NOTES AND COMMENTS

LEGAL STATUS OF ADMINISTRATIVE DIRECTIONS—THREE RECENT CASES ADD TO THE CONFUSION

THE LAW relating to administrative directions is in a state of conundrum and this is simply the creation of the judges. Same of the reasons appear to be the age-old conflict between law and justice (the considerations of justice in a particular case prevailing over the well established principles of law), the concession made by the government and sometimes even the lack of adequate perspective about the law relating to administrative directions amongst the judges themselves. This has resulted in the great uncertainty of law, and too much uncertainty of law is not a happy thing for the legal process. The three recent Supreme Court cases, all reported in All India Reporter 1982 (January and April), are examined here to show the inconsistent (and even untenable) positions taken by the court.

The two of the cases (both reported in April) took a contradictory position on the question whether "directions" could modify "rules". The proposition is well settled that administrative directions, which by their very nature do not have statutory force, cannot modify the statutory rules. This proposition was reiterated by the Supreme Court in *V.T. Khanzode* v. *Reserve Bank of India*.[1] In this case the bench consisted of three judges and the opinion was delivered by Chief Justice Chandrachud. The question involved was whether the staff regulations issued by the Reserve Bank of India fixing the basis of seniority of its employees could be modified by a circular issued by the bank later on. To answer that question, it was necessary to determine, according to the court, whether the regulations were statutory, and if they were, "they cannot be altered by administrative circulars and in that event the impugned circular will not have the effect of superseding them."[2] This in turn necessitated whether the regulations involved were issued under section 58 of the Reserve Bank of India Act 1934. Under the section the bank may make regulations, with the previous sanction of the Central Government, to provide for all matters for which provision is necessary for the purpose of giving effect to the provisions of the Act. The court held that service regulations can certainly be made under the section. However, it found that the regulations involved were not issued under the aforesaid section and hence were not statutory. Firstly, the regulations did not purport to have been made with the previous sanction of the government. Secondly, while issuing the regulations the source of power

1. A I.R. 1982 S.C. 917.
2. *Id.* at 926.

was not mentioned. The court conceded that the failure to do so by itself is not conclusive of the matter, if otherwise the authority possessed the power. However, if the common course of manner in which the power was exercised established that while exercising power under the section the practice was to mention the source, it would be a relevant factor in determining whether the regulations had statutory force or not. The court noted that the various other regulations promulgated by the bank did mention the source of power in the recitals. In this context the absence of such a recital in the case of the regulations in question led to the inference that they were not made under section 58.

Since the staff regulations were in the nature of administrative directions, they could be amended by an administrative circular.

A contrary result was reached by the court in *Amitabh Shrivastava* v. *State of M.P.*,[3] where the court enforced the administrative directions which had modified the statutory rules. Here the state government had prescribed certain qualifying marks by rules including marks for certain reserved categories (like the scheduled castes and scheduled tribes and children of military personnel) for admissions to medical colleges affiliated to different universities of the state. The petitioner did not qualify for admission on the basis of these rules. Subsequently through an executive order the government reduced the percentage of qualifying marks, and there was a dispute with regard to the interpretion of this executive order whether the petitioner could be admitted under the same. The High Court by majority (two to one) decided against the petitioner, but the Supreme Court interpreted the executive order differently and granted him admission. Thus the court enforced an executive order (which presumably was "an administrative direction") at the instance of the individual as against the "rules". The only justification for the court's holding appears to be that the government did not raise an objection as to the enforceability of a merely executive order (administrative direction) at the instance of the individual. Thus, an outcome of a case, whether an administrative direction beneficial to the individual is to be enforced or not, is made to depend on the capriciousness of the executive whether it raises such an objection or not.

An extremely bad case on the question of adversely affecting individual rights by an administrative instruction is *Bishamber Dayal Chandra Mohan* v. *State of U.P.*[4] Our Constitution and the common law jurisprudence which is well entrenched and deep rooted in our country assume freedom of individual and any restriction on his activities can only be placed by law. But the court conveniently ignores this sound proposition.

