

THE HON'BLE THE CHIEF JUSTICE SATISH CHANDRA SHARMA
AND

THE HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI

WRIT PETITION Nos.1215, 4557, 6896, 6898, 6903, 7158, 8327,
8358, 8661 and 11045 of 2017 and 12011, 29262 of 2019
and 4852 of 2021

COMMON ORDER: *(Per the Hon'ble the Chief Justice Satish Chandra Sharma)*

Regard being had to the similitude in the controversy involved in the present cases, the writ petitions were analogously heard and by a common order, they are being disposed of by this Court.

2. The facts of W.P.No.1215 of 2017 are as follows:-

The petitioner, Dr. Kolla Venkata Subba Rao, has filed the present writ petition being aggrieved by the statutory executive instructions issued by the Government of India, dated 29.10.2014, which has been re-issued by the Government of Andhra Pradesh, vide G.O.Ms.312, General Administration (SR) Department, dated 30.10.2014 in the matter of allocation of employees. The petitioner's contention is that the post of Civil Assistant Surgeon is a state level post and allotment of employees is being done taking into account Section 77 of the Andhra Pradesh Reorganisation Act, 2014.

3. The facts of the case further reveal that local status of the petitioner is State of Andhra Pradesh and in the order of reverse seniority, though the petitioner has opted for State of Telangana, he has been allocated to the State of Andhra Pradesh. The petitioner in the present case has prayed for the following relief:-

“For the reasons stated in the accompanying affidavit, it is therefore prayed that this Hon’ble High Court may be pleased to grant appropriate relief more in the nature of Writ of mandamus under Article 226 of the Constitution of India declaring the instructions issued by the 1st respondent in F.No.27/13/2013-SRS, dated 29.10.2014 which was re-issued by the 6th respondent in G.O.Ms.No.312, General Administration (SR) Department, dated 30.10.2014 in so far as it relates to applying the local status in adopting provisions of the Andhra Pradesh Public Employment (Organisation of Local Cadres and Regulation of Direct Recruitment) Order, 1975 while making allotments to the State level posts in pursuance of A.P. Reorganization Act, 2014 is concerned, as arbitrary, illegal, unconstitutional violating Articles 14, 16 and 21 of the Constitution of India and set aside the same including the Notification No.378/SR1/A1/2015-21, dated 25.01.2016 in so far as the allotment of the petitioner to the State of Andhra Pradesh is concerned instead of State of Telangana in the cadre of Associate Professor in Pediatrics while making final allotments in pursuance of the tentative allocation made in Notification No.378/SR1/A1/2015-21, dated 25.01.2016 issued by the

6th respondent and allow the petitioner to continue in the State of Telangana in the cadre of Associate Professor in Pediatrics and pass such other orders as it deem fit and proper in the circumstances of the case.”

4. It is nobody’s case that the petitioner has been allocated in violation of the executive instructions dated 29.10.2014 issued by the Government of India. However, by taking a plea that the petitioner is an employee of state level cadre, he has challenged the constitutional validity of the executive instructions.

5. In identical circumstances, wherein constitutional validity of the executive instructions was under challenge, this Court has passed the common order, dated 21.03.2022, in W.P.Nos.38658 of 2016 and batch, which reads as under:-

“19. The Hon’ble Supreme Court of India in the case of **Indradeo Paswan v Union of India**¹, while dealing with the Bihar Reorganization Act, 2000, in paragraph 12 has held as under:-

“12. We see no reason not to accept the principle adopted in *Prakash Chandra Sinha v. Union of India* [(2003) 4 JCR 165] by the High Court that the allocation should not be interfered with on individual grievances relating to non-acceptance of options exercised, unless clear illegality or Wednesbury unreasonableness is

¹ (2007) 7 SCC 250

established. The State was reorganised with effect from 20-11-2000. We are in the year 2007. It had taken almost five years for the Union of India to publish the final list of allocation regarding this Department. In the absence of any clear ground for interference found in the case, merely on the ground that the appellant had opted for going to the State of Jharkhand but had been allocated to the State of Bihar, it does not appear to be necessary or proper to interfere with the order of allocation. It is brought to our notice that the State of Bihar had subsequently informed the appellant that he had been given regular promotion to the post of Additional Director of Mines by the Department of Mines and Geology and that he could join that post. There is therefore no subsisting reason for the appellant to complain even as regards the post to be held by him in the reorganised State of Bihar. It is not necessary for us to deal with or comment on the consequences of the appellant, in spite of being relieved from the State of Jharkhand on 10-5-2005 pursuant to the final allocation, not joining the service in the reorganised State of Bihar. Suffice it to say that in this appeal we see no ground to interfere with the decision of the High Court.”

