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ADMINISTRATIVE LAW

*SS Jaswal**

I INTRODUCTION

THERE CAN be little doubt that the central purpose of administrative law is to promote good administration.[1] It is a branch of law which is being increasingly developed to control abuse of misuse of governmental power and keep the executive and its various instrumentalities and agencies within the limits of their power. The role of law, which runs like a golden thread through every provision of the Constitution and indisputably constitutes one of its basic features, requires that every organ of the state must act within the confines of the powers conferred upon it by Constitution and law; and administrative law is that branch which seeks to ensure observance of the rule of law.[2]

A discussion of administrative law inevitably brings with it a discussion of rights, obligations, duties or privileges of public authorities *inter se* and their relationship with the private individuals.[3] One of the safeguards available to the individual against the vast powers of the state is in procedural safeguards, and, it has been very aptly said that the history of human liberty has been largely the history of procedural safeguards. As the recent case shows, the Supreme Court has been playing a vigorous and a commendable role in evolving these safeguards.[4] In the year under survey the cases decided by the apex court in the field of administrative law have been covered under various heading such as administrative action, natural justice, delegated legislation and judicial review.

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1 See, Mark Elliott and Jason N. E. Varuhas, *Administrative Law, Text and Materials*, Oxford, 5th Edn. 2017, at 1.

2 See, IP Massey, *Administrative Law*, Easten Book Company, 2017, IX.

3 See, SS Jaswal, "Administrative Law" LII *ASIL* 2 (2016).

4 See, SN Jain "Some Recent Development in Administrative Law" 10, *JILI,* 530, 1968.

II ADMINISTRATIVE ACTION

It is a settled principle of administrative law for many years now that when an administrative order is passed in exercise of a statutory power on certain grounds, its validity must be judged by the reasons mentioned in the order and such reasons cannot be supplemented by other reasons through an affidavit or otherwise. Were this not so, an order otherwise bad in law at the very outset may get validated through additional grounds later brought out in the form of an affidavit.

In the survey year the abovementioned principle of administrative law was reiterated in *T.P. Senkumar* v. *Union of India*.[5] In this case the Chief Minister of State of Kerala ordered to transfer appellant, state police chief, before completing his tenure on grounds of serious dissatisfaction in general public about efficacy of police in his jurisdiction in regard to Puttingal Temple tragedy and Jisha murder case. However, in detailed counter affidavit it was additionally stated that appellant attempted to interfere in investigations relating to Puttingal Temple case.

On facts the apex court stated that the reasons given in the transfer order cannot be supplemented with the additional grounds in the counter affidavit and held:[6]

> Apart from the fact that it is not permissible for the State Government to reasons in the detailed counter-affidavit for the transfer of the appellant, additional reasons that are not mentioned by the Chief Minister, the reference to interference in the investigation in the Puttingal Temple tragedy are somewhat incongruous. There is nothing to suggest what advantage could be gained by the appellant in scuttling the investigations in the Puttingal Temple tragedy, particularly since in an earlier part of the detailed counter-affidavit it is admitted that the State Police Chief is not personally responsible for supervising the conduct of events or adherence to safety measures in relation to large public gatherings.

This verdict has set a benchmark and proved that honest officers can hope to be protected from transfers and removals based on the whims and fancies of the government of the day. Such judgments will generate confidence which will help them to take the right action without fear of losing their jobs.

Tests to determine quasi-judicial function

A judicial decision is made according to law, whereas an administrative decision is made according to administrative policy. A quasi-judicial function lying somewhere in between is an administrative function which the law requires to be exercised in some respects as if it were judicial. A quasi-judicial decision is, therefore, a decision which is subject to a certain measure of judicial procedure. In the classic case of *The*

5 (2017) 6 SCC 801.

6 *Id.* at para 87.

King v. *Electricity Commissioners,*[7] Lord Justice Atkin defined quasi-judicial order as follows:

> Whenever anybody of persons having legal authority to determine questions affecting rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

This celebrated passage has been referred to time and again in the Supreme Court's judgments in India. Thus, in *Province of Bombay* v. *Kushaldas S. Advani*[8] it was held:[9]

> (i) That, if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by any party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis* and prima facie, and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and
>
> (ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.

In the survey year in *National Securities Depository Limited* v. *The Securities and Exchange Board of India,*[10] Supreme Court was confronted with an interesting question as to whether an administrative circular issued by SEBI under section 11(1) of the Securities Exchange Board of India Act, 1992, can be the subject matter of appeal under section 15T of the said Act.

