CHAPTER -2

CONTROL OVER ADMINISTRATIVE DISCRETION UNDER ADMINISTRATIVE LAW

1. Need of Control:

As pointed out in the earlier Chapter under the impact of Welfare State and to meet the emergency, the conferment of discretionary powers on the administration cannot ne avoided. Thus in modern times discretionary powers of administrative authority embrace nearly all the spheres of an individual's life in the society. But if the administrative authorities who posses these discretionary powers are given complete freedom in the exercise of these powers it would pose a serious problem for individual liberty and it may also frustrate the purposes for which it is granted. It is, therefore that the exercise of discretion has to be, to some extent, controlled so that it may not be exercised in an unrestrained and arbitrary manner. If discretionary power is allowed to be exercised in an unrestricted and arbitrary manner, the concept of rule of law would be reduced to the position of a sham formality. As observed by our Supreme Court through K.S. Megde J. in **A.K. Kraipak** Vs **Union of India"**[1] The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions if a fair and just manner.[2] The predominance of regular laws opposed to the influence of arbitrary power or even of wide discretionary power is the first and the most important requirement of rule of law. It is true that the development of a planned society necessarily means some re-orientation of the traditional legal approach. But it does not mean that in a planned society rule of law cannot hold good. It is for the courts to reconcile the problem of administrative necessity with the fundamental postulates of rule of law.[3] The increasing phenomenon of State control does not mean the total surrender of individual's interest to an unrestricted choice of administration. The Court, therefore, must maintain rule of law and protect individual's liberty and freedom by preventing the administrative discretion from being exercised in an arbitrary

manner. The Government has to function according to law rather than law is to be subjected to arbitrary government will. Executive power has thus to be controlled by law and has to be exercised according to legal principles of fair and proper procedure. It comes to no more than striking a balance between power and responsibility at a point which commends to public opinion. Therefore, no consideration of administrative convenience or executive efficiency should be allowed to weaken the control of the courts and no obstacle can be placed in the way of subjects' unimpeded access to them. "The power to act at discretion is not the power to act **ad arbitrium**. The discretionary authority does not carry any despotic power. There is nothing like absolute discretion bordering on arbitrariness and legal irresponsibility"[4] That there is a necessity of the supervisory jurisdiction of the courts to control the exercise of the administrative discretion of executive authorities is clearly brought out in the following remark of Subba Rao, J (as he then was) in **M.P. Industries** Vs **Union of India.**[5] Said he

> "A judge is trained to look at things objectively uninfluenced by considerations of policy or expediency, but, an executive officer generally looks at things from the stand point of policy and expediency. The habit of mind of an executive officer so formed cannot be expected to change from function to function or from act to act. So it is essential that some restrictions shall be imposed on tribunals in the matter of passing orders affecting the rights of the parties."[6]

The system for exercising necessary control over the exercise of administrative discretion has taken different shapes in different countries. For example, in France, due to peculiar interpretation of the doctrine of separation of powers, the ordinary courts of law are disabled from having to do anything in a matter where administration is involved. It is this immunity of the administration from the jurisdiction of the ordinary courts which attracted the disparaging comments of Prof. A.V. Dicey. But later researches have amply shown that French systems does not confer any absolute or arbitrary powers to the Government and the administration. There are administrative courts with conselt-

d-Etat at its head which exercise if anything better control over administrative discretion than what can be imagined in common law system.

In England 'Parliamentary Supremacy' bars jurisdiction of the Courts to judge the vires of any of the Parliamentary enactments. The power of the Parliament is subject to no other authority. It can be express words in a statute take away from the courts the power of judicial review. But it does not mean that courts in England have no power of judicial review at all. In fact unless expressly provided otherwise in a statute, the courts can review any administrative action if any illegality appears to have been done. The executive action in England is not therefore, free from judicial control.

In the U.S.A., as it is clear from the "Due process" clause the power of judicial review of courts cannot be taken away or restricted by any ordinary legislation. Within the sphere of "due process" clause the courts can interfere with administrative actions. Apart from the guarantee of above clause section 10 of Administrative Procedure Act, 1946, specifically provides that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any statute, shall be entitled to judicial review there of". In exercising the power of Judicial review the American courts may consider the whole records and may take due account of prejudicial errors and also they may strike down the decisions if the same are not based on reliable probative and substantial evidence.

The Indian judiciary also, like that of England, exercises the power of judicial review in respect of administrative actions on their being ultravires the constitution or on other well established grounds. Under our constitution the scope of judicial review wider than that which is possessed by the judiciary in England. The very preamble of our constitution aspires to build a "Sovereign Democratic Republic"[7] dedicated to ideals of "justice liberty and equality and fraternity". With these ends in view, its provisions embody in express terms the power of judicial review in the courts of the land, a power which was recognised in the United States only after a long struggle"[8]. The Indian judiciary has been described as the watch dog of democracy.[9] Rule of law is an important feature of our

constitution. Article 14 of our Constitution guarantees to all persons equality before the law an the equal protection of the laws within the territory of India. Any discriminatory action of the executive may be challenged under this Article. Our constitution under Articles 32, 226, 136 and 227 enable the Judiciary in express terms to interfere with the misuse of powers by the administration.

2. Courts do not go into the Merits of Exercise of Discretion:

On one hand the legislature confers powers on administrative authorities which they may be required to exercise according to their own discretion and on the other hand they are also required to act within the limits of the law and powers conferred upon them. The pattern of judicial review in the field of Administrative law reflects a reconciliation between these two conflicting values. While conferring discretionary powers legislature never intends that the executive itself ahould become sole and final judge of the extent of its powers. This task is left with the courts which keep the administration within the compass of law. As observed by Wade "The Court Must take care not to usurp the discretion given to some other body"[10]. The Courts should not and do not go into the merits of the exercise of discretion and their concern is only with the legality of what is done. The observations of Greene, M.R. In **Associated Provincial Picture House Ld.** Vs **Wednesbury Corporation**[11] support this view. In this case the Cinematograph Act, 1909, empowered the local council to license Sunday opening of Cinemas 'subject to such conditions as the authority may think fit to impose'. A licence was granted subject to the condition that no children under fifteen years of age should be admitted whether accompanied by an adult or not. This total ban on children and indirectly on parents was challenged as being unreasonable and therefore ultravires. Lord Greene M.R. said :

> "When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. It must be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognises certain principles upon which that discretion must be exercised, but within the four corners of

these principles the discretion is an absolute one and cannot be questioned in any court of law."

This decision makes it clear that an exercise of discretion may in the opinion of court, be unwise, but it is not the function of the court to substitute its own wisdom in place of the discretion of the authority on whom discretion is conferred by law.

The principle can also be illustrated with the help of a few decisions of our own Supreme Court. The syndicate of Utkal University Cancelled the examination of a subject namely 'Anatomy (a subject for M.B.B.S. course) and directed that another examination be held as it was satisfied that there had been a leakage of questions. The High Court while examining the facts for itself concluded that even if "The evidence is sufficient to indicate a possibility of some leakage, there was no justification for the syndicate to pass such a drastic resolution in the absence of proof of the quantum and the amptitude of leakage".

On appeal the Supreme Court reversed this decision of the High Court unanimously and through Bose J. said that the High Court could not constitute itself into a court of appeal from the authority against which the appeal was sought. It was not the function of the courts of law to substitute their wisdom and discretion for that of the persons to whose judgment the matter in question was entrusted by law. It was not for the High Court to require proof of the quantum and amplitude of the leakage.[12]

In ***Pratap Singh*** Vs ***State of Punjab***[13] the appellant, a Civil Surgeon in the employment of State Government, was initially granted leave preparatory to retirement, but subsequently it was revoked and he was place under suspension and displnary action was started against him on the charge that he had accepted a bribe of Rs. 16/- from some patient prior to going on leave. The appellant alleged that the disciplinary action against him had been initiated at the instance of the Chief Minister to wreak personal vengeance on him as he had refused to yield to the illegal demands of the Chief Minister and the member of his family. In the course of his judgment Raj Gopala Ayyanger J. speaking for the majority of the Supreme Court said that :

> "……..the court is not an appellate forum where the correctness of the order of the Government could be canvassed and, indeed, it has no jurisdiction to substitute its own view……. For entirety of the power, jurisdiction and discretion…….. is vested by law in the Government. The only question which could be considered by the Court is whether the authority vested with the power has paid attention to or taken into account circumstances, events or matters wholly extraneous to the purpose for which the power was vested, or whether the proceedings have been intimated mallified for satisfying a private or personal grudge of the authothiry."[14]

The discretionary power is not discretionary in the sense that it is uncontrolled and without any qualification and it totally depends on the subjective satisfaction of the authority upon whom it is conferred by law, but it is always subject to some restrictions flow from the language of the Act itself by which the discretionary power is conferred. As observed by Lord Pearce in **Padfield** Vs **Minister of Agriculatural, Fisheries, Food and others.**"[15] that:

> "Where a statute conferring a discretion on a minister to exercise or not to exercise a power did not limit expressly or define the extent of his discretion and did not require him to give reasons for declining to exercise the power, his discretion might nevertheless be limited to the extent that it must not be so used, whether by reasons of misconstruction of the statute or other reasons, as to frustrate the object of the Statute which conferred it.[16]"

From the above discussion it appears that discretionary power is always subject to judicial review, although judicial review is permitted to a limited extent, Even if absolute discretionary power is conferred without any restitution, it is also subject to judicial review because discretionary power conferred with an object or for a policy or purpose which the statute conferring it reflects. In this connection Lord Up John observed that :

> "the use of the adjective unfettered, even and Act of Parliament, can do nothing to unfetter the control which the judiciary have over the

executive, namely that in exercising their powers the latter (executive must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives."[17]

The Courts have propounded certain propositions and taken recourse to certain principles or tests to control such powers in certain situations and contingencies. They can be grouped into two categories:

A- Where the authority has abused its powers or has not properly exercised the same.