20. In the light of the aforesaid judgment, as the allocation has been done keeping in view the executive instructions framed on the subject, merely because the petitioner wants to be allocated to the State of Telangana, the question of interference does not arise.

21. The petitioner wants her allocation to be changed to the State of Telangana. The claim of the petitioner cannot be considered by superseding the claim of the other employees who are much senior to

the petitioner. The allocation of the petitioner to the State of Andhra Pradesh has been done strictly in consonance with the statutory provisions as contained under Section 77 of the Reorganisation Act read with paragraphs 18 and 19 of the Executive Instructions issued by the Government of India, dated 10.08.2015.

22. The petitioner has challenged the constitutional validity of executive instructions issued by the Government of Andhra Pradesh, dated 30.10.2014 in respect of allocation of employees to the State of Telangana and the State of Andhra Pradesh. The executive instructions which are under challenge have been issued in exercise of powers conferred under section 77 of the A.P. Reorganisation Act, 2014 and having statutory force. The constitutional validity of an Act, the Rules or statutory executive instructions can certainly be challenged under Article 32 of the Constitution of India as well as under Article 226 of the Constitution of India.

23. In **Shayara Bano v. Union of India**², the Supreme Court had examined the question of law that a legislation, be it plenary or subordinate, can be challenged on the ground of arbitrariness with regards to the practice of Triple Talaq and the Muslim Personal Law (Shariat) Application Act, 1937. The Apex Court, per Nariman and Lalit, JJ, held that:

² (2017) 9 SCC 1

“82. It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments in *Mithu case* [*Mithu v. State of Punjab*, (1983) 2 SCC 277 : 1983 SCC (Cri) 405] and *Sunil Batra case* [*Sunil Batra v. Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155] that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be “arbitrary”.

83. However, the three-Judge Bench in *McDowell* [*State of A.P. v. McDowell and Co.*, (1996) 3 SCC 709] dealt with the binding Constitution Bench decision in *Mithu* [*Mithu v. State of Punjab*, (1983) 2 SCC 277 : 1983 SCC (Cri) 405] as follows : (*McDowell case* [*State of A.P. v. McDowell and Co.*, (1996) 3 SCC 709] , SCC p. 739, para 45)

“45. Reference was then made by Shri G. Ramaswamy to the decision in *Mithu v. State of Punjab* [*Mithu v. State of Punjab*, (1983) 2 SCC 277 : 1983 SCC (Cri) 405] wherein Section 303 of the Penal Code, 1860 was struck down. But that decision turned mainly on Article 21 though Article 14 is also referred to along with Article 21. Not only did the offending provision exclude any scope for application of judicial discretion, it also deprived the accused of the procedural safeguards contained in Sections 235(2) and 354(3) of the Criminal Procedure Code. The ratio of the said decision is thus of no assistance to the petitioners herein.”

A binding judgment of five learned Judges of this Court cannot be said to be of “no assistance” by stating that the decision turned mainly on Article 21, though Article 14 was also referred to. It is clear that the ratio of the said Constitution Bench was based *both* on Article 14 and Article 21 as is clear from the judgment of the four learned Judges in paras 19 and 23 set out supra. [It is clear that one judgment can have more than one ratio decidendi. This was recognised early on by the Privy Council in an appeal from the Supreme Court of New South Wales, in *Commissioners of Taxation for the State of New South Wales v. Palmer*, 1907 AC 179 (PC). Lord