In this case by an administrative circular dated 9th November, 2005, SEBI under the caption "review of dematerialization charges" issued an administrative circular under section 11(1) of the SEBI Act to protect the interests of investors in securities and to promote the development of, and to regulate the securities market.

A preliminary objection was raised in the appeal filed by the respondent before the securities appellate tribunal. It was urged that under the SEBI Act, SEBI has

7 (1924) 1 KB 171.
8 (1950) SCR 621.
9 *Ibid.*
10 (2017) 5 SCC 517.

administrative, legislative and quasi-judicial functions. Appeals preferred to the securities appellate tribunal can only be from quasi-judicial orders and not administrative and legislative orders.

This preliminary objection was turned down by the impugned judgment dated 29th September, 2006, by the securities appellate tribunal. According to the tribunal, the expression "order" is extremely wide, and there being nothing in the Act to restrict an appeal only against quasi-judicial orders, appeals would lie against all three types of orders under the Act *i.e*., administrative orders, legislative orders as well as quasi-judicial orders. The tribunal, therefore, rejected the preliminary objection and went into the merits of the arguments against the impugned circular, and dismissed the same.

Cross appeals were filed in the apex court. Civil Appeal No.5173 of 2006 was filed by the *National Securities Depositories Ltd.* v. *SEBI* on the merits of the dismissal, whereas Civil Appeal No.186 of 2007 was filed by the SEBI against the rejection of the preliminary objection raised before the securities appellate tribunal. The apex court took the second appeal first inasmuch as if the preliminary objection were to succeed, clarifying that the merits would not have to be gone into.

While deciding the appeals the apex court laid down the three requisites which are necessary in order that the act of an administrative body be characterised as quasi-judicial:[11]

(i) there must be legal authority;
(ii) this authority must be to determine questions affecting the rights of citizens; and
(iii) there must be a duty to act judicially.

It was further observed by the court that:[12]

> The absence of a *lis* between the parties would not necessarily lead to the conclusion that the power conferred on an administrative body would not be quasi-judicial – as long as the aforesaid three tests satisfied, the power is quasi-judicial. If a statutory authority has power to do any act which will prejudicially affect the citizen, then although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the citizen opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially. An administrative order would be one which is directed to the regulation or supervision of matters as distinguished from an order which decides

11 See: *The King* v. *Electricity Commissioners,* (1924) 1 KB 171; *Province of Bombay* v. *Kushaldas S. Advani,* (1950) SCR 621; *Shivji Nathubhai* v. *Union of India,* (1960) 2 SCR 775; *Indian National Congress (I)* v. *Institute of Social Welfare,* (2002) 5 SCC 685; *Shankarlal Aggarwala* v. *Shankarlal Poddar,* (1964) 1 SCR 717.

12 *Supra* note 10 at paras 14-17.

> the rights of parties or confers or refuses to confer rights. One of the tests would be whether a matter which involves the exercise of discretion is left for the decision of the authority, particularly if that authority were a court, and if the discretion has to be exercised on objective, as distinguished from a purely subjective, consideration, it would be a judicial decision.

Finally the apex court allowed the Civil Appeal No.186 of 2007 and the preliminary objection taken before the securities appellate tribunal by the respondent was sustained. The judgment of the securities appellate tribunal was, accordingly, set aside and held that:[13]

> It may be stated that both Rules made under section 29 as well as regulations made under section 30 have to be placed before Parliament under section 31 of the Act. It is clear on a conspectus of the authorities that it is orders referable to sections 11(4), 11(b), 11(d), 12(3) and 15-I of the Act, being quasi-judicial orders, and quasi-judicial orders made under the Rules and Regulations that are the subject matter of appeal under section 15T. Administrative orders such as circulars issued under the present case referable to section 11(1) of the Act are obviously outside the appellate jurisdiction of the Tribunal for the reasons given by us above.....
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> ..... In this view of the matter, Civil Appeal No.5173 of 2006 being a challenge to the merits of the impugned circular has necessarily to be dismissed. We make it clear that liberty is granted to take appropriate steps in judicial review proceedings to challenge the aforesaid circular in accordance with law. Civil Appeal No.5173 of 2006 is disposed of accordingly.

The apex court has attempted to throw light on the difference between administrative and judicial/quasi-judicial orders as to minimize any disputes as to the nature of an order. Such disputes may naturally arise now that certain classes of orders have been precluded altogether from being assailed before the securities appellate tribunal. While this decision should reduce the burden of cases brought before the securities appellate tribunal, it will be interesting to observe how the jurisprudence on this further develops.

III NATURAL JUSTICE

In *Vipulbhai Mansinghbhai Chaudhary* v. *State of Gujarat,*[14] the appellant was elected as the chairman of the Mehsana District Cooperative Milk Producers Union

13 *Id.* at paras 25-26.

