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THE DOCTRINE OF SUBSTANTIVE ULTRA VIRES

For the purpose of making project in the subject Administrative Law, a very distinct and important topic has been taken as the central issue of it. The "Doctrine of Substantial Ultra Vires" which is the present issue in concern is a substantial principle of administrative law having its own importance and influence in the legal scenario irrespective of the boundaries of law. Therefore the research would be deliberating upon the topic concerned.

Research methodology to be followed:

To deliberate upon the issue "Doctrine of Substantial Ultra Vires" will be dealt in a systematic and particular way. In this regard, Doctrinal approach has been adopted and compilation from literary sources, course materials, articles, reviews, e-databases and books have been given special importance. Along with founding sources the recent developments in form of judicial pronouncement and case study has also been incorporated in this project.

The Doctrine of Ultra Vires: An Introduction

The doctrine of ultra vires is the basic doctrine in administrative law. The doctrine envisages that an authority can exercise only so much power as is conferred on it by law. An action of the authority is intra vires when it falls within the limits of the power conferred on it but ultra vires if it goes outside this limit. The doctrine of ultra vires has two aspects: substantive and procedural.

When a piece of delegated legislation is declared to be ultra vires, it is void and becomes unenforceable. It cannot affect the rights and duties of any person. Until a rule is declared invalid by a court, it is presumed to be valid. If the valid and the invalid parts of a rule can be severed, only then the invalid portion of the rule is quashed and the valid portion can continue to remain operative. However, if the valid and the invalid parts are inextricably mixed up, then the entire rule has to go. A void rule cannot be the basis of any administrative action. No one can be

prosecuted under a void rule. The validity of a rule can be challenged in a court either directly or collaterally, or by way of defense to a civil claim based on the impugned rule, or as a defense in a prosecution for infringing the rule. A person can challenge the validity of administrative action by challenging the validity of the relevant rule. A person whose interest is affected adversely by a piece of delegated legislation can directly challenge its vires in a court. The court may grant an injunction or declaration or issue mandamus or award damages to the affected person as may be suitable.

If the subordinate or delegated legislation goes beyond the scope of authority conferred on the delegate or it is in conflict with the parent or enabling act, it is called substantive ultra vires. The validity of the subordinate or delegated legislation may be challenged before the Courts on this ground.

Grounds on which Delegated legislation may be challenged

Enabling or Parent Act is unconstitutional:

In India, there is supremacy of the Constitution and therefore an act passed by the Legislature is required to be in conformity with the constitutional requirement and if it is found to be in violation of the constitutional provisions, the court declares it unconstitutional and void. If enabling or parent act (i.e the act providing for the delegation) is void and subordinate or delegated legislation made under the act will also be declared to be unconstitutional and therefore void. The limits of the Constitution may be express and implied.

Express Limit: Articles 13, 245 and 246 provide the express limits of the constitution. Article 13(1) provides that all laws in force in the territory of India immediately before the commencement of the constitution in so far as they are inconsistent with the provisions of Part III (fundamental rights) shall, to the extent of the contravention, be void. According to article 13(2), the state shall not make any law which takes away or abridges the rights conferred by part III (i.e the Fundamental Rights) and any law made in contravention of this clause shall, to the extent of the contravention, be void. Article 13(3) makes it clear that for this purpose, unless the context otherwise requires, law includes any ordinance, order, by – law, rule, regulation, notification, custom or usage having in the territory of India, the force of law. The legislature, thus, cannot violate the provisions of part III of the constitution granting the fundamental rights. If the parent or enabling Act is violative of the Fundamental Rights granted by part III of the constitution, it will be declared by the court as unconstitutional and void, and the subordinate or delegated legislation made under the act will also be held to be unconstitutional and void.

Article 245 makes it clear that the legislative powers of the parliament and that of the state legislatures are subject to the provisions of the constitution. Parliament may make laws for the whole or any part of the territory of India and the legislatures of a state make laws for the whole or any part of the state. No law made by the parliament shall be deemed to be invalid on the ground that it would have extra territorial operation. The state legislature can make law only for the State concerned and, therefore, the law made by the state legislature having operation outside the state would be invalid. In the matter of Cauvery Water Disputes Tribunal, the Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991 was declared unconstitutional on

certain grounds including the ground that it had extra territorial operation inasmuch as it interfered with the equitable rights of Tamil Nadu and Pondicherry to the waters of Cauvery River.

