JUDICIAL REVIEW AND THE CONTRACTUAL POWERS OF GOVERNMENT

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The 'Administrative Law' is a branch of law which is being increasingly developed to control arbitrary exercise of power by the Government and keep the executive and its various instrumentalities and agencies within the limits of their power. The rule of law which constitutes one of the basic features of the Constitution requires that every organ of the State must act within the confines of the powers conferred upon it by the Constitution and the law, and administrative law is that branch of the law which seeks to ensure observance of the rule of law.

As the concept of an intensive form of Government requires active participation of the State in welfare and service activities, carrying on of any trade or business, aquisition, holding or disposing of property, it becomes necessary for the Government to enter into contract with private individuals.[1] The transactions carried out by the Government with the individuals or industrial or commercial organisations, for the purpose of sale, purchase, construction, aquisition of services are called 'government contracts'. Government has large funds at its disposal. It is the biggest buyer and procurer of supplies and services in many countries of the world. Therefore, the subject of government contracts is becoming more and more important day by day. At the same time there is threat of abuse or misuse of the vast discretionary power conferred on the Government. So, the main problem is how to control the exercise of such vast discretionary power to ensure that these powers are not misused.

Government contracts are not similar in all respects to private contracts as both contractual and administrative powers intersect here.[2] Government occupies a different position as compared to an individual, as it deals with public money. It involves some public interest in it. The law relating to government contracts is not evenly developed in different countries of the world. In countries following civil law system and the United States, this branch of law is very much developed. In France, a distinct branch of law, *Droit administratif* has arisen to take care of distinctive feature of government contracts. However, in India the law relating to the government contracts is still in the process of evolution. There is no separate branch of law dealing specifically with the government contracts. These are governed both by provisions of the Constitution and general law governing private contracts.

I. FORMATION OF THE GOVERNMENT CONTRACTS

The statutory provisions specifically dealing with the government contracts in India are Articles 298 and 299 of the Constitution. Article 298 provides for the power of the Government to enter into contracts. Article 299 (1) contains certain procedural formalities which a government contract must fulfil. These formal requirements are (i) all contracts made in exercise of the executive power of the Union or of a State shall be expressed to be made by the President or by the Governor of the State, as the case may be; (ii) all such contracts and all assurances properly made in exercise of that power shall be executed on behalf of the President or Governor, and (iii) it shall be executed by such persons and in such manner as may be directed or authorised by the President or the Governor. However, the constitutional code of public contracts is not complete. For the rights and liabilities of the parties arising under a government contract, the Indian Contract Act, 1872, the Sale of Goods Act, 1930 and a number of other Acts have to be consulted.

Contracts Not in Conformity With Article 299 (1)

A government contract which is not in compliance with Article 299 of the Constitution is void, not even capable of ratification.[3] The question which becomes relevant here is that in the absence of a valid contract, can the party claim compensation under Section 70 of the Contract Act. There are three essential conditions to be fulfilled for application of Section 70 of the Contract Act. Firstly, a person should lawfully do something for another person or deliver something to him. Secondly, in doing so, he must not intend to act gratuitously and thirdly, the other person for whom something is done or to whom something is delivered must enjoy the benefits thereof. If these three conditions are satisfied, Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the things done or delivered.

The question of relationship between Article 299 (1) and Section 70 was discussed elaborately by the Supreme Court in *State of West Bengal* v. *B.K. Mondal & Sons*[4] where the court said that the fields covered by the two provisions are separate and distinct. Article 299 (1) deals with contracts and provides how they should be made, while Section 70 deals with the cases where there is no valid contract and provides for compensation to be paid in a case where the three requisite conditions prescribed by it are satisfied. So, according to the court, there is no conflict between the two provisions. Section 70 in no way detracts from the binding character of Article 299 (1) nor does it amount to circumvention of Article 299 (1) in any way. It may, rather, be read as supplementing the provisions of Article 299 (1). The court also emphasized that it was necessary to invoke Section 70 both as a matter of administrative convenience and justice to the people. Like the ordinary citizen even the Government ought to be subject to Section 70 which prevents unjust enrichment.

Same view was reiterated by the Supreme Court in *New Marine Coal* v. *Union of India*[5] where it was held that the Government must make compensation for the coal supplied which had been consumed by it, even though the contract was not in compliance with the requirements of Article 299 of the Constitution.