Macnaghten put it thus: (AC p. 184)“... But it is impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined.” In *Jacobs v. London County Council*, 1950 AC 361 : (1950) 1 All ER 737, the House of Lords, after referring to some earlier decisions held, as follows : (AC p. 369 : All ER p. 741) “... However, this may be, there is, in my opinion, no justification for regarding as obiter dictum a reason given by a Judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing. A good illustration will be found in *London Jewellers Ltd. v. Attenborough*, (1934) 2 KB 206 (CA). In that case the determination of one of the issues depended on how far the Court of Appeal was bound by its previous decision in *Folkes v. R.*, (1923) 1 KB 282 (CA), [in which] the court had given two grounds for its decision, the second of which [as stated by Greer, L.J., in *Attenborough case*, (1934) 2 KB 206] was that : (KB p. 222) ‘... where a man obtains possession with authority to sell, or to become the owner himself, and then sells, he cannot be treated as having obtained the goods by larceny by a trick.’”In *Attenborough case*, (1934) 2 KB 206 it was contended that, since there was another reason given for the decision in *Folkes case*, (1923) 1 KB 282, the second reason was obiter, but Greer, L.J., said in reference to the argument of counsel : (*Attenborough case*, KB p. 222)“I cannot help feeling that if we were unhampered by authority there is much to be said for this proposition which commended itself to Swift, J., and which commended itself to me in *Folkes v. R.*, (1923) 1 KB 282, but that view is not open to us in view of the

decision of the Court of Appeal in *Folkes v. R.*, (1923) 1 KB 282. In that case two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the *ratio decidendi* and neglect the second, or to pick out the second reason as the *ratio decidendi* and neglect the first; we must take both as forming the ground of the judgment.” So, also, in *Cheater v. Cater*, (1918) 1 KB 247 (CA) Pickford, L.J., after citing a passage from the judgment of Mellish, L.J., in *Erskine v. Adeane*, (1873) LR 8 Ch App 756, said : (*Cheater case*, KB p. 252)“... That is a distinct statement of the law and not a dictum. It is the second ground given by the Lord Justice for his judgment. If a Judge states two grounds for his judgment and bases his decision upon both, neither of those grounds is a dictum.”] A three-Judge Bench in the teeth of this ratio cannot, therefore, be said to be good law. Also, the binding Constitution Bench decision in *Sunil Batra* [*Sunil Batra v. Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155] , which held arbitrariness as a ground for striking down a legislative provision, is not at all referred to in the three-Judge Bench decision in *McDowell* [*State of A.P. v. McDowell and Co.*, (1996) 3 SCC 709] .

84. The second reason given is that a challenge under Article 14 has to be viewed separately from a challenge under Article 19, which is a reiteration of the point of view of A.K. *Gopalan v. State of Madras* [*A.K. Gopalan v. State of Madras*, 1950 SCR 88 : AIR 1950 SC 27 : (1950) 51 Cri LJ 1383] that fundamental rights must be seen in watertight compartments. We have seen how this view was upset by an eleven-Judge Bench of this Court in *Rustom Cavasjee Cooper v. Union of India* [*Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248] and followed in *Maneka Gandhi* [*Maneka*

Gandhi v. Union of India, (1978) 1 SCC 248] . Arbitrariness in legislation is very much a facet of unreasonableness in Articles 19(2) to (6), as has been laid down in several judgments of this Court, some of which are referred to in *Om Kumar* [*Om Kumar v. Union of India*, (2001) 2 SCC 386 : 2001 SCC (L&S) 1039] and, therefore, there is no reason why arbitrariness cannot be used in the aforesaid sense to strike down legislation under Article 14 as well.

85. The third reason given is that the courts cannot sit in judgment over parliamentary wisdom. Our law reports are replete with instance after instance where parliamentary wisdom has been successfully set at naught by this Court because such laws did not pass muster on account of their being “unreasonable”, which is referred to in *Om Kumar* [*Om Kumar v. Union of India*, (2001) 2 SCC 386 : 2001 SCC (L&S) 1039] . We must never forget the admonition given by Khanna, J. in *State of Punjab v. Khan Chand* [*State of Punjab v. Khan Chand*, (1974) 1 SCC 549] . He said : (SCC p. 558, para 12)

“12. It would be wrong to assume that there is an element of judicial arrogance in the act of the courts in striking down an enactment. The Constitution has assigned to the courts the function of determining as to whether the laws made by the legislature are in conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the courts discharge an obligation which has been imposed upon them by the Constitution. The courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the Articles of the Constitution. Articles 32 and 226 are an integral part of the Constitution and provide remedies for enforcement of fundamental rights and other rights conferred by the Constitution. Hesitation or refusal on the part of the courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution. Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others against

measures which are violative of the Constitution is fraught with serious consequences. It is as much the duty of the courts to declare a provision of an enactment to be unconstitutional if it contravenes any article of the Constitution as it is theirs to uphold its validity in case it is found to suffer from no such infirmity.”

