ADMINISTRATIVE DISCRETION AND ITS AMENABILITY TO JUDICIAL REVIEW

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I. Introduction

The development of the concept of welfare state has led to rise in and diversification of government functions. Consequently, the functions of government have turned even more complex. To perform the government functions, the administrative authorities have acquired vast discretionary powers. This has led to the advent of administrative discretion.

On the one hand, this freedom given to the administrative authorities leads to the effective functioning of the state, as such the administrative discretion allows the administrative authorities to use their professional expertise while performing official duties, while on the other hand, the absolute freedom to administrative authorities may also put limitations on the people's freedom in case if such discretion is abused.

The probability of abuse of discretion necessitates formulation of guidelines and policies within which administrative authorities shall exercise its discretion, because the complete freedom to administrative authorities would result in arbitrariness which will threat the individual's liberty. The discretionary powers are thus subject to the limitation prescribed by the law; however, in case of absence of control mechanism, the judiciary has greater responsibility to keep a check upon the actions of administrative authorities.

II. Meaning of Administrative Discretion

Administrative discretion means freedom of choice and of action which is used by administrative authorities in their functions. Administrative discretion intends to give a choice on an issue with different options accessible and the decisions should be based on reasoning and within limits. The administrative discretion must not be relating to personal views, beliefs and beyond limits.

According to *Black's Law Dictionary*[2], Administrative discretion means, "A public official's or agency's power to exercise judgment in the discharge of its duties."

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[2] Bryan A. Garner (ed.), *Black's Law Dictionary* 534 (Thomson Reuters, 9th ed., 2010).

Ernest Freund[3] has given a very good definition of administrative discretion and he defined administrative discretion as:

> "*When we speak of administrative discretion, we mean that a determination may be reached, in part at least, upon the basis of consideration not entirely susceptible of proof or disproof...it may be practically convenient to say that discretion includes the case in which the ascertainment of fact is legitimately left to administrative determination.*"

Lord Diplock in Se*cretary of State for Education and Science* v. *Tameside Metropolitan Borough Council*[4] said:

> "*The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred*."

Thus, accordingly the decisions taken by the administrative authorities are in accordance with the policy of the government and in exercise of their discretionary powers.

III. Judicial Review of Administrative Discretion

Judicial review is a power exercised by the courts to review the legislative or executive actions. Lord Diplock[5] has succinctly defined the ambit of the judicial review in the following words:

> "*The subject matter of every judicial review is decision made by some person (or body of persons) whom I will call the decision-maker or else a refusal by him to make a decision.*"

The administrative authorities have discretion to act or not to act in one way or the other. It has now become a mandate to confer the administrative authorities with vast discretionary powers. The conferments of wide discretionary powers to the administrative authorities have certain limitations *viz.* the administrative authorities should exercise their power according to the procedure established by law.

[3] Ernest Fruend, *Administrative Powers over Powers and Property: A Comparative Survey* 71 (University of Chicago Press, Chicago, Illinois, 1928).
[4] (1977) AC 1014.
[5] Lord Diplock's formal statement on judicial review in H.W.R Wade and C. F. Forsyth, *Administrative Law* 831 (Oxford, 2009).

It is however also true that in case the absolute powers are given to the administrative authorities, it will lead to the arbitrariness, hence certain measures are required to control the administrative discretion. Thus, there arises the need to have control over discretionary powers of the administrative authorities to ensure that there will be a government of laws and not of men.[6] The judiciary is always concerned to look into the patently arbitrary and perverse administrative orders, which are subject to the scrutiny. In such a case the judicial review is one of sharpest weapon in the hands of judiciary. In *L. Chandra Kumar* v. *Union of India*[7], the Apex court held:

> "*Judicial review is certainly an omnipotent weapon in the hands of judiciary to restrain administrative authority from abusing or misusing its power and provide just and fair treatment to the common man in the spirit of law.*"

The judicial review is based on the fact that "wider the discretion more is the possibility of its misuse". Thus, "wider the power, the greater is need for the restraint in its exercise."[8]

With regard to the purpose of judicial review the Supreme Court in *B. C. Chaturvedi* v. *Union of India*[9], has laid down that:

> "*The very purpose of judicial review is to find out and determine whether the inquiry was held by competent person; whether the rules of natural justice were complied with; whether findings were based on evidence; whether the administrative authority has jurisdiction to take such decisions.*"

IV. Principle Grounds for Judicial Review of Administrative Discretion

Over the period of time, the courts on various circumstances have noticed the arbitrariness in the decisions taken by the administrative authorities under the garb of administrative discretion, and thus the courts have rightly intervened those decisions and reviewed the same.