However, question of applicability of Section 70 of the Contract Act also arises in a situation where a person has done something for the Government under a void contract but the Government has not obtained any benefit under it. As one of the requirements for the application of Section 70 is that the person to whom something is delivered must have enjoyed the benefit thereof. Such a situation came before the Supreme Court in *State of Uttar Pradesh* v. *Murari Lal & Sons.*[6] In that case an officer of the Government Department of Agriculture who was not authorised to sign contracts on behalf of the Government contracted for a space in cold storage for potatoes from the Agriculture Department, which never came. The proprietors sued for damages which they suffered for keeping the space vacant. The Supreme Court held that since the requirement of Article 299 are not complied with, the contract was void and was also not capable of ratification, which presupposes a valid contract. Section 70 of the Contract Act was also not applicable as the Government had not derived any benefit under the contract.

Therefore, regarding the liability of the Government, the position as it emerges is that a government contract which does not comply with the requirements of Article 299 of the Constitution is void, not even capable of ratification and the party shall have no claim whatsoever either against the Government or the officer except where the Government has taken any benefit under the contract. This state of law is entirely unsatisfactory. As the proprietors, in *Murari Lal, supra,* who kept their space vacant under a contract with the Government officials were compelled to suffer a loss without any remedy, simply for the reason that the officer of the government department was not authorised to enter into a contract on behalf of the Government.

In *State of Bihar* v. *Hindustan Agencies*[7], a Government official entered into a contract with the respondants for supply of pipes. The same was done without inviting tenders. No advertisement in the newspapers was published to invite tenders for supply of pipes. It was found that the Government official had no authority to place the order, the rules and regulations were also violated.

Therefore, the Government cancelled the supply order made by an officer of the government department not authorised to do so. Again innocent respondants were forced to suffer harm.

In the age of intensive form of Government, it is not possible for anyone to keep himself uptodate with the list of Government officials authorised to negotiate public contracts in various departments. The main reason for such a difficulty with the law relating to government contracts is that there is no distinct branch of law dealing specifically with the government contracts. The government contracts are governed both by the provisions of the Constitution and the general law governing private contracts. The application of general law governing private contracts to the government contracts as well is the root cause of the problem as by such application injustice and arbitrariness is bound to occur. In countries following civil law system, there are separate and specific statute dealing with every aspect of government contracts. In the absence of special law dealing specifically with the government contracts it is for the courts of India to pay attention towards the applicability of general law governing private contracts to public contracts as well and try to mitigate the hardships to the innocent public.

II. Judicial Review and the Government Contracts

Although this cannot be denied that any intensive form of Government cannot function without the conferment of discretionary powers on its officials, but this is also to be accepted that discretion can never be absolute. 'Discretion' here means choosing from amongst the various available alternatives with reference to the rules of reason and justice, and not according to the personal whims. Such exercise is not to be arbitrary, vague and fanciful, but legal and regular as Article 14 of the Constitution strikes at arbitrariness in administrative action and ensures fairness and equity of treatment. The important question, therefore, is how to limit and control the powers of extensive form of government, so as to prevent its arbitrary application or exercise and to uphold the rule of law in administration.

The government contracts have often been challenged by the private contractors as being discriminatory and arbitrary and therefore violative of Article 14 of the Constitution. It has been alleged by contractors that their lowest tenders have been wrongfully and arbitrarily rejected[8], the contract which has already been awarded to a particular contractor has been arbitrarily cancelled to prefer another contractor resulting in unequal treatment[9] or sometimes that a particular contractor has been wilfully and arbitrarily blacklisted so as to deprive him from entering into contracts with the Government thereby causing discrimination[10]. The main question herein involved is whether the Government discretion to award contracts is amenable to judicial review? If yes, to what extent such review is possible?

A. Judicial Review of Government Contracts - A Profile

Formerly, the tendency of the courts was not to interfere with the Government's discretion to award contracts. The reason given was that like an individual, it is perfectly open to the Government to decide with whom it would like to have contractual relationship, as a contract which is held from Government stands on no different footing from a contract held from a private party.

The state of law, however, was unsatisfactory as Government does not occupy the same position as a private individual. Some distinction is inevitable between the position of the Government, whose main concern is the betterment of the society as a whole and an individual who view his own benefit.[11] So, Government has to act as a Government and not as a private trader. Even if a person may not claim a fundamental right to do business with the Government, nevertheless he has a right to be treated fairly and in a non discriminatory manner. It is necessary to ensure that injustice is not to be done to an individual by the State or its instrumentalities.