This again cannot detain us.

86. One more reason given is that the proportionality doctrine, doubtful of application even in administrative law, should not, therefore, apply to this facet of Article 14 in constitutional law. Proportionality as a constitutional doctrine has been highlighted in *Om Kumar v. Union of India* [*Om Kumar v. Union of India*, (2001) 2 SCC 386 : 2001 SCC (L&S) 1039] , as follows : (SCC pp. 400-01, paras 30-32)

“30. On account of a Chapter on Fundamental Rights in Part III of our Constitution right from 1950, Indian courts did not suffer from the disability similar to the one experienced by English courts for declaring as unconstitutional *legislation* on the principle of proportionality or reading them in a manner consistent with the charter of rights. Ever since 1950, the principle of “proportionality” has indeed been applied vigorously to legislative (and administrative) action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India—such as freedom of speech and expression, freedom to assemble peaceably, freedom to form associations and unions, freedom to move freely throughout the territory of India, freedom to reside and settle in any part of India—this Court has occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. The burden of proof to show that the restriction was reasonable lay on the State. “Reasonable restrictions” under Articles 19(2) to (6) could be imposed on these freedoms only by legislation and courts had occasion throughout to consider the proportionality of the restrictions. In numerous judgments of this Court, the extent to which “reasonable restrictions” could be imposed was considered. In *Chintamanrao v. State of M.P.* [*Chintamanrao v. State of M.P.*, AIR 1951 SC 118 : 1950 SCR 759] Mahajan, J. (as he then was) observed that (AIR p. 119, para 7) “reasonable restrictions” which the State could impose on the fundamental rights “should not be arbitrary or of an excessive nature, *beyond what is required* in the interests of the public”. “Reasonable” implied intelligent care and deliberation, that is, the *choice* of a course which reason dictated. Legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of reasonableness unless it struck a *proper balance* between the rights guaranteed and the control

permissible under Articles 19(2) to (6). Otherwise, it must be held to be wanting in that quality. Patanjali Sastri, C.J. in *State of Madras v. V.G. Row* [*State of Madras v. V.G. Row*, 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966] , observed that the Court must keep in mind the 'nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the *disproportion* of the imposition, the prevailing conditions at the time'. (AIR p. 200, para 15)

This principle of proportionality vis-à-vis legislation was referred to by Jeevan Reddy, J. in *State of A.P. v. McDowell & Co.* [*State of A.P. v. McDowell and Co.*, (1996) 3 SCC 709] recently. This level of scrutiny has been a common feature in the High Court and the Supreme Court in the last fifty years. Decided cases run into thousands.

31. Article 21 guarantees liberty and has also been subjected to principles of "proportionality". Provisions of the Criminal Procedure Code, 1973 and the Penal Code, 1860 came up for consideration in *Bachan Singh v. State of Punjab* [*Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] the majority upholding the legislation. The dissenting judgment of Bhagwati, J. (see *Bachan Singh v. State of Punjab* [*Bachan Singh v. State of Punjab*, (1982) 3 SCC 24 : 1982 SCC (Cri) 535]) dealt elaborately with "proportionality" and held that the punishment provided by the statute was *disproportionate*.

32. So far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the courts considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality. There are also cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [see *Air India v. Nergesh Meerza* [*Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : 1981 SCC (L&S) 599] (SCC at pp. 372-73)]. But this latter aspect of striking down legislation only on the basis of "arbitrariness" has been doubted in *State of A.P. v. McDowell and Co.* [*State of A.P. v. McDowell and Co.*, (1996) 3 SCC 709] "

87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in *McDowell* [*State of A.P. v. McDowell and Co.*, (1996) 3 SCC 709] when it is said that a constitutional

challenge can succeed on the ground that a law is “disproportionate, excessive or unreasonable”, yet such challenge would fail on the very ground of the law being “unreasonable, unnecessary or unwarranted”. The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

88. We only need to point out that even after *McDowell* [*State of A.P. v. McDowell and Co.*, (1996) 3 SCC 709] , this Court has in fact negated statutory law on the ground of it being arbitrary and therefore violative of Article 14 of the Constitution of India. In *Malpe Vishwanath Acharya v. State of Maharashtra* [*Malpe Vishwanath Acharya v. State of Maharashtra*, (1998) 2 SCC 1] , this Court held that after passage of time, a law can become arbitrary, and, therefore, the freezing of rents at a 1940 market value under the Bombay Rent Act would be arbitrary and violative of Article 14 of the Constitution of India (see paras 8 to 15 and 31).

