



Preventive Detention-Scope and Extent of Administrative Discretion

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Abstract:

The problem of administrative discretion is complex. It is true that in any intensive form of government, the government cannot function without the exercise of some discretion by the officials. But it is equally true that absolute discretion is a ruthless master. Therefore, there has been a constant conflict between the claims of the administration to an absolute discretion and the claims of subjects to a reasonable exercise of it. The area of preventive detention is very much administrative-ridden. The law has been so designed as to leave a very wide discretion with administrative authorities to order preventive detention of a person. However, the courts have been conscious of the fact that preventive detention affects one of the most cherished rights of a human being, namely, the freedom of the person and have, therefore, gradually evolved a few principles to control administrative discretion in the area in order to safeguard the individual's freedom from undue exercise of power.

Key Words: Preventive Detention, Administrative Discretion, Public Safety.

Introduction

The most significant phenomenon of the present-day administrative process is the conferment of wide discretionary powers on administrative personnel to take decisions from case to case. The reason for this development is that, more often than not, the administration is required to handle intricate problems which involve investigation of facts, making of choices and exercise of discretion before deciding on the action to be taken. Rarely does the legislature enunciate a policy or a principle subject to which the executive may have to exercise its discretionary powers. Quite often the legislature bestows more or less an unqualified or uncontrolled discretion on the executive. Administrative discretion may be denoted by such words or phrases as "public interest", "public purpose", "prejudicial to public safety or security", "satisfaction", "belief", etc.

Satisfaction-Whether subjective?

Preventive detention is one of the important areas where there is enormous scope for administrative decision-making often resulting in gross violation of the fundamental rights of citizens. Enabling statutes leave it to the satisfaction of the detaining authorities with regard to preventive action in the interest of security of state, public order etc. The terms such as "security of state", "public order", "law and order" etc. are so abstract, vague and misleading that there is no set standard for the authorities to form satisfaction. Individual perceptions leading to satisfaction may very resulting in wrong actions ensuing serious consequences. Ultimately when allegations of abuse of discretion are made, the jurisdiction of the Court is invoked to examine them case by case.

However, there have been judicial reservations about the competence of the Court to probe administrative action in the case of preventive detention because the satisfaction of the authority envisaged is subjective in nature. It would be difficult, if not impossible, to lay down objective rules of conduct failure to conform to which should lead to such detention. In *Madras V V.G.Row case* Patanjali Sastri, C.P. pointed out that preventive detention is "largely precautionary and based on suspicion and the court is the least appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely based". This being the nature of the proceeding, it is impossible to conceive how it can possibly be regarded as capable of objective assessment. Entrusted with the duty of maintaining public peace, the executive alone is empowered to make detention orders. Those who are responsible for national security must be the sole judges of what national security requires. Nevertheless, given the nature of detention laws and the scope of the powers conferred, the authorities concerned are required to place the security of the nation above all other considerations while giving effect to the provisions of different statutes.

In the area of preventive detention or detention without trial in general the object of the legislations is not to punish a man for having done something but to intercept before he does it and to prevent him from doing. Justification for such detention is suspicion or reasonable probability and not criminal conviction which can be only be warranted by legal evidence. Thus any preventive measures even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State. Therefore, in keeping with the constitutional scheme, the authorities under the preventive detention statutes are vested with wide discretionary powers.

The phrase “if satisfied” used in Preventive Detention statutes in general shows that satisfaction of the detaining authority is the basis of every detention order. It is the subjective satisfaction of the authority that is contemplated and no objective standard can be prescribed which the court can utilize for determining whether the requirements of law have been complied with. As the very term implies in preventive detention cases, the detention is effected with a view to preventing the person concerned from action prejudicial to certain objects which the legislation providing for such detention has in view. The responsibility for the security of the state and the maintenance of public order, having been laid on the exercise the power of preventive detention whenever they think the occasion demands. As such it would be a serious derogation from that responsibility if the court were to substitute its judgment for the satisfaction of the executive authority and, to that end, undertake an investigation of the sufficiency of the materials on which such satisfaction was grounded.

