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Judicial review and government contracts: An appraisal

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Abstract
The concept of judicial review and its extent in government contracts is not unknown to Indian Jurisprudence. It is no longer *res integra* that source of judicial review lies in Articles 32, 226 and 227 of the Constitution of India with its charter flowing from Article 13. It has been held by Dalveer Bhandari, J, who is presently a Judge of the International Court of Justice, in *Mahmadhusen Abdulrahim Kalota Shaikh v. Union of India*, that judicial review forms part of the basic structure of the Constitution and that the violation of judicial review is another way of saying that the separation of powers between the principal three organs of the State have been violated. Overseeing the sphere of control of the other two organs of the State, the Court has power to afford protection from executive and/or legislative encroachment. Where judicial review is put off the way, the Court shall still review the constitutional validity of such an action. It would be incorrect to assume that judicial review has emerged of late. As early as in 1952, the then Chief Justice Patanjali Sastri for a Constitution Bench observed in *State of Madras* v. *V G Row*, that Indian Constitution contains express provision for judicial review. His lordship opined that courts have been assigned the role of a sentinel on the *qui vive*. In last six decades the Supreme Court has time and again reiterated that judicial review is a part of the inviolable basic structure doctrine. It is trite that any provision of law which bars judicial review is unconstitutional for all purposes. Amendments to the Constitution are subject to judicial review and hence, it becomes an important task to undertake a study of the contours of judicial review particularly in the field of government contracts. An attempt has been made in this paper to analyze judicial review in the context of government contracts dividing the themes for better appreciation of law.

Keywords: Indian jurisprudence, judicial, union of India

1. Introduction
Though the Parliament has the power to amend the Constitution and enact a new law; the legislature or the executive, has no power to either interpret the Constitution, or to determine the validity of an amendment to the provisions of the Constitution. The power to determine the validity of a constitutional amendment exclusively rests with the higher judiciary. Every amendment and statute has to be tested on the touchstone of 'basic structure' as declared by the judiciary. The power to judicially review the legislative actions can not withdrawn or revoked. It won't be wrong to assume that this power is no less significant than the legislative power of Parliament. It was ruled in *Supreme Court Advocates-on-Record-Association v. Union of India* [4], by J S Khehar, J (as his lordship then was) that the importance of the power of judicial review vested with the higher judiciary (to examine the validity of executive and legislative actions), bestowed superiority to the judiciary over the other two pillars of governance. This position, it was pointed out, was critical to balance the power surrendered by the civil society, in favour of the political and the executive sovereignty.

The question which arose for consideration was the nature of the standards of judicial review required to be applied in judging the validity of the constitutional amendments in the context of the doctrine of basic structure in *M Nagaraj v. Union of India* [5]. Speaking for a Constitution bench it was held by S H Kapadia, J (as his lordship then was) that the Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.

The concept of a basic structure giving coherence and durability to a Constitution has a certain intrinsic force. This doctrine has essentially developed from the German Constitution. This development is the emergence of the constitutional principles in their own right. It is not based on literal wordings. The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules [6]. For a

constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, the second step is to be taken, namely, whether the principle is so fundamental as to bind even the amending power of the Parliament, i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of the Parliament.

In order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then, it can be examined whether it is so fundamental as to bind even the amending power of the Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure. Judicial review of legislation enacted by the Parliament within limited powers under the controlled constitution which we have, has been a feature of our law and this is on the ground that any law passed by a legislature with limited powers is ultra vires if the limits are transgressed. The framers conferred on the Supreme Court the power to issue writs for the speedy enforcement of those rights and made the right to approach the Supreme Court for such enforcement itself a fundamental right [7].