89. Similarly in *Mardia Chemicals Ltd. v. Union of India* [*Mardia Chemicals Ltd. v. Union of India*, (2004) 4 SCC 311] , this Court struck down Section 17(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as follows : (SCC p. 354, para 64)

“64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that : (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet, (iii) the secured assets or their management with transferable interest is

already taken over and under control of the secured creditor, (iv) no special reason for double security in respect of an amount yet to be determined and settled, (v) 75% of the amount claimed by no means would be a meagre amount, and (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not only onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution.”

90. In two other fairly recent judgments, namely, *State of T.N. v. K. Shyam Sunder* [*State of T.N. v. K. Shyam Sunder*, (2011) 8 SCC 737 : 6 SCEC 65], SCC at paras 50 to 53, and *A.P. Dairy Development Corpn. Federation v. B. Narasimha Reddy* [*A.P. Dairy Development Corpn. Federation v. B. Narasimha Reddy*, (2011) 9 SCC 286], SCC at para 29, this Court reiterated the position of law that a legislation can be struck down on the ground that it is arbitrary and therefore violative of Article 14 of the Constitution.

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101. It will be noticed that a Constitution Bench of this Court in *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* [*Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when

something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14.

24. In the present case, the executive instructions issued on the subject have been issued to provided transparency in the matter of allocation of employees and by no stretch of imagination, it can be said that the executive instructions are arbitrary in nature and therefore, in the light of the aforesaid Judgment, the question of declaring the executive instructions as arbitrary, illegal and unconstitutional, violative of Articles 14, 16 and 20 of the Constitution of India and also contrary to Section 77 of the A.P.Reorganisation Act, 2014 does not arise.

25. In the case of **State of Andhra Pradesh v. McDowell & Co.**,³ the liquor manufacturers of Andhra Pradesh had challenged the vires of the Andhra Pradesh Prohibition (Amendment) Act, 1995 before the Supreme Court under Article 32 of the Constitution of India. The Apex Court in the aforesaid case in paragraph 43 has held as under: -

“43. Shri Rohinton Nariman submitted that inasmuch as a large number of persons falling within the exempted categories are allowed to consume intoxicating liquors in the State of Andhra Pradesh, the total prohibition of manufacture and production of these

³ (1996) 3 SCC 709

liquors is 'arbitrary' and the amending Act is liable to be struck down on this ground alone. Support for this proposition is sought from a judgment of this Court in *State of T.N. v. Ananthi Ammal* [(1995) 1 SCC 519] . Before, however, we refer to the holding in the said decision, it would be appropriate to remind ourselves of certain basic propositions in this behalf. In the United Kingdom, Parliament is supreme. There are no limitations upon the power of Parliament. No court in the United Kingdom can strike down an Act made by Parliament on any ground. As against this, the United States of America has a Federal Constitution where the power of the Congress and the State Legislatures to make laws is limited in two ways, viz., the division of legislative powers between the States and the Federal Government and the fundamental rights (Bill of Rights) incorporated in the Constitution. In India, the position is similar to the United States of America. The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness — concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation.

It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary [An expression used widely and rather indiscriminately — an expression of inherently imprecise import. The extensive use of this expression in India reminds one of what Frankfurter, J. said in *Hattie Mae Tillerv. Atlantic Coast Line Railroad Co.*, 87 L Ed 610 : 318 US 54 (1943). “The phrase begins life as a literary expression; its felicity leads to its lazy repetition and repetition soon establishes it as a legal formula, indiscriminatingly used to express different and sometimes contradictory ideas”, said the learned Judge.] or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety (see *Council of Civil Service Unions v. Minister for Civil Service* [1985 AC

