

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.09.2019

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE D. KRISHNAKUMAR

W.A.No.2929 of 2019

V.Swathi

... Appellant

Vs.

1. The Principal Secretary to Government,
Rural Development and Panchayat Raj Department,
Fort St.George,
Chennai - 600 009.

2. The Director of Rural Development and Panchayat Raj,
Saidpet, Chennai - 600 015. ... Respondents

Writ Appeal filed under Clause 15 of the Letters Patent
against the Order dated 09.04.2019 made in W.P.No.27633 of 2018.

W.P.No.27633 of 2018:

Writ Petition praying call for all connected records in the
impugned portions in respect of para 3 of G.O.Ms.NO. 102 RD and
PR(ES) dated 13.07.2015 and to quash consequently to give effect
that order to take retrospectively without any restriction/
discrimination to any person who seeks for appointment on
compassionate grounds.

For Appellant : Mr.A.L.Namasivayam

For Respondents: Mr.P.S.Sivashanmugasundaram
Special Government Pleader

J U D G E M E N T

(Order of the Court was delivered by S.MANIKUMAR, J)

Instant writ appeal is filed against the order dated
09.04.2019 made in WP.No.27633 of 2018, wherein claim of the
writ petitioner for appointment on compassionate ground, by
quashing para No.3 of G.O.Ms.No.102, RD &PR (E5) dated
13.07.2015, was rejected.

2. Brief facts leading to the filing of the writ appeal are
as follows:

Father of the writ petitioner / appellant viz., Shri N.Vasudevan, was employed as a Writer (Clerk) in Vasishtapuram Panchayat, Veppur Panchayat Union and died on 29.05.2015, while he was in service. Writ petitioner's father had served for about 17 years with clean records and he belongs to Scheduled Caste Community. Seeking employment assistance on compassionate ground, writ petitioner submitted an application and the said application was rejected on the ground that petitioner's father died on 29.05.2015 and the very policy of the scheme of compassionate appointment, introduced, by the Government insofar as the legal heirs of the deceased Panchayat Secretaries in the Village Panchayats is concerned, in G.O.Ms.No.102, Rural Development and Panchayat Raj (E5) Department, on 13.07.2015 cannot be extended to the case of the petitioner. Being aggrieved, writ petitioner filed WP.No.27633 of 2018, challenging the Government Order with a consequential prayer to provide appointment on compassionate grounds.

3. After hearing the learned counsel on either side, writ Court vide order dated 09.04.2019, dismissed WP No.27633 of 2018. Relevant portion of the order reads thus.

5. This Court is of the firm opinion that if a rule of relaxation is invoked in a routine manner it will amount to neutralizing and degrading the recruitment rules in force. A striking balance in between has to be adopted while exercising the powers of relaxation by the Competent Authorities. The process of recruitment and appointment shall be made only by following the recruitment rules in force. In other words all appointments are to be made strictly by adhering the recruitment rules in force. Thus, the rule of relaxation is an exception and such an exception is to be exercised cautiously and sparingly in order to rectify the injustice caused to a particular case. Thus, the relaxation cannot be claimed as a matter of right by the candidates.

6. Rule of relaxation is a discretion granted to the Government and such a discretionary power has to be exercised judiciously and not in a routine manner. Relaxation being a discretionary power has to be exercised by the competent authorities by applying the facts in a particular case and not in a mechanical way to grant certain service benefits to the similarly placed persons. Granting relaxation in one case by the Government cannot be cited as a precedent in other cases. In view of the fact that the relaxation is an exception and cannot be followed in a routine affair. Thus, this Court is of the firm view that all the appointments and

regularizations are to be made only by following the recruitment rules in force strictly and no relaxation can be granted by citing other cases and the Government also to be cautious while exercising the powers of relaxation under Rule 48 in certain cases.

7. The consequences of exercising the power of relaxation under Rule 48 in a routine manner will affect the right of the employees who were appointed regularly in accordance with the recruitment rules in force. In other words, there are large number of employees who are working in the Departments, were fully qualified and who were appointed in accordance with the recruitment and service rules in force. Any relaxation granted under Rule 48 should not have an impact of depriving those candidates, who were appointed regularly in accordance with the rules in force, specifically in the matter of promotions. This being the principles to be followed, while exercising the powers of relaxation, this Court is of the opinion that the policy introduced in G.O.Ms.No.102, dated 13.7.2015 is to be implemented strictly with reference to the terms and conditions stipulated therein.

8. This Court is of the opinion that consideration for appointment on compassionate ground is to be construed as violation of Articles 14 and 16 of the Constitution of India and is only in the nature of concession and therefore does not create a vested right in favour of the claimant. A compassionate appointment scheme is a non-statutory scheme and is in the form of a concession and it cannot be claimed as a matter of right by the claimant to be enforced through a writ proceeding. A compassionate appointment is justified when it is granted to provide immediate succor to the deceased employee. Mere death of a Government employee in his harness, it does not entitle the family to claim compassionate employment. The competent authority has to examine the financial condition of the family of the deceased employee and only if it is satisfied that without providing employment, the family will not be able to meet the crisis, that a job is to be offered to the eligible member of the family of the deceased employee.

9. In the present case on hand, the contention raised by the learned counsel for the writ petitioner is that the father of the writ petitioner died on 29.5.2015 and after two months from the date of death of the deceased employee, the scheme of

compassionate appointment has been implemented. On account of the fraction of two months, the benefit of compassionate appointment is unable to be extended to the legal heirs of the deceased employee. May be in an unfortunate situation, where the deceased employee died two months prior to the implementation of the scheme.

10. However, in the matter of providing public employment, Courts can never show any misplaced sympathy establishing the fact that constitutional rights of all others who all are waiting to secure public employments by participating in the open competitive process. Leniency or misplaced sympathy cannot be granted to secure public employments only the Courts can follow the same.

11. In the present case on hand, the Government Order, which is impugned in the writ petition states that the order shall take effect from the date of issuance of the order. The said order states that the Government has taken a policy decision to sanction compassionate appointment to the legal heirs of the Panchayat Secretaries died while in service and are eligible to be appointed as Night Watchman, Office Assistant, Record Clerk and Junior Assistant according to the prescribed educational qualifications and to the post of Junior Assistant as per Tamil Nadu Ministerial Service Rules, subject to fulfilment of the conditions laid down by the Government under the Recruitment Rules in force.

