

ALL INDIA REPORTER

INDIA'S PREMIER MONTHLY LAW JOURNAL SINCE 1914

MAY 2015

VOL. 102 - PART 1217

Founder

Late Shri V. V. Chitaley

Chief Editor

V. R. Manohar, Advocate

IMPORTANT DECISIONS

- While computing period of 90 days for release of accused on statutory bail, date on which accused was remanded to judicial custody is to be excluded
1294 (SC)
- Classification of subscribers into two categories on basis of calls made by them from private network to another private network and from private network to BSNL/MTNL is arbitrary
1297 (SC)
- Expression "soon before her death" in S. 304B, Penal Code is not synonymous with "immediately before". Demand for dowry should not be stale but should be continuing cause for death of married woman
1359 (SC)
- Person can be accorded Scheduled Caste status on his reconversion to Hinduism if accepted by community
1402 (SC)
- Service Rule providing that contracting of another marriage during existence of first marriage without permission of Govt., would amount to service misconduct is not violative of Art. 25 of Constitution
1429 (SC)
- Increasing trade refuse charges by 10% every year without guidelines and irrespective of nature of business is arbitrary
1434 (SC)

(contd. on Cover Page 2)



AIR LAW ACADEMY
& RESEARCH CENTRE



AIR INFOTECH



AIR CAFE



airwebworld



AIR INFOTECH SERVICES (P) LTD.



AIR
ACTIVE CLUB

EMERGING DOCTRINES IN ADMINISTRATIVE LAW: A STUDY

By : Prof. (Dr.) Mukund Sarda, Dean & Principal, New Law College, Bharati Vidyapeet, Pune.

In a democratic set-up committed to rule of law and E-governance to cope with the necessity of dealing with various types of demands in the context of a Welfare State, the administrative agencies have to meet several challenges in resolving many issues that crop up in the daily routine of discharge of varied functions. There is a growing criticism that the administrative agencies have become not responsive to various types of public issues. The judiciary, in the exercise of powers of judicial review coupled with judicial activism have been able to create a set of doctrines highly useful in increasing the efficiency of such agencies and to attain a high degree of 'quality administrative justice' to people. These developments may be summarized thus:

(1) In the sphere of imposition of penalties and punishments in a variety of cases, including disciplinary proceedings, the administrative authorities exercised a wide range of powers to inflict penalties etc., as they "deemed fit". Factually, it resulted in violation of Art. 20(1)¹ of the Constitution. In many cases, the punishments awarded were challenged on the grounds of fairness and violation of principles of natural justice. This obviously resulted in the consideration of two vital issues such as :

- i) The magnitude of the act or misconduct committed; and
- ii) the penalties inflicted being questioned as arbitrary, unfair and disproportionate.

Bentham in his 'theory of legislation'² advocated that the offences and punishments must be proportionate and inadequate punishments must be avoided. In dealing with such cases, the judiciary laid down the 'doctrine of proportionality' which effectively controlled the discretionary power of the administration in the imposition of punishments. The exercise of power of judicial review, courts scrutinized the punishments on the grounds of 'illegality', 'irrationality' and 'impropriety'.³ This involved relative importance

to be given to various factors of the case. This resulted in evolving a principle that more drastic measures were to be avoided and 'just measures' to be adopted to achieve the purpose for which the punishment is provided. In other words, punishment must balance with the delinquencies and in no case be excessive. If the administrative authorities have the choice of either imposing more drastic provisions and less drastic ones, it may adversely effect the rule of law by the exercise of arbitrary powers to be exercised at their own 'whim and fancy', in applying whichever provision it thinks fit. Thus, the resultant effect would be 'rule of law' replaced by 'rule of men'. In Dr. D.S.Reddi's case (1967-68) the Supreme Court struck down the more drastic provision and upheld the less drastic.⁴ The Government servant conduct rules which provides for departmental enquiry and imposition of penalties/punishments appear to be 'ex facie' illegal merely because the enquiry is based on major or minor penalties criteria, and not on the basis of charges against the delinquent. It is the offence which should prescribe the punishment for it, and not the punishment to decide the offence. It is like putting the cart before the horse. Hence, the conduct rules require re-drafting. The punishment imposed must suit "the offence and the offender".⁵

(2) Another doctrine evolved by the Judiciary in the realm of Administrative law is the "Doctrine of legitimate expectations". It may be considered as the "latest recruit to a long list of concepts fashioned by the courts for the review of administrative actions."⁶ This doctrine deals with

also Re Coimbatore Dist., Central Co-op Bank, AIR 2007 SC (Supp) 1323.

