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Speech on 'Service Law'

By

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As I take my stand my mind goes back to 24 years back, when the Gauhati Bench of the Central Administrative Tribunal started functioning from the precincts of Gauhati High Court for want of its own proper infrastructure. As a lawyer at that time, I had the privilege and distinction to file the first case before the CAT Gauhati Bench. Subsequent to that, I have had numerous occasions to meet and interact with the functionaries of the CAT Bar Association in different capacities. I am grateful to the organizers, especially Mr. Justice V K. Bali for inviting me to speak and share my thoughts before this august gathering. The credit for successful completion of 24 years of CAT goes to all those who contributed to its establishment and were closely connected with it.

In India. the Constitution is regarded as the source of all laws as it is the fundamental legal document. Unlike the United Kingdom, in India like USA, the Constitution and not the Parliament is supreme. The Preamble of our Constitution assures to secure the goals of Justice, Liberty, Equality and Fraternity to people of India. The objectives, enshrined in the Preamble together with features like separation of powers among the three organs of the government, independence of Judiciary and Judicial review constitute the basic structure of the Constitution.

The Constitution has entrusted the responsibility of dispensation of justice to the judiciary. The Supreme Court and the High Courts are the guardians of the Constitution. To ensure this power and exercise, writ jurisdiction has been

conferred upon the Supreme Court under Article 32 and upon the High Courts under Article 226 of the Constitution. Article 32 has been described as the 'heart' and 'soul' of the Constitution. The framers of the Indian Constitution, recognizing the need to have an effective machinery to enforce the fundamental rights contained in Part III of the Constitution and to make such rights more meaningful, gave to the people of India the right to move the Supreme Court itself a fundamental right.

Need for Administrative Tribunals

Today, over and above ministerial functions, the executive performs many quasi-legislative and quasi-judicial functions also. The government functions have increased and even though according to the traditional theory, the function of adjudication of disputes is the exclusive jurisdiction of the ordinary courts of law, many judicial functions have come to be performed by the executive. This is explicit in the field of service law. The adjudication of issues and disputes in the field of service law like termination of employment, initiation of departmental proceeding issuing orders of punishment, disposal of appeals etc. requires technical knowledge and in view of paucity of time with the courts, establishment of specialized mechanism of dispute settlement through departmental inquiries and Administrative Tribunals was deemed expedient.

In this context, it becomes imperative to have specialized courts and tribunals. The advantages of having specialized courts are numerous. In specialized matters, where time is critical, the matter is disposed of quickly in specialized courts and matter is not allowed to be prolonged/ dragged for long. Further, specialization may give judges time and responsibility to keep up with new specialized court issues and laws, thereby having better decisions. It also improves the efficiency among the judges as they become more familiar with law and common fact patterns, lead? to fasten and more certain deckion-making and this efficiency

further grows with each case. It further contributes in the growth of law in the sense that specialization of court may spur specialization of the bar and the prosecution service, thereby further improving the quality of Specialised Court litigation. It also helps in reducing the caseload, and especially the burden of more difficult cases, of the courts of general jurisdiction. There must be a clear vision of having exclusive Specialized Commercial Divisions/ Commercial Courts. This concept of having specialized courts must be at all level of hierarchy, viz. trial court, High Courts, and the Supreme Court. The experience of other jurisdiction especially USA and China may be taken into consideration.

Coming back to service Iaw, the field of services can be divided into two parts – Private and Public. Private field is governed by Labour Laws or civil suit for damages under the Specific Relief Act as under the provisions of the said Act, personal service cannot be enforced. Public Service includes services under the Union and the States and is governed by the Constitution and other statutes, framed by exercising powers vested under the Constitution.

In exercise of the power conferred by clause (i) of Article 323-A of the Constitution as inserted by the Constitution (Forty-second Amendment) Act, 1976, Parliament enacted the Administrative Tribunals Act, 1985. The Act was enacted with the salutary object of providing for the adjudicarion or trial by Administrative Tribunals of disputes and co nplaints with respect to recruitment and conditions of service of persons appointed to public services and posts.

One of the prominent features of the administrative tribunals is that they have statutory origin. As an administrative tribunal is a creation of a statute, no appeal, revision or reference lies against the decision rendered by an administrative tribunal unless such a right has been conferred by the relevant statute. Provisions can also be made for ouster of jurisdiction of civil courts; and in all these cases the decisions rendered by the tribunal will be treated as 'final'. This statutory finality,

however, is not capable of affecting the power of the judicial review of the Supreme Court and that of the High Courts, for the power of the judicial review has the authority of the Constitution and cannot be taken away or abridged by any statute.

Judicial Review of Administrative Actions

Judicial review is the doctrine under which legislative and executive action is subject to invalidation by the judiciary if and when the action is found to be violative of the provisions of the Constitution and the laws made thereunder.