Following are the principle grounds where the courts have intervened and reviewed the administrative decisions.

[6] *P. N. Duda* v. *V. P. Shiv Shankar* (1988) 3 SCC 167.
[7] AIR 1997 SC 1125.
[8] *Ranjit Thakur* v. *Union of India* (1987) 4 SCC 611.
[9] (1995) 6 SCC 749.

1. **Ultra-vires**

It states that administrative authority can perform those acts only which they are statutorily authorized to do so. In case, while making any decision, the administrative authority exceeds its statutory limitation, the court can strike down that decision.

It was held in the *State of Rajasthan* v. *A. K. Dutt*[10] that, "the doctrine of ultra-vires is called as the centre principle of the administrative law. It restricts a public authority from acting outside its powers."

The Apex Court has ruled in *Khoday Distillaries Ltd*. v. *State of Karnataka*[11] that, "the act of the administrative authority can be struck down if it is manifestly unreasonable and arbitrary."

2. **Mala Fides**

At many circumstances, the courts have found that the administrative discretion was exercised malafidely for wrongful gain. The term '*mala fide*' means 'in bad faith'. In common term, the '*mala fide*' may be defined as an act of fraudulently deceiving someone.

It is a settled norm that administrative authority must not exercise its discretionary power malafidely. Every action of administrative authority is expected to be with proper reasoning and in good faith. On the other hand, it is also the duty of the court to ensure that the administrative authority is exercising its power properly. Any decision of administrative authority on the basis of bad faith is thus open to judicial review.

In *Jaichand* v. *State of West Bengal*[12] the Supreme Court observed that, "*mala fide* exercise of power is an abuse of power. Even though it may be difficult to determine whether or not the authority has exceeded its powers in a particular case because of the broad terms in which the statute may have conferred power on it. The discretionary action may, nevertheless, be declared bad if the motivation behind it is honest. Thus, the *mala fide* exercise of power is invalid."

[10] AIR 1981 SC 20.
[11] (1996) 10 SCC 304.
[12] AIR 1967 SC 483.

3. Malice

Any act done with ill intention is malice. Malice is categorized in malice in fact and malice in law.

Malice in fact is an act performed with ill intention towards an individual. In *Shearer* v. *Shields*[13], Malice in fact means "an actual malicious intention on the part of the person who has done the wrongful act, and it may be, in proceedings, based on wrongs independent of contract, a very material ingredient in the question of whether a valid cause of action can be stated." In other words, malice in fact means an act committed due to personal spite corrupt motive or malicious intention.

Malice in law means "an act done wrongfully and willfully without reasonable and probable cause, and not necessarily an act done from ill feeling and spite." The Supreme Court has defined malice in law in *Venkataraman* v. *Union of India*[14] in the following words, "Malice in its legal sense malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse or for want of reasonable or probable care."

The administrative authority while taking any decision should take due care that it is not on the basis of malice, and in any case if malice is present, it can be vitiated by the court.

4. Bias

The term bias means the unfair inclination for some person or group. It may also be termed as one-sided leaning of mind. In any case, if there is biasness in taking administrative decisions, it is open to judicial review.

In *Gullapalli Nageswara Rao* v. *Andhra Pradesh State Road Transport Corporation*[15], the Supreme Court held that "Where the deciding officer is directly or otherwise involved in the subject matter of the case, involvement of deciding officer may be a ground to vitiate the administrative action if there was a real likelihood of bias."

5. Abuse of Power

At many circumstances the administrative authority can be seen to be abusing their powers. The abuse of power is defined under the following heads:

[13] (1914) AC 808.
[14] AIR 1979 SC 49.
[15] AIR 1959 SC 308.

a) Improper Purpose

Improper purpose is a purpose which lies outside the scope and purpose of the enabling statute. The Supreme Court in *State of Mysore* v. *P. R. Kulkarni*[16] held that "It is well settled principle that power conferred on the administrative authority must be exercised for the purpose for which they were granted."

In another case of *Bangalore Medical Trust* v. *Muddappa*[17], a piece of land allotted at the instance of the then Chief Minister to a private trust for construction of a nursing home which was originally marked for public park. The Supreme Court held that, "though the allotment was made in public interest but the discretion exercised by the office of the Chief Minister was contrary to the power conferred upon them by the statute."

