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Case Comment: Sarbananda Sonowal (II) vs Union of India - A Study of Excessive Delegation

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INTRODUCTION

The case on hand follows up on the highly controversial case filed by the same petitioner in 2005¹. The original case was a Public Interest Litigation filed by Mr. Sarbananda Sonowal against the IMDT (Illegal Migrants Determination by Tribunals Act), 1983². In it, he contended that the act that dealt with the issue of illegal Bangladeshi immigrants in Assam was arbitrary and unconstitutional and that it should be struck down.

The crux of his argument was that the act had made it harder to find and deport illegal immigrants, thereby violating its constitutional mandate under Article 355 to protect the Indian citizens in Assam. Put simply, the petitioner perceived the influx of illegal immigrants in Assam as a threat to the state's internal peace and stability³. The court saw merit to this argument and ruled in his favour. In July 2005, they declared the IMDT Act unconstitutional

¹ *Sarbananda Sonowal v Union of India* (2007) 1 SCC 174

² *Ibid*

³ 'Assam Accord' (*Supreme Court Observer*, 2020) <<https://www.scobserver.in/court-case/assam-accord-case>> accessed 07 June 2021

and directed the government to constitute adequate tribunals to carry out the identification of illegal migrants in the state.

THE PRESENT CASE

A writ petition was filed the following year by the same complainant against the Union of India for not implementing the orders of the Supreme Court in the original case. He argued that instead of obeying the orders of the court, the central government had sought to undermine the decision by amending the Foreigners (Tribunals) Order 1964 in order to make it inoperative in the State of Assam⁴.

The court had ruled in favour of having the Foreigners Act, 1946 applicable to the state of Assam, seeing as though the state was not able to provide any reasonable rationale for having a separate law for Assam. However, the move made by the centre sought to re-instate the unusual status quo for Assam.

The issue boiled down to two main points:

1. Non-compliance with the court's order on behalf of the central government.
2. That the 2006 order that was an ultra-vires subordinate legislation

Not surprisingly, the court ruled in favour of the petitioner, yet again and repudiated the centers' amendment. They indicted the central government for having misused its arbitrary powers and failing to comply with the court's original direction.

ANALYSIS OF COURTS POSITION

In this case, the court has sought to reinstate the status quo approach towards illegal immigration in India. Post the judgement in the first case, the central government chose not to comply with the order of the court and instead passed subordinate legislation that overruled

⁴ Archit Guha, "The "Illegal Immigrant identity and its fragments- From "Enemy Foreigner" to "Bangladeshi Illegal Immigrant"" (*Post Colonial India*) <<http://docs.manupatra.in/newslines/articles/Upload/D192949B-7771-4BD4-9AE2-DDA13E327C32.pdf>> accessed 07 June 2021

the court's decision. Their position on the issue was why should the immigration laws in Assam be different from the rest of the country. Since the rest of the country was governed on this matter by the Foreigners (Tribunal) Order 1964, so should Assam. Thus, the court had strong statutory backing for its decision.

In this paper, the author will be analysing the features of administrative orders such as the one passed by the government in 2006. The study will examine the binding power of administrative orders in special cases such as where they attempt to modify a pre-existing law or judicial decision.

WHAT IS SUBORDINATE LEGISLATION?

The constitution of India empowers the parliament to formulate laws to govern the country, the executive to implement these laws, and the judiciary to interpret these laws. However, in reality, the lines are not so distinct. In most cases, the standard operating procedure is that the legislature only ratifies legislation that consists of broad general policies and principles of governance and delegates the working out of the details and rules needed to adapt and implement it expeditiously to the executive.

For instance, the Essential Commodities Act, 1955, enacted by the legislature bestows the power to revise the list of essential goods as and when it deems fit. This authority is discretionary however it must abide by the core policies and fulfill the purpose of the parent act. These rules, bye-laws, notifications, regulations, and orders are known and *subordinate legislation or delegated legislations*.

Delegated legislation is also assigned several other names, such as bye-laws, regulations, rules, schemes, etc⁵. In *Sukhdev Singh v. Bhagatram*,⁶ it was pointed out that "Rules Regulations, Schemes, Bye-laws, Orders made under statutory powers are all comprised in delegated legislation". In cases where the delegated legislation pertains to statutory corporations, the legislations framed are known as regulations and bye-laws. With the respect to such

⁵ *Tata Iron & Steel Co v Workmen* AIR (1972) SC 1918

⁶ *Sukhdev Singh v Bhagatram* AIR 1975 SC 1331

corporations, there are two stages of delegated legislation; at the first level the government has the power to frame rules for such corporations, and further, the corporation has the power to promulgate bye-laws and regulations. Different terms exist to differentiate between rules made by the government and sub-legislations framed by the corporations.