To a limited extent, the Government's broad power to enter or not to enter into a contract with any person came to be subjected to one restriction by the court in *Eurasian Equipment & Co Ltd.* v. *West Bengal,*[12] Wherein the Supreme Court invoked Article 14 to impose on the Government the requirement of giving a hearing to the person who was being blacklisted by it for entering into contractual relationship. The reason being that a person who is on the approved list of the Government, when blacklisted, becomes unable to enter into advantageous relationship with the Government and a disability is thus imposed on him.

In the landmark case *Ramana Dayaram Shetty* v. *Indian Airport Authority,*[13] the Supreme Court objected to the International Airport Authority entering into a contract for running a cafeteria at the airport with a person who did not fulfil the conditions mentioned in the notice inviting tenders. Bhagwati J. enunciated the crucial principle in this regard as where the Government is dealing with the public, whether by way of giving jobs or entering into contract or granting other forms of largesses, it cannot act arbitrarily at its sweet will. It cannot like a private individual, deal with any person it pleases, but its action must be in conformity with standards or norms, which is not arbitrary, irrational or irrelevant. Same view was tãken by the Supreme Court in *M/s Kasturilal* v. *Jammu and Kashmir*[14] that where the Government is dealing with the public, it must exercise its power in non arbitrary manner. It is necessary to ensure fairness in every action of the State.

This principle also flows directly from Article 14 of the Constitution which strikes at arbitrariness in State action and ensures fairness and equality of treatment.[15]

It has been firmly established that the discretionary powers given to the governmental or quasi-governmental authorities must be hedged by standards, procedural safeguards or guidelines, failing which the exercise of discretion and delegation may be quashed by the courts.[16]

With the passage of time, the judicial trends in relation to the government contracts has undergone a substantial change, emphasising more on administrative aspects of Government contracts and moving away from purely law approach. The position now is that the Government no longer enjoy absolute discretion to enter into contract with anyone it likes. The Government has to choose the party in non-discriminatory manner. So having regard to the constitutional mandate of Article 14 and also to the judicially evolved rules of administrative law, the Government must exercise its power in a regular and reasonable manner and not in an arbitrary manner.

B. Limitations and Extent of Judicial Review

Though it is true that every action of the State or public authority whether contractual or public must be open to judicial review, however, courts generally held that the scope of judicial review vary with reference to the type of matters involved. So question arises how far do the public law principles of judicial review apply to the exercise by the government body of its contractual powers? The courts generally find certain inherent limitations in the exercise of that power of judicial review.

There has been a notable increase in the number of reported cases in which the exercise of contractual powers has been challenged on public law grounds, and in several cases the courts have accepted that judicial review is available. However, it would be premature to say that the courts now accept that the contractual powers of public authorities are subject to review in the same manner as other powers of Government. Generally, it is the tendency of the courts to point out some 'public law' element in particular case to remove it from the realm of purely contractual nature and thereby justify its conclusion. The ambivalent attitude of the court is neatly highlighted by the recent Supreme Court decision in *Shrilekha Vidyarthi* v. *State of U.P.*[17] It was a case of mass termination of district government counsels in the State of U.P. In this case the Supreme Court took the view that the contractual powers of public authorities should generally be amenable to judicial review under Article 14 for being arbitrary, yet it sought existence of public element in the instant case to justify its decision. It was a case of non government servant holding a public office, on account of which it was held to be a matter within the public law field.

It is really the nature of its personality as State which is significant and not the nature of its function contractual or otherwise and this should not be the decisive factors for examining the validity of the act. Even assuming that it is necessary to import the concept of presence of some public law element in a state action to attract Article 14 and permit judicial review, the ultimate impact of all actions of the State or public body being undoubtedly on public interest, the requisite public element for that pupose is present also in the contractual matters.[18]

On the question of limits of judicial review, the Supreme Court in *Sterling Computers Ltd.* v. *M. & N. Publications Ltd.*,[19] while holding that the actions of public authorities could be judged and tested in the light of Article 14, laid at the same time that some more discretion should be given to these authorities in contractual matters having commercial element. The public authorities should be given liberty to assess the overall situation for the purpose of taking decision as to whom the contract should be awarded and at what terms, so that they may enter into contract with persons, keeping an eye on the augmentation of the revenue.

The extent of permissible judicial review of State activity in contractual matters was indicated in *Dwarkadas Marfatia and Sons* v. *Board of Trustees of the port of Bombay*[20] by saying that actions are amenable to judicial review only to the extent that State must act readily for a discernible reason, not whimsically for any ulterior purpose. The court in *Mahabir Auto Stores* v. *Indian Oil Corporation*[21] agreed with *Dwarkadas Marfatia* while holding that the scope of judicial review is limited in contractual matters.