12. The reasons stated by the writ petitioner that the scope of the Government Order should be enlarged by granting retrospective effect or the case of the writ petitioner is to be considered as a special case, deserves no merit consideration. Such an exercise of interference of the policy decision of the Government can never be undertaken by the High Courts. In normal circumstances, the policy of the Government has to be implemented. In the event of not establishing any unconstitutionality or other illegality, the High Courts would not interfere with the policy decision taken by the Government in this regard. When the scope of compassionate appointment itself is in consonance with the scheme of public posts, this Court would not consider the case of the writ petitioner by expanding the scope of the Government Order by giving retrospective effect to treat the case of the writ petitioner as a special case. In the event of expanding such a benefit, the same will set a wrong precedent and it will provide scope for all other similarly placed persons either

to approach the authorities or to approach the Court of Law.

13. Thus, this Court is not inclined to consider the case of the writ petitioner, as the writ petitioner is unable to establish any illegality or unconstitutionality or infirmity in respect of the decisions taken by the Government in the order impugned.

14. Accordingly, the writ petition is devoid of merits and the same stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed."

Being aggrieved by the above order, writ petitioner has filed the instant writ appeal.

4. Mr.A.L.Namasivayam, learned counsel for the appellant submitted that vide G.O.(Ms.) No.102 dated 13.07.2015 of the Rural Development and Panchayat Raj (E-5) Department, government have extended the concession of compassionate appointment to the dependents of the deceased employees in Panchayat, based on representations / demands made by various associations of the Panchayat, Panchayat Unions etc. were made from 2014. Learned Counsel further submitted that the Government Order was passed belatedly only in the year 2015 and in para 3 of the Government Order, it is stated that the orders will take effect from the date of issue of Order i.e. 13.07.2015 and not retrospectively and therefore, it directly affects the petitioner/appellant.

5. Learned counsel for the appellant further submitted that within three years from the date of death i.e on 29.05.2015, petitioner/appellant has made a detailed representation on 01.03.2017 to consider her case as a special case, on humanitarian grounds, as the family has lost the bread winner. Since representation of the petitioner was not considered, writ petitioner has filed WP No.12715 of 2017 and this Court vide order dated 17.05.2017, observed that when the government have taken a policy decision to provide compassionate appointment to the legal heirs, it should be applied uniformly without prescribing a cut off date, otherwise it will be violative of Article 14 of the Constitution of India and the writ court ought to have directed the respondents therein to consider the petitioner's application.

6. Learned counsel for the appellant submitted that as the order made in WP.No.12715 of 2017 dated 17.05.2017, was not complied with, writ petitioner filed contempt petition. In the said contempt petition, by producing a copy of proceedings of the Director of Rural Development and Panchayat Raj, Chennai, dated 28.08.2017, it was informed that since government order

was passed on 13.07.2015 only, and that petitioner's father died, prior to the issuance of Government Order, request of the petitioner cannot be complied with.

7. Learned counsel for the appellant further submitted that the Contempt petition was closed with an observation that it is open to the writ petitioner to challenge the proceedings of the Director of Rural Development and Panchayat Raj, Chennai, dated 28.08.2017, if aggrieved.

8. Learned counsel for the appellant further contended that since vide proceedings dated 28.08.2017, the Director of Rural Development and Panchayat Raj, Chennai, has stated that the government order cannot be given retrospective effect, petitioner has challenged the government order in WP No.27633 of 2018. He further submitted that petitioner's father had served for 17 years and for the delay of the department in taking a decision on the proposals submitted for extending compassionate ground appointment, petitioner need not be denied appointment.

9. Heard the learned counsel for the petitioner and perused the materials available on record.

10. G.O.(Ms) No.102 Rural Development and Panchayat Raj (E5) Department dated 13.7.2015, is reproduced hereunder:

GOVERNMENT OF TAMIL NADU

Abstract

Establishment - Rural Development and Panchayat Raj
Department - Compassionate ground appointment to the
legal heirs of the deceased Panchayat Secretaries in
the Village Panchayats - Sanction - Orders - Issued.

Rural Development and Panchayat Raj (E5) Department

G.O.(Ms) No.102
: 13.07.2015

Dated

Read:

1. Director of Rural Development and Panchayat Raj
Letter No.74340/

13/E3 dated 23.8.2014 and 17.3.2015.

2. From the Secretary, Tamil Nadu Public Service
Commission Letter

No.2667/CD-C3/2015 dated 30.4.2015.

ORDER:

The Director of Rural Development and Panchayat Raj in the letter 1st read above has stated that the various Associations have, among other demands, requested for the sanction of compassionate ground appointment to the legal heirs of the deceased Panchayat Secretaries. He has also stated that in case of the Government servants who die while in service, their legal heirs are eligible to be appointed as Night Watchman, Office Assistant, Record Clerk and Junior Assistant according to their educational qualification on compassionate grounds. He has therefore requested to extend the same benefit to the Panchayat Secretaries working in the Village Panchayats and to sanction compassionate ground appointment to the legal heirs of the deceased Panchayat Secretaries in the cadre of Night Watchman, Office Assistant, Record Clerk and Junior Assistant according to their educational qualification subject to fulfilling the other conditions prescribed by the Government.

2. After careful examination, the government have accepted the proposal of the Director of Rural Development and Panchayat Raj and order to sanction compassionate ground appointment to the legal heirs of the Panchayat Secretaries who die while in service to the post of Night Watchman, Office Assistant and Record Clerk according to the prescribed educational qualification and to the post of Junior Assistant as per Tamil Nadu Ministerial Service Rules, subject to fulfilling the conditions laid down by the Government (under Recruitment Rules).

3. This order shall take effect from the date of issue of order.

4. This order issues with the concurrence of Finance department vide U.O. No.1122/FS/P/2016, dated 20.03.2015 and Labour and Employment Department vide U.O. No.7779/Q1/2015, dated 24.3.2015.

(By Order of the Governor)

GAGANDEEP SINGH BEDI
SECRETARY TO GOVERNMENT

To
The Director of Reural Development and Panchayat Raj,
Chennai-15

All District Collectors (Except Chennai District)
The Commissioner of Treasuries and Accounts, Chennai - 15
The Accountant General, Chennai - 18/35
The Director, Local Fund Audit, Chennai - 108
The Secretary, Tamil Nadu Public Service Commission, Chennai - 3

Copy to:

The Chief Minister's office, Chennai - 9
The Senior P.A. to Hon'ble Minister
(Municipal Administration, Rural Development, Law, courts and Prisons)
Chennai - 9
The Senior P.A. to Hon'ble Minister (Rural Industries and labour), Chennai - 9
The Personnel and Administrative Reforms Department, Chennai-9
The Labour and Employment Department, Chennai-9
The Finance Department, Chennai-9

11. Introduction of a scheme for providing employment assistance to deceased government servant is the policy of the government. Fixing a date for applicability of the scheme is again the prerogative of the government. Let us consider few decisions on policy matters.