In short, no law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation. However, the law made by the state legislature may be challenged on the ground of extra territorial operation. If the parent act is declared to be unconstitutional, then the delegated legislation made under such act would also be declared to be unconstitutional and thus, void.

Article 246 makes provisions in respect of the distribution of powers between the powers between the Parliament and the State legislatures. From article 246 and the seventh schedule, it becomes clear that the subjects have been divided into three categories – Union list, State list and Concurrent list. Parliament has exclusive power to make laws with respect to any of the matters or subjects enumerated in the Union list and of the legislature of any state has power to make laws for such state or any part thereof with respect to any of the matters or subjects enumerated in the State list. Parliament and State Legislatures both have power to make laws with respect to any of the matters or subjects enumerated in the Concurrent List, but In the case of conflict between the law made by Parliament and a law made by the State Legislature with respect to such matter or subject, the law made by Parliament shall prevail and the laws made by the State Legislature, to the extent of repugnancy, be void, unless the law made by the State Legislature has received the assent of the President.

Implied limit: If the Enabling or Parent Act violates the implied limit of the Constitution, it will be ultra vires the Constitution and therefore It will be void and the delegated legislation made under the Act will also be unconstitutional and void. The implied limit of the Constitution Is that essential legislative function entrusted to the legislature by the Constitution cannot be delegated by it. The essential legislative function consists of the determination of the legislative policy and its formulation as a rule of conduct. The legislature delegating its legislative power must lay down the legislative policy and guidelines regarding the exercise of tin delegated power by delegate. The delegation of essential legislative function is taken as abdication of essential legislative function by the Legislature and this is not permitted by the Constitution.

In a case the Supreme Court has made it clear that the essential legislative function which consists of the determination of the legislature policy cannot be delegated. Such delegation would amount to abdication of the essential legislative functions.

The Supreme Court has made it clear that the excessive delegation is not permissible. The doctrine of excessive delegation has played an important role in controlling the practice of delegated legislation. Excessive delegation is taken as abdication of essential legislative function by the legislature. The delegation must not be unguided and uncontrolled. If the delegation is excessive, the Enabling Act or Parent Act will be unconstitutional and therefore void and the delegated legislation made under such Enabling or Parent Act will also be unconstitutional and void.

Subordinate or delegated legislation is ultra vires the Constitution:

Sometimes it is found that the Enabling or Parent Act is not violative of the Constitution, but the subordinate or delegated legislation made under it violates the provisions of the Constitution. Such subordinate or delegated legislation will be unconstitutional and void, though the Enabling or Parent Act is perfectly valid. Thus, the subordinate or delegated legislation, (e.g., rules, regulations, by-laws, etc.) made under the Enabling or Parent Act may be unconstitutional while the Enabling or Parent Act is constitutional.

Article 31-B of the Constitution of India is also notable here. The Acts and Regulations Included in the IXth Schedule of the Constitution are protected under Article 31-B against the ground of Infringement of any of the Fundamental Rights, but not against other grounds. The protection of Article 31-B is available only to the Acts or Regulations placed in the IXth Schedule of the Constitution. If an Act is placed under the IXth Schedule, the protection of Article 31-B will be available to such Act, but this protection will not be available to the delegated legislation made under it. Thus, the delegated legislation may be challenged on the ground that it violates the Constitution, even though the Enabling or Parent Act under which it has been made is protected by Article 31-B. (Legislation in 9th schedule is not under judicial scrutiny) (zamindari abolishment Act)

Delegated legislation is ultra vires the Enabling or Parent Act:

The validity of the subordinate or delegated legislation can be challenged on the ground that it is ultra vires the Enabling or Parent Act. If the subordinate or delegated legislation made by the delegate is in excess of the power conferred by the Enabling or Parent Act or is in conflict with the provisions of the Enabling or Parent Act or is made without following the procedure required by the Enabling or Parent Act to be followed by the delegate, the delegated or subordinate legislation will be invalid on the ground that it is ultra vires the Enabling or Parent Act. The validity of the exercise of power is tested on the basis of the Prussians as it stands currently and not on the basis of that it was before.