B- Where the authority has not applied its mind in exercising the powers.

A. Abuse of Discretion:

Abuse of powers is not confined to cases where the wrong thing is done, or the right thing is done by wrong procedure, the right thing may be done by the right procedure, but on the wrong grounds.[18] Bad faith, dishonesty, unreasonableness, attention given to extraneous considerations, disregard of public policy and things like that have all been referred to according to the facts of individual cases, as being matters which are relevant in determining the question whether the discretion was abused. If they cannot be confined under one head, they at any rate overlap to a very great extent.[19] This has been illustrated by Warrington L.J. in **Short** Vs **Poole Corporation**[20] where a red haired teacher was dismissed because she had red hairs. This is unreasonable in one sense. In another, it is taking of extraneous matters into consideration. It is also so unreasonable that it might almost be described as being done in bad faith. In fact, all these things run into one another and the task of eparating them analytically in a particular situation my be difficult, but they are reconised as forming distinct legal categories and in majority of the cases separate identification is not impossible. According to Dr. Markase, the concept of abuse of power comprehends the following elements:[21]

a- At the top of the list may be placed exercise of sacred trust conferred on the authority for personal considerations, e.g. bribery, corruption, official victimisation of vindictiveness due to personal grudge.

b- Exercise of power though not actuated by selfish or immoral considerations but still moved by undesirable ends e.g. evasion of the consequences of decisions of the courts.

c- Exercise of power in such mode and to disclose callous or reckless indifference to private interests. For examples impatience at any attitude of indifference to official inclination and precipitate action using more force and violence and promptoriness than necessary. That is to say lawful orders have to be enforced with unpleasantness, but still there may be a reasonable mode of doing it, when the mode of exercising a valid power is improper and unreasonable there is an abuse of power. An instance may be the refusal to restore possession of a person's cycle found on the public path on the ground that it was a temporary encroachment under the Municipal Act.

d- A further and large group where abuse of power occurs is where a discretion is exercised on consideration irrelevant to the statutory purpose. Here the irrelevant considerations dominate not because of any deliberate choice of the authority but as a result of honest mistake which it makes about the object or scope of its power.

e- The last class of power is where the available powers are used by the statutorily authority for a collateral purpose deliberately and with motive to further certain official policy which either the specific authority itself might have or the Government, its superior. For example, Calcutta Corporation may exercise its power of compulsory acquisition of land with the best motive not for itself (though that is its ostensible purpose) but for the Calcutta Improvement Trust.

The different kinds of abuse of power mentioned above may be discussed under the following heads:-

(i) Exercise of power improper purpose.

(ii) Colorable exercise of power.

(iii) Malafides

(iv) Leaving out relevant considerations.

(v) Taking into account irrelevant considerations.

(vi) Mixed considerations.

(vii) Unreasonable exercise of power.

(i) Exercise of Power Improper Purpose:

Where discretionary power is granted for one purpose and it is exercised for a different or collateral or foreign purpose, the power is said to be exercised not properly. If purposes are expressly mentioned in the statute conferring discretionary powers then there is no difficulty, but if purposes are not expressly mentioned in the statute, then it is implied purposes for which power is to be exercised. The implied purpose is purpose of the statute conferring the power and it is for the court to determine it. In other words there must be a reasonable relation between the exercise of power and the object of the statute.[22] In this connection Lord Reid in **Padfield** Vs **Minsiter of Agriculature**[23] says :

"Parliament must have conferred the discretion with the intention that it should be used to promote the object and policy of the Act. The policy and object of the Act must be determined by construing the Act as a whole and Construction is always a matter of law for the Court. In a matter of this kind it is not possible to draw a hard and fast line, but if the minister by reason of his having misconstrued the Act or for any other reasons, so uses his discretion as to thwart or run counter to the policy and object of the Act, then our laws would be very defective if persons aggrieved are not entitled to the protection of the Court.[24]"

The cases of exercise of discretionary power for improper purpose have arisen much in modern times because conferment of broad discretionary power has become and usual tendency. It has been rightly remarked by Jain and Jain[25] that because of the broad phraseology used in a statute to confer discretion on the authority concerned, an order passed by it, may look on its face to be proper and within the ambit and scope of its statutory power but nevertheless, the real purpose for which the power has been exercised may be contrary to the purpose and objectives of the statute in questions. In a case[26] where a local authority empowered to acquire property for the purpose of widening a street or re-developing and urban area, acquires a man's land ostensibly for the permitted

purposes but in reality for the purpose of resulting it at a profit or preventing him from reaping the benefit of the expected increment in land values or giving an advantage to a third party, it cannot be said that the discretionary power has been used for the proper purpose. In another case.[27] where the land was acquired ostensibly for public purpose by the corporation at its expense but really for the improvement trust at the latter's cast, the court held the action of the corporation illegal because it could not use the power to enable another body to acquire land. When power is exercised for a collateral purpose it is said to be abused. This can better be lustrated by the majority judgment of the Supreme Court in **Madhava Rao Scindia Bahadur** Vs **Union of India.**[28] Hedge J observes :

> "The impugned order (derecognising the Princes in mass) is also unconstitutional for the reason that the power conferred under Article 366(11) is exercised is exercised for a collateral purpose. The power to recognise rulers conferred for the purpose of implementing some of the provisions of the Constitution and not for denuding the contents of those provisions of the Constitution. The Government of India sought to amend the Constitution by deleting Articles 291, 362 and 366 (11). But as bill seeking the amendment of the Constitution failed, the cabinet met and advised the President to pass the impugned orders. This is clearly and attempt to do indirectly what the Government could not do directly. Such an exercise of power is impermissible under Article 366(11). It is fraud on that power."

Where unlimited power is conferred on the authority the exercise of power must be directed to achieve the object of the Statute and not otherwise.

In cases mentioned above there is no problem because in such type of case the authority concerned achieves an altogether different purpose pretending that he is achieving one which is sought to be achieved by the Act conferring discretionary power. But the Problem may arise in cases where the power exercised by the authority concerned is for mixed purposes i.e. where the power is exercised for achieving the purpose sought to be achieved by the Act and also for

some other purpose. In such cases the courts normally seek to ascertain what was the "true purpose" for which the power was exercised and if the purpose thus ascertained was lawful then the mere fact that some subsidiary object had also been pursued may be disregarded.[29]

"Improper purpose" is broader than *mala fides,* for whereas the latter denotes a personal spite or malice, the former may have no such element. The action of an authority may be motivated by some public interest (as distinguished from private interest) but it may be different from what is contemplated by the statute under which the action has been taken. Here it is not so much relevant to assess whether the authority is acting in good faith or bad faith. What is relevant is to assess whether the purpose in view is one sanctioned by the statute which confers power on the authority concerned. In this context 'improper purpose' doctrine is also at times referred to as colourable exercise of power or legal malafidesor malice in law.

(ii) Colourable Exercise of Power:

This ground of attack on administrative action is based on the principle that one cannot do a thing indirectly what he cannot do directly. Colourable exercise of power means to do something which is not authorised by the statute or to exercise power for the purpose alien or foreign to the object of the enabling statute under the guise or colour of authorised one. In this sense colourable exercise of power does not appear to be a distinct ground of judicial review of administrative action but it appears to be covered under the head 'Exercise of power for improper purpose'. In **Pratap Singh** Vs **State of Punjab**[30] it was said that the use of power for achieving an alien purpose i.e. wreaking minister's vengeance on the officer would be malafide and a colorable exercise of that power, and would therefore, be struck down by the courts. With references to acquisition of land under the Land Acquisition Act, Mudholar J. of the Supreme Court observed:

"……Whether in a particular case the purpose for which land is needed is a public purpose or not is for the State Government to be satisfied about. If the purpose for which land is being acquired by the State is within the

legislative competence of the State the declaration of the Government will be final, subject to one exception. That exception is that if there is a colourable exercise of power the declaration will be open to challenge at the instance of the aggrieved party……. If it appears that what the Government is satisfied is not a public purpose but a private purpose or no purpose at all the action of the Government would be colourable as not being relative to the power conferred upon it by the Act and its declaration will be nullity.[31]

From the above passage it is clear that the term colorable exercise of power may be used in the sense of exercise of power for a purpose not authorised by the statute conferring the discretion on the authority concerned. As observed by Hegde J. in the **Privy Purse'** s case[32] in a passage already quoted such an exercise of power may also be termed as fraud on the power.