14 (2017) 13 SCC 51.

Ltd. (hereinafter "the Union") under the Gujarat Cooperative Societies Act, 1961 (hereinafter, "the Act") for a period of three years from 2-5-2011 to 1-5-2014. However, he continued to hold the office beyond the period of three years by virtue of the operation of section 74C (2) as it then existed: "section 74C (2). When the election of all the members of the committee of any such societies held at the same time, the members elected on the committee at such general election shall hold office for a period of three years from the date on which the first meeting is held and shall continue in office until immediately before the first meeting of the members of the new committee". During the continuance of appellant in the office, a show-cause notice was issued on 12-1-2015 (hereinafter "Show-cause Notice I") by the registrar of the cooperative societies (hereinafter, "the Registrar") purporting to be one under section 16-B(1) and (2) of the Act calling upon the appellant to show cause why he should not be removed from the office for various reasons mentioned therein. A learned judge of the high court by his judgment dated 29-9-2015 upheld the action of the registrar insofar as it pertained to the removal of the appellant from the office but set aside the order of his disqualification for a future period of three years. It was held that proceedings under section 76-B(2) for disqualifying appellant could have been initiated only after an order under section 76-B(1) is passed. Since the registrar acted on the basis of a composite notice i.e. show-cause notice I, the action of the registrar under section 76-B (2) could not be sustained.

In view of the fact that the high court set aside the order of the registrar disqualifying the appellant for a period of three years. The registrar issued a fresh show cause notice dated 3-10-2015 (hereinafter, "Show cause Notice II") calling upon the appellant to explain as to why he should not be disqualified for a future period in exercise of the powers under section 76-B (2) of the Act.

By an order dated 23.11.2015 of apex court, Chaudhary was permitted to reply to the second show-cause notice and he did in fact file a reply. Thereupon the registrar passed an order dated 16.12.2015 disqualifying Chaudhary for a period of six (6) years. Aggrieved by the same, Chaudhary filed Writ Petition (SCA No.177 of 2016). By the judgment dated 18.01.2016, the same was partly allowed by a learned single judge to the extent the disqualification imposed went beyond three years and hence the appeal before the apex court.

The main issue involved in this appeal was whether the order of the registrar disqualifying the appellant, from participating in elections or holding post, for a period of six years, pursuant to the issuance of a fresh show-cause notice II under section 76-B(2) was sustainable in law? The court held that the order of the registrar is sustainable in law and, therefore, the second show cause notice under section 76-B(2), could be issued without obtaining the leave of the high court. In conclusion the court uphold the disqualification but to the extent of the three years the court made the important observations pertaining to the scope and applicability of the principles of natural justice in the instant case which are discussed in the subsequent paragraphs.

On the issue of interfering with the findings of the Registrar the court held thus:[15]

> Section 76B provides for (i) removal of "any officer"; and (ii) disqualification of such a removed officer to hold or contest election to any office either of that Society or any other Society for a certain period. It was in exercise of the power under section 76B. Action was initiated against Chaudhary initially by issuing show-cause notice–I which culminated in a final order dated 10.3.2015 by which Chaudhary was removed from the office of the Chairman of the UNION and also disqualified for a period of three years from holding any office or to participate in any election "in any sahakari mandal". The conclusions recorded by the Registrar, in the order of dated 10.3.2015 removing Chaudhary from office, remained undisturbed by the High Court, in Special Civil Application No.9618/2015. The High Court recorded (See paras 11 to 15 of the judgment) that of the various charges levelled against Chaudhary, i.e. charges Nos. 2, 3, 6, 9, 10 and 11 had been held proved by the Registrar. The High Court further held that such findings could not be determined in exercise of the jurisdiction under article 226 of the Constitution of India. The High Court rightly declined to interfere with those findings. We see no error in the decision of the High Court in this regard. We decline to undertake the exercise of examining the correctness of the conclusions recorded by the Registrar.

Further on the issue whether there is a necessity of seeking leave of the high court for issuance of a fresh show cause notice when the prior notice is quashed by the high court the apex court held thus:[16]

> It is already held by this Court that where an order passed in exercise of a power conferred by a statute is set aside on the ground that such an order was passed in breach of the principles of natural justice, the power could once again be exercised by complying with the principles of natural justice. In a case where the flaw in the order appealed against consists of in the non-observance of certain procedure or in not giving effect to the maxim *'audi alteram partem'*, it is open to the officer concerned to start the procedure once again with a view to follow the rules of procedure and the principles of natural justice. The conclusion of the Division Bench of the high court quashing the show-cause notice II is clearly untenable and is required to be set aside.