When it is made in excess of the power conferred by the Enabling or Parent Act:

The subordinate or delegated legislation is held to be ultra vires the Enabling or Parent Act when it is found to be in excess of the power conferred by the Enabling or Parent Act. If the delegated legislation is beyond the power conferred on the delegate by the Enabling Act, it would be invalid even if it has been laid before the Legislature. Where an administrative authority is empowered by the Enabling Act to make by-laws to regulate market and the authority makes by-law which prohibits running of cattle market the by-law will be ultra vires the Enabling Act.

In *S.T.O. v. Abraham* the Act empowered the Government to carry out the purposes of the Act the Government made rule so as to fix the last date for filing the declaration forms by dealers for getting the benefit of concessional rates on inter-State sales. This rule was held to be ultra vires the Enabling Act on the ground that the Act empowered the Government for making rules for prescribing the particulars to be mentioned in the forms and it was not given power to prescribe a time-limit for filling the form.

When delegated legislation is in conflict with the Enabling or Parent Act:

When the delegated legislation is found to be directly or indirectly in conflict with the provisions of the Enabling Act or Parent Act, it is held to be ultra vires the Enabling or Parent Act. In *Delhi Transport Undertaking v. B.R.I. Hajelay*, a rule was declared Invalid on the ground that it was in conflict with the provisions of the Enabling or Parent Act, According to Section 92 of the Delhi Corporation Act, 1957, all persons drawing salary less than 350 rupees per month shall be appointed only by general Manager of the Delhi Transport Undertaking. According to Section 95 of the Act, no person can be dismissed by any authority subordinate to the authority who has appointed him. The rules made under the Act empowered the General Manager to delegate all his powers to the Assistant General Manager. The rule was held to be In conflict with the aforesaid provision of the Parent Act. The effect of the rule was that a person appointed by the General Manager could be dismissed by the Assistant General Manager. i.e. a person could be dismissed by an authority subordinate to the authority who had appointed him while Section 95 of the Act provided that no person can be dismissed by an authority subordinate to the appointing authority. Thus, the rule was in conflict with Section 95 of the Act. Consequently the rule was held to be invalid.

When delegated legislation is made by authority exercising its power mala fide:

When the subordinate or delegated legislation is made by the administrative authority exercising its power mala fide or with ulterior motive, It is held to be ultra vires and, therefore, invalid.

When the delegated legislation is unreasonable and arbitrary:

When the delegated legislation is found unreasonable and arbitrary, it is declared invalid. In India, in some cases the High Courts express the view that the delegated legislation cannot be challenged on the grounds of unreasonableness. However, the view of the Courts is that the delegated legislation may be challenged on the ground of unreasonableness and arbitrariness. In India doctrine of unreasonableness has been given the solid base of Article 14. The delegated legislation which is unreasonable and arbitrary can be challenged on the ground that it is violative of Article 14.

In *Air India v. Nargesh Meerza*, a regulation provided that an air hostess would retire from the service attaining the age of 35 years or on marriage within 4 years of service or on first pregnancy, whichever occurred earlier. The regulation authorized the Managing Director to extend the age of retirement to 45 years at his option if an air hostess was found medically fit. The Regulation did not contain any guidelines or policy according to which the discretion conferred on the Managing Director was to be exercised. The regulation conferred on the Managing Director was unguided and uncontrolled discretion. The termination of service of an air hostess on pregnancy was unreasonable and arbitrary. The regulation was held to be violative of Article 14 as it was unreasonable and arbitrary.

Briefly stated, the principle is that the delegate cannot make a rule which is not authorized by the parent statute. If the subordinate legislative authority keeps within the bounds of the power delegated, the delegated legislation is valid, however, if the authority exceeds the power delegated, then the courts will certainly declare it to be ultra vires.

