Writs as Effective Tool in Administrative Law

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Abstract:
Administrative law has greatly demarcated the checks, balances and permissible area of an exercise of power, authority and jurisdiction over administrative actions enforced by the any State, Governmental agencies and instrumentalities defined under Article 12 of the Constitution of India. And the judiciary is dynamically carving the principles and exceptions, while making the judicial review of administrative actions. The administrative law is that branch of law that keeps the governmental actions within the bounds of law or to put it negatively, it prevents the enforcement of blatantly bad orders from being derogatory.

The makers of the Constitution have adopted the English remedies in the Constitution under Articles 32 and 226. There has been specifically made provisions in the Constitution which empowers the Supreme Court and High Courts to issue writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari. This article studies the historical background of such writs, its Constitutional status and its role in Administrative Law.

1. Introduction

The Courts have constantly tried to protect the liberties of the people and assume powers under the Constitution for judicial review of administrative actions. The discretionary powers have to be curbed, if they are misused or abused. The socio-politic Institution need not cry, if the courts do justice and perform the substantial role. That is the essence of justice. It is submitted, the trend is to read the social justice and to translate in reality. The welfare State has to discharge its duty fairly without any arbitrary and discriminatory treatment to the people in the country. If such powers come to the notice of the Courts, the courts have raised the arms consistently with the rule of law. Today the Government is the provider of social services; new form of property like jobs, quotas, licenses and mineral rights etc. The dispenser of special services cannot therefore act arbitrarily. Courts laid the standard of reasonableness in Governmental action.

2. Source of Writs

The origin of writs can be drawn from the English Judicial system and were created with the development of English folk courts-moots to the common law courts. The law of writs has its origin from the orders passed by the King's Bench in England. Writs were issued on a petition presented to the king in council and were considered as a royal order. Writs were a written order issued in the name of the king which acted as groundwork for the subsequent proceedings. However, with different segments writs took various forms and names. The writs were issued by the crown and in the interest of the crown

but with the passage of time it became available for ordinary citizens also. However a prescribed fee was charged for it and the filing of these writs were known as Purchase of a writ.

3. Historical Background

The origin of writs in India goes back to the Regulating Act, 1773 under which Supreme Court was established at Calcutta. The charter also established other High courts and these High Courts had analogous power to issue writs as successor to the Supreme Court. The other courts which were established subsequently did not enjoy this power. The writ jurisdiction of these courts was limited to their original civil jurisdiction which they enjoyed under section 45 of the Specific Relief Act, 1877.

4. Constitutional provisions

The makers of the Constitution have adopted the English remedies in the Constitution under Articles 32 and 226. There has been specifically made provisions in the Constitution which empowers the Supreme Court and High Courts to issue writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari. The fundamental rights which are inalienable sacrosanct in nature and character which were conceived in national and public interest could be illusory if there is no constitutional machinery provided for its enforcement. Unless such constitutional remedies for its enforcement is not provided the rights guaranteed by part III of the Constitution cannot be ever implemented by the citizens. Article 32 contained in Part III is itself a fundamental right given to the person under the Constitution. Similarly Article 226 of the Constitution is conferred on the High Courts to exercise its prerogative writs which can be issued against any person or body of person including the government. The distinction between the two remedies is very negligible. The remedy under Article 32 is confined to enforcement of fundamental rights whereas Article 226 is available not only against the enforcement of fundamental rights but also for any other purpose. Thus the constitution provides the discretionary remedies on the High Court and the Supreme Court. In the absence of the provisions of such remedies no one can enforce its rights given. Thus wherever there is a right there must be a remedy for it. Thus it should satisfy the maxim, 'ubi jus ibiremedium.'

One of the principle makers of the constitution, Dr. Ambedkar has given the prime importance to Article 32 among all other articles from the Indian Constitution. He has referred that, "It is the very soul of the Constitution and the very heart of it."

In Devilal v. STO, it has been marked that, "There can be no doubt that the Fundamental Rights, guaranteed to the citizens are a significant feature of our Constitution and the High Courts under Article 226 are bound to protect these Fundamental Rights."