15 *Id.* at paras 22, 25, 26 & 29.

16 *Id.* at paras 36, 37 & 38.

Audi Alteram Partem

The Supreme Court in *Kanachur Islamic Education Trust* v. *Union of India,*[17] reiterated the importance of *audi alteram partem* as one of the most important principles of natural justice and observed that the affected parties should be given opportunity to meet case against him effectively and passing of just decision supported by the reasons is a part of fair hearing. Therefore, it is the duty of the adjudicator to endure fairness in procedure and action. Justice must not only be done but also manifestly appears to have been done.

Reasonable opportunity of hearing or right to 'fair hearing' casts a steadfast and sacrosanct obligation on the adjudicator to ensure fairness in procedure and action, so much so that any remiss or dereliction in connection therewith would be at the pain of invalidation of the decision eventually taken. Every executive authority empowered to take an administrative action having the potential of visiting any person with civil consequences must take care to ensure that justice is not only done but also manifestly appears to have been done.

On facts the court held that the materials submitted by the petitioner college were not fairly and consummately considered resulting in denial of fair hearing to Petitioner college especially in the light of earlier decision dated 1-8-2017.

Duty to give speaking order

The apex court in *J. Ashoka* v. *University of Agricultural Sciences,*[18] reiterated the duty of an administrative or quasi-judicial authority to record reasons for its orders or decisions and held that the reasons are links between materials on which conclusions are based and actual conclusions disclosing application of mind to subject matter of decision.

IV DELEGATED LEGISLATION

In *Bhuwalka Steel Industries Ltd.* v. *Union of India*[19] the main question was – whether section 3A(2)[20] of the Excise and Salt Act, 1944 and/or rule 5 the Hot Re-Rolling Steel Mills Annual Capacity Determination rules, 1997 (hereafter "rules of 1997") really create a legal fiction. The apex court, while answering this question explained the meaning of and also distinguished between the 'legal fiction' and 'presumption' and observed thus:[21]

> 38. There is a clear distinction in law between a legal fiction and presumption. "A distinction commonly taken between the fiction and the legal presumption runs something as follows: A fiction assumes

17 (2017) 15 SCC 702.

18 (2017) 2 SCC 609.

19 (2017) 5 SCC 598.

20 Introduced by the Finance Act 1997.

21 *Supra* note 19 at 615.

> something which is known to be false; a presumption (whether conclusive or rebuttable) assumes something which may possibly be true. This distinction is regarded as being reinforced, as it were, in the case of the rebuttable presumption because such a presumption assumes a fact which *probably* is true". "Presumptions are closely related to legal fictions… but they operate differently". "Fictions always conflict with reality, whereas presumptions may prove to be true". Legal fictions create an artificial state of affairs by a mandate of the legislature...
> 39. Whereas presumptions are rules of evidence for determining the existence or otherwise of certain facts in issue in a litigation.
> "Presumptions were inferences which the judges were directed to draw from certain states of facts in certain cases, and these presumptions were allowed a certain amount of weight in the scale of proof; such a presumption and such evidence amounted to full proof, such another to half full, and so on".

Further, the court reiterated a settled position of law that legal fictions can only be created by a competent legislative body but not by a subordinate law making body in the following words:[22]

> When a fiction is created by law, it is not open to anybody to plead or argue that the artificial state of facts created by law is not true, barring the only possible course if at all available is to question the constitutionality of the fiction. It is settled law that only sovereign legislative bodies can create legal fictions but not a subordinate law making body. Nothing is brought to our notice to say that a non-sovereign law making body cannot make a rule of evidence containing a presumption. In our opinion, Agricultural Market Committee is not an authority for the proposition that a presumption cannot be created by subordinate legislation.....
> ....35. Presumptions are of two kinds, rebuttable and irrebuttable. Normally any presumption is rebuttable unless the legislature creates an irrebuttable presumption. It is a different question – whether an irrebuttable presumption could be created by a non-sovereign law-making body? That question has not been argued before us and, therefore, we do not examine that proposition.

Finally the court while relying on *Consolidated Coffee Ltd.* v. *Coffee Board, Bangalore*[23] and *St. Aubyn* v. *Attorney-General*[24] decided that section 3A (2) of the

22 *Id. at* 615-616.
23 (1980) 3 SCC 358.
24 (1951) 2 All ER 473, 498.