374 : (1984) 3 All ER 935 : (1984) 3 WLR 1174] which decision has been accepted by this Court as well). The applicability of doctrine of proportionality even in administrative law sphere is yet a debatable issue. (See the opinions of Lords Lowry and Ackner in *R. v. Secy. of State for Home Deptt., ex p Brind* [1991 AC 696 : (1991) 1 All ER 720] AC at 766-67 and 762.) It would be rather odd if an enactment were to be struck down by applying the said principle when its applicability even in administrative law sphere is not fully and finally settled. It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted. Now, coming to the decision in *Ananthi Ammal* [(1995) 1 SCC 519] , we are of the opinion that it does not lay down a different proposition. It was an appeal from the decision of the Madras High Court striking down the Tamil Nadu Acquisition of Land for Harijan Welfare Schemes Act, 1978 as violative of Articles 14, 19 and 300-A of the Constitution. On a review of the provisions of the Act this Court found that it provided a procedure which was substantially unfair to the owners of the land as compared to the procedure prescribed by the Land Acquisition Act, 1894, insofar as Section 11 of the Act provided for payment of compensation in instalments if it exceeded rupees two thousand. After noticing the several features of the Act including the one mentioned above, this Court observed: (SCC p. 526, para 7)

“7. When a statute is impugned under Article 14 what the court has to decide is whether the statute is so arbitrary or unreasonable that it must be struck down. At best, a statute upon a similar subject which derives its authority from another source can be referred to, if its provisions have been held to be reasonable or have stood the test of time, only for the purpose of indicating what

may be said to be reasonable in the context. We proceed to examine the provisions of the said Act upon this basis.”

26. In the light of the aforesaid judgment, the executive instructions cannot be said to be arbitrary and unreasonable and a transparent mechanism has been devised for allocating the employees and after examination of the executive instructions, this Court is of the considered opinion that they cannot be declared as unconstitutional as prayed for on account of alleged arbitrariness.

27. In the case of **Namit Sharma v. Union of India**⁴, there was a challenge to the vires of certain provisions of the Right to Information Act, 2005 concerning criterion for appointment of persons for adjudication of disputes under the Act. The Apex Court noticed the following:-

“11. An enacted law may be constitutional or unconstitutional. Traditionally, this Court had provided very limited grounds on which an enacted law could be declared unconstitutional. They were legislative competence, violation of Part III of the Constitution and reasonableness of the law. The first two were definite in their scope and application while the cases falling in the third category remained in a state of uncertainty. With the passage of time, the law developed and the grounds for unconstitutionality also widened. D.D. Basu in *Shorter Constitution of India* (14th Edn., 2009) has detailed, with reference to various judgments of this Court, the grounds on which the law could be invalidated or could not be invalidated. Reference to them can be made as follows:

⁴ (2013) 1 SCC 745

“Grounds of unconstitutionality.— A law may be unconstitutional on a number of grounds:

(i) Contravention of any fundamental right, specified in Part III of the Constitution. (Ref. Under Article 143: *Special Reference No. 1 of 1964, In re* [AIR 1965 SC 745 : (1965) 1 SCR 413] .)

(ii) Legislating on a subject which is not assigned to the relevant legislature by the distribution of powers made by the Seventh Schedule, read with the connected articles. (Ref. *Special Reference No. 1 of 1964, In re* [AIR 1965 SC 745 : (1965) 1 SCR 413] .)

(iii) Contravention of any of the mandatory provisions of the Constitution which impose limitations upon the powers of a legislature e.g. Article 301. (Ref. *Atiabari Tea Co. Ltd. v. State of Assam* [AIR 1961 SC 232] .)

(iv) In the case of a State law, it will be invalid insofar as it seeks to operate beyond the boundaries of the State. (*State of Bombay v. R.M.D. Chamarbaugwala* [AIR 1957 SC 699] .)

(v) That the legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution or has made an excessive delegation of that power to some other body. (*Hamdard Dawakhana v. Union of India* [AIR 1960 SC 554 : 1960 Cri LJ 735] .)”

12. On the other hand, a law cannot be invalidated on the following grounds:

“(a) That in making the law (including an Ordinance), the law-making body did not apply its mind (even though it may be a valid ground for challenging an executive act), (Ref. *Nagaraj K. v. State of A.P.* [(1985) 1 SCC 523 : 1985 SCC (L&S) 280]) or was prompted by some improper motive. (Ref. *Rehman Shagoo v. State of J&K* [AIR 1960 SC 1 : 1960 Cri LJ 126 : (1960) 1 SCR 680] .)

