1
ADMINISTRATIVE LAW

*S S Jaswal**

I INTRODUCTION

THE LAST survey on the administrative law[1] had revealed that the stand of the court of non-interference with policy decisions has remained firm.[2] Situations where it had interfered were clearly where the need for interference existed.[3] The jury was still out on whether the court over stepped limits in certain situations.[4] It had made it clear that it would not permit the executive to hide behind it, while taking decisions.[5] It showed a reluctance of trusting completely the executive[6] but, even then it had not lightly interfered with a validly taken decision,[7] especially, not on technical grounds.[8] It had also not allowed fanciful claims of legitimate expectation.[9]

The judicial trend in the year 2012 is almost the same that was in the previous year so far as the field of administrative law is concerned. The areas covered in this survey are, administrative action, administrative and regulatory bodies, judicial review, natural justice and delegated legislation.

II ADMINISTRATIVE ACTION

Unreasonable delay

The decision in *K.B. Nagur* v. *Union of India*[10] raised the issue of holding periodic elections for the Central Council of Indian Medicine constituted under section 3 of the Indian Medicine Central Council Act, 1970. Under the Act, the

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1 See SS Jaswal, "Administrative Law" XLVII *ASIL* 1 (2011).

2 *Union of India* v. *JD Suryavanshi* (2011) 13 SCC 167 and *State of Jharkhand* v. *Ashok Kumar Dongi* (2011) 13 SCC 383.

3 *State of T.N.* v. *K. Shyam Sunder* (2011) 8 SCC 737.

4 *Centre for PIL* v. *Union of India* (2011) 4 SCC 1.

5 *Priyadarshini Dental College and Hospital* v. *Union of India* (2011) 4 SCC 623.

6 *ADP Jain Pathshala* v. *Shivaji Bhagwat More* (2011) 13 SCC 99.

7 *State of Rajasthan* v. *Sanyam Lodh* (2011) 13 SCC 262.

8 *K.T. Plantation (P) Ltd.* v. *State of Karnataka* (2011) 9 SCC 1.

9 *State of Haryana* v. *Mahabir Vegetable Oils Private Limited* (2011) 3 SCC 778 and *AP Transco* v. *Sai Renewable Power* (2011) 11 SCC 34.

10 (2012) 4 SCC 483.

central council is to consist of such number of members, not exceeding 5, as may be determined by the central government for each of the *ayurveda*, *siddhi* and *unani* systems of medicines, from each state, in which a State Register of Indian Medicine is maintained, to be elected from amongst themselves, by the persons enrolled on the register as registered practitioners of the respective systems. One member for each of the systems of medicine from each university is to be elected from amongst themselves, by the department of the respective system of medicine of that university. The central government could also nominate such number of members, not exceeding 30% of the total members elected, from amongst persons having special knowledge or practical experience in Indian medicine. These elected members are to elect a president and a vice president. This elected council is responsible for *inter alia,* granting of recognition to medical colleges, maintenance of educational standards and conduct of examinations, *etc*. The central government is obligated to hold their election. However, the elections for the council had not been held for the last almost 25 years. This was brought to the notice of the Supreme Court by one Nagur an *ayurvedic* doctor by way of a writ petition. Nagur sought a direction from the court to direct the central government to hold the elections of the central council in accordance with law. Nagur also sought a declaration from the court that a portion of section 7 of the Act be declared unconstitutional. This section deals with tenure, elected members are entitled to enjoy. In terms of the section, the term of office of all elected members is five years from the date of election or nomination as the case may be, "or until his successor shall have been duly elected or nominated, whichever is longer." As the central government did not take steps to hold election, the persons who were elected took advantage of this position and continued in office far beyond the stipulated five years as no one was elected to replace them.

The court rejected the challenge to the constitutionality of the section. In the court's view the section was "intended to ensure that there is no vacuum in the membership of the Central Council" as "there can be situations where the elections in the entire country or in any part thereof cannot be held within the prescribed time and for valid reasons." Rejecting the challenge the court held thus: [11]

> …The legislative intent is clear that there cannot be a vacuum in the working of a statutory body and it cannot be rendered non-existent even for a short period by lapse of membership term or otherwise. Thus, to provide a safeguard for the interregnum period, of the earlier members of the Central Council vacating their office and newly elected members assuming their office, the provisions of Section 7 have been enacted by the legislature.

In coming to this conclusion, the court found support from the decision in *Dental Council of India* v. *H.R. Prem Sachdeva (Dr.)*[12] where a similarly worded provision of the Dentists Act, 1948 had been upheld holding that "a reasonable interpretation of the provisions of the Act and the regulations would be that elections/

11 *Id.* at 490.

12 (1999) 8 SCC 471.

nominations to the council should normally be held/made once in five years. However, if for some valid reasons the elections cannot be held during the term of five years, the same should be held within a reasonable time thereafter and the continuance in office of the elected/nominated members should not go on for perpetuity". The court had come to this conclusion, as the provisions of the Dentists Act were silent about the period during which the elections should be held as also about the consequences of not holding the elections.

Even though the court upheld the constitutionality of the section it came down heavily on the Central Government for not performing its statutory obligation. The court's view is expressed in these harsh words: [13]

> We cannot understand any reason whatsoever for the Central Government not to perform its statutory duties, particularly when it concerns with the systems of medicine catering to a country of one billion people.…
>
> … It cannot justify its conduct in unduly delaying the proper constitution of such bodies in accordance with the provisions of the statutes and create faux pas which shall prejudicially affect all concerned, including the people at large.

The court pointed out that even though "no outer limit has been specified" for which the elected members can continue in office "but this certainly cannot be for indefinite period" and accordingly, "the concept of reasonable time would come into play." In the courts considered view "a period of three months would be more than sufficient for completing the election process in the event of exceptional circumstances." This the court did only because it could "always supply such lacunae in the interpretation of provisions of a law so as to achieve the object of the Act."

The decision, however, does not make clear the consequences that would follow if the central government fails to adhere to this time limit. Does the court seem to suggest that the council be automatically dissolved once the three-month period expires? The court's concluding observations that "no elected member, under any of the three systems of medicine, *ayurveda*, *unani* or *siddha* shall hold the office of the President, Vice-President or member, beyond a period of three months from the expiry of their term," do seem to suggest that "if that is the case, one wonders whether the court did not in effect strike down the words "whichever is longer" which find place in the section without actually saying so.

Communication of an administrative action

The decision in *Bipromasz Bipron Trading Sa* v. *Bharat Electronics Ltd***.**[14] arose out of a petition under section 11 of the Arbitration and Conciliation Act 1996. The petitioner sought reference of the disputes to an independent and sole arbitrator. In terms of the arbitration agreement, the petitioner had issued the necessary notice and the responded has not agreed for such appointment to an independent arbitrator. The only objection raised by the respondent is that the

13 *Id*. at 493.