1944 Act and rule 5 of the 1997 rules do not create legal fictions but create a rebuttable presumptions and held thus:[25]

> The words "shall be deemed to be" occurring in both section 3A(2) and Rule 5 appear to create a fiction. But in our opinion, on a true and proper construction (as rightly argued by the respondent) they do not create a legal fiction. In *Consolidated Coffee Ltd.* v. *Coffee Board, Bangalore*[26] it was held: that the word *"deemed"* is used a great deal in modern legislation in different senses and it is not that a deeming provision is every time made for the purpose of creating a fiction. A deeming provision might be made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail, but in each case it would be a question as to with what object the legislature has made such a deeming provision. In our opinion, section 3A (2) only embodies a rule of evidence which command the department to presume certain facts. Such presumptions are not unknown to law. section 114 of the Indian Evidence Act, 1872 enacts a rule of evidence which requires a court to presume the existence of any fact which the Court thinks likely to have happened regard being had to common course of natural events etc. The presumption created under rule 5 is similar to the one contained in illustration (d) to section 114 of the Evidence Act.

V JUDICIAL REVIEW

Nature and scope

It is a settled principle of law that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority.[27] This view has been reiterated by the apex court in *State of Jammu and Kashmir* v. *A.R. Zakki.*[28] It is not for the writ courts to consider the relative merits of the different political theories or economic policies. This court has the power to strike down a law on the ground of want of authority, but the court will not sit in appeal over the policy of parliament in enacting a law.[29] In *A.K. Roy* v. *Union of India*[30] it was held that no *mandamus* can be issued to enforce an

25 *Supra* note 19 at para 36, 37.

26 *Supra* note 23.

27 *Supreme Court Employees' Welfare Assn.* v. *Union of India,* (1989) 4 SCC 187.

28 1992 Supp (1) SCC 548.

29 *Rusom Cavasiee Cooper* v. *Union of India,* (1970) 1 SCC 248.

30 (1982) 1 SCC 271.

Act which has been passed by the legislature. The apex court dealt with a similar aspect recently in the case of *Census Commissioner* v. *R. Krishnamurthy.*[31] Following discussion from the said judgment is useful and worth a quote:[32]

> 25. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is arbitrary, it may invite the frown of article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner. (emphasis supplied)

In the survey year the Supreme Court in *M/s Mangalam Organics Ltd.* v. *Union of India*[33] reiterated the abovementioned position of law in the area of judicial review of exercise of discretionary power vested in an administrative authority and that:[34]

> Merely because conditions laid in the said provisions are satisfied, would not be a reason to necessarily issue such a notification. It is purely a policy matter. No doubt, the principle against arbitrariness has been extended to subordinate legislation as well. At the same time, the scope of judicial review in such cases is very limited. Where the statute vests a discretionary power in an administrative authority, the Court would not interfere with the exercise of such discretion unless it

31 (2015) 2 SCC 796.

32 *Ibid.*

33 (2017) 7 SCC 221.

34 *Id.* at *para* 39.

> is made with oblique end or extraneous purposes or upon extraneous considerations, or arbitrarily, without applying its mind to the relevant considerations, or where it is not guided by any norms which are relevant to the object to be achieved.

In this case an appeal was filed against the judgment of the high court rendered in the writ petition filed by the appellant, wherein the appellant wanted the high court to exercise its powers under article 226 of the Constitution of India and issue *mandamus* to the Central Government directing the Central Government to issue a notification under section 11C of the Central Excise Act, 1944 to the effect that duty payable by the appellant on goods manufactured by it shall not be paid.

The high court *vide* impugned judgment concluded that section 11-C of the Act grants a discretionary power to the government to issue or not to issue such a notification. The said provision does not mandate the government to necessarily issue such a notification and in the absence of any obligation on the part of the government in this behalf, the courts are precluded from giving any *mandamus* to the central government to exercise such a power and issue the notification.

While deciding the argument based on obligation of the government to issue such a notification is concerned, the court made a clear distinction between the duty to act in an administrative capacity and the power to exercise statutory function and held thus:[35]

> If a public authority is foisted with any duty to do an act and fails to discharge that function, mandamus can be issued to the said authority to perform its duty. However, that is done while exercising the power of judicial review of an administrative action. It is entirely different from judicial review of a legislative action. According to de Smith in *Judicial Review of Administrative Action*, the following legal consequences flow from the aforesaid distinction:
>
> (i) If an order is legislative in character, it has to be published in a certain manner, but it is not necessary if it is of an administrative nature.
>
> (ii) If an order is legislative in character, the court will not issue a writ of certiorari to quash it, but if an order is an administrative order and the authority was required to act judicially, the court can quash it by issuing a writ of certiorari.
>
> (iii) Generally, subordinate legislation cannot be held invalid for unreasonableness, unless its unreasonableness is evidence of mala fide or otherwise shows the abuse of power. But in case of unreasonable administrative order, the aggrieved party is entitled to a legal remedy.