In such cases, the courts insist that the administrative authority is not free to exercise its power as it likes and that the power should be exercised only to achieve the purpose related to the object of the statute, and where the purpose is not expressly mentioned, the courts would interpret the statute to ascertain the purposes for which power has been conferred.

b) Irrelevant Consideration

The power conferred upon an administrative authority is based on consideration which is relevant for the purpose conferred, however, in any case if the authority concerned considers irrelevant events; the administrative decisions are liable to be challenged.

In *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[18], (popularly known as *Wednesbury Principle*), Lord Greene, M.R. laid down that an authority exercising discretion must:-

(i) Take all factors into account;

(ii) Exclude all irrelevant factors from its consideration;

(iii) Reach the decision which is neither perverse nor irrational.

[16] (1973) 3 SCC 597.
[17] (1991) 4 SCC 54.
[18] (1947) 2 All ER 680 (CA).

The '*Wednesbury Principle*'[19] is now a common and convenient label indicating the special standard of unreasonableness which has become the criterion for judicial review of administrative discretion.

A decision is unreasonable when an authority has taken a decision which it was not supposed to be taken reasonably. However, this is different from the 'reasonable man's test' in torts. In administrative law, 'reasonableness' is the standard indicated by the true construction of the act which distinguishes between what the statutory authority may or may not be authorized to do. It distinguishes between the proper and improper use of power. Therefore, an action of the administrative authority will be considered reasonable if it directs itself properly in law; considers the matter which it is bound to consider; excludes irrelevant considerations and there must not be anything so absurd that no sensible man could ever dream that it lay within the powers of the authority.[20]

It is now well settled that "while exercising its discretionary powers, the authority must apply its mind to relevant material and exclude from consideration the matter which is irrelevant and not germane to the object."[21]

c) Errors of Law

The court can review any administrative decision where there has been an apparent error of law. "The error on the face of record means the decision has been made wrongly in law."[22]

In *Bijli Cotton Mills Private Ltd.* v. *Presiding Officer, Industrial Tribunal*[23], the Supreme Court while fixing the ambit of error stated that "the error should be gross and palpable having resulted in failure of justice."

d) Unauthorized Delegation

It is a general rule that discretionary powers can only be exercised by those administrative authorities to whom it is delegated. The unauthorized delegation is a ground for judicial review. It is pertinent to mention that the administrative authorities are themselves the delegates of

[19] *Ibid.*
[20] I.P. Massey, *Administrative Law* 131 (Eastern Book Company, Lucknow, 2005).
[21] *State of Bombay* v. *K. P. Krishnan and Others* AIR 1960 SC 1223.
[22] *Perilly* v. *Town Hamlets Borough Council* (1973) QB 9.
[23] (1972) 1 SCC 840.

legislators i.e., there is already a delegation of powers and any sub-delegation has no legal authenticity unless provided expressly by statute.

It was held in *State* v. *Hyder Ali*[24], "a delegate cannot further delegate the power, unless expressly provided in the statues."

6. Colourable Exercise of Power

An authority under the colour and guise of power conferred for one purpose seeks to achieve some other purpose, which it is not authorized to do under the law in question. On the face of it, it does not look like a separate ground for judicial review of administrative discretion and appears to be covered by improper purpose.[25]

In *Rajendra Kumar Gupta* v. *State of U.P*[26], an order requisitioning the land of a person under Section 23 of the Defence and Internal Security Act, 1971 was passed during the emergency. The order continued in effect even after the parent Act had already ceased to operate and emergency withdrawn two decades earlier. Section 23 did not provide for requisitioning of immovable property for an indefinite period. The Supreme Court held that "such requisition virtually amounted to acquisition by colourable exercise of power and quashed the order."

At present, the term 'colourable exercise of power' does not seem to be a distinct and identifiable ground of invalidity but seems to be more as merely a colourful way of denoting the already recognised grounds for invalidating decision. However, the principle may not be discarded for its vagueness. As judicial control of discretion is an expanding area, the term 'colourable exercise of power' may be retained to possibly catch some residuary ground or flaw or abuse of power which may not be covered by any other grounds.[27]

7. Fettering of Discretion

The administrative authority who has been conferred with certain discretionary powers shall apply it case to case and it should not fetter its discretionary powers uniformly in all cases. In any case if the administrative authorities applies a general rule for each case, without considering

[24] AIR 1957 MP 179.
[25] M.P. Jain and S.N. Jain, *Principles of Administrative Law* 1146 (Wadhwa, Nagpur, 2007).
[26] (1997) 1 SCR 1056.
[27] *Supra* note 25 at 1148.

the facts of each case, the order passed under such circumstances may be declared bad, and it is a ground for judicial review.