14 (2012) 6 SCC 384.

disputes have to be referred to the chairman and managing director of the respondent or his nominee in terms of the arbitration clause.

The parties had entered into a contractual obligation for the supply of certain goods. However, as disputes arose between the parties on 20.05.2011. The petition requested the respondent to agree on a name of an independent and impartial sole arbitrator. The respondent received the notice on 23.05.2011. The respondent has acknowledged the receipt of notice by letter dated 08.06.2011. On 29.06.2011, the authorized representative of the petitioner has sworn the necessary affidavit in Poland for filing of the present petition after the expiry of 30 days of the statutory period and the same was dispatched to the counsel at New Delhi. In the meantime, the respondent replied by a communication dated 29.6.2011 to the notice dated 20.5.2011, stating that the chairman-cum-managing director is a competent person as the petitioner has subscribed the contract which states the nominated arbitrator, and hence the correspondence between the parties has been placed before the chairman-cum-managing director for appropriate action. The petitioner claims that the aforesaid reply was received on 01.07.2011. It was the case of the respondent that prior to the filing of the petition before the court, the chairman-cum-managing director, as sole arbitrator, has duly acted and exercised the power in appointing M. R. Chandra Kumar, general manager (Kot), Bharat Electronics Ltd. district Pauri Garhwal, Kotdwar, as the arbitrator and communicated by fax on 19.07.2011. It was submitted that the petition was not maintainable as even prior to the filing of the petition the chairman-cum- managing-director had duly acted and exercised his power and appointed an arbitrator on 19.07.2011.

The Supreme Court, however, rejected the challenge as to the maintainability of the petition on the ground that an official order takes effect only when it is served on the person affected. The court held:[15]

> … an order passed by an authority cannot be said to take effect unless the same is communicated to the party affected. The order passed by a competent authority or by an appropriate authority and kept with itself, could be changed, modified, cancelled and thus denuding such an order of the characteristics of a final order. Such an uncommunicated order can neither create any rights in favour of a party, nor take away the rights of any affected party, till it is communicated.
>
> …it becomes evident that the order dated 19-7-2011 would be binding on the Chairman-cum-Managing Director for the purposes of working out the limitation, but so far as the petitioner is concerned, the relevant date would be the date when the order is communicated to the petitioner. The order made by a statutory authority or an officer exercising the powers of that authority comes into force so far as the authority/officer is concerned, from the date it is made by the authority/officer concerned. But, so far as the affected party is concerned, the order made by the appropriate authority would be the date on which it is communicated…

15 *Id.* at 396–398.

Judicial review

The facts in *Heinz India (P) Ltd.* v. *State of U.P.*[16] were not too complicated. Glaxo India set up an industrial unit at Aligarh for the manufacture of what is sold in the market under the brand names Complan, Glucone-D, Farex and other similar milk and energy products. The manufacturing process undertaken at the unit produced ghee as a by-product. Sometime in the 1994 the family products division of Glaxo India was taken over by Heinz India, who continued manufacturing these products.

In terms of section 17(iii) of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam 1964, sale of specified agricultural produce within the *mandi* limits attracts levy of what is described as mandi fee from the person effecting the sale. The *mandi samitti* demanded the said fee from Glaxo India upto the year 1994 and from Heinz India from 1994 onwards in respect of sales effected by the companies of its products including ghee. These demands were resisted by both the companies on the ground that bulk of the ghee produced in their unit at Aligarh was sent out of the *mandi* limits on stock transfer basis and there was no sale involved in such transfers so as to attract the levy of *mandi* fee. Even so the companies continued removing their goods from the *mandi* limits in accordance with the procedure at the relevant time.

Pursuant to the law declared by the Supreme Court, Heinz made claims for the refund of the amount paid by it towards market fee and furnished to the *mandi samiti* material to support that claim. The material produced was evaluated by the *mandi samiti* which came to the conclusion that the same was not sufficient to rebut the statutory presumption that the removal of goods from the *mandi* limits was pursuant to a sale within such limits. The claim for refund of the amount by Heinz was accordingly rejected by the *mandi samiti*.

Aggrieved by the order passed by the *mandi samiti*, both Glaxo India and Heinz India filed revision petition before the director, *mandi parishad* under section 32 read with section 33 of the Act. By his order-dated 24.10.1996 the director dismissed the revision petition. This order was challenged by the companies before the high court, which on 03.04.1997 remitted the matter back to the director for fresh consideration and disposal in accordance with law. The director heard the revision petition afresh, reappraised the material and came to the conclusion that the claim of the companies for refund remained unsubstantiated and the presumption arising under the explanation to section 17 (iii) unrebutted. This order was again challenged before the high court which, however, agreed with the view of the director and dismissed the writ petitions. The high court held that the material produced by the companies did not make out a case for refund. It held that the material produced by the companies was either not reliable or deficient. It also held that the companies had withheld the best evidence available to them without offering any explanation.

Appeals against this order were preferred to the Supreme Court. In this background one of the issue that came for consideration before the court was whether the orders passed by the *mandi samiti* and that passed by the director as the delegate of the *mandi parishad* suffered from any legal infirmity to call for interference? This was pure and simple issue of judicial review. The question before the court in

16 (2012) 5 SCC 443.

essence was determining the limits of the courts powers to interfere with decisions taken by administrative authorities. The court was quick to point out that the market committee and the director had recorded concurrent finding of facts to the effects that the appellants had failed to rebut the statutory presumption. The court noted that it needed to "sail smooth over that aspect before examining the validity of the orders within the permissible parameters of judicial review". The court also noted that the power of judicial review is neither unqualified nor unlimited. It has its own limitations. There was almost complete unanimity, the court noted, on the principle that judicial review is not so much concerned with the decision itself as much with the decision making process. The juristic basis for such limitation on the exercise of the power of judicial review is that unless the restrictions on the power of the court are observed, the courts may themselves under the guise of preventing abuse of power, be guilty of usurping that power. In view of the legal position the court had no hesitation in upholding the orders passed by the statutory authorities below. It noted thus: [17]

> Suffice it to say that the Mandi Samiti appreciated each piece of evidence and found the same to be insufficient to hold that the sale transactions had, in fact, taken place outside the mandi area so that the presumption arising under Section 17(*iii*) of the Act stood rebutted. The Director exercising powers of the Mandi Parishad has in its order dated 25-9-2004 once again evaluated the evidence and concurred with the view taken by the Mandi Samiti.
>
> In the light of the legal position stated in the earlier part of this order, it is neither feasible for us to embark upon an exercise of reappreciating the entire material or to substitute our own findings for those recorded by the Mandi Samiti and the Director/Mandi Parishad. So long as the findings recorded by the Mandi Samiti and the Mandi Parishad are not irrational or perverse, and so long as the view taken by them is a reasonably possible view, this court would not interfere.