11.1. In Narmada Bachao Andolan Vs. Union of India and Others, reported in {2000 (10) SCC - 664}, the Hon'ble Supreme Court observed as follows:-

"232. While protecting the rights of the people from being violated in any manner utmost care has to be taken that the Court does not transgress its jurisdiction. There is, in our constitutional framework a fairly clear demarcation of powers. The Court has come down heavily whenever the executive has sought to impinge upon the Court's jurisdiction.

233. At the same time, in exercise of its enormous power, the Court should not be called upon to or undertake governmental duties or functions. The Courts cannot run the Government nor can the administration indulge in abuse or non-use of power and get away with it. The essence of judicial review is a constitutional fundamental. The role of the higher judiciary under values of the Constitution and the rights of Indians. The Courts must therefore, act within their judicially permissible limitations to uphold

the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by this Court that in matters of policy the Court will not interfere. When there is a valid law requiring the Government to act in a particular manner the Court ought not to, without striking down the law, give any direction which is not in accordance with law. In other words, the Court itself is not above the law.

234. In respect of public projects and policies which are initiated by the Government the Courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in public interest to require the Court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation, the Court should not refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government is possible. When two or more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the Court to go into the matter afresh and, in a way, sit in appeal over such a policy decision."

11.2. The above mentioned observations have been quoted with approval by the Hon'ble Supreme Court in BALCO EMPLOYEES' UNION (REGD) Vs. UNION OF INDIA AND OTHERS {2002 (2) SCC - 333}.

11.3. In DIVISIONAL MANAGER, ARAVALI GOLF CLUB AND ANOTHER {2008 (1) SCC - 683}, in paragraphs Nos.17, 19, 20 and 22, the Hon'ble Supreme Court held thus:-

"17. Before parting with this case, we would like to make some observations about the limits of the powers of the judiciary. We are compelled to make these observations because we are repeatedly

coming across cases where judges are unjustifiably trying to perform executive or legislative functions. In our opinion this is clearly unconstitutional. In the name of judicial activism judges cannot cross their limits and try to take over functions which belong to another organ of the State.

19. Under our Constitution, the legislature, the executive and the judiciary all have their own broad spheres of operation. Ordinarily, it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction.

20. Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like emperors. There is broad separation of powers under the Constitution and each organ of the State - the legislature, the executive and the judiciary - must have respect for the other and must not encroach into each other's domains.

22. In *Tata Cellular Vs. Union of India* (vide AIR para 113 : SCC para 94), this Court observed that the modern trend points to judicial restraint in administrative action. The same view has been taken in a large number of other decisions also, but it is unfortunate that many Courts are not following these decisions and are trying to perform legislative or executive functions. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimisation of the Judges' preferences. The Court must not embarrass the administrative authorities and must realise that administrative authorities have expertise in the field of administration while the Court does not. In the words of Neely VJ (SCC p.681, para 82).

"82.... I have very few illusions about my own limitations as a Judge ... I am not an accountant, electrical engineer, financier, banker, expect Judges intelligently to review a 5000 page record addressing the intricacies of a public utility operation."

It is not the function of a Judge to act as a superboard, or with the zeal of a pedantic

schoolmaster substituting its judgment for that of the administrator."

11.4. In COMMON CAUSE (A REGD. SOCIETY) VS. UNION OF INDIA AND OTHERS, {2008 (5) SCC - 511}, wherein at paragraph No.40, the Hon'ble Supreme Court, held thus:-

"The justification given for judicial activism is that the executive and legislature have failed in performing their functions. Even if this allegations is true, does it justify the judiciary in taking over the functions of the legislature or executive? In our opinion it does not: firstly, because that would be in violation of the high constitutional principle of separation of powers between the three organs of the State, and secondly, because the judiciary has neither the expertise nor the resources for this. If the legislature or executive are not functioning properly it is for the people to correct the defects by exercising their franchise properly in the next elections and voting for candidates who will fulfil their expectations, or by other lawful means e.g., peaceful demonstrations and agitations, but the remedy is surely not by the judiciary in taking over the functions of the other organs."

12. In Food Corporation of India and Another vs. Ram Kesh Yadav and Another reported in (2007) 9 SCC 531, while dealing with an issue as to whether government can fix age for availing the benefit of compassionate appointment at Para 9, held thus:

"9. There is no doubt that an employer cannot be directed to act contrary to the terms of its policy governing compassionate appointments. Nor can compassionate appointment be directed de hors the policy. In Life Insurance Corporation of India v. Asha Ramchandra Ambedkar [1994 (2) SCC 718], this Court stressed the need to examine the terms of the Rules/Scheme governing compassionate appointments and ensure that the claim satisfied the requirements before directing compassionate appointment. In this case, the scheme clearly bars compassionate appointment to the dependant of an employee who seeks voluntary retirement on medical grounds, after attaining the age of 55 years. There is a logical and valid object in providing that the benefit of compassionate appointment for a dependant of an employee voluntarily retiring on medical grounds, will be available only where the employee seeks such

retirement before completing 55 years. But for such a condition, there will be a tendency on the part of employees nearing the age of superannuation, to take advantage of the scheme and seek voluntary retirement at the fag end of their service, on medical grounds, and thereby virtually creating employment by 'succession'. It is not permissible for the court to relax the said condition relating to age of the employee. Whenever a cut off date or age is prescribed, it is bound to cause hardship in marginal cases, but that is no ground to hold the provision as directory and not mandatory."

Conscious of the fact that, fixing a cut off date or age, is bound to cause hardship in marginal cases, Hon'ble Supreme Court held as above.

13. In *Sudhir Kumar Consul vs. Allahabad Bank* reported in (2011) 3 SCC 486, fixing a cut off date for eligibility of pension was the issue, which according to the appellant, which according to the appellant therein, created classification. While upholding the same, the Hon'ble Supreme Court, considered the following cases:

17. It is well settled law that the vires of any subordinate legislation can be challenged on the ground that it is arbitrary, unreasonable and offends Article 14 of the Constitution of India. The 1979 Regulations were introduced with a view to standardize and provide comprehensive and compact set of rules in respect of wages and perquisites of the officers of the Bank. In furtherance of this object, Regulation 46 (1) of the 1979 Regulations provides pension in lieu of gratuity only to the officers appointed prior to or on 01.07.1979 and not to officers appointed, recruited or promoted thereafter. In this view, we are of the opinion that the said Regulation 46 (1) lays down a reasonable criteria for differentiation between the officers appointed prior to or on 01.07.1979 and after the said date. Hence the said Regulation 46 (1) is in consonance with the Article 14 of the Constitution of India.