35 *Id.* at paras 35 & 40.

> (iv) Only in most exceptional circumstances can legislative powers be sub- delegated, but administrative powers can be sub-delegated.
>
> (v) Duty to give reasons applies to administrative orders but not to legislate orders.

Finally the apex court upheld the impugned judgment of the high court and found to be bereft on any merit. While dismissing the appeal the court held thus:[36]

> Issuance of a notification under section 11-C of the Act is in the nature of subordinate legislation. Directing the Government to issue such a notification would amount to take a policy decision in a particular manner, which is impermissible. In the counter affidavit filed by the respondent, it is categorically mentioned that the policy of the Government is not to issue the notification under section 11-C of the Act when it benefits only a few assesses. It is mentioned that the specific policy of the Government is that when a large section of trade is affected and any relief is proposed to be given, a notification under section11-C of the Act is issued. When the reasons furnished by the Government in not exercising its power to issue notification under section 11-C of the Act are seen in this perspective, namely, such a notification, if issued, is going to benefit only two units, we find them to be valid and justified. As already pointed out above, it is impermissible for this Court to tinker with such policy decision more particularly when it is found that the decision is not irrational and is founded on valid considerations. It has also to be borne in mind that in the instant case the appellant has already paid the duty. Section 11-C contemplates those situations where duty is not paid. It does not cover the situation where duty is paid and that is to be refunded.

Exclusion of judicial review

In *Union of India* v. *M Selvakumar*[37] the appellants challenged the judgments of Madras High Court and Delhi High Court allowing the writ petitions filed by physically handicapped candidates (hereinafter "PH candidates") belonging to other backward classes (OBCs), claiming that they are entitled to avail 10 attempts instead of 7 attempts in the civil services examination. In their impugned judgments held that increasing number of attempts in respect of PH candidates in the general category from 4 to 7 and not increasing proportionally the attempts for PH candidates belonging to OBC category candidates is arbitrary. It was held that the Petitioner (Respondent in the present appeal) is further entitled to 3 more chances. The main challenge is on the ground that since the attempts for PH candidates belonging to general category have

36 *Ibid.*

37 (2017) 3 SCC 504.

been increased from 4 to 7, *w.e.f.* 2007 civil services examination, there should be a proportionate increase in attempts to be taken by PH candidates belonging to the OBC category.

At the outset the court declined to agree with the high court that there is discrimination between PH candidates of OBC category and physically handicapped candidates of general category. The reserved category candidate belonging to OBC are separately entitled for the benefit which flow from vertical reservation, and the horizontal reservation being different from vertical reservation, no discrimination can be found when PH candidates of both the above categories get equal chances i.e., 7 to appear in the examination.

Apex court relied on the decision of court in *NTR University of Health Sciences, Vijaywada* v. *G. Babu Rajendra Prasad*[38] wherein it was held that how and in what manner reservation is granted, should be made a policy matter of decision for state. Such a policy decision normally would not be challenged.

While allowing the appeal the apex court declined to subscribe to the view taken by the Madras High Court and Delhi High Court and held thus:[39]

> The horizontal reservation and relaxation for PH category candidates for civil services examination, is a matter of Governmental policy and the Government after considering the relevant materials have extended relaxation and concessions to the Physically Handicapped candidates belonging to the Reserved Category as well as General Category. It is not in the domain of the courts to embark upon an inquiry as to whether a particular public policy is wise and acceptable or whether better policy could be evolved. The Court can only interfere if the policy framed is absolutely capricious and non-informed by reasons, or totally arbitrary, offending the basic requirement of the article 14 of the Constitution. (emphasis supplied)

The present case is not a case of treating unequals as equal. It is a case of extending concessions and relaxations to the PH candidates belonging to general category as well as PH belonging to OBC category. PH category is a category in itself, a person who is physically handicapped, be it physically handicapped of a general category or OBC category, suffering from similar disability has to be treated alike in extending the relaxation and concessions, rightly noted the court in its judgment.

Doctrine of judicial restraint

Judicial restraint, a procedural or substantive approach to the exercise of judicial review. As a procedural doctrine, the principle of restraint urges judges to refrain from deciding legal issues, and especially constitutional ones, unless the decision is

38 (2003) 5 SCC 350.