The facts of the case in brief were as follows. Under the U. P. Foodgrains Dealers (Licensing and Restriction of Hoarding) Order 1976, issued under the Essential Commodities Act 1955 by the State of Uttar Pradesh,

3. A.I.R. 1982 S.C. 827.
4. A.I.R. 1982 S.C. 33.

no person can carry on the business of foodgrains without a licence. According to another control order, namely, the U. P. Foodgrains (Procurement and Regulation of Trade) Order 1978, a licensee, that is, a wholesale dealer, commission agent or retailer, "shall have in stock wheat in quantities not exceeding 250 quintals, 250 quintals and 20 quintals at a time" respectively. There is a provision in the order for search of any place or vehicle used or believed to be used for the purchase, sale or storage for sale of any of the foodgrains, and the competent officer is empowered to seize such foodgrains. None of the control orders contains any restrictions on the movement of foodgrains from one place to another within the state or movement to a place outside the state. However, by a teleprinter message the government instructed its officers that the movement of wheat by traders on private account to an outside district would be regulated only with the permission of certain officials. In other words, by this message inter-district movement of wheat was restricted. This message was signed by the secretary to the government and was addressed to the regional food controllers. It was thus an intra-departmental communication.

The several petitioners belonged to Delhi, Punjab, Haryana and Uttar Pradesh. The trucks containing wheat belonging to these petitioners were seized at the checkpost on the border between the States of Uttar Pradesh and Madhya Pradesh on the basis of the above teleprinter message. As far as the traders outside Uttar Pradesh were concerned, there was a doubt in the mind of the officials whether the wheat which was being transported was not purchased by them from within the state. The contention of these traders was that the wheat was purchased by them from places outside Delhi; the trucks carrying the wheat commenced their journey from Delhi (or passed through Delhi) and the destination of these trucks was the State of Maharashtra or Madhya Pradesh, but they had to necessarily pass through Uttar Pradesh to reach their destinations. After sometime the seized wheat was sold by the authorities by auction pending further investigations and passing of the final orders.

The opinion of the court was given by A. P. Sen J., and the other judge on the bench was Baharul Islam. The opinion suffers from ambivalence and quite a few oddities.

The court makes the following startling proposition:

> Even assuming that the impugned teleprinter message is not relatable to the two Control Orders, the State Government undoubtedly could, in exercise of the executive power of the State, introduce a system of verification on movement of wheat from the State of Uttar Pradesh to various other States at the check-posts on the border and place restrictions on inter-district movement of wheat by traders on private account within the State.[5]

---

5. *Id.* at 41.

In other words, the court is saying that under the executive power conferred on the government by article 162 of the Constitution, the individual right could be substantially affected not by law but merely by administrative directions. The proposition is so obnoxious and mischievous that the sooner it is interred for ever the better it is for the country.

Another act of judicial impropriety committed by the court is that it explicitly states that the issue involved in the present writ petitions "raises questions of the *highest importance* as to the scope and extent of the executive power of the State under Art. 162 of the Constitution, in relation to regulation and control of trade and commerce in foodstuffs."[6] But this question of *highest importance* is decided by a bench consisting of only two judges, contrary to the mandate contained in article 145 (3) which requires that the minimum number of judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of the Constitution shall be five. A question of highest importance could not be but a substantial question of law as to the interpretation of the Constitution. What adds odium to this disregard of the constitutional mandate is that the court lays down a ludicrous proposition on a question of far-reaching significance by a bench consisting of two judges. If at all any justification can be offered for the present case being decided by a bench of two judges, it is that the practical necessities of meeting the colossal arrears facing the court has to prevail over the constitutional requirement.

Initially, though the official communication to the petitioners was that the wheat was seized as per the teleprinter message, yet the counsel on behalf of the government had argued that this was really done to see the compliance of the two control orders. The argument was that it was essential to control movement of wheat in order to check that a dealer was not holding more than the specified quantity of wheat. The court did somewhat succumb to this argument of the state.[7] However, the government's point was extremely weak. If that was the intention as was stated by the counsel before the court, then at least before the drastic power of seizure was exercised by the officials, they should have been statisfied *prima facie* that the wheat which was being transported by a dealer was in excess of his holding allowance permissible by the control order. But it appears they had absolutely no material to that effect in their possession (as is evidenced by the facts mentioned in the judgment). Here there was an indiscriminate seizure *simply* because the wheat was in movement and this indiscriminate seizure could only be in pursuance of the teleprinter message which was certainly not law, and the action on its face was arbitrary, violative of both articles 14 and 19(1) (g).