Colourable exercise of power means that power is exercised ostensibly for the permitted purpose but really to achieve some other purpose, that is the exercise of power is illegal, but it has been given the guise of legality.[33] It may, however be said that all these terms improper purpose, fraud, malafide and colourable are often interchangeably.[34]

The term "colourable" has also been used at times in the sense of "*mala fide*" action.[35] "*Mala fide*" as a distinct ground to quash administrative action has already been considered. Colourable means that the power is exercised ostensibly for the authorised end but really to achieve some other purpose; in other words, the exercise of power is illegal but it has been given the guise of legality. Colourable exercise and improper purpose, as discussed earlier, appear to converge and the two pharases can be used inter-changeably. In the context of preventive detention, when the court felt that the power of detention could not be used as a substitute for criminal prosecution, it used the pharase "colourable exercise of power" by the executive.[36] The court could have as well said that the power was exercised for an *improper purpose* to evade the normal process of criminal law.

(iii) Malafide's:

'Malafides' a latin expression mean bad faith, malicious or dishonest intention. Malafides, malice and bad faith are synonymous terms though not admitting of precise definition,[37] In the words of Lord Somerevell.[38]

> "Mala fides is a phrase often used in relation to the exercise of statutory powers. It has never been precisely defined as its affects have happily remained in the region of hypothetical cases. It covers fraud or corruption."

The term 'bad faith' imlies wilful failure to respond to one's own obligation or duty or breach of lack of good fiath. Section 52 of the Indian Penal Code defines the expression 'Good faith' in negative terms :

> Nothing is said to be done or believed in good faith which is done or believed without due care and attention."

It means that anything done without due care or attention would amount to the thing having been done in bad faith. In the **Privy Purse's** case[39] majority of the Supreme Court through Hidaytullah C.J. declared.

> "The charge of malafide action in this connection can only mean want of good faith. Good faith according to the definition in General clause Act, means a thing which is in fact done honestly, whether it is done negligently or not. In other words an act done honestly must be deemed to be done in good to be in good faith..... want of good faith must avoid the act…. Lack of bonafide (s) unravels every transaction. (But) I do not think it is open to Mr. Palkiwala to describe the act as wanting in good faith without pleading any collateral fact. Futher it is not open to me to probe the reasons for a decision by the President."

Malafide exercise of power does not necessarily imply any moral turptude as a matter of law. It only means that statutory power is exercised for purposes foreign to those for which it is in law intended.[40] Private grudge or vindictiveness should not be the basis of and administrative order. In **Pratap Singh** Vs **State of Punjab**[41] Raj Gopala Ayyanager J. set aside the suspension order against the

appellant Civil Surgeon and also the order revoking the leave already granted. His Lordship stated :-

> "……..We are satisfied that the dominant motive which induced the Government to take action against the appellant was not to take disciplinary proceedings against him for misconduct which it bonafide believed he had committed, but to wreak vengeance on him for incurring his wrath and for the discredit that he had brought on the Chief Minister by the allegations that he had made in the article which appeared in the Blitz dated January 15, 1961……."

The importance of the case lies in the fact that the case has been dealt with keeping in view the two related aspects of the rule that every power vested in the body or authority has to be used honestly, bonafide and reasonably, though the tow-ultravires and malafides- often slide into each other.

As regards the first, the question is what is the true nature of the power which has been granted to achieve a definite object? In this case, it would be conditioned by the purpose for which it is vested.[42] The nature of the Power thus discloses its purpose and the use of the power for achieving an alien purpose would be malafide and colourable exercise of that power. Thus the purpose of the power vested in the Government to take disciplinary action against an employee was to ensure probity and purity in the public services and not to wreak personal vengeance, therefore, it was a case of ultravires. In another sense it was a case of malfide distinct from ultravires because the Government was authorised to take disciplinary action against him and the action was intravires but the action was vitiated by malicious intention hence malafides.

In **C.S. Rawil** Vs **State of A.P.**[43] under the scheme prepared by the State Road Transport Corporation certain transport routes were proposed to be nationalised. The scheme owed their origin to the directions by the Chief Minister. It was alleged that the Chief Minister had acted malfide in giving the directions. The charge against him was that particular routes had been selected because he sought to take vengeance against the private operators on those routes as they

were his political opponents, who worked either against the Chief Minister of his friends, supporters and relations in the election of February, 1962. From the course of events and the absence of an affidavit from the Chief Minister denying the charges against him, the court concluded. That malafide on the part of the Chief Minister was established. The petitioners gave all the relevant objective facts in support of their case. The allegations were not rebutted by the Chief Minister. The Scheme was, therefore, struck down having been engineered by maladifes on the part of the Chief Minister. Thus malafides would include those cases where the motive force behind an administration action is personal animosity, spite, Vengeance, personal benefit to the authority itself or its relations or friends.[44]

It may, of course, be taken for granted that the Parliament does not intend the powers to be exercised dishonesty or corruption comes into play, the act must be made ultravires. In this connection Lord Denning has said.[45]

> "No Judgment of the court, no order of a minister can be allowed to stand, if it has been obtained by fraud and that every power vested in public body or authority has to be used honestly, bonafide and reasonably."

Bu it is settled law that allegations of malafides must be strictly proved and the practical impossibility of discharging that burden has been judicially recognised:-

> "No doubt he (i.e. the person exercising the power) must not exercise the power in bad faith but the field in which this kind of question arises, is such that the reservation in the case of bad faith is hardly more than a formality.[46]

Thus, however, it is found too difficult to establish malafides on the part of an official. It is general presumption that the Government exercises its power in good faith and burden of proof against it lies on the person alleging that the power has been expericesd in bad faith or with malafides. He who seeks to invalidate or nullify any act or order must establish the charge of bad faith or misues of power by the authority concerned. The burden of proving malafides is on the individual

making the allegations as the order is deemed to be regular on its face. The burden of the individual is not easy to discharge as it requires going into the motives or the state of mind of an authority concerned and it is hardly possible for an individual to know the same. Thus it is all the more difficult to establish the charge of malafides before a Court of law. In the absence of clear proof of some indirect motive, purpose, bad faith or personal ill-will the charge cannot be established. The mere possibility of malice is of no avail. The circumstances in which malice can be presumed very from case to case. If a given case does not by itself raise a presumption of malice, the other circumstances have to be bought in to prove the existence of malice.[47] However, it must be observed that though it is very difficult to establish the guilty state of some one's mind yet if the facts of a case and surrounding circumstances prove it the courts will not be reluctant to accept it.

There is distinction between malice in law and malice of fact. Whereas in a case involving malice in law which if established may lead to an inference that the authorities had acted without jurisdiction while exercising its jurisdiction, malice of fact must be pleaded and proved.[48] The State is under obligation to act fairly without ill will or malice-in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act down from ill feelin0g and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for 'purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts.[49] Passing an order for an unauthorised purpose constitutes malice in law.

(iv) Leaving out Relevant Considerations:

In exercising discretionary power the administrative authority should not leave out considerations which are germane to the exercise of discretionary

power. If the authority leaves out relevant considerations the exercise of power will not be regard as valid and the same may be quashed. But it is, however, too difficult to establish in a case that the authority has left out relevant considerations and the difficulty in this regard seems to be far greater than in a situation where irrelevant considerations have been taken into account. Unless detailed reasons are given from which it can be inferred that the authority took action by ignoring material considerations, it is difficult to have and administrative action quashed on this ground Because of the difficulty of proof not many cases have occurred in this area.[50] However, the discretionary power conferred on the administrative authorities cannot be read in isolation. It is conferred on them for certain purposes and sometimes the statute itself defines the circumstances on the existence of which it has to be exercised and if the authority disobeys statutory provisions his act decisions must be held inoperative. Therefore, if an authority does not apply its mind to relevant considerations it must be said to have abused its powers. In a cinema licence case Lord Greene M.R. observed.[51]

"If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those relevant collateral matters."

In this connection **Rampur Distillery Company Vs Company Law Board**[52] may also be referred to. The facts of this case were like this. Under section 326(2) (b) of the Indian Companies Act, 1956, practically unlimited discretion has been conferred on of the board to accord approval for renewing managing agency. Section 326(2) (b) reads :-

> "that the Managing Agent proposed is, in its opinion, a fit and proper person to be appointed or re-appointed as such, and that the conditions of the managing agency agreement proposed are fair and reasonable."

The company Law Board acting under the above provision refused to give its approval for renewing the managing agency of the company concerned which had been the managing agent of the Rampur Distillery since 1943. The above disapproval was based on the report of the enquiry commission headed by Mr. Justice Vivian Bose, according to which the director was guilty of grossly improper conduct in relation to those companies in the year 1946-47. It was conceded by the court that the past conduct of the directors was a relevant circumstance in considering the question of fitness of the managing agent for the purpose of giving approval for renewing the same. But the court insisted on taking into account also the present acts and activities of the directors of the managing agency. Since the board did not take into account the latter, it left out some relevant considerations and the action of the board was therefore, held to be bad. It has also been rightly observed by Griffith and Street.