Dealing with a special provision for Andhra Pradesh constitutionally mandated, Chief Justice P N Bhagwati in *P. Sambamurthy v. State of A P* [8], for a Constitution Bench, recorded that it is a basic principle of the rule of law that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but must also be in accordance with law and the power of judicial review is conferred by the Constitution with view to ensuring that the law is observed and there is compliance with the requirement of law on the part of the executive and other authorities. It is through the power of judicial review conferred on an independent institutional authority such as the High Court that the rule of law is maintained and every organ of the State is kept within the limits- of the law. Now if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it, it would sound, the death-knell of the rule of law. The rule of law would cease to have any meaning, because then it would be open to the State Government to defy the law and yet get away with it [9].

2. Judicial Review: Basic Structure Doctrine

In the Fundamental Rights Case [10], the then Full Court by a wafer-thin majority declared that Article 368 of the Constitution does not enable the Parliament to alter the basic structure or framework of the Constitution. The basic structure of the Constitution could not be altered by any constitutional amendment and it was held unambiguously that one of the basic features in our constitutional scheme is the presence of judicial review. This view was affirmed/reiterated/followed by a Constitution Bench in *Minerva Mills Ltd. v. Union of India* [11] unanimously while putting a stop to Parliament's power to nullify the principles laid down in the preceding case. In *L Chandra Kumar v. Union of India* [12], a seven Judge Bench of Supreme Court held that jurisdiction conferred upon the High Courts under Articles 226/227 of the Constitution and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution which cannot be upset even by a constitutional amendment. In *I R Coelho v. State of Tamil Nadu* [13], a Bench of nine Judges again held that power of judicial review is a part of the basic structure of the Constitution while clarifying the principles laid down in *Kesavananda* [14].

Recently, in *Bharati Reddy v. State of Karnataka* [15], it was observed that S Abdul Nazeer, J for himself and J Chelameswar, J that it is clear that power of judicial review under Articles 32/226/227 of the Constitution is an essential feature of the Constitution which can neither be tinkered with nor eroded. Even the Constitution cannot be amended to erode the basic structure of the Constitution. The views of Abdul Nazeer, J was reiterated by a full bench of Supreme Court consisting of Dipak Misra, C J, A M Khanwilkar and Dr. D Y Chandrachud, JJ again in *Bharati Reddy v. The State of Karnataka* [16].

3. Judicial Review of Government Contracts

Few principles, then, laid down in the last three decades to put the matter in right perspective will be order in consonance with the title of this paper. The question which fell for consideration in *Star Enterprises v. City and Industrial Development Corporation of Maharashtra* before a full bench was that when highest offers are rejected by the State, whether reasons sufficient to indicate the stand of appropriate authority should be made available and should be communicated to concerned parties. Answering the question in affirmative it was held by Ranganath Misra, J (as his lordship then was) that in recent times, judicial review of administrative action has become expansive and is becoming wider day by day. The traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers. That very often involves long stakes and availability of reasons for action on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process [17].

The question which arose for consideration in *Sterling Computers Limited M & N Publications Limited* [18] was the extent to which governmental contracts could be reviewed. It was held by N.P. Singh, J that while exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the 'decision making process'. In this connection reference may be made to the case of *Chief Constable of the North Wales Police v. Evans* [19], where it was observed that the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that

the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court. By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time the Courts can certainly examine whether "decision making process" was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution. It was further held that while exercising the power of judicial review in connection with contractual obligations, Courts should be conscious of the urgency of the disposal of such matters, otherwise the power which is to be exercised in the interest of the public and for public good in some case become counter-productive by causing injury to the public in general [20].

The applicability of the doctrine of legitimate expectation fell for consideration in *Union of India v. Hindustan Development Corporation* [21]. It was held by K. Jayachandra Reddy, J that if a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power of violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot *ipso facto* give a right to invoke these principles. It could be one of the grounds for consideration but the court must lift the veil and see whether the decision is violative of these principles warning interference. It depends very much on the facts and the recognised general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is 'not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits', particularly when the element of speculation and uncertainty is inherent in that very concept [22].