III ADMINISTRATIVE AND REGULATORY BODIES

Compliance with the regulatory regime

Avishek Goenka v. *Union of India*[18] was a public interest litigation filed by a businessman engaged in the business "of distribution of prepaid virtual and tangible calling value for mobile phone subscribers" to highlight the grave issue of non observance of the norms and regulations relating to the proper and effective verification by various service providers. According to the petitioner, there was rampant flouting of norms relating to this subject matter and there was no proper verification of the subscribers prior to selling of the prepaid mobile connections.

The petitioner had prayed that there should be strict implementation of subscriber verification guidelines, physical verification be compulsory in future

17 *Id*. at 473.
18 (2012) 5 SCC 275.

and physical re-verification of existing subscriber base be conducted in a transparent manner. He also seeks the prevention of inflated subscriber base.

The Telecom Regulatory Authority of India (TRAI) is the regulatory body for the telecommunications sector in India and the Union of India has responsibility to issue guidelines and frame regulations and conditions of license, in consultation with TRAI, to ensure coordination, standardization and compliance with the regulations, as well as protecting the security interests of the country. In terms of section 11 of the Telecom Regulatory Authority of India Act, 1997 it is a statutory obligation upon TRAI to recommend a regulatory regime which will serve the purpose of development, facilitate competition and promote efficiency, while taking due precautions in regard to safety of the people at large and various other aspects of subscriber verification. Similarly, DoT is responsible for discharging its functions and duties as, ultimately; it is the responsibility of the government to provide for the safety of its citizens. TRAI has to regulate the interests of telecom service providers and subscribers, so as to permit and ensure orderly growth of telecom sector. The government of India and TRAI, both, has to attain this delicate balance of interests by providing relevant instructions or guidelines in a timely manner and ensuring their implementation in accordance with law.

If one examines the powers and functions of TRAI, as postulated under section 11 of the Act, it is clear that TRAI would not only recommend, to DoT, the terms and conditions upon which a licence is granted to a service provider but has to also ensure compliance with the same and may recommend revocation of licence in the event of non-compliance with the regulations. It has to perform very objectively one of its main functions, *i.e.*, to facilitate competition and promote efficiency in the operation of the telecommunication services, so as to facilitate growth in such services. It is expected of this regulatory authority to monitor the quality of service and even conduct periodical survey to ensure proper implementation.

The points of divergence between TRAI and DoT are matters which will have serious ramifications not only *vis-à-vis* the regulatory authorities and the licensees but also on the subscribers and the entire country. These aspects demand serious deliberation at the hands of the technical experts. It will not be appropriate, the court noted, for it to examine these technical aspects, as such matters are better left in the domain of the statutory or expert bodies created for that purpose. The court said thus:[19]

> The concept of "regulatory regime" has to be understood and applied by the courts, within the framework of law, but not by substituting their own views, for the views of the expert bodies like an appellate court. The regulatory regime is expected to fully regulate and control activities in all spheres to which the particular law relates.
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> We have clearly stated that it is not for this Court to examine the merit or otherwise of such policy and regulatory matters which have been determined by expert bodies having possessing requisite technical know-how and are statutory in nature. However, the Court would step in and direct the technical

19 *Id.* at 281.

> bodies to consider the matter in accordance with law, while ensuring that public interest is safeguarded and arbitrary decisions do not prevail.

The court went on to note that in a regulatory regime, the terms and conditions imposed there under should be unambiguous and certain. It is expected that the authorities concerned would enforce the regulatory regime with exactitude. Therefore, the court noted that it was imperative that TRAI and DoT seriously cogitate on the issues where divergence has been expressed between them and bring unanimity in the terms and conditions of licenses which would form an integral part of the instructions dated 14.03.2011. The court accordingly partly allowed the writ and accepted the instructions dated 14.03.2011 issued by DoT subject to certain conditions.

Interim orders by regulatory bodies

The sole question for consideration before the court in *Super Cassettes Industries Ltd.* v. *Music Broadcast (P) Ltd*.[20] was whether on a complaint made to the Copyright board under section 31 of the Copyright Act 1957, the board under clause B of sub-section can pass an interim order in a pending complain.

The appeals preferred to the Supreme Court were directed against the order pass by the Delhi High Court by which it reversed the order of the copyright board. The board had held that it did not have the power to grant an interim compulsory licence. The high court reversed the finding of the copyright board upon holding that even while the grant of compulsory licence under section 31 of the Copyright Act was under consideration an interim compulsory licence could be granted. The high court also held that where the dispute was over the quantum of licence fee, and interim compulsory licence had to be granted.

Before the Supreme Court it was urged that the copyright board is a tribunal created under section 11 of the Copyright Act 1957 and being a creature of the statute, its powers were confined to the powers given to it by the statue. It was submitted that being a creature of statute the board could only exercise such powers as were expressly vested in it by the statute and that the power to grant an interim compulsory licence not having been vested with the board it could not exercise such substantive power, which it did not posses. This argument found favour with the court. The court noted that: [21]

> In the instant case, the power being sought to be attributed to the Copyright Board involves the grant of the final relief, which is the only relief contemplated under Section 31 of the Copyright Act. Even in matters under Order 39 Rules 1 and 2 and Section 151 of the Code of Civil Procedure, an interim relief granting the final relief should be given after exercise of great caution and in rare and exceptional cases. In the instant case, such a power is not even vested in the Copyright Board and hence the question of granting interim relief by grant of an interim compulsory licence cannot, in our view, arise.

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20 (2012) 5 SCC 488.

21 *Id.* at 507.

> … It is no doubt true, that tribunals discharging quasi-judicial functions and having the trappings of a court, are generally considered to be vested with incidental and ancillary powers to discharge their functions, but that cannot surely mean that in the absence of any provision to the contrary, such tribunal would have the power to grant at the interim stage the final relief which it could grant. As also indicated hereinbefore, such incidental powers could at best be said to exist in order to preserve the status quo, but not to alter the same, as will no doubt happen, if an interim compulsory licence is granted. If the legislature had intended that the Copyright Board should have powers to grant mandatory injunction at the interim stage, it would have vested the Board with such authority. The submission made that there is no bar to grant such interim relief in Section 31 has to be rejected since the presence of a power cannot be inferred from the absence thereof in the statute itself.

IV JUDICIAL REVIEW

Contractual matters

In *Tejas Constructions & Infrastructure (P) Ltd.* v. *Municipal Council, Sendhwa,*[22] municipal council, Sendhwa in the State of Madhya Pradesh invited tenders from eligible contractors for the construction of an integrated water supply scheme at an estimated cost of Rs. 20 crores. In response to the notice several applications were received by the municipal council for the purchase of tender forms. Only 6 of the applicants eventually participated in the prebid meeting. Out of the 6 bidders only 4 were found eligible. These included the appellant and responded no. 2.