> "Although the courts frequently say that erroneous interpreting of statute is not an excess of jurisdiction they will always interpret statute to find what are the relevant considerations' implied by it and quash only if the these are not taken into account."[53]

Though a statute may give *prima facie* an almost unlimited discretion to take administrative action, yet the court may imply some limitations into this power and this may go to such an extent in a case that it may be difficult to say whether the court is merely concerned with the legality of the order or it is going into the merits of the case. This is well illustrated by ***Ranjit Singh*** *v.* ***Union of India***.[54] The petitioner had been carrying on the business of manufacturing guns for a number of years. His quota to manufacture guns was considerably reduced by the government. The justification given was that the Industrial Policy Resolution of 1956 envisaged a monopoly in the Central Government for manufacturing arms and ammunitions. The court said: "Any curtailment of quota must necessarily proceed on the basis of reason and relevance. The court found that the Industrial Policy Resolution contained a specific commitment to permit the continuance of existing factories. In determining the specific quota of a manufacturing unit, the relevant considerations were the production capacity of the factory, the quality of

guns produced and the economic viability of the unit on the one hand, and the requirements of current administrative policy pertinent to the maintenance of law and order and internal security on the other. These factors were impliedly read by the court into the statute. Since the Government had left out these relevant considerations, its action was held to be arbitrary.

(v) Taking into account Irrelevant Considerations:

As leaving out relevant considerations affords a ground to quash an administrative action, in the same way 'taking into account irrelevant considerations' also affords another ground for the courts to declare the administrative action to be bad. A power conferred by a statute must be exercised on the basis of considerations mentioned therein. Where the authority concerned attends to or takes into account circumstances, events or matters wholly irrelevant or extraneous to those mentioned in the statute the administrative action will be quashed by the courts. According to professor de Smithi :-

> "If the influence of irrelevant factor is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence; it seems to be enough to prove that their influence was substantial. For this reason there may be a practical advantage in founding a challenge to the validity of a discretionary act on the basis of irrelevant considerations rather than improper purpose, though the line of demarcation between two grounds of validity is often imperceptible."[55]

In determining what factors may or must be taken into account by the competent authority, the courts are faced with problems of statutory interpretation in the solution of which they themselves in practice exercise a wide discretion. If relevant factors are specified in the enabling Act it is for the courts to determine whether they are factors to which the authority is compelled to have regard and if so, whether they are to be construed as being exhaustive. If the relevant factors are not specified, it is for the courts to determine whether the permissible considerations are impliedly restricted and if so, to what extent. In **Roberts** Vs. **Hopwood**[56] in 1920, the Poplar Borough Council wishing to set an example as

model socialistic employers, instituted a minimum weekly wage for all their employees of 4 of men and women alike. The minimum wage had previously been 3. 4 s. for men and 2 9 s. 9 d. for women. In 1921-22 there was a sharp fall in the cost of living and in wages, but the minimum wage of 4 was left unchanged. The Council's statutory power was to pay their servants "Such salaries and wages as they may think fit". The House of Lords upheld a complaint that the weekly minimum wage of 4 was so excessive in relation to labour market, that it amounted a gratuitous subsidy to the employees and contained an element which was not wages at all. The legislature must have intended that in fixing wages at all. The legislature must have intended that in fixing wages the council should have regard to the labour market. By acting without regard to it and for extraneous reasons which Lord Atkinson described as "ecentric principles of socialistic philanthropy" and "feminist ambition" the Council had abused their powers.

In **State of Bombay** Vs **K.P. Krishnanan**[57] there was a dispute between the Fire Stone Tyre and Rubber company of India and its workmen with regard to the payment of bonus for the year 1952-53. The Government acting under Sec. 12(5)[58] of Industrial Disputes Act, 1947, refused to refer the dispute to a tribunal for adjudication for the reasons that the workmen had resorted to go slow during the year 1952-53. The High Court of Bombay held that the reasons given were wholly extraneous and not germane to section 12(5) and issued a writ of mandamus against the appellant. On appeal to the Supreme Court, Gajendragadkar J. in this case observed :-

> "Any consideration of dispute cannot……. legitimately be allowed to impose such a punishment on the employees. It would plainly be a punitive action to refuse to refer such a dispute solely on the ground of their misconduct…. and it appears that…….. the investigation and settlement of any industrial dispute is prevented by the appropriate Government by refusing to make a reference on grounds which are wholly irrelevant and extraneous, a case for the issue of a writ of mandamus is clearly established. A claim for bonus is based on the consideration that by their contribution to the

profits of the employer, the employees are entitled to claim a share in the said profits and so any punitive action taken by the Government by refusing to refer for adjudication an industrial dispute, in our opinion, be wholly inconsistent with the object of the Act."

The Courts also quash such exercise of administrative discretion as are for purposes wider than actually atuthorrised by the relevant statute. For example in **Ram Manohar Lohia** Vs **State of Bihar**[59] the petitioner was detained under Defence of India Rules, 1962, to prevent him from acting in a manner prejudicial to the maintenance of law and order, whereas the rules provided for detention to prevent subversion of public order. The court quashed the detention order as according to it the two terms were not the same, the term law and order being wider than the 'public order'.

The General Manager, Telephones, Delhi, disconnected the petitioner's telephone under rule 422 of the Telegraph Rules. The ground was that the telephone was being used for illegal *satta* purposes. Rule 422 empowers the divisional engineer, he the event of any emergency, to disconnect any subscriber. The court emphasized that the existence of an emergency was a prerequisite to the exercise of power and the satisfaction as to the emergency had to be that of the divisional engineer but be had to arrive at such satisfaction rationally on relevant material. The order of disconnection was quashed because it was made on a ground which was not germane to rule 422.[60]

From the above cases it would appear that statutes may either expressly define the considerations with reference to which the discretion has to be exercised, or they may leave it to spelled out in the light of the purposes for which the power is to be exercised. In either case, the exercise of discretion based on considerations other those expressly mentioned or necessarily implied from the context will have to be quashed by courts of law.

(vi) Mixed Considerations:

In the categories discussed above, the exercise of discretionary power is based either on irrelevant considerations or on ignoring relevant consideration but

cases may also arise and have arisen where the exercise of discretionary power by the authority concerned is based on both relevant and irrelevant considerations. Thus exercise of discretionary power is based on mixed consideration relevant and irrelevant both. In cases where administrative orders or decisions are based on both relevant and irrelevant considerations the attitude of the Indian Judiciary does not appear to be uniform. The legality of such orders varies from case to case. In preventive detention cases the attitude of the judiciary has been to invalidate the detention orders, even though only one ground was vague and other were not vague, because as the courts have observed, to uphold the validity of such an order would amount to substitute the satisfaction of the court for that of executive authority, as it cannot be assessed in what manner and to what extent each of the grounds operated upon the mind of the concerned authority. In **Shibban Lal Saxena** Vs **State of U.P.**[61], the petitioner was originally detained on the grounds that his activities were prejudicial to (i) the maintenance of supply of sugar cane essential to the community and (ii) the maintenance of public order. As the Advisory Board did not uphold the detention ends of the petitioner under section. 3(1)(a) (iii) of the Preventive Detention Act, 1950, the Government revoked his detention on the first ground but continued it on the second ground. Again the Government in its communication admitted that the first ground was either unsubstantial or was not in existence at the time the original order was made. The question before the Court was whether in this case the original detention order could be allowed to stand? The Court stated that it could neither decide whether those grounds were good or bad nor could attempt to assess in what manner and to what extent each of these grounds operated upon the mind of the appropriate authority and contributed to the creation of the satisfaction on the basis of which detention order was made. "To say that the other grounds, which still remains, is quite sufficient to sustain the order would be to substitute an objective judicial test for the subjective decision of the executive authority, which is against the legislative policy underlying the Statute.[62] The Court, therefore, quashed the detention order. Again in **Prabhu Dayal** Vs **D.M. Kamrub**[63]. Mathew J. delevring the majority opinion observed :

> "As one of the grounds communicated to the petitioners is found to be vague, the detention order must be pronounced to be bad on the basis of a series of decisions of this Court."

Similarly in **Bhupesh Chandra Ghosh** Vs **Arif Ali**[64] the Court observed :

> "In Such cases…… the position would be the same as one of these two grounds were irrelevant for the purpose of the Act or was wholly illusory and this would vitiate the detention order as a whole."