In the matter of grant of tender the State cannot act as a private person having regard to Article 14 of the Constitution of India was the finding recorded in *New Horizons Ltd. v. Union of India* [23]. It was categorically opined that departing from the narrow legalistic view the Courts have taken note of the realities of the situation which, by no stretch of imagination, would mean that the Court would substitute itself in the place of a statutory authority. The Court in a case of this nature must exercise judicial restraint. It may be one thing to say that having regard to the public interest, the Court may itself invite bids so as to verify the justification of accepting a palpably lower bid as was done in *Ram and Shyam Company v. State of Haryana* [24], but it is another thing to say the Court would under all circumstances not allow a play in the joints in favor of the employer.

The question of limitation upon the power of judicial review of government contract fell for consideration in *Asia Foundation & Construction Ltd. v. Trafalgar House Construction* [25]. G B Pattanaik, J (as his lordship then was) held that though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favoritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose [26].

The parameter for the exercise of judicial review in case of government contracts was considered in *Raunaq International Limited v. I.V.R. Construction Ltd* [27]. It was held by Sujatha V Manohar, J that judicial review would be permissible only on the established grounds for such review including mala fides, arbitrariness or unreasonableness. The principles of judicial review are no different in cases of governmental contracts. However, grant of stay or injunction in such cases may or may not result in prejudice to the public revenue, depending on the facts of the case. At times granting of a licence or permission may cause public harm e.g. in the case of damage to the ecology. Interim orders will have to be made in such cases on a consideration of all relevant factors, providing for restitution where required in public interest [28].

Government contract could be set aside if it is contrary to public policy was the principle laid down in *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu* [29]. D P Wadhwa, J went on to hold that every decision of every authority except the judicial decision is amenable to judicial review and reviewability of such a decision cannot now be questioned. However, a judicial review is permissible if the impugned action is against law or in violation of the prescribed procedure or is unreasonable, irrational or malafide [30].

In commercial transaction of complex nature authority awarding contract is not even bound to see the highest offer was the law laid down in *Air India Ltd. v. Cochin International Airport Ltd* [31]. In the words of G T Nanavati, J the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedure laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness [32]. The principle was reiterated in *Monarch Infrastructure (P) Ltd. v. Commr, Ulhasnagar Municipal Corporation* [33], wherein it was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the

tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the ones prescribed in the earlier tender invitations [34].

Whether writ is the remedy for enforcing contractual obligations was the issue in *State of Bihar v. Jain Plastics and Chemicals Ltd* [35]. It was held M B Shah, J that writ petition under Article 226 is not the proper proceeding for adjudicating such disputes. It was further held that it is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the Court of issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226. It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a Court exercising prerogative of issuing writs [36].

Governmental contracts have to comply with the doctrine of reasonableness as per the decision rendered in *Union of India v. International Trading Co* [37]. It was held by Dr Arijit Pasayat J that Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. While the discretion to change the policy in exercise of the executive power, when not trammeled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the state, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness [38].

Public interest could be one of the factors to exercise power of judicial review in cases of government contracts is the statement of law in *Binny Ltd. v. V. Sadasivan* [39]. It was observed by K G Balakrishnan, J. (as he then was) that a contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. Nevertheless it may be noticed that the Government or Government authorities at all levels is increasingly employing contractual techniques to achieve its regulatory aims. It cannot be said that the exercise of those powers is free from the zone of judicial review and that there would be no limits to the exercise of such powers, but in normal circumstances, judicial review principles cannot be used to enforce the contractual obligations. When that contractual power is being used for public purpose, it is certainly amenable to judicial review. The power must be used for lawful purposes and not unreasonably. In a case where a public law element is involved, judicial review may be permissible [40].

In matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself as per *Reliance Airport Developers (P) Ltd. v. Airports Authority of India* [41]. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of 'judicial review' cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above 'certainty' is an important aspect of rule of law.