The tender condition provided that the bid documents shall comprise three envelopes to be submitted by each of the bidders. Envelope 'A' was to contain the earnest money deposited, envelope 'B' was to contain the technical bid including qualification documents while envelope 'C' was to contain the price bid of the bidders. The opening of envelope 'A' was uneventful.

The appellant's case is that when envelope B was opened a request was made to the council to show the technical bid received from respondent no. 2. Upon perusal of the technical bid the appellant raised an application as to the eligibility of respondent no. 2 to participate in the bid process on the ground that it did not have the requisite experience of executing a single integrated water supply scheme of the requisite value. The respondent no. 2 is said to have claimed eligibility to offer a bid on the basis of clubbing of different water supply scheme projects at Vyara and Songadh which was impermissible according to the appellant.

The appellant also raised an objection to the effect that respondent no. 2 had not submitted certified copies of audited balance sheets for the last five years and that the net worth certificate produced from a chartered accountant for the financial year 2010-2011, did not according to the appellant, satisfy the said requirement.

22 (2012) 6 SCC 464.

Despite the objections raised by the appellant, the respondent no.1 considered all the bids and accepted the bid offered by respondent no.2.

Aggrieved by the allotment of work in favour of respondent no.2, the appellant approached the high court to challenge the eligibility of the respondent no.2 and eventually to the allotment of the project work to the said respondent. The writ petition was confined to two distinct grounds, namely, (i) the respondent no.2 had not filed the requisite certified balance sheets for five years immediately preceding the issue of tender notice, and (ii) that respondent no.2 did not have the requisite experience of executing a single integrated water supply scheme of the required value.

The high court examined both the grounds urged in support of the writ petition and clearly come to the conclusion that respondent 2 was eligible to offer a bid inasmuch as it had substantially complied with the requirement of filing the certified copies of audited balance sheets for the previous period of five years immediately preceding the issue of tender notice and that it had the requisite experience of executing a single integrated water supply project of the requisite value. As to what was involved before it the court had this to say: [23]

> A challenge to the award of the project work in favour of Respondent 2 involved judicial review of administrative action. The scope and the approach to be adopted in the process of any such review, has been settled by a long line of decisions of this Court. Reference to all such decisions is in our opinion unnecessary as the principles of law settled therefor are fairly well recognised by now.

In view of this background the court held: [24]

> **…** that in the matter of evaluation of the bids and determination of the eligibility of the bidders the Municipal Council had the advantage of the aid and advice of an empanelled consultant, a technical hand, who could well appreciate the significance of the tender condition regarding the bidder executing the single integrated water supply scheme and fulfilling that condition of tender by reference to the work undertaken by them. We, therefore, see no reason to interfere with the view taken by the High Court of the allotment of work made in favour of respondent 2.
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> …Interference with the ongoing work is, therefore, not conducive to public interest which can be served only if the scheme is completed as expeditiously as possible giving relief to the thirsty residents of Sendhwa. This is particularly so when the allotment of work in favour of respondent 2 does not involve any extra cost in comparison to the cost that may be incurred if the contract was allotted to the appellant company.

In the light of the above settled legal position and in the absence of any *mala fides* or arbitrariness in the process of evaluation of bids and the determination of

23 *Id*. 468.
24 *Id*. at 475.

the eligibility of the bidders, we do not consider the present to be a fit case for interference of this court.

V NATURAL JUSTICE

In India there is no statute laying down the uniform minimum procedure, which administrative agencies must follow while exercising decision-making power. There is, therefore, a bewildering variety of administrative procedures under which agencies function. The courts of law have, however, always insisted that the administrative agencies must follow a minimum of fair procedure. This minimum fair procedure refers to the principles of natural justice.[25]

The report of the British Committee on Ministers Powers[26] described the principles of natural justice as the "canons of judicial conduct to which all tribunals and persons who have to give judicial or quasi judicial decisions ought to confirm." As it is noted, these principles are "implicit in the rule of law."

The English courts have authoritatively pronounced "those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice."[27]

In *Union of India* v. *TR Verma*[28] the Supreme Court noted that the "rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them."

In *Krishi Utpadan Mandi Samiti* v. *Ved Ram*[29] the respondent company was engaged in the business of manufacture and sale of milk products. It had set up a manufacturing unit in Ghaziabad which falls within the market area of *Krishi Utpadan Mandi Samiti*, Ghaziabad (KUMS). The company's case was that is sold milk products manufactured by it through its agents located at several places in different parts of the country.

The appellant *samiti,* by a show cause notice called upon the respondent company "to produce all the relevant documents with regard to the production, sale-purchase, movement and storage of its product for the relevant period." The notice was pursuant to a declaration received from the respondent company that a consignment of *desi ghee* to Ahmedabad "was a stock transfer which did not require any gate pass for its movement outside the market area."

In response to the show cause notice the respondent company filed a reply explaining the nature of the transaction and claiming that the transfer of stocks to

25 IP Massey, *Administrative Law* (4th edn., 144, EBC, 1995).

26 Committee on Minister's Power: Report Presented by the Lord High Chancellor to Parliament by Command of His Majesty. Cmd. 4060 (1932).

27 *Local Government Board* v. *Arlidge* (1915) AC 120, 138 [HL].

28 AIR 1957 SC 882 at 885 : [1958] SCR 499 at 507.

29 (2012) 4 SCC 496.

its godowns outside the market area was on 'stock transfer basis' and not pursuant to any sale effected within the *mandi* area. The appellant *samiti* by its order held that "obtaining of gate passes after producing evidence to rebeit the presumption arising cut under the Explaination to section 17(iii) (b) of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 was necessary". The *Samit* held that the company had not adduced sufficient evidence to rebut the presumption that the movement of goods from the *mandi* area to places outside such area was pursuant to a sale effected within the area. The *samiti* accordingly levied a market fee and development fee for the quantity of *desi* ghee taken out from the market area under section 17(iii) (b) of the 1967 *Adhiniyam*. It was further directed that in future the company was to produce the details of its business and obtain gate passes whenever it removes ghee from the market area.

The revision filed by the company under section 32 of the *Adhiniyam* was dismissed. Aggrieved, the company approached the high court which set aside the order of the *samiti* and directed it to make a fresh assessment of the market fee for the period in question after providing an opportunity of being heard to the company. *Samiti* came up in appeal before the Supreme Court. The explanation to section 17 reads as under:-

> '*Explanation*.—For the purpose of clause (*iii*), unless the contrary is proved, any specified agricultural produce taken out or proposed to be taken out of a market area by or on behalf of a licensed trader shall be presumed to have been sold within such area and in such case, the price of such produce presumed to be sold shall be deemed to be such reasonable price as may be ascertained in the manner prescribed.'