The necessity for such a power to be delegated and constituted through the original act passed by the legislature is a well-settled precedent affirmed by the Supreme Court in several cases. To meet the increasingly complex demands of socio-economic programs, they have discovered that the process of delegation provides a greater range of flexibility to meet these new requirements. It provides flexibility by virtue of the fact that the process for making rules is significantly less cumbersome than that of passing legislation. In the current legislative landscape, often statutes and policies enacted are experimental in nature which makes it tough to predict the nature of problems that would arise during the course of their implementation and hence require amendments regularly which are tuned as per the needs of the state. Moreover, the process of passing legislation is expedited in the hopes that the intricacies of implementation will be taken care of by the executive. This entails that the legislation needs to be changed regularly as per the problems at hand. If these changes in detail would have to be included in the statute, the lengthy process of passing the amendment through the parliament would follow, which would further hamper the implementation of such legislation and would add to the workload of the legislature. The process of delegated legislation circumvents such a scenario and enables flexibility in operations and administrative process as it allows the executive to constantly adapt to future conditions by enacting requisite changes.

Subordinate legislation cannot be conceived unless the state or central act consists of provisions conferring the power to the same on the respective governments. The scope of functions of subordinate legislation is limited to carrying out the objectives of the parent act. Thus, the government cannot frame new legislative policies or transcend the perimeter of the authorizing act.

There are three primary systems to safeguard that a subordinate legislations act in accordance with the above:

- “Parliamentary scrutiny
- Public consultation
- Judicial scrutiny”⁷

In India, every act has a built in provision for enacting subordinate legislations. The Manual of Parliamentary Procedure prescribes a cut-off date of six months for the framing of such orders, notifications, or rules⁸ and they usually take effect as soon as the notification for the same is published in the National Gazette and exist alongside their associated act unless they are repealed.

EXCESSIVE DELEGATION

The doctrine of excessive delegation is a crucial safeguard mechanism that aims to maintain the sanctity of the legislature's mandate and to keep in check excesses in the process of delegated legislation. The doctrine seeks to maintain and preserve the constitutional role of elected representatives, formulate policies, and not extend these functions to civil servants which tend to be politically insulated. The doctrine ensures that the crucial policy decisions are decided by the legislature and not by the bureaucracy. A line of demarcation is hence essential to limit the delegation of power, if not, the bureaucracy gets a free hand ergo becoming the primary legislator. Hence the doctrine is essential in promoting democracy and curbing bureaucracy.⁹ Further, the doctrine ensures that while delegating authority the legislator shall provide the recipient with an intelligible principle to exercise the delegated authority. This helps in keeping the delegated powers in check. The doctrine further provides the courts with the power of judicial intervention, where the courts deem that the delegated powers have been exercised beyond a reasonable degree. The doctrine facilitates the courts to direct the

⁷ ‘Parliamentary Scrutiny of Executive Rule Making: Background Note for the Conference on Effective Legislatures’ (PRS Legislative Research)

<https://www.prsindia.org/administrator/uploads/general/1370586704_Parliamentary%20Scrutiny%20of%20Executive%20Rule%20Making.pdf> accessed 07 June 2021

⁸ Chapter 11, Manual of Parliamentary Procedure, Ministry of Parliamentary Affairs, 4th Report of the Committee on Subordinate Legislation (LS), December 18, 1985.

⁹ *Gwalior Rayon Co v Asstt Commr of Sales Tax* AIR 1974 SC 1660

legislature to engage in formulating and enacting the bulk of the laws instead of leaving the entire task up to the bureaucracy.

Subordinate legislations are qualified and subject to specific limitations that test their validity and thus enable their existence. Excessive delegation is a result of the failure of such a law to stand this test and comply with the scope of the delegated act. The concept of excessive delegation has been enumerated in many cases and the courts have concluded that in such a situation, the stated legislation would be struck down and held ultra-vires.

In one such instance, *J.K. Industries v. Union of India*¹⁰, the court had opined that:

*“A delegated legislation should be within the limits of the Act and should supplement and not supplant it. In other words, the nature of the delegated legislation is to fill up the details and perform ancillary and subordinate legislative functions. And whenever, the Court assesses the vires of a delegated legislation it has to examine the nature, object and the scheme of the legislation as a whole and consider the area over which powers are delegated”*¹¹.