Justice Subba Rao in the case of Basheshwar Nath v. Commissioner, Income Tax, stated that, "A large majority of people are socially poor educationally backward and politically yet not conscious of their rights, cannot be pitted against the state or the institution or they cannot be put on equal status with the state or large organizations. The people are requires to be protected from themselves. It is therefore the duty of the court to protect their rights and interests. Fundamental rights are therefore transcendental in nature and created and enacted in national and public interest and therefore they cannot be waived."

In Daryao v. State of U.P., it was held that the right to obtain a writ must equally be a fundamental right when a petitioner presents the case. Thus, it cannot merely be considered as an individual's right to move the Supreme Court but it is also the duty and responsibility of the Supreme Court to protect the fundamental rights.

5. The Role of writs in administrative actions

Now as far as the role of the writs is concerned, let us go by illustration over the cases on discretion. Conferment of discretionary powers has been accepted as necessary phenomena of modern administrative and constitutional machinery. Law making agency legislates the law on any subject to serve the public interest and while making law, it has become indispensable to provide for discretionary powers that are subject to judicial review. The rider is that the Donnie of the discretionary power has to exercise the discretion in good faith and for the purpose for which it is granted and subject to limitations prescribed under the Act. The Courts have retained their jurisdiction to test the Statute on the ground of reasonableness. Mostly, the courts review on two counts; firstly whether the statute is substantively valid piece of legislation and, secondly whether the statute provides procedural safeguards. If these two tests are not found, the law is declared ultra vires and void of Article 14 of the Constitution.

Beside this, Courts control the discretionary powers of the executive government being exercised after the statutes have come to exist. Once they come into existence, it becomes the duty of the Executive Government to regulate the powers within limitations prescribed to achieve the object of the Statute. The discretionary powers entrusted to the different executives of the Government play substantial role in administrative decision making and immediately the settled principles of administrative law trap the exercise of powers. If these discretionary powers are not properly exercised, or there is abuse and misuse of powers by the executives or they take into account irrelevant consideration for that they are not entitled to take or simply misdirect them in applying the proper provision of law, the discretionary exercise of powers is void. Judicial review is excluded when it is found that executives maintain the standard of reasonableness in their decisions. Errors are often crept in either because they would maintain pure administrative spirit as opposed to judicial flavour or that they influence their decisions by some irrelevant considerations or that sometimes, the authorities may themselves misdirect in law or that they may not apply their mind to the facts and circumstances of the cases. Besides, this aspect, they may act in derogation of fundamental principles of natural justice by not conforming to the standard or reasons and justice or that they do not just truly appreciate the existence or non-existence of circumstances that may entitle them to exercise the discretion.

“The Executive have to reach their decisions by taking into account relevant considerations. They should not refuse to consider relevant matter nor should they take into account considerations that are wholly irrelevant or extraneous. They should not misdirect themselves on a point of law. Only such a decision will be lawful. The courts have power to see that the Executive acts lawfully. They cannot avoid scrutiny by courts by failing to give reasons. If they give reasons and they are not good reasons, the court can direct them to reconsider the matter in the light of relevant matters though the propriety adequacy or satisfactory character of these reasons may not be open to judicial scrutiny. Even if the Executive considers it inexpedient to exercise their powers they should state their reasons and there must be material to show that they have considered all the relevant facts.”

he role of writs is also sensibly laid down in a famous Pad field’s case; In England in earlier days the Courts usually refused to interfere where the Government or the concerned officer passed what was called a non-speaking order, that is, an order which on the face of it did not specify the reasons for the orders. Where a speaking order was passed the Courts proceeded to consider whether the reasons given for the order or decision were relevant reasons. Where there was a non-speaking order they used to say that it was like the face of the Sphinx in the sense that it was incurable and therefore hold that they could not consider the question of the validity of the order. Even in England the Courts have travelled very far since those days. They no longer find the face of the Sphinx inscrutable.