For the same reasons the court quashed the detention order in **Satya Brat Ghosh** Vs **Arif Ali.**[65]

The ground of mixed considerations for challenging the administrative order or decision is not confined only to preventive detention cases. It has been invoked in other situation as well. In **State of Maharashtra** Vs **Babulal.**[66] the Government in exercise of its power under the City of Nagpur Corporation Act, 1950, superceded the Municipal Corporation of Nagpur City on the grounds of deterioration of the financial position and its neglect to undertake improvement of water supply. The order was challenged in the Court on the ground that it was based on some relevant and some irrelevant considerations. The Court upheld other order because the fact that one of the grounds was irrelevant did not affect the order in as much as in the opinion of the Government the grounds were "severally and jointly" serious enough to warrant the said action. In fact reliance was placed by the Court on the words "severally and jointly" used in the show cause notice. The Court observed :

> "An administrative or quasi-judicial order based on several grounds all taken together cannot be sustained if it be found that some of the grounds are non-existent or irrelevant and there is nothing to show that the authority would have passed the order on the basis of the other relevant and existing grounds. On the other hand, an order based on several grounds some of which are found to be non-existent or irrelevant, can be sustained if the court is satisfied that the authority would have passed the order on the basis of the other

relevant and existing grounds and the exclusion of irrelevant or non-existent ground, could not have affected the ultimate opinion or decision."[67]

All that can be ascertained on the basis of the principles laid down by the judiciary is that, if the court is satisfied that the authority would have passed the same order even on the basis of relevant and existing ground and that the exclusion of the irrelevant or non existent ground would not have affected the ultimate opinion or decision, the order can be held valid.[68]

The principle emerging from the above cases appears to be that an administrative order based on both relevant and irrelevant (or non-existent) considerations is not invalid if the court is satisfied that the authority would have passed the order even on the basis of the relevant and existing grounds, and that the exclusion of the irrelevant or non-existent grounds would not have affected its ultimate decision.

(vii) Unreasonable Exercise of Power:

Law could never perform its proper functions of a controlling force in society if courts of law did not hold themselves bound to subordinate their own ideas of what is reasonable to an assumed superior reasonableness in the law; that assumption may not always be well founded, but it is necessary to our social security that it should be acted upon until the law is altered…. To hold that unreasonable can invalidate a rule of law is to confuse the function of legislation with that of ascertaining what existing law is.[69] The above statement is of an English writer conversant with the principles of Supremacy of parliament where the courts do not perform the function of judicial review of legislation. However, as observed earlier, the English Courts are as active as their counter parts in other jurisdiction in invalidating wrong exercise of administrative disrection and one of the grounds for such invalidation can be unreasonable exercise of power. However, here they keep in mind the fact that it is the executive authority to whom the power is given and not the courts. Therefore, unless the exercise of power is so arbitrary that no reasonable persons would be that they would be reluctant to substitute their own judgment for that of the concerned authority.

Thus in **A.P. Picture Houses** Ltd. Vs **Wednesbury Corporation**.[70] Greene P.M.R., observed :

> "It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come it, then the court can interfere…….. but to prove a case of that kind would require something over-whelming."

It has often been asserted that powers are conferred subject to an implied requirement that they be exercised reasonable and a authority failing to comply with this obligation acts unlawfully. According to Jain and Jain[71] the teem "unreasonable" means than one thing. It may embody a host of grounds mentioned already, as that the authority has acted on irrelevant or extraneous considerations or for an improper purpose or malafide etc. Viewed thus "unreasonableness" does not furnish and independent ground of judicial control of administrative powers apart from the grounds already mentioned. "unreasonableness" may also mean that even though authority has acted according to law in the sense that it has not acted on irrelevant grounds or exercised power for an improper purpose, yet it has given more weight to some factors than they deserved as compared with other factors. Interference on this ground requires going into the relative importance of different factors and their balancing which amounts to substituting the discretion of the judiciary for that of the executive. Courts do not normally exercise such wide powers to interfere in the exercise of the administrative discretion. The following points may further be noted with regard to the concept of reasonableness as a ground invalidating administrative actions :-

(a) A duty to act in good faith is distinguishable from duty to act reasonably. As Scrutton L.J. observes:

> Some of the most honest people are the most unreasonable and some excesses may be sincerely believed in but yet quite beyond the limits of reasonableness."[72]

(b) Neither every reasonable exercise of judgment is right nor is every mistaken exercise of judgment unreasonable. There are host of

decision which lay down the rule that no court should seek to replace the authority's judgment with its own."[73]

(c) Judicial standard of reasonableness in also variable. If a court holds that it has jurisdictions to determine the reasonableness of an administrative decision, it may imagine itself in the position of the competent authority by which the impugned decision was taken and then determine what should have been a reasonable decision. In 1925 in **Roberts** Vs **Hoowood**,[74] the House of lowrds noticed that expenditure by a local authority was contrary to law if in the opinion of the court it was clearly unreasonable. Most of the commentators agree that yhis decision exceeded the proper limits of judicial review an that it was likely to be distinguished if relied upon as an atuhtority in future. Yet 30 years later it was followed by the Court of Appeal in some what similar way though there the emphasis was placed on irrelevant considerations rather than unreasonableness."[75]

Patanjli Shastri J. of the Indian Supreme Court in V.G. Row Vs State of Madras[76] though in a different context also asserted that judges while exercising the power of invalidation should exercise self-restraint and avoid as much as humanly possible their own subjective notions. He observes :

"In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and scale of values of the judges participating in the decisions should play an important part and the limit of their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the constitution is meant not only for the people of their way of thinking, but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restriction, considered them to be reasonable."

Now it would be convenient to discuss the whole subject under two heads depending on whether there is or there is not an express statutory requirement to

act reasonably. As will be been below- the scope of review will be wider where the requirement of reasonableness is conferred by statute itself.

(a) Where there is an express statutory requirement of act reasonable :

In **Liversidge** Vs **Anderson.**[77] Regulation 18-B of the Defence (General) Regulation. 1939 of the United Kingdom ran as follows:

> "If the secretary of the State has reasonable cause to believe any person to be of hostile origin or association……"

The House of Lords was faced with the question whether the words "reasonable cause to believe" should be given on objective or subjective meaning. The House of Lords, by majority, interpreted the words subjectively and held that Parliament had conferred an absolute discretion on the Secretary of State that he must satisfy himself that he had reasonable cause, but need not satisfy any one else. But in **Nakkuda Ali** Vs **Jayaratne**[78] the Privy Council through Lord Radcliff stated it would be very unfortunate if the decision of the **Liversidge case** came to be regarded as laying down any general rule as to the construction of such phrases. The case is merely an authority for the proposition that the words "if A.B. has reasonable cause to believe" were capable of meaning "if A.B. honestly thinks that he has reasonable cause to believe" in the context of the case. In Nakkuda Ali's case, Lord Radcliff relied on the minority speech of Lord Atkin in **Liversidge** case and held that when the legislature used the word "reasonable" it must have intended to serve in some sense as a condition limiting the exercise of an arbitrary power. But if question whether condition has been satisfied is to be conclusively decided by the man who wields the power, the value of intended restraint is in effect nothing. In the instant case, it was held that words that "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" would impose a condition that there must exist in fact reasonable grounds known to the Controller, before he could validly exercise the power of cancellation of licence. Therefore, though the belief of the controller that the dealer was unfit was subjective, existant of reasonable grounds on which the belief could be founded was objective and thus a limitation on his power. The

principles laid down in this case has been applied in a number of Indian decisions.[79]

Under section 34(1-A) of the Income Tax Act 1932, the authority has to proceed on only when it has "reason to believe" that the required circumstances exist. In **Sheo Nath Singh** Vs **The Appellate Assistant Commissioner of Income Tax**[80] the Supreme Court had an occasion to interpret the words "reason to believe" used in the said Act. The Supreme Court in this connection observes that the said words suggest that the belief must be of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion or rumour. The Income Tax Officer would be acting without jurisdiction if the reason for his belief did not exist or was not material or relevant to the belief required by the section. The assessing authority should act not capriciously but on recognised principles of justice.[81] Again in **Commissioner of Sale Tax U.P.** Vs **M/s. Bhagwandas Industries**[82] the same words "reason to belief" appearing in section 21 of the U.P. Sales Tax Act, 1848, were before the Supreme Court. In this case also the same principles was stated like this "the words reason to believe…. Convey that there must be some rational basis for the assessing authority to form the belief that the whole or any part of the turn over of a dealer has, for any reason, escaped assessment to tax for the same year."[83] Thus if there were in fact some reasonable grounds for assessing authority to form such belief it may take action under section 21 of the Act. Reasonable grounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment.

The scope of judicial review when the statute uses such phrases as "reasonable grounds" or "reasonable cause to believe" or "to act reasonably" was considered by the House of Lords in *Secretary of State for Education v. Tameside Metropolitan Brough Concil*.[84] The act authorised the Secretary of State to issue directions to a local education authority as appeared to him to be expedient if he was satisfied that the authority was acting unreasonably. The Secretary of State issued directions to the local authority not to reverse a scheme adopted by its predecessor which was in the process of implementation, as reversal at that state

would give rise to considerable difficulties and disruption. It was held that though the adoption of the original scheme would raise difficulties, yet it was not so impracticable that no reasonable authority could have adopted it. As regards the principles of judicial review, it may be appropriate to quote LORD DIPLOCK:

> It was for the Secretary of State to decide that. It is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matter that were irrelevant to what he had to consider.[85]

The above decision of the Supreme Court shows that the last say about the unreasonable exercise of administrative power rests with the judiciary.