Before the Government can pass an order of preventive detention it must be satisfied with respect to the individual person that his activities are directed against one or other of the three objects mentioned in the section, and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. The wording of the section thus clearly shows that it is the satisfaction of the Central Government or the State Government on the point which alone is necessary to be established. It is significant that while the objects intended to be defeated are mentioned, the different methods, acts or omissions by which that can be done are not mentioned, as it is not humanly possible to give an exhaustive list.

Courts do not go into the merits of exercise of Discretion

Preventive Detention is a form of Precautionary police action, to be employed on the sole responsibility of the executive government whose discretion is final, no recourse being permitted to a court of law by way of review or justification of such action except on allegations of mala fides or irrational conduct. A court is the least appropriate tribunal to investigate the question whether circumstances of suspicion exist warranting the restraint on a person. The basic principle is that the court could not interfere with or probe into the merits of the exercise of discretion by an authority, as it is not a forum to hear appeals from the decisions of the authority. They would not go with the question whether the opinion formed by the concerned authority is right or wrong. The satisfaction of the authority is purely subjective and could not, in the absence of proof of bad faith, be questioned at all. Before a person can be held liable for an offence it is obvious that he should be in a position to know what he may do or not do, and an omission to do or not to do will result in the state considering him guilty according to the penal enactment. When it comes however to preventive detention, the very purpose is to prevent the individual not merely from actin in a particular way but, from achieving a particular object. It will not be humanly possible to tabulate exhaustively all actions which may lead to a particular object. Therefore, the court does not substitute its own views for that of the authority concerned. When the power to issue a detention order has been made to depend upon the existence of a state of mind in the detaining authority, that is, its “satisfaction”, which is a purely subjective condition, so as to exclude a judicial enquiry into the sufficiency of the grounds to justify the detention, it is wholly inconsistent with that scheme to hold that it is open to the court to examine the sufficiency of the same grounds. 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 proceedings have been initiated mala fide for satisfying a private or personal grudge of the authority.

Reiterating the principle of judicial non-intervention laid down in earlier decisions, P.N. Bhagvati J observed that preventive action is taken by way of precaution to prevent mischief to the community. Since every preventive measure is based on the principle that a person should be prevented from doing something which, if left free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof. This being the nature of the proceeding it is impossible to conceive how it can possibly be regarded as capable of objective assessment. The matters which have to be considered by detaining authority are whether the person concerned having regard to his past conduct judged in the light of the surrounding circumstances and other relevant material, would be likely to act in a prejudicial manner as contemplated in the provision and if so, whether it is necessary to detain him with a view to preventing him from so acting. These are not matters susceptible of objective determination and they could not be intended to be judged by objective standards. It must in the circumstances be held that the subjective satisfaction of the detaining authority as regards these matters constitute the foundation for the exercise of the power of detention and the court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority is based.

Satisfaction must have some basis

The satisfaction of the government however must be based on some grounds. There can be no satisfaction if there are no grounds for the same. There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the section. One person may think one way, another the other way. If, therefore, the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of male fides cannot be challenged in a court. The Central Government or the State Government is the competent authority to decide on the sufficiency or otherwise of the grounds of detention.

Power of detention-Whether quasi-judicial?

The question whether the power of detention is administrative or quasi-judicial was considered by the Supreme Court in the case of Bhut Nath Mata's case. It was observed that the exercise of the power of detention implies a quasi-judicial approach; as such the power must be regarded as a quasi-judicial power. However in the case of Khudiram Das the Supreme Court took a different view and held that it is purely an administrative function. The court observed as follows, "The matters which have to be considered by the detaining authority are whether the person concerned, having regard to his past conduct judged in the light of the surrounding circumstances and other relevant material, would be likely to act in a prejudicial manner and if so, whether it is necessary to detain him with a view to preventing him from so acting. These are not intended to be judged by objective determination and they could not be intended to be judged by objective standards. They are essentially matters which have to be administratively determined for the purpose of taking administrative action. Their determination is, therefore, deliberately and advisedly left by the legislature to the subjective satisfaction of the detaining authority which by reason of its special position, experience and expertise would be best fitted to decide them. It must in the circumstances be held that the subjective satisfaction of the detaining authority as regards these matters constitutes the foundation for the exercise of the power of detention and the Court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority is based. The Court cannot, on a review of the grounds, substitute its own opinion for that of the authority, for what is made condition precedent to the exercise of the power of detention is not an objective determination of the necessity of detention for a specified purpose but the subjective opinion of the detaining authority as regards the necessity of detention for a specified purpose, the condition of exercise of the power of detention would be fulfilled. This would clearly show that the power of detention is not a quasi-judicial power. This observation in Khudiram Das case was not meant to convey that the power of detention is a quasi-judicial power. The only thing which it intended to emphasize was that the detaining authority must exercise due care and caution and act fairly and justly in exercising the power of detention.