4. The Osmania University Amendment Act inserted two provisions. One provided for cessation of office of Vice-Chancellor after 90 days of the Amendment Act coming into force and the other provided for dismissal/removal after enquiry into allegations and the charges being proved in an enquiry. The provision of cessation of office after 90 days of the Amendment Act coming into force was struck down as more drastic.

5. In Re Ranjit Thakur, AIR 1987 SCP 2386.

6. See C.K.Takwani, "Lectures on Administrative Law" 5th Edition 2012 P.337.

1. Art. 20(1) dealt with rule against excessive punishments.

2. See for details Bentham, 'the Theory of legislation' Chapter 'Principles of Penal legislation'

3. Per Lord Diplock in Re Council of Civil Services Union (1984)3 All ER P935 (HL). See

expectations of a person to be treated, in the absence of any 'legal right', in a particular way by administrative agencies, as the individual concerned can expect to receive the benefits or privileges. Such an obligation on the part of an administrative authority may arise from a promise or regular practice which he expects to continue and whenever denied, the affected party may invoke the power of the court to protect such expectations on the principles of natural justice and fair play and the courts may require the "authorities to act fairly". The doctrine of legitimate expectations rests on four principles:

i) Good administration should observe this doctrine when citizens require the administration to act fairly and reasonably;⁷

ii) Principles of natural justice require the administrative authorities to act reasonably and fairly;

iii) The right to be heard to be given by the authority concerned to the affected party;⁸ and

iv) The doctrine of rule of law which requires that all citizens to be treated fairly and equally and the action of the State should be in conformity with the concept of equality as guaranteed under Art. 14 of the Constitution of India⁹.

In a case, where the foreigners were allowed to stay for a limited period, permission was refused to stay, within the said period and the issue came up before the court of appeal. Based on the doctrine of legitimate expectation,¹⁰ the court held that despite the fact that the foreigners had no right for extension, the revocation would be contrary to the legitimate expectation.¹¹ In other words decisions affecting such legitimate expectations become subject to review.¹²

The following principles were drawn from the application of the doctrine of legitimate expectation:-¹³

7. O'Reilly v. Mackman (1983) 2 ACP 237

8. Wade "Administrative Law", 2009 P 446-447.

9. V.G. Ramachandran, 'Law of Writs', Vol. II P. 1310. See also the decision in Re Food Corporation of India, AIR 1993 SC P 1601.

10. This doctrine was first recognized in Re Schmidt (1969) 1 All ER 904 (CA).

11. Asif Mahmood Khan (1985) 1 All ER 40 (CA) reiterating the earlier law laid down in Re Schmidt (See Note 10).

12. Madras City Urea Merchants Association v. State of TN (1994) 5 SCC P 509 : 1994 AIR SCW 3915.

13. Ibid.

i) Hearing before a decision is taken gives rise to the legitimate expectation that a hearing will be given. This can also be supported by the principle of 'Audi Alteram Partem' (hear before you decide). This can arise out of a promise made that hearing will be given;

ii) Consultation with affected interests before a decision-making by authorities may give rise to an expectation that they could be consulted. This is also a democratic practice, that any order which affects a party shall be made only after the concerned party/parties are consulted. This is also a practice adopted in the exercise of 'delegated legislation,' that rules affecting a section of people shall be made only after such consultation;