The said explanation was a subject matter of decision on more than one occasion. In *Krishi Utpadan Mandi Samiti* v. *Saraswati Cane Crusher,*[30] the Supreme Court had held that:

> We conceive that when demands are raised by the Krishi Utpadan Mandi Samiti against a trader before he could ask for transit of goods outside the market area, the trader would be entitled to tender a valid rebuttal to say that no sale had taken place within the notified area and that if the explanation is accepted there and then by the Mandi Samiti, no question of payment would arise as also of withholding the gate passes. If prima facie evidence led by the trader is not accepted by the Mandi Samiti, the trader or the dealer can be compelled to pay the market fee as demanded before issuance of gate pass. If the trader makes the payment without demur, the matter ends and the assessment is finalised. But in case he does so and raises protest, then the assessment shall be taken to be provisional in nature making it obligatory on the trader to pay the fee before obtaining the requisite gate pass. After protest has been lodged and the provisional assessment has been made, a time-frame would be needed to devise making the final assessment.

30 Civil Appeals Nos. 1769-73 of 1998, decided on 25-3-1998 (SC).

In view of this, the court held: [31]

> The High Court appears to have overlooked the fact that if gate passes are required to be obtained under the rules, removal of stocks without applying for such gate passes and without furnishing prima facie evidence of proof that there was no sale of the goods involved, was a reason enough for the Mandi Samiti to demand payment of the market fee on the stocks that were removed. The absence of gate passes was tantamount to removal of the goods in breach of the relevant rules and also in breach of the directions issued by this court in the two cases mentioned above. A dealer who adopted such dubious procedure and means could not complain of a failure of opportunity to produce material in support of its claim that no sale was involved.
>
> No opportunity to a dealer who was acting in defiance of the rules and removing the goods without any intimation and permission of the Samiti could be granted for the occasion to grant such an opportunity would arise only when the trader applied for the issuance of a gate pass. As a matter of fact, the goods having been taken away without gate passes and without any material to show that there was no sale, the Samiti could demand payment of the market fee and leave it open to the respondent trader to claim refund by rebutting the presumption that the removal was pursuant to a sale.

The order of the *samiti* imposing the market fee was thus upheld.

Duty to record reasons

Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable.[32] Recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders.[33] Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons'

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31 *Supra* note 29 at 504.

32 *Union of India* v. *Mohan Lal Capoor* (1973) 2 SCC 836 at 853.

33 *CCT* v. *Shukla & Bros.* (2010) 4 SCC 785, 790.

is not to be equated with a valid decision-making process.[34]

In *Ravi Yashwant Bhoir* v. *Collector*[35] the appellant had been elected as a member of the urban municipal council and subsequently elected as its president. On 03.12.2008 he was served upon with a show cause notice calling upon him to explain why action under section 55B of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 not be taken against him. The said section reads as under:-

> 55-B. *Disqualification for continuing as Councillor or becoming Councillor on removal as President or Vice-President*—Notwithstanding anything contained in Section 55-A, if a Councillor or a person is found to be guilty of misconduct in the discharge of his official duties or being guilty of any disgraceful conduct while holding or while he was holding the office of the President or Vice-President, as the case may be, the State Government may—
>
> (*a*) disqualify such Councillor to continue as a Councillor for the remainder of his term of office as a Councillor and also for being elected as a Councillor, till the period of six years has elapsed from the order of such disqualification;
> (*b*) disqualify such person for being elected as a Councillor till the period of six years has elapsed from the order of such disqualification."

In terms of the section, a person found guilty of "misconduct in the discharge of his official duties" or of "any disgraceful conduct"[36] while holding the office of the president may be disqualified by the state government to continue as a councilor for the remainder of his term of office as also for being elected as a councilor for a period of six years has elapsed from the order of such disqualification.

The appellant submitted his explanation in writing in response to the show-cause notice after which the appellant was issued a notice for hearing on 23.01.2009. Though the appellant was present before the chief minister who was the disciplinary authority but the hearing had to be adjourned for a subsequent date for production of additional documents. However, without any subsequent place the appellant was disqualified for his remaining tenure on 21.03.2009. The appellant challenged the order before the high court and again in appeal before the Supreme Court.

One of the grounds that the appellant urged that the order of the chief minister was unreasoned and it did not disclose an application of mind on the part of the chief minister. This argument found favour with the Supreme Court as in its view "even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order." The court referred a

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34 *Kranti Associates (P) Ltd.* v. *Masood Ahmed Khan* (2010) 9 SCC 496.

35 (2012) 4 SCC 407.

36 *Id.* at 424 "Disgraceful conduct need not necessarily be connected with the official (*sic* duties) of the office-bearer. Therefore, it may be outside the ambit of discharge of his official duty."

number of precedents[37] governing the field and concluded that: [38]

> The emphasis on recording reason is that if the decision reveals the "inscrutable face of the sphinx", it can by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind of the authority before the court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out the reasons for the order made, in other words, a speaking out. The inscrutable face of the sphinx is ordinarily incongruous with a judicial or quasi-judicial performance.

The court pointed out that even though the chief ministers order disqualifying the appellant ran for some 20 pages, only five of those pages disclose the actual operative portion of the order. The court pointed out that the disciplinary authority "did not make any reference to the pleading s taken by the appellant either in his reply to show cause or during the course of the hearing." The order of punishment the court observed was very cryptic, certain portions of which were not even relevant for court's consideration. The order, in the court's own words "simply reveals that the Hon'ble Minister noticed certain things". The court also emphasized that the explanation furnished by the appellant had not been considered at all. The following observations of the court seem to sum up its view on the matter. [39]

In a democratic institution, like ours, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law or he is removed by the procedure established under law. The proceedings for removal must satisfy the requirement of natural justice and the decision must show that the authority has applied its mind to the allegations made and the explanation furnished by the elected office-bearer sought to be removed.

Bias

The question for determination before the Supreme Court in *N.K. Bajpai* v. *Union of India*[40] was "whether section 129(6) of the Customs Act, 1962 which stipulates that on demitting office as member of the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') a person shall not be entitled to appear before CESTAT, is *ultra vires* the Constitution of India?"

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37 *Union of India* v. *Mohan Lal Capoor* (1973) 2 SCC 836; *S.N. Mukherjee* v. *Union of India,* (1990) 4 SCC 594; *Shrilekha Vidyarthi (Kumari)* v. *State of U.P.* (1991) 1 SCC 212; *State of W.B.* v. *Atul Krishna Shaw,* 1991 Supp (1) SCC 414; *Krishna Swami* v. *Union of India* (1992) 4 SCC 605; *Mahesh Chandra* v. *U.P. Financial Corpn.*(1993) 2 SCC 279; *LIC* v. *Consumer Education & Research Centre* (1995) 5 SCC 482 and *Sant Lal Gupta* v. *Modern Coop. Group Housing Society Ltd.,* (2010) 13 SCC 336

38 *Supra* note 35 at 430.