Objective standards for the exercise of discretionary power

The word 'subjective' does not mean capricious but that it may vary from one person to another. The courts in the United States of America, United Kingdom and India have prescribed objective standards for the exercise of discretionary power. If it is taken to mean that a detaining authority can pass orders without reference to any materials or surrounding circumstances there is always a danger of the citizens being at the mercy of the executive authorities for the exercise of the Fundamental Rights enshrined in the constitution. If the view be taken that the power to detain a person could be exercised by the detaining authority merely on its subjective satisfaction which could not be tested with reference to objective standards, the detention statute which empowered the detaining authority to exercise the power of detention on the basis of its subjective satisfaction, imposed unreasonable restrictions on the fundamental rights of the petitioner under Article 19(1).

It is one possible opinion that any reasonable person can arrive at. 'Satisfaction' denotes the intimate opinion of the person concerned and not the logical conclusion arrived at in accordance with the strict rules of evidence. Such subjective satisfaction has to be arrived at on two points-firstly on the veracity of facts imputed to the person to be detained and secondly on the prognostication of the detaining authority that the person concerned is liable to indulge again in the same kind of nefarious activities of course, the second point depends on the first but the subjectivity is higher as regards the second point. Circumstances prevailing at that time in society may also be taken into account. This is matter of expediency not subject to judicial review. But, as far as the first point is concerned, the detaining authority which has to form an opinion about the veracity of facts has to take into account all the facts, those which are against as well as those in favour of the person concerned and the approach of the determining authority should disclose that he has effectively engaged himself in to such an exercise. Courts do not have to find out whether the opinion arrived at is sound, but to verify whether the detaining authority has proceeded in the proper manner and approached to apprehend the reality with all the materials at its disposal.

Scope of Judicial Review

Notwithstanding the conservative view that subjective satisfaction in the area of preventive detention is beyond the scope of judicial review the modern trend is otherwise. If the control of liberty in an emergency barbed-wire entanglement of freedom by the executive is necessary, control of control is in some measure healthy. The principle of judicial non-intervention in the field of subjective satisfaction, should not lead one to the conclusion that discretionary administrative powers are completely beyond the pale of judicial control. Judicial vigilance is the price of liberty and freedom of the person is a founding faith of our Republic. There is nothing like unfettered discretion immune from judicial reviewability. "Law has reached its finest moments when it has freed man from

the unlimited discretion of some rule, some official, and some bureaucrat. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions". The humanist restraint so woven in to the law against executive extravagance or indifference must be strictly applied since casual and careless and uninformed disposal of other's freedom is to break faith with the Constitutional trust. And this is much more so in a case where personal liberty is involved. That is why the Courts have devised various methods of judicial control so that power in the hands of an individual officer or authority is not misused or abused or exercised arbitrarily or without any justifiable grounds.