39 *Ibid.*

necessary to the resolution of a concrete dispute between adverse parties. Exercise of power of judicial review would be called for if the approach is arbitrary or *malafide* or procedure adopted is meant to favour one. The decision making process should clearly show that the said *maladies* are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or sub serves the purpose for which the tender is floated, the court should follow the principle of restraint.[40] Technical evaluation or comparison by the court would be impermissible.

In *Consortium of Titagarh Firema Adler S.P.A. – Titagarh Wagons Ltd.* v. *Nagpur Metro Rail Corporation Ltd.,*[41] Nagpur Metro Rail Corporation Ltd., the 1st respondent herein, issued a notice inviting tender (hereinafter 'NIT') on 25.01.2016 for the work of design, manufacture, supply, testing, commissioning of 69 passenger rolling stock (Electrical Multiple Units) and training of personnel at Nagpur Metro Rail Project. The said project was funded by KfW Development Bank, Germany. As per the clause ITS 35.8 at all stages of bid evaluation and contract, award would have to be subject to no-objection from KfW Development Bank.

In response to the said NIT, three bidders submitted their bids. One was found technically disqualified and thus, only the appellant and the respondent No. 2 remained in contest. Upon opening of financial bid on 29.09.2016, it was found that the appellant had given a bid of Rs. 852 crores whereas the bid of the respondent No. 2 was Rs. 851 crores. The director level tender committee of the 1st respondent agreed with the report of the tender evaluation committee and recommended to accept the lowest offer of respondent No. 2 and the work order was to be issued after compliance of certain technical requirements. Before issue of work order, the appellant filed Writ Petition No. 5818 of 2016 before the High Court contending that respondent No. 2 was not technically qualified and, therefore, its financial bid could not have been opened.

The division bench of the high court rejected the contention to go into the legality or otherwise of clause 26 observing that the appellant had participated in the tender bid knowing very well that such a clause existed and it was not open to it to contend that the said clause is onerous and lacks transparency and, therefore, violative of article 14 of the Constitution; and it had challenged the same only after it is found that its financial bid was higher than that of respondent No. 2. It further observed that the matter would have been different had the appellant, immediately after the tender notice was published, challenged the said condition after NIT was issued. The high court placing reliance upon the decisions in *New Horizons Ltd.* v. *Union of India,*[42]

40 See, *Montecarlo Ltd.* v. *NTPC Ltd.*, (2016) 15 SCC 272; *Afcons Infrastructure Ltd.* v. *Nagpur Metro Rail Corporation Ltd.*, (2016) 16 SCC 818; *Tata Cellular* v. *Union of India*, (1994) 6 SCC 651; *Reliance Telecom Ltd.* v. *Union of India*, (2017) 4 SCC 269.

41 (2017) 7 SCC 486.

42 (1995) 1 SCC 478.

Tata Cellular v. *Union of India,*[43] *Central Coalfields Ltd.* v. *SLL-SML (Joint Venture Consortium)*[44] and *Afcons Infrastructure Ltd.* v. *Nagpur Metro Rail Corporation Ltd*.[45] dismissed the writ petition. After perusing the entire documents on record, the high court came to hold that:[46]

> It is to be noted that the tender evaluation committee consists of Chief Project Manager/RS, General Manager/Procurement, Chief Project Manager/Signalling and the General Manager/Finance. The said committee has evaluated the documents with regard to the technical qualification of the petitioner as well as respondent no. 2. It could thus be seen that the perusal of the document placed on record would reveal that the decision making process of the technical evaluation committee has been guided by the relevant factors and it cannot be said that they have not taken into consideration any of the relevant factors. We are, therefore, of the considered view that the decision of the technical evaluation committee would fall within the ambit of 'rationality'.

Thereafter, the high court referred to the authorities mentioned herein before and appreciated the principles stated therein and eventually dismissed the writ petition. Aggrieved by the decision of the high court, the appellant filed an appeal before the Supreme Court.

In the appeal before the apex court the core issue pertained to acceptance of the technical bid of the respondent no. 2 by the 1st respondent and the court ventured on to address the same solely on the touchstone of eligibility criteria regard being had to the essential conditions. The court further left the decision on other technical aspects, to the experts.

The court by following the doctrine of restraint declared the appeal to be without any merit and declined to interfere with the impugned judgment of the high court, held thus:

> As is noticeable, there is material on record that the respondent no. 2, a Government company, is the owner of the subsidiaries companies and subsidiaries companies have experience. The 1st respondent, as it appears, has applied its commercial wisdom in the understanding and interpretation which has been given the concurrence by the concerned committee and the financing bank. We are disposed to think that the concept of "Government-owned entity" cannot be conferred a narrow construction. It would include its subsidiaries subject to the satisfaction of the owner. There need not be a formation of a joint venture or a

43 *Supra* note 40.
44 (2016) 8 SCC 622.
45 *Supra* note 40.
46 *Ibid.*

> consortium. In the obtaining fact situation, the interpretation placed by the 1st respondent in the absence of any kind of perversity, bias or mala fide should not be interfered with in exercise of power of judicial review. Decision taken by the 1st respondent, as is perceptible, is keeping in view the commercial wisdom and the expertise and it is no way against the public interest. Therefore, we concur with the view expressed by the High Court. Resultantly, the appeals are dismissed.

