settled, are not rigid, immutable or embodied rules that may be capable of being put in strait jacket nor have the same been so evolved as to apply universally to all kind of domestic tribunals and enquiries. What the courts in essence look for in every case where violation of the principles of natural justice is alleged is whether the affected party was given reasonable opportunity to present its case and whether the administrative authority had acted fairly, impartially and reasonably. The doctrine of audi alteram partem is thus aimed at striking at arbitrariness and want of fair play. Judicial pronouncements on the subject have, therefore, recognized that the demands of natural justice may be different in different situations depending upon not only the facts and circumstances of each case but also on the powers and composition of the Tribunal and the rules and regulations under which it functions. A court examining a complaint based on violation of rules of natural justice is

82 *Id.,* at 121-122.

> entitled to see whether the aggrieved party had indeed suffered any prejudice on account of such violation. To that extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate the action. Judicial pronouncements on the subject are a legion.

Audi alteram partem

In *Taranjeet Singh Mohan Singh Sawhney* v. *Registrar Cooperative Societies*,[83] late Mohan Singh (predecessor of the appellants) owned land 4144.90 sq. mtrs. In village KoleKalyan, Taluka Andheri. He entered into an agreement with respondent no. 4 for the sale of the land measuring 3762.45 sq. mtrs. After execution of the agreement, respondent no. 4 constructed five buildings, which were occupied by the members of three co-operative housing societies, *i.e.*, respondents nos. 3, 5, and 6. Due to non-payment of the amount in terms of agreement dated 16.10.1979, the appellants, who are the legal heirs of late Mohan Singh, issued notice dated 16.3.2005 and terminated agreement dated16.10.1979. After four years, respondent no.5 approached the appellants for purchase of 702.341 sq. mtrs. of the land owned by late Mohan Singh. At the asking of the appellants, respondent no.5 produced the consent of respondent nos. 3 and 6. Thereafter, the appellants executed conveyance dated 25.8.2011 in favour of respondent no.5 and the developer M/s. Rahul Constructions. In furtherance of the agreement entered with M/s. Raja Builders, respondent no.3 filed an application praying for grant of a certificate for unilateral execution of the conveyance deed. Respondent no.1 entertained the application and ordered notices to the appellants and respondent nos. 4 to 6. In his reply dated 19.03.12, appellant no.1 raised several objections. Respondent no.1 fixed the matter for hearing on several dates. On 07.05.12, the case was adjourned for 15.05.12 with a direction to the appellants to file written arguments. However, the appellants did not file written arguments and applied for adjournment. Thereupon, respondent no.1 adjourned the case to 19.6.2012. After sometime, he *suo motu* changed the date of hearing from19.6.2012 to 21.5.2012 and a notice to this effect was issued by his office on 16.5.2012. On 21.5.2012, respondent no.1 heard the arguments of the counsel for the applicant and closed the matter. He finally decided the application *vide* order dated 12.6.2012. The appellants challenged the aforesaid order in the Supreme Court. One of the grounds taken by the appellants was that respondent no.1 unilaterally changed the date of hearing and finally decided the matter without ensuring service of notice issued to the parties about the changed date of hearing. The counsel for respondent no.3 supported the decision of respondent no.1 to prepone the date of hearing by pointing out that the officer concerned was compelled to do so because he was required to decide the application within six months of its institution.

In relation to preponement of date of hearing, it was held that where the application was required by law to be disposed of within the prescribed time limit and despite knowing that requirement the authority concerned originally fixed a particular date for hearing a large number of cases, but subsequently, for

83 (2013) 10 SCC 402.

unexplained reasons, preponed the date of hearing of a particular applicant, as in the above case, such preponement appears to be founded on extraneous reasons, unwarranted and unjustified. It was further held that though the notice of advancement/preponemnet of the date of hearing from 19.06.12 to 21.05.12 was sent by registered post but the concerned authority has failed to produce the receipt of delivery. Therefore, the irresistible inference was that the affected person was not made aware of the change of the date of hearing.

Malice in law and malice in fact

In *Ratnagiri Gas & Power (P) Ltd.* v. *RDS Project Ltd.*,[84] the apex court held that cases involving malice in law the administrative action is unsupportable on the touchstone of an acknowledged or acceptable principle and can be avoided even when the decision maker may have had no real or actual malice at work in his mind. Between 'malice in fact' and 'malice in law' there is a broad distinction which is not peculiar to any system of jurisprudence. The person who inflicts a wrong or an injury upon any person in contravention of the law is not allowed to say that he did so with an innocent mind. He is taken to know the flaw and can only act within the law. He may, therefore, be guilty of 'malice in law', although. So far as the state of his mind was concerned he acted ignorantly, and in that sense innocently. 'Malice in fact' is a different thing. It means an actual malicious intention on the part of the person who has done the wrongful act.