USA and tho Indian Courts have propounded tho doctrine of judicial roviow in order to: a.) check the abuse of power b) to guard against discrimination and to ensure equal treatment. In India, Judicial Review is a part of the basic structure of the Constitution. As such, it is inviolable and unamenable to amendment by the Parliament under Article 368 of the Constitution. Broadly speaking, judicial review in India comprises of three aspects: judicial review of legislative action, judicial review of judicial decisions arid judicial review of administrative action. The power of judicial review is important to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of functions, transgress the constitutional limitations.

It is settled legal position is that the decisions of the administrative tribunals are subject to judicial review of the superior courts. However, such power of judicial review cannot be applied in each and every case. Some of the grounds, which may call for review by the superior courts, are as follows:

a. Authority/Tribunal has acted without jurisdiction; or

b. the tribunal has failed to exercise jurisdiction vested in it; or

c. if the order passed by the tribunal is arbitrary, perverse or malafide; or

d. the tribunal has not observed the principles of natural justice; or

e. there is an error apparent on the face of the record.

Service Matters

Under the Constitution, the provisions relating to public service may be found in Articles 309, 310 and 311 of the Constitution. Article 309 deals with the rule making power. Article 310 provides that all persons in Defence, Civil or All India Service holds office during the pleasure of the President (Pleasure theory). Exception to Article 310 provides that these persons dismissed or removed by subordinate authority would not suffer dismissal, removal, or reduction without being provided an opportunity of hearing. That assurance is explicitly provided in Article 311 of the Constitution.

Article 311 provides for the protection provided to public servant from punitive action being taken against them by an authority subordinate to one who appointed him, or without an inquiry. Exceptions in Article 311 are contained in second proviso to clauses (a), (b) & (c) which provide that the said article shall not apply to people who have been punished for conviction in a criminal case or where inquiry is not practicable for reasons to be recorded in writing or where the President or Governor as the case may be is satisfied that such enquiry is to be dispensed with for maintaining security of state.

An explicit articulation of "protection" in Article 311 of the Constitution itself gives an impression of inordinate 'protection' to the civil servants. The requirement of 'prior sanction' of the competent authority to initiate proceedings agaiiist public servants and the inordinate delays in getting such sanctions seriously undermines public confidence in the judicial system of the country and

gives a serious setback to the administration of justice. Article 311, in the present form, adopts a right-oriented approach instead of emphasizing on the aspect of work and corresponding duty of a civil servant. There must be a shift towards accountability approach.

In present times of which globalization is a chief characteristic, the position prevailing in India has to be viewed against the practice that is followed in other countries, where such punitive action of dismissing an erring civil servant from service is possible with a hearing permitted at the discretion of the appropriate authority, not as a matter of right. Even in the UK, whose administrative systems were adopted in India, such freedom does not exist. India is perhaps one of very few countries where a public servant, who, though an agent of the government, has the power to invoke Constitutional rights against the government which is his/her employer. He enjoys a status which at times sought to be abused by the employee.

Public authority must maintain a sense of proportion between his particular goals and the means he applies to achieve such goal, so that, his actions impinge upon individual rights to the minimum extent to preserve public interest.

Judicial Review in Service Matters

In 1985, the Supreme Court had observed in *Karampal's case* that there was a phenomenal rise in the service disputes between the government and its employees.

Matters of Service were originally falling within the jurisdiction of the High Courts under Article **226** of the Constitution. Later on, with the insertion of Articles **323A** and **323B** in the Constitution and with the enactment of the

Administrative Tribunals Act, those matters were transferred and brought within the jurisdiction of the Administrative tribunals.

In ***Sampath Kumar's case*** (1987), wherein the Supreme Court was called upon to examine the constitutional validity of the Administrative Tribunals Act, the Supreme Court observed that Administrative tribunal is an Alternative Institutional Mechanism and the Supreme Court will continue to exercise the power of judicial review over the administrative tribunals. The avenue of appeal under article 136 to the Supreme Court against the decisions of the Tribunals was also kept intact. As far as the question of jurisdiction of the High Courts was concerned, the Supreme Court took a narrow view and held that the High Courts did not have power of judicial review in such matters.

The correctness of the decision of ***Sampath Kumar*** in 1987 was called in question in the case of L. ***Chandra Kumar*** (1997). The Apex court overruled the decision of ***Sampath Kumar*** by holding and recognizing the judicial supremacy of the High Courts over tribunals. Therefore, now the settled legal position is that the Central Administrative Tribunal exercises original jurisdiction under the Act. A party aggrieved by a decision of the tribunal can invoke the jurisdiction of the High Court under articles 226 and 227 of the Constitution. Only thereafter a person aggrieved by the decision of the High Court may approach the Supreme Court under Article 136 of the Constitution.