iii) Any benefit or advantage conferred on the people shall not be taken away without giving an opportunity of hearing to the people concerned. In fact, it is also the practice established in administration that withdrawal of such benefit in cases shall not affect the existing person who enjoy the benefit but shall be given effect to in future cases. For example existing pensioners on the cut-off date were declared entitled to continuation of pensionary benefits but shall effect persons who are recruited after the cut-off date. In matters like deprivation of livelihood, it was held that one cannot be deprived without hearing.¹⁴ One of the limitation in the application of the doctrine of legitimate expectation, that it cannot override a Statute or the performance of a statutory duty, and there is a promised procedure¹⁵ by the authority shall be followed. Such a step would create credibility in the Government and retains people's faith in the administration. It follows that when the decision-maker takes a particular decision, which runs counter to the doctrine of legitimate expectation, he must justify some overriding public interest¹⁶ for the denial.

(3) Needed Doctrines

In the context of a developing State with emphasis that the administrative authorities act as instruments of justice as well as an instrument of public service, there is a need for recognizing some more doctrines to make administrative agencies effective and promote a system of Govern-

14. Per Lord Denning in G Breen v. Amalgamated Engineering Union (1971) 1 All ER P 1148.

15. In Re Ng Yuen Shiu (1983) 2 AC 629.

16. (2005) 2 SCC P 625.

ment which only acts to maintain maximum happiness of the maximum number of people. The happiness of the Government depends on the happiness of the people. The new doctrines which are the prime need of the hour can be mentioned thus:

i) Doctrine of giving appointment to the people by administration :—

Citizens having many complaints against administration and grievances, seek appointments with administrative officers or other administrative agencies. It has been the experience of the citizens that the appointments are either not given or delayed for a longer periods, as a result they suffer irreparably and put to untold misery and agony. Thus, this doctrine proposed can lay down that the appointments shall be given at the earliest point of time. Having the appointment fixed on a particular date and time, if the officer concerned is neither unavailable nor free to honour the appointments on the ground that he is otherwise busy with meetings or other engagements, the citizens concerned who come from far places spending money on travel and incur other expenses for stay and boarding are put to considerable loss of money and go with deep sense of disappointment and frustration. This doctrine must provide that, "no officer shall excuse himself from the appointments given to public and in case of unavailability due to other unavoidable work, he shall intimate 3 days in advance of the postponement of the appointment to the concerned party and give at the earliest possible date the appointment, and hear the grievances and do administrative justice of high order". In the event of failure to do so, the officer concerned shall be liable to pay compensation for the loss and consequential expenses incurred by the person concerned. Such compensation claims be settled on the spot on the date of appointment by the Department concerned and the compensation paid by the Department be recovered from the salary of the officer concerned. Every Government Department shall endeavor to render administrative justice as expeditiously as possible. Such measures will not only satisfy the members of the public but also reduce the bulk of litigation before courts etc., for instance if the claim submitted by a citizen is inordinately delayed, the officer concerned may arrange payment on the date of appointment to the person concerned so that the need to approach courts etc., does not arise.

ii) Doctrine of procurement of materials for Government use by administration :—

Several instances have occurred where malpractices were resorted to in the purchase of materials for use by Government departments by violation of rules or resorting to illegal or improper methods in procurement. This has given rise to scams, kick-backs and also led to enormous amount of black-money. The Government of India introduced a bill¹⁷ to deal with procurement. For reasons best known to the then Government there was delay in enacting the Bill into law. The need for the doctrine of procurement of materials for Government use by administration should now lay down that the provisions of the Bill be treated as binding code of conduct, in making purchases and any officer violating the code shall be liable for punishment as may be prescribed.

The Bill must be enacted into a Statute without any further delay and public procurement should not result in scams and there must be absolute honesty in procuring. Strict enforcement of law is necessary to avoid loss to public money and accountability on the part of the official to be ensured.

iii) Doctrine of avoidance of wastage of food and austerity in public spending :—

It has been noticed that several meetings of the Government are arranged in Five Star Hotels and food is wasted and huge expenditure is incurred in making food arrangements. In this context, the recent decision of the Government of India, that such meetings shall not be held in Five Star Hotels and absolute austerity should be observed in spending needs welcome. Any officer violating the procedure shall be made liable for the loss caused to the Government. It may also be necessary to limit the number of delegates to be invited for the meeting and the food ordered to be served shall be subject to such items as may be prescribed. Guest control order may be required to be made to provide for the following :—

- 1) The number of persons to be invited; and
- 2) The items of food to be ordered.