39 *Id.* at 427.

40 (2012) 4 SCC 653.

Section 129(6) was introduced to the Customs Act, 1962 by the Finance Act of 2003, in terms of which the members of the Tribunal were debarred from appearing, acting r pleading before it. The relevant portions of the section read as under: -

> 129. *Appellate Tribunal*.—(1) The Central Government shall constitute an Appellate Tribunal to be called the Customs, Excise and Service Tax Appellate Tribunal, consisting of as many judicial and technical members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act.…
>
> (6) On ceasing to hold office, the President, Vice-President or other member shall not be entitled to appear, act or plead before the Appellate Tribunal."

The appellants had challenged the constitutional validity of the section before the Delhi High Court in writ proceedings. It was contended that the section was *ultra vires* the aticles 14, 19(1) (g) and 21 of the Constitution. It was further contended that in any event, the section had no application to the appellants as it was prospective and would not apply to them as they had demitted office much before the section had been brought into the statute book.

The high court upheld the validity of the section. In its view the predominant rationale for the introduction of the provision was to strengthen the cause of administration of justice and to remove what the legislature, in its wisdom, felt was a perceived class bias. Aggrieved, the appellant had come up in appeal before the Supreme Court.

To answer the questions raised before it, the court traced the history of the Advocates Act, 1961 and analyzed what rights it gave to an advocate. Having regard to the scheme of the Act, the court noted that "the right to practice is not an absolute right which is free from restriction and without any limitation." The right to practice, it noted, "is a statutorily regulated by two conditions – (i) that a persons name should be on the state rules and second that he should be permitted by the law for the time being in force to practice before any authority or person." And accordingly, were the advocate has a right to appear before an authority or a person that right can be denied by law that can be framed by the competent legislature. The court then proceeded to deal with the main issue before it as to whether the provision "is so unreasonable that it inflicts an absolute restriction upon carrying on the profession of the Appellants." This the court rejected for two separate reasons:[41]

> …Firstly, it is not an absolute restriction. It is a partial restriction to the extent that the persons who have held the office of the President, Vice-President or other members of the Tribunal cannot appear, act or plead before that Tribunal. In modern times, there are so many courts and tribunals in the country and in every State, so that this restriction would hardly jeopardise the interests of any hardworking and upright advocate. The right of such advocate to practise in the high courts, district courts and other tribunals established by the State or the Central Government other than

41 *Id.* at 669.

> CESTAT remains unaffected. Thus, the field of practise is wide open, in which there is no prohibition upon the practise by a person covered under the provisions of Section 129(6) of the Customs Act. Secondly, such a restriction is intended to serve a larger public interest and to uplift the professional values and standards of advocacy in the country. In fact, it would add further to public confidence in the administration of justice by the Tribunal in discharge of its functions.

It was also contended before the court that the restrictions on the right to practice was based "on an illogical presumption of likelihood of bias" and "the presumption of legal bias being without any basis and ill founded, the amendment itself is liable to be declared *ultra vires*."

To deal with the argument of bias in its proper perspective, the court felt the need to explain what was meant by bias in its true sense. [42]

> Bias must be shown to be present. Probability of bias, possibility of bias and reasonable suspicion that bias might have affected the decision are terms of different connotations. They broadly fall under two categories i.e. suspicion of bias and likelihood of bias. Likelihood of bias would be the possibility of bias and bias which can be shown to be present, while suspicion of bias would be the probability or reasonable suspicion of bias. The former lead to vitiation of action, while the latter could hardly be the foundation for further examination of action with reference to the facts and circumstances of a given case. The correct test would be to examine whether there appears to be a real danger of bias or whether there is only a probability or even a preponderance of probability of such bias, in the circumstances of a given case. If it falls in the prior category, the decision would attract judicial chastisement but if it falls in the latter, it would hardly affect the decision, much less adversely.

In this background, the court was not wrong when it noted that "when you have been a member of a tribunal over a long period, and other members have been your co-members whether judicial or technical, it is difficult to hold that there would be no possibility of bias or no real danger of bias. Even if we rule out this possibility, still, it will always be better advised and in the institutional interest that restrictions are enforced. Then alone will the mind of the litigant be free from a lurking doubt of likelihood of bias and this would enhance the image of the tribunal."

The court further went on to observe:

> The general principles of bias are equally applicable to our administrative and civil jurisprudence. The members of the tribunals called upon to try issues in judicial or quasi-judicial proceedings should act judicially. Reasonable apprehension is equatable to possible apprehension and, therefore, the test is whether the litigant reasonably apprehends that bias is attributable to a member of the tribunal.[43]

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42 *Id.* at 677.

43 *Id.* at 678.

The court rejected the submission that the amendment would not apply to the appellant by hoding that there exists "a distinction between a law being enforced retrospectively and a law that operates retroactively."

Promissory estoppel

In *Collector* v**.** *Cine Exhibitors (P) Ltd***.**[44] the Gwalior Development Authority (GDA) issued an advertisement for allotment of a plot situated in the locality known as Mayur Market for the purpose of construction of a cinema house in a public auction. The respondent company was the highest bidder in the auction. A lease agreement was executed between GDA and the respondent company on 27.05.1978. The agreement was for a period of thirty years with a right of renewal.

The company constructed the cinema hall on the plot and commenced business. Disputes arose between the directors of the company and it was resolved that the license for running the cinema should be surrendered. The collector accordingly cancelled the license for running the cinema hall. After the closure of the cinema hall GDS on 02.08.2002 terminated the lease and directed for handing over of the possession of the land.

The appellant company challenged the order of the GDA before the high court. The single judge of the high court refused to interfere with the order. The division bench in appeal, however, held the notice terminating the lease was illegal. In its opinion no notice of termination was given despite it being imperative and secondly, there was no breach of an express condition of a lease.

Before the division bench the state had taken a categorical stand that there had been no transfer of land by the state in favour of GDA and, therefore, the grant of lease by GDA in favour of the company was void. The division bench repelled the said stand on the ground that the lease had been granted in a public auction which was conducted with the knowledge of the state. The state was, therefore, estopped from revising a plea that the land had not been transferred to GDA.

The state came up in appeal before the Supreme Court contending that the concept of promissory estoppel did not have any role to play in the case as no competent authority of the government had transferred the land in favour of GDA. Any steps by GDA even in the presence of an officer of the state will not debar the state from raising the plea of its rights, title and interest. In view of this, the question for consideration before the Supreme Court was whether "the Division Bench is justified in stating in a sweeping manner that when GDA had granted the lease of the land in auction within the knowledge of the State, the State is estopped from raising any such ground that the land had not been transferred to GDA after lapse of thirty years."