Subsequently, in the case of *Hiral P. Harsora v. Kusum Narottamdas Harsora*¹², it was established that in order to determine the foundational objective, aim, and purpose of a piece of legislation, one must study its preamble. Further, in *Confederation of Indian Alcoholic Beverage Companies v State of Bihar*¹³, Justice Shah relied on the test laid down by the Supreme Court in *Hamdard Dawakhana vs Union of India*¹⁴ i.e. *“that it should not amount to abdication of the legislative function”*¹⁵.

The question of the extent of delegated power under each individual act is also well settled by our judiciary. In *Municipal Corporation of Delhi vs. Birla Cotton Spinning and Weaving*

¹⁰ *JK Industries v Union of India* (2007) 13 SCC 673

¹¹ *Ibid*

¹² *Hiral P Harsora v Kusum Narottamdas Harsora* (2016) 10 SCC 165

¹³ *Indian Alcoholic Beverage Companies v State of Bihar* Civil Writ No 6675/2016

¹⁴ In *Dawakhana* AIR 1960 SC 554, the Court had invalidated Section 3(d) of the Drugs and Magical Remedies Act, which used the term *“or any other disease or condition which may be specified in rules made under this Act”*, on the basis that there was no legislative guidance on how these “diseases” were to be selected

¹⁵ *Ibid*

*Mills*¹⁶, it was opined that the legislature could not under any circumstances delegate its 'essential functions'. All it must do is put a legislative policy and its core principles in place and render advice to the administrative functionaries prior to delegating powers. Thus, the framing of legislative policies is essentially a legislative function and may not be delegated to any administrative body¹⁷.

In *Raj Narian Singh vs. Patna Administration Committee*¹⁸, the court held that:

"The legislature has the authority to delegate the power to:

(i) modify an Act as long as the legislative policy remains intact.

(ii) appoint a commencement date of the provisions of the Act.

*(iii) exempt and include certain categories of people, goods."*¹⁹

JUDICIAL REVIEW OF EXCESSIVE DELEGATION

Seeing as delegated/ subordinate legislation is a subset of laws passed by the parliament, they too are subject to the judicial review and scrutiny of their provisions. A piece of legislation can be declared ultra-vires if it comprises of a power beyond that was conferred upon it by the delegating authority. The foundational principle of administrative law rests on the rule that executive authority cannot act in excess of its inherent limitations.

Judicial control over delegated legislation is exercised by applying the doctrine of ultra vires in a number of circumstances:

1. The subordinate legislation violates the provisions of the Constitution

When a delegated legislation contravenes the fundamental rights or any other provisions of the Constitution:

¹⁶ *Municipal Corporation of Delhi v Birla Cotton Spinning & Weaving Mills* AIR 1968 SC 12

¹⁷ *Harishankar Bagla v State of MP* AIR 1954 SC 465

¹⁸ *Raj Narian Singh v Patna Administration Committee* AIR 1954 SC 569

¹⁹ *Ibid*

In *Narendra Kumar v. Union of India*²⁰, the SC held that “ every Act which confers power to make subordinate law does so with an implied condition that such legislation shall be in accordance with the provisions of the Constitution.”²¹

In *Lakshman v. State of M.P.*,²² the SC declared a notification under the Forest Act, 1927 to be violative of Articles 14, 19, and 301 of the constitution for prescribing disproportionate and exorbitant rates for grazing 'foreign cattle'.

2. The subordinate legislation is ultra vires of the parent act

The power of subordinate/delegated legislation should always be applied within the limitations delegated by the parent act and those that violate this principle shall be invalidated immediately.²³ If subordinate legislation proposes to exercise power beyond the scope of the act from which it derives its power it will be declared ultra vires.

In *Dwarkanath v. Municipal Corp*²⁴, the appellant challenged Rule 32 under Section 23(1) of the Prevention of Food Adulteration Act, 1954 on grounds that it exceeded the scope of the delegation conferred under Section 23(1) of the Act, 1954, which was restricted to "quantity and quality" only. The Supreme Court held Rule 32 ultra vires.

3. The enabling Act is itself unconstitutional

If the enabling act itself or a part of it being violative of constitutional safeguards, then the subordinate legislation existing alongside it would also be ultra-vires.

In the *Delhi Laws Act case*,²⁵ the court unanimously held that the exercise of the power of delegated legislation was invalidated because the enabling Act betrayed the constitutional limits by approving the revocation of a law existing in the area.

²⁰ *Narendra Kumar v Union of India* AIR 1960 SC 430

²¹ *Ibid*

²² *Lakshman v State of MP* (1983) 3 SCC 275

²³ *Kerala State Electricity Board v Indian Aluminium Co* AIR 1976 SC 1031

²⁴ *Dwarkanath v Municipal Corp* AIR 1976 SC 1031

²⁵ *Delhi Laws Act case* AIR 1951 SC 347

It can also be the case that the parent act is ultra-vires owing to the excessive delegation on its part or where its provisions are ambiguous and fail to prescribe any limitations or standards of care. In the case of *Hamdard Dawakhana v. Union of India*²⁶, the Drugs and Magic Remedies (Objectionable Advertisement) Act was vitiated because it lacked clarity and had thus surrendered undue power to the executive.