The decision of the Supreme Court in L. ***Chandra Kumar*** is the proper view as, by recognizing the judicial supremacy of the High Courts over the tribunals, it has offered to the litigant aggrieved by the decision of the tribunal, an additional avenue for having his wrong redressed by approaching the High Court instead of directly approaching the Supreme Court which is already burdened with numerous cases and is constantly fighting to pull down the number of pending cases.

It must be understood that judicial review is different from judicial control. From ***Motiram Deka's case*** to ***Uma Devi case,*** great strides have been made in the service law jurisprudence. There are significant changes both in concept as well as in perception.

Judicial Review can be an unruly horse unless it is properly controlled. Judiciary must maintain restraint and be aware of the limitation and should not try to run the govemment. It must not act like legislature or administrators. The Supreme Court has consistently maintained that there can be no interference with policy matters unless it is arbitrary or in violation of constitutional limits or statutory power.

In ***TATA Cellular's case*** (1994) the Supreme Court laid down extensively the extent of power of judicial review and laid emphasis on judicial restraint on administrative action.

I can say with great satisfaction that there are disposal of about 5 lakhs cases by the CAT since 1985. Upto September 2009, 5,37,950 cases has been instituted out of which 5,15.289 cases has been decided and there is the pendency of about 22 thousand cases before it. Looking at the data, the disposal rate is quite good. Credit has to be given and appreciation must be made of the Chairman, members and the entire team at CAT for their achievement. But there are certain areas which require special focus and attention. These are Benches where disposal rate is below 40%. On the other hand, Guwahati Bench has only 299 pending matters.

Apart from central government employee cases of other services including public sector, autonomous bodies (numbering around 155 societies and statutory organisations including DDA, MCD, NDMC, Delhi Jal Board. DTC etc. have also been brought within the jurisdiction of CAT by issuing appropriate notification. Being encouraged by achievement of CAT, the Armed Forces Tribunal has also been established by the Government.

On a request by the Supreme Court to the Law Commission of lndia to make a study of working of Tribunals & make recommendations, the Law Commission submitted its 162nd Report wherein the Law Commission recommended for constitution of National Appellate Administrativa Tribunal in the line of National Consumer Disputes Redressal Commission. An appeal on substantial question of law would lie to this Appellate Tribunal. In writ petitions wherein the challenge is with regard to the jurisdiction, the Court must quickly dispose of those kind of matters.

I would suggest constitution and setting up of in-House mechanism for resolving **disputes between the government employer and employees. The objective behind** having such an In-House mechanism is that public servant is a strong and large force. Grievance should be sought to be redressed at their own level so as to maintain a healthy relationship. The disputes should be settled by alternative in house mechanisms by following procedure of mediation, conciliation, etc. The Court should only be approached as the last resort and only if these disputes are not resolved by these mechanisms. Adopting these methods is important in light of the heavy burden of pending cases in the superior courts.

Suggestions

ADR-Mediation - Mediation cell could be constituted in each department of the government. Appropriate training could be provided in this regard. It may include all types of service disputes ranging from recruitment to post retirement and even death – compassionate appointment. In order to facilitate resolution of dispute, the Vigilance Branch could also be associated at this stage of mediation/conciliation.

The judicial discipline, decorum and propriety must be strictly adhered to while adjudicating disputes. Of course, the power of reference to larger Bench is always available for reconsideration of decision of co-ordinate Bench and that power should be usually resorted to without resorting to creating conflict of decisions.

For the proper, speedy and effective functioning of the Tribunal, there must be excellent I) Court Management; and 2) Case management – case flow & load management. In order to have proper Court Management, Training programme/ refresher courses for members may be conducted by the National Judicial Academy1 State Judicial Academies as continuing education helps quicker **disposal, proper management and uniform procedure adopted for dealing with a** matter.

Under Court management, the attention may be given to the (a.) Process Management (Rationalizing terms & Rules and timely inputs from process service); (b.) Staff management; (c.) Statistics and data management; and (d.) Computerization and interlinking of Benches.

Under Case flow management technique, attention may be given to prioritizing of certain kind of matters. The techniques of clubbing and grouping may be used in order to increase the over all efficiency. Time table for complex/neglected/countering dilatory tactics may be prepared and periodically monitored. There could be many more such steps. In this context, interaction and deliberation among all stakeholders would give and show better course and desired results.

There is always great scope of innovation which can be adopted by the Tribunal. Judiciary, Executive and legal fraternity must unite together and create a vision document to tackle arrears, pendency and delay in disposal. This Tribunal and other Tribunals could also he part of that.

I end by quoting from Frankfurter's observation:

> "All power is, in Madison's phrase 'of an encroaching nature'. Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self restraint".

These words are very apt and a judge deciding a case should consider these as sermons.