The Supreme Court to pointed out that the doctrine of promissory estoppel is founded on the principles of equity to avoid injustice. The doctrine cannot be treated to be sacrosanct when a public authority carries out a representation which is prohibited in law. In view of this, the court held:[45]

> We have referred to these aspects singularly to highlight that unless affirmative steps are taken by the State Government by issuing a notification

44 (2012) 4 SCC 441.

45 *Id.* at 456.

> changing the character of the land and transferring it in favour of any authority, corporation or municipality, it maintains its own character, *i.e*., nazul land. In the case at hand, the land is recorded as nazul land for the Public Works Department. Nothing has been brought on record that it had ever been notified for transfer in favour of GDA. Thus analysed, GDA never became the owner of the land or had the authority to deal with the land and, therefore, it could not have put the land to auction for any purpose whatsoever.
>
> Ergo, the first respondent cannot assert any right or advance any claim to remain in possession and run the cinema hall and that too after cancellation of the licence, solely on the basis of a lease granted by its lessor, a statutory authority, who had no right on the land for the simon-pure reason that the ownership still remained with the State Government. When no right lies with GDA in respect of the land in view of the conditions precedent as stipulated in the Revenue Book Circular not having been satisfied and the nature of the land has remained in a sustained state, no legal sanctity can be attached to the lease executed by it in favour of the first respondent. The grant is fundamentally *ultra vires* and hence, the respondent Company has to meet its Waterloo.

The court accordingly allowed the appeal of the state and permitted it to proceed against the respondent for its eviction.

VI DELEGATED LEGISLATION

The respondent before the Supreme Court in *Head Master Lawrence School* v. *Jayanthi Raghu*[46] was appointed to the post of a mistress of Lawrence School in 1993. It was stipulated in the letter of appointment that she would be on probation for a period of two years which may be extended for another one year, if necessary. While the respondent was working as a mistress, with the appellant, she was alleged to have been involved in some misdeed; as a result the respondent was terminated from service from 18.06.1997.

The respondent before the high court successfully challenged the order of termination. One of the contentions that found favour with the high court was as to the interpretation of a subordinate legislation. It had been contended that by virtue of the language employed in rule 4.9 of the rules of Lawrence school, Lovedale (Nilgiris) she had earned the status of a confirmed employees having successfully completed the period of probation and, therefore, her services could not have been dispensed with without holding an enquiry. It was argued that she was deemed to have been a confirmed employee of the school and hence it was obligatory on the part of the employer to hold an enquiry before putting an end to her services. The high court accepted the submission and the school authorities came up in appeal. The rule which is relevant for our purposes, reads as under:[47]

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46 (2012) 4 SCC 793.

47 *Id.* at 797.

> 4.9 All appointments to the staff shall ordinarily be made on probation for a period of one year which may at the discretion of the Headmaster or the Chairman in the case of members of the staff appointed by the Board be extended up to two years. The appointee, if confirmed, shall continue to hold office till the age of 55 years, except as otherwise provided in these Rules. Every appointment shall be subject to the conditions that the appointee is certified as medically fit for service by a Medical Officer nominated by the Board or by the Resident Medical Officer of the School.

Before the Supreme Court, the school authorities contended that the high court erred in holding that after the expiry of the probation period; the respondent became a confirmed employee. It was contended that if the language employed in rule 4.9 of the rules especially the words "if confirmed" are appreciated in their proper perspective, there can be no trace of doubt that an affirmative act was required to be done by the employer without which the employee could not be treated to be a confirmed one. This contention found favor with the Supreme Court.

The letter of appointment of the respondent indicated that she was appointed as a mistress in the school on a probation period of two years with the stipulation that it may be extended by another year. The court found nothing in the terms of the letter of appointment from which it could be construed that after the expiry of the period of probation; the respondent would be treated as a deemed confirmed employee. The controversy before the court, therefore, dependent upon the interpretation to be placed on rule. To appreciate the proper interpretation, the court referred to the decision in *High Court of M.P.* v. *Satya Narayan Jhavar*[48] wherein it had been held that: [49]

> The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the subject-matter of consideration before this Court, times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or in the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. The other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the order of termination has not been passed. The last line of cases is where, though under the rules maximum period of probation is prescribed, but the same requires a specific act on

48 (2001) 7 SCC 161.

49 *Id*. at 168.

> the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired.

On the basis of this interpretation the court came to the conclusion that: [50]

> **…** when the language employed under Rule 4.9 is scrutinised, it can safely be concluded that the entitlement to continue till the age of superannuation i.e. 55 years, is not absolute. The power and right to remove is not obliterated. The status of confirmation has to be earned and conferred.
>
> Had the rule-making authority intended that there would be automatic confirmation, Rule 4.9 would have been couched in a different language. That being not so, the wider interpretation cannot be placed on the Rule to infer that the probationer gets the status of a deemed confirmed employee after expiry of three years of probationary period as that would defeat the basic purpose and intent of the Rule which clearly postulates "if confirmed"....

The Supreme Court accordingly allowed the appeal and set aside the order of the high court.

Absence of subordinate legislation

In *State of M.P.* v. *S.K. Dubey*[51] the respondent was appointed as the president of the State Consumer Dispute Redressal Commission, Madhya Pradesh on 18.09.1998. The respondent assumed office on 21.091.1998 and continued to hold office till 12.08.2003.When he demitted the office of the president, he had rendered service of 4 years 10 months and 22 days as president of the state commission. The controversy before the court was as to the respondent's entitlement to pension for his service rendered as the president under the office order dated 05.04.2002 issued by the state government.

By an order dated 03.06.1999, the state government had prescribed the terms and conditions of the appointment of the respondent as president of the state commission. The order *inter alia* provided that during the currency of his appointment, the respondent shall be paid a salary as payable to a judge of the high court minus pension payable. On 05.04.2002, the state government issued another order for counting the period or service as president for the purpose of pensionary benefits. The order provided as under:[52]

> …the State Government now accords sanction for counting the services of the post of President, Madhya Pradesh State Consumer Disputes Redressal

50 *Id.* at 804.
51 (2012) 4 SCC 578.
52 *Id.* at 586.

> Commission, Bhopal for pension provided that the pension on this post and the pension received earlier from the State Government or Central Government the two pensions combined together shall not exceed the maximum of the pension prescribed for the Judges of the Honourable High Court.

In terms of the order, the necessary papers for payment of pension and gratuity to the respondent were prepared and submitted to the office of the appellant by the registrar of the state commission. The state government also recommended the case of the respondent to the appellant. The appellant, however, raised an objection that the pension and gratuity were not payable to the respondent as proposed and recommended.