What is evident from these two decisions is that the power of Government in contractual matters is reviewable only on the ground of arbitrariness and on no other grounds. The wisdom of the policy or lack of it or the desirability of better alternative is not within the permissible scope of judicial review in such cases. It is not for the courts to recast the policy or to substitute it with another which is considered to be more appropriate, once attack on the ground of arbitrariness is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case.

The Supreme Court in *Shrilekha* opined that the scope of judicial review in respect of disputes falling within the domain of contractual obligations might be more limited and in doubtful cases the parties might be relegated to adjudication of their rights by resort to remedies provided in for adjudication of purely contractual disputes.

It is strange why the courts are not in favour of adopting a uniform approach in this regard and thereby subjecting the contractual powers of Government to judicial review in the same manner as its other powers. When remedies available in private law field are applied to government contractual activities as well, injustice and arbitrariness is bound to occur. It is to be kept in mind that government contract is not similar to contract between private individuals as it involves some public interest in it.

The scope of judicial review of power of the Government in contractual matters came to be dealt elaborately by Mohan, J. in *Tata Cellular* v. *Union of India.*[22] The court was of the view that though the principle of judicial review would apply to the exercise of contractual powers by the government bodies in order to prevent arbitrariness or favouritism, but there are inherent limitations in exercise of that power of judicial review. It is the basic principle of administrative law that by way of judicial review the court is not expected to act as a court of appeal while examining an administrative decision and to record a finding whether such finding could have been taken otherwise on the facts or circumstances of the case. The duty of the court is to confine itself to the question of legality. The rule laid down by the court in this regard is while the court cannot interfere with government's freedom of contract, yet the invitation of tender and its refusal which pertain to public policy must not be decided arbitrarily, unfairly and illegally.

This is a welcome step wherein the court clearly leaned towards the view that all action of the public authorities, whether contractual or public are subject to review in the same manner on the grounds of illegality, irrationality, procedural impropriety, arbitrariness or unfairness. But the position is still uncertain.

C. Present Position in India with Regard to Judicial Review

It is pity to note that in many recent decisions, the Supreme Court has refused to apply public law principles of judicial review to contractual activities of the Government.

In *State of Gujarat and Others* v. *M. P. Shah Charitable Trust and Others,*[23] the Supreme Court refused to allow the writ petition as it was a public law remedy and not applicable in the private law field e.g. where the matter was governed by non-statutory contracts. In this case, the State Government resolved to discontinue the 12 donor seats in M.P. Shah Medical College, Jamnagar. The respondant-trust challenged the resolution by filing writ petition before the High Court. The Court observed that in 1954-55 there was no medical college in Saurashtra and that a college could be established only with the help of donation from Shri M. P. Shah. The provision for nomination by the said donor in consideration of donation, the court held was reasonable. Appeal was made against the decision of the High Court, which was allowed by the Supreme Court. One of the arguments put forward on behalf of the respondant-trust was that in the facts and circumstances of the case, the contract between the parties could not have been terminated unilaterally without observing the principle of natural justice. The Supreme Court held that there was no substance in the argument that the termination of arrangment without observing the principle of natural justice (*audi alteram partem*) was void. The termination was not a quasi-judicial act; hence it was not necessary to observe the principles of natural justice. It was not also an executive or administrative act to attract the duty to act fairly. It was a matter governed by contract between the parties, therefore, the writ petition being a public law remedy was not available in private law field.

The court in this case relied on *Assistant Excise Commissioner and others* v. *Issac Peter.*[24] In that case, the court took the view that the doctrine of fairness or duty to act fairly and reasonably was the doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action was administrative in nature. Just as principle of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the action is administrative. However, in case of contract freely entered into with the State, there is no room for invoking the doctrine of fairness or resonableness against the party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happened to be the State. In such cases the mutual rights and liabilities of the parties are governed by the terms of the contract and the law relating to the contracts. These contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of State power being involved in such contracts. The State does not guarantee profit to licencees in such contracts. There is no warranty against incurring loses. It is a business for the licencees, whether they make profit or incur loss is no concern of the State.

It would be unreal and non pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State action that are required to be non-arbitrary and justified on the touchstone of Article 14. The requirement of Article 14 and contractual obligations are not alien concepts and can co-exist. Bringing the State action in contractual matters also within the purview of judicial review is inevitable.