In any case if the court would have justified the official action on the basis of the two control orders *alone* (ignoring the teleprinter message as

6. *Id.* at 36. **Emphasis added.**
7. See, for instance, *id.*, para 39 at 47.

if it did not exist), the court could have averted much damage which it caused to the law on administrative directions. However, the court was under the spell of the teleprinter message and indulged in an odyssey from which it became difficult for it to come out unscathed. The court did pose the question, "whether the instructions conveyed by the teleprinter message had the force of law".[8] But instead of directly facing the question the court became evasive by discussing the reasonableness of the restrictions in question under articles 19(1) (g) and 301. By no stretch of imagination the teleprinter message could be regarded as having statutory force. It was not published in the gazette, in fact nowhere. It was an intra-departmental communication addressed by a superior officer to his subordinates. It was in the form of a memorandum.

It is well established that the state cannot impose restrictions on the freedom of trade and commerce or interfere with individual freedom to carry on any trade or business without the authority of law. The court does mention the earlier rulings[9] in support of this proposition but then indulges in irrelevance. Instead of examining whether the movement of wheat could be restricted on the basis of a teleprinter message, the court merely refers to the provisions of the Essential Commodities Act in justification of the restriction. The Act by itself does not restrict the movement of wheat, but to do so the government has to act by issuing a notified order, and here the two notified orders did not contain any restrictions on movement.

It is again unfortunate that the court examines whether the teleprinter message was constitutional or not under articles 19(1) (g) and 301 and finds the message to be valid either as imposing a "reasonable restriction" or to be "regulatory" in nature.[10] If the teleprinter message was not law, and there is absolutely no doubt that it was not, no restriction could be imposed on the individual freedom under the two articles by what is not law.

The court says that a "regulatory" measure was permitted by article 301 and here the restrictions imposed were nothing but "regulatory measures to ensure that the excess stock of wheat held by a wholesale dealer, commission agent or a retailer is not transported to a place outside the State or from one district to another".[11] This statement is questionable, and the court misconstrues its earlier holdings on the subject. The word "regulatory" has been used not in the sense of putting a direct restriction on the movement of a commodity which happened in this case, but a restriction which facilitated the movement of trade and commerce, *e.g.*, safety measures regulating the movement of vehicles. Such other

8. See *id.* at 45.

9. For instance, *State of Madhya Pradesh* v. *Thakur Bharat Singh*, A.I.R. 1967 S.C. 1170; *Satwant Singh* v. *Dr. Ramarathanam*, A.I.R. 1967 S.C. 1836.

10. *Id.* at 51.

11. *Ibid.*

measures as safeguard public health or morality may be regarded as "regulatory" but certainly not an economic measure like the present one, directly restricting movement.[12] Assuming that the movement could be restricted under the control orders in the present case, the only justification for the restriction under article 301 could be that the state government was acting under a central law, if that could be the justification at all (the point needed probing by the court but which opportunity it missed).

Finally, the court while denying relief to the petitioners says that the matter was still under investigation by the authorities and if the petitioners failed to get relief, "their remedy lies in a suit of damages for wrongful seizure". This statement again appears to have been made off-the-cuff. The law on the subject is in a higly nebulous state. It is uncertain as to how far a suit for damages against the administration would lie for wrongful administrative action, particularly when the officers were purporting to act under the statutory authority (as given countenance by the court in the present case).

*S.N. Jain**

12. See S.N. Jain, "Freedom of Trade and Commerce" 10 *J.I.L.I.* 547 at 556 (1969), and the views of the various judges in the *Automobile* case mentioned therein. Also *Koteswar* v. *K.R.B. & Co.*, A.I.R. 1969 S.C. 504.

* LL.M., S.J.D. (Northwestern), Director, Indian Law Institute, New Delhi.