18. Moreover, the fixing of the cut-off date for granting retirement benefits such as gratuity or pension under the different schemes incorporated in the subordinate legislation, thereby, creating two distinct and separate classes of employees is well within the ambit of Article 14 of the Constitution. The differential treatment of two sets of officers appointed prior to the notified date would not

offend Article 14 of the Constitution. The cut off date may be justified on the ground that additional outlay as involved or the fact that under the terms of appointment, the employee was not entitled to the benefit of pension or retirement.

19. This Court, in *Union of India v. P.N. Menon*, (1994) 4 SCC 68, has held:

"8. Whenever the Government or an authority, which can be held to be a State within the meaning of Article 12 of the Constitution, frames a scheme for persons who have superannuated from service, due to many constraints, it is not always possible to extend the same benefits to one and all, irrespective of the dates of superannuation. As such any revised scheme in respect of post-retirement benefits, if implemented with a cut-off date, which can be held to be reasonable and rational in the light of Article 14 of the Constitution, need not be held to be invalid. It shall not amount to "picking out a date from the hat", as was said by this Court in the case of *D.R. Nim v. Union of India*, (1967) 2 SCR 325, in connection with fixation of seniority. Whenever a revision takes place, a cut-off date becomes imperative because the benefit has to be allowed within the financial resources available with the Government."

The Court further observed:

"14...No scheme can be held to be foolproof, so as to cover and keep in view all persons who were at one time in active service. As such the concern of the court should only be, while examining any such grievance, to see, as to whether a particular date for extending a particular benefit or scheme, has been fixed, on objective and rational considerations."

20. In *State Government Pensioners' Association v. State of A.P.*, (1986) 3 SCC 501, the Order in question provided that retirement gratuity may be one-third of the pay drawn at the time of retirement for every six-monthly service, subject to maximum of 20 months' pay limited to `30,000. This Order was made effective from 01.04.1978. The petitioners, who were government employees and had retired before 01.4.1978, contended that the gratuity, being a part and parcel of the pensionary benefits, they were also entitled to the same retrospectively. On behalf of the State, it was pointed out that the gratuity which had accrued to the petitioners prior to

01.4.1978, was calculated on the then existing rules and pay, and such petitioners formed a distinct class, for the purpose of payment of gratuity, from others who retired after 01.04.1978, the date from which the revised pension rules were made applicable by the Government. This Court held that the upward revision of gratuity which took effect from a specified date i.e. 1-4-1978 with prospective effect, was legal and not violative of Article 14 of the Constitution.

21. In Action Committee South Eastern Railway Pensioners v. Union of India, 1991 Supp (2) SCC 544, this Court has examined the concept of 'dearness pay', including the two options for retirement benefits given to the employees which had been framed fixing a cut-off date. This Court held:

"12. ... Learned counsel for the petitioners only submitted that if the formula adopted in the case of employees having retired after March 31, 1985 vide circular dated May 17, 1985 is applied in the case of the petitioners then it would make substantial difference in the calculation of the amount of gratuity and commuted value of pension. As already discussed above no such claim can be allowed nor the same can be permissible on any principle of equality enshrined under Article 14 of the Constitution inasmuch as the petitioners form a different class from those who were continuing in service on or after March 31, 1985. The petitioners of their own accord had opted for the choice given to them and the principle enunciated in D.S. Nakara case (1983) 1 SCC 305 cannot be applied in the case of the petitioners."

22. In All India Reserve Bank Retired Officers' Association v. Union of India, 1992 Supp (1) SCC 664, the Retired Officers' Association of the Reserve Bank of India questioned the validity of introduction of pension scheme in lieu of Contributory Provident Fund Scheme. The bank employees, who retired prior to 01.01.1986, had not been given benefit of the said Pension Scheme. This Court held that the said cut-off date was neither arbitrary nor artificial or whimsical. It was further observed:

"10. ... The underlying principle is that when the State decides to revise and liberalise an existing pension scheme with a view to augmenting the social security cover granted to pensioners, it cannot ordinarily grant the benefit to a Section of

the pensioners and deny the same to others by drawing an artificial cut-off line which cannot be justified on rational grounds and is wholly unconnected with the object intended to be achieved. But when an employer introduces an entirely new scheme which has no connection with the existing scheme, different considerations enter the decision making process. One such consideration may be the financial implications of the scheme and the extent of capacity of the employer to bear the burden. Keeping in view its capacity to absorb the financial burden that the scheme would throw, the employer would have to decide upon the extent of applicability of the scheme." (Emphasis added)

23. In *University Grants Commission v. Sadhana Chaudhary*, (1996) 10 SCC 536, this Court has observed:

"21. ... It is settled law that the choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless it can be said that it is very wide off the reasonable mark."

24. In *T.N. Electricity Board v. R. Veerasamy*, (1999) 3 SCC 414, the pension scheme was applied differently to persons who had retired from service before 01.07.1986, and those who were in employment on the said date. This Court held:

"15. ... We are of the view that the retired employees (respondents), who had retired from service before 1-7-1986 and those who were in employment on the said date, cannot be treated alike as they do not belong to one class. The workmen, who had retired after receiving all the benefits available under the Contributory Provident Fund Scheme, cease to be employees of the appellant-Board w.e.f. the date of their retirement. They form a separate class."

25. In *State of Punjab v. Boota Singh* case, (2000) 3 SCC 733, this Court has held that the benefit conferred by the notification dated 9-7-1985 can be claimed by those who retire after the date stipulated in the notification and those who have retired prior to the stipulated date in the notification are governed by different rules. They

are governed by the old rules, i.e., the rules prevalent at the time when they retire. The two categories of persons are governed by different sets of rules. They cannot be equated. The grant of additional benefit has financial implications and the specific date for the conferment of additional benefits cannot be considered arbitrary.

26. This Court held:

"In Indian Ex-Services League v. Union of India (1991) 2 SCC 104 this Court distinguished the decision in Nakara case (1983) 1 SCC 305 and held that the ambit of that decision cannot be enlarged to cover all claim by retirees or a demand for an identical amount of pension to every retiree, irrespective of the date of retirement even though the emoluments for the purpose of computation of pension be different. We need not cite other subsequent decisions which have also distinguished Nakara case (1983) 1 SCC 305. The latest decision is in the case of K.L. Rathee v. Union of India (1997) 6 SCC 7 where this Court, after referring to various judgments of this Court, has held that Nakara case (1983) 1 SCC 305 cannot be interpreted to mean that emoluments of persons who retired after a notified date holding the same status, must be treated to be the same. The respondents are not entitled to claim benefits which became available at a much later date to retiring employees by reason of changes in the rules relating to pensionary benefits."