Substantive ultra vires means that the rule making authority has no substantive power under the empowering act to make rules in question. It refers to the scope, extent and range of power conferred by the parent statute to make delegated legislation. Briefly stated, the principle is that the delegate cannot make a rule which is not authorized by the parent statute. If the subordinate legislative authority keeps within the scope and bounds of the power delegated, the delegated legislation is valid; but if it fails outside the scope of the power, the courts will declare it invalid. Delegated legislation to be valid must fall within the four corners of the powers conferred by the statute. Declaring a rule in the Karnataka Motor Vehicle Rules, 1963, ultra vires the Motor vehicles act, 1939, as a rule was inconsistent with a section in the act, the Supreme Court declared in *State of Karnataka v H. Ganesh Kamath* that the rule making power "cannot include within its scope the power to make a rule contrary to the provisions of the Act conferring the rule making power.

Conferment of a rule making power by an Act does not enable the rule – making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto." As the Supreme Court has emphasized in *State of U.P v Renusagar Power Co.*, "if the exercise of power is in the nature of subordinate legislation, the exercise must conform to the provisions of the statute. All the conditions of the statute must be fulfilled."

The doctrine refers to the extent, scope and range of power conferred by the parent act on the concerned authority to make rules. Conferment of rule making power by an Act on an authority does not enable the rule making authority to make a rule which is beyond the scope of the enabling act, or which is inconsistent therewith or repugnant thereto.

Substantial Ultra vires & Procedural Ultra vires: a Comparison

When delegated legislation is In conflict with the procedure prescribed by the Enabling or Parent Act

When the delegated legislation is found to be in conflict with the procedure prescribed by the Enabling Act, it is held to be ultra vires the Enabling Act and, therefore, void. If the delegated legislation is made without following the mandatory procedure prescribed by the Enabling or Parent Act, It will be ultra vires the Enabling or Parent Act and, therefore, invalid. It is to be noted that the delegated legislation will be held to be invalid on the ground only if the procedure prescribed by the Act is mandatory. In short, if the procedure required to be complied with in making the delegated legislation is mandatory and it is not complied with, the delegated legislation will be held to be invalid on the ground of procedural ultra vires. If the procedure prescribed by the Enabling Act is not mandatory but directory, its' substantial compliance will be sufficient and thus in case of substantial compliance, It will not be invalid. In *Raja Buland Sugar Co. v. Rampur Municipality*, the U.P. Municipalities Act. 1916 provided that the draft rules must be published in a local Hindi daily. The draft rules were published in a local Urdu Daily. The Court held that what was mandatory was publication of the draft rules in a newspaper. Publication In a

Hindi daily was only directory. Consequently, the Court held that the rules could not be held to be ultra vires the Enabling Act merely because they were published in Urdu daily, (instead of a Hindi daily). The publication was made in substantial compliance with the manner provided in the Act.

Test of measuring the validity of Rules

Rules have to be consistent with the provisions of the parent statute. A rule cannot enlarge the meaning of a statutory provision. A rule has to yield to the statutory provision. If a rule goes beyond what the section in the Act contemplates, the rule has to go. A rule is ultra vires when it goes beyond the authority conferred on the rule making body by the relevant statute.

To be valid, a rule must fulfill two conditions, they are:

it must conform to the provisions of the statute under which it is framed; and

it must also come within the scope and purview of the rule making power of the authority framing the rule.

If either of these two conditions is not fulfilled; the rule would be void. To apply the doctrine of ultra vires, the court has first to interpret the statutory provisions to determine the scope of delegation of power, then to interpret the delegated legislation in question and finally, to adjudge whether the same is within, or without, the statutory power conferred.

Difficulty in application of the Doctrine of Ultra Vires

The efficacy of judicial control of delegated legislation is very much dependant on how broad is the statutory formula conferring power of delegated legislation is very much dependant on how broad is the statutory formula conferring power of delegated legislation on the delegate.

Usually, the application of the ultra vires rule becomes very difficult because of three reasons:

Powers are usually conferred in broad language.

Ordinarily, the Courts interpret the enabling provision rather broadly.

The courts adopt a deferential, rather than a critical, attitude towards delegated legislation.