When it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion. It is to be, not arbitrary, vague, fanciful, but legal and regular. The courts have rejected the concept of an absolute and unfettered statutory discretion. Even when a statute uses words so as to confer *ex facie* an absolute discretion on the administrative authority concerned, the discretion can never be regarded as unfettered. It is an eternal principle of administrative law that there is nothing like unfettered discretion immune from judicial reviewability. The truth is that in a Government under law, there can be no such thing as unreviewable discretion. Where the liberty of a subject is involved and he had been detained without trial, and a law made pursuant to Article 22 which provides certain safeguards, it is the duty of the court as the custodian and sentinel on the ever vigilant guard of the freedom of an individual to scrutinize with due care and anxiety that this precious right which he had under the Constitution is not in any way taken away capriciously, arbitrarily or without any legal justification. The Court has to satisfy itself that all the safeguards provided by the law have been scrupulously observed and the subject is not deprived of his personal liberty otherwise than in accordance with law. In keeping with the Constitutional requirement the detention laws invariably provide that all basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to the making of the order of detention must be communicated to the detenu, so that the detenu may have an opportunity of making an effective representation against the order of detention.

Grounds of Judicial Review

The principles of judicial review, evolved by decisions in the area of discretionary powers fall into two major classifications viz; (i) Abuse of power by the authority and (ii) Non-exercise of power. Abuse of power signifies *mala fide* exercise of power, improper purpose, extraneous considerations and disregarding relevant consideration. Non-exercise of power implies acting under dictation, acting mechanically or fettering discretion, non-application of mind and improper exercise of power.

The process of forming satisfaction

The power of the executive to order preventive detention is often described as a "jurisdiction of suspicion". It enables authorities to proceed on bare suspicion which has to give rise to a "satisfaction". Therefore, detention statutes while laying down the grounds for detaining a person. Invariably prescribe satisfaction of the appropriate government as a condition precedent for the exercise of power by the authorities of the government. Since the rights of the individuals as well as the interest of the society revolve around the satisfaction of the executive authorities there arises the need for certain guidelines or standards to examine whether the satisfaction formed by the authority concerned is just, fair and reasonable. In this regard, the judiciary, from time to time, has formulated and applied certain principles relating to the mode of exercise of power.

Sec. 3(i) of the detention statutes invariably lays down that the satisfaction of the Government is the most essential condition for the detention of a person, however long or short the period may be. The satisfaction envisaged in the section is not individual satisfaction but it is an institutional satisfaction. The Government as a whole is a composite legal entity.

Delay in passing detention order

Delay defeats justice is an important slogan in the modern jurisprudence. Since preventive detention causes deprivation of the very basic human rights of the detenu, judicial pronouncements have come down heavily upon delay in passing detention orders. Long periods of incarceration without trial cannot be justified by the authorities in the absence of valid reasons. Whenever there is delay in passing detention order, the detaining authority is under the obligation to explain, by producing sufficient materials, to show that the delay is not inordinate and is explainable.

The Supreme Court, in a recent decision, strongly condemned the detaining authorities holding that the views of the sponsoring authority to be not necessary for the disposal of representation and reason for delay, if any should be properly explained. It was observed "a constitutional protection is given to every detenu mandating grant of liberty of making representation against detention as laid down in Article 22(5). The authority concerned needs to address representation expeditiously in right perspective keeping in view detention of detenu to be based on subjective satisfaction. Infringement of constitutional right conferred under Article 22(5) invalidates detention order, personal liberty protected under Article 21 is so sacrosanct and so high in scale of constitutional values that is the obligation of detaining authority to show that impugned detention meticulously accords with procedure established by law.

Deepak Bajaj- the Trend setter

A recent judgment of the Apex Court in *Deepak Bajaj V State of Maharashtra* has virtually nullified most of the earlier decisions of various High Courts and the Supreme Court. The reputation of a person is a facet of his right to life under Art 21 of the constitution and to protect his right, illegal preventive detention orders can be quashed even at pre-execution stage through habeas corpus petitions. If a person is sent to jail then even if he is subsequently released his reputation may be irreparably tarnished. The liberty of a person is a precious fundamental right under Art 21 and should not be transgressed.

Conclusion

The present trend indicates that judicial review of preventive detention orders, at least on limited grounds, is settled. Since jurisdiction of the law-enforcing authorities under preventive detention laws is based on subjective satisfaction of the suspected involvement of individuals in activities detrimental to security of the nation, security of state, public order etc., It has been established that the judiciary cannot substitute its satisfaction to that of the detaining authority. However, the judiciary has never hesitated to interfere whenever the procedural safeguards were either violated or disregarded.

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