27. In State of Punjab v. J.L. Gupta, (2000) 3 SCC 736, this Court reiterating the views expressed in Boota Singh (supra), held: "5. The controversy involved in the present appeal and connected appeals is squarely covered by the aforesaid decision. The respondents are thus not entitled to claim benefits under the notification dated 9-7-1985 since the said benefits became available on a much later date to the retiring employees by reason of change in the rules relating to pensionary benefits. In this view, the judgment of the High Court cannot be sustained."

28. In Ramrao v. All India Backward Class Bank Employees Welfare Assn., (2004) 2 SCC 76, this Court has held that, even for the purpose of effecting promotion, fixing of a cut-off date was neither arbitrary, unreasonable nor did it offend Article 14 of the Constitution. This Court further observed:

"32. If a cut-off date can be fixed, indisputably those who fall within the purview thereof would form a separate class. Such a

classification has a reasonable nexus with the object which the decision of the Bank to promote its employees seeks to achieve. Such classifications would neither fall within the category of creating a class within a class or an artificial classification so as to offend Article 14 of the Constitution of India.

33. Whenever such a cut-off date is fixed, a question may arise as to why a person would suffer only because he comes within the wrong side of the cut-off date, but, the fact that some persons or a Section of society would face hardship, by itself cannot be a ground for holding that the cut-off date so fixed is ultra vires Article 14 of the Constitution."

29. In *State of Punjab v. Amar Nath Goyal*, (2005) 6 SCC 754, this Court held:

"37. In the instant case before us, the cut-off date has been fixed as 1-4-1995 on a very valid ground, namely, that of financial constraints. Consequently, we reject the contention that fixing of the cut-off date was arbitrary, irrational or had no rational basis or that it offends Article 14."

30. In *State of Bihar v. Bihar Pensioners Samaj*, (2006) 5 SCC 65, this Court held:

"17. We think that the contention is well founded. The only ground on which Article 14 has been put forward by the learned counsel for the respondent is that the fixation of the cut-off date for payment of the revised benefits under the two notifications concerned was arbitrary and it resulted in denying arrears of payments to certain Sections of the employees. This argument is no longer res integra. It has been held in a catena of judgments that fixing of a cut-off date for granting of benefits is well within the powers of the Government as long as the reasons therefor are not arbitrary and are based on some rational consideration."

31. We have sympathies for the appellant but, in a society governed by Rule of law, sympathies cannot override the Rules and Regulations. We may recall the observations made by this Court while considering the issue of compassionate appointment in public service.

32. In *Life Insurance Corporation of India v. Asha Ramachandra Ambekar and Anr.* (1994) 2 SCC 718, wherein the Court observed:

"10.....The High Courts and the Administrative

Tribunals cannot confer benediction impelled by sympathetic consideration.... Yielding to instinct will tend to ignore the cold logic of law. It should be remembered that "law is the embodiment of all wisdom". Justice according to law is a principle as old as the hills. The Courts are to administer law as they find it, however, inconvenient it may be."

14. Ultimately, Hon'ble Supreme Court held that, cut off fixed, is permissible. Though in Sudhir Kumar's case, Hon'ble Supreme Court considered the contentions with regard to pension, we are of the view that the said judgment can be made applicable, insofar as the power of the State government, to fix a cut off date for implementation of the policy on compassionate appointment.

15. Yet another aspect to be considered in this case is whether the decision of the government, in introducing a scheme of compassionate appointment, but with a specified date, can be judicially reviewed and struck down. What are all the tests for judicial review? We deem it fit to consider few decisions on judicial review.

(i) In Council of Civil Service Unions Vs. Minister for the Civil Service, reported in (1984) 3 All ER 935 Lord Diplock enunciated three grounds upon which an administrative action is subject to control by judicial review, viz. (i) illegality (ii) irrationality and (iii) procedural impropriety, as follows:

"By "illegality" he means that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it, and whether he has or has not, is a justiciable question; by "irrationality" he means "Wednesbury unreasonableness". It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided, could have arrived at it; and by "procedural impropriety" he means not only failure to observe the basic rules of natural justice or failure to act with procedural fairness, but also failure to observe procedural rules that are expressly laid down in the legislative instrument by which the tribunal's jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

(ii) The principle of "Wednesbury unreasonableness" or irrationality, classified by Lord Diplock as one of the grounds for intervention in judicial review, was lucidly summarised by Lord Greene M.R. in Associated Provincial Picture Houses Ltd. Vs. Wednesbury Corpn., reported in (1948) 1 KB 223 = (1947) 2

All ER 680 as follows:

"...the court is entitled to investigate the action of the local authority with a view of seeing whether it has taken into account matters which it ought not to take into account, or conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere."

(iii) In State of U.P. & Anr. Vs. Johri Mal, reported in (2004) 4 SCC 714, the Hon'ble Supreme Court observed thus:

"The scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi-judicial or administrative. The power of judicial review is not intended to assume a supervisory role or don the robes of the omnipresent. The power is not intended either to review governance under the rule of law or do the courts step into the areas exclusively reserved by the suprema lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review court."

(iv) In Rameshwar Prasad & Ors. (VI) v. Union of India & Anr., (2006) SCC 1, the Hon'ble Supreme Court observed thus,

"A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules he may truly be said to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.

It is an unwritten rule of law, constitutional and administrative, that whenever a decision-making function is entrusted to be subjective satisfaction of

a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote."

(v) In *Jayrajbhai Jayantibhai Patel v. Anilbhai Jayantibhai Patel and Ors.*, reported in 2006 (8) SCC 200, the Hon'ble Supreme Court in Para 18 observed as under:-

"18. Having regard to it all, it is manifest that the power of judicial review may not be exercised unless the administrative decision is illogical or suffers from procedural impropriety or it shocks the conscience of the court in the sense that it is in defiance of logic or moral standards but no standardised formula, universally applicable to all cases, can be evolved. Each case has to be considered on its own facts, depending upon the authority that exercises the power, the source, the nature or scope of power and the indelible effects it generates in the operation of law or affects the individual or society. Though judicial restraint, albeit self-recognised, is the order of the day, yet an administrative decision or action which is based on wholly irrelevant considerations or material; or excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a Court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the Court to intervene. It is nevertheless, trite that the scope of judicial review is limited to the deficiency in the decision-making process and not the decision."

The following passage from Professor Bernard Schwartz's book *Administrative Law* (Third Edition) aptly echo's our thoughts on the scope of judicial review:

"Reviewing courts, the cases are now insisting, may not simply renounce their responsibility by mumbling an indiscriminate litany of deference to expertise. Due deference to the agency does not mean abdication of the duty of judicial review and rubber-stamping of agency action : [W]e must accord the agency considerable, but not too much deference; it is entitled to exercise its discretion, but only so far and no further."