In India, the test of reasonableness is applicable to delegated legislation, both on general principles of administrative law as well as under such fundamental rights as are guaranteed under Constitution of India.

Exclusion of judicial review

Sometimes a clause is inserted in the Enabling or Parent Act for ousting the jurisdiction of the Courts to review the delegated legislation. This is called exclusion clause. Usually such clause contains the words 'rules made shall have effect as if enacted or Included in the Act Itself or 'rules made shall not be called in question in any Court.' In England. in *Institute of Patent Agents v.*

Lord Herschel expressed the view that such provision excluded the judicial review of the delegated legislation on the ground of ultra vires. However, In a later case, *Minister of Health v. King*. *Lx Paste Yabbe*. the view of Lord Herscheli has not been followed. In this case, the Court has held that inspite of the exclusion clause, the delegated legislation can be reviewed by the Court and can be declared invalid If it is found ultra vires the Enabling or Parent Act. Thus, in England, the present position is that Inspite of the exclusion clause, the subordinate or delegated legislation may be challenged on the ground that they are ultra vires the Enabling Act.

In India in a few cases the Supreme Court has adopted the view expressed by Lord Herschel in the case of *Institute of Patent Agents v. Lockwood*, stated above (the Supreme Court has held that such clause will exclude the Judicial review of the delegated legislation on the ground of ultra vires), but in some other cases, the Supreme Court has held that inspite of such exclusion clause, the delegated legislation can be reviewed by the Court. The present position is that inspite of such exclusion clause. the delegated legislation may be challenged before the Court on the ground that they are ultra vires and the Court can hold the delegated legislation invalid, if it finds them ultra vires.

Case Study

Implied limits of the Constitution are those laid down in *In re Delhi Laws Act* case, namely the laying down policy and enacting that policy into a binding rule of conduct. Section 7 of the *Delhi Laws Act, 1972* delegated to the provincial government the power to extend to Delhi area with such restriction and modification any law in force in any part of British India. Section 2 of the *Ajmer Merwaha (Extension of Laws) Act, 1947* delegated the power to the Government to extend to the province of Ajmer-Merwaha any law in force in any other province with such modification and restriction as it may deem fit any enactment which was in force in any part 'A' state. it also empowered the Govt. to repeal or amend any corresponding law which was applicable to part 'C' state. The legislature cannot delegate its essential legislative power to any other agency and if it so delegates the enabling would be ultra vires of the Constitution. In the said case the Court held that the later part of clause 2 invalid because it authorized the administrative agency to repeal a law, which in the opinion of the Court, is an essential legislative action.

In *Indian Council of Legal Aid and Advice v Bar Council of India* the Supreme Court held that: a rule made by BCI barring qualified persons above the age of 45 years from enrollment as advocates, as ultra vires, a sit fell outside the power of BCI conferred by it by the *Advocates Act, 1961*, Section 49(1).

In *Additional District Magistrate (Revenue) Delhi Administration v Siri Ram* the *Delhi Land Revenue Rules 1962* made under the *Delhi Land Revenue Act, 1954*, were declared ultra vires as being contrary to the Parent Act as well as another Act, by making the rules, the rule making authority had exceeded the power conferred on it by the *Land Reforms Act 1954*.

Ajay Kumar Mukherjee v UOI is a case where Supreme Court has said that delegated legislation ultra vires the act by cutting down the breadth of the delegation to bring it in line with the object

of the delegation of legislative power. The purpose or object of the conferment of the power must be borne in mind.

Conclusion

Thus, to draw conclusion it can be said that if the subordinate or delegated legislation goes beyond the scope of authority concerned on the delegate or it is in conflict with the Parent or Enabling Act, it is called substantive ultra vires. The validity of the subordinate or delegated legislation may be challenged before the Courts on this ground. It is a mechanism to curb down the exploitation of power by the administrative authority as we all know that "power corrupts and absolute power corrupts absolutely". However in this field there is lack of development and there is no substantial change in the concept all though the changing nature of the current legislative method has widen the horizon of the power of the authority by giving them power to act according to the need of the time, even sometimes travelling beyond the restrictions.

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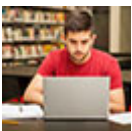

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