6. About Writs

(a) Writ of Habeas Corpus

The Latin term Habeas Corpus means 'have the body'. The incalculable value of habeas corpus is that it enables the immediate determination of the right of the appellant's freedom."The writ of Habeas Corpus is a process for securing liberty to the party for illegal and unjustifiable detention. It objects for providing a prompt and effective remedy against illegal restraints in order to protect the liberty and freedom which is conceived to be very vital. It is issued against the wrongful detention or confinement through the police authority. By virtue of this writ the police authorities or other such statutory authorities are empowered to bring the custody of the person who has been wrongfully detained by the court of law.It is a judicial order issued by Supreme Court or High Court through which a person confined may secure his release. The writ of Habeas Corpus can be filed by any person on behalf of the other person.

In Icchu Devi v. Union of India, the Supreme Court held that in a case of writ of Habeas corpus there are no strict observances of the rules of burden of proof. Even a post card by any pro bono publico is satisfactory to galvanize the court into examining the legality of detention.

In A.D.M. Jabalpur v. Shivakant Shukla, it was observed that "the writ of Habeas Corpus is a process for securing the liberty of the subject by affording an effective means of immediate relief from unlawful or unjustifiable detention whether in prison or private custody. By it the High Court and the judges of that court at the instance of a subject aggrieved command the production of that subject and inquire into the cause of his imprisonment. If there is no legal justification for that detention, then the party is ordered to be released."

In the case of State of Bihar v. Kameshwar Singh it was stated that, the writ of Habeas Corpus is in the nature of an order for calling upon the person who has detained or arrested another person to produce the latter before the court, in order to let court know on what ground he has been confined and to set him free if there is no legal justification for the imprisonment. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of article 21 secured, is to mulct its violators in the payment of monetary compensation.

(b) Writ of Mandamus

Mandamus is a judicial remedy which is in the form of an order from a superior court to any Government agency, court or public authority to do or forbear from doing any specific act which that body is obliged to do under the law. The writ of mandamus is issued whenever the public authorities fail to perform the statutory duties confirmed on them. Such writ is issued to perform the duties as provided by the state under the statute or forbear or restrain from doing any specific act. The first case reported on the writ of mandamus was the Middleton case in 1573 wherein a citizen's franchise was restored. The writ of mandamus can be issued if the public authority vested with power abuses the power or acts mala fide to it. In Halsbury's Laws of England, it is mentioned that, "As a general rule the order will not be granted unless the party complained of has known what it was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce and that that demand was met by a refusal."

The writ of mandamus is ordered when the statutory authorities who entrusted with the duties fail to discharge its obligatory duty. It may be applied when the government authorities vested with absolute

powers fail to perform their administrative and statutory duties. In Ratlam Municipal Council v. Vardhichand, on account of the public nuisance created in the area by the corporation in not maintaining the drainage system and the dirty water stinking had clogged around which obviously created nuisance at the hands of municipality for not discharging the duties under the act. As a result the residents of Ratlam municipality moved the Sub-divisional magistrate under section 133 of Code of Criminal Procedure, 1973 for abatement of nuisance and the court issued the directions that, "Judicial discretion when facts for its exercise are present has a mandatory import. Therefore when the Sub-Divisional Magistrate, Ratlam, has before him information and evidence which disclose the presence of public nuisance, considers it lawful to remove such obstruction. This is a public duty implicit in the public power to be exercised on behalf of the public and is pursuant to public proceeding."

(c) Writ of Certiorari

Certiorari is a Latin term being in the passive form of the word 'Certiorare' meaning thereby'to inform'. It was a royal demand for information. Certiorari can be described as "one of the most valuable and efficient remedies." Certiorari is one of the five prerogative writs adopted by the Indian Constitution under Article 226 which would be enforced against the decisions of the authority exercising judicial or quasi-judicial powers. Such powers are exercised when the authorities have failed to exercise the jurisdiction though vested in it or failed to exercise the jurisdiction though vested on him or to correct the apparent error on the face of record or there is violation of the principle of natural justice. An instance showing the certiorari powers was exercised by the Hon'ble Supreme court in A.K.Kraipak v. Union of India, where the selection was challenged on the ground of bias. The Supreme Court delineated the distinction between quasi-judicial and administrative authority. The Supreme Court exercising its powers issued the writ of Certiorari for quashing the action.