Quoting Judge Leventhal from *Greater Boston Television Corp. Vs. FCC*, 444 F. 2d 841 (D.C.Cir. 1970), he further says:

"...the reviewing court must intervene if it

"becomes aware...that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making..."

(vi) In *Ganesh Bank of Kurundwad Ltd. and others Vs. Union of India and others*, reported in (2006) 10 SCC 645, the Hon'ble Supreme Court in Paras 50 and 51 observed as under:-

"50. There should be judicial restraint while making judicial review in administrative matters. Where irrelevant aspects have been eschewed from consideration and no relevant aspect has been ignored and the administrative decisions have nexus with the facts on record, there is no scope for interference. The duty of the court is (a) to confine itself to the question of legality; (b) to decide whether the decision making authority exceeded its powers (c) committed an error of law (d) committed breach of the rules of natural justice and (e) reached a decision which no reasonable Tribunal would have reached or (f) abused its powers. Administrative action is subject to control by judicial review in the following manner:

(i) *Illegality*. - This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) *Irrationality*, namely, *Wednesbury* unreasonableness.

(iii) *Procedural impropriety*.

(vii) Professor De Smith in his classical work "*Judicial Review of Administrative Action*" 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarized as follows. The authority in which discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main

categories: (I) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

(viii) The court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability enumerated above; like illegality, irrationality and procedural impropriety."

(vii) In Bank of India v. T.Jogam reported in 2007 (7) SCC 236, the Hon'ble Supreme Court has held that it is well settled principle of law that Judicial review is not against the decision, but is against the decision making process.

(viii) In State of Maharashtra v. Prakash Prahland Patil reported in 2009 (12) SCC 159, the Hon'ble Supreme Court, at Paragraphs 5 and 6, held as follows:

"5. The scope for judicial review has been examined by this court in several cases. It has been consistently held that the power of judicial review is not intended to assume a supervisory role or don the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the supreme lex to other organs of the State. A mere wrong decision, without anything more, in most of the cases will not be sufficient to attract the power of judicial review. The supervisory jurisdiction conferred upon a court is limited to see that the authority concerned functions within its limits of its authority and that its decisions do not occasion miscarriage of justice.

6. The courts cannot be called upon to undertake governmental duties and functions. Courts should not ordinarily interfere with a policy decision of the State. While exercising power of judicial review the court is more concerned with the decision making process than the merit of the decision itself."

(ix) In All India Railway Recruitment Board v. K.Shyam Kumar reported in 2010 (6) SCC 614, the Hon'ble Supreme Court, held as follows:

"22. Judicial review conventionally is concerned with the question of jurisdiction and natural justice and the Court is not much concerned with the merits of

the decision but how the decision was reached. In Council of Civil Service Unions Vs. Minister of State for Civil Service (1984) 3 All ER 935 the (GCHQ Case) the House of Lords rationalized the grounds of judicial review and ruled that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as audi alteram partem, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc.

23. Ground of irrationality takes in Wednesbury unreasonableness propounded in Associated Provincial Picture Houses Limited v. Wednesbury Corporation (1947) 2 All ER 680, Lord Greene MR alluded to the grounds of attack which could be made against the decision, citing unreasonableness as an 'umbrella concept' which covers the major heads of review and pointed out that the court can interfere with a decision if it is so absurd that no reasonable decision maker would in law come to it. In GCHQ Case (supra) Lord Diplock fashioned the principle of unreasonableness and preferred to use the term irrationality as follows:

"By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury's unreasonableness', It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

24. In R. v. Secretary of State for the Home Department ex parte Brind (1991) 1 All ER 720, the House of Lords re-examined the reasonableness of the exercise of the Home Secretary's discretion to issue a notice banning the transmission of speech by representatives of the Irish Republican Army and its political party, Sinn Fein. Court ruled that the exercise of the Home Secretary's power did not amount to an unreasonable exercise of discretion despite the

issue involving a denial of freedom of expression. House of Lords however, stressed that in all cases raising a human rights issue proportionality is the appropriate standard of review.

25. The House of Lords in *R (Daly) v. Secretary of State for the Home Department* (2001) 2 AC 532 demonstrated how the traditional test of *Wednesbury* unreasonableness has moved towards the doctrine of necessity and proportionality. Lord Steyn noted that the criteria of proportionality are more precise and more sophisticated than traditional grounds of review and went on to outline three concrete differences between the two:-

(1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.

(2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations.

(3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights. Lord Steyn also felt most cases would be decided in the same way whatever approach is adopted, though conceded for human right cases proportionality is the appropriate test.

26. The question arose as to whether doctrine of proportionality applies only where fundamental human rights are in issue or whether it will come to provide all aspects of judicial review. Lord Steyn in *R. (Alconbury Development Limited) v. Secretary of State for the Environment, Transport and the Regions* (2001) 2 All ER 929 stated as follows:-

"I consider that even without reference to the Human Rights Act, 1998 the time has come to recognize that this principle (proportionality) is part of English administrative law not only when Judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing".

Lord Steyn was of the opinion that the difference between both the principles was in practice much less than it was sometimes suggested and whatever principle was applied the result in the case was the same.

27. Whether the proportionality will ultimately supersede the concept of reasonableness or rationality

was also considered by Dyson Lord Justice in R. (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence [2003] QB 1397 and stated as follows:-

"We have difficulty in seeing what justification there now is for retaining Wednesbury test but we consider that it is not for this Court to perform burial rights. The continuing existence of the Wednesbury test has been acknowledged by House of Lords on more than one occasion. A survey of the various judgments of House of Lords, Court of Appeals, etc. would reveal for the time being both the tests continued to co-exist."

28. Position in English Administrative Law is that both the tests that is. Wednesbury and proportionality continue to co-exist and the proportionality test is more and more applied, when there is violation of human rights, and fundamental freedom and the Wednesbury finds its presence more on the domestic law when there is violations of citizens ordinary rights. Proportionality principle has not so far replaced the Wednesbury principle and the time has not reached to say good bye to Wednesbury much less its burial.

29. In Huang case (2007) 4 All ER 15 (HL), the House of Lords was concerned with the question whether denial of asylum infringes Article 8 (Right to Respect Family Life) of the Human Rights Act, 1998. House of Lords ruled that it was the duty of the authorities when faced with individuals who did not qualify under the rules to consider whether the refusal of asylum status was unlawful on the ground that it violated the individual's right to family life. A structured proportionality test has emerged from that decision in the context of the violation of human rights. In R (Daly) (supra) the House of Lords considered both common law and Article 8 of the convention and ruled that the policy of excluding prisoners from their cells while prison officers conducted searches, which included scrutinizing privileged legal correspondence was unlawful.