In the absence of any other circumstances suggesting that the process was indeed vitiated by consideration of any inadmissible material or non-consideration of material that was admissible or misdirection on issues of vital importance, fresh recommendations made in tune with the legal opinion could not be held to have been vitiated by malice in law.[85]

It need hardly be pointed out that in cases where the decision making process is multi-layered, officers associated with the process are free and indeed expected to take views on various issues according to their individual perceptions. They may in doing so at time strike discordant notes, but that is but natural and indeed welcome for it is only by independent deliberation, that all possible facets of an issue are unfolded and addressed and a decision that is most appropriate under the circumstances shaped.[86]

If every step in the decision making process is viewed with suspicion the integrity of the entire process shall be jeopardized. Officers taking views in the decision making process will feel handicapped in expressing their opinions freely and frankly for fear of being seen to be doing so for *mala fides* reasons which would in turn affect public interest. Nothing in the instant case was done without a reasonable or probable cause which is the very essence of the doctrine of malice in law vitiating administrative actions.[87]

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84 (2013) 1 SCC 524.
85 *Id.* at 544.
86 *Ibid.*
87 *Ibid.*

Burden of proof

Every action taken by a public authority even though untenable cannot be dubbed as *mala fide* simply because it has fallen short of the legal standards and requirements. Burden to establish action was *mala fide* rests heavily upon the person making the charge and the person against whom the charge is made must be impleaded as a party to the proceedings and given an opportunity to refute the charge against him. In *Mutha Associates* v. *State of Maharastra*,[88]the Supreme Court observed that the allegations suggesting 'malice in fact' have to specific and supported by necessary particulars. Vague and general averments to the effect that the action under review was taken mala fide would not suffice. The high court in this case attributed to the minister *mala fides* because the order passed by him was found to be untenable in law. However, the Supreme Court held that such an inference was not justified, no matter how strongly the circumstances enumerated by the high court give rise to strong suspicion that the minister acted out of extraneous considerations. Suspicion, however strong, cannot be proof of the charge of *mala fides*. It is only on clear proof of high degree that the court could strike down an action on the ground of *mala fide*. As the writ petition filed did not provide specific particulars or details of how the decision taken by the minister was influenced by the developer or by any other person for that matter, such allegations were insufficient to hold the charge of 'malice in fact'.

VII CONCLUSION

In the year 2013 also the judicial trend in the area of administrative law is almost the same as was in the previous year. The court has reiterated that a statutory authority shall not act with pre-conceived notions and shall not speak its master's voice, because formation of opinion must be its own, not of somebody else in power to achieve some ulterior motive.[89] Further the court has cautioned that public money cannot be spent unless there is mutual benefit.[90] Providing relief to the retired employees from the government service the apex court held that the right to receive pension is recognized as the right to "property" and accordingly a person cannot be deprived of his pension without the authority of law, which is the constitutional mandate enshrined in article 300- A of the Constitution.[91]

The apex court has also held that the public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.[92] In the selection process there is a need

88 (2013) 14 SCC 304.
89 *Supra* note 23.
90 *Supra* note 26.
91 *Supra* note 13.
92 *Supra* note 33.

for intellectual objectively and industry.[93] In quasi-judicial proceedings, the authority deciding a dispute has to be free from bias, without conscious or unconscious prejudice to either of the contesting parties.[94] The court also reiterated that the burden of prove prejudice caused by non-grant of opportunity of hearing lies on a person challenging order concerned on the ground that it is causing civil consequences.[95]

Regarding the principle of natural justice the apex court made it clear that the demands of natural justice may be different in different situations depending upon not only the facts and circumstances of each case but also on the powers and composition of the tribunal and the rules and regulations under which it functions.[96] 'Malice in fact' is a different thing, an actual malicious intention on the part of the person who has done the wrongful act.[97] Burden to establish action was *mala fide* rests heavily upon the person making the charges.[98] Regarding the judicial review the court said that it is settled legal proposition that judicial review is not akin to adjudication on merit by re-appreciating the evidence as an appellate authority.[99]

93 *Supra* note 61.
94 *Supra* note 38.
95 *Supra* note 86.
96 *Supra* note 76
97 *Supra* note 79.
98 *Supra* note 83.
99 *Supra* note 38.