III. Conclusion

The aforesaid discussion leads to the inescapable conclusion that the government contracts are neither governed exclusively by the principles of private law nor exclusively by the public law. The contractual relationship between the Government and the contractors is regulated both by the principles of private law as well as public law, which is sole cause of difficulties with law relating to the government contracts in India. It is unfortunate that there is no separate branch of law dealing specifically with the government contracts, as is *Droit administratif* in France, which has developed to take care of distinctive features of the government contracts. So, it is advisable for our legislatures also to recognise the separate entity of government contracts. In the absence of legislation in this regard role of courts become more important so far as applicability of private law to the field involving public interest is concerned. Judicial review is an important weapon in the hands of courts to check any abuse or misuse of power by the State or its intrumentalities. Although, it is true that the court must not usurp the discretion of the public authority, however, it should also be kept in mind that the discretion can never be absolute under our constitutional scheme. Such discretion must be governed by some norms and procedures in public interest and for public good. There is nothing wrong in imposing legal limits on such authorities by the courts even in contractual matters because the whole concept of unfattered discretion is inappropriate to a public authority, which is expected to exercise such powers only for the public good. It is difficult to appreciate why the simple fact that the power in question is a contractual one should affect the scope of judicial review, where it is admitted that the public interest is involved. The court should adopt the same approach to the judicial review of contractual powers as they do to the review of other activities of the Government. However, there may be valid reasons for limiting the operation of judicial review in specific areas involving the exercise of contractual powers. It may also be necessary to limit content of some of the specific public law doctrines for practical reasons e.g. it may not be practical for all applicants for government contracts to be given a hearing. So, the way left for the courts is to recognise that as a general principle the contractual powers of public authorities are subject to judicial review in the same manner as its other powers which may be negated or limited by specific policy factors.

Notes and References

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1. M.P. Jain and S.N. Jain, Principles of Administrative Law (Agra, Nagpur : Wadhwa and Company, 1993) at 808.
2. *Id.* at 809.
3. See *Mulam Chand* v. *State of M.P.*, AIR 1968 SC 1218.
4. AIR 1962 SC 669; (1962) SCR Supp. 876.
5. AIR 1964 SC 152.
6. AIR 1971 SC 2210; (1971) 2 SCC 449.
7. (1995) 4 SCC (Supp) 607.

8. See *C.K. Achtuan* v. *State of Kerala*, AIR 1959 SC 490; *Trilochan* v. *State of Orissa*, AIR 1971 SC 7333; *Indira* v. *Walaiti Ram*, AIR 1971 SC 2295; *G.E. & Co.* v. *Chief Engineer*, AIR 1974 Ker 23; *Purxotoma Ramanta Quenin* v. *Makan Kalyan Tandel*, AIR 1974 SC 651.
9. *Supra* n. 7.
10. *Punnen Thomas* v. *State of Kerala*, AIR 1969 Ker 81; *Eurasian Equipment & Co. Ltd.* v. *West Bengal*, AIR 1975 SC 266; *Nova Steel (India) Ltd.* v. *MCD and Others*, AIR 1995 SC 1057.
11. *C.K. Achtuan* v. *State of Kerala*, AIR 1959 SC 490; *Punnen Thomas* v. *State of Kerala*, AIR 1969 Ker 81; *Trilochan* v. *State of Orissa*, AIR 1971 SC 733; *Union of India* v. *Walaiti Ram*, AIR 1971 SC 2295; *G.E. & Co.* v. *Chief Engineer*, AIR 1974 Ker 233; *Purxotoma Ramanata Quenin* v. *Makan Kalyan Tandel*, AIR 1974 SC 651.
12. AIR 1975 SC 266. Also see, *Joseph Vilangandan* v. *Executive Engineer*, AIR 1978 SC 930.
13. AIR 1979 SC 1628.
14. AIR 1980 SC 1992.
15. see *E.P. Royappa* v. *State of Tamilnadu*, AIR 1974 SC 555; *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.
16. see *R.R. Verma* v. *India*, AIR 1980 SC 1461; *Subash Chandra* v. *State of U.P.*, AIR 1980 SC 800; *State of Punjab* v. *Gurdial Singh*, AIR 1980 SC 319; *Accountant General* v. *D. S. Dooraiswamy*, AIR 1981 SC 783.
17. AIR 1991 SC 537.
18. *Supra* n. 15.
19. (1993) 1 SCC 445.
20. AIR 1989 SC 1642.
21. AIR 1990 SC 1031.
22. (1994) 6 SCC 651.
23. (1994) 3 SCC 552.
24. JUDGEMENT TODAY (1994) 2 SC 140.