(b) That the law contravenes some constitutional limitation which did not exist at the time of enactment of the law in question. (Ref. *STO v. Ajit Mills Ltd.* [(1977) 4 SCC 98 : 1977 SCC (Tax) 536])

(c) That the law contravened any of the directive contained in Part IV of the Constitution. (Ref. *Deep Chand v. State of U.P.* [AIR 1959 SC 648])”

28. The executive instructions under challenge does not contravene any fundamental right and does not contravene any mandatory provision of the Constitution of India and therefore, the question of quashing the executive instructions as prayed for does not arise.

29. In **Supreme Court Advocates-on-Record Association v. Union of India**⁵, the constitutional validity of the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 were challenged before the Supreme Court. The Constitutional Bench held as under:-

“853. The accepted view is that a parliamentary statute can be struck down only if it is beyond legislative competence or violates Article 13 or the fundamental rights. The basic structure doctrine is not available for striking down a statute. It was held in *State of A.P. v. McDowell & Co.* [*State of A.P. v. McDowell & Co.*, (1996) 3 SCC 709, para 43] that: (SCC pp. 737-38)

“43. ... The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone viz. (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground.”

854. This view was followed in *Public Services Tribunal Bar Assn. v. State of U.P.* [*Public Services Tribunal Bar Assn. v. State of U.P.*, (2003) 4 SCC 104 : 2003 SCC (L&S) 400, para 26] in the following words: (SCC p. 120)

“26. The constitutional validity of an Act can be challenged only on two grounds viz. (i) lack of legislative competence; and (ii) violation of any of the fundamental

⁵ (2016) 5 SCC 1

rights guaranteed in Part III of the Constitution or of any other constitutional provisions. In *State of A.P. v. McDowell & Co.* [*State of A.P. v. McDowell & Co.*, (1996) 3 SCC 709, para 43] this Court has opined that except the above two grounds there is no third ground on the basis of which the law made by the competent legislature can be invalidated and that the ground of invalidation must necessarily fall within the four corners of the aforementioned two grounds.”

857. Strictly speaking, therefore, an amendment to the Constitution can be challenged only if it alters the basic structure of the Constitution and a law can be challenged if:

- (1) It is beyond the competence of the Legislature;
- (2) It violates Article 13 of the Constitution;
- (3) It is enacted contrary to a prohibition in the Constitution; and
- (4) It is enacted without following the procedure laid down in the Constitution.”

30. Keeping in view the aforesaid judgment, it can never be said that the executive instructions are violative of Articles 14, 16 and 21 of the Constitution of India, nor can it be said that the executive instructions have been framed contrary to the provisions of the Constitution of India, nor can the executive instructions be termed as arbitrary and therefore, keeping in view the aforesaid judgments, the question of interference does not arise.

31. The general notion pertaining to challenging the constitutional validity of a law, as noted in **Mc.Dowell** case, recognized two grounds. These are:-

- (a) Lack of legislative competence;

- (b) Violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision.

32. Subsequently, “arbitrariness” has also been considered as a ground to challenge the constitutional validity of a law in the **Shayara Bano** case, after re-examining the legal position in **McDowell** case.

33. This Court, in the light of the aforesaid judgment, is of the view that the petitioner has challenged the executive instructions without there being any ground to challenge the same and in respect of allocation, which was made in the year 2017 on account of interim order, the petitioner is continuing in the State of Telangana. This Court is of the opinion that the petitioner has not been able to make out any case for interference in a transparent process of allocation and the writ petition deserves to be dismissed and is accordingly dismissed.”

- 6. Keeping in view the aforesaid Judgment delivered by this Bench only, this Court is of the opinion that the petitioner has not been able to make out any ground for quashment of the executive instructions issued by the Government of India.

7. The learned counsel for the petitioner has argued before this Court that while deciding the earlier batch of cases, this Court has not taken into account the judgment delivered in the case of **Telangana Judges Association v. State of Telangana**⁶.