ANALYSIS OF JUDGEMENT IN THE PRESENT CASE

1. Whether the central government's non-compliance with the court's orders justified?

The court in Sonowal I has issued clear directives to the administrative authorities to prioritize strengthening the number of tribunals under the 1946 order. Although a directive issued by a court is not a law and thus non-binding and thus not enforceable against the party in a court of law. The onus was put on the central government to abide by their duty however instead they chose to enact a new order that negated the applicability of the parent act in Assam and changed the procedure reflecting the provisions of the (repealed) IMDT act. The government refused to respect the decision of the Supreme Court and deliberately defied them by introducing a new order that nullified the efforts of the court.

2. Whether the Foreigners Tribunal (Amendment) order, 2006 qualified as subordinate legislation?

In its judgment, the court categorically stated that the 2006 order was undoubtedly subordinate legislation and therefore it cannot contravene the substantive provisions of its parent act. The power of the government to impose conditions and terms and frame rules is subject to the provisions of the act. Thus, it must be formulated only to fulfill the objectives of the act.

They cited the case of *Kerala Samsthana Chethu Thozhilali Union v. State of Kerala & Ors*²⁷ and observed that:

²⁶ *Hamdard Dawakhana v Union of India* AIR 1960 SC 554

²⁷ *Kerala Samsthana Chethu Thozhilali Union v State of Kerala & Ors* (2006) 3 SCALE 534

"A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by the Parliament or the State Legislature."²⁸

In *Ashok Lanka and Another v. Rishi Dixit and Others*²⁹ the court observed :

"We are not oblivious of the fact that framing of rules is not an executive act but a legislative act; but there cannot be any doubt whatsoever that such subordinate legislation must be framed strictly in consonance with the legislative intent as reflected in the rule-making power contained in Section 62 of the Act."³⁰

3. Whether the Foreigners Tribunal (Amendment) order, 2006 was ultra vires?

The objective of the Foreigners Act, 1946 is to discern a foreigner from a citizen for the functioning of the Passport Act, 1920. However, in order to fulfill this objective, the government cannot enact subordinate legislation that is ultra-vires the constitution or the parent act.

The Foreigners Tribunal (Amendment) order, 2006 is applicable only in Assam and on the residents of Assam. It violates the provision of equality guaranteed by Article 14 of the Constitution. As previously reasoned, if subordinate legislation contravenes any provision under Part III of the Constitution, it is ultra-vires.

The real problem with the 2006 Order is that it has the characteristic of primary legislation and not subordinate legislation. While the latter are drafter to implement the former, this Order not only contradicts the provisions of its parent act but is also ultra-vires the constitution. It is proof that somehow the executive had legislated.

²⁸ *Ibid*

²⁹ *Ashok Lanka & Anr v Rishi Dixit & Ors* (2005) 5 SCC 598

³⁰ *Ibid*

Thus, the Supreme Court declared that the disputed subordinate legislation was invalid and the Tribunals established under The Foreigners (Tribunals) Order, 1964 would have full applicability and authority to try such cases.

FINDINGS AND CONCLUSION

In this case, the government in 2006 declared a subordinate law to reverse the Supreme Court's judgment in *Sarbananda Sonowal*³¹ that had struck down the Illegal Migrants (Determination by Tribunals) Act, 1983 ("IMDT Act"). This attempt was immediately shut down by the Supreme Court who in *Sarbananda Sonowal (II)*³² reprimanded the administration and overturned the subordinate law in question.

It is important to empower the government to deal with illegal foreigners on its territory. However, it is also vital that statutory due process not be influenced by political forces to render the deportation power stricter or ineffective. This has taken place primarily because of the excessive delegation of the Foreigner's Act's vast powers. Therefore, any suggestions for change in the extradition powers under the Foreigners Act are welcome but must abide by the procedure established by law.

Overall, judicial review of delegated legislation contributes more or less is symbolic value than practical value as a regulation method over delegated legislation. To make it more effective legislation mustn't be worded in very broad and generalized expressions. As it would make it extremely difficult to determine which rule falls outside the scope of delegated power, for the courts.

³¹ *Sarbananda Sonowal v Union of India* (2005) 5 SCC 665

³² *Sarbananda Sonowal v Union of India* (2007) 1 SCC 174