(b) Where there is no express statutory requirement to act reasonably:

Sometimes the statutes confer power on administrative authorities in general terms using the words such as 'if it is satisfied', 'as it may think fit', 'as it may judge', as it may consider' etc. Now the problem arises whether the exercise of power in such cases can be challenged on the ground of unreasonableness. The general rule is that the authority must not act in bad faith and it should exercise its power reasonably even where no restrictive term has been used in the statute conferring discretionary power. The basis of this principle is that the power it conferred on the authorities for certain purposes and not to make them dictator in the field to which the statute concerned relates.

In **Roberts** Vs **Hopwood**[86] Lord Wrenbury observed that it would not make any difference whether the words 'reasonably' or 'reasonable' appeared in the statute or not. His Lordship in this connection observes "A person in whom is vented a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to so…… he must in the exercise of his discretion do not what he likes but what he ought. In other words he must by use of his reason ascertain and

follow the course which reason directs. He must act reasonably." This decision was in its own period regarded as touching, if not over reaching, the absolute high mark of legitimate judicial control.[87] This approach confers on the courts a great deal of judicial control over the exercise of administrative discretion. But in practice the general trend of the judiciary is somewhat different. It does not generally go to such an extreme as appears from Lord Russel's statement in **Kruse** Vs **Johnson**[88] where he observes that when such a discretion is conferred on a local authority, the Court ought to show great reluctance before they attempt to determine how in their opinion the discretion ought to be exercised. The decision of the House of Lords in Padfield's case[89] encouraged Prof. wade to write about it under the head "Myth of **unfettered Discretion".**[90] Commenting on this case he observed :

> "…….. for in theory every discretion is capable of unlawful abuse; and infact the courts have usually been astute to detect implied limits in vague subjective expressions which parliament uses so freely, for example, in empowering a public authority to act' as it that executive discretion must be exercised reasonably goes back at least to Rook's case (1998) 5, Co Rep 996) and today it is perhaps more active than ever before".

In **K.D. Co** Vs **K.N. Singh**[91] which shows a deviation from the principles as discussed above, it was argued that the words 'as it may judge' should be construed as meaning 'as it may on reasonable grounds judge' but the Court refused to accept this plea because "the statute confides in clear and unambiguous terms the authority to judge whether the act is beneficial to the estate, to the court of wards and not to any outside authority.[92] This approach does not in any way give room to the ground of unreasonableness where the statute is silent about its requirement. But this approach appears to an exception rather than rule.[93]

On the other hand in **Chandreshwar Prasad** Vs **State of Bihar**[94] the authority has cancelled grants of property made to the petitioner by the previous owner on the ground that the transfer was made with a view to

defeat the provisions of the Bihar Land Reforms Act, 1950, and to obtain higher compensation . The court found that there was no evidence to support the findings of the authority. The court proceeded on to say "the words 'satisfied' in section 4(h) to must be construed to mean 'reasonably satisfied' and therefore, findings of the collector under section 4(h) cannot be subjective or arbitrary cannot be subjective or arbitrary finding but must be based upon adequate materials.[95] But where two alternative interpretations were possible regarding the scope and applicability of a law and the authority adopted a reasonable view relating thereto which was favourable to one side of a case , such finding cannot be assailed on the ground that the authority ought to have adopted another alternative interpretation.[96] It cannot be challenged on the ground that the authority has exercised its power unreasonably.

No administrative authority can confer jurisdiction on itself to decide its own power. It must exercise its power fairly impartially and reasonable,[97] especially where the Act does not provide for any appeal or revision from the order; it must exercise its power on settled and recognised principles of justice and not capriciously.[98] The findings of the executive authority may be interfered with if it is found to be so unreasonable that no person acting judicially and properly instructed as to the relevant law could have arrived at it.[99] In **Rohtas Industries** Vs **S.D. Agrwal**[100] the Supreme Court observed that "we do not think that any reasonable person much less any expert body like the Government on the material before it could have jumped to a conclusion that there was any fraud involved in the sale of shares in question.[101] The court can, therefore, set aside the order of an administrative authority if it thinks that no reasonable person on a proper consideration of the materials before it, could have reached to that conclusion.[102] This appears to be an indirect approach of the principle that the administrative authority should act reasonably.

The term reasonableness is a very vague and flexible term. It may be construed in a very narrow as well as in a broader sense. Ultimately it is for the courts to say whether they should look into the reasonableness of an administrative act or not and, if yes, to what extent they should go into the merit of the case. The standard of approach varry from case to case. However, scope of judicial review appears to be more effective where the statute itself expressly requires reasonable behavior of an administrative body.

Judicial review of administrative action on this account, therefore, appears to be more restrictive than when the authority is required to act reasonably. Of course, because of the fine distinctions between the two it is not clear whether the test of "unreasonable action pure and simple" is in any way different from the test of "a decision which no reasonable body would reach". In practice, it may be hard to draw a line between the two, and a judge wishing to quash administrative action on the ground of "unreasonableness" may express his conclusion one way or the other.

B. Authority not applying its Mind:

By conferring discretion trust is placed in the individual judgment and wisdom of the administrative authority who is expected to exercise it by applying its mind to the facts of the case in hand. If the authority acts without applying its mind to the case before it, the action will be bad. In such a situation the authority is deemed to have failed to exercise the discretion or not to have considered the case before it. The very object of conferring an administrative power is that the authority must exercise its judgment and good sense on each occasion. It is not without fore thought that particular authorities are chosen by the legislature as the proper recipients of specific powers. The methods of delegation are many. It ranges from the thoughtless shunting of duty by indolent superiors on indifferent subordinates to the fawning obedience by spineless or designing to superior's ukases. In these cases abdication of one's own statutory functions rather than delegation in the strict sense takes place. Delegation may be the result of honest misapprehension by the authority concerned of the legal position. It sometime arises out of a desire to expedite official business. But still it will be invalid if it is

not legally permitted. There are provisions for delegations in prescribed ways in almost all public departments for, without some provisions for it conduct of public business will be difficult. When a new power is given to an existing department of Government, unless otherwise directed, the established procedure of that department can be followed for the exercise of that power also. When it is said that a discretion cannot be delegated the reference is to power definitely conferred on a specific authority without any provision for any further delegation. The legislature has delegated to that authority and the delegate cannot further delegate at all. He cannot abdidate in sense that he cannot be dictated to on the matter. He cannot fatter his discretion even for value and promise a particular course of action for future. It is therefore, clear that such an authority should not be allowed to evade this irksome necessity of applying its mind to individual cases. He cannot broadcast a general rule which will completely govern his attitude in the particular matter in future. Such a practice if permitted will defeat the very purpose of the legislation and will promote nothing but official indolence.[103]

The ground 'Authority not applying its mind' conveniently be discussed under the following sub-heads :

(i) Sub-delegation of power.

(ii) Acting under dictation

(iii) Fettering discretion by self imposed or created rules of policy.

(iv) Acting mechanically and without due care.

(v) Effect of error of law in construing the scope of discretion.

(i) Sub-Delegation of Power:

A discretionary power must, in general, be exercised only by the authority upon which it has been conferred. It is based on the principle that when power is conferred to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another. This principle, which has often been applied in law of trust and agency expressed in the form of the maxim **'delegatus non potest delegare'** is applicable to the delegation of all classes of powers. Sometimes the Courts concede that a public body has an

implied power to entrust a group of its own members with authority to investigate, to hear evidence and submissions, and to make recommendations in a report provided that (i) it retains the power of decision in its own hands and receives a report full enough to enable it to comply with its duty to "hear" before deciding and (ii) the context does not indicate that it performs the entire "adjudicatory" process itself.[104]

The Government and authorities vested with the executive and administrative authority statutorily cannot delegate their authority and administrative discretion to the subordinate authorities. **In Jhansi Electricity Supply Co Ltd.** Vs **D.M.**[105] it was held by the Allahabad High Court that the Central Government who were in terms of section 29 of the Defence of India Act 1962, authorised to requisition an accommodation, if in their opinion the necessity existed for such requisition for maintaining the essential services, could not entrust their opinion making function to any administrative authority. They could however, after having formed an opinion and decided upon the requisitioning authority the District Magistrate to requisition the premises. No administrative authority can abdicate its power to make an order or determination.