The writ of Certiorari is basically issued against the statutory bodies exercising judicial or quasi-judicial powers. Such writ is issued against the authorities namely the government and the courts or other statutory bodies who have power to determine and decide the issues between the parties. In deciding such issues if the decision making order is passed without any authority or has passed the order in exercise of such authority or has committed an error of law and facts the high court is empowered to correct such error of the lower court or government authorities. Certiorari may apply when the administrative or executive authority fails to observe their duty to act fairly with respect to the administrative functions. The writ of Certiorari may also be issued against a subordinate tribunal even if the decision impugned is pronounced. A leading case of Ryots of Garabandho vs Zemindar of Parlakimediwas the first decision on the writ of Certiorari.

(d) Writ of Prohibition

The writ of Prohibition is issued by the court exercising the power and authorities from continuing the proceedings as basically such authority has no power or jurisdiction to decide the case. Prohibition is an extra ordinary prerogative writ of a preventive nature. The underlying principle is that 'prevention is better than cure.' In East India Commercial Co. Ltd v. Collector of Customs, a writ of prohibition is an order directed to an inferior Tribunal forbidding it from continuing with a proceeding therein on the ground that the proceeding is without or in excess of jurisdiction or contrary to the laws of the land, statutory or otherwise.

The writ of Prohibition is issued essentially against the government or its authorities when they are not conferred with the power or jurisdiction to decide the dispute. The court by virtue of this power restrains the authority to exercise such powers which are not given to the authority.

(e) Writ of Quo Warranto

Quo Warranto means "by what warrant or authority". Quo Warranto writ is issued against the person of public who occupies the public seat without any qualification for the appointment. It is issued to restrain the authority or candidate from discharging the functions of public office. In University of Mysore v. Govinda Rao, the Supreme Court observed that the procedure of quo Warranto confers the jurisdiction and authority on the judiciary to control executive action in making the appointments to public offices against the relevant statutory provisions; it also protects a citizen being deprived of public office to which he may have a right.

The high Court would exercise the power of Quo Warranto against the public authority or government who acts contrary to the provisions of the statute and restrains the authority or public servant from usurping the public office on account of lack of qualification. It is a means of asserting sovereign right. In SonuSampat v. Jalgaon Borough Municipality, "If the appointment of an officer is illegal, everyday that he acts in that office, a fresh cause of action arises and there can be therefore no question of delay in presenting a petition for quo warranto in which his very, right to act in such a responsible post has been questioned."

7. Conclusion

The prerogative powers of writ jurisdiction conferred by the constitution for judicial review of administrative action is undoubtedly discretionary and yet unbounded in its limits. The discretion however should be exercised on sound legal principles. In this respect it is important to emphasis that the absence of arbitrary power is the first essential of the rule of law upon which the whole constitution system is based. In a system governed by rule of law when discretion is conferred upon the executive authorities it must be based on clearly defied limits. Thus the rule of law from this point of view means that the discretion or the decision must be based on some principles and rules. In general the decision should be predictable and citizens should know where he is. If a decision is taken not on the basis of any principle or rules then such decision is arbitrary and is taken not in accordance with the rule of law.

The law has reached its finest moments stated Duglas, C.J. in United States v. Wunderlich when it has freed man from the shackles of unlimited discretion. The man has suffered on account of absolute discretion. The decision should be guided by rule of law and it should not be based on whims, fancy and humour.

The Constitution is the law of the laws and nobody is supreme. Even the judges of Supreme Court are not above law and they are bound by the decisions which are the law of the land declared by them under the writ petitions. Thus, the constitutional remedies provided under the constitution operate as a check and keeps the administration of government within the bounds of law.

Refrences

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