30. Both the above-mentioned cases, mainly concerned with the violation of human rights under the Human Rights Act, 1998 but demonstrated the movement away from the traditional test of Wednesbury unreasonableness towards the test of proportionality. But it is not safe to conclude that the principle of Wednesbury unreasonableness has been replaced by the doctrine of proportionality.

31. Justice S.B. Sinha, as His Lordship then was, speaking for the Bench in State of U.P., v. Sheo

Shanker Lal Srivastava and Ors. (2006) 3 SCC 276 after referring to the judgment of the Court of appeal in Huang v. Secretary of State for the Home Department (2005) 3 All ER 435, R. v. Secretary of State of the Home Department, ex parte Daly (2001) 3 All ER 433 (HL) opined that Wednesbury principle may not now be held to be applicable in view of the development in constitutional law and held as follows:-

"24. While saying so, we are not oblivious of the fact that the doctrine of unreasonableness is giving way to the doctrine of proportionality.

25. It is interesting to note that the Wednesbury principles may not now be held to be applicable in view of the development in constitutional law in this behalf. See, for example, Huang v. Secy. of State for the Home Deptt. wherein referring to R. v. Secretary of State of the Home Department, ex parte Daly, it was held that in certain cases, the adjudicator may require to conduct a judicial exercise which is not merely more intrusive than Wednesbury, but involves a full-blown merit judgment, which is yet more than ex p. Daly, requires on a judicial review where the court has to decide a proportionality issue."

32. Sheo Shanker Lal Srivastava case was later followed in Indian Airlines Ltd., v. Indian Airlines Ltd., v. Prabha D.Kanan (2006) 11 SCC 67. Following the above mentioned two judgments in Jitendra Kumar and Others v. State of Haryana and Another (2008) 2 SCC 161, the Bench has referred to a passage in HWR Wade and CF Forsyth on Administrative Law, 9th Edition. (2004), pages 371- 372 with the caption "Goodbye to Wednesbury" and quoted from the book which reads as follows:-

"The Wednesbury doctrine is now in terminal decline but the coup de grace has not yet fallen, despite calls for it from very high authorities" and opined that in some jurisdictions the doctrine of unreasonableness is giving way to doctrine of proportionality."

33. Indian Airlines Ltd.'s case and Sheo Shanker Lal Srivastava's case (supra) were again followed in State of Madhya Pradesh and Others v. Hazarilal, (2008) 3 SCC 273 and the Bench opined as follows:-

"Furthermore the legal parameters of judicial review have undergone a change. Wednesbury principle of unreasonableness has been replaced by the doctrine of proportionality."

34. With due respect, we are unable to subscribe to that view, which is an overstatement of the English Administrative Law.

35. Wednesbury principle of unreasonableness as such has not been replaced by the doctrine of proportionality though that test is being applied more and more when violation of human rights is alleged. H.W.R. Wade & C.F. Forsyth in the 10th Edition of Administrative Law (2009), has omitted the passage quoted by this court in Jitender Kumar case and stated as follows:

"Notwithstanding the apparent persuasiveness of these views the coup de grace has not yet fallen on Wednesbury unreasonableness. Where a matter falls outside the ambit of 1998 Act, the doctrine is regularly relied upon by the courts. Reports of its imminent demise are perhaps exaggerated." (emphasis applied).

36. Wednesbury and Proportionality - Wednesbury applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to 'assess the balance or equation' struck by the decision maker. Proportionality test in some jurisdictions is also described as the "least injurious means" or "minimal impairment" test so as to safeguard fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. Suffice to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalize or lay down a straight jacket formula and to say that Wednesbury has met with its death knell is too tall a statement. Let us, however, recognize the fact that the current trend seems to favour proportionality test but Wednesbury has not met with its judicial burial and a state burial, with full honours is surely not to happen in the near future.

37. Proportionality, requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. Courts entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate, i.e. well balanced

and harmonious, to this extent court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.

38. Leyland and Anthony on Textbook on Administrative Law (5th edn. OUP, 2005) at p.331 has amply put as follows:

"Proportionality works on the assumption that administrative action ought not to go beyond what is necessary to achieve its desired results (in every day terms, that you should not use a sledgehammer to crack a nut) and in contrast to irrationality is often understood to bring the courts much closer to reviewing the merits of a decision".

39. Courts have to develop an infeasible and principled approach to proportionality till that is done there will always be an overlapping between the traditional grounds of review and the principle of proportionality and the cases would continue to be decided in the same manner whichever principle is adopted. Proportionality as the word indicates has reference to variables or comparison, it enables the Court to apply the principle with various degrees of intensity and offers a potentially deeper inquiry into the reasons, projected by the decision maker."

(x) In *Union of India v. Rajasthan High Court* reported in 2017 (2) SCC 599, the Hon'ble Supreme Court, at Paragraph 13, while discussing the scope of judicial review, held as follows:

"13.The powers under Article 226 are wide - wide enough to reach out to injustice wherever it may originate. These powers have been construed liberally and have been applied expansively where human rights have been violated. But, the notion of injustice is relatable to justice under the law. Justice should not be made to depend upon the individual perception of a decision maker on where a balance or solution should lie. Judges are expected to apply standards which are objective and well defined by law and founded upon constitutional principle. When they do so, judges walk the path on a road well-travelled. When judicial creativity leads judges to roads less travelled, in search of justice, they have yet to remain firmly rooted in law and the Constitution. The distinction between what lies within and what lies outside the power of judicial review is necessary to preserve the sanctity of judicial power. Judicial power is respected and adhered to in a system

based on the rule of law precisely for its nuanced and restrained exercise. If these restraints are not maintained the court as an institution would invite a justifiable criticism of encroaching upon a terrain on which it singularly lacks expertise and which is entrusted for governance to the legislative and executive arms of government. Judgments are enforced, above all, because of the belief which society and arms of governance of a democratic society hold in the sanctity of the judicial process. This sanctity is based on institutional prestige. Institutional authority is established over long years, by a steadfast commitment to a calibrated exercise of judicial power. Fear of consequences is one reason why citizens obey the law as well as judicial decisions. But there are far stronger reasons why they do so and the foundation for that must be carefully preserved. That is the rationale for the principle that judicial review is confined to cases where there is a breach of law or of the Constitution."