If necessary, prior approval for conducting the meeting should be obtained from the Head of

17. The Bill is known as "The Public Procurement Bill 2012 and provides for basic norms of public procurement and code of integrity for procuring entity and bidders.

Department concerned, who shall determine various issues relating to meetings, conferences etc., limiting the expenditure and food items to be provided.

In course of time, it may also be made applicable for private individuals as in a Country suffering from poverty, there should be no wastage of foods.

iv) Doctrine of Gandhiji concept of Swatch Bharath :—

It is a welcome decision of the Union Government to observe Gandhiji's birthday as "Swatch Bharath" day and Prime-Minister inaugurating the event by sweeping the public road. It is necessary that absolute cleanliness shall be maintained in domestic as well as in public places. Cleanliness is next to Godliness and also diseaselessness. Health hazards can be avoided by cleanliness all over.

There is a need for constitutional amendment to provide a new Directive Principle of State Policy (Chapter IV) to the following effect.

"The State shall endeavour to promote and develop the concept of Swatch Bharath on Gandhian lines and it shall be implemented by appropriate measures by all Government officials or authorities and failure to do so shall be punishable by law as may be prescribed".

A new fundamental duty needs to be provided for, by a suitable amendment to the Constitution in the following terms:

"Every citizen shall be under a duty to maintain and develop "Swatch Bharat" as may be provided and they shall also be under a duty to assist the public authorities in measures relating to 'Swatch Bharath' and a failure to do so or render the duty shall be punishable by law as may be prescribed".

Suitable awards or prizes be given to the best institution/citizen who has maintained and developed the concept of Gandhiji's Swatch Bharath.

v) Doctrine of moral Code of Conduct relating to bigamy, smoking, drinking etc. :—

It has been noticed that some of the Government employees were found resorting to bigamy or illicit sexual relationships, smoking, drinking and consumption of narcotic drugs etc. This has caused considerable suffering and agony to the members of the family and dependents and also caused serious problems in the execution of pub-

lic duties, such as abusing the subordinates, using improper language and bad behavior with the public who visit the Government offices. Thus, the need for the doctrine of moral Code of Conduct relating to bigamy, smoking, intoxication etc., has become necessary. The code may provide thus:

"No public servant shall resort to bigamy, illicit sexual relationship, smoking or consumption of liquor or Narcotic drugs".

The violation of this shall result in dismissal of the public servant and in order to provide social security a member of the family may be given a compassionate appointment as the Government may consider fit. Bigamy has already been provided in the conduct rules.

vi) Doctrine of commitment to domestic obligations :—

It has been observed that in some cases of public servants that they spend their income on several illegal activities and the family members suffer from poverty and other types of agony, pain and torture.

The arguments of the public servants in such cases is that it relates to their right of privacy and no one should interfere in such matters. Protecting family interests and social security should take priority and it should override considerations of 'right of privacy'. The children of such public servants constitute human resource and it should not be destroyed. Gradually it can be extended and made applicable to private individuals as well.

vii) Doctrine of financial accountability in matters of raising loans and borrowings :—

It has been found that public servants raise loans for purposes not required and spend lavishly and being unable to repay, either abscond or commit suicide. There should be a specific provision particularly for public servants that borrowings must be for legitimate purposes and shall be limited to their repaying capacity. If such limitations are not there, the public servant concerned will be acting in a manner unbecoming of a Government servant and cause suffering to their family members. Committing suicide is going to create more problems and a family may become orphan in such cases.

The rule may provide thus:

"No public servant shall borrow money except for legitimate purposes and avoid getting into indebtedness without the capacity to repay".