While deciding the appeal the court dealt with nature and scope of power of judicial review of administrative decisions by constitutional courts in cases where the decision relating to award of contract is *bona fide* and is in public interest and a procedural aberration or error in assessment or prejudice to a tenderer, is made out and quoted with approval several judicial decisions.

In *Montecarlo Ltd.* v. *NTPC Ltd,*[47] the court referred to *TATA Cellular* v. *Union of India*[48] wherein certain principles, namely, the modern trend pointing to judicial restraint on administrative action; the role of the court is only to review the manner in which the decision has been taken; the lack of expertise on the part of the court to correct the administrative decision; the conferment of freedom of contract on the government which recognizes a fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere, were laid down. It was also stated in the said case that the administrative decision must not only be tested by the application of *Wednesbury* principle of reasonableness but also must be free from arbitrariness not affected by bias or actuated by *mala fides.* The court quoted a passage from *Afcons Infrastructure Ltd.* v. *Nagpur Metro Rail Corporation Ltd.*[49] wherein the principle that interpretation placed to appreciate the tender requirements and to interpret the documents by owner or employer unless *mala fide* or perverse in understanding or appreciation is reflected, the constitutional courts should not interfere. It has also been observed in the said case that it is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given. After referring to the said authority, it has been ruled thus:[50]

> We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive

47 *Supra* note 40.

48 *Ibid.*

49 *Ibid.*

50 (2016) 15 SCC 272.

> commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or *malafide* or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or sub-serves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.

In *Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) rep. by its Chairman & Managing Director* v. *CSEPDI-Trishe Consortium, rep. by its Managing Director,*[51] the court, after referring to *Jagdish Mandal* v. *State of Orissa*[52] and taking note of the complex fiscal evaluation and other aspects, held:[53]

> At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder

51 (2017) 4 SCC 318.

52 (2007) 14 SCC 517.

53 *Supra* note 51 at 319-320.

> and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant's assessment. Suffice it to say, it is neither *ex facie* erroneous nor can we perceive as flawed for being perverse or absurd.

In *Reliance Telecom Ltd.* v. *Union of India*[54] the court referred to the authority in *Asia Foundation & Construction Ltd.* v. *Trafalgar House Construction (I) Ltd.,*[55] wherein it has been observed that though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. Thereafter, the court in *Reliance Telecom Ltd*.[56] proceeded to state thus:

> In the instant case, we are unable to perceive any arbitrariness or favouritism or exercise of power for any collateral purpose in the NIA. In the absence of the same, to exercise the power of judicial review is not warranted. In the case at hand, we think, it is a prudent decision once there is increase of revenue and expansion of the range of service. It needs to be stressed that in the matters relating to complex auction procedure having enormous financial ramification, interference by the Courts based upon any perception which is thought to be wise or assumed to be fair can lead to a situation which is not warrantable and may have unforeseen adverse impact. It may have the effect potentiality of creating a situation of fiscal imbalance. In our view, interference in such auction should be on the ground of stricter scrutiny when the decision making process commencing from NIA till the end smacks of obnoxious arbitrariness or any extraneous consideration which is perceivable.

VI CONCLUSION

During the period under survey, the Indian judiciary has not deviated from the settled principle of administrative law. It has retreated that an administrative order is passed in exercise of a statutory power on certain grounds, its validity must be judged by the reasons mentioned in the order and such reasons cannot be supplemented by other reasons through an affidavit or otherwise. Were this not so, an order otherwise bad in law at the very outset may get validated through additional grounds later brought

54 *Supra* note 40.

55 (1997) 1 SCC 738.

56 *Supra* note 54 at 317.

out in the form of an affidavit.[57] The perusal of the foregoing survey reveals the judicial decisions are important miles stone towards the goals of attaining safeguards to the individuals against abuse of powers of the state. The study reveals that the apex court is quite active in responding to the demand made upon. It is quite vigilant in protecting individual liberty without, at the same time, unduly hampering the task of the government in establishing welfare state.[58]

57 *Supra* note. 5.
58 *Supra* note. 4