(xi) In *Royal Medical Trust v. Union of India* reported in 2017 (16) SCC 605, the Hon'ble Supreme Court, on the scope of judicial review, held as follows:

"The principle of judicial review by the constitutional courts have been lucidly stated in many an authority of this Court. In *Tata Cellular v. Union of India*¹⁷, dealing with the concept of Judicial Review, the Court held:-

"Lord Scarman in *Nottinghamshire County Council v. Secretary of State for the Environment* proclaimed:

'Judicial review' is a great weapon in the hands of the judges; but the judges must observe the constitutional limits set by our parliamentary system upon the exercise of this beneficial power." Commenting upon this Michael Supperstone and James Goudie in their work *Judicial Review* (1992 Edn.) at p. 16 say:

"If anyone were prompted to dismiss this sage warning as a mere obiter dictum from the most radical member of the higher judiciary of recent times, and therefore to be treated as an idiosyncratic aberration, it has received the endorsement of the Law Lords generally. The words of Lord Scarman were echoed by Lord Bridge of Harwich, speaking on behalf of the Board when reversing an interventionist decision of the New Zealand Court of Appeal in *Butcher v. Petrocorp Exploration Ltd.* 18-3-1991." Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in

any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself."

44. After so stating, reference was made to the law enunciated in *Chief Constable of the North Wales Police v. Evans* (1982) 3 All ER 141 wherein, it has been ruled:-

"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

* * * Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

45. In the said case, the Court also referred to *R. v. Panel on Take-overs and Mergers, ex. P. Datafin plc* (1987) 1 All ER 564 wherein Sir John Donaldson, M.R. Commented:-

"An application for judicial review is not an appeal."

46. The three Judge Bench further held:-

"The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers."

47. The Court further opined that in the process of judicial review, it is only concerned with the manner in which the decisions have been taken. The extent of the duty is to act fairly. It will vary from case to case. Explicating further, it ruled:-

"Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker

must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v. Secretary of State for the Home Department, ex Brind*, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

48. Thereafter, the Court referred to the authorities in *R. v. Askew* 20 and *Council of Civil Service Unions v. Minister for Civil Service* 21 and further expressed:-

"At this stage, *The Supreme Court Practice*, 1993, Vol. 1, pp. 849-850, may be quoted:

"4. *Wednesbury principle*.— A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, per Lord Greene, M.R.)" We may hasten to add, though the decision was rendered in the context of justification of grant of contract but the principles set out as regards the judicial review are of extreme significance.

49. Discussing at length, the principle of judicial review in many a decision, the two Judge Bench in *Reliance Telecom Ltd. & Another v. Union of India & Another* 22, has held:-

20 (1768) 4 Burr 2186 : 98 ER 139 21 (1985) 1 AC 374 : (1984) 3 All ER 935 : (1984) 3 WLR 1174 22 (2017) 4 SCC 269 "As we find, the decision taken by the Central Government is based upon certain norms and parameters. Though criticism has been advanced that it is perverse and irrational, yet we are disposed to think that it is a policy decision which subserves the consumers' interest. It is extremely difficult to say that the decision to conduct the auction in such a manner can be considered to be mala fide or based on extraneous considerations."

50. Thus analysed, it is evincible that the exercise of power of judicial review and the extent to

which it has to be done will vary from case to case. It is necessary to state with emphasis that it has its own complexity and would depend upon the factual projection. The broad principles have been laid down in Tata Cellular (supra) and other decisions make it absolutely clear that judicial review, by no stretch of imagination, can be equated with the power of appeal, for while exercising the power under Article 226 or 32 of the Constitution, the constitutional courts do not exercise such power. The process of adjudication on merit by re-appreciation of the materials brought on record which is the duty of the appellate court is not permissible.

51. The duty of the Court in exercise of the power of judicial review to zealously guard the human rights, fundamental rights and the citizens' right of life and liberty as also many non-statutory powers of governmental bodies as regards their control over property and assets of various kinds. (See: Union of India and Anr. v S.B. Vohra²³)"

16. Policy decision of the government, in the matter of providing employment assistance, a scheme to mitigate the hardship to the bereaved family of a government servant/panchayat servant, is a welfare measure. A cut off date is fixed for giving effect to the same. In Divisional Manager, Aravali Golf Club and Another vs Chander Hass and Another reported in (2008) 1 SCC 683 at paras 17, 19, 20, 22, the Hon'ble Supreme Court held thus:

"17. Before parting with this case we would like to make some observations about the limits of the powers of the judiciary. We are compelled to make these observations because we are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions. In our opinion this is clearly unconstitutional. In the name of judicial activism judges cannot cross their limits and try to take over functions which belong to another organ of the State.

19. Under our Constitution, the legislature, the executive and the judiciary all have their own broad spheres of operation. Ordinarily it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction.

20. Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like emperors. There

is broad separation of powers under the Constitution and each organ of the State—the legislature, the executive and the judiciary—must have respect for the other and must not encroach into each other's domains.

22. In *Tata Cellular v. Union of India* [(1994) 6 SCC 651 : AIR 1996 SC 11] (vide AIR para 113 : SCC para 94) this Court observed that the modern trend points to judicial restraint in administrative action. The same view has been taken in a large number of other decisions also, but it is unfortunate that many courts are not following these decisions and are trying to perform legislative or executive functions. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimisation of the judges' preferences. The Court must not embarrass the administrative authorities and must realise that administrative authorities have expertise in the field of administration while the Court does not. In the words of Neely, C.J. [Ed.: Quoting from Bernard Schwartz in *Administrative Law*, 2nd Edn., p. 584] : (SCC p. 681, para 82)

"82. ... 'I have very few illusions about my own limitations as a Judge ... I am not an accountant, electrical engineer, financier, banker, stockbroker or systems management analyst. It is the height of folly to expect Judges intelligently to review a 5000 page record addressing the intricacies of a public utility operation.'

It is not the function of a Judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator."

17. In *Common Cause (A Regd. Society) v. Union of India* reported in 2008 (5) SCC 511, at para 40, the Hon'ble Supreme Court held thus:

"40. The justification given for judicial activism is that the executive and legislature have failed in performing their functions. Even if this allegation is true, does it justify the judiciary in taking over the functions of the legislature or executive? In our opinion it does not: firstly, because that would be in violation of the high constitutional principle of separation of powers between the three organs of the State, and secondly, because the judiciary has neither the

expertise nor the resources for this. If the legislature or executive are not functioning properly it is for the people to correct the defects by exercising their franchise properly in the next elections and voting for candidates who will fulfil their expectations, or by other lawful means e.g. peaceful demonstrations and agitations, but the remedy is surely not by the judiciary in taking over the functions of the other organs.

Writ court has considered as to whether retrospective effect can be given or not. There is no reason to reverse the order. In the light of the above discussion and decisions, writ appeal is dismissed. No costs.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

ars/asr

To

1. The Principal Secretary to Government,
Rural Development and Panchayat Raj Department,
Fort St.George, Chennai - 600 009.

2. The Director of Rural Development and Panchayat Raj,
Saidpet, Chennai - 600 015.

+1 CC to The Govt. Pleader sr 76900.

W.A.No.2929 of 2019

MG(CO)
SP(31/10/2019)

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