8. In the aforesaid case, on account of reorganisation of States, the Judicial Officers were allocated to two States based upon Section 77 of the Andhra Pradesh Reorganisation Act, 2014 read with executive instructions issued by the Government of India and also the modified guidelines submitted by the High Court vide letter dated 08.07.2017 and paragraphs 58 to 62 of the aforesaid Judgment are reproduced as under:-

“**58.** The petitioners' submission that the High Court has modified the guidelines for accepting option without there being any valid reason and further no valid reasons have been indicated by the High Court for modifying the guidelines. In this context, it is relevant to notice that the draft guidelines, which were initially circulated by the High Court on 26-2-2016 have in the first sentence stated “the allocation shall be done in the order of seniority as available on 2-6-2014”. The second sentence read “Preference shall be given first to those who

⁶ (2019) 18 SCC 769 : 2018 SCC OnLine SC 1729

have applied for the State in which the district declared by them at the time of entering service falls”. The above draft guidelines have only been amplified retaining the initial concept of accepting option on the basis of seniority. Both the concepts as noted above are now reflected in modified guidelines as Guidelines 5(1) and 5(2) as extracted above. Thus, the argument of the petitioners that guidelines have been substantially changed by the High Court without there being any reason cannot be accepted. The substance of the guidelines are same, which were initially contained in the draft guidelines and modified guidelines. It was the DoPT, which has proposed guidelines, where content Clause 5.2 was 5.1 of modified guidelines were proposed as 5.1 was 5.2, which was not accepted by the High Court and the Full Court reiterated their earlier principle, which was initially encapsuled in the draft guidelines.

59. We, during the course of the submissions, had asked Shri Venkatramani, learned Senior Counsel appearing for the High Court to give a chart indicating the details of options and chart showing details of Judicial Officers working in both the States of Andhra Pradesh and Telangana from 2-6-2014 and the acceptance position of their option. Detailed chart has been submitted by the High Court, which indicates that all Judicial Officers belonging to territorial area of Telangana region have been allocated Telangana State and the option of all the Judicial Officers, who have opted for Telangana State has been accepted. A list of all officers belonging to District Judge Cadre; Civil Judge Senior Division cadre and Civil Judge, Junior Division cadre has been submitted, which indicates that all officers, who have opted for Telangana State have been allocated Telangana State.

60. All the Judicial Officers belonging to Telangana State having opted and allocated the Telangana State, practically, we do not find any error in the operation of guidelines finalised by the High Court.

61. In view of the foregoing discussions, we are of the view that modified guidelines as submitted by the High Court vide letter dated 8-7-2017, which has been accepted by DoPT does not suffer from any illegality or error. The above guidelines are to be accepted and approved. In view of the foregoing discussions, we dispose of the writ petition with direction to the respondents to finalise options of all the Judicial Officers as per the above guideline and complete the process of allocation within a period of two months from today.

62. Now, coming to the civil appeals arising out of SLPs (C) Nos. 18787-90 of 2016, the appellants themselves in their submissions have not pressed the quashing of Recruitments 2014 and 2015. Further, the Andhra Pradesh Judicial Service Rules, 2007 as adopted by the State of Telangana, which was quashed by the High Court is now substituted by fresh Rules, namely, the Telangana State Judicial Service Rules, 2017. All the issues raised in the above civil appeals arising out of special leave petitions have become academic and need no consideration. The civil appeals having become virtually infructuous are dismissed accordingly. The parties shall bear their own costs.”

9. In the aforesaid case, it was vehemently argued that the guidelines, as modified by the High Court accepted by

the Department of Personnel and Training, are prejudicial to the rights of the judicial officers of the State of Telangana and it is the Central Government alone, which is competent to issue guidelines as per Section 77 read with Section 80 of the Andhra Pradesh Reorganisation Act, 2014. The Hon'ble Supreme Court has dismissed the writ petitions without any interference in the matter of allocation of judicial officers.

10. In the considered opinion of this Court, the aforesaid Judgment does not help the petitioner in any manner as allocation has been done on the basis of nativity keeping in view Section 77 of the Andhra Pradesh Reorganisation Act, 2014 read with executive instructions issued on the subject. The executive instructions have been issued to ensure fair and equal treatment to all persons affected and also to conform equality clause as enshrined in Article 14 of the Constitution of India.

11. The petitioner in the present petition as well as the petitioners in other connected writ petitions have not been able to point out a single deviation from the executive instructions issued on the subject, dated 29.10.2014, which

were re-issued on 30.10.2014 and therefore, in the light of the earlier order issued by this Court in W.P.Nos.38658 of 2016 and batch, this Court does not find any reason to interfere in the matter of allocation.

12. The interim orders granted in all the writ petitions are vacated and the writ petitions are accordingly dismissed.

Miscellaneous applications, pending if any, shall stand dismissed. There shall be no order as to costs.

SATISH CHANDRA SHARMA, CJ

ABHINAND KUMAR SHAVILI, J

31.03.2022
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