In **Pradyat Kumar** Vs **C.J. of Calcutta,**[106] the registrar of the High Court was dismissed by the Chief Justice on the report of another judge who made an enquiry on the charges leveled against the registrar. Before he was dismissed, notice was given by the Chief Justice to the Registrar to show cause why he should not be dismissed from services. A hearing was given but after due consideration the dismissal order was passed. Jagannadha Das J. relying on the observations of Lord chancellor in **Local Government Board** Vs **Arlidge**[106] over-ruled the objection to the validity of the dismissal which was based on the ground that the delegation of the enquiry amounted to the delegation of the power itself. The argument was held to be without substance and therefore, rejected. But in **B.K. Sardari Lal** Vs. **Union of India**[108]the Supreme Court through A.N. Grover J. declared that the power under Act 311 (2)(c) of the Constitution to dismiss civil servants at pleasure is outside the scope of Arts 53 and 154 of the Constitution and cannot be delegated by the President or the Governor to a subordinate officer

and can be exercised by him only in the manner prescribed by the constitution, President's or Governor's as the case may be, personal satisfaction was essential for the exercise of power in question. However, this decision has been reversed by the Supreme Court itself in Shamsher Singh's case.[109]

In the words of Prof. De Smith:

> A discretionary power must, in general, be exercised only by the authority to which it has been committed. It is a well-known principle of law that when a power has been confided to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another.

The very object of conferring a power on a particular administrative authority is that the power must be exercised by that authority and cannot be sub-delegated to any other authority or official.

> Delegation may be the result of honest misapprehension by the authority concerned of the legal position. It sometimes arises out of a desire to expedite official business. But still it will be invalid if it is not legally permitted.[110]

In conclusion it may be stated that power cannot be delegated which, if not exercised, or wrongly exercised may make the authority administratively responsible and accountable and give rise to a liability, or cause for an action. What can be delegated may include ministerial work, translation of documents, clerical work, typing of letters, accounting filing in details, collection data, collation of information preparation of minutes for proceedings of a committee meeting etc.[111]

(ii) Acting Under Dictation:

A case of non-application of its mind by the administrative authority concerned arises when the authority exercises its discretion under dictation from a superior authority and does not consider the matter itself. In the words of Prof. Wade :

"A Kindred method of vitiating the exercise of a discretion is where the person entrusted with it, instead of delegating it, exercises it at the dictation of some other person. For although he is then acting himself, it is not this own discretion which governs the act, as the legislature intended that it should be.

An authority entrusted with a discretion must not, in the purported exercise of its discretion act under the dictation of another body or authority. Further, surrender of independent discretion in favour of the adoption of a policy pursued by a superior authority is no less improper because the superior authority has not sought to impose its policy.[113]

In **Commissioner of Police** Vs **Gordhan Das Bhanji,**[114] under the Bombay Police Act, 1902 the Commissioner of Police was authoritsed to grant licences for the construction of cinema theaters. The commissioner granted a license to the respondent on the recommendation of an advisory committee but later cancelled it at the direction of the States Government. Bose J. emphatically denounced the practice of the Commissioner refusing or avoiding the exercise of his mind. The learned Judge held the cancellation of the order bad as it had come from the Government and the Commissioner merely acted as a transmitting agent. In another case **Pratabpore Company Ltd.** Vs. **Cane Commissioner of Bihar,**[115] the Supreme Court quashed the order of the Cane Commissioner Bihar, by which he had excluded 99 villages from the area reserved by him in favour of the appellant sugar company under the Sugar Cane Control Order 1966. The reason was that the Cane Commissioner had been dictated by the Chief Minister who imposed his opinion on the Cane Commissioner. The Supreme Court declared that the power exercisable by the Cane Commissioner under clause 6(1) of the Sugar Cane Control Order, 1966 was a statutory power which could be exercise only by him. The power having been exercised by the Chief Minister who was not an authority under clause 6(i) read with clause 11 of the order, the impugned orders were ultravires. The succinct observations of justice K.S. Hedge, are worth quoting :

> "The executive officers entrusted with statutory discretion may in some cases be obliged to take into account considerations of public policy and in some context the policy of a minister or the Government as a whole when it is relevant factor in weighing the policy but this will not absolve them from the duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for them to be given binding instructions by a superior."[116]

The rule against' acting under dictation' does not mean that the executive officer or administrative authority is not obliged to take into account policy decision of a minister or of the Government. However this does not preclude the authority can under to exercise its personal judgment unless there is an express statutory requirement to receive binding instructions by a superior or unless the cumulative effect of the subject matter and their hierarchical subordination make it clear that it is constitutionally proper for them to receive and obey instructions conveyed in the proper manner and form. There is, however, a difference between seeking advice or assistance and being dictated. Advice or assistance may be taken so long as the authority concerned does not mechanically act on it and itself takes the final decision in the matter before it.

It is thus clear that every authority entrusted to exercise discretionary power must exercise the said power as per its own discretion and cannot act at the dictation of any other authority. It is, no doubt, open to such authority to take into account an advice or assistance from other authority. But the final decision must be of the competent authority.

The difficulty, however, lies in deciding as to when it can be said that there is an "advice" and when it can be termed as a "dictation". It is submitted that the dividing line between "advice" or "assistance" on the one hand and "dictation" or "direction" on the other hand, is difficult to draw. Only thing which can be stated is that it is open to the authority to accept the advice or assistance of the higher authority. But the final decision most be of adjudicatory authority alone. Whether

the decision of the authority is under "dictation" or on "advice" depends upon the facts and circumstances of each case.

(iii) Fettering Discretion by Self Imposed or Created Rules of Policy:

A situation of the authority not applying its mind arises where the authority upon whom discretion is conferred fetters exercise of its dis retion by creating rules of policey rigidly applicable to all cases coming before it for decision. When a statutery has conferred power on an authority to apply a standard or norm it is expected from the authority concerned that it should apply its mind to the merits of each case and then decide each case accordingly. If instead it creates a general rule to be applicable to each and every cases then it is preventing itself from exercising its mind according to the need and circumstances of each case and this amounts to going against what the stature had intended the authority to do. In **Gell** Vs **Tele Noora**[117] under section 6 of the Bombay Police Act 1863, the Commissioner of Police had discretion to refuse to grant a licence for any land conveyance which he might consider to be insufficiently found or otherwise unfit for the conveyance of the public. Instead of applying his discretion after examining each carriage he issued a general order setting forth the details of construction which he required to be adopted in victorias presented for licence and instead that he had a sample vitoria prepared and that all new victorias must conform to that pattern Starling J. observed :

> "…….. under section (1-6) The Commissioner has a discretion which is not an absolute one, but one which is to be exercised after the Commissioner has made himself in some way acquainted with the character of the carriage to be licensed, and has considred whether it, as an individual carriage, is fit for the conveyance of public. In the exercise of this discretion he is not to fetter himself with rules which would prevent him in each case being quite free to consider the merits of each particular carriage."[118]

Thus the order of the Commissioner was held to be illegal.

As it is known that one of the reasons for conferring administrative discretion by a statute is that the problem is such that it is not possible to reduce it

within the four corners of a rule. Thus if the authority concerned lays down in advance a rule or policy it is violating that principle and acting illegally. However, it does not mean that an administrative authority should not be encouraged to lay down some general norms of policy even though the statute had failed to do so. Wherever possible it may lay down the principles for the exercise of its discretion.[119]

Though it is a general rule that adopting a rigid policy and exercising discretion accordingly is wrong yet a general policy may, however, be adopted but each case should be decided on its merits an each case should be considered to see whether the general policy is applicable to it or not. The question which should be considered is whether on, the facts of a particular case there are enough reasons to take it out of the general rule which the authority concerned has laid down.[120] Thus:

> "…..(a) Minister charged with the duty of making individual administrative decisions in a fair and impartial manner may nevertheless have a general policy in regard to the matters which are relevant to those decisions, provided that the existence of that general policy does not preclude him form fairly judging all the issues which are relevant to each individual case as it comes up for decisions."[121]

The principles has also been reiterated by the House of Lords in **British Oxygen Co. Ltd.** Vs. **Minister of Technology**.[122] Lord Reid in this case observes that a minister having a discretion may formulate a policy or make a limiting rule as to the future exercise of his discretion, if he thinks that good administration requires it, provided that he listens to any applicant who has something now to say. The general rule is that anyone who has to exercise a statutory discretion must not "shut his ears to an application". This observation of the House of Lords has also been followed by our Supreme Court recently in **Shri Ram Sugar Industries Ltd.** Vs **State of Andhra Pradesh and others.**[123]

The administrative authority exercising discretion must not "shut its ears to an application". It is submitted that the test is correctly laid down in *Stringer* v. *Minister of Housing and Local Govt.*[124], wherein Lord Cooke J rightly observed:

> [A] Minister charged with the duty of making individual administrative decision in a fair and impartial manner may nevertheless have a general policy in regard to matters which are relevant to those decisions, *provided that the existence of that general policy does not preclude him from fairly judging all the issues which are relevant to each individual case as it comes up for decision*.[125]

Recently, in *TGN Kumar* v. *State of Kerala*[126], the Kerala High Court issued a general direction to all subordinate courts to grant exemption from personal appearance to accused under Section 138 of the Negotiable Instruments Act,1881.

Holding that the discretion to grant exemption under Section 205 of the Criminal Procedure Code, 1973 (CrPC) is with the Magistrate, the Supreme Court set aside the order of the High Court.