The Bombay High Court has rightly observed in *Gell* v. *Teja Noora*[28] that, "the order passed by the commissioner of police with regard to the issuance of license was bad in law as the commissioner fettered his discretion instead of exercising his discretion with regard to the fact of the case."

8. Misdirection of Fact and Law

The administrative discretion is vitiated if the administrative authority is misdirected as to the law, or if he misconstrues the limits imposed by the law on the scope of the power. The administrative authority must understand the law correctly.

Ignorance of an established and relevant fact can be a ground for judicial review. When discretionary powers are entrusted to the executive by statute, the courts can examine the use of those powers so as to see that they are "used properly, and not improperly or mistakenly". 'Mistakenly' means "under the influence of misdirection in fact or in law."[29] The Supreme Court in *M.A. Rasheed* v. *State of Kerala*[30] observed:

> "*Where powers are conferred on public authorities to exercise the same when 'they are satisfied' or when 'it appears to them' or when 'in their opinion' a certain state of affairs exists; or when powers enable public authorities to take 'such action as they think fit' in relation to a subject matter, the Courts will not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated.*"

9. Doctrine of Proportionality

The doctrine of proportionality is a principle exercised by the courts to keep a check on the administrative actions. The doctrine denotes that the punishment prescribed by the administrator should not be disproportionate or unequal to the committed offence.

[28] (1903) 27 ILR Bom 307.
[29] *Supra* note 25 at 1150.
[30] AIR 1974 SC 2249.

The doctrine of proportionality seeks that, if there is no relationship between the objective sought to be achieved and the means used to achieve that objective, or where the punishments imposed by an administrative authority are out of proportion, the court will quash the exercise of discretionary powers.

The Supreme Court, while invoking the principle of proportionately has held in *Union of India* v. *Kuldeep Singh*[31] that, "it is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of misconduct would be violative of Article 14 of the Constitution."

In *Union of India* v. *G. Ganayutham*[32], the Apex Court summarized the position of proportionality in administrative law in England and India as the court should not interfere with the administrative decision unless it was illogical or suffers from procedural impropriety or is shocking to the conscience of the court, in the sense that it is in defiance of logic or moral standards. The '*Wednesbury Principle*'[33] will be taken into consideration in which the court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him and also nor could the Court substitute its decision to that of the administrator. The principle of proportionality will be applied where such action is alleged to offend fundamental freedoms.

10. Doctrine of Legitimate Expectation

When a public authority withdraws from a representation made to a person it is a ground for judicial review. It is based on the concept of natural justice wherein the authorities are prevented from abusing their power.

The doctrine of legitimate expectation was invented by Lord Denning in the case of *Schmidt* v. *Secretary of State for Home Affairs*[34]. In this case, the government had cut short the period already allowed to an alien to enter and stay in England. The court held that the person had legitimate expectation to stay in England which cannot be violated without following a procedure which is fair and reasonable. Lord Denning used the expression 'legitimate

[31] (2004) 2 SCC 590.
[32] AIR 1997 SC 3387.
[33] *Supra* note 18.
[34] (1969) 1 All ER 904 (CA).

expectation' instead of 'right'. However, the doctrine found a more refined expression in *Breen* v. *Amalgamated Engineering Union*[35]. In this case, the District Committee of a trade union had refused to endorse a member's election as shop steward. The court held that, if a person claims a privilege he can be turned away without hearing but here something more than a mere privilege – a legitimate expectation that his election would be approved unless there are relevant reasons for not doing so, therefore, the natural justice principles are attracted to the case in order to ensure fairness.

In India, the concept of legitimate expectation was introduced by the Supreme Court in *State of Kerala* v. *K.G. Madhavan Pillai*[36] In this case, the government had issued a sanction to the respondents to open a new unaided school and to upgrade the existing ones. However, after 15 days, a direction was issued to keep the sanction in abeyance. The order was challenged on the ground of violation of natural justice. The court held that "the sanction order created legitimate expectation in the respondents which was violated by second order without following the principles of natural justice which is sufficient to vitiate an administrative order."

The Supreme Court of India in the landmark cases *National Building Construction Corp.* v. *R. Raghunathan*[37] and *Sethi Auto Service Station* v. *DDA*[38] has held that, "The government and its departments in administering the affairs of the country, are expected to honour their statement of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion."