In *Noble Resources Ltd. v. State of Orissa* [42], the question which arose for consideration was whether governmental contracts are within the realm of judicial review and if yes then to what extent? It was held by S B Sinha, J that it is trite that if an action on the part of the State is violative the equality clause contained in Article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the

Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on its part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter. Contractual matters are, thus, not beyond the realm of judicial review. Its application may, however, be limited [43].

Again Sinha, J read some limitations into judicial review in regard to governmental contracts in *Ramachandra Murarilal Bhattad v. State of Maharashtra* [44]. It was observed that while exercising its jurisdiction of judicial review, the Court is required to decide the cases before it, keeping the well-known principles therefore in mind and having regard to the fact situation obtaining therein. No hard and fast rule can be laid down therefore. Noticing some of the areas where judicial review would be permissible, the Court opined that ordinarily, superior courts would not enforce specific performance of contract where damages would be adequate remedy. It was also held that conduct of the parties would also play an important role. The expansive role of Courts in exercising its power of judicial review is not in dispute. But each case must be decided on its own facts [45].

In *Puravankara Projects Ltd. v. Hotel Venus International* [46], reliance was placed upon *Directorate of Education v. Educomp Datamatics Ltd* [47], and *Tata Cellular v. Union of India* [48], to conclude that the courts can scrutinize the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. As held in *Jagdish Mandal v. State of Orissa* [49], before interfering in tender or contractual matters in exercise of power of judicial review, the court should pose to itself the following questions: i) whether the process adopted or decision made by the authority is mala fide or intended to favor someone and ii) whether public interest is affected [50].

In *Haryana State Agricultural Marketing Board v. Sadhu Ram* [51], the issue which arose was whether the right to refuse the lowest or any tender is available to the Government? While answering the issue in affirmative it was observed by Tarun Chatterjee, J that Article 14 of the Constitution must be kept in mind while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best quotation and also to cancel the best quotation if it was of the view that the best quotation also was not to the satisfaction of the Government to get a better market price of the plots in question [52]. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the Court who is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest [53]. It is well settled principle that in the matters of Government contract, the scope for judicial review is very limited and that the Court cannot substitute its own decision for that of the government [54].

In *Maa Binda Express Carrier v. Northeast Frontier Railway* [55], the question which arose for consideration was that whether authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons if such relaxation is permissible under the terms governing the tender process? While answering the question in affirmative it was held by T S Thakur, J. (as he then was) that the power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers [56]. In *Haryana Urban Development Authority v. Orchid Infrastructure Developers P. Ltd* [57], it was held by Arun Mishra, J that it is a settled law that the highest bidder has no vested right to have the auction concluded in his favour. The Government or its authority can validly retain power to accept or reject the highest bid in the interest of public revenue [58].

4. Conclusion

From its initial hesitation to judicially review government contracts, Supreme Court in the last three decades has laid down several principles governing them so much so that it could now be fairly stated that is now well-settled by a long line of decisions that judicial review is now available at every stage beginning with the process of allotment of contracts by an instrumentality of the State. In several decisions, it has been laid down that exercise of contractual powers by the Government and Government instrumentalities in order to prevent arbitrariness or favoritism could be checked so that the command of the equality clause is not breached. In certain situations, courts have been forced to act keeping the public interest. The mandate of law, in brief, is that (i) the Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest, (ii) the Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate, (iii) it is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

Despite the fact that Supreme Court has laid down various principles in the field of judicial review of government contracts for guidance and application by various high courts,

matters do reach the Apex Court where the views of the high courts are reversed being not in line with the law of the land. As more and more areas are opening up for citizens to do business with the government, it is expected that the Supreme Court might have to invent new principles keeping in mind various factors, as for instance, particular facts of the case, needs and demands of time, interest of justice, equity, etc. One thing, of course, is certain in that having travelled this far, Supreme Court cannot refuse to interfere in the field of government contracts using its constitutional power of judicial review.

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