Aggrieved, the respondent approached the high court. Before the high court the appellant took the stand that there was no provision for pension under the 1986 Act or the Madhya Pradesh Consumer Protection Rules, 1987 for payment of pension to the president of the state commission. The appellant relied on the decision in *Justice P. Venugopal* v. *Union of India*[53] to content that the respondent was not entitled to club the two services. The appellant pointed out that if the state government intended to grant pension to the respondent for the service rendered by him as the president of the state commission, then the requisite statutory rules would have to be framed and duly ratified by the state legislature in terms of section 30(2) of the 1986 Act. The high court by the impugned judgment allowed the petition filed by the respondent. The high court held that by office order dated 05.04.2002; the state government had declared that the services rendered by the respondent as president would be counted as pensionable services. It is from this order that the appeal had been filed before the Supreme Court.

It was contended that there were no statutory provision for grant of pension to the president of the state commission. The state rules also did not make any provision for pension and, therefore, no order for payment of pension could have been passed. It was pointed out that when an Act is required to be done in a particular manner, then it must be done in that manner and in no other manner.

In the words of Lodha J the question that felt for determination before the court was whether "in the absence of any express rule in the state rules, was it open to the State Government of Madhya Pradesh to have provided by way of an executive order dated 5.4.2002 that the service rendered by the respondent as president of the state commission would be counted as pensionable service?"[54]

Lodha J was pointed out that the executive power of a state extends to the matters with respect to which the legislature of the state to make laws. He noted that the statutory provision contained in section 16(2) was quite clear and provided that the salary and other allowances payable to the member of the state commission shall be such as may be prescribed by the state government. The question, therefore, was as to the meaning of the words "as may be prescribed by the state government." Lodha J came to the conclusion that these words have to be read as prescribed by

53 (2003) 7 SCC 726.

54 *Supra* note 51 at 593.

the rules framed by the state government, if any. In his view, if the Parliament intended that the salary and other allowances payable to a member have to be provided in the rules framed by the state government in exercise of its power under section 30(2) and in no other manner than the provision in section 16(2) would have expressly provided so. He further went on to note that the power that vests in the state government under section 30(2) to carry out the provisions contained in section 16(2) does not take away its executive power to make provision for the subject covered in section 16(2) for which no rules have been framed by it.

In any case, he noted that the provisions of section 31(2) which provided that every rule made under the Act shall be laid before the state legislature was merely directive in nature. To come to this conclusion he took the support of the decision in *Atlas Cycle Industries Ltd.* v. *State of Haryana*[55]. In view of this, he concluded that:[56]

> It follows from the above discussion that the State Government has power to issue executive order or administrative instructions with regard to subject(s) provided in Section 16(2) of the 1986 Act where the State Rules are silent on any of such subject. There is nothing in Section 30(2) or Section 31 of the 1986 Act that abridges the power of the State Government to issue executive order or administrative instructions with regard to pensionable service of the President and Members of the State Commission, although the State Rules have been framed but such Rules are silent on the aspect of the pensionable service. In other words, in the absence of any provision in the State Rules relating to the pensionable service of the President and Members of the state commission, there is no bar for the State Government in issuing executive order or administrative instructions regarding pensionable service of the President, State Commission.
>
> Insofar as the order dated 5-4-2002 issued by the Government of Madhya Pradesh according sanction for counting the service of the respondent on the post of president, state commission for pension is concerned, the same being not inconsistent with the statutory provision contained in section 16(2) and the state rules, the view of the high court that the respondent was entitled to pension from the state government as per the terms and conditions of appointment cannot be faulted. The high court rightly observed that the respondent was entitled to pension from the state government insofar as service rendered by him as the president, state commission was concerned to the extent provided in the order dated 5-4-2002. Obviously such service shall not be clubbed with the service of the respondent as a high court Judge and shall not be charged to the consolidated fund of India.[57]

However, the other judge constituting the bench, Gokhale J descended from the opinion of Lodha J In the opinion of Gokhale J when the statute provides that

55 (1979) 2 SCC 196.
56 *Supra* note 51 at 596-597.
57 *Id.* at 597.

the "terms and conditions shall be such as may be prescribed" and prescribed means prescribed by the rules it is implied that these rules shall be of general application. In his view, a pension is to be covered under the concept of terms and conditions of service under section 16(2) there has to be a general rule concerning the same. In the case before it, he noted there were general rules laying down the terms and condition framed under the statute concerned, but they did not make any provision for pension. In his view, nothing prevented the state government from making rules in this behalf specifically for this purpose. He noted that grant of pension is a matter concerning public finance and such a grant cannot be made at the instance of the government when the rules do not prescribe the same. The order according sanction to pension, he noted, neither prescribed any period for eligible nor any rate at which the pension was to be paid. He concluded thus: [58]

> In the present case the Rules have been framed. It is not a case of absence of rules. It is a case where there is no concept of pension at all in the Rules concerned. The question is whether such a provision can be brought in through an executive order for the benefit of an individual. In the instant case there are Rules framed for the purpose of Section 16(2) of the Act read with Section 30(2) of the Act. The Rules do not provide for any pension, and if they do not so provide, the concept and the obligation there under cannot be brought in through an executive order.

Though Lodha J would have dismissed the appeal on the basis of the appeal, Gokhale J allowed the appeal in view of the divergence of opinion between the two judges; the matter was directed to be placed before the Chief Justice for being assigned to an appropriate bench.

VII CONCLUSION

The twentieth century has witnessed a phenomenal growth in the powers and functions of the state. This has been mainly due to the emergence of the welfare state, which envisaged state intervention in an effort to bring about a just social order. The state no longer confines itself to its traditional functions such as defence, administration of justice or maintenance of law and order. It undertakes to provide social security and social welfare for the common man.[59]

A study of the decisions in the year under survey in the field of administrative law has revealed certain interesting facets. The court has not shied away from taking a stern view of the non-performance of the statutory obligations of the executive.[60] It has shown a reluctance to interfere with the decisions taken by administrative authorities[61] or even regulatory bodies.[62] This is consistent with the pattern which

58 *Id.* at 606.

59 S P Sathe, *Administrative Law* 1 (6th edn., Butterworths,1998).

60 *Supra* note 10.

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

62 *Supra* note 18.

the survey of the past few years have revealed. Though the court has laid great stress on the importance of the principals of natural justice[63] but at the same time it has not easily permitted defaulting parties to hide behind the cloth of technicalities.[64] The court has emphasized on the importance of the statutory authorities to record reasons in their decisions. The principle of bias has been expounded to new heights[65] a feature that the author feels is a step in a right direction.

63 *Supra* note 35.
64 *Supra* note 29.
65 *Supra* note 40.