The concept of legitimate expectation has now gained importance in administrative law as a component of natural justice, non-arbitrariness and rule of law. It has become a tool for checking the growing abuse of administrative power as a supplement to the principles of natural justice, unreasonableness, fiduciary duty of administrative authorities and in future, probably, the principle of proportionality.[39]

[35] (1971) 1 All ER 1148 (CA).
[36] AIR 1989 SC 49.
[37] (1998) 7 SCC 66.
[38] (2009) 1 SCC 180.
[39] *Supra* note 20 at 304.

11. Doctrine of Public Accountability

Public Accountability doctrine is emerging field of administrative law. It aims to check the growing abuse of power by the administrative authority and to provide speedy relief to the victims of such exercise of power. It is based on the principle of public trust i.e., the power in the hands of administrative authorities is a public trust which must be exercised in the best interest of the people.[40] In *Attorney General of India* v. *Amritlal Prajivandas*[41], the Supreme Court applied the doctrine of public accountability. The validity of the 'illegally-acquired properties' in clause (c) of Section 3(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 was challenged. The Act provided for the forfeiture of properties earned by smuggling or other illegal activities whether standing in the name of the offender or in the name of other parties. The court upheld the validity of the Act. The principle has been further strengthened by the Court by holding that the concept of sovereign immunity is not applicable to the case of violation of right to life and personal liberty guaranteed by Article 21[42] and that if the harm is caused due to handling of hazardous material, the liability of the State or its instrumentality would be absolutely strict.[43]

12. Unreasonable Exercise of Discretionary Power

It is a fact that the powers vested with the administrative authority are expected to be abused, the courts are thus vigilant to check the abuse of powers. Unreasonableness is a ground for judicial review. In *Pramila Suman Singh* v. *State of Maharashtra*[44], "the unreasonableness was denoted to be an extreme behaviour such as acting in bad faith, or a decision which is perverse." The criteria of reasonableness have been explained coherently by Lord Greene in '*Wednesbury Principle*'[45] that "there may be something so absurd that no sensible person could ever dream that it lay within the power of authority."

[40] *Id*. at 309.
[41] AIR 1994 SC 2179.
[42] *Nilabati Behera* v. *State of Orissa*, AIR 1993 SC 1960.
[43] *M.C. Mehta* v. *Union of India*, AIR 1987 SC 965.
[44] (2009) 2 SCC 729.
[45] Supra note 18.

It is the duty of the court to see whether the discretionary powers conferred upon the administrative authorities are being exercised reasonably, and in any case there is unreasonableness, it will be deemed to be an abuse of power.

13. Non Application of Mind

The administrative authorities are essentially required to apply their mind before arriving at any discretionary decision and in case if the authority has not exercised its mind, the decision shall be a ground for judicial review.

In *Assistant Collector of Estate Duty* v. *Prayagdass Agarwal*[46], the Supreme Court held that "an authority cannot be said to exercise statutory discretion when it passes an order mechanically, without applying its mind to the facts and circumstances of the case."

In *Emperor* v. *Sibnath Banerji*[47], the Privy Council held that, "the authority acting mechanically simply relying on the subordinate and non-considering the matter itself and applying its own mind ignoring the circumstances of the case has been deprecated by ruling that the personal satisfaction was a condition precedent to the issue of the order."

V. Conclusion

As discussed above, the administrative authorities are conferred with wide discretionary powers, and conferment of such powers has resulted in the authorities acting in an arbitrary manner. The courts have invoked their power of review time to time in the cases where the administrative authorities have exceeded their discretionary powers. The judiciary has played an important role in reviewing the arbitrary administrative decisions.

The principle grounds discussed above, broadly enumerate the yardsticks applied by the courts while reviewing exercise of administrative discretion. Judicial review is attracted when the decision taken by the administrative authority has consequences affecting some person or body of persons.

[46] AIR 1981 SC 12263.
[47] AIR 1945 PC 156.

It involves altering of rights or obligations of that person which are enforceable by or against him in public law, or it may deprive him of some benefit or advantage which he was enjoying, or which he has the right to enjoy, or which he was made to believe that he would enjoy, on some frivolous ground, or without giving him a hearing before withdrawing such benefit or advantage. It has become necessary that the judicial review mechanism is so strengthened that, it would act as a strong weapon in restraining the administrative authorities from abusing their powers and provide just and fair treatment to a common man. The judiciary, by employing a review of the administrative decisions striving to ensure that the administrative authorities do not exceed their power and work within the ambit of law.