(iv) Acting Mechanically and Without Due Care:

Another situation of an authority having statutory discretion not applying its mind arises were the authority concerned acted in a mechanical way without making any pressure on its mind. In **G.Sadandan** Vs **State of Kerala**[127] where the Court commented adversely on the casual manner in which the detaining authority had acted in passing the order, the order was quashed with a strong reminder to the administration that it should be more careful in exercising its powers. The court observed :

> "We feel rudely disturbed by the thought that continuous exercise of the very wide powers conferred by the Defence of India Rules on the several authorities is likely to make the conscience of the said authorities insensitive,, if not blunt, to the paramount requirement of the constitution that even during Emergency, the freedom of Indian citizens cannot be taken away without the existence of the justifying necessity specified by the Rules themselves.[128]

The court pointed out that the tendency to treat these matters in a somewhat "casual and cavalier manner" which conceivably results from the continuous use of unfettered powers may ultimately pose serious thereat to the basic values of the democratic way of life.

A case of non-application of the mind also arises when the authority concerned does not act with due care and caution and with a sense of responsibility in exercising its discretion.[129] In **Brium Chemicals Ltd.** Vs **Rand.**[130] under section 19(2) of the Foreign Exchange Regulation Act, 1947, the Central Government' if it considers necessary or expedient' to obtain and examine for the purpose of the Act, any information, book or other document in the possession of any person, may by order in writing require any such person to furnish the same to it. The words "considers it necessary or expedient" indicate an unqualified discretion with Government to obtain such information. But the Supreme Court interpreted these words as postulating that "the authority concerned has thought over the matter deliberately and with care and it has been found necessary as a result of such thinking to pass the order." The Court may quash the order if it appears that there was no careful thinking or proper application of the mind as to the necessity of obtaining and examining the documents etc. Thus in the instant case the court found that the order served on the appellant had specified a number of documents some of which did not have even the remotest bearing on the matters covered by the Act and thus court concluded that there was no due application of the mind by the authority concerned.

When a discretionary power is conferred on an authority, the said authority must exercise that power after applying its mind to the facts and circumstances of the case in hand. If this condition is not satisfied, there is clear non-application of mind on the part of the authority concerned. The authority might be acting mechanically, without due care and caution or without a sense of responsibility in the exercise of its discretion. Here also, there is failure to exercise discretion and the action is bad.

(v) Effect of Error of Law in Construing the Scope of Discretion:

Partial or total failure to exercise a discretion may also occur because the authority competent has failed to appreciate the amplitude of its discretion.[131] In **R.** Vs **St. Paneras Vestry,**[132] an authority had discretionary power to grant pensions to its officers at amounts up to two third of their retiring salaries. Misconstruing the scope of its powers under the statute, it thought that it had no discretion as to the amount, and for this reason it refused to award any pension at all to a particular officer who in its opinion did not deserve the full amount. Its error of law had caused it to refuse to exercise part of the discretion conferred upon it and the officer concerned obtained a writ of mandamus to direct the authority to consider and determine his claim.

In another case of **Harmmond** Vs **Hutt Valley and Bays Metropolitan Milk Board,**[133] a magistrate who had heard and dismissed an appeal against the refusal of a milk licence on the fotting that his jurisdiction was essentially of a supervisory nature, was held to have declined jurisdiction (although all the signs of the exercise of jurisdiction had been persent), in as much as, he was empowered to determine the matter 'denovo' and to substitute his own opinion for that of the licensing authority but had proceeded on the erroneous assumption that he was precluded from so doing.[134]

In the leading case of ***Frederic Guilder Julius* v. *Lord Bishop of Oxford*[135] (*Julius*),** the Bishop was empowered to issue a Commission of Enquiry in case of alleged misconduct by a clergyman, either on an application by someone or suo motu and when such an application was made, the question was whether the Bishop had a right to refuse the commission. The House of Lords held that the Bishop had discretion to act pursuant to the complaint and no mandatory duty was imposed on him.

Lord Cairns made the following instructive, thought provoking and oft-quoted observations:

> *[T]here may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in*

whom the power is reposed, to exercise that power when called upon to do so.[136]

Thus it is clear that if the administrative authority miscontrue its power that must be subject to judicial review.

3. Administrative Discrimination:

Article 14 of Indian Constitution guarantees equality before law and equal protection of laws which provides an additional dimension to the judicial review of administrative action. Under this Article a statute which confers unregulated and uncanalised disretion to the executive and also does not provide definite criteria for making reasonable classification can be declared as void on the ground of discrimination. There may, however, be cases where the statute may not suffer from the above defects, but the administrative authority entrusted with the duty of carrying the statute into operation may apply it in a discriminatory manner and may disregard the policy of the statute in exercise of its discretion. In this case also where discretionary power is exercised in a discriminatory manner the exercise of discretion may be challenged under Article 14 of the Constitution. In **Yick Wo** Vs **Hopkins**[137] (which is though an American case yet is most important in this connection) by an ordinance, the city of San Francisco made it unlawful to carry on a laundry, without the consent of the board of supervisors, except in a brick or stone building. In administrating it, 200 Chinese launderers were denied permission, even though they complied with every requisite, while 80 nonchinise under similar circumstances had been permitted. Two Chinese brought the matter before the U.S. Supreme Court which held that the Ordinance had been administered with "a mind so unequal and oppressive as to amount to a practical denial by the State" of Equal Protection of laws. The Court went on to state :

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."[138]

The above principle has also been judicially recognised in India. Article 14 secures all persons not only against arbitrary laws but also against arbitrary application of laws, and that it ensures non-discrimination in State action both in administrative and legislative spheres. "Equal protection clause" can be invoked not merely where discrimination appears on the express terms of the status itself but also when it is the result of improper or prejudiced execution of the Law.[139] In **Lumsedn Rambagh Gardens Amritsar** Vs **Punjab** the Excise Commissioner banned the sale of liquor at the lumsden club but not at other clubs which were in the similar position. The Division Bench of the High Court through Bhandari, C.J. observed :

> "It is true that statutes which confer discretionary power on executive officers without prescribing rules for guidance can be challenged on the ground that they confer arbitrary and uncontrolled powers which render them invalid."[140]

The order was quashed as there was unjust discrimination. In another case **State of Jammu and Kashmir** Vs **Bakshi Ghulam Mohd**[141] appointment of commission of inquiry under section 3 of the J & K Commission of Inquiry Act, 1962 to enquire into the acts of the former Prime Minister of the State was challenged. The inquiry was directed against the acquisition of wealth by him by misuse of his official position. It was contended that the inquiry was discriminatory as it was directed only against the Prime Minister and not against the rest of his Cabinet Colleague. Rejecting the argument A.K. Sarkar C.J. pointed out that it would be strange if the inquiry into misuse of official position to acquire wealth by the Prime Minister, were also directed against all the other ministers, for it could not be asserted that all ministers had acquired wealth by these acts. The Prime Minister was, therefore, a class by himself and the classification had a rational connection with the setting up of the commission for the object was to find out whether the wealth had been enquired by the former Prime Minister by abuse of his position. It could not, therefore, be contended that by picking the former Prime Minister out of the entire cabinet for the enquiry, he had been discriminated. In **Sathwant Singh** Vs **A.P.O. New Delhi**[142] an order

refusing to issue a pass port t o the petitioner was held to be violative of Article 14 as there was no law governing the issue of a passport by the executive and it was entirely a matter of discretion for the executive and it was entirely a matter of discretion for the executive to issue it or not. It was contended by the petitioner that the unfettered discretion given to the respondent to issue or not to issue a passport to a person offends Articles 14 in as much as it enables the State to discriminate between similarly situated persons. The majority of the Supreme Court through K. Subba Rao C.J. observed :

> "….. in the case of unchannelled arbitrary discretion, discrimination is writ large on the face of it. Such a discretion patently violates the doctrine of equality, for the difference in the treatment of persons rests solely on the arbitrary selection of the executive.[143]

From the above discussion it is clear in principle a discriminatory administrative action can be challenged under Article 14 but in practice it is not easy to establish that administrative authority has acted in discriminatory manner.

In *Ramana Dayaram Shetty* v. *International Authority of India*,[144] a statutory authority awarded the contract to a person who did not fulfil the norms of eligibility laid down in the tender. It was held that this was discriminatory as it excluded persons similarly situated from tendering for the contract. While the Government contracts, he should be given an opportunity of being heard as blacklisting creates a disability and prevents the concerned person from entering into lawful relationship with the Government for purposes of gain. In this case, the Court introduced procedural safeguards as a check on the arbitrary exercise of power by the government.[145]

The presumption is always in favour that administrative authority has not acted in a discriminatory manner and court would not easily assume abuse of power when discretion is vested in high officials. The burden to prove that authority has acted in discriminatory manner lies on the complainant. If, however, in a particular case, the complainant were to point out the circumstances which primafacie make out the exercise of power discriminatory quo. him then authority concerned would be obliged to explain the circumstances under which the order

was made. The court would then scrutinise the circumstances with regard to the object sought to be achieved by the enactment and come to its own conclusion with respect to